

**REFEREED PAPER****LIVESTOCK AND PUBLIC ACCESS : WHY DOES STRICT LIABILITY EXIST AS A LEGAL PRINCIPLE, WHAT IS 'REASONABLE' CARE, AND SHOULD LIVESTOCK KEEPERS BE CONCERNED ABOUT RECENT COURT DECISIONS?***Carrie de Silva*

*McKaskie v Cameron [2009] concerned a farmer's liability for serious personal injury caused by animals when on a public right of way across farm land.*

*There have been towards 20 fatalities in such circumstances over the past 15 years (according to HSE statistics), with additional serious injuries. Negligence, occupiers' liability and the Animals Act 1971 were applied, with reference to the potential criminal liability under the Health and Safety at Work etc. Act 1974.*

*This paper summarises the case and the relevant law and reviews the matter in the context of rural risk management and the development of good working practices, i.e. what livestock keepers can do to avoid / mitigate damage and legal exposure.*

Key words Public access, right of way, liability, injury, livestock. Shirley McKaskie v John Cameron (2009)

The case of McKaskie v Cameron<sup>1</sup> was brought after a walker, out with her dog, suffered severe personal injury caused by the defendant's cattle when on a public right of way across farm land. After an award to the injured party in the County Court in the order of £1 million, leave to appeal was not taken up by the defendant and an out of court settlement was reached in January 2010.<sup>2</sup>

Clearly, public access over private land gives rise to risks, physical and legal, for both owners, occupiers and the public. This case explores the legal issues in some detail and points towards the management of those risks.

**1 THE CASE**

C (the Claimant) had lived in Greystoke Gill, Cumbria since 2002 and often walked with her Jack Russell terrier along a nearby public footpath. The accident in respect of which the case was brought took place in May 2003 on or near the public footpath which links Greystoke to the hamlet of Greystoke Gill. The footpath in question crosses three of D's (the Defendant's) fields in Millrigg Farm - Sealby's Field, Bank Field and Far Bank Field. C did not make a claim until almost three years after the accident.

**1.1 The Farm**

D had farmed At Millrigg since 1965. Since 1991 the business was beef and sheep. Grazing in Sealby's and Bank Fields were 20 cows (7 Simmentals,

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11 Simmental cross, one Aberdeen Angus cross and one Limousin cross). D held one Simmental bull so some calves were Simmental, most were cross (with some Friesian but predominantly Simmental). The calves at the time of the accident were between 5 and 9 months old.

The Wildlife and Countryside Act 1981 prohibits bulls of recognised dairy breeds from being kept in fields with public access.<sup>3</sup> Simmentals are not such a breed.<sup>4</sup>

Sealby's and Bank Fields were used for the grazing of cows and autumn born calves and Far Bank Field for silage. Some fields on the farm changed usage periodically. Others had usage constrained by condition, e.g. too wet or steep for machinery. There were several other footpaths crossing various areas of the farm.

### **1.2 The Route of the Footpath**

The path leaves the garden of a Gallery by a stile leading into Sealby's Field. At the other side of the field is an opening in a dry stone wall (an 'ever open gate') by which to enter the next field. There is a track, which D unsuccessfully tried to establish was made by sheep, which would indicate to a walker to go straight from the stile to the ever open gate. This would be an incorrect route according to OS<sup>5</sup> map which has the path following the field boundary and leading to a stile (rather than the ever open gap in the wall). That second stile was not visible from the first stile on entering Sealby's Field. Again, in Bank Field the OS map has the path following the boundary until reaching a third stile leading from Bank Field to Far Bank Field.

There were footpath indicators with a notice 'Farmland - please close gates - please keep your dog on a lead - Thank You' between the Gallery and Sealy's Field. There was conflicting evidence as to when these signs were erected. There were no other signs over the farmland.

When C and her partner were first told about the footpath by locals, they were directed towards the ever open gate. They used the route at least, and probably more than, 20 times and were not challenged about taking the unofficial route.

### **1.3 Farming Practice**

Calves born in the autumn and winter were wintered indoors and turned out to graze with their mothers in late April or early May after de-horning and castration. There were two creep feeders for calves (not accessible by fully grown cattle) in Bank Field and water was provided by a stream.

The May turnout had been customary since 1991 with no apparent accidents. There had been an incident in 1990 or 1992, the facts of which are unclear. On first turning out, the cows and calves would be frisky for an hour or so but soon settle down to graze.

### **1.4 The Accident**

C had only used the footpath since December 2002 and was on holiday in early May 2003, thus had not seen cattle in the field before - only sheep. Having dropped her partner at the pub and done some chores, C planned to

walk down the footpath to the pub, with her dog, to join him. Only C witnessed the accident and the judgment indicates that her recollection must, in part, be inaccurate.

The accident was discovered by D who went to investigate on his quad bike on hearing the cows making a commotion. D's wife made the HSE report from her husband's account - great weight was put on this account. D recovered C, who was being 'thrown about' by the cows. He brought C to the farm house, dialled 999, tried to make her comfortable on cushions in the yard and got neighbours to help. C was discharged from hospital in July 2004, over a year after the accident.

C was found some 50 yards from the designated footpath. D's wife noted that she believed that if C had been on the route of the footpath she would have been able to get away from the cows.<sup>6</sup> She also noted that it was known that people did use the 'short cut'. D was cross examined on the HSE report and confirmed his wife's statement. D expressed horror at seeing his cows throwing C around and had not seen anything like it before, considering that C was lucky to have survived.

Although it is acknowledged that there was no attempt to deceive by D, in the very open HSE report and other statements, it was notably criticised by the judge that D's legal advisers were misguided in leaving out certain aspects of evidence from an edited version of a witness statement in an attempt to strengthen D's case.

