SCOTTISH LAW
COMMISSION

CONSULTATIVE MEMORANDUM NO: 55

CIVIL LIABILITY IN RELATION TO ANIMALS

August 1982

This Consultative Memorandum is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Consultative Memorandum were submitted by 28 February 1983. All correspondence should be addressed to:-

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CONSULTATIVE MEMORANDUM NO. 55: CIVIL LIABILITY IN RELATION TO ANIMALS

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LIST OF ABBREVIATIONS

(Excluding standard law reports)

P.S. Atiyah (1970	Accidents, Compensation and the Law London, Weidenfeld and Nicolson, 1970
Balfour	The Stair Society, The Practicks of Sir James Balfour of Pittendreich. Volumes I-II (Nos. 21, 22) Edinburgh, 1962-1963
Bankton	Andrew McDouall, Lord Bankton, An Institute of the Laws of Scotland Edinburgh, 1751-1753
Bell	George Joseph Bell, Principles of the Law of Scotland, (The Tenth Edition, Revised and Enlarged by William Guthrie, Advocate, LL.D. Edin.) Edinburgh, T & T Clark, 1899.
R Black (1975)	"A historical survey of delictual liability in Scotland for personal injuries and death: Part Three: English Accretions." (1975) 8 Comparative and International Law Journal of Southern Africa 318-343
A.P. Blair (1978)	Accident Compensation in New Zealand. Wellington, Butterworths of New Zealand Ltd., 1978.
C.J.S.	Corpus Juris Secundum: A complete restatement of the entire American law as developed by all reported cases.
CLCLDA, Report (1953)	Report of the Committee on the Law of Civil Liability for Damage done by Animals. London, H.M.S.O, 1953, Cmd. 8746.
D.C.C. (Netherlands)	The Netherlands Ministry of Justice (ed.), The Netherlands Civil Code: Book 6: The Law of Obligations: Draft Text and Commentary. Leyden, A.W. Sijthoff International Publishing Company B.V., 1977.
DOE, Report (1976)	Department of the Environment, Report of the Working Party on Dogs London, H.M.S.O., 1976.
Encyclopaedia	Encyclopaedia of the Laws of Scotland. Edinburgh, W. Green & Son Limited, 1926-1949.

Erskine	John Erskine of Carnock, an Institute of the Law of Scotland Edinburgh, 1773
Fleming (1977)	J.G. Fleming, The Law of Torts (5th ed.) Sidney, The Law Book Company Limited, 1977
Glegg (1955)	A.T. Glegg, The Law of Reparation in Scotland (4th ed.) Edinburgh, W. Green & Son Ltd., 1955
Guthrie (1879)	William Guthrie, Select Cases Decided in the Sheriff Courts of Scotland Edinburgh, T & T Clark, 1879
Guthrie (1894)	William Guthrie, Select Cases Decided in the Sheriff Courts of Scotland: Second Series Edinburgh, T & T Clark, 1894
Hume, Lectures	The Stair Society, Baron David Hume's Lectures 1786-1822, Volumes I-VI. (Nos. 5, 13, 15, 17-19) Edinburgh, 1939-1958.
T Ingman (1981)	"A History of the Defence of Volenti Non Fit Injuria" 1981 Juridical Review 1-28
B S Jackson (1975)	"Liability for Animals in Scottish Legal Literature: From the Auld Lawes to the Sixteenth Century" (1975) 10 Irish Jurist 334-351.
B S Jackson (1977)	"Liability for Animals in Scottish Legal Literature: From Stair to the Modern Law" 1977 Juridical Review 139-163.
Kames	The Honourable Henry Home of Kames, Principles of Equity (3rd ed.) Edinburgh, 1825.
LC, Report (1967)	The Law Commission, Civil Liability for Animals, Law Com. No. 13, London, HMSO, 1967.
LC, Report (1970)	The Law Commission, Civil Liability for Dangerous Things and Activities, Law Com. No. 32. London, HMSO, 1970.
LRC(I) Working Paper (1977)	The Law Reform Commission of Ireland, Working Paper No. 3-1977, Civil Liability for Animals. Dublin, The Law Reform Commission, 1977.

LRC(NSW), Report (1970)	Report of the Law Reform Commission of New South Wales on Civil Liability For Animals, LRC 8. New South Wales, Government Printer, 1970.
LRC(Q), Working Paper (1977)	The Law Reform Commission of Queensland, Working Paper On A Bill To Remove The Anomalies Presently Existing With Respect To Civil Liability For Animals And To Rationalize The Existing Rules Of The Common Law For Damage Done By Animals, QLRC W.18. Brisbane, Law Reform Commission, 1977.
LRC(S), Report (1963)	Twelfth Report of the Law Reform Committee for Scotland, The law relating to civil liability for loss, injury and damage caused by animals. Edinburgh, HMSO, 1963, Cmnd. 2185.
LRC(S), Report (1964)	Thirteenth Report of the Law Reform Committee for Scotland, The law relating to civil liability for loss, injury and damage caused by dangerous agencies escaping from land. Edinburgh, HMSO. 1964, Cmnd. 2348.
LRC(SA), Report (1969)	Seventh Report of the Law Reform Committee of South Australia to the Attorney-General, Law Relating To Animals. South Australia, Government Printer, 1969.
LRC(T), Report (1980)	Law Reform Commission of Tasmania, Report No. 27, Report and Recommendations relating to Animals Straying upon the Highway. Tasmania, Law Reform Commission, 1980.
LRC(WA), Report (1981)	The Law Reform Commission of Western Australia, Report On Liability For Stock Straying On To The Highway, Project No. 11. Perth, Western Australia, Law Reform Commission, 1981.
D L Carey Miller (1969)	"Liability for animals causing injury to persons or property: a comparative study." LL.M Thesis, University of Edinburgh, 1969.
D L Carey Miller (1973)	"A Statutory Substitute for Scienter", 1973 Juridical Review 61-74.

D L Carey Miller (1974)	"The Scottish Institutional Writers on Animal Liability; Civilian or Scienter?" 1974 Juridical Review 1-12.
North (1972)	P.M. North, The Modern Law of Animals London, Butterworth & Co (Publishers) Ltd., 1972.
V. Powell-Smith (1971)	"The Animals Act 1971" (1971) 121 The New Law Journal 584-586.
RCCL, Report (1978)	Royal Commission on Civil Liability and Compensation for Personal Injury, Chairman: Lord Pearson, Report. London, HMSO, 1978, Cmnd. 7054 I-III.
Rankine (1909)	John Rankine, The Law of Land-Ownership in Scotland (4th ed.) Edinburgh, William Green & Sons, 1909.
S. Roberts (1968)	"Law Commission: Civil Liability for Animals" (1968) 31 Modern Law Review 683-687.
A. Samuels (1971)	"The Animals Act 1971" (1971) 34 Modern Law Review 550-556.
SLRC(V), Report (1978)	Report From the Statute Law Revision Committee of Victoria upon The Law Relating to Animals on Highways, Together With An Appendix. Ordered by the Legislative Council to be printed, 14 November, 1978. Melbourne, Government Printer, 1978.
Stair	James, Viscount of Stair, The Institutions of the Law of Scotland Edinburgh, 1832.
TGLRC(NZ), Report (1975)	Report of the Torts and General Law Reform Committee of New Zealand, The Law Relating To Liability For Animals. Presented to the Minister of Justice in September 1975. Wellington, New Zealand, Government Printer, 1975.
Walker (1981)	D.M. Walker, The Law of Delict in Scotland Edinburgh, W. Green & Son Ltd., 1981.
Williams (1939)	G.L. Williams, Liability for Animals Cambridge, Cambridge University Press, 1939.
R Yaron (1966)	"The Goring Ox in Near Eastern Laws" (1966) 1 Israel Law Review 396-406.

PRELIMINARY

Background

0.1 Liability for animals was included in the Commission's First Programme of Law Reform[1], but until quite recently there has been no great pressure for reform. Within the last few years, however, certain problems have been brought to our attention which have highlighted defects in the existing rules. Also, it has been suggested recently by a Royal Commission that reforms effected in England by the Animals Act 1971 (c.22) should be extended to Scotland.[2] But, in our view, that cannot be accepted without a more detailed examination of the existing law. Such an examination is our purpose in this memorandum.

Pamphlet and Questionnaire

0.2 Because of the nature of the topic we have also prepared a short Pamphlet and Questionnaire intended mainly for the use of those who may not have time to study the detail of the memorandum. This may also be useful as a summary of the memorandum, and copies can be obtained from us free of charge. But we must emphasise that the propositions contained in the memorandum[3] are more numerous and more detailed than those in the Questionnaire. They are also ordered differently. So we would ask consultees, when submitting their comments, to identify the propositions they are dealing with clearly, either by number if referring to the memorandum, or by letter and number if referring to the Questionnaire. We would hope that as many as possible will examine the memorandum itself and criticise its propositions in detail.

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[1] (1965) Scot. Law Com No. 1, para. 13 - with particular reference to the preceding Report of the Law Reform Committee for Scotland on the subject (LRC(S), Report (1963)).

[2] RCCL, Report (1978), Volume One, para. 1626, p. 339.

[3] The propositions (questions mainly) are summarised in Appendix I where they are gathered into groups, each of which is preceded by brief introductory Notes for the guidance of consultees.

Part I: Introduction

Civil liability in relation to animals

1.1 In this memorandum we shall examine the rules of law which may be invoked by a private individual against the owner or keeper of an animal to compel him to pay compensation for harm caused by the animal, or to prevent it from causing harm. Harm may take the form of personal injury, damage to property, financial loss, in certain circumstances, or detriment to amenity. All species of animals are included, at least in principle.[1] In fact, only very few species commonly cause harm. We shall be concerned exclusively with civil liability, which we shall generally refer to simply as "liability". However, civil liability is sometimes to be founded on the same facts as give rise to sanctions in criminal law and, where the contents of civil obligations are in issue, it may be relevant to consider analagous prohibitions, if any, of the criminal law. Accordingly, from time to time, we shall refer explicitly to criminal liability. We must also emphasise that we are not concerned with liability for harm suffered by animals, except so far as such harm may be inflicted by other animals; nor are we concerned, generally, with the principles of law underlying the mass of legislation enacted for the protection of animals. We have no reason to believe that the law in these areas warrants investigation by a law reform body.

General rules of liability

1.2 A preliminary question arises whether liability in relation to animals should be treated as a separate legal topic. Motor vehicles, buildings and dangerous substances, though inanimate, can also be instrumental in causing harm. So it could generally be stated that it is always some human activity which is the real cause of harm. And, indeed, many of the rules giving rise to liability in relation to animals are merely specific applications of more general rules which apply to many different sorts of harm-causing activity. For example, if an animal -

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[1] That is, all Mammalia (except man), Aves, Reptilia, Amphibia, Pisces and Insecta.

(a) is negligently managed and so causes harm;[1] or

(b) constitutes a legal nuisance, say by causing offensive smells or excessive noise;[2] or

(c) is the instrument in a deliberate assault[3] or trespass on land;[4]

then, its owner or keeper may be liable to legal action to compel him to pay compensation or prevent harm under these general rules.

Special rules of liability

1.3 However, there are also special rules which apply only in the case of animals. These rules are part of a very old tradition attesting the importance of animals in the early agricultural community.[5] The Winter Herding Act 1686 (c.21), which deals with damage done by straying livestock, is still extant. The rule which requires the owner of an animal of known dangerous or harmful propensities to confine it effectually has survived from the same period,[6] and, indeed, is very similar to even earlier laws of wide application in the Near East.[7] There are also more recent enactments in the same tradition.[8] We consider that the existence of these special rules and the long tradition of having such rules are good reasons for treating liability in relation to animals as a separate legal topic.

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[1] Alexander v. Comrie (1898) 14 Sh.Ct.Rep. 201 (collision between horse-drawn vehicles); Gilligan v. Robb 1910 S.C. 856 (negligent driving of a cow).

[2] Ireland v. Smith 1895, 3 SLT 180 (dust, noise and smell from a hen-run); Shanlin v. Collins 1973 SLT (Sh.Ct.) 21 (noise from kennels for boarding and breeding dogs).

[3] Ewing v. Earl of Mar (1851) 14D 314 (horseman deliberately riding at a pedestrian).

[4] Inverurie Magistrates v. Sorrie 1956 S.C. 175 (exercising horses).

[5] See D L Carey Miller (1974); B S Jackson (1975), (1977).

[6] Stair, 1.9.5 is generally considered as the source of this rule - LRC(S), Report (1963) p.2.

[7] See R Yaron (1966); also B S Jackson (1975).

[8] Dogs Acts, 1906 (c.32) to 1928 (c.21) (livestock-worrying by dogs) Agricultural Holdings (Scotland) Act 1949 (c.75) s.15 (damage done by game).

Control of animals

1.4 In the modern community, animals are still part of many, very diverse activities, most of which are not harmful in themselves, although they may become so simply because they involve animals: that is, the presence of animals may actually be the criterion for classifying certain activities as potentially harmful. This is another and equally important reason why we propose to treat animals as a separate topic. Animals, by their very nature, cause quite distinct problems. In some sense they can be said to be capable of action, and they are always to a greater or lesser extent independent of those who manage or exploit them. So the right to keep animals must constantly be balanced against the need for effective control. This quality of animals has long been recognised in the law; indeed, the earliest remedies did not always distinguish between compensating the victim and punishing the guilty animal.[1]

Case-studies

1.5 To focus the problems of control more sharply we shall first describe a number of characteristic problems which we shall then use as case-studies in our systematic discussion of the relevant rules of law. Some of the problems are derived from actual legal cases. We refer to them at this stage because we consider that they help to define the range of problems for which consistent solutions must be provided, if the law is to be satisfactory.

Case 1: livestock

1.6 The rearing of livestock, construed widely as including cattle, sheep, goats, swine, horses and poultry,[2] is a large part of the agricultural economy. Damage caused by livestock, or to livestock, in this context by animals, is correspondingly significant. Problems may arise where people must work with

[1] B S Jackson (1975), pp. 344-345.

[2] Cf. the definition of livestock in s.3(1) of the Dogs (Protection of Livestock) Act 1953 (c.28).

livestock, or where livestock are pasturing or are in transit. There are problems of protecting livestock from other animals, particularly dogs.

Case 1(a): working with livestock

1.7 Cattle are probably the most common hazard.[1] A farm-worker may know the habits and character of an animal with which he must work,[2] but his personal safety may still depend on the system of work adopted by his employer. For example, in one case, a bull was kept in its loose-box while it was being cleaned out.[3] There were no precautions taken to protect the employee while working in the loose-box, although the bull could easily have been removed, or dehorned and securely tethered, or the loose-box itself so constructed that it provided protection or allowed escape. This problem can be readily generalised.

Case 1(b): pasturing livestock

1.8 It is not practicable for the Scottish livestock farmer to ensure that pasturing animals are herded at all times. It may not always be practicable for him to confine them within enclosures. The quality of grazings is often poor, particularly in highland Scotland, and it may be necessary to allow stock to range over extensive areas which could only be fenced at considerable expense. Even where enclosure is feasible, animals may be difficult to fence in, or people to fence out. Accordingly, pasturing animals are inevitably a source of potential harm, mainly, though not only, because they are inclined to stray. They may damage fences, crops

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[1] RCCL, Report (1978), Volume Two, para. 293, p.80.

[2] Clark v. Armstrong (1862) 24 D 1315 at p.1321.

[3] Henderson v. John Stuart (Farms) Limited 1963 S.C. 245.

and planting, infect or injure other livestock, or cause other forms of financial loss, or injure people.[1] In particular, they may stray on to the highway and cause traffic accidents.[2]

Case 1(c): livestock in transit

1.9 Movement of livestock on the farm and from farm to market or slaughterhouse is an integral part of the farming activity. Animals in transit may be more excitable than usual and may cause damage of every sort, if they are not managed properly or escape from those controlling them.[3]

Case 1(d): protecting livestock

1.10 So far we have mainly considered livestock as a source of harm, though incidentally also as a source of harm to other livestock. However, a major problem for livestock farmers is the incidence of injury to livestock caused by dogs.[4] Sheep, particularly sheep near urban areas, are probably most at risk. This problem raises difficult issues of how to ensure that dog-owners control their animals, and whether some degree of self-help should be sanctioned, as, for example, under the present law, by allowing farmers to shoot marauding dogs in certain circumstances.

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[1] See, for example, Lindsay v. Somerville (1902) 18 Sh.Ct.Rep.230 (colt straying into paddock and injuring filly); MacAtee v. Montgomery (1949) 65 Sh.Ct.Rep. 79 (heifer straying into garden and injuring occupier); Daniel Logan & Son v. Rodger 1952 SLT (Sh.Ct.) 99 (bull jumping fence and serving pedigree cows which dropped cross-bred calves); Brown and Another v. Lord Advocate 1973 SLT 205 (sheep straying and causing damage to plantations of young trees); Lanarkshire Water Board v. Gilchrist 1973 SLT (Sh.Ct.) 58 (pasturing bull on unfenced land endangering users of right of way).

[2] See, for example, Fraser v. Pate 1923 SC 748 (straying sheep); Gardiner v. Miller 1967 SLT 29 (straying horse).

[3] See, for example, Phillips v. Nicoll (1884) 11R 592 (cow excited by sojourn in slaughterhouse escaping and injuring pedestrian); Gilligan v. Robb 1910 SC 856 (escaped cow entering house and causing nervous shock to occupant); Cameron v. Hamilton's Auction Marts Limited 1955 SLT (Sh.Ct.) 74 (cow escaping from auction mart and causing damage to property).

[4] See, for example, Mitchell v. Duncan (1953) 69 Sh.Ct.Rep.182.

Case 2: working animals

1.11 Some animals are kept to work for their owners. Dogs in particular perform many useful tasks; for example, guiding the blind, guarding premises, herding livestock. However, some of the characteristics which are developed in animals by training them for certain tasks are potentially harmful. The ferocity of guard-dogs and police-dogs is a simple example.[1] Horses, also, are still working animals, though less commonly now. The obvious problems associated with horse-drawn vehicles are well attested in the earlier case-law.[2]

Case 3: animals kept for sporting purposes

1.12 Animals are frequently kept for sporting purposes. Horses, hunting animals and game are notable examples. The latter introduce two new elements. Game are not domesticated; nor are they usually kept in the sense of being directly maintained or owned, though the right to take them, considered as a real right, is an incident of landed property.[3]

Case 3(a): horses

1.13 Of the many sporting uses of animals, horse-riding is perhaps the commonest source of harm, though it is probably riders who most commonly suffer serious harm.[4] Problems may arise, for example, as to the responsibilities of riding establishments when they hire out their horses,[5] or where horses are ridden or led on

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[1] Daly v. Arrol Brothers (1886) 14 R 154 (watch-dog); also the South African case Chetty v. Minister of Police 1976 (2) SA 450 (N) (police-dog).

[2] See, for example, M'Cairns v. Wordie & Co 1901, 8 SLT 354; M'Intosh v. Waddell (1896) 24 R 80: Hendry v. McDougall 1923 SC 378.

[3] Rankine (1909) pp. 147-148.

[4] RCCL, Report (1978), Volume 2, paras. 297-299, p.81 (This only deals with personal injury).

[5] Cf. Wilson v. Wordie & Co. (1905) 7F 927 (hired horses injuring member of public).

the highway[1], or in relation to the safety of spectators at race meetings, gymkhanas or shows.[2]

Case 3(b): hunting animals

1.14 The point was made about working animals that training for an otherwise useful purpose may, at the same time, develop characteristics in the animal which are potentially harmful. The same may be true of hunting animals such as hounds or terriers. Naturally wild animals used for hunting, such as ferrets,[3] may also be dangerous if not properly controlled.

Case 3(c): game

1.15 Game may proliferate naturally or may be managed and maintained at stable levels by stocking and culling. Deer, small ground-game such as hares and rabbits, and game-birds such as grouse are common examples. Populations of game are potentially a hazard to crops and planting or to forestry plantations,[4] and excessive stocking or inadequate culling or control may significantly increase those risks. Some species of game, pheasants for example, may be reared in semi-confinement before release, and may similarly be a source of harm if not properly confined.[5]

Case 4: domestic pets

1.16 Pet-ownership is widespread in the community, and the care and control of pets is often left to young children. Dogs and cats, which are among the most common pets, are probably most likely to cause harm. Cats as well as dogs may engage in livestock-worrying, especially poultry.[6] Apart from livestock

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[1] Lanark Plate Glass Mutual Protection Society v. Capie (1908) 24 Sh.Ct.Rep. 156 (horse backing into shop window).

[2] Meldrum v. Perthshire Agricultural Society (1948) 64 Sh.Ct. Rep.89 (pony deviating from race track and injuring spectator).

[3] Nicol v. Summers (1921) 37 Sh.Ct.Rep. 77.

[4] See, for example, Forrest v. Irvine (1953) 69 Sh.Ct.Rep. 203 (rabbits).

[5] See, for example, the Irish case Robson v. Marquis of Londonderry 34 ILTR 88.

[6] Cf. para. 1.10, and see, for example, Allan v. Reekie (1906) 22 Sh.Ct.Rep. 57; Peden v. Charleton (1906) 22 Sh.Ct.Rep. 91; Turner v. Simpson (1913) 29 Sh.Ct.Rep. 81.

worrying, serious problems are caused by dogs in urban communities, particularly by stray dogs, either ownerless or simply at large outwith their owners' control.[1] The individual and pack behaviour of stray dogs increases the normal risks associated with dogs, such as biting[2] or straying on to the highway.[3] Dogs, whether or not they are strays, may also cause detriment to amenity by the noise of their barking[4] or by their habits of defecation.[5] There may also be a risk that disease may be transmitted through faeces, particularly to children playing in fouled areas.[6] A large population of stray dogs is also a serious hazard in the event of an outbreak of a disease such as rabies.[7]

Case 5: wild animals

1.17 So far we have referred to wild animals only incidentally.[8] We shall now consider the principal cases involving wild animals, though there is little evidence that such animals are a significant source of harm.[9] Dangerous wild animals are mainly kept for the purposes of display or entertainment in zoos or circuses, though occasionally as pets. Some species of wild animals are

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[1] DOE, Report (1976), section 3, pp.3-4.

[2] See, for example, Smillies v. Boyd (1886) 14R 150; McDonald v. Smellie (1903) 5F 955; Gordon v. Mackenzie 1913 SC 109.

[3] Milligan v. Henderson 1915 SC 1030.

[4] Shanlin v. Collins 1973 SLT (Sh.Ct.) 21.

[5] DOE, Report (1976), section 16, pp.17-19.

[6] Ibid,, para. 14.3, pp.15-16.

[7] Ibid., section 15, pp.16-17.

[8] See paras. 1.14, 1.15.

[9] RCCL, Report (1978), Volume Two, para. 290, p.80 (This only deals with personal injury).

farmed. Some species, particularly of wild birds, are protected in sanctuaries or nature reserves.

Case 5(a): dangerous wild animals kept as pets or for the purposes of display or entertainment

1.18 Wild animals such as the tiger are essentially always dangerous if at liberty among human beings.[1] Others such as the elephant or camel, which are domesticated in some parts of the world, may be more or less dangerous according to use or circumstances.[2] Individual ownership of wild animals has become sufficiently extensive in recent years to warrant legislative control.[3] However, it is probably still the case that such animals are most commonly kept for display or entertainment in the close confinement of zoos or circuses, although a popular and potentially hazardous variant of the zoo has developed recently, namely, the safari park. There, some of the most dangerous animals traditionally kept in zoos are at liberty to roam over extensive areas of enclosed park-land to which the public are admitted, albeit in the comparative safety of their cars.

Case 5(b): farming wild animals

1.19 The farming of certain species of wild animals may lead to unnaturally large populations of these animals within geographically restricted localities. As a consequence the risk of damage if the animals are not properly confined is greater than it would be otherwise. Mink and fox, for example, are farmed for their pelts in close confinement; deer are farmed to produce meat and may not be so closely confined. All of these animals are a source of potential harm, particularly to property, if they escape from confinement.

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[1] Henderson v. John Stuart (Farms) Limited 1963 SC 245 at p.247.

[2] Compare, for example, Bennet v. Bostock (1897) 13 Sh.Ct.Rep.50 (elephant yoked to circus carriage on highway frightening passing horse) and the English case, Behrens v. Bertram Mills Circus Limited [1957] 2 BQ 1 (elephant chasing dog and knocking over booth at fun-fair).

[3] Dangerous Wild Animals Act 1976 (c.38).

Case 5(c): protected wild animals

1.20 In accordance with policies aimed at preserving the natural environment, certain species of animals, in particular wild birds, may be protected generally or in sanctuaries or nature reserves.[1] At this point personal ownership or possession as a factor of control is entirely absent. However, areas where species are protected and may therefore gather in considerable numbers may be contiguous with farm-land, and certain species, such as geese, may be a particular hazard to crops and planting.[2] This case may therefore be regarded as analagous to game. Indeed, some nature reserves are designed to protect species of deer.

Summary

1.21 The problems which we have described are not all on the same scale.[3] However, taken together, they do show clearly that the issue of whether or how particular animals can or should be controlled must be central in any consideration of liability; and that that issue can arise in a great variety of situations. This variety is evident in a number of aspects - the natural propensities or trained characteristics of different animals, the roles or capacities of owners or keepers, the restraints which are feasible, the activities of which animals are part. These are simple points but worth making, because it is not always easy to be objective about animals. Many organisations exist to promote particular interests in relation to animals,[4] and it may often be easier to sympathise with owners or keepers of animals, of whom there are many, than with those suffering harm, of whom

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[1] Protection of Birds Act 1954 (c.30), esp. s.3 (bird sanctuaries), but see Wildlife and Countryside Act 1981 (c.69) ss.1-8, 73(1) and 74(2) and Schedule 17, Part II (not yet in force); Nature Conservancy Council Act 1973 (c.54) s.1, National Parks and Access to the Countryside Act 1949 (c.57) ss.15, 20, 21 (nature reserves).

[2] The same problem may arise in the case of unprotected species - Smith v. Campbeltown Town Council (1935) 51 Sh.Ct.Rep. 122 (seagulls attracted to local refuse dump and causing damage to nearby property).

[3] In Appendices II-IV we gather together some readily available statistics bearing on the more commonly occurring problems.

[4] See, for example, the list of organisations consulted in DOE, Report (1976), Appendix F, pp.39-40.

there are relatively few.[1] But if we are to ensure equitable and consistent solutions to the various problems, the multiplicity and variety of the problems must first be properly acknowledged. We shall therefore refer back constantly to the problems which we have described, using them as case-studies, as it were, both in our description of the content of the present law in Parts II to IV and in our discussion of its reform in Parts V and VI.

The present law: preliminaries

1.22 In our treatment of the present law we shall examine in Part II those special rules which are statutory and have application only to particular cases.[2] In Parts III and IV we shall examine the mainly non-statutory rules which apply across cases, whether they apply only to animals, or also where harm is caused in other ways.[3] It must be borne in mind that the rules described in Parts III and IV may apply to a case to which a rule described in Part II applies and that those rules are themselves not mutually exclusive. The tactics of litigation as much as principle may determine the choice of rule pleaded. For under certain rules[4] it is only necessary to prove harm, ownership or possession of the animal which caused the harm and, where appropriate, knowledge of its dangerous or harmful propensities, although limited defences may be available (see below). Otherwise, the issue is whether the owner or keeper of the animal took reasonable care in the circumstances, and it is always open to him to contest this. Liability in the former case is said to be strict or sometimes, where it arises under statute, absolute; in the latter case, it is usually described as being based on culpa, that is, on the fault of the owner or

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[1] Cf. LRC(I), Working Paper (1977), paras. 142-144.

[2] Principally the rules contained in the Winter Herding Act 1686 (c.21), and the Dogs Acts 1906 (c.32) to 1928 (c.21) which apply respectively to cases 1(b) and 1(d). The Agricultural Holdings (Scotland) Act 1949 (c.75) s.15 has limited application to case 3(c).

[3] Principally the rules described in para. 1.2 and the non-statutory special rule mentioned in para. 1.3.

[4] That is, the rules we refer to as the special rules (para. 1.3); also nuisance (para. 1.2).

keeper.[1] The substantive distinction between strict and absolute liability turns on the defences which may be available. In the case of strict liability certain limited defences are generally available[2]:

(a) unavoidable accident, by which we mean those extraordinary or calamitous circumstances[3] variously referred to in the case-law as damnum fatale,[4] vis major[5] or act of God or of the Queen's enemies;[6]

(b) intervention of a third party;[7]

(c) act or default of the party suffering harm either in the form of -

(i) voluntary assumption of, or consent to, the risk of harm occurring (volenti non fit iniuria);[8] or

(ii) contributory negligence.[9]

In the case of absolute liability even these defences, or some of them, may be excluded or restricted, depending on the terms of the statute in question.[10]

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[1] But in some analyses strict liability is assimilated to liability based on culpa.

[2] (a) - c(i) exclude liability; c(ii) excludes liability or reduces the compensation payable according to the court's assessment of the degree of negligence - see Law Reform (Contributory Negligence) Act 1945 (c.28). Nuisance raises special considerations - see para. 4.17.

[3] ".... circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility." - Tennent v. Earl of Glasgow (1864) 2M(H.L.) 22 per the Lord Chancellor at p.27.

[4] Tennent v. Earl of Glasgow, above.

[5] M'Intyre v. Clow (1875) 2 R 278 per Lord President Inglis at p.290.

[6] Henderson v. John Stuart (Farms) Limited 1963 S.C. 245 at p.247.

[7] Fleeming v. Orr (1855) 2 Macq. 14, per the Lord Chancellor at p.20.

[8] Daly v. Arrol Brothers (1886) 14R 154.

[9] Gordon v. Mackenzie 1913 S.C. 109.

[10] See generally, Walker (1981), pp.206-207, 295, Chaps. 9, 10 (passim).

Part II: The statutory rules

Introduction

2.1 In this Part we shall examine the following enactments:

A Winter Herding Act 1686 (c. 21);

B Dogs Acts 1906 (c. 32) to 1982 (c. 21);

C Agricultural Holdings (Scotland) Act 1949 (c. 75), section 15.

These contain rules which apply specifically to particular cases described in Part I.

A Winter Herding Act 1686 (c.21)

General application

2.2 Under case 1(b) we described certain characteristic problems associated with pasturing livestock.[1] The Winter Herding Act 1686 (c.21) is relevant to some of these. As interpreted, the Act requires the herding of livestock on property possessed by their owner so that they do not stray[2] on to his neighbour's property and eat or destroy ground, woods, hedges or planting. The statutory obligation is to herd throughout the year and to confine at night in houses, folds or enclosures. The Act, which even in 1878 was judicially criticised as not suited to the present day,[3] is in the following terms:[4]

> "Our Soveraigne Lord considering the prejudice and damnage which the lieges doe sustaine in their planting and inclosurs through the not herding of nolt[5] sheep and other bestial in the winter tyme wherby the young trees and hedges are eaten and destroyed doeth with advice and consent of his Estates of Parliament statute and ordaine

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[1] Para. 1.8.

[2] Straying is to be contrasted with deliberate trespass - Cameron v. Miller (1907) 23 Sh. Ct. Rep. 318. See para. 2.7.

[3] M'Arthur v. Jones (1878) 6R 41 per Lord Justice-Clerk Moncreiff at p. 42; cf. Farquharson v. Walker 1977 SLT (Sh. Ct.) 22.

[4] The Act is cited and quoted as printed in the Official Revised Edition of the Statutes, Statutes in Force: Agriculture: 1

[5] "nolt" (or "nowt") - cattle collectively (The Scottish National Dictionary)

that all heretors liferenters tenents cotters and other possessors of lands or houses shall cause herd their horses nolt sheep suyne and goats the wholl year alse weell in winter as in summer and in the night tyme shall cause keep the same in houses folds or inclosures soe as they may not eat or destroy their nighboures ground woods hedges or planting certifieing such as contraveen they shall be lyable to pay halfe a merk[1] toties quoties for ilke beast they shall have goeing on their neighboures ground by and attour[2] the damnage done to the grass or planting And declares that it shall be laufull to the heretor or possessor of the ground to detaine the said beasts untill he be payed of the said halfe merk for ilke beast found upon his ground and of his expences in keeping of the same And this but prejudice of any former acts of Parliament made against destroyers of planting and inclosures."

Origins

2.3 The origins of the Act are of some importance, having been invoked to justify certain interpretations of it.[3] These are that negligent custody need not be proved - that is, liability is strict, or perhaps absolute[4]; and that liability under the Act extends to compensation for damage done, as well as the penalties and expenses expressly mentioned. For this purpose, the Act is regarded as having extended and strengthened an earlier non-statutory remedy.[5] Pre-Act, animals trespassing while the crops were in the ground might be detained brevi manu for 24 hours. If compensation was not then paid or pledged, the animals could be sold, so far as necessary to realise the value placed on the damage by the stated apprisers of the barony.

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[1] "halfe a merk" - one third of the pound Scots, equivalent to about 3p. (The Scottish National Dictionary quotes £5.11.1⅓ = 100 merks.)

[2] "by and attour" - over and above, as well as (Brown and Another v. Lord Advocate 1973 SLT 205 per Lord Grieve at p. 210).

[3] Brown and Another v. Lord Advocate, above.

[4] Cf. para. 1.22 and see further para. 2.8.

[5] Brown and Another v. Lord Advocate, above at pp. 207-208, founding principally on Erskine III.vi.28; see further Balfour, pp. 490-491 and discussion in B.S. Jackson (1975) at pp 349-350, (1977) at pp. 145-147; Bankton IV.41.16.

Damage

2.4 The damage for which compensation may be claimed is damage to ground, woods, hedges, planting or grass. It is arguable that there is no protection under the Act where land is neither enclosed nor planted. At least, this seems to be the main ground of the decision in the Sheriff Court case of Gordon v. Grant[1]. However, this decision is not altogether consistent with other cases decided by higher courts. For example, in the earlier case of Pringle v. M'Rae[2] the Act was expressly applied to a highland sheep-farm, although there were no plantings, enclosures, sown grass or crops on the farm. It was said:

> "That the provisions of the Act requiring efficient herding were evidently more applicable and useful in a wide uninclosed district than in a part of the country where there were inclosures."[3]

Similarly, in the later case of M'Arthur v. Miller,[4] where the Act was expressly applied to a garden, MacArthur, the owner of the straying animals, was not allowed to plead Miller's failure to repair his garden wall in mitigation of the trespass:

> "There was no obligation to build up the wall, or duty on the appellant in that respect under the statute. It was incumbent on M'Arthur to take the measures required by the statute to avoid liability for the penalties should his sheep trespass on the adjoining ground".[5]

The better view, therefore, is that ground need not be enclosed to be protected under the Act, nor even planted - at least if it serves some such minimal purpose as rough grazing, for example. Cultivated land, or land which is in grass or under crop, is clearly protected[6], and a crop

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[1](1870) Guthrie (1879) p. 575.

[2]31 Jan. 1829, Faculty Decisions; (1829) 7S 352.

[3]31 Jan. 1829 Faculty Decisions per Lord Glenlee.

[4](1873) 1R 248; cf. Farquharson v. Walker 1977 SLT (Sh. Ct.) 22.

[5]M'Arthur v. Miller, above, per Lord Cowan at p. 252.

[6]Govan v. Lang February 18, 1794, Faculty Decisions.

continues to be protected while being harvested, and until removed.[1]

Possessors and neighbours

2.5 Under the Act "heretors liferenters tenents cotters and other possessors of lands or houses" are obliged to herd their animals so that they do not eat or destroy their "nighboures ground woods hedges or planting". Possession in terms of the Act is a very broad concept. So, for example, liability has been imposed on the joint tenant of a crofters' common pasture[2], as well as on a seasonal grazing tenant[3], and even on a sub-tenant who hired the right of grazing from a tenant by the day or week.[4] Similarly, neighbours are entitled to protection provided only they possess their land in recognised legal form. For example, it was sufficient in one case that the party claiming compensation had purchased the crop which was damaged, although he had possession of the ground "only for the temporary purpose of harvesting and removing the crop".[5] Further, there is no requirement that "nighboures ground" must be coterminous with or adjacent to the ground from which the trespassing animals have strayed. The term "neighboures" means, simply, "other men".[6] However, the Act is not excluded merely because pursuer and defender happen to be in a particular relationship, such as landlord and tenant.[7]

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[1] Murphy v. Beckett (1920) 36 Sh. Ct. Rep. 38.

[2] Malcolmson v. Bruce (1892) 8 Sh. Ct. Rep. 338.

[3] Hill v. Burnett (1954) 70 Sh. Ct. Rep. 328.

[4] Murphy v. Beckett, above.

[5] Murphy v. Beckett, above at p. 39.

[6] Murphy v. Beckett, above at p. 40; Gordon v. Grant (1870) Guthrie (1879) p. 575; Farquharson v. Walker 1977 SLT (Sh. Ct.) 22.

[7] Turnbull v. Couts February 23 1809, Faculty Decisions. But see Brown and Another v. Lord Advocate 1973 SLT 205 at p. 209 where it may be implied that the Act does not apply in case of employer and employee.

Livestock

2.6 The Act requires specifically the herding of "horses nolt sheep suyne and goats". The preamble, which narrates as the reason for the enactment "the damnage which the lieges doe sustaine in their planting and inclosurs", refers in more general terms to the "not herding of nolt sheep and other bestial". "Bestial" is a collective term for livestock on the farm or in older Scots for domestic animals and animals in general.[1] It seems appropriate to read the term in context as restricted to the animals listed by kind. Certainly, a restrictive reading is more in accord with the tendency to construe the Act narrowly, as being a penal statute.[2] The significance of a restrictive interpretation is that the Act would not apply to animals such as deer, not previously domesticated in this country, but now part of livestock farming, a process which may accelerate with mounting pressure to make economic use of marginal land.

