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Animals Act 1971 (Amendment) Bill

Bill 18 of 2007-08

This Bill aims to reduce the number of situations under the *Animals Act 1971* when, following an accident involving certain types of animal, an owner of the animal is strictly liable (that is liable to pay compensation regardless of whether there is any fault on the owner's part).

In 2003, in the case of *Mirvahedy v Henley*, a split decision in the House of Lords confirmed a wide interpretation of what was called an "opaque" section of the *Animals Act 1971*. One consequence of this decision has been an increase in insurance premiums for keeping such animals. In some cases increased premiums appear to have led to the closure of some businesses, such as riding schools.

The Bill would amend the wording of the 1971 Act to provide more clarity and with the intention of limiting the circumstances where strict liability would apply.

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Summary of main points

The owner of an animal may be found liable to pay compensation for damage caused by their animal as a result of a number of different types of action, including actions in negligence or strict liability.

Section 2(2) of the *Animals Act 1971* sets out three conditions which, if satisfied, will make the owner of an animal (which does not belong to a "dangerous" species) strictly liable for damage caused by the animal. Strict liability means that the keeper of an animal will be liable to pay compensation to an injured party regardless of whether there is any intention or negligence on their part.

Section 2(2)(b) of the 1971 Act states that the keeper of the animal is liable (subject to the criteria in section 2(2)(a) and (c) being fulfilled) if "the likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances."

All three conditions must be met for liability to be established. However, it has been the interpretation of section 2(2)(b) of the 1971 Act in the case of *Mirvahedy v Henley* [2003], which has proved especially problematic for the owners of certain animals, particularly horses. This interpretation has been blamed for a direct rise in insurance premiums for keeping animals. Prior to this case, there had been varying judgements about whether a keeper of an animal would be held strictly liable for damage caused by an animal.

In *Mirvahedy v Henley* the House of Lords called this section of the 1971 Act "opaque". In a majority judgment it was held that, under section 2(2)(b) of the 1971 Act, the keeper of a non-dangerous animal was strictly liable for damage or injury it caused while it was behaving in a way that, although not normal behaviour generally for animals of that species, was nevertheless normal behaviour for the species in the particular circumstances, such as a horse bolting when sufficiently alarmed.

The Bill would amend the wording of section 2(2) of the 1971 Act to limit the number of situations where strict liability would apply. It would change the wording so that if the animal exhibited a type of behaviour that is shared by all animals of the same species, but only in particular circumstances, then liability would not apply if the "keeper of the animal at the time when the damage was caused shows that there was no reason to expect that special circumstances would arise at that time."

The Bill has Government support and was drafted in conjunction with the Department for Environment, Food and Rural Affairs. The Countryside Alliance, the Country Land and Business Association and the British Horse Society have also given this Bill their support. It has been called it a "vitally important Bill for all horse and animal owners."

CONTENTS

I Introduction and background

A. Why the Bill is being introduced

Following the ballot for Private Members' Bills, in which he secured sixth place, Stephen Crabb set out the broad intended purpose of this bill in a press release:

> The proposed law aims to ensure that responsible animal owners cannot be unfairly forced to pay compensation, where they have taken all reasonable steps to prevent accidents. Under current law, owners of animals such as horses and cattle can face huge compensation claims, even when it is accepted that an accident involving one of their animals was not their fault. The problem is particularly severe for horse owners. Ever since the House of Lords ruled in 2003 that "strict liability" applied to all animal owners, insurance premiums have soared, threatening the livelihoods of thousands in small stables across the country.[1]

A spokesman for the Department for Environment, Food and Rural Affairs (Defra) was quoted as saying:

> Defra is sympathetic to the objectives of this Private Member's Bill. We welcome Mr Crabb's initiative in taking it forward and we remain happy to assist him in developing a workable and effective proposal."[2]

The Bill aims to narrow the number of situations under the *Animals Act 1971* when an owner of an animal will be strictly liable (that is liable for compensation to an injured party regardless of whether there is any fault on the owner's part) following an accident involving the animal.

The *Animals Act 1971* does not extend to Scotland or to Northern Ireland,[3] and accordingly this Bill would extend only to England and Wales.

B. Current law

The owner of an animal may be found liable to pay compensation for damage caused by their animal as a result of a number of different types of action, including actions in negligence or in strict liability.

1. Negligence

Negligence is a tort (a wrongful act or omission for which damages can be obtained in a civil court by the person wronged).[4] For a successful claim in negligence, various elements must generally be present:

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1 Stephen Crabb MP, press release, *Responsible Animal Owners to Benefit from MP's Proposed Law*, 27 November 2007

2 *Ibid*

3 *Animals Act 1971* section 13

4 *Oxford Dictionary of Law*, 5th Edition, 2003

- There must be a duty to take care. A duty of care is decided in relation to the facts at issue in a particular case, or in other words, did this defendant owe a duty of care to this claimant. It has been held that, in addition to the foreseeability of damage, in any situation giving rise to a duty of care it is also necessary that there should be sufficient "proximity" between the parties, and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other.[5]

- There must be a breach of that duty.

- There must be actual damage caused as a result of the breach of the duty to take care. The damage must not be too remote a consequence of the breach of duty.

Thus, in order to bring a successful claim in negligence it is necessary to show some fault on the part of the defendant.

In the context of a negligence action brought against the owner of an animal, a person may be liable, for example, where they fail to exercise reasonable care over their animal and as a result, the claimant suffers damage. However, as in all claims relating to negligence, each case would be decided on its own particular facts and what is reasonable in the circumstances involved.

As set out in the Explanatory Notes published with the Bill, the existence of section 2 of the *Animals Act* (ie the possibility of imposing strict liability for damage caused by certain animals) does not affect liability in negligence under the common law for the keeper of an animal.[6]

2. Strict liability under the *Animals Act 1971*

In some situations a defendant may be liable even though the damage was caused without intention or negligence on the defendant's part. This is known as strict liability.

In certain circumstances, the *Animals Act 1971* imposes strict liability on animal owners for any damage caused by their animals. In effect, the owner of the animal is liable for such damage regardless of any actions they may have taken to limit the risk of it occurring.

