

The Law Reform Commission

CIVIL LIABILITY FOR ANIMALS

INTRODUCTION

1. It is interesting to note how frequently a judicial dictum of doubtful accuracy can gain for itself an unwarranted prominence in the literature of a particular subject. Because such a dictum can be frequently unhelpful or misleading in elucidating the law, one can only assume that the unwarranted prominence which the expression wins for itself, is due, not to its accuracy or perceptiveness, but rather to the colourful language or the attractive metaphor used in the expression itself. Colourful metaphor is, in such cases, preferred to clarity of thought. An instance of such a dictum is that of Lord Simonds in Read v. J. Lyons & Co. Ltd.¹:

"The law of torts has grown up historically in separate compartments and.... beasts have travelled in a compartment of their own."²

2. That such a dictum should find favour with the writers on the subject of Civil Liability for Animals is curious because it is not very helpful in elucidating the law.

¹ [1947] A.C. 156.

² Id., at 182. Animals for the purpose of this branch of law includes mammals, reptiles, birds and insects, but not human beings.

True it may be that in the torts train a special compartment is reserved for animals (beasts), but it would be an unwarranted assumption to suppose, as the dictum suggests, that animals are not also to be found in many other compartments on the train. If one cares to look one would also find animals lurking in the compartments marked Negligence, Nuisance, Rylands v. Fletcher³, Occupiers' Liability and Trespass. The locomotive metaphor is misleading in that it implies that unless the animal finds a place in the Animals Carriage he cannot travel on the train at all, but must remain disconsolate on the platform. This, of course, is not so.

3. Abandoning the metaphor for the moment one can succinctly state the legal position relating to the liability for injuries caused by animals in the following way: granted that special rules of strict liability have been developed by the law in relation to some injuries caused by some animals these are in no way exclusive rules of liability; the general rules of tort liability also apply to injuries caused by animals. If a dog bites a person, the owner may in the appropriate circumstances be liable in Trespass, in Negligence, in Nuisance, under the rule of Rylands v. Fletcher⁴ or under the heading of Occupiers' Liability. There may be an advantage for the plaintiff to attempt to bring the special rules of animal liability into play, but if he fails he can still proceed under any of the above general headings in the appropriate circumstances. The

³ (1866), L.R. 1 Exch. 265, affirmed (1868) L.R. 3 H.L. 330.

⁴ Ibid.

advantage of trying to get the special rules to cover the case is, of course, that if he succeeds, principles of strict liability will apply. The special rules of animal liability when they apply, generally impose strict liability on the defendant, whereas the general rules of tort liability still require the plaintiff in many cases to prove fault on the part of the defendant. Small wonder then that plaintiffs should attempt in the first instance to have the special rules applied to their cases.

4. It is understandable, therefore, that plaintiffs in animal cases should, to revert to the earlier metaphor, in the first instance attempt to get into the Animals carriage where, if they succeed, they are ensured of a smoother and more comfortable ride. But failure to get a place in the Animals carriage does not inevitably mean that the plaintiff has to remain on the platform. He may still be able to get accommodation in the other carriages where the ride, it is true, may not be as smooth, but where the facilities may be amply adequate to ensure that he reaches his destination. Too often the uninitiated may make the unwarranted assumption that if one does not succeed in having the special rules applied to one's case then there can be no liability at all.

5. This then is the starting point: all the general rules of tortious liability apply to animals in much the same way as they apply to other chattels. Accordingly, the owner of an animal which causes damage may be liable in Negligence, in Nuisance, in Trespass, under the rule in Rylands v. Fletcher⁵ or on the principles governing Occupiers' Liability.

⁵ Supra fn. 3.

6. Apart, however, from liability under these general rules, specialised rules of liability for injuries done by animals have also developed in the common law. Two common law actions in particular deserve mention even at this early stage: the scienter action and cattle trespass. The keeper of an animal is liable under the scienter action if the animal which caused the damage is a "wild animal" (*fera natura*) or, if being a "tame animal" (*mansueta natura*) it has a vicious propensity known to the keeper. Liability under this heading is strict and does not depend on proof of fault on the part of the owner. The owner of straying cattle is also strictly liable under these specialised rules for damage caused when his cattle trespass on another person's land. "Cattle" in this tort is defined to include most domestic animals, but does not cover cats and dogs.

7. In addition to these two special common law actions the liability for damage to livestock caused by dogs is the subject of special statutory rules laid down in the Dogs Act 1906 and the Dogs (Protection of Livestock) Act 1960.

8. Finally, one must mention, even in an introduction as brief as this, the curious immunity that exists in relation to damage caused by animals straying on the highway.

9. This Working Paper will examine successively the Irish law on each of these topics in the following order:

- Chapter 1. General Liability in Tort: Liability in Negligence, Nuisance, Trespass, *Rylands v. Fletcher* and Occupiers' Liability.
- Chapter 2. The Scienter Action and Liability for Harm caused by Dogs.
- Chapter 3. Cattle Trespass.
- Chapter 4. Animals on the Highway.
- Chapter 5. Criticisms of Existing Law and Signposts for Reform.

CHAPTER 1 GENERAL LIABILITY IN TORT: LIABILITY IN
 NEGLIGENCE, NUISANCE, TRESPASS, RYLANDS v.
 FLETCHER AND OCCUPIERS' LIABILITY

10. The owner or keeper of an animal may become liable under the general principles of tort law just as the owner of any chattel may become so liable. If, for example, a person brings a dog onto the highway he may be liable in Negligence if he does not exercise reasonable care controlling the dog⁶. Again, if a person keeps animals in such numbers that they unreasonably interfere with his neighbour's enjoyment of his property then the owner of the animals may be liable in Nuisance⁷. Similarly, will the owner be liable if the noise or stench which such animals emit, unreasonably interferes with the quiet enjoyment of adjoining property⁸. In trespass too the owner who commands a dog to attack a person or who drives a beast onto another's land may be liable⁹. The occupier of premises may be liable if, for example, injury is caused to a lawful entrant by the occupier's dog¹⁰. Finally, within the principle expressed in Rylands v. Fletcher¹¹, if animals are collected on property, in such a way as to amount to a non-natural user of the land, and, if they are likely to do damage if they escape, the owner may then be liable for all injuries caused by such an escape.

⁶ Gomberg v. Smith, [1963] 1 Q.B. 25; [1962] 1 All E.R. 725.

⁷ O'Gorman v. O'Gorman [1903], 2 I.R. 573, 36 ILTR 237.

⁸ William Aldred's Case (1610), 9 Co. Rep. 576.

⁹ Cronin v. Connor [1913] 2 I.R. 119.

¹⁰ Kavanagh v. Stokes [1942] I.R. 596.

¹¹ Supra

11. These are all instances of cases where the liability for injuries inflicted by a person's animals are accommodated within the general rules of tort. In these cases the fact that the instrument which occasioned the harm happens to be an animal, is irrelevant. Animals in these cases are treated as any other chattel. Negligently controlling a dog on the highway has the same legal consequences as negligently controlling a motor car or an umbrella. Whether a stench constitutes an actionable nuisance or not, will not be determined by the fact that its source is industrial, human or animal; nor if it is a noise, by the fact that it is caused by the barking of dogs or the banging of silver trays¹². Whether one throws a stone or a dog onto the plaintiff's land is immaterial as far as the issue of Trespass is concerned. In all such cases what is important is the conduct of the defendant and not the nature of the instrument of harm. Furthermore, it should not be thought that the plaintiff's task in such cases is an unduly onerous one. The law reports abound with instances where the plaintiff successfully sued under the general principles of tort law and an examination of some of the reported cases is instructive.

*"And the crowds at the fair,
The herds loosened and blind,
Loud words and dark faces
And the wild blood behind!"*

A Drover. Padraig Colum.

¹² As in Christie v. Davey [1893] 1 Ch. 316.

(a) Negligence

12. In Howard v. Bergin, O'Connor & Co.¹³ the defendants purchased cattle in the country and sent them by train to Dublin. The defendant's drovers in unloading the cattle allowed two bullocks who "got wild" to escape onto the highway where they eventually knocked down and injured the plaintiff. The following facts were proved in the case: although an unloading platform with pens was provided at the station this platform was not always used and was not used in the instant case; a gate on the public road was not closed during the unloading operation; one drover who followed the animals and who located them in a yard off a laneway before the accident, left them unguarded to report their location and to get assistance.

13. The Supreme Court held (reversing the High Court) that the defendants were liable in Negligence. Apart from dicta on scienter (see infra) all three judges in the Supreme Court were of the opinion that in circumstances such as those present the defendants should be liable. Kennedy C.J., and O'Connor J., thought that there was sufficient evidence of negligence on the part of the defendants whereas Fitzgibbon J., while not satisfied that the jury had found negligence on the part of the defendants agreed with the legal proposition that if the jury had made such a factual finding the defendants would be liable in law.

"If cattle in the state of terror and excitement in which these two bullocks are admitted to have been were negligently permitted to escape into a public

¹³ [1925] 2 I.R. 110, 118.

street, I agree with my brother O'Connor that no question of scienter can arise. The case would not then be one of an apparently harmless animal taking sudden fright while being driven along the highway, but of an infuriated animal being permitted by negligence to escape from an enclosure...."¹⁴

14. Although this was a case where an animal in a wild state was negligently allowed to escape onto the roadway and where "it dashed blindly along colliding with or overturning human impediments to its wild progress"¹⁵, the law would be the same if the animal was brought peacefully onto the highway but caused damage because it was negligently managed while on the road. In Powell v. McGlynn & Bradlaw¹⁶ the plaintiff was run down by a runaway pony and trap which was left unattended as the driver, McGlynn, said good-night to his lady friend. A verdict for £250 against McGlynn was not disputed in an appeal on the issue whether McGlynn, on that occasion, was the servant of Bradlaw.

15. It is equally clear that if there was no negligence on the part of the handler of the cattle the defendants would not be liable unless scienter or nuisance were proved. In Scully v. Mulhall¹⁷, for example, it was held that a person is not guilty of negligence for merely bringing and driving a bullock known to be quiet on the highway. The action arose because although known to be quiet and being driven properly the bullock in question suddenly broke into a gallop and knocked the plaintiff off her bicycle.

¹⁴ Id., 186. Two of the judges were also willing to impose liability on the principle of scienter.

¹⁵ Id., 125.

¹⁶ [1902] 2 I.R. 154.

¹⁷ 85 ILTR 18.

16. Nor is liability for Negligence limited to accidents occurring on the highways. A similar judgment was handed down in Kavanagh v. Stokes¹⁸ where the plaintiff, a paying guest in the defendant's home, was bitten on the lip by the plaintiff's dog. The plaintiff and four other girls went out to a dance having informed the defendant of their plans. The defendant left the door on the latch and on returning from the dance the four girls entered the house while the plaintiff waited to close the gate. When the defendant's dog approached barking, the plaintiff bent to pat it and was bitten on the lip. The High Court found for the plaintiff and declared that there was no need to examine scienter. There was an obligation on the defendant to provide a reasonably safe method of access for the plaintiff. Failure to do so amounted to negligence.

17. The same principle was applied in Mallon v. G.S. & W. Ry. Co.¹⁹. The plaintiff, a transit passenger on a crowded platform tripped over a chain lead attached to a dog being managed by one of defendant's servants. In falling, the plaintiff was also bitten by the animal. The dog which was muzzled, was being taken from one train to another by a porter who was also wheeling a luggage barrow. To cope with all his load the porter had fastened the dog's chain on to the bar that ran between the handle and the leg of the barrow. An award for the plaintiff of £100 was upheld on appeal. The court held that there was sufficient evidence of negligence and in the circumstances no question of scienter arose. (The amount awarded, however, was held to be excessive and the court offered the plaintiff a reduced award of £50 or a new trial.)

¹⁸ [1942] I.R. 596.

¹⁹ 27 ILTR 125 (C.A.).

18. In O'Gorman v. O'Gorman²⁰ and McStay v. Morrissey²¹ it is clear that negligence in the keeping or management of bees may render the beekeeper liable. Although in both cases there are strong elements of Nuisance it is clear that liability will also arise in appropriate circumstances in Negligence.

19. In O'Gorman v. O'Gorman, the facts of which are given below, although Kenny J. and Wright J. found for the plaintiff on what seemed to be nuisance considerations, Barton J., was willing to find for him in Negligence. On the special facts of the case he held that the defendant owed the plaintiff a duty to take reasonable care (citing Le Lievre v. Gould [1893] 1 Q.B. 491). There was a breach of duty because "a word of warning would have avoided all the harm". He was emphatic that his decision for the plaintiff was based neither on scienter, nor on the escape of animals nor on nuisance, but purely on negligence principles.

20. In McStay's case the case head-note accurately states that:

"The owner of bees is liable for injuries inflicted by the bees on persons living in the vicinity only where there is clear evidence that the bees are kept in unreasonable numbers and in an unreasonable place, or that the injuries were caused as a result of the negligence of the owner in the handling and management of the bees."²²

In the circumstances of the case the judge held that there was no evidence of negligence and gave a direction for the defendant. Had there been evidence of negligence, however, it is clear that the plaintiff could have recovered.

²⁰ [1903] 2 I.R. 573; 36 ILTR 237.

²¹ 83 ILTR 28.

²² Ibid.

(b) Nuisance

21. The defendant may also be liable for injuries caused by his animals under the heading of Nuisance. If the defendant by keeping or managing animals wrongfully interferes with a public right or with another landowner's reasonable use of his property, then in the latter case the injured party, and in the former case a member of the public who suffers special damage, can sue the defendant. That the instrument causing the Nuisance happens to be an animal or animals does not exempt the defendant from liability; whether the defendant is liable under any special rule is another question entirely.

22. In Cunningham v. Whelan²³ the plaintiff was proceeding along the road in an unladen horse and cart when he saw some 24 bullocks and heifers unattended, some distance ahead. Although the plaintiff stopped and pulled into the side, the animals nevertheless pressed against the cart and overturned it thereby causing injury to the plaintiff. In the course of his judgment the judge accepted the authority which held that there is no liability on the owner of cattle for mere trespass of an animal on the highway (citing Jones v. Lee 106 LTR 123 and Ellis v. Banyard 106 L.T. 51 C.A.) but then went on to say:

"But when you are dealing with the combined mass, sufficient in themselves by their impact to overturn the cart, then we must see the difference between such a case and Ellis v. Banyard."

²³ 52 ILTR 67.

At a later point he puts his reason for the decision in the following language:

"It is, I think, clear that while, in ordinary circumstances an owner is not bound to prevent his cattle or other domestic animals from straying on the highway, he is bound to use such care or caution that they will not stray in such numbers so as to render the highway positively unsafe or dangerous to those who use it. If he omits to do so, and allows his cattle to wander or be there, it is a breach of duty on his part, and if that breach is the approximate cause, he is liable."²⁴

23. It is not clear whether this decision is based on Negligence or Nuisance. Although the head-note refers to Negligence and much of the judgment suggests Negligence there was no evidence that the defendant was negligent (nor was there any reference in the case to *res ipsa loquitur*) and the statement by the judge that it was irrelevant how the cattle got there suggests that liability might have been based on Nuisance. In Furlong v. Curran²⁵ the High Court in allowing the plaintiff to recover on clearly negligence principles, when he ran into nine cows being driven along the road at night time, purported to follow Cunningham v. Whelan. In Furlong's case, however, there was clear evidence of negligence as the cattle were brought onto the road and it was night time when the accident occurred.

24. In the Northern Ireland case of Hall v. Wightman²⁶ the plaintiff's motor car collided with the defendant's dark brown heifer which had strayed from the defendant's field through another field onto the highway. The accident

²⁴ Id., 69.

²⁵ [1959] Ir. Jur. 30.

²⁶ [1926] N.I. 92.

occurred after midnight and it was found as a fact there was no negligence in the driving of the car. Although there were 7 cattle near the accident it was admitted by the parties that they were not causing an obstruction at the time of the accident. The court held that there is no obligation on the owner of land adjoining the highway to fence his lands in such a manner as to keep his animals from straying onto the highway and there being neither negligence nor nuisance on his part the defendant was not liable. The court, however, expressly declared that the matter might have been different if a lot of cattle were causing an obstruction on the highway at the time of the accident, as was the case in Cunningham v. Whelan. Cunningham v. Whelan was, therefore, approved but distinguished.

25. In the above cases, the nuisance complained of amounted to a wrongful interference with a public right. The nuisance complained of, however, may also be a wrongful interference with the enjoyment of a private property right. Liability would lie, for example, where a person keeps animals in unreasonable numbers so that they interfere with his neighbour's right to the quiet enjoyment of his land. If animals are kept in unreasonable numbers so that they cause an unreasonable amount of noise or emit an unreasonable stench, liability may well lie on the owner of the land where the animals are kept. The ordinary rules of Nuisance apply. The fact that the source of the noise, or stench, happens to be animals does not, of course, exempt the owner from liability. The rules of Nuisance apply whether the noise is caused by the banging of silver trays or the barking of dogs or whether the stench is attributed to industrial waste or animal discharge.

*"Nine bean rows shall I have there, a hive for the honey bee,
And live alone in the bee-loud glade."*

The Lake Isle of Innisfree. W.B. Yates.

26. The conditions necessary for liability in such circumstances were examined in the two Irish bee-keeping cases: O'Gorman v. O'Gorman²⁷ and McStay v. Morrissey²⁸.

