

AN

Liability for animals

Online content

INTRODUCTION

This chapter concerns the principal causes of action which arise in modern English law when an animal wreaks havoc and causes C injury or loss – an action in negligence, and a statutory action under the Animals Act 1971.

In one of the more memorable metaphors in English case law, Lord Simonds stated, in *Read v J Lyons & Co Ltd*,¹ that '[t]he law of torts has grown up historically in separate compartments and ... beasts have travelled in a compartment of their own.' However, that metaphor is entirely inaccurate. As the Irish Law Commission subsequently noted:² '[i]f one cares to look, one would also find animals lurking in the compartments marked Negligence, Nuisance [both private and public], *Rylands v Fletcher*, Occupiers' Liability, and Trespass [where D incites his animal to attack C]. 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.'

The two relevant causes of action

SAN.1 C, who suffers injury or damage due to an unfortunate encounter with D's animal, has two principal causes of action, *viz*: a common law action in negligence; or a statutory, strict liability, action pursuant to the Animals Act 1971.

Success in this area has been characteristically quite 'lop-sided'. Negligence actions for injuries caused by D's animal have been quite difficult for C to prove; while actions under the Animals Act 1971³ have been more successful – and much of that has been attributable to a very claimant-friendly, and tortuous, interpretation of an opaquely-worded and obfuscatory statute.

The Animals Act 1971 was promulgated as a result of the English Law Commission's report on *Civil Liability for Animals*⁴ – the purpose of which was to 'make recommendations for modernising and simplifying the common law.' However, it is distinctly doubtful whether the Commission's hopes were realised. In an effort to bring some much-needed clarity to the

¹ [1947] AC 156 (HL) 182.

² Irish LRC, *Civil Liability for Animals* (WP 3, 1977) [2], having cited Lord Simond's metaphor are 'colourful', but 'misleading'.

³ c 22, and available at: <http://www.legislation.gov.uk/ukpga/1971/22>. ⁴ EWLC (Rep 13, 1967).

application of strict liability to the keepers of animals, the Government published a *Consultation on Changes to the Animals Act 1971* in 2009.⁵ Two proposed Bills have also been proposed over the years.⁶ However, no legislative changes ensued. As a further key indicator of difficulty, a number of the cases discussed in this chapter went to appeal – and, in *Mirvahedy v Henley*,⁷ that leading House of Lords’ decision on the Animals Act was decided by a bare majority of 3:2.⁸

The enactment of the statute had several ramifications. In particular, it replaced the common law of *scienter* i.e., the law imposing strict liability for damage done by an animal, on the ground that the animal was regarded as *ferae naturae* or that its vicious or mischievous propensities were known or presumed to be known.⁹ The Act also replaced the common law rules imposing liability for cattle trespass (per s 1(1)(c) of the Animals Act 1971),¹⁰ and the rule in *Searle v Wallbank* (per s 8(1)).¹¹ These former doctrines are worth a quick snapshot – because, whilst not of continuing application in English law, they provide some of the background as to why the law changed.¹²

A snapshot of old common law doctrines: *scienter*, cattle trespass, and the rule in *Searle v Wallbank*

The *scienter* doctrine: A keeper of an animal was strictly liable, if the animal which caused the damage was a ‘wild animal’ (*ferae naturae*) – because that keeper was irrebuttably presumed to know of the vicious propensities of that wild animal. That keeper was also strictly liable, if the animal which caused the damage was a ‘tame animal’ or ‘domestic animal’ (*mansueta naturae*), and that animal had a vicious propensity known to the keeper – liability for that keeper was strict too, because it did not require proof of fault, only that the animal had a vicious propensity to do the kind of injury caused to C, and that the keeper knew of this propensity. The doctrine depended upon the keeper’s knowledge of the animal’s vicious propensities – in the case of wild animals, that knowledge was irrebuttably presumed; and in the case of domestic animals, that knowledge had to be proven. According to *McQuaker v Goddard*,¹³ wild animals were assumed to be dangerous to man, because they had not been domesticated, whereas domestic animals were assumed not to be dangerous.

Under the *scienter* doctrine, domestic animals included (according to case law): cats, dogs, cattle, horses, pheasants and partridge, bees, and camels. Wild animals included: elephants, bears, zebras, lions, tigers, and monkeys. Nevertheless (said the Irish LRC), ‘there is some doubt as to the

⁵ Dept of Environment, Food and Rural Affairs (DEFRA) *Consultation on Changes to the Animals Act 1971 to Clarify the Application of Strict Liability to the Keepers of Animals* (Mar 2009) (available at: <http://www.fao.org/fileadmin/user_upload/animalwelfare/consultation-doc.pdf>).

⁶ A Private Members’ Bill in 2007; and the Animals Act 1971 (Amendment) Bill 2008 (both noted in B Compton and J Hand, ‘The Animals Act 1971: The Statutory Defences to Strict Liability’ [2012] *JPIIL* 1, fn 2).

⁷ [2003] UKHL 16, [2003] 2 AC 491.

⁸ Lords Nicholls, Hobhouse and Walker; Lords Slynn and Scott dissenting.

⁹ See, particularly: EWLC, *Civil Liability for Animals* (Rep 13, 1967), Pt A, B(b).

¹⁰ See, further: EWLC, *Civil Liability for Animals* (Rep 13, 1967), Pt C, ‘Liability for Cattle Trespass’.

¹¹ [1947] AC 341 (HL).

¹² See, further: Irish LRC, *Civil Liability for Animals* (WP 3, 1977), chh 2 and 3, respectively, from which some of the material in the box was summarised.

¹³ [1940] 1 KB 687 (CA) 695.

criterion used in categorising these animals' – and whether it is because one is tamed and the other is untamed; or that one is indigenous and the other is foreign; or that one is harmless and the other is dangerous – 'one could imagine a case' of a circus zebra, which might be wild and foreign, but would not normally be untamed and dangerous, whilst a dog might belong to a domesticated species indigenous to the country, but be untamed and dangerous.

In *McQuaker v Goddard*, C was visiting D's 'zoological garden' in Regent's Park, London, where a fenced enclosure contained an Arabian camel. C was feeding the camel apples, when the camel caught his hand in its teeth, biting and crushing it severely. D called expert evidence that the camel had no natural tendency to bite human beings, and that camels were not wild animals in any part of the world with a tendency to viciousness, but were only under the control and in the service of man as a domestic animal, carrying loads of people or products. Also, D did not know that this camel had previously bitten anyone or was otherwise dangerous. **Held:** D was not liable under the *scienter* principle. The experiences elsewhere could be taken judicial notice of, and that was that the camel was a domestic animal. Hence, if D had no knowledge that the camel in question had previously shown any vicious propensity, D could not be liable for C's injuries.

As mentioned above, the keeper, D, must also know of the animal's vicious propensity to be liable in *scienter*. That means 'actual knowledge', and could be obtained from personal observation, hearsay, or via an employee or family member who had general charge of the animal (a 9-year-old girl's knowledge was enough to render her father liable in *scienter*).

The cattle trespass doctrine: The owner of straying cattle was strictly liable for the damage caused when his cattle trespassed on C's land. For the purposes of this tort, 'cattle' meant most domestic animals (horses, sheep, goats, pigs, domestic fowl, domesticated deer), and anything 'reduced into possession', but not cats and dogs. Under the doctrine, a keeper of 'cattle' was liable, if they strayed and came onto C's property, whether from an adjoining field or from the highway. It was necessary that they *strayed* – if they were driven, or controlled somehow, onto C's property, then that was an action for trespass to land, not for cattle trespass.

The rule in *Searle v Wallbank*: Where a domestic animal strayed onto a highway, causing injury to C, then the owner or keeper of that animal was not liable in negligence to C. There was no obligation on D to fence his land and to keep his domestic animals in; whilst C, a road user, was taken to voluntarily accept the normal risks of using highways, including the possibility that animals would be present on it. The rule applied, no matter how easy it would have been to enclose the land, or how busy the road was; albeit with serious misgivings about whether it applied to accidents which occurred in built-up areas or only in rural areas, or to accidents involving dogs.

In *Searle v Wallbank*, C was injured when, in the early hours of the morning, he collided with D's horse on a highway, whilst riding his bike. The bike's front light was masked in accordance with war-time regulations in place. The horse, usually kept in a field adjoining the highway, escaped from D's field through a defective fence. **Held:** no liability attached to D for the injuries caused to C.

The balancing exercise for damage done by animals

Where injuries are caused by animals, there are two balancing exercises which may typically feature.

Who should bear the loss, for misbehaving animals?

The majority of case law concerning claims for injury caused by animals arises from 'domesticated' animals – particularly accidents involving horses. In *Mirvahedy v Henley*, Lord Nicholls

pointed to the competing social policy arguments as to where liability for C's injury should lie. On the one hand, D chooses to keep an animal which is known to be dangerous in some circumstances, and which carries with it associated risks of which D is aware. On the other hand, 'everyone must take the risks associated with the ordinary characteristics of animals commonly kept in this country. These risks are part of the normal give and take of life'.¹⁴

As expected from a strict liability regime such as the Animals Act 1971, the loss has fallen on D, as the keeper of the animal, more often than it has fallen upon C, where an unfortunate accident arose through no fault of D's. However, as Lord Nicholls pointed out in *Mirvahedy*, the court must assume that Parliament took the aforementioned competing policy arguments into account, so that the court must simply interpret the Animals Act in accordance with established principles of statutory interpretation.¹⁵ It is not for the courts to recalibrate those social policy arguments and ignore the strict (albeit obfuscatory) statutory language.

Profit-making farms versus the rambling public

The second balancing act frequently arises where C is exercising his right to pass along a public footpath which crosses grazing pasture where D farms his animals – and where D is legitimately using that land as a business. Who should prevail, when one of those animals injures C?

In *McKaskie v Cameron*,¹⁶ Howarth DCJ gave the example of a brass band which walks along the footpath a few times a year whilst playing at full volume – that may be tolerable, but doing it on a daily basis, causing D's animals to panic, would not: 'excessive conduct on the part of either party is not allowed, but where should the boundary line be drawn? ... this must be dealt with on a case by case basis, taking into account all the individual facts of each case', but with the caveat that if the scales are evenly balanced, 'then the rights of the public will prevail'. The tension between C's recreational pursuits and D's profit-making endeavours is a policy conundrum which, under the Animals Act 1971, has often been resolved in favour of C (as it was in *McKaskie* itself).

Before turning to the complexities of the Animals Act 1971, it is appropriate to first consider D's liability in negligence for injuries caused by his animal.

NEGLIGENTLY-CAUSED INJURIES BY ANIMALS

SAN.2 Generally speaking, the case law demonstrates that, where C sues D in negligence for damage done to C by D's animals, the loss will fall on C (i.e., C will be without remedy).

Negligence suits have been tried, unsuccessfully, in several cases, e.g.: in *Turnbull v Warrener*¹⁷ (re a bolting horse wearing a bitless bridle); in *Welsh v Stokes*¹⁸ (re a rearing horse); in *Bodey v Hall*¹⁹ (re a bolting horse which threw C out of the horse-trap); in *Mirvahedy v Henley*²⁰ (where three horses escaped from their field); in *Gloster v Greater Manchester Police*²¹ (where a police dog slipped his collar and bit a police officer instead of the intended quarry); in both *Addis v Campbell*²² and in *Whippey v Jones*²³ (where large dogs knocked the respective claimants over); and in *Hole v Ross-Skinner*²⁴ (where a horse collided with a car). In some of the notable animal

¹⁴ [2003] UKHL 16, [2003] 2 AC 491, [6]. ¹⁵ *ibid*, [7]. ¹⁶ (Preston CC, 1 Jul 2009) [379].

¹⁷ [2012] EWCA Civ 412. ¹⁸ [2007] EWCA Civ 796, [2008] 1 WLR 1224.

¹⁹ [2011] EWHC 2162 (QB), [2012] PIQR P1. ²⁰ [2003] UKHL 16, [2003] 2 AC 491.

²¹ [2000] EWCA Civ 90, [2000] PIQR P114 (CA). ²² [2011] EWCA Civ 906.

²³ [2009] EWCA Civ 452. ²⁴ [2003] EWCA Civ 774.

injury cases, there was no claim in negligence brought at all (e.g., in *Flack v Hudson*,²⁵ and in *Freeman v Higher Farm Park*²⁶).

The following sections tease out the principal points which emerge for consideration in negligence suits arising out of injury caused by D's animals. Readers are referred to Part I of this book, for the negligence framework, and for a more detailed consideration of some of the principles governing the law of negligence.

Duty of care

SAN.3 Proving that D, the owner/keeper of an animal, owed C a duty of care, where C was injured by that animal, has been a straightforward task.

There is clearly foreseeability of some injury to C, if the animal wreaks havoc; there is usually a close physical proximity between D (whose animal it is) and C (who is injured by that animal); and there are no public policy reasons precluding a duty of care. There appear to have been no cases in English law to date in which duty of care has been lacking.

In *Whippey v Jones*, where C was knocked over by a big Great Dane, the court held that D 'clearly owed a duty of care to [C] with regard to the way [D] handled Hector in the public park in Leeds that afternoon'.²⁷ In *Hole v Ross-Skinner*, where C collided with a horse let out of D's field, the court accepted that 'there was clearly a duty of care on a person who has animals on his land to ensure that the animals are kept there in reasonable safety. The land owner in such circumstances has ... a duty to take reasonable precautions in all the circumstances to ensure that the animals do not escape and foreseeably cause damage to other people'.²⁸ In *Draper v Hodder*, where a pack of seven Jack Russell terriers injured an infant, a duty of care 'clearly does exist'.²⁹ When it comes to livestock wandering from a field onto a road, then according to *Wilson v Donaldson*, there is a common law duty on farmers to take all reasonable precautions to prevent their escape.³⁰

Hence, duty of care has been easily established, in cases arising from damage done by animals. The same cannot be said for the next element of the cause of action.

Breach of duty

C must prove that D's conduct in handling/supervising/owning etc, the animal, on the day of C's accident, fell below the standard to be expected of a reasonable handler/supervisor/owner of the animal. However, the relevant test of foreseeability has proven to be the first stumbling block in such negligence cases.

Foreseeability of harm

SAN.4 The court must be satisfied that a reasonable person in the position of D, the keeper of the animal, would foresee a real risk of injury to C arising from D's particular acts or omissions in

²⁵ [2001] QB 698 (CA). ²⁶ [2008] EWCA Civ 1185, [2009] PIQR P6.

²⁷ [2009] EWCA Civ 452, [13]. ²⁸ [2003] EWCA Civ 774, [19].

²⁹ [1972] 2 QB 556 (CA) 582. The Animals Act 1971 did not apply, as C's injuries were incurred prior to the commencement of the Act.

³⁰ [2004] EWCA Civ 972, [33].

dealing with the animal. Otherwise, in the absence of that foreseeability, a reasonable D would have done nothing different in response to the risk posed by his animal.

The mere or remote possibility of injury to C is not sufficient. There must be a sufficient probability of injury to lead a reasonable person in D's position to anticipate C's injury (per *Whippey v Jones*³¹). At this stage of the negligence enquiry, the test of foreseeability is narrower than that which applied at duty stage, because at the breach stage, the court must consider what actually happened, and what a reasonable D would have done in response to the risk of injury. If the events which occurred were very unlikely and unexpected – and in particular, if the animal had never behaved in that fashion previously – then no reasonable D, as keeper of the animal, would have done anything different. In that event, negligence must fail.

In *Whippey v Jones*, Mr Jones, C, was running along a footpath beside the River Aire at Kirstall in Leeds, when Hector, a fully-grown 2-year-old Great Dane, weighing 12.5 stone, appeared from behind a bush and enthusiastically bumped into C, causing C to fall down a slope to the river and badly break his ankle. Mr Whippey, D, an RSPCA officer, owned Hector. C sued D for damages, claiming that D had been negligent in the way he had handled Hector that afternoon whilst walking Hector in the park beside the river. **Held:** D was not negligent. Hector had no tendency to jump up at people previously, the most he had ever done was to bark at people from a few metres away. There was no reason why D, as a reasonable dog handler, should have anticipated that, if Hector was let off the lead, Hector would bound up to a nearby adult, come into contact with him, and cause him physical injury.