Prerequisites of liability

2.7 It may be that an act of straying, as opposed to a deliberate trespass, is a prerequisite of liability. In the Sheriff Court case of Cameron v. Miller,[3] the defender's shepherd acting in an emergency caused by a snow-storm, drove a flock of sheep some 6 miles and placed them in parks tenanted by the pursuer. It appeared that the shepherd wrongly supposed that his employer was entitled to use the parks. The decision that the Act was not applicable in the circumstances rests partly on the view that the Act should be construed narrowly as being "a highly penal one",[4] and partly on the view that the remedy sought was simply not appropriate:

> "It was a trespass (and another remedy is being sought), but it was not a case of allowing his sheep for want of herding to stray on the parks."

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[1] The Scottish National Dictionary.

[2] M'Arthur v. Jones (1878) 6R 41; Cameron v. Miller (1907) 23 Sh. Ct. Rep. 318 at p. 319. But see Brown and Another v. Lord Advocate 1973 SLT 205 per Lord Grieve at pp. 207-8, 210; Farquharson v. Walker 1977 SLT (Sh. Ct.) 22 at pp. 22, 23. See paras. 2.7, 2.12.

[3] Above.

[4] Cf. paras. 2.6, 2.12.

While straying as such may be a prerequisite of liability, detention of the straying animals is not, though it may simplify the matter of proof; nor is de recenti notice of the straying to the owner of the animals required.[1] Likewise, actual damage to ground or planting is not a prerequisite of liability, and the statutory penalties may be separately recovered merely on proof of straying.[2]

Liability and defences

2.8 Liability is strict, if not absolute. Once straying is proved, it is not open to the owner of the offending animals to rebut liability by claiming that in fact he took reasonable precautions in the circumstances.[3] So, for example, it is not sufficient that he employs someone to herd his animals; what is required is such herding as prevents straying[4]. Beyond that, it is not altogether clear whether liability under the Act should be characterised as absolute for the purpose of excluding or restricting defences which might otherwise be available.[5] In the most recent discussions of the nature of the liability involved,[6] there are references without distinction to "absolute obligation", "absolute liability", "strict liability", "liability without fault" and "liability without proof of fault." This is not surprising since it is the distinction between strict liability and liability based on culpa which is primarily in issue. However, in the earlier case-law, certain acts of the claimant in relation to fencing

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[1] Shaw and Mackenzie v. Ewart March 2 1809 Faculty Decisions; Mitchell & Sons v. M'Millan (1909) 25 Sh. Ct. Rep. 240.

[2] Leith v. Ross (1895) 11 Sh. Ct. Rep. 110.

[3] Cf. para. 1.22.

[4] Turnbull v. Couts February 23 1809 Faculty Decisions. Shaw and Mackenzie v. Ewart, above.

[5] See para. 1.22.

[6] Brown and Another v. Lord Advocate 1973 SLT 205: Farquharson v. Walker 1977 SLT (Sh. Ct.) 22.

have been plead as negating liability.[1] From the failure of these pleas it may be inferred that the defence of contributory negligence is at least curtailed, although the issue of fencing may raise special considerations.[2] It has also been said that it is immaterial that animals may have escaped by the malicious act of a third party.[3] The other possible defences do not appear to have been directly raised.

Liability and interdict

2.9 Although the Act is most commonly invoked to found a claim for compensation after the event of damage, it has also been invoked in proceedings for interdict to compel the owner of livestock to prevent the occurrence of damage which is anticipated.[4] It appears to be accepted that the Act is available for this purpose:

> ".... all remedies available at common law in respect of a breach, actual or threatened, of an obediential obligation such as that which existed in relation to hained[5] lands prior to 1686 are, in my opinion, available in relation to the extended obligation imposed by the Act of 1686."[6]

However, a distinction is drawn between straying which is too trivial to justify interdict and straying which results in material damage.[7] It is argued that the law strikes only at the latter, although it is difficult to see how this

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[1] Loch v. Tweedie July 3 1799. Faculty Decisions; Mor 10501 (Claimant had participated with owner of straying animals in erecting march fence between their properties); M'Arthur v. Miller (1873) 1R. 248 (Claimant had allowed his garden wall to fall into disrepair - see para. 2.4).

[2] See para. 5.12.

[3] Murphy v. Beckett (1902) 36 Sh. Ct. Rep. 38 at p. 39.

[4] Macleod's Trustees v. Macpherson (1883) 10R 792; Winans v. Macrae (1885) 12R 1051; Robertson v. Wright (1885) 13R 174; Campbell v. Mackay (1959) 75 Sh. Ct. Rep. 54; Wilson v. Fleming 1970 SLT (Sh. Ct.) 49.

[5] "hained" - from hain: to enclose or protect a field or wood by a hedge or fence; generally found as hained, of a grass crop: kept for hay, allowed to lie without pasturing; of a plantation: preserved from cutting. (The Scottish National Dictionary.)

[6] Wilson v. Fleming, above at p. 49. But see Robertson v Wright, above at p. 178; Robertson v. Wright (1886) 2 Sh. Ct. Rep. 60 at p. 61; Campbell v. Mackay, above at pp. 60-61.

[7] Wilson v. Fleming, above at p. 49.

distinction can be reconciled with the terms of the 1686 Act. For under the Act damages may be claimed irrespective of any fault or of the adequacy of the precautions, and penalties recovered without the need to prove damage. Nevertheless, it seems that the remedy of interdict is excluded where it cannot be shown that the defender has failed to take all reasonable steps to prevent his animals from straying and causing damage. This limitation has been explained as follows:

> "The point decided in Wilson's case[1] and in Robertson v. Wright[2] as I understood them was, when you are seeking the remedy of interdict under the Act you have to establish some act against which the interdict can be directed ... prima facie it seems logical that, where an action of interdict is raised, it must be directed against some act which the defender is likely to perform if not prevented from doing so."[3]

Detention

2.10 The Act provides for the detention of straying animals:

> "... it shall be laufull to the heretor or possessor of the ground to detaine the said beasts untill he be payed of the said halfe merk for ilke beast found upon his ground and of his expenses in keeping of the same ..."

This provision has two aspects. It sanctions what is, in effect, self-help, as a means of preventing or restricting damage. It also makes available a means of enforcing payment of what is due under the Act. The process of detention is subject to a number of conditions. Only animals actually on the detainer's ground may be detained, though once lawfully detained, they may be followed and recaptured if they escape.[4] Animals must have access to water and fodder while detained and cannot be used by the detainer.[5] Conditions other than payment of what is due under the Act cannot be imposed on their release.[6]

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[1] Wilson v. Fleming 1970 SLT (Sh. Ct.) 49.

[2] Robertson v. Wright (1886) Sh. Ct. Rep. 60.

[3] Brown and Another v. Lord Advocate 1973 SLT 205 per Lord Grieve at p. 209.

[4] M'Arthur v. Jones (1878) 6R 41.

[5] Duncan v. Kids (1676) Mor. 10514.

[6] Fraser v. Smith (1899) 1F 487.

Sale

2.11 While detention operates as a means of enforcing payment of what is due under the Act, and is sometimes referred to as a poinding, following Erskine, it does not have the effect of common poindings:

> "This title [Of Arrestments and Poindings] may be concluded with a short account of a species of poinding much differing from common poindings, viz. the poinding of horses, cows or sheep, found in fields of corn or grass, plantations or other inclosures, by the proprietor or possessor. This poinding does not transfer property and was intended merely as a spur to tenants to keep a watchful eye over their cattle, and as a compensation to him whose corns, grass or plantations have suffered by the trespass."[1]

Such detention is not in the proper sense a security for payment or a diligence to enforce payment. The pre-Act remedy on which the Act is predicated entailed the right to sell in the event of non-payment.[2] The procedures of that period have long since fallen out of use, but the right has been retained although it is not expressly mentioned in the Act. Under the modern procedure a warrant of the court to sell would first be required.[3] Other aspects of this procedure are not entirely clear. Detention is expressly authorised under the Act in respect of the fixed penalties[4] and the expenses of keeping the detained animals. The Act has been applied to the recovery of damages for actual damage[5] and this suggests that the remedy of detention should also be available in such a case. This was certainly the view of Erskine:

> "Though the act does not give expressly a right of detention for the damage, yet as that right was competent to the possessor by our usage prior to the act, it may be safely concluded that that right continues in the possessor; as the plain intention

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[1] Erskine III.vi 28.

[2] See para. 2.3.

[3] Rankine (1909) at p. 612.

[4] halfe a merk per animal per trespass. See para. 2.2.

[5] Brown and Another v. Lord Advocate 1973 SLT 205.

> of the law was not to weaken, but on the contrary, to strengthen the possessor's rights."[1]

But earlier decisions in which damages did not arise held continued detention to be unlawful after tender of payment of penalties and expenses.[2] If, in fact, detention for damages is not available, the usefulness of the Act may be diminished. In practice, no doubt, if animals were detained for unpaid damages, the claim would be valued in an action concluding for damages and warrant to sell. However, the decision not to release detained animals may be problematic, if there is the possibility that a counter-claim for loss arising from improper detention might be available to the owner who has tendered payment of penalties and expenses. An alternative procedure may be for the owner of the animals to pay the disputed damages under protest to secure their release and subsequently seek the court's aid to fix the sum really due. This procedure has been judicially commended in the case of disputed expenses,[3] but would be unattractive when a claim for damages is large. It may be that, in practice, these problems seldom arise, if detention is indeed "out of date" and "defunct" as assumed by the sheriff in the most recent decision on the Act.[4]

Penalties

2.12 Reference has already been made to the penal character of the Act, which has been invoked to justify particular restrictive interpretations[5]. More recently, this view has been criticised:

> "... I would respectfully suggest that the Act was intended to protect the possessor rather than to punish the owner of the straying animals. I mention this because it was suggested on behalf of the defender that the statute was a penal one and had to be construed as such. I do not

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[1] Erskine III.vi.28. See also Brown and Another v. Lord Advocate, 1973 SLT 205 per Lord Grieve at p. 210.

[2] Fraser v. Smith (1899) 1F 487; cf. M'Arthur v. Miller (1873) 1R 248.

[3] Malcolmson v. Bruce (1892) 8 Sh. Ct. Rep. 338 at p. 346.

[4] Farquharson v. Walker, 1977 SLT (Sh. Ct.) 22 at pp. 22-23.

[5] See paras. 2.6, 2.7.

agree. As pursuers' counsel put it, the Act of 1686 is no more penal than the Factories Act."[1]

Nevertheless, the recovery of the statutory penalties may still be subject to special conditions. It has been held that proceedings for the recovery of penalties under the Act were subject to the provisions of the Summary Jurisdiction (Scotland) Acts 1864 to 1881.[2] The effect of this was that proceedings could not be brought in the then existing Small Debt Court[3], and, more importantly, could only be brought within a period of 6 months after the contravention in respect of which the penalties were due.[4] The general scheme for the recovery of statutory penalties under the 1864 and 1881 Acts was continued successively in the Summary Jurisdiction (Scotland) Act 1908 (c. 65)[5], the Summary Jurisdiction (Scotland) Act 1954 (c.48)[6] and the Criminal Procedure (Scotland) Act 1975 (c.21)[7]. From the beginning, the forms provided by these various Acts do not seem to have been regarded as necessary,[8] but it is arguable that the time limit of 6 months for proceedings still

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[1] Brown and Another v. Lord Advocate 1973 SLT 205 per Lord Grieve at pp. 207-208; see also at p. 210.

[2] Summary Procedure (Scotland) Act 1864 (c.53), ss. 3(3), 4, 26, 27; Summary Jurisdiction (Scotland) Act 1881 (c.33), s.3.

[3] Grant v. Hay (1888) 2 White 6.

[4] Grewer v. Wright (1883) Guthrie (1894) p. 412.

[5] ss. 4, 6. The time limit specified under the Act (s.26) applies specifically to proceedings under the Act but the time limit incorporated into the procedure for recovering penalties under the 1686 Act (Grewer v. Wright, above) may continue to apply in terms of s.6.

[6] s.1(1)(b) and (3), which correspond respectively to ss. 4 and 6 of the Summary Jurisdiction (Scotland) Act 1908 (c.65); s.23 corresponds to s.26 of that Act.

[7] s.283(1)(b) and (3), which correspond respectively to s.1(1)(b) and (3) of the Summary Jurisdiction (Scotland) Act 1954 (c.48); s.331 corresponds to s.23 of that Act.

[8] Grewer v. Wright, above. The continuance of this practice depends on the interpretation of ss. 6 and 26 of the Summary Jurisdiction (Scotland) Act 1908 (c.65), ss. 1(3) and 23 of the Summary Jurisdiction (Scotland) Act 1954 (c.48) and ss. 283(3) and 331 of the Summary Jurisdiction (Scotland) Act 1975 (c.21).

applies.[1] There is no discussion of this point specifically in recent cases. Indeed, in the most recent of these the view is expressed that the provision for recovery of penalties is out of date and that questions of penalties, generally, have passed away during the last 100 years.[2] If that is so, the residual obscurities affecting penalties may be of little practical significance.

B Dogs Acts 1906 (c.32) to 1928 (c.21)

General application

2.13 Under case 1(d)[3] we described the problem of livestock-worrying by dogs. The Dogs Acts 1906 (c.32) to 1928 (c.21) apply specifically to this case:

> "1(1) The owner of a dog shall be liable in damages for injury done to any cattle or poultry by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owners knowledge of such previous propensity, or to show that the injury was attributable to neglect on the part of the owner."[4]

The reference to injury done may seem to imply the actual infliction of physical injury by the dog, and, indeed, this restrictive interpretation is adopted in an early case[5]. However, indirect injury is probably now sufficient - for example, if an animal injures itself while trying to escape from a feared or actual attack.[6]

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[1] Cf. Walker (1981) at p. 941.

[2] Farquharson v. Walker 1977 SLT (Sh. Ct.) 22 at pp. 22-23.

[3] Para. 1.10.

[4] Dogs Act 1906 (c.32) - s.1(1) to (3) of the Dogs Act 1906 (c.32) and part of s.1(1) of the Dogs (Amendment) Act 1928 (c.21) have been repealed for England and Wales by s.13(2) of the Animals Act 1971 (c.22).

[5] See Young v. Cameron (1889) 5 Sh. Ct. Rep. 292 (decided under the Dogs (Scotland) Act 1863 (c.100)).

[6] Belford v. Reid and Ogilvie (1912) 28 Sh. Ct. Rep. 12. See also Riach v. Neish (1950) 66 Sh. Ct. Rep. 286 in which, although the Acts are not expressly mentioned, other cases specifically under the Acts (or under the earlier Act of 1863 - see footnote 5 above) are cited, and a claim is considered in respect of lambs born dead after the disturbance of the flock. But see the Irish case Campbell v. Wilkinson (1909) 43 ILT 237.

Livestock

2.14 The expression "cattle" as used in the Act includes horses, mules, asses, sheep, goats and swine.[1] The expression "poultry" is defined by reference to the Poultry Act 1911 (c.11)[2]. There, it is defined to include domestic fowls, turkeys, geese, ducks, guinea-fowls and pigeons.[3] That definition has been repealed and re-enacted in a succession of subsequent Acts.[4] In its current form[5] it is much wider. It includes specifically pheasants and partridges in addition to the species mentioned and may be extended or restricted by subordinate legislation. According to the usual principles of interpretation statutory references to provisions which have been re-enacted are to be taken as references to the re-enacted forms unless the contrary intention appears.[6] It is fairly clear that extensions to the definition effected by subordinate legislation will not apply for the purposes of the Dogs Acts, since the power to make the subordinate legislation is expressed as being only for the purposes of the Act in which the power is conferred.[7] This would seem to be sufficient indication of the contrary intention required. Arguably, in the case of pheasants and partridges too, the contrary intention appears. The extension is specifically made in the context of diseases of animals which is remote from that of harassment of livestock by dogs. Intuitively, principles which are applicable to domestic fowls seem inappropriate to game birds. However, the Animal Health Act 1981 (c.22) does

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[1]Dogs Act 1906 (c.32) s.7.

[2]Dogs (Amendment) Act 1982 (c.21) s.1(2).

[3]s.1(3).

[4]Diseases of Animals Act 1935 (c.31) ss. 1(2)(a), 19(3), Sch. 2; Diseases of Animals Act 1950 (c.36) ss. 84(2), 89(1), Sch. 5; Animal Health Act 1981 (c.22) ss. 87(4), (5), 96(2), Sch. 6.

[5]Animal Health Act 1981 (c.22) s.87(4), (5).

[6]Interpretation Act 1889 (c.63) s.38(1); Interpretation Act 1978 (c.30) s.17(2).

[7]Diseases of Animals Act 1950 (c.36) s.84(2) proviso; Animal Health Act 1981 (c.22) s.87(5).

contain provisions relating to the worrying of animals, (livestock) by dogs[1], and pheasants and partridges reared and kept in captivity until killed for the table may conceivably be poultry[2]. So the issue is not altogether clear.

Ownership

2.15 Under the Acts it is the owner of the dog who is liable to pay compensation for injury done, but there are provisions which operate to identify the owner presumptively where his identity may be in doubt:

> "1(2) Where any such injury has been done by a dog, the occupier of any house or premises where the dog was kept or permitted to live or remain at the time of the injury shall be presumed to be the owner of the dog, and shall be liable for the injury unless he proves that he was not the owner of the dog at that time:
>
> > Provided that where there are more occupiers than one in any house or premises let in separate apartments, or lodgings, or otherwise, the occupier of that particular part of the house or premises in which the dog has been kept or permitted to live or remain at the time of the injury shall be presumed to be the owner of the dog."[3]

For the presumptive owner to exclude liability it is sufficient if he proves that he is not in fact the owner of the dog at the relevant time. The actual owner, if known, will then be liable. This contrasts with the previous law where the presumptive owner, similarly defined, had to prove not only that he was not the owner of the dog but also that the dog was not kept on his premises without his sanction or knowledge.[4] Where two or more dogs, acting together, cause injury their respective owners are jointly and severally liable for the whole amount of the compensation to be paid.[5]

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[1] s.13(2) - but "animals" as defined does not include poultry (s.87). Cf Diseases of Animals Act 1950 (c.36) ss. 44(c), (d), 84.

[2] Cf. Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association [1969] 2AC 31 esp. at p. 85.

[3] Dogs Act 1906 (c.32).

[4] Dogs (Scotland) Act 1863 (c.100) s.2. See Murray v. Brown and Porteous (1881) 19 SLR 253; Jackson v. Drysdale and Craig (1896) 12 Sh. Ct. Rep. 224.

[5] Arneil v. Paterson 1931 S.C. (HL) 117.

Liability

2.16 Under the Acts it is not necessary to show either -

(a) a previous mischievous propensity in the dog or the owner's knowledge of such propensity; or that

(b) the injury was attributable to neglect on the part of the owner.[1]

The provision takes this form for historical reasons, and a brief examination of these may help to clarify the nature of the liability involved. The current provision replaces an earlier enactment in rather similar terms:

> "1 In any Action brought against the Owner of a Dog for Damages in consequence of Injury done by such Dog to any Sheep or Cattle, it shall not be necessary for the pursuer to prove a previous Propensity in such Dog to injure Sheep or Cattle."[2]

That provision was intended to abrogate the effect of the case of Fleeming v. Orr[3] which was then thought to have laid down the rule that liability in relation to a dog injuring livestock could only be founded on the owner's proven knowledge of a previous propensity in the dog to behave in that way. Subsequently, the provision was criticised:

> "The next question is, whether the Act 26 and 27 Vict. cap. 100, introduced any change in the common law with regard to the liability of the owner of the dog in a case of this kind. I must say that I do not think the statute deals very intelligibly with the matter. I have no doubt that the intention of the Legislature was to abrogate the law laid down by the House of Lords in the case of Fleeming v. Orr, 2 Macq. 14, and to make the owner of the dog liable, on proof of its being the cause of the mischief, whether there be proof of fault on his part or not, but certainly that is not very satisfactorily declared by the statute."[4]

The point of the criticism is that, while the earlier Act clearly dispensed with any requirement of previous propensity

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[1] Dogs Act 1906 (c.32) s.1(1) quoted at para. 2.13.

[2] Dogs (Scotland) Act 1863 (c.100).

[3] (1855) 2 Macq. 14. This case and its consequences are considered in some detail at para. 3.4.

[4] M'Intyre v. Carmichael (1870) 8M 570 per Lord President Inglis at p. 574. See also Murray v. Brown and Porteous (1881) 19 SLR 253 and Arneil v. Paterson 1931 SC (HL) 117 esp. per Lord President Clyde in the Court of Session at p. 118.

in the dog, it left uncertain whether or not some fault on the part of the owner was a prerequisite of liability. The 1906 Act, accordingly, reiterates the exclusion of the assumed requirement to show mischievous propensity and knowledge and expressly excludes in addition any requirement to show neglect, that is fault or negligence, on the part of the owner. So liability under the Acts is strict, if not absolute.[1]

Defences

2.17 It is not clear whether liability under the Acts is to be further characterised as absolute for the purpose of excluding or restricting any of the defences generally available in the case of strict liability.[2] There is very little by way of Scottish authority on these issues. However, there are English and Irish cases which suggest that the defences of voluntary assumption of risk and of contributory negligence may be available.[3] The defence of intervention of a third party may also be available. This at least seems to be the import of the sheriff's remarks in the case of Belford v. Reid and Ogilvie[4] where both defenders were held liable under the Acts, although Ogilvie was out by himself with his and Reid's dogs. In the course of his judgement the Sheriff said:

> "The difficulty lies in determining ... whether Ogilvie had not, by taking or going off with Reid's dog, assumed the liabilities of owner to the exclusion of Reid. I admit the case is a hard one, but I can find no reason to relieve Reid of responsibility. I think the result would have been different if Ogilvie had taken Reid's dog from a shut place or from a chain, but in the present circumstances there is nothing to show that Reid had taken any precautions to prevent his dog straying and getting into mischief ..."

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[1] See para. 1.22 and further at para. 2.17.

[2] See para. 1.22.

[3] Elliot v. Longden (1901) 17 TLR 648 (decided under the Dogs 1865 (c.60); Campbell v. Wilkinson (1909) 43 ILT 237. See also Grange v. Silcock (1897) 77 LT 340 (no defence that animals injured while trespassing), and discussion in Williams (1939) at pp 355-357. In other jurisdictions with similar legislation, it has been argued that all the usual defences in case of strict liability applied - see North (1972) at p. 193 and cases cited in footnote 12.

[4] (1912) 28 Sh. Ct. Rep. 12 at p.13. But the judgement is perhaps equivocal, and almost amounts to reintroducing fault as the basis of liability.

Similar principles might apply to the defence of unavoidable accident, but this does not appear to have been considered.

C Agricultural Holdings (Scotland) Act 1949 (c.75) section 15

Compensation for game-damage

2.18 Under case 3(c)[1] we described the problem of game-damage. Under section 15 of the Agricultural Holdings (Scotland) Act 1949 (c.75) the tenant of an agricultural holding may obtain compensation from his landlord for damage caused by game:[2]

> " 15.(1) Subject to the provisions of this section, where the tenant of an agricultural holding has sustained damage to his crops from game, the right to kill and take which is vested neither in him nor in anyone claiming under him other than the landlord,[3] and which the tenant has not permission in writing to kill, he shall be entitled to compensation from his landlord for the damage if it exceeds in amount the sum of 12 pence per hectare[4] of the area over which it extends:
>
> Provided that compensation shall not be recoverable under this section unless[5] -
>
> (a) notice in writing is given to the landlord as soon as may be after the damage was first observed by the tenant, and a reasonable opportunity is given to the landlord to inspect the damage -

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[1] Para. 1.15.

[2] Tenants of small landholders' holdings and of crofts have similar rights - see Small Landholders (Scotland) Act 1911 (c.49) s.10(3) and Crofters (Scotland) Act 1955 (c.21) Sch. 2, para. 10.

[3] The statutory right of an occupier of an agricultural holding under s.43(1) of the Agriculture (Scotland) Act 1948 (c.45) to kill deer in certain circumstances does not defeat the right to compensation - Lady Aukland v. Dowie 1965 SLT 76. For a proposed new form of that provision see Deer (Amendment) (Scotland) Bill (Print 1 April 1982) clause 10.

[4] Once the threshold is exceeded the threshold sum is not deducted from the compensation as assessed - Roddan v. M'Cowan (1890) 17R 1056 which was decided on a similar provision in a lease.

[5] No other defences appear to be available to the landlord, not even that the game has come from another's land - Thomson v. Earl of Galloway 1919 SC 611 (decided under the corresponding provisions of an earlier Act - Agricultural Holdings (Scotland) Act 1908 (c.64) s.9).

(i) in the case of damage to a growing crop, before the crop is begun to be reaped, raised or consumed; and

(ii) in the case of damage to a crop reaped or raised, before the crop is begun to be removed from the land; and

(b) notice in writing of the claim, together with the particulars thereof, is given to the landlord within one month after the expiration of the calendar year, or such other period of twelve months as by agreement between the landlord and the tenant may be substituted therefor, in respect of which the claim is made.[1]

(2) The amount of compensation payable under this section shall, in default of agreement made after the damage has been suffered, be determined by arbitration.

(3) Where the right to kill and take the game is vested in some person other than the landlord, the landlord shall be entitled to be indemnified by that other person against all claims for compensation under this section;[2] and any question arising under the foregoing provisions of this subsection shall be determined by arbitration.

(4) In this section the expression "game" means deer, pheasants, partridges, grouse and black game."

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[1] See Earl of Morton's Trustees v. Macdougall 1944 SC 410 (decided under the corresponding provisions of an earlier Act - Agricultural Holdings (Scotland) Act 1923 (c.10) s.11(2)).

[2] But the landlord cannot be indemnified where game has come from another's land - Thomson v. Earl of Galloway, 1919 S.C. 611.

Part III: Failure to confine dangerous animals

Introduction

3.1 In this part we examine the last of the rules special to animals, namely, the rule which requires the owner or keeper of an animal of known dangerous or harmful propensities to confine it effectually.[1] This is a common law rule and applies broadly across many of the cases described in Part I.[2] Liability under the rule is strict.[3]

Origins

3.2 In its development in the case-law[4] the rule is usually derived from Stair, who adduced it in treating the liability of accessories to wrongful acts as an example of anterior accession to delinquence:

> "Accession to delinquence is either anterior, concomitant, or posterior to the delinquence itself. Anterior is, either by command or counsel, instigation or provocation; or by connivance in foreknowing, and not hindering those, whom they might and ought to have stopped, and that either specially in relation to one singular delinquence, or generally in knowing and not restraining the common and known inclination of the actors towards delinquences of that kind, as when a master keeps outrageous and pernicious servants or beasts. And therefore in many cases, even by natural equity, the master is liable for the damage done by his beast. As is clearly resolved in the Judicial law,[5] in the case of the pushing ox, which if it was accustomed to push beforetime, the owner is liable for the damage thereof, as being obliged to restrain it; but if not, he is free. So the like may be said of mastives and other dogs, if they be accustomed to assault men, their goods and cattle, and be not destroyed or restrained, the owner is liable. The remedies adhibited by the Romans see L. 40. et seqq. D. de aedil. ed. et tot. tit. D. et Inst. si quad. paup."[6]

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[1] Cf. para. 1.3.

[2] Paras. 1.5-1.20.

[3] Cf. para. 1.22 and see further para. 3.22.

[4] Principally of the mid to late 19th century e.g. Fleeming v. Orr (1855) 2 Macq. 14; Clark v. Armstrong (1862) 24D 1315; Burton v. Moorhead (1881) 8R 892.

[5] The "Judicial law" is "the prime positive law of God ... which God, by the Ministry of Moses, prescribed to the people of Israel ..." - in this case, in particular, Exodus xxi, 29, 35, 36 (Stair 1.1.9). See discussion in B.S. Jackson (1977) at pp. 142-143.

[6] Stair 1.9.5.

More recently, Stair's statement of the rule has been the subject of much academic and judicial debate, and doubt has been expressed about the text, its precise meaning and its broad significance.[1] There are two points which must be made with reference to this debate.

Independence of the rule

3.3 First, the rule does not subsume the more general principles of liability on grounds of negligence or failure to take reasonable care,[2] as has been argued from time to time,[3] but has a truly independent existence. In other words, liability under the rule is distinguishable from liability founded on negligence or failure to take reasonable care, whatever the proper basis of the distinction may be:

> "... such a ground of action [that is, negligence proper or failure to take reasonable care] may, in appropriate circumstances, co-exist with the action based on failure to perform the duty of confining effectually or, as it is known in England, the scienter action[4] ... Moreover, the two grounds of action are, in my opinion, quite distinct ... Stair, in the passage cited, [Stair 1.9.5] is engaged in stating a principle ... The principle being dealt with is anterior accession to delinquence, of which one example is failure by a master who has foreknowledge to restrain outrageous and pernicious servants or beasts kept by him. Such failure renders the master who keeps such servants or beasts liable in reparation, on the grounds, in my opinion, of culpa; but the fault consists not in failure to take reasonable care, but in failure to restrain or confine ..."[5]

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[1] See, for example, D.L. Carey Miller (1974); B.S. Jackson (1977); Milligan v. Henderson 1915 S.C. 1030; Henderson v. Stuart (Farms) Limited 1963 S.C. 245.

[2] Cf. para. 1.2.

[3] See, for example, Milligan v. Henderson, above; Fraser v. Pate 1923 S.C. 748; Henderson v. John Stuart (Farms) Limited, above.

[4] The action is so named from the early form of writ originally used. For example, the defendant might be required to answer "Quare quendam canem ad mordendas oves consuetum ... scienter retinuit .." (Why he knowingly kept a dog accustomed to biting sheep ...) - see Williams (1939) at pp. 276-279.

[5] Henderson v. John Stuart (Farms) Limited above, per Lord Hunter at p. 248. Cf. LRC(S), Report (1963) p.2 and discussion in B.S. Jackson (1977) at pp. 139-145.

Influence of English common law

3.4 The second point is that the development and content of the rule have been considerably influenced by the principles of the English scienter action[1] which is mentioned in the last quotation. This is a process which started with the case of Fleeming v. Orr[2] where the view was expressed that the laws of Scotland and England alike rested on culpa or fault which, however, it was said, was assumed in England not to exist in the case of a domestic animal without knowledge (scientia) of its particular harmful habits. It was quite clearly the view of the Lord Chancellor, who delivered the leading opinion in that case, that the presumed harmlessness of domestic animals was a feature of English law rather than Scots law. However, in time, less cautious, though equally influential, statements were made and indeed, supported by misconceived legislation.[3] For example:

> "On the general question of the legal obligation on owners of such animals [bulls] I think it right to state what I hold that obligation to be. I do not apprehend that there is any substantial difference between the laws of Scotland and England on the point. There may perhaps be some difference in the form of pleading applicable to such cases; and in English practice a more specific averment of scientia on the part of the owner, or knowledge of the vicious propensities and habits of the animal may be required than is necessary in Scotch pleading. But the law of Scotland will not, any more than that of England, make a master responsible for injury done by a domestic animal unless it be an animal of unusually vicious habits and propensities, and known to the owner to be so."[4]

This passage must of course be read subject to the decision in Henderson v. John Stuart (Farms) Limited[5] that an action founded on negligence, or failure to take reasonable care, may be available in principle without regard to foreknowledge and

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[1] That is, the action as it existed before the passing of the Animals Act 1971 (c.22).

[2] (1855) 2 Macq. 14.

[3] See para. 2.16.

[4] Clark v. Armstrong (1862) 24D 1315 per Lord Justice-Clerk Inglis at p. 1320. Cf. Milligan v. Henderson 1915 S.C. 1030 per Lord Justice Clerk Scott Dickson at p. 1035; Fraser v. Pate 1923 S.C. 748 per Lord Ashmore at pp. 750-751 and Lord Justice-Clerk Alness at pp. 753-754.

[5] 1963 S.C. 245.

failure to restrain. Nevertheless, it clearly articulates a judicial attitude which is manifest in the earlier case-law in particular and undoubtedly influenced the course of legal development.[1] So there has been frequent citation of English case-law in the Scottish authorities and the distinction, long-accepted in Scotland, between the persuasive and binding force of such citation is perhaps, in this area of the law, more difficult to maintain than usual. Quite recently, however, there has again been a change in the judicial attitude, represented most clearly by Lord Hunter:

> "... when Scottish judges, in considering liability for animals in certain types of cases, have expressed opinions to the effect that the law of Scotland is the same as, or similar to, the law of England they must have had in mind practical results in the particular circumstances under consideration rather than underlying principles"[2]

Since then the Animals Act 1971 (c.22) has changed the law in England, although a scienter principle has been retained.[3] As a consequence the position in Scotland is now less clear. There exists a body of case-law, not yet expressly overruled, in which English authorities, technically now obsolete, have influenced the detail of the decisions. At the same time there is a trend to reinstate principles supposedly pre-dating those decisions. In the circumstances, the analogy of the English scienter action must be treated with care.

Development

3.5 In the institutional writers after Stair the rule recurs in various forms. Bankton, in his statement of it, introduces knowledge as a factor in liability, but implicitly as a

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[1] But this view was not unchallenged before Henderson v. John Stuart (Farms) Limited 1963 S.C. 245 - see, for example, Milligan v. Henderson 1915 S.C. 1030 per Lord Johnston at pp. 1042-1045.

[2] Henderson v. John Stuart (Farms) Limited, above, at pp. 247-248. Cf. Gardiner v. Miller 1967 SLT 29; Sneddon v. Baxter 1967 SLT (Notes) 67; Maclean v. The Forestry Commission 1970 SLT 265. Gallacher v. St. Cuthbert's Co-operative Association Limited 1976 SLT (Notes) 25.

[3] See s.2(2).

qualification of what is essentially a civilian form of the rule:[1]

> "In case of damage done by beasts, contrary to the natural custom of their kind, without provocation, as a horse kicking, or an ox goring, termed by the Romans, Pauperies, the master must either answer the damage, or deliver up the beast to the person that received the prejudice. He may be more severely punished, in case he did not restrain the beast, after due intimation, according to the judicial law of the Jews, and natural reason."[2]

Kames, who treats the topic, apparently on the basis of a broad concept of culpa or fault, states the rule as follows:

> "With respect to animals, it is the proprietor's duty to keep them from doing harm; and if harm ensue that might have been foreseen, he is bound to repair it; as, for example, where he suffers his cattle to pasture in his neighbour's field; or where the mischief is done by a beast of a vicious kind; or even by an ox or a horse, which, contrary to its nature, he knows to be mischievous."[3]

Bell, in the earlier editions of his Principles of the Law of Scotland, merely refers to carelessness in the keeping of a dangerous dog which "subjects to damage in reparation"[4]. However, Guthrie in his edition of that work considerably expands Bell's treatment[5]:

> "It was formerly held that the owner's knowledge of the dangerous or mischievous character of a domesticated animal must in all cases be proved in order to render him liable; but now, in any action for injury to sheep or cattle, it is not necessary to prove a previous propensity in a dog to injure sheep or cattle; .... The "scienter", i.e. the owner's or custodier's knowledge of the animal's vicious propensity, must still be proved in the case of other domesticated animals, and in the case of injuries done by dogs to persons or other animals than sheep or cattle. And one who keeps a dog or bull, or the like, which he knows to be of a ferocious disposition, or a wild beast, is not merely bound to take all proper

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[1] That is, a form derived from the early Roman law. See D.L. Carey Miller (1974) at p. 7; B.S. Jackson (1977) at pp. 148-149.

[2] Bankton 1.10.4. Bankton cites Tit.ff.ii quadrup. paup. [Digest] and Exod. xxi.29 in his text.

[3] Kames 1.1.2. Kames cites Exodus, chap. xxi, 29, 36 in his text. See D.L. Carey Miller (1974) at pp. 9-10; B.S. Jackson (1977) at pp. 151-156.

[4] 4th ed. (1839), para. 553.

[5] 10th ed. (1899), para. 553.

> precautions for its control, but, ... is absolutely bound to prevent mischief, and must at his peril keep the animal from doing hurt. .... Apart from the vice or ferocity of the animal, its owner is liable, according to the ordinary rules of law, for negligence in using or guarding it, as for careless or reckless driving of horses or cattle in public places, or failure in maintaining fences. Indeed the scientia, so much discussed in the cases cited, is just an element in the proof of negligence, having the effect when established of shifting the onus probandi. [burden of proof]"

Hume, in his lecture on obligations quasi ex delicto states a somewhat different form:

> "I may now close this discussion with a few words concerning damage done by vicious animals in one's keeping [such as bulls or dogs]. For this, I take it, the master or owner is liable, only if the animal be of a known vitious kind, or if the particular animal is known to be so, and has been complained of to the master, and the master[1] has failed to part with or sufficiently confine it."

Classifying animals

3.6 The several forms of the rule, although differing from each other substantially, presuppose a distinction between harm caused by abnormal animal behaviour and harm caused by normal animal behaviour. In the former case, liability generally depends on the owner's knowledge that a particular animal is vicious, although not of a species known generally to be vicious.[2] In the latter case, knowledge is presumed to be common to all that any animal of the kind in question is vicious and likely to cause harm if not restrained, and the owner's liability follows immediately in the event of harm. It is possible that the rule in its earlier forms in Stair and Bankton was not thought of as including wild animals within its scope. Surrender of the

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[1] Hume, Lectures, Volume III, p. 198. See D.L. Carey Miller (1974) at p. 10.