D indicated that he found C in the middle of Bank Field. C said she was attacked by the cattle in Sealby's Field. This cannot be correct unless the cattle pushed C up some considerable length of slope, pushed her through the ever open gate and then on up across Bank Field. Evidence from C's partner is that in Bank Field they habitually walked on a route which followed the OS designated footpath. D asserted that as C was found in the middle of the field she was taking a short cut. The court considered that on the balance of probabilities she had been following her usual route but had veered from it as the cows moved in.

### **1.5 Claimant's Route**

C believed she was following the correct footpath route, as described to her by locals. Only when the original defence was served was a query as to the route of the path, and C's route, raised.

Photographs, of various dates but not at the time of the accident, show high nettles and other growth which would indicate that following the correct route might have been difficult.

### **1.6 Farming Decisions**

D, as would any competent farmer, acknowledged the danger of cows with calves at foot, particularly in the presence of dogs. But he stressed that this is more with very young calves, i.e. spring born, which he consciously grazes in fields not crossed by public footpaths. His autumn born calves are indoors at this stage. The court accepted the decision making behind the positioning of spring born calves. It was not persuaded that such risk assessment was

operative with autumn born calves where the convenience of available land seemed to be a higher priority to D. He stated that otherwise the cattle would have to be in three separate (rather than abutting) fields and would be more difficult to manage.

## 2 THE LAW

### Possible Causes of Action

Occupiers' Liability Act 1957  
 Occupiers' Liability Act 1984  
 negligence  
 Animals Act 1971  
 Health and Safety at Work, etc. Act 1974

#### 2.1 Occupiers' Liability Act 1957

The Occupiers' Liability Act 1957 imposes a duty<sup>7</sup> on the occupiers of premises to take such care as is reasonable to see that lawful visitors are reasonably safe for the purposes for which he is permitted on the premises. This duty does not extend to risks willingly accepted by the visitor<sup>8</sup>.

Lawful visitors are those who either have express permission or, as with users of a public footpath, a legal right to be there<sup>9</sup>. As C was found some considerable distance from the line of the path, was she a trespasser and so outside the protection of the 1957 Act?

Readers may be aware that injuries sustained by users of public rights of way<sup>10</sup> generally do not have the protection of the 1957 Act.<sup>11</sup> That exemption indicates that there is normally no duty owed in respect of *non-feasance*,<sup>12</sup> e.g. not filling in a hole, but there remains a duty for *mis--feasance*. Thus, where injury is sustained due to something the occupier has actively done, in this case introducing livestock, then the basic statutory principles still apply.

#### 2.1.2 Occupiers' Liability Act 1984

A duty is owed to persons *other than visitors*<sup>13</sup> (within the meaning of the 1957 Act). The duty applies to those who enter land without authority and are therefore technically trespassers, and also to those who enter without permission but with lawful authority, e.g. persons entering land subject to an access agreement<sup>14</sup> or order in force under the National Parks and Access to the Countryside Act 1949<sup>15</sup> and persons exercising a private right of way. The provisions follow the Law Commission's recommendations in their *Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability*<sup>16</sup> which ascribes liability where the occupier is aware of the danger (or has reasonable grounds to believe that it exists), *and* they know (or have reasonable grounds to believe) that C would come into the vicinity of the danger *and* the risk is one against which D may reasonably be expected to offer some protection.<sup>17</sup> Where a duty arises under this Act that duty is to take reasonable care to ensure that persons do not suffer injury on the premises by reason of the danger.<sup>18</sup> This duty *may* be discharged by warning, although a

warning does not *necessarily* discharge the duty<sup>19</sup>. It will be a matter of fact in the individual circumstances.<sup>20</sup>

So on the footpath D had a duty to keep C reasonably safe. Off the footpath D had a duty to take reasonable steps to protect C against injury arising from things done or omitted to be done on the land on or near the footpath, if he knew or ought reasonably to have known of the danger.

### 2.1.3 Which Act applies? Establishing Status of Claimant

*Prima facie* C was not on the footpath so must have been a trespasser, albeit unintentional. While most trespasses to land are intentional, trespass can also be committed negligently<sup>21</sup> or accidentally.<sup>22</sup> C followed the route explained to her by locals and also apparent to any observer due to the wearing of a path in the field. D and his wife were aware, as evidenced by their witness statements to the HSE, that walkers used this alternative route. There were no signs to indicate the correct route. It was successfully argued that D's implied consent, or lack of objection, to walkers using the alternative route prevented him from asserting that C was a trespasser. D later said he only rarely saw people using the short cut and on each occasion objected with those concerned. This did not appear to align with the earlier HSE Report.

Taking into account the apparently habitual use of the unofficial route, the appearance of the track in the field, the lack of signage, that anyone without an OS map would take the unofficial route, the knowledge of D that the short cut was used the court found the requisite degree of acquiescence such that D was estopped from claiming C was a trespasser.

As there was some evidence raised that there might have been some obstruction of the right of way, the judge went on to consider the right to deviate when a right of way was obstructed with particular reference to private rights of way.<sup>23</sup> *Halsbury's Law of England*<sup>24</sup> indicates the right to deviate from the public highway onto open land where the usual route is 'founderous and impassable'.<sup>25</sup>

So :Was D under a duty to keep footpath in good repair and passable?

The general right of repair is at public expense<sup>26</sup> and the court found no duty on D to repair the footpath.

Was there good reason for C to deviate?

It is likely that there were nettles in front of the stile and that the obvious alternative would be through the ever open gate. It was noted that the right to deviate is a matter of fact. It is irrelevant whether or not C knew the correct route and had consciously deviated.

### 2.1.4 What care would have been required if C had been a trespasser?

To take the three stage test in the Occupiers' Liability Act 1984,<sup>27</sup> D clearly knew of the danger, knew of the presence of walkers and the judge found that it was a danger against which D should reasonably be expected to offer some protection.