27. In O'Gorman v. O'Gorman the plaintiff and the defendant were neighbouring small farmers in Co. Clare. The defendant kept between 20 and 22 bee hives near the boundary fence between the two holdings and close to the plaintiff's haggard and house. The bees swarmed while the defendant was taking honey from them and attacked the plaintiff's horse and the plaintiff himself. The horse got frightened and bolted, severely injuring the plaintiff. The plaintiff subsequently died, although there was some dispute as to whether it was because of the injuries he suffered in this accident. Some evidence was produced that the plaintiff had made previous complaints about the bees (the most recent being on the morning of the accident) and that the defendant knew or ought to have known that the plaintiff would be tackling his horse near the boundary fence at the time of the accident.

28. An appeal from a jury verdict in favour of the plaintiff was rejected. Although Barton J. found for the plaintiff on negligence principles both Wright J. and Kenny J. preferred to base their reasoning on nuisance considerations.

²⁷ [1903] 2 I.R. 573, 36 ILTR 237.

²⁸ 83 ILTR 28.

Wright J. declared that the jury's finding should not be upset since it was found that the bees were kept in unreasonable numbers, at an unreasonable place and with appreciable danger to the plaintiff. In the course of his judgment, Kenny J., explained the basis for his decision in the following language:

"The defendants were entitled to the natural and reasonable use of their own land, and the jury had to consider whether this keeping of bees in the manner and place which they did, went beyond the lawful user of their own land in relation to their neighbour. It was a jury question, and there was, in my opinion, evidence upon which they could properly act. They found in effect that the defendant had set up what was an actionable nuisance, and that it resulted in injury to his neighbour. I do not think that that finding can be quarrelled with...."²⁹

29. Although a verdict for the defendant was given in McStay v. Morrissey³⁰ this was due to different factual considerations rather than to a different view of the law. Again the plaintiff and the defendant had adjoining holdings and the defendant kept 4 bee hives (this number had been reduced from 7) some seven yards from plaintiff's boundary. The plaintiff gave evidence that he had been stung on many occasions (on one occasion 3 times in the one day), that at times it was impossible for him to continue working on the holding, and that his child on one occasion became acutely ill after being stung. After this last event the defendant moved the hives to the points on his holding furthest away from the plaintiff, some forty-seven yards from the

²⁹ [1903] 2 I.R. 573, 582-583.

³⁰ Supra

plaintiff's boundary. The plaintiff sought an injunction to prevent the defendant from keeping the bees and a mandatory injunction to compel the defendant to remove the bees. The court, however, gave a direction in favour of the defendant holding that there was no evidence that the bees were kept in unreasonable numbers or in an unreasonable place. In the circumstances the judge refused to interfere with the carrying on of what he termed was "a valuable industry".

30. In Grainger v. Finlay³¹ the plaintiff complained that the defendant kept a vicious and dangerous dog upon his land which prevented the plaintiff and his family from using a right of way which passed close to the defendant's land. The plaintiff failed, but only because he did not aver in his pleadings that his fear, and the fear of his family, in using the right of way was a reasonable one. Had he done so and had he been able to satisfy the court of the truth of his claim, the court it seems would have allowed him to recover.

(c) Trespass

31. The defendant may also be liable for the Trespass of his animals under the general tort of Trespass. Thus, if a person throws an animal or drives an animal onto another's land he will be liable just in the same way as if he threw a stone or drove a car onto another's land. That

³¹ (1858) 7 I.C.L.R. 417, 3 Ir. Jur. N.S. 175.

the object through which the trespass is committed happens to be an animal does not alter the legal situation. Similarly, if a person sets a dog at another person he will be liable for trespass to the person³².

32. Liability for trespass, however, must of course be distinguished from the strict liability to be found in the specific rule of Cattle Trespass which will be dealt with at a later point. An illustration may help to mark the difference between the two cases. If I drive my cattle unlawfully onto my neighbour's land, my neighbour, as already noted may sue me under the general rules of trespass. If, however, my cattle, because of defective fencing on my land, stray onto my neighbour's land this is more properly called cattle trespass. In the former case, my actions in driving the cattle, constitute the gist of the action and the role played by the cattle in comparison to my part is small; in the latter case, however, the cattle's actions are more directly in focus, whereas my actions (or omissions) are only indirectly in question.

33. The New South Wales Law Reform Commission in its Report on the Civil Liability for Animals³³ puts the matter in the following way:

"If one's cattle stray, of their own volition, onto the land of another, without his consent, one thereby commits the tort of cattle-trespass, on the other hand if one's cattle get onto the land, not by straying, but because one deliberately drives them

³² Scott v. Shepherd (1773) 3 Wils. 403, 408. See also Manton v. Brocklebank [1923] 2 K.B. 212, 219.

³³ (1970), L.R.C. 8.

onto the land, one commits the ordinary tort of trespass to land. In the case of the ordinary tort of trespass to land, the cattle are merely the means whereby one commits the trespass. It would be equally ordinary trespass to land if one drove onto the land not cattle but a motor car."³⁴

34. The distinction between the two kinds of trespass is important for the following reasons: first, liability in Cattle Trespass is strict whereas liability in some kinds of trespass at least requires intention or negligence on the part of the defendant³⁵; second, Cattle Trespass is confined to "cattle", and does not extend to other animals such as cats and dogs; third, the defences in both torts are not the same.³⁶

35. The distinction between ordinary Trespass and Cattle Trespass is not always maintained by the courts, however, as can be seen from the Irish case Cronin v. Connor³⁷. The facts of the case were as follows. The plaintiff had the right to cut and save turf (turbary rights) on the defendant's bog. The bog was part of a larger holding but was not fenced off therefrom and some cattle belonging to the defendant who owned the land got on to the bog and damaged turf which the plaintiff was in the process of saving. The following question was put by way of case stated to the

³⁴ Id., at §23.

³⁵ Fowler v. Lanning [1959] 1 Q.B. 426; [1959] 1 All E.R. 290.

³⁶ For defences available in Cattle Trespass see infra.

³⁷ [1913] 2 I.R. 119.

King's Bench Division:

"Is the defendant, as owner or occupier of land upon which the plaintiff is entitled to turbarry, liable to the plaintiff for injury to the turf caused by defendant's cattle trampling the spread turf?"

36. In answering the question in the affirmative Kenny J. (with whom Wright J. concurred) made the following statement:

"I think we can adjust the relations of the parties only by applying the test of what seems most reasonable under the circumstances, and, inasmuch as the plaintiffs whole turbarry harvest, the cutting and saving of which is confined to a comparatively small portion of the year, would be imperilled if the defendant were entitled to allow his cattle to wander at large and without restraint over every portion of the bog, I am of the opinion that it would be an unreasonable exercise of his rights of ownership if he were permitted to do so without making some sort of provision against injury to the plaintiff".³⁸

37. Although it would seem from the underlined phrase that the judge considered it to be a case of cattle trespass there is some suggestion earlier in the report that the defendant drove the cattle back onto the bog. At p. 120 the following sentence occurs:

"The plaintiff complained of the injury done by the defendant's cattle, and removed them from the bog while the turf was being saved; but the defendant insisted on putting the cattle back on the bog, and maintained his right so to do, contending that it was the plaintiff's duty to keep the cattle from injuring the turf, and that he, the defendant had no duty in that respect."³⁹

³⁸ Id., 126. Emphasis added.

³⁹ Emphasis added.

38. The distinction may not have been too important for the issue at hand, however, as it seems clear that if the court was willing to impose liability on the defendant when his cattle merely wandered onto the bog, there is little doubt but that it would have imposed liability if the defendant intentionally drove the animals onto the bog. The distinction is a valuable one, however, and in the interests of clarity it should not be allowed to become blurred.

(d) Rylands v. Fletcher⁴⁰

39. Under the rule laid down in this case "the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape".⁴¹

40. In theory there seems no reason why this rule should not apply to animals just as it can apply to water or explosives⁴². Problems can arise, however, in deciding whether liability in Rylands v. Fletcher is independent of liability under other headings (e.g. nuisance, scienter, cattle trespass) or whether liability under this heading represents a principle of which cattle trespass, etc. are but examples. Although there is some support for the view that cattle trespass in particular is but an example of

⁴⁰ (1866), L.R. 1 Exch. 265, affirmed (1868), L.R. 3 H.L. 330.

⁴¹ Id., (1866), L.R. 1 Exch. 265, 279, per Blackburn J.

⁴² Rylands v. Fletcher itself, supra fn. 40; Read v. J. Lyons & Co. Ltd. [1947] A.C. 156.

Rylands v. Fletcher⁴³ liability, the majority of judicial and academic thinking nowadays prefers the view that these are distinct heads of liability and should be viewed independently⁴⁴.

41. Theoretically speaking, therefore, a person may be liable under Rylands v. Fletcher if he brings onto his land and keeps there an animal such as a tiger⁴⁵ or a fox⁴⁶ which escapes and causes damage. The importance of the rule for plaintiffs is that when it applies it imposes strict liability on the owner without proof of fault.

42. Subsequent judicial developments, however, limit the application of the rule in the following ways. First, for liability to arise there must be "an escape" from the defendant's land⁴⁷. So, if a person comes on my land and is bitten by a fox which I keep on my land no liability will arise under Rylands v. Fletcher. There may be liability, of course, under some other heading where "an escape" is not an essential ingredient of liability. Second, for liability to arise in Rylands v. Fletcher, there must be a non-natural user of the property⁴⁸. Third, the more recent version of

⁴³ See, e.g., Blackburn J., in Rylands v. Fletcher itself, (1866), L.R. 1 Exch. 265, at 280 et seq; O'Brian J., in Noonan v. Hartnett 84 ILTR 41, 43.

⁴⁴ North, The Modern Law of Animals, 175; Williams, Liability for Animals, 197-199.

⁴⁵ Behrens v. Bertram Mills Circus, Ltd. [1957] 2 Q.B. 1, 22.

⁴⁶ Brady v. Warren [1900] 2 I.R. 632, 651.

⁴⁷ Read v. J. Lyons & Co. Ltd., [1947] A.C. 156.

⁴⁸ See generally Salmond, Torts, 17th ed., 321-323 and cases cited therein.

the rule is inclined to limit its application to "dangerous things"⁴⁹. The last two limitations in particular reduce the scope of the Rylands v. Fletcher rule in relation to animals. One would assume for example that keeping cattle on a farm⁵⁰ or keeping a domestic pet such as a dog⁵¹ or a cat would not be a non-natural user of land and that in no way could ordinary domestic animals such as cattle, dogs, cats, etc., be considered to be "dangerous things" within the rule. Its sphere of application, therefore, is severely limited in the context of animal liability and its appeal as a legal basis for recovery to a plaintiff injured by an animal is accordingly limited. This is especially so when one considers the alternative headings of strict liability which may be available to the plaintiff in such circumstances, namely, scienter and cattle trespass.

43. One word of qualification, however, might be added. If the animals are kept in unreasonably large numbers, what would be a natural user may easily become a non-natural user and by their very numbers one could imagine "things" becoming "dangerous things". Liability in such circumstances may, however, also, and perhaps more easily, be proved in Nuisance or in the appropriate circumstances in Cattle Trespass⁵².

⁴⁹ Idem, 323-326.

⁵⁰ Williams, op. cit., 199; Manton v. Brocklebank [1923] 2 K.B. 212 (horses).

⁵¹ Cf. Hines v. Tousley (1926), 95 L.J.K.B. 773.

⁵² Brady v. Warren [1900] 2 I.R. 632; See also Robson v. Marquis of Londonderry, 34 ILTR 88 where the number of pheasants bred by the defendant was not unreasonable having regard to the acreage of the demesne.

44. One Irish case which is difficult to totally reconcile with the above principles is Noonan v. Hartnett⁵³. In that case the defendant Hartnett entered into an agistment contract with a third party which allowed the third party to graze his cattle on defendant's lands and under which the third party took responsibility for fencing and for herding the cattle in question. The cattle broke out and caused damage to the plaintiff's crop. O'Briain J. gave judgment for the plaintiff and his judgment is interesting for three reasons. First, the judge said that liability for cattle trespass is based on the principle of liability expressed in Rylands v. Fletcher. Second, the judge said liability would lie in the present case on the defendant because she had brought the cattle onto her land for her own purpose. That she was not in possession of the cattle did not matter.

"Rylands v. Fletcher seems to me to state clearly that if a person, for his own purposes, brings on his land something which was not there before, and the thing is likely to do mischief if it escapes, it is kept on the land at the peril of the person who brings it thereon. Consequently I am of opinion that if the agister makes a bargain with a third person that he may graze his cattle on the agister's lands, these cattle have been brought on the lands for his own purposes by the owner of the land and, in the present case, the defendant brought the cattle on to her lands for her own gain, and consequently, the plaintiff is entitled to succeed notwithstanding the defendant's contract with another person".⁵⁴

Third, the judge implied from this that bringing cattle onto one's land was a "non-natural user" and that cattle were "dangerous things" within the meaning of the rule in Rylands v. Fletcher.

⁵³ 84 ILTR 41.

⁵⁴ Idem., 44.

45. Leaving aside the second point for the moment it would seem that what the learned judge said in the first and third points is open to dispute now. That cattle trespass should be looked at as an instance of legal liability arising independently of Rylands v. Fletcher and not as deriving therefrom is supported by the bulk of modern authorities nowadays⁵⁵. Likewise to say that the depasturing of cattle in an agricultural country like Ireland amounts to a "non-natural user" of land is difficult to support nowadays. There is considerable authority to the contrary⁵⁶.

(e) Occupiers' Liability

46. If the injury caused by the animal occurs on the defendant's property then the injured party can sue on the principles relating to Occupiers' Liability. In Kavanagh v. Stokes⁵⁷ a paying guest returning from a dance to her guest house was bitten by the defendant's (the owner of the guest house) dog. She was successful in her action and no question of scienter arose.

47. The law relating to the duties of occupiers to those who enter their property has been recently restated in Ireland by the Supreme Court in McNamara v. E.S.B.⁵⁸. In that case the Supreme Court held that the occupier owes a duty of reasonable care to reasonably foreseeable

⁵⁵ North, op. cit., 175 and authorities cited at fns. 17 and 18.

⁵⁶ Williams, op. cit., 199; North, op. cit., 175. Cf. Stearn v. Prentice Bros., Ltd., [1919] 1 K.B. 394.

⁵⁷ Kavanagh v. Stokes [1942] I.R. 596.

⁵⁸ [1975] I.R. 1. Noted in 91 L.Q. Rev. 323-329.

trespassers. On the facts of McNamara the court allowed a child trespasser to recover for severe injuries he suffered while descending from the defendant's electricity transformer station. This would seem to be the standard of care which would now apply in Ireland if, for example, a foreseeable trespasser was attacked by a savage guard dog. It would also seem logical to assume that if a trespassing child is entitled to the reasonable care of the occupier, lawful entrants (who would by definition almost always be foreseeable) should be entitled to no less concern for their safety.

48. One may assume, therefore, since McNamara v. E.S.B., that if a person is injured by the animal of another person while on the property of that other person that the liability of the occupier will depend on whether the presence of the injured person was reasonably foreseeable and on whether, in the circumstances, the occupier showed reasonable care. Kavanagh v. Stokes⁵⁹, therefore, although decided long before McNamara can nowadays be easily rationalised in McNamara terms.

49. That statutory provisions do not always make the law more simple can be seen from a recent Court of Appeal case in England: Cummings v. Grainger⁶⁰. There, the plaintiff, a trespasser in the defendant's scrap-yard, was savaged by an untrained Alsatian dog used to guard the premises. Under the specific provisions of the English Animals Act 1971 an award in favour of the plaintiff was reversed. Because the

⁵⁹ Supra fn. 57.

⁶⁰ [1976] 3 W.L.R. 842, [1977] 1 All E.R. 104.

decision is heavily based on the specific provisions of the Animals Act 1971 and as such is more an exercise in statutory interpretation than in the principles relating to animal liability it need not concern us at this juncture. The complexity of the decision, however, clearly shows that reforming legislation does not always simplify the law; rather does it make one appreciate the degree of clarity and simplicity which a case like McNamara introduces into this branch of the law in Ireland.

CHAPTER 2 SCIENTER

"All animals are equal, but some animals are more equal than others".

Animal Farm. George Orwell.

50. One of the specific rules of animal liability depends on a distinction made between wild animals (*ferae naturae*) and domestic animals (*mansuetae naturae*). The keeper of a wild animal is said to be strictly liable for the damage such an animal causes and a person who keeps such an animal is said to keep it at his peril. Negligence does not have to be proved by an injured plaintiff when he is injured by such an animal. To recover for injuries caused by a domestic animal, however, the plaintiff must prove that the animal in question had a vicious propensity to do the kind of injury that is the subject of the complaint, and further, it must be shown that the defendant knew of this propensity. Put another way, the defendant is only liable for injuries caused by domestic animals when he knows of the vicious propensity, but in the case of wild animals the knowledge of a vicious propensity is irrebutably presumed. The scienter action, therefore, extends not only to damage caused by domestic animals known to be vicious but also to wild animals presumed to be vicious. The scienter principles is described by Williams in the following language:

"The general principle in present-day English law is that, apart from cases in cattle-trespass and the ordinary torts of nuisance, negligence, and so on, liability for damage caused by one's animal depends on previous knowledge of its vicious nature. Such knowledge had originally to be proved in all cases, but in modern law it is presumed if the animal in

question is one of a dangerous class. The principle is known as the scienter principle (from the words scienter retinuit in the old form of the writ), and proof of knowledge is called, somewhat ungrammatically, proof of scienter."⁶¹

51. A fuller explanation must examine in more detail the following concepts:

- (a) The distinction between wild and domestic animals;
- (b) What exactly amounts to a "mischievous propensity" on the part of a domestic animal?
- (c) Who is the proper defendant in the scienter action: the owner of the animal or its keeper?
- (d) What defences are available to the defendant in such an action?