In *Draper v Hodder*, a pack of seven Jack Russell terriers dashed from D's premises on to C's premises and attacked infant Gary, stripping him of virtually all his clothing and biting him more than 100 times, causing him horrendous facial and head injuries. **Held:** negligence was proven. It was a 'striking feature' that veterinary and other evidence could not adduce any similar previous experience with Jack Russell terriers. C had to show that the propensity of a pack of Jack Russell terriers allowed to wander was that D knew, or ought to have known and foreseen, that there was a real risk of attack upon a small child whom the pack might encounter. The fact that they were a pack gave rise to a real risk, and they had scavenged for food in dustbins as a pack previously, which D knew. A perimeter fence around D's property was reasonable, to stop them ranging as a pack.

The characteristics of the particular animal in question, as deduced from the evidence given by those who actually knew the animal, is also highly relevant to the breach enquiry:

In *Addis v Campbell*,³² Mr and Mrs Addis (both of whom had died by the time of the trial), C, took their black Labrador dog for a walk to an open space in Devon. There were two other dogs there, including Mr Leaman's (D's) bull mastiff, Taz. All dogs were off the lead (as was permitted) and playing in the river. Mr Leaman, 86, tried to cross the river across some stepping stones, slipped and fell, and was rescued. Taz, by this stage in the river too, bounded out and knocked over Mr Addis, causing him serious injury. Those who knew Taz variously described him as 'very docile', obedient, and 'gentle, non-aggressive and "stupid" in a kind way'. C alleged that D should have resumed control of Taz after he was rescued from the river, by putting him on a lead, and that Taz, excitable and running about, presented a danger to someone, like C, who was nearby. **Held:** D was not negligent. D could not have foreseen that Taz was a risk of injury to anyone. In *McKenny v Foster (t/a Foster*

³¹ [2009] EWCA Civ 452, [16], [19]. ³² [2011] EWCA Civ 906, [6], [18].

Partnership),³³ Helen McKenny, C, was driving near Bridlington, when her car struck D's cow, which had escaped from its field and was in the middle of the road. C's passenger, and the cow, were killed, and C was badly injured. C claimed that the cow had escaped from the field, due to D's negligence. **Held:** D was not negligent. The cow's calf had been weaned off her that morning, and those who dealt with livestock knew that cows can become agitated when their calves were removed, due to a strong maternal instinct. However, this was the **third** time that a calf had been weaned off this cow, and she had never shown any strong maternal instinct before. Furthermore, how the cow escaped from the field was entirely unforeseeable. She climbed over a high livestock gate, and then having run away from the calf in the byre, jumped a 12 foot cattle grid – 'an extraordinary long-jumper as well as an extraordinary high-jumper', as the trial judge put it. D could not possibly have foreseen the extraordinary events which led to the accident.

Proving the breach

SAN.5

To fall below the standard of reasonable care as a keeper of an animal, D must have failed to do that which a reasonable keeper would have done (to supervise/fence/control, etc, the animal), or have done something which a reasonable keeper would not have done.

Provided that D fenced/supervised/controlled/treated the offending animal, in accordance with commonly-accepted livestock or animal management practices, there will be no negligence. Those commonly-accepted practices (adduced by reliance upon *Bolam*-type evidence, as discussed in Chapter 7) must be reasonable and rational, to exculpate D. Some allegations of breach have centred upon the physical structures which contained the animal:

In *Mirvahedy v Henley*,³⁴ C was driving home from work in Devon, along a dual carriageway between Torquay and Exeter, when his car collided with D's horse which was running across the road. The roof of C's car was peeled off, C suffered very serious head and facial injuries, and the horse was killed. The horse (one of three which escaped from Dr Henley's, D's, field) had panicked because of some unknown event. D lived about a mile from where the accident occurred. In escaping from the field, the horses pushed over an electric wire fence and a surrounding wooden fence, trampled through a strip of tall bracken and vegetation, raced 300 yards up a track, and then raced almost a mile along a minor road, before reaching the busy dual carriageway. **Held:** D was not negligent. D had adequately fenced the field in which the horses had been held. In *McKenny v Foster (t/as Foster Partnership)*,³⁵ facts previously, **held:** D was not negligent. The cow was adequately supervised in a field with livestock proof boundaries and gate. The gate that she climbed over was sound and well-built. The cattle grid was adequately constructed. Given that the escape happened because the cow must have been in a state of extreme agitation; and the only reasonable explanation for that state was a wholly abnormal exhibition of maternal instinct, there was no need for D to have supervised the cow further than he did.

Other allegations of breach have centred upon the means which D used (or omitted to use) to control or to restrain the animal, quite apart from physical structures of containment.

In *Bennet v Bellm*,³⁶ Mr Bennet, C, was driving his car along a road when a pony ran into it. The pony was being ridden by an 11-year-old girl, accompanied by her grandfather, D. The area was

³³ [2008] EWCA Civ 173, quote at [12], and see too [39]–[41]. ³⁴ [2003] UKHL 16, [2003] 2 AC 491.

³⁵ [2008] EWCA Civ 173. ³⁶ [2005] CLY 189 (Winchester CC, 28 Apr 2004).

well-known for horse-riding. The pony was experienced with riders, and considered safe, but was spooked by two other horses cantering along the bridle-path on a common. The pony bolted, dislodged the girl, and ran 1/4 mile off the common, onto the road and into C's vehicle. C alleged that D should have had a leading rein attached to the pony. **Held:** D was not negligent. To expect D to have kept the pony on a leading rein throughout the ride was far above 'reasonable behaviour'. The horse had bolted when still some considerable distance from the road; and D had intended to apply a leading rein when he had got closer to the road. That was satisfactory.

Where D has a mishap and accidentally releases an animal which then injures C, and which mishap no amount of reasonable care could have prevented, there will be no breach on D's part.

In *Gloster v Greater Manchester Police*,³⁷ a dog police handler, D, was chasing a quarry with his police dog Jack, when D slipped and fell, and Jack slipped his collar. Meanwhile, PC Gloster, C, was also involved in trying to apprehend the quarry. Jack went for C instead of the quarry, and bit C twice on the leg. As soon as he realised what was happening, D, as handler, shouted 'Leave', and Jack obeyed immediately. **Held:** D was not negligent, in either slipping and thereby releasing the dog, or in the instructions he subsequently gave. It was 'an accident pure and simple', with no negligence. (There was no appeal against that finding, although Hale LJ expressed 'surprise' at the decision; and Pill LJ remarked that 'the negligence claim failed in this case, but a high standard of care must be required of those who use dogs such as German shepherds for security purposes'.) In *Addis v Campbell*,³⁸ facts previously, **held:** there was no negligence in Taz being allowed off the lead before Mr Leaman, D, fell in the water. To find D guilty of breach for not having taken control of Taz, when he was just rescued from the river himself, would be to impose too stringent a duty. There was nothing that a reasonable D could have done to prevent the accident.

On the other hand, if D could have taken various reasonable precautionary steps which would have prevented the animal's causing the injury to C, then D will have breached his duty of care. Whether those steps would be reasonable depends upon the *Bolton v Stone*³⁹ factors – the probability of the injury occurring, the gravity of the injury should it occur, the cost and burden of those precautionary steps upon D, and any third parties' interests which would be compromised if those precautionary steps were taken.

In *Wilson v Donaldson*,⁴⁰ Mr Wilson, D, was a farmer whose cattle wandered out into a road near Middlesbrough. Mr Donaldson's, C's, car collided with the cattle, causing C serious injury. The field at Mounthouse Farm, where they had been kept, was separated from the road by a lower field belonging to a farm, Home Farm, which was delapidated, neglected, unoccupied, and its gates were largely incapable of being shut (which D knew). Home Farm had not been farmed for over 5 years, whereas D's farm was very well-maintained (and no animals had strayed from its fields for the 36 years that D had been farming the land). The only way for the cattle to get to the road was by leaving D's field through its stock gate which was left open by walkers, going downhill into Home Farm, and then along an unfenced track onto the road. **Held:** D was negligent in not securing the cattle in his field better. His stock gate was the sole barrier between his cattle and the road. However, it was not self-closing; the public footpath was regularly used by walkers; there was no 'kissing-gate' or stile nearby which would enable the gate to stay locked and with walkers going around it somehow; the gate had to be fastened manually; and there was no warning or 'Please Shut the Gate' reminder

³⁷ [2000] EWCA Civ 90, [2000] PIQR P114, quotes at 122, 120. ³⁸ [2011] EWCA Civ 906, [18].

³⁹ [1951] AC 850 (HL) 867–68. See Chapter 7, pp 352–58. ⁴⁰ [2004] EWCA Civ 972, especially [36] (Potter LJ).

notice on the gate. The dangers of the cattle escaping, through the carelessness of a walker, could have been avoided by D simply locking and chaining the gate. D was aware that if any cattle strayed through his gate, they could get to the road; and it would not have been costly or difficult to provide a means for the walkers to get over the fence but to ensure that the stock gate always remained secured, and not carelessly left open.

This was a rare case of a successful negligence claim against the keeper of animals.

Causation

SAN.6 In damage-by-animals cases, C must prove that, as in the usual negligence action, D's failure to supervise/handle/care for the animals caused C's injury on the balance of probabilities.

Readers are referred to **Chapter 8** for the general principles governing causation in negligence. The actions of third parties have been particularly important in damage-by-animal cases, for the actions of that third party may constitute an intervening act, severing the causal chain.

In *Hole v Ross-Skinner*,⁴¹ Mr Hole, 28, C, was injured when his car collided with a horse on his side of a dual carriageway. Mr Ross-Skinner, D, owned a country house and surrounding land, including the fields in which horses were kept. C alleged that D had been negligent in failing to maintain adequate stock-proof fencing, hedging and gates around the perimeters of his fields, especially around his fields close to the road. The horses had been left in the Middle Park field overnight, but it was found in the morning, after the accident, that the barbed wire fence had been cut at some point during the night, and that a gate which had been closed the night before was open in the morning; and that the horses had walked out of the gap, through a chalk pit, and then onto the road. There had been trouble in the past with deer poachers going onto D's land without permission, cutting fences and opening gates. **Held:** D was not negligent. He was not responsible for cutting the barbed wire fence, or leaving open the gate. There was no evidence that the fences around the fields abutting the road were insecure. The escape of the animals was due to the activities of poachers. Even if D had taken the additional precaution of double padlocking the gate, that could not have reliably excluded the poachers.

However, the fact that a third party could have intervened so as to **prevent** the escape/release of the offending animal, does not sever the chain of causation between D's breach and C's damage.

In *Wilson v Donaldson*, facts previously, **held:** D was negligent. The gate through which the cattle escaped onto the road, where C collided with the cattle, had been replaced some years earlier by the National Park Authority. However, the Park Authority was *not* obliged to advise D as to whether to adopt a different method of access for walkers, in order to avoid the danger of cattle escape, or to consider the adequacy of the gates and fencing on Home Farm. The actions of walkers in leaving the gate open did not sever the chain of causation either, because the danger of leaving the gate open would not have been apparent to a hiker, unaware of the topography or the state of disrepair of Home Farm, and that cows might go straight to the road if the gate was left open.

⁴¹ [2003] EWCA Civ 774.

Remoteness

SAN.7 As in the usual course of negligence, the injury or damage suffered by C must not be too remote at law to be recoverable.

In accordance with the usual principles governing remoteness (canvassed in **Chapter 9**), it is not necessary that the particular way in which C was injured by reason of the animal's behaviour, nor the extent of that harm, ought to have been reasonably foreseen. What is necessary is that the *type of harm* was, broadly speaking, reasonably foreseeable.

In *Draper v Hodder*,⁴² it was reasonably foreseeable that an infant toddler might suffer some personal injury (scratches, say) from the Jack Russell terriers. Being bitten over 100 times was not reasonably foreseeable, but was within the range of foreseeable injury. Similarly (said the court), where D negligently allowed a large herd of horses to enter a small field where a school picnic was being held and one of the children was bitten, it might reasonably be contemplated that one of the children might be trampled upon, but not that the child would be bitten. Nevertheless, being bitten would be within the range of foreseeable personal injury suffered.

Defences to negligence

SAN.8 Any of the defences available in negligence may apply to injury-by-animal cases, including contributory negligence.

Contributory negligence may be pleaded against C, in being careless of his own safety and by exposing himself to the danger posed by the animal.

In *Bodey v Hall*,⁴³ Mrs Bodey, C, was travelling in a pony and trap driven by Mrs Hall, D, on a country lane near Newbury in Berkshire. The horse, Pepper, became startled, shortly after Mrs Hall turned off a country lane onto a track. The trap shot forward, and the trap tilted, throwing both C and D out of the trap onto the ground. C sustained a severe head injury. C was an experienced horsewoman who had been driving with D on 6–8 previous occasions, and she knew the horse involved. She decided not to wear a riding hat on the day of the accident. **Held:** C's failure to wear a riding hat was not contributorily negligent. The evidence was that it might have been prudent for drivers and grooms of ponies and traps to wear riding hats, but it was not customary that they did so; there were 'clearly different schools of thought as to whether riding hats should be worn whilst carriage driving'; and it came down to 'largely a matter of personal choice'. There were no rules or guidance for carriage driving, or which recommended that hats be worn.

Whenever an accident involving C and the animal was *solely* the result of C's own negligence – that C was the 'sole author of his own misfortune' – then it has been found (per *Burrow v Commr of Police*⁴⁴) that no claim is possible for C to bring at all. This equates to a holding that C was liable for 100% contributory negligence – a controversial proposition, as discussed in **Chapter 10**.

In *Burrow v Commr of Police*, PC Burrow, C, a mounted police officer, suffered serious physical injury and phobic anxiety disorder, when the horse, Yeates, which he was riding on Wimbledon Common,

⁴² [1972] 2 QB 556 (CA) 573 (Edmund Davies LJ). ⁴³ [2011] EWHC 2162 (QB) [43]–[44].

⁴⁴ [2004] EWHC 1435 (QB) [54].

bolted. Yeates was very good on soft ground, and for maintaining public order at football matches, but he had a tendency to be spooked in traffic. C sued his employer, D, in negligence. **Held:** D was not negligent. The accident was the result of C's own negligence, his self-confidence that he could control Yeates one-handed while simultaneously smoking a cigarette, and while knowing that Yeates was not the most biddable horse in the police stables at Wandsworth. Possibly because of wet reins, C lost control of Yeates. Ultimately, C was the author of his own misfortune.

Hence, although contributory negligence is preferably considered to be a partial defence only, the possibility of its being a complete defence has certainly been raised in the context of negligently-caused injury-by-animal.

The problem of straying animals

Straying onto the highway

SAN.9

Where D's animals have strayed onto a public highway, s 8(1) of the Animals Act 1971 abolished the old common law immunity for D in negligence (per *Searle v Wallbank*). Therefore, wherever animals stray onto a road, the ordinary principles of negligence apply, so that if they strayed because of D's lack of reasonable care, and D's breach caused C's injury, C will succeed.

As Lord Denning MR stated in *Davies v Davies*,⁴⁵ the common law position was that, 'the owner of an animal was not liable if it strayed on to a highway. He was under no duty of care to repair the hedges or to keep the animal in the field, [per] *Searle v Wallbank* ... But, in 1971, that law was altered. As a result of the Animals Act 1971 [s 8(1)], the general rule is that the keeper of an animal is under a duty to take such care as is reasonable to see that it does not stray on to a highway and cause damage.'

This change in the law was driven by the dissatisfaction of the English Law Commission⁴⁶ with the rule in *Searle v Wallbank*, on several bases: its qualifications were uncertain in scope; it did not reflect modern conditions of fast-moving traffic; the fencing of fields adjoining highways became far more common; and the rule did not coalesce well with the liability of D for damage caused by the straying of his animals onto C's land (in that D could be liable for his cattle consuming some crops under the doctrine of cattle trespass, but not where his cattle caused a bus to crash on a road, killing 20 people).