Where any damage is caused by an animal belonging to a dangerous species, any person who is its keeper is strictly liable for the damage, subject to certain exceptions.[7] In this situation, the keeper's state of knowledge of the animal's characteristics is not relevant, nor is the fact that the particular animal is tame.

The Act defines what is meant by a "dangerous species" in section 6(2):

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5 *Caparo Industries plc v Dickman* [1990] 2 AC 605

6 Bill 18-EN, paragraph 3

7 *Animals Act 1971* section 2 (1)

> (2) A dangerous species is a species—
>
> (a) which is not commonly domesticated in the British Islands; and
>
> (b) whose fully grown animals normally have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be severe.

Any species of animal which does not meet these requirements (for example because it is commonly domesticated in the British Isles), such as a horse, is therefore the type of animal referred to in section 2(2), which is the provision that the Bill would amend. Under Section 2(2) of the *Animals Act 1971:*

> 2) Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if—
>
> (a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and
>
> (b) the likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances: and
>
> (c) those characteristics were known to that keeper or were at any time known to a person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, were known to another keeper of the animal who is a member of that household and under the age of sixteen.

It is important to note that strict liability occurs only when all of section 2(2)(a), (b) AND (c) are satisfied.

There are certain statutory defences to the strict liability arising from section 2 of the Animals Act 1971 and these are set out in section 5 of the 1971 Act.

3. Law Commission Report on Civil Liability for Animals 1967

One of the drivers behind the current law in the *Animals Act 1971* was a Law Commission report on *Civil Liability for Animals* of 1967.[8] This was the precursor to the introduction of the *Animals Bill* in 1969 (the Bill which became the 1971 Act) . On the point of strict liability for acts of non-dangerous animals, the Law Commission concluded:

> Strict liability should also be imposed in respect of injury or damage done by an animal which does not belong to a dangerous species, if the particular animal had known dangerous characteristics from which the injury or damage in fact resulted.

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[8] Law Commission on *Civil Liability for Animals* (1967) (Law Com no 13)

> Such characteristics should be capable of giving rise to strict liability even if, though not common to the species as a whole, they are shared by other animals within the species, whether at a particular age, at certain times of the year, or in certain conditions.[9]

The Law Commission appended a draft bill to their report which set out how their conclusions would look in legislation. Section 2(2), of what subsequently became the *Animals Bill 1969,* read:

> (2) Where damage of any kind is caused by an animal which does not belong to a dangerous species, and—
>
> (a) the animal has such characteristics that it is likely, unless restrained, to cause damage of that kind or that any damage of that kind that it may cause is likely to be severe: and
>
> (b) those characteristics are known or treated as known to a person who is a keeper of the animal;
>
> that person is liable for the damage, except as otherwise provided by this Act.[10]

This wording does not contain what is now section 2(2)(b) of the *Animals Act 1971.* The *Animals Bill 1969* lapsed when Parliament was dissolved for the 1970 general election. When the Bill was reintroduced in the following session, clause 2(2) had been reformulated to include what is now condition (b) of section 2(2) of the 1971 Act.

4. Case law

Section 2(2) is a very complex and difficult area of the law. A number of judges have struggled with its interpretation and have come to different conclusions as to how it should be applied. It has been described in a legal textbook on personal injury law as "by far the most problematic statutory provision that will be encountered in this book. No commentary is an adequate substitute for patiently reading the words of the Act"[11].

The problematic section has been dealt with in a number of cases only some of which are considered here. Difficulties have arisen particularly in interpreting and applying the two limbs of section 2(2)(b):

- the first limb refers to characteristics of the animal which are not normally found in animals of the same species (eg a general propensity of a dog to bite) and

- the second limb refers to characteristics which are not normally so found except at particular times or in particular circumstances (eg the propensity of a bitch with pups to bite).

Different interpretations of each test have been given in separate cases in the Court of Appeal. The leading case on these issues in the House of Lords was decided by a

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9 Law Commission on *Civil Liability for Animals* (1967) (Law Com no 13) p15

10 Law Commission on *Civil Liability for Animals* (1967) (Law Com no 13), appendix A Draft of Animals (Civil Liability) Bill, p45

11 Peter Barrie, *Personal Injury Law*, second edition, 2005, p292

majority judgment (3:2). The courts have also considered the meaning of the term "likelihood of the damage".

The cases discussed in this section involve difficult issues. However, they are considered in some detail here as the arguments set out in the various judgments go to the heart of explaining why insurance premiums for animal owners appear to have increased to such an extent. Although there have been decisions both ways, following the House of Lords judgment, it now seems that the balance may have swung towards strict liability for animal owners. The cases also illustrate judicial opinion that the wording of the law in this area is unsatisfactory.

a. Cummings v Granger

In *Cummings v Granger*,[12] the Court of Appeal interpreted the second limb of section 2(2)(b) independently of the first and concluded that an Alsatian guard dog which attacked a trespasser was displaying a characteristic which arose in particular circumstances, even though this was normal behaviour for such dogs in such circumstances. Lord Denning said that "The section is very cumbrously worded and will give rise to several difficulties in future".[13] He held that the three elements in section 2(2) had been satisfied in this case:

> Section 2 (2) (a): this animal was a dog of the Alsatian breed; if it did bite anyone, the damage was "likely to be severe." Section 2 (2) (b): this animal was a guard dog kept so as to scare intruders and frighten them off. On the defendant's own evidence, it used to bark and run round in circles, especially when coloured people approached. Those characteristics - barking and running around to guard its territory - are not normally found in Alsatian dogs except in circumstances where they are used as guard dogs. Those circumstances are "particular circumstances" within section 2 (2) (b). It was due to those circumstances that the damage was likely to be severe if an intruder did enter on its territory. Section 2 (2) (c): those characteristics were known to the defendant. It follows that the defendant is strictly liable unless he can bring himself within one of the exceptions in section 5.