52. Before one addresses these less certain penumbra of the scienter rule, however, it might be informative to examine a few cases which illustrate the principle in operation in straightforward situations.

53. In Kelly v. Wade⁶² the defendant kept a dog which attacked and killed the plaintiff's sheep. An averment by the plaintiff that the defendant negligently kept such an animal was held to be insufficient; since the animal was not *ferae naturae*, the plaintiff was obliged to allege scienter⁶³.

⁶¹ Williams, op. cit., 273.

⁶² (1848) 12 ILR 424. This case pre-dated the various Dogs Acts. See infra.

⁶³ The court followed May v. Burdett (1846), 9 Q.B. 101, 115 E.R. 1213. See also Daly v. Hagarty, 40 ILTR 26. It should be noted that statutory liability for dogs worrying sheep did not exist at the time of this decision.

54. In Quinn v. Quinn⁶⁴ the plaintiff and the defendant occupied the same yard and had joint use of a stall in which the plaintiff kept a cow and the defendant kept two sows. The cow was separated from the pigs by a timber partition. The plaintiff's sows were allowed to get over to the cow's side of the stall where they ate off two of the cow's paps. The cow died as a result of the injuries. The plaintiff recovered as there was evidence that the pigs had previously attacked and killed certain cocks and hens to the knowledge of the defendant. (There was also some evidence that the plaintiff had previously asked the defendant to strengthen the partition.)

55. In the case of a wild animal no such proof is necessary to establish liability. So where injury was caused by a bear⁶⁵, by an elephant⁶⁶ and by a zebra⁶⁷ it was not necessary in any of these cases to allege or prove the vicious propensity of the animal in question.

A further word is now necessary on the specific questions raised earlier.

⁶⁴ 39 ILTR 163.

⁶⁵ Wyatt v. Rosherville Gardens Co. (1886) 2 T.L.R. 282.

⁶⁶ Filburn v. Peoples Palace and Aquarium Co. Ltd. (1890) 25 Q.B.D. 258.

⁶⁷ Marlor v. Ball (1900) 16 T.L.R. 239.

*"Tyger! Tyger! burning bright
 In the forests of the night,
 What immortal hand or eye
 Could frame thy fearful symmetry.*

* * *

*When the stars throw down their spears,
 And water'd heaven with their tears,
 Did he smile his work to see?
 Did he who made the Lamb make thee?*

The Tyger. William Blake.

(a) The distinction between wild and domestic animals

56. Whether a particular kind of animal is classified as wild or domesticated is a question of law. Judicial precedent is important, therefore, in determining into which class an animal fits. Cats⁶⁸, dogs⁶⁹ and cattle have all been treated as domestic animals as have "horses, pheasants and partridge"⁷⁰ and bees⁷¹. Elephants⁷², bears⁷³ and

⁶⁸ Buckle v. Holmes [1926] 2 K.B. 125.

⁶⁹ Kelly v. Wade (1848) 12 I.L.R. 424.

⁷⁰ Filburn v. People's Palace and Aquarium Co. Ltd., as reported in (1890), 59 L.J.Q.B. 471, 472.

⁷¹ O'Gorman v. O'Gorman [1903] 2 I.R. 573, 581, 583 and 588.

⁷² Filburn v. People's Palace and Aquarium Co. Ltd., *supra* fn. 70; Behrens v. Bertram Mills Circus Ltd. [1957] 2 Q.B. 1.

⁷³ Supra fn. 65.

zebras⁷⁴ have, not surprisingly, all been classified as wild animals for the purpose of the scienter rule, and although one can readily accept this allocation there is some doubt as to the criterion used in categorising these animals. Is it that the former group is comprised of wild animals; or is it that the former are tamed and the latter are untamed; or is it that the former are indigenous and the latter are foreign; or is it that the former are harmless and the latter are dangerous. The importance of the criterion should not be exaggerated, however, because once the classification is made, reference does not have to be made to the criterion anymore; the classification being a question of law the precedent suffices to justify the classification for the future. Moreover, in many of the cases the result of the classification would not differ with the various criteria suggested. In other words, the criteria although by no means identical may not be very different from each other in particular cases. A lion, for example, may be considered in Ireland wild, untamed, foreign and dangerous so as to attract strict liability under all criteria. A cat, on the other hand, would normally be considered domesticated, tamed, indigenous and harmless. Nevertheless, one could imagine a case - say, a circus zebra - where an animal might be wild and foreign but would not in normal usage be untamed and dangerous. Indeed, the English courts have held that a camel was a domestic animal for the purpose of the rule⁷⁵.

⁷⁴ Supra fn. 67. Lions, tigers and monkeys would probably be similarly classified. See also May v. Burdett (1846), 9 Q.B. 101 - a case involving a monkey where the classification was irrelevant because the defendant knew of the particular monkey's vicious propensity to bite human beings. See also Brook v. Cook (1961), 105 Sol. Jo. 684. See also ibid, 1094-1095.

⁷⁵ McQuaker v. Goddard [1940] 1 K.B. 687.

Conversely, one could imagine an animal - say a dog or a cat - which might belong to a domesticated species indigenous to the country but which would nevertheless be untamed and dangerous. In such cases, the criterion used would become crucial for classification purposes. There have been few difficult cases before the Irish courts on this matter and English precedents cited above would probably be followed in Irish courts.

57. It has been suggested⁷⁶ that a division based on a dangerous/harmless distinction would yield a happier dichotomy than that which is based on the present wild/domesticated standard and indeed this suggestion has been adopted in recent legislation in England (Animals Act 1971, section 2).

58. The balance of English authority before 1971 seemed to favour the view that whether an animal was to be classed as a wild animal or not depended on whether the animal belonged to a species which was a danger to mankind⁷⁷, although in determining the issue the courts may have regard to the experience of other countries with the animal. It seems that this was the reason why the English Court in McQuaker v. Goddard⁷⁸ classified a camel as mansuetae naturae. Although there is no direct authority on the matter it is hoped that were the question to arise in Ireland the dangerous/harmless criterion would also be adopted.

⁷⁶ Williams, op. cit., 294.

⁷⁷ Law Com. No. 13, p. 6; North, op. cit., 42; Buckle v. Holmes [1926] 2 K.B. 125, 129.

⁷⁸ [1940] 1 K.B. 687.

59. Once an animal is classified as a wild animal on the danger to mankind principle, however, it seems that strict liability will attach even for injury to property. This would seem to be the legitimate conclusion to be drawn from statements of principle occurring in Besozzi v. Harris⁷⁹, Filburn v. The People's Palace and Aquarium Co. Ltd.⁸⁰, Marlor v. Ball⁸¹, and Behrens v. Bertram Mills Circus Ltd.⁸²

*"The dog to gain some private ends
Went mad and bit the man."*

An Elegy on the Death of a Mad Dog. O. Goldsmith.

(b) "Mischievous propensity"

60. Before the keeper of a domesticated (harmless) animal is liable it must be shown that the particular animal in question had a "vicious, mischievous or fierce" propensity⁸³. There will be no liability if the propensity is not vicious or mischievous. A dog in the habit of bounding upon people

⁷⁹ (1858) 1 F & F 92, 93.

⁸⁰ (1890) 25 Q.B.D. 258, 260.

⁸¹ (1900) 16 T.L.R. 239, 240.

⁸² [1957] 2 Q.B. 1, 13-14.

⁸³ Per Diplock L.J. in Fitzgerald v. E.D. & A.D. Cooke Bourne (Farms) Ltd. [1964] 1 Q.B. 249, 270.

in play⁸⁴ or a filly which prances around strangers⁸⁵ will not render his keeper liable in scienter. Furthermore, a dog which has bitten under provocation does not render his master liable in scienter⁸⁶.

61. Subject to what will be said hereafter about Howard v. Bergin, O'Connor and Co.⁸⁷ it would also seem from the decided cases that the plaintiff must show that the animal's conduct complained of must be of the same kind as previous displays of viciousness. So it would not be sufficient where the plaintiff complains of being bitten by a horse, to show that the horse had a previous propensity to kick. Neither, in an action where the plaintiff complains of an attack on his person by an animal will it suffice to show that the animal in question had a propensity to attack other animals⁸⁸. The converse, however, namely a previous attack on a person will support an action alleging an attack on other animals⁸⁹. In Quinn v. Quinn⁹⁰ where two sows attacked a cow and inflicted injuries, by tearing the cow's paps, from which the cow died, there was evidence that the sows had to the knowledge of the defendant previously attacked and killed some fowl. In giving a decree for the plaintiff Lord O'Brien L.C.J., said:

⁸⁴ Line v. Taylor (1862) 3 F & F 731, 176 E.R. 335. Contrast Price v. Wright (1899) 35 N.B.R. 26.

⁸⁵ Diplock in Fitzgerald v. L.D. & A.D. Cooke Bourne (Farms) Ltd., *supra*.

⁸⁶ Cp. per Metcalfe J. in Andrew v. Kilgour (1910), 13 W.L.R. 608, 19 Man. L.R. 545.

⁸⁷ [1925] 2 I.R. 110, 118.

⁸⁸ Glanville v. Sutton, [1928] 1 F.B. 571; Osborne v. Chocqueel, [1896] 2 Q.B. 109.

⁸⁹ See Jenkins v. Turner (1696) 1 Ld. Raym. 109; Gething v. Morgan (1857) Saund. & M. 192.

⁹⁰ 39 ILTR 163.

"I believe that the sow eat (sic) the cocks and hens in the presence of the defendant, as deposed to by the plaintiff. The question then is whether this particular sow was a sow of mischievous propensities with a taste for blood. A cock or hen is an animal, and a cow is an animal, and they both have blood. Therefore, the sow had a mischievous disposition to take blood, and as I am certain the defendant saw the birds being attacked, the mischievous disposition was evidenced before the defendant."⁹¹

Whether knowledge that the sows had displayed a taste for blood by previously killing some hens would support an action for a subsequent attack on a human being is more doubtful, but on the dictum of O'Brien L.C.J., there would seem to be no reason why it should not. What English authority exists would seem to argue against liability in such a case.⁹²

62. General knowledge of the tendencies of a harmless species - e.g. bulls will attack red, or greyhounds will chase running children - will not be sufficient evidence of mischievous propensity. The evidence must be specific; it must relate to the particular animal in question as well as the particular kind of damage complained of. On this matter Williams makes the following statement:

"The conclusion seems to be that once an animal is found to belong to the 'harmless' class, the owner is not liable for it (so far as the law of scienter is concerned) without knowledge of its propensity obtained from the history of the particular animal. There is no universal principle that a man must be taken to know the ordinary nature of his animal; and even if he does in fact know it he is not liable unless it has been demonstrated to him in the particular case."⁹³

⁹¹ Idem, 164. The conclusion in the statement hardly follows logically from the premiss.

⁹² See Glanville v. Sutton [1928] 1 K.B. 571.

⁹³ Op. cit., 289. Footnote omitted.

63. The mischievous propensity need not be a chronic or permanent element of its nature, but may be a passing or temporary phase of the character or temper of the particular animal in question. Accordingly, a bitch with pups may have a mischievous propensity to bite, and a cow with calf afoot may have a mischievous propensity to attack. In Howard v. Bergin, O'Connor & Co.⁹⁴ Kennedy C.J. put the matter in the following way:

"In my opinion, however, what is called a "mischievous propensity" may be as well a passing or temporary phase of character or temper of the particular animal as a chronic or permanent element of its nature. If this opinion needs any authority to support it, reference may be made to, inter alia, Turner v. Coates; Manton v. Brocklebank.

.... I understand by the expression "a mischievous propensity", a propensity to do mischief, a tendency to do harm or cause injury, whether, in one case, by some single characteristic action such as kicking or goring or biting or, in another case, generally when mischief may be done in any of a variety of ways."⁹⁵

64. He instances the case where an ox being lead to the slaughter-house gets frightened and runs amuck. In such a case the butcher would be held to have knowledge of the mischievous propensity. In the case before him, where bullocks 'got wild' and broke onto the highway and where one "dashed blindly along colliding with or overturning human impediments to its wild progress"⁹⁶ the animal "had to the knowledge of [the drovers] become "an exception to its class".... and the duty of controlling it as though it

⁹⁴ [1925] 2 I.R. 110, 118.

⁹⁵ Idem, 124-125. Footnotes omitted.

⁹⁶ Idem, 125.

belonged to the class of animals *ferae naturae* had fallen on the defendants and their servants...."⁹⁷

65. These dicta of Kennedy J. (which were apparently accepted by O'Connor J., in the same case) are not without difficulty because they indicate that knowledge of a passing phase is sufficient to establish scienter even if there was no evidence of any previous disposition to such activity. The dicta of Kennedy J., and O'Connor J., on this matter have been criticised by Williams⁹⁸.

66. O'Brien's dictum in Quinn's case where he suggests that an animal's previous disposition "to take blood" will support a subsequent action based on another attack on any other blood animal (including man?), and Kennedy J.'s dictum that "mischievous propensity" includes a passing phase, help to confuse further what are already difficult and technical questions of law.

67. The defendant must also have knowledge of the vicious propensity before he will be liable in scienter. With regard to this knowledge Williams in his book *Liability for Animals* at p. 305 accurately states the pre-1971 position in England as follows:

"To summarise the law: (a) Knowledge means actual knowledge, but it is immaterial whether it be acquired (b) from personal observation or by hearsay, whether (c) by the defendant himself or by his servant who has general charge of the animal, and whether (d) a long time before or only shortly before the injury

⁹⁷ Ibid.

⁹⁸ Op. cit. at 291-292.

complained of. Moreover, (e) both the vicious act and the defendant's knowledge of it may be proved by an admission of a very general nature."

This, in so far as authorities go, would also seem to accurately represent the Irish position and in Bennett & Another v. Walsh⁹⁹ knowledge of a mischievous propensity by a nine year old girl was sufficient to render her father liable in scienter.

68. Two further points of confusion should be referred to at this juncture. Sometimes in the scienter action it is suggested that liability will not arise unless the domestic animal in question "escapes". It should be pointed out that the escape in question is not the same kind of "escape" which is a sina qua non for recovery under the rule in Rylands v. Fletcher¹⁰⁰. In this last rule the "escape" in question means that the thing capable of doing mischief breaks out of the property limits of the defendant¹⁰¹. In the context of scienter the "escape" at issue refers to the animal's breaking from the control of the owner or keeper. Some courts have held that such an "escape" is necessary to have liability in scienter; others have doubted it. But whether it is essential to prove such an escape in the scienter action or not, it is important to remember that when the courts are discussing the problem, they are not speaking of Rylands v. Fletcher liability. Rylands v. Fletcher liability is an independent question altogether. The similarity of the terminology should not be allowed to cloud two separate legal issues. Another source of confusion can arise when the court, in an action for animal

⁹⁹ 70 ILTR 252.

¹⁰⁰ (1866) L.R. 1 Exch. 265, affirmed (1868) L.R. 3 H.L. 330.

¹⁰¹ Read v. J. Lyons & Co. Ltd., [1947] A.C. 156.

damage under general tort principles (negligence, trespass, etc.) turns to discuss the question of remoteness of damage. In such cases the defendant may bring in evidence to show that the damage was not reasonably foreseeable (i.e. was too remote) by attempting to show what conduct, for example, can be expected from a bitch with a litter of pups, from a mare in season or from "a cow with calf afoot"¹⁰². In view of Kennedy's willingness to declare that knowledge of a temporary phase or a passing condition may amount to knowledge of a mischievous propensity and thereby amount to scienter, there may be an inclination in such cases to conclude that the evidence adduced goes to the scienter problem. A tendency to confuse the two issues can easily arise. Legally speaking, however, the issues are distinct. The evidence in both situations may be the same but the object of the evidence is different in both cases. In the former case the defendant would be trying to prove that the act of the animal was too remote and so the defendant ought not to be liable in negligence, trespass, etc.; in the latter case the object of the evidence is to show that there was no mischievous propensity.

(c) The Proper Defendant: Owner or Keeper?

69. Although there is little Irish authority on the point liability in scienter seems to be attracted by possession rather than by ownership. The problem becomes acute only where possession and ownership are separated as where, for example, a person lends an animal to another or gives it to

¹⁰² See McCabe v. Delany [1951] Ir. Jur. Rep. 10.

another under a contract of bailment. The word used in the old writ - scienter retinuit - also supports the view that possession should be the crucial factor in determining liability rather than ownership. In Walker v. Hall¹⁰³ the trainer of a horse which he knew was accustomed to bite was held liable simply because he had control over the animal. Although it is doubtful whether the owner is liable as such¹⁰⁴ a master who obliges a servant to keep an animal in the course of his employment¹⁰⁵ may be vicariously liable in scienter, or at any rate in negligence¹⁰⁶. In Crean v. Nolan & Others¹⁰⁷ sheep belonging to the plaintiff were killed by some beagles, which had strayed after the termination of a drag hunt organised by the Festival of Kerry Committee. It was held that although a prima facie principal-agent relationship existed between the Festival Committee and the owners of the beagles, this relationship had ended at the time when the beagles had killed the sheep some considerable time after the hunt was over. It is clearly suggested in this case that the defendants might have been liable either in trespass, in negligence or if scienter was proved, if the damage was inflicted during the hunt. During the hunt the Festival Committee it seems would have had sufficient control to attract liability.

70. This case also illustrates the difficulty which the plaintiff may face in framing such an action. He cannot

¹⁰³ (1876) 40 J.P. 456.

¹⁰⁴ Williams, op. cit., 325-326.

¹⁰⁵ But not, seemingly, if the servant keeps the animal as a pet: Knott v. London County Council /1934/ 1 K.B. 126; Cf. North v. Wood /1914/ 1 K.B. 629.

