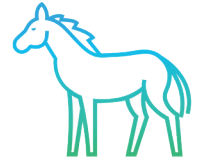


LIABILITY FOR DAMAGE CAUSED BY ANIMALS



CORE TOPICS:

- Liability for damage caused by animals under common law and statute.
- Defences available to rewilders responsible for animals.

KEY TAKEAWAYS:

- If you own or are responsible for an animal, you should take steps to ensure it does not cause injury or damage to third parties (including employees) or their property.
- There are important practical steps that should be taken to avoid accidents in the first place and minimise the risk of liability when they do occur.
- Damage or injury caused by animals may result in civil or criminal liability.
- Liability will always be fact dependent and may arise under common law and different legislation.

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1. PRACTICAL TIPS TO AVOID OR LIMIT POTENTIAL LIABILITY

There are some practical steps that can be taken to reduce the risk of being held financially and/or criminally liable for damage or injury caused by animals. In particular, a rewilder should:

- undertake regular and thorough risk assessments in relation to the risks posed to visitors by animals, taking into account areas of the project to which members of the public have access. The HSE has published [important guidance](#) on the interaction between animals and public access which should be followed. Key examples from this guidance which relate to animals and public access are highlighted in the *Rewilding in Scotland: Public Access* briefing. Acting in accordance with these risk assessments will help rewilders to demonstrate that they have acted in accordance with the duty owed to members of the public under the HSAW Act, the common law and also the Occupiers' Liability Act;
- ensure that they have the right insurance in place which covers any civil liability for damage or harm caused by animals;
- make explicitly clear, via signs or other notifications, whether the rewilding project is publicly accessible or not, if there is risk of harm by animals. This is to reduce the risk of animals causing damage or injury to members of the general public, and may help to fulfill a rewilder's duty of care towards third parties entering their land. Remember that the Land Reform (Scotland) Act 2003 gives everyone in Scotland the right to cross land, and access land for recreational, educational and limited commercial purpose; therefore, rewilders must be careful not to limit or restrict these access rights in the process. A landowner must act responsibly and balance their obligations to manage access, and health and safety considerations;

- erect/maintain fencing and/or other suitable barriers to ensure livestock, horses and other animals cannot escape and cause damage to neighbouring land or property or injury to third parties;
- seek targeted legal advice when the rewilding project is set up and the (re)introduction of animals is being considered. This may also include seeking evidence from experts that can ascertain whether an animal belongs to a "dangerous species"; and
- seek targeted legal advice if an animal causes damage or injury, including with respect to which defences may be available. This may also include seeking evidence from experts (biologists, veterinarians and other specialists) that can ascertain whether an animal belongs to a "dangerous species" or not.

2. LIABILITY UNDER THE ANIMALS (SCOTLAND) ACT 1987

2.1 Liability

The Animals (Scotland) Act 1987 ('**ASA87**') establishes strict liability offences which mean that the 'keeper' of certain types of animals could be required to pay monetary compensation for damages (including injury or death in certain instances) caused by those animals.

In order for liability to be established under the ASA87, three conditions must be met:

- the person involved must be the 'keeper' of the animal;
- the animal must be of a species covered by the Act; and
- the injury or damage must be directly referable to the physical attributes or habits of the animal concerned.¹

We will address each of these in turn.

First, a keeper of an animal is defined as someone who owns or has possession of that animal.² A person is not regarded as having possession of an animal by 'temporarily detaining it for the purpose of protecting it'. However, the keeper of the animal remains the keeper, even if the animal has been abandoned or has escaped, until someone else becomes the owner or possessor. When an animal is owned by one person, but another person is in possession of the animal, both parties can be jointly and severally liable. Therefore, a rewilder who owns livestock would be a keeper even if those livestock are grazed on someone else's land (i.e., someone else is in possession of them).

