

# Additional Chapter

## Animals

### KEY ISSUES

#### (1) Five broad categories of liability

Liability in tort for damage caused by animals can be placed into five distinct categories. The first consists of common law liability. The second, third, fourth, and fifth categories all derive from the Animals Act 1971 and relate, in turn, to liability for dangerous animals, liability for non-dangerous species, liability for straying livestock, and liability for loss of livestock caused by dogs.

#### (2) Common law liability

Over the years, the courts have held that a range of familiar torts—including negligence, battery, nuisance, and public nuisance—can all be committed through the instrumentality of animals. For these purposes, it does not matter whether the animal is of a kind that is commonly tamed or domesticated.

#### (3) Liability for dangerous animals under the Animals Act 1971

The 1971 Act creates a somewhat complex rule of strict liability for damage caused by dangerous animals. The Act provides its own definition of what constitutes a dangerous species. And this definition turns upon the pivotal concepts of whether it is a species that is not commonly domesticated in the British

Isles and whether a full-grown animal of that species has either a propensity to cause harm or a propensity to cause severe harm in the event (which need not be independently likely) that it does cause harm.

#### (4) Liability for other animals under the Animals Act 1971

The 1971 Act also provides a complex liability rule in relation to animals that do not belong to a dangerous species. Critical to such liability is knowledge on the part of the animal's keeper (which term is defined by the Act) of the unusual characteristics in the particular animal or those that are not normally found in animals of the same species except at particular times or in particular circumstances.

#### (5) Liability for straying livestock under the Animals Act 1971

The 1971 Act instantiates a third set of rules that apply to straying 'livestock'. The term livestock receives specific definition under the Act.

#### (6) Liability for injury to livestock caused by dogs under the Animals Act 1971

Within this fourth category of statutory liability, the Act sets specific limits on the circumstances in which liability will be incurred for injury to livestock caused by dogs.

## Section 1 Common law liability

Persons who own or control animals can be held liable for harms caused under established categories of tort law, although those categories are not specifically concerned with animals. Thus, for example, in *Leeman v Montagu*,<sup>1</sup> a poultry farmer was held liable in nuisance for the disturbance caused by his crowing cockerels. And in *Draper v Hodder*,<sup>2</sup> the owner of a pack of terriers was found liable in negligence when his dogs bit a neighbour's child; he had been negligent in failing to control and/or train the pack adequately. An occupier of premises might also be liable under the Occupiers' Liability Acts 1957 and 1984 in respect of injuries inflicted by dogs on his premises,<sup>3</sup> while liability in battery can be imposed where a dog owner or handler sets the dog upon another.<sup>4</sup> Finally, escaping animals might create liability under the rule in *Rylands v Fletcher*<sup>5</sup> or, most commonly—and as dealt with in depth later in this chapter—in accordance with the law of trespass.

## Section 2 Statutory liability for dangerous animals

### (A) Dangerous species

The Animals Act 1971, sub-section 2(1), imposes strict liability where any damage is caused by an animal that belongs to a dangerous species. A dangerous species, for these purposes, is one that is not commonly domesticated in the British Isles, and whose fully grown animals have such characteristics that (1) they are likely, unless restrained, to cause severe damage, or (2) they are of such a kind that any damage they do cause is likely to be severe.<sup>6</sup> The list is not confined to animals likely to attack persons, such as bears, tigers, etc. Furthermore, liability can arise even though the animal has not escaped from the control of its keeper. So, a keeper would be liable if his elephant slipped or stumbled and thereby caused damage. 'Damage' for the purposes of the Act embraces harm to either persons or property. An action lies even though the damage caused is not of the kind in respect of which the species is known to be dangerous. 'Damage' also includes the impairment of any mental condition.<sup>7</sup> So, if someone suffered psychiatric illness by virtue of the sudden appearance of a cobra, there would be liability.

### (B) Non-dangerous species

**Rule** The Animals Act 1971, sub-section 2(2), imposes liability in certain (convoluted) circumstances for an animal that does not belong to a dangerous species. It provides:

Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage if:

- (a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and

<sup>1</sup> [1936] 2 All ER 1677.

<sup>2</sup> [1972] 2 QB 556.

<sup>3</sup> *Hill v Lovett* 1992 SLT 994.

<sup>4</sup> *Roberts v CC of Kent* [2008] EWCA Civ 1588.

<sup>5</sup> *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1.

<sup>6</sup> Animals Act 1971, sub-s 6(2).

<sup>7</sup> Animals Act 1971, s 11.

- (b) the likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and
- (c) those characteristics were known to that keeper or were at any time known to a person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, were known to another keeper of the animal who is a member of that household and under the age of 16.