[2] Bankton and Bell (as edited by Guthrie) adopt noticeably different approaches, but in both cases knowledge of viciousness is an important factor in liability.

offending animal[1], mentioned by Bankton, was characteristic of the civilian remedy for pauperies which did not extend to damage caused by wild animals; and Stair's manner of referring to the civilian sources seems in fact to distinguish the civilian remedies, or analogues of them, as required to supplement his stated rule.[2] However, the distinction, in some of its forms certainly, is very close to the distinction drawn for the purposes of the pre-1971 English scienter action between animals mansuetae naturae (of a tamed or mild nature) and animals ferae naturae (of a wild or fierce nature).[3] Broadly[4], the former are the animals presumed to be harmless, therefore including most, if not all, of the domesticated animals, although previous knowledge (scientia) of a particular animal's propensities may operate to rebut the presumption[5]; the latter are the dangerous animals, therefore including the wild beasts proper, and knowledge that they are dangerous is ascribed by law.[6] Given the near coincidence of these distinctions it is hardly surprising after Fleeming v. Orr[7] and Clark v. Armstrong[8] that the English form of the distinction should have become the received version in Scots law and the practice established of frequent citation of English authority:

> "The cases illustrate the clear distinction which the law has established between, on the one hand, domestic

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[1]The last case in which surrender is mentioned appears to be Todridge v. Androw (1678), M.P. Brown, Supplement to the Dictionary of the Decisions of the Court of Session (Edinburgh, 1826), iii 223 in which the fact that an offending dog had been shot, and was not therefore available for surrender, did not exclude liability for the damage caused.

[2]Stair 1.9.5 (quoted at para. 3.2). See D.L. Carey Miller (1974) at pp. 5-8, 11-12; B.S. Jackson (1977) at pp. 143-145.

[3]See Williams (1939) at pp. 286-298 esp. at pp. 292-293.

[4]See further paras. 3.7-3.9.

[5]Cf. Fleeming v. Orr (1855) 2 Macq. 14 per the Lord Chancellor at p. 23.

[6]Besozzi v. Harris (1858) 175 ER 640.

[7]Above.

[8](1862) 24 D 1315.

> animals of a mild nature [mansuetae naturae], e.g., sheep, fowls, pigs, dogs, cattle, and horses, not known to have shown any vicious, dangerous, or mischievous habit or propensity and, on the other hand, animals fierce by nature [ferae naturae], e.g. elephants, monkeys, boars, or animals of vicious, dangerous, or mischievous habits or propensities or easily infuriated. As regards the former class the owner is not responsible for injuries of a personal nature done by them, but as regards the latter class the man who keeps them must keep them secure at his peril. Lord Esher in Filburn v. People's Palace and Aquarium Co (1890) 25 QBD 258, at p. 260".[1]

In summary, the import of Stair's rule, as developed, is that liability for an animal depends on its owner's knowledge of its propensity to cause harm. That knowledge may be imputed by law as species-related in the case of animals of a known vicious kind (animals ferae naturae). Otherwise, in the case of an animal of a species mansuetae naturae causing harm, the owner's knowledge must be actual knowledge of that animal's particular propensity to cause harm.

Principles of classification

3.7 The plausibility of imputing species-related knowledge of the harmful propensities of an animal to its owner depends on the plausibility of the principle or criterion used in law to classify animals as either ferae naturae or mansuetae naturae. In practice, in the case-law, the classes tend to be represented by stereotypes - the wild beasts in the case of animals ferae naturae, and the domesticated animals in the case of animals mansuetae naturae[2]. But there is not always liability where a wild beast causes harm[3]; nor are all domesticated species, as such, mansuetae naturae.[4] Moreover, the courts have had

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[1] Fraser v. Pate 1923 S.C. 748 per Lord Ashmore at p. 751. See also Burton v. Moorhead (1881) 8R 892 per Lord Justice-Clerk Moncreiff at p. 895.

[2] See, for example, Fraser v. Pate, above.

[3] Bennet v. Bostock (1897) 13 Sh. Ct. Rep. 50 (circus elephant yoked to a caravan on the highway frightening a horse).

[4] Hennigan v. M'Vey (1882) 9R 411 (boars not mansuetae naturae as being apt to do mischief on the slightest provocation).

difficulty with common species such as bulls[1], cows[2] and cats[3] which, as species, do not seem to belong wholly to either class. There is also some authority for the proposition that sub-species may be distinguishable as ferae naturae within species otherwise mansuetae naturae[4]. These doubts about classifying animals, despite the immediate acceptability of the stereotypes, may reflect shifting or uncertain criteria. Certainly, several dichotomies can be identified, and these may operate separately or in conjunction. For example, animals may be characterised as wild or domesticated, untamed or tamed, foreign or indigenous, dangerous or harmless. The expressly favoured test in Scots law is to distinguish between those animals which according to the experience of mankind are not dangerous to man (mansuetae naturae); and those which are dangerous (ferae naturae).[5] In the case proposing that criterion there was significant citation of English authority, and, indeed, it was the opinion of the Law Commission in 1967 that that criterion was the then established criterion in English law.[6]

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[1] See Clark v. Armstrong (1862) 24D 1315; Harpers v. Great North of Scotland Railway Co. (1886) 13R 1139; Mitchell v. Langlands and Scott (1883) Guthrie (1894) p. 465; Lanarkshire Water Board v. Gilchrist 1973 SLT (Sh. Ct.) 58.

[2] See Phillips v. Nicol (1884) 11R 592; Downs v. King (1936) 52 Sh. Ct. Rep. 75.

[3] See Parkhill v. Duguid (1900) 16 Sh. Ct. Rep. 366; Allan v. Reekie (1906) 22 Sh. Ct. Rep. 57; Peden v. Charleton (1906) 22 Sh. Ct. Rep. 91; Turner v. Simpson (1913) 29 Sh. Ct. Rep. 81; Paterson v. Howitt (1913) 29 Sh. Ct. Rep. 216.

[4] Renwick v. Von Rotberg (1875) 2R 855 (evidence considered that Spanish bloodhounds were dogs naturally of a ferocious character). Cf. Henderson v. John Stuart (Farms) Limited 1963 S.C. 245 (evidence proferred that Friesian dairy bulls were particularly dangerous). But see Tallents v. Bell and Goddard [1944] 2 All E.R. 474 cited in Walker (1981) at p.638, footnote 55, in support of the proposition that breed does not matter.

[5] Fraser v. Pate 1923 S.C. 748 per Lord Ashmore at p. 751. Cf. Hennigan v. M'Vey, (1882) 9R 411.

[6] LC, Report (1967) para. 5.

Problems of classification

3.8 But even if that is the criterion adopted there are still problems of principle unresolved. In the first place, the classification, as determined by that criterion, does not coincide with the classification of animals as ferae or mansuetae naturae in the law of property.[1] So some species, for example rabbits and bees, may be ferae naturae for the purposes of the law of property and mansuetae naturae as regards liability for the harm which they cause. This may be a source of confusion, since the distinction in the law of property determines when rights of ownership are acquired and lost, and ownership is at the foundation of liability for harm.[2] More importantly, both elements of the criterion as adopted are problematic. Animals are ferae naturae by the criterion if they are -

(a) according to the experience of mankind,

(b) dangerous to man

It is not clear whether experience of an animal elsehwere than in this country is to be taken into account. Theoretically, perhaps, it should, and there is English authority which supports this.[3] This may apply in Scotland,[4] but the issue seems not to have been considered. As regards the second element, liability has been imposed in relation to an animal ferae naturae causing injury to animals as opposed to persons[5]. But it is not clear whether the principle includes damage to other kinds of property. It may be that it is a prerequisite of liability in such cases that the animal is also, potentially at least, a danger to persons, and that animals cannot be classified as ferae naturae if they are a hazard to property only[6]. If this were so it would be unsatisfactory since,

[1] See Rankine (1909) at pp.145-147; Williams (1939) at p. 294.

[2] See paras. 3.18, 3.25.

[3] McQuaker v. Goddard [1940] 1KB 687.

[4] See para. 3.4.

[5] Nicol v. Summers (1921) 37 Sh. Ct. Rep. 77 (ferret attacking poultry).

[6] This was also a problem for the pre-1971 English law - see L C , Report (1967) para. 5, and discussion in Williams (1939) at pp. 296-298.

clearly, there are animals which are a serious hazard to property, but in no real sense dangerous to man.

Legal precedents

3.9 Since the classification is one of law, legal precedents become particularly important. Indeed, given that the criterion discussed in the previous paragraph is not altogether securely established, or at least is not always applied systematically, it is arguable that the precedents are as important as any general criterion which may be devised. The Law Reform Commission of Ireland, discussing the problem of classification, which is essentially the same in Ireland as here, put it this way:[1]

> "The importance of the criterion should not be exaggerated, however, because once the classification is made, reference does not have to be made to the criterion anymore; the classification being a question of law the precedent suffices to justify the classification for the future.";

and they conclude:

> "There have been few difficult cases before the Irish Courts on this matter and English precedents would probably be followed in Irish Courts."

This is perhaps a feasible approach to the existing case-law on classification in Scotland also, although there are problems. Apart from the difficulty of anticipating on the basis of the cases how any particular species might be classified, it is not altogether clear what force English precedents would have in Scotland.[2] However it is probable that they would continue to be accepted. Certainly, in the most recent of the major Scottish text books on the topic the problem of classification is treated in part in this way, and classifications already made by the courts both in Scotland and in England are listed together as follows[3] (footnotes as in the text):

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[1] LRC(I), Working Paper (1977) para. 56.

[2] See para. 3.4.

[3] Walker (1981) at pp. 638, 639.

(a) animals *ferae naturae*: monkeys;[1] boars;[2] lions;[3] bears;[4] elephants;[5] ferrets;[6] zebras;[7]

(b) animals *mansuetae naturae*: cats;[8] dogs;[9] fowls;[10]

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[1] *May* v. *Burdett* (1846) 9 QB 101.

[2] *Hennigan* v. *M'Vey* (1881) 9R 411.

[3] *Pearson* v. *Coleman Bros* [1948] 2KB 359.

[4] *Besozzi* v. *Harris* (1858) 1 F & F 92; *Wyatt* v. *Rosherville Gardens Co* (1886) 2 TLR 282.

[5] *Filburn* v. *People's Palace and Aquarium Co Ltd* (1890) 25 QBD 258; *Behrens* v. *Bertram Mills Circus Ltd* [1957] 2QB 1. (But see also *Benett* v. *Bostock* (1897) 13 Sh. Ct. Rep. 50, not cited by Walker at this point.)

[6] *Nicol* v. *Summers* (1921) 37 Sh. Ct. Rep. 77.

[7] *Marlor* v. *Ball* (1900) 16 TLR 239

[8] *Clinton* v. *Lyons* [1912] 3KB 198; *Buckle* v. *Holmes* [1926] 2KB 125. (But see para. 3.7.)

[9] *Fleeming* v. *Orr* (1855) 2 Macq 14; *Renwick* v. *Von Rotberg* (1875) 2R 855; *Filburn* v. *People's Palace and Aquarium Co Ltd*, [above],260; *Milligan* v. *Henderson* 1915 S.C. 1030: The breed does not matter: *Tallents* v. *Bell and Goddard* [1944] 2 All ER 474 (But see para 3.7).

[10] *Hadwell* v. *Righton* [1907] 2KB 345.

sheep;[1] horses;[2] cattle;[3] bulls;[4] sows;[5] camels;[6] rams.[7]

Acquired knowledge

3.10 Even when a species of animals has been classified by law as mansuetae naturae, the owner or keeper of such an animal which has caused harm may still be liable, if it can be shown that he had previous knowledge, founded in the history of his particular animal, that it had a propensity to behave in harmful ways. The knowledge required is primarily knowledge of an actual manifestation of its harmful propensity on some previous occasion.[8] At the formal level, there is no very precise standard of specification which the averments of previous manifestation must meet,[9] but it seems that actual knowledge of some, even if only one[10], such occasion is essential. Certainly, in one case, where the offending animal had only been in the possession of the owner for a few days and the

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[1] Heath's Garage, Ltd v. Hodges [1916] 2KB. 345; Fraser v. Pate 1923 S.C. 748.

[2] Hammack v. White (1862) 11C.B. (N.S.) 588; Cox v. Burbidge (1863) 13 CB (N.S.) 430; Jones v. Lee (1911) 28 TLR 92; Bradley v. Wallaces [1913] 3KB 629; Glanville v. Sutton [1928] 1KB 571; Coyle v. Bald (1920) 36 Sh. Ct. Rep. 83; Magee v. L.N.E. Rly. (1929) 45 Sh. Ct. Rep. 220. Cf. Gallacher v. St. Cuthbert's Co-operative Socy. 1976 SLT (Notes) 25; Manton v. Brocklebank [1923] 2KB 212 (mare biting horse).

[3] Ellis v. Banyard (1911) 28 TLR 122.

[4] Clark v. Armstrong (1862) 24D 1315; Hudson v. Roberts (1851) 6 Exch. 697; Lathall v. Joyce [1939] 3 All ER 854. But see Lanarkshire Water Board v. Gilchrist 1973 SLT (Sh. Ct.) 58. (See para. 3.7).

[5] Higgins v. Searle (1909) 100 LT. 280.

[6] McQuaker v. Goddard [1940] 1KB 687.

[7] Jackson v. Smithson (1846) 15 M & W 563

[8] Coyle v. Bald, above; Magee v. London and North-Eastern Railway Company, above.

[9] Clelland v. Robb 1911 S.C. 253; Coyle v. Bald, above.

[10] M'Intyre v. Carmichael (1870) 8M 570. According to a pre-1971 English principle the knowledge may have been acquired at any time before the event of harm - Williams (1939) at pp. 303, 308; North (1972) at p. 54. Cf. Walker (1981) at p. 637.

averments bearing on previous knowledge were merely in general terms, the action was held irrelevant.[1] However, it is not required that the owner's knowledge should be based on personal experience or observation. It will be sufficient if he has acquired his knowledge through being informed by others, for example by members of his family, who, for this purpose, and even where their own knowledge is indirect, may be presumed in law to pass on relevant information available to them.[2] It is not clear how far the chain of indirect information may extend. It may also be sufficient if an employee of the owner has the necessary knowledge. But, before that knowledge can be imputed to the owner, it seems that the employee must have had control over the animal, that is, control relevant to the circumstances in which harm was caused; it may also be necessary that he had direct personal knowledge of the manifestation of the harmful propensity.[3]

Unjustified ignorance

3.11 It has also been said that the owner or keeper of an animal is liable if he should have actually known that his animal was dangerous.[4] This may mean either that he should have taken care to inform himself properly where relevant information was available; or, perhaps, that the circumstances in which he placed his animal were such that anyone should have known that an animal of that kind so placed would be likely to cause harm. Neither way of taking the proposition is very satisfactory; nor does it seem to hold of the pre-1971 scienter action in England.[5] The proposition stated in the first way would not be clearly distinguishable from liability

[1] Turner v. Neill (1913) 29 Sh. Ct. Rep. 47.

[2] McIntyre v. Carmichael (1870) 8M 570 (intimation by third party to owner's son); Flockhart v. Ferrier (1958) 74 Sh. Ct. Rep. 175 (wife's knowledge as owner imputed to husband as custodier - for liability of owner as against custodier see para. 3.18).

[3] Maclean v. The Forestry Commission 1970 SLT 265.

[4] Walker (1981) at p. 636.

[5] See Williams (1939) at p. 305; North (1972) at p. 68.

based on the more general principles of negligence or failure to take reasonable care.[1] Taking the proposition in the second way, if the suggestion is that knowledge of the harmful propensity of an animal, otherwise mansuetae naturae, might be implicit in the immediate circumstances in which it actually causes harm, this may have some support in the case-law,[2] But so taken it would seem to lead once more to the assimilation of liability in scienter to liability based on negligence or failure to take reasonable care.

Mitigating the scienter rule

3.12 These difficulties may simply mark the point where the distinction between liability in scienter and liability in negligence ceases to be meaningful.[3] Alternatively, they may be a sign of some perceived need to mitigate the rigour of the scienter rule in its established form which has been characterised as having little logic about it.[4] That there is such a perception seems clear from the tendency to require very little by way of evidence of knowledge[5] or, even more anomalously, to admit evidence of vice subsequent to the harm-causing event as indicating "that the act complained of was not an isolated incident, such as may happen once in the lifetime of a well-behaved [animal], but that the [animal] was disposed to be vicious."[6] That principle is in almost direct contradiction of another ameliorating principle mentioned above, namely, that one previous manifestation of vice is sufficient.

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[1] Cf. Maclean v. The Forestry Commission 1970 SLT 285 at pp. 269, 271.

[2] Cf. Phillips v. Nicol (1884) 11R 592; Harpers v. Great North of Scotland Railway Co (1886) 13R 1139 at p. 1146.

[3] Interestingly, the view is expressed in an influential English treatment of the pre-1971 law that "Scots law does not draw a firm line between liability in scienter and liability in negligence" - see Williams (1939) at p. 314, footnote 3.

[4] Williams (1939) at p. 289.

[5] See, for example, Renwick v. Von Rotberg (1875) 2R 855 where the defender's remark to a witness - "If you call him by his name, he will not harm anybody" - was regarded as corroborating evidence that the dog was of a species, generally ferocious. See discussion in Williams (1939) at pp. 308-309.

[6] Gordon v. Mackenzie 1913 S.C. 109 per Lord Justice-Clerk Macdonald at p. 111.

Aggressive propensities

3.13 The knowledge to be proved against the owner or keeper of an animal mansuetae naturae, if he is to be liable for the harm which it causes, has been characterised as knowledge of an actual manifestation of some harmful propensity in the animal on an occasion prior to the manifestation leading to the claim for compensation.[1] Clearly, where harm results from a physical attack by an animal a previous such attack will manifest the prerequisite harmful propensity. Obvious examples are dogs biting[2], horses kicking[3], bulls goring or trampling.[4] Something less may be sufficient, for example previous aggressive behaviour short of actual attack.[5] This, however, may be subject to the limitation that the previous behaviour and the behaviour complained of should be of the same harmful kind or exhibit the same kind of viciousness.[6] This is primarily a rule developed in England in relation to the pre-1971 scienter action. It requires in effect that the same propensity is manifest in the previous behaviour as in the behaviour complained of.[7] But as it was developed in England technicalities proliferated, so that a propensity to attack animals was

[1] See para. 3.10.

[2] Cowan v. Dalziels (1877) 5R 241; Burton v. Moorhead (1881) 8R 892; Smillies v. Boyd (1886) 14R 150; Daly v. Arrol Brothers (1886) 14R 154; M'Donald v. Smellie (1903) 5F 955; Rennet v. Great North of Scotland Railway Company 1909, 2 SLT 328; Gordon v. Mackenzie 1913 S.C. 109.

[3] Clelland v. Robb 1911 S.C. 253; Magee v. London and North-Eastern Railway (1929) 45 Sh. Ct. Rep. 220.

[4] Clark v. Armstrong (1862) 24D 1315.

[5] Fraser v. Bell (1887) 14R 811. See discussion in Williams (1939) at pp. 303-304; North (1972) at p. 59.

[6] Walker (1981) at p. 637, citing Osborne v. Chocqueel [1896] 2 QB 109; Glanville v. Sutton & Co [1928] 1KB 571.

[7] See Williams (1939) at pp. 301-302; North (1972) at pp. 54-56.

regarded as distinct from a propensity to attack human beings[1], though the converse did not hold,[2] and a propensity to attack animals of one kind was not indisputably a propensity to attack animals of another kind.[3] In practice Scottish courts may adopt a more straightforward approach.[4] Where the harm complained of results from behaviour which falls short of a completed physical attack the same principles would seem to apply.[5] However, this may be subject to further limitation. If apparently aggressive behaviour lacks what may be referred to as malevolence it may not be regarded as vicious or dangerous, even although it has in fact resulted in harm. This again is a rule developed primarily in relation to the English scienter action.[6] It may be applicable in Scotland,[7] although it has been said:

> "The act [the violent rush and barking of the dog which featured in Fraser v. Bell[8]] might have been nervous or frolicsome rather than vicious, but it seems that the quality of the act is to be estimated from its injurious effects, and not from the intention of the animal. Thus a dog may have certain propensities which cannot properly be called vicious, for they belong to dogs as a class, and may, indeed, be highly useful in certain circumstances, but which are to be looked on as vicious in the eye of the law, because of their injurious results. An owner, having notice of them, is bound to restrain these propensities as much as the propensity to bite human beings."[9]

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[1] Glanville v. Sutton [1928] 1KB 571.

[2] Jenkins v. Turner (1696) 1 Ld. Raym. 109; Gething v. Morgan (1857) Saund & M. 192.

[3] Williams (1939) at pp. 301-302 and cases cited. Cf. Walker (1981) at p. 637; Glegg (1955) at p. 361

[4] Cf. Flockhart v. Ferrier (1958) 74 Sh. Ct. Rep. 175.

[5] Fraser v. Bell (1877) 14R 811.

[6] See Williams (1939) at pp. 300-301, 314-315 and cases cited; Fitzgerald v. ED and AD Cooke Bourne (Farms) Ltd [1964] 1 Q.B. 249.

[7] See para. 3.4.

[8] (1887) 14R 811.

[9] Glegg (1955) at p. 361 citing Renwick v. Von Rotberg (1975) 2 R.855; M'Donald v. Smellie (1903) 5F 955. But see Walker (1981) at p. 637 who appears to accept the rule, citing English authority.

Non-aggressive harmful propensities

3.14 Can there be harmful propensities which are essentially non-aggressive and, if so, how are they to be described? There certainly seem to be such propensities, and in the case-law they are often characterised in very general terms. The clearest example of this is probably the spiritedness or restiveness of horses which may be manifest in behaviours other than kicking, for example, shying, bolting or generally resisting control, although the cases in which knowledge of this propensity is averred tend to be founded on negligence or failure to take reasonable care.[1] Another example is the disobedient or uncontrolled, boisterous behaviour of some dogs, particularly of young dogs, so that a persistent tendency, say, to rush at traffic may be considered a harmful propensity:

> "... for injury to human beings by [animals mansuetae naturae] there is no liability, unless the animal was known by its owner or custodian to have previously acted so as to be a source of danger. When I say a source of danger, I do so advisedly instead of using such expressions as "vicious" or "mischievous". It may well be that an owner who knew that his dog, although neither vicious or mischievous, was in the habit of rushing at and after carriages and cyclists, would be liable if an accident occurred, directly or indirectly, through the action of a dog with such known habits."[2]

On that view, theoretically at least, any form of behaviour which actually results in harm may be described as a manifestation of a harmful propensity to behave specifically in that way. But such a principle does not make for certainty in the law.

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[1] Brown v. Fulton (1881) 9R.36; Smith v. Wallace & Co (1898) 25R 761; Wilson v. Wordie & Co. (1905) 7F 927.

[2] Milligan v. Henderson 1915 S.C. 1030 per Lord Guthrie at p. 1046. But it is necessary to distinguish a known persistent tendency to behave in a harmful way on the highway from merely straying on the highway. In many cases strict liability in scienter has been held inappropriate where livestock, straying on the highway, caused harm - Fraser v. Pate 1923 S.C. 748; Shanks v. Cartha Athletic Club (1924) 40 Sh. Ct. Rep. 89; Lawson v. Barclay (1924) 40 Sh. Ct. Rep. 202; Paterson v. Aitchison & Sons (1933) 49 Sh. Ct. Rep. 216; Anderson v. Wilson's Trustees 1965 SLT (Sh. Ct.) 35.

Behaviour contra naturam

3.15 There is a general problem about behaviour contra naturam (contrary to nature) which may, in fact, underlie a number of the problems discussed in the preceding paragraphs. This is whether or not there is a rule to the effect that the behaviour of an animal classified as mansuetae naturae cannot be regarded as manifesting a harmful propensity for the purpose of founding liability unless it is in some sense "contrary to the natural custom of [its] kind"[1], or "contrary to its nature"[2]. It is difficult to say precisely what this rule means. If classifying animals as mansuetae naturae entails laying down standard, irrebuttable presumptions, for example that cattle by nature never attack men, that dogs by nature never attack sheep and so on, then the rule may be simply tautologous. For any behaviour contrary to such a presumption would automatically be contrary to the nature of the animal concerned.[3] On the other hand, if there are no such irrebuttable presumptions, and if behaviour resulting in harm is to be scrutinised in every case and treated as not founding liability if, in fact, it manifests a propensity which is natural to the species of the animal concerned, then the rule would have considerable substance.

Indications supporting the rule

3.16 There are indications in the case-law that the rule may excist in its stronger form. A particularly clear example can be found in the case of Dobbie v. Henderson[4]. There a bull had escaped from its field and mated with immature heifers belonging to a neighbouring farmer. The result was that two heifers

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[1] See Bankton 1.10.4 quoted at para. 3.5.

[2] See Kames 1.1.2 quoted at para. 3.5.

[3] Cf. Williams (1939) at p. 318.

[4] 1970 SLT (Sh. Ct.) 27; cf. Harvie v. Turner (1916) 32 Sh. Ct. Rep. 267 (bull) Daniel Logan & Son v. Rodger (1952) SLT (Sh. Ct.) 99 (bull). See also Paterson v. Howitt (1913) 29 Sh. Ct. Rep. 216 at p. 218 (cat); Brown v. Soutar (1914) 30 Sh. Ct. Rep. 314 at p. 316 (dog). For corresponding English cases see discussion in Williams (1939) at pp. 289-292, 316-320 and in North (1972) at pp. 49-53.

calved and one of the heifers and both calves died, while the development of the surviving heifer was affected by the calving. It was said:

> "A bull is a domestic animal, and not one ferae naturae ... In the present case there is nothing to suggest that the defender's bull was vicious. All that it did was to obey its natural mating instinct. There is no authority for the proposition - which is essential to the pursuer's case - that for this reason its owner is under an absolute duty to confine it in its field."[1]

Counter-indications

3.17 However there are other cases to the contrary effect, and the position is ultimately rather unclear, as it was in England pre-1971.[2] For example, there is a tendency in the case-law to treat bulls and cows, usually classified firmly as mansuetae naturae, as having a natural propensity to become temporarily agitated and unpredictable.[3] It is not really clear whether they are seen on this view as becoming, temporarily, species ferae naturae, or as having individually a harmful propensity to behave in some circumstances in an agitated and unpredictable way which is known to the owner because it is a natural or commonly known characteristic of the species. But, even where the latter view emerges there is never any question of exempting the owner from liability because the propensity is natural; quite the reverse in fact. A similar thing seems to happen with temporary natural propensities of a periodic character, for example the allegedly natural propensity of an animal with young to be more aggressive than usual. If the logic of the rule were followed, a bite, say, from a bitch with pups, would not manifest a harmful propensity but only a natural propensity. Most of the authority on this point relates to the pre-1971 English scienter action, although there is a discussion in one

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[1] Dobbie v. Henderson 1970 SLT (Sh. Ct.) 27 at p. 29.

[2] L C , Report (1967) para. 6 and see discussion in Williams (1939 at pp. 318-320 and in North (1972) at pp. 49-53 and s. 2(2)(b) of the Animals Act 1971 (c.22).

[3] Cf. Phillips v. Nicol (1884) 11R 592; Harpers v. Great North of Scotland Railway Co (1886) 13R 1139 at p. 1146.

Scottish case of the natural propensities of a cow with calf, where the proven common knowledge of such an animal's propensities in these circumstances facilitates a finding of negligence on the part of the defender's employees who were maltreating the animal.[1] Under the pre-1971 English rules, which may apply in Scotland,[2] it seems that the only way an owner or keeper could avoid liability was by showing that he personally did not know of the commonly known propensity alleged.[3] That is, it was not open to him simply to aver that the propensity was a natural one.

Ownership and custody

3.18 Liability primarily follows ownership. But if an animal is not in the custody of its owner when it causes harm the custodier or keeper may be liable:

> "If one commits the care of such an animal [a dog which one knows ought not to go at large] to another for a length of time and for his own behoof, and the custodier is trustworthy, and fully aware of the precautions necessary, I think the owner is not liable."[4]

Nevertheless, ownership is apparently seen as a more important factor than custody when attributing liability. It is not that custody is not significant, but merely that it does not of itself determine liability:

> ".... I am not prepared to lay down as a general proposition that the owner of a dog is not to be held liable unless the dog is in his personal custody. On the contrary, I think that as long as the owner retains the substantial control over its custody it is of no consequence whether he exercises that control by himself or by another. He is responsible for its safe custody to the public. Indeed it has been held that the knowledge of a servant of a dog's ferocity is the knowledge of the master. I am therefore not prepared to say that if a man keeps a dog which he knows ought not to go at large, and

[1] Downs v. King (1936) 52 Sh. Ct. Rep. 75.

[2] See para. 3.4.

[3] See discussion in Williams (1939) at pp. 290-291 and in North (1972) at p. 49-50.

[4] Cowan v. Dalziels (1877) 5R 241 per Lord Justice-Clerk Moncrieff at p. 243.

lends it to another person who allows it to go at large, he may not be responsible."[1]

This approach would accord with the statutory tradition in the case of dogs injuring livestock where the owner is primarily liable and provision is made for deemed ownership in certain circumstances.[2] In contrast, in England, pre 1971, it seems that custody was more important than ownership.[3] However, it seems to have been assumed that, where ownership and custody are separated, either the owner or the custodier will be liable but not both. It is difficult to see what basis in principle this assumption has, and in at least one important case, decree was granted against owner and custodier jointly and severally without debate.[4] It is, however, appropriate to take the tests laid down in Cowan v. Dalziels[5] as determining when the custodier or keeper will be liable rather than the owner.

The tests for transferring liability

3.19 As regards the tests themselves, there is very little authority on what is required to satisfy them. The first, that the owner must have committed the care of his animal to the custodier for a length of time, is particularly unhelpful. It is presumably intended to exclude the custodier's liability where the transfer of custody is such that the custodier may be considered as acting in the short-term simply on behalf of

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[1] Cowan v. Dalziels (1877) 5R 241 per Lord Justice-Clerk Moncrieff at p. 243. But see Flockhart v. Ferrier (1958) 74 Sh. Ct. Rep. 175, where a husband walking his wife's dog was held liable when it attacked another dog and bit its owner.

[2] See para. 2.15.

[3] See discussion in Williams (1939) at pp. 324-326) where, interestingly, Cowan v. Dalziels, above, is cited (footnote 3 at p. 324) in support of the proposition that mere possession engenders liability.

[4] Fleeming v. Orr (1855) 2 Macq. 14; (1853) 15D 486. Cf. Brown v. Fulton (1881) 9R 36 in which an issue on fault was approved against father and son where the son had been allowed to ride his father's horse although it was known to both of them to be powerful and spirited.

[5] Above, per Lord Justice-Clerk Moncrieff at p. 243 (quoted above).

the owner. But in that sense it seems to have been ignored.[1] The second test, that the transfer of custody must be for the custodier's benefit is reasonably clear in the circumstances in Cowan v. Dalziels[2]. There, the owner derived no positive benefit from the transfer of custody and the custodiers were benefited by the continuous service of the animal (a watch-dog) while in their custody. However custody may be transferred in many circumstances in which benefit accrues both to owner and custodier, or in which the custodier's benefit is not derived directly from the service of the animal. For example, custody may be transferred to a veterinary surgeon for treatment, or to a carrier for conveyance,[3] or to an auctioneer for sale[4] and so on. It is far from clear how the test might apply to these various circumstances. The third test, which requires that the custodier is trustworthy, appears more properly to raise questions as to whether the owner has exercised reasonable care in transferring custody of the animal.[5] The fourth test, which requires that the custodier should be fully aware of the precautions necessary, presumably means that the custodier should have that knowledge of the animal's propensities which in the owner would found liability. It may be that the custodier should acquire the necessary knowledge from the owner;[6] or possibly he might acquire the knowledge for himself while the animal is in his custody, or even be deemed by law to have the necessary knowledge in the case of an animal ferae naturae. There is no general guidance in the case-law on this, although, in one case, the knowledge of an owner was imputed to a custodier.[7] In conclusion,

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[1] Flockhart v. Ferrier (1958) 74 Sh. Ct. Rep. 175 (husband walking wife's dog liable for injury caused by it.)

[2] (1877) 5R 241.

[3] Cf. Gray v. North British Railway Company (1890) 18R 76.

[4] Cf. Renwick v. Von Rotberg (1875) 2R 855; Cameron v. Hamilton's Auction Marts Limited 1955 SLT (Sh. Ct.) 74.

[5] Cf. Brown v. Fulton (1881) 9R 36.

[6] Cf. Wilson v. Wordie & Company (1905) 7F 927.

[7] Flockhart v. Ferrier, above.

therefore, while the principle is established, that the custodier of an animal may sometimes be liable rather than its owner, it is not really clear on the tests proposed, and in the absence of authority, in what circumstances precisely liability will be transferred.

Failure to confine

3.20 Where the owner or keeper of an animal has knowledge that it is harmful, the duty to confine is conceived as arising inexorably from that knowledge, so that any harmful act of the animal immediately implies a breach of duty. Generally, there is no further requirement that some more specific failure to control the animal be shown. However, there is a line of authority on the pre-1971 English scienter action which suggests that some escape of the animal, or some failure of control, may be required. For example:

> ".... if an elephant slips or stumbles its keeper is [not] responsible for the consequences. There must be a failure of control"[2]

This is referred to in the most recent Scottish text book on the topic where it is said that the keeper is not responsible in such circumstances "unless there was a failure of control, even temporarily".[3] It seems, therefore, that if the rule applies in Scotland, it is to be construed narrowly. There is no direct authority on the point, although in the case of Bennet v. Bostock[4], where an elephant under perfect control on the highway frightened a horse which injured itself, there was held to be no liability. However the problem was analysed by the court in terms of nuisance and negligence and not scienter. Notwithstanding these indications to the contrary, the better view is probably that, given knowledge,[5] the fact of harm is in itself sufficient to imply failure to confine.

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[1] Burton v. Moorhead (1881) 8R 892, although limited defences may be available - see para. 3.22.

[2] Behrens v. Bertram Mills Circus Ltd [1957] 2QB 1 per Lord Devlin at p. 19. See LC, Report (1967) para. 7 and discussion in North (1972) at pp. 69-71.

[3] Walker (1981) at p. 640.

[4] (1897) 13 Sh. Ct. Rep. 50.

[5] Imputed or actual.

Harm

3.21 In principle, where liability may be imposed for harm directly caused by the behaviour of an animal, there should also be liability if that behaviour causes harm indirectly. As regards animals ferae naturae there is no direct authority on this. However, in one English case it is said in relation to a tiger, which is taken as an example, that it is irrelevant whether a person is injured as the result of a direct attack or because on seeing it he runs away and falls over.[1] As regards animals mansuetae naturae there are several cases which suggest that the principle holds.[2] Indeed, it seems that if liability in scienter is established in respect of some harm then liability extends to all harm caused however remote - Cameron v. Hamilton's Auction Marts Ltd.[3] In that case an action laid in scienter was held competent against a farmer who owned a cow which ran away while in the custody of auctioneers, although the damage caused[4] was considered too remote for the purposes of founding an action in negligence against the auctioneers.

Strict liability and defences

3.22 Liability in scienter is strict. So, once it is established that an animal of known[5] harmful propensities has caused harm it is not open to its owner to rebut liability by showing that he took precautions which were reasonable in the circumstances:[6]

> "But when the ferocity of the [animal (a dog)] is quite well known to the owner his obligation is not one of

[1] Behrens v. Bertram Mills Circus Ltd [1957] 2QB 1 per Lord Devlin at p.18.

[2] Fraser v. Bell (1887) 14R 811; M'Donald v. Smellie (1903) 5F 955; Milligan v. Henderson 1915 S.C. 1030 per Lord Guthrie at p.1046 (quoted at para. 3.14); Cameron v. Hamilton's Auction Marts Limited 1955 SLT (Sh. Ct.) 74.

[3] Above. See the further discussion of this case at para. 4.6.

[4] The cow climbed stairs above a shop and fell through the floor, turning on a tap in its struggles and flooding the shop below.

[5] Whether knowledge is imputed or actual.

[6] Cf. para. 1.22.

> reasonable care, but not to keep the [animal] at all, unless he does it in such a way as to make it perfectly secure. The distinction is most clear, and therefore the owner of the [animal] keeps it entirely at his own risk. He does not undertake that he will restrain the animal, but he must restrain, and, if he does not, he will be responsible for its acts."[1]

However liability is strict, not absolute, so that limited defences may be available, namely, unavoidable accident[2]; intervention of a third party;[3] act or default of the party suffering harm either in the form of voluntary assumption of risk[4] or contributory negligence.[5] To these may be added the defences of trespass and reversion to the wild state.

Voluntary assumption of risk and contributory negligence

3.23 In essence, an act or omission of the pursuer is regarded as contributory negligence if it shows want of care and contributes to causing the harm complained of[6]. So, for example, provoking or teasing a dog so that it bites would be contributory negligence, but merely patting a dog wandering in the street would not[7]. If the pursuer's act or omission is accompanied by awareness or knowledge that it involves him in the risk of harm and amounts to an express or implicit consent

[1] Burton v. Moorhead (1881) 8R 892 per Lord Justice-Clerk Moncrieff at p. 895.

