

Department for the Environment, Food and Rural Affairs

Consultation on changes to the Animals Act 1971 to clarify the application of strict liability to the keepers of animals



**A response by the Association of Personal Injury Lawyers
19 June 2009**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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1. Do you agree that there is a case for amending section 2(2)(b) of the Animals Act 1971?

APIL does not believe that there is a case for making the proposed changes to section 2(2)(b) of the Animals Act 1971 (the Act), and submits that the status quo should remain. The proposed changes would create a fundamental shift in the principle of the Act, that people injured by animals should be able to claim compensation in specified circumstances. We believe the wording of the proposed amendment is no less opaque than the current wording, for the reasons stated later in this paper.

Furthermore, it was inaccurate of Jane Kennedy MP, former Minister of State for farming, to say that the proposed amendment is 'a small amendment'¹. If the proposed changes are implemented, the law affecting people injured in incidents involving animals will be fundamentally changed. The amendment would actually make this area of law, which is already complex, even more complex.

The amendment to the Act would discard over 30 years of case law build on the current wording of the legislation. It is vital to keep the case law in this area due to both the ambiguity of the original wording of the Act, which has been clarified by the case of *Mirvahedy v Henley*², and the complex nature of claims involving animals. There have been many judgments over the years which have gone some way to providing clarification of the meaning of the words included in the Act. Dealing with negligence in relation to animals is difficult, given, for example, the differences in behaviour between species and even between breeds of the same species. Those people who drive a car too fast are aware of the potential problems which may arise, but there is not the same level of certainty regarding actions involving animals. This complex area of the law has been clarified, over the past 30 years, through case law, and to lose that case law may once again throw the meaning of the Act into confusion.

¹ <http://www.defra.gov.uk/news/2009/090327b.htm>

² [2003] UKHL 16

The most important case relating to the Act is *Mirvahedy v Henley*. The driver of a car was seriously injured after a collision with a horse that had escaped from a field which was protected by an electric fence. Although the case for negligence was rejected, as the judge accepted that the owners of the horse had taken reasonable care to keep it fenced in, a separate case was brought under section 2 of the Act. The appeal by the injured person was upheld in the House of Lords, as the animal had a dangerous characteristic, in this case a propensity to escape, of which the owners were aware.

Another case which illustrates the complexity of the issue is *Wilson v Donaldson*³, where the farmer was found liable for injuries sustained by a car driver in an incident involving a cow, after the cow had escaped through a gate which had been left open by a member of the public. Lord Justice Rix stated in his judgment that the farmer has to 'exercise his mind about the risks inherent in his business, and the means of protecting against such risk'.

We agree with Lord Justice Rix that it is right that farmers, and everyone who keeps animals, to protect against such risks. It is also imperative that these people also have correct insurance, in the event that an incident does occur. It is not good public policy to leave injured people wholly dependant on the state for their care, when in other circumstances an insurance policy would have been in place to cover such costs.

The verdicts in the cases outlined above illustrate the fact that this is an incredibly complex area of law, with the wording of the legislation open to the interpretation of different judges. If the changes proposed in the consultation document are made, the ambiguity around the wording would be exacerbated, as there would not be any case law to guide the decisions of the judge.

³ [2004] EWCA Civ 972

We have concerns that these changes will have a negative impact on people injured by animals. The public would, rightly, expect that a child who is bitten by a dog, and potentially left disfigured, would be able to claim compensation. There are hundreds of cases involving dog bites every year, and if the amendment is introduced, these people may be left unable to claim compensation.

It is the experience of APIL members who have pursued claims for injury caused by animals that it is difficult to succeed in a case brought under the current wording of the Act. If the changes are made it would be even harder to bring a successful claim, even if it is meritorious. On the website Lawtel⁴, the last 12 cases reported involving the Act show only two were successfully argued on behalf of the claimant. Jayne Phillips, a leading defendant lawyer in cases involving animals, recently told a riding publication that she has won eight out of the last nine cases that she has defended under the Act⁵. There is also some anecdotal evidence from APIL members that it can be difficult to obtain after the event insurance for a claim under the Act, due to the relatively low claimant success rate. The current wording of the Act, and the ambiguity surrounding the definition of the wording, can make it difficult for even meritorious cases to be successful on the claimant's behalf. We believe that this means that the current balance in the Act between those who keep animals and those who are injured by those animals is working as well as can be expected, given the difficulties regarding the operation of the law of negligence in relation to animals.