Second, the animal must belong to a 'species whose members generally are by virtue of their physical attributes or habits likely (unless controlled or restrained) to injure severely or kill persons or animals, or damage property to a material extent'³ (a 'Relevant Species'). This is a general definition and it will be for the court to decide in each case whether or not the animal concerned falls within the definition. Note that 'species' is widely defined to include 'a form or variety of the species or a subdivision of the species, or the form or variety, identifiable by age, sex or other such criteria as are relevant to the behaviour of animals ...'⁴

However, the ASA87 expressly defines two categories of animals which are deemed to satisfy the definition:

- The first category is dogs, and dangerous wild animals listed in the Schedule to the Dangerous Wild Animals Act 1976 ('**DWAA**')⁵ ("**Dangerous Wild Animals**"). The ASA87 states that this category of animals shall be deemed to be species which are likely 'to injure severely or kill persons or animals by biting or otherwise savaging, attacking or harrying'. Rewilders should note that whilst most of the animals listed in the Schedule to the DWAA are exotic, there are a number of native species which may be relevant to rewilders including wild horses, bison, reindeer, wolves, lynx and wild boar.

- The second category is ‘cattle, horses, asses, mules, hinnies, sheep, pigs, goats and deer’ in the course of foraging which are deemed likely ‘to damage to a material extent land or the produce of land’ (e.g., crops).⁶

Therefore, a rewilder may be strictly liable if their grazing animals damage a neighbour’s land or crops while foraging. However, they will not be strictly liable for injury or death caused by one of these species unless the court decides that the animal belongs to ‘a species. ... likely ... to injure severely or kill’ (see full definition above), and this will be considered on a case-by-case basis.

In contrast, where a rewilder is a ‘keeper’ of a dog, or a Dangerous Wild Animal, they will be strictly liable for any sort of damage, injury or death which is caused by that animal to the extent the damage is “directly referable to their physical attributes” (see below).

Third, the injury or damage must be directly referable to the physical attributes or habits of the animal concerned. The Act does not explain what this means, however, the obvious implication is that if the damage is only indirectly referable to the animal or if the damage does not arise from its attributes or habits, then the keeper will not be liable under the Act.

The ‘strict liability’ nature of offences under the ASA87 means that liability is effectively automatic if the three tests described above are satisfied. In addition, if a court were to consider whether such liability existed, it would not take into account whether the damage was foreseeable, or whether the keeper of the animal had taken steps to prevent such damage occurring, i.e., whether their actions were based upon negligence.

Finally, the ASA87 contains two limitations on the type of damage for which liability can be found under the Act. Under s.1(4), the Act ‘shall not apply to any injury caused by an animal where the injury consists of disease transmitted by means which are unlikely to cause severe injury other than disease’ and under s.1(5) the Act ‘shall not apply to injury or damage caused by the mere fact that an animal is present on a road or in any other place’. This second limitation could

be particularly important in situations where animals are free to roam on land crossed by public roads.

The legal position will be clear cut in some instances, and far more complicated and fact-specific in others. Litigation over the ASA87 for non-dangerous species may be particularly complex, since there are numerous tests that a case must pass before liability can be shown on the part of the owner or keeper of the non-dangerous animal.⁷

2.2 Exceptions to liability under the ASA87

There are three exceptions to liability set out in the ASA87⁸. A person will not be liable where:

- the injury or damage was due wholly to the fault of the person sustaining it; or in the case of injury sustained by an animal, the keeper of the animal;
- the person sustaining the injury or damage willingly accepted the risk of it; or
- the injury or damage was sustained on land which was occupied by a person who was a keeper of the animal which caused the injury or damage; and the person or animal sustaining the injury or damage was not authorised or entitled to be on that land.

The ‘keeper’ of the animal in question would have to prove only one of these three exceptions to avoid being held liable for the damage caused by that animal. However, these exceptions will not apply if the animal causing the injury or damage was kept on the land for the purpose of protecting persons or property, unless this is deemed reasonable in the circumstances, or the animal was a guard dog within the meaning of the Guard Dogs Act 1975.

To reduce or mitigate the risk of being held financially liable for damage caused by animals, it is advisable to take the practical steps discussed later in this note.