¹⁰⁶ Williams, op. cit., 325.

¹⁰⁷ 97 ILTR 125.

sue the owners of the dogs because he has no way of knowing which dogs killed the sheep. He cannot sue in Cattle Trespass as dogs are not "cattle" for the purpose of the rule. And he cannot make the defendant committee liable under the Dogs Act 1906 which imposes strict liability in the case of dogs worrying "cattle", because liability under that Act attaches only to the owners of the dogs, and the Festival Committee was not the owner of the dogs.

*"Over rock and wrinkled ground
 Bar the lingering nose of hound,
 The little and elastic hare
 Stretched herself nor stayed to stare".*

Beaules. W.R. Rodgers.

(d) Defences to the Scienter Action

71. There is little doubt that contributory negligence on the part of the plaintiff is a partial defence to a scienter action¹⁰⁸. Likewise if the plaintiff's act was the sole cause of the injuries or if the plaintiff contracted or agreed (with or without consideration) to waive his legal rights in the terms of Section 34(1)(b) of the Civil Liability Act 1961 the defendant has a complete defence¹⁰⁹.

72. Carroll v. Kehoe¹¹⁰ gives a good illustration of voluntary assumption of risk in operation in the Irish

¹⁰⁸ Civil Liability Act 1961, sec. 34. Cf. Campbell v. Wilkinson, 43 ILTR 237.

¹⁰⁹ See also Law Com. No. 13, p. 8; Williams, op. cit., 331 et seq.

¹¹⁰ 61 ILTR 192.

Courts before the Civil Liability Act 1961 came into force. In this case the defendant was a Catholic curate and the plaintiff was a former employee of his. While the plaintiff was an employee of the defendant's the defendant bought a collie dog and it was part of the plaintiff's duty to care for and feed the dog. On at least one occasion the dog attacked a visitor to the curate's house and this fact was known to the defendant. The curate was appointed parish priest in another parish and moved house. He asked the plaintiff to look after the dog until he could arrange transport. The plaintiff agreed to do so. A driver eventually called for the dog and the plaintiff tied a rope around the collie's neck and put a calf's muzzle on the dog. The collie refused to enter the car whereupon the plaintiff got into the car first and began to pull the dog in while the driver pushed the dog from behind. The plaintiff stretched to catch the dog by the collar and the dog bit him severing one of his fingers. The High Court, upholding the Circuit Court, held for the defendant saying that the plaintiff "acted at his own risk".

73. Such a decision must now, of course, be considered in the light of Section 34(1)(b) of the Civil Liability Act 1961. The consent of the plaintiff will now only amount to a full defence where the plaintiff contracts or agrees in the full bilateral sense (with or without consideration) to waive his legal rights in the matter. Anything less than such a contract or agreement, while it might at common law amount to the defence of volenti, must now be considered as contributory negligence and must be considered as providing a partial defence only under the Act¹¹¹.

¹¹¹ O'Hanlon v. E.S.B. [1968] I.R. 72; See also McComiskey v. McDermott [1974] I.R. 75.

74. Act of God on analogy to Rylands v. Fletcher and act of a third party, because it is clearly recognised as a defence in Cattle Trespass¹¹² ought also to be defences although there are conflicting dicta in the pre-1971 English cases. That the plaintiff was a trespasser on the defendant's property will be treated as a factual consideration which might enable the defendant to plead that he owed him no duty of care in that he could not reasonably foresee his presence or that he was not in breach of the duty owed to such a trespasser under the law as now stated in McNamara v. E.S.B.¹¹³.

LIABILITY FOR HARM CAUSED BY DOGS

75. There is one statutory exception to the general rule that the owner of a domestic animal must know of a mischievous propensity on the part of that animal before he becomes liable. The Dogs Act 1906¹¹⁴ (replacing earlier legislation including the Dogs (Ireland) Act 1862¹¹⁵) imposed strict liability on the owner of a dog for injury caused to cattle

¹¹² Moloney v. Stephens [1945] Ir. Jur. Rep. 37; McGibbon v. McCorry, 43 ILTR 132. See infra Chap. 3.

¹¹³ [1975] I.R. 1. Supra Chap. 1(3).

¹¹⁴ 6 Edw. 7, c. 32.

¹¹⁵ 25 & 26 Vict. c. 59.

which term was defined to include horses, mules, asses, sheep, goats and swine¹¹⁶. The Act also contains provisions concerning the power of police officers to seize stray dogs and enables the making of orders in relation to identification collars for dogs and curfew for the prevention of the worrying of cattle at night¹¹⁷. This legislation was re-inforced by

¹¹⁶ Sec. 1 and Sec. 7 of the Dogs Act 1906.

Some indication of the dimensions of the dogs-worrying-livestock problem can be got from the following statistics for the years 1974, 1975 and 1976. Figures for earlier years are not available. It would probably be wrong to assume from the reduction in the figures over the period 1974-1976 that the dogs-worrying-livestock problem is decreasing: it is possible that during the period in question the Gárdai have become more preoccupied with the increase in other, more serious, crimes.

Proceedings and Persons Convicted for offences under the Dogs (Protection of Livestock) Act 1906.

Year	No. of Offences in which proceedings were taken	Charges withdrawn or dismissed	Number of convictions	Charges proved and order made without conviction	Adjourned sine die or otherwise disposed of
1974	114	15	89	3	7
1975	88	20	62	6	-
1976	72	n.a.	49	n.a.	n.a.

Source: *Annual Report on Crime for 1974 and 1975*. (Submitted by Commissioner, Garda Síochána to Minister for Justice).
Figures for 1976 provided by Department of Justice.

n.a. = not available as yet.

¹¹⁷ Sec. 3. Under the Dogs Order 1966 (S.I. No. 229 of 1966) the owner or keeper of a dog is obliged to put a collar or other identification of ownership on his dog (Article 2) and is also obliged to keep the dog secured at night time (Article 3). The order, however, made under the Diseases of Animals Act 1966 does not provide a civil remedy for breach of these obligations. See also the Guard Dogs Act 1975 in England an Act which attempts to regulate the use of guard dogs and Section 1(1) of which was recently interpreted in *Hobson v. Glendhill* (Q.B.D. (Div. Ct.)). *The Times*, 13 October 1977.

the Dogs (Protection of Livestock Act 1960 which makes it a criminal offence (for the owner or the person in charge of the dog) if a dog worries livestock. It is, however, a good defence to such a criminal charge to show that the defendant took reasonable care to prevent the worrying. The Act also permits the *Gárda Síochána* to seize a dog which has been worrying livestock and provides a defence in an action for damages which might be maintained against a person for shooting a dog in the act of worrying livestock¹¹⁸.

76. In relation to this latter defence the section in question (Section 4) does not provide a defence, however, where the defendant shoots a dog which is not in the act of worrying livestock. So in *Eccles v. McBurney*¹¹⁹ a Northern Ireland case, where the defendant shot a dog which had been worrying his sheep, but which when shot by the defendant was in an empty nearby field, the matter was determined on common law principles. The statutory defence contained in the Dogs (Northern Ireland) Act 1927 (like Section 4 in the Dogs (Protection of Livestock) Act 1960 in Ireland) extended only to the case where the dog is shot while actually attacking animals. It is worth noting, therefore, that while Section 4 gives a statutory defence to a person who shoots a dog while it is attacking livestock, the common law also recognises that a person may have the right in some circumstances to shoot a dog which has been worrying

¹¹⁸ Sections 3 and 4. This defence was also available at common law in the appropriate circumstances. In *Staveley v. Barrington* (1913) 47 ILTR 296 the defendant who shot a dog about to attack his sheep was held not to be liable in an action by the owner of the dog, and the court held that everyone has a clear right to do what is reasonably necessary to protect his property. As to defences available in a prosecution for killing or capturing protected wild animals see Wildlife Act 1976, Sec. 42, Sec. 22(6) and Sec. 23(8).

¹¹⁹ [1959] N.I. 15. *Creswell v. Sirl* [1948] 1 K.B. 241 followed.

livestock. The conditions, however, which the defendant must prove in order to get the benefit of the common law defence are formidable. In the Eccles case itself, it was held that the defendant had no answer to the plaintiff's claim. The right to shoot a poaching dog which is in pursuit of a hare (as opposed to a dog worrying livestock) is even more limited at common law¹²⁰.

77. The importance of this legislation for the purpose of the present study, however, relates to the strict liability imposed on the owner of a dog for injury caused to cattle under the Dogs Act 1906. In this respect it is true to say that the law as it stands shows more concern for sheep than for humans, because in the event of a person being attacked by a dog scienter or negligence must still be shown.

78. One further question needs to be asked. Does the strict liability imposed by the Dogs Act 1906 on the owner of a dog render the owner of the dog liable for all the injuries which occur to the cattle as a result of the attack? In Campbell v. Wilkinson¹²¹ the plaintiff was driving two foals along a public road when a young dog rushed out of the defendant's house and barked at the foals. The foals got frightened, broke away and were not recovered until the next day. Both foals died from injuries received during that night. The court disallowed the plaintiff's claim saying that the damage done did not amount to "injury" within the meaning of Section 1 of the Dogs Act 1906¹²². By way of

¹²⁰ See Brown v. Belfast Water Commissioners. Co. Ct. Belfast 47 ILTR 153.

¹²¹ 43 ILTR 237.

¹²² The court also suggested that the Dogs Act 1906 (Sec. 3) does not exclude the defence of Contributory Negligence.

contrast in the earlier case of Fleming v. Graves¹²³ the Circuit Court seems to have been prepared to interpret more generously the word injury used in an earlier Act in a similar statutory provision¹²⁴. In that case two fox-terriers belonging to the defendant chased the plaintiff's sheep out of a field where they proceeded down a public road, up a railway embankment and onto a railway line where several of the sheep were killed by a passing train. Gibson J., held that although the sheep were not injured by biting or worrying nevertheless the act covered such indirect injuries as those before him. Perhaps one could distinguish the cases by emphasising the facts that in Campbell v. Wilkinson the foals were on the highway and were in the charge of their owner at the time of the attack, and that this was not the kind of injury which the Act contemplated in making the owners of dogs strictly liable for worrying cattle. In the Fleming case, however, the attack was the very type of injury contemplated by the Act and the only question was one of remoteness. In holding as it did the Fleming case held that the damage was not too remote.

¹²³ 31 ILTR 143.

¹²⁴ The Dogs Act 1865 (28 & 29 Vict., c. 60). Section 1 enacted that "the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog". The court, in error, based its decision on The Dogs Act 1865 although this Act applied to England and Wales only. The decision should have been based on The Dogs (Ireland) Act 1862 (25 & 26 Vict. c. 59). As the provision in question, however, is identical in both Acts the error had no consequence in law.

CHAPTER 3 CATTLE TRESPASS

*"O Little boy blue come blow your horn
The sheep are in the meadow, the cows are in the corn"*

Nursery Rhyme.

*"The Kine of my father, they are straying from my keeping;
The young goat's at mischief, but little can I do:
....."*

The Kine of My Father. Dora Sigerson Shorter

79. Apart from scienter the other special rule relating to animal liability is known as Cattle Trespass. Here too, as in the scienter action, the owner is, in the appropriate circumstances, strictly liable for damage caused by his trespassing cattle.

80. At the very outset a distinction must be made between Cattle Trespass on the one hand and the personal trespass which one may commit through the medium of one's animals. If, for example, my cattle stray from my land and go onto the land of another this is properly called cattle trespass. If, on the other hand, I drive my cattle or deposit them onto another's land, then this is not cattle trespass, but trespass to land committed by me through the instrumentality of my cattle. The fact that it is cattle which I drove onto my neighbour's land is of no more consequence than if it was a load of stones which I deposited on the land. This distinction has been made in an earlier chapter¹²⁵ and need not be further developed at this stage.

¹²⁵ Chapter 1(c).

81. The first point to note about the strict liability imposed by this rule is that it only applies to "cattle". Accordingly, if my dog or my cat trespasses on your land, I am not liable under this rule. Likewise, it would seem, that the owner of pheasants is not liable if they trespass on neighbouring property, although there may, of course, be liability if the pheasants are negligently managed or kept in unreasonable numbers so that they constitute a nuisance¹²⁶. The term "cattle", however, includes much more than heifers, bullocks, cows and bulls; it also covers horses, sheep, goats, pigs, asses, domestic fowl¹²⁷ and seemingly domesticated deer¹²⁸. Furthermore, liability under this rule arises only in respect of animals which have been reduced into possession; it does not extend to wild animals (e.g. rabbits, pigeons, etc.) which may trespass from one piece of property to another. The upshot of the cases on this matter may, therefore, be stated as follows: if animals have been reduced into possession and are in the nature of cattle then the owner is strictly liable for their trespasses.

82. In Brady v. Warren¹²⁹ the defendant inherited a demesne in 1898 on which there were rabbits and deer. These animals trespassed on the adjoining lands which were in the occupation of the plaintiff. In an action grounded in trespass, negligence and nuisance the court held that the defendant could not be liable in respect of damage done by the rabbits as they were wild and did not belong to the

¹²⁶ Foley v. Berthoud, 37 ILTR 123.

¹²⁷ Williams, op. cit., 27 and 136.

¹²⁸ Brady v. Warren [1900] 2 I.R. 632.

¹²⁹ Ibid.

defendant. Evidence that the defendant's predecessor had brought onto the demesne foreign rabbits to improve the strain of the breed and that the rabbits were trapped, killed and exported, did not alter the fact that they were wild and did not belong to the defendant. With regard to the deer, however, the court took a different view, and on the facts (e.g. there was some evidence that the defendant used to feed them in the winter), it was prepared to hold that the deer were in fact tame and under the defendant's control. The defendant in these circumstances was liable for the trespass to the plaintiff's crops. The tamed deer owned by the defendant were treated seemingly (the court is not explicit on the matter) as cattle for the purpose of the cattle trespass rule¹³⁰.

83. If cattle are straying and they come onto another person's property it does not matter if they have come from an adjoining field or from the highway. Strict liability will attach in either event. It should be hastily added that this is the case only when the cattle have strayed onto the property (i.e. cattle trespass properly so called). If the cattle are being driven and through mis-handling they break onto another person's property then whether the owner of the cattle is liable or not depends on principles of negligence or ordinary trespass. This applies whether the cattle are being driven or managed on private property from which they break out or whether they are being driven along the highway and break onto adjoining property. The owner of cattle which are lawfully on the highway is not liable

¹³⁰ See also Foley v. Berthoud 37 ILTR 123 - rabbits and pheasants; Farrar v. Nelson (1885) 15 Q.B.D. 258 where the defendant was held liable in nuisance.

without negligence for trespasses which his cattle commit to adjoining property. This is not an exception to the cattle trespass rule because in cattle trespass the animals are by definition straying on the road and are not on the highway for a lawful purpose. The reason for the rule is that

"Traffic on the highways, whether by land or by sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger.... In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident."¹³¹

84. From the adjacent landowner's point of view it may be stated that while he must be taken to accept the inevitable risk of damage done by animals lawfully using the highway, he does not assume the same risk in respect of straying animals (i.e. animals not lawfully on the highway). In Kennedy v. McCabe¹³² the plaintiff claimed damages for trespass by the defendant's cattle on his land. There was a public road between the lands of the plaintiff and the defendant, and on the occasion in question, the plaintiff found nine cows and a goat in his field which was some distance up an open laneway. The defendant admitted that the animals were hers. In giving an award for the plaintiff the Circuit Court Judge obviously referring to the risk of trespasses which landowners adjoining the highway are deemed to accept quotes with approval the following passage from Williams, Liability for Animals, p. 373, footnote omitted:

¹³¹ Fletcher v. Rylands L.R. 1 Ex. 265, 286, per Blackburn J.

¹³² 103 ILTR 110.

"The animals that escaped must have been lawfully on the highway - i.e. they must have been there in pursuance of the right of passage, and not merely straying upon it. This was laid down in *Dovaston v. Payne* (1795);.....

Its justification at the present day is that damage done by straying cattle is not one of the risks that those who have property adjacent to a highway may be expected to assume. Where cattle stray in this way, the landowner may lawfully replace them on the highway or distrain them damage feasant; in the former case he may also bring an action of cattle-trespass."

85. If on the other hand, the cattle are lawfully on the highway exercising the right of passage no liability attaches for their trespasses in the absence of negligence. In *Buckley v. Fitzgerald*¹³³ P sold some bulls to the defendant Fitzgerald and P agreed to drive the bulls to Bandon Railway Station where the defendant would take control of them. As the bulls were being driven through the streets of the town one entered a shop and injured Mrs Buckley. The original action was brought against P and Fitzgerald but it was continued against Fitzgerald only. The jury found that the bulls were being negligently driven - they had neither rings nor ropes - and assessed damages at £50. As the jury was unable to agree as to whether the bulls were in charge of the defendant (Fitzgerald) or his servants at the time of the accident, however, a new trial was ordered¹³⁴. That it is necessary to prove negligence in such circumstances can also be seen from *Scully v. Mulhall*¹³⁵ where a bullock known to be quiet was brought on

¹³³ (1881) 15 ILTJo 118.

¹³⁴ See also *Tillett v. Ward* (1882) 10 Q.B.D. 17.

¹³⁵ 85 ILTR 18.

the highway and while being properly driven suddenly broke into a gallop and knocked the plaintiff off her bicycle. Since there was no negligence the plaintiff failed in her action. Although this case involved a personal injury inflicted on the highway it is submitted that there would have been no liability even if the bullock, as in the Buckley case, entered adjoining premises and injured the plaintiff thereon.

