

CHAPTER SIX LIABILITY NOT BASED ON CONDUCT

6.2. LIABILITY FOR ACCIDENTS

6.2.2. OTHER ACCIDENTS

Liability for animals

In the legal systems under study here, one of the earliest instances of liability not based on fault — if not the earliest — related to liability for animals. Indeed, before industrialization and mechanization, the main source of danger to person and property in excess of that encountered in the normal course of human interaction came from the keeping of animals for agricultural purposes and the use of animals either for work or transportation purposes. Hence, the very lines of reasoning which progressively led to the abandonment (or dilution) of fault as a basis for liability in respect of work or traffic accidents were already at work some time earlier in relation to animals. In the current context, liability for animals is no longer a major head of liability, and accordingly it is surveyed in the next paragraphs, without any materials.

Under **German law**, liability for animals is governed by § 833 BGB, which reads:

If an animal kills or injures a person, affects the health of a person or damages a thing, the keeper of the animal is bound to compensate the resulting damage. Liability does not arise where the damage was caused by a domestic animal which the keeper uses in order to exercise a profession, earn income or insure his subsistence, provided that the keeper exercised the requisite care in supervising the animal or that the damage would have occurred even if that care had been exercised.

§ 833 BGB was originally enacted (in 1896) without the second sentence. It thus created a broad risk-based liability regime (*Gefährdungshaftung*) for animals. In 1908, the second sentence was added, whereby the scope of the *Gefährdungshaftung* was considerably reduced, by excluding from it “domestic animals which the keeper uses in order to exercise a profession, earn income or insure his subsistence”. Those who keep such animals are subject to liability based on a rebuttable presumption of fault (arising from the violation of a *Verkehrspflicht* relating to the supervision of the animal): that regime runs along the same lines as § 831 BGB for employers.¹ Accordingly, the first

¹ Münchener-Stein, § 833 at 1817, para. 2. See also Larenz/Canaris at 487.

LIABILITY NOT BASED ON CONDUCT

sentence of § 833 BGB is sometimes referred to as “liability for luxury animals” (*Luxustierhaftung*).² In accordance with the “fault principle” which underlies German tort law, § 833 BGB is one of a limited list of exceptional liability regimes not based on fault (*Enumerationsprinzip*),³ and courts have tended to interpret it restrictively.⁴

The conditions for liability to arise under § 833 BGB are:

- The plaintiff must have suffered an injury coming within the scope of protection of § 833 BGB, which includes life, bodily integrity, health and property,⁵ but *not* the “other rights” which have been recognized under § 823(1) BGB, in particular the *Recht am Gewerbebetrieb*.⁶ It should be noted that, by contrast with most other risk-based liability regimes, § 833 BGB allows for the recovery of *Schmerzensgeld* (since § 847 applies to it) and does not provide for upper limits on the damages to be awarded.⁷
- The injury must have been caused by an animal not coming within the class of animals listed in the second sentence of § 833 BGB. There is some controversy as to whether micro-organisms escaping from a laboratory qualify as animals for the purposes of liability under § 833.⁸
- In accordance with the general approach to causation prevailing for *Gefährdungshaftung*,⁹ the injury must have constituted the realization of a specific risk relating to animals. This is where case law has attempted to give a restrictive construction to § 833 BGB, holding that the injury must have resulted from capricious (*willkürlich*) or unpredictable (*unberechenbar*), as opposed to natural, behaviour of the animal in question;¹⁰ writers generally dismiss such restriction on

² Münchener-Stein, § 833 at 1817, para. 1.

³ See *supra*, 6.G.1. and notes thereafter.

⁴ See Münchener-Stein, § 833 at 1817-9, para. 3-7.

⁵ There is some controversy under German law as to whether a person who voluntarily exposes himself or herself to the danger created by an animal (for instance, a rider on a hired horse) can bring a claim against the keeper of the animal under § 833 BGB. Case law has always allowed such claims, but a substantial number of writers would deny them, by analogy with §§ 8 and 8a StVG (see *supra*, 6.G.12., Note (4)): see Münchener-Stein, § 833 at 1826-7, para. 25-7, Larenz/Canaris at 617.