3. LIABILITY UNDER COMMON LAW

The ASA87 replaced old common law rules relating to strict liability for damage caused by animals. However, it is still possible for a person to be found liable for damage caused by animals under the common law rules, where it is established that a person’s careless actions or omissions caused reasonably foreseeable damage, i.e., that they were based upon negligence.

This means that incidents which are not covered by the ASA87, may be covered by common law. For example, section 1(3) of the ASA87 establishes that strict liability applies for an animal that by virtue of its physical attributes or habits is likely to injure people. The Act goes on to state in section 1(3)(a) that dogs are deemed in law to be likely to injure people by ‘biting, savaging, attacking or harrying’. However, what happens when a dog causes injury in a manner other than by attacking?

This was discussed in *Welsh v Brady* [2009]⁹. In this case, the pursuer was walking her dog in a field commonly used by dog walkers and was struck by a dog running off the lead. As a result, the pursuer fell and suffered injury. The dog had caused damage, but not by ‘biting, savaging, attacking or harrying’. The judge held that Section 1 of the ASA87 did not apply and that the case needed to be considered under common law negligence on the part of the owner.

On the facts, negligence was not established in that case: it was held that the likelihood of injury by a dog running free was not significant enough to impose a duty upon the defender to prevent it. However, had the damage been reasonably foreseeable, common-law liability would have been established. Rewilders should therefore be aware that, notwithstanding the ASA87, liability relating to damage caused by animals may be established under common law.

4. LIABILITY UNDER THE HEALTH AND SAFETY AT WORK ACT 1974

Under the Health and Safety at Work Act 1974 (“**HSAW Act**”), anyone undertaking rewilding as some form of business or operation which otherwise generates income (including on a self-employed basis), owes a duty of care to ensure that any person who may be affected by the rewilding activities is not exposed to risks to their health or safety.

Liability under the HSAW Act is criminal liability and is typically enforced by the Health and Safety Executive (the “**HSE**”). If an offence is established, the person found to be in breach could be ordered to pay a fine and/or face up to two years imprisonment.

Landholders including rewilders should be aware that the HSE regularly investigates incidents involving cattle and members of the public, with the two most common factors in these incidents being cows with calves and walkers with dogs.¹⁰ The HSE has also previously prosecuted farmers where a member of the public has been killed by livestock.¹¹

Landholders including rewilders must undertake adequate risk assessments to ensure that their duty under the HSAW Act is complied with.

For further details on liability under the HSAW Act, please see the *Rewilding in Scotland: Liability to Visitors and Neighbours* and *Rewilding in Scotland: Public Access* notes published in this series of briefings.

5. OCCUPIERS' LIABILITY

The Occupiers' Liability (Scotland) Act 1960 establishes that occupiers owe a duty to a person on his/her premises to take reasonable care to avoid acts or omissions which they could reasonably foresee may result in harm or injury.

This duty of care and associated liability could apply to the keeping of animals and livestock.

Please see the *Rewilding in Scotland: Liability to Visitors and Neighbours* note for details of this Act and how it may apply to the keeping of animals and livestock.

6. APPLICATION IN PRACTICE

EXAMPLE 1

As part of a rewilding project large herbivores are released into a project landscape, to roam free across the land with minimal human contact or management. One of the animals escapes the boundaries of the project, crosses a nearby road and is hit by a car, causing serious injury and damage.

ASA87

If the injury and damage arose from the mere fact that the animal was present on the road, then under s.1(5) ASA87, there should be no liability under the Act.

If the facts were more complicated and this exception could not be relied upon, whether or not there could be liability for this injury or damage under the ASA87 would depend on what particular species of animal was hit by the car. It would need to be of a Relevant Species meaning a species that ‘generally are by virtue of their physical attributes or habits likely (unless controlled or restrained) to injure severely or kill persons or animals,

or damage property to a material extent’. This would be a question of fact because the two deemed applications do not appear to apply on these facts: the damage and injury caused is not as a result of the animal attacking a human (so the Dangerous Wild Animals provision is irrelevant) nor has the damage been caused to land or the produce of land (meaning that the foraging provision is irrelevant).

It appears arguable that in these circumstances, the damage and injury suffered is not directly referable to the physical attributes or habits of the animal concerned but instead simply because the animal was on the road.