Lord Justice Ormrod spoke of the difficulty of interpreting section 2(2)(b):

> Having struggled with section 2 (2) (b) for a considerable time to ascertain its meaning through its remarkably opaque language, I agree that the upshot of it can perhaps be put in this way. The plaintiff must prove that the animal had a propensity to cause damage which is not normally found in the variety of dog concerned or only at particular times or in particular circumstances; and an example of that is a bitch with pups or an Alsatian dog running loose in a yard which it regards as its territory when a stranger enters into it.[14]

In such circumstances, strict liability would therefore be established (although in this case one or more of the defences applied).

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12 *Cummings v Granger* [1977] QB 397
13 At 404
14 At 407

b. Breeden v Lampard

However, in *Breeden v Lampard*[15], the Court of Appeal interpreted the second limb of section 2(2)(b) as subject to the first limb, that is as not applying to any characteristic which was normal for the species. Lord Justice Lloyd said:

> The essential condition of liability now is that the characteristic which is known to the owner must be a characteristic which is abnormal for the species …. If liability is based on the possession of some abnormal characteristic known to the owner, then I cannot see any sense in imposing liability when the animal is behaving in a perfectly normal way for all animals of that species in those circumstances, even if it would not be normal for those animals to behave in that way in other circumstances, for example, a bitch with pups or a horse kicking out when approached too suddenly, or too closely, from behind. In my view, the purpose of the concluding words of s. 2(2)(b) …. may be designed to meet an argument by an owner:
>
> 'My horse did not have any abnormal characteristics even though it was liable to kick out all the time, because all horses are liable to kick out some of the time eg. when crowded from behind'.
>
> In other words, the concluding words are refining what is meant by abnormality, not imposing a head of liability contrary to the main thrust of s. 2(2)(b) of the Act.[16]

The characteristic of a horse to kick when approached too quickly from behind did not fall under the second limb as it was considered to be a normal characteristic of the species. Under this interpretation, if an animal was acting in a normal way for all animals of a species in a particular situation (regardless of whether it might not be normal for the animal to behave in that way in most other situations), there was no strict liability.

c. Mirvahedy v Henley

In 2003, in *Mirvahedy v Henley*,[17] the House of Lords ruled on the interpretation of section 2(2)(b) of the *Animals Act 1971*. As it has been argued that this case has contributed to the problems that this Private Member's Bill is intended to address, the judgment is considered in some detail here. The case illustrates the difficulty involved in interpreting section 2(2) and the divergence of opinion to which such interpretation has given rise.

The case concerned a horse, owned by the Henleys, which one night became spooked by something unknown and bolted from its field, knocking over two fences along the way until it reached a dual carriageway where it collided with a car driven by Mr Mirvahedy. Mr Mirvahedy suffered serious personal injuries and claimed that, although a claim in

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15 *Breeden v Lampard*, unreported, 21 March 1985
16 *Mirvahedy v Henley* [2003] UKHL 16 at para 124
17 *Mirvahedy v Henley* [2003] UKHL 16

negligence had failed, the Henleys should be held strictly liable for the actions of their horse under section 2(2) of the *Animals Act 1971*.

In a majority judgment it was held that, under section 2(2)(b) of the 1971 Act, the keeper of a non-dangerous animal was strictly liable for damage or injury it caused while it was behaving in a way that, although not normal behaviour generally for animals of that species, was nevertheless normal behaviour for the species in the particular circumstances, such as a horse bolting when sufficiently alarmed. In this case, the horse owners were liable to the driver.

Lord Nicholls of Birkenhead said that the appeal turned on one question: whether the keeper of an animal, such as a horse, was strictly liable for damage caused by the animal when the animal's behaviour in the circumstances was in no way abnormal for an animal of the species in those circumstances.[18] He considered, that as a matter of social policy, there were arguments on each side of this issue:

> Considered as a matter of social policy, there are arguments in favour of answering this question yes, and arguments in favour of answering no. 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.[19]

He went on to say, however, that social policy was a matter for Parliament, and that the court's role was to interpret the law as enacted. He also stated that the language of section 2(2) was "opaque [… and] in this instance the parliamentary draftmans' zeal for brevity has led to obscurity"; and that "over the years section 2(2) has attracted much judicial obloquy."[20]

Lord Nicholls considered the background to the section and the intention of Parliament when the Act was passed. In particular, he referred to the 1967 Law Commission report, *Civil Liability for Animals* .[21] Lord Nicholls said that section 2(2)(b) had been introduced following criticism that even normal behaviour of an animal might cause damage and give rise to strict liability. [22]

Lord Nicholls upheld the wider definition of strict liability as given in *Cummings v Granger*,[23] and said:

> [O]n balance I prefer the Cummings interpretation of section 2(2)(b), for a combination of reasons. First, this interpretation accords more easily and naturally with the statutory language. Damage caused by an attack by a newly-

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18 *Mirvahedy v Henley* [2003] UKHL 16, para 5
19 *Mirvahedy v Henley* [2003] UKHL 16 at para 6
20 *Mirvahedy v Henley* [2003] UKHL 16, para 9
21 Law Commission report No 13, 1967, *Civil Liability for Animals*
22 *Mirvahedy v Henley* [2003] UKHL 16, para 39
23 *Cummings v Granger* [1977] QB 397