2. Do you have views regarding the expected benefits of the proposals as identified in Chapter 3 of this consultation document and addressed in the Impact Assessment at Annex C?

APIL believes that there is little evidence to support the claims that the changes to the Act will provide the benefits set out in chapter 3 of the consultation document.

⁴ <http://www.lawtel.com/login/default.aspx>

⁵ http://ridingsafely.tripod.com/sitebuildercontent/sitebuilderfiles/will_i_be_successfully_sued.pdf

There is no evidence provided that insurance costs are a severe burden on farmers, and even less evidence that this is due to the provisions currently set out in the Act. APIL has heard anecdotal evidence that although insurance costs for farmers have increased in recent times, premiums have not increased anywhere near as much as other costs associated with keeping a farm, such as animal feed. We submit, therefore, that insurance premiums paid by farmers do not constitute a 'severe burden'. It is definitely not certain that insurance premiums would fall, even if the proposed amendment was made. The confusion which the wording of the Act would bring could even lead insurance premiums to rise, as insurers will be unsure of the level of litigation which could be brought under the new wording. This could leave farmers continuing to pay the same level of insurance premiums, while people who have been injured by animals would not be able to obtain the essential compensation they need to rebuild their lives.

Compensation is necessary to support families and individuals in the wake of any injury, including those caused by an animal. When a wage earner has had a catastrophic injury and is no longer able to work, for example, it is not just that the Government should provide full monetary support. If an injury is caused in almost any other way, insurance premiums paid by the individual responsible would cover the cost of compensation. If private individuals want to own animals, they should be willing to take out insurance to cover themselves for any injuries or damage which the animal may cause, in the same way that motorists take out insurance for any damage which may be caused by their vehicle. Obtaining insurance for such essential circumstances is an important social contract, which gives people who are injured through no fault of their own the ability to obtain compensation. When an injured person is unable to claim the compensation they need, then it will often be the state that pays the costs which would have been met by an insurance claim.

The insurance market, and the premiums farmers pay to insurance companies, are commercial matters, with which the Government should not interfere. The consultation document states that one of the reasons for the proposed change is that 'the Government believes that there could be benefits to businesses and individuals, including potentially reduced insurance premiums, from amending the Act'. There have been no proposals from the Government to attempt to artificially alter the impact of insurance premiums on any other individual who pays them. It could be argued that it would be beneficial, for different individuals or groups, if the Government were to change legislation to ease the perceived burden placed on those individuals by different responsibilities, yet this is the only sector where the Government proposes to do so.

Prior to any change to primary legislation that is motivated, even if only in part, by reducing the burden of insurance premiums for a specific business sector, the Government must provide evidence that the change would actually reduce that burden. No such evidence has been produced here, and APIL would submit that this is an area which should continue to be free from Government intervention.

There have been reports in the magazine Horse and Hound recently that have also questioned both the argument that insurance premiums for riding schools are rising, and the presumption by the Government that the amendment will reduce premiums. One article states that 'punitive insurance premiums for British riding schools have peaked and in some cases are dropping'⁶. A report on the proposed amendment says that the changes 'may not lead to cheaper insurance premiums for riding schools as claimed in the press'⁷.

⁶ Horse and Hound, 19 July 2008

⁷ Horse and Hound, 2 April 2009

3. Do you have any views on the possible adverse impacts of this proposal as identified in Chapter 3 of this consultation document and addressed in the Impact Assessment at Annex C?

We believe that this amendment would have a number of adverse impacts on injured people. There would be a delay in clarifying the new wording; this would need to be done through litigation which could take many years, as it did with the current wording. There would also be a problem of injured people being left without compensation in circumstances where they would currently receive compensation. This would occur not only due to the ambiguous wording, but the fact that the amendment seeks to limit the occasions where strict liability is applied.

4. Do you agree that the proposed approach will achieve the objective of clarifying the law in order to limit the application of strict liability where harm or damage is caused by animals to cases where the animals involved are known to be dangerous either permanently or in the specific circumstances known to apply at the time the damage was caused?