[2] Henderson v. John Stuart (Farms) Limited 1963 S.C. 245 per Lord Hunter at p. 247 (see para. 1.22).

[3] Fleeming v. Orr (1855) 2 Macq. 14 per the Lord Chancellor at p.20. The example given is of someone setting loose a properly secured dog and urging him to attack another's livestock. But not every act of a third party which contributes to causing harm will exculpate the primary defender. See, for example, M'Ewan v. Cuthill (1897) 25R 57 where negligence was found against a van-driver who left his horse unattended, although the horse bolted because it was frightened by the whistling of a railway engine. In England, pre-1971, it was doubtful whether the defence was available - L.C., Report (1967), para. 9.

[4] Daly v. Arrol Brothers (1886) 14R 154.

[5] Gordon v. Mackenzie 1913 S.C. 109.

[6] See Walker (1981) at pp. 353-375.

[7] Gordon v. Mackenzie, above.

to accept that risk, then his conduct may be distinguished as voluntary assumption of risk.[1] So, for example, where a workman taking a short cut across a yard, where he need not have been and where it was not usual for workmen to be, approached too near to a chained watch-dog and was bitten, there was no liability.[2] The defence of contributory negligence operates to reduce compensation according to the court's assessment of the proportion of blame, or degree of responsibility, to be attributed to the pursuer[3], and the assessment is usually expressed in terms of a percentage figure. On the other hand, the defence of voluntary assumption of risk, if successful, excludes liability simpliciter. But the same conduct may sometimes be justifiably described either as contributory negligence which was the sole cause of the harm suffered or as voluntary assumption of risk.[4] So, while there is a distinction between the defences which may be important, this is not always the case.

Trespass

3.24 There is a suggestion in Burton v. Moorhead[5], where the pursuer was bitten by a watch-dog while he was on the defender's private property, that had the pursuer clearly had no right to be where he was, compensation would not have been recoverable. Such circumstances may be analysed in terms of voluntary assumption of risk or contributory negligence where the victim is aware of the presence of the potentially harmful animal. But even if he lacks that awareness there may be a defence of trespass available based simply on the fact that he had no right to be where he was. This, however, is controversial. The defence seems to have been available in England pre-1971, but

[1] See T. Ingman (1981).

[2] Daly v. Arrol Brothers (1886) 14R 154.

[3] Law Reform (Contributory Negligence) Act 1945 (c.28).

[4] See, for example, Titchener v. British Railways Board 1981 SLT 208.

[5] (1881) 8R 892; cf. Daly v. Arrol Brothers, above.

there also was apparently somewhat controversial.[1] In Scotland, it seems that such a defence, if available at all, would only be available in very limited circumstances:

> "I am of opinion in this case that it is proved that the pursuer was bitten by the defender's dog, and that the defender knew that the dog was of a biting disposition ..... The question, however, remains whether the defender is responsible for the injury done to the pursuer by the dog, the pursuer being in the vicinity of the defender's farm, not in the exercise of any right, but as a mere passer-by. It is strongly contended for the defender that a "trespasser" is not entitled to any reparation. I am not able to concur entirely in that argument. No doubt if a person were on premises for a distinctly unlawful purpose it might very well be maintained that he is not entitled to any damages for anything that may happen to him. The circumstances here, however, do not disclose such a case. The pursuer was walking along a road which passes through or near by the defender's farm steading, not certainly in the exercise of any right, but in accordance with a custom of passage which had been tolerated by the defender and his predecessors in the occupancy of the farm for many years."[2]

Reversion to the wild state

3.25 Liability primarily attaches to ownership of an animal.[3] Generally, under Scots law, the rights of property in animals ferae naturae, which for this purpose are untamed or non-domesticated animals,[4] subsist only so long as the animals are confined or retain the habit of returning home after straying afield.[5] So if an animal ferae naturae, in both senses, escapes and then causes harm the defence of reversion to the wild state may be available. The authorities on this are few, and again English[6].

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[1] See L C , Report (1967) para. 9 and discussion in Williams (1939) at pp. 349-352.

[2] Bell v. Taylor (1914) 30 Sh. Ct. Rep. 39 at p. 40. (Cf. Smillies v. Boyd (1886) 14R 150.) The sheriff expressly repudiated the appropriateness of being guided by English authorities, and this approach probably remains valid, notwithstanding the subsequent rather complex development of the law of occupiers liability culminating in the Occupiers Liability (Scotland) Act 1960 (c.30) - see further references at para. 4.4.

[3] See para. 3.18.

[4] Not necessarily dangerous animals according to the classification for the purposes of liability in scienter.

[5] See Rankine (1909) at pp. 145-147.

[6] See Williams (1939) at pp. 336-339.

Probably something more than mere escape is required;[1] otherwise the duty to confine effectually is rendered meaningless. Two tests are proposed in the literature.[2] Either the owner should cease to be liable when the animal has resumed its natural habitat, which implies, presumably, either that it belongs to a species occurring naturally in the locality or perhaps that the locality provides what would be a normal habitat for it;[3] or the owner should cease to be liable when his rights of ownership terminate. But under the rules referred to ownership may terminate on or immediately after escape. So the test of resumption of habitat is more compatible with continuing liability for harm during the process of escape. These issues, however, do not seem to have received judicial consideration.

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[1] See Williams (1939) at p. 336.

[2] See Williams (1939) at p. 338.

[3] The test of resumption of habitat has some small support in English case-law - see Williams (1939) at p. 338.

Part IV: The general rules

Preliminary

4.1 In this Part we examine the general rules of civil liability as they apply to the keeping of animals.[1] We consider these under the following headings:-

A: Negligence;
B: Nuisance;
C: Intentional harm

A. Negligence

Introduction

4.2 In Part III we contrasted liability in scienter with liability in negligence.[2] Perhaps the most general and all pervasive of the principles of civil liability is culpa or fault in the sense of negligence, or failure to take reasonable care, and it is in that sense that we use "negligence" in this memorandum[3]. Negligence extends across the whole field of human activity. It is therefore apt to apply to animals in every respect (save in so far as excluded by other rules of law or statutory provisions), simply as one particular application of the general principle. After a preliminary statement of the main constituents of negligence we shall demonstrate its use under the existing law to establish liability in respect of animals in the various respects referred to in the case studies.

Duty of care

4.3 It has been said of liability founded on negligence:

"Negligence per se will not make liability unless there

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[1] See para. 1.2.

[2] See, for example, paras. 3.11, 3.12.

[3] Although the principle is largely a common law principle there are also many forms of "statutory negligence" - see Walker (1981), Chapters 9, 18.

> is first of all a duty which there has been a failure to perform through that neglect."[1]

Whether a duty of care, as it is called, exists in any given circumstances is generally determined by legal precedent or by analogical development of precedent, but in truly novel circumstances there is an irreducible element of policy in the court's decision. This is not to say that there is no general principle under which the many determinations of specific duties may be subsumed. It is a persistent view that there is such a principle:

> ".. there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances .... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[2]

However, while the existence of foreseeable risk is perhaps the most plausible, and almost certainly the most quoted, test for the existence of a duty of care, it is at best a necessary condition of liability and by no means also a sufficient condition.[3] Some brief comment on the other elements of liability is therefore required.

Standard of care

4.4 Negligence, or failure to take reasonable care, is technically conduct in breach of some specified duty of care. It is conduct which falls below some standard established by law for the protection of others against unreasonable risk of

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[1] Clelland v. Robb 1911 S.C. 253 per Lord President Dunedin at p. 256. See also Kemp & Dougall v. Darngavil Coal Co Ltd 1909 S.C. 1314 and discussion in R. Black (1975) at pp. 319-327.

[2] Donoghue v. Stevenson 1932 S.C. (H.L.) 31 per Lord Atkin at p. 44, considering specifically the law of England, which, however, is not to be distinguished from the law of Scotland in this respect. See also Bourhill v. Young 1942 S.C. (H.L.) 78, esp. per Lord Macmillan at p.88.

[3] See Fleming (1977) at pp. 136-137.

harm.[1] The standard set is that of "the reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs" or of the "prudent and reasonable man."[2] This is a hypothetical construct:

> "The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question."[3]

But in cases where some particular activity is under consideration, for example, the driving of cattle, an appropriate level of skill may be required of those participating[4], or the observance of appropriate customary practices[5], the more so if these are incorporated formally in the codes of expert or professional bodies or in legislation.[6] Similarly, account may be taken of the actual knowledge and qualities of particular persons where these are considered relevant. So, for example, in Brown v. Fulton[7] an issue on fault was approved against a father and son where injury was caused by a horse which the father entrusted to the son although it was known by both of them to be powerful and spirited. Indeed, it is precisely because knowledge can affect the standard of foresight required in this way that the distinction between liability in scienter and liability in negligence is sometimes blurred.[8]

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[1] Fleming (1977) at p. 106.

[2] Blyth v. Birmingham Waterworks Company (1856) 11 Exch. 781 per Alderson B. at p. 784 - quoted and approved in Clelland v. Robb 1911 S.C. 253. This standard may be reproduced in statutory form as in, for example, the important Occupiers Liability (Scotland) Act 1960 (c.30). Under that Act, the occupier of premises is required to show such care as is reasonable in all the circumstances to see that anyone entering on the premises does not suffer injury or damage by reason of danger due to the state of the premises or to anything done (or not done) there. Animals on the premises may conceivably represent such a danger in certain circumstances - see Walker (1981) at p. 591 and generally, pp. 578-599.

[3] Muir v. Glasgow Corporation 1943 S.C. (H.L.) 3 per Lord Macmillan at p.10.

[4] Gilligan v. Robb 1910 S.C. 856 (youthful and inexperienced drover setting a dog at a cow and causing it to bolt.)

[5] Harpers v. Great North of Scotland Railway Co (1886) 13R 1139 (held sufficient that a bull be conveyed in accordance with the usual and normally safe precautions, although other and more secure methods were well known.)

[6] See, generally, Fleming (1977) at pp. 119-120, 122-133.

[7] (1881) 9R 36.

[8] Cf. paras. 3.11, 3.12.

Causation

4.5 It is necessary that the harm complained of should be shown to be the consequence of the breach of duty alleged. This has two aspects. First, there must be a relation of cause and effect between the conduct constituting the breach of duty and the harm suffered; that is, a relation of cause and effect in accordance with the usual scientific or objective notions of physical sequence.[1] In the case of harm caused by an animal this is generally unproblematic, since the breach of duty is normally some failure to confine or control the animal, and the harm is in most circumstances clearly attributable to the behaviour of the animal. However, multiple causation is possible, and in that case there may be a defence available, usually referred to as novus actus interveniens (supervening event), which amounts to alleging a break in the chain of causation between the breach of duty and the subsequent harm. We shall consider this further below.[2] The second aspect is a negative one. Notwithstanding physical causation, the harm may be regarded as too remote a consequence of the conduct complained of to entail liability. This rule sets a limit, as a matter of policy, to what can be considered as reasonably foreseeable, and it probably reflects the residual meaning of fault as blameworthy conduct.

Remoteness

4.6 Remoteness is a rather arbitrary test, but two examples may illustrate its application. In Gray v. North British Railway Company[3] a dog in transit by rail escaped from a railway station and eventually entered a public garden some two miles away where it bit a gardener. The Railway Company had been given no reason to suppose particular precautions were needed, and were held not liable. Again, in Cameron v. Hamilton's Auction Marts Limited[4] a cow escaped from a mart,

[1] But the conduct in question must be a necessary cause of the harm - what has been called a "but for" cause - see Fleming (1977) at p.180.

[2] See para. 4.14.

[3] (1890) 18R 76.

[4] 1955 SLT (Sh. Ct.) 74.

climbed to the upstairs premises above a shop and fell through the floor, turning on a tap in its struggles and causing damage to goods in the shop below. It was held that such a cow was sui generis and its harmful exploits not reasonably foreseeable so that the auctioneers from whom it had escaped were not liable. But that case has been criticised for confusing remoteness as a condition excluding liability altogether with remoteness as a condition limiting compensation to part only of the harm suffered.[1] The test of remoteness in the former sense is whether the consequences of the conduct complained of are reasonably foreseeable; in the latter sense, whether they are natural and direct. Frequently, natural and direct consequences will also be reasonably foreseeable. But sometimes they will include consequences which, from the defender's point of view, are strictly unpredictable. So in Cameron's case[2], if escape and some damage to property were foreseeable, there should have been liability for all the natural and direct consequences of the escape. Only if escape or damage were altogether unforeseeable should liability have been excluded.[3]

Case-studies

4.7 In Part I we described a number of characteristic problems involving animals. Many such problems have arisen in practice and have been analysed in terms of negligence, and numerous specific duties are now recognised in relation to animals. Breach of these duties, or of analogous duties, will entail liability. Accordingly, to give some content to the notion of the duty of care in relation to animals, we shall survey this body of case-law briefly under the headings adopted in Part I.

Livestock

4.8 The main problems which we described in Part I arise from the demands of agricultural employment and livestock

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[1]Walker (1981) at pp. 261-262, 278 and see generally pp. 231-283.

[2]Cameron v. Hamilton's Auction Marts Limited 1955 S.L.T. (Sh.Ct.) 74

[3]Cf. Hughes v. Lord Advocate 1963 S.C. (H.L.) 31.

management. It is now clearly established that the livestock farmer as an agricultural employer owes a duty of care to his employees to ensure that safe methods of working with livestock are in use on his farm.[1] In the management of stock on the farm he also owes duties of care to his neighbours and to those coming into the vicinity of the farm. So he should not pasture potentially harmful animals, such as bulls, in fields over which there are rights of way, or on unfenced land near the highway.[2] He should take reasonable precautions to prevent his stock from trespassing on to neighbouring property and injuring animals there or causing other forms of loss.[3] In certain circumstances, not altogether clearly defined in the case-law, he owes a duty of care to users of the highway to prevent his stock from straying there.[4] So far as the movement of stock is concerned, he and his employees owe a duty of care to members of the public to ensure that animals which they take on to the highway or into other public places are competently and safely managed in accordance with the customary and appropriate precautions.[5] A like duty is imposed on others in charge of livestock in similar circumstances, for example, auctioneers or dealers.[6]

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[1] Henderson v. John Stuart (Farms) Limited 1963 S.C. 245; Sneddon v. Baxter 1967 SLT (Notes) 67.

[2] Clark v. Armstrong (1862) 24D 1315 per Lord Benholme at pp. 1320-1321; Lanarkshire Water Board v. Gilchrist 1973 SLT (Sh. Ct.) 58.

[3] Lindsay v. Somerville (1902) 18 Sh. Ct. Rep. 230; Harvie v. Turner (1916) 32 Sh. Ct. Rep. 267; Daniel Logan & Son v. Rodger 1952 SLT (Sh. Ct.) 99; Dobbie v. Henderson 1970 SLT (Sh. Ct.) 27. As regards personal injuries, the position is unclear - see MacAtee v. Montgomery (1949) 65 Sh. Ct. Rep. 65 and Dunlop v. Dunlop (1955) 71 Sh. Ct. Rep. 220. Damage to ground, crops and planting is compensated under the Winter Herding Act 1686 (c.21) - see Part IIA.

[4] Wark v. Steel 1946 SLT (Sh. Ct.) 17; Tierney v. Ritchie (1960) 76 Sh. Ct. Rep. 57; Gardiner v. Miller 1967 SLT 29. The duty does not amount to a duty to fence in all circumstances.

[5] Harpers v. Great North of Scotland Railway Co (1886) 13R 1139; Karrigan v. Edgar (1888) 4 Sh. Ct. Rep. 83; Smith v. John Swan & Sons (1888) 4 Sh. Ct. Rep. 162; Walker v. Bowie (1888) 4 Sh. Ct. Rep. 188; Cessford v. Young 1933 SLT 502; Downs v. King (1936) 52 Sh. Ct. Rep. 75; Milne v. MacIntosh 1952 SLT (Sh. Ct.) 84.

[6] Phillips v. Nicoll (1884) 11R 592; Smith v. Scott (1923) 39 Sh. Ct. Rep. 105; Cameron v. Hamilton's Auction Marts Ltd 1955 SLT (Sh. Ct.) 74.

Working animals

4.9 Most of the case-law relates to horses which are not so commonly used now as working animals. However, some of the principles established will also apply in the case of other animals. So, for example, an employer owes a duty of care to his employees to ensure that animals which they are required to work are suitable for the purpose; and a more general duty to employees and members of the public to ensure that those who are required to work animals are suitably experienced.[1] Similarly, those who are working or using animals owe a duty of care to persons in their vicinity to follow reasonably safe practices.[2] In particular, the same standard of care is required of those driving horse-drawn vehicles as of drivers of motor vehicles;[3] and those in charge of horse-drawn vehicles also owe a duty of care to members of the public not to leave their vehicles unattended in public places in circumstances in which it may be dangerous to do so.[4] In all these cases, knowledge of the nature of the particular animal may be a relevant factor in determining liability.

Animals kept for sporting purposes

4.10 As regards horses kept for sporting purposes, a rider owes a duty of care to those in his vicinity to control his

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[1] Young v. Stewart (1885) 1 Sh. Ct. Rep. 175; Wilson v. Wordie & Co (1905) 7F 927; Richardson v. Beattie 1923 SLT 440.

[2] Smith v. Wallace & Co (1898) 25R 761; Milne & Co v. Nimmo (1898) 25R 1150; Hogg v. Cupar District Committee of the County Council of Fife 1912, 1 SLT 57; Ballantyne v. Hamilton 1938 SLT 219, 468; Burns v. Western S.M.T. Co. Ltd. (1955) 71 Sh. Ct. Rep. 232.

[3] Clerk v. Petrie (1879) 6R 1076; Grant v. Glasgow Dairy Co. (1881) 9R 182; Martin v. Ward (1886) 2 Sh. Ct. Rep. 346; Anderson v. Blackwood (1886) 13R 443; MacArthur v. Abercromby (1889) 5 Sh. Ct. Rep. 322; Tannahill v. Caledonian Railway Co. (1891) 7 Sh. Ct. Rep. 70; Morrison v. M'Ara (1896) 23R 564; Alexander v. Comrie (1898) 14 Sh. Ct. Rep. 201.

[4] Shaw v. Croall & Sons (1885) 12R 1186; Marshall v. Bell (1887) 3 Sh. Ct. Rep. 399; M'Gee v. Sproull (1890) 6 Sh. Ct. Rep. 116; M'Intosh v. Waddell (1896) 24R 80; M'Ewan v. Cuthill (1897) 25R 57; Wright v. Dawson 1897, 5 SLT 196; M'Cairns v. Wordie & Co 1901, 8 SLT 354; Hendry v. M'Dougall 1923 SC 378.

horse.[1] The standard is not perfect control but reasonable competence.[2] This may require him, or those wholly or partly responsible for him, to take account of his age, strength and experience, or of the known character of the particular horse.[3] Those hiring out horses for sporting purposes probably owe a duty of care to those who use their animals, and perhaps also to those who may be affected by their use, to ensure that the animals are reasonably safe.[4] Those who promote sporting events in which animals are involved owe a duty of care to the spectators to provide for their safety, though not against the usual and customary incidents of such events which spectators should know to expect.[5]

Domestic pets

4.11 The bulk of the case-law arising from the behaviour of domestic pets is concerned with liability in scienter or under the Dogs Acts 1906 (c.32) to 1928 (c.21). However, it is clear that anyone physically in charge of a dog owes a duty of care to those in the vicinity to keep it under proper control.[6] Carriers may also owe a duty of care in this respect to their passengers[7], or even in certain circumstances to members of the public generally[8]. However, there seems to be no duty as such to ensure the constant supervision of the common domestic pets.[9]

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[1] Lanark Plate Glass Mutual Protection Society v. Capie (1908) 24 Sh. Ct. Rep. 156.

[2] Meldrum v. Perthshire Agricultural Society (1948) 64 Sh. Ct. Rep. 89.

[3] Brown v. Fulton (1881) 9R 36.

[4] Cf. Wilson v. Wordie & Co. (1905) 7F 927.

[5] Meldrum v. Perthshire Agricultural Society, above.

[6] Brogan v. Worton (1891) 7 Sh. Ct. Rep. 162; Thomson v. Cartmell (1894) 10 Sh. Ct. Rep. 179.

[7] Rennett v. Great North of Scotland Railway Company 1909, 2 SLT 328.

[8] Gray v. North British Railway Company (1890) 18R 76.

[9] Allan v. Reekie (1906) 22 Sh. Ct. Rep. 57; Brown v. Soutar (1914) 30 Sh. Ct. Rep. 314.

Wild animals

4.12 There is very little case-law on wild animals which is not bound up with the problem of classifying animals as ferae or mansuetae naturae, or with liability in scienter generally. In the case of Smith v. Campbeltown Town Council[1] it was averred that the defenders were negligent in depositing fish offal in their dump without suitable precautions, so that seagulls were attracted to the dump and damaged a turnip crop in an adjacent field. The damage was considered too remote to entail liability. However, the case was distinguished from an earlier unreported decision in which a farmer successfully sued a local authority for damage to his grain crop by rats which were breeding in their dump.[2] So, in certain circumstances, it seems that there may be a duty of care in respect of wild animals over which there is no direct control.

Liability and defences

4.13 The essence of liability in negligence is that it is liability arising from some failure to take reasonable care. So it is generally a defence to show that precautions were in fact taken which were reasonable in the circumstances[3], or which were customary and normally sufficient.[4] A fortiori the defences which are applicable in the case of strict liability are also applicable in the case of liability in negligence - that is, the defences of unavoidable accident, intervention of a third party, voluntary assumption of risk and contributory negligence.[5]

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[1](1935) 51 Sh Ct. Rep. 122.

[2]Addison v. Magistrates of Buckie (unrep.) 1930, Sheriff Court of Banffshire. Cf. Blair v. Springfield Stores Limited (1911) 27 Sh. Ct. Rep. 178 (escape of weevils from a grain-store) and see para. 4.22.

[3]Cf. Burton v. Moorhead (1881) 8R 892.

[4]Harpers v. Great North of Scotland Railway Co. (1886) 13R 1139.

[5]Cf. paras. 1.22, 3.22, 3.23. For the defence of trespass see para. 3.24. There seems to be no significant distinction between liability in negligence and liability in scienter with regard to that defence.

Novus actus interveniens (supervening event)

4.14 These defences overlap with the general defence usually referred to as novus actus interveniens (supervening event) which negates the element of causation required for liability and is therefore a complete defence if established.[1] Indeed, the defences of unavoidable accident and intervention of a third party are vitually specific forms of that defence. In the latter case, the act of a third party must generally be deliberate or malicious, or at least an act which was either not foreseeable or against which reasonable precautions would have been inoperative. A plea that the pursuer's own act is novus actus interveniens will generally only be successful if the act is one of reckless or deliberate folly. So acts to save life or property, acts which are instinctive reactions to danger or acts in emergencies will not generally be held to negate causation. An act which is negligent only is even less likely to suffice unless it is at least separated clearly in time from the defender's negligent conduct so that the pursuer had adequate time and opportunity to act deliberately.

Res ipsa loquitur

4.15 The maxim res ipsa loquitur has been said to express a principle of the law of evidence.[2] In certain circumstances, proof of the occurrence of the event which caused harm may be regarded as establishing a prima facie case of negligence or failure to take reasonable care against the defender. It then falls to the defender to show that the event can be reasonably explained without reference to negligence on his part, or alternatively that he took all reasonable and proper precautions in the circumstances. The maxim has been considered, for example, in relation to horses bolting and causing injury to members of the public, where no very clear explanation of the horse's behaviour was available.[3] But in

[1] Walker (1981) at pp. 214-230.

[2] ibid. at pp. 394-403.

[3] Snee v. Durkie (1903) 6F 42; Hendry v. M'Dougall 1923 S.C. 378.

the case of horses natural waywardness falling short of that degree of spiritedness or restiveness which if known might found liability in scienter[1] may be sufficient explanation to counter the presumption of negligence.[2] On the other hand, that same waywardness may have implications for the standard of precautions required, and in no case is the court relieved from the necessity of considering the bearing of evidence actually available on such issues.[3] Generally, the principle will only apply in the absence of explanation; where the harm is such as does not ordinarily happen; and where it happens in circumstances over which the defender alone has control.[4]

B. Nuisance

Definition

4.16 The term nuisance is used very broadly to cover any use of property which causes trouble or annoyance to neighbours:

> "The description of nuisance in Scotland is the same whether the public or the individual be regarded. Whatever obstructs the public means of commerce and intercourse, whether in highways or navigable rivers; whatever is noxious or unsafe, or renders life uncomfortable to the public generally, or to the neighbourhood; whatever is intolerably offensive to individuals in their dwelling-houses, or inconsistent with the comfort of life, whether by stench (as the boiling of whale blubber), by noise (as a smithy in an upper floor) or by indecency (as a brothel next door), is a nuisance."[5]

The remedy against nuisance may be by way of interdict or damages.

Liability and defences

4.17 Liability is strict:

> "In general it may be conceded that if an occupier of land so uses it as to cause interference with his

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[1] See para. 3.14.

[2] Ballantyne v. Hamilton 1938 SLT 219 per Lord Robertson at p. 221.

[3] Ballantyne v. Hamilton 1938 SLT 468 per Lord Moncrieff at p. 481 (reversing the decision of Lord Robertson).

[4] Colvilles, Ltd. v. Devine [1969] 2 AER 53.

[5] Bell para. 974. Cf. Watt v. Jamieson 1954 SC 56.

> neighbour's property - either in the form of structural damage or interference with its comfortable enjoyment - an action in nuisance will lie if the interference, especially in an urban situation, is, in all the circumstances of the case, plus quam tolerabile [more than is tolerable]. In a true nuisance case liability is strict and questions of foreseeability do not arise."[1]

The defences generally available in case of strict liability[2] are not particularly relevant in the circumstances of nuisance, although, no doubt, where causation was in issue, those defences might be invoked which serve to negate the existence of a causal link between the conduct complained of and the subsequent harm. The defences more commonly encountered are statutory authority, express acquiescence or prescriptive right to commit nuisance, or amelioration, where the defender pleads that he has taken or is taking remedial measures.[3]

Nuisance in relation to animals

4.18 As in the case of negligence and the duty of care there is an infinite variety of ways in which a nuisance may be committed. This can be illustrated from the case-law in relation to animals.

Livestock

4.19 The noise or stench of livestock, such as poultry,[4] may be a nuisance. So also the methods of managing livestock may create a nuisance, for example by causing pollution of water.[5] In essence, whether a nuisance of this kind exists or not, depends on the offensiveness of the practices complained of and is not determined merely on considerations of locality.[6] Allowing livestock to stray on the highway in such numbers or in such circumstances as amount to an obstruction may possibly

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[1] Lord Advocate v. Reo Stakis Organisation Ltd, 1982 SLT 140 at p. 142.

[2] See para. 1.22.

[3] See, generally, Walker (1981) at pp. 969-971, 973.

[4] Ireland v. Smith 1895, 3 SLT 180.

[5] Dumfries Water-Works Commissioners v. M'Culloch (1874) 1R 975.

[6] Manson v. Forrest (1887) 14R 802; Simpson v. Duncan (1914) 30 Sh. Ct. Rep. 125.

constitute nuisance. This issue arose in an Irish case, Cunningham v. Whelan [1], which was referred to, though not adopted, in Cessford v. Young.[2] The analysis in the Scottish case was in fact in terms of negligence but the issue of nuisance in such circumstances appears to remain open.

Game

4.20 In a number of cases, the question has arisen whether damages can be obtained for loss caused by game or rabbits. Where a landlord is sued by his agricultural tenant, which has frequently been the case, liability seems to rest on the view that there is an obligation or condition to be implied in any agricultural lease that the landlord will not unduly increase the stock of game on his land during the currency of the lease. But the analyses in some of the cases where excessive increase is alleged are very similar to analyses in terms of nuisance.[3] Where there is no contractual relationship between the parties nuisance is clearly a relevant ground of liability.[4] In the bulk of such cases liability has been held to require some unnatural or extraordinary use of land, or some introduction or attraction of the offensive of animals into the vicinity. However, it is difficult to see how this reasoning can with-

[1] 52 ILTR 67. But the analysis in this case is ambiguous - see LRC(I), Working Paper (1977) paras. 22-25, esp. para. 23.

[2] 1933 SLT 502. Cf. Bennet v. Bostock (1897) 13 Sh. Ct. Rep. 50 - see para. 4.21.

[3] See, for example, Inglis v. Moir's Tutors (1871) 10M 204, Cadzow v. Lockhart (1876) 3R 666. In one case the terms of the analysis almost suggest negligence as the ground of liability - Ormston v. Hope (1917) 33 Sh. Ct. Rep. 128.

[4] Johnston v. Viscount Strathallan (1902) 18 Sh. Ct. Rep. 25; Marshall v. Moncreiffe (1912) 28 Sh. Ct. Rep. 343; Gordon v. Huntly Lodge Estates Co. Ltd (1940) 56 Sh. Ct. Rep. 112; Forrest v. Irvine (1953) 69 Sh. Ct. Rep. 203. Account may have to be taken of an occupier's rights to kill hares and rabbits under the Ground Game Act 1880 (c. 47) and the Ground Game (Amendment) Act 1906 (c.21) or to take deer under s.43(1) of the Agriculture (Scotland) Act 1948 (c.45). (For proposed new provisions affecting the taking of deer see para. 2.18).

stand the recent decision in Lord Advocate v. Reo Stakis Organisation Ltd.[1]

Domestic pets

4.21 There is very little case-law to consider under this heading. In Shanlin v. Collins[2] the noise from kennels used for boarding and breeding dogs was held to constitute nuisance.

Wild animals

4.22 As with game, it may be a nuisance to introduce or attract harmful species into the vicinity of someone's property. So enticing pigeons to congregate by feeding them was held to be a nuisance - Allison v. Stevenson[3]. Similar questions have arisen in the case of attracting seagulls to a rubbish dump, allowing rats to breed in a rubbish dump, and allowing weevils to escape from a grain-store, but these cases, apart from the last, were considered in terms of negligence.[4] Bees, like pigeons, may be kept as a semi-domesticated species. There seems to be no Scottish authority on this, but in two Irish cases nuisance was regarded as an appropriate ground of liability where bees caused injury.[5] Finally, in Bennet v. Bostock[6] it was argued that a circus elephant drawing a caravan on the highway constituted a nuisance. While it was

[1] 1982 SLT 140 - see para. 4.17.

[2] 1973 SLT (Sh. Ct.) 21; cf. Jackson v. Mackay (1894) 10 Sh. Ct. Rep. 25.

[3] (1908) 24 Sh. Ct. Rep. 214. Pigeons in a rural context are probably to be treated analogously with rabbits - see para. 4.19 - or possibly with poultry, if semi-domesticated. In earlier times pigeons were extensively kept for food and the keeping of them was controlled by law - see Rankine (1909) at pp 146-147. The legislation referred to in that passage has now been repealed.

[4] See para. 4.12.

[5] O'Gorman v. O'Gorman [1903] 2 IR 573; McStay v. Morrissey 83 ILTR 28 - see LRC(I), Working Paper (1977) paras. 26-29. Negligence was also discussed.

[6] (1897) 13 Sh. Ct. Rep. 50.

apparently accepted in principle that obstruction of the highway in this manner might constitute nuisance, it was held in the particular circumstances that, in order to recover damages, it was necessary for the pursuer to establish fault or negligence on the part of the defender.

Liability for the escape of dangerous agencies from land

4.23 There is an analogous principle of strict liability in Scots law which, theoretically at least, may have some application to problems of controlling game or introducing or attracting harmful animals on to land. The foundation of liability under this principle is the introduction on to land, or the accumulation on land, of something not there previously which is dangerous if it subsequently escapes.[1] Despite the very general nature of the terms used to describe the principle, it seems to have originated in a series of cases concerned specifically with escapes of water and fire. In its development it has also been associated with what is referred to in England as the rule in Rylands v. Fletcher.[2] Both rules are hypothetically applicable to the case of introducing or attracting dangerous or harmful animals on to land, or accumulating such animals on land, and then allowing them to escape. Indeed, in Ireland the rule in Rylands v. Fletcher has been invoked, somewhat anomalously, in the case of cattle.[3] There seems to be no reported case involving animals under the Scottish principle. Moreover, the principle has given rise to some difficulty in the past, and, indeed, has been examined in relation to inanimate agencies by the Law Reform Committee for Scotland, who, in some doubt, recommended no change in the law.[4] In

[1] Walker (1981) at pp. 974-991. The defences available, other than the usual defences to strict liability (para. 1.22), are generally similar to those available in case of nuisance.

[2] (1868) L.R. 3 H.L.330. Williams (1939) distinguishes liability under the rule in Rylands v. Fletcher from liability in scienter (at pp. 352-353), liability in the action of cattle-trespass (at pp. 197-199) and liability in nuisance (at pp. 261-262). In the absence of authority he considers its application to the escape of noxious creatures a matter of speculation (at pp. 261-262). See also North (1972) at p. 175.

[3] Noonan v. Hartnett 84 ILTR 41 - see LRC(I), Working Paper (1977) paras. 39-45, esp. paras. 44, 45.

[4] LRC(S), Report (1964).

these circumstances, we do not propose to examine the principle in detail, though it may be necessary to take account of it when formulating proposals in relation to other principles of liability.

C. Intentional harm

Liability

4.24 Liability to make reparation arises in the case of any harm caused by intentional conduct.[1] So, for example, a horseman who deliberately rides his horse at a pedestrian is liable to make reparation for any injury he may cause[2]; or, again, there may be liability where someone deliberately trespasses on land by means of an animal.[3] The requisites of such liability have been very little discussed in general terms in the Scottish cases because, in a sense, they are obvious. As regards causation, there will be liability for the consequences which, though not intended, arise naturally and directly from the conduct complained of.[4]

Defences

4.25 Numerous defences are available according to circumstances, for example, authority, unavoidable accident, necessity, provocation, self-defence or defence of another or of property.[5] So the use of a police-dog may be justified as necessary or authorised[6], or trespass may be justified as necessary in the cause of pursuing foxes in accordance with the custom of the locality, subject always to payment for damage actually done to ditches, hedges and dykes, and planting.[7]

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[1] See para. 1.2.

[2] Ewing v. Earl of Mar (1851) 14D 314.

[3] Cameron v. Miller (1907) 23 Sh. Ct. Rep. 318 at p. 319; Inverurie Magistrates v. Sorrie 1956 S.C. 175.

[4] Scott's Trustees v. Moss (1889) 17R 32.

[5] See, generally, Walker (1981), Chap. 10.

[6] Cf. the South African case Chetty v. Minister of Police 1976(2) SA 452(N).

[7] Colquhoun v. Buchanan (1785) Mor. 4997.

Part V: Reform

Introduction

5.1 In this and the following Part we examine the case for reforming the present law and formulate a number of propositions on which we invite consultees' views. These are summarised in Appendix I.[1] The present law in Scotland in this area is not unlike the law as it was in England and Wales before the reforms effected by the Animals Act 1971 (c.22). We have therefore examined that Act carefully as well as the preceding Report[2] of the Law Commission on which it was founded. Law Reform bodies in Australia, Ireland and New Zealand have also recently examined the law in this area.[3] We have studied their publications closely and make frequent reference to them in what follows. Finally, we also refer briefly at certain points to the European civil code systems and occasionally to other jurisdictions where the contrast with our own system or with the English common law systems seems particularly instructive. Our main concern in this Part is to examine the individual rules of law and the detailed changes which might be required. In Part VI we consider briefly some wider issues. Our discussion in this Part falls under the following topics:

A Approaches to reform;
B Winter Herding Act 1686 (c.21);
C Dogs Acts 1906 (c.32) to 1928 (c.21);
D Agricultural Holdings (Scotland) Act 1949 (c.75) section 15;
E Failure to confine dangerous animals;
F The general rules;
G Simplifying the bases of liability

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[1] In the Summary, the propositions are gathered into groups, and each group is preceded by Notes which should be consulted whenever particular propositions are being considered.

[2] LC, Report (1967).

[3] The law in these countries is founded on the English common law.

A. Approaches to reform

Multiplicity of bases of liability

5.2 Our examination of the present law has disclosed a multiplicity of bases of liability for animals. Three distinct principles underlie this multiplicity. First, there is a principle of strict liability for special risk. The statutory rules[1] and the scienter rules[2] fall under this principle. Secondly, there is a principle of liability based on personal fault. This covers the rules of negligence[3] and intentional harm.[4] Thirdly, there is a principle of strict liability based on the interests of neighbourhood. The rules of nuisance and the rules relating to the escape of dangerous agencies from land fall under this principle.[5] The same multiplicity is apparent in many other jurisdictions.[6] However, in the European civil code systems a more comprehensive principle of strict liability applies in the case of all animals without distinction, at least if they are in human keeping or use.[7] This does not necessarily imply that there are no remedies based on other principles in these systems. So, for example, under the Draft Civil Code of the Netherlands a remedy for damage caused by an animal which acts as the instrument of the

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[1] Part II.

[2] Part III.

[3] Part IV A.

[4] Part IV C.

[5] Part IV B. Cf. LRC(S), Report (1964), esp. paras. 12, 15.

[6] LC, Report (1967) and Animals Act 1971 (c.22); D L Carey Miller (1969), Chap. V: South African Law; LRC (SA), Report (1969); LRC (NSW), Report (1970) and Animals and Dog (Amendment) Acts 1977;TGLRC (NZ), Report (1975); LRC (Q), Working Paper (1977); LRC (I), Working Paper (1977).