> calved cow or a dog on guard duty fits readily into the description of damage due to characteristics of a cow or a dog which are not normally found in cows or dogs except in particular circumstances. That is not so with the Breeden interpretation. The Breeden interpretation has the effect that these examples would fall outside both limbs of paragraph (b). This result makes sense only on the supposition that, by the references to abnormal characteristics in section 2(2)(b) (characteristics 'not normally found'), Parliament intended that strict liability should never arise if the animal's conduct was normal for the species in the circumstances in which it occurred. But the language of the paragraph provides no substantial support for this supposition.
>
> 45. Secondly, the Breeden interpretation would depart radically from the legislative scheme recommended by the Law Commission. There is no evidence that any such departure was intended. Indeed, far from such a departure being intended, the wording of clause 2(2)(b) of the reformulated Animals Bill, subsequently enacted as section 2(2)(b) of the Animals Act, was plainly drawn from, and closely followed, the language of paragraphs 18(ii) and 91(iv) of the Law Commission's report.
>
> 46. Thirdly, the 'lack of content' argument levelled against the Cummings interpretation cannot be pressed too far. The Cummings interpretation does not empty requirement (b) of all content. Some forms of accidental damage are instances where this requirement could operate. Take a large and heavy domestic animal such as a mature cow. There is a real risk that if a cow happens to stumble and fall onto someone, any damage suffered will be severe. This would satisfy requirement (a). But a cow's dangerousness in this regard may not fall within requirement (b). This dangerousness is due to a characteristic normally found in all cows at all times. The dangerousness results from their very size and weight. It is not due to a characteristic not normally found in cows 'except at particular times or in particular circumstances'.
>
> 47. For these reasons I agree with the interpretation of section 2(2)(b) adopted in Cummings v Granger [1977] QB 397 and Curtis v Betts [1990] 1 WLR 459 and by the Court of Appeal in the instant case. The fact that an animal's behaviour, although not normal behaviour for animals of that species, was nevertheless normal behaviour for the species in the particular circumstances does not take the case outside section 2(2)(b).

Two of the other Lords hearing the appeal agreed with Lord Nicholls to give a 3:2 majority.

Lord Hobhouse of Woodborough agreed that there was liability in relation to temporary characteristics which were normal for the animal in particular circumstances:

> It is true that there is an implicit assumption of fact in s.2(2) that domesticated animals are not normally dangerous. But the purpose of paragraph (b) is to make provision for those that are. It deals with two specific categories where that assumption of fact is falsified. The first is that of an animal which is possessed of a characteristic, not normally found in animals of the same species, which makes it dangerous. The second is an animal which, although belonging to a species which does not normally have dangerous characteristics, nevertheless has dangerous characteristics at particular times or in particular circumstances. The essence of these provisions is the falsification of the assumption, in the first

> because of the departure of the individual from the norm for its species, in the second because of the introduction of special factors…
>
> 72. The statute, in this respect following the recommendation of the Law Commission, had to reflect a choice as to the division of risk between the keeper of an animal and members of the general public. Neither is blameworthy but it is the member of the public who suffers the injury or damage and it is the keeper who knows of the characteristics of the animal which make it dangerous and liable to cause such injury or damage. The element of knowledge makes the choice a coherent one but it, in any event, was a choice which it was for the Legislature to make.[24]

Lord Walker of Gestingthorpe sympathised with the position of the horse owners but did not consider it unjust that they should be held liable:

> It is common knowledge (and was known to the appellants in this case) that horses, if exposed to a very frightening stimulus, will panic and stampede, knocking down obstacles in their path (in this case an electric fence, a post and barbed wire fence behind that, and then high undergrowth) and may continue their flight for a considerable distance. Horses loose in that state, either by day or by night, are an obvious danger on a road carrying fast-moving traffic. The appellants knew these facts; they could decide whether to run the unavoidable risks involved in keeping horses; they could decide whether or not to insure against those risks. Although I feel sympathy for the appellants, who were held not to have been negligent in the fencing of the field, I see nothing unjust or unreasonable in the appellants having to bear the loss resulting from their horses' escape rather than the respondent (who suffered very serious and painful injuries in the accident, although he was wearing a seatbelt and slowed down as soon as he saw the first horse in his headlights).[25]

In a dissenting judgement, Lord Scott of Foscote favoured the interpretation of section 2(2)(b) in *Breeden v Lampard:*

> A construction of paragraph (b) under which abnormal behaviour is a requisite for strict liability seems to me consistent with the statutory language, to promote the apparent scheme of the Act by confining strict liability under section 2(2) to cases where damage has been caused by animals displaying characteristics which are not normal for their species and to avoid the anomalies produced by the dual test construction. The construction, as Lloyd LJ noted, attributes the inclusion in paragraph (b) of the concluding words "or are not normally so found except at particular times or in particular circumstances" to the need to forestall attempts by defendants to escape the opening words, "the likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species", by contending that all dogs will sometimes bite, all horses will sometimes kick, all bulls will sometimes charge etc. If, as I think it was, the intention of paragraph (b) was to require the likelihood of the damage, or its severity, to be attributable to particular, individual characteristics of the delinquent animal not shared by others of its species, some additional words were necessary to prevent escape attempts of the sort described. The language

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[24] *Mirvahedy v Henley* [2003] UKHL 16, paras 71-72
[25] *Mirvahedy v Henley* [2003] UKHL 16, para 157

> might have been better chosen and have avoided the ambiguity that has caused the problem. But the suggested construction is, in my opinion, consistent with the statutory language actually used by Parliament and is one that I think your Lordships can and should adopt.[26]

Lord Scott also commented on the interpretation of the word "likely" in section 2(2):

> 97. In Smith v Ainger, an unreported case in the Court of Appeal in which judgment was given on 16 May 1990, a large delinquent dog attacked the plaintiff's dog and, in the process, knocked over the plaintiff causing him to break a leg. The only judgment in the case was given by Neill LJ with whom the other two members of the court expressed agreement. Neill LJ directed himself first to the meaning to be given to the word "likely" in section 2(2)(a). He rejected "probable" or "more probable than not" as correct and preferred "such as might happen" or "such as might well happen". I would respectfully agree with the Lord Justice's rejection of "probable" and "more probable than not" but am unable to agree that "such as might happen", a phrase consistent with no more than a possibility, can be right. A mere possibility is not, in my opinion, enough. I have suggested "reasonably to be expected" as conveying the requisite meaning of "likely" in paragraph (a). But it may be that there is no material difference between "reasonably to be expected" and Neill LJ's "such as might well happen".
>
> 98. In my opinion, there has been insufficient attention paid in the present case to the requirements of paragraph (a). It seems to have been assumed that because Mr Mirvahedy suffered serious personal injuries caused by the escaped horse and that considerable damage was caused to his car, the requirements of paragraph (a) were shown to be satisfied. My own impression, however, is that a horse loose on the highway does not usually result in damage to third parties, that if damage to third parties does result the damage is not usually severe, no more, perhaps, than a dent to a car, and that the cases in which serious injury or damage results are fortunately few and far between.