Liability under the ASA87 would also only be incurred if the rewilder was shown to be the ‘keeper’ of the animal. The fact that these animals are (or should have been) enclosed within the project area suggests that the rewilder would be the keeper.

Common law

There could also be a case for liability under common law, provided the pursuer is able to prove negligence on the part of the owner of the herbivores. For example, the case of *Sandison v Coope* involved a cyclist riding her bike on a quiet country road. The defender, who had trained his dog to respond to his command, called his dog, who then ran in front of the cyclist. The cyclist was unable to avoid the dog, striking it, and was injured.

In that case, the court held that an owner’s carelessness in allowing his dog to cross a public road at a blind corner without first checking for other hazards amounted to negligence under common law. Whilst under ASA87, damage and injury suffered must be directly referable to the ‘physical attributes or habits’ of the animal concerned, under the common law rules of negligence, it was not suggested that the nature of the defender’s dog had any bearing on the circumstances which gave rise to the collision. Therefore, liability on behalf of the owner was established under common law (albeit, in

that case it was conceded that animals were a potential hazard on quiet country roads and that as a result the cyclist should contribute 30% of the damages).

In this case, it is not clear the extent to which the owners of the herbivores are at fault for the collision. This would be for the judge to consider using the precise facts of the case.

HSAW Act

Whether or not the keeper could be held liable for the injury under the HSAW Act would depend on whether (a) they were carrying out a business or income producing operation and (b) they took all 'reasonably practicable' steps to comply with sections 2 and 3 of the Act.

Occupiers' Liability

Again, for the keeper to be held liable, a duty of care towards the road user would have to be established. This is unlikely given that the damage was sustained outwith the boundaries of the project.

EXAMPLE 2

An area of rewilding land is left open and unfenced and wild animals are able to enter and exit the land as they see fit. A herd of wild deer that has been living on the land then roams onto a nearby road and one is hit by a passing car.

ASA87

There would be no liability in these circumstances because the deer are wild animals which do not have a keeper and can roam freely. In any case, there is no liability under the Act for damage caused by the mere fact that an animal is present on a road.

Common Law

For liability to arise, there would have to be negligence on behalf of the rewilder. However, these are wild animals which have wandered on to the road by chance. It would therefore be difficult to argue that the damage caused was reasonably foreseeable.

HSAW Act and Occupiers' Liability

Again, the foreseeability of this damage is probably far too remote for any kind of duty of care to be owed.

EXAMPLE 3

A rewilding project includes a sanctuary into which wolves are introduced and allowed to roam. The sanctuary is fenced off with high level fencing (as required to comply with the DWAA licence for keeping the wolves) and signs are erected around the enclosure which explain that wolves are living without restriction or human control in the enclosed area and warn against entering the enclosure. A passing walker ignores these and climbs the fence and is attacked by the wolves.

ASA87

This type of injury caused by wolves will fall within the scope of the ASA87 because wolves are a Dangerous Wild Animal, meaning that to the extent any injury is due to attacking or mauling another being, they will be assumed to be of a Relevant Species for the purpose of the Act.

The rewilder is also clearly the 'keeper' of the wolves and the injury suffered is directly attributable to the wolves' physical characteristics and attributes.

However, subject to more detailed information about the facts (e.g., was the fencing adequate? Did the walker accept the risk? Did the walker have a right to roam into

the area? Did the keeper comply with a DWAA licence? Etc.), the keeper may not be liable under ASA87 because at least two of the exceptions set out in the Act are triggered by these facts: the injury was wholly due to the fault of the walker who appears willingly to have accepted the risk of injury.

In these situations, it is important that notices contain the necessary information to allow individuals to understand the risk rather than just saying e.g., 'do not enter' or 'trespass prohibited'.

Common law

As for common law liability, this will only be established through negligence on behalf of the keeper. Again, whether the keeper here has taken all precautionary measures to keep walkers safe from the enclosed wolves will depend on the specific facts of the case.

