SOUTH AUSTRALIA

SEVENTH REPORT

of the

LAW REFORM COMMITTEE
of
SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

LAW RELATING TO ANIMALS

1969

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*
S. J. JACOBS, Q.C.
K. P. LYNCH.
D. ST.L. KELLY.

The Secretary of the Committee is Mr. H. G. Edwards, c/o Adelaide Magistrates' Court Department, Adelaide, South Australia.

SEVENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

To:

The Honourable R. R. Millhouse, M.P.,
Attorney-General for South Australia.

Sir,

We have the honour to report at your request on the law relating to animals. In relation to this topic we have considered the following six matters:—

1. There is a distinction between animals ferae naturae and animals mansuetae naturae which reflects itself (*inter alia*) in relation to property in animals.
2. In relation to animals mansuetae naturae scienter or knowledge of a dangerous propensity has to be proved before the plaintiff can recover damages (subject to the exception contained in section 25 of the Registration of Dogs Act, 1924).
3. The law relating to animal trespass and in particular animals trespassing on roads is in a most unsatisfactory state.
4. The law relating to the keeping and cultivation of animals is in a state of flux.
5. Warranties on the sale and purchase of animals are a source of much litigation.
6. The law relating to diseased animals is archaic.

Unless you Mr. Attorney direct us otherwise, we do not propose to deal with the sale of protected animals and birds, the question of cruelty to animals, the question of registration of animals or the criminal law relating to animals.

Taking our points in order:—

1. The distinction into animals ferae naturae and animals mansuetae naturae.

See *Halsbury* 3*rd Edn., Vol.* 1, *Title Animals, paragraphs* 1249-1257.

We think that this classification is bad in two ways:—

(1) It is difficult to know where to draw the line. For example A. P. Herbert's famous question: is a snail an animal ferae naturae?[9] and

(2) The various forms of qualified property which ensue from this distinction are more appropriate to the game laws of earlier centuries than to the modern realities of control over animals.

We recommend that legislation be introduced to abolish the distinction between animals ferae naturae and animals mansuetae naturae. On the other hand, in abolishing this distinction which has remained in the common law for many ages, we think that certain matters should be set out in a section of the proposed Act following the section abolishing the distinction saying that, without affecting the generality of the foregoing, a Court may take into account in deciding the questions of negligence (amongst other things)—

(*a*) the absence of any effective warning which might reasonably be brought to the notice of any person likely to be affected by the animals;

(*b*) the extent of the security used in relation to the animal;

(*c*) the fact that one or more animals of the same species were kept at the same time (this is to deal with the wellknown problem that animals will sometimes attack in packs where they will not attack singly);

(*d*) Whether the person concerned (not being an infant of tender years) was a trespasser on the property where the animal was kept.

A further matter on which the Committee were divided was a question of contributory negligence rather than negligence and we think it is probably a question of policy in the last resort to be considered at Government level. The question is: whether if the person trespassing was in fact an infant of tender years who would normally be in parental custody whether the parent ought to contribute to the damages payable by the owner of the animal by reason of the parent's lack of supervision of his child.

2. The doctrine of scienter is of course allied with this and only applies in the case of animals mansuetae naturae.

See *Halsbury, paragraphs* 1267-1273.

The absurdity of this is well highlighted by section 25 of the Registration of Dogs Act which abolishes scienter in the case of dogs, in the case of attacks on cattle or poultry, but leaves it intact in relation to attacks on human beings who presumably are of less value. The doctrine should in our opinion simply be abolished and the question should be whether the owner was negligent in the care custody and control of the animal concerned having regard to all the circumstances. This would entail a consequential amendment to section 25 of the Registration of Dogs Act.

3. Animals on roads and animal trespass generally.

See *Halsbury, paragraphs* 1274-1276 *and* 1314 and *Fleming on Torts* 3*rd Edn., pages* 331-333.

This aspect of the law as far as roads are concerned is bedevilled by the anachronistic decision of the House of Lords in *Searle v. Wallbank*, 1947 *A.C.* 341. We recommend that the position should be that the liability of an owner in relation to his animals for not keeping them properly fenced in, penned up, chained or as the case may be should be determined in accordance with the ordinary law of negligence.