The interpretation of this provision appears to have departed from that which was intended, becoming wider in scope. The enlargement of liability caused Lewison LJ (with whom Stanley Burnton LJ agreed) to express dismay in *Turnbull v Warrener* that the provision now attracts regular claims in what appear to be unexceptional horse-riding and other cases.<sup>8</sup> With this point in mind, sub-section 2(2) imposes three conditions that must be met before the keeper can be held liable.<sup>9</sup>

**Severe damage likely** First, the damage must be of a kind which the animal, unless restrained, was likely to cause<sup>10</sup> or which, if caused by the animal, was likely to be severe.<sup>11</sup> Courts should be careful to examine this issue from a point in time prior to the incident in question and by reference to then-prevailing knowledge.<sup>12</sup> The statutory formulation would cover not only an animal that attacks a person, but also one with a dangerous disease, such as foot and mouth, that spreads the infection to other animals.

**Abnormal behaviour** The second subparagraph focuses on unusual characteristics in the particular animal or those that are not normally found in animals of the same species,<sup>13</sup> except at particular times or in particular circumstances. This requirement has been held to embrace behaviour that is to be expected of a particular species but only in special circumstances, such as where the animal is frightened. Thus, in *Mirvahedy v Henly*,<sup>14</sup> a cause of action lay where the claimant was injured by a horse that had been panicked and escaped from its field. A majority of their Lordships took the view that bolting was *not* a normal characteristic of a horse, even though in such circumstances it would be typical of the species.<sup>15</sup> It was therefore abnormal behaviour within the

<sup>8</sup> [2012] PIQR P16, at [45]–[48].

<sup>9</sup> Note that one keeper might be liable to another keeper: *Flack v Hudson* [2001] QB 698.

<sup>10</sup> This is now settled to mean 'reasonably to be expected': *Mirvahedy v Henly* [2003] 2 AC 491, at [97]–[98] (Lord Scott); *Turnbull v Warrener* [2012] PIQR P16, at [12].

<sup>11</sup> There is no need to show that *the severity of the potential damage* ensues from any abnormal characteristics in the animal: *Curtis v Betts* [1990] 1 All ER 769.

<sup>12</sup> *Turnbull v Warrener* [2012] PIQR P16, at [51]–[54], also holding that this matter can be established through empirical and other expert evidence. Contra *Freeman v Higher Park Farm* [2009] PIQR P103, at [34] (Etherton LJ).

<sup>13</sup> The Animals Act 1971, s 11 defines 'species' to include subspecies. It seems that different breeds of dogs are treated as subspecies: *Curtis v Betts* [1990] 1 All ER 769.

<sup>14</sup> [2003] 2 AC 491. See also *Cummings v Granger* [1977] QB 397 (C was bitten by D's Alsatian dog, which was used as a guard dog in his scrap yard. The dog barked and ran around when non-white people, like C, approached. This is not a usual characteristic in Alsatian dogs, except when used as guard dogs. Accordingly this was held to be a particular circumstance within the Animals Act 1971, sub-s 2(2)(b).)

<sup>15</sup> See also *Williams v Hawkes* [2017] EWCA Civ 1846 ('galloping' steer).

meaning of sub-section 2(2)(b).<sup>16</sup> For the purposes of the sub-section, the Court of Appeal has explained that the word ‘normally’ should be understood in the light of what the species as a whole can be expected to do, rather than in the light of what is normal for the particular creature. Thus, in one case, liability was imposed in respect of a rearing horse that injured the claimant *even though* that particular horse had no record at all of such behaviour.<sup>17</sup>

**Knowledge** The third requirement of this sub-section is that the animal’s unusual characteristics must have been known to the keeper, or to his servant, or to a member of his household under the age of 16. Thus, a cattle owner was held not liable for damage caused by a cow disturbed by the fact that it had been separated from its calf: crucially, there was ‘no evidence that cows in general become excessively agitated when they are weaned from their calves.’<sup>18</sup> This part of the sub-section further requires that a causal link between the ‘abnormal’ characteristic and the injury be established.<sup>19</sup>

### (C) Liability for ‘keepers’

Strict liability under the Animals Act 1971 is imposed on the ‘keeper’ regardless of whether the animal in question belongs to a dangerous or a non-dangerous species. A keeper for these purposes is defined in terms of the person who owns the animal or has it in his possession, or who is head of the household of which a member under the age of 16 owns the animal or has it in his possession.<sup>20</sup> This last provision prevents evasion of liability by making a child in the family the nominal owner. If a person ceases to keep, own, or possess it, he continues to be liable until another person owns or possesses it.<sup>21</sup>

### (D) Defences

While liability under the Act is imposed regardless of fault, the defendant is not liable for any damage which is due wholly to the fault of the person suffering it.<sup>22</sup> Damages will certainly be reduced under the Law Reform (Contributory Negligence) Act 1945 where the claimant—through his own fault—contributes to his damage.<sup>23</sup> It is also a defence under the Act that the damage was suffered by a

<sup>16</sup> The same applies to the aggression of a bull mastiff dog defending his ‘territory’: *Curtis v Betts* [1990] 1 All ER 769.

