THE LAW RELATING TO LIABILITY FOR ANIMALS

report of the
torts and general
law reform committee

Presented to the Minister of Justice
in SEPTEMBER 1975

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Terms of Reference

In 1967 the Law Revision Commission placed the topic of liability for damage caused by animals on the Committee's programme. A comprehensive background paper was prepared for the Committee in 1972 by Mr L.H. Atkins, now a lecturer in law at Canterbury University. Following Committee deliberation, a working paper was circulated for comment and criticism in July 1973. Copies were sent to the following organisations and persons: the Automobile Association, Federated Farmers, the Insurance Council, all Zoo authorities, the Ministry of Transport, the Department of Internal Affairs, the Railways Department, the Counties Association, the Law Societies, the Law Schools, and the members of the Law Revision Commission.

The Hon. Mr Justice White, formerly Chairman of this Committee, referred to us a copy of his judgment in McKenzie v. Risk, later reported in [1974] 2 NZLR 214. This is the only recent judicial exposition of the law of cattle trespass in New Zealand. The members were particularly appreciative of this gesture and derived considerable assistance from the judgment. We were similarly aided by comments from counsel both for the plaintiff and the defendant in that case.

General Approach

The law governing liability for animals is quite distinct from the law which determines the scope and operation of the general tort of negligence. There

are special risks associated with animals. The law is commonly discussed under two heads: liability for dangerous animals and liability for cattle trespass. The general action based on negligence exists as a "back up" for those who cannot establish a claim under the specialised actions which do not depend upon proof of fault. The law in New Zealand is to be found in a plethora of cases, some of which contradict one another, and in legislation covering registration of dogs, liability for damage done by dogs, and the impounding of stray animals. The result has been confusion and consequent difficulty in finding and establishing the law regulating the rights and obligations of those keeping animals. Moreover the law relating to animals has remained relatively static and some of it does not accord with modern conditions. Similar law in other common law countries (for example, the United Kingdom and Australia) has produced almost similar confusions, difficulties and inadequacies which have resulted in moves towards reform in those countries. Because of New Zealand's high animal population and way of life similar modification and clarification is required here.

Since the commencement of the accident compensation scheme the scope of the topic is limited to three areas: compensation for disease, compensation for property damage and compensation for economic loss. It has to be decided whether the law in New Zealand should continue to treat these residual classes of damage as a separate branch of the law of torts, or whether they should be subsumed under the general liability for damage caused intentionally or negligently.

While the existence of a statutory compensation scheme renders the task of reform less acute, it in no way detracts from the need to rationalize the present law and produce a set of rules appropriate to the 1970s. Major areas of concern apart from compensation for personal injuries still remain: liability for cattle trespass, liability for damage to property including damages caused to individuals by collisions with wandering stock, and liability for transmission of disease.

This report will take the form of a broad exposition of the law as it presently stands, from which specific difficulties and uncertainties will be isolated. Following this, avenues of reform will be outlined and recommendations made. The law will be examined under four headings:-

1. Liability for dangerous animals.
2. Liability for cattle trespass.
3. Liability for dogs.
4. The rule in Searle v. Wallbank [1947] A.C. 431, which relates to liability for the straying of animals on to public roads.

1. LIABILITY FOR DANGEROUS ANIMALS

The current law

Anyone who keeps a mischievous animal does so at his peril. He is responsible for the harm it may do by indulging in its dangerous instincts, provided he knows or is presumed to know of its vicious tendencies. Society tolerates the keeping of animals with an inherent

or displayed tendency to cause damage but imposes strict liability as the price.

The animal world has been divided into two broad categories represented by the lion and the lamb: ferae naturae and mansuetae naturae. Animals ferae naturae are animals belonging to a naturally fierce and dangerous species. The keeper of such an animal is presumed to know that it is dangerous and is liable for any damage which it does. Animals mansuetae naturae are animals of a species naturally tame or harmless and usually domesticated. If an animal mansuetae naturae causes injury the keeper will be liable without fault only if the individual animal has shown a tendency in the past to do damage of the kind in question and the keeper is aware of this. Proof of knowledge of the dangerous nature of such an animal is known as proof of the scienter. In the case of an animal ferae naturae the scienter is conclusively presumed while in the case of animals mansuetae naturae the scienter must be proved by reference to past behaviour and knowledge of that behaviour by the keeper.

Animals ferae naturae

Bears, elephants, zebras, racoons, chimpanzees, lions, wolves, huskies and leopards have all been held to be animals ferae naturae. In order to determine whether or not an animal falls into this class a Court will ask whether, as a matter of common knowledge, the species constitutes a danger to mankind. This test, however, raises a difficulty: danger to mankind does not really include within its ambit danger to property, yet

authority suggests that once an animal is classified ferae naturae the keeper will be held liable for damage which it may do to property. Thus the test does not reflect the scope of liability.

Another difficulty is presented by an English case (McQuaker v. Goddard [1940] 2 K.B. 687) where the test applied seems to have been whether the animals in question (camels) were generally domesticated or not. On the basis of such a test a lizard would be classified ferae naturae. While domestication may be relevant to classification, it is unsatisfactory as an exclusive test.

As was indicated earlier, the effect of the classification ferae naturae is to give rise to the irrebuttable presumption that the keeper of the animal ferae naturae was aware of the danger his animal constitutes - this follows from the fact that the classification is based on common knowledge. Thus the keeper of a trained and tamed circus elephant will be held liable for any damage it does because elephants as a species are classed ferae naturae (Behrens v. Bertram Mills Circus Ltd. [1957] 2 Q.B. 1). It does not matter, therefore, if the keeper thinks his animal is tame and harmless. The presence or absence of negligence is also immaterial.

Animals mansuetae naturae

These are animals which, according to the test referred to above, belong to a species not considered a danger to mankind - horses, cows, bulls, cats, sheep etc. It follows that determination of whether or not an animal

in this class is dangerous operates at an individual level, rather than, as with animals ferae naturae, at a species level. In order that an animal mansuetae naturae be classified dangerous two things must be shown:

(a) that the particular animal in question exhibited a prior propensity for doing damage of the kind in issue;

(b) that the keeper had actual knowledge of that propensity.

Once these points are established negligence, or the lack of it, on the part of the keeper is immaterial.

(a) Propensity

What actually constitutes "propensity" has been the subject of some controversy and the law here is in need of clarification. Probably the most satisfactory formulation that can be drawn from the law as it stands is that the animal must have a vicious or fierce tendency to injure people by attacking them. The propensity must be one which is not common to the species (since this is taken into account when the animal is classed mansuetae naturae as against ferae naturae). However an English case (Fitzgerald v. E.D. & A.D. Cooke Bourne (Farms) Ltd. [1964] 1 Q.B. 249) took this point further, the Court holding that the playfulness common to young fillies is not sufficient to establish or constitute a propensity. Thus the fact that certain animals at certain times (for example, when young or when giving birth) are dangerous is not enough to indicate a

propensity. This is not particularly satisfactory as it leaves a gap. It is not likely that such transitory characteristics will be taken into account during the ferae/mansuetae naturae classification process either, yet during these transitory periods some animals are undoubtedly more dangerous than usual.