⁶ See Münchener-Stein, § 833 at 1821, para. 11. On the *Recht am Gewerbebetrieb*, see *supra*, Chapter I, 1.4.3., Introductory Note under b) and Chapter II, 2.3.2., Introductory Note under d) and 2.G.37. and notes thereafter.

⁷ See *supra*, 6.G.2., Note (3).

⁸ The authors are somewhat evenly divided: for the inclusion of micro-organisms under § 833 BGB, see Münchener-Stein, § 833 at 1820-1, para. 10, against it, see Larenz/Canaris at 613-4.

⁹ See *supra*, 6.G.2., Note (4) as well as 6.G.3. and notes thereafter.

¹⁰ See for an example on this point *infra*, Chapter VII, 7.G.9. For a recent case where the BGH confirmed its case law, see BGH, 6 July 1999, NJW 1999, 3119.

the scope of application of § 833 BGB.¹¹

- The person whose liability is sought was the keeper (*Halter*) of the animal.¹² That concept is construed in the same way as for motor vehicles.¹³ In the case of animals, the keeper is ultimately the person who has the power of life or death over the animal.¹⁴

Under **French law**, liability for animals comes under Article 1385 C.civ., which reads:

The owner of an animal, or the user thereof during such time as he is using it, is liable for the damage caused by the animal, if the animal was either under his *garde* or had strayed or escaped.

Even if Article 1385 C.civ. historically served a role in providing a model for the development of a general regime of liability without fault for things under one's *garde* under Article 1384(1) C.civ., by now the roles have changed and Article 1385 has come to be seen as a specific case of that general regime of liability for things,¹⁵ the sole distinctive feature of which appears to be that it is found in a separate provision.¹⁶ Accordingly, the conditions for liability to apply under Article 1385 C.civ. are the same as under Article 1384(1) C.civ.:

- The victim must have suffered injury.
- The injury must have been caused by an animal. An animal can apparently be any living organism that has been appropriated,¹⁷ so as to include micro-organisms under the control of a laboratory.¹⁸
- The injury must have been due to the "behaviour of the animal" (*fait de l'animal*), which is the "triggering factor" (*fait générateur*) for liability under Article 1385 C.civ. It should be noted that the infection by an animal of another animal or of a

¹¹ See Münchener-Stein, § 833 at 1821-2, para. 13; Larenz/Canaris at 615-6.

¹² Pursuant to § 834 BGB, a person who undertakes by contract to exercise the supervision of an animal (which would otherwise be exercised by the keeper of the animal) is liable for the damage caused by that animal. § 834 BGB contains a mere presumption of fault against that person, however, which applies irrespective of whether the animal falls under the first or the second sentence of § 833 BGB.

¹³ See *supra*, **6.G.14.** and notes thereafter.

¹⁴ See Larenz/Canaris at 614-5; Münchener-Stein, § 833 at 1824-5, para. 18-24.

¹⁵ That regime is discussed *supra*, 6.1.2.

¹⁶ See Viney and Jourdain, *Conditions* at 604-5, para. 629; Le Tourneau and Cadet at 887, para. 3731. Viney and Jourdain, for instance, do not devote any specific heading to liability for animals under Article 1385 C.civ., rather merging it fully with the discussion of liability for things under Article 1384(1) C.civ.

¹⁷ Le Tourneau and Cadet at 891-2, para. 3747-8.

¹⁸ Legros (JC Art. 1382-6, Fasc. 151-1) at 6, para. 29.

LIABILITY NOT BASED ON CONDUCT

person constitutes a *fait de l'animal*.¹⁹

- The person whose liability is sought must have been the *gardien* of the animal. Even if Article 1385 refers to the “owner of the animal”, it has been recognized that liability in fact attaches to the person who has the *garde* of the animal.²⁰ As is the case with Article 1384(1) C.civ. as it applies to things, the owner is presumed to be the *gardien* of the animal.²¹

Various torts known to the common law of **England** can be committed as a result of the involvement of animals in the commission of the tort.²² In addition, some specific strict liability torts concerning animals had been developed under the common law,²³ but they were modified or superseded by the Animals Act 1971, which contains three strict liability regimes.