Under the ordinary action in negligence, the Law Commission suggested that the following matters should be taken into account (and legislatively prescribed⁴⁷) when determining whether D met the standard of reasonable care, in preventing the risk of his animals straying onto the highway:

- the nature of D's land from which the animals strayed, and where it was situated in relation to the highway;
- how busy the highway would be, at the time when the animals strayed;
- the obstacles, if any, to be overcome by animals in straying from D's land onto the highway;
- the extent to which road users might be expected to be aware of, and guard against, the risk of animals being on the road; and
- the seriousness of that risk, and the steps that would have been necessary to avoid or reduce it.

⁴⁵ [1975] QB 172 (CA) 175. ⁴⁶ *Civil Liability for Animals* (Rep 13, 1967) [29]–[59].

⁴⁷ Per the Draft Bill, cl 8(2).

That recommendation of legislative prescription was not carried forth into the Animals Act 1971. However, presumably this list would be influential, and highly relevant, when determining whether D failed to meet the standard of reasonable care as owner or keeper of the straying animal/s.

In *Hole v Ross-Skinner*⁴⁸ and *Wilson v Donaldson*,⁴⁹ where a horse and cattle, respectively, escaped onto a road, causing C injury, the ordinary principles of negligence applied. **Held:** C failed in *Hole*, and succeeded in *Wilson*, for reasons explored earlier in the chapter.

Note that s 8 does **not** require that D fence the field in which his animals were kept. All that it requires is that D exercised reasonable care to prevent his animals from escaping.

However, s 8(2) of the Animals Act 1971 provides an 'escape hatch' for D – if he has put his animals on a village green, a field which is in an area where fencing is not customary, or on 'common land',⁵⁰ and had a right to put them there, then the fact that they escaped from there is **not** proof, in and of itself, that D committed a breach in permitting them to escape.

In *Davies v Davies*, Mr Wynford Davies, C, was driving his car along a road at night, when he collided with some sheep that had strayed onto the road from Mr Alan Davies', D's, land. The sheep had been kept on a large area of common land, with several farms around it, which came down to a single unfenced point of contact with the busy road. D's aunt and uncle had a registered right to graze 100 sheep on the common, which was adjacent to a farm belonging to them, and D had his own sheep in the farm fields and let them graze on the common under that registered right too. C sued D in negligence. **Held:** D was not liable, due to the escape hatch in s 8(2). That section protected, not only the owner of the right to graze animals on the common, but any person licensed by the owner to place animals on the land. In this case, D as licensee had a 'right to place the animals on that land' within the meaning of s 8(2).

Straying onto C's land

This scenario – which was once governed by the cattle trespass doctrine – is now under the auspices of s 4 and s 4A of the Animals Act 1971. Section 4, an original provision of the Act, relates to wandering livestock; but recent legislative enactment, per the Control of Horses Act 2015,⁵¹ now provides separately that where a horse has strayed onto C's land without authority, then 'the person to whom the horse belongs' is liable for damage which that horse has caused to C's land or property. Both provisions are considered later in the chapter.

STATUTORY CAUSES OF ACTION UNDER THE ANIMALS ACT 1971

SAN.10 The Animals Act 1971 contains a strict liability regime. Under s 2(1), strict liability is imposed on D for damage caused by animals of a dangerous species. Under s 2(2), strict liability is imposed on D for damage caused by domesticated animals (e.g., dogs and horses), but only if three conditions are proven by C.

The Animals Act 1971 ('the Act') imposes civil liability for the damage caused by animals. It supplements those statutes which impose criminal liability (e.g., fines, imprisonment, seizure)

⁴⁸ [2003] EWCA Civ 774. ⁴⁹ [2004] EWCA Civ 972.

⁵⁰ According to s 11 of the Animals Act 1971, 'common land' and 'town or village green' have the same meanings as in the Commons Registration Act 1965.

⁵¹ c 23, in force 26 May 2015 (per s 5(1)). Section 4, which applies in England, inserted a new s 4A in the Animals Act 1971.

for the damage caused by dangerous animals,⁵² as well as those statutes which impose compulsory insurance and licensing requirements upon the keepers of animals, whereby insurance schemes, rather than litigation, is the primary source of compensation for the injured C.⁵³

The legal framework of the Act is shown below:

Nutshell analysis: Animals Act 1971

Preconditions for the regime to apply:

- i Who can sue and be sued under the Act
- ii An appropriate type of animal which did the injury or damage
- iii An appropriate type of injury or damage recoverable under the Act

Caterogies:

Animals belonging to a dangerous species: s 2(1)

Animals belonging to a non-dangerous species: s 2(2)

- 1 Satisfying the opening words of s 2(2)
- 2 Satisfying s 2(2)(a)
- 3 Satisfying s 2(2)(b)
- 4 Satisfying s 2(2)(c)

Dogs which do damage to C's livestock or property: s 3

Damage done by D's straying livestock: s 4, or horses: s 4A

Statutory defences – various (depending upon the statutory action), including (but not limited to):

- Damage due solely to the fault of C: s 5(1)
- Voluntary acceptance of risk: s 5(2)
- Acts of trespassers: s 5(3)
- Contributory negligence

Dealing now, in turn, with each requirement of the *modern* framework under the Animals Act 1971:

Pre-requisites

Precondition #1: Who can sue and be sued under the Act

SAN.11 The person who is 'keeper of the animal' which did the harm is the appropriate D under the Animals Act 1971. A 'keeper' is one who owned and/or looked after the animal, at the time that the animal caused the damage.

⁵² e.g., Dangerous Dogs Act 1991 (owners of proscribed dogs which have not been registered commit a criminal offence, punishable by fine, imprisonment, and/or seizure of the dog); Guard Dogs Act 1975 (prohibits the use of a guard dog at any premises unless there is a handler capable of controlling the dog, except where it is secured; warning signs required; contraventions punishable by fine).

⁵³ e.g., under the Dangerous Wild Animals Act 1976, keepers of dangerous wild animals (nominated in the Schedule to the Act) must take out compulsory insurance policies against liability for damage caused to third parties, and be licensed by a relevant local authority. Apparently the statute was enacted 'following the fashion in the 1970s for keeping exotic animals, such as lions and tigers': noted at: <<http://archive.defra.gov.uk/wildlife-pets/wildlife/protect/dwaa/about.htm>>. Under the Riding Establishments Act 1970, s 2(4A), any licence granted to a riding school will be subject to a condition that the licence holder shall hold an insurance policy.

A 'keeper' is defined by statute:

- s 6(3) ... 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.

It follows from this definition that a 'keeper' includes a bailee⁵⁴ who is in possession of the animal (as occurred, e.g., in *Flack v Hudson*⁵⁵). Moreover, there may be simultaneous keepers of the animal – say, the owner of the animal, and the person who looks after it (shown, e.g., by the dual defendants sued in *Goldsmith v Patchcott*⁵⁶). However, where a person takes in an animal to prevent it from causing damage or to return it to its owner, that possession of the animal does not render that person a 'keeper' under the Act (per s 6(4)).

SAN.12 The appropriate C under the Animals Act 1971 is anyone who has suffered injury caused by an animal.

The Act says nothing about who may sue, and hence, anyone whose injury was caused by an animal may do so. C may be an employee of D (e.g., the stable hand in *Welsh v Stokes*⁵⁷), a friend of D (e.g., *Turnbull v Warrener*⁵⁸), a stranger to D (e.g., the driver who hit D's escaped animals on a road in *Mirvahedy v Henley*⁵⁹), or a client of D's equestrian centre (e.g., *Freeman v Higher Park Farm*⁶⁰).

SAN.13 One keeper can sue another keeper under the Act. A keeper is an appropriate C under the Act, if that keeper has suffered injury caused by an animal.

There is nothing in the Act which says that an appropriate C must be a 'stranger' to the keeper. According to *Flack v Hudson*,⁶¹ if that had been the parliamentary intention, then it would have been expressly provided in the statute – and it is not. Hence, a bailee in possession (keeper #1) may sue the animal's owner (keeper #2), as *Flack* demonstrated.

In *Flack v Hudson*, Mrs Salli Hudson, D, owned a horse, Sebastian. When D fell pregnant, she was keen for Sebastian to be exercised, and advertised for someone to ride the horse. Mrs Shirley Flack, C, who had riding experience, obtained the position. Thereafter, until the date of the accident, C rode Sebastian about three times a week, both on and off the road. One day, Sebastian bolted when a tractor, with an attached sprayer, approached, and C was thrown to the road. She died two days later from her injuries. One of the legal questions was whether Mrs Flack was a 'keeper', and if so, whether she (via her estate) could sue Mrs Hudson as co-keeper. **Held:** C was bailee of the horse. Further, C was entitled to sue the owner (via her estate, given her death from the accident).

⁵⁴ i.e., a person to whom goods are entrusted for some purpose, express or implied, to be returned after the purpose is fulfilled: J Penner, *The Law Student's Dictionary* (OUP, 2008) 24.

⁵⁵ [2001] QB 698 (CA) [17]. ⁵⁶ [2012] EWCA Civ 183, [9], [11]. ⁵⁷ [2007] EWCA Civ 796.

⁵⁸ [2012] EWCA Civ 412. ⁵⁹ [2003] UKHL 16, [2003] 2 AC 491.

⁶⁰ [2008] EWCA Civ 1185. ⁶¹ [2001] QB 698 (CA) [17].

As reasoned in *Flack*, why should someone in possession of an animal not be able to recover from its owner for the damage he suffers, without proof of negligence, if the owner is aware that the animal has the abnormal characteristic which made it likely that such damage would be caused? After all, the owner does have potential protection under the Act: he has to know of the dangerous characteristic of the animal to be liable under s 2(2); and one or more of the defences in s 5 of the Act may apply (per *Flack*⁶²) (these points are considered shortly).

Precondition #2: The type of animal which caused the injury

Notably, the term, 'animal', is not defined, either in the Animals Act 1971 or elsewhere in the general Interpretation Act 1978.⁶³ The potential scope of the Act is, hence, not entirely clear. According to the *Oxford Dictionary of English*,⁶⁴ an 'animal' can be defined as a 'living organism which feeds on organic matter, other than a human being', or separately, can be defined as 'a mammal, as opposed to a bird, reptile, fish or insect' (it is not clear, then, whether the latter category are 'animals' for the purposes of the Act). The Irish Law Commission certainly anticipated that these latter things would be included within the auspices of the English Act.⁶⁵ According to the *Oxford Dictionary*, bacteria are classified separately from both plants and animals, as prokaryotes. Hence, those would, perhaps more definitely, not be covered by the Act.

SAN.14 For the purposes of the statutory cause of action under the Act, it is necessary to determine whether or not the animal which caused the harm to C belonged to a so-called 'dangerous' species, or to a non-dangerous species, as different elements in proving liability apply to each category of animal.

Under s 2 of the Act, all animals are placed into one of two categories, in order for D's liability to be determined – they either belong to a dangerous species, or to a non-dangerous species.

Notably, this division does not quite replicate the old common law *scienter* doctrine, which distinguished between damage caused by animals which were wild by nature (*ferae naturae*) or by tame animals (*mansuetae naturae*). Nevertheless, it is the statutory division which now exists, and the allocation between categories is a question of law.⁶⁶

Animals which belong to a dangerous species are covered by s 2(1) of the Act. These are animals which satisfy the two requirements of s 6(2), *viz*, they are of a species which 'is not commonly domesticated in the British Islands', and also that 'fully-grown animals of the species normally have such characteristics that are likely, unless restrained, to cause severe damage, or that any damage they may cause is likely to be severe'. Obviously, s 2(1) has a fairly narrow application. According to Lord Walker in *Mirvahedy v Henley*,⁶⁷ s 2(1) is likely to be 'almost entirely limited to incidents in (or following escapes from) zoos or circuses', involving tigers, elephants, and the like. Foxes, kangaroos, and the grey squirrel, for example, may also fall within the definition, because they are not commonly domesticated in this country, and any damage that they may cause is likely to be severe. Any animals listed in the Schedule of the Dangerous Wild Animals Act 1976 (and there are many of these, including

⁶² *ibid*, [42]–[45] (Keene LJ), citing: *Mirvahedy v Henley* [2003 UKHL 16, [17].

⁶³ Per Sch 1, 'Words and Expressions Defined'. ⁶⁴ (2nd edn (revised), 2006) 61, 119.

⁶⁵ Irish LRC, *Civil Liability for Animals* (WP 3, 1977), 'Introduction', fn 2.

⁶⁶ EWLC, *Civil Liability for Animals* (Rep 13, 1967) [25].

⁶⁷ [2003] UKHL 16, [2003] 2 AC 491, [135], and see too [12] (Lord Nicholls).

the aforementioned) are likely to be treated as animals which belong to a dangerous species under s 2(1).⁶⁸

On the other hand, animals which are not dangerous species are covered by s 2(2) of the Act. Although a misnomer in some respects (because such animals can be very dangerous in some circumstances), these types of animals are considered to be 'domesticated', and hence, not a 'dangerous species' within s 2(1). They include: horses (per *Turnbull v Warrener*⁶⁹); domestic dogs and cats (per *Cummings v Granger*⁷⁰); and livestock, such as sheep or cows (per *McKenny v Foster (t/a Foster Partnership)*⁷¹). Most litigation arising under s 2(2) concerns injuries arising from dogs or (especially) horses.

Precondition #3: The type of compensable harm under the Act

SAN.15 Under the Act, compensable injuries include C's death, personal injury (including contraction of disease), property damage, and consequential economic loss.

Per s 11 of the Act, 'damage' 'includes the death of, or injury to, any person (including any disease and any impairment of physical or mental condition).' It is an inclusive definition. Case law demonstrates that a wide range of injury is recoverable under the Act, whether liability is pursued under ss 2(1) or 2(2), including:

- physical injury to C caused by the animal directly (e.g., C being thrown off a horse or bitten by a dog); or where physical injury is caused to C because a horse or livestock got onto a roadway and collided with C's car; or where injury to C is caused by the spread of infection from D's animals;
- property damage to C's chattels caused by the animal (e.g., where C's car collided with an animal);
- physical injury to C's livestock (e.g., D's dog killing C's sheep, or D's cat killing C's birds);
- property damage to C's fixtures (e.g., damage to crops or gardens caused by straying animals);
- consequential economic loss flowing from property damage (e.g., arising from C's inability to sell his crops in the example above); or
- loss of amenity damages, compensating for intangible inconveniences to C, arising from the smell or noise of D's animals (these may overlap with the cause of action in private nuisance, per Chapter 16).

Turning now to the imposition of liability under the Animals Act 1971:

Animals belonging to a dangerous species

SAN.16 D can be strictly liable for harm done by animals belonging to a dangerous species, i.e., without any fault or knowledge on his part.

Section 2(1) of the Act states:

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.

⁶⁸ See Sch 1, 'Kinds of Dangerous Wild Animals'. ⁶⁹ [2012] EWCA Civ 412, [3].

⁷⁰ [1977] QB 397 (CA) 409 (also known as *Cummings v Grainger*). ⁷¹ [2008] EWCA Civ 173, [22].

This provision creates (according to *Turnbull v Warrener*) ‘a form of strict, albeit not absolute, liability.’⁷² Liability is strict because it is irrelevant, **both** whether D took every possible precaution to prevent the dangerous animal escaping, and whether D realised that the animal was dangerous. However, the statutory defences which are available under the Act (considered later) apply, even where the animal belongs to a dangerous species, and hence, liability is not absolute.

The ‘damage’ referred to in s 2(1) is likely to refer to either personal injury or property damage. The English Law Commission remarked that, ‘although there is no direct authority on the point, statements of principle in a number of cases suggest that, provided an animal is a danger to mankind, there is strict liability for any damage which it may cause to property’.⁷³

So far as the author can ascertain, this provision has never been litigated in English law to date.