86. The operation of the principal rule which renders the owner strictly liable for his trespassing cattle, whether they enter the plaintiff's lands from the highway or from adjoining property, can be illustrated in the following Irish decisions the facts of which need not be recited: Ryan v. Glover¹³⁶; McCabe v. Delany¹³⁷; Brady v. Warren¹³⁸.

87. One difficulty which arises in the case of Cattle Trespass relates to the question as to who is the proper defendant in such an action: the owner of the cattle or the person in possession of the land from which the cattle strayed. The question has come up for decision in three Irish cases: Dalton v. O'Sullivan¹³⁹, Noonan v. Hartnett¹⁴⁰ and Winters v. Owens¹⁴¹.

¹³⁶ [1939] Ir. Jur. Rep. 65.

¹³⁷ [1951] Ir. Jur. Rep. 10.

¹³⁸ [1900] 2 I.R. 632. See also Carroll v. Parks, 47 ILTR 88.

¹³⁹ [1947] Ir. Jur. Rep. 25.

¹⁴⁰ 84 ILTR 41.

¹⁴¹ [1950] I.R. 225; 84 ILTR 197.

88. In Dalton v. O'Sullivan¹⁴² the cattle in question were in the possession of an agister, who had placed them on his lands in pursuance of an agistment agreement. The cattle escaped and caused damage to the plaintiff's property. An action against the defendant as owner of the cattle failed, as it was clear on the facts that the defendant was neither in possession of the cattle nor in occupation of the land. In fact, the defendant lived in Killarney nearly 100 miles from the land in question. Dalton's case, therefore, in deciding negatively that the defendant was not liable merely because he owned the cattle, did not decide whether primary responsibility rested in the case of cattle trespass on the person who was in possession of the cattle at the material time or the occupier of the land from which they escaped.

89. In Winters v. Owens¹⁴³ the defendant Owens took lands on a grazing letting from Kearney and part of the terms obliged Kearney to herd the cattle. In fact, however, Owens himself did a lot of tending and feeding and counting of the animals in question. When some of the sheep belonging to Owens broke out of the said lands and damaged the plaintiff's crops an action was brought against Owens. Owens was held liable, and in the course of the judgment Lavery J., went to great pains to show that in spite of the legal undertaking by Kearney to herd the animals Owens retained possession and control of them. At p. 230 of the report he said:

142 Supra

143 Supra

"Mr Owens would, I think, have been very surprised if he were told that he had not possession and full control of his sheep, notwithstanding that Mr Con Kearney had undertaken to check and count them daily".

Liability against Owens, therefore, was based on his possession and control of the animals.

90. But this is not an end to the matter. Can it be said that in the case of cattle trespass the occupier of the land from which the cattle break out is also liable in addition to the person who possesses or controls the animals? This very question arose in Noonan v. Hartnett¹⁴⁴, a case where the facts were almost identical with those in Winters v. Owens¹⁴⁵, but where the action was brought against the land owner. The case pre-dated the Winters case and is dealt with out of chronological sequence because the decision is not without difficulty. As a Circuit Court decision it is, of course, also much less important as a precedent than Winters v. Owens which was a decision of the High Court.

91. The judge in Noonan's case found that the contract under which the defendant held the lands was in the nature of an agistment contract and (although not absolutely clear from the report¹⁴⁶) that the defendant was also in possession of the animals in question. If this was the position then Noonan's case, in making the defendant liable, can be seen as being in harmony with the Winters v. Owens decision¹⁴⁷. In Noonan's case, however, the judge went

144 Supra

145 Supra

146 See Carroll, The Rule in Rylands v. Fletcher: A Re-assessment, (1973) 8 The Irish Jurist (n.s.) 208, 216.

147 Supra

further and based his decision seemingly not on possession of the animals, but rather on Rylands v. Fletcher considerations. Liability for cattle trespass is, according to Judge O Briain based on Rylands v. Fletcher and that case according to the judge,

"Seems to me to state clearly that if a person, for his own purposes, brings on his land something which was not there before, and that thing is likely to do mischief if it escapes, it is kept on the land at the peril of the person who brings it thereon. Consequently, I am of opinion that if the agister makes a bargain with a third person that he may graze his cattle on the agister's lands, these cattle have been brought on the lands, for his own purposes by the owner of the land and, in the present case, the defendant brought the cattle on to her lands for her own gain, and, consequently, the plaintiff is entitled to succeed notwithstanding the defendant's contract with another person."¹⁴⁸

92. Apart from the fact that instances of cattle trespass are to be found long before Rylands v. Fletcher was decided it is difficult nowadays to hold such a person liable on Rylands v. Fletcher principles because it means that the depasturing of cattle would have to be treated as "a non-natural user" of the land. Nevertheless, the result, that the owner of land who makes an agistment agreement under which he agrees to herd the animals, may be liable for damages if the cattle break out, may not be too unpalatable.

93. To summarise the result of these cases, therefore, we may say that the person who possesses or controls the cattle in question is liable in an action for Cattle Trespass. This is not to say, however, that the owner of land may never be liable in such cases, and if as in an agistment agreement the owner of the land also undertakes to herd the

¹⁴⁸ 84 ILTR 41,44.

animals he may well be liable. It must be doubted, however, that his liability in such circumstances is based on Rylands v. Fletcher principles. Lastly, the owner of land who has no control whatsoever over the cattle is hardly liable in an action for Cattle Trespass.

94. With regard to the persons who can bring the action it is clear that the possessor of the land on which the cattle have trespassed can bring an action. It is equally clear that a person who takes land on conacre has sufficient interest to support an action in Cattle Trespass for damage to his crop¹⁴⁹. Finally, in Cronin v. Connor¹⁵⁰ it was held that a person entitled to turbary on the defendant's land can maintain an action against the defendant owner of the land for damage caused by the defendant's cattle to the plaintiff's turf.

95. It should be noted, however, that the action of Cattle Trespass is primarily considered to be a wrong against land and, as such, it does not normally extend to personal injuries caused by trespassing cattle to persons on the property. Servants, guests or relatives of the possessor of the land it was felt, therefore, could not in normal circumstances at common law recover for personal injuries caused by trespassing cattle¹⁵¹. Recovery has, however, been allowed in more recent times in England where

¹⁴⁹ Winters v. Owens [1950] I.R. 225, 227.

¹⁵⁰ [1913] 2 I.R. 119.

¹⁵¹ North, The Modern Law of Animals, 94. See generally Williams, op. cit., 163-173. See also Cox v. Burbidge (1863), 13 C.B.N.S. 430.

the trespassing animal caused physical injury to the owner occupier in Wormald v. Cole¹⁵² and would also probably be allowed where the occupier's servant is injured when trying to put the trespassing animals off the premises¹⁵³. Williams¹⁵⁴ seems to suggest that even on the earlier cases (principally Cox v. Burbidge¹⁵⁵) the possessor of the cattle may be liable if the personal injury is consequent upon the escape of cattle and if it is consonant with the ordinary nature of the class of animal concerned. This approach seems to have found favour with Lavery J. in Winters v. Owens¹⁵⁶ where he cites with approval Williams J's judgment in Cox v. Burbidge. So if cattle break into my garden and eat my lettuce plants the owner of the cattle will be strictly liable for the damage, and if, on the way to the lettuce patch, they knock over a pram in which a child is sleeping, it may be (but this is not certain) that the child will have a right to sue even in the absence of negligence. Such an expanding version of the damages recoverable in a cattle trespass action can also be supported by McCabe v. Delany¹⁵⁷ where the plaintiff recovered damages for injuries done to his horse by a trespassing "cow with calf afoot", and by Ryan v. Glover¹⁵⁸ where the plaintiff recovered for injuries caused by the trespassing cattle to his own cattle.

¹⁵² [1954] 1 Q.B. 614.

¹⁵³ Harrison v. Armstrong (1917) 51 I.L.T. 38, a case, however, which may have turned more on negligence than on cattle trespass. See also Lavery J., in Winters v. Owens [1950] I.R. 225, 231.

¹⁵⁴ Williams, *op. cit.*, 163.

¹⁵⁵ (1863) 13 C.B. (N.S.) 430, 143 E.R. 171.

¹⁵⁶ [1950] I.R. 225, 231.

¹⁵⁷ [1951] Ir. Jur. Rep. 10.

¹⁵⁸ [1939] Ir. Jur. Rep. 65.

96. Before looking at the defences available to an action in cattle trespass note should also be taken of an old statutory provision relating to trespass of animals which occurs in the Summary Jurisdiction (Ireland) Act 1851 (14 and 15 Vict. c. 92). Section 20(1) and (2) of this Act provides that although there can be impounding where the owner of the trespassing animal is unknown there is to be no impounding of trespassing animals where the owner of the animal is known. Instead the owner of the trespassing animal on the return of the animal shall become liable to pay the occupier of the land a sum in accordance with the scale set out in the section. This scale provides the rate for trespassing fowl on common pasture land or any arable uncropped land to be $\frac{1}{2}$ ^d; for a goose the rate is 1^d, for a calf, sheep or lamb the rate is 2^d, for other larger 'cattle' - horse, cow, pig, etc. the rate is 6^d. For some strange reason the highest rate is for a trespassing goat: 3^s. For a trespass on fattening pasture or meadow land or cropped land the rate is double the above amounts. If either of the parties is not satisfied with the above rates he may complain to the justice of the petty sessions (to the District Justice nowadays) and the latter has power after investigation to make such award against either party as seems just under all the circumstances. This may involve an award based on the scale of rates outlined above, for the first trespass; double the scale for the second trespass; treble the scale for the third or subsequent trespass; or an award for the actual damage done by the animal (Section 20(3)).

DEFENCES TO AN ACTION IN CATTLE TRESPASS

1. Act of Third Party

97. Although there used to be some doubt about it, it seems now to be well settled by two Irish cases that the act of a third party is a good defence to an action in Cattle Trespass. In Moloney v. Stephens¹⁵⁹ the plaintiff and defendant owned adjoining property and a third party had a right of way over both farms. The third party in exercising his right of way failed to close a gate as he was obliged to do with the result that the defendant's horses trampled on the plaintiff's land. Judge O Briain in following an earlier Irish case, McGibbon v. McCorry¹⁶⁰ said in quite unequivocal language "that the defendant has established a good defence in law to this action by showing that the trespass complained of was caused by the wrongful acts of a third party"¹⁶¹.

2. Act of God

98. It would seem that if an action of a third party affords a defence then Act of God should also immunise the defendant from legal liability. So if the fence or gate through which the cattle trespassed was blown down by an extraordinary gale no liability should attach to their owner¹⁶². Moreover, since Act of God is a defence in the

¹⁵⁹ [1945] Ir. Jur. Rep. 37.

¹⁶⁰ 43 ILTR 132. A case in which the facts were very similar.

¹⁶¹ [1945] Ir. Jur. Rep. 37, 38.

¹⁶² See Williams, op. cit., 184-185; Delany, 10 N.I.L.Q. 145.

Rylands v. Fletcher situation, it would seem that it should also be a defence in cattle trespass. There seems no good reason why cattle trespass liability should be any stricter than Rylands v. Fletcher.

3. The Plaintiff's own fault and Contributory Negligence

99. Where the plaintiff is the sole author of his own misfortune then, of course, he cannot complain. So, for example, if the cattle have trespassed because the plaintiff in breach of an obligation to fence allows the defendant's cattle on to his own property he cannot complain at law¹⁶³. If he has, however, been only partly responsible for the trespass then the apportionment provisions of the Civil Liability Act 1961¹⁶⁴ should apply.

4. Inevitable Accident

100. The defence of inevitable accident appears to be available in some limited cases at least. It seems to be recognised at least where the cattle trespass is necessary to secure the reasonable fulfilment of the defendant's rights. It was accepted in an old case in the Year Books where the defendant's ox took a mouthful of the plaintiff's grass when the defendant was turning the oxen and plough at a headland as he was entitled to do by custom¹⁶⁵.

¹⁶³ Plummer v. Webb (1619) Noy. 98, 74 E.R. 1064.

¹⁶⁴ Section 34 et seq.

¹⁶⁵ Y.B.P. 21 E. 4. 28b, pl 23, continued in Y.B.P. 22 E.4. 8a, pl. 24 (Bro. Custom 51, Trespas 351). Cited in Williams, op. cit., 191. See also generally idem, 185-194.

Lavery J. in Winters v. Owens¹⁶⁶ seemed willing to admit it generally when in unqualified language he declared: "The owner of a straying animal is not liable if the escape is due to something unavoidable...."¹⁶⁷. Whether this dictum of Lavery's is an indication of a full acceptance of the defence of inevitable accident in all circumstances is difficult to say.

101. Apart from these special defences, however, it should be noted that more general defences may also be available such as the defence that the cattle were lawfully on the land (e.g. by virtue of a licence or a right in common) or that the damage caused by the trespass was too remote¹⁶⁸ or that the trespass was caused by a breach by the plaintiff of a duty to fence which the plaintiff owed to the defendant¹⁶⁹.

*"But when the Dark Cow leaves the moor,
And pastures poor with greedy weeds,
Perhaps he'll hear her low at morn
Lifting her horn in pleasant meads."*

Lament for Thomas McDonagh. Francis Ledwidge.

¹⁶⁶ [1950] I.R. 225.

¹⁶⁷ Idem, 232.

¹⁶⁸ See McCabe v. Delany [1951] Ir. Jur. Rep. 10; Ryan v. Glover [1939] Ir. Jur. Rep. 65.

¹⁶⁹ See Winters v. Owens [1950] I.R. 225, 232.

CHAPTER 4 ANIMALS ON THE HIGHWAY

*"To Meath of the pastures
From wet hills by the sea,
Through Leitrim and Longford,
Go my cattle and me.*

*I hear in the darkness
Their slipping and breathing,
I name them the bye-ways
They're to pass without heeding."*

A Drover. Padraig Colum.

102. In considering the liability caused by animals on the highway a distinction should be made between damage done by animals which are brought onto the highway and damage done by animals which stray onto the highway.

103. In the former case, as has been indicated already, liability is determined purely on ordinary principles of negligence and nuisance. If I bring an animal onto the highway I must exercise reasonable care in ensuring that while on the highway the animal causes no damage. This rule is amply illustrated in the Irish decisions most of which have already been referred to above in Chapter 1(a) and (b).¹⁷⁰ Moreover, liability will also attach for damage caused by an animal which, although not brought onto the highway, was negligently allowed to escape onto a public way. This is

¹⁷⁰ See also Buckley v. Fitzgerald 1881, 15 I.L.T.Jo. 118; Furlong v. Curran /1959/ Ir. Jur. Rep. 30.

amply attested to in Howard v. Bergin, O'Connor & Co¹⁷¹ and need not be further elaborated at this juncture. Negatively stated, this rule would exempt from liability any person whose animal caused damage while lawfully using the highway, provided there was no negligence or nuisance on the part of the owner¹⁷².

104. Concerning injuries caused by animals which stray onto the highway the law is different. Normally speaking no liability attaches to the owner of such animals simply because he has allowed them to escape from his land. There is no obligation in such circumstances to fence one's land and to keep one's domestic animals in. Moreover, the orthodox view also states that road users in such circumstances voluntarily accept the normal risks associated with highways including the possibility that animals will be present on the highway.

105. The rule although found in earlier common law is usually referred to as the rule in Searle v. Wallbank¹⁷³. Since the decision in this case has come in for some severe criticism in recent years the facts ought to be recited.

106. The plaintiff was injured when at 1.30 a.m. on 1 April 1944 the bicycle which he was riding collided with the defendant's horse on a public highway. The plaintiff's front light was masked in accordance with war-time regulations at the time of the accident. The field in which

¹⁷¹ [1925] 2 I.R. 110, 118.

¹⁷² Scully v. Mulhall, 85 ILTR 18.

¹⁷³ [1947] A.C. 341.

the horse was kept, with other animals, adjoined the highway and the horse escaped because of a defective fence. The House of Lords in dismissing the plaintiff's appeal held that the owner of a field adjoining the highway is under no prima facie legal obligation to users of the highway so to keep and maintain his hedges and gates along the highway as to prevent his animals from straying onto it. Nor is he under any duty to users of the highway to take reasonable care to prevent any of his animals, not known to be dangerous, from straying onto the highway.

107. The general principle stated in Searle v. Wallbank has been accepted in Ireland in the following cases: Gibb v. Comerford¹⁷⁴; Dunphy v. Bryan¹⁷⁵; Cunningham v. Whelan¹⁷⁶; and in Northern Ireland in Hall v. Wightman¹⁷⁷.

108. In Gibb v. Comerford, Maguire P., cited with approval the following dictum from Heath's Garage, Ltd. v. Hodges¹⁷⁸ as being a proper statement of the law.

"In my opinion the experience of centuries has shown that the presence of domestic animals upon the highway is not inconsistent with the reasonable

¹⁷⁴ [1942] I.R. 295.

¹⁷⁵ 97 ILTR 4.

¹⁷⁶ 52 ILTR 67.

¹⁷⁷ 1926 N.I. 92.

¹⁷⁸ [1916] 2 K.B. 370.

safety of the public using the road. I am unable to draw any distinction in this regard between domestic animals. I think horses, cattle, sheep, pigs, fowl and dogs all fall into the same category for this purpose.... The prima facie harmlessness of domestic animals as frequenters of the highway is, I think, established as a legal doctrine."¹⁷⁹

109. In Gibb v. Comerford a dog was frightened by a motor car and "dashed back like the shot of a gun" against the plaintiff's bicycle thereby causing the plaintiff injury. Although the court expressed great sympathy for the plaintiff the action was dismissed. "If the law needs modification there is no difficulty in our Legislature making such a modification, should modern conditions be thought to require it, but it is not for me to change the law."¹⁸⁰

110. In Dunphy v. Bryan¹⁸¹ the straying animal in question was a pet lamb and in Cunningham v. Whelan¹⁸² the accident was caused by a herd of cattle.