Due to the absence of signs, many people would be likely to trespass

without meaning to do so, which D knew, and many walkers would not appreciate the danger of cows with calves. The danger, given a cow's size and weight, would be likely to be severe.

Although not tested in court, it might be that signs alone *would* offer an adequate defence against a claim by trespassers in a situation where there was not suggestion of public access.

## 2.2 Negligence

The basic principles of negligence need not be set out in detail here. Suffice it to note that there is a three stage test such that it must be established that D owes C a duty of care, that this duty of care has been breached, and that the damage claimed for resulted from that breach and was of a broadly foreseeable nature. In fulfilling a duty of care D must take 'reasonable' care,<sup>28</sup> a measure of which would be industry good practice.<sup>29</sup> In this case, the point in question was that of breach and, in this respect, a number of claims were made. In ascertaining whether D had taken reasonable care it was asserted that

- a. He failed to consider that cows with calves are more likely to react to dogs;
- b. He failed to post adequate warning signs such that C could make an informed decision;
- c. Allowing a Simmental bull materially increased the risk of unpredictable behaviour in the cows and calves - both veterinary experts disagreed with this point;
- d. The likelihood of walkers taking short cut, with the attendant increased need for accurate signage, was not considered.

### 2.2.1 Duty of care

Given that C has been found to be a lawful visitor, it needed to be established that D had taken 'reasonable care'. A number of cases were considered which underlined the point that there is *no* duty to warn or protect against 'obvious risk'.<sup>30</sup> The court felt that walking across a field with cattle grazing, even with a dog, was *not* an 'obvious risk' to the average citizen with no specialist agricultural knowledge, thus some warning or protection should have been given.

### 2.2.2 Did C consent to the risk?

She did not know there were cattle in the field on entering. C did, actually, come from a farming family and she knew cows could be dangerous but did not appear to know of the additional danger of calves at foot, especially when faced with a dog.<sup>31</sup>

### 2.2.3 Contributory negligence

Not unexpectedly, the defence raised arguments of contributory negligence,<sup>32</sup> i.e. the principle that the claimant's own lack of care directly caused or contributed to her injuries :

Claim - C did not try to escape over stream or in creep feeder. This was found

to be impractical and/or ineffectual and was rejected.

Claim - If she followed the footpath she would have been less vulnerable The veracity of this was rejected on expert evidence.

Claim - C should have retraced her steps once realising cattle were there. It was found that (a) her position would make this unfeasible, (b) she did not know that cows with calves were a danger.

Claim - the dog was on an extended lead and not under complete control. This was rejected.

### **2.2.4 What should D have done to comply with his duty under OLA 1957?**

Clearly, following the published NFU and HSE guidance which warns against putting cows with calves in fields with public access, would be key. In short, either put up temporary fencing or use other fields. The dangers of walkers with dogs might be rare but leave a farmer vulnerable if a walker is injured. The situation is susceptible to the most sensitive animal in the herd, who others will follow if it becomes agitated.

Warning signs - helpful, indicators of good practice but not the only answer.

Fencing - ideal, but likely to be impractical for reasons of time and expense in many instances.

Other fields - relatively easy to arrange on this farm, but that will obviously not be the case universally.

It might be noted that there have been other cases in recent years where a farmer has been found to be negligent for lack of due care when managing livestock in a way which most industry observers would consider to be good practice. In the Court of Appeal it was decided in *Wilson v Donaldson* [2004]<sup>33</sup> that a farmer, who had good fencing and regularly checked stock, should have had self-closing gates due to the possibility of walkers leaving gates open, leaving him liable when the cattle got onto the public highway. There is clearly room for concern as to what the courts will see as negligence in a farming context.

### **2.3 Animals Act 1971**

The Animals Act ascribes liability, in certain circumstances, in the absence of fault. Under this Act (to take the relevant elements) it must be established that damage, if caused, is likely to be severe.<sup>34</sup> Clearly this is the case with cattle, due to their size, weight, potential speed, the likely use of their heads as a weapon and their habit of trampling.

It must then be established that the likelihood of damage is either due to known characteristics of the animal in question (e.g. it has a history of aggression) or is due to characteristics found at particular times or in particular

circumstances,<sup>35</sup> e.g. with calves at foot. This accords with the view taken in *Mirvahedy v Henley* [2003].

Were those characteristics known to D? Yes (or should have been).

Do any of the s5 defences offer D any protection?

- (1) Was the injury wholly due to C's fault?
- (2) Had C voluntarily accepted the risk?

In *Cummings v Granger* [1977],<sup>36</sup> it was held that to prove someone has voluntarily accepted the risk it must be shown (1) that they fully appreciate the risk, and (2) that they, thus, voluntarily exposed themselves to it. It was held that C did *not*, and cannot have been expected, on an objective standard, to have appreciated the risk.

There have been other cases where the s5 defence of voluntary acceptance of risk has succeeded (e.g. *Freeman v Higher Park Farm* [2008]<sup>37</sup>) but in the *McKaskie* case the judge found that s2(2) of the Act was satisfied and none of the s5 defences to be operable.

### **2.3.1 In the absence of lack of care, can Animals Act strict liability be justified?**<sup>38</sup>

The underlying reasoning behind civil actions for damage caused by animals has classical Roman roots in Ulpian's:<sup>39</sup> man should not use his own property so as to hurt another.<sup>40</sup>

Although, as was heavily reported in the press following *Mirvahedy*, it perhaps seems *prima facie* to be 'unfair' to ascribe liability without fault when there is every evidence of due care, this was specifically explored in the thinking behind the Animals Act in a number of preceding reports and papers.<sup>41</sup> In short, although the defendant may not be at fault, the claimant certainly is not<sup>42</sup> and, on balance, with whom should liability and the insurance burden lie?