Animals belonging to a non-dangerous species

SAN.17 D may be liable for injury caused to C by a non-dangerous (harmless) animal which has behaved in an abnormal manner in some respect, even if D took every reasonable precaution to prevent the animal escaping or doing C harm. D’s liability is independent of fault.

Section 2(2) of the Animals Act 1971 governs liability where damage has been caused by an animal from a non-dangerous species. Unfortunately, the drafting of this provision is extremely convoluted. That is unfortunate, given that it operates far more widely than s 2(1) does – far more accidents involve ‘harmless’ animals than ‘dangerous’ ones. Indeed, as Lord Walker said in *Mirvahedy v Henley*, s 2(2) ‘has a lot of work to do. It is expressed in general, abstract terms and it has to be applied to a wide range of disparate incidents’.⁷⁴

Rather than reproducing the sub-section *in toto*, it is more helpful to break down the provision into its constituent parts:

THE CONSTITUENT PARTS THAT MAKE UP s 2(2)

opening words	Damage was caused by an animal (which did not belong to a dangerous species)
s 2(2)(a)	The damage to C was of a kind which the animal either :
per first limb:	was likely to cause, if it was not restrained; OR
per second limb:	was unlikely to cause, but which was likely to be severe if the animal did cause it
s 2(2)(b)	The animal’s characteristic either :
per first limb:	was not normal behaviour or a normal attribute for animals of that species; OR
per second limb:	was normal behaviour or a normal attribute for that species of animal, only <i>in the particular circumstances of the case</i> .
s 2(2)(c)	D knew of the animal’s characteristics which led to C’s injury, because either :
per first limb:	the particular animal had behaved that way previously; OR
per second limb:	the animal’s behaviour was a characteristic of the species, whether in general, or in the particular circumstances in which C’s injury was caused

⁷² [2012] EWCA Civ 412, [3].

⁷³ EWLC, *Civil Liability for Animals* (Rep 13, 1967), ch 1, [5], referring to, e.g., *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1 (CA) 13–14.

⁷⁴ [2003] UKHL 16, [2003] 2 AC 491, [135] (Lord Walker).

Various judges have been fairly scathing of s 2(2)'s poor drafting. Within a decade of its enactment, Lord Denning MR predicted, in *Cummings v Granger*,⁷⁵ that 'the section is very cumbrously worded and will give rise to several difficulties'. That proved prescient. In different 2012 cases, Maurice Kay LJ observed, in *Turnbull v Warrener*, that it had 'attracted four decades of judicial and academic criticism', 'is grotesque', and that it had given rise to 'numerous expressions of judicial disapprobation',⁷⁶ while Jackson LJ despaired, in *Goldsmith v Patchcott*, that the language was akin to 'fighting through the thickets' and was 'both oracular and opaque'.⁷⁷ Some courts have blamed⁷⁸ s 2's lack of clarity on the fact that, during its passage through Parliament, its wording changed 'significantly', such that the original Bill contemplated by the Law Commission was not reproduced by Parliament (as discussed later⁷⁹). Ultimately, C has a significantly easier task of proving liability on the part of D, the keeper of an animal, than the Law Commission ever intended.

To emphasise, all three of the pre-requisites in s 2(2) outlined in the Table above must be met, in order for D to be liable for the injury caused by his animal. If one of them fails, D cannot be liable under the Act (rendering s 2(2)'s regime a less-strict liability regime than s 2(1)'s regime for dangerous species, as pointed out in *Turnbull v Warrener*⁸⁰). Furthermore, even though it does not matter whether D took every careful precaution to prevent his animal escaping or doing C harm, D does require a certain degree of knowledge to be liable under s 2(2) – rendering this, again, less-strict liability than under s 2(1).

Tackling each of the conditions for s 2(2) to apply:

Element #1: Satisfying the opening words of s 2(2)

SAN.18 The damage to C must have been caused by D's animal.

Until recently, the opening words of s 2(2), imposing a causal requirement, were easily satisfied.

In *Bodey v Hall*,⁸¹ facts previously, **held**: C's head injury was caused by the actions of the horse, and C's being thrown out of the trap onto her head when the horse unexpectedly shot forward, tipping the trap over.

However, these opening words have given rise to some further judicial discussion. If C loses control of D's horse, it bolts, and C falls off onto hard ground and suffers injury, has the horse 'caused' that damage to C? In *Turnbull v Warrener*,⁸² Lewison LJ noted that, in several riding accident cases (e.g., *Welsh v Stokes*,⁸³ and *Freeman v Higher Park Farm*⁸⁴), the courts assumed that the horse had caused the damage, but that the assumption had 'never been tested by argument'.⁸⁵ His Lordship suggested, rather, that the damage may be *caused* by C hitting the tarmac. The point has yet to be examined in further litigation.

Element #2: Satisfying condition s 2(2)(a)

As Lord Hobhouse put it in *Mirvahedy v Henley*, this condition deals with the animal's 'dangerousness'.⁸⁶ This requirement corresponds broadly with what had been called, under the *scienter* doctrine at common law, proof of a 'vicious propensity' on the part of the animal.

⁷⁵ [1977] 1 QB 397 (CA) 404. ⁷⁶ [2012] EWCA Civ 412, [4]. ⁷⁷ [2012] EWCA Civ 183, [31], [43].

⁷⁸ *Freeman v Higher Park Farm* [2008] EWCA Civ 1185, [17]. ⁷⁹ Cross cite pp 103–4.

⁸⁰ [2012] EWCA Civ 412, [4]. ⁸¹ [2011] EWHC 2162 (QB), [2012] PIQR P1, [29]. ⁸² [2012] EWCA Civ 412.

⁸³ [2007] EWCA 796, [2008] 1 WLR 1224. ⁸⁴ [2008] EWCA Civ 1185. ⁸⁵ [2012] EWCA Civ 412, [49].

⁸⁶ [2003] UKHL 16, [2003] 2 AC 491, [16].

This condition is probably the easiest of the three contained in s 2(2). As Jackson LJ remarked in *Goldsmith v Patchcott*, failing to meet s 2(2)(a) ‘will only eliminate a small number of cases. Most animal-related damage which someone wishes to sue about will fall into one or other of those two categories’.⁸⁷ It will be recalled that C has to prove **either** limb of s 2(2)(a), **not** both.

The first limb. This is the first opportunity for C to recover damages for the injuries caused by a non-dangerous species of animal.

SAN.19 Under the first limb of s 2(2)(a), the damage to C must be of a kind that was ‘likely’ to be caused by that particular animal if it was unrestrained. In that context, C’s damage does not have to be likely ‘on the balance of probabilities’, but it must be ‘reasonably to be expected’, and more than a mere possibility.

Section 2(2)(a) requires the court to consider the *actual culprit animal* which caused C damage. By comparison, s 2(2)(b) requires the court to identify the *characteristics of the species of animal* of which the actual animal is one – a far more generalised enquiry than s 2(2)(a) permits. This key difference between the two conditions was pointed out in *Freeman v Higher Park Farm*.⁸⁸ The focus under this limb is on the particular animal which did the damage.

C does not have to prove that the animal would ‘probably’ have caused damage unless tethered – but only that it was ‘reasonably to be expected’. That pro-claimant, and easily satisfied, interpretation of the word, ‘likely’, was confirmed by the House of Lords in *Mirvahedy v Henley*.⁸⁹ It follows that something that is ‘reasonably to be expected’ can be of fairly low probability.

C will have difficulties in proving this limb, however, if the particular animal concerned had no history of bad behaviour before causing the injury to C. If, on the evidence, the particular animal had **never** behaved in that way before, then the damage is not of a kind which the animal was likely to cause if it was not restrained. The animal’s offending behaviour must be considered to be a remote possibility at best, and cannot be said to be ‘reasonably to be expected’. In each of the following, the first limb of s 2(2)(a) failed on that basis:

In *Whippey v Jones*,⁹⁰ facts previously, where C was knocked over by Hector, a fully-grown Great Dane whilst out running beside a river – Hector had never jumped up at any individual before, but had sometimes barked at people from a short distance away. In these circumstances, the damage which C suffered was only a mere ‘possibility’. Had Hector shown any previous such behaviour, then given that he was so large (12.5 stone) and suddenly appeared from behind a bush startling C, some injury surely would have been ‘reasonably to be expected’. In *Turnbull v Warrener*,⁹¹ Mrs Warrener, D, owned a horse called Gem. For four years, D regularly rode Gem, but when she became pregnant, she arranged for Mrs Turnbull, C, to ride Gem on a regular basis. One weekend, after 5 months, C rode Gem with a new bitless bridle (because Gem had had some dentistry work done). After enclosed riding to get Gem used to the new bridle, C went off on a canter, but Gem galloped uncontrollably, veering through a gap in a hedge and throwing C onto the tarmac. However, until that day, Gem had never disobeyed his riders’ instructions or failed to respond to his riders’ attempts to control

⁸⁷ [2012] EWCA Civ 183, [33]. ⁸⁸ [2008] EWCA Civ 1185, [21].

⁸⁹ [2003] UKHL 16, [2003] 2 AC 491, [95]–[97] (Lord Scott). Later applied: *Freeman v Higher Park Farm* [2008] EWCA Civ 1185, [33] (Etherton LJ); *Turnbull v Warrener* [2012] EWCA Civ 412, [12] (Maurice Kay LJ).

⁹⁰ [2009] EWCA Civ 452, [18]–[20]. ⁹¹ [2012] EWCA Civ 412.

him. In *Welsh v Stokes*,⁹² Miss Aimee Welsh, 17, C, was riding a 9-year-old horse called Ivor on a road in Cornwall, when it reared. C fell onto the road, and Ivor fell onto her. C had been working as a trainee at D's horse yard for 8 months before the accident, and was competent to ride a 'sensible' horse on her own. Ivor was a 'sensible' horse with no history of misbehaviour or vice of any kind, he was docile, and had never reared before.

The second limb. Even if C fails under the first limb, there is a second chance to ensure that s 2(2)(a) is met.

SAN.20 Under the second limb of s 2(2)(a) – and even if the damage to C caused by that particular animal was not likely – it will be sufficient if the damage to C could reasonably be expected to be *severe*, if that animal did cause damage.

This limb is a lot less demanding for C than the first limb. As pointed out in *Turnbull v Warrenner*, the second limb has generally either been conceded by D or 'readily assumed by the judge in favour of [C]'.⁹³ Dealing with the key points under this limb:

- regarding horse accidents, on one view, the second limb is easily made out:

Where a rider is bucked or thrown off a horse, the likelihood of suffering a 'severe injury' has been said to be 'obvious' (in *Freeman v Higher Park Farm*⁹⁴) and 'inevitable' (in *Welsh v Stokes*⁹⁵). In *Mirvahedy v Henley*,⁹⁶ it was conceded that, if horses ran onto a busy roadway and collided with a vehicle, then the damage to C from the collision could reasonably be expected to be severe, even if a dent to the car was more probable.

However, not all horse accidents giving rise to a dislodged rider have been judicially treated so sympathetically under the second limb of s 2(2)(a). A mere possibility of the damage to C being 'severe' is not sufficient to prove this limb, as both of the following cases showed:

In *E v Townfoot Stables*,⁹⁷ E, C, aged 8, was attending a riding school, when she was thrown from a pony. She broke her arm. According to the evidence, the pony had made a sudden and unbalancing movement or series of movements, possibly caused by a horse coming up too close behind her. The damage was not of a kind which a pony was likely to cause, or if caused, was likely to be severe. It was a mere possibility only, and not reasonably to be expected. In *Turnbull v Warrenner*⁹⁸ (in which the horse, Gem, bucked off rider C onto hard tarmac), an expert witness had the following exchange with counsel: 'Q: So a fall in the circumstances such as this may possibly result in severe injury, but it's not likely? A: It might occur, but statistically it probably won't.' The expert had agreed that hundreds of people up and down the country fall off horses every week, without suffering anything more than soft tissue injury. According to two members of the Court (Stanley Burnton and Lewison LJ), given the expert's evidence, the second limb of s 2(2)(a) was not met, because severe injury was not 'reasonably to be expected'. Indeed, it was improbable. Lewison LJ noted that '[a]lmost anyone

⁹² [2007] EWCA Civ 796, [28].

⁹³ [2012] EWCA Civ 412, [11] (Maurice Kay LJ), and in [13], citing a similar assessment by Dyson LJ in *Welsh v Stokes* [2007] EWCA Civ 796.

⁹⁴ [2008] EWCA Civ 1185, [34] (Etherton LJ). ⁹⁵ [2007] EWCA Civ 796, [33], [40] (Dyson LJ).

⁹⁶ [2003] 2AC 491 (HL) [98] (Lord Scott). ⁹⁷ (Newcastle upon Tyne CC, 3 Sep 2003).

⁹⁸ [2012] EWCA Civ 412, with quotes variously at [8], [15]–[16], [54].

who has ever ridden will have the experience of having fallen off a horse, getting up and remounting the horse. I do not, with respect, regard it as self-evident that a rider who falls off a rearing horse (or for that matter a cantering horse) is likely to suffer severe injury.'

These statements in *Turnbull* were dicta, because D succeeded on the defence in s 5(2). Nevertheless, the case raises the real prospect of an expert's evidence – that severe injury was very unlikely – defeating the second limb of s 2(2)(a).

- regarding dog bites, the cases are more consistent:

In *Cummings v Granger*, it was accepted that, where the culprit was an Alsatian guard dog, then 'if it did bite anyone, the damage was "likely to be severe";⁹⁹ with the same view being formed of a 10-stone bull mastiff in *Curtis v Betts* ('the judge was ... right to hold that the requirement of s 2(2)(a) was satisfied'¹⁰⁰).

- where the offending animal is very large and heavy, then by virtue of those inherent characteristics, any damage caused by the animal is likely to be severe. That will, of itself, satisfy the second limb of s 2(2)(a).

In *Mirvahedy v Henley*, the horse which collided with C's car was a heavy animal, weighing 600 lbs. Lord Nicholls stated, '[t]ake a large and heavy domestic animal such as a mature cow. There is a real risk that if a cow happens to stumble and fall onto someone, any damage suffered will be severe. This would satisfy requirement (a).'¹⁰¹ The same applied to this bolting horse, and s 2(2)(a) was satisfied. In *McKaskie v Cameron*, it was also accepted that any damage caused by stampeding cattle was of a kind which was likely to be severe, given the weight and speed of such cattle (a quarter of a ton for cows, and a ton for the bulls), the likely use of their heads as a weapon, and their known habit of trampling.¹⁰² In *Clark v Bowlit*,¹⁰³ where a horse collided with a car, causing C personal injury and property damage, s 2(2)(a) was met. Given the size of any horse, the resulting damage in the event of a collision was likely to be severe.

Under the *Mirvahedy* view, C has excellent prospects of satisfying s 2(2)(a) whenever the damage was done to him by a sizable domesticated animal.

- As a final point under s 2(2)(a)'s second limb: there is an interpretative problem, as Lewison LJ pointed out in *Turnbull v Warrener*. Whether C's injuries caused by the animal were likely to be severe depends upon whether the question is posed generally or specifically. If the court asks: 'if C falls off a rearing horse onto a hard surface, and the horse falls on top of C, is the injury to C likely to be severe?', the answer would be 'yes'. But if the court asks, 'if C falls off a horse, is the injury to C likely to be severe?', the answer may be 'no, it usually isn't'. Lewison LJ called this a problem as to what 'level of generality' the question in s 2(2)(a)'s second limb is asked, and that 'I do not believe that this problem has yet been squarely confronted in the cases'.¹⁰⁴ Given that *Turnbull* was decided in 2012, some 40 years after the Animals Act was enacted, that seems to be remarkable. Nevertheless, it may be that, in future cases, C will not have such a straightforward time of proving the second limb of s 2(2)(a), if the question is posed more generally.

⁹⁹ [1977] QB 397 (CA) 404 (Lord Denning MR). ¹⁰⁰ [1990] 1 WLR 459 (CA) 463 (Slade LJ).

¹⁰¹ [2002] UKHL 16, [2003] 2 AC 491, [46]. ¹⁰² (Preston CC, 1 Jul 2009) [352].