111. The justification for the rule in Searle v. Wallbank seems to be mainly historical. It has been stated¹⁸³ that "in early times, very few roads were fenced off from the adjoining land, and it would have been a considerable imposition on the owner of cattle if he had been compelled to prevent them from straying". Moreover, road users were usually taken to have accepted the risks inherent in road travel and this seems to have included the possibility of the

¹⁷⁹ [1916] 2 K.B. 370, 382.

¹⁸⁰ [1942] I.R. 304.

¹⁸¹ 97 ILTR 4.

¹⁸² 52 ILTR 67.

¹⁸³ Delany, 10 NILQ 140.

presence of straying animals. In recent years, however, because of the increasing speed with which road traffic moves, because of the increasing number of wide and fast-surfaced roads, and because of the serious consequences which may occur nowadays if fast moving traffic collides with animals on the highway, a great deal of dissatisfaction has been expressed about the rule in Searle v. Wallbank. Before assessing it, however, the limits of the rule should be noted.

112. First, it seems that it does not apply in Ireland, if the animals are straying on the roadway in sufficiently large numbers to cause an obstruction¹⁸⁴. Second, the rule does not apply to wild animals or to domestic animals who show peculiar characteristics or where scienter is proved¹⁸⁵. Thus, if a person knows that his dog has a mischievous propensity to chase passing motor-cyclists he may be liable in scienter if he allows his dog to stray onto the highway. Third, it does not apply if animals are brought onto the highway¹⁸⁶. Fourth, in Howard v. Bergin, O'Connor & Co.¹⁸⁷ O'Connor J., was inclined to limit the application of Searle v. Wallbank to rural conditions. He was of the opinion that the defence that there was no obligation on adjoining owners to fence and that there was no liability for any damage caused by straying animals in any circumstances, was too wide a proposition to be accepted as law. Although it was

184 Cunningham v. Whelan (*supra*).

185 Brock v. Richards [1951] 1 K.B. 529, 535; Howard v. Bergin, O'Connor & Co. (*supra*).

186 Gomberg v. Smith [1963] 1 Q.B. 25.

187 Supra.

unnecessary for him to decide the question in the case before him, and although he could find no authorities to support him, he was inclined to the view that the common law which relieves occupiers of land adjoining the highway from fencing does not apply to cities. City dwellers, should according to O'Connor's view, be obliged to fence. Although this line of argument seems to have been supported by Delany,¹⁸⁸ judicial authority on the matter is scarce and inconclusive¹⁸⁹. Lastly where there were special circumstances such as peculiar topography or where the animal was engaged in an activity which could only be carried on under a high degree of human control it has been suggested that liability might also arise¹⁹⁰.

113. Although it is clear, therefore, from Searle v. Wallbank, that the owner cannot in general be sued for injuries caused by his animals straying on the highway, the question still remains as to what is the position in relation to the plea of contributory negligence if the owner of the animal brings an action against the road user for wrongfully injuring his animal.

114. Section 34(1) of the Civil Liability Act 1961 which provides for the apportionment of liability in the case of contributory negligence, reads as follows:

188 10 NILQ 135, at 141 - 142.

189 See also e.g. Lord Goddard C.J. in Carmarthenshire County Council v. Lewis /1955/ A.C. 549, 561; Holroyd Pearce L.J. in Gomberg v. Smith /1963/ 1 Q.B. 25, 34 and Harman and Davies L.J.J. in same case.

190 Ellis v. Johnstone /1963/ 2 Q.B. 8; Bativa v. West /1970/ 1 Q.B. 716; North, op. cit., 150 - 151.

"34(1). Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant...."

For the apportionment process to operate it is clear from the wording of the statutory provision that the defendant's conduct must amount to a "wrong" whereas the plaintiff's conduct need only be "negligence or want of care". Since "wrong" is defined in Section 2 of the Act as being "a tort, a breach of contract, or a breach of trust" it is clearly different from the "negligence or want of care" of the plaintiff. In other words, for the apportionment to operate the statute provides that the defendant's conduct must be actionable, either as a tort, a breach of contract or a breach of trust; no such condition is necessary in relation to the plaintiff's conduct, however. Apportionment can take place if the plaintiff's conduct merely showed "negligence or want of care". The plaintiff's conduct does not have to be actionable; it suffices if it simply amounts to a "want of care" which is a causative factor. It is further submitted that 'negligence' and 'want of care' as used in the phrase "negligence or want of care" are not synonymous and that the word 'or' is used disjunctively.

115. In the context of a Searle v. Wallbank type accident, therefore, this interpretation would mean that although the conduct of the farmer in permitting his cattle to stray is not actionable (Searle v. Wallbank) it may still amount to "want of care" for the purpose of §34 of the Civil Liability

Act 1961. It would, on this interpretation, constitute a partial or total defence under the section. A consequence of this, of course, is that the farmer may by his "want of care" be found 100% to blame for the accident and recover nothing for the loss of the animal.

116. That the plaintiff farmer's conduct may amount to contributory negligence does not of course mean that a cross-action by the defendant in such circumstances would succeed. Under Searle v. Wallbank the plaintiff (the owner of the cattle) owes no duty in the first place to prevent his animals from escaping onto the highway and if the farmer's conduct is not amenable to a full action surely it cannot be amenable to a cross action.

117. Although Searle v. Wallbank has been followed in Ireland it has been subject to severe criticisms in other countries and has been disapproved of in Canada¹⁹¹, Australia¹⁹² and Scotland¹⁹³ and has been repealed by statute in England¹⁹⁴. The exemption which the rule affords to the owners of cattle is strangely anachronistic in an age when the general rule relating to man's tortious liability is based at least on concepts of fault, and in many cases is moving towards strict liability. That owners and occupiers adjoining the highway can with impunity ignore

¹⁹¹ Fleming v. Atkinson [1959] S.C.R. 513; 18 D.C.R. (2d) 31.

¹⁹² Reyn v. Scott (1968), 2 D.C.R. (N.S.W.) 13; Fleming, Torts, 5th ed., 351-353. Cf. [1969] 2 N.S.W.R. 733. See also Appendix A.

¹⁹³ Gardiner v. Miller, 1967 S.L.T. 29.

¹⁹⁴ The Animals Act 1971, sec. 8.

the state of their fencing and allow their cattle to wander onto the path of fast moving traffic, is in modern conditions difficult to justify. Moreover, the rule in Searle v. Wallbank provides an anomaly within the rules of animal liability itself. This anomaly may be appreciated by considering the legal principles that govern the following factual situations:

- (1) If a person's cow breaks out of a field and into an adjoining field where it causes damage, liability is strict under the cattle trespass rule.
- (2) If the cow instead breaks out of the field and onto the highway where it causes damage, there is normally no liability.
- (3) If the cow is being driven along the highway and causes damage, there will be liability if there is negligence.
- (4) If the cow breaks out onto the road, and wanders along until it finds a convenient gap and enters the adjoining field, liability is once more strict.

118. In a regime where both strict liability and negligence play a prominent part the immunity conferred by Searle v. Wallbank (i.e (2) above) is patently anomalous.

119. In a fairly recent Canadian case¹⁹⁵, which decisively rejected Searle v. Wallbank, Mr Justice Roach in a literary flourish pointed to the inappropriateness of the rule in modern social conditions.

¹⁹⁵ Supra at fn. 191.

"It is now over 200 years since Thomas Gray wrote his famous lines descriptive of rural England at eventide, 'The lowing herd winds slowly o'er the lea'. The lea no doubt included such highways as then traversed the landscape. As I read the modern English cases the herd may still wander along those same highways without the owner being subject to civil liability for the injuries they may cause. No longer in this Province does 'the ploughman homeward plod his weary way'. He goes now in his tractor, oft-times along the highway. The farmer whose land adjoins the King's Highway can in this modern era scarcely know the meaning of the 'solemn stillness' of which Gray wrote. No longer can he be conscious of the beetle wheeling his droning flight. What he hears, instead, is the whirl of motor cars wheeling their way at legalized speed along the adjoining highway. The common law of England may have been adequate in Gray's day. The Courts in England have held that it is still adequate, but surely it must be apparent that today in this Province it is not."¹⁹⁶

120. One last question should be raised here. In so far as the presumption of modern law is that the soil of the highway is owned by the landowners or landowner on either side, ad medium filum or altogether as the case may be, can an adjoining owner maintain an action for cattle trespass on the highway? Although the problem is of little practical concern and has not figured in the courts in recent years, the answer seems to be yes. Williams, in his book *Liability for Animals*, on the question puts forward the following conclusion

"On the whole, therefore, it seems probable that at the present day an action of trespass will lie for any escape of cattle onto the highway, at least if there is actual damage, or for any intentional depasturing of it; and a distress damage feasant may be made in the same circumstances if (perhaps) there is actual damage and if the Statute of Marlborough does not apply".¹⁹⁷

¹⁹⁶ Quoted in Wright and Linden, Canadian Tort Law, at 563.

¹⁹⁷ At 368. Footnotes omitted.

But no action will arise where cattle being lawfully driven along the highway nibble the grass along the highway or adjoining crops, unless the drover is negligent. In such cases the defence of inevitable accident is good¹⁹⁸

¹⁹⁸ Williams, Liability for Animals, 368-369.

CHAPTER 5 CRITICISMS OF EXISTING LAW AND SIGNPOSTS FOR REFORM

*"Cats and monkeys, monkeys and cats -
all human life is there."*

The Madonna of the Future. Henry James.

121. It might be helpful in attempting an assessment of the law on this topic to set out, even in the most general terms, the bases of liability that operate in this area.

122. First, in so far as liability may arise under the general principles of tort it may be based either on the fault concept (Negligence, Trespass to Person, etc.) or it may be based on notions of strict liability (Rylands v. Fletcher, Trespass to Land, Nuisance, etc.). Second, the scienter rule when it applies imposes strict liability on the keeper of the animal. Similarly, strict liability arises by statute for injury done by dogs to cattle. Third, the law imposes strict liability for cattle trespass. And fourth, the law confers an immunity on the owner of cattle which cause injury while straying on a public highway. If one ignores this last immunity for a moment, the overall picture that emerges from even this brief sketch, therefore, is one where the owner of animals is liable for his negligence in their management and in many cases is held to be strictly liable even when there is no fault on his part.

123. Any criticism of this branch of law must commence with the immunity conferred on the owners of cattle which cause injury while straying on the public highway. Since Donoghue v. Stevenson¹⁹⁹ the minimum standard of care

¹⁹⁹ [1932] A.C. 562.

required of a person in society is that of reasonable care. Instances of cases where a person will not be liable for his unreasonable conduct did survive the Donoghue v. Stevenson deluge, but little by little these exceptions are being successively submerged²⁰⁰, and those that remain are becoming more and more obvious as irregular isolations. When the trend in many areas of tortious liability is towards strict liability²⁰¹ it is curious to say the least that instances survive where a man may not be liable even for unreasonable conduct.

124. Moreover, the factual assumptions that underlie the earlier cases like Cox v. Burbidge²⁰² have greatly changed in the century that has since passed. Farms are smaller nowadays, fencing materials are more readily available, cattle are more expensive and farmers are much more businesslike in their approach to their occupation. Furthermore, traffic conditions have changed dramatically: fast moving vehicles speed on wide and well surfaced roadways where, in the event of a collision, the likelihood of serious injury to life and limb is much greater than in

²⁰⁰ Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd. /1964/ A.C. 465, approved in Securities Trust Ltd. v. Moore and Alexander Ltd. /1964/ I.R. 417, (negligent statements); Purtill v. Athlone U.D.C. /1968/ I.R. 205; McNamara v. E.S.B. /1975/ I.R. 1 (occupiers' liability); Campbell v. O'Donnell /1967/ I.R. 226 (semble, the gratuitous bailor of goods).

²⁰¹ See e.g. EEC Draft Directive on Liability for Defective Products, presented by Commission to Council on 9 September, 1976.

²⁰² (1863) 13 C.B. (N.S.) 430 at 435-6, 143 E.R. 171, 173.

the old "horse and buggy" days²⁰³.

²⁰³ The following table indicates the incidence of highway accidents which involved animals during the period 1968-1977. It should be mentioned that figures were only available for personal injury accidents (fatal and non-fatal) and no statistics were available in relation to highway accidents which involved material damage to property only. The table is based on figures supplied by An Foras Forbartha.

Personal Injury Accidents on the Highway: Totals (Fatal and Non-Fatal) and those involving Animals

Year	Total Number Fatal	Fatal Involving Animals	Total Injury	Injury Involving Animals	Total	Total Involving Animals
1968	415	2 (0.48%)	6,406	115 (1.8%)	6,821	117 (1.7%)
1969	438	3 (0.68%)	6,092	109 (1.8%)	6,530	112 (1.7%)
1970	502	2 (0.4%)	5,902	114 (1.9%)	6,405	116 (1.7%)
1971	538	8 (1.48%)	5,948	102 (1.7%)	6,486	110 (1.7%)
1972	610	9 (1.48%)	5,613	106 (1.9%)	6,223	115 (1.8%)
1973	556	7 (1.26%)	5,464	89 (1.6%)	6,020	96 (1.6%)
1974	551	6 (1.07%)	5,081	102 (2.00%)	5,632	108 (1.9%)
1975	523	2 (0.38%)	4,391	81 (1.8%)	4,914	83 (1.7%)
1976	489	8 (1.64%)	4,628	56 (1.2%)	5,117	64 (1.3%)
1977 First Quarter	n.a.	n.a.	n.a.	n.a.	1,098	14 (1.3%)

With regard to types of animals involved figures were available only for 1975 (part), 1976 (all) and 1977 (part) and these indicate as follows:

	1975	1976	1977
Total Road Accidents involving Animals	47	64	14
<u>Animals Involved:</u>			
Cattle, Horses, Sheep	36	56	12
Dogs	2	4	1
Other animals/or Not Known	9	4	1

The very limited figures available relating to the geographical distribution of such accidents did not indicate any unusual pattern.

125. The anomaly of the immunity can be highlighted by contrasting it to other analogous rules of liability that apply in similar cases. If, for example, a parent or a school teacher negligently allows a child to stray onto the highway where the child causes an accident the parent or teacher may be liable for negligence²⁰⁴. If a man brings cattle onto the highway he will be liable if, through negligence, they cause damage on adjoining property²⁰⁵. Again, if the owner of a cow allows it to stray into another person's field he will be strictly liable for cabbages which the animal eats on that property²⁰⁶. Finally, if a person allows a lot of cattle to stray onto the highway so that they cause an obstruction he will be liable for damage which they cause²⁰⁷. But, under the present immunity, if a person allows a few cattle to stray onto the highway where they cause an accident there is no liability on the owner of the animals. Such a rule can hardly conform to the reasonable man's expectations of the legal position nor to his instinctive concepts of justice. What evidence we have seems to suggest that even the farming community itself would now be willing to see this immunity go²⁰⁸.

126. The Law Commission in England put the case for a change of the law in this matter in the following language:

²⁰⁴ See Carmarthenshire County Council v. Lewis [1955] A.C. 549.

²⁰⁵ Supra Chap. 1(a), paras. 12 to 15.

²⁰⁶ Supra Chap. 2 on Cattle Trespass.

²⁰⁷ Cunningham v. Whelan, 52 ILTR 67.

²⁰⁸ Submission by Muintir na Tire dated 28 July 1977.

"We have reached the conclusion 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 recognize 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."²⁰⁹

*"All in the April evening,
April airs were abroad,
The sheep with their little lambs
Passed me by on the road"*

Sheep and Lambs. Katherine Tynan.

127. If one, therefore, concedes that this privileged immunity must go in any reforming measure one may sketch the broad contours of the remaining legal position in the following way: the principles of strict liability apply where the special rules on animal liability operate - scienter, cattle trespass, and dogs injuring cattle (statutory) - and in some cases where the general torts rules apply - as in Rylands v. Fletcher, Nuisance etc.; where only the general principles of tortious liability

²⁰⁹ Law Com. 13, para. 40.

apply, the owner of the animal is liable at least for his negligence. One cannot discern from this picture any unifying principle of liability for the damage caused by one's animals. Indeed the opposite may be true: if one looks long enough and focusses especially on the results of specific fact situations, what one begins to perceive is a somewhat chaotic scene of irrational loss distribution, where in some cases the owner of the animals is strictly liable, while in others he is only liable for negligence. An examination of the instances given in the preceding paragraphs will bear this out.

128. A closer examination of the two special rules on liability for animals, namely, scienter and cattle trespass, also discloses special difficulties and complexities.

129. In scienter the distinction between wild and domestic animals is artificial, is not to be found in nature, and in terms of danger, does not correspond to the experience of professional animal keepers. For example, the keeper of Dublin Zoo expressed the opinion that all animals should be considered dangerous and declared that even rabbits can at certain times bite and be aggressive. Bord na gCapall expressed the view that care was always needed in handling horses (domestic animals) and that "all animals should be treated as 'wild animals'". A senior official of Bord na gCon was of the same opinion in relation to greyhounds. He stated that great care was needed in handling greyhounds and that they should always be kept under control and muzzled in exercise. This would lead one to believe that the sex, the health, the individual disposition and the season may be as relevant as the species in determining whether an animal is dangerous to mankind or not. Moreover, the legal criterion for separating the "wild" from the "domestic" i.e. by reference solely to their danger to

mankind, ignores any danger which such animals may present to property. It may be, for example, that a tame fox which breaks away from his confinement, and which does not represent any threat to mankind, could nevertheless be a much more serious menace to a neighbour with a free range fowl farm, than a zebra, for example, which breaks away from a circus. The Report of the New South Wales Law Reform Commission (1970) makes the point that to:

"focus attention.... upon animals such as fully grown lions is but to ignore the difficulties of defining a test for the assigning of all animals to one or the other of two groups. Such a division is not to be found in nature. The different species of animals in fact present different degrees of danger to mankind and within each species the danger presented is not constant but varies according to age, sex, time of the year and many other matters; and individual animals within the one species differ."²¹⁰

130. Besides the fact that the "actual knowledge" which is required before the keeper of animals mansuetae naturae is liable in scienter is considered to be too restrictive, other aspects of the scienter rule also cause serious problems: for example, the uncertainty surrounding the term "mischievous propensity"; whether "an escape" or "an attack" of the domesticated animal has to be shown; what exactly is the scope of the defences to the action and, in particular, whether an act of a third party is a defence; and what is the scope of the scienter action in the employer and employee situation²¹¹.