The animal need not have actually made an attack to exhibit propensity, it need only show a tendency to do so. It must be shown, however, that the propensity was of a kind likely to cause the damage in question. Thus, in an action for personal injury it is not enough to show that the animal causing the injury was inclined to attack other animals. It is not clear whether or not the converse applies, i.e. whether or not knowledge of an animal's propensity to attack humans is sufficient to found liability for damage to other animals; or whether an attempted attack on a human is sufficient to show a propensity which will result in liability for attacking other animals. The weight of authority suggests that it is, although there are indications to the contrary. If this is correct then a keeper of an animal mansuetae naturae can be held liable for damage done to other than humans, simply because the animal is dangerous to humans. This again points to the inadequacy of the broad classification test and also of the propensity test within the mansuetae naturae classification.

The final point relates to liability for diseased animals mansuetae naturae. This has to

be considered with respect to disease transmitted from one animal to another and also with respect to disease transmitted from an animal to a human. It is not certain whether all cases of disease transmitted to humans will be covered by the accident compensation scheme.

(b) Knowledge

It is not sufficient to show that if the keeper had exercised reasonable care he would have known of the propensity - actual knowledge is required. However, in certain limited circumstances knowledge can be imputed. Where, for example, the owner of an animal has entrusted the care of the animal to a servant, the servant's knowledge is attributed to the employer.

There is no distinction, save one, between an animal ferae naturae and an animal mansuetae naturae once propensity and knowledge of that propensity has been proved as regards the latter. The one distinction is open to doubt: present indications are that as far as the former is concerned the keeper will be liable for any damage done by the animal; that as far as the latter is concerned only damage attributable to the dangerous propensity will attract liability, except in the case of a propensity for an attack on other animals. The remainder of the discussion relating to dangerous animals is applicable to both animals ferae naturae and animals mansuetae naturae when the scienter has been proved.

Escape from control

Before liability can be brought home to the keeper for damage done by a dangerous animal it must be shown that the animal escaped from control (Christian v. Johannesson [1956] NZLR 664). This requirement has led to some difficulties. A keeper has been held liable for injury inflicted by a bear that was, and remained, chained. In the case of Rands v. McNeil [1955] 1 Q.B. 253, however, the requirement of escape from control was held to be more stringent. The plaintiff was a farm worker who entered the stall of a bull known to be dangerous. There the bull injured him. Two of the Lord Justices (Denning and MorrisL.JJ.) took the view that liability could not be established unless the animal could be shown to have escaped from a controlled space. The law in this area is thus somewhat confused.

Who is a keeper?

Since the whole of the law relating to dangerous animals depends on knowledge, actual or presumed, of the animal's dangerous propensity it is reasonable that the person responsible will be the person exercising control over the animal. Thus the test appears to be "who had control over the animal?" Responsibility does not, therefore, rest on ownership.

Defences available to the keeper of a dangerous animal

There are basically six possible defences (once scienter, escape from control and injury have been established), some of which are open to doubt. There is no doubt that contributory negligence and volenti non

fit injuria (voluntary assumption of risk) are available. The fact that the injured party was a trespasser when injured seems to be regarded by most authorities as a good defence providing the animal doing the injury was not kept for the purpose of injuring as distinct from discouraging the trespasser (Sarch v. Blackburn (1830) 4 C. & P. 297). Similarly "act of God" may be a defence in extremely limited circumstances although there are indications that it may have no application as far as animals ferae naturae are concerned. There has been much discussion whether or not the defence of the "act of a third person" is available. Some commentators have argued that such an act should be deemed to be within the risk involved in keeping dangerous animals, as the keeper is better placed to guard against the intervention of a third party than the victim. The other possible defence is a curious one suggested by the case of Rands v. McNeil (supra) and applied at first instance in James v. Wellington City [1972] NZLR 70, 75 where the Supreme Court held that the relationship of employer and employee limits liability in relation to animals owned by the employer to cases where negligence is proved. The Court of Appeal, however, did not distinguish between this defence and that of volenti non fit injuria ([1972] NZLR 978, 984.)

Areas for reform

Having regard to the impact of the Accident Compensation Act 1972 the Committee sees the following areas as those which are now in need of reform:

(a) The test of "danger to mankind" to determine whether an animal is ferae naturae or

mansuetae naturae appears inappropriate when the areas of liability are limited to damage to property (including other animals), transmission of disease to humans, and economic loss:

(b) The definition of "dangerous propensity" within the mansuetae naturae class is unclear, particularly in relation to transitory characteristics:

(c) The state of the law regarding liability for the transmission of disease from animals is unclear:

(d) The narrow view taken of escape from control is out of harmony with the concept of the scienter action:

(e) The range of defences available to the keeper of an animal which is dangerous is vague.

Reform in other jurisdictions

England

The Law Commission recommended the retention of a special but simplified form of civil liability for animals, albeit in a simplified form. Features of the proposals were:

- strict liability should be imposed for damage by animals of a species which present a special danger to persons or property
- a dangerous species should be one not

generally domesticated in the British Isles

- strict liability should also be imposed in respect of a particular animal with known dangerous characteristics
- strict liability in either of the categories should not be dependent upon escape from control
- the keeper of the animal should be fixed with the liability.

The Animals Act 1971 (U.K.) implemented these recommendations in the following manner:

> 2. Liability for damage done by dangerous animals -
>
> (1) Where any damage is caused by an animal which belongs to a dangerous species, any person who is a keeper of the animal is liable for the damage, except as otherwise provided in this Act.
>
> (2) 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, except as otherwise provided by this Act, 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
>
> (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 sixteen.

5. Exceptions from liability under sections 2 to 4 -

(1) A person is not liable under sections 2 to 4 of this Act for any damage which is due wholly to the fault of the person suffering it.

(2) A person is not liable under section 2 of this Act for any damage suffered by a person who has voluntarily accepted the risk thereof.

(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.

6. Interpretation of certain expressions used in sections 2 to 5 -

(1) The following provisions apply to the interpretation of sections 2 to 5 of this Act.

(2) A dangerous species is a species -

(a) which is not commonly domesticated in the British Islands; and

(b) whose fully grown animals 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.

(3) Subject to subsection (4) of this section, a person is a keeper of an animal if -

(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 sixteen owns the animal or has it in his possession;

and 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.

(5) Where a person employed as a servant by a keeper of an animal incurs a risk incidental to his employment he shall not be treated as accepting it voluntarily.