<sup>17</sup> *Welsh v Stokes* [2008] 1 WLR 1224. See also *Freeman v Higher Park Farm* [2009] PIQR P6; *Goldsmith v Patchott* [2012] EWCA Civ 183, at [38]–[40].

<sup>18</sup> *McKenny v Foster* [2008] EWCA Civ 173, at [32]. <sup>19</sup> *Jaundrill v Gillett* (1996) *Times*, 30 January.

<sup>20</sup> Animals Act 1971, sub-s 6(3).

<sup>21</sup> Animals Act 1971. But a person who takes possession only for the purpose of preventing damage or restoring it to its owner is not thereby made liable: sub-s 6(4).

<sup>22</sup> Animals Act 1971, sub-s 5(1). It has been applied where C ignored police warnings to come out and was subsequently bitten by a police dog: *Dhesi v CC of West Midlands* 2000 WL 491455.

<sup>23</sup> Animals Act 1971, s 10.

person who has voluntarily accepted the risk.<sup>24</sup> According to the Court of Appeal, '[w]hat must be proved in order to show that somebody has voluntarily accepted the risk is that (1) they fully appreciated the risk, and (2) they exposed themselves to it.'<sup>25</sup> In terms of what constitutes 'appreciation' of the risk, it has been held that, although knowledge of risk is required, there is no need to be able to foresee the 'precise degree of energy with which the animal will engage' in its injurious behaviour.<sup>26</sup> However, an employee who accepts a risk that is necessarily incidental to his employment shall not be treated as accepting it voluntarily.<sup>27</sup> It is also a defence that the damage occurred on property where the claimant was a trespasser<sup>28</sup> *so long as* it is proved either that the animal was not kept there for the protection of persons or property or, if kept for those purposes, that thus keeping it there was not unreasonable.<sup>29</sup> Presumably it would be difficult to maintain this defence in respect of a dangerous species being kept for protection only, because that might well be unreasonable. Trespassers will never have a remedy when attacked by an animal of a dangerous species not kept for protection.

### Section 3 Liability for straying livestock

The Animals Act 1971, section 4, imposes liability on a person in possession of livestock which strays onto another's land.<sup>30</sup> Under section 4, 'livestock' now comprehends cattle, sheep, pigs, goats, poultry, and deer not in the wild state.<sup>31</sup> (Horses, including asses, mules, and hinnies are now subject to sub-section 4A as described later.) Liability is for damage done by the livestock to the land or to any property on it.<sup>32</sup> Presumably, 'property' includes other animals as well as goods, but the claimant cannot recover under section 4 for his personal injuries. Either the person in possession or the owner (even though not in possession) can recover for damage to his land or property.

<sup>24</sup> Animals Act 1971, sub-s 5(2). In *Cummings v Granger* [1977] QB 397, the court found that when C knew of the dog she must be taken to have voluntarily accepted the risk. The court, esp Ormrod LJ (at 408), treated this defence as being wider than the common law defence of *volenti*.

<sup>25</sup> *Freeman v Higher Park Farm* [2009] PIQR P6, at P112.

<sup>26</sup> *Goldsmith v Patchott* [2012] EWCA Civ 183, at [50] (horse bucking more violently than anticipated).

<sup>27</sup> Animals Act 1971, sub-s 6(5); *Canterbury CC v Howletts & Port Lympne Estates Ltd* [1997] ICR 925 (a tiger keeper was killed by one of the zoo's tigers; the zoo especially encouraged 'bonding' between the tigers and their keeper, which necessitated entering the cage regularly: the keeper's dependants could recover damages).

<sup>28</sup> Since the creation in the Countryside and Rights of Way Act 2000 of certain rights to roam, there will now be a smaller number of potential trespassers in relation to whom this defence can be raised.

<sup>29</sup> Animals Act 1971, sub-s 5(3); *Cummings v Granger* [1977] QB 397 (it was reasonable to keep an Alsatian dog, known to be ferocious, to protect old cars in a locked yard).