APIL does not agree that the proposed approach will clarify the law in order to limit strict liability to apply only in certain circumstance. The language of the proposed amendment is no clearer than the current wording, and full clarification will only be achieved after many years of satellite litigation. The wording of the amendment will be open to just as much interpretation as the current wording, specifically where cases involve 'unusual characteristics' and 'particular circumstances'. New clause 2 (3) will also cause problems with definition, as it states 'a characteristic of an animal is unusual or it is not shared by animals of that species generally'. There are many different breeds within each species of animal, and there can be marked differences in normal behaviour between breeds.

This will make it very difficult to determine whether an animal's behaviour is 'unusual' in particular circumstances, it may be perfectly normal for one breed to behave in a certain way, while another breed behaves in the complete opposite way in the same circumstances.

We understand that this is a difficult area of law to express in words for the purposes of legislation; but we also feel that the current wording of the Act, along with the current case law which has clarified the terminology, specifically in the *Mirvahedy* case relating to strict liability, is satisfactory. The wording of the amendment would require the behaviour of animals would have to be redefined completely, and this would be almost impossible to do through legislation, requiring instead many years of litigation.

The new wording will also lead to detailed arguments about minute details of animals' behaviour and the circumstances of particular incidents. This is not the best way to decide such claims, due to the difficulties in defining animals' behaviour, and the differences in behaviour between species, and even breeds, as outlined above. APIL believes that a fairer way to conduct such cases is for the keeper of the animal to be liable in all cases, which would remove the need for detailed arguments surrounding the wording of the amendment.

5. Do you agree that the proposed Parliamentary resolution procedure (as outlined in Paragraphs 54-57) should apply to the scrutiny of this Proposal?

The proposed amendment to the Act is a major change to the principle of the legislation, which would redefine the behaviour of animals as set out over the past 30 years. APIL believes any amendment to primary legislation should be made through the usual parliamentary channels and only after scrutiny by both Houses of Parliament.

Such a fundamental change to the principle of legislation should also be subject to full consultation outside Parliament. This consultation takes place after the date to change the law has been set, and the consultation document includes the draft order to change the law. A recent report in the media stated that the change would be made on 1 October 2009, but made no mention of the fact that the issue is being consulted on.⁸

Any change to existing legislation should go through pre-legislative scrutiny and the usual process for public Bills. Prior to the Animals Bill (now the Act) being introduced into Parliament in 1970, the Law Commission carried out a full consultation. The Bill was then considered in the usual ways in both the House of Commons and Lords. This level of scrutiny is clearly missing from this proposed amendment.

If the Government wishes to make such a change to primary legislation, then it must provide evidence that such a change is necessary, or even desirable. There was no evidence for this when Stephen Crabb MP introduced his Animals Act (Amendment) Bill in 2007, and there is no evidence for it set out in the consultation document.

APIL is concerned that primary legislation is being changed using legislative reform orders, and believes that any changes to primary legislation should be taken in accordance with normal Parliamentary scrutiny processes.

6. Do you think the proposals will remove or reduce burdens as explained in Chapter 6?

We do not believe that the current wording of the Act imposes burdens on those keeping animals. The fact that the wording of the proposed amendment is no clearer than the current wording means that any such burdens may in fact be increased, until the wording has been clarified through case law, which could take many years.

⁸ *Horse Deals* magazine, 1 June 2009, page 10

The consultation document says that the current wording of the Act places a 'significant burden on the keepers of animals in terms of both financial cost and administrative inconvenience.' APIL does not believe that carrying out a risk assessment is a 'significant burden', as all responsible animal owners should be assessing the risk that their animals may cause to others. Protecting people from animals and ensuring that correct insurance is obtained is not simply red tape or bureaucracy.

Under common law, people who choose to keep animals have a responsibility to take reasonable care that the animal will not injure people. This is backed up by the application of strict liability in the Act, where the animal has a dangerous characteristic, of which the owner was aware. We understand that it is essential that any law relating to negligence involving animals must strike a balance between the keeper and the injured person, and believe that Lord Nicholls summed up the need in his judgment in the case of *Mirvahedy v Henley*⁹, when he said: "It may be said that the loss should fall on the person who chooses to keep an animal which is known to be dangerous in some circumstances. He is aware of the risks involved, and he should bear the risks. On the other hand, it can be said that, negligence apart, everyone must take the risks associated with the ordinary characteristics of animals commonly kept in this country. These risks are part of the normal give and take of life in this country." This would appear to show that the opinion of the House of Lords is that the appropriate balance is already in place in the current wording of the Act.