[7] Articles 1385 of the French Civil Code, 2052 of the Italian Civil Code, 833 of the German Civil Code, 1404 of the Netherlands Civil Code as replaced in effect by article 6.3.11 of the new Draft Civil Code (1977). In the German Civil Code there is a derogation from the regime of strict liability where a domestic animal is used for the profession, business or maintenance of the keeper.

person riding or leading it, would be provided by article 6.3.1 (liability for fault) rather than by article 6.3.11 (liability without fault for animals).[1]

Some approaches to reform

5.3 Where Law Reform bodies have examined the law relating to liability for animals in jurisdictions in which there was a multiplicity of bases of liability, they have generally recommended simplification, in the sense of reducing the number of bases of liability. In the publications of these bodies there are essentially three approaches to reform. The first is to abolish apecial strict liability rules applying only in the case of animals so that liability for harm caused by animals is determined exclusively by the same principles which apply in the case of harm otherwise caused. This was the approach adopted, for example, by the Law Reform Commission of New South Wales, although they also advocated strict liability for special risk in the case of dogs.[2] The second approach is to introduce a comprehensive principle of strict liability on the model of the European civil code systems which will assimilate the special strict liability rules. Such an approach was adopted, for example, by the Law Reform Commission of Ireland.[3] The third approach is to retain all existing bases of liability but modify special strict liability rules so that anomalies are eliminated. This was the approach adopted, for example, by the Law Commission in England and Wales.[4] Finally, there is an ancillary device which is employed usually in conjunction with the first approach. So, for example, it has been proposed as a solution to

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[1] D.C.C. (Netherlands), Commentary, article 6.3.11 (renumbered after recent amendment as 6.3.2.8), Ad.2, at p. 424. The provisions in the Draft Civil Code, though not yet in force have been anticipated in the case of liability for animals by the Hoge Raad (Nederlandse Jurisprudentie 1980 No. 353).

[2] LRC (NSW), Report (1970, esp. paras. 6, 33, 34 and Animals Act 1977 (Act No. 25, 1977) and Dog (Amendment) Act 1977 (Act No. 27, 1977).

[3] LRC (I), Working Paper (1977), esp. paras. 147, 148.

[4] LC, Report (1967), esp. paras. 91-97 and Animals Act 1971 (c.22)

certain problems that evidence of the factual circumstances in which harm is caused should be evidence from which negligence may be inferred or presumed.[1] It then falls to the defender to lead evidence to displace that presumption. For this reason the principle is often described as imposing a reversal of the burden of proof.[2] It is, on this view, no more than a modified version of the principle of liability based on personal fault.[3] But there is a slightly different way of looking at this principle. If strict liability and liability based on personal fault (unmodified) are thought of as setting higher and lower standards of care, as appropriate, then introducing a principle of presumed liability can be seen as establishing a distinct form of liability and interposing an intermediate standard of care between these two. This view depends on the quite intuitive notion that the harder it is for a potential defender to escape liability, the more careful he is likely to be. Such a form of presumed liability does exist independently in other jurisdictions.[4] But, as we have mentioned, although it exists in our law at present (res ipsa loquitur), it is very much restricted.[5]

Previous recommendations for reform in Scotland

5.4 The Law Reform Committee for Scotland, when they examined the law in this area, in effect adopted the first approach,[6] although they also recommended the retention, with modifications, of the existing strict liability for special risk in the case of livestock[7] and dogs.[8] This approach is compatible

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[1] LRC (N.S.W.), Report (1970), para. 27 and Animals Act 1977 (Act No. 25, 1977) s.10 (animals, other than cats or dogs, causing damage while trespassing - trespassing on roads is not covered); TGLRC (NZ), Report (1975) at p. 52 (unattended stock on a road).

[2] Cf. RCCL, Report (1978), Volume One, paras. 313, 314, p. 75.

[3] See para. 5.2.

[4] See, for example, article 56 of the Swiss Code of Obligations which establishes a comprehensive form of presumed liability. A defender may rebut the presumption of liability by proving that he took all care required in the circumstances or that such care would not have prevented the harm.

[5] See para. 4.15.

[6] LRC (S), Report (1963), esp. para. 17.

[7] See Part II A, above.

[8] See Part II B, above.

with the current tendency to re-interpret the scienter rules in terms of a broader concept of culpa or fault.[1] It can also be justified historically in that the beginnings of such a view can be found in the institutional writers.[2] However, the Royal Commission on Civil Liability and Compensation for Personal Injury in effect adopted the third approach, recommending that the law of Scotland should be brought into line with current English law as contained in the Animals Act 1971 (c.22)[3]. But that approach has been much criticised, even in England.[4] In our view, therefore, it is not sufficient, simply to adopt one or other of the approaches described, without examining the merits and implications of the individual solutions to the particular problems suggested by each approach.

The issue of strict liability

5.5 Underlying the several approaches to reform are two distinct views of strict liability. So, for example, the Law Commission in England and Wales saw the imposition of strict liability as appropriate only after careful consideration of the particular risk involved.[5] This is the view taken recently by the Royal Commission on Civil Liability and Compensation for Personal Injury.[6] On the other hand, the Law Reform Commission of Ireland, criticizing the attempt to re-integrate the rules of liability for animals into the ordinary rules of civil liability, concluded that modern trends in the law of torts seemed to favour principles of strict liability.[7] It is not immediately clear why there should be this division. The

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[1] See para. 3.4.

[2] See the passages from Kames and Bell quoted in para. 3.5.

[3] RCCL, Report (1978), Volume One, para. 1626, p. 339.

[4] See, for example, S. Roberts (1968); A Samuels (1971); V. Powell-Smith (1971); North (1972) at pp. 19-20.

[5] LC, Report (1967) para. 14.

[6] See, for example, RCCL, Report (1978), Volume One, paras. 312-319, pp. 74-75.

[7] LRC (I), Working Paper 1977 para. 136, citing the then Draft EEC Directive on Products' Liability, No Fault Automobile Insurance Schemes in U.S.A. and Canada and the New Zealand Accident Compensation Act 1972.

main practical disadvantages of strict liability seem to be a possible loss of flexibility in the decisions of the courts, and perhaps also an increase in the costs of liability insurance. Against those, however, might be set the possible advantages in reducing litigation or facilitating the process of proof in litigation, although these are difficult to quantify. Again, some practical problems, notably that of livestock-worrying by dogs, are unlikely to be resolved merely by adopting one basis of liability rather than another. The conflicting views of strict liaiblity probably reflect different views as to how far legal liability should coincide with moral culpability. This is a persistent issue in the law of civil liability with its vocabulary of terms, such as fault and reasonableness, which have moral connotations. In that form the issue probably cannot be resolved. However, the concrete question does arise in case of strict liability, namely, On whom should strict liability be imposed?; and that question may be crucial where the reasons for imposing liability on one rather than another of several possible defenders are evenly balanced.[1] This, in our view, makes it necessary to consider in any particular case the arguments for and against a resort to strict liability.

The purpose of the law of civil liability

5.6 There is one more very general issue which should be mentioned because it is associated with the issue of strict liability. Support for a norm of strict liability often rests on a particular view of the social purpose of the law of civil liability. According to this view the compensation system operates essentially to allocate risk and redistribute loss.[2] So it may be argued that loss should be borne by whoever, in pursuit of permissible benefit, creates the risk of that loss. It is also part of such a view that the primary aims of the system are certainty and speed, and rules of strict liability may be thought to further these aims as well. Applied to the case of animals, this requires that the keeping of animals, as such, be regarded as constituting a special risk, so that the

[1] For example, on the owner as against the possessor of an animal.

[2] See, for example, LRC (I), Working Paper (1977) para. 137.

owners or keepers, who are benefited, should bear the cost of repairing any harm which their animals cause. That, in brief, is the principle of allocating risk. However, it is buttressed by an economic-welfare argument in favour of redistributing loss. So it may be argued, for example in the case of livestock, that any loss caused by such animals should be regarded as part of the livestock producer's costs. For this loss will be covered by liability insurance, the cost of which will be redistributed via premium rates among all livestock producers and ultimately among the more numerous consumers who meet their costs generally. A variant of this argument will apply in the case of the non-economic animals, so that the owner of such an animal, who is presumed to benefit from it, may be regarded as the person best placed to control it and insure against the risk of injury or loss which it represents. Again, loss will be redistributed to some extent via insurance premiums. This is an attractive argument, and, indeed, in its general form it is a principle motivation in the current concern with Insurance and No-Fault Compensation Schemes which we consider briefly in Part VI.[1] However, to adopt such a view at the outset would presuppose precisely what may be lacking, namely, the consensus that, in fact, the keeping of animals, as such, should be regarded as constituting a special risk.

Our approach

5.7 In light of these general considerations we shall approach the issues of reform by first examining the special rules, that is the rules which fall under the principle of strict liability for special risk.[2] In each case we shall consider whether strict liability should be retained; and, on the assumption that it should, what modifications in the rules may be required. We shall then consider the more general issues arising in connection with the other principles of liability and the interrelations of all three principles. In Part VI we shall mention for completeness sake some wider issues of reform which go beyond our immediate concern with the actual rules of liability.

[1] See RCCL, Report (1978).

[2] See para. 5.2.

B. Winter Herding Act 1686 (c. 21)[1]

Retaining strict liability

5.8 The Law Reform Committee for Scotland were of the view that the Winter Herding Act 1686 (c.21) continued to serve a useful purpose and that its provisions should be retained, though re-enacted in modern language.[2] We have no information about how well its provisions are known to livestock producers, or how frequently it is used. However, it may be anomalous that strict liability should be imposed in respect of keeping livestock when it is not imposed in relation to more hazardous activities, such as motoring, which involve significant risks of serious personal injury[3]; or, conversely, that it should be expressly imposed only for damage to ground, woods and planting and not for damage to other kinds of property or injury to persons or animals, or, indeed, for the serious damage and injury which can be caused by livestock straying on to a public road.[4] In other jurisdictions where there were similar remedies opinions have differed. So, for example, the Law Reform Commission of New South Wales proposed the abolition of strict liability for cattle trespass, as it was known, but recommended the introduction of a general rule that the fact of trespass should constitute evidence of negligence in order to ensure a trial on the merits.[5] On the other hand, the Law Commission in England and Wales recommended the introduction of a new form of limited strict liability in

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[1] See Part IIA.

[2] LRC(S), Report (1963) para. 14.

[3] See RCCL, Report (1978) Volume One, paras. 1060-1068, pp. 224-226.

[4] Other remedies may be available, of course - see, for example, para. 4.8.

[5] LRC(NSW), Report (1970) paras. 25-27 and Animals Act 1977 (Act No. 25, 1977) s.10. The rule did not include cats and dogs and did not extend to trespass on a public road.

similar circumstances[1]. In coming to this conclusion they were influenced by the view that the retention of strict liability for straying livestock mainly concerned farmers who well understood its implications and were enabled thereby to avoid litigation involving allegations of negligence.[2] This view might be appropriate if the farming community as a whole were in favour of such a provision and the damage covered were restricted as at present. But there are wider issues and interests to be considered if the question is raised, as it must be, whether strict liability should not also be imposed for all damage to property of whatever kind and for injuries to persons or livestock, including the communication of disease, and including quite generally all damage or injuries caused by straying on to a public road.

Livestock straying on to the highway

5.9 Of these possible extensions the extension to livestock straying on to a road is probably the most controversial. But the Law Reform Commission of Tasmania, examining this problem recently, saw such an extension of strict liability as likely to ensure that damage would in practice be insured against and at very small cost to the individual land occupier, thus both maximising the chances of compensation being available and minimising the risk that either party would face severe financial loss.[3] In favour of this view they cited the provisions in civil code jurisdictions such as France, Germany, Italy and the Province of Quebec and referred to the recommendation of the Law Reform Commission of Ireland that a general principle

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[1] LC, Report (1967) para. 93 and Animals Act 1971 (c.22) ss. 1(1)(c), 4, 5(1), (5), (6), 10, 11. The damage covered is conceived as limited to that suffered by land in personal ownership or occupation and by things on land (belonging to the owner or occupier of the land), including crops etc, buildings and chattels (including animals) - see North (1972) at pp 101-102. For a recommendation of comprehensive strict liability see LRC(I), Working Paper (1977) para. 148.

[2] LC, Report (1967) paras. 62 and 63. Cf. CLCLDA, Report (1953) para. 3.

[3] LRC(T), Report (1980) p.30.

of strict liability should be introduced.[1] However, they ultimately recommended that the rules of negligence only should apply to livestock straying on the highway. Indeed, a solution in this or in similar form has been adopted in most jurisdictions where the problem has been examined[2], and the consensus is probably that this is the just and fair solution, taking account of the respective interests of land-occupiers and road users. It gives road users the same legal rights at present available generally to other members of the community who suffer loss, injury or damage due to another's negligence, and, in absence of justification for exceptional treatment, it is probably the solution most consistent with accepted principles. It is the recommended solution of the Law Reform Committee for Scotland[3], and probably, in fact, also the solution adopted under the present law, although this may not be absolutely beyond doubt.[4]

Communication of disease

5.10 The possible extension of strict liability to the communication of disease may also be controversial. Under the present law the rules of negligence have been applied where diseased animals infected other animals.[5] In principle, the scienter rules might also apply if, for example, the bite of a diseased animal of known vicious propensities infected its victim.[6] In addition, the Animal Health Act 1981 (c.22) provides for a number of criminal offences in connection with the prevention of the spreading of disease, and enacts an

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[1] See LRC(I), Working Paper (1977), para. 148.

[2] LC, Report (1967) para. 92 and Animals Act 1971 (c.22) s.8; LRC(SA), Report (1969) para. 3; LRC (NSW), Report (1970) paras. 17-22 and Animals Act 1977 (Act No. 25, 1977) s.7; TGLRC(NZ), Report (1975) p. 52; LRC(Q), Working Paper (1977) pp 2-6; LRC(WA), Report (1981), Chapter 6. We consider this further under head F of this Part.

[3] LRC(S), Report (1963), para. 12.

[4] See paras. 4.8, 5.44.

[5] Robertson v. Connolly (1851) 14D 315; Baird v. Graham (1852) 14D 615.

[6] Cf. Williams (1939) at pp. 320-321; and see para. 3.21.

elaborate system of inspection and control under the supervision of Ministers and Local Authorities which covers the separation, treatment, slaughter and movement of animals, including in particular their import and export. In the case of slaughter for specified diseases, compensation is payable in accordance with prescribed scales. None of these provisions, at any rate expressly, appears to give rise to civil liability, although perhaps insofar as codes of required practices and procedures are established, these might be reflected in the standard of care which the courts would require of the reasonable livestock producer, auctioneer, carrier and so on, if the question of negligence were raised in such circumstances.[1] Conversely, there appears to be no implication that the provision of statutory compensation is intended to exclude the possibility of additional non-statutory compensation being claimed on grounds of negligence, or the like.[2] A primary duty on the possessor of an infected animal under the Act is that he should, so far as practicable, keep it separated from uninfected animals and notify the authorities of the fact of infection.[3] In the prosecution of any offence relative to the disease of an animal, the owner or person in charge of it is presumed to have known of the existence of the disease unless he shows that he did not know of it and could not have known by exercising due diligence.[4] It is arguable that no higher standard should be required for civil liability, which may imply that the rules of negligence are appropriate rather than strict liability, when the communication of disease is in issue.

Issues arising

5.11 Under reference to the preceding discussion, we now invite consultees' views on the following issues:

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[1] See para. 4.4.

[2] However, insurers are authorised to deduct compensation from sums payable under policies of insurance.

[3] s.15.

[4] s.79(2).

Propositions

1. Should liability for harm caused by livestock straying on to land be, in principle, strict?

2. If so, should liability be imposed -

   (a) on the owner of the livestock; or
   (b) where the livestock are not in their owner's possession but in the possession of another, on the possessor; or
   (c) on the owner or occupier of the ground from which the livestock stray;
   (d) on all or any of these, jointly and severally?

3. If liability were strict, should it extend to -

   (a) damage to any kind of property;
   (b) injury to persons and animals, including the communication of disease;

or should it only extend to damage to ground, woodland and planting, or be restricted in some other way?

4. If strict liability extended to all damage and injury (Proposition 3), should damage or injury caused on a public road, or in a public place, or in buildings or other premises, also be included?

Fencing

5.12 As the Winter Herding Act 1686 (c.21) has been interpreted, it is not a defence against a claim made thereunder that the person complaining has not protected his land by fencing it or has neglected to maintain fencing in adequate repair.[1] There is no general duty in Scots law requiring a man to fence his property to keep livestock out. Such duty may arise by agreement or, under certain statutory provisions, may be inspired by certain bodies, but even so will generally be imposed in order to keep livestock in rather than to prevent them from entering. Under the March Dykes Acts of 1661 (c.284) and 1669 (c.38) it is possible for a

[1] See para. 2.8.

proprietor of land to compel a coterminous proprietor to share in the cost of erecting and there maintaining a suitable fence along their mutual boundary. It is, however, essential in such case that there be reasonable mutuality of advantage, nor will order compelling such sharing be made if the cost of erection of such a fence would be out of proportion to the value of the ground.[1] We do not consider it feasible in the context of liability for animals to undertake a review of the whole provisions governing liability for fencing. For that purpose, however, it is necessary to consider whether where a duty to fence can be established on the part of the person complaining of damage sustained by trespassing animals, or where an existing fence is maintained by him, breach of that duty or failure to maintain that fence should be taken into account as a defence in considering such liability.[2] Questions about fencing may also arise where the fence abuts a public road. Where there is no duty to fence as such, questions arise about the proper maintenance of such fences as do exist. If strict liability is to be selected it is easy to envisage situations where no sort of moral blameworthiness could be said to fall on the owner of the animals (e.g. the hole in the fence through which animals escape being caused by a vehicular accident). This type of case could, however, be regarded as falling under the heading of intervention of a third party.[3] In some cases at least the fence may have been erected by a public authority or it may have a duty to do so, and indeed that authority may be responsible for the maintenance of the fence for the future. In such event, a question which has to be considered is whether where animals get on to a public road by escape through a fence not properly maintained by such an authority or where no fence has been erected by such authority, such circumstances should afford a defence to the owner of the livestock. We therefore invite consultees' views on the following issues:

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[1] Lord Advocate v. Sinclair (1872) 11M 137. See, generally Encyclopaedia, Volume 2, paras. 874-890.

[2] Such a defence is available in England and Wales under s.5(6) of the Animals Act 1971 (c.22) - see North (1972) Chapter 4.

[3] See para. 1.22.

Proposition

5. (a) Should it be a defence, where liability for harm caused by straying livestock is strict, that such harm would not have occurred but for some breach of a duty to fence (established by contract or under statute) on the part of the person claiming, or some failure on his part to maintain an existing fence for which he is responsible?

(b) Should such a defence also apply in the case where the duty to fence or to maintain fencing already in existence rests upon some third party?

Defences

5.13 Failure to fence, or to fence adequately, can be regarded as an aspect of the defence of contributory negligence or possibly of the defence of voluntary assumption of risk. Both defences may be appropriate generally in the circumstances we are considering, as well as other defences which we have previously mentioned, namely, unavoidable accident, as we have defined that term, and intervention of a third party.[1] Apart from questions of fencing, none of these has been considered directly in the context of the Act.[2] In England and Wales a defence was also recommended by the Law Commission where the offending livestock strayed from a public road on which they were lawfully present.[3] The rationale of

[1] See para. 1.22. For the current position in England and Wales, see North (1972) at pp. 109-111, 114-115. Of the defences mentioned, the last two are not available there and the defence of voluntary assumption of risk is only available to the extent that it can be brought under s.5(1) of the Animals Act 1971 (c.22) (no liability for damage due wholly to the fault of the person suffering it).

[2] See para. 2.8. There is some authority for the proposition that the defence of intervention of a third party may not be available.

[3] LC, Report (1967) paras. 67, 93(iv)(b) and Animals Act 1971 (c.22) s.5(5) - see North (1972) at pp. 112-114. Generally, livestock which have strayed on to the highway are not lawfully present there.

this was explained as the recognition by the law of the inevitable risk to be accepted by those having property adjacent to public roads, at least to the extent that they could not recover without proof of negligence occasioning the damage complained of. There is a trace of a similar view in Gordon v. Grant[1], but we do not find it plausible. Quite apart from the possibility of strict liability being introduced in case of straying on a public road, it is not altogether clear when the presence of unattended animals on a road is unlawful[2]. Moreover, it would seem anomalous if there was strict liability generally in case of straying on unenclosed land, but not if the animals crossed a public road to get there. As regards the other defences we see no reason why they should not be available, although the defence of intervention of a third party may require to be specifically restricted to acts which are deliberate or which are not reasonably foreseeable or which no practicable precautions would prevent.[3] However, we invite consultees' views on these issues:

Proposition

6. (a) Should all or any of the following defences be available:

(i) unavoidable accident;
(ii) intervention of a third party;
(iii) voluntary assumption of risk;
(iv) contributory negligence;
(v) the defence that the livestock strayed from a public road?

(b) If the defence of intervention of a third party should be available, should it be restricted? If so, should it be restricted to such acts as are deliberate or malicious or not reasonably foreseeable, or which no practicable precautions would prevent, or be restricted in some other way?

(c) Should any other defence be available?

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[1](1870) Guthrie (1879) p. 575. See para. 2.4.

[2]Cf. Roads and Bridges (Scotland) Act 1878 (c.51) Schedule (C) para. CIII.

[3]Cf. para. 3.22.

Detention and sale

5.14 The Law Reform Committee for Scotland were of the view that the provisions in the Act for detaining straying livestock should be retained and extended to cover damage caused by the animals and be reinforced by a clear right of sale.[1] As we mentioned, some doubt remains under the present law whether straying animals can be detained for damages, and the procedure for exercising the right of sale, which does exist, is not well-defined.[2] In principle, detention appears to be a useful means of self-help to prevent or minimise damage. But some recent judicial comment suggests that it may not in fact be widely used.[3] The Law Commission recommended the introduction of such a right of detention and sale in England and Wales[4], and there are similar impounding provisions in many other jurisdictions.[5] But the right has been criticised as of very little practical value to the urban pursuer and as "cumbersome and unrealistic in practice".[6] Such a right, if not qualified, might also enable someone to achieve an excessive settlement by detaining a valuable animal in security for trivial damage. Accordingly, we invite consultees' views on the following issues:

Proposition

7. Should the owner or occupier of land on to which livestock have strayed have the right -

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[1] LRC(S), Report (1963) para. 14.

[2] Para. 2.11.

[3] Farquharson v. Walker 1977 SLT (Sh. Ct.) 22 at pp. 22-23. We have made enquiries of the Department of Agriculture and Fisheries of Scotland and their lands staff who work throughout Scotland, but have not found any cases where detention was used.

[4] LC, Report (1967) paras. 71, 94 and Animals Act 1971 (c.22) s.7 - see North (1972) at pp. 115-123 (Cf. LRC(Q), Working Paper (1977)).

[5] See, for example, in New Zealand, TGLRC(NZ), Report (1975); and for American jurisdictions, 3A CJS Animals, paras. 123-136, 159-165.

[6] See North (1972) at p. 123, V. Powell-Smith (1971) at p. 585.

(a) to detain the livestock until compensated for all damage and loss which he has suffered[1] including the costs of detention; and

(b) failing payment of compensation, to sell so many animals as may be necessary to recoup his loss?

Penalties and procedure

5.15 A number of points arise in connection with the rights referred to in the previous paragraph. The penalties provided by the Act at present are nugatory, and there are obscurities about the possible time limits which may apply to recovery.[2] Also, provisions under the present law regulating the care of detained livestock may have to be incorporated in any new procedure introduced,[3] and the actual procedural steps and the functions of the courts laid down in some detail. Accordingly, we invite consultees' views on the following issues:

Propositions

8. If rights to detain and sell straying livestock were introduced (Proposition 7), we would propose that -

(a) there should be no provision for penalties over and above damages;

(b) anyone detaining straying livestock should be liable for any damage caused by his failure to treat them with reasonable care;

(c) the procedure for exercising the rights to detain and sell should be specified in legislation introducing those rights and should, on the analogy of the Animals Act 1971 (c.22) section 7, include in particular:

(i) provision for notice of detention and particulars of claim within a prescribed period (perhaps 48 hours) to the owner or possessor of the livestock, if known, and for

[1] Cf. Proposition 3 at para. 5.11.

[2] See para. 2.12.

[3] See para. 2.10.

notice of detention to the police authority of the area;

(ii) failing payment of the claim within a prescribed period (perhaps 14 days), provision for sale by public auction of the detained livestock, or so many of them as may be necessary to satisfy the claim, subject to the right of the owner or possessor of the livestock to take legal proceedings to prevent sale in the event of his disputing the claim;

(iii) provision for accounting to the owner or possessor of the livestock for the proceeds of sale and remitting any balance due after payment of the claim (including costs of detention) and settlement of the expenses of sale.

9. What animals or birds should be classified as livestock for the purpose of the foregoing propositions?[1] In particular, should any wild species in captivity be so classified?

C. Dogs Acts 1906 (c.32) to 1928 (c.21)[2]

Retaining strict liability

5.16 The Law Reform Committee for Scotland concluded that the provisions of the Dogs Acts 1906 (c.32) to 1928 (c.21) should continue to have effect.[3] In most jurisdictions where this issue has been examined recently a measure of strict liability is imposed on the owners of dogs or has been proposed.

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[1] Propositions 1-8.

[2] Part IIB.

[3] LRC(S), Report (1963), para. 15. In England and Wales the principle of strict liability has been retained and restated following the Law Commission's recommendations- L C , Report (1967) para. 95 and Animals Act 1971 (c.22) s.3.

Livestock-worrying is generally accepted as a case for strict liability but otherwise there is no general consensus as to what is appropriate. The most comprehensive proposals are probably those of the Law Reform Commission of Ireland. The form of strict liability which they advocate would seem to cover all injury and damage by dogs however caused, although it is probably implicit in their proposals that some act on the part of the dog is required.[1] In other jurisdictions, for example New South Wales and New Zealand, a distinction is proposed between injury or damage which a dog may cause directly in the course of attacking or chasing persons or animals and injury or damage which may be the incidental result of a dog's presence or behaviour.[2] Strict liability is considered appropriate for the former but not for the latter, although there may be liability in negligence in that case. In England and Wales recovery in cases other than livestock-worrying depends on the application of the new scienter rules,[3] or on negligence.

The case for strict liability

5.17 The case for strict liability rests partly on the physical attributes of dogs which are commonly such as enable them to inflict serious bodily injury on persons and animals; partly on their natural tendency to chase other animals if given the opportunity; and partly on the fact that many people still hold the view that, broadly speaking, dogs can

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[1] LRC(I), Working Paper 1977 para. 148. The only exceptions suggested (apart from contributory negligence) are the defence of Act of God and recourse to the rules of negligence where a trespasser is injured.

[2] Injury or damage caused by tripping over a sleeping dog or in a major traffic accident which resulted from a dog chasing a cat across a street would be regarded as caused incidentally by the dog - see LRC(NSW), Report (1970), paras. 37, 39 and Dog (Amendment) Act 1977 (Act No. 27, 1977) s.2. Cf. TG LRC (NZ), Report (1975) at pp. 43-46. For a criticism of this view, see LRC(Q), Working Paper (1977) at pp. 6-7.

[3] See LC, Report (1967) para. 91(iv) and Animals Act 1971 (c.22) s.2(2). Cf. LRC (Q), Working Paper (1977). See further head E of this Part.

be allowed to roam and that, in ordinary circumstances, the owner of a dog does not act unreasonably towards others in permitting it to do so.[1] The case for strict liability also derives support from the fact that dogs are singled out in penal enactments. So the Dogs (Protection of Livestock) Act 1953 (c.28) makes an owner or person in charge of a dog guilty of an offence if it worries livestock on agricultural land, and for this purpose it may be sufficient if a dog is not on a lead or not otherwise under close control in a field or enclosure in which there are sheep.[2] Similarly, it is a criminal offence to cause or permit a dog to be on a designated road without being held on a lead.[3] There are also special provisions in the Dogs Act 1871 (c.56), as amended by the Dogs Amendment Act 1938 (c.21), whereby a court of summary jurisdiction may take cognizance of a complaint that a dog is dangerous and order it to be kept under proper control or destroyed.[4] Anyone failing to comply with such an order is liable to penalties. Both the Acts of 1906 and 1953 also contain powers under which the police may seize unattended dogs and lately such powers have been extended in certain areas under private legislation to enable local authorities to establish dog-warden schemes.[5] Apart from the Act of 1906, none of these provisions appears to give rise to civil liability as such, and, while the dog is undoubtedly in a rather special position in law, none of these considerations

[1] See LRC(NSW), Report (1970) paras. 35, 37. Cf. TGLRC(NZ), Report (1975) at p. 43, LRC(I), Working Paper (1977), para. 143.

[2] See Wildlife and Countryside Act 1981 (c.69). Schedule 7 para. 3. There are exceptions for certain categories of dogs. See also Animal Health Act 1981 (c.22) s.13(2) under which orders may be made with a view to the prevention of the worrying of livestock, providing for keeping dogs from straying at night; and the Control of Dogs Order 1930. No. 39 SR & O Rev. Vol. VI p. 96.

[3] Road Traffic Act 1972 (c.20) s.31. A general prohibition against allowing dogs to foul footpaths is also in prospect - Civic Government (Scotland) Bill (Print 16 March 1982) clause 50.

[4] A dog which has worried livestock may be treated as a dangerous dog - see Dogs Act 1906 (c.28) s.1(4).

[5] See, for example, the Inverclyde District Council Order Confirmation Act 1979 (c. ii). Some 20 authorities have taken similar powers. Apart from these more recent developments, dogs have long been subject to a plethora of controls under local bylaws.

of itself determines where the limit of strict liability should lie. Accordingly, we invite consultees' views on the following issues:

Propositions

10. Should liability for harm caused by dogs be, in principle, strict?

11. If so, should it extend to -

(a) damage to any kind of property;
(b) injury to persons and animals, including the communication of disease;

or should it be restricted to -

(c) damage, loss or injury caused in the course of attacking or chasing a person or animal;
(d) injury or loss caused in the course of worrying livestock;

or should it be restricted in some other way?

12. Should it be a prerequisite for liability that the harm complained of be the direct result of some act attributable to the dog and not merely the incidental consequence of the dog's presence or behaviour?

Ownership and possession

5.18 Under the Acts in their present form strict liability is imposed on the owner of a dog, and for this purpose the occupier of premises where a dog is kept may be deemed to be the owner.[1] The Law Reform Committee for Scotland recommended that liability should attach to the keeper of a dog as well as to its owner.[2] The keeper is the person who has custody or possession of the dog. For this proposal the Committee refer to the earlier Report of their English counterparts.[3] There and as developed subsequently by the Law Commission[4] the

[1] See para. 2.15.

[2] LRC(S), Report (1963) para. 15. Cf. LC, Report (1967) paras. 74-78 and Animals Act 1971 (c.22) ss. 3, 6(3).

[3] CLCLDA, Report (1953) para. 6.

[4] LC, Report (1963) paras. 74-78.

proposal seems to be intended primarily to impose a form of vicarious liability in the case of the young owner or possessor. In the broader context of the Law Commission's discussion it also operates to overcome certain difficulties which may arise when the scienter rules are applied in the case of a separation of ownership and possession, or when possession of a wild animal is lost.[1] Now, in England and Wales, the statutory keeper of a dog is the owner or the possessor of the dog, or where the owner or possessor of the dog is under the age of 16, the head of the household of which that person is a member.[2] It seems that where ownership and possession of a dog are separated, both owner and possessor may be liable for it jointly and severally[3].

Transfer of possession

5.19 Under the Dogs (Protection of Livestock) Act 1953 (c.28) the owner of a dog and the person in charge of it, if not the owner, are both guilty of an offence where a dog worries livestock, but it is a defence for the owner to show that when the dog worried the livestock it was in the charge of a person whom he reasonably believed to be a fit and proper person to be in charge of it.[4] It may be that a corresponding defence should be available if there were to be some modified re-enactment of the Dogs Acts imposing joint and several liability on owner and possessor of a dog. The effect of this would be to mitigate the imposition of strict liability to some extent. With regard to the possessor, it may seem anomalous that in a case considered sufficiently serious to merit the imposition of strict liability the burden of this

[1] Cf. paras. 3.18, 3.19, 3.25. Scienter rules are discussed under head E in this Part.

[2] Animals Act 1971 (c.22) s.6(3), (4) (quoted at para. 5.37). See North (1972) at pp. 189-190.

[3] See North (1972) at pp. 189-190, 194-195 and, generally, at pp. 23-34. The point is made that common law decisions will continue to be relevant to the interpretation of "keeper" and in particular to the meaning of possession. See also at para. 5.37.

[4] s.1(4).

may shift with every transfer of possession, no matter to whom or however temporary. One solution to this may be to retain ownership as the primary basis of liability and define restrictive conditions which must be satisfied before possession will entail liability, whether in lieu of owner's liability or cumulatively. Accordingly, under reference to this and the preceding paragraph, we invite consultees' views on the following issues:

Propositions

13. If liability for harm caused by a dog were strict, should it be imposed -

(a) on the owner of the dog (possibly with provision for deemed ownership as under section 1(2) of the Dogs Act 1906 (c.32));[1]

(b) where a dog is not in its owner's possession (or custody) but in the possession (or custody) of another, on the possessor (or custodier); or

(c) where the owner or possessor (or custodier) is under the age of 16, on the head of the household[2] of which the owner or possessor (or custodier) is a member; or

(d) on all or any of these jointly and severally;

14. If liability were imposed on a possessor (or custodier), including joint and several liability with another:

(a) Should it be a prerequisite for liability that the possessor (or custodier) had possession (or custody) otherwise than merely on a temporary basis or for the benefit of the owner?

(b) Assuming a possessor (or custodier) under the age of 16 might be liable jointly and severally with the head of his household, should the same principles apply to such a possessor (or custodier)?

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[1] See para. 2.15.

[2] Heads and members of households may have to be defined carefully - cf. North (1972) at p. 28. Perhaps a provision written in terms of family relationships would be more suitable.

(c) What should happen in such a case if a possessor (or custodier) over the age of 16 takes possession (or custody) from an owner or possessor (or custodier) under the age of 16?

(d) Should there be any other prerequisite conditions for liability?

15. So far as the owner of a dog might be liable for the harm which it causes while in another's possession (or custody), should it be a defence for the owner to show that he transferred possession (or custody) of the dog to the possessor (or custodier) in the reasonable belief that he was a fit and proper person to be in charge of the dog? If so, should such a defence be available irrespective of whether or not the possessor (or custodier) might be liable? Should the defence be specifically excluded in the case where the possessor (or custodier) is a member of the owner's household under the age of 16.

General defences

5.20 Under the present law it is not altogether clear what defences are available under the Acts.[1] The defence of contributory negligence is now available in England and Wales under the Animals Act 1971 (c.22).[2] The defence of voluntary assumption of risk may also be available there if it can be brought under section 5(1) of that Act (no liability for damage due wholly to the fault of the person suffering it).[3] The defence of intervention of a third party, although not available in England and Wales, was recommended by the Law Reform Commission in New South Wales where the act was one of intentional cruelty or intentional provocation which wholly induced the dog's behaviour.[4] We see no reason why these defences should not be available together with the defence

[1] See para. 2.17.

[2] ss. 5(1), 10, 11 - see North (1972) at pp. 190-191.

[3] Cf. para. 5.13. But see North (1972) at p. 194 who excludes the possibility of the defence in this case.

[4] LRC(NSW), Report (1970) para. 40 and the Dog (Amendment) Act 1977 (Act No. 27, 1977) s.2.

of unavoidable accident (also unavailable in England and Wales). However, we invite consultees' views on these issues:

Proposition

16. (a) Should all or any of the following defences be be available:

(i) unavoidable accident;

(ii) intervention of a third party;

(iii) voluntary assumption of risk;

(iv) contributory negligence?

(b) If the defence of intervention of a third party should be available should it be restricted? If so, should it be restricted to such acts as are provocative or malicious, or not reasonably foreseeable, or which no practicable precautions would prevent, or be restricted in some other way?

(c) Should any other defence be available?

The defence of trespass

5.21 Under the Animals Act 1971 (c.22)[1] it is also a defence in England and Wales where a dog injures livestock that the livestock were straying on land occupied by the person to whom the dog belonged, or on land on which the dog's presence was authorised by the occupier.[2] A similar defence is available under the Dogs (Protection of Livestock) Act 1953 (c.28).[3] It seems reasonable that such a defence should be available in Scotland, in case of civil liability.

Qualifying the defence of trespass

5.22 However, if strict liability were to be extended to include injury to persons it would be necessary to consider the particular effect of such a defence on the common practice of

[1] s.5(4) - see North (1972) at pp. 191-193 who discusses in some detail the problems raised by that provision in the particular form in which it is drafted.

[2] Cf. LC, Report (1967) para. 73. For a similar recommendation elsewhere see LRC(NSW), Report (1970) para. 40 and the Dog (Amendment) Act 1977 (Act No. 27, 1977) s.2.

