Law Reform Commission

REPORT 8 (1970) - REPORT OF THE LAW REFORM COMMISSION ON CIVIL LIABILITY FOR ANIMALS

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Preface

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are -

The Honourable Mr Justice Reynolds, Chairman.

Mr R. D. Conacher, Deputy Chairman.

Mr C. R. Allen.

Professor D. G. Benjafield.

The Honourable Mr Justice Manning, Professor W. L. Morison and Mr J. O. Stevenson were Commissioners during part of the period of the Commission's work on the subject-matter of this report. Mr Justice Manning retired as Chairman of the Commission upon his appointment as a Judge of Appeal on the 7th October, 1969. Mr J. O. Stevenson died on the 16th February, 1970. Professor Morison's term as a Commissioner expired on the 28th February, 1970.

The Executive Member of the Commission is Mr R. E. Walker.

The offices of the Commission are at Park House, 187 Macquarie Street, Sydney.

This is the eighth report of the Commission on a reference from the Attorney-General. Its short citation is L.R.C. 8.

REPORT 8 (1970) - REPORT OF THE LAW REFORM COMMISSION ON CIVIL LIABILITY FOR ANIMALS

Report

Report on Civil Liability for Animals

To the Honourable K. M. McCaw, M.L.A.,

Attorney-General for New South Wales.

1. You have made a reference to this Commission in the following terms -

> "To review the law relating to damage caused by or to animals and incidental matters."

2. In this task we have had the assistance of the consideration which was given to this subject in 1965 and 1966 by a sub-committee, presided over by Mr Justice Allen, of the Chief Justice's Law Reform Committee. This assistance includes the benefit of a transcript of the extensive inquiries made and interviews conducted by that sub-committee to ascertain the relevant facts and the views of organisations whose interests, or those of its members, might be directly affected by an alteration in the existing law as to liability for damage caused by animals. We, in turn, have made further inquiries and investigations. In order to crystallise, in a non-technical way, the particular problems which the present state of the law presents, we have also circulated to all organisations with which Mr Justice Allen's sub-committee was in communication, as well as to the New South Wales Bar Council and the Law Society of New South Wales, an explanatory memorandum. This memorandum included, so as to facilitate pertinent comment, tentative suggestions as to reforms which might be appropriate. We have received helpful observations. A list of the organisations to which the memorandum was circulated appears in Appendix A. Much of the preparatory work of the Commission on this reference was done by Professor W. L. Morison during his term as a Commissioner; and, despite the expiration of that term, he has kindly continued to give us the benefit of his learning.

3. The need for reform of the law relating to animals has been widely recognised. In the United Kingdom reports have been published not only of a special committee presided over by Lord Chief Justice Goddard (1953 Cmnd. 8746) but also of the Law Reform Committee for Scotland (1963 Cmnd. 2185) and, more recently, of the Law Commission (1967, Law Com. No. 13).

4. No useful purpose would the served by including in this report an elaborate review of the law on this subject. This branch of the law is not lacking in expert exposition (see, for example, Glanville Williams, Liability for Animals, published in 1939). In this report, therefore, it is our intention to state and explain the present law only in so far as this is necessary for appreciation of the essential problems and of the reasons for our proposals.

5. The law as to liability for damage done by animals is a potpourri of special rules of mediaeval origin. These special rules, for the most part, are such as to give rights of action which are additional to the rights of action which, in modern times, lie in respect of damage generally (that is, whether or not the damage was caused by an animal). A person who has suffered damage caused by an animal can frame his action for redress on modern principles-for example, in negligence; or he can frame it under the special rules which are peculiar to liability for

damage done by animals; or he can, by including separate causes of action in the one proceeding, get the better of both worlds-modern and mediaeval.

6. Reform may take one of two general courses. It may modify or replace these special rules which are collateral to the general body of the law; or it may take the bolder course of sweeping aside these special rules, thereby leading to the result that liability for damage done by animals will be determined exclusively by the same principles which pertain in respect of damage otherwise caused. We favour, with only minor qualifications, the bolder course.

7. Since the fourteenth century an action has lain for redress in respect of damage caused by a savage or dangerous animal. This action, which developed centuries before the emergence of the modern tort of negligence, is known as the scienter action-because the basis of it is knowledge, actual or presumed, in the keeper of the animal. For the purposes of a scienter action liability does not depend upon proof that the keeper of the animal was negligent-that is, broadly speaking, upon proof that he failed to act reasonably in all the circumstances. The test for liability under a scienter action is whether the animal in question was, to the prior knowledge or presumed knowledge of its keeper, of a savage disposition.

8. Although the scienter action is not based on the modern concept of negligence, it was an attempt by the mediaeval courts to provide a practical test of fault. "It was a rough device for . . . [determining] the liability of the master by taking some account of his moral culpability." (Glanville Williams, Liability for Animals at p. 273.)

9. From about the seventeenth century onwards the common law has recognized, for the purposes of the scienter action, a division of all animals into two classes-animals *ferae naturae* (wild) and animals *mansuetae naturae* (tame). In respect of an animal *ferae naturae* it is conclusively presumed that the animal was dangerous and that the keeper of it knew this, "as every one must know that such animals as lions and bears are of a savage nature". *(Besozzi v. Harris* (1858) 1 F. & F. 92 at p. 93; 175 E.R. 640 at p. 641.) To focus attention, however, upon animals such as fully grown lions is but to ignore the difficulties of defining a test for the assigning of all animals to one or the other of two groups. Such a division is not to be found in nature. The different species of animals in fact present different degrees of danger to mankind and within each species the danger presented is not constant but varies according to age, sex, time of the year and many other matters; and individual animals within the one species differ.

10. To some extent these problems are arbitrarily answered by rules which are peculiar to the scienter action. In order to determine whether an animal is *ferae naturae* it is not permissible, according to these rules, to have regard to the disposition of the particular animal. Regard can be had only to the species as a whole. Thus it has been held in Canada that a pet raccoon is an animal *ferae naturae (Andrew v Kilgour* (1910) 13 W.L.R. 608; 19 Man. L.R. 545). The fact that particular animal may have been completely tamed is irrelevant. This rule has led to bizarre results. For example, a court was compelled to declare that a docile circus elephant, which it found to be "in fact no more dangerous than a cow", was *ferae naturae.* The court was in the position that it was bound by judicial precedent to ignore "the world of difference between the wild elephant in the jungle and the trained elephant in the circus". *(Behrens v. Bertram Mills Circus Ltd.* [1957] 2 Q.B. 1 at p. 14.) The keeper of the elephant could not, by taking even the most extreme of precautions, escape liability for damage which it might cause. On the other hand it has been held that no such liability was imposed upon the keeper, in a zoo, of an Arabian camel which bit a child's hand—because, it was said, camels are, as a species, not *ferae naturae.* Camels are, as a species, domesticated animals *(McQuaker* v. *Goddard* [1940] 1 K.B. 687). None of this makes much sense. It