There is one variant of this and this is in relation to cattle trespass where one has the ancient remedy of distress damage feasant. See *Halsbury, paragraphs* 1281-1295. We recommend that the ancient remedy be abolished and that the laws relating to cattle trespass be assimilated to that of all other trespass of animals. This would require a consequential amendment to the Impounding Act.

4. Qualified property in animals.

This has three aspects. Firstly the keeping and cultivation of animals today requires intensive cultivation and will with the world population explosion require more intensive cultivation in the near future: for example with fish in the sea and in rivers and dams and oysters as at

present and other forms of intensive cultivation of animals, *e.g.*, Kangaroos have been suggested by the Australian Conservation Foundation. These forms of intensive cultivation should in our submission be dealt with by some form of notification and protection.

The second difficulty is where animals are already in a state of intensive cultivation. The law at the moment penalizes—

(*a*) malice (see *Hollywood Silver Fox Farms v. Emmett* 1936 1 *All E.R.* 825); and

(*b*) damage where there is known abnormal sensitivity (see *Nova Mink v. Trans Canada Airlines* 1951 2 *D.L.R.* 241).

Neither of these categories seem to us to be very satisfactory and it would be a great deal better to simply subsume them under the ordinary law of negligence.

5. Warranties on sale.

See *Halsbury, paragraphs* 1301-1310.

The unsatisfactory nature of the present law is illustrated by many cases; not least by that of the differing judgments of Mr. Justice Travers and the Full Court in *Stuart v. Dundon* 1963 *S.A.S.R.* 134. We think that there should be a limited warranty in the case of the sale of animals akin to that which now exists by statute, for example, in the case of the sale of vegetable seeds, namely a warranty—

(*a*) that the animal is fit for the purpose for which it is sold; and

(*b*) that it is true to breed or type.

We further recommend that these warranties cannot be excluded except by an express specific exclusion in writing in the contract.

6. Diseased animals.

See *Halsbury, paragraphs* 1379-1381.

At the moment caveat emptor applies in this respect and it does open the way to blatant frauds.

The Committee thought that provision should be made by law that during a short period of say twenty-one days, which would act rather like a quarantine period, it should be open to the purchaser to claim rescission of the contract if the animals were proved to be diseased or infested at the time of sale. It should further be provided that nothing done in relation to the animals during the period that they were in the hands of the purchaser including any resale or attempt thereat should be an affirmation of the contract. Further, that if there was any statutory or other official order to destroy the animals for disease that this should not prevent rescission and that these provisions cannot be excluded by contract.

We are not sure whether the time of twenty-one days is a proper time or not and we recommend that expert advice be obtained on this point.

7. Ancillary.

We think that two ancillary or evidential matters ought to be dealt with in the legislation:—

(*a*) That proof of the happening of the injury inflicted by the animal is *prima facie* evidence of negligence against the person for the time being who is or ought to have been in possession or control of the animal;

(*b*) That because proof of ownership of a domestic animal in particular is not easy that an allegation in a complaint or in a Writ of Summons that X is the owner (defining as we have said "owner" to include the person who is or ought to have been in possession or control of the animal for the time being) is *prima facie* evidence of that fact.

8. There will need to be a clause in the Act providing that our recommendations do not affect certain other special Acts. The Acts which we have noted ourselves and we do not pretend these are a complete list are as follows:—

The Alsatian Dog Act, 1934-1965.

The Cattle Compensation Act, 1939-1968.

The Dairy Cattle Improvement Act, 1921-1968.

The Fauna Conservation Act, 1964-1965.

The Noxious Insects Act, 1934-1955.

The Prevention of Cruelty to Animals Act, 1936-1964.

The Registration of Dogs Act, 1924-1968 (except as noted in 2 above).

The Swine Compensation Act, 1936-1968.

The Vermin Act, 1931-1967.

The Wild Dogs Act, 1931-1961.

We have the honour to be

HOWARD ZELLING.
S. J. JACOBS.
K. P. LYNCH.
D. ST.L. KELLY.

The Law Reform Committee of South Australia.

A. B. JAMES, GOVERNMENT PRINTER, ADELAIDE