Scotland

The Law Reform Committee for Scotland, in its report, having stated that liability should depend "on whether there has been a failure to exercise reasonable care to prevent the animal causing the injury", commented -

"[T]his simple principle could be effectively applied in all cases and ... it is flexible enough to allow the court to have regard to all the circumstances of a particular case. Such circumstances would, of course, include the nature and disposition of the animal concerned and the knowledge which the defender [defendant] had or ought to have had thereof, but the court would also be enabled to take into account other

> considerations, such as the nature of the place where the injury was caused, whether the place was habitually enclosed, whether the person injured had any right to be there, the conditions (including the time of day or night) under which the occurrence took place, and the nature of the precautions (if any) taken by the defender [defendant] to prevent injury."

(12th Report of the Law Reform Committee for Scotland, 1963, Cmnd. 2185, para. 11.)

New South Wales

The Law Reform Commission strongly advocated dispensing with the special set of rules in favour of determining liability for damage done by animals on the same basis as liability for damage otherwise caused, i.e. negligence. The Commission posed a series of questions which demonstrate the anomalies present in the current legal framework and concluded that the courts have had little success in arriving at satisfactory answers. The Commission was influenced by the flexibility of the remedy. Not only will the nature and disposition of the animal be a guiding factor, but the knowledge of the defendant, the nature and location of the damage, and the precautions taken by the defendant will all have a significant bearing on the determination of the liability. The Commission noted that

> it is fundamental to the tort of negligence that one of the factors which delimit the extent of the precautions which a person must take, so as to satisfy the standard of the reasonable man, is the gravity of the risk against which it is his duty to guard. In the case of some animals the extent of the precautions required to satisfy this standard will be "so stringent as to amount practically to a 'guarantee of safety'". (per Devlin J. in Behrens v. Bertram Mills Circus Ltd. [1957] 2 Q.B. 1 at p.14 quoting Lord Macmillan in

Donoghue v. Stevenson [1932] A.C. 562 at p.612.)
(L.R.C. 8, para. 14.)

The general approach adopted in New South Wales was the same as that taken by a previous Committee in England - the Goddard Committee. The Chairman of the Law Revision Commission advised in June 1975 that the Report has not been implemented but is currently under active consideration by the Government.

Reform recommendations

In our working paper we advanced the view that the present law should be retained in essence, but that modifications should be made removing its crudities, anomalies and vagaries. We were concerned that if the special rules were abolished in favour of a general liability for negligence the courts might still use the old law to determine when a duty of care should be held to arise and to determine the scope of that duty. We are now persuaded that the advantages of a simple negligence test outweigh the disadvantages.

The ordinary law of negligence can determine the scope and extent of the duty of the keeper of animals in the circumstances of the particular case. It imposes a duty commensurate with the risk and imposes a liability where risk was foreseeable and should have been guarded against. In an appropriate case the Courts can apply the doctrine res ipsa loquitur and would in that context have brought into account the dangerous nature of the particular animal and the circumstances generally. We do not consider that in modern times the keeper of an animal ought to be placed in a position of absolute liability and to be treated as an insurer. Property

insurances are widespread but would not necessarily cover all circumstances in which a claim might be considered.

The main policy reason for the approach taken in the United Kingdom was the value of strict liability as a deterrent. This deterrent can no longer be provided by an action for damages for personal injury in New Zealand.

Since the enactment of the Accident Compensation Act 1972 claims for personal injury to humans are excluded from consideration in the present context. We believe that the ordinary concept of negligence can adequately deal with the problems associated with the questions of escape and the transmission of disease to humans or animals. Unless negligence is proved, we believe that it is not socially unfair to leave the loss to lie where it falls in the case of damage to property, or to other animals, or the transmission of disease to other animals except where negligence does exist. The question of disease transmitted to humans may or may not be covered by the Accident Compensation Act 1972, depending upon whether there can be established a "personal injury by accident". We believe that social policy in this limited field would be better promoted by bringing the question of disease in a non-accident situation under a statutory compensation scheme rather than by enacting statutory provisions imposing a special liability for animals.

The Occupiers' Liability Act 1962 enacted a common duty of care which seems to us to have put into

statutory form in the particular context a statement of an ordinary negligence approach, freeing the particular area of the law from its special problems. We are of the view that a similar general approach is appropriate here. The successful operation of the Occupier's Liability Act dispels any fear that the courts will resort to the old law for the purpose of interpreting the new.

2. LIABILITY FOR CATTLE TRESPASS

The Common Law

This tort is of ancient origin and is distinguished from the tort of trespass to land by the fact that the latter is committed by means of a conscious act on the part of a trespasser - driving animals on to land, for example. For the tort of cattle trespass it is sufficient that the defendant's cattle stray, of their own volition, on to the land. Once again, therefore, concepts of negligence are irrelevant. Liability is established without proof of fault in the keeper.

For the purposes of the action animals are divided into two classes , domesticated (domitae) and undomesticated (ferae). It will be seen immediately that this distinction is quite different from that made in the scienter action. The consequences of the distinction are that the owner of land from which animals stray is only liable for animals domitae. This distinction is very vague, however, and is not often adverted to since courts usually limit themselves to asking whether

or not the person sued was the keeper of the animal the actions of which gave cause for complaint.

The current legal position in New Zealand

In the New Zealand environment the emphasis is placed on prevention through the enforcement of fencing rights rather than the pursuit of an action in tort. McKenzie v. Risk [1974] 2 NZLR 214, a Supreme Court decision, affords the most appropriate starting point for any analysis of the law of cattle trespass in New Zealand. This most recent judicial exposition of cattle trespass isolates the salient features of the present law.

- The law is essentially governed by s.26 of the Impounding Act 1955 and not the common law.

- Recovery is barred unless the land trespassed upon is fenced or the occupier can prove that the trespass was not wholly or partly due to the fact that his land was not fenced.

- Previous cases establish that land may be regarded as unfenced when it is no longer enclosed by a sufficient fence within the Fencing Act 1908.

- Further, a fence will be treated as insufficient even although it has fallen into

this state:

- through the action of the neighbour's stock; or
- through the failure by the neighbour to comply with his fencing obligations; or
- the negligence of the owner of the trespassing stock.

The law affords an occupier of land who suffers trespass limited relief. Protection lies in the occupier invoking the Fencing Act 1908 to ensure he has a sufficient boundary fence.

Section 26 of the Impounding Act provides as follows:

> 26. Damages for trespass - (1) Except as otherwise provided in this Act, the occupier of land trespassed upon by stock shall not be entitled to demand or recover any damages whatsoever on account of the trespass thereon of any stock unless -
>
> (a) The land or the portion of the land trespassed upon is fenced; or
>
> (b) He proves that the trespass on to his land was not wholly or partly due to the fact that his land or the portion trespassed upon was not fenced; or
>
> (c) In any case where stock trespassing on any land adjoining his land and not fenced therefrom has trespassed on to his land from that adjoining land, he proves that the trespass on to the adjoining land was not wholly or partly due to the fact that that adjoining land was not fenced; or

(d) The land (whether fenced or unfenced) is situated in a borough or town district:

Provided that nothing in this paragraph shall apply with respect to the trespass by stock on to unfenced land having a frontage to a road declared by the local authority by bylaw to be a stock route, if the stock is being driven along the road at the time and subject to the conditions prescribed by the bylaw.