would be less disconcerting if it were not now well settled that whether an animal is *ferae naturae* or *mansuetae naturae is* not a question of fact to be decided in each case. It is a matter of law; so that the question is to be decided by a court in accordance with any judicial precedent which binds that court. Unless some appropriate higher court otherwise rules every elephant, be it as "harmless as a cow", is *ferae naturae* and every camel is not-even if the camel has never been tamed and exhibits, to their full extent, all the natural anti social characteristics of that beast. The unnatural division of animals into two classes raises nice questions. How far, if at all, is the court to have regard to natural classifications? Can it have regard to the differences between sub-species? Should the test be limited to whether the species as a whole presents a danger of bodily injury to mankind? This is the test which the law now applies; but some animals are capable of causing very serious damage to the property of mankind. Why should not the keeper of such an animal be placed on the same basis of liability as the keeper of an animal likely to do bodily harm? - particularly as it is clear that if an animal which is *ferae naturae* causes property damage the liability-therefore is as absolute as if the damage were bodily injury. It is settled law that the fact that an animal is not normally domesticated does not necessarily mean that it *is ferae naturae.* A rabbit is not dangerous to the bodily safety of mankind. Should, then, the fact that an animal is, as a species, generally domesticated be conclusive that it is not *ferae naturae?*-or should this fact be only part of the material upon which the court declares, as a matter of law, whether it is *ferae naturae?* Should the keeper of an animal *ferae naturae* be liable for any damage which it may do?; or should he be liable only for such damage as results from its savage disposition?; or should he be liable only for damage of a kind reason ably likely to result from that savage disposition? To questions such as these the courts have had little success in arriving at answers which are generally accepted as satisfactory.

11. There is in the scienter action a more direct relationship to "moral culpability" in the case of liability for damage done by an animal *mansuetae naturae.* It has to be proved that the animal had previously shown, as its keeper was aware, a disposition dangerous to mankind. But distinctions, which are rather artificial, have been evolved. A short extract from a standard textbook is sufficient to indicate these artificialities -

> "(I)t is necessary for the plaintiff to prove that the defendant actually knew that the . . . [animal] was dangerous and had departed from the peaceful habit of its species. It is not sufficient to prove that he had the means of knowing this, and would have known it had he exercised reasonable care.
>
> Nor is it sufficient in the case of a harmless animal to prove that the defendant knew that it was an ordinary propensity of animals of the class to which it belonged to do the kind of damage complained of. Liability can only be based on the defendant's actual knowledge of the particular animal's past conduct. It is uncertain whether it must also be proved that the animal's vicious tendency was contrary to the nature of the animals of that class. In the past liability has been imposed for bulls charging, horses kicking, and dogs chasing pheasants. But the need for proof of an unnatural tendency was emphatically affirmed by the Court of Appeal (in England) in *Fitzgerald v. E. D. & A. D. Cooke Bourne (Farms) Ltd.* [1964] 1 *Q.B.* 249), in which it was held that there was no liability in scienter for personal injuries inflicted by a young filly which was following its own natural propensities, which were also those of fillies as a class, by galloping up to and prancing round lawful visitors to a field. In short, the animal must have a vicious tendency to injure people or animals by attacking them. The court may well have been unduly tender to owners of horses, and much of its reasoning seems to be based on anthropomorphic conception of animals. For a horse or a dog cannot reason like a human being, and there is something bizarre in seeking the mens rea [guilty mind] of a pony.

> On the other hand, the plaintiff is favoured in that it is not necessary to prove that the animal has on any previous occasion actually done the kind of harm complained of; it is enough that it has sufficiently manifested a tendency to do such harm, and that the defendant was aware of the fact. But it is necessary to prove knowledge that the animal is prone to do or has done the particular kind of damage complained of. If a horse bites a man the scienter is not established by proving that the horse was known to bite other horses. On the other hand, if the animal is known to have a propensity to attack people (in the sense explained above) it is immaterial that it does so from non-vicious motives - e.g., an over-friendly large dog which hugs the plaintiff." (Salmond on Torts, 15th ed., at pp. 435 436.)

Are all these complications really necessary in order to determine whether the keeper of an animal ought to bear the loss for damage which it has caused?

12. The defences to the scienter action are few; but, such as they are, they do show the intention to link liability with culpability. Thus it would seem that it is a defence that the accident occurred because of some "act of God" - such as a bolt of lightning or an earthquake liberating a dangerous animal. It may be a defence that the harm was brought about by the malicious interference of some stranger (contra *Behrens v. Bertram Mills Circus Ltd [1957*] 2 Q.B. 1). It is a defence that the person injured fully appreciated that there was a risk and accepted the risk as being on his own head (volenti non fit injuria). It is a defence that the person injured was trespassing upon land occupied by the keeper of the animal, and that the animal was not kept for the purpose of injuring trespassers - as distinct from discouraging them from trespassing. It is a defence that the person injured tormented the animal beyond endurance-as distinct from a case where the conduct of the person injured was merely a contributing factor to the attack by the animal. These defences, however, are too limited, and too inflexible, to achieve sufficient amelioration of the inherent deficiencies of the scienter action in so far as it is intended by that action to relate liability to "moral culpability".

13. In the United Kingdom, the Law Commission has recommended legislation which, if enacted, would remove many of the cruder anomalies and uncertainties of the scienter action. But it would retain the essential feature of that action-namely that there is liability, with out proof of negligence, in respect of any animal which is known by its keeper to be dangerous in fact or which, even though in fact docile, is of a species which the law classes as dangerous. On the other hand both the Goddard Committee and the Law Reform Committee for Scot land recommended that the modern tort of negligence be permitted to displace entirely the old action and not merely provide, as it now does, an alternative remedy at the choice of the plaintiff. The Law Reform Committee for Scotland, in its report, having stated that liability should depend "on whether there has been a failure to exercise reason able care to prevent the animal causing the injury", commented—

> "(T)his simple principle could be effectively applied in all cases and . . . it is flexible enough to allow the court to have regard to all the circumstances of a particular case. Such circumstances would, of course, include the nature and disposition of the animal concerned and the knowledge which the defender [defendant] had or ought to have had thereof, but the court would also be enabled to take into account other considerations such as the nature of the place where the injury was caused, whether that place was habitually enclosed, whether the person injured had any right to be there, the conditions (including the time of day or night) under which the occurrence took place, and the nature of the precautions (if any) taken by the defender [defendant] to prevent injury." (12th Report of the Law Reform Committee for Scotland, 1963, Cmnd. 2185, para. 11.)

We agree. We recommend that the scienter action be abolished.

14. An argument that is sometimes advanced in support of retention of the scienter action, or some modified form of it, is that some animals are so obviously dangerous to mankind that no one should be permitted to keep them otherwise than upon the condition imposed by law that he shall be absolutely liable for any harm which they may do to others. If harm occurs, it is said, the innocent should not go without redress. The answer to this sort of argument is that it would not be a consequence of abolition of the scienter action that the innocent would go without redress. It is fundamental to the tort of negligence that one of the factors which delimit the extent of the precautions which a person must take, so as to satisfy the standard of the reasonable man, is the gravity of the risk against which it is his duty to guard. In the case of some animals the extent of the precautions required to satisfy this standard will be "so stringent as to amount practically to 'a guarantee of safety'." (Per Devlin J. in *Behrens v. Bertram Mills Circus Ltd.* [1957] 2 Q.B. 1 at p. 14 quoting Lord Macmillan in *Donoghue v. Stevenson* [1932] A.C. 562 at p. 612).