First, pursuant to s. 2(1) of the Animals Act 1971, the keeper of an animal belonging to a **dangerous species** is strictly liable for the damage caused by that animal. A dangerous species is one “(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”.²⁴ Section 2(2) of the Act, relating to **non-dangerous animals** is not very well worded, but in practice it imposes liability on the keeper of a non-dangerous animal which has some exceptional characteristic making it dangerous, when those characteristics are known to the owner.²⁵ Despite the element of knowledge, authors agree that s. 2(2) of the Act imposes strict liability as well.²⁶ The “keeper” is defined as the person who owns and possesses the animal, or the head of a household where someone owns and possesses the animal; furthermore, even if those conditions cease to be met, the keeper of an animal remains such until another person becomes

¹⁹ Le Tourneau and Cadet at 887, para. 3732

²⁰ Cass. civ., 2 May 1946, D 1946.Jur.305.

²¹ Le Tourneau and Cadet at 889, para. 3737.

²² Rogers at 473-5; Markesinis and Deakin at 474-77; *Clerk & Lindsell on Torts* at 1006-7, para. 20-16 and 20-17. At common law, however, there was no duty of care to prevent livestock from straying on the highway (as recognized in *Searle v. Wallbank* [1947] AC 341, HL). That century-old rule outlived its policy purpose (to spare farmers the high costs of fencing their land) and was abolished in the Animals Act 1971, c. 22, Art. 8(1); see *Clerk & Lindsell on Torts* at 1005-6, para. 20-14 and 20-15..

²³ Essentially the *scienter* rule (now found in slightly modified form under s. 2 of the Animals Act) and cattle trespass (now superseded by s. 4 of the Animals Act).

²⁴ Animals Act 1971, s. 6(1). See Rogers at 475-6; Markesinis and Deakin at 479-80; *Clerk & Lindsell on Torts* at 996-7, para. 20-02.

²⁵ Animals Act 1971, s. 2(2).

²⁶ See Rogers at 477-9; *Clerk & Lindsell on Torts* at 997-9, para. 20-03 to 20-06; Markesinis and Deakin at 481-2.

its keeper.²⁷

Secondly, s. 3 of the Animals Act 1971 provides that the keeper of a **dog** is strictly liable for injury caused by that dog to livestock.²⁸

Thirdly, s. 4 of the Animals Act 1971 imposes strict liability on the owner of **straying livestock** for damage caused to the *property* of another person (as well as the expenses incurred by that other person in keeping the livestock until it is restored to its owner).²⁹ Livestock is defined so as to include ordinary farm animals.³⁰ In addition to the usual defences, the owner of the livestock can escape liability if the livestock strayed on to the property of the claimant from a highway that it could lawfully use.³¹

Finally, it should be pointed out that some uncertainty remains as to whether it must be shown, under the various regimes of the Animals Act 1971, that the injury suffered by the victim is such as would normally be expected to result from the risk created by the animal.³²

Liability for injury caused by means of transportation other than motor vehicles

As regards **air transportation**, the Warsaw Convention³³ applies in the legal systems under study here³⁴ to govern the liability of airlines for (i) damage resulting from the death or injury of a passenger, (ii) damage to or loss of passenger baggage and (iii) damage to or loss of cargo.³⁵ The Warsaw Convention in essence makes the airline strictly liable for such damage, but in return it sets a ceiling to the amount of the

²⁷ Animals Act 1971, s. 6(3).

²⁸ The definition of keeper is the same here: see Rogers at 483-4; *Clerk & Lindsell on Torts* at 1001-2, para. 20-09; Markesinis and Deakin at 485.

²⁹ See Rogers at 480-2; *Clerk & Lindsell on