[3] S.1(3).

keeping a watch-dog to guard premises against intruders. At present, in Scotland, the role of this particular defence in these circumstances is very restricted, whether the cause of action is considered as arising under the scienter rules, or under the ordinary principles of negligence, or even under the Occupiers Liability (Scotland) Act 1960 (c.30)[1]. The approach to this problem adopted by the Law Reform Commission of New South Wales was to recommend the defence without qualification, whether animals or persons were injured.[2] The injured trespasser, therefore, had no remedy on principles of strict liability, but might invoke principles of negligence if the keeper could be shown to have acted unreasonably in having a watch-dog or in the way in which he used it in the particular circumstances. The solution in England and Wales is similar but rather more complex. The injured trespasser may rely on the ordinary law of occupiers liability. Alternatively, he may rely on strict liability which now rests on the new scienter rules[3], in which case a qualified defence of trespass is available to the keeper if he can show that the keeping of a watch-dog was not unreasonable in the circumstances.[4] That defence has been considered in the case of Cummings v. Granger[5] where it was held not unreasonable to keep an untrained Alsatian at large in a scrap yard from which it could not escape. However, under the Guard Dogs Act 1975 (c.50), it is now a criminal offence to use or permit the use of a guard dog at premises unless it is under the control of a capable handler or secured, and a warning notice is exhibited at every entrance to the premises.[6] That Act neither confers, nor derogates from, any civil right of action[7]. But it may affect a defence in the form which we are considering by

[1] See paras. 3.24, 4.4, 5.41.

[2] LRC (NSW), Report (1970) para. 40 and the Dog (Amendment) Act 1977 (Act No. 27, 1977) s.2.

[3] Animals Act 1971 (c.22) s.2(2).

[4] Animals Act 1971 (c.22) s.5(3) (quoted at para. 5.41) - see North (1972) at pp. 77-83. Cf. LC, Report (1967) paras. 21-25, 58.

[5] [1977] 1 All ER 104.

[6] s.1(1)-(3).

[7] s.5(2).

implicitly defining standards of reasonableness in the keeping and using of guard dogs.[1] It is arguable, therefore, that, if the defence of trespass is to be made available, this should be explicitly recognised[2]. Accordingly, under reference to this and the preceding paragraph we invite consultees' views on the following issues:

Proposition

17. (a) If there were strict liability where a dog kills or injures livestock or other animals (Proposition 11), should it be a defence that the animals were killed or injured while trespassing on land, or in premises, owned or occupied by the owner or possessor (or custodier) of the dog?

(b) If strict liability were to extend to personal injury, should a similar defence be available? If so, should it be qualified in any way? In particular, should it be a condition of such a defence that the dog is not kept to protect persons or property, or is kept secured or under the control of a competent handler, or that adequate warning notices are posted; or should any other conditions apply?

The problem of livestock-worrying

5.23 While strict liability is the norm in the case of dogs attacking livestock[3], it is arguable that this does not of itself provide an adequate solution to the problem of livestock-worrying. The effectiveness of the present civil remedy, and, indeed, of the criminal sanctions under the Dogs (Protection of Livestock) Act 1953 (c.28) depends on being able to identify the owner or person in charge of the dog.[4]

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[1] See Cummings v. Granger [1977] 1 All ER 104 per Lord Denning MR at p.109, Bridge LJ at p.112-113. See also para. 4.4.

[2] It should be borne in mind that the Guard Dogs Act 1975 (c.50) does not apply where the dog is kept on agricultural land or in, or within the curtilage of, a dwelling-house (s.7).

[3] See para. 5.16.

[4] Cf. LC, Report (1967) para. 84.

Moreover, prevention is probably as important to the livestock producer as compensation after the event. This is already recognised to some extent in the statutory provisions for confining dogs during the hours of darkness[1], and for treating a dog shown to have injured livestock as a dangerous dog for the purpose of the Dogs Act 1871 (c. 56) so that it may be either destroyed or subject to a control order.[2] However, the former provisions seem not to be well known[3] and the effectiveness of the procedures under the 1871 Act is difficult to assess. In similar circumstances, the Law Commission recommended as a partial remedy some clarification and extension of the then existing right at common law to kill a dog worrying livestock in certain circumstances.[4] Other approaches to the problem have also been tried, notably in Canada.[5]

Preventing damage by killing animals

5.24 There is a wider context in which the issue of killing a dog to protect livestock must be set. Generally, where rights of property subsist in an animal, killing or injuring it wilfully or negligently will found a claim for damages.[6] This means in effect that killing a domesticated animal, such as a dog, in which rights of property subsist notwithstanding that it is at liberty to roam[7], will only be justifiable in exceptional circumstances.[8] In this respect dogs may be distinguishable even from cats.[9] Preventive measures against non-domesticated species may be taken subject only to the

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[1] Animal Health Act 1981 (c.22) s. 13(2)(b) and (c), Control of Dogs Order 1930 No. 399. (SR & O Rev. Vol. VI p. 96) - see para. 5.17.

[2] Dogs Act 1906 (c.28) s.1(4).

[3] Our enquiries addressed to Police Authorities and Local Authorities disclosed only a very few sets of local regulations under article 2 of the Control of Dogs Order 1930.

[4] LC, Report (1967) paras. 85-90; Animals Act 1971 (c.22) s.9. Cf. LRC(Q), Working Paper (1977).

[5] We shall discuss these in Part VI.

[6] See Walker (1981) at pp. 1013 ff.

[7] Cf. para. 3.25.

[8] So, for example, livestock cannot be shot merely to protect crops - Clark v. Syme 1957 JC 1.

[9] M'Kay v. Kidd (1869) Guthrie (1879) p. 502; Parkhill v. Duguid (1900) 16 Sh. Ct. Rep. 366; Brown v. Soutar (1914) 30 Sh. Ct. Rep. 314.

observance of statutory conditions imposed for the protection of particular species.[1] Semi-domesticated species, such as pigeons, are probably to be treated like domesticated species.[2]

Trespassing dogs

5.25 While we referred initially to the right under the present law to kill a dog worrying livestock in certain circumstances this is perhaps somewhat misleading. The right has in fact been developed in the case-law as a defence to claims for damages by owners of dogs which have been killed or injured.[3] As such it is a plea in justification and it rests on the defender to establish it.[4] The fact that the owner of a dog, or the person in charge of it, may be liable for any harm which it causes if not prevented does not of itself preclude taking preventive measures.[5] However, if such liability does exist and the harm anticipated is relatively trivial, it may be more difficult to plead justification. The right to kill is therefore much qualified, and the mere fact that a dog is trespassing does not justify killing it.[6] It is always necessary that actual harm, or some reasonable belief in the likelihood of harm, be shown in the particular circumstances,

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[1] In fact protective restrictions are quite extensive - see, for example, the Agriculture (Scotland) Act 1948 (c.45) s.39; Protection of Birds Acts 1954 (c.30) and 1967 (c.46) (consolidated in the Wildlife and Countryside Act 1981 (c.69) which is still to be brought into force in this respect), Deer (Scotland) Act 1959 (c.40). For an occupier's right to kill ground game and deer see the Ground Game Act 1880 (c.47), Ground Game (Amendment) Act 1906 (c.21), Agriculture (Scotland) Act 1948 (c.45) ss. 43, 48 and Deer (Scotland) Act 1959 (c.40) s.33(3)-(5). For important amendments of the provisions relating to deer, see the Deer (Amendment) (Scotland) Bill (Print 1 April 1982).

[2] Murray v. Turnbull (1797) Mor. 7628. The early Scottish Acts referred to in that case have been repealed but the principle seems to be still valid - Muirhead v. Waugh (1912) 28 Sh. Ct. Rep. 143.

[3] Also as a defence to prosecution under the Protection of Animals (Scotland) Act 1912 (c.14) s.1 (offences of cruelty to animals) - see, for example, Farrell v. Marshall 1962 SLT (Sh. Ct.) 65.

[4] Shedden v. Eddington (1904) 20 Sh. Ct. Rep. 268 at p.270; Leven v. Mitchell 1949 SLT (Sh.Ct.) 40 at p.42.

[5] A fortiori, it is irrelevant whether such liability is strict or based on culpa or fault.

[6] Duncan v. Gillespie (1888) 4 Sh.Ct.Rep. 195; Cumming v. M'Ewan (1900) 16 Sh.Ct. Rep. 368.

whether to persons,[1] game[2], livestock,[3] poultry,[4] or other animals[5]; and that no other practicable means of preventing harm are available.[6]

Circumstances in which a dog may be killed to protect livestock

5.26 The Law Commission, examining this problem in England and Wales, found the law as laid down in the case of Cresswell v. Sirl[7] inadequate in that preventive measures could only be taken during an actual attack or where there was likelihood of the imminent renewal of an attack, and could not be taken when the attacking animal was escaping. In the Law Commission's view this did not take account of the well-known fact that dogs which have worried livestock are likely to do so again, nor even of the practical difficulties of tracing their owners.[8] Cresswell v. Sirl[9] has been cited in Scottish authorities, the most unequivocal support for the propositions which it laid down being found in the case of Mitchell v. Duncan:[10]

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[1] Smith v. Aitken (1897) 13 Sh.Ct. Rep. 279.

[2] Shedden v. Eddington 1904) 20 Sh.Ct. Rep. 268. But there is some doubt about whether a dog can be killed merely for pursuing game which is not owned as such. It may be at least necessary that the game threatened are kept in preserves - Scott v. White (1886) Guthrie (1894) p. 470; Bathgate v. Black (1890) Guthrie (1894) p. 469.

[3] See, for example, among many cases Turner v. M'Laren (1887) 3 Sh. Ct. Rep. 57.

[4] Smith v. Aitken, above.

[5] Duncan v. Gillespie (1888) 4 Sh. Ct. Rep. 195 (rabbits in a hutch); Strachan v. Ross (1925) 41 Sh. Ct. Rep. 212 (valuable rabbits kept in hutches); Watt v. Logan (1945) 61 Sh. Ct. Rep. 155 (dog).

[6] Mitchell v. Duncan (1953) 69 Sh. Ct. Rep. 182.

[7] [1948] 1 KB 241.

[8] LC Report (1967) para. 85.

[9] Above.

[10] (1953) 59 Sh. Ct. Rep. 182 at pp. 186-187. The Sheriff asserted that Scots law did not differ from English law citing Duncan v. Rodger (1891) 7 Sh. Ct. Rep. 313; Blackie v. Stewart (1921) 37 Sh. Ct. Rep. 60; Wilson v. Buchanan (1943) 59 Sh. Ct. Rep. 54. For further citations of Cresswell v. Sirl, above, see Leven v. Mitchell 1949 SLT (Sh. Ct.) 40; Farrell v. Marshall 1962 SLT (Sh. Ct.) 65.

> "The law on this subject is perfectly clear. It is that if a farmer finds strange dogs trespassing on one of his fields he is not warranted in shooting these dogs unless it can be clearly established that the dogs were either found in the act of attacking and damaging sheep belonging to him, and that the only way (the stress is on the word only) to prevent damage was by shooting these dogs or shooting of these dogs is warranted if the dogs have run away, but there are well-founded and reasonable grounds for believing that the dogs are in the act of returning to renew the attack. If dogs are either seen worrying sheep or they are suspected of such, and the dogs have run away it is always wise to try and trace the dogs (I know it may often be difficult), and make the owner aware so that he may be given an opportunity of controlling or disposing of his dogs. It should be marked well that it is always a dangerous thing to shoot dogs unless that is the only course open to protect one's property. If the property can be protected in some other way, that other way should be adopted."

However, there is also Scottish authority for a less restrictive approach. So while measures against a dog tend to be justified in terms of immediate danger and the need to prevent further loss there and then[1], nevertheless shooting an escaping dog some distance from the scene of the attack has been allowed.[2] Even where the tests in Cresswell v. Sirl[3] are adopted there may be greater emphasis on viewing the necessity of the measures taken subjectively, that is as seen by the person taking preventive action.[4] So, for example, the fact that the dog's owner may be present does not exclude the possibility that killing the dog may be seen as appropriate.[5] Again, a third party may be allowed to act on behalf of another, for example an employee on behalf of an employer.[6]

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[1] Blackie v. Stewart (1921) 37 Sh. Ct. Rep. 60.

[2] Duncan v. Rodger (1891) 7 Sh. Ct. Rep. 313. But compare Jackson v. Drysdale and Craig (1896) 12 Sh. Ct. Rep. 224.

[3] [1948] 1 KB 241.

[4] Leven v. Mitchell 1949 SLT (Sh. Ct.) 40.

[5] Wilson v. Buchanan (1943) 59 Sh. Ct. Rep. 54.

[6] Duncan v. Rodger, above. But compare Mitchell v. Duncan (1953) 69 Sh. Ct. Rep. 182 at p. 186, where the defender was merely a neighbour of the farmer whose sheep were attacked, and acted without authority.

The problems of the present law

5.27 So far as the present law in Scotland reflects the law as previously laid down for England in Cresswell v. Sirl[1] it is open to the same objections which the Law Commission raised against that case. The recent authorities strongly suggest that the position in Scotland is not substantially different from the pre-1971 position in England.[2] Even if that goes beyond what might strictly be justified on the basis of the earlier case-law the effect is to introduce considerable uncertainty into the law. Apart from that, the burden of proving that the action taken was justified is not easily discharged in a civil case[3], and corroboration of evidence may present difficulties if the court is not prepared to take account of the typical circumstances in which livestock-worrying occurs.[4]

A possible remedy

5.28 The remedy adopted in England was to clarify and extend the defence of justified killing in the circumstances of livestock-worrying.[5] In essence, it is now a defence there for anyone sued in respect of killing or injuring a dog to prove that he was acting to protect livestock which belonged to him or which were on land in his occupation, or was acting under the express or implied authority of someone who owned the livestock or occupied the land on which they were. An act is deemed to be for the protection of livestock if, and only

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[1] [1948] 1KB 241.

[2] Mitchell v. Duncan (1953) 69 Sh. Ct. Rep. 182; Farrell v. Marshall 1962 SLT (Sh. Ct.) 65.

[3] Shedden v. Eddington (1904) 20 Sh. Ct. Rep. 268. For the defence in a criminal prosecution see Farrell v. Marshall, above.

[4] Compare Shedden v. Eddington, above and Mitchell v. Duncan, above, with Leven v. Mitchell 1949 SLT (Sh. Ct.) 40 and Wilson v. Padkin (1908) 24 Sh. Ct. Rep. 371. Past behaviour of the animal may not be sufficient corroboration (Shedden v. Eddington, above), although it may be significant (Wilson v. Padkin, above). The fact that killing a dog apparently brings attacks to an end generally may be relevant corroboration - M'Intyre v. Carmichael (1870 8M 570.

[5] Animals Act 1971 (c.22) s.9. See discussion in North (1972) at pp. 195-208.

if, the actor had reasonable ground for believing -

(a) that the dog was worrying or about to worry the livestock and there were no other reasonable means of ending or preventing the worrying; or

(b) that the dog had been worrying livestock, had not left the vicinity and was not under the control of any person and that there were no practicable means of ascertaining to whom the dog belonged.[1]

It is a prerequisite of pleading the defence that notice be given to the police within 48 hours after the incident and that the livestock in question were not trespassing on land occupied by the person to whom the dog belonged, or on land on which the dog's presence was authorised by the occupier. On one view, such a provision would add little to the broader interpretations of the defence in Scotland under the existing law[2]. It is even arguable that the test of reasonable belief is more rigorous than the present subjective approach. Moreover, in the form which the defence takes in England, it is not altogether clear whether the presence of the owner of the dog necessarily represents other reasonable means of ending or preventing worrying, or is only significant where the dog has left off the attack. Under the present law in Scotland the presence of the owner does not necessarily mean that action against the dog is inappropriate.[3] Accordingly, we invite consultees' views on the following issues, which we have formulated in broad terms to take account of the wider context in which livestock-worrying by dogs must be set:[4]

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[1] North (1972) at pp. 205-206 draws attention to the difference between acting to protect "any livestock" where a dog "is worrying or is about to worry the livestock" (s.9(3)(a) of the 1971 Act) and where a dog "has been worrying livestock" (s.9(3)(b). The latter provision is apparently wider - cf. LC, Report (1967) para. 88.

[2] See para. 5.26.

[3] Wilson v. Buchanan (1943) 59 Sh. Ct. Rep. 54.

[4] See para. 5.24.

Propositions

18. Should it be permissible to take action which may be injurious against a dog to protect persons or livestock? If so, should that right be recognised only as an exception or defence in respect of the killing or injuring of a dog or be conferred as a separate right?

19. If action against a dog were so permissible, should the exercise of the right be qualified in any way? In particular:

(a) Should it only be permitted -

(i) in circumstances in which an attack by the dog is actually taking place or is imminent and there are no other reasonable means of ending or preventing it;

(ii) in circumstances in which a dog, after an attack, has not left the vicinity and is not under the control of any person and there are no practicable means of ascertaining to whom it belongs;

(iii) where the person taking action either owns or possesses the livestock or occupies the land on which they are or is expressly or implicitly authorised to act on behalf of such a person ?

(b) Should action taken be subject to notification to the police authority of the area ?

(c) Should the possibility of taking action be excluded where the attack takes place on land or in premises owned or occupied by the owner or possessor (or custodier) of the dog?

20. Should it be permissible to take action against a dog to protect any other species of animals (including wild species)? If so, which, if any, of the principles mentioned in Propositions 18 and 19 should apply?

21. Should it be permissible to take action which may be injurious against animals other than dogs? If so, against which animals and for what reasons; and which, if any, of the principles mentioned in Propositions 18 and 19 should apply?

Definition of livestock

5.29 There is some doubt about the definition of poultry under the Dogs Acts.[1] Also, the definition in its least extensive form is wider than the definition of poultry in the Dogs (Protection of Livestock) Act 1953 (c.28)[2]. We see no reason wny the definition for the purposes of civil liability should not be wide enough to cover all animals which may be maintained as part of an agricultural enterprise. Accordingly, we invite consultees' views on the following issues:

Proposition

22. For the purposes of Propositions 11, 17, 18 and 19, what animals or birds should be classified as livestock? In particular, should any wild species in captivity be so classified?

D. Agricultural Holdings (Scotland) Act 1949 (c.75) section 15[3]

Game-damage

5.30 Among the problems which we mentioned in particular in Part I was the problem of damage caused by game.[4] It may seem anomalous that the agricultural tenant who is protected under his lease against excessive increase of game should also have the advantage of an expeditious statutory procedure ensuring compensation for damage in the ordinary case, while a proprietor can only invoke the uncertain principles of nuisance if game encroach from neighbouring property.[5] The rationale of such a distinction is presumably contained in the statutory requirement that the tenant should have no right or written permission to take game.[6] The proprietor of land clearly has such a right, which is recognised in cases of alleged nuisance,[7] although, in fact, it is much qualified.[8] Again,

[1] See para. 2.14.
[2] s.3(1).
[3] Part IIC.
[4] Para. 1.15; cf. para. 4.20.
[5] Para. 4.20.
[6] Para. 2.18.
[7] Para. 4.20.
[8] Cf. para. 5.24.

the tenant's right to compensation is not defeated, for example, by his right to take deer under s.43(1) of the Agriculture (Scotland) Act 1948 (c.45).[1] It is arguable that an extension of the statutory scheme, or an analogous scheme, would be to the benefit of proprietors suffering extensive game-damage. However, this is perhaps strictly beyond the scope of our present exercise. Accordingly:

Proposition

23. We propose that section 15 of the Agricultural Holdings (Scotland) Act 1949 (c.75) should continue to have effect in its present form.

E. Failure to confine dangerous animals

Retaining a scienter principle

5.31 The case for retaining strict liability for animals of known dangerous or mischevious propensities was stated by the Law Commission as follows:

> "With regard to animals we see a great deal of common sense in the broad distinction which the law makes between dangerous and non-dangerous animals. It does not seem unreasonable that the keeper of a dangerous animal should bear the special risk which is created by keeping it; moreover, it is a risk against which he can more conveniently insure than can the potential victim."[2]

This led to two recommendations:

> "We recommend the imposition of strict liability for animals belonging to a species which constitutes a special danger to persons or to property. By a special danger we mean that animals of that species are likely to cause damage or that any damage which they may cause is likely to be severe ... If ... there is to be a category of animals of a dangerous species for which strict liability is imposed, it would seem reasonable that an animal not belonging to that category should nevertheless give rise to strict liability in respect of injury or damage which it causes if that damage results from dangerous characteristics of the particular animal which are known to its keeper. As far as the potential defendant is concerned, he is equally the creator of a special risk if he knowingly keeps, for example, a savage Alsation as if he keeps a tiger. As far as the

[1] Lady Aukland v. Dowie 1965 SLT 76 and see para. 2.18.

[2] LC, Report (1967) para. 14; cf. para. 20.

> potential plaintiff is concerned, an animal belonging to an ordinarily harmless species, which is known to its keeper to be dangerous is in the nature of a trap ... which would seem to justify the same strictness of liability as applies to an obviously dangerous animal."[1]

In other jurisdictions in which the issue has been considered this approach has been generally rejected.[2] In particular it has been rejected by the Law Reform Committee for Scotland.[3] However, a distinction between dangerous and non-dangerous wild animals has been established in connection with the licensing system set up under the Dangerous Wild Animals Act 1976 (c.38), although the distinction is effected by specifically scheduling the dangerous species. Under that Act it is an offence, subject to certain exceptions, to keep dangerous wild animals without a licence granted by a local authority.[4]

Arguments against retaining a scienter principle

5.32 The reasons which are generally given for rejecting a scienter principle are broadly of two sorts. First, there are the arguments in favour of having, so far as possible, a single principle of liability. Secondly, there are the arguments directed against the anomalies of the scienter principle in its present form and the difficulties of clarifying and restating it adequately. The Law Commission's view, that such anomalies and difficulties did not justify abandoning what was essentially a sound principle, may be tenable,[5] but given the almost unanimous rejection of the principle elsewhere, where it has been examined, it is far from obvious that it can be easily restated in a form which would prevent the recurrence of the existing problems.

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[1] LC, Report (1967) paras. 16, 17 and see Animals Act 1971 (c.22), s.2.

[2] See LRC (SA), Report (1969) paras. 1,2; LRC (NSW), Report (1970) paras. 7-14 and Animals Act 1977 (Act No. 25, 1977); TGLRC (NZ), Report (1975) pp. 3-18; LRC (I), Working Paper (1977) paras. 145-148.

[3] LRC (S), Report (1963) para. 11.

[4] s.1(1). The Act applies to England and Wales as well as Scotland.

[5] See LC Report (1967) para. 14.

Criticisms of the scienter principle

5.33 The main criticism of the scienter principle is that the division of animals into animals ferae naturae and animals mansuetae naturae, which is essential to its operation, is not found in nature.[1] As regards the risk of bodily injury, different species present different degrees of danger to mankind. Within species the danger presented is not constant but varies according to age, sex, time of the year and many other matters. Sub-species may differ within species, as may individual animals within the same species or sub-species. Moreover, different species of animals may represent completely different kinds of risk. If it is accepted that a particular species should be singled out because it represents a special risk of bodily injury, it may be arbitrary not to do likewise where a species represents a special risk, say, to other animals or to other kinds of property.[2] This principle is already recognised in the special treatment of livestock and dogs under the present law. Similar criticisms apply in the case of animals which the law normally classifies as harmless, although capable of harmful behaviour. The present requirement that liability for such animals should be referable to the manifestation of harmful propensities verges on anthropomorphism, at least to the extent that propensities are thought of as intentional[3] or abnormal.[4] Such notions of intentionality and normality may express sound intuitions based on the general experience of mankind with animals, and may indeed, for all we know, rest on a tenable view of intrinsic animal nature, but they hardly seem reliable measures of the degree of responsibility to be expected of human agents. Apart from these quite general criticisms, there are, as we noted earlier, the many particular difficulties concerning separation of ownership and possession (or custody),[5]

[1] Cf. LRC (NSW), Report (1970) paras. 9, 10; LRC (I), Working Paper (1977) para. 129. See paras. 3.6-3.8.

[2] Cf. LRC (NSW), Report (1970) para. 10; LRC (I), Working Paper (1977) para. 129. The present position is not clear - see para. 3.8.

[3] See paras. 3.13, 3.14.

[4] See paras. 3.15-3.17.

[5] Paras. 3.18, 3.19.

acquisition of knowledge,[1] the possible requirement of escape,[2] causation and the application of a remoteness test[3] and the availability and effects of certain defences (notably intervention of a third party, trespass and reversion to the wild state).[4]

Dangerous species

5.34 The first requirement of a viable distinction between species for the purpose of liability in scienter is to identify those characteristics by virtue of which species are to be classified as dangerous. The criteria adopted in England and Wales in the Animals Act 1971 (c.32),[5] following the recommendations of the Law Commission,[6] are:

(a) that the species[7] is not commonly domesticated in the British Islands; and

(b) that the fully grown animals of the species normally have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be severe.

This test in conjunction with the statutory definition of damage[8] is apt to include animals which may represent a danger to property only, provided they have a keeper, that is, a person who owns or, in some undefined sense, possesses them.[9] Domestication as a criterion has been criticised on the ground

[1] Paras. 3.10, 3.11.

[2] Para. 3.20.

[3] Para. 3.21.

[4] Paras. 3.22, 3.24, 3.25.

[5] s.6(2).

[6] LC Report (1967) paras. 16, 25(ii); draft Bill (Appendix A) clause 6(2). See discussion in North (1972) at pp 34-43.

[7] North (1972) at pp. 36-38 draws attention to the ambiguity created by defining species to include sub-species and variety (s.11).

[8] s.11: "damage" includes the death of, or injury to, any person (including any disease and any impairment of physical or mental condition).

[9] Animals Act 1971 (c.22) ss. 2(1), 6(3). See North (1972) at pp. 42-43.

that it seems to ignore the fact that domesticated animals account for far more damage than wild animals, which are generally confined.[1] The open-endedness of the criterion referring to characteristics has also been criticised as failing to ensure the necessary clarity.[2] The whole approach adopted in England and Wales depends on the assumption that domesticated animals are readily identifiable. This is plausible, although the reference to dangerous species as species not commonly domesticated in this country is potentially problematic.[3] An alternative approach might be to adopt the method of the Dangerous Wild Animals Act 1976 (c.38). In that Act, species of dangerous wild animals are specified exhaustively by listing them in a Schedule which may be subsequently amended by subordinate legislation.[4] This would meet the criticisms referred to in that domesticated species might be listed along with non-domesticated species, and species included at any given time would be quite clear. It would also allow of animals being listed because they presented a special risk to property only, although it might be an objection that the resulting list would be of a very miscellaneous character.

Harmful characteristics of non-dangerous animals

5.35 It is a much more difficult problem to define the harmful characteristics of a non-dangerous animal which, if known to its keeper, might render him liable in case the animal causes harm. The definition adopted in England and Wales in the Animals Act 1971 (c.22) has three elements all of which

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[1] D L Carey Miller (1973) at pp. 66-67. The keeping of wild animals is also subject to control under licensing provisions - see Dangerous Wild Animals Act 1976 (c.38), Zoo Licensing Act 1981 (c.37) (not yet in force).

[2] D L Carey Miller (1973) at p 66. See discussion in North (1972) at pp 39-42.

[3] See North (1972) at pp 38-39.

[4] Dangerous Wild Animals Act 1976 (c.38) ss 7(4), 8, Schedule and the Dangerous Wild Animals Act 1976 (Modification) Order 1981 (SI 1981/1173).

must be satisfied.[1] First, the damage must be of a kind which the animal, unless restrained, is likely to cause or which, if caused, is likely to be severe. Secondly, damage, or the likelihood of its being severe, must be due to characteristics not normally found in animals of the species (which includes sub-species or variety), or not normally so found except at particular times or in particular circumstances. Thirdly, those characteristics must have been known to the keeper, to the keeper's servant or to another keeper in the keeper's household under the age of 16.[2] The really problematic element is the second. It is fairly clear from the preceding recommendations of the Law Commission[3] that this was primarily intended to resolve the difficulties of the pre-1971 law arising from the concept of behaviour contra naturam (contrary to nature).[4] But the statutory formula has already been the subject of judicial criticism in this respect - Cummings v. Granger[5]. In that case the court had to consider circumstances in which an Alsation guard-dog, running loose in the premises which it was guarding, bit someone entering the premises. With considerable difficulty they held that the dog's characteristics were such as were not normally found in dogs of the species except in the particular circumstances of running loose in premises which they regarded as their territory. The veterinary evidence presented shows clearly just why the court had such difficulty:

> "The Alsation is a dog which is very insecure, very nervous type of animal. This dog has had no formal discipline or training at all. The plaintiff has already said that she was frightened of the dog. The dog would be perfectly well aware of this, instantly ... If a dog feels threatened, and this dog has a job to do, which is to guard its territory, if it feels threatened, it wants to defend that territory; if it then smells fear, this is the next reaction and it is a very very common one ... many house dogs will not accept strangers, and this sort of behaviour where you bend down straight out of the

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[1] ss. 2(2), 11. See discussion in North (1972) at pp. 48-68.

[2] Where a keeper is under the age of 16, the head of the household of which he is a member is deemed to be a keeper (s.6(3)).

[3] LC, Report (1967) paras. 6, 18.

[4] See paras. 3.15-3.17.

[5] [1977] 1 All ER 104. See also Wallace v. Newton [1982] 1 WLR 375.

blue, you are likely to get attacked by many dogs, Alsations and many other sorts of dogs."[1]

So despite the Law Commission's concern to avoid inquiry into the states of mind of animals[2] the judges in Cummings v. Granger[3] were compelled to consider specialist evidence in highly anthropomorphic terms and to make fine distinctions as regards territorial behaviour which, on the basis of the evidence presented to them, was widespread among dogs of all species and could conceivably be manifest in many different kinds of circumstances. It seems to us that any attempt to define a variable norm of animal behaviour cannot avoid these problems.

Objective definition of harmful characteristics

5.36 It may be that dangerous characteristics can be defined in terms of causing injury or damage[4] or in terms of attacking, chasing or harassing persons or animals.[5] The requisite knowledge of the keeper would then be defined as knowledge of previous behaviour which could be brought under the same description. It would be irrelevant to consider the behaviour of the individual animal in relation to the species to which it belonged or in relation to forms of behaviour normally exhibited by the species at particular times or in particular circumstances. However, this is to depart from the original intuitive notion that strict liability in the case of a "non-dangerous" animal is to be justified on the basis that the owner or possessor of the animal had good reason to anticipate the harm which it has caused, whereas the person who has suffered the harm had not. It seems difficult, therefore, to justify such a move except by arguments which would serve equally well to justify adopting a more comprehensive principle of strict liability without the complications of taking account of the keeper's state of knowledge. Accordingly, while

[1] Cummings v. Granger [1977] 1 All ER 104 at p. 107.

[2] See LC Report (1967) para. 18(i).

[3] Above.

[4] Cf. para. 3.13.

[5] Cf. paras. 5.16-5.17.

we consider that the existing principle of strict liability arising from failure to restrain or confine an animal with known dangerous propensities should be abolished, we nevertheless invite consultees' views on these issues:

Propositions

24. Should there be strict liability in scienter for harm caused by animals?

25. If so, should the existing classification of animals as ferae naturae or mansuetae naturae be reformulated and, if so, how?

We leave open at this stage the issue of whether a principle of liability based on personal fault would be sufficient in the circumstances of abolition, with or without specified exceptions (which might, of course, include specified species of "dangerous" animals), or whether a more comprehensive principle of strict liability should be introduced, or even a principle of presumed liability[1]. We shall return to this in heads F and G of this Part. Here, however, it is necessary to consider the other criticisms of the scienter principle, which we mentioned,[2] and to identify those further issues which must be resolved if, contrary to our expressed view, a scienter principle were considered desirable.

Defining the keeper

5.37 Under the present law liability primarily attaches to the owner of an animal, and we have drawn attention to the problems which arise when the animal is in the possession or custody of someone other than its owner. The solution adopted to such problems in England and Wales in the Animals Act 1971 (c.22) is to impose liability on the keeper of an animal so defined that either the owner or possessor might be a keeper who is liable:

"6(3) Subject to subsection (4) of this section, a person is a keeper of an animal if -

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[1] See para. 5.3.

[2] Para. 5.33.

(a) he owns the animal or has it in his possession; or

(b) he is the head of a household of which a member under the age of 16 owns the animal or has it in possession;

and if at any time an animal ceases to be owned by or to be in the possession of a person, any person who immediately before that time was a keeper thereof by virtue of the preceding provisions of this subsection continues to be a keeper of the animal until another person becomes a keeper thereof by virtue of those provisions.

(4) Where an animal is taken into and kept in possession for the purpose of preventing it from causing damage or of restoring it to its owner, a person is not a keeper of it by virtue only of that possession."[1]

That is, liability is joint and several. As we pointed out previously, there seems to be no reason why this should be excluded in principle[2], although, as regards the owner, it might be equitable to allow him a defence where he has transferred possession of the animal to another in the reasonable belief that he was a fit and proper person to be in charge of it.[3] But imposing liability on the possessor, jointly and severally with the owner, or alone, immediately raises the problem of whether there should be some restriction on the nature of the possession which is to be regarded as sufficient for liability, given, of course that the possessor has the requisite knowledge.[4] The solution of the Animals Act 1971 (c.22) in England and Wales is not altogether clear. Possession is not defined. So, presumably, any legally recognised category of possession might give rise to liability.[5] Under the present law in Scotland there are restrictions placed on

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[1] See North (1972) at pp. 23-34.

[2] Para. 3.18.

[3] Cf. para. 5.19.

[4] See para. 3.19.

[5] But North (1972) at pp. 23-25 makes and develops the point that the statutory liability is the same as that previously at common law, so that the earlier decisions of the courts will continue to be relevant to any consideration of who is keeper under the Act.

the nature of the possession which will found liability, although these are not well defined.[1] Essentially, these problems are the problems which we discussed in relation to the Dogs Acts 1906 (c.32) to 1928 (c.21)[2]. And, indeed, the dog is probably one of the most common examples of an animal which is classified as mansuetae naturae but is occasionally known to be harmful. So the arguments for and against admitting joint and several liability in this context are similar, and the qualifications of possession previously suggested in relation to dogs are the qualifications which might be appropriate here.[3] Accordingly, we invite consultees' views on the following issues:

Propositions

26. If there were liability in scienter for harm caused by an animal, should it be imposed -

(a) on the owner of the animal; or

(b) where the animal is not in its owner's possession (or custody) but in the possession (or custody) of another, on the possessor (or custodier); or

(c) where the owner or possessor (or custodier) of the animal is under the age of 16, on the head of the household of which the owner or possessor (or custodier) is a member; or

(d) on all or any of these jointly and severally?

27. If liability were imposed on a possessor (or custodier), including joint and several liability with another:

(a) Should it be a prerequisite for liability -

(i) that the possessor (or custodier) had such knowledge of the animal as would render him liable if he were owner;

(ii) that the possessor (or custodier) had possession (or custody) otherwise than

[1] See paras. 3.18, 3.19.

[2] See paras. 5.18-5.19 and Propositions 13-15. The problem of someone under the age of 16 owning or possessing a dangerous or harmful animal also arises.

[3] These qualifications largely coincide with the tests proposed in Cowan v. Dalziels (1877) 5R 241.

merely on a temporary basis or for the benefit of the owner?

(b) Assuming a possessor (or custodier) under the age of 16 might be liable jointly and severally with the head of his household, should the same principles apply to such a possessor (or custodier)?

(c) What should happen in such a case if a possessor (or custodier) over the age of 16 takes possession (or custody) from an owner or possessor (or custodier) under the age of 16?

(d) Should there be any other prerequisite conditions for liability?

28. So far as the owner of an animal might be liable in scienter for the harm which it causes while in another's possession (or custody), should it be a defence for the owner to show that he transferred possession (or custody) of the animal to the possessor (or custodier) in the reasonable belief that he was a fit and proper person to be in charge of the animal? If so, should such a defence be available irrespective of whether or not the possessor (or custodier) might be liable? Should the defence be specifically excluded in the case where the possessor (or custodier) is a member of the owner's household under the age of 16?

Acquisition of knowledge

5.38 There are several areas of uncertainty in the present law concerning the acquisition of knowledge of the harmful propensities of animals mansuetae naturae. First, there are the problems of indirect knowledge. It is not entirely clear when the direct or indirect knowledge which another may have of an animal will be attributed by law to the owner of the animal.[1] Secondly, it is not clear whether ignorance excludes liability in circumstances in which the necessary information about his animal's past behaviour would in fact have been

[1] See para. 3.10.

available to its owner had he made inquiry.[1] Thirdly, it is not clear to what extent the law might ascribe a presumed general knowledge of the common dangers of otherwise non-dangerous species to an owner.[2] However, the last two of these problems can properly be solved by the ordinary rules of negligence, and we only mention them at this point to set them aside, as we think they should be, when considering what would be required if a scienter principle were to be retained. As regards attributing one person's knowledge to another, such an attribution, whether of direct or indirect knowledge, might be made a presumption of law in certain circumstances, for example in case of attributing the knowledge of one member of a household to another member; or it might in every case simply be left to the court to determine the matter as one of fact. Under the present law it is probably always a matter of fact to be determined on evidence, whether one person's knowledge is available to another.[3] On that view it would not be necessary in any restatement of the scienter principle to provide specifically for the various circumstances in which such an attribution of knowledge might be made. However, if a form of vicarious liability were introduced in respect of an owner or possessor under the age of 16[4] then specific provision for attribution of the owner's or possessor's knowledge to the head of the household would probably be required.[5] Similarly, it might also be appropriate to make particular provision in the case of employee and employer.[6] But apart from these particular cases it would probably be better to leave the courts to determine over time circumstances in which attribution of one person's knowledge to another might be appropriate.[7] Accordingly:

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[1] See para. 3.11.

[2] See para. 3.11.

[3] McIntyre v. Carmichael (1870) 8M 570; Flockhart v. Ferrier (1958) 74 Sh.Ct. Rep. 175 although, in the latter case, it is proposed that knowledge of one member of a family should be attributed to another as a matter of equity.