The law had long imposed strict liability in cases of cattle trespass, i.e. where certain kinds of animals stray on to the land of another. Under the old doctrine of *scienter*,<sup>43</sup> strict liability also arose in regard to injury caused by a domesticated animal where it could be established that the defendant knew that the animal had a vicious or mischievous propensity. This tort of strict liability was referred to in *Rylands v Fletcher*<sup>44</sup> and although that rule would only embrace animals of a dangerous species,<sup>45</sup> not those of a domesticated species with a dangerous disposition, the thread of legal reasoning is clear: reflecting the reciprocity theory of tort, if one takes risks or actions (e.g. by animal keeping), one must bear the burden of resultant damage.<sup>46</sup>

There have been several attempts either to remove<sup>47</sup> or temper the strict liability element of the Animals Act. Defra consulted with industry on the matter in 2009.<sup>48</sup> This retained strict liability for claims involving animals which are known to show characteristics 'unusual' to their type, i.e. that are

particularly vicious. The revised provisions contain a classification of ‘conditional’ characteristics. These are those characteristics generally shared by the species but only in particular circumstances. There would be strict liability here *unless* the keeper can show that there was no particular reason to expect the particular circumstances that provoked the conditional characteristic would arise at that time. In March 2010 a response was published, which indicated that there was no clear support for the new revision. The conclusion is that Defra will prepare a revised Legislative Reform Order<sup>49</sup> and seek further views from respondents to the original consultation in order ‘...it is hoped, agreement, on an acceptable way forward.’<sup>50</sup>

Suffice is to say that the proposals as they stand would not have helped the defendant in *McKaskie v Cameron* (disregarding any lack of due care) once the behaviour of cows with older calves was accepted, in that it *would* be expected that cows with calves could be aggressively protective and it *would* be expected that walkers with dogs might be on a public footpath.

#### **2.4 Health and Safety at Work etc. Act 1974**

The Health and Safety Executive (HSE) Inspector considered the duty, subject to criminal charges, of D under the Health and Safety at Work etc. Act 1974<sup>51</sup> to ensure that third parties are not put at risk from their work activities. He stressed that his discussions with D and his wife revealed their ‘extensive knowledge’ of farm health and safety. He concluded that D recognised where the risks lay in keeping cattle in fields and had taken reasonable practicable steps to manage the risk. The HSE decided not, therefore, to pursue a criminal action under the Health and Safety at Work etc. Act. The court noted that the lack of eye witnesses would have been detrimental to the criminal standard of proof<sup>52</sup> required for such an action.

Given both the different standard of proof in the civil court and the solely persuasive value of the HSE Inspector’s report, the court noted that it was not bound in its consideration of other areas of law by the HSE’s apparent preference for the defence case.

It may be noted that the HSE investigations of similar incidents were referred to in the case, the vast majority of which involved cows with calves and walkers with dogs.

### **3 RISK MANAGEMENT AND GOOD PRACTICE**

The court considered industry guidance and the opinions from expert witnesses (farm management and veterinary). Their views and conclusions point towards general good practice and risk management in this area.

#### **3.1 Cattle and Public Access in England and Wales<sup>53</sup>**

Produced by the HSE, this leaflet stresses the potential dangers of all large animals and, regarding the decision to put cattle in fields with public access it advises :

consider whether cattle should be in fields with public access at all, based on both the nature of the cattle and the level and nature of public use;

consider whether animals are generally placid;

assess whether young calves will affect cattle behaviour;

consider whether temporary fencing would be practicable.

If the decision *is* made to put cattle in a field with public access suggested precautions include :

check fences, stiles and gates;

check that paths are clearly marked;

check cattle at least once a day;

it is good practice to display signs;<sup>54</sup>

remove or cover inappropriate signs (e.g. 'bull' signs left simply to deter public use).

### **3.2 Livestock on Rights of Way : A Guide to the Law<sup>55</sup>**

The NFU document was produced in 2002. The advice is against putting cows with calves in fields with public access without some suggested precautions, in the light of the *Mirvahedy v Henley* [2003] Animals Act 1971 judgment.<sup>56</sup>

The advice was :

where particular animals are known to be aggressive or there is a general risk of aggression, e.g. cows with calves, then either have the herd away from public footpath or erect temporary fencing;

also consider placing signs at all entrances:

it is not acceptable for signs to indicate that people enter at their own risk;

signs should be removed as soon as they become redundant;

it advises they check wording with the HSE agricultural specialists at Stoneleigh;<sup>57</sup>

the HSE document noted above is recommended.

The guidance makes the point that if signs indicate that an animal is aggressive or dangerous it should not be in the field anyway. Misleading or intimidating signs are not permissible.

### **3.3 Farming Management and Practice Experts**

Both expert witnesses on farming management and practice agreed on :

- the mix of livestock that were in the field;
- that cows and calves bellow constantly for a few days after separation;
- that the bull was not involved in the accident;
- that continental breeds are less reliable and docile than native breeds;
- in suckler herds, the breed is less important to temperament than management and handling;
- that cows can be unapproachable for the first month after birth.

The main disagreement was at what point the cow and calf bond reduces such that there is little behaviour danger in the relationship.

#### **3.3.1 Farming Expert for C - Mr Marshall**

The expert for the C, Mr Marshall, noted that it was incumbent upon cattle keepers to assess their particular cattle and to take into account that most footpath users will have no specialist knowledge of livestock. He suggested that mothers will defend young well over 12 months of age, quoting examples of how cows separated from older calves still bellow on separation, and a cow separated at six months still allowed it to suckle when they were re-united when the heifer was two years old. He also mentioned the well publicised availability of signs available from agricultural suppliers such as 'Caution – farm livestock and young'. He noted that D knew :

- continental cattle are known to be less placid than native breeds;<sup>58</sup>
- cows were out with calves;
- walkers could have dogs with them.