Lord Slynn of Hadley also delivered a dissenting judgment and said "It is not surprising that different Courts in cases before the present one should have taken different views as to the meaning of section 2(2)(b) of the Act; nor that different views should emerge in the present case. The meaning of that part of the sub-section is not at all obvious or clear".[27] He considered that the object of the provision was to exclude strict liability not only for behaviour which is normal in the normal circumstances but also behaviour which is normal in particular (i.e. abnormal) circumstances, even if such behaviour would be abnormal in normal circumstances:

> the intendment of para. (b) is that if the animal does what is normal for the species (a) usually or (b) only in special circumstances or at special times then it should not be treated as dangerous and there should be no strict liability, it being always remembered that liability in negligence is preserved.[28]

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[26] *Mirvahedy v Henley* [2003] UKHL 16, para 131
[27] at paragraph 50
[28] at paragraph 59

d. Clark v Bowlt

In *Clark v Bowlt*, the Court of Appeal again considered the interpretation of section 2(2) – particularly the relationship between subsections (a) and (b) – and called it a "difficult area of the law".[29]

The driver of a car slowed down to pass two horses. As he passed, one of the horses (called Chance) moved into the road and hit the car causing damage. Neither the driver nor the rider was found to have been negligent.

At first instance, the county court judge said that Chance was a heavy animal, and in close proximity to traffic. If, as it did, the animal decided to move into the path of a car, the damage was likely to be severe. Applying the *Mirvahedy* case, he considered the second part of subsection 2(a) to be satisfied. In relation to section 2(2)(b), he said that horses, and this horse in particular, normally follow the direction of their rider, but in particular times and in particular circumstances, horses generally can (as Chance did) assert an inclination to move otherwise than as directed. The judge said that the horse had a characteristic which could and did lead it to move near to a moving car, and that this was a characteristic which only arose at particular times and in particular circumstances. This caused the accident and damages were awarded.

The Court of Appeal reversed this decision. The Lord Chief Justice, Lord Phillips of Worth Matravers, gave the lead judgment and said that "in this rather difficult area of the law the judge has got into a muddle". The judge did not address the question of whether the damage caused by Chance was damage which Chance, unless restrained, was likely to cause (the first limb of section 2 (2) a)). Based on the fact that the horse was a heavy animal, the judge held that the alternative limb of section 2(a) was satisfied, namely that if Chance caused damage it was likely to be severe.

Lord Phillips said that when the judge came to address requirement (b) he should have asked himself whether the likelihood of the damage being severe was due to characteristics of the animal not normally found in animals of the same species. The relevant characteristic was the weight of the animal. Had the judge asked the right question, he would have concluded that Chance's weight was a normal characteristic of all horses at all times, so that requirement (b) was not satisfied. He said that, instead of asking the right question, the judge identified as the relevant characteristic the propensity of a horse "in particular times and in particular circumstances" to "assert an inclination to move otherwise than as directed". If the uncontrolled movement was taken as the basis of section 2(2)(b) this would not satisfy section 2(2)(a) as horses are normally liable to follow the direction of their rider rather than make uncontrolled movements. He also said that, even if a propensity occasionally to move otherwise than as directed could be described as a characteristic, it was questionable whether this was not normally found in horses "except at particular times and in particular circumstances". He added "The judge failed to identify either the particular times or the particular circumstances when this characteristic manifested itself. Indeed in saying that this was a characteristic of horses generally the judge came close to accepting that the propensity was a normal

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[29] *Clark v Bowlt* [2006] EWCA Civ 978

characteristic of a horse, not one that only arose at a particular time or in particular circumstances".[30]

Lord Justice Sedley agreed that the favourable finding that it was the horse's weight which brought the case within section 2(2)(a) was "the respondent's undoing" under section 2(2)(b). He said:

> Section 2(2) is not intended to render the keepers of domesticated animals routinely liable for damage which results from characteristics common to the species. It requires something particular, and there was nothing of the specified kind to render the keeper liable here.[31]

C. Comment on the impact of *Mirvahedy v Henley*

One consequence of the *Mirvahedy v Henley* judgement appears to have been a rise in insurance premiums for keeping animals. For example, the Stoneways Insurance Services website states that premiums for equine liability cover have risen as a direct result of this judgement.[32] It has been reported in the press that a corollary of the raised insurance premiums has been the closure of businesses such as livery yards, which have struggled to pay the higher premiums. A press article in November 2007 reported that 650 riding schools had closed in the past four years as a result of the judgement and the higher insurance premiums.[33] In 2007, Stephen Crabb spoke of a constituent who runs a riding school whose insurance premium had risen from £858 in 2001 to more than £7,000 a year. He said that she had had to increase her charges to try to cover the costs, but was concerned that she was now pricing out many low-income people from enjoying the sport and recreation. [34]

The Racehorse Owners' Association (ROA), has decided to include third-party liability insurance in its annual membership fee. The increased cost of the annual membership premium has been reported as being raised from £165 to £195 to cover the insurance cost.[35]

When he announced that he would be introducing a Private Member's Bill to address this issue, Stephen Crabb commented:

> The existing situation is grossly unfair to responsible animal owners, including many in my own constituency. Not only are rural businesses placed at risk by the huge increase in premiums since the House of Lords judgement, but the millions of people who enjoy horseriding face extra costs as a result. Many stables have already closed and many more are threatened.[36]

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30 at paragraph 13
31 At paragraph 24
32 Stoneways Insurance Services website, *Horse insurance* [0n 10 March 2008]
33 "MP's law will shield stables from crushing insurance bill", *The Times*, 27 November 2007
34 HC Deb 27 June 2007 c336
35 Racehorse Owners Association, *Third Party Liability Insurance* [on 10 March 2008]
36 Stephen Crabb MP, press release, *Responsible Animal Owners to Benefit from MP's Proposed Law*, 27 November 2007

An article by barristers Susan Rodway QC and James Todd, *Mirvahedy – Three Years On*, sets out some concerns of keepers of domestic animals and refers to their insurance premiums following the House of Lords judgement. It speaks of particular concern in the equine community:

> Mirvahedy has undoubtedly been responsible for changes in the horse world during the last three years. Insurance premiums have risen by as much as 300% and, for riding schools, insurers are likely now to insist on much higher standards of risk management in the form of record keeping, risk assessments and compliance with local licensing regimes.[37]

The article however, goes on to question why the predicted "explosion" in strict liability compensation cases had not happened as many feared it would, considers that one reason for this is "imaginative judicial thinking in the few cases that have reached court," and discusses various county court judgments dealing with liability for animals.[38]

Barrister Richard Burns writing in the *Personal Injury Law Journal* commented on the effect of Mirvahedy for animal keepers and their insurance premiums:

> whilst lawyers and academics may point to the easy ride that keepers have had in the past and to the defences available under s5 of the Act, the thousands of keepers of livestock who are having to find the money for the additional premiums now being demanded by their public liability insurers and for new fencing, gates and alarms, are not likely to take such a relaxed view. They may well feel, as I do, that their Lordships failed to have adequate regard for the knock-on effects of their decision, and that Mirvahedy was a classic example of a hard case making bad law.[39]

A textbook on tort[40] comments on the decision in *Mirvahedy v Henley:*

> The rival, unsuccessful interpretation, that the "second limb" is not an alternative basis of liability but merely explains the basic requirement of abnormality by recognising that in some circumstances even placid animals will react dangerously is less consistent with the statutory wording but may be thought to reflect better policy, bearing in mind that the law of negligence is available as a fall-back. As things stand, the owner of the animal appears to be in a cleft stick: either the behaviour was abnormal by the general standards of the species or, even if it was normal in that sense, the behaviour was produced by the particular circumstances… It seems that once one attempts to bring in some cases where the ordinary or average animal [footnote: The "reasonable animal"?] of the species would behave in that way, s. 2(2) becomes almost unworkable. It would be better to abandon it and to make liability for domesticated animals turn on negligence in the keeper – or to have a simple, general rule of strict liability for damage done by animals. [Footnote: Such is French law: Art. 1385, Code Civil. But German law, while imposing strict liability for pets does not apply to "working"

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37 Susan Rodway QC and James Todd, *Mirvahedy – Three Years On,* 26 May 2006 p1-2
38 Susan Rodway QC and James Todd, *Mirvahedy – Three Years On,* 26 May 2006 p2
39 Richard Burns, barrister, Ropewalk Chambers Nottingham, "Life after Mirvahedy", *Personal Injury Law Journal*, April 2006
40 A tort is a civil wrong

> animals.] The latter might be justified on the ground that, while no one would regard a horse of a dog as presenting the same risk as a tiger, yet they have "minds of their own" and are prone to behave unpredictably.[41]

D. Previous activity relating to a change in the law

The introduction of the *Animals Act 1971 (Amendment) Bill* follows two previous attempts to introduce legislation on this subject using the ten-minute rule bill procedure, an expression of Government support for an attempt to change the law, a Defra consultation, and a number of EDMs.

1. Government support

The Defra website highlights concerns raised about the effect of the *Mirvahedy* judgment and indicates that the Government would support an attempt to amend the law:

> It has been suggested that the application of strict liability in these circumstances is out of line with other areas of the law where legal liability can be mitigated by the taking of reasonable precautions. It has also been claimed by the horse industry that horse owner's liability insurance premiums have risen dramatically following this decision by the House of Lords.
>
> The Country Land and Business Association (CLA) together with other equine organisations such as the British Horse Society have initiated a campaign to have the Animals Act amended to address this potentially open-ended liability issue. The Government understands the horse industry's desire to clarify the Animals Act, following the Mirvahedy judgement, to ensure that animal owners who take every reasonable precaution to prevent accidents involving their animals happening should not have to bear full liability when such accidents occur. We are also clear that any change in the law must not absolve the owners of horses or other animals from their responsibility to take every reasonable effort to prevent the occurrence of damage and that full liability for such damage should still apply in any cases where negligence is proven.
>
> We have made it clear that we are willing to advise and support the horse industry in amending the Act if an agreed approach, which commands the full support of the rest of the horse industry, and a suitable vehicle, such as a Private Members' Bill, can be found. We are currently working with the horse industry, including both the CLA and the BHS, to agree a suitable amendment which could then be picked up by an MP who is successful in the next Private Members' Bill ballot.[42]

2. Laurence Robertson's ten minute rule bill

The first ten minute rule bill on this subject was presented by Laurence Robertson MP on 11 July 2006. This Bill would have introduced a defence in law against strict liability if

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41 W V H Rogers, *Winfield and Jolowicz Tort,* Seventeenth edition, 2006, p735

42 Department for Environment, Food and Rural Affairs website, *Insurance: The Animals Act 1971* [on 10 March 2008]

the owner of an animal involved in an accident had taken all reasonable care to keep the animal in a secure enclosure.[43]

3. Government consultation

The then Minister for Biodiversity, Landscape and Rural Affairs at Defra, Barry Gardiner, subsequently wrote to stakeholders seeking their views about whether the introduction of a defence of reasonable care might be acceptable in principle:

> Mr Robertson's Ten Minute Rule bill has been tabled under his own initiative, and does not currently have Defra's formal support. The timing of Mr Laurence's proposal and the nature of Ten Minute Rule bills also suggest that this particular legislative vehicle may not succeed. However, the Government is aware of the importance that the horse industry places on this issue, and expects that efforts will continue to secure a change in the law. Defra is, therefore, keen to elicit views from a wide range of stakeholders on whether the introduction of a defence of reasonable care might be acceptable in principle. Defra is clear that any change in the law must not absolve the owners of horses or other animals from their responsibility to take every reasonable effort to prevent the occurrence of damage and that full liability for such damage should still apply in any cases where negligence is proven. [44]

Defra later published a brief summary of responses on their website, indicating that of the twenty nine responses received, twenty six agreed that the *Animals Act* needed to be amended.[45] Defra ended the summary by saying that it remained keen to receive further thoughts from people interested in this issue.