15. Akin to the scienter action is an action upon the rule in *Rylands v. Fletcher* ((1868) L.R. 3 H.L. 330). By this rule an occupier of land who brings and keeps upon it, otherwise than as a "natural-user" of the land, anything likely to do damage if it escapes, is bound at his peril to prevent its escape, and is liable for all direct consequences of its escape, even if he has not been guilty of negligence. Quite possibly this rule, of which the scienter action was an historical antecedent, is applicable, at least in some circumstances, in respect of the escape of animals as a basis of liability independently of liability under a scienter action. This, however, cannot be regarded as settled law and, in our opinion, it would be a misfortune if the rule were to be applied to animals as well as to substances. Whatever may be the justification of the rule as a legal expression of social policy in relation to such enterprises as the maintaining of gasometers, overhead water tanks, chemical stores, fireworks factories and the like, the rule is inapt to govern liability for animals. One learned writer has said of the rule that "Whatever the true explanation of the reasons behind the decision [in *Rylands v. Fletcher*], it became accepted doctrine in British jurisdictions and has found additional favour in more recent times among the proponents of 'enterprise liability'. Anyone, they contend, whose activity entails exceptional peril to others, notwithstanding all reasonable safety precautions should fairly treat all typical harm resulting from it as a cost item which can be absorbed in pricing and passed on to the consumer, spread so thin that no one will be seriously hurt by it; and if the activity is not a business venture, the defendant should not prosecute it for his own purposes, unless he is willing to pay the price. Besides, the cost of liability can be easily controlled by indemnity insurance." (Fleming, The Law of Torts, 3rd ed. at pp. 300-301). Animals, however, do not where "reasonable safety precautions" have been taken, present "exceptional peril" to others "Enterprise liability" is inappropriate. Liability for negligence is all that is needed to balance fairness to the keeper of the animal and fairness to any person suffering any harm which the animal may cause. It is not by any means clear what the path of development, if any, will be of the rule in *Rylands v. Fletcher.* As the same learned writer (Professor Fleming) has said "The rule in *Rylands v. Fletcher* has not elicited enthusiastic judicial response in recent years. Indeed, from its inception, it was subject to a process of constriction . . . Many of the exceptions engrafted on the rule show a steady re-encroachment of the 'fault' dogma and, in the aggregate, have circumscribed its compass to such an extent that its sphere of operation is becoming increasingly unpredictable." *(ibid.).* We do not consider that it would be wise to subject liability for damage done by animals to this unpredictability. We recommend that it be made clear, by legislation, that the rule in *Rylands v. Fletcher is* not to be applied in relation to damage done by any animal.

16. Some refinements have evolved in the law as to the duties which an occupier of premises (which includes, of course, vacant land) has in respect of harm which may befall a person who enters upon the premises. For

example, where the entrant enters the land with the occupier's consent but solely for his own benefit (as where the occupier gives a neighbour permission to take a short cut across the occupier's land) the duty of care owed to the entrant is, as a matter of law, satisfied, in the common type of case, by the occupier warning the entrant of any dangers on the land which would not be apparent to the entrant, even if reasonably alert, but which are in fact known to the occupier. No particular difficulty exists in applying these refinements to cases in which the source of the danger on the land is an animal. We have under consideration, pursuant to a separate reference which we have received from you, the question of review of these refinements. We do not consider it desirable to recommend, in this present report, any alteration to the existing law in this regard which would be applicable only where the source of the danger on the premises is an animal. Piecemeal revision would be undesirable.

17. The abolition of the scienter action would not remove all the peculiarities of the common law as to liability for animals. As we have previously noted, a person who has suffered damage caused by an animal can, in lieu of or in addition to relying upon a scienter action, found his claim for relief upon the causes of action which lie under modern principles of tort liability. There has developed in the common law, however, an important exception to liability which otherwise would be incurred pursuant to these modern principles. The development of this exception culminated, in 1946, in the decision of the House of Lords *in Searle* v. *Wallbank* ([1947] A.C. 341). In that case the House of Lords affirmed a long-standing rule of the common law that the owner or occupier of land which adjoins a highway (that is any public road or way) is free to let his livestock (other than any animal he knows to be vicious) stray on to the highway and that he does not incur any liability to users of the highway for any bodily injury or property damage caused by the livestock so straying—no matter how grave a risk the livestock create and no matter how easy it would have been to prevent that risk arising. It follows that the owner or occupier need not even shut the gates in existing fencing.

18. This decision of the House of Lords has been the subject of much criticism both by judges and legal scholars. In 1953 the Goddard Committee recommended substantial change. In 1959 the Supreme Court of Canada (in *Fleming v. Atkinson* (1959) 18 D.L.R. (2d) 81) refused to be bound by any principle of law said to be found in the decision of the House of Lords. In 1963 the Law Reform Committee for Scotland did not, in its report, recommend that the decision should form part of the law of Scotland. In New South Wales the sub-committee presided over by Mr Justice Allen reported in November 1966 that it considered that the exception to liability established by that case should be abolished. In 1967 the Law Commission recommended, for England and Wales, that the decision be abrogated. We also recommend its abrogation.

19. The Supreme Court of Canada when refusing, in 1959, to apply the decision of the House of Lords in *Searle v. Wallbank,* made some observations which we consider to be entirely pertinent for New South Wales. The Supreme Court pointed out that the House of Lords had rejected any duty upon an adjoining owner of reasonable care to users of the highway in respect of injury which they might sustain from the straying onto the highway of domestic animals not known to be dangerous. It continued—

> "There were two reasons implicit in the judgment in *Searle v. Wallbank* for the rejection of the duty. The first is based upon the history of the highways of England, which came into being largely as a result of dedication by adjoining owners, who gave to the public no more than a right of passage which had to be exercised subject to the risk of straying animals. The second is based upon the facts as they existed until the advent of fast-moving traffic . . .

> (T)he historical basis for the rule in *Searle v. Wallbank,* dependent as it is upon peculiarities of highway dedication in England, has never existed in Ontario . . .
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> The other foundation for the principle of immunity in favour of the adjoining owner was that until the advent of fast-moving traffic no cause of action could possibly have existed. There was in fact no real risk worthy of judicial consideration from the mere presence of straying animals on the highway. There was nothing that called for the interference of the law in this situation. But does it follow as a consequence of this that there can be no cause of action today when the facts are entirely different and when there has been a developing law of negligence for the last 150 years? As was pointed out by the learned editor in 66 L.Q. Rev. 456, the real objection to the decision in *Searle v. Wallbank is* that a conclusion of fact has hardened into a rule of law when the facts upon which the original conclusion was based no longer exist . . .
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> A rule of law has, therefore, been stated in *Searle v. Wallbank . . .* which has little or no relation to the facts or needs of the situation and which ignores any theory of responsibility to the public for conduct which involves foreseeable consequences of harm. I can think of no logical basis for this immunity and it can only be based upon a rigid determination to adhere to the rules of the past in spite of changed conditions which call for the application of rules of responsibility which have been worked out to meet modern needs." *(Fleming v. Atkinson* (1959) 18 D.L.R. (2d) 81 per Judson J. at pp. 97-99, Fauteux and Abbot JJ. concurring.)