He also knew, or ought to have known, about the NFU and HSE leaflets about keeping livestock in fields crossed by public footpaths. He expressed surprise at the HSE decision. He felt that, although not implicated in the accident, the presence of the bull with no warning signs evidenced a lack of proper risk assessment. If, which was not the position in this case, there was no possible alternative fields for the cattle then Mr Marshall would have expected warning signs regarding the cattle, signage for the footpath route and

a check that stiles were usable, even if temporary fencing was not practicable, concluding that D had not acted in a way which would have been expected from an experienced and prudent farmer.

Mr Marshall answered questions that clearly had the Animals Act in mind to the effect that statements about the cows tossing and head butting C were in character with cows in such a situation and that injury from such an attack was likely to be severe, given the weight of cows being around 650kg – 750kg and speed being up to 25 miles per hour over short bursts.<sup>59</sup> He indicated that such behaviour was not normal in cows but was normal in particular times and/or particular circumstances,<sup>60</sup> i.e. the circumstance of having calves and C having a dog. Mr Marshall found D to be a competent farmer of many years experience who had received formal training at agricultural college and who understood good stockmanship. It was thus concluded that he would have known of the HSE and NFU advisory leaflets.

### 3.3.2 Farming Expert for D - Mr Pitchford

Part of Mr Pitchford's evidence was that the farm was typical of Lake District farms. The judge doubted the application of statistics in reaching this conclusion. He also doubted the relevance of the statement that the relationship between the many visitors to the Lake District and farmers normally works well. As a matter of fact, most farming in the area was upland sheep – lowland cattle were *not* typical of the area.<sup>61</sup> The statement that a stream formed a natural barrier to keep the bull and other cattle out was also discarded – in the light of Mr Marshall's statement that cattle could easily cross the stream, the judge found 'something strange' about Mr Pitchford's assertion. Mr Pitchford said that the considered decision to put older calves with cows, and a bull, was a reasonable one. He also stated that there was no statutory obligation to erect signs and that a reasonably prudent farmer would not think signs to be necessary. Mr Pitchford was cross examined on the prudence of signs and his responses, such that there was never a need for signs as anything particularly dangerous should not be in a public access field, was discarded. The judge was concerned as to whether Mr Pitchford understood that his duty as an expert witness was to the *court* rather than one or other of the parties.<sup>62</sup>

In cross examination Mr Pitchford could not but agree that there were heightened risks in various aspects of the situation which have already been explored, i.e. calves at foot and walkers with dogs

After hearing the experts the judge considered how likely danger had to be before preventative measures were required within the OLA 1957 requirements of reasonable care.

### 3.4 Veterinary Experts

The two veterinary expert witnesses agreed in certain areas set out in a joint report, most of which has been covered above :

even placid cattle can be aggressive in certain circumstances;

cattle can cause serious injury due to their size, even if not intentional;  
increased handling tends to make animals more docile;  
beef animals tend to be handled less and are less docile than dairy breeds;<sup>63</sup>  
continental breeds tend to be less docile;<sup>64</sup>  
suckling enforces the cow-calf bond;  
dogs are a predator species to cattle and their reaction, even to a well behaved dog, is hard to predict;  
almost all HSE data on death or injury to walkers across fields caused by cattle involved dogs and Continental breeds of cattle.

#### **3.4.1 Veterinary Expert for C - Mr Dobbs**

In addition to the above agreed points, Mr Dobbs stressed that behaviour as exhibited by D's cattle in the accident was not uncommon for Continental breeds. He recommended that cows with calves not be kept in fields with public access and he noted the disturbing effect of dogs on cows with calves. The vet spent some considerable time explaining the strong bond between cow and calf, often re-established after some considerable period apart. He asserted that this bond was as strong with a 5 – 7 month old calf as with one of less than one month old. He said, under examination, that the bond was very strong until weaning - up to 12 months of age.

When posed with a threat in the form of a walker and, more particularly, a dog, in the confined space of a field with calves at foot the normal response to the 'flight or fight' instinct would be to fight.

Mr Dobbs concluded that the behaviour of D's cattle was not unusual for this breed in the given circumstances. He noted that tossing a body around was not 'normal' but was not an unusual form of aggressive behaviour in the face of stress. Clearly, given a cow's size and weight, injuries caused were likely to be severe. Mr Dobbs particularly noted the effect of the cattle being in a new field - they had only been let out to graze, after over-wintering indoors, 8 days earlier and there would have been an additional element of stress due to the recent castration of the calves. He also stated that the physiological effects of castration and disbudding can last for some weeks.

Mr Dobbs was particularly firm on the fact that whilst the cow-calf bond changed over time, it did not diminish.

#### **3.4.2 Veterinary Expert for D - Dr Andrews**

Dr Andrews, in discussing the temperament of various breeds found that the Simmental does not have a negative reputation. He did *not* agree with Mr Dobbs and others that all Continental breeds are more difficult than native breeds. He indicated that breeding, rearing, handling and the situation all have an effect. Dr Andrews felt that the cow-calf bond *did* reduce after the calf was

a month old. The court doubted Dr Andrews' basis for this statement which seemed largely to be a study of Japanese Black cattle - a different breed and with no evidence of a dog. He acknowledged the effect of the presence of a dog.

The court commented that Dr Andrews referred to D and other witness statements (of parties not called for cross-examination). This was not veterinary evidence.

Dr Andrews disagreed with Mr Dobbs in that he felt that if C had walked on the designated path, round the edge of the field, she would have been less likely to have got into difficulties.

The judge, in commenting of Dr Andrews' representations about the dog appeared to discount the possibility of the dog having barked or otherwise disturbed the cattle, even if well behaved and on a lead.