²¹⁰ §9.

²¹¹ See generally North, op. cit., 48; on the application of scienter in the employer and employee situation in England see Rands v. McNeil [1955] 1 Q.B. 253 and Law Com. No. 13, para. 20.

131. The action of Cattle Trespass also presents some difficulties. The retention of strict liability for damage caused by one's trespassing cattle had to be justified in recent years where negligence had become necessary in other forms of trespass e.g. trespass to person²¹². If cattle belonging to a person broke into a neighbour's field and there caused personal injuries to the owner of the field (or perhaps to his family or employees) then the owner of the cattle would be liable for such injuries without proof of fault; if the cattle, however, injured a stranger on the property such an injured person would have to prove negligence in an action based on trespass to person before he could recover. The doubt as to whether an action in Cattle Trespass could be brought for personal injuries inflicted on persons other than the owner of the land (and perhaps his servant injured while turning out the animals)²¹³ might be sufficiently great to prevent him from suing in Cattle Trespass. Furthermore, the meaning of the term "cattle" and the scope of the defences available to an action in Cattle Trespass were further difficulties associated with this action.

SIGNPOSTS FOR REFORM

132. In considering the approach which a reforming measure might take several theoretical possibilities present themselves for consideration. Before examining these possibilities more closely, however, the ground should be

²¹² Fowler v. Lanning [1959] 1 Q.B. 426; [1959] 1 All E.R. 290.

²¹³ Supra, Chap. 3, para. 95 et seq.

partly cleared by dealing first with the rule of Searle v. Wallbank²¹⁴. There is little doubt nowadays that the immunity which the present law confers on the owners of cattle which stray on the highway should be abolished. The arguments for the removal of this immunity have already been made²¹⁵ and need not be repeated here.

133. If one accepts the need to abolish the immunity confirmed in Searle v. Wallbank as the starting point, then the remaining rules dealing with animal liability might be approached in any of the following ways.

134. First, one could abolish completely the specific rules relating to animals - the scienter action and cattle trespass - and allow the general principles of tort law (principally negligence and nuisance) to handle the injuries caused by animals in the same way as it handles injuries caused by other chattels.

135. One would, by adopting such a suggestion, reintegrate animals into the ordinary rules of tortious liability. In modern times, it could be argued, there seems to be no good reason for treating animals in a manner different from other chattels. Moreover such an approach would, in many cases, merely leave the legal determination of the issue to "the familiar calculus of negligence"²¹⁶ - an approach, which

²¹⁴ [1947] A.C. 341.

²¹⁵ Supra paras. 117 to 119.

²¹⁶ Fleming, *The Law of Torts*, 351, 5th ed.

because of its familiarity, should hold no terror for us. It would reintroduce flexibility into a branch of the law that has become all too rigid and this flexibility would also restore to the factual plane matters which under the special rules have wrongly been treated as questions of law. Finally, such an approach would make the law clearer and more understandable to the lay person, although determination of the rights of parties would not be made appreciably easier in particular cases as can be seen from the amount of litigation that, at present, surrounds motor car accidents determined by Negligence rules. Technically speaking, such an objective could be easily achieved: it would merely involve the passing of an Act which would abolish the scienter and the cattle trespass rules. No other provision would be necessary (although it might be argued that it would be desirable) as the common law principles of Negligence, Nuisance, etc. already apply in any event. One might also consider the possibility, if one opted for a negligence type of approach, of presuming negligence in all accidents involving animals and obliging the owner of the animal to show that he acted reasonably if he wishes to escape liability in such circumstances. Such a switch of the normal onus of proof from the shoulders of the plaintiff to the shoulders of the defendant might also make more palatable the introduction of strict liability under the guise of ordinary fault principles. As a reforming measure, however, this suggestion holds little appeal.

136. Against such a solution it could be argued that such a proposal would be a solution which favours the "fault" basis of liability, at a time when modern trends in the law of torts seem to favour principles of strict liability²¹⁷.

²¹⁷ See e.g. Draft EEC Directive on Products' Liability, No Fault Automobile Insurance Schemes in U.S.A. and Canada, New Zealand Accident Compensation Act 1972, etc.

The suggestion, the argument might run, that animal injuries should be accommodated in the general principles of tort law might be acceptable if one was dealing with a tabula rasa, but unfortunately this is not so. To suggest the abolition of scienter and cattle trespass at a time when the general trend is towards strict forms of liability is therefore regressive. Liability in scienter and cattle trespass although having an old history, can be justified in modern times in terms of the new rationale of strict liability. One could also argue that resort to the general tort principles and to negligence principles in particular, is too unpredictable, especially where there is a jury system; it encourages litigation and makes the advising of clients more difficult.

137. Second, at the other extreme, one could take the strict liability imposed in the scienter action and in cattle trespass as the norm and introduce legislation which would make the keeper of any animal strictly liable for injuries caused by that animal. This strict approach could be supported nowadays by arguments based on the risk theory of liability, by economic arguments which would regard injuries committed by animals which form part of a business (a farmer's cow, etc.) as part of the producer's costs which should be borne by the producer, and lastly, by arguments which suggest in all cases (whether the animal is used as part of a trade or business or is merely kept as a domestic pet) that the owner of the animal is the person best positioned to control the animal and to insure against the risk of injury which such an animal may represent to other persons in society. Information to hand suggests that such insurance would be readily available and would not be expensive.

138. Other arguments in favour of a strict liability approach may be mentioned. First, much of the existing law relating to animals is strict in its present form. Under the general principles of law if the plaintiff succeeds in showing that there was a Trespass to land or to chattels, damage under Rylands v. Fletcher or damage under some forms of Nuisance, the defendant's liability is strict. If the defendant keeps a wild animal or a domestic animal known to have a mischievous propensity, liability is strict. If it is a case of cattle trespass, liability is strict and if it is a case of dogs injuring cattle, liability is strict under the Dogs Act 1906. In all these cases, under the existing law, the defendant is liable even though he was not at fault. In advocating a regime of strict liability for injuries caused by animals, therefore, one is not advocating a switch from a total negligence regime, to a strict system; what one is suggesting is that a system which already displays a good deal of strict liability should now become completely strict. Even if one decided to go for a negligence approach one would still find it difficult to abandon the strict liability at present to be found in cattle trespass, in scienter and in the case of dogs injuring cattle.

139. Second, strict liability is not absolute liability. This means that as well as Act of God, the plaintiff's own act or omission could cause, in the appropriate circumstances, the damages for such wrong to be reduced in accordance with the apportionment provisions of the Civil Liability Act 1961. Moreover, even a regime of strict liability should contemplate an exception in the case of a trespasser being injured by an animal. In such circumstances reasonable care would seem to be a more satisfactory standard than strict liability.

140. Third, strict liability regimes for injuries caused by animals already exist in many other countries - France, Germany, Italy, etc. (see Appendix A) - without any great legal or social difficulty. Indeed in Canada, the Province of Quebec, following a civil law tradition, has a strict regime and no great difficulties are experienced even though all the other Provinces are in the common law tradition.

141. Fourth, such a system would provide a clear and simple legal rule which would undoubtedly reduce litigation in this area. This factor was considered important by the farming community in England when it argued to the Law Commission in England that strict liability for cattle trespass should be retained²¹⁸. The attractions of legal certainty and reduced litigation are powerful arguments in favour of such a strict regime.

142. It must be admitted that many people in our society might show an initial hesitancy in contemplating such a rule of strict liability, but it is submitted that this reaction is an emotional rather than a rational response to the problem. It stems from the fact that many people personalise the problem and view it from the limited vantage of their own personal circumstances. This, of course, is very understandable. Many people belong to families which possess an animal of some sort whereas few people belong to a family a member of which has been injured by an animal. (It is, after all, a somewhat rare occurrence!) People in

²¹⁸ See Law Com. No. 13, paras. 62 and 63. See also Report of the Committee on the Law of Civil Liability for Damage done by Animals, Cmnd. 8746, para. 3.

these circumstances when considering strict liability, immediately personalise the problem by saying to themselves: "This means that I will now be strictly liable for my dog Cara, for my cat Pangur or for my horse Finn". The thought disturbs them and they immediately conclude: "Since it disturbs me, it must be wrong".

143. This conclusion, of course, although, as already noted, very understandable, is itself wrong. It springs from an incorrect assumption made by the layman that legal liability should be co-extensive with moral culpability. There are many cases, even within the existing rules relating to liability for animals, where this is not so. Perhaps the best way of countering such an argument, however, is by giving a concrete example of the injustice that may arise in a system where liability depends on the ability of the plaintiff to show negligence on the part of the defendant, and one does not have to over-dramatise the example by basing it on recent newspaper reports concerning the injuries, in one case, and death in another, inflicted on a child by a pack of greyhounds. Suppose, for example, that Mary, a four year old child is bitten by her neighbour's dog while playing in his house with his daughter. The law at present would make the owner of the dog liable only if he was negligent or if he knew of the dog's propensity to do such mischief. Many people would find such a rule acceptable and fair because, it is submitted, they find it easier to identify with the owner of the dog in the example than with Mary. It is easier for them to identify with the dog owners (of whom there are many) than with the injured girls (of whom there are few). But if one were to pause and look at the injured girl's position for a moment one might get a deeper appreciation of the whole problem. Consider, for a moment, the feelings of Mary's parents when they see

her running in home with a blood stained face and with a piece of her cheek or her lip hanging off. It would be even more appropriate to consider the position of the child herself. Consider the shock, the pain, the suffering, the anguish transmitted to her parents, the hospitalisation, the adjustment of coping with disfiguration, etc. Why should Mary have to bear this loss? If the owner of the dog is not fully to blame, is Mary any more blameworthy? If there are degrees of innocence, surely the girl is more innocent than the owner of the dog? After all was it not the ownership that created the risk in the first place? Was it not through the owner's control that the accident could best be avoided? Moreover, on information provided by the insurance industry and based on the existing law, the owner can for a very modest insurance premium cover such a risk. In these circumstances it could hardly be called unjust to impose liability on the owner of the dog.

144. If one personalises the problem, then in fairness, one should personalise it from both sides and if one does this surely the balance must be tipped in favour of a rule that strengthens Mary's position in the law, without imposing an undue burden on the owner of the dog.

145. Third between these two approaches, the negligence approach or the strict liability approach one could take up an intermediate stance such as that adopted by the Law Commission in England²¹⁹ and enacted by Parliament in England in the Animals Act 1971. The view of the Law Commission was that the scienter principle and the cattle trespass rule have much to recommend them and should be retained. It felt that although these rules should be

²¹⁹ Law Com. No. 13.

tidied up and reduced to a statutory form they should not be abolished. Strict liability would remain, therefore, in these cases only; in all other cases, whether the plaintiff had an action or not would depend on the general principles of tort, and in particular on Negligence and Nuisance. The position which the Law Commission takes about these special rules - scienter and cattle trespass - could also, of course, be taken as regards any one of them alone. One could suggest, for example, that strict liability should be retained in cattle trespass only, but not in scienter, or vice versa.

146. The English approach has been criticised²²⁰ and the difficulties which such legislation can produce are amply illustrated in the recent Court of Appeals decision in Cummings v. Grainger²²¹. This was a case where the plaintiff was savaged by the defendant's Alsatian dog while trespassing on the defendant's premises at night. Whatever one may say about the outcome of the case (the plaintiff failed to recover) it is very clear that legislation even in the nature of a reforming measure (The Animals Act 1971 in this case) does not always make the law on a particular topic less complicated or more easily understood. Indeed, after reading this decision one is convinced that the retention of a statutory form of scienter²²² is misconceived and unhelpful.

²²⁰ Roberts, (1968) 31 M.L.R. 683; Powell-Smith, (1971) 121 N.L.J. 584; Samuels, (1971) 34 M.L.R. 550; North, op. cit., 19-20.

²²¹ [1976] 3 W.L.R. 842, [1977] 1 All E.R. 104. Noted in 40 M.L.R. 590-596.

²²² Section 2 of Animals Act 1971.

147. On the main issue, therefore, consideration of the three approaches to the problem - first, the negligence approach, second, the half-and-half approach (half negligence and half strict) and third, the strict approach with exceptions - suggests that the strict approach should be preferred as a reforming measure. Such an approach would provide a clear legal regime which as well as reducing litigation would bring justice to the parties.

148. By way of summary, therefore, the following tentative proposals for reform are suggested.

1. The existing immunity of the owner of straying cattle for damage caused on the highway should be abolished.
2. The owner of an animal which causes injury should be made liable on principles of strict liability irrespective of fault. Two exceptions should be made in such a system of liability: first, the defence of Act of God should be available to the defendant and second, in determining the rights of a trespasser who is injured by an animal ordinary negligence principles should apply. In all such cases, however, the plaintiff's own fault should also be a ground for reducing the damages awarded.
3. The adoption of such a strict system would mean that the rules of scienter, cattle trespass and dogs worrying cattle, could be abolished as they would be absorbed by the new system.

149. No draft bill is attached to the present Working Paper as the preparation of the heads of such a bill would be a relatively simple task. The heads of such a bill would merely state the general rule of strict liability, list the exceptions and cite the law to be repealed.

APPENDIX A COMPARATIVE NOTE ON THE LAW IN OTHER
 JURISDICTIONS

1. In most civil law countries strict liability is imposed on the owner of animals for damage which such animals cause. No distinction is made between animals *ferae naturae* and animals *mansuetae naturae* nor between dogs and other domestic animals.

2. Examples of the law in some civil law countries are given hereunder.

France

3. Article 1385 of the French Civil Code provides the general rule that "the owner of an animal, or the person making use of it, while it is at his service, is responsible for the damage which the animal has caused, whether it was under his care or had strayed or escaped from it." Initially it was felt that this provision merely shifted the onus of proof from the plaintiff on to the defendant, but since the latter half of the nineteenth century French jurisprudence has interpreted the article as imposing strict liability on the owner of animals. He will not, in other words, be relieved of his responsibility by showing absence of fault on his part. The only defences available to him are force majeure, fault of the victim or *cas fortuit* (something approximating the defence of inevitable accident at Common Law). (See *Responsabilite Civile*, Mazeaud-Tunc, 5th ed., vol. II, 1958, no. 1073; *Encyclopedie Dalloz, Droit Civil*, vol. II, 1952 under force majeure, at 833 et seq.)

Italy

4. The Italian Civil Code in dealing with damage caused by animals follows closely the French position. Article 2052 of the Italian Civil Code reads as follows:

"2052. Damage caused by animals. The owner of an animal, or one who makes use of it, for the period of such use, is liable for damage caused by the animal, regardless of whether the animal was in his custody or strayed or escaped, unless he proves that the damage was the result of a fortuitous event."

(Translation in Baltramo, Longo, Merryman, The Italian Civil Code.)

Civil Code of the Province of Quebec

5. Article 1055 of the Civil Code of Quebec also closely resembles Article 1385 of the French Civil Code. Although there is a slight difference in the phraseology used, the substance is the very same as that in Article 1385 of the French Code. (See Wright and Linden, Canadian Tort Law: Cases, Notes and Materials, 6th ed., 562-563.)

Germany

6. A similar regime of strict liability is to be found in Section 833 of the BGB (Civil Code) in Germany.

"833. If a person is killed, or the body or health of a person is injured, or a thing is damaged by an animal, the person who keeps the animal is bound to compensate the injured party for any damage arising therefrom."

(Chung Hui Wang, German Civil Code, 183.)

7. It should be noted that liability is placed on the keeper (who need not necessarily be the owner) of the animal and is imposed irrespective of whether the keeper was at fault or not. It represents a "genuine case of responsibility for risks". (See Cohn, I, Manual of German Law, 2nd ed., para. 328.)

8. A derogation from this regime of strict liability was made by an amendment to section 833 effected by law of 30 May, 1908. Under this amendment the keeper of a domestic animal used for the profession, business or maintenance of the keeper will not be liable for the injuries caused by such animal if the keeper can show either that he took reasonable care or that damage would have occurred even if he had taken such care. In other words, in the case of an animal used in the keeper's trade strict liability is replaced by notions of culpability. Current economic arguments related to loss distribution and forwarded in favour of theories of strict liability, render this exception somewhat curious nowadays.

Other Common Law Jurisdictions

England

9. The common law position in England is sufficiently dealt with in the main body of this Working Paper and needs no further elaboration.

10. The Animals Act 1971 which amended the law in England is reproduced in Appendix B.

Scotland

11. The law on the civil liability for animals in Scotland is generally comparable to the common law position that existed in England before the Animals Act 1971. It is true that in details, peculiar Scottish mutations manifest themselves because of the historical influence of civil law concepts in the Scottish legal system, but the general picture is similar to the pre-1971 common law. Accordingly, apart from liability in negligence, the scienter rule also applies. The Dogs Act 1906 extends to Scotland and the immunity for damage caused on the highway by straying cattle was adopted in Sinclair v. Muir (1933 S.N. 42, 62).