20. In arriving at our recommendation that the decision in *Searle v. Wallbank* be abrogated, we have given thought to the varying conditions that may be met throughout New South Wales. The variations are of course, great-even apart from the variation between urban, sub urban and country areas. The variations range from remote areas where grazing properties occupy hundreds of square miles and where one sheep may run on a number of acres, through to closely settled dairying country on the coastal fringes. We have considered the possibility of imposing different duties in different types of localities, but have rejected this as less satisfactory than the flexible tests which are to be applied under modern common law principles.

21. A fear has been expressed in some quarters that a consequence of the abrogation in New South Wales of the decision in *Searle v. Wallbank* would be the imposition upon graziers of a duty to construct or maintain fences in cases and in circumstances where this would not be warranted economically. The fear is, however, unfounded. The principles of the tort of negligence would not, if the decision in *Searle v.Wallbank* were abrogated, impose a duty to fence or a duty to maintain fencing. What the tort of negligence would do, in respect of any risk to users of a highway which the presence of straying animals may cause, is to require of the keeper of the animals that he does not behave unreasonably towards users of the highway. It is obvious that, in some circumstances, this standard of reasonableness would require of a person keeping animals on land adjoining a highway that he take some positive step to prevent them creating a situation of danger by straying onto the highway; and, no doubt, a person who is subjected to that requirement may find that the most practical method of meeting it is by attending to fencing. For example, a person who owns cattle sale yards which abut upon a busy highway and who regularly conducts sales at those yards can hardly claim that he is meeting the standard of reasonable care if he takes no steps to prevent cattle blundering into the path of the motor traffic; and one of the practical precautions which he could take is to keep the fencing in reasonable repair. But, to go to the opposite extreme, it is equally clear that in remote, infertile areas, in which the roads are infrequently used, it may well be not unreason able for a grazier to take no step at all towards discouraging his livestock from straying onto a highway or towards warning users of the highway o£ their presence. Most cases lie, of course, between such extremes. In some circumstances the

mere displaying of a warning notice may be sufficient to satisfy the standard of reasonableness. In others some concern for gates or for fencing may be appropriate. We do not consider, however, that in any of the ordinary circumstances of grazing there is the slightest reason to apprehend that application of the general principles of the tort of negligence would require any higher general standard as to the extent or quality of fencing than that which would pertain, in any event, for the purposes of practical animal husbandry in such conditions. The realities as to usual practices and techniques, cost. the degree of likelihood of a real risk being created, whether it is probable that any such risk will be encountered only by persons likely to be on their guard against it and able to avoid it, are all relevant in the determination of whether the standard of reasonableness has been attained.

22. We have considered the desirability of the inclusion, in any legislation to implement our recommendations, of specific provisions to allay the fear referred to in the last paragraph; but we are satisfied that to do so not only is unnecessary but might create difficulty which would not otherwise exist.

23. Another special branch of the common law relating to animals is the tort of cattle-trespass. The name of this tort has become misleading in that it relates not only to trespass by cattle, in the present day sense of the word "cattle", but also to trespass by sheep, goats, pigs, horses, poultry and some other domesticated animals. It does not apply to cats or to dogs. The tort is of mediaeval origin, being cognate to the ordinary tort of trespass to land. The distinction between the two torts is this—if one's cattle stray, of their own volition, onto the land of another, without his consent, one thereby commits the tort of cattle-trespass; on the other hand if one's cattle get onto the land, not .' by straying, but because one deliberately drives them onto the land, one commits the ordinary tort of trespass to land. In the case of the ordinary tort of trespass to land, the cattle are merely the means whereby one commits the trespass. It would be equally ordinary trespass to land if one drove onto the land not cattle but a motor car.

24. From about the middle of the fourteenth century the tort of cattle-trespass became established. By this tort the keeper of cattle incurs liability for trespass by the cattle even though he has done nothing to cause the trespass. Whether or not the trespass of the cattle is due to negligence is altogether immaterial.

25. The tort of cattle-trespass produces some odd results. Being cognate to the ordinary tort of trespass to land it gives a right of action only to an occupier of the land upon which the cattle stray. It gives no right of action to any other person who is upon the land when the trespass occurs. This distinction would not be of much practical importance were it not that the damages which can be recovered by the tort are not restricted to damage to the surface of the land or to crops or fodder on the land but extend also to any bodily injuries which the trespassing animals may inflict. Thus if a bull strays onto adjoining land and gores the grazier who occupies that land, the grazier can recover from the keeper of the bull damages for the bodily injury even if that person has not been negligent. On the other hand, if the trespassing bull gores a guest upon the property, the guest cannot recover damages from the keeper of the bull unless he can prove negligence. We see no merit in this distinction. A further exception to the principle of liability without fault which underlies the tort of cattle-trespass is that where cattle, in the course of being driven along a highway, escape onto adjoining land, the occupier of that land cannot recover in respect of the damage which they may do unless he can prove negligence. The basis of this exception is said to be that the occupier of premises which abut onto a highway is presumed to accept the normal hazards which are incidental to ordinary use of the highway as a highway. However, it is not such a use of a highway for cattle to stray onto it from an adjoining property. Therefore if cattle stray from property occupied by their keeper onto the highway and thence onto the land of some other occupier, the keeper of the cattle is liable, despite absence of any fault on his part, for the damage they do on the land of the other. Anomalies such as these lead

us too the conclusion that the tort of cattle trespass is no longer worthy of a place in the law. It developed, long before the advent of the modern tort of negligence, as an expedient to enable recovery of damages for harm done by trespassing cattle in cases other than those where the cattle were deliberately driven onto the land. The tort of negligence, however, also achieves this result; but it does so more flexibly and more justly.

26. A possible approach to reform of the law relating to cattle trespass is to retain liability, without fault, in respect of some specified types of damage. This approach has found some support in England. The Goddard Committee recommended that the tort of cattle-trespass be confined to damage to land or to crops (although Professor Glanville Williams in a separate note to the report argued for abolition entirely of the tort); and the Law Reform Committee recommended, for England and Wales, a re-statement of the principle of liability without fault in terms which would exclude such liability in respect of bodily injury. On the other hand, the course could be taken of abolishing the tort of cattle-trespass altogether so that the liability of a person for damage, no matter of what kind, done by trespassing animals which have strayed onto land is determined by the ordinary principles of liability in tort. This was the recommendation for New South Wales which was made by Mr Justice Allen's subcommittee. We agree with the recommendation. We cannot see any justification for making legal liability for cattle-trespass dependent upon whether the resulting damage took the form of damage to property or bodily injury. We recommend abolition of the tort of cattle-trespass. This would make desirable a minor con sequential amendment to s. 250 of the Crown Lands Consolidation Act, 1913.