¹⁰³ [2006] EWCA Civ 978, [15] (Lord Phillips LCJ). ¹⁰⁴ [2012] EWCA Civ 412, [51].

Element #3: Satisfying condition s 2(2)(b)

This condition refers to ‘the source of the animal’s dangerousness’ (per Lord Nicholls in *Mirvahedy v Henley*¹⁰⁵). The provision is obfuscatory, and had been described judicially as being ‘opaque’ and ‘tortuous’.¹⁰⁶

The key to the provision is abnormality. It requires that the animal’s behaviour or characteristics were abnormal, or highly unusual, in some way, for D to be strictly liable (per Lord Nicholls in *Mirvahedy v Henley*¹⁰⁷). If the offending animal was behaving ordinarily in all circumstances when the mishap happened, then C cannot prove this condition. Lord Hobhouse rationalised the condition, in *Mirvahedy*, as follows: ‘there is an implicit assumption of fact in s 2(2)(b) that domesticated animals are not normally dangerous. But the purpose of [s 2(2)(b)] is to make provision for those that are. It deals with two specific categories where that assumption of fact is falsified. The first is that of an animal which is possessed of a characteristic, not normally found in animals of the same species, which makes it dangerous. The second is an animal which, although belonging to a species which does not normally have dangerous characteristics, nevertheless has dangerous characteristics at particular times or in particular circumstances. The essence of these provisions is the falsification of the assumption, in the first because of the departure of the individual from the norm for its species, and in the second because of the introduction of special factors.’¹⁰⁸ The Animals Act 1971 is not meant to render D, as the keeper of a domesticated animal, ‘routinely liable for damage which results from characteristics common to the species. It requires something particular’ (per *Clark v Bowl*¹⁰⁹).

Just as with s 2(2)(a), s 2(2)(b) has two limbs, and meeting either of them will satisfy the condition.

The first limb. This is the first opportunity for C to meet the statutory requirement of s 2(2)(b).

SAN.21 Under the first limb of s 2(2)(b), to cause C’s damage, the offending animal must have manifested something which was *not* normal behaviour or a normal characteristic for an animal of that species. An animal’s size and weight is *always* a normal characteristic.

The case law shows that it can be very difficult to prove that what the animal did, when causing injury to C, was ‘abnormal behaviour’. If all the animal was doing when it caused the injury was displaying ‘normal behaviour’, then the first limb of s 2(2)(b) **cannot** be met.

Horses which bolt, rear, or buck are showing normal behaviour: according to *Freeman v Higher Park Farm*,¹¹⁰ ‘lots of horses buck’, it was a normal characteristic of horses generally. A cow’s strong maternal instinct and anxiety at being separated from her calf is normal behaviour, per *McKenny v Foster (t/as Foster Partnership)*.¹¹¹

Whenever the animal’s characteristic which caused C’s harm relates to its size or weight – something which is inherent in the animal at all times – then that characteristic will always be a normal attribute, and the first limb of s 2(2)(b) cannot be satisfied. In *Mirvahedy v Henley*, Lord Nicholls noted that, given its size and weight, ‘a cow’s dangerousness ... may not fall within s 2(2)(b). This dangerousness is due to a characteristic normally found in all cows at all

¹⁰⁵ [2003] UKHL 16, [2003] 2 AC 491, [16]. ¹⁰⁶ *Turnbull v Warrener* [2012] EWCA Civ 412, [17] (Maurice Kay LJ).

¹⁰⁷ [2003] UKHL 16, [2003] 2 AC 491, [17]. ¹⁰⁸ *ibid*, [71]. ¹⁰⁹ [2006] EWCA Civ 978, [24] (Sedley LJ).

¹¹⁰ [2008] EWCA Civ 1185, [27]. ¹¹¹ [2008] EWCA Civ 173, [27].

times. The dangerousness results from their very size and weight.¹¹² These are not abnormal characteristics.

In *Clark v Bowlt*,¹¹³ Mr Clark, C, was driving on a road, when he saw, 50 yards ahead, two horses being ridden on the narrow grass verge on his side of the road. One horse called Chance was being ridden by Mrs Bowlt, D. C slowed down to 15 mph, and the horses showed no sign of panic, but as he was about to pass Chance, the horse moved into the road in an uncontrolled movement, and hit C's car, causing C property and personal damage. **Held:** the first limb of s 2(2)(b) could not be met. The relevant characteristic was the weight of the horse, Chance, which caused the damage to C, but that weight (600 pounds) was a *normal* characteristic of her species.

It must be shown, to meet the first limb, that the characteristic which the animal displayed would **not normally** be a characteristic of that species of animal – which inevitably requires that the animal was behaving very peculiarly. In the following cases, the first limb of s 2(2)(b) was met, for that reason:

In *Flack v Hudson*,¹¹⁴ the horse, Sebastian, had a propensity to be upset, and very difficult to control, when he saw or heard agricultural machinery when he was out on a road. This was not a characteristic normally found in horses. The real fear which Sebastian displayed of agricultural machinery was an abnormal characteristic of that species of animal. In *Kite v Napp*,¹¹⁵ D's dog had a habit of attacking people who were carrying handbags, which was, again, not a characteristic normally found in the species of dog.

Nevertheless, these unusual scenarios are not common, and the limb is difficult to prove for that reason.

The second limb. C has a second, and alternative, chance of proving the condition.

SAN.22 Under the second limb of s 2(2)(b), the characteristic of the offending animal which caused C damage must be a characteristic which was normal behaviour for that species only *on particular occasions* – and one such occasion was when C was injured.

Whatever behaviour the animal displayed in causing injury to C – if that can be 'normal behaviour' for that species, but only at particular times or in particular circumstances (which happened to be when/where the accident occurred), this will render D liable under s 2(2)(b). In other words, the animal was demonstrating a behaviour or characteristic which is not normally found except in particular circumstances. That is sufficient to prove the sort of abnormality which is the focus of this condition.

In comparison with the first limb above, this second limb has been judicially interpreted in a very pro-claimant manner. That approach to the construction of s 2(2)(b) flows from the majority's decision in *Mirvahedy v Henley*,¹¹⁶ in which Lord Nicholls said that '[t]he fact that an animal's behaviour, although not normal behaviour for animals of that species, was nevertheless normal behaviour for the species in the particular circumstances, does not take the case outside section 2(2)(b).' As a result of the *Mirvahedy* interpretation, the second limb of s 2(2)(b) is remarkably easy for C to satisfy. Indeed, it was satisfied in all of the following cases:

¹¹² [2003] UKHL 16, [2003] 2 AC 491, [46]. ¹¹³ [2006] EWCA Civ 978, [15] (Lord Phillips LCJ).

¹¹⁴ [2001] QB 698, [22]. ¹¹⁵ (The Times, 1 Jun 1982), as cited in: *Mirvahedy v Henley* [2003] 2 AC 491, [138].

¹¹⁶ [2003] UKHL 16, [2003] 2 AC 491, [47]–[48], and see too, [21] and [62].

- Re horses:

In *Mirvahedy v Henley*, it was never clear what frightened the three horses so badly as to escape from D's field onto the highway, but something did. Horses do not normally behave as D's horses did during that night, but it was 'characteristic' of horses to bolt when they had some sort of fright or alarm, and those were the 'particular circumstances' in this case. 'They attempt to flee, ignoring obstacles in their way, and are apt to continue in their flight a considerable distance, even beyond the point when the perceived threat was detectable', as happened in this case. In *Bodey v Hall*,¹¹⁷ the horse behaved unpredictably, by shooting forward suddenly, at speed and uncontrollably, when confronted by an unknown stimulus which frightened it. That could properly be identified as a characteristic which was 'normal behaviour' in the particular circumstances. In *Goldsmith v Patchcott*,¹¹⁸ Mrs Kara Goldsmith, C, rode D's horse, Red, several times, but during the course of one ride, something startled Red, he reared up, and started to buck violently. C tried to ride it out, but she was thrown to the ground and then struck by the horse's hoof, suffering severe facial injuries. Again, rearing or bucking was a normal characteristic of horses in particular circumstances, viz, when they were frightened or alarmed. The fact that Red may have bucked more violently than normal still kept the scenario within s 2(2)(b).

- Re dogs:

In *Cummings v Granger*,¹¹⁹ D occupied a scrapyard in East London. It was always locked up at night, with D's untrained Alsatian dog roaming around the yard. One night, Mr Hobson, a friend of D's, plus Mrs Cummings, C, who worked as a barmaid in the pub next door and who knew of the presence of the dog, gained access to the yard with a key. The dog attacked C, injuring her. That biting was due to characteristics not normally found in Alsatians except in the 'particular circumstances', namely, an untrained dog roaming a yard which it regarded as its territory to defend. In *Curtis v Betts*,¹²⁰ Rolfe and Frances Betts, D, owned two dogs, including a bull mastiff, Max. These dogs served as pets and as guard dogs for school grounds in Nottingham, where D was caretaker. Max was described as being 'docile and lazy'. Lee Curtis, C, a 10-year-old neighbour of D, approached the dogs in the street as they were being transferred from D's house to a Land Rover, to be taken for exercise in the park. Max savaged C on his face. D was liable under s 2(2)(b), because bull mastiffs had a tendency to react fiercely when defending the boundaries of what they regarded as their territory, and that included the back of the Land Rover in which they travelled three times a week. In *Mirvahedy, the hypothetical example*¹²¹ was given of the biting dog: dogs are not normally prone to bite all and sundry – but they may do so, when they are guarding their territory (as in *Cummings*), or when a bitch's litter of pups are being threatened. That a guard dog or bitch with pups will bite is due to a characteristic of the particular animal which is not normally found in members of the species of domesticated dogs, except in the particular circumstances of guarding territory or protecting pups. Hence, s 2(2)(b) would be met in these cases.

- Re cows:

In *McKaskie v Cameron*,¹²² C was injured when walking her dog along a public footpath which ran across D's fields. D knew that walkers from time to time used the footpath to take their dogs for a walk. C was attacked by D's cows which had just calved. It was a characteristic of cows with calves

¹¹⁷ [2011] EWHC 2162 (QB). ¹¹⁸ [2012] EWCA Civ 183. ¹¹⁹ [1977] 1 QB 397 (CA) 407.

¹²⁰ [1990] 1 WLR 459 (CA). ¹²¹ [2003] UKHL 16, [2003] 2 AC 491, [18] (Lord Nicholls).

¹²² (Preston CC, 1 Jul 2009) [354].

at foot to be aggressive, especially towards dogs and people accompanied by dogs. That characteristic is not normally found in cattle, but is found during the period after cows have given birth to calves, and where the cows have calves at foot. Similarly, in *McKenny v Foster (t/as Foster Partnership)*,¹²³ the cow's maternal instinct, which caused her to become so agitated that she clambered over a gate and jumped a cattle grid in the most extraordinary circumstances, was a characteristic only found in particular circumstances, i.e., when a calf was just weaned from her mother. In both cases, the second limb of s 2(2)(b) was met.

As an even more claimant-friendly ruling, this second limb can be satisfied, even if the offending animal has, so far as anyone knows, never displayed such behaviour before. This was demonstrated in the following cases, where the second limb of s 2(2)(b) was satisfied:

In *Welsh v Stokes*,¹²⁴ facts previously, the horse, Ivor, was quiet and docile, and never known to rear before. However, horses have the characteristic that they will rear if they do not want to go forward, and have a rider on board who is unable to handle them or who lacks confidence. It was immaterial that Ivor had never reared in this way before. The characteristic of rearing was normally found in horses as a species in particular circumstances, even if not 'usual behaviour' for Ivor. In *McKenny v Foster (t/as Foster Partnership)*,¹²⁵ the cow had never shown aggressive behaviour when her two previous calves were weaned from her.

The difficulty with the *Mirvahedy* interpretation of s 2(2)(b) is that it seems to cover *every single scenario* in which C was injured by an animal. That offending animal will have been showing a normal characteristic in that particular situation in which C was injured, and consequently, D will be liable under s 2(2)(b). In *Turnbull v Warrener*,¹²⁶ Maurice Kay LJ remarked that the *Mirvahedy* approach was 'very favourable to [C]', and had 'resulted in [the] virtual emasculation' of the second limb; whilst, in *Goldsmith v Patchcott*, Jackson LJ said that it was 'not obvious what purpose the section serves'.¹²⁷ The trial judge in *Mirvahedy* perhaps summed it up best, noting that one can always find that animals behave in particular ways at some particular time or in some particular circumstance.¹²⁸ If the *Mirvahedy* interpretation 'empties the condition of all content',¹²⁹ then can D ever defeat the second limb of s 2(2)(b)?

The case law demonstrates that D may seek to rely upon **one** of the following points to negate the second limb:

- the animal's behaviour was so unusual, unprecedented and one-off, or accidental, that it could never be described as a 'characteristic' – and if it was not an animal's *characteristic* which caused C's damage, then s 2(2)(b) cannot be met. This point is illustrated by the House of Lords' decision in *Mirvahedy*, and in *Turnbull v Warrener*¹³⁰ (where the Court of Appeal was divided on this point):

In *Mirvahedy v Henley*,¹³¹ the following *hypothetical example* was given: suppose that a mature cow stumbles and falls on C. Any damage suffered by C will be severe. Hence, s 2(2)(a)'s second limb would be met. However, the cow's 'characteristic' would not satisfy s 2(2)(b). The cow's dangerousness was due to the characteristic normally found in all cows at all times, *viz*, its very size and weight, so the first limb is not met. The fact that the cow stumbled is not normal behaviour for

¹²³ [2008] EWCA Civ 173. ¹²⁴ [2007] EWCA Civ 796, [30], [41]–[47]. ¹²⁵ [2008] EWCA Civ 173.

¹²⁶ [2012] EWCA Civ 412, quotes at [18] and [23], respectively. ¹²⁷ [2012] EWCA Civ 183, [40].

¹²⁸ [2003] UKHL 16, [2003] 2 AC 491, [138] (Lord Walker), citing the trial judge on this point.

¹²⁹ To paraphrase Lord Nicholls, *ibid*, [46]. ¹³⁰ [2012] EWCA Civ 412, especially [9], [40], [54].

¹³¹ [2003] UKHL 16, [2003] 2 AC 491, [46] (Lord Nicholls).

a cow in particular times or in particular circumstances, it was just an accident, so the second limb would fail too. Hence, C would not be able to prove either limb of s 2(2)(b).

In *Turnbull v Warrener*, facts previously, the horse, Gem, took off on a gallop in a field, and did not respond to C's instructions to slow to a canter, while wearing the bitless bridle to which he was completely unaccustomed. Gem had only started wearing it because of dentistry work done earlier in the week. The question was whether failing to respond to a bitless bridle was 'normal behaviour', for horses who were unfamiliar with such equipment. The expert evidence (the Bitless Bridge manual) was that, when starting a horse with a bitless bridle, 'it sometimes revives a horse's spirits with a feeling of "free at last"', that such exuberance occurred in <1% of horses, and to 'begin in a covered school or small paddock rather than an open area.' **Held (2:1)**: it was 'questionable' whether C satisfied either limb of s 2(2)(b). According to Stanley Burnton LJ (with whom Lewison LJ agreed), something that occurred in <1% of horses was an 'unprecedented, one-off action of an animal', which could **not** be 'a characteristic' of that animal at particular times or in particular circumstances. Maurice Kay LJ dissented, holding that Gem showed normal behaviour for horses which were unfamiliar with that new equipment, so that the second limb of s 2(2)(b) *was* met.