(2) In any case where damages are payable under this section the amount of any damage shall be recoverable by action from the owner of the stock.

(3) Where stock has been impounded for trespass and the occupier of the land trespassed upon notifies the pound-keeper that he intends to claim actual damages instead of trespass rates pursuant to section twenty-seven of this Act, the pound-keeper shall, on payment of all other authorised fees and charges, release the stock to the owner.

This section gives the occupier the option of claiming trespass rates or actual damage.

Trespass rates

Before he can claim trespass rates, the occupier must impound the stock. He may then claim impounding rates (if the stock is impounded on his own property) and trespass rates. While the level of impounding rates was inreased in 1968, the level of trespass rates has remained unaltered since the enactment of the current statute in 1955. The trespass rates per day are as follows:

	Trespass on any paddock or meadow of grass or stubble	Trespass on any land having thereon any growing crop or from which the crop has not been removed, or in any cemetery
For every horse, mare, gelding, colt, filly, foal, bull, cow, ox, steer, heifer, calf, ass, or mule	20¢	50¢
For every ram, ewe, wether or lamb	5¢	10¢
For every goat, or boar, sow or other pig	50¢	$1.00

Actual damages

It is only where the occupier elects this option that the common law assumes any significance. There are no reported cases in New Zealand on how such damage might be determined. At common law liability may be established without proof of fault on the part of the keeper of the stock. The keeper of the stock will be liable for such damage as is the natural consequence of the trespass. This has been held to include damage done by trespassing stock to the stock properly on the land trespassed upon, e.g. where scab-infested sheep trespass and infect the occupier's sheep (Theyer v. Purnell [1918] 2 K.B. 333.)

Defects in the present law

The view reflected in the Impounding Act is that a person with property adjoining land where stock is kept

is virtually accepting the risk that stock will stray and damage will ensue if the boundary fence is not up to Fencing Act standard. In short the farmer is assumed at law to expect that animals will wander wherever they are unrestricted.

The law is defective in the following respects:

- There is no liability for damage where the trespass occurs in the period between the service of a fencing notice and the carrying out of the work.

- There is no liability for damage where a hitherto sufficient fence is rendered insufficient by a change of use of the land by one of the neighbours.

- There is no liability for damage where the fence has been rendered insufficient by the activities of the owner of the trespassing stock or by his stock.

- The types of fence listed as sufficient in the schedule of the Fencing Act 1908 are no longer representative of modern fencing styles.

- The scope of s.26(1)(b) and (c) of the Impounding Act 1955 is both difficult to define and to apply.

- The trespass rates available to a successful plaintiff bear no resemblance to the actual loss incurred.

The Committee considers it important that the practical dimension of these defects should be appreciated. Representations to the Committee have provided ample evidence of the practical difficulties that arise from these defects. The following are examples:

(a) 2 mile boundary fence in difficult back country in need of repair. Neighbour A uses cattle to reduce feed on his side of boundary. Some cattle get through boundary. Neighbour B complains and A and B finally decide to re-fence boundary. A says he will lay the line, i.e. remove the old fence and use a blade to make the line easier and then lay out the posts. B agrees to arrange for fencers. A makes sure posts not laid until winter and fencers unobtainable. He then fully stocks his side of the boundary with cattle which have little feed (due to A's careful planning). They immediately cross the boundary (pulled down as agreed by A) and eat up B's winter feed.

The Impounding Act offers no remedy.

(b) Farmer A grows clover. The stock of farmer B in drought conditions break down the fence and demolish the crop. The fence that may have been sufficient when the land was grazing pasture on both sides of the fence was not sufficient when an agricultural crop was grown.

Again the Impounding Act offers no remedy.

Reform in other jurisdictions

(a) England

The Report of the English Law Commission on Civil Liability for Animals (Law Com. 13) culminated in the Animals Act 1971. The Commission took the view that the retention of strict liability for trespass could be justified only if it provided a clear rule as to liability for trespassing cattle facilitating the settlement of disputes without recourse to litigation. It was considered that the law failed to meet that test and a new statement of the principles was recommended. The new cattle trespass action still adheres to the concept of strict liability but certain exceptions are enacted -

Section 5(1) - A person is not liable for any damage which is due wholly to the fault of the person suffering it.

Section 5(5) - A person is not liable where the stock strayed from a highway and its presence there was a lawful use of the highway.

Section 5(6) - In determining whether any liability for damage under s.4 of this Act is excluded by subs. (1) of this section the damage shall not be treated as due to the fault of the person suffering it by reason only that he could have prevented it by fencing; but a person is not liable under that section where it is proved that the straying of the livestock on the land would not have occurred but

for a breach by any other person, being a person having an interest in the land, of a duty to fence.

The tort is essentially retained but in a modified form under the new legislation.

(b) New South Wales

The report of the Law Reform Commission on Civil Liability for Animals (L.R.C. 8) observed that the tort of cattle trespass produced some odd results. The chief target of criticism was the limitation of the scope of the remedy to the occupier. Such anomalies led the Commission to the conclusion that the tort of cattle trespass was no longer worthy of a place in the law.

The Commission accordingly recommended the abolition of the tort of cattle trespass and that in future liability in such a situation should be governed by the ordinary principles of liability in tort.

Areas for reform

1. Reform of the Fencing Act 1908:

As the law of cattle trespass revolves around enforcement of the Fencing Act 1908, it is logical that reform of the law of cattle trespass should hinge on a new fencing code. The Property Law and Equity Reform Committee in 1972 presented a report on this very topic which tackles to some degree the problems that occur in this field.

(a) Fencing Notices

The Property Law and Equity Reform Committee has preserved in its recommendations the principles of the 1908 Act. This Committee is convinced, however, that the procedure in that Act should be expanded to cater for cattle trespass situations. Speed is of the essence if the Fencing Act is to afford any redress and this requires machinery for urgent service and an abridged time for cross-notice. Further, the Act should stipulate the status of the fence pending the completion of work, as well as enabling the Court to make ancillary orders where protection of either party's position is warranted.

(b) Change of use

The Property Law and Equity Reform Committee has dealt with the change of use situation by empowering a Magistrate to order that the whole of the cost of the work is to be borne by one of the parties to the exclusion of the other. A satisfactory cattle trespass law demands that the Fencing Act take one further step. This step involves some stipulation as to which party bears the burden of upgrading the fence to suit the new purpose.