27. We appreciate that where an animal is found trespassing, it may be that the person who suffers damage thereby will find himself in the unfortunate position of having no knowledge as to how it got there. Thus his claim for damages might fail, even though it may have been the carelessness of the defendant (for example in not shutting a gate) which enabled the animal to enter upon land occupied by a person other than the defendant. We propose that, as the animal was in a place where it should not have been, it be provided that the fact of its trespass shall be evidence of negligence. This would not mean the re-imposition of liability without fault: nor would it mean that the defendant must prove his innocence. The fact of the trespass would be only one of the many facts which are relevant to determination of whether there has been a failure by the defendant to take reasonable care. The provision would mean. however, that the person harmed would never find himself in the position of having no evidence to place before the court, and that the defendant would be the more likely, therefore, to find it prudent to place before the court the matters which are within his knowledge. A trial on the real merits would thus be more likely to ensue. We would not extend the provision to the wanderings of cats or of dogs. Cats are inveterate roamers. It would be unreal to say that the presence of one’s neighbour’s cat on one’s land by itself affords the slightest evidence of negligence on the part of the neighbour. The conduct of dogs poses special problems. We consider these later in this report (paragraphs 34-41).

28. There is still in existence in New South Wales the ancient remedy of distress of an animal damage feasant pursuant to which, subject to numerous technicalities, a trespassing animal may be kept in custody until the damage done by it is paid for. For all practical purposes the remedy has long been superseded in New South Wales by legislation as to impounding (see now Part XVIII of the Local Government Act, 1919, and the Impounding Act, 1898). We recommend its abolition. An old decision of the Supreme Court (*Barclay v Why Te Hong* (1882) 3 N.S.W.L.R. 119) gives rise to some doubt whether an action for the recovery of damages caused by trespassing animals can be brought if the plaintiff has exercised, in respect of the trespass, rights under the impounding legislation. We recommend that this doubt be removed by redrafting s. 58 of the Impounding Act, 1898, and s. 444 of the Local Government Act, 1919. A minor matter is that these sections, as presently drafted, make special provision as to costs of an action. The provision in obsolete in the light of modern procedures as to

payment into court and the conferring upon the court of discretion not to award costs to a successful plaintiff (see, for example, s. 5(d) of the Administration of Justice Act, 1968). We recommend that, in the redrafting of the sections, the provision be deleted.

29. It may be helpful for us to indicate, albeit briefly, the principles of the modern law of tort which, if our recommendations are accepted, would govern liability for damage done by animals to the exclusion of the special rules of mediaeval origin. These principles are to be found within three torts-the tort of negligence, the tort of trespass and the tort of nuisance.

30. We have already referred to some of the features of the tort of negligence, drawing attention to its flexibility and its use of the concept of reasonableness as the standard of the care which it requires. Three other features of this tort should be noted. Each of them is desirable for the determination of where the loss shall lie in the case of damage caused by an animal. The first is that where the person injured has, by his own lack of care, contributed to the occurrence of the damage, the damages which he recovers are appropriately scaled down (Law Reform (Miscellaneous Provisions) Act, 1965, ss. 9-10). The second is that the tort is not committed unless damage in fact results from the failure to take reasonable care. Thus liability is not incurred unless not only has there been a failure to take reasonable care but damage has in fact resulted. The third is that the tort of negligence employs the criterion of reasonableness, which involves consideration of what in fact was reasonably foreseeable, to determine upon whom it is in all the circumstances, that the duty to take care towards the protection of another from harm is imposed. This approach is far superior to the special rules relating to animals which determine whether a person is to have legal responsibility for the conduct of animals. Thus in the scienter action the duty to prevent the animal causing harm is imposed upon the "keeper" of the animal. But who is its keeper? Its legal owner? The person who usually feeds it? The child or adolescent whose pet it is?—or his father, or mother, or both? The person who is looking after it temporarily for another? To such questions the scienter action admits only of the answer "yes" or "no"—so that either the person concerned, so far as a scienter action is concerned, has no duty at all or he is in the position that he may incur liability for what the animal does even though he has taken all reasonable care. There is either a famine of legal responsibility or a feast. Yet it is typical of the roughness of the scienter action as a "device" for relating liability to "moral culpability" that it is far from clear what the test is which, for the purposes of that tort, determines whether a person has sufficient possession or control of an animal so as to incur the responsibilities which go with being its "keeper". Under the special rules similar problems arise in respect of liability for the tort of cattle-trespass.

31. The tort of trespass has to a large extent become over shadowed by the growth of the tort of negligence. In so far as the tort has vitality in relation to liability for damage caused by animals, it is that the deliberate driving of animals onto land constitutes the tort of trespass to land (which is to be distinguished from the mediaeval tort of cattle-trespass where animals stray onto the land) and that deliberately causing animals to inflict physical injury upon a person (for example by driving animals over him) constitutes the tort of trespass to the person. Our recommendations do not affect this branch of the law.

32. The tort of nuisance covers two distinct heads of liability— namely private nuisance and public nuisance. The essence of the tort of private nuisance is that it is tortious to make such use of property as causes damage to or impairment in the enjoyment of land occupied by another, where the damage or impairment so caused is more than what the occupier ought, having regard to the prevailing general standards of the locality, reasonably to accept as part of the give and take of life in that locality. The most frequent application of this tort is in respect of the impairment in enjoyment which ensues from the invasion of the land by such emanations as noises,

vibrations and fumes. The tort refers to a noxious state of affairs as distinct from some isolated occurrence. Where the tort has been committed damages can be obtained —although the more usual remedy sought is an injunction to restrain continuance of the nuisance. It is obvious that the keeping upon land of animals can cause, by such emanations as noise or smell, such impairment to the enjoyment of the land occupied by another as to constitute the tort. It is a matter of what is reasonable as a compromise between the competing interests of the persons concerned. There are differences between the tort of private nuisance and the tort of negligence. There is, however, a clear practical affinity between these torts and we do not consider that, for the purposes of this report, an exposition of the relationship between them is warranted. We would mention, however, that the tort of private nuisance is not confined to the invasion of an occupier's land by things which are relatively intangible. It extends also to its invasion by quite tangible things—such as water contaminated by animal droppings. The tort could, indeed, be committed where physical damage or interference with amenities results from the incursion of the animals themselves. If it would be. however, only in exceptional cases that liability for damage caused by the trespass of animals would be incurred under the tort of private nuisance where the person so liable would not also have been guilty of the tort of negligence. (*Pratt v. Young* (1952) 69 W.N. 214) may be an illustration of such a case. In that case a grazier deliberately set out to injure his neighbour. He ploughed a portion of his own land which abutted onto his neighbour's land, thereby attracting onto the ploughed portion rabbits from nearby land which was heavily infested. He partly fenced, with rabbit-proof fencing, this ploughed portion so that the rabbits enticed onto the ploughed portion, did not spread onto the rest of his land. Instead they spread, as he intended, onto his neighbour's land. It is not surprising that the court rejected his argument that no legal basis could be found for holding him liable to pay damages to his neighbour in compensation for the harm which his neighbour had suffered. He was not guilty of trespass to land. He had not driven the rabbits onto his neighbour's land; he had merely turned to his advantage the propensity of rabbits to spread. The court had no difficulty, however, in holding that he was liable under the principles of the tort of private nuisance. His use of his own land, directed solely to the harming of his neighbour, was not a reasonable use having regard to the interests of his neighbour. It is by no means certain that the tortious liability could be classified also as liability in negligence—although the trend of legal development suggests that this may be a possible classification on the basis that the defendant had, in the circumstances, a duty, which he failed to discharge, to take reasonable care to remove the hazard to his neighbour which he had created by his activities on his own land (cf. *Goldman v. Hargrave* [1967] 1 A.C. 645). The liability in nuisance, however, was clear. We do not consider that it would be prudent to exclude, in respect of dam age caused by animals, application of the principles of the tort of private nuisance. The principles of this tort cannot safely be divorced from those of the tort of negligence. In the development of the law of torts the principles of each of these torts have important and inter-acting roles. To exclude in respect of harm caused by animals application of the principles of the tort of private nuisance would be to again isolate the law in respect of harm so caused from the broad stream of legal development, thereby incurring the risk that it will again become anachronistic. The only aspect of the tort of public nuisance (as distinct from private nuisance) which calls for comment in relation to animals is that the tort is committed where a person so collects or controls animals on a highway as unreasonably to impede traffic on the highway thereby causing to some person special damage beyond that suffered by the public at large. However, a person is entitled to make reasonable use of the highway even if this reasonable use causes some inconvenience to other users of the highway. Here, again, the law invokes the concept of reasonableness to strike a fair balance between the interests of the persons affected.