- it is apparent that whatever characteristic about the animal was relied upon to satisfy s 2(2)(a) – whether it be the animal's weight and size, its biting, its bucking – that must be the **same** characteristic that is relied upon to make out s 2(2)(b). Hence, if the animal's weight was cited, under the second limb of s 2(2)(a), to prove that the damage caused by the animal was likely to be severe, then that characteristic **cannot** satisfy s 2(2)(b)'s second limb – because that weight is a normal characteristic of the species in **all** circumstances. There is nothing generally abnormal about an animal's weight, at any particular times or in any particular circumstances, as the second limb requires:

In *Clark v Bowl*,¹³² facts previously, **held**: the trial judge had held that the weight of the horse, Chance (at 600 pounds), meant that, if Chance moved into the path of C's car, the damage from the collision was likely to be severe under s 2(2)(a). However, that weight was a normal characteristic of a fully-grown horse. Hence, *if referring to Chance's weight as the relevant characteristic*, the second limb of s 2(2)(b) could not be met. According to Sedley LJ, 'the favourable finding that it was the horse's weight which brought the case within s 2(2)(a) is C's undoing under s 2(2)(b)'.

- even if an animal can demonstrate a normal characteristic only in particular circumstances, those circumstances were completely absent in this case:

In *Clark v Bowl*,¹³³ facts previously, **held**: the second limb of s 2(2)(b) could not be met. Leaving the horse's weight to one side – as a normal characteristic of horses in particular circumstances, a horse may bolt or do some uncontrolled movement, if given a severe fright. In this case, however, Chance was not given any fright, because C, driving his car, approached the horses with caution, at 15mph, and moved to the centre of the road, giving plenty of room for Chance on the verge. Hence, there were no 'particular circumstances' which could trigger the second limb of s 2(2)(b).

- C may fail to adduce any evidence on the point of whether the animal's behaviour was normal in the particular circumstances:

In *Freeman v Higher Park Farm*,¹³⁴ Miss Freeman, C, was an experienced horsewoman who had been riding for 40 years. She fell from a horse, Patty, supplied by D, at an equestrian and riding centre, on an outing organised by D on Chobham Common. She fell when the horse gave two or three large

¹³² [2006] EWCA Civ 978, [19]. ¹³³ [2006] EWCA Civ 978. ¹³⁴ [2008] EWCA Civ 1185, especially at [27].

bucks as it was beginning to canter. As a result she suffered head and other injuries. **Held:** the first limb of s 2(2)(b) was not met, because bucking *was* a normal characteristic of horses generally. The second limb was not met either. The relevant question for the second limb was 'whether it is normal for horses generally to buck, when beginning to canter', but C adduced no evidence on that point, so no conclusions about the second limb could be drawn.

- the animal's behaviour was due to a characteristic always found in that species of animal, in all circumstances:

In *Gloster v Greater Manchester Police*,¹³⁵ facts previously, **held:** s 2(2)(b) could not be met (according to Pill LJ – Hale LJ did not express a definitive conclusion on this issue). It was a hallmark of the breed of German Shepherd, including police dog Jack, that those dogs have the ability to respond to specific training and instruction, such as to attack persons in some circumstances which the dog was trained to recognise. That was a characteristic normally found in this breed, which made it such a suitable dog for police training. It was the ability to respond to training which was the relevant characteristic present in all circumstances. Hence, the limb failed, because what happened was entirely characteristic of German Shepherd dogs: 's 2(2) was not intended to cover German shepherd dogs acting in accordance with their character'

However, and despite these 'escape hatches' for D, undoubtedly s 2(2)(b)'s second limb has been judicially construed in a way which favours C. Most scenarios to do with a misbehaving animal fall within it – because the animal was not acting normally in all circumstances, but it was behaving normally for the particular circumstances which prevailed when the incident occurred.

Element #4: Satisfying condition 2(2)(c)

Under this third statutory criterion (which was judicially said in *Goldsmith v Patchcott* to be 'a more coherent requirement'¹³⁶ than the other two), the relevant characteristics of the animal must be *known* to the keeper or to others linked to the keeper (i.e., a child under 16 in the keeper's household who has the animal, or an employee of the keeper who is in charge of it).

The condition requires proof of actual knowledge – as confirmed in *Welsh v Stokes*,¹³⁷ constructive knowledge (i.e., what D ought to have known) is not sufficient to fix D with liability.

SAN.23 D must have known of the animal's characteristics which led to C's injury. This can be proven where *either* D knows of the offending animal's dangerous propensities because the animal has behaved that way previously, *or* D knows the animal's dangerous behaviour to be a characteristic of the species, whether in general, or in the particular circumstances in which C's injury was caused.

D may have **both** types of knowledge noted in this principle, but only one is required to satisfy the condition.

In *McKaskie v Cameron*,¹³⁸ facts previously, C was injured when walking along a footpath, and attacked by D's cows, which had just calved. **Held:** s 2(2)(c) was satisfied. D knew that his cows (and that cows in general) could act aggressively if they became stressed, or after calving, and that this could occur if a walker was accompanied by a dog, as the cow would perceive that to be a danger to it or to its calves. D knew of those tendencies, both specifically, and generally of the species. In

¹³⁵ [2000] EWCA Civ 90, [2000] PIQR P114, 119. ¹³⁶ [2012] EWCA Civ 183, [41] (Jackson LJ).

¹³⁷ [2007] EWCA Civ 796, [66] (Dyson LJ). ¹³⁸ (Preston CC, 1 Jul 2009).

Curtis v Betts,¹³⁹ facts previously, D knew that their two dogs had the habit of jumping up at the school gate in the playground, and growling and snarling at passers-by. **Held:** s 2(2)(c) was proven. D knew of Max's relevant characteristic, namely his tendency to react fiercely when defending what he regarded as his own territory.

If the offending animal has **never** shown the particular characteristic before, C can still establish D's liability by pointing to the fact that D knew that the species of animal *in general* could exhibit that characteristic. This is, again, a construction of s 2(2)'s conditions which is very favourable to C – if the culprit animal has never behaved that way previously, D can **still** be fixed with liability.

In *Welsh v Stokes*,¹⁴⁰ facts previously, **held:** s 2(2)(c) was met. D, the owner of the horse yard, had no specific knowledge that Ivor, the horse which reared and fell onto rider, C, had the characteristic of rearing when out riding on a roadway. However, D, 'as experienced keepers of horses, would have known that Ivor, like any horse of his kind, was capable of rearing'. In *Turnbull v Warrener*,¹⁴¹ facts previously, **held:** s 2(2)(c) was met. D was an experienced horsewoman, who was aware that a new bitless bridle with which horse Gem was unaccustomed, should be tried out in an enclosed environment, and slowly at first. She was aware that horses may react unpredictably on using equipment with which they are unfamiliar. D was present when Gem was being taken through some walking in an enclosed environment, and then considered that a gentle canter would be appropriate. There was an 'evidential foundation for a finding of knowledge' on D's part. It did not assist D to say that Gem had never before disobeyed his rider's instructions or failed to respond to his rider's attempts to control him.

It seems to be a very rare instance where the animal's behaviour was so unusual and a one-off that D could not be fixed with the requisite knowledge that either animals generally, or this animal in particular, could behave in the way that the animal did. Nonetheless, such scenarios can exist:

In *McKenny v Foster (t/as Foster Partnership)*,¹⁴² facts previously: **held:** s 2(2)(c) was not met. The characteristic of the cow which escaped – agitation resulting from the cow's normal maternal instinct upon being separated from her calf, so that she was in the state of an excited, wild animal, plus her exceptional long- and high-jumping ability – were not known to D. Simply put, the cow had no known propensity to jump as she did, nor was it known of the species in general.

A problem with s 2(2)(c) is that a keeper, D, who is completely unfamiliar with the ways of animals, is more likely to escape liability under this provision than a professional keeper of animals who will be better aware of the propensities of those animals – an anomaly which Lord Scott (dissenting) in *Mirvahedy v Henley*¹⁴³ considered to be yet another problem of this statutory regime.

The flawed implementation of Parliamentary intention under s 2?

Some senior English judges believe that the Animals Act 1971 is giving rise to far more liability for D than was ever intended by Parliament, and that it has departed too far from the recommendations of the Law Commission.

In *Mirvahedy*, Lord Scott (dissenting in the outcome) was of the view that the only scenario in which the keeper of a non-dangerous animal (say, a biting dog) should be liable under the Act, was where that animal caused injury due to 'abnormal characteristics that it was known

¹³⁹ [1990] 1 WLR 459 (CA) 463 (Slade LJ). ¹⁴⁰ [2007] EWCA Civ 796, with quote at [62], and also [71].

¹⁴¹ [2012] EWCA Civ 412, [26]. ¹⁴² [2008] EWCA Civ 173. ¹⁴³ [2003] 2 AC 491, [119]–[120].

by its keeper to possess. This seems to me to be a coherent policy.¹⁴⁴ That is, domestic animals which behave in a normal manner and which cause injury to C in doing so, were never intended to fall within the rubric of the Act at all. Rather, they should be dealt with by *the cause of action in negligence* (so that D would be liable if he failed to exercise reasonable care to see that the domestic animal did not cause damage when behaving ‘normally’).

In *Turnbull v Warrener*,¹⁴⁵ all of the Court of Appeal judges expressed real disquiet about how s 2(2) has been judicially interpreted so strongly in C’s favour. Maurice Kay LJ called Lord Scott’s abovementioned view ‘compelling’.¹⁴⁶ Stanley Burnton LJ also considered that, under the Act, there ‘is no significant difference’ between the liability of the keeper of a wild animal and that of a keeper of a domesticated animal – both can be strictly liable under the Act, the former under s 2(1) and the latter under s 2(2) – and that ‘I have no doubt that that was not the intention of Parliament in enacting the Act.’¹⁴⁷ In the same case, Lewison LJ outlined just how the Animals Act had departed from the views of the Law Commission.¹⁴⁸

For convenience, some of these important differences pointed out by Lewison LJ are outlined in the Table below:

A COMPARISON OF THE ENGLISH LAW COMMISSION REPORT, AND HOW THE ANIMALS ACT HAS EVOLVED	
What the Law Commission intended	What has occurred under the Act
for an animal belonging to a non-dangerous species (say, a dog), strict liability should be imposed on its keeper, D, if C’s injury results from dangerous characteristics of the particular animal which are actually known to D. That is because D is ‘equally the creator of a special risk if he knowingly keeps a savage Alsatian as if he keeps a tiger’. The same strictness of liability should attach to each. ^a	the scope of strict liability has considerably widened – to cover injury caused by non-dangerous animals, which goes beyond where dangerous characteristics of that animal were actually known to D, as keeper of the animal. Even where an Alsatian is not known to be ‘savage’ because the dog has no prior history of misbehavior but is normally docile, D can be liable under s 2(2)(b), because D should know that aggressive behaviour can be a feature of Alsatians as a species if they are guarding their territory (i.e., that trait can be displayed in particular circumstances). Even if C gets thrown off a horse on its becoming frightened, the behaviour of rearing or bolting are seen as normal characteristics in the circumstances of the horse becoming frightened, and hence, D is liable for any injuries caused by the ‘normal characteristic’ of the horse in those circumstances.
for an animal belonging to a non-dangerous species, strict liability should be imposed on D only if the act of the animal was in the nature of an ‘attack’ – it should not include behaviour which, although it caused damage, is only frolicsome. ^b	the scope of strict liability attaches to D, where his animal does not ‘attack’, but merely acts as animals of that species have a propensity to do. A horse which bolts because it is frightened, throwing its rider, C, is not ‘attacking’ C nor fiercely aggressive towards C, yet D will potentially be liable for C’s injuries.

^a *Civil Liability for Animals* (Rep 13, 1967), Pt A, [17].
^b *ibid*, [6].

¹⁴⁴ [2003] UKHL 16, [2003] 2 AC 491, [130].

¹⁴⁵ [2012] EWCA Civ 412.

¹⁴⁶ *ibid*, [18].

¹⁴⁷ *ibid*, [37].

¹⁴⁸ *ibid*, [43]–[54].

Dogs which do damage to C's livestock or property

SAN.24 Under s 3 of the Act, where a person, C, owns livestock which is killed or injured by D's marauding dog (where D is the keeper of that dog), then D is strictly liable to C for that damage to his livestock.

The damage covered by s 3 must be caused by a dog which D, as keeper of the animal, controls. The liability of D will typically equal the money required for the reinstatement of C's livestock which was injured or destroyed by that dog. According to s 11, damage to any of the following livestock of C will be sufficient to invoke D's liability under s 3: cattle, horses, asses, mules, hinnies, sheep, pigs, goats and poultry, deer not in the wild state, and pheasants, partridges and grouse (while in captivity).

Furthermore, a person whose livestock is being worried by D's marauding dog may kill or injure D's dog with justification, if 'that person acted for the protection of any livestock', and if that person informs a police officer that the dog was killed or injured within 48 hours of the event, per s 9(1). In other words, s 9 provides a complete defence for the livestock owner, against the keeper of that dog. This defence on the livestock owner's part encapsulates the common law. Indeed, the defence conferred by s 9 extends to any person who *owns the threatened livestock*, or who owns *the land* upon which the threatened livestock resided, or who was *acting under the authority* (express or implied) of the person who owned the livestock or the land, when destroying the dog (per s 9(2)).

In *Cresswell v Sirl*,¹⁴⁹ Mrs Cresswell owned a bull terrier dog, which chased sheep in a field on a moonless night and penned them in a pigsty. The sheep were terrified, and several of the sheep later aborted. Mr Sirl, whose father owned the sheep, went into the field and shot and killed Mrs Cresswell's dog, as it left the sheep and was coming towards him aggressively. **Held:** Mr Sirl's father's sheep were in real or imminent danger of being injured or killed by Mrs Cresswell's dog, and any reasonable man would have shot the dog if the sheep were to be preserved. The shooting of the dog was entirely justified, and Mrs Cresswell could have no claim against Mr Sirl for that loss.

In *Cresswell*, the dog which was shot by Mr Sirl was actually in the act of worrying his father's sheep. To what extent s 9 would apply, if the offending dog had left the animals and was in a nearby empty field when it was shot (as in the Northern Ireland case of *Eccles v McBurney*¹⁵⁰) has been expressly clarified by s 9(3) – the entitlement to shoot the marauding dog applies, whenever '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 'the dog has been worrying livestock, has not left the vicinity, is not under the control of any person, and there are no practicable means of ascertaining to whom it belongs.'

Damage done by D's straying livestock or horses

Straying onto C's land

SAN.25 Under s 4 of the Act – which replaced the old cattle trespass doctrine – where D is in possession of livestock (except for horses) which strays onto land owned/occupied by C, and harms

¹⁴⁹ [1948] 1 KB 241 (CA).

¹⁵⁰ [1959] NI 15, and referred to in: Irish LRC, *Civil Liability for Animals* (WP 3, 1977) [76].

either the land or the property of C, then D is strictly liable for the damages and expenses caused. No proof of negligence on D's part is required. A similar provision applies, under s 4A of the Act, in relation to any horse which is 'on any land in England without lawful authority'.

These provisions replace the common law cattle trespass doctrine, but the strict liability approach of the common law doctrine is retained.

Section 4 clarifies some key aspects of the old doctrine (at the recommendation of the English Law Commission whose report preceded the Animals Act 1971¹⁵¹ – '[t]here can be little doubt that this part of the law is afflicted with archaic and doubtful rules, and rather than attempt to patch up parts of the present law relating to cattle trespass, we think it preferable to provide a new statement of the principles of strict liability for straying livestock'). More recently, similar provisions to s 4 have been enacted, in s 4A, specifically in relation to straying horses¹⁵² (and s 4 itself no longer applies 'in relation to horses on land in England', per s 4(3)). In summary, these statutory provisions in ss 4 and 4A provide for the following:

- according to s 11, damage caused by any of the following straying livestock which belongs to (i.e., is in the possession of) D, will be sufficient to invoke D's liability under s 4: cattle, asses, mules, hinnies, sheep, pigs, goats and poultry, and deer not in the wild state. As noted above, horses which are on another's land 'without lawful authority' (per s 4A(1)) are now governed by the separate provisions in s 4A;
- the livestock or horses do not need to stray from D's land which he owns or occupies – all that is required, under s 4(2) and under s 4A(3), respectively, is that the livestock 'belongs' to D, where 'belongs' means that D possesses it. (However, where the livestock strays from D's possession *onto a road* and then onto C's land, then the defence in s 5(5), discussed below under 'Defences', is potentially relevant, and a similar defence applies to straying horses, under s 5(5A).)