We also believe that it is sensible for people who keep animals to have insurance to cover them, in the event that an animal does injure someone. If everyone who keeps an animal took out insurance to cover them in the eventuality that their animal did injure someone.

⁹ [2003] UKHL 16

This would not only spread the risk of paying compensation, but may lead to insurance premiums decreasing, as there would be more money in the insurance fund. In our view, this is a better way to reduce insurance premiums than making the proposed amendment.

APIL also argues that the changes to the Act would place a burden on the state to look after people who may be injured in an incident involving animals. When no compensation can be obtained following such an incident the state will be paying to look after the injured individual. This may not only be through medical treatment on the NHS, but potentially benefits paid to any dependants of the injured person.

7. Are there any non-legislative means that would satisfactorily remedy the difficulties which the proposals intend to address?

APIL does not believe, as stated above, that there are any problems with the current wording of the Act which requires any remedy. Furthermore, APIL contends that the only problem with the wording of section 2(2)(b) of the Act at present is that it can leave injured people without the compensation they need, and this could be exacerbated if the proposed changes are made.

8. Are the proposals put forward in this consultation document proportionate to the policy objective?

We believe that the ends and the means of this process are undesirable and inappropriate respectively. Even if the Government feels that the outcome is desirable, it should be willing to make the case for change in Parliament, not change the law by the back door. The changes would be likely to lead to years of satellite litigation to determine the exact meaning of the new wording, as has happened with the current wording of the Act. This is something that we certainly feel is not proportionate.

9. Do the proposals put forward in this consultation document taken as a whole strike a fair balance between the public interest and any person adversely affected by it?

APIL believes that the proposals put forward in the consultation document are weighted in favour of the keeper of the animal, and do not give enough regard to injured people, for the reasons stated above.

APIL believes that the balance which the Government is seeking strike must take into account the widow whose husband died after his car collided with a cow, or the child who is left disfigured after being attacked by a dog. The impact on the lives of those involved makes it essential that people can obtain the compensation they need. There are already such provisions in the Act for damage done to property, and these provisions should be extended to include personal injuries as well.

10. Do the proposals put forward in this consultation document remove any necessary protection?

APIL believes that the proposed changes to the Act could remove the protection which allows injured people to claim compensation after being injured, in certain circumstance, through no fault of their own. If an incident involving an animal occurs in the circumstances set out in the Act, and clarified through 30 years of case law, it is vital that there is a safeguard to allow anyone who is injured to rebuild their lives with the appropriate level of compensation.

11. Do the proposals put forward in the consultation document prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise. If so, please provide details.

APIL believes people have a right to go about their everyday business without being injured by an animal, in the same way that drivers have the right to drive on a public highway without being injured by another car through the drivers' negligence. The changes set out in the legislative reform order would have a fundamental impact on the lives of people who are injured by animals through no fault of their own by potentially denying them the opportunity to claim compensation.

12. Do you consider the provisions of the proposals to be constitutionally significant?

APIL believes that it is constitutionally significant that the Government is using a legislative reform orders to amend primary legislation without proper Parliamentary scrutiny. The proposed amendment would do more than simply clarify the law, something which has already been done through judgments in the courts.

APIL is also concerned that the changes to the Act may shift the burden of proof away from the animal's keeper, and on to the injured person. This could occur because it will be up to the injured person to prove that the behaviour of the animal was 'due to an unusual or conditional characteristic'; or that the characteristic which led the animal to cause the damage is 'unusual or it is not shared by animals of that species generally'. Both of these stipulations could be very difficult to prove.

13. Do the proposals put forward in the consultation document make the law more accessible and easily understood?

APIL believes the proposed amendment is less clear than the current wording of section 2 (2) (b) of the Act. APIL would submit that the changes would make the law less accessible and less easy to understand, as set out above. For this reason, as well as for the others outlined above, APIL believes that the proposed amendment should not be made.