33. The essence of our recommendations is that the law relating to liability for animals be brought into harmony with the law relating to liability for damage otherwise caused.

34. We consider, however, that there should be some further liability in respect of dogs. Section 20 of the Dog Act, 1966, provides that "The owner of a dog shall be liable in damages for injury done to any person, property, or animal by his dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of that previous mischievous propensity, or that the injury was attributable to neglect on the part of the owner." The imposition upon the owner of a dog of some measure of liability, without fault, for damage done by the dog is a common legislative provision in the United Kingdom, other States of Australia, the Australian Capital Territory, New Zealand, and Provinces of Canada (Dogs Act, 1906 (U.K.), s. 1; Dog Act 1958 (Vic.), s. 26; Registration of Dogs Act, 1924-1929 (S.A.), ss. 24, 25; Dog Act, 1903-1963 (W.A.), s. 24; Dog Act, 1934 (Tas.), s. 13; Dogs Registration Ordinance 1926-1967 (A.C.T.), s. 14 (1); Dogs Registration Act 1955 (N.Z.), s. 29; as to the Canadian Provinces see the references in Glanville Williams, Liability for Animals, Appendix V) .

35. Dogs quite commonly have such size, strength, and other physical attributes as enable them to inflict serious bodily injury upon people and upon animals; although whether a particular dog will attack a person, or another animal, and if so, when and under what circumstances, cannot be predicted with confidence. Dogs have, moreover, a natural tendency to worry or chase other animals, and animals worried or chased by a dog may suffer physical harm by exhaustion or by injury resulting from panic. These canine characteristics, however, do not, by themselves, justify the imposition upon the owner of a dog of liability without fault on his part. There are many other animals which, if allowed to go at large, would be more likely than are dogs to inflict serious bodily injury. What places dogs in a special position is that despite their canine characteristics and the rapidly increasing urbanization of our society it is still popularly accepted that, broadly speaking, dogs are privileged to roam and that, in ordinary circumstances, the owner of a dog does not act unreasonably towards others in permitting it to do so. No like privilege is conceded to any other animal which is as likely as is a dog to inflict serious injury. The position of dogs is special; and this warrants the imposition of special liability in respect of them. We do not consider unreasonable the long-standing statutory solution, namely that part of the price of keeping a dog is liability in some circumstances for damage which it may do. What, however, should be the circumstances which attract this liability?

36. In considering the question as to the circumstances which should attract the statutory liability, there are two matters which must not be overlooked. One is that even where a person has not should the statutory liability he may still be liable, as he would be for harm caused by an animal other than a dog, under the principles of the torts of negligence, trespass and nuisance. The other is that the statutory liability is liability without fault—that is, liability no matter how- careful the owner of the dog has been and no matter how considerate he has been towards others. Such a liability is not lightly to be

37. We have come to the conclusion that the circumstances which attract the statutory liability without fault must relate to those canine characteristics which, in conjunction with the freedom of dogs to roam, put dogs in a special position. These are the characteristics of attacking people and-thereby inflicting bodily injury upon them and of attacking, worrying and chasing other animals thereby causing injury to It would be unreasonable to impose upon the owner of a dog the statutory- liability in respect of any harm of which the presence or conduct of the dog has been a cause. The canine characteristics would be irrelevant where, for example, a person suffers injury from falling in consequence of tripping over a dog which is asleep.

38. The various attempts which have been made, not only in this but also elsewhere, to find a statutory solution to the problem to who should bear responsibility for damage inflicted by a dog indicate, in the main, awareness of

the factors which place dogs in a special position. In New South Wales the relevant legislation commenced in 1830 with the Act 11 Geo. IV No. 8. Section 12 of this Act rendered the owner of a dog liable to fine if the dog "shall attack any person in a public street, the imposition of the fine being "over and above the amount of any damage which such dog may occasion". The reason for this legislation appears clearly enough from the recital in the preamble that "the Streets of the Towns of Sydney, Parramatta, Liverpool and Windsor are infested by the great number of dogs which are allowed to go loose at all hours of the day and night to the danger of passengers . . .“ The Act 11 Geo. IV No. 8 was a temporary Act; but it was revived and continued, with some additions and amendments. by the Act 6 Wm. IV No. 4, known as the Dog Act, 1835. By s. 8 d this Act the liability to fine "over and above the amount" of the damage caused was extended to the case where a dog "shall in any street . . . rush at or attack any person or horse or bullock . . ." The side note to the section reads "Penalty on owners of dogs attacking persons or frightening horses". It was subsequently held, although not until 1875, that this section did not authorize the court, in a prosecution under it, to order payment in respect of the damages as well as imposing the fine *(ex p. Hartmann* (1875) 14 S.C.R. 205); but it may well be doubted whether this decision reflects the actual intent of the legislature. In the United Kingdom, legislation in respect of liability for damage done by dogs was enacted, for England and Wales, by the Dogs Act, 1865 (28 & 29 Vic. c. 60). Section 1 of this Act, so far as material, provided that - The owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner . . ." The reference to "injury done to any cattle or sheep by his dog'- is indicative of legislative concern with bodily harm caused to cattle and sheep by the typically canine behaviour of dogs attacking, worrying, or chasing them. This United Kingdom legislation affected the course of legislation in New South Wales as well as elsewhere. Section 9 of the Dog Act Amendment Act of 1875 (New South Wales) provided that "The owner of every dog shall be liable in damages for injury done to any person property or animal by his dog and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog or the owners knowledge of such previous propensity or that the injury was attributable to neglect on the part of the owner." It is clear that this section was adapted from s. 1 of the Dogs Act, 1865, of the United Kingdom. In view of the history of the legislation in respect of dogs in New South Wales it is not surprising that this liability without fault for injury done by a dog was not limited, as in the United Kingdom, to injury to cattle or sheep. The adaption, however, of s. 1 of the United Kingdom Act was clumsy. In particular, the extension of the relevant "injury" to injury to "property” as well as injury to any animal expanded the meaning of "injury” beyond bodily injury and thus weakened the indication that the provision was directed to the consequences of typically canine behaviour as distinct from damage otherwise caused by a dog. It is unlikely that this was intended (cf. s. 10). The provision made by s. 9 of the Dog Act .Amendment Act of 1875 remains the present law, having become in turn s. 19 of the Dog and Goat Act, 1898, and s. 20 of the present Act—the Dog Act, 1966. We recommend that s. 20 of the Dog Act. 1966, be reframed so as to make it clear that the conduct of a dog which is relevant for the imposition of liability without fault is that f the dog attacking a person or attacking, worrying or chasing an animal.