4. Stephen Crabb's ten minute rule bill

The second ten minute rule bill relating to this issue was presented by Stephen Crabb on 27 June 2007. Rather than introduce a defence against strict liability, this bill would have limited the scope of strict liability to dangerous animals only, effectively excluding animals which were not normally dangerous.[46] Stephen Crabb thought that introducing a defence would not help to lower insurance premiums:

> First, the 1971 Act is about strict liability and, quite rightly, there should be no reasonable defence to strict liability. If a person owns a dangerous animal such as a poisonous snake that harms a third party, it is right that that person should be strictly liable and have no defence of reasonable care. That was the intention behind the 1971 Act. Secondly, with a defence of reasonable care, no insurer will risk going to court and the defence not being accepted. Insurers will continue to settle out of court, keeping insurance premiums as high as they are now.

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43 HC Deb 11 July 2006 c1297

44 Letter from Barry Gardiner MP, Minister for Biodiversity, Landscape and Rural Affairs at the Department for Environment, Food and Rural Affairs to Stakeholders *Re: The Animals Act 1971 and its implications regarding strict liability for animal owners*, October 2006

45 Department for Environment, Food and Rural Affairs, *summary of responses to stakeholder letter re The Animals Act 1971 and its implications regarding strict liability for animal owners*, undated [on 10 March 2008]

46 HC Deb 27 June 2007 c335

> Under my Bill, however, riding schools, farmers and pet owners will be subject to the usual common law negligence and health and safety laws, meaning that if an owner or business has taken all possible safeguards they are unlikely to be blamed for an accident. That would encourage owners to take out third-party insurance but would remove liability for genuine accidents. Owners of dangerous animals would, quite rightly, continue to be liable.[47]

Stephen Crabb said that the Government had signalled support for the principles of the Bill.[48]

Both this Bill and Laurence Robertson's earlier Bill failed to get further Parliamentary time and so fell.

5. Early day motions

On 2 November 2005, Stephen Crabb tabled an early day motion, *Horse Riding Establishments and Insurance*. It received cross-party support from 149 signatures:

> That this House notes that horse-riding establishments are encountering difficulty with insurance claims following accidents and in obtaining insurance cover generally following the House of Lords interpretation of the Animals Act 1971 in the case of Mirvahedy v Henley [2003] 2 AII ER 401; further notes that this decision has limited the availability of insurance and increased the cost, adversely affecting the commercial viability of the equine sector; further notes the petition of the Country Land and Business Association (CLA), which attracted 911 signatures at country shows in 2005; and supports the CLA in its calls on the Government to remedy this situation by way of legislative amendment as soon as possible. [49]

James Paice tabled a similar EDM on 28 February 2007[50] which received 63 signatures. He tabled another in the current session on 11 November 2007; it currently stands at 59 signatures:

> That this House recognises the importance of the equine industry; notes with concern that horse-riding establishments continue to encounter difficulty with insurance claims following accidents and in obtaining insurance cover generally following the House of Lords interpretation of the Animals Act 1971 in the case of Mirvahedy v Henley [2003] 2 AII ER 401; further notes that this decision has limited the availability of insurance and increased the cost, adversely affecting the commercial viability of the equine sector; applauds the campaign initiated in 2005 by the Country Land and Business Association to have the Animals Act amended; and urges the Government to resolve this issue as soon as possible. [51]

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47 HC Deb 27 June 2007 c337
48 HC Deb 27 June 2007 c337
49 EDM 922 session 2005-06
50 EDM 1010 session 2006-07
51 EDM 14 session 2007-08

II *The Animals Act 1971 (Amendment) Bill*

The Animals Act 1971 (Amendment) Bill is a Private Member's Bill presented by Stephen Crabb as Bill 18 of 2007-08. It had its first reading on 5 December 2007 and is due to have its second reading on 14 March 2008. The Bill has Government support and was drafted in conjunction with the Department for Environment, Food and Rural Affairs.[52] With the consent of Stephen Crabb, Defra has prepared Explanatory Notes to the Bill, which have been published separately as Bill 18-EN.

The *Animals Act 1971* does not extend to Scotland or to Northern Ireland,[53] and accordingly this Bill would extend only to England and Wales.

The Explanatory Notes set out the policy that the Bill seeks to reflect:

> The policy that it seeks to reflect is that it is desirable that the keepers of animals that do not belong to an inherently dangerous species should be strictly liable for damage or harm caused by that animal when they know that the animal in question may be dangerous at the time the damage is caused, either because of its particular temperament, or because of the particular circumstances applying at the time, such as when it has young to protect.[54]

Clause 1 includes the substance of the Bill:

> 1 Liability for damage by animals
>
> (1) Section 2 of the Animals Act 1971 (c. 22) (liability for dangerous animals) is amended as follows.
>
> (2) For subsection (2)(b) (non-dangerous species: special characteristics) substitute—
>
> > "(b) the damage was due to an unusual or conditional characteristic of the animal;".
>
> (3) In subsection (2)(c)—
>
> > (a) for "those characteristics" substitute "that characteristic, in the case of an unusual characteristic," and
> >
> > (b) for "were" (in each place) substitute "was".
>
> (4) After subsection (2) insert—
>
> > "(2A) A characteristic of an animal is unusual if it is not shared by animals of that species generally.

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52 Private correspondence with the Office of Stephen Crabb MP on 20 February 2008
53 *Animals Act 1971* section 13
54 Bill 18-EN 2007-08 para 7

> (2B) A characteristic of an animal is conditional if it is shared by animals of that species generally, but only in particular circumstances.
>
> (2C) Subsection (2)—
>
> > (a) applies by virtue of a conditional characteristic only if the damage was caused in the particular circumstances (or one of them), and
> >
> > (b) does not apply by virtue of a conditional characteristic if the keeper of the animal at the time when the damage was caused shows that there was no particular reason to expect that those circumstances would arise at that time."

Accordingly the Bill would remove the wording relating to "characteristics of the animal which are not normally found in animals of the same species" and the wording relating to "except at particular times or in particular circumstances". It was these words which the House of Lords called "opaque" and the interpretation of which has been blamed for the subsequent rise in insurance premiums.