<sup>30</sup> Where an animal strays onto the highway, the ordinary rules of negligence apply: see, eg, *Hole v Ross Skinner* [2003] EWCA Civ 774; *Wilson v Donaldson* [2004] EWCA Civ 972.

<sup>31</sup> Animals Act 1971, s 11.

<sup>32</sup> Cases involving loss (but no damage) would not be covered (eg, if the Ministry of Agriculture makes a foot-and-mouth order restricting movement of cattle, but none of C's cattle are destroyed).

A claimant may incur expense in keeping livestock while it cannot be restored to its owner, or while it is detained in pursuance of the power conferred by the Animals Act 1971 to detain it.<sup>33</sup> He can recover any such expenses reasonably incurred.<sup>34</sup>

Liability is strict under this section, but the defendant is not liable for any damage due wholly to the fault of the claimant.<sup>35</sup> Thus, if the claimant could have prevented the damage by fencing,<sup>36</sup> and the claimant was under a duty (owed to a person having an interest in the land from which the livestock strayed) to fence, the defendant is not liable so long as the straying would not have occurred but for that breach on the part of the claimant.<sup>37</sup>

The Law Reform (Contributory Negligence) Act 1945 again applies in respect of damage in part caused by the claimant's own fault.<sup>38</sup> It is also a defence that the livestock strayed from a highway and its presence there was a lawful use of the highway. This is because the owner of property adjoining a highway is presumed to have accepted risks incidental to such ownership.<sup>39</sup>

As mentioned, horses (including asses, mules, and hinnies)<sup>40</sup> are now dealt with under a separate provision in the 1971 Act, that is, section 4A, which provides:

- (1) This section applies where a horse is on any land in England without lawful authority.
- (2) The person to whom the horse belongs is liable for—
  - (a) any damage done by the horse to—
    - (i) the land, or
    - (ii) any property on it which is in the ownership or possession of the freeholder or occupier of the land, and
  - (b) any expenses which are reasonably incurred by a person detaining the horse under section 7A or 7B of this Act—
    - (i) in keeping the horse while it cannot be restored to the person to whom it belongs or while it is detained under section 7A or 7B of this Act, or
    - (ii) in ascertaining to whom it belongs.

This is subject to the other provisions of this Act.
- (3) For the purposes of this section a horse belongs to the person in whose possession it is.

Again, liability is strict under this section, but the defendant is not liable for any damage due wholly to the fault of the claimant.<sup>41</sup> Moreover, no liability arises 'in respect of a horse which strays from a highway when its presence there was a lawful use of the highway'.<sup>42</sup>

<sup>33</sup> Animals Act 1971, s 7. See *Matthews v Wicks* (1987) *Times*, 25 May; *Morris v Blaenau Gwent DC* (1982) 80 LGR 793. 33

<sup>34</sup> Animals Act 1971, sub-s 4(l)(b).

<sup>35</sup> Animals Act 1971, sub-s 5(1); *Nelmes v CC of Avon and Somerset* (9 February 1993) (unreported) (C kicked a police dog, before his arrest, provoking it into biting him).

<sup>36</sup> Fencing includes the construction of any obstacle designed to prevent animals from straying.

<sup>37</sup> Animals Act 1971, sub-s 5(6). In the absence of any such duty to fence, there is no defence under the Act.

<sup>38</sup> Animals Act 1971, ss 10 and 11. <sup>39</sup> Animals Act 1971, sub-ss 5(4), (5).

<sup>40</sup> Animals Act 1971, s 11. <sup>41</sup> Animals Act 1971, sub-s 5(1). <sup>42</sup> Animals Act 1971, sub-s 5(5A).

## Section 4 Liability for injury done by dogs to livestock

The Animals Act 1971, section 3, provides that, where a dog kills or injures livestock,<sup>43</sup> its keeper is liable for the damage, even though he was not negligent. But a person is not liable if the livestock was killed or injured on land onto which it had strayed and either the dog belonged to the occupier or its presence on the land was authorised by the occupier.<sup>44</sup> It is a defence that the damage was due wholly to the fault of the person suffering it.<sup>45</sup>

### Further reading

LAW COMMISSION, *Civil Liability for Animals* (1967)

NORTH, *Civil Liability for Animals* (2nd edn, 2012)

<sup>43</sup> Livestock for this purpose is a slightly wider category than the one under s 4 in that it includes pheasants, partridges, and grouse while in captivity: Animals Act 1971, s 11.

<sup>44</sup> Animals Act 1971, sub-s 5(4).

<sup>45</sup> Animals Act 1971, sub-s 5(1). If C, by his own fault, has contributed to the damage, the Law Reform (Contributory Negligence) Act 1945 applies to permit a reduction of the damages awarded.