39. Our concern that the statutory liability be confined to cases where it is not unreasonable to impose liability for damages upon the owner of the dog, even though he has not been in any way at fault for the damage which the dog has caused, leads us to further recommendations. It would be unjust, in our opinion, to impose the statutory liability for every harmful consequence of a dog attacking a person or attacking, worrying or chasing an animal. A consequence of a dog chasing a cat across a street, for example, may be that there is a major motor vehicle accident. It hardly would be reasonable that, in such a case, the owner of the dog, where no want of care on his part contributed to the occurrence, should be liable either for the damage to the motor vehicle or for any bodily

injury sustained in the accident. We recommend that in the case of a dog attacking a person the statutory liability be limited to liability in damages in respect of any bodily injury to and damage to clothing of that person caused by the dog wounding him in the course of the attack; and that in the case of a dog attacking, worrying or chasing another animal the liability be limited to liability in damages in respect of any injury to the animal. Damages for "bodily injury" to a person extend to such consequential related matters as pain, loss of earnings during any period of incapacity and the incurring of medical and like expenses. Likewise damages for injury to an animal extend to such consequential related matters as veterinary expenses, the loss of stud fees or other profits and diminution in the value of the animal. No doubt there are cases in which it would not be unreasonable for the owner of a dog to be strictly liable for damage which is not within the ambit of our recommendations. Any statement of the relevant damages, however, which is wide enough to include such cases is not, in our view, acceptable if in its general application it would include also instances where imposition of the statutory liability would be unreasonable. We consider that our recommendations place the limits of the statutory liability as widely as can be done with assurance that the bounds of reasonableness are not exceeded.

40. Section 20 of the Dog Act, 1966, does not state any circumstances which exclude the statutory liability. This section re-enacts s. 19 of the Dog and Goat Act, 1898, of which the High Court has said that "The opening words of this provision express a liability without condition or qualification. It may be said that the very generality of its terms provokes attempts at restriction by implication. No doubt it is improbable that the Legislature meant that circumstances sufficient to justify or excuse the intentional infliction of harm by the owner should afford no answer to his statutory liability for injury done by his dog. Perhaps an even greater limitation than this is required upon the meaning of the provision." *(Simpson v. Bannerman* (1932) 47 C.L.R. 378 at p. 383). We do not consider it satisfactory that whatever the exceptions to the statutory liability may be, the court must read them into a provision which, if read literally, admits of no qualification, We recommend that there be two exceptions to the statutory liability and that these exceptions be expressly stated. The first is that the statutory liability should not be incurred where the dog's aggression is in immediate response to and wholly induced by intentional cruelty to or provocation of the dog. The second is that the statutory liability should not be incurred where the injury, whether to a person or to an animal, is sustained upon premises or upon a vehicle occupied by the dog’s owner or on which the dog is normally kept. A person is entitled to act reasonably in having a watch-dog. It may well be that each of these exceptions would be implied by the court even if they are not specifically stated; but we do not consider that there should be unnecessary uncertainty. The exceptions are limited to the statutory liability. They do not exclude liability which may be incurred by the principles of negligence, nuisance or trespass.

41. There is some doubt whether the provisions of Part III of the Law Reform (Miscellaneous Provisions) Act, 1965, whereby the damages recoverable are reduced where the plaintiff has himself been guilty of contributory negligence, apply in respect of liability to damages incurred by the owner of a dog pursuant to s. 20 of the Dog Act, 1966. We recommend that it be made clear that Part III of the Law Reform (Miscellaneous Provisions) Act, 1965, is to apply to the liability for damages incurred under that section as reframed.

42. We have dealt with the law relating to damage caused to animals in so far as that damage has been caused by another animal. In respect of damage to an animal otherwise caused we consider that the present law is adequate.

43. Appendix B to this report embodies our recommendations in the form of a Bill. One provision of the Bill calls for comment. It is the proposed new s. 20A of the Dog Act, 1966. We do not consider that there is room for any real doubt that the Compensation to Relatives Act of 1897 applies where the statutory liability under the Dog Act,

1966, is incurred in respect of bodily injury inflicted upon a person by a dog and the person thereafter dies from the injury. There is, however, a verbal difficulty. Section 3 of the Compensation to Relatives Act of 1897 provides for the application of the provisions of that Act ". . . (w)hensoever the death of a person is caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof . . ." Section 20 of the Dog Act, 1966 (both in its present form and in our suggested redrafting of it) provides that the owner of the dog ". . . shall be liable in damages . . ." in respect of the bodily injury; but it does not expressly state that the owner is guilty of any wrongful act, neglect, or default. The proposed new s. 20A reconciles the wording of the two statutory provisions.

29th June, 1970.

R. G. REYNOLDS,

Chairman.

R. D. CONACHER,

Deputy Chairman.

C. R. ALLEN,

Commissioner.

Appendix A

Organizations to which the explanatory memorandum was circulated

Albury and District Law Society.

Australian Mercantile, Land and Finance Company, Limited.

Central Western Law Society.

Clarence River and Coff's Harbour Law Society.

Dalgety & New Zealand Loan Ltd.

Elder Smith Goldsbrough Mort Limited.

Far North Coast Law Society.

Far South Coast and Monaro Law Society.

Government Insurance Office of New South Wales.

Grazcos Co-operative Ltd.

Hunter Valley Law Society.

Local Government Association of New South Wales.

Mid North Coast Law Society.

Milk Board.

Milk Zone Dairymen's Union.

Near Western Law Society.

Newcastle Law Society.

North and North-West Law Society.

N.R.M.A. Insurance Limited.

Parramatta and District Law Society.

Pasture Protection Boards' Association of New South Wales.

Pitt, Son & Badgery Ltd.

Riverina Law Society.

Schute, Bell, Badgery, Lumby Ltd.

Shires Association of New South Wales.

Southern Tablelands Solicitors' Association.

South West Slopes Law Society.

The Fire and Accident Underwriters Association.

The Graziers' Association of New South Wales.

The Law Society of New South Wales.

The New South Wales Bar Association.

The Non-Tariff Insurance Association of Australia.

United Farmers and Woolgrowers' Association of New South Wales.

Winchcombe Carson Ltd.

Wollongong and District Law Society.

Younghusband Ltd

Appendix B

A BILL

Relating to liability for damage caused by animals; for this purpose to amend the Impounding Act, 1898, and certain other Acts; and for purposes connected therewith.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

PART I.

PRELIMINARY.

Short title.

1. This Act may be cited as the "Animals Act, 1970".

The Crown.

2. This Act binds the Crown, not only in right of New South Wales, but also, so far as the legislative power of Parliament permits, the Crown in all its other Capacities.

Division of Act.