[4] See para. 5.37.

[5] Cf. Animals Act 1971 (c.22) s.2(2)(c).

[6] Cf. Animals Act 1971 (c.22) s.2(2)(c).

[7] See D L Carey Miller (1973) at p.72.

Proposition

29. If there were liability in scienter, we would propose:

(a) if the head of a household were to be held liable for harm caused by an animal owned or in the possession (or custody) of another member of the household under the age of 16, that knowledge of the animal's propensities acquired directly or indirectly by the owner or possessor (or custodier) of the animal should be attributed by law to the head of the household;

(b) that knowledge of an animal's propensities acquired directly by an employee should be attributed by law to his employer; and

(c) that, apart from these cases, it should be a matter of fact to be determined by the court whether one person's knowledge of the propensities of an animal should be attributed to another.

Escape

5.39 The present law is not entirely clear whether some escape of the animal or failure of control is a prerequisite for liability in scienter.[1] We see no reason why, if a scienter principle were retained, there should be such a requirement. The essence of strict liability in scienter is that the obligation of the keeper with knowledge that his animal is dangerous is either not to keep the animal at all, or to see to it that the conditions under which it is kept preclude the possibility of it causing harm. Accordingly:

Proposition

30. If there were liability in scienter, we would propose that it should not be a prerequisite for liability that an animal escape from control.

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[1]Para. 3.20.

Causation

5.40 In England and Wales, under the Animals Act 1971 (c.22), liability in scienter is imposed in respect of damage "caused by an animal".[1] There is no definition of what it is for an animal to cause damage. This has been criticised.[2] The relevant head-note to section 2 of the Act refers to "damage done by dangerous animals". This, although not conclusive, may suggest that causation is to be restricted so that damages can only be recovered for harm which results directly from some "act" attributable to the animal[3]. This is a problem which we recognised explicitly in formulating the corresponding issue arising in relation to the Dogs Acts 1906 (c.32) to 1928 (c.21).[4] An alternative approach to the problem is to consider whether a remoteness test should be applied in the case of liability in scienter as in the case of liability based on negligence.[5] Under the present law there is apparently no such restriction[6], although if harmful propensities of a very general character are admitted, for example a tendency to run away as alleged of the cow in Cameron's case[7], then the problem of causation is acute. Accordingly, we invite consultees' views on the following issues:

Proposition

31. If there were liability in scienter, should liability be restricted to harm which is caused directly by some "act" attributable to the animal? Alternatively, should the extent of liability in scienter rest on the

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[1] s.2.

[2] D L Carey Miller (1973) at pp. 72-73.

[3] Cf. para. 5.16.

[4] Proposition 12 at para. 5.17. Cf. Propositions 3 and 4 at para. 5.11 where similar issues arise in relation to straying livestock.

[5] See para. 4.6.

[6] See para. 3.21. This depends on an interpretation of Cameron v. Hamilton's Auction Marts Limited 1955 SLT (Sh. Ct.) 74 which has been severely criticised - see para. 4.6.

[7] Cameron v. Hamilton's Auction Marts Limited, above.

same principles of remoteness as apply in the case of liability based on negligence; or should some other criterion apply for determining the extent of liability and, if so, what?

Defences

5.41 We earlier drew attention to a number of problems concerned with the defences to strict liability in scienter[1]. In England and Wales, under the Animals Act 1971 (c.22), the defences of voluntary assumption of risk and contributory negligence are available.[2] The Law Commission in their preceding Report were of the view that the defence of unavoidable accident was an unnecessary complication.[3] They were also against admitting the defence of intervention of a third party on the ground that it was in accordance with the rationale of strict liability in scienter to treat such an act as one of the circumstances against which the person creating the risk should take precautions. In our view, however, it would be a retrograde step, if there were this form of strict liability, to remove existing defences,[4] although some clarification of the defence of intervention of a third party might be required. In England and Wales, under the Animals Act 1971 (c.22) there is also a qualified defence of trespass available:

> "5(3) A person is not liable under section 2 of this Act for any damage caused by an animal kept on any premises or structure to a person trespassing there, if it is proved either -
>
> (a) that the animal was not kept there for the protection of persons or property; or
>
> (b) (if the animal was kept there for the protection of persons or property) that keeping it there for that purpose was not unreasonable."

We discussed the problems of such a defence in some detail in relation to the Dogs Acts 1906 (c.32) to 1982 (c.21),[5]

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[1] See paras. 3.22-3.25.

[2] ss. 5(1), (2), 10, 11. See North (1972) at pp. 71-76, 83-89.

[3] Para. 24 (referring to "Act of God").

[4] See para. 3.22.

[5] See paras. 5.21, 5.22.

and considered in particular whether further qualification of the defence might be required in light of the Guard Dogs Act 1975 (c.50).[1] The same issues must be considered here. The defence of reversion to the wild state, which, of course, would apply only in respect of animals classified as wild animals for the purposes of the law of property, was also considered by the Law Commission.[2] The Animals Act 1971 (c.22), following their recommendations, excludes the defence. Once an animal has a keeper that keeper remains its keeper until another person becomes its keeper under the Act.[3] This would seem to be acceptable. If the defence were to be available a test of resumption of habitat would probably be appropriate. The significance of such a test would be that the defence would not be available in the case of exotic animals for which no British habitat could be regarded as normal, even although particular animals might be capable of adaptation.[4] Accordingly, we invite consultees' views on the following issues:

Proposition

32. (a) Should all or any of the following defences be available:

(i) unavoidable accident;

(ii) intervention of a third party;

(iii) voluntary assumption of risk;

(iv) contributory negligence;

(v) trespass;

(vi) reversion to the wild state?

(b) If the defence of intervention of a third party should be available, should this be restricted? If so, should it be restricted to such acts as are provocative or malicious or not reasonably foreseeable or which no practicable precautions would prevent, or be restricted in some other way?

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[1] It should be borne in mind that the Act does not apply where the dog is kept on agricultural land or in, or within the curtilage of, a dwelling-house (s.7).

[2] See paras. 3.18, 3.25; LC, Report (1967) paras. 76, 77.

[3] s.6(3) (quoted at para. 5.37).

[4] See para. 3.25.

(c) If the defence of trespass should be available, should it be qualified in any way? In particular, should it be a condition of such a defence that the animal is not kept to protect persons or property, or is kept secured or under the control of a competent handler, or that adequate warning notices are posted, or should any other conditions apply?

(d) If the defence of reversion to the wild state should be available, should the test of reversion be that the animal has resumed its natural habitat or should some other test be applied?

(e) Should any other defence be available?

F. The general rules

Introduction

5.42 In Part IV we described the present rules under which there may be liability in relation to animals for negligence, nuisance, the escape of dangerous agencies from land and intentional harm. The existence of these general rules is important for any consideration of the possible future role of the special rules for animals, and we shall return to this issue in head G of this Part. Here, however, we wish to discuss briefly two connected issues in negligence.

Animals straying on to a public road

5.43 A problem which has been of particular concern in a number of jurisdictions is that of animals, usually livestock, straying on to public roads which carry fast-moving traffic.[1] We have already mentioned this when discussing the possible

[1] In some jurisdictions the problem has been the exclusive subject of Reports - see SLRC(V), Report (1978); LRC(T), Report (1980); LRC(WA), Report (1981). In other jurisdictions it has received special consideration among other problems of civil liability for animals - see LC, Report (1967) paras. 29-59; LRC(SA), Report (1969) para. 3; LRC(NSW), Report (1970) paras. 17-22; TGLRC(NZ), Report (1975) pp 46-52; LRC(Q), Working Paper (1977) pp 2-6; LRC(I), Working Paper (1977) paras. 102-120.

extension of strict liability for livestock[1] and dogs[2]. The reason for this concern, apart from a natural desire to guard against the potentially serious consequences of such straying, is the widespread effects in the English common law jurisdictions of the rule enunciated in the English case of Searle v. Wallbank.[3] According to that rule, as it applied in England and Wales pre-1971, the owners and occupiers of land adjoining the highway were under no duty of care to prevent their animals straying on the highway.[4] The rule was criticised by the Law Commission[5] and abolished in England and Wales by the Animals Act 1971 (c.22).[6]

The position in Scotland

5.44 When the Law Reform Committee for Scotland examined the problem they concluded, although with no great confidence, that the English rule did not apply in Scotland.[7] Since then the case of Gardiner v. Miller[8] has consolidated the trend in the earlier case-law[9] towards founding liability on negligence where loss is suffered as a consequence of animals straying on to a road. But two problems remain. First, the Inner House case of Fraser v. Pate[10], which is cited as contrary authority, still stands. It may be that this decision can now be re-interpreted, as has been suggested, as authority only for the proposition that the owner of lands adjacent to a public highway owes in general no duty to the user of the highway to fence his land so as to prevent animals straying therefrom;[11]

[1] Para. 5.9.

[2] Paras. 5.16, 5.17.

[3] 1947 AC 341.

[4] The rule may have extended beyond rural areas and to animals other than livestock - see LC, Report (1967) para. 30.

[5] LC, Report (1967) paras. 31-40. The rule has also been criticised in all the other jurisdictions in which it was examined.

[6] s.8. See North (1972) at pp. 149-165.

[7] LRC(S), Report (1963) para. 8.

[8] 1967 SLT 29.

[9] Sinclair v. Muir 1933 SN 42, 62; Colquhoun v. Hannah, Court of Session, 28 January 1943, (unreported); Wark v. Steel 1946 SLT (Sh. Ct.) 17; Tierney v. Ritchie (1960) 76 Sh. Ct. Rep. 57. Cf. para. 4.8.

[10] 1923 SC 748.

[11] Gardiner v. Miller 1967 SLT 29 per Lord Thomson at p. 32.

or, more particularly, as authority for the proposition that:

> "... since negligence *per se* is not a ground of liability, there can be no duty towards any person using the highway unless the damage caused is a natural and probable consequence of the presence of the domestic animal on the highway, which the owner was reasonably bound to anticipate."[1]

But the matter is not entirely beyond doubt. The second problem is that the case-law offers very little guidance to land-occupiers concerned to be clear about their duties under the law, although it has been said:

> "There cannot be an absolute duty to fence or to keep gates shut so that domestic animals will not stray. Nor, in my view, can it be said that there is never a duty in any circumstances. In the great unfenced areas in the Highlands the motorist or cyclist must take the roads as he finds them. In country which is normally fenced the motorist is familiar with the notice 'Motorists beware of sheep' exhibited at points where the fenced pasturage gives place to unenclosed lands. Such notices are conceived in the interests of both the motorist and the owner of the sheep. Where the pasture is normally enclosed by walls or fences the domestic animals do not normally escape on to a public highway. But sometimes they do, and this is a matter of common knowledge. If in such a locality a horse is allowed through an act of carelessness to escape on to the highway the question of whether there is a duty depends on the circumstances .... In my opinion, then, the owner or occupier of a field adjoining a highway is bound to take reasonable care that his horses or other animals do not cause damage. It would not be reasonable to expect him to put up fences in areas where lands are not normally fenced. Nor in a fenced countryside could he be responsible if some unauthorised person opened his gate or if a horse escaped through a gap the existence of which he could not reasonably be expected to have known. He could not be liable because he would not be negligent. But if he opens the gate himself, or otherwise negligently allows his horse to escape on to the road, then he may be in breach of a duty if he has put it in a position in which having regard to all the circumstances it is likely to cause damage to persons lawfully using the highway."[2]

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[1] *Wark* v. *Steel* 1946 SLT (Sh. Ct.) 17 at p. 21.

[2] *Wark* v. *Steel*, above at p. 22 - quoted in part and approved in *Gardiner* v. *Miller* 1967 SLT 29 *per* Lord Thomson at p. 33.

The appropriateness of the rules of negligence

5.45 In most jurisdictions where the problem has been examined it has been considered appropriate that the rules of negligence should apply.[1] This was also the view of the Law Reform Committee for Scotland.[2] Only in Ireland has a clear preference for strict liability been stated.[3] But many Law Reform bodies advocating negligence-based liability have been acutely aware of the problem of uncertainty. This problem, of course, is not uncommon elsewhere, where the rules of negligence apply, and it may simply have to be accepted as the necessary condition of the flexibility of the rules which is their attraction. However, there have been two quite significant attempts to resolve the problem.

Statutory criteria for negligence

5.46 The first suggestion is that statutory criteria for negligence should be stated. This was initially recommended by the Law Commission in England and Wales though not adopted in the Animals Act 1971 (c.32).[4] The essence of this approach is that the courts should be required to have regard to specified criteria, although not exclusively to these criteria. The argument is that guidance is thereby provided in advance to keepers of animals as to the standard of care expected of them. Such an approach has been adopted in other areas of the law, for example in the Unfair Contract Terms Act 1977 (c. 50), but probably remains controversial.[5] While we ourselves do not favour this approach the criteria which have been suggested do indeed represent factors which we would expect the courts to take into account when determining negligence[6]:

(a) the general nature of the locality;

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[1] See para. 5.9.

[2] LRC(S), Report (1963) paras. 11, 12.

[3] LRC(I), Working Paper (1977) paras. 123-126, 148.

[4] LC, Report (1967) para. 57. For a similar suggestion see LRC(WA), Report (1981) paras. 6.13-6.15.

[5] See LRC(NSW), Report (1970) para. 22; LRC(T), Report (1980) at pp. 25-26.

[6] LRC(WA), Report (1981) para. 6.14; cf. LRC(S), Report (1963) para. 12, LC, Report (1967) para. 57.

(b) the nature and amount of traffic using the highway;

(c) common practice in the locality in relation to fencing and the erection of other barriers or devices to keep animals off the highway;

(d) the cost of fencing or taking other measures to prevent animals straying on to the highway or to warn users of the highway of their likely presence;

(e) the extent to which users of the highway would expect to encounter animals on the particular highway and could be expected to guard against the risk associated with their presence.

Presumed liability

5.47 The second suggestion which has been made is that the fact of straying should be treated as prima facie evidence of negligence so that the keeper of the straying animals can only escape liability by proving that the loss is not attributable to negligence on his part.[1] This is an uncompromising application of the principle of res ipsa loquitur[2], almost amounting to establishing a form of presumed liability intermediate between strict liability proper and liability based on negligence.[3] The argument advanced to justify this approach is that, in the ordinary case, the facts and circumstances of straying are more likely to be within the knowledge of the keeper of the straying animals than of the road-user who consequently runs the risk of being unable to have the merits of his claim adjudicated. However, as has been pointed out, this difficulty is not unique to claims brought in respect of straying animals; nor does shifting the burden of proof reduce the problems of interpreting reasonable care.[4] In the absence of special justification we see no intrinsic merit in arguing

[1] See LRC(SA), Report (1969) paras. 3, 7; TGLRC(NZ), Report (1975) pp. 46-52.

[2] Cf. para. 4.15.

[3] See para. 5.3.

[4] See LRC(T), Report (1980) pp. 30-31; LRC(WA), Report (1981) paras. 5.10-5.13.

that the rules of negligence are appropriate, but changing the usual requirement that a claimant prove his case.[1] For a claimant would not be excluded from invoking the principle of res ipsa loquitur if the usual requirements were satisfied.

General negligence-based liability for animals

5.48 The particular proposals to introduce statutory criteria for negligence or presumed liability, which we have discussed in relation to the problem of animals straying on a public road, have been generalised to all negligence-based liability for animals and appropriate factors have been suggested which the courts should be required to take into account when determining negligence[2]:

(a) the absence of any effective warning which might reasonably be brought to the notice of any person likely to be affected by the animal;

(b) the extent of the security used in relation to the animal;

(c) the fact that one or more animals of the same species were kept at the same time;

(d) whether the person concerned was a trespasser on the property where the animal was kept.

While these factors are plausible[3], we do not see the need to specify them. With regard to presumed liability, considered as a means of imposing a higher standard of care,[4] this may be appropriate in at least some cases; for example, for injury or damage caused by dogs, or by clearly identified species of

[1] Other solutions have been proposed which we shall take up briefly in Part VI.

[2] LRC(SA) Report (1969) paras. 1, 3, 7. Cf. the treatment of trespassing animals in LRC(NSW), Report (1970) and the Animals Act 1977 (Act No. 25, 1977) s.10. For a comprehensive form of presumed liability see Article 56 of the Swiss Code of Obligations - see para. 5.3.

[3] Cf. LRC(S), Report (1963) para. 11.

[4] See para. 5.3.

dangerous wild animals,[1] or even by livestock in certain circumstances. Whether it is appropriate should be determined not by looking to the problems of proof, but by considering, in each case, the arguments for and against requiring an enhanced standard of care short of the standard implied by strict liability. Notwithstanding these considerations, our tentative view is that the present rules should not be modified so far as negligence is considered the appropriate ground of liability for animals.[2]

Issues arising

5.49 The views which we have expressed in the course of discussing the issues raised in the preceding paragraphs are provisional at this stage, and, accordingly, we would invite consultees' views on these issues:

Propositions

33. Should liability for loss, injury or damage caused by the presence of livestock, or other animals, on a public road or in a public place be founded on negligence?

34. So far as liability for harm caused by animals may be founded on negligence, should statutory criteria for negligence be specified in any case?

35. (a) Should evidence of harm caused by animals be prima facie evidence of negligence in any or every case, implying liability unless the keeper proves that the harm was not attributable to negligence on his part?

(b) In particular, should evidence of the presence of livestock or other animals on a road and of consequent loss, injury or damage be prima facie evidence of negligence implying liability unless the keeper of the animals proves that the loss, injury or damage was not attributable to negligence on his part?

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[1] See para. 5.34.

[2] Whether or how far negligence is an appropriate ground of liability is an important issue which we shall take up again in head G of this Part.

If a form of presumed liability were considered appropriate, generally, some of the preceding propositions[1] should be reconsidered in that context, namely, Propositions 7, 8 and 18-21 (also 9 and 22 indirectly). More particularly, so far as such a form of liability might be considered appropriate in the cases specifically mentioned, that is for dogs, livestock or clearly identified species of dangerous wild animals, other propositions may also have to be reconsidered in the new context and commented on as appropriate. These are Propositions 2, 3, 5, 6, 11-17, 25, 26, 27(a)(ii)-(d), 28 and 32 (and again 9 and 22 indirectly).

G. Simplifying the bases of liability

Introduction

5.50 Up to this point we have been concerned mainly with the issues arising in relation to one or other of the sets of rules which we originally identified as applying to liability for animals.[2] We now take up some of the broader issues which we anticipated in head A of this Part. How far can, or should, the rules of liability for animals be re-integrated with the ordinary rules of civil liability? Alternatively, is there a case for resting liability for animals on a single principle of liability, and, if so, on which?[3] Or, if no single principle is sufficient in itself, is there some minimum number of principles which may suffice, with or without limited exceptions, and, if so, which principles; and what exceptions, if any, should there be?

Nuisance and intentional harm

5.51 The principle of liability on which the remedy for nuisance rests is a principle of strict liability, while that on which the remedy for intentional harm rests is a principle of liability based on personal fault, that is on culpa in its

[1] Appendix I provides a convenient reference to the paragraphs in which particular propositions are stated.

[2] Paras. 1.2, 1.3.

[3] See paras. 5.2, 5.3.

wider sense. For at least restricted ranges of problems analyses in terms of nuisance, or in terms of culpa, in the sense in which it comprehends intentional harm,[1] seem peculiarly appropriate if not indispensable. The latter range is very narrow in case of animals and ultimately perhaps not of any great importance.[2] Nuisance, on the other hand, is particularly relevant as a means of setting limits to the keeping of animals which generally in our society is a permitted activity; it also has a significant application in the case of controlling wild animals, notably game, which are not usually in any proper sense in human keeping.[3] If it is considered that these modes of analysis are irreducible, however narrow the range of their application, then from the outset the argument for a system resting on a single principle of liability may be weakened.

Strict liability

5.52 Earlier we discussed existing views of strict liability and its role generally in a system of civil liability conceived primarily as a means of allocating risk and redistributing loss.[4] As our examination of the present law has disclosed, much of it is in fact founded on principles of strict liability, and we have discussed, in particular, possible extensions of strict liability in connection with livestock[5] and dogs.[6] But a substantial element of strict liability would remain even if those extensions were not made and strict liability in scienter were abolished as we suggest.[7] The rationale of that remainder might be expressed as strict liability only for such harmful behaviour as might be expected of an animal at liberty to roam and given opportunity. That is, livestock can be expected to destroy crops and planting,

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[1] Sometimes distinguished as dolus. Cf. Owner of the "Islay" v. Patience (1892) 20R 224.

[2] See para. 4.24.

[3] See paras. 4.19-4.23.

[4] See paras. 5.5-5.6. See further paras. 6.2-6.6.

[5] Paras. 5.8-5.11.

[6] Paras. 5.16-5.17.

[7] See paras. 5.32-5.36.

and dogs to chase livestock. The same rationale might justify continued strict liability for specified wild animals which might be expected to harm persons or animals if at liberty, or which might represent a special risk to property. But this need not imply having a scienter principle with its problems of examining species case by case or comparing individuals with species, or interpreting variable norms of animal behaviour.[1] It is arguable that, given the present importance of strict liability, a shift to a simpler and more comprehensive principle of strict liability for animals would be justified and desirable, particularly if this were conjoined with an extension of compulsory liability insurance.[2]

Liability based on culpa or personal fault

5.53 But against the existing prevalence of strict liability for animals and the arguments for retaining or extending it we must set the pervasive nature of culpa or fault as a ground of civil liability generally. We have emphasized the flexibility of this principle.[3] In particular, we have illustrated its aptness for analysing problems which might otherwise be analysed in terms of scienter.[4] These considerations may well suggest that the rules of negligence are more appropriate in the ordinary case than principles of strict liability. However, there could be difficulties if the scienter rules, or indeed all the special forms of strict liability, were simply abolished in favour of the rules of negligence. For example, some problems might allow of analysis not only in terms of negligence but also in terms of nuisance or the principles of strict liability for the escape of dangerous agencies from land.[5] This might result in a reinstatement of strict liability under other principles, so undermining the intention to establish personal fault as the primary ground of liability. Again, the

[1] Cf. para. 5.34.

[2] See paras. 6.2-6.6.

[3] See para. 4.2.

[4] See para. 4.4.

[5] For example, the problem of obstructing the highway - see Bennet v. Bostock (1897) 13 Sh. Ct. Rep. 50 discussed at para. 4.19; for escaping animals see the Irish case of Noonan v. Hartnett 84 ILTR 41 discussed at para. 4.23.

very flexibility of the rules of negligence, might simply allow the courts to reintroduce, within the field of negligence, the distinctions which are now made in relation to the scienter rules.

Abolishing the scienter rules

5.54 We have already stated our view that the scienter rules should be abolished,[1] although possibly there could be a non-scienter form of strict liability for specified "dangerous" animals. But there seems to be no very conclusive reason for replacing these rules with the rules of negligence rather than with a simple principle of comprehensive strict liability for animals. The rules of negligence are of great generality and probably well known as they operate in other spheres of human activity. But they are so general that they often lead to some uncertainty in their application, and would inevitably do so, initially at least, if applied more extensively than at present in the case of animals.[2] Against that, the principle of strict liability is more easily stated and therefore understood by potential defenders and their insurers. But the behaviour of human agents in the many different situations where animals cause harm[3] is infinitely variable and a principle of strict liability would not allow distinctions to be made.

Issues arising

5.55 The issues which arise from the preceding discussion can be simply put:

Proposition

36. Apart from the law of nuisance on which we make no recommendations:

(a) Should liability for harm caused by animals rest exclusively on culpa or fault, in the sense of negligence or intentional harm; or, alternatively,

[1] See paras. 5.32-5.36.

[2] Unless perhaps statutory criteria for negligence were specified - see Proposition 34 at para. 5.49.

[3] See Part I.

(b) should liability be comprehensively strict; or

(c) if neither principle of liability is to apply exclusively, which should predominate and what exceptions should be provided for; or

(d) should there be some other general rule of liability, and, if so, what?[1]

In considering these issues it is essential to take into account preceding propositions[2] in which strict liability was canvassed in various forms.[3] It may be that the more extensive the role allocated to strict liability under these separate propositions, the more persuasive the argument becomes for introducing a simple principle of comprehensive strict liability. But if it is considered that strict liability in scienter should be replaced by a form of strict liability without reference to knowledge, say, for certain clearly identified species of dangerous wild animals, then some of the propositions expressed in relation to scienter should be reconsidered in the new context and commented on as appropriate.[4] These are Propositions 25, 26, 27(a)(ii)-(d), 28 and 32. Finally, certain preceding propositions should be reconsidered and commented on in the light of the forms of liability selected in terms of the above Proposition, namely Propositions 7, 8 and 18-21 (also 9 and 22 indirectly).

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[1] We have specifically canvassed a principle of presumed liability (a species of negligence-based liability) in Proposition 35 at para. 5.49.

[2] Appendix I provides a convenient reference to the paragraphs in which particular propositions are stated.

[3] Propositions 1, 3, 4, 10, 11 and 24.

[4] We assume that, so far as consultees may choose strict liability for livestock or dogs, they will have already dealt appropriately with the corresponding propositions under heads B and C of this Part.

Part VI: Wider issues

Introduction

6.1 In this Part we examine briefly a number of issues which go beyond our immediate concern with the detail of the rules of liability and take a final look at two of the more intractable problems. It is arguable that the effectiveness of the remedies provided by the civil liability system depends on the availability of insurance; in particular, that strict liability should be reinforced generally by a requirement of compulsory insurance.[1] There are also more profound criticisms of the civil liability system generally and considerable support for no-fault compensation which would displace wholly or partly the existing rules of liability.[2] Among the problems which we described in Part I two are peculiarly intractable, namely, the problem of livestock-worrying by dogs[3] and the problem of livestock straying,[4], or, more particularly, of livestock (or other animals) straying on the highway.[5] It is difficult to see how these problems can be satisfactorily resolved merely by clarifying and modifying the existing rules of liability. Schemes of compulsory insurance or no-fault compensation may offer better solutions.[6] Finally, more radical solutions to the problem of straying livestock linked to provisions for fencing have been proposed in other jurisdictions and we would like to look briefly at these, although, ultimately, the defects and obscurities of our existing law on fencing may preclude adopting such remedies.[7] These rather

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[1] Cf. RCCL, Report (1978), Volume One, paras. 323-324, p. 76.

[2] See RCCL, Report (1978), Volume One, paras. 246-263, pp. 61-65.

[3] See paras. 1.10, 5.23-5.28.

[4] See paras. 1.8, 5.8-5.15.

[5] See paras. 1.8, 1.16, 5.9, 5.12, 5.16, 5.43-5.47.

[6] In this connection it may be instructive to consider the case of diseases of animals where statutory schemes of compensation and control have all but displaced the civil liability system - Animal Health Act 1981 (c.22) (see para. 5.10).

[7] Cf. para. 5.12.

miscellaneous matters will be considered under the following headings:

A Insurance;

B No-fault compensation schemes;

C Fencing to prevent livestock straying.

A. Insurance

Liability insurance

6.2 Earlier we drew attention to the signifiance of liability insurance as an element in the view that the system of civil liability primarily operates to allocate risk and redis tribute loss.[1] This like other forms of insurance is an agreement whereby in consideration of a premium the insurer undertakes to indemnify the insured against specified loss. The insured loss is the loss incurred in consequence of certain types of legal liability, perhaps the most common example being third party liability insured under motor vehicle policies. While, in form, the purpose of insurance is to protect the insured, in fact liability insurance in many cases ceases to be merely a protective device for a small number of prudent persons and becomes part of a compulsory system designed to secure compensation to those suffering loss for which the insured is legally liable. Again, the example of compulsory third party liability insured under motor vehicle policies is apposite. Indeed, it has been said that the law of civil liability generally can be regarded as a means of inducing those who cause losses to others to procure insurance in their favour by compelling them to pay for the losses themselves if they fail to procure such insurance.[2] This view would reduce the law of civil liability to the level of a sanction for failing to insure, which is perhaps extreme, although it does provide a necessary corrective to the common view that liability insurance is merely ancillary to legal liability as a means of securing compensation.

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[1] Para. 5.6. See also para. 5.52.

[2] A view quoted in P S Atiyah (1970) at p. 252.

Compulsory liability insurance in respect of animals[1]

6.3 In some of the problem areas which we described in Part I compulsory insurance schemes operate in conjunction with licensing controls. So under the Riding Establishments Act 1964 (c.70)[2] the licence holder must have insurance both in respect of injury to persons hiring or using his horses and in respect of injuries which such persons may cause to others; under the Dangerous Wild Animals Act 1976 (c.38)[3] and the Zoo Licensing Act 1981 (c.37)[4] the licence holder must have insurance in respect of any damage caused by wild animals in his keeping;[5] and, of course, work-related injuries caused by animals would be covered in the usual way by employers' liability insurance.[6] Curiously, perhaps, the compulsory insurance provisions contained in the Road Traffic Act 1972 (c.20) do not apply to horse-drawn vehicles.[7]

Extension of compulsory insurance

6.4 Given these provisions, the question arises whether compulsory insurance might be extended in case of animals. Recently the Royal Commission on Civil Liability and Compensation for Personal Injury considered animals in particular as a source of injury.[8] However, they did not examine, at

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[1] Apart from compulsory insurance, we understand from discussions we have had with officials in the insurance industry that cover is readily available at reasonable cost against the various risks associated with livestock and other animals.

[2] s.1(4A)(d). See para. 1.13.

[3] s.1(6)(iv).

[4] s.5(3)(c) (not yet in force).

[5] See para. 1.18.

[6] Employers Liability (Compulsory Insurance) Act 1969 (c.57). See paras. 1.7, 4.8, 4.9. See also RCCL, Report (1978), Volume One, para. 1623, p. 338 (quoted at para. 6.8).

[7] ss. 143, 190(1). See paras. 1.11, 4.9.

[8] RCCL, Report (1978) Volume One, Chapter 30, pp. 334-339; Volume Two, Chapter 13, pp. 80-81.

length, questions of insurance in respect of animals, although they did recommend that the Dangerous Wild Animals Act 1976 (c.38) and the Riding Establishments Acts 1964 (c.70) and 1970 (c.32) should be amended either to specify practical limits to the third party insurance cover required, or to give the licensing authorities discretion to determine what is a satisfactory amount.[1] In particular, they did not examine the case for compulsory insurance. This omission is rather difficult to understand. For when they came to consider liability for exceptional risks[2], for which they recommended a scheme of strict liability to be implemented in primary and subordinate legislation, they said:

> "We considered whether the listed things and activities should be subject to compulsory third party insurance. Although we would not go so far as to say that compulsory insurance should be automatic in every case where strict liability was imposed, we would expect it to be found appropriate in most cases. One of the difficulties involved in imposing compulsory insurance is the practical one of supervising and enforcing it. Where, however, strict liability has been imposed in specific cases by statutory instrument, [as it would be according to the general scheme proposed] this difficulty should be less acute."[3]

This might suggest that a compulsory insurance requirement should be imposed in the case of animals to cover at least certain categories of risk for which strict liability is considered appropriate, or, indeed, to cover all risk if a comprehensive principle of strict liability were to be introduced. Categories of risk which may be worth considering, in particular, are the risks presented by dogs, either generally, or in

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[1] RCCL, Report (1978), Volume One, Recommendation 176, p. 386 (cf. paras. 1627, 1628, p. 339). This was because in practice insurers normally refuse to provide unlimited cover which the Acts apparently require.

[2] RCCL, Report (1978), Volume One, Chapter 31, pp. 340-349. By exceptional risks are meant the risks created by things or operations which by their unusually hazardous nature require close supervision or which may cause serious and extensive casualties if they go wrong, though they may be normally quite safe. Cf. para. 4.23.

[3] RCCL, Report (1978), Volume One, para. 1668, p. 348. See also Volume One, paras. 320-324, pp. 75-76.

relation to livestock-worrying, and the risks presented by livestock, again either generally, or in relation to straying or simply to straying on the highway.

Costs of insurance

6.5 Any proposal to change the basis of liability for animals or to extend the existing compulsory insurance requirements may affect the costs of insurance. In principle, there should not be large increases in premium rates. On the information given to us by insurers, the incidence of claims in respect of animals is low in relation to the number of insured. This ratio is not likely to change, even with a considerable extension of insurance. But it is difficult to assess the effects of such changes precisely. In Western Australia, where the exemption from liability for livestock straying on a public road, provided by the rule in Searle v. Wallbank[1], was replaced in 1976 by liability based on negligence, premium rates were not affected.[2] But, of course, a different pattern might emerge in this country, or in case of other risks, or if strict liability were to replace negligence-based liability on a large scale. Another aspect of the problem of costs is the uncertainty of the effects on costs if the number of larger claims was to increase significantly, which might be the case if, for example, strict liability were to be introduced in respect of livestock or other animals straying on a public road.[3] It is possible in such a case that providing full indemnity at reasonable cost would be impracticable for the insurance companies. This is the problem which has emerged in relation to the compulsory insurance requirements under the Riding Establishments Act 1964 (c.70) and the Dangerous Wild Animals Act 1976 (c.38).[4] Similar considerations led the Law Reform Commission of Western Australia, when examining the problem of livestock on the highway, to

[1] 1947 AC 341. See paras. 5.43-5.44.

[2] LRC(WA), Report (1981) para. 6.16. Insurance against livestock straying on the highway was common in Western Australia because of the uncertainties of the rule in Searle v. Wallbank, above.

[3] Cf. LRC(WA), Report (1981) para. 6.18.

[4] See para. 6.4.

recommend that an upper limit be fixed beyond which damages could not be awarded in respect of any one accident.[1] This, as the Commission acknowledged, gives rise to the problem of fixing and regularly adjusting the limit, as well as to difficulties in case of multiple accidents. However, in our view, the possible limits and costs of insurance should neither dictate the nature and extent of liability in any particular case, nor exclude consideration of the circumstances where compulsory insurance might otherwise be appropriate.

Issues arising

6.6 The preceding discussion can be summed up in the following issues on which we invite consultees' views:

Proposition

37. Should liability insurance in respect of animals be compulsory, either generally or in any particular case? If so, should provision be made in any, or in every, case for fixing and regularly adjusting an upper limit beyond which damages could not be claimed; or should provision simply be made to secure a practicable minimum permissible cover in any particular case?

B. No-fault compensation schemes

No-fault compensation

6.7 No-fault compensation is a system of obtaining payment from a fund instead of proceeding against the person responsible for causing the injury or harm complained of.[2] In this country there is already a considerable element of no-fault provision. Contributory benefits are available under the social security scheme, non-contributory benefits to the disabled and medical benefits to all, and local authorities provide social services of various kinds. The existence of this provision does not of course exclude the simultaneous recovery of damages under the ordinary system of civil

[1] LRC(WA), Report (1981) paras. 6.18-6.21. The Commission were not considering compulsory insurance.

[2] RCCL, Report (1978), Volume One, para. 34, p. 9

liability and indeed damages continue to be the main remedy. To the extent that animals might be involved in injuries at work there would in fact be no fault compensation under the present provision. Recently the Royal Commission on Civil Liability and Compensation for Personal Injury examined the case for the extension and improvement of the existing provision. They concluded that a new no-fault scheme should be introduced for road injuries and that a new social security benefit should be introduced for severely handicapped children, but otherwise supported the continuance of the existing mixed system of no-fault provision and compensation under the law of civil liability[1], though with modifications to ensure that the separate parts of the system properly complemented each other.[2]

No-fault scheme for injuries caused by animals

6.8 The Commission examined in particular the case for a scheme of no-fault compensation for injuries caused by animals and concluded:

> "1623 Our conclusion is that a case has not been made out for a scheme of no-fault compensation for injuries caused by animals. There is no ready and cheap method by which all of the large number of keepers of animals could be made to contribute and there is a relatively small number of serious injuries caused by animals (other than those covered by the industrial injuries scheme and the proposed motor vehicle injuries scheme). We think that any attempt to provide no-fault compensation for all people injured by animals would involve administrative effort quite out of proportion to the benefits.
>
> 1624 We considered whether there was sufficient justification for a special no-fault scheme covering injuries caused by dogs; the dog licence fee, suitably increased, could provide a means of financing such a scheme. Our attention was drawn in particular to the problem of unidentified dogs. An inter-departmental working party on dogs, under the chairmanship of Mr W G S Batho of the Department of the Environment, published a report in 1976 which included an invitation to us to consider whether a compensation fund might be set up from licence revenue to meet claims for injury by people who had been attacked by unidentified dogs. On balance, we feel

[1] RCCL, Report (1978), Volume One, para. 281, p. 69.

[2] RCCL, Report (1978), Volume One, paras. 307-311, pp. 73-74.

> that the hardships caused by the lack of a special scheme, whether for all dogs or just for unidentified dogs, are not sufficient to justify the administrative machinery which would be required."[1]

Standing these views it is unlikely that there will be any development in the near future of no-fault provision in relation to animals except in so far as this might be covered by the existing industrial injuries scheme or the proposed new motor vehicles injuries scheme.

Other jurisdictions

6.9 No-fault provision in relation to harm caused by animals exists elsewhere in other forms. In New Zealand, for example, under the Accident Compensation Act 1972, there is a comprehensive no-fault provision covering personal injury by accident and displacing the law of civil liability in respect of all compensatible injuries.[2] However, while accidents involving animals are covered by the Act, major areas still remain outwith its ambit: liability for cattle trespass, liability for damage to property including such damage when caused in a collision between a vehicle and wandering stock and liability for transmission of disease.[3] Again, in Ontario[4] under the Dog Licensing and Live Stock and Poultry Protection Act 1970 (RSO 1970 Chap. 133), compensation is payable by municipalities up to fixed maximum amounts, where livestock or poultry are killed or injured by a dog. The administration of the system depends on a network of local valuers who investigate and report on claims. Municipalities have a right to recover the amount of the damage paid from the owner of the dog without having to prove that it was vicious or accustomed to worrying livestock or poultry.