HSAW Act

Whether or not the keeper could be held liable under the HSAW Act will depend on whether (a) they were carrying out a business or income producing operation and (b) they took all 'reasonably practicable' steps to comply with sections 2 and 3 of the Act. Here, the keeper has taken several measures to protect members of the public from the wolves.

Occupiers' liability

If it is reasonably foreseeable that a certain danger to third parties exists on the premises (as is the case here), then the occupier will owe a duty of care in respect of this to third parties entering on the land. Given the keeper has put up fencing, and signs, and that it is only by virtue of the fact the walker ignores these that he is injured, it is likely that the requisite standard of care has been met.

EXAMPLE 4

As part of a rewilding project highland cattle are introduced. Fences are erected but a walker using a right of way leaves a gate open and one of the cows wanders onto neighbouring land to forage for food and damages crops and property.

ASA87 and common law

In these circumstances, the keeper of the highland cattle could be held liable for the damage under the ASA87 as long as the damage was “to a material extent”. This is because highland cattle fall within the second category of animals, i.e., those that are deemed likely to cause damage to land and to the produce of land while foraging.

The strict liability nature of offences under the ASA87 means that the keeper of the cattle would not be able to point to the fact that the damage only occurred because a gate was left open by a third party. These facts would, however, be relevant to a determination as to whether any common law liability could also arise.

EXAMPLE 5

A member of the public is crossing the rewilder’s land on a right of way with a dog not on its leash. The dog approaches a herd of cows and attacks and injures one of the cows.

ASA87

It is a criminal offence for an owner (or person in charge) to allow a dog to worry livestock on any agricultural land under the Dogs (Protection of Livestock) Act 1953. The definition includes attacking livestock as well as chasing them in such a way that a dog is expected to cause injury or suffering.

There would probably also be civil liability for the keeper of the dog under the ASA87 as, under the Act, a dog is deemed to be an animal likely to cause injury.

Common law

The fact that the dog is not on a lead may amount to negligence on behalf of the owner, if it can be proven that the injury caused by the dog was reasonably foreseeable.

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of December 2022.

ENDNOTES

1. ASA87 s 1(1).
2. ASA s 5.
3. ASA87 s 1(1)(b). Note that the ASA87 expressly excludes from the definition of ‘animal’ viruses, bacteria, algae, fungi and protozoa. A(S)A 1987, s 5(1)(a).
4. ASA87, s (2)(a)
5. ASA87 s 1(3)(a)
6. ASA87 s (3)(b)
7. These steps are discussed in *Welsh v Brady* [2009] CSIH 60 at para. [13]
8. ASA87 s 2.
9. *Welsh v Brady* [2009] CSIH 60
10. [Cattle and public access in Scotland: Advice for farmers, landowners and other livestock keepers AIS17 \(hse.gov.uk\)](#)
11. See e.g., https://www.farminguk.com/news/farmer-receives-prison-sentence-after-cattle-killed-walker_59818.html



WHO'S BEHIND THIS GUIDANCE?



This note is part of a range of information produced by Rewilding Britain and The Lifescape Project to provide practical guidance to rewilders. Each is designed to help rewilding practitioners across Britain overcome common barriers in their rewilding journey, as identified through conversations with members of our Rewilding Network.

Rewilding Britain's Rewilding Network provides a central meeting point for landowners, land and project managers and local groups in Britain, offering opportunities for collaboration and allowing smaller landowners to take on larger-scale rewilding together. If you find this useful, please consider joining the Network, where those in Britain can explore these issues further with others in the same boat.



The Lifescape Project is a rewilding charity using a multi-disciplinary approach to achieve its mission of catalysing the creation, restoration and protection of wild landscapes. Lifescape's legal team is working to support rewilders in understanding how the law applies to their activities and pursuing systemic legal change where needed to support the full potential of rewilding. These notes form part of Lifescape's Rewilding Law Hub which aims to provide a legal resource centre for those wanting to manage land in accordance with rewilding principles.



JOIN THE CONVERSATION

We'd love to hear what you've found useful in these notes and where we can help fill gaps in the guidance so that we can make sure they remain an up-to-date practical tool for rewilders.

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