(c) Responsibility where fence rendered insufficient

On occasions a hitherto sufficient fence may be rendered insufficient solely because of the activities of the owner of the trespassing stock, or of the stock itself. In this situation justice

demands that the Impounding Act bar be lifted and that the Court be given jurisdiction to entertain a claim for damages by the owner of the land trespassed upon.

(d) Categories of fence

The report of the Property Law and Equity Reform Committee seeks to substitute the concept of an adequate fence for the present sufficient fence. A fence under the proposal will be adequate if it is satisfactory for the purposes it serves or is intended to serve. An up-to-date schedule is also proposed, not as definitive of the range of fencing, but as a conveyancing guide. This approach is suitable for cattle trespass purposes.

2. Reform of s.26(1)(b) and (c) of the Impounding Act 1955:

Section 5 of the Impounding Act 1908, the precursor of the present s.26, denied the occupier a remedy in damages for trespass on unfenced land. The situation was mitigated in 1939 when an amendment restored the common law position in cases where the plaintiff proved that the trespass was not wholly or partly due to the fact that the adjoining land was not fenced. An opportunity to determine the ambit of the amendment (cf. s.26(1)(b) and (c)) presented itself in McKenzie v. Risk, but the question was not tackled. Counsel for the defendant in that case informed the Committee that an attempt was made during the hearing to think of a fact situation where the subclause might apply. Ventured was the hypothetical case of animals

being deliberately or negligently introduced onto the neighbour's property through a gate. Davis, in a comment upon liability for animals in New Zealand, suggests a steeplechaser being attracted by a field of oats, access to which would not be denied to the horse by any type of fence, whether a sufficient fence within the meaning of the Act or not. (Davis, 1 NZULR 206, 221.)

Counsel for the plaintiff in the McKenzie case has suggested to the Committee that the subclauses be clarified to make it possible to determine in what kind of circumstances a plaintiff can recover where the fence has not contributed to the trespass. Further, this counsel contends that it should not matter if the fence is not a "Fencing Act fence" in this case. The Committee agrees that an inquiry as to whether the fence can be classed as a sufficient fence is irrelevant where a plaintiff contends that the trespass has occurred regardless.

3. Availability of coincident remedies:

It is not clear from the present case law whether s.26 of the Impounding Act excludes the possibility of an action being brought in negligence. In Edwards v. Rawlings [1924] NZLR 333, 336 Hosking J. held that the section

> "makes no exception in favour of the occupier because the trespass is due to the negligence of the owner of the cattle"

and a similar view appears to have been taken in Gaynor v. Lacy [1920] NZLR 235. However, in McKenzie v. Risk (supra) White J. contemplated the possibility of a

negligence action arising if the fence in no way contributed to the damage, but held that if there was an insufficient fence due to the negligence of the defendant no claim lay. The Court found on the facts of that case that the age and condition of the fence had contributed to its collapse and it was, prior to the trespass, not a "sufficient fence" in terms of the Fencing Act 1908. It was not, therefore, necessary for the Court to pursue the allegation of negligence any further.

The possibility of a negligence action being brought was also contemplated by the Magistrate's Court in Welch v. Producers Meat Ltd. (1956) 9 M.C.D. 84. McKenzie v. Risk and Welch v. Producers Meat Ltd. were both decided after the 1939 Amendment to the Act inserted the qualification (now contained in s.26(1)(b) and (c) referred to earlier)which provided that the section would not apply where the plaintiff proved that the trespass was not wholly or partly due to the fact that the adjoining land was not fenced. White J. in McKenzie v. Risk appears to regard an action in negligence as being available only where the plaintiff could show that the trespass would have taken place despite the existence of a "sufficient fence" in terms of the Fencing Act. The prior negligence on the part of the adjoining owner in failing to keep the fence in proper repair so that it fell below the standard of a "sufficient fence" could not form the basis of a negligence action.

A further question which arises is whether s.26 of the Impounding Act operates as a bar to recovery of

damages only for damage done to the land itself or whether damage to personal property may not still be the subject of an action at common law either for cattle trespass or negligence, e.g. damage done to the motor vehicle of the occupier, or disease transmitted by trespassing cattle to the cattle of the occupier. In the only authority to deal with this question, Edwards v. Rawlings, Hosking J. rejected as erroneous the view that the section was limited to damage to the land itself, and held that the words of the section "any damage whatsoever" must be given proper weight. At p.335 he stated:

> So the damages which the enactment in question renders irrecoverable are all damages which would follow as natural and probable consequences, and so damages for injuries done to animals and other chattels on the land, as well as the land itself, provided they are not too remote, come within the scope of the prohibition."

Hosking J. went on to consider the situation of a person other than the occupier, and it is implicit from his judgment that the common law right of action of such persons remains unaffected. The section deals only with any right of "the occupier" to recover damages. At common law persons other than the occupier, e.g. the occupier's wife or a member of his family, or a visitor, have no cause of action in cattle trespass but may bring an action in negligence or under the scienter rule. This right of action would appear to be unaffected by s.26.

It is also significant that the cases under s.26 of the Impounding Act have, apart from one Magistrate's Court decision, dealt only with trespass from adjoining land. It is not clear whether the section covers the

case where the trespass takes place from off the highway, or whether the common law would apply in this situation. At common law the occupier of premises adjoining the highway is presumed to accept the ordinary risks incidental to the passage of stock along the highway, and no liability is placed on the owner of the stock unless negligence on his part is established: Tillett v. Ward (1882) 10 Q.B.D. 17; Wingate v. Pedersen (1906) 1 M.C.R. 83. There are, however, dicta in Adamson v. Aitken (1912) 31 NZLR 964 which suggests that s.26 of the Impounding Act does operate to bar recovery of damages where stock trespass from the highway on to unfenced land. Paragraph (d) of subs. (1) would also lend support to such a contention. The issue remains unresolved.

Reform recommendations

The primary question is whether it is appropriate or equitable to retain the emphasis on fencing reflected in the Impounding Act. This emphasis may have been appropriate in 1884 when there was a general lack of fencing, and it may have been considered unfair to apply the English common law notion of strict liability. The accent was obviously on preventing trespass by encouraging fencing rather than on compensating a person once trespass had occurred. In contrast much of the country is now substantially fenced.

Federated Farmers of New Zealand (Inc.) submitted to us that the Impounding Act provisions should remain because of the value of speed and certainty. The Committee is persuaded of the need to aspire to certainty of rules in this area. However, the Committee does not

believe that certainty is the only criterion. Some relaxation of the absolute bar imposed by the Impounding Act is justified. The following situations illustrate this:

(a) Bulls of neighbour A, which have a tendency to roam, crash the boundary and mate with neighbour B's Charolais cows. B is barred from claiming damages. The land is not regarded as fenced even although there was a sufficient fence until A's bulls knocked it down.

(b) B's herd is tested for brucellosis and certified clean. A has yet to arrange testing when his stock break down the boundary fence, trespass on to B's land, and infect his herd. B cannot claim.

