

## DELICTS IN NATIVE LAW

### PAUPERIES — INJURY BY ANIMAL — NEGLIGENCE

"The record is silent as to whether this case was tried under Native Law or Common Law. Even if it was tried under the former the plaintiff is entitled to succeed. The case of N. Makeleni vs Ndlebe 3 N.A.S. 47 is very similar to the present case. There the plaintiff sued for damages for the death of his cow which had been gored or poked on the common grazing ground by a cow belonging to defendant, which was known to be vicious, the defendant having been previously informed that the cow had goring or poking propensities. The Tswana assessors were asked to state whether damages would be allowed against the owner of a cow which was admittedly vicious but had not, so far as was known, actually killed another animal, for injury by such cow to other animals on the common pasture lands. The assessors stated that there was no case in which damages had ever been awarded under such circumstances. If the cow is vicious its owner is told to cut off the tips of its horns, and if he neglects to do so he is held liable for damages subsequently done by it, and that it is the duty of a man owning a vicious cow to cut off the tips of its horns without being asked to do so.

In the present case the defendant admits that the ox in question had previously injured a horse belonging to a dipping foreman who had suggested to him that he should cut off the tips of its horns but said he had not done so as he had not had the time owing to its being scuffling season. . . . . As defendant knew of the vicious propensities of this ox he was clearly negligent at least in failing to cut off the tips of its horns.

Under the Common Law there are no fewer than four different actions by which compensation can be claimed for damage done by an animal:—

① The actio de pauperie, which is one based on ownership and not on culpa (See O'Callaghan vs Chaplin, 1927 A.D. 310 & S.A.R. & H. v. Shwanda, 1930 A.D.)

- (2) the actio de pastu (damage done by animals trespassing)  
 (3) an action based on the Aediles Edict, which prohibited the keeping of certain animals in the vicinity of a public place.  
 (4) The action under the Lex Aquilia.

The appropriate remedy for harm done by a domesticated animal falling outside the scope of the actioes de pauperis and de pastu is the Aquilian action. Culpa on the part of the owner, or person in charge of the animal is the basis of liability. In the case of harm done by a domesticated animal known to have vicious propensities, culpa will be presumed but in all other cases the onus of establishing culpa rests on the plaintiff who alleges it. (McKerrow: The Law of Torts in S. A. p. 177.)

As already pointed out, defendant knew of the vicious propensities of his animal and culpa on his part is therefore presumed and it is for him to rebut that presumption, which he failed to do.

Ntembula Exarisa vs Segokarona Maggoza, 1936 N.A.S. (C10) 36.