The new terms introduced by the Bill: "unusual characteristic" and "conditional characteristic" are defined further in the Bill in clause 1(4) which would in turn add new clauses 2A, 2B and 2C into the 1971 Act. A characteristic of an animal is defined as "unusual" if it is not shared by animal of that species generally. A characteristic is defined as "conditional" if it is shared by animals of that species generally, but only in particular circumstances.[55]

The Explanatory Notes draw attention to the fact that the term "particular circumstances" is not defined in the Bill stating "it would be for the courts to decide what constitutes them in the light of the details of cases brought before them ".[56]

There might still be scope for an owner of an animal to be held strictly liable for damage caused by their animal but the Bill aims to limit the number of situations where strict liability would apply. The Explanatory Notes set out how it is intended that the Bill would achieve this objective:

> 10. There are therefore two limbs in section 2(2)(b); one concerning "unusual characteristics", the other concerning "conditional characteristics". The original section 2(2)(c) was designed to cover both, but it is not apt to cover "conditional characteristics" properly as now clarified. The knowledge requirement in relation to "conditional characteristics" is therefore now dealt with separately as a defence in section 2(2C)(b).
>
> 11. The new wording requires that for strict liability to apply in cases where an unusual characteristic was the cause of the damage, the keeper of the animal at the time the damage was caused must have known of that characteristic in the animal. It limits the application of strict liability in cases where the damage is due

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55 *Animals Act 1971 (Amendment) Bill*, clause 1(4)

56 EN 18-EN paragraph 9

to a conditional characteristic of the animal by providing a defence to strict liability where the keeper of the animal when the incident took place shows that there was no particular reason to expect that the particular circumstances that provoked the conditional characteristic would arise at that time. The intention is to allow the courts to distinguish between a continuing, generalised risk that the keeper knows may occur at some time (e.g. a horse may shy at a plastic bag if one blows in the wind near it) but does not know when it may occur, and a heightened, specific risk over a specific period of time that the keeper knows will increase the possibility of the animal displaying dangerous behaviour during that period (e.g. a cow with calves, or a horse in a field next to a shoot).

12. Finally, the Bill addresses a further long-standing criticism of section 2(2)(b) of the Act, by removing the phrase "the likelihood of the damage or of its being severe" and replacing it with "the damage", as suggested by the Court of Appeal in Curtis v Betts [1990] 1 All ER 769. This is intended to simplify the Act, by removing references to the likelihood and severity of the damage that are already contained in section 2(2)(a) and therefore to remove an confusion that may arise from the repetition of these words.

The Explanatory Notes set out a consolidated version of section 2 as amended by the proposals in the Bill, showing the amendments which would be inserted by the Bill as underlined. For ease of reference this is reproduced below:

"2 Liability for damage done by dangerous animals

(1) Where any damage is caused by an animal which belong to a dangerous species, any person who is a keeper of the animal is liable for the damage, except as otherwise provided by this Act.

(2) Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if-

(a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, of caused by the animal, was likely to be severe; and

(b) the damage was due to an unusual or conditional characteristic of the animal; and

(c) that characteristic, in the case of an unusual characteristic, was known to that keeper or was at any time known to a person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, was known to another keeper of the animal who is a member of that household and under the age of sixteen.

(2A) A characteristic of an animal is unusual of it is not shared by animals of that species generally.

(2B) A characteristic of an animal is conditional if it is shared by animals of that species generally, but only in particular circumstances.

(2C) Subsection (2)-

> (a) applies by virtue of a conditional characteristic only if the damage was caused in particular circumstances (or one of them); and
>
> (b) does not apply by virtue of a conditional characteristic if the keeper of the animal at the time when the damage was caused shows that there was no particular reason to expect that those circumstances would arise at that time.".

The Bill's Impact Assessment[57] has found that the impact on business will be generally positive. It states that land-based and equestrian businesses should benefit from the greater certainty, which "may result in fewer court cases and reduced insurance premiums."[58] It also considers that insurance companies will be able to balance any loss in terms of lower premiums with the reduced cost of payments needed to settle cases brought under the clarified Act.

The Impact Assessment also acknowledges that there may be an impact on some individuals injured in accidents involving animals where strict liability does not apply following the Bill and yet may have applied under the current case-law interpretation of the 1971 Act. It states that "Some of these cases may be addressed by negligence and some of them will not. The impact will be felt more acutely in cases where negligence cannot be established. Such cases are thought to be relatively rare and their outcome relatively uncertain under the current legislation."[59]

III Reaction to the bill

In a press release in December 2007, the Countryside Alliance welcomed the announcement of the Bill. Its chief executive Simon Hart said:

> This is a very positive step forward. Since its implementation, the 1971 Act has unfairly damaged rural businesses and the tourist industry. In the past four years, 650 riding schools have been forced to close as a direct result of soaring insurance premiums within the current compensation culture. There is no valid reason for anyone to stand in the way of this bill.[60]

The Country Land and Business Association also welcomed the Bill saying that:

> This is a vitally important Bill for all horse and animal owners. It doesn't seek to free animal owners from blame or a duty of care but it would free people from the unfair burden of strict liability.[61]

The Bill also has the full support of the British Horse Society:

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57 As stated in the Explanatory Notes. The Impact Assessment is not yet published at time of writing
58 Bill 18-EN 2007-08, para 15
59 Bill 18-EN 2007-08, para 16
60 The Countryside Alliance, *Alliance welcomes sensible liability legislation*, 5 December 2007
61 Country Land and Business Association, *Bill will Protect Animal Owners from Unfair Compensation Claims*, 4 December 2007

At long last it appears that there is a reasonable prospect that the Animals Act 1971 may be amended to limit the strict liability faced by animal owners (including horse owners) when their animals cause damage or injury despite all care being taken by the owner.

Stephen Crabb MP, with the full support of the BHS, has tabled a Private Members' Bill, the effect of which would be to remove liability from the owner if the animal causing the damage had acted in a way which the owner could not reasonably have been expected to foresee.[62]

[62] British Horse Society, *The BHS's December 2007 Report* [on 10 March 2008]