(c) There is an outbreak of foot and mouth disease. A instructs cartage firm, X Co., to remove his infected stock for slaughter, but before this is done they get through a hole in the boundary fence and all B's stock become infected. B is precluded from suing for any compensation.

(d) A and B are sheepfarmers sharing a common boundary which is sufficiently fenced. Without notice to B, A puts a large number of cattle in a boundary paddock which has never previously been used for this purpose. The cattle break down the fence. B has no remedy.

The new section which we propose to replace s.26 of the Impounding Act 1955 should be comprehensive. The

possibility of the plaintiff bypassing the new code and arguing that it does not apply to actions framed in negligence or nuisance should be foreclosed. It therefore becomes necessary to deal exhaustively with the possible defences and, as in the Occupiers' Liability Act 1962, to state whether or not defences deriving from the common law are available. We consider that contributory negligence should be an available defence, with the result that damages would be apportioned if contributory negligence is established. Volenti non fit injuria should not be an available defence as this would confusingly introduce questions as to what the plaintiff has consented to a second time. "Act of a stranger" and "act of God" are more difficult. But on policy grounds we consider that neither defence should be available to a defendant. If an occupier's remedies against strangers, particularly people trespassing on his land, are considered insufficient the proper way to strengthen his remedies under the Trespass Act 1968. At present that Act strikes what the Legislature considers to be an acceptable balance between the conflicting interests involved, and we feel it is proper to build on that basis rather than attempt to alter it.

The Committee therefore makes the following recommendations:

A statutory provision should be introduced replacing s.26 of the Impounding Act and the common law, and providing a comprehensive statement dealing with the liability of the owner of trespassing stock which cause damage. The section should provide for the following matters:

(a) A right of action for damages or a claim for statutory rates where appropriate, for the damage caused to the land or other property of the occupier or the property of any other person which is lawfully on the land of the occupier.

(b) The action shall lie whether the stock trespass on to the land of the occupier from adjoining land or from a highway.

(c) Unless the plaintiff is able to prove that the trespass on to the occupier's land was not wholly or partly due to the absence or insufficiency of fencing, it shall be a defence to any such action that the land of the occupier is not fenced at the time of the trespass by a fence which is reasonably sufficient to prevent the entrance of stock of the kind and in the numbers which the occupier ought reasonably to foresee will be using the adjoining land or highway (whether or not the fence is a sufficient fence within the meaning of s.8 of the Fencing Act 1908).

(d) That a fence shall not be held to be insufficient if it would have been sufficient but for

(i) the wilful act or negligence of the person having control of the trespassing stock; or

(ii) the actions of the trespassing stock at or before the time of trespass; or

(iii) a change of use of his lands by the person having control of the trespassing stock

for which the occupier has not had a reasonable opportunity to provide.

(e) That the defence of contributory negligence shall be available.

(f) That the code shall be comprehensive, and thus render it impossible for the occupier or the owner of property lawfully on the occupier's land to have recourse to the tort of negligence (or any other tort) and disregard the section. So the section should apply "in substitution for any rules of the common law".

(g) That the defences of "act of a stranger" and "act of God" shall not avail the defendant.

(h) That the alternative of claiming impounding and trespass rates be retained, but the amount of those rates should be increased in line with the changes in the value of money since 1955 and in the case of the impounding rates, since 1968.

Under the proposed provision the state of the fence will continue to have a significant impact on liability. We therefore suggest that the particular fencing reforms we have discussed earlier might feature in any comprehensive review of the fencing legislation.

3. DOGS

Shape and content of current law

For over a century statutory provisions have imposed a special liability on owners and keepers of dogs. The Dogs Registration Act 1955 together with its forerunners reverses the common law position under which dogs were classed as mansuetae naturae. Part III of the Act governing liability for injury or damage caused by dogs contains the key provision, s.29, which reads as follows:

> 29. Mischievous propensity in dog need not be proved - The owner of a dog shall be liable in damages for injury done by the dog, and it shall not be necessary for the person seeking damages to show a previous mischievous propensity in the dog, or the owner's knowledge of any such mischievous propensity, or that the injury was attributable to neglect on the part of the owner of the dog.

Essential to discovering the ambit of this provision is the definition of "owner" -

> "Owner", in relation to any dog, includes every person who -
>
> (a) Keeps or harbours the dog or has the dog in his care for the time being, whether the dog is at large or in confinement; or
>
> (b) Occupies any house or premises in which the dog is usually kept or permitted to remain.

The most comprehensive judicial determination of the scope of s.29 is found in the Supreme Court decision of Chittenden v. Hale [1933] NZLR 836. The judgment of Blair J. hinged on the scope of the words "injury done

by the dog" which he concluded was confined to injuries caused by biting. Accordingly in that case an injury caused by a chained dog leaping at the plaintiff forcing her to step back and fall did not constitute injury "done by a dog". The validity of linking the injury concerned to injury by biting has been disputed in academic circles. Aspects of that decision were considered by Cooke J. in Christian v. Johannesson [1956] NZLR 664, this Judge being disposed "to agree with the view expressed by Blair J. although I think that he put the matter in too absolute a form". Again in Knowlson v. Solomon [1969] NZLR 686 McGregor J. agreed with the academic opinion that it is difficult to accept all the conclusions reached by Blair J. In his judgment, at p. 90, the words "done by the dog" connote something of an active nature, and not passive on the part of the dog.

Section 29 has been applied to a situation where dogs worried sheep in Lankshear v. Fair [1930] NZLR 347 and considered in relation to injury to a cow in Graham v. Bowis (1963) 11 M.C.D. 76.

The liability under the Act is not limited to the true owner of a dog for as we have seen there is a special definition of the word "owner" in s.2.

The impact of the wider scope of the term "owner" can be seen in the case of Burchmore v. Rawson [1932] G.L.R. 283. Ostler J. pointed out that our notion of "owner" is very wide. He then went on to say first "that the object of the definition was to get over the difficulty of sheeting home the responsibility for

injury done by a particular dog". Secondly "the Legislature intended to get over that difficulty by making the person who kept or harboured a dog or allowed it to remain on his premises, liable for its misdeeds as though he were its owner". In that case the appellant was liable for damage done by a dog which, although owned by an employee, was, when the employee was away, fed by another employee and occasionally by the appellant's wife.

A person who has cared for a dog has been held liable under the Act even though the true owner was known (Tobin v. Dorman & Anor. [1937] NZLR 937). This attributed ownership seems harsh as liability attaches whether or not the mischievous propensity is known and whether or not there is negligence.

It must be assumed by virtue of s.29 that a dog is a vicious animal and it is not necessary for the appellant to show a previous mischievous propensity of the dog, or the owner's knowledge of any such mischievous propensity. But what is the vice or propensity against which the owner must guard? The Legislature has indicated the general nature of the vicious propensity against which the owner must effectively guard others at his peril in the provisions of ss. 22 and 24 of the Act; the dangerous dog in s.22, the dog which in any highway or on any place open to the public may attack any person or stock, the dog which in any highway may attack persons or may rush at vehicles or frighten stock or worry sheep.