Although the expert's understanding of their role was referred to by the judge with reference to Mr Pitchford, he made a far more overt statement of disquiet regarding Dr Andrews : 'I have to ask how independent a witness is Dr Andrews?'<sup>65</sup> As well as denouncing Dr Andrews' attempt to consider 'what may or may not have occurred'<sup>66</sup> he finds that Dr Andrews is 'plainly wrong' in the conclusions he draws from photographs regarding what C could see on entering the fields, and also regarding the possible safety of the stream or entering a creep feeder. The court also rejected a hypothesis of Dr Andrews that the cows approached in a curious, rather than aggressive manner, and the injury was caused by C losing her footing. He felt that this was not consistent with the 'fight or flight' instinct.

The judge seemed very ready to reject the idea that cattle might be boisterously curious rather than making a direct attack.

Dr Andrews particular stressed that the cow-calf bond at this age should not have been strong and that there was no indication of why D should not have put his cattle in these fields. This does not take into account HSE guidance on precautions. The nub of Dr Andrews' opinion is the strength of the cow-calf bond in animals of 5 months or more.

In answer to some of the particulars of negligence (as amended) Dr Andrews' view was:

D failed to have adequate signage allowing C to make and *informed* decision.

Dr Andrews felt that to put such a sign would be to admit animals are dangerous.

D kept a Simmental bull in the field which C claimed materially increased the risk of the cattle's behaviour being unpredictable.

Dr Andrews asserted that the presence of a bull would have a calming effect on the cattle.

The court agreed with the vets' joint report that the bull had no relevance to the accident.

D, having decided to keep cow with calves and a bull in a field with public access, did not appreciate the risk of walkers going across the worn track in the middle of the field rather than keeping to the proper route round the edge.

Mr Dobbs felt that the route was irrelevant, that the cattle would have reacted in the same way to a walker with a dog on the field margin.

Dr Andrews felt that they would have been more prominent on the correct footpath - which seems somewhat odd.<sup>67</sup>

Dr Andrews referred to C's statement about the animals 'trotting' towards her, which he felt indicated curiosity rather than the 'fight' instinct. The court noted that her statement said 'trotting towards her with a purpose' which were felt not to be inconsistent with aggression rather than mere curiosity.

Dr Andrews felt that D's description of what he saw did not indicate aggression - the court felt that a description of something being thrown about 'like a rag doll' did indicate aggression.

Dr Andrews acknowledged that a suckler herd grazing in a field with public access posed a risk, in comparison with a dairy herd, but that the risk reduced as the calves got older, although still present at the time of the accident. The dog would also be a risk factor. He stated that although not all cows and/or calves would react badly to a walker with dog, if some reacted then the others might well join in.

### **3.4.3 Judge's conclusions on expert evidence**

The court favoured Mr Marshall as agricultural expert.

The court favoured Mr Dobbs as veterinary expert.

The court noted that three of the experts felt that continental breeds are less reliable than native breeds whereas Dr Andrews did not. The judge also criticised Dr Andrews for ruling out the possibility of the cattle aggressively instigating the accident (rather than the dog setting them off). Dr Andrews appeared to ignore witness statements of those who had previously encountered the cattle behaving aggressively.

The judge preferred Mr Dobbs evidence that whether the walker was on the field edge or middle made no difference to the situation. Dr Andrews said the walker would have been worse on the correct path.

On the cow-calf bond, the judge, favouring Mr Marshall and Mr Dobbs, felt that the bond lasted at least 7 months and that this should be the consideration in respect of the OLA 1957.

### **3.5 Knowledge and understanding of the farmer**

Evidence from the HSE and the NFU about the circulation of risk assessments and instructional leaflets and documents available as a result of membership, together with the HSE Inspector's opinion as to the general level of agricultural education and managerial competence of D, indicated that D was highly likely to have seen such documents.

A general knowledge of such incidents to be gained from the press was not

imputed as most such accidents were reported after the incident in question.

### 3.6 Warning Notices

What wording would protect D from liability, given the potential legal exposure which a sign could engender? There are a number of contra-indications regarding the wording of signs :

- Animals known to be dangerous (whether as a type, such as dairy bulls, or as individuals) should not be in a field with public access so a notice would not offer legal protection.<sup>68</sup>
- Wording should not be so dramatic as to discourage public access.<sup>69</sup>
- Wording should not be so vague as to offer no real purpose.<sup>70</sup>
- Members of the public with little knowledge of agriculture would not ascribe a meaning of warning to a sign indicating 'livestock with young'.

C said she would have chosen a different route if there had been *any* suggestion of a problem with the stock.

Following the reports of the case in the summer of 2009, the NFU introduced signs indicating : 'Your dog can scare or harm farm animals - Keep it on a lead around livestock, but let go if chased by cattle.'<sup>71</sup> Reviewing the wording with a consideration of the above issues indicates that the signs seem to fulfil the purpose intended, of warning the public of dangers and avoiding unnecessary risk, without further legal exposure.

## 4 CONCLUSION

### 4.1 The judge's concluding remarks

The judge made some unhelpfully vague comments (which he stressed did not form part of the judgment) on the conflict of interest where a footpath crosses grazing land, between the public and the land owner/occupier, with there being a balance between farmers' and walkers' interests such that farmers should not keep cows with calves in fields when walkers wanted to use them - which, given the nature of public rights of way, seems to be all but meaningless. He ignored existing provisions regarding the right to plough up footpaths, subject to reinstatement.<sup>72</sup> On balance, he felt that the public's rights should prevail.