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[1] RCCL, Report (1978), Volume One, paras. 1623, 1624, pp. 338-339.

[2] RCCL, Report (1978), Volume One, paras. 219-229, pp. 56-58; Volume Three, Chapter 10, pp. 183-205; A P Blair (1978).

[3] Comprehensive proposals in these areas were made by the Torts and General Law Reform Committee of New Zealand - see TGLRC(NZ), Report (1975).

[4] For no-fault provision in Canada generally see RCCL, Report (1978) Volume Three, Chapter 2, pp. 9-38.

Issues arising

6.10 Notwithstanding the views of the Royal Commission on Civil Liability and Compensation for Personal Injury, we are impressed by the effectiveness of the no-fault provision in relation to animals in New Zealand and Ontario. The Ontario scheme in particular illustrates well how provision for a specific category of limited risk can be incorporated into local administrative organisation. On the statistics available to us, it is clear that livestock-worrying by dogs is a considerable problem in this country. It is equally clear that it is difficult to find a satisfactory solution for the problem merely by clarifying and modifying existing rules.[1] In these circumstances it may well be that a no-fault provision at least in relation to dogs injuring or killing livestock should be reconsidered. Accordingly, we invite consultees' views on these issues:

Proposition

> 38. Should a no-fault compensation scheme be considered in relation to any particular category of risk presented by animals? In particular should such a scheme be considered in relation to dogs killing or injuring livestock, and, if so, how should such a scheme be administered and financed?

C. Fencing to prevent livestock straying

Fencing

6.11 When discussing the problem of re-enacting and modernising the Winter Herding Act 1686 (c.21) we examined the question of whether a defence should be available where the claimant, or some third party, had failed in fencing duties to which he was subject; and we considered in particular the problem of fences abutting on public roads.[2] Subsequently, we also considered in some detail how the rules of negligence might apply to the problems of livestock straying on public

[1] See paras. 5.23-5.28.

[2] Para. 5.12.

roads, and again the issue of fencing arose.[1] There seems to be little doubt that the existence and maintenance of fencing is a key factor in the problem of livestock straying generally as well as straying on the highway. Statistics obtained by the Law Commission for the New Forest section of the trunk road A31 show clearly the effects of introducing fencing.[2] During the period 1961 to 1966 the rate of accidents involving animals fell from over 80 per year to less than 5 per year when fencing was provided. But, of course, it does not follow from this that occupiers of land carrying stock should be under an obligation to fence. The cost of doing so may be a quite unreasonable burden in relation to the probability of serious loss, although this in itself might suggest that a norm of strict liability reinforced by compulsory insurance is the appropriate solution.

Other jurisdictions

6.12 Similar considerations in other jurisdictions have led to solutions being examined which were linked to fencing duties. In New Zealand, for example, the Torts and General Law Reform Committee considered the general problem of straying livestock in the context of the improvement of an existing fencing code. This enabled them to propose as a remedy to the problem of livestock straying on the highway that the rules of negligence should apply and that the presence of unattended stock on the highway should constitute evidence from which negligence might be inferred, except in an area where it was not customary to fence.[3] The Statute Law Revision Committee of Victoria proposed a scheme whereby legislation should specifically define the circumstances in which the owner of livestock straying on the highway might be liable and

[1] Paras. 5.43-5.47.

[2] LC, Report (1967) para. 38.

[3] TGLRC(NZ), Report (1975) pp.32-36, 52. But in New Zealand the fundamental emphasis, historically, had been on preventive fencing by all land-occupiers, irrespective of whether they were stock owners. This is in contrast with the fundamental obligation on stock owners in Scotland to herd their animals.

emphasized the theme of prevention of accidents rather than after-the-event protection of victims by suggesting the strengthening of the existing powers of municipalities to require the fencing of properties by stock owners.[1] In Tasmania, the Law Reform Commission, examining the problem of livestock straying on the highway, discussed, but did not adopt, a scheme under which the rules of negligence might be applied in conjunction with a requirement of fencing and a detailed statutory specification of standards of fencing; it was envisaged that such a scheme might be applied differently in metropolitan areas as opposed to rural areas where fences lined main roads and rural areas where secondary roads were not fenced.[2]

Issues arising

6.13 There are three main features of these various solutions. First, a statutory specification is envisaged of the duty to fence or of the standards of sufficient fencing. It is fairly clear that this is more apposite where there is already some existing statutory foundation.[3] Secondly, a principle of discriminating between different types of environment is considered appropriate. Thirdly, the involvement of local administrative authorities is a prerequisite. It is not clear to us in advance of consultation that the incidence of loss as a result of livestock straying is such as to warrant

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[1] SLRC(V), Report (1978) paras. 46-59. From inquiries made of local authorities in Scotland, we know that general powers under the Burgh Police (Scotland) Act 1892 (c.55) (s.190) have occasionally been invoked to require the fencing in of stock. But that provision, it seems, would have to be considerably strengthened if local authority action of this sort were to be seen as a feasible solution to the problem.

[2] LRC(T), Report (1980) pp. 32-37.

[3] See LRC(T), Report (1980) pp. 32-37.

establishing a scheme of this degree of complexity, either generally, or in relation to straying on the highway. However, we invite consultees' views on these issues:

Proposition

39. Should there be a statutory obligation to fence in livestock, either generally or where pasture abuts on a public road? If so, in either case, should that obligation apply throughout Scotland or only in certain areas; and, if the latter, in what areas and on what criteria? If there were an obligation to fence in livestock should standards of fencing be prescribed?

Summary of Propositions

(The bracketed references are to the paragraphs in which propositions are stated).

A. Propositions 1-9: Strict liability for straying livestock

Notes for the guidance of consultees

i. The propositions in this group arise from our examination of the Winter Herding Act 1686 (c.21). The basic issue is whether a modernised version of the Act is needed, or some modified or extended form of the strict liability for which it provides.

ii. The significance of strict liability is that once harm is caused liability follows, and it is no defnece in an action for damages that reasonable care may in fact have been taken to avoid causing harm. However, other more restricted defences may be available (Propositions 5, 6). In essence, these are defences which recognise that harm on any particular occasion may be truly attributable to some external event or agency other than the defender.

iii. The alternatives to strict liability are:

(a) liability based on negligence, or failure to fulfil some legally recognised duty of care owed specifically to the person complaining of harm;

(b) presumed liability, by which we mean that the owner or keeper of an animal is presumed in law to be liable for any harm which it causes unless he can prove that the harm was not due to lack of care on his part; in other words, the defence that reasonable care was taken is allowed, but the defender must prove it.

These are the subject of Propositions 33-36.

iv. The various forms of liability may be thought of as representing different possible standards of care. A minimum requirement would be not to be negligent. The highest standard would be represented by strict liability, and an intermediate standard by presumed liability. A single standard may be appropriate wherever animals cause harm, or any combination of standards according to circumstances.

v. Propositions 2-9, though expressed in terms of strict liability, are also relevant to some at least of the other forms of liability. Propositions 7 and 8* are relevant whatever form of liability may be thought appropriate. They should therefore be considered again specifically when considering Propositions 35 and 36. Similarly, Propositions 2-6* are relevant to presumed liability. Of these, Proposition 4 is actually taken up in Proposition 35(b). The others should be considered again specifically in the context of Proposition 35(a).

*Also Proposition 9 indirectly.

Propositions

1. Should liability for harm caused by livestock straying on to land be, in principle, strict?

(5.11)

2. If so, should liability be imposed -

(a) on the owner of the livestock; or

(b) where the livestock are not in their owner's possession but in the possession of another, on the possessor; or

(c) on the owner or occupier of the ground from which the livestock stray;

(d) on all or any of these, jointly and severally?

(5.11)

3. If liability were strict, should it extend to -

(a) damage to any kind of property;

(b) injury to persons and animals, including the communication of disease;

or should it only extend to damage to ground, woodland and planting, or be restricted in some other way?

(5.11)

4. If strict liability extended to all damage and injury (Proposition 3), should damage or injury caused on a public road, or in a public place, or in buildings or other premises, also be included?

(5.11)

5. (a) Should it be a defence, where liability for harm caused by straying livestock is strict, that such harm would not have occurred but for some breach of a duty to fence (established by contract or under statute) on the part of the person claiming, or some failure on his part to maintain an existing fence for which he is responsible?

(b) Should such a defence also apply in the case where the duty to fence or to maintain fencing already in existence rests upon some third party?

(5.12)

6. (a) Should all or any of the following defences be available:

(i) unavoidable accident;
(ii) intervention of a third party;
(iii) voluntary assumption of risk;
(iv) contributory negligence;
(v) the defence that the livestock strayed from a public road?* (5.13)

(b) If the defence of intervention of a third party should be available, should it be restricted? If so, should it be restricted to such acts as are deliberate or malicious or not reasonably foreseeable, or which no practicable precautions would prevent, or be restricted in some other way?
(c) Should any other defence be available?

7. Should the owner or occupier of land on to which livestock have strayed have the right -

(a) to detain the livestock until compensated for all damage and loss which he has suffered including the costs of detention; and
(b) failing payment of compensation, to sell so many animals as may be necessary to recoup his loss? (5.14)

8. If rights to detain and sell straying livestock were introduced (Proposition 7), we would propose that -

(a) there should be no provision for penalties over and above damages;
(b) anyone detaining straying livestock should be liable for any damage caused by his failure to treat them with reasonable care;
(c) the procedure for exercising the rights to detain and sell should be specified in legislation

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*See para. 5.13 above.

introducing those rights and should, on the analogy of the Animals Act 1971 (c.22) section 7, include in particular:

(i) provision for notice of detention and particulars of claim within a prescribed period (perhaps 48 hours) to the owner or possessor of the livestock, if known, and for notice of detention to the police authority of the area;

(ii) failing payment of the claim within a prescribed period (perhaps 14 days), provision for sale by public acution of the detained livestock, or so many of them as may be necessary to satisfy the claim, subject to the right of the owner or possessor of the livestock to take legal proceedings to prevent sale in the event of his disputing the claim;

(iii) provision for accounting to the owner or possessor of the livestock for the proceeds of sale and remitting any balance due after payment of the claim (including costs of detention) and settlement of the expenses of sale.

(5.15)

9. What animals or birds should be classified as livestock for the purpose of the foregoing propositions? In particular, should any wild species in captivity be so classified?

(5.15)

B: Propositions 10-22: Strict liability for dogs etc.

Notes for the guidance of consultees

i. The propositions in this group arise from our examination of the Dogs Acts 1906 (c.32) to 1982 (c.21). The basic issue is whether these Acts should continue to have effect, or whether the form of strict liability for which they provide, should be modified or extended.

ii. Proposition 21 is wider than the other propositions in the group in that it is concerned with animals other than dogs. It is included in the group because it arises from our consideration of the wider context in which the corresponding propositions for dogs (Propositions 18-20) must be set.

iii. In the Notes to Part A of the Summary some brief comments were made on strict liability, liability based on negligence and presumed liability. These comments are equally relevant to this Part, and, as in Part A, propositions may be relevant to more than one form of liability.

iv. So Propositions 18-21* are relevant whatever form of liability may be thought appropriate, and should therefore be considered again in the context of liability based on negligence (Proposition 36) and in the context of presumed liability (Proposition 35(a)). Similarly, Propositions 11-17* are relevant to presumed liability and should be considered again specifically in that context (Proposition 35(a).

Propositions

10. Should liability for harm caused by dogs be, in principle, strict?

(5.17)

11. If so, should it extend to -

(a) damage to any kind of property;

(b) injury to persons and animals, including the communication of disease;

or should it be restricted to -

(c) damage, loss or injury caused in the course of attacking or chasing a person or animal;

(d) injury or loss caused in the course of worrying livestock;

or should it be restricted in some other way?

(5.17)

12. Should it be a prerequisite for liability that the harm complained of be the direct result of some act attributable to the dog and not merely the incidental consequence of the dog's presence or behaviour?

(5.17)

13. If liability for harm caused by a dog were strict, should it be imposed -

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*Also Proposition 22 indirectly.

(a) on the owner of the dog (possibly with provision for deemed ownership as under section 1(2) of the Dogs Act 1906 (c.32));*
or

(b) where a dog is not in its owner's possession (or custody) but in the possession (or custody) of another, on the possessor (or custodier); or

(c) where the owner or possessor (or custodier) is under the age of 16, on the head of the household of which the owner or possessor (or custodier) is a member;
or

(d) on all or any of these jointly and severally;

(5.19)

14. If liability were imposed on a possessor (or custodier), including joint and several liability with another:

(a) Should it be a prerequisite for liability that the possessor (or custodier) had possession (or custody) otherwise than merely on a temporary basis or for the benefit of the owner?

(b) Assuming a possessor (or custodier) under the age of 16 might be liable jointly and severally with the head of his household, should the same principles apply to such a possessor (or custodier)?

(c) What should happen in such a case if a possessor (or custodier) over the age of 16 takes possession (or custody) from an owner or possessor (or custodier) under the age of 16?

(d) should there be any other prerequisite conditions for liability?

(5.19)

15. So far as the owner of a dog might be liable for the harm which it causes while in another's possession (or custody), should it be a defence for the owner to show that he transferred possession (or custody) of the dog to the possessor

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*See para. 2.15 above.

(or custodier) in the reasonable belief that he was a fit and proper person to be in charge of the dog? If so, should such a defence be available irrespective of whether or not the possessor (or custodier) might be liable? Should the defence be specifically excluded in the case where the possessor (or custodier) is a member of the owner's household under the age of 16.

(5.19)

16. (a) Should all or any of the following defences be available:

(i) unavoidable accident;
(ii) intervention of a third party;
(iii) voluntary assumption of risk;
(iv) contributory negligence?

(b) If the defence of intervention of a third party should be available should it be restricted? If so, should it be restricted to such acts as are provocative or malicious, or not reasonably foreseeable, or which no practicable precautions would prevent, or be restricted in some other way?
(c) Should any other defence be available?

(5.20)

17. (a) If there were strict liability where a dog kills or injures livestock or other animals (Proposition 11), should it be a defence that the animals were killed or injured while trespassing on land, or in premises, owned or occupied by the owner or possessor (or custodier) of the dog?

(b) If strict liability were to extend to personal injury, should a similar defence be available? If so, should it be qualified in any way? In particular, should it be a condition of such a defence that the dog is not kept to protect persons or property, or is kept secured or under the control of a competent handler, or that adequate warning notices are posted; or should any other conditions apply?

(5.22)

18. Should it be permissible to take action which may be injurious against a dog to protect persons or livestock?

If so, should that right be recognised only as an exception or defence in respect of the killing or injuring of a dog or be conferred as a separate right?

(5.28)

19. If action against a dog were so permissible, should the exercise of the right be qualified in any way? In particular:

(a) Should it only be permitted -

(i) in circumstances in which an attack by the dog is actually taking place or is imminent and there are no other reasonable means of ending or preventing it;

(ii) in circumstances in which a dog, after an attack, has not left the vicinity and is not under the control of any person and there are no practicable means of ascertaining to whom it belongs;

(iii) where the person taking action either owns or possesses the livestock or occupies the land on which they are or is expressly or implicitly authorised to act on behalf of such a person?

(b) Should action taken be subject to notification to the police authority of the area?

(c) Should the possibility of taking action be excluded where the attack takes place on land or in premises owned or occupied by the owner or possessor (or custodier) of the dog?

(5.28)

20. Should it be permissible to take action against a dog to protect any other species of animals (including wild species)? If so, which, if any, of the principles mentioned in Propositions 18 and 19 should apply?

(5.28)

21. Should it be permissible to take action which may be injurious against animals other than dogs? If so, against which animals and for what reasons; and which, if any, of the principles mentioned in Propositions 18 and 19 should apply?

(5.28)

22. For the purposes of Propositions 11, 17, 18 and 19, what animals or birds should be classified as livestock? In particular, should any wild species in captivity be so classified?

(5.29)

C. Proposition 23: Damage by game

Notes for the guidance of consultees

i. This proposition arises from our examination of the scheme for compensation for damage by game under section 15 of the Agricultural Holdings (Scotland) Act 1949 (c.75).

ii. The problem of damage by game is not dealt with in detail in the memorandum. It is largely discussed in terms of nuisance as to which we make no recommendations. However, it should be borne in mind that species of game kept in captivity might be classified as livestock (Proposition 9).

iii. Normally in law there will be no distinction between game which have escaped from captivity and game in the wild state. But in some circumstances damage by escaping game, for example by winged game rendered incapable of flight, may raise the issue of whether action against such game to prevent damage is justified (Proposition 21).

iv. Such factors may have some significance when considering whether or not there should be wider provision for compensation along the lines of the scheme in the 1949 Act.

Proposition

23. We propose that section 15 of the Agricultural Holdings (Scotland) Act 1949 (c.75) should continue to have effect in its present form.

(5.30)

D. Propositions 24-32: Liability in scienter.

Notes for the guidance of consultees

i. The propositions in this group are concerned with liability in scienter; that is strict liability arising from failure to confine animals of known harmful propensities.

ii. Since liability in scienter is a form of strict liability it can be regarded as an alternative to the forms of strict liability for livestock and dogs which are canvassed

in preceding propositions. But, of course, it would extend also to dangerous wild animals, however that category might be defined.

iii. On the other hand, either presumed liability, or strict liability without reference to knowledge, might be substituted for liability in scienter (Propositions 35(a), 36). At least, this might seem appropriate for certain clearly identified species of dangerous wild animals. If so, some of the propositions in this group should be considered again specifically in those contexts, namely, Propositions 25, 26, 27(a)(ii)-(d), 28 and 32.

iv. Because of the overlap mentioned in paragraph ii , many of the propositions in the group correspond closely with preceding propositions stated in relation to livestock or dogs. Conversely, some of the preceding propositions will also be relevant if there were liability in scienter and should be specifically considered again in this context. Essentially, these are the propositions of a more general character which we have already marked as relevant to more than one form of liability, namely, Propositions 7, 8 and 18-21.*

v. While we have criticised liability in scienter severely in the memorandum, we would ask consultees, even if they agree with our criticisms, to consider and comment on all the propositions in the group, assuming that there were to be liability in scienter. The preceding propositions referred to as relevant should also be considered. This will help us with issues which would have to be resolved if there were liability in this form.

Propositions

24. Should there be strict liability in scienter for harm caused by animals?

(5.36)

25. If so, should the existing classification of animals as ferae naturae or mansuetae naturae be reformulated and, if so, how?

(5.36)

26. If there were liability in scienter for harm caused by an animal, should it be imposed -

(a) on the owner of the animal; or

(b) where the animal is not in its owner's possession (or custody) but in the possession (or custody) of another, on the possessor (or custodier); or

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*Also Propositions 9 and 22 indirectly.

(c) where the owner or possessor (or custodier) of the animal is under the age of 16, on the head of the household of which the owner or possessor (or custodier) is a member; or

(d) on all or any of these jointly and severally)

(5.37)

27. If liability were imposed on a possessor (or custodier), including joint and several liability with another:

(a) Should it be a prerequisite for liability -

(i) that the possessor (or custodier) had such knowledge of the animal as would render him liable if he were owner;

(ii) that the possessor (or custodier) had possession (or custody) otherwise than merely on a temporary basis or for the benefit of the owner?

(b) Assuming a possessor (or custodier) under the age of 16 might be liable jointly and severally with the head of his household, should the same principles apply to such a possessor (or custodier)?

(c) What should happen in such a case if a possessor (or custodier) over the age of 16 takes possession (or custody) from an owner or possessor (or custodier) under the age of 16?

(d) Should there be any other prerequisite conditions for liability?

(5.37)

28. So far as the owner of an animal might be liable in scienter for the harm which it causes while in another's possession (or custody), should it be a defence for the owner to show that he transferred possession (or custody) of the animal to the possessor (or custodier) in the reasonable belief that he was a fit and proper person to be in charge of the animal? If so, should such a defence be available irrespective of whether or not the possessor (or custodier) might be liable? Should the defence be specifically excluded in the case where the possessor (or custodier) is a member of the owner's household under the age of 16?

(5.37)

29. If there were liability in scienter, we would propose:

(a) if the head of a household were to be held liable for harm caused by an animal owned or in the possession (or custody) of another member of the household under the age of 16, that knowledge of the animal's propensities acquired directly or indirectly by the owner or possessor (or custodier) of the animal should be attributed by law to the head of the household;

(b) that knowledge of an animal's propensities acquired directly by an employee should be attributed by law to his employer; and

(c) that, apart from these cases, it should be a matter of fact to be determined by the court whether one person's knowledge of the propensities of an animal should be attributed to another.

(5.38)

30. If there were liability in scienter, we would propose that it should not be a prerequisite for liability that an animal escape from control.*

(5.39)

31. If there were liability in scienter, should liability be restricted to harm which is caused directly by some "act" attributable to the animal? Alternatively, should the extent of liability in scienter rest on the same principles of remoteness as apply in the case of liability based on negligence; or should some other criterion apply for determining the extent of liability and, if so, what?

(5.40)

32. (a) Should all or any of the following defences be available:

(i) unavoidable accident;

(ii) intervention of a third party;

(iii) voluntary assumption of risk;

(iv) contributory negligence;

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*See paras. 3.20, 5.39.

(v) trespass;

(vi) reversion to the wild state?

(b) If the defence of intervention of a third party should be available, should this be restricted? If so, should it be restricted to such acts as are provocative or malicious or not reasonably foreseeable or which no practicable precautions would prevent, or be restricted in some other way?

(c) If the defence of trespass should be available, should it be qualified in any way? In particular, should it be a condition of such a defence that the animal is not kept to protect persons or property, or is kept secured or under the control of a competent handler, or that adequate warning notices are posted, or should any other conditions apply?

(d) If the defence of reversion to the wild state should be available, should the test of reversion be that the animal has resumed its natural habitat or should some other test be applied?

(e) Should any other defence be available?

(5.41)

E. Propositions 33-35: Negligence and presumed liability

Notes for the guidance of consultees

i. The propositions in this group are concerned with liability based on negligence and presumed liability. These forms of liability were mentioned in contrast with strict liability in the Notes to Part A of the Summary.

ii. It should be noted that Propositions 33 and 35(b) are directed to the problem of livestock or other animals straying on a public road and are much narrower than the other propositions in the group.

iii. Propositions in preceding groups have been mentioned as relevant to this group and should be considered again and commented on as appropriate. These are Propositions 2, 3, 5-8, 11-21, 25, 26, 27(a)(ii)-(d), 28 and 32* which should be considered specifically in the context of presumed liability (Proposition 35(a)).

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*Also Propositions 9 and 22 indirectly. See the Notes to the relevant Parts of the Summary.

Propositions

33. Should liability for loss, injury or damage caused by the presence of livestock, or other animals, on a public road or in a public place be founded on negligence?

(5.49)

34. So far as liability for harm caused by animals may be founded on negligence, should statutory criteria for negligence be specified in any case?

(5.49)

35. (a) Should evidence of harm caused by animals be prima facie evidence of negligence in any or every case, implying liability unless the keeper proves that the harm was not attributable to negligence on his part?

(b) In particular, should evidence of the presence of livestock or other animals on a road and of consequent loss, injury or damage be prima facie evidence of negligence implying liability unless the keeper of the animals proves that the loss, injury or damage was not attributable to negligence on his part?

(5.49)

F. Proposition 36: The forms of liability

Notes for the guidance of consultees

i. This proposition is probably the most important single proposition in the memorandum. In effect, it asks which form or forms of liability (as mentioned in the Notes to Part A of the Summary) should be adopted in our law.

ii. When considering this proposition it is essential also to recall the further option that some form of presumed liability might be adopted (Proposition 35).

iii. Propositions in preceding groups have been mentioned as relevant whatever form of liability might be adopted. These are Propositions 7, 8 and 18-21* which should therefore be considered and commented on specifically in this context.

*Also Propositions 9 and 22 indirectly.

iv. However, in one sense, all the preceding propositions on strict liability are relevant when considering this proposition. This would include the propositions on strict liability in scienter, for which strict liability without reference to knowledge might seem a ready substitute. (Note iii to Part D of the Summary). Certainly, the more extensive the role allocated to strict liability under these separate propositions, the more significant the option of comprehensive strict liability may be.

v. If, in particular, it is considered appropriate that a more comprehensive form of strict liability should be substituted for liability in scienter, say for clearly identified species of dangerous wild animals, Propositions 25, 26, 27(a)(ii)-(d), 28 and 32 should be reconsidered and commented on in that context.

vi. It should be noted that we make no recommendations as regards nuisance.

Proposition

36. Apart from the law of nuisance on which we make no recommendations:

(a) Should liability for harm caused by animals rest exclusively on culpa or fault, in the sense of negligence or intentional harm; or, alternatively,

(b) should liability be comprehensively strict; or

(c) if neither principle of liability is to apply exclusively, which should predominate and what exceptions should be provided for; or

(d) should there be some other general rule of liability, and, if so, what?*

(5.55)

G. Propositions 37-39: Insurance etc.

Notes for the guidance of consultees

The propositions in this group are concerned with the wider issues of insurance and no-fault compensation and a more radical approach to the particular problem of livestock straying.

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*Presumed liability is canvassed specifically in Proposition 35.

Propositions

37. Should liability insurance in respect of animals be compulsory, either generally or in any particular case? If so, should provision be made in any, or in every, case for fixing and regularly adjusting an upper limit beyond which damages could not be claimed; or should provision simply be made to secure a practicable minimum permissible cover in any particular case?

(6.6)

38. Should a no-fault compensation scheme be considered in relation to any particular category of risk presented by animals? In particular should such a scheme be considered in relation to dogs killing or injuring livestock, and, if so, how should such a scheme be administered and financed?

(6.10)

39. Should there be a statutory obligation to fence in livestock, either generally or where pasture abuts on a public road? If so, in either case, should that obligation apply throughout Scotland or only in certain areas; and, if the latter, in what areas and on what criteria? If there were an obligation to fence in livestock should standards of fencing be prescribed?

(6.13)

Appendix II

STATISTICS: LIVESTOCK

1. Case 1(a)[1]: Working with livestock

Table 1: Reported accidents in agriculture in Scotland 1977-1980[2]

ANIMALS	1977	1978	1979	1980	TOTALS	PERCENTAGE OF ALL ACCIDENTS 1977-80
BULLS	3	12[3]	3	7[3]	25	7.06
OTHER CATTLE	69	70	37	48	224	63.28
BOARS	4	4	2	2	12	3.39
HORSES AND OTHER ANIMALS	18	21	14	40[3]	93	26.27
TOTALS	94	107	56	97	354	100.00

[1]See para. 1.7.

[2]Source: Health and Safety Executive.

[3]Figures include one fatal accident.

2. Case 1(b)[1]: pasturing livestock
Case 1(c)[2]: livestock in transit

Table 2: Road accidents 1978-1981 involving livestock (Dumfries and Galloway)[3]

ANIMALS	1978	1979	1980	1981	TOTALS	PERCENTAGE OF ACCIDENTS INVOLVING LIVESTOCK 1977-81
HORSES	5	3	1	3	12	19.67
COWS	17	9	3	10	39	63.94
SHEEP	3	3	-	4	10	16.39
TOTALS	25	15	4	17	61	100
AS A PERCENTAGE OF ALL ACCIDENTS INVOLVING ANIMALS	13	9	3	11	9	

[1]See para. 1.8.

[2]See para. 1.9.

[3]Source: Dumfries and Galloway Constabulary. No comparable figures are available for other Police Authority areas.

Appendix III

STATISTICS: LIVESTOCK-WORRYING BY DOGS[1]

Table 3: Reported episodes of livestock-worrying by dogs 1977-1980 where death or injury caused to livestock[2]

POLICE AUTHORITY AREA	1977	1978	1979	1980	TOTALS	PERCENTAGE OF ALL EPISODES 1977-80
CENTRAL SCOTLAND	76	64	70	27	237	10.64
DUMFRIES AND GALLOWAY	15	13	12	17	57	2.56
FIFE	20	18	25	20	83	3.73
GRAMPIAN	136	137	109	112	494	22.18
LOTHIAN AND BORDERS[3]	63	48	69	51	231	10.37
NORTHERN	82	116	110	90	398	17.87
STRATHCLYDE	199	183	133	117	632	28.38
TAYSIDE	47	19	14	15	95	4.27
TOTALS	638	598	542	449	2227	100.00

[1]See para. 1.10: Case 1(d): protecting livestock.

[2]Source: Police Authorities.

[3]The figures provided are those for proceedings under the Dogs (Protection of Livestock Act 1953 (c.28).

Table 4: Animals injured or killed in reported episodes of livestock-worrying (Table 3)[1]

ANIMALS	1977	1978	1979	1980	TOTALS
SHEEP	1187	1049	912	894	4042
CATTLE	12	14	5	12	43
GOATS	1	-	-	-	1
POULTRY	20	57	38	28	143
NOT DISTINGUISHED	4	1	-	3	8
TOTALS	1224	1121	955	937	4237

[1]Source: Police Authorities. No figures are available for the Lothian and Borders area.

Table 5: Cases in which dogs traced as a percentage of reported episodes of livestock-worrying (Table 3)[1]

POLICE AUTHORITY AREA	1977	1978	1979	1980
CENTRAL SCOTLAND	47	50	36	33
DUMFRIES AND GALLOWAY	73	100	67	59
FIFE	45	72	60	65
GRAMPIAN	68	59	28	73
NORTHERN	94	97	88	90
STRATHCLYDE	67	66	93	72
TAYSIDE	60	89	93	87

[1]Source: Police Authorities. No figures are available for the Lothian and Borders area.

Table 6: Cases in which dogs destroyed as a percentage of cases in which dogs traced (Table 5)[1]

POLICE AUTHORITY AREA	1977	1978	1979	1980
CENTRAL SCOTLAND	22	53	28	67
DUMFRIES AND GALLOWAY	33[2]	-	25[2]	-
FIFE	22	15	13	31
GRAMPIAN	24	26	23	22
STRATHCLYDE	64	51	40	51
TAYSIDE	57	24	38	15

[1]Source: Police Authorities. No figures are available for the Lothian and Borders and Northern areas.

[2]Dogs shot while chasing sheep.

STATISTICS: DOGS[1]

Table 7: Dog licences: revenue and expenses of collection 1980/81[2]

TOTAL NUMBER OF LICENCES ISSUED 1980/81	TOTAL REVENUE	EXPENSES OF COLLECTION (INCL. V.A.T.)	DEFICIT
208,448[3]	£80,417.62½	£216,079.27	£135,661.64½

[1] See para. 1.16: Case 4: domestic pets.

[2] Source: Scottish Home and Health Department.

[3] Not all dogs require to be licensed e.g. working sheep dogs, but widespread evasion of licensing requirements is suspected. The U.K. dog population has been estimated as in excess of 6 million in 1976 (DOE, Report 1976, para. 2.3).

Table 8: Stray dogs: dogs seized by the Police[1]

POLICE AUTHORITY AREA	1977	1978	1979	1980	TOTALS	PERCENTAGE OF ALL DOGS SEIZED 1977-80
CENTRAL SCOTLAND	735	783	851	869	3,238	3.80
DUMFRIES AND GALLOWAY	376	434	418	360	1,588	1.87
FIFE	816	840	856	934	3,446	4.05
GRAMPIAN	1,033	1,228	1,529	1,446	5,230	6.14
LOTHIAN AND BORDERS	3,492	3,402	3,083	3,141	13,118	15.40
NORTHERN	612	834	883	772	3,101	3.64
STRATHCLYDE	10,162	12,998	12,729	11,863	47,752	56.07
TAYSIDE	1,962	1,891	1,927	1,914	7,694	9.03
TOTALS	19,188	22,410	22,276	21,293	85,167	100.00

[1] Source: Scottish Home and Health Department and Police Authorities.

Table 9: Stray dogs: mode of disposal of dogs seized by the Police as a percentage of seizures (Table 8)[1]

METHOD OF DISPOSAL	1977	1978	1979	1980
RETURNED TO OWNER	44	47	47	47
TRANSFERRED TO NEW OWNER OR HANDED OVER TO SUITABLE PERSON	34	34	34	37
DESTROYED	33	33	29	28
ESCAPED, DIED ETC.	2.4	2.2	1.3	2.2

[1] Source: Scottish Home and Health Department and Police Authorities. Figures are not available for Lothian and Borders, Northern and Strathclyde areas. Since information in each category is not provided for each area, the percentages are based on different totals and therefore do not total 100%.

Table 10: Stray dogs: dogs dealt with under Dog Warden Schemes[1]

DISTRICT COUNCILS	1978	1979	1980	1981	TOTALS	APPROXIMATE AVERAGE ANNUAL COST
CITY OF EDINBURGH	974	670	549	743	2,936	£12,500
CITY OF GLASGOW	3,085	3,015	3,033	3,398	12,521	£40,500[2]
KILMARNOCK AND LOUDOUN	80[3]	316	345	86	827	£ 5,000[4]
WEST LOTHIAN	159	196	208	372	935	£ 3,100

[1] Dog Warden Schemes are administered by some local authorities under private legislation - see para. 5.17. We have selected from the statistics made available to us by the authorities in order to illustrate the operation of the longer-running schemes.

[2] The cost of the scheme rose from £31,000 in 1978 to £57,000 in 1981.

[3] From 4 September 1978.

[4] The costs over the 3 years 1978-1980 represented the Council's share of the costs of the scheme which was then run jointly with the Scottish Society for the Prevention of Cruelty to Animals. Costs for the initial 3 months of the scheme were £4,000. Costs for the year 1981 were estimated at £4,000.

Table 11: Stray dogs: mode of disposal of dogs under Dog Warden Schemes as a percentage of dogs dealt with (Table 10)[1]

METHOD OF DISPOSAL	1978	1979	1980	1981
RETURNED TO OWNER	88	85	88	82
TRANSFERRED TO NEW OWNER OR HANDED OVER TO SUITABLE PERSON	4	7	7	10
DESTROYED	10	14	13	11
ESCAPED, DIED, ETC.	.1	.3	.2	.1

[1]The percentages do not total 100%. This is probably due to the fact that not all dogs are necessarily dealt with in the year in which they are uplifted. Also, the categories for classifying disposals vary slightly from area to area.

Table 12: Road accidents involving dogs where personal injury caused 1975-1980[1]

	1975	1976	1977	1978	1979	1980	TOTAL
NUMBER OF ACCIDENTS	102	106	95	92	124	126	645
PERCENTAGE OF ALL ACCIDENTS INVOLVING ANIMALS	47	50	46	43	50	52	48

Table 13: Road accidents involving dogs where no injury caused 1979-1981 (Dumfries and Galloway and Grampian)[2]

	1979	1980	1981
NUMBER OF ACCIDENTS	156	145	142
PERCENTAGE OF ALL ACCIDENTS INVOLVING DOGS	96	91	93
PERCENTAGE OF ALL ACCIDENTS INVOLVING ANIMALS	75	77	67

[1]Source: Scottish Road Safety Advisory Unit.

[2]Source: Dumfries and Galloway Constabulary and Grampian Police.

Table 14: Attacks by dogs on postmen 1977-1981[1]

NUMBER OF ATTACKS	1977	1978	1979	1980	1981	TOTAL
	300	258	392	304	357	1,611

Table 15: Analysis of attacks (Table 14) for period September-November 1981[1]

(a)

NUMBER OF ATTACKS	AREA		PLACE		ATTACK BY STRAY DOG
	RURAL	URBAN	PUBLIC	PRIVATE	
107	16	91	45	62	9
PERCENTAGE OF ALL ATTACKS	15	85	42	58	8

(b)

NUMBER OF ATTACKS	POLICE TOLD	OWNER TOLD	DOCTOR TOLD	TIME LOST (DAYS) ≤3	TIME LOST (DAYS) >3
107	39	92	72	9	5
PERCENTAGE OF ALL ATTACKS	36	86	67	8	5

[1]Source: J. Woodburn, Regional Safety Officer, Scottish Postal Board.

Table 16: Miscellaneous offences involving dogs 1977-1980[1]

OFFENCE	1977	1978	1979	1980	TOTALS	PERCENTAGE OF ALL OFFENCES 1977-80
FAILURE TO PAY DOG LICENCE	555	446	532	854	2,387	28.45
GUARD DOGS ACT 1975 (c.50)[2]	127	161	127	119	534	6.37
OTHER OFFENCES[3]	1,116	1,315	1,477	1,560	5,468	65.18
TOTALS	1,798	1,922	2,136	2,533	8,389	100.00

[1]Source: Police Authorities. Figures for Central Scotland are included only for 1980.

[2]See para. 5.22.

[3]For examples of these offences see Table 17.

Table 17: Analysis of "other offences" involving dogs (Table 16) for Strathclyde 1980[1]

OFFENCE	NUMBER	PERCENTAGE OF ALL OFFENCES
ATTACKS ON PERSONS	496	65.44
FAILURE TO KEEP DOG UNDER CONTROL	140	18.47
DANGEROUS DOGS	49	6.46
FOULING FOOTPATH	3	.40
FAILURE TO WEAR COLLAR OR IDENTITY DISC ETC	70	9.23
TOTAL	758	100.00

[1]Source: Strathclyde Police.