The defences currently available are those which

lie for the scienter action generally and can be listed as follows: contributory negligence, volenti non fit injuria, and trespass by the injured party. The availability of the two defences act of God and act of a third person are contentious.

Reform approaches

England

The Dogs Acts 1906 to 1928 constitute, as in New Zealand, a striking statutory exception to the general law regarding civil liability for damage done by animals. In England, however, the range of strict liability is confined to injury to cattle and poultry. The Law Commission recommended that the range of available defences to such an action should be clarified. In so far as the range of persons subject to this liability was concerned the Commission recommended that this should rest with the keeper - i.e. the person who owns or possesses the dog. Further the Commission proposed a new set of defences designed to cater for the specific situation of the protection of livestock against dogs.

Section 9 of the Animals Act 1971 (U.K.) implements these recommendations in the following manner in s.3 and in s.9:

> 3. Liability for injury done by dogs to livestock - Where a dog causes damage by killing or injuring livestock, any person who is a keeper of the dog is liable for the damage, except as otherwise provided by this Act.
>
> 9. Killing of or injury to dogs worrying livestock
>
> (1) In any civil proceedings against a person

(in this section referred to as the defendant) for killing or causing injury to a dog it shall be a defence to prove -

(a) that the defendant acted for the protection of the livestock and was a person entitled to act for the protection of that livestock; and

(b) that within forty-eight hours of the killing or injury notice thereof was given by the defendant to the officer in charge of a police station.

(2) For the purposes of this section a person is entitled to act for the protection of any livestock if, and only if -

(a) the livestock or the land on which it is belongs to him or to any person under whose express or implied authority he is acting; and

(b) the circumstances are not such that liability for killing or causing injury to the livestock would be excluded by section 5(4) of this Act.

(3) Subject to subsection (4) of this section, a person killing or causing injury to a dog shall be deemed for the purposes of this section to act for the protection of any livestock if, and only if, either -

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

(b) the dog has been worrying livestock, 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.

(4) For the purposes of this section the condition stated in either of the paragraphs of the preceding subsection shall be deemed to have

been satisfied if the defendant believed that it was satisfied and had reasonable ground for that belief.

(5) For the purposes of this section -

(a) an animal belongs to any person if he owns it or has it in his possession; and

(b) land belongs to any person if he is the occupier thereof.

"Keeper is defined in the following manner -

6. (3) Subject to subsection (4) of this section, a person is a keeper of an animal if -

(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 sixteen owns the animal or has it in his 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 purposes 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.

(5) Where a person employed as a servant by a keeper of an animal incurs a risk incidental to his employment he shall not be treated as accepting it voluntarily.

New South Wales

The New South Wales Law Reform Commission asserts that the position of dogs is sufficiently special to warrant the imposition of special liability. The acid test however is posed as "what should be the circumstances which attract this liability?" The Commission recommends that the conduct of a dog which is relevant for the imposition of liability without fault is that of the dog attacking a person or attacking, worrying, or chasing an animal. These canine characteristics coupled with the freedom of dogs to roam puts dogs in a special position. Two exceptions are recommended to the statutory liability. The first is where the dog's aggression is in immediate response to, or wholly induced by, intentional cruelty to or provocation of the dog. The second is where the injury is sustained or the damage caused on premises or in a vehicle occupied by the dog's owner or on which the dog is normally kept. The Commission expressed the view that it would be unreasonable to extend the statutory liability of the owner of a dog to cover any harm of which the presence or conduct of the dog has been a cause. Such an extension would create liability where for example a person suffers injury from falling in consequence of tripping over a dog which is asleep. An accident of this kind is quite unrelated to the particular characteristics that distinguish dogs.

By virtue of the Accident Compensation Act 1972, claims for personal injury to humans are now excluded from the operation of Part III of the Dogs' Registration Act. Section 29 is now confined to damage to property, including the clothing of a person injured, motor vehicles,

premises, damage to other stock and disease transmitted to a human or animals. In our view the present strict liability for damage caused by dogs should be retained. The damage which dogs can cause, coupled with their freedom to roam, makes it inappropriate to rely on the general tort of negligence. A plaintiff would not be able as in the case of ferocious animals to rely on res ipsa loquitur. A number of deserving plaintiffs would go uncompensated.

We have considered whether any distinction should be made between urban and suburban dogs on the one hand, and farm dogs on the other. We reject any such distinction both in principle, and because of the difficulty of formulating it in clear terms. We have also considered whether any distinction should be made between damage to stock and other types of damage. The importance to New Zealand of its farming operations requires the continuance of the existing liability for damage caused to stock. We believe there is still a need for control of dogs in other situations, and that those who suffer other types of damage should continue to have an effective remedy.

Before the Accident Compensation Act 1972 the restrictive interpretation given the words "injury done by the dog" worked a hardship. With the advent of a statutory compensation scheme for personal injury by accident that hardship has disappeared. The previously advocated (cf. Working Paper) amendment to s.29 by replacing the words "injury done by a dog" with the words "damage done or caused by or contributed to by a dog" must now be assessed in the context of the accident compensation scheme. We are not persuaded

that it would be right to inject the strict liability contained in the proposed amendment, particularly in the area of motor vehicle damage. The question is primarily one of who is best prepared to bear the loss - the dog owner (who probably is not insured) or the car owner (who is most likely to be insured). We therefore recommend that s.29 be amended simply by changing the word "injury" to "damage" to cater for the impact of the Accident Compensation Act 1972. We reject the approach of strict liability for all damage in which a dog was instrumental. We contend, along with our counterparts in England and New South Wales, that there should be an inquiry in each case as to whether the dog was a causa sine qua non or a causa causans of the damage.

We recognise the harshness and unfairness of the special definition of "owner" even when the scope of s.29 is narrowed to exclude personal injuries to humans. We accordingly recommend a slight modification to the existing definition of "owner". Our concern is that strict liability should be limited to those persons who would commonly be regarded as having a moral responsibility to restrain a dog that may cause harm. We would borrow from the definition of "keeper" in s.6(3) of the Animals Act 1971 (U.K.) and we would define "owner" as follows:

> "Owner" in relation to any dog means every person who
>
> (a) owns the dog; or
>
> (b) has the dog in his possession, whether the dog is at large or in confinement, otherwise than for the purpose of preventing

the dog causing damage or for the sole purpose of restoring a lost dog to its owner; or

(c) the parent or guardian of a person under the age of 16 years who

(i) is the owner of the dog pursuant to paragraph (a) or paragraph (b) hereof, and

(ii) is a member of his household living with and dependent on him.

A person who is excluded from the above definition will not be liable under the section but he will, if negligent, still be liable for that negligence.