### 4.2 Practical Implications

For those with farm management responsibilities, it is clear that industry guidance from the NFU and the HSE provides the basis for managing stock in land with public access. The NFU signs give wording which would appear to fulfil both their intended purpose of protecting the public and fulfilling the occupiers' duty of care. The *McKaskie* case, and others discussed above, do give a clear view of what might be considered 'reasonable' care in terms of the age and breeds of cattle. The conclusion of the length of time a cow-calf bond persists might be a concerning view for farm managers but more evidence is

needed if it is to be rebutted as future courts will doubtless consider this case. The Animals Act continues to play a part and any proposed changes are not likely to have a major impact on situations such as were found in this case.

The judge's conclusions are certainly not universally accepted and many were hoping that there would be an appeal to hear the arguments reviewed, but for that we await another case, as Ms McKaskie settled out of court.

### **About the author**

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*Blyth v Birmingham Waterworks* (1856) 11 Exch 781

*British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL

*Cummings v Granger* [1977] QB 397, [1977] 1 All ER 104

*Donaghue v Stevenson* [1932] AC 562, [1932] All ER 1

*Freeman v Higher Park Farm* [2008] EWCA Civ 1185

*Gautret v Egerton* (1867) LR 2 CP 371

*Greenhalgh v British Railways Board* [1969] 2 QB 286

*Jones v Stones* [1991] 1 WLR 1739

*League Against Cruel Sports v Scott* [1985] 2 All ER 489

*McKaskie v Cameron* (2009) Blackpool County Court claim no. 6NE04848 1<sup>st</sup> July 2009

*McGeown v Northern Ireland Housing Executive* [1994] 1 WLR 187

*Mirvahedy v Henley* [2003] UKHL 16, [2003] 2 All ER 401

*R v Majid* [2009] EWCA Crim 2563

*R v Secretary of State for the Environment, Transport and the Regions, ex parte Gloucestershire County Council* [2000] EGCS 150

*River Wear Commissioners v Adamson* [1877] 2 App Cas 743

*Rylands v Fletcher* (1868) LR 3 HL 330

*Selby v Nettleford* (1873) 9 Ch. App. 111  
*Stacey v Sherrin* (1913) 29 TLR 555  
*Staples v West Dorset District Council* [1995] PIQR 439  
*Trustees of Portsmouth Youth Activities Committee v Poppleton* [2008] EWCA Civ 646  
*Wilson v Donaldson* [2004] EWCA Civ 972

### **Statutes and Regulations**

Access to the Countryside (Dedication of Land) (England) Regulations 2003  
Animals Act 1971  
Civil Procedure Rules  
Countryside and Rights of Way Act 2000  
Health and Safety at Work etc. Act 1974  
Health and Safety (Safety Signs and Signals) Regulations 1996  
Highways Act 1980  
Law Reform (Contributory Negligence) Act 1945  
Legislative and Regulatory Reform Act 2006.  
National Parks and Access to Countryside Act 1949  
Occupiers' Liability Act 1957  
Occupiers' Liability Act 1984  
Rights of Way Act 1990  
Wildlife and Countryside Act 1981

### **Notes**

1. 1<sup>st</sup> July 2009, Blackpool County Court, claim no. 6NE04848.
2. Cumberland and Westmorland Herald, 29<sup>th</sup> January 2010.
3. s59. Bulls under 10 months old or not of a recognized dairy breed, or if with cows or heifers, are permitted.
4. s59 (4) 'Recognised dairy breeds' are Ayrshire, British Holstein, British Friesian, Dairy Shorthorn, Guernsey, Jersey or Kerry.
5. OS ref. x344605, y529609.
6. Doubted, as a matter of fact, in argument in response to claims that C in some way caused or exacerbated her injuries.
7. s2(2).
- 8' s2(5).
9. s1(2).
10. And, indeed, access land granted under s13 of the Countryside and Rights of Way Act 2000 or land set aside under the Access to the Countryside (Dedication of Land) (England) Regulations 2000 .
11. *Gautret v Egerton* (1867) LR 2 CP 371, *Greenhalgh v British Railways Board* [1969] 2 QB 286, *McGeown v Northern Ireland Housing Executive* [1994] 1 WLR 187,
12. See de Smith, S A (1949) 'Misfeasance and Non-Feasance.' *The*

- Modern Law Review*, Vol. 12, No. 1 (Jan., 1949), pp. 96-97 and **Rowe**, Jean Elting and Silver, Theodore (1995) 'Jurisprudence of Action and Inaction in the Law of Tort : Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth through the Twentieth Centuries.' 33 *Duquesne Law Review*, Summer 1995, 807.
13. s 1(1)(a).
  14. Under Countryside and Rights of Way Act 2002, see section 13.
  15. s 60(1).
  16. 1973, Cmnd 6428, which followed upon the modification of case law in *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL.
  17. s1(3).
  18. s1(4).
  19. s1(5).
  20. Wulff, Helge 'Recreational Access to Agricultural Land: The European Experience.' 24 *Independent Law Review* 1641 (1990-1991).
  21. *League Against Cruel Sports v Scott* [1985] 2 All ER 489.
  22. *River Wear Commissioners v Adamson* (1877) 2 App Cas 743.
  23. See Gaunt, Jonathan and Morgan, Paul eds. (2008) *Gale on Easements* 18<sup>th</sup> ed. London : Sweet and Maxwell; *Stacey v Sherrin* (1913) 29 TLR 555, *Selby v Nettleford* (1873) 9 Ch. App. 111.
  24. *The Right Honourable Lord*, ed. (2004) London : LexisNexis Butterworths at para. 208.
  25. See *Arnold v Holbrook* (1873) LR 8 QB 96.
  26. *Halsbury's Law of England*, paras 97 and 621.
  27. Section 1(3).
  28. *Blyth v Birmingham Waterworks* (1856) 11 Exch 781; *Donaghue v Stevenson* [1932] AC 562, [1932] All ER 1.
  29. See HSE and NFU guidance under 'Evidence' below.
  30. *Staples v West Dorset District Council* [1995] PIQR 439; *Trustees of Portsmouth Youth Activities Committee v Poppleton* [2008] EWCA Civ 646.
  31. Kilgour, R and Dalton, C (2006) *Livestock Behaviour : a practical guide*. Oxford : CAB International.
  32. Under the Law Reform (Contributory Negligence) Act 1945.
  33. EWCA Civ 972.
  34. s2(a).
  35. s2(b).
  36. [1977] QB 397, [1977] 1 All ER 104.
  37. [2008] EWCA Civ 1185.
  38. See the Law Reform Commission / An Coimisiún Um Athchóiriú An Dlí (1982) *Report on Civil Liability for Animals* (Dublin) for an