3. This Act is divided as follows:-
PART I. - PRELIMINARY - ss. 1-3.
PART II. - ABOLITION OF CERTAIN MATTERS - *ss.* 4, 5.
PART III. - LIABILITY FOR ANIMALS - ss. 6-11.
PART IV. - AMENDMENT OF DOG ACT, 1966 - s. 12.
PART V. - AMENDMENT OF VARIOUS ACTS - *ss.* 13-15.

PART II.

ABOLITION OF CERTAIN MATTERS.

Cattle trespass.

4. (1) The tort of cattle-trespass is abolished.

(2) This section does not apply to a case where a cause of action for cattle-trespass accrues before the commencement of this Act.

(3) This section does not affect the construction of a reference in any Act to a trespassing animal.

(4) This section does not affect the tort of trespass committed by a person by means of cattle.

Distress damage feasant.

5. (1) The remedy at common law of distress of an animal damage feasant is

abolished.

(2) This section does not apply to a case where an animal is distrained damage feasant before the commencement of this Act.

PART III.

LIABILITY FOR ANIMALS.

Application

6. This Part does not apply to a case where the acts or omissions giving rise to a question of liability occur before the commencement of this Act.

Interpretation

7. In this Part -

"liability" means a liability in damages in tort.

"occupier", in relation to any premises. means a person who is an occupier of the premises for the purposes of the law relating to the liability of occupiers for damage arising from dangers to persons entering premises, being dangers due to the state of the premises or due to things done or left undone on the premises.

"premises" means any land, structure (fixed or movable), vessel, aircraft or other vehicle.

Generally.

8. (1) Liability for damage caused by an animal depends on the general law.

(2) In this section, "general law" means the law relating to liability, excepting any common law qualification, restriction, exclusion, extension or imposition of liability relating specially to damage caused by an animal, whether or not the qualification, restriction, exclusion, extension or imposition—

(a) is by reference to the nature or propensity of any animal or of any kind or class of animal, or knowledge of any such nature or propensity; or

(b) applies generally or in the circumstances of escape on to a highway or in any other particular circumstances.

Occupier.

9. Where damage results from a danger to a person entering premises, being a danger due to the state of the premises or due to things done or left undone on the premises, the liability if any of an occupier of the premises in respect of the damage depends on the law relating to the liability of occupiers, notwithstanding that the danger is or is associated with the presence or behaviour of an animal on the premises.

Rule in *Rylands v Fletcher* (1868) L.R. 3 H.L. 330.

10. The rule in Rylands and Fletcher does not apply relation to damage caused by an animal.

Evidence.

11. (1) For the purposes of this section an animal is unlawfully on or in any premises if the animal is on or in the premises without the consent of the occupier of the premises or by lawful authority binding on the occupier.

(2) Where -

(a) a person is under a duty to another person to take reasonable care that he is not subjected to the danger of an animal causing damage to him; and

(b) the animal causes the damage while it is unlawfully on or in any premises, the fact that the animal is unlawfully on or in the premises is evidence of breach of the duty.

(3) This section does not apply -

(a) where the premises concerned are a place used by the public as a road or way;

(b) where the person under the duty is an occupier of the premises; or

(c) where the animal concerned is a dog or a cat.

PART IV.

AMENDMENT OF DOG ACT, 1966.

Amendment of Act No. 2, 1966.

12. The Dog Act, 1966, is amended -

Subst. Sec.20.

(a) by omitting section twenty and by inserting in lieu thereof the following section:-

Liability for the wounding of a person.

20. (1) The owner of a dog shall be liable in damages in respect of bodily injury to and damage to clothing of a person caused by the dog wounding that person in the course of attacking him.

(2) This section does not apply in the case of an attack by a dog occurring on any land vehicle or other premises -

(a) of which the owner of the dog is an occupier; or

(b) on which the dog is ordinarily kept.

(3) This section does not apply in the case of an attack by a dog which is in immediate response to and is wholly induced by intentional cruelty to or intentional provocation of the dog by a person other than the owner of the dog, his servants or agents.

(4) This section does not affect the liability apart from this section of any person for damage caused by a dog.

New secs. 20A, 20B, 20C.

(b) by inserting next after section twenty the following new sections:-

Liability where death caused.

20A. Where the death of a person is caused by: a dog wounding him, and the person (if death had not ensued) would, in respect of bodily injury to him caused by the wounding, have been entitled, pursuant to section twenty of this Act, to maintain an action against and recover damages from the owner of the dog, the wounding shall, for the purposes of the Compensation to Relatives Act of 1897, be treated as a wrongful act, neglect, or default such as would (if death had not ensued) have entitled the person injured to maintain an action against and recover damages from the owner of the dog in respect thereof.

Liability for injury to an animal.

20B. (1) The owner of a dog shall be liable in] damages in respect of injury (whether fatal or not fatal) to another animal caused by the dog attacking,

worrying or chasing it.

(2) This section does not apply in the case of a dog attacking, worrying or chasing another animal on any land, vehicle or other premises

(a) of which the owner of the dog is an occupier; or

(b) on which the dog is ordinarily kept.

(3) This section does not apply in the case of a dog attacking, worrying or chasing another animal where the attacking, worrying or chasing is in immediate response to and is wholly induced by intentional cruelty to or intentional provocation of the dog by a person other than the owner of the dog, his servants or agents.

(4) This section does not apply in the case of a dog attacking, worrying or chasing another dog.

(5) This section does not affect the liability apart from this section of any person for damage caused by a dog.

Contributory negligence.

20C. Where the owner of a dog incurs liability, which he would not incur but for section twenty or section 20B of this Act, to pay damages in respect of damage caused by the dog, and the damage is the result partly of contributory negligence on the part of the person who suffers the damage -

(a) the liability of the owner to pay damages shall be treated for the purposes of Part III of the Law Reform (Miscellaneous Provisions) Act, 1965, as due to his "fault" and not as founded upon a breach of statutory duty;

(b) the contributory negligence shall be treated, for the purposes of that Act, as "fault".

PART V.

AMENDMENT OF VARIOUS ACTS.

Amendment of Act No. 6, 1898.

13. The Impounding Act, 1898, is amended by omitting. section fifty-eight and by inserting in lieu thereof the following section:-

Subst. Sec. 58.

Action for damages preserved.

58. The existence of any right given by this Act or its exercise shall not prevent any person from maintaining an action for damages on a cause of action which he would have otherwise.

Amendment of Act No. 7, 1913. Sec. 250. (Impounding and actions for trespass.)

14. The Crown Lands Consolidation Act, 1913. is amended by omitting from subsection one of section two hundred and fifty the words "trespass committed by stock" and by inserting in lieu thereof the words "the recovery of damages for damage caused by stock trespassing".

Amendment of Act No 41, 1919.

15. The Local Government Act, 1919, is amended by, omitting section four hundred and forty-four and by inserting in lieu thereof the following section:-

Subst. Sec. 444. No jurisdiction

444. (1) Nothing in this Part shall give jurisdiction to any justices in any matter

where title to land is in question. Cf. Impounding Act, 1898, s. 56.

where the title to land is bona fide in question.

Action for damages preserved. Cf. Impounding Act, 1898, s. 58.

(2) The existence of any right given by this Part or its exercise shall not prevent any person from maintaining an action for damages on a cause of action which he would have other wise.