C3.46

DAMAGE DONE BY ANIMALS.

There are various ways in which damage may be done by animals. Such damage usually results in some one or other suffering loss. The question consequently arises as to the circumstances under which an action for damages will lie at the instance of the person who has suffered loss as the result of the damage caused by the animal or animals in question.

A distinction must obviously be drawn between damage done by wild animals and damage done by domesticated animals. It is not difficult to see that if any person keeps a wild animals in a place where it is likely to injure the person or the property of other members of the community and the animal does in fact do damage, the owner of such an animal will be liable in damages for the harm done. This situation so seldom arises, especially in native society, that there appears to be no need to discuss it any further.[1]

The more usual situation is that in which damage has been done by a domesticated animal. The liability of the owner or the person in charge of the animal in this case rests upon negligence (culpa). Thus if the owner or the person in charge of an animal is aware that it has vicious propensities, he is required to exercise greater care than if it is not known to have such propensities. In the case of harm done by a domesticated animal, culpa on the part of the owner will be presumed, but in all other cases the onus of establishing culpa rests on the plaintiff who alleges it.

That the principles of Native law in this matter were similar to those of the common law was shown in N. Makeleni vs Ndlebe, 3 N.A.C. 47. 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 the defendant, which was known to be vicious, the defendant having been previously informed that the cow had goring or poking propensities.

1. Ntombela & Xaba vs Sigokwana Maggoza, 1936 N.A.C. (C&O) 36. quoting with approval McKerron: "The Law of Delicts in S. A." p. 177.)

The matter was referred to Native assessors and they were asked to state whether damages would be allowed under Native Law & Custom 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 case of Ntambula Ekarisa vs Segokoora Maggga, 1936 N.L.C. (C+O) 36 the defendant admitted that the ox in question had previously injured a horse belonging to a differing foreman who had suggested to him that he should cut off the tips of its horns. This the defendant had neglected to do, and consequently when the same ox was involved in an injury done to another animal, the Court held that as the defendant knew of its vicious propensities culpa on his part must be presumed and that the onus rested upon him to rebut that presumption.

Where the animal was not known to have vicious propensities the onus will be upon the plaintiff to prove negligence on the part of the defendant. In such a case the animal is said to have acted contrary to its nature and if the plaintiff fails to prove negligence on the part of the defendant, the liability, if any, of the latter, which has not been proved will rest not on his negligence but on his ownership of the animal. But the liability of the owner even in such a case is not an absolute liability. In other words there are certain circumstances in which the owner will not be held liable for any damage done by the animal.

Thus in order to succeed in this action the plaintiff must prove

that the animal acted contrary to its nature from outward excitement or vice. Thus once the plaintiff may discharge, for example, by proving that he was attacked by the animal without any apparent cause. Mere proof that he was injured by contact with the animal is not sufficient.

The plaintiff will not succeed if he is himself responsible for the way in which the animal acted, for example, if he provoked the animal ~~in so~~ or in some other way by "substantial negligence or imprudence contributed to his own injury.

Similarly the plaintiff will not succeed if some third party, not the owner, provoked the animal. In that event the plaintiff must sue the third party concerned and not the owner.

~~The~~ Furthermore, the plaintiff will not succeed if he injury he sustained was due to pure accident, that is, if no one was to blame for the way in which the animal acted.

Finally the plaintiff must have been lawfully at the place where he was injured or alternatively that he had lawful business where he was injured. For example, a trespasser on private property would not be able to claim damages for any ~~damage~~ injury suffered by him.

These limitations also apply to injuries caused by one animal to another. Thus if two animals engage in a fight and the one that started the fight is killed, no action will lie against the owner of the other animal. So no action will lie if the animal was injured at a place where it had no right to be, its owner being regarded as negligent in having allowed it to stray.

TRESPASS OF STOCK.

~~A second~~ Another way in which animals may do damage and thus render their owners liable for damages is by grazing where they have no right to graze. Under the Roman Law compensation could be claimed for damage done in this way under the *actio de pastu*. Under the modern common law this action has been superseded by the Pound Acts of the various Provinces under which the owner of an animal which trespasses on the property of another is liable to pay for any damage done by the animal in the course of its trespass.

The action of trespass by stock is well known under Native Law & Custom. Under that system, ~~as a rule~~ when stock has been found grazing where it has no right to do so, the trespassing stock is taken to its owner or the owner is otherwise notified about the matter. The owner of the stock is then called upon to make an estimate of the damage done and to make it good accordingly. If the owner refuses to pay the damages claimed, the person on whose property trespass has taken place may impound the stock until the damage done has been paid.[1,2] ~~[illegible]~~

Section 77 of Proclamation 387 of 1893 as amended by Proclamation 60 of 1910 which governs the trespass of stock specifically provides that the native custom that the proprietor shall take the trespassing stock or notify the trespass to its owner when known before exercising his right to impound the stock shall continue in force. Thus there is a duty cast upon the proprietor of the land on which the trespass has taken place to make inquiries as to ownership of the trespassing stock and it is illegal for him to proceed to impound without having made an attempt to find the owner, and if he has discovered the ownership, without notifying the owner of the trespass

The object of ascertaining ~~the ownership and~~ who the owner of the stock may be and of notifying him of the trespass as a first step is to prevent the irritation inconvenience that would naturally be caused by the removal of a man's stock for what might be a very trifling trespass to a distance from his own kraal, thereby depriving him

1. Mgokeli Arose vs Beleni Monyakanyaka, 1936 N.A.C. (C&O) 137.
2. MANTSUNDU MQANA v MAJINGO NDIBONGO, 1936 N.A.C. (C&O) 226.

and his family of its use for perhaps several days; also in order that he might know as early as possible that his stock had committed trespass and thereby be afforded an opportunity of paying the amount laid down in the regulations and thus obviate any necessity for impounding'.

The right to impound trespassing stock upon failure to obtain satisfaction of ~~claim~~ damages claimed is vested in the proprietor ~~of~~ or the lawful occupier of the land and entered in the information on which the trespass has taken place[2]. No question has been raised as to whether a wife has the right to impound stock found trespassing on her husband's land[3].

1. Sikuti vs Sinombu, 1 N.A.C. 4; also Mpambani Tshombu vs Mshweshwe Kondlo, 1936 N.A.C.(C&O) 196; MANTSUNDU MQANA vs MAJINGO NDIBONGO, 1936 N.A.C.(C&O) 226.
2. ZACHARIAH MPANDE vs UMQANTO NQOLOSI, 1938, N.A.C.(C&O) 8
3. Mnensa vs Ngqengelele 5 N.A.C. 174; also M. MQANA vs M. Ndlebeng. 1936 N.A.C.(C&O) 226.