In *Matthews v Wicks*,¹⁵³ Mr Matthews, D, lived in Cinderford, and had run sheep in the Forest of Dean since he was 12. His ewes were in lamb, and wandered from the common land during the night, including grazing and wandering around on Victoria St. In the morning, 23 of his sheep entered the garden of Mr and Mrs Wicks, C, from Victoria St, where they damaged many plants. **Held:** *prima facie*, C had a claim under s 4, given that D's ewes, which belonged to him and which were on Victoria St, had strayed into C's garden. This was subject to a consideration of several defences, below, which did **not** apply for D's benefit.

- the straying of livestock or horses is not actionable *per se*, but requires proof of actual damage. Under s 4(1) and s 4A(2), respectively – and notwithstanding that 'damage' is defined far more broadly in s 11 of the Act – the damages recoverable under s 4 (for straying livestock) and under s 4A (for straying horses) are restricted to damage to C's land and property (which would include things growing on the land, buildings attached to C's land, and C's chattels), and any reasonable expenses incurred by C in keeping the livestock or horses under the right of detention.

¹⁵¹ *Civil Liability for Animals* (Rep 13, 1967) [63]–[66].

¹⁵² Inserted by the Control of Horses Act 2015, s 4.

¹⁵³ (CA, 1 Jan 1987).

Thus, even though personal injury to C was covered under the old cattle trespass doctrine (per *Wormald v Cole*,¹⁵⁴ where C was awarded damages for cattle trespass, when she was knocked down and injured by D's trespassing heifer as it was blundering about in her garden), the Legislature has ruled out the recovery for personal injury under s 4(1)(a) (for straying livestock) and under s 4A(2)(a) (for straying horses). Further, given the careful drafting of these provisions, it is most unlikely that any pure economic loss caused by the straying of D's (say, disease-carrying) animals would be recoverable by C either. Where C does suffer these types of damage or loss arising from D's straying livestock, then C must seek to claim against D in negligence – for which a lack of reasonable care on D's part must be proven, of course. This leads to the somewhat anomalous result (as noted by the English Law Commission too¹⁵⁵) that personal injury requires the more difficult task of proving negligence, whilst property damage permits the easier route of strict liability under the Act;

- the right of action under s 4(1) (for straying livestock) and under s 4A(2) (for straying horses) is extended to a person, C, who either owns or occupies the land onto which D's animals stray. This originally stemmed from the recommendation of the English Law Commission¹⁵⁶ that, 'the occupier of the land strayed upon should, in most cases, be the only person able to claim on the basis of strict liability. We recognize, however, that in some cases such an unqualified rule could lead to undesirable results, and we therefore recommend that an owner of land who is not in occupation should be able to rely upon the rule of strict liability, insofar as his interest in the land or in chattels on the land has suffered damage';
- what is meant by 'straying' in s 4 is not legislatively defined. It clearly requires some sort of entry of D's animal onto C's land, however minuscule or 'technical'¹⁵⁷ that trespass may be.

In *Ellis v Loftus Iron Co*,¹⁵⁸ D's stallion bit and kicked C's mare on C's land. The stallion only reached its neck over the boundary of C's land and its hoofs penetrated through the hedge fence. **Held:** C could recover damages for the harm done to his mare by the stallion.

Straying onto a highway

This topic is now governed solely by the common law of negligence, given the enactment of s 8(1), as discussed previously in this chapter.¹⁵⁹ C, who is injured whilst travelling along a road when encountering D's animal, must prove that D lacked reasonable care as keeper of that animal, which caused C's injuries. Hence, claims such as *Mirvahedy v Henley* were capable of being brought in negligence, precisely because of the abolition of the rule in *Searle v Wallbank*.

Combining the scenarios

The vagaries and complexities of this area of tortious liability for animals – as evident from the provisions of the Animals Act 1971, and the case law canvassed above – is best demonstrated by the diagram overpage.

The diagram does rather belie the hopes of the English Law Commission that, in replacing the old cattle trespass doctrine, its purpose was to 'provid[e] a relatively simple rule'.¹⁶⁰

¹⁵⁴ [1954] 1 QB 614 (CA). ¹⁵⁵ *Civil Liability for Animals* (Rep 13, 1967) [61].

¹⁵⁶ *ibid*, [66]. ¹⁵⁷ *ibid*, fn 95. ¹⁵⁸ (1874) LR 10 CP 10, and cited *ibid*, fn 92. ¹⁵⁹ Cross cite pp 78, 86–87.

¹⁶⁰ *Civil Liability for Animals* (Rep 13, 1967) [65].

Straying animals		
D's animals stray from this land onto this road, causing injury to C, a road user	... and then passing over the road, and then onto C's land, causing damage to C's livestock or property:
	<i>D can only be liable in negligence (given that the rule in Searle v Wallbank is now abolished by s 8(1))</i>	<i>It would seem, from Matthews v Wicks, that D is strictly liable under s 4 (or under s 4A, if the culprit is a horse). However, negligence is still highly relevant, because in this particular instance where animals stray from a road, the defences in s 5(5) and in s 5(5A) potentially apply (per box below)</i> <i>In the case of personal injury to C, negligence is again the only available claim for C</i>
... onto C's adjacent land, causing damage to C's livestock or property: <i>D is strictly liable (without proof of negligence) under s 4 (which codifies the old cattle trespass doctrine) and s 4A (which applies to straying horses)</i> or onto C's land, causing personal injury or pure economic loss to C: <i>D can only be liable in negligence (s 4 and s 4A do not apply to this type of damage)</i>	D's animals stray from this road onto C's land, causing livestock or property damage: <i>D is not strictly liable under s 4 for any such damage caused by his animals straying from the road to C's land if the animals were using the road lawfully, under the s 5(5) defence. For straying horses under s 4A, a similar defence applies under s 5(5A). However, according to case law, the defence is lost, and D remains strictly liable under s 4, if D was negligent in allowing the animals to stray from the road (discussed below)</i> onto C's land, causing personal injury or pure economic loss to C: <i>D can only be liable in negligence (s 4 and s 4A do not apply to this type of damage)</i>

Remoteness

SAN.26 It remains unsettled as to whether the damage or loss suffered by C must have been reasonably foreseeable in order to be recoverable, where an action based upon strict liability is brought under the Act, whether under ss 2, 3 or 4.

In its preceding 1967 report, the English Law Commission did not allude to whether damage might be too remote to be recoverable in an action under the Animals Act 1971. Later, in its 1977 report, the Irish Law Reform Commission¹⁶¹ noted that remoteness may figure in animal-related negligence cases, where D may seek to prove that the damage to C was not reasonably foreseeable (e.g., that the conduct of a bitch with a litter of pups, or a mare in season, was too unusual to be foreseeable), but did not refer to the issue as arising under the Animals Act 1971.

¹⁶¹ *Civil Liability for Animals* (Rep 3, 1977) [68].

Indeed, there have been no cases decided under the Act since, which turned on this point, so far as the author's searches can ascertain. However, it has certainly been submitted in counsel's argument (in *Bedfordshire Police Authority v Constable*¹⁶²) that in strict liability cases, under both the Animals Act and the principle in *Rylands v Fletcher*, the ordinary principles of causation and remoteness should apply.

Whilst the court did not need to deal with the issue in *Bedfordshire*, the analogies between those strict liability regimes – in which D may be liable, notwithstanding that he has exercised all due care to prevent the escape or injury – suggest that a remoteness enquiry is properly part of a legal analysis under the Animals Act 1971. It will be seen¹⁶³ that the common law strict liability principle of *Rylands v Fletcher*¹⁶⁴ is now subject to the requirement that knowledge, or at least foreseeability of the risk, of the damage caused by the escape, is a prerequisite for the recovery of damages, per *Cambridge Water Co v Eastern Counties Leather plc.*¹⁶⁵ This was justified (in part) in *Cambridge Water*, on the basis that, in *Rylands*, Blackburn J spoke of something 'which [D] knows to be mischievous if it gets on his neighbour's property', and the liability to 'answer for the natural and anticipated consequences'. In the same judgment, Blackburn J also referred to escapes by animals as giving rise to strict liability on a similar basis, referring to 'a person whose grass or corn is eaten down by the escaping cattle of his neighbour'. Given this close connection, it is submitted that the doctrine of *Cambridge Water* applies to the Animals Act 1971 too, notwithstanding that nothing to that effect is expressly stated in the statute.

It appears that the damage suffered by C does not need to be direct to be recoverable. Precedent under the former doctrines of *scienter* and cattle trespass confirmed that the harm done by the animal did not have to arise because the animal carried out its propensity to attack, bite, scratch, buck, kick, etc – and that, provided that more of these injuries were foreseeable, D would be liable.

In *Behrens v Bertram Mills Circus Ltd*,¹⁶⁶ Johannes Behrens, C1, and his wife, Emmie, C2, were dwarfs. C1 was 30 inches tall, and claimed to be the smallest man in the world, whilst his wife was 36 inches tall. C frequently joined fairs and circuses, including Bertram Mills Circus, D, where they were exhibited in a booth so that members of the public could view them for a fee. D also kept performing animals, including six Burmese elephants. Cs' booth was in a passageway leading from the funfair to the circus ring, and the elephants passed this way several times a day. One day, Cs' manager had a small dog with him on the premises, against D's rules. As the elephants passed by, the dog ran out barking and snapping at one of them, Bullu. Bullu turned and went after the dog, and Cs' booth was knocked down. C2 was seriously injured by falling parts of the timber booth. Bullu did not directly attack either C1 or C2. An action for *scienter* (for breach of a strict duty on the keeper of a dangerous animal to confine and control it) was brought against D. **Held:** D was liable. Given that an elephant was loose in the funfair and stampeding around, C's injury caused by a crashed booth was compensable. In *Behrens*, hypothetical examples were given by Devlin J: if a tiger escapes and turns up amiably sitting on C's bed, but C has a heart attack when he wakes up and see it sitting there, that would be compensable. If that tiger is let loose among a funfair, and C sees it and runs away in terror, and falls over something and injures himself, that would be compensable too. In *Wormald v Cole*,¹⁶⁷ facts previously, C sued D in cattle trespass. **Held:** D was liable. The trespassing heifer did not attack C, but only knocked her down whilst she was trying to get it out of her garden.

¹⁶² [2008] EWHC 1375, [71] (Walker J). ¹⁶³ See Chapter 17.

¹⁶⁴ (1866) LR 1 Exch 265, aff'd: (1868) LR 3 HL 330. ¹⁶⁵ [1994] 2 AC 264 (HL).

¹⁶⁶ [1957] 2 QB 1, examples at 17–18. ¹⁶⁷ [1954] 1 QB 614 (CA).

Suffering injury from being knocked over by a frightened animal blundering about, or suffering a heart attack from seeing a tiger on one's bed, are foreseeable injuries, even if they are not directly connected with the physical characteristics of the animal.

In respect of a claim brought by C under the Act, it is now necessary to turn to the numerous defences available to D whose animal has caused C injury or loss. The defences differ, depending upon which type of claim is being brought – a claim for damage caused by dangerous or harmless animals (under s 2); a claim for damage done by D's dogs (under s 3); or a claim for damage caused by D's straying livestock (under s 4).

Statutory defences for D's liability under s 2

The Animals Act 1971 provides for three statutory defences for D who is *prima facie* liable under s 2. These defences are available, whether or not D's offending animal belongs to a dangerous species.

SAN.27 The three defences available to D under the Animals Act, for liability under s 2, consist of the following: the damage was due wholly to the fault of C; C voluntarily accepted the risk of damage; or C was a trespasser. Although the conditions laid down in s 2(2) are relatively easy for C to establish (given how they have come to be interpreted), some balance is restored in D's favour by the generous way in which these defences have been interpreted.

The importance of these defences, for those whose animals do harm to others, cannot be over-estimated. As Jackson LJ noted in *Goldsmith v Patchcott*, '[d]efences of this nature assume particular importance in cases of strict liability imposed by statute ... they provide an escape route for [D] who face tortious liability, even though their conduct was neither negligent nor otherwise culpable'.¹⁶⁸ Earlier, in *Cummings v Granger*, Ormrod LJ made the same point, that where D's liability under the Animals Act 1971 was not based upon either negligence or fault, but was 'a strict liability situation', then the defences contained in that Act 'are very important and ought not to be whittled away. To be fair to [D] and to be fair to [C], each of them must have their full statutory rights'.¹⁶⁹

More than one statutory defence may be available to D on the facts (e.g., as in *Cummings v Granger*¹⁷⁰ and *Jones v Baldwin*¹⁷¹).

Damage wholly due to the fault of C

SAN.28 If C has been 'wholly at fault' for his own damage, then D is not liable. However, once D, as the keeper of the animal, is found to have been liable for some 'fault' – whether that be in negligence or in some other respect – then it is impossible to say that C was 'wholly at fault'. The defence simply cannot apply where D was negligent or at fault in some way.

This defence is provided by s 5(1). It applies to liability arising under ss 2, 3, 4 and 4A. Under s 11 of the Animals Act 1971, and in the context of this defence, 'fault' means the same as it does in s 4 of the Law Reform (Contributory Negligence) Act 1945, i.e., 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort'.

¹⁶⁸ [2012] EWCA Civ 183, [45]. ¹⁶⁹ [1977] 1 QB 397 (CA) 407.

¹⁷⁰ *ibid*, 408 (Ormrod LJ), 410 (Bridge LJ). ¹⁷¹ (Cardiff CC, 12 Oct 2010).

In *Turnbull v Warrenner*,¹⁷² facts previously, **held**: D could not rely on the s 5(1) defence. The trial judge had held that D could rely on s 5(1), because C was 'wholly at fault in cantering off on Gem, ... using a bitless bridle, before testing him adequately with that piece of equipment ... in closed and/or open conditions'. However, given that C and D were both experienced horsewomen, D, the animal's keeper, could have insisted on Gem being cantered in an enclosed space before C rode Gem in a field, but she did not. For that, D was partly at fault. Hence, on appeal, to hold that C was 'wholly' at fault could not co-exist with that finding.

In *Jones v Baldwin*,¹⁷³ Mr Barrie Jones, C, was an experienced equestrian trainer, who was participating in a horse competition. He was riding in the ring on a well-behaved horse, Ryder, but there was also in the ring a misbehaving horse, Joshua, owned by Ms Tanya Baldwin, D. When C passed close by to Joshua, that horse kicked out, and broke C's leg. **Held**: D could rely on the s 5(1) defence. The reason that Joshua gave a double-barrelled kick was that he felt threatened by C and his horse approaching him from behind and coming too close to him. C should have given the agitated animal a wider berth, and was 'wholly at fault'.

Voluntary acceptance of risk

SAN.29 Where C has 'voluntarily accepted the risk' of damage caused by D's animal, then D has a good defence. That statutory defence, whilst a complete defence, is *not* strictly equivalent to the defence of *volenti* at common law.

This defence is provided by s 5(2), and only applies to liability under s 2. It has two constituent elements: that C (1) fully appreciated the risk, and (2) exposed himself to it (per *Freeman v Higher Park Farm*¹⁷⁴).

Although the wording of s 5(2) calls to mind the common law doctrine of *volenti*, that sentiment has been judicially disavowed. The reasons for a lack of parallel between *volenti*, and s 5(2), are two-fold. First, the complexities of *volenti* were best avoided. In *Freeman v Higher Park Farm*, Etherton LJ said that '[t]he words of section 5(2) are simple English, and must be given their ordinary meaning and not be complicated by fine distinctions, or by reference to the old common law doctrine of *volenti*'.¹⁷⁵ Secondly, as explained by Ormrod LJ in *Cummings v Granger*, *volenti* developed in the context of fault-based liability in negligence, whereas s 5(2) applies in the different context of *strict* liability.¹⁷⁶ Where D is facing strict liability, then 'statutory words which provide exceptions to that liability should not be narrowly construed or applied' (per *Flack v Hudson*¹⁷⁷).