Police dogs

We have given consideration to whether police dogs should be subject to a special exception but as the problem is now confined to claims for damage to personal property we do not feel that the problem is important enough to warrant creating a special exception.

4. NEGLIGENCE

The current law

The scienter and cattle trespass rules in no way destroy the ordinary duty not to be negligent. An action in negligence therefore serves as a residual category of claim where the elements of the other categories of animal actions cannot be satisfied. There is however one glaring exception to the availability of

an action in negligence. Known as the rule in Searle v. Wallbank, the exception is that no owner or occupier of land abutting the highway is under any duty to those using the highway to prevent his animals from straying onto the highway. The rule is founded on conditions once pertaining in the United Kingdom - the open field system, the dedication of roads by adjoining landowners and the lack of motorised traffic. Despite the fact that the first two conditions were never operative in New Zealand and the last is no longer so, New Zealand Courts have followed the United Kingdom authorities.

Exceptions to the rule

Not all the exceptions to the rule are clear or well established. If the landowner or occupier abutting a highway has in his possession an animal which he knows to be particularly dangerous whenever it is on the highway he is apparently under a duty to prevent it straying there. Also, if the keeper of an animal deliberately brings it on to the highway he is under a general duty to take care that it does no harm. There are two other possible exceptions. The first is where an animal escapes from the direct control of its keeper onto a highway (for example, a horse escaping from the control of its rider). The second is where animals escape onto the highway in such numbers as to cause an obstruction. The authority for these two propositions is extremely scanty.

Legislative provisions

There are two statutory provisions in New Zealand relating to the straying of animals onto a public highway. The first is to be found in s.4(1)(i) of the Police Offences Act 1927 which provides that every person is liable to a fine of up to $20 who permits cattle to wander without guidance in any public place. It has been held that this provision requires that there be proof of guilty knowledge on the part of the defendant. It gives no right to damages for anyone injured by the presence of animals in a public place. Under the Impounding Act 1955 (s.33) there is a similar provision involving a $20 fine for the owner of stock found straying, wandering or tethered on a public road in such a way as to cause an obstruction or be likely to cause an obstruction. Under this provision it is not necessary for the prosecution to prove that the owner had knowledge of the danger caused by his animals. However, as with the Police Offences Act, the section gives no right to damages to anyone injured.

Reform approaches

In our working paper we floated the proposition that the rule in Searle v. Wallbank be abolished, thus providing a remedy for those who sustain property damage by the presence of unattended stock on the road. Success would hinge on proof of negligence on the part of the owner or keeper of the stock causing damage.

The Automobile Association of New Zealand Inc., keen and longstanding advocates of abolition, accord the Committee's proposition the organisation's whole-hearted

support. However the Automobile Association expresses doubt that the rights of such plaintiffs will be in any way improved if the plaintiff is required to shoulder the burden of proof of negligence on the part of the stock owner. The Automobile Association contends that in "almost every case the facts behind the escape of stock onto the highway will be solely within the knowledge of the owner of the stock". The Automobile Association accordingly seeks the statutory reversal of the burden of proof. This would negative a requirement of proof of negligence on the part of the claimant and would leave the burden of disproving negligence on the stock owner. The Automobile Association acknowledges that hard cases may occur but submits that the answer lies in the question - "where should the loss fall?".

Predictably Federated Farmers adopts an entirely different tack. Issue is taken with the Committee's abolition stance, and the retention of the existing legal regime advocated. In support the Federation advances dicta of Turner J. in the Court of Appeal decision of Ross v. McCarthy [1970] NZLR 449. Discussing the rights and liabilities of owners in respect of their straying animals Turner J. observed -

> After all, this is a country of farmers; and it is just a question of how far a reform in the interests of passing motorists ought to be contemplated without very careful consideration, when it so apparently conflicts with the established interests of the farming community in a country such as this."

The Federation recognises that the proof of negligence in these circumstances would be a difficult task, a matter that did not escape the notice of the Automobile

Association. Federated Farmers is also concerned at the fencing implications of abolition:

> In certain parts the quality of fencing is barely adequate while for very large areas, especially in the South Island, there is no fencing.

Reform in other jurisdictions

England

The Law Commission considered it important in the interests both of the occupiers of land as well as those damaged by animals on the highway that the law should be made more certain. The Commission concluded that the case for changing the principle behind Searle v. Wallbank is overwhelming.

> 'The expanding needs of society as a whole must from time to time require some adjustment of the rights and duties of particular interests within that society; in the present context this means that the balance between the interests of the keepers of animals and users of the highway which was struck in the remote past under very different conditions cannot be wholly maintained in the twentieth century. We recognise however that any such readjustment must take account of the economic and social importance of the keeping of animals and of the burden and practical difficulties which may be involved in ensuring that they do not cause damage on the highway; but against these considerations must be weighed the danger to life, limb and property of those who use the highway." (Law Com. No. 13, para. 40)

That balance was struck in the legislation implementing the Commission's recommendation in the following manner:

> 8. Duty to take care to prevent damage from animals straying on to the highway.
>
> (1) So much of the rules of the common law

relating to liability for negligence as excludes or restricts the duty which a person might owe to others to take such care as is reasonable to see that damage is not caused by animals straying on to a highway is hereby abolished.

(2) Where damage is caused by animals straying from unfenced land to a highway a person who placed them on the land should not be regarded as having committed a breach of the duty to take care by reason only of placing them there if -

(a) the land is common land, or is land situated in an area where fencing is not customary, or is a town or village green; and

(b) he had a right to place the animals on that land.

New South Wales

The Law Reform Commission recommended the abrogation of the rule in Searle v. Wallbank. In so recommending they were not unmindful of the fear of farmers that a consequence of abrogation might be the imposition of a duty to construct or maintain fences in cases and in circumstances where this would not be warranted economically. The Committee considered this fear unfounded commenting that

"in any of the ordinary circumstances of grazing there is not the slightest reason to apprehend that application of the general principles of the tort of negligence would require any higher general standard as to the extent or quality of fencing than that which would pertain in any event, for the purposes of practical animal husbandry in such conditions."

South Australia and Western Australia have made similar recommendations.

Reform recommendations

The Committee is convinced that modern farming and highway conditions demand a restyling of the rule in Searle v. Wallbank. The proposition that strict liability should be cast upon an owner of wandering stock was rejected as tantamount to the implementation via the back door of a policy that all roads should be fenced.

In proposing a new liability we have been influenced by the evidentiary hurdles that would face a plantiff if negligence principles were simply declared to apply. We have therefore adopted an intermediate position. We recommend the enactment of a provision under which the presence of unattended stock on a road should constitute evidence from which negligence may be inferred, except in an area where it is not customary to fence. The idea is that such presence should be prima facie evidence of negligence thus avoiding the possibility that the plaintiff will be non-suited.

(I.L. McKay)
Chairman
for the Committee

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