12. With regard to cattle trespass the position is somewhat different, however. Liability for cattle trespass is not strict in the common law of Scotland. Recovery in such circumstances is given only "on proof of failure by the owner to take reasonable care to keep the animals in, and of damage done by them" (Walker, II Delict, 940). There is an important statutory provision, however, - The Winter Herding Act 1686 - which makes the owner of a domestic animal absolutely liable for trespassing damage. Although the Act enables the injured person to take possession of the animals and to hold them until compensation is paid, judicial interpretation has also allowed an action for damages in such circumstances (Brown v. Lord Advocate (O.H.), 1973 S.L.T. 205).

13. This branch of the law was reviewed in Scotland in 1963 and recommendations for reform were suggested in the Twelfth Report of Law Reform Committee for Scotland (Cmd. 2185). No legislative action has been taken for Scotland, however, and the English Animals Act 1971 does not apply to Scotland.

Australia

14. Civil liability for injury caused by animals in Australia follows the common law pattern with strict liability being applied in both the scienter action and cattle trespass.

15. Two special features - one judicial and one statutory - of the Australian experience, however, deserve our attention. In Ryan v. Scott (1968) 2 D.C.R. (N.S.W.) 13, 43 A.L.J. 171 and Jones v. McIntyre (Tas. 6/2/73, 47 A.L.J. 140) two Australian courts departed from the rule of Searle v. Wallbank (1947 A.C. 341). From these precedents one might conclude that ordinary negligence principles apply, therefore, in determining liability for collisions with straying animals on the highway and that there is no immunity from liability for injuries caused on the highway by one's straying animals.

16. Although these precedents certainly indicate a dissatisfaction with the rule in Searle v. Wallbank, Kelly v. Sweeney (1975 2 N.S.W.L.R. 720, where the C.A. divided on the issue, shows that it may yet be too premature to celebrate the rule's total demise in Australia. (See also, Fleming, Law of Torts, 5th ed., 351. Departure from the Searle v. Wallbank rule now also recommended by N.S.W. Law Com. (1970) No. 8, §18.)

17. The second development relates to Dog statutes. In most States in Australia dog statutes have dispensed with the need to prove scienter and these statutes unlike their English model (The Dogs Act 1906 as amended) normally cover any injury done by a dog. Only in South Australia does the legislation follow the English Act, dispensing with scienter

only in the case where the injury by the dogs is to cattle. The relevant legislation is the following: N.S.W.: Dog Act 1966, s. 20 (person, property or animal); W.A.: Dog Act 1903, s. 24 (any injury); Tas.: Law of Animals Act 1962, s. 15 (do.); S.A.: Registration of Dogs Act 1924, s. 25. (See Fleming, Law of Torts, 5th ed., 346.)

New Zealand

18. New Zealand also follows the general common law approach and has refused to overrule Searle v. Wallbank. (Ross v. McCarthy /1970/ N.Z.L.R. 449 (C.A.), but Law Reform Commission in 1975 recommended that unattended stock on the road should constitute evidence of negligence. See Fleming, Law of Torts, 5th ed., 351).

19. The Dogs Registration Act 1955, s. 29 imposes strict liability for any injury done by a dog - and not just injury to livestock. The courts in New Zealand, however, have taken a restrictive view of this provision and have insisted that before a dog is liable a hostile act must be shown, as was the position at common law (Knowlson v. Solomon /1969/ N.Z.L.R. 686; Chittenden v. Hale /1933/ N.Z.L.R. 836).

United States of America

20. Most States in the United States of America follow the English pattern of liability in relation to animals. Accordingly, the special rules of liability - scienter and cattle trespass - are to be found as the starting point in most of these jurisdictions.

21. With regard to cattle trespass, however, the position is not all that simple as Prosser points out:

"In earlier days in the United States, many courts rejected entirely the rule of strict liability for animal trespasses, as contrary to established local custom, particularly in western country where cattle were allowed to graze at large on the range. This view still prevails in some parts of our western states. But as the country has become more closely settled, the tendency has been to restore the common law rule, either by statute or by decision. The matter is now very largely governed by statutory provisions. The first legislation to be adopted consisted of "fencing out" statutes, which provided that if the plaintiff properly fenced his land there was strict liability when the animals broke through the fence, but otherwise there was liability only when the owner was at fault. As the country became more settled, the conflict between the grazing and the agricultural interests resulted in many states in "fencing in" statutes, which required the owner of the animals to fence or otherwise restrain them, and made him strictly liable if he did not do so. Sometimes the final step was taken, by legislation restoring the common law rule. In a good many states individual counties are permitted to choose the rule that they wish to apply, so that the law varies in different parts of the state. It is of course generally agreed that there is liability for any negligence leading to the animal trespass."

(Prosser, Law of Torts, 4th ed., 1971, 497-498. Footnotes omitted. See also Harper and James, The Law of Torts, §§14.9 and 14.10 (1956).)

22. In relation to dogs, developments in some States differ from the common law. For example, some courts have been willing to treat the owners of dogs as strictly liable in cattle trespass (Chunot v. Larson, 1868, 43 Wis. 536; Doyle v. Vance, 1880, 6 Vict. L. Rep. 87; McClain v. Lewiston Interstate Fair & Racing Association, 1909, 17 Idaho 63, 104 P. 1015). Some States have effected the same

result by statute. Other States have by legislation imposed absolute liability for certain types of damage done by animals such as dog bites. These usually contemplate exceptions in the case where the injured person is a trespasser or tortfeasor.

23. Finally, there are some States which impose strict liability for all damage done by dogs (see Prosser, *op. cit.* 502 fn. 10 and accompanying text; and 497 fn. 55 and accompanying text).

24. Needless to say as in other common law jurisdictions these special rules of liability are to be considered in addition to the liability that may arise for damage done by animals under general torts principles such as Negligence, Nuisance, etc.

Canada

25. Apart from the Province of Quebec (where strict liability in the civil law tradition applies) the general position in Canada approximates to the common law situation save where it has been altered by statute. Accordingly, as well as the possibility of being liable under the general rules of tort (Kokolsky (Capital Mink Farm) v. Caine Fur Farms, Ltd, and Caine, 45 W.W.R. 86; Vander Linden v. Kellett (1971) 21 D.L.R. (3d) 256; Maynes v. Galicz (1975) 62 D.L.R. (3d) 385 E.C.), the owner of an animal may also be liable in scienter. (Nasser v. Rumford & Rumford, S.C. Alberta, 24 May, 1977. Unreported as yet. The Animals Act, R.S.B.C., 1948, Sec. 21 shifts the onus of proof in the scienter action from the plaintiff to the defendant. See Bebbington and Bebbington v. Colquhoun (1960), 24 D.L.R.

(2d) 557; 32 W.W.R. 467). Liability for cattle trespass is also strict but not absolute (Falardeau v. Church (1972), 30 D.L.R. (3d) 614 (B.C.S.C.)).

26. Some developments in Canada which deserve to be noted are the following:

(1) The immunity conferred on the owners of animals for injuries caused when the animals stray on the highway (Searle v. Wallbank (*supra*)) has been disapproved of in some (Atkinson v. Fleming /1959/ S.C.R. 513; 18 D.L.R. (2d) 81; Gash v. Wood (1960), 22 D.L.R. (2d) 625, 31 W.W.R. 177; 8 N. & P.E.I.R. 261 (Prince Edward Island); 4 N.S.R. (2d) 718 (Nova Scotia)) but not all Provinces. (Lane v. Biel, /1971/ 2 W.W.R. 128 (Saskatchewan).)

(2) Legislation analogous to the Dogs Act 1906 is to be found in most of the Provinces. Some of these Acts dispense with the need to prove scienter in the case of dogs worrying sheep, others dispense with the need to prove scienter in the case of dogs worrying livestock and still others dispense with the need to prove scienter where dogs cause any injury, including injury to persons. (For earlier legislation see Williams, *op. cit.*, p. 358 et seq. An example of more modern legislation occurs in British Columbia Domestic Animal Protection Act 1973 (British Columbia, 1973 Second Sess.) ch. 114. See Sigismund v. Atlatzi Holdings Ltd. et al., Co. Ct. Vanc., 5 July, 1977. Unreported as yet. And Dog Tax and Livestock and Poultry Amendment Act 1968 (Ontario). In some cases, e.g. Ontario, the legislation is linked with a licencing system and the licensing municipality pays the owner of livestock injured by dogs

limited compensation without proof of scienter. The municipality is then entitled to claim over against the owner of the dog. See Dog Tax and Live Stock Protection Act, R.S.O. 1960 (s. 111) as amended in 1968. See also Raisbeck v. Desabrais, [1971] 1 W.W.R. 678 for case on legislation in force in Alberta and Lupu et al. v. Rabincvitch et al. (1975) 60 D.L.R. (3d) 641 for Manitoba's position.

(3) The strict liability imposed for cattle trespass still applies in many parts of Canada (see for e.g. Popowich v. Letweniuk, [1972] 1 W.W.R. 641). Statutory provisions modifying that position in the Provinces, however, have according to Williams (op. cit. p. 227-230) two distinct sets of provisions: (1) there are provisions for allowing cattle to run at large in many Provinces, save as otherwise provided by statute, bye-law or Order in Council. (2) There are provisions whereby one landowner can compel his neighbour to make and keep up a just (or equal) proportion of the fences between them. Although there has been a good deal of legislation in this area since Williams' book was published in 1939, the pattern of the legislation has not changed. In Falardeau v. Church ((1972), 30 D.L.R. (3d) 614; [1972] 6 W.W.R. 450), however, a municipal bye-law making it unlawful for cattle to run at large, was held to have superseded the above statutory provision.

27. By way of contrast section 13 of the Animals Act R.S.B.C. 1960 imposed absolute liability for damage done by some straying animals - swine, bulls and stallions. (See Staul v. Crawford (1968), 64 W.W.R. 568.)

APPENDIX B THE ENGLISH ANIMALS ACT 1971

The Animals Act 1971

STRICT LIABILITY FOR DAMAGE DONE BY ANIMALS

1. New provisions as to strict liability for damage done by animals. -

(1) The provisions of sections 2 to 5 of this Act replace -

- (a) the rules of the common law imposing a strict liability in tort for damage done by an animal on the ground that the animal is regarded as *ferae naturae* or that its vicious or mischievous propensities are known or presumed to be known;
- (b) subsections (1) and (2) of section 1 of the Dogs Act 1906 as amended by the Dogs (Amendment) Act 1928 (injury to cattle or poultry); and
- (c) the rules of the common law imposing a liability for cattle trespass.

(2) Expressions used in those sections shall be interpreted in accordance with the provisions of section 6 (as well as those of section 11) of this Act.

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 by 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.

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.

4. Liability for damage and expenses due to trespassing livestock. -

(1) Where livestock belonging to any person strays on to land in the ownership or occupation of another and -

- (a) damage is done by the livestock to the land or to any property on it which is in the ownership or possession of the other person; or
- (b) any expenses are reasonably incurred by that other person in keeping the livestock while it cannot be restored to the person to whom it belongs or while it is detained in pursuance of section 7 of this Act, or in ascertaining to whom it belongs;

the person to whom the livestock belongs is liable for the damage or expenses, except as otherwise provided by this Act.

(2) For the purposes of this section any livestock belongs to the person in whose possession it is.

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.

(4) A person is not liable under section 3 of this Act if the livestock was killed or injured on land on which it had strayed and either the dog belonged to the occupier or its presence on the land was authorised by the occupier.

(5) A person is not liable under section 4 of this Act where the livestock strayed from a highway and its presence there was a lawful use of the highway.

(6) In determining whether any liability for damage under section 4 of this Act is excluded by subsection (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 to 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.

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 if at any time an animal ceases to be owned by or to be in the possession of a person, any person who immediately before that time was a keeper thereof by virtue of the preceding provisions of this subsection continues to be a keeper of the animal until another person becomes a keeper thereof by virtue of those provisions.

(4) Where an animal is taken into and kept in possession for the purpose of preventing it from causing damage or of restoring it to its owner, a person is not a keeper of it by virtue only of that possession.

(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.

DETENTION AND SALE OF TRESPASSING LIVESTOCK

7. Detention and sale of trespassing livestock. -

(1) The right to seize and detain any animal by way of distress damage feasant is hereby abolished.

(2) Where any livestock strays on to any land and is not then under the control of any person the occupier of the land may detain it, subject to subsection (3) of this section, unless ordered to return it by a court.

(3) Where any livestock is detained in pursuance of this section the right to detain it ceases -

- (a) at the end of a period of forty-eight hours, unless within that period notice of the detention has been given to the officer in charge of a police station and also, if the person detaining the livestock knows to whom it belongs, to that person; or

- (b) when such amount is tendered to the person detaining the livestock as is sufficient to satisfy any claim he may have under section 4 of this Act in respect of the livestock; or
- (c) if he has no such claim, when the livestock is claimed by a person entitled to its possession.

(4) Where livestock has been detained in pursuance of this section for a period of not less than fourteen days the person detaining it may sell it at a market or by public auction, unless proceedings are then pending for the return of the livestock or for any claim under section 4 of this Act in respect of it.

(5) Where any livestock is sold in the exercise of the right conferred by this section and the proceeds of the sale, less the costs thereof and any costs incurred in connection with it, exceed the amount of any claim under section 4 of this Act which the vendor had in respect of the livestock, the excess shall be recoverable from him by the person who would be entitled to the possession of the livestock but for the sale.

(6) A person detaining any livestock in pursuance of this section is liable for any damage caused to it by a failure to treat it with reasonable care and supply it with adequate food and water while it is so detained.

(7) References in this section to a claim under section 4 of this Act in respect of any livestock do not include any claim under that section for damage done by or expenses incurred in respect of the livestock before the straying in connection with which it is detained under this section.

ANIMALS STRAYING ON TO HIGHWAY

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 shall 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.

PROTECTION OF LIVESTOCK AGAINST DOGS

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 any 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 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.

SUPPLEMENTAL

10. Application of certain enactments to liability under sections 2 to 4. - For the purposes of the Fatal Accidents Acts 1846 to 1959, the Law Reform (Contributory Negligence) Act 1945 and the Limitation Acts 1939 to 1963 any damage for which a person is liable under sections 2 to 4 of this Act shall be treated as due to his fault.

11. General interpretation. - In this Act -

"common land", and "town or village green" have the same meanings as in the Commons Registration Act 1965;

"damage" includes the death of, or injury to, any person (including any disease and any impairment of physical or mental condition);

"fault" has the same meaning as in the Law Reform (Contributory Negligence) Act 1945;

"fencing" includes the construction of any obstacle designed to prevent animals from straying;

"livestock" means cattle, horses, asses, mules, hinnies, sheep, pigs, goats and poultry, and also deer not in the wild state and, in sections 3 and 9, also, while in captivity, pheasants, partridges and grouse;

"poultry" means the domestic varieties of the following, that is to say, fowls, turkeys, geese, ducks, guinea-fowls, pigeons, peacocks and quails; and

"species" includes sub-species and variety.

12. Application to Crown. -

(1) This Act binds the Crown, but nothing in this section shall authorise proceedings to be brought against Her Majesty in her private capacity.

(2) Section 38(3) of the Crown Proceedings Act 1947 (interpretation of references to Her Majesty in her private capacity) shall apply as if this section were contained in that Act.

13. Short title, repeal, commencement and extent. -

(1) This Act may be cited as the Animals Act 1971.

(2) The following are hereby repealed, that is to say -

(a) in the Dogs Act 1906, subsection (1) to (3) of section 1; and

(b) in section 1(1) of the Dogs (Amendment) Act 1928 the words "in both places where that word occurs".

(3) This Act shall come into operation on 1 October 1971.

(4) This Act does not extend to Scotland or to Northern Ireland.

APPENDIX C NOTE ON FENCING

1. At common law there is no obligation on the owner of land to keep and maintain fences, and this is so whether the land in question adjoins the highway as was the case in Hall v. Wightman (1926 N.I. 92) or adjoins other private property (Walsh v. Coakely & Sullivan, 32 ILTR 356; C.I.E. v. Connor, 83 ILTR 182 - no duty on railway company to fence canal). In the case of cattle trespass, for example, the law places an obligation on the owner of the cattle to prevent the cattle from straying, but (Gilmore v. Mayben (1898) 33 ILTR 35) there is no obligation on the owner of the land to fence the cattle out.

2. An obligation to fence, however, may arise (1) by virtue of statute (see e.g. C.I.E. v. Connor, 83 ILTR 182; Greer v. Belfast and Co. Down Ry /1926/ N.I. 68), (2) by agreement (see e.g. Gilmore v. Mayben (1898) 33 ILTR 35), (3) by way of acquired easement under the general rules of prescription or (4) by special rule of common law (McMorrow v. Layden and Others /1919/ I.R. 398 - duty to fence a quarry. With regard to fencing lands adjoining the highway see Williams, Liability for Animals, Pt. VI, Chap. XXII. As to nuisances adjoining the highway see McMahon, Occupier's Liability in Ireland: Survey and Proposals for Reform incorporated in Report of Advisory Committee on Law Reform: Reform of Occupier's Liability in Ireland Prl. 4403). See also the Boundaries Act (Ireland) 1721, 8 Geo. 1, c. 5 (repealed in part by Statute Law Reform (Ireland) Act 1878 (c. 57)) and Summary Jurisdiction (Ireland) Act 1851 (c. 93), s. 20(4) whereby justices may order repair of fences. (Noted in Williams, Liability for Animals, 227 fn. 1. See also Wylie, Irish Land Law, 375.)