Certain propositions have flowed from s 5(2):

Comparative knowledge and experience. If C has significant knowledge as to the unpredictable nature of animals, or of that particular animal who did the damage – and what ought to have been done to minimise the risk of injury occurring, but deciding to proceed anyway – then the defence is likely to be established. C will be taken to have fully appreciated the risk of what he was doing, and exposed himself to it. In all of the following cases, the facts of which have been previously described, D could rely on the s 5(2) defence:

¹⁷² [2012] EWCA Civ 412, [7]. ¹⁷³ (Cardiff CC, 12 Oct 2010) [60]–[62].

¹⁷⁴ [2008] EWCA Civ 1185, [48]; and see, earlier: *Cummings v Granger* [1977] QB 397 (CA) 410 (Bridge LJ).

¹⁷⁵ *ibid*, [48]. ¹⁷⁶ [1977] QB 397 (CA) 408 (Ormrod LJ). ¹⁷⁷ [2001] QB 698 (CA), [38], citing the trial judge.

In *Turnbull v Warrener*,¹⁷⁸ C was an experienced horsewoman, and her knowledge and experience of what could happen with a horse using a bitless bridle for the first time (i.e., an increased risk of not being responsive to a rider's instructions) was just as significant as that of D, the owner of Gem. C also knew that, when she took Gem into the open, he had not yet cantered when fitted with the bitless bridle. In *Goldsmith v Patchcott*,¹⁷⁹ whilst the horse, Red, was normally docile, both C and D knew that 'horses could buck when startled or alarmed'. The fact that Red would buck so violently could not be anticipated, but it was not a condition of the defence that C 'could foresee the precise degree of energy' which Red would display. C knew of the inherent characteristics of horses in general, including their possibility of bucking, and chose to ride, knowing of the risks.

On the other hand, where there is a significant disparity of knowledge, with D knowing far more about the characteristics of either D's particular animal, or of that species of animal in general, the defence will be unsuccessful for D, as it was in both of the following (and previously-considered) cases:

In *Flack v Hudson*,¹⁸⁰ D knew that her horse, Sebastian, had a specific risk-creating characteristic (i.e., fear of agricultural machinery) but C, the rider who received fatal injuries, did not know of that particular characteristic of Sebastian's at all; she had not been alerted to the horse's aversion to agricultural machinery. As a mother of four young children, C would not have ridden the horse if she had been informed of the specific risk. In *McKaskie v Cameron*,¹⁸¹ C, crossing the field while walking her dog, did not fully appreciate the risk which was involved in attempting to cross the field, when there were cows with calves at foot there. Until it was too late, she may not have seen any cattle of any sort. Hence, it could not be said that she exposed herself to this risk.

Assuming the risk by statements and behaviour. Where the facts indicate that C was fully prepared to take on the risk posed by D's animal and expressly confirmed that, by words and behaviour, the defence will be proven, as in the previously-considered cases below:

In *Freeman v Higher Park Farm*,¹⁸² C had been riding horses regularly for nearly 40 years. She told the stable-hands at D's riding centre that she was an experienced rider, and looking for an exciting ride on 'a forward-going horse'. D's employees told C, before she went out on the ride, that Patty was a horse which occasionally bucked when going into a canter, but not of the sort to cause a problem to an experienced rider such as C. Patty bucked once, and C was asked by D's employee if she was alright and wished to continue, and she said 'yes'. D's employee then asked all riders whether or not they agreed to canter a second time, and C said 'yes'. There was no question of C's being forced to carry on riding after the first big buck. C was aware of Patty's general predisposition to bucking, not only from what she had been told in advance at D's stables, but also because she had experienced the first significant buck on the ride. C had voluntarily assumed that risk and its consequences. In *Jones v Baldwin*,¹⁸³ facts previously, C gave statements in evidence indicating that he relished the risks and challenges which horse riding and competition presented, that 'there are big risks', and that 'I know that horses can get excited'. **Held:** D could rely on the s 5(2f) defence. C had a full appreciation of the risks that all the competitors were running in the ring that day.

Signage. If D erects a visible sign stating that an animal is on his premises, that will not, of itself, provide a s 5(2) defence for D, as keeper of the animal. However, it will help prove that

¹⁷⁸ [2012] EWCA Civ 412, [32]. ¹⁷⁹ [2012] EWCA Civ 183, [54], [59].

¹⁸⁰ [2001] QB 698 (CA) 707. ¹⁸¹ (Preston CC, 1 Jul 2009) [360].

¹⁸² [2008] EWCA Civ 1185, [7], [11]. ¹⁸³ (Cardiff CC, 12 Oct 2010) [60]–[62].

C had the requisite degree of knowledge to voluntarily assume the risk of entering the premises notwithstanding, as in the case below:

In *Cummings v Granger*,¹⁸⁴ Mrs Cummings, C, worked in the building next to D's scrap yard, and knew of the presence of the Alsatian dog in the yard, and also knew that it could be aggressive and vicious. C admitted that she was frightened of it. There was also a large warning notice on the gates of the yard saying, 'Beware of the Dog'. Hence, C voluntarily accepted the risk of damage, by entering the scrap yard at night; and it could not be said, realistically, that she was relying upon her boyfriend, Mr Hobson, to protect her.

However, and conversely, the failure to put up a warning sign may actually lose D the benefit of this defence. When *Cummings* was decided, the Guard Dogs Act 1975¹⁸⁵ did not apply, with its requirement that a person using a guard dog must erect a warning sign of that fact at each entrance to the premises.¹⁸⁶ However, in the modern era, if D, the keeper of the Alsatian guard dog, contravened that requirement, then even though that contravention technically only gives rise to a criminal offence on D's part,¹⁸⁷ it is also highly arguable that D would lose the benefit of the s 5(2) defence if a civil suit were brought by C for injuries incurred by the Alsatian – for how could it be sensibly said that C voluntarily assumed the risk of injury, when D was criminally liable for creating the environment in which those injuries occurred?

C's treatment of the animal. If C caused the animal to exhibit its dangerous characteristics, by treating the animal in a certain manner, then D may be able to rely on the s 5(2) defence, as in the case below:

In *Plum v Berry*,¹⁸⁸ C fell from a horse and suffered injuries when the horse she was riding bucked. Evidence showed that C had caused the animal to buck, through pulling too hard on the horse's mouth. **Held:** D, as keeper, could rely on the s 5(2) defence.

Forgoing protective equipment. If C decides not to wear protective equipment which may have prevented or minimised his injury from the animal – when C knew that such equipment would have done so, and when the risks posed by the animal were clearly known to C – then D may be able to rely on the s 5(2) defence, but that is not an absolute conclusion:

In *Bodey v Hall*,¹⁸⁹ Mrs Bodey, C, was an experienced horsewoman who had been driving with Mrs Hall, D, on 6–8 previous occasions, she knew the horse involved, Pepper, and she fully appreciated that there was a risk of injury from the trap tilting or tipping when she agreed to act as D's groom on the day of the accident. She decided not to wear a riding hat. However, riding hats did not have to be worn by law, and that it was largely a matter of personal preference. **Held:** C's failing to wear one did not prove the defence for D. Rather, the s 5(2) defence was proven because, as an experienced horsewoman who was familiar with the ways of Pepper, C fully appreciated the risk that she was exposed to whilst being driven by D in the trap.

The modern viewpoint of this defence. A liberal (i.e., favourable to D) reading of s 5(2) is consistent with the modern legal view that individuals who choose to embark on inherently-risky activities concerning animals should bear the responsibility themselves.

¹⁸⁴ [1977] 1 QB 397 (CA) 398, and cited in *Turnbull v Warrener* [2012] EWCA Civ 412, [32].

¹⁸⁵ See note 52 above. ¹⁸⁶ Section 1(3).

¹⁸⁷ Section 5(1), giving rise to a fine, but not conferring any right of civil action: s 5(2)(a).

¹⁸⁸ (Preston CC, 5 Nov 2004). ¹⁸⁹ [2011] EWHC 2162 (QB) [39], [42].

In *Turnbull v Warrener*,¹⁹⁰ Lewison LJ referred to *Tomlinson v Congleton BC*,¹⁹¹ in which the House of Lords noted: ‘Does the law require that all trees be cut down because some youths may climb them and fall? Does the law require the coastline and other beauty spots to be lined with warning notices? Does the law require that attractive waterside picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no’, and that any suggestion that D should be liable for such accidents ‘attacks the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk, and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen.’ Drawing upon that philosophy, Lewison LJ held that if C ‘chooses to ride horses for pleasure’, then ‘inherent in that activity is the risk that, on occasions, the horse will not respond to its rider’s instructions, or will respond in a way that the rider did not intend. That is one of the risks inherent in riding horses. That is all that happened in the present case.’¹⁹²

Trespassers

SAN.30 Where C is injured by D’s animal when trespassing on a premises or structure where D’s animal was kept, D has a complete defence if *either* D did not keep the animal there to protect persons/property; *or* the animal was kept by D to protect persons/property, and it was reasonable for D to keep the animal for that purpose.

The two limbs of this defence are available pursuant to s 5(3)(a) and (b) of the Animals Act 1971, and applies to liability incurred under s 2 only. Notably, the defence does not apply to a claim brought by C against D in occupiers’ liability – if D is an occupier of the premises where the animal did C the injury, then D’s duty of care to a trespasser is governed by the Occupiers’ Liability Act 1984 (as analysed in Chapter 12).

Under this section, an open field is not a ‘premises’ or ‘structure’ (per *McKaskie v Cameron*¹⁹³). In fact, that case clarified that ‘premises’ must be ‘enclosed in some way’, so part of a field cannot be ‘premises’ either.

In *Cummings v Granger*,¹⁹⁴ facts previously, **held**: D could rely on the s 5(3)(b) defence. The Alsatian dog was kept in the scrap yard to protect property in it. It was not unreasonable for D to do so. C was a trespasser, and hence, the conditions for the defence were met.

As noted above, the Guard Dogs Act 1975 would now apply to the *Cummings* scenario, and one of that Act’s further requirements is that guard dogs be kept under a handler’s control, or be appropriately secured.¹⁹⁵ Hence, any contravention of that obligation would likely mean that it was unreasonable for D to keep the guard dog for that purpose under s 5(3), where D was committing a criminal offence in doing so.

¹⁹⁰ [2012] EWCA Civ 412, [51].

¹⁹¹ [2003] UKHL 47, [2004] 1 AC 46, [81] (Lord Hobhouse). See also Chapter 10 and the discussion of ‘*Volenti*’.

¹⁹² [2012] EWCA Civ 412, [55]–[56]. ¹⁹³ (Preston CC, 1 Jul 2009) [356].

¹⁹⁴ [1977] 1 QB 397. ¹⁹⁵ Section 1(1).

Contributory negligence

SAN.31 C's contributory negligence may also be relied upon by D.

Contributory negligence applies, even if C's claim is restricted to a claim under the Animals Act, and with no negligence claim brought against D.

In *McKaskie v Cameron*,¹⁹⁶ facts previously, where C's claim was brought under the Animals Act, **held**: no contributory negligence succeeded against C, when she decided to walk into the field with her dog, with cattle in the field. There was no evidence that C walked too close to the cattle, that she even knew that D's cattle were in the field until she reached the ever-open gate, or that she knew that the cows had calves at foot which could present an additional danger. By the time the cows started trotting towards her, she could not take evasive action, and her dog did nothing to provoke the cows.

Statutory defences for D's liability under s 3

SAN.32 Where D is a keeper of a dog which kills or injures C's livestock, D is strictly liable to C, the owner of the livestock, for that damage under s 3, subject to three statutory defences.

D will have a defence to any liability under s 3, if one of the following applies:

- damage to C's livestock by D's offending dog was 'due wholly to the fault of [C]', per s 5(1);
- C's livestock strayed onto land, where the offending dog either belonged to the occupier of that land, or the dog's presence on the land was authorised by that occupier, per s 5(4); or
- the common law defence of contributory negligence applies, per s 10.

Statutory defences for D's liability under s 4 or s 4A

SAN.33 D has certain statutory defences available to him, where he has permitted his animals to stray onto C's land, causing harm to C's property or livestock, and giving rise to *prima facie* liability under s 4 (for straying livestock) or under s 4A (for straying horses).

Dealing with each defence in turn:

- It is a defence if the damage caused by the straying was 'due wholly to the fault of [C]', per s 5(1). Note that C's failing to fence his land to prevent D's animals encroaching is not C's 'fault' in and of itself, where there is no duty on C to fence his land, per s 5(6).

In *Matthews v Wicks*,¹⁹⁷ C were under no duty to fence their land, so the 5(1) defence did not apply.

- It is a defence where D's livestock strayed onto C's land from a highway, and the animals were lawfully using that highway, per s 5(5). A similar defence applies where a horse, which was lawfully present on a highway, strays from that highway, per s 5(5A).¹⁹⁸

¹⁹⁶ (Preston CC, 1 Jul 2009) [368]–[373]. ¹⁹⁷ (CA, 1 Jan 1987).

¹⁹⁸ Inserted by the Control of Horses Act 2015, s 4.

According to the English Law Commission,¹⁹⁹ the defence in s 5(5) (which was already endorsed at common law) recognised that C must take the inevitable risks of owning or occupying land adjacent to a highway.

In *Tillett v Ward*,²⁰⁰ D's ox was being driven by his employee along a town road, when it entered C's ironmonger premises, which adjoined the street, through the open doorway. C's goods were damaged. D was not negligent in the handling of the ox. **Held:** D was not liable for the damage caused.

However, the defence under s 5(5) is lost where D allows the animals to escape from the highway via negligence. In that event, the common law always provided – and still does – that C can sue for D's lack of reasonable care.

In *Gayler & Pope Ltd v B Davies & Son Ltd*,²⁰¹ Gayler, C, were drapers who ran their business from premises in Marylebone. Davies was a milk-run business, and an employee was delivering milk, via a pony and milk van, at 6.00am, when the pony, which was left unattended on the road, took fright, dashed through C's shop window, and damaged a large quantity of goods in the shop. **Held:** D was liable for the damage caused. A bolting horse left unattended in a public street showed a lack of reasonable care by D.

Moreover, if the animals were not 'using' the highway when they strayed onto C's land – and the general use of a highway is to pass along it – then the terms of the defence (whether in s 5(5) or in s 5(5A), the wording is similar in each) will not be met by D either.

In *Matthews v Wicks*, **held:** the defence in s 5(5) did not apply. The presence of D's sheep on Victoria Street did not constitute 'a lawful use of the highway', because the sheep were not passing along, they were merely grazing on its verges, and just generally wandering around at night.

- It is a defence if someone other than D, and having an interest in the land, had a duty to fence the land from which the animals (whether livestock under s 4 or horses under s 4A) escaped, and did not do so, per s 5(6). Although the English Law Commission gave no example of where this defence would be proven,²⁰² presumably it would apply if a lessor had a duty to fence the land, and it was the tenant's, D's, animals which caused the damage.
- The common law defence of contributory negligence may also apply, per s 10. As the Court of Appeal described in *Matthews v Wicks*,²⁰³ D must establish that C, 'failed to take such precautions which he ought reasonably to have taken in his own interests. It is not sufficient to show that, through mere misfortune or inadvertence, C has not effectively taken some precaution which would have prevented the damage.'

In *Matthews v Wicks*, **held:** the defence did not apply. C were aware of the risk of trespassing sheep in Victoria St, and they had walls and gates around their garden, which they checked were shut each night. The fact that the gate was not latched and secured that particular night must have happened through misfortune, but these things can 'easily happen'. It was mere inadvertence, not a failure by C to take reasonable care for their own protection.

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¹⁹⁹ *Civil Liability for Animals* (Rep 13, 1967) [67] and fn 97.

²⁰⁰ (1882) 10 QBD 17, noted *ibid*, fn 97. ²⁰¹ [1924] 2 KB 75.

²⁰² *Civil Liability for Animals* (Rep 13, 1967) [67] and fn 98. ²⁰³ (CA, 1 Jan 1987).