- excellent review of the common law relating to animals.
39. Dometius Ulpianus (170 - c224 AD) was a Roman lawyer whose writings comprise about two-fifths of Justinian's *Digest* which formed the core of European legal education.
  40. **Honoré, Tony** (2002) *Ulpian : Pioneer of Human Rights*. Oxford : Oxford University Press.
  41. Law Commission Report on the Civil Liability for Animals (1967, Cmd 13), Lord Goddard's Report of the Committee on the Law of Civil Liability for Damage Done by Animals (1953, Cmd 8746), Report of the Law Reform Committee for Scotland (1963, Cmnd 2185) and Williams, Glanville (1939) *Liability for Animals*. Cambridge : Cambridge University Press.
  42. Or if he / she is, that is adequately dealt with by the defence available in s.5(1) : 'A person is not liable under sections 2 to 4 of this Act for any damage which is due wholly to the fault of the person suffering it.'
  43. Jackson, Bernard S (1978) 'On the Origins of Scienter'. *The Law Quarterly Review*. 94 (1978), p.85.
  44. (1868) LR 3 HL 330
  45. I.e. animals which would not be a 'natural' use of land, as is required for liability under the rules in the rules in *Rylands v Fletcher*.
  46. Fletcher, George P 'Fairness and Utility in Tort Theory.' (1972) 85 *Harvard Law Review*, 537; Epstein, Richard A (1973) 'Theory of Strict Liability.' *The Journal of Legal Studies*, Vol. 2, No. 1 Jan, 1973,
  47. July 2006 - private members bill introduced under the Ten Minute Rule. Hansard 11 July 2006, column 1297 -1299 - Laurence Robertson (Con., Tewkesbury). March 2008 - 2<sup>nd</sup> Reading of Animals Act 1971 (Amendment) Bill failed through insufficient members in Parliament to vote (< 40).
  48. June 2009 Defra sought response to consultation document on amendment Bill, see [www.defra.gov.uk/corporate/consult/animals-act/index.htm](http://www.defra.gov.uk/corporate/consult/animals-act/index.htm) .
  49. The mechanism for Ministers to amend existing legislation under the Legislative and Regulatory Reform Act 2006.
  50. Defra (2010) 'Consultation on changes to the Animals Act 1971 to clarify the application of strict liability to the keepers of animals : full consultation response. March 2010. [www.defra.gov.uk/corporate/consult/animals-act/summary-responses.pdf](http://www.defra.gov.uk/corporate/consult/animals-act/summary-responses.pdf) .
  51. s 3(2).
  52. *R v Majid* [2009] EWCA Crim 2563 and Keogh, Andrew (2009) *Crown Court Bench Book : Specimen Directions for Crown Court Cases*. Wigan : CrimeLine Publishing. ch 2, 'Burden and standard of proof.'

53. Agricultural Information Sheet no. 17EW (a similar sheet is available for Scotland - Agricultural Information Sheet no. 17S).
54. Refer to BS 5378, European equivalent and, where appropriate, Health and Safety (Safety Signs and Signals) Regulations 1996.
55. The court noted that as 'A Guide to the Law' it is of persuasive authority only. The guide was updated in May 2009 and the NFU have released further guidance notes for members, such as a briefing on the *McKaskie* case, 7<sup>th</sup> July 2009.
56. [2003] UKHL 16, [2003] 2 All ER 401.
57. But, as of September 2008, this branch no longer exists.
58. Although this was stressed as far more significant by the claimant's expert, and is not without controversy.
59. See [www.britishtsimmental.co.uk](http://www.britishtsimmental.co.uk).
60. Animals Act 1971, s2(2).
61. See Defra (2009) *Agriculture in the UK 2008*, <https://statistics.defra.gov.uk/esg/publications/auk/>. Released annually.
62. Civil Procedure Rules, Part 35.3 (as supported by Practice Direction 'Experts and Assessors') Experts – overriding duty to the court : (1) It is the duty of experts to help the court on matters within their expertise; (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid. [www.justice.gov.uk/civil/procrules\\_fn/](http://www.justice.gov.uk/civil/procrules_fn/).
63. Simmental being large a beef breed, particularly in the UK : [www.britishtsimmental.co.uk/breed/](http://www.britishtsimmental.co.uk/breed/).
64. See Grandin, Temple ed. (2007) *Livestock Handling and Transport*. 3rd ed. Oxford : CAB International and Stricklin, W R, Hesler, C E and Wilson L L (1980) 'Heritability of Temperament in Beef Cattle.' *Journal of Animal Science* 51 (Supp. 1) 109.
65. Para. 236.
66. Para. 238 - a job for the court not the expert witness.
67. Comment - could it possibly be that Dr Andrews is referring to the worn middle field path as 'the Footpath'?
68. This would constitute negligence and almost certainly strict liability under s2(2) Animals Act 1971.
69. Contravention of the National Parks and Access to Countryside Act 1949, s57.
70. Probably negligent.
71. Available in English or Welsh from NFU CallFirst on 0870 8458458.
72. Section 1(3) Rights of Way Act 1990, amending s134 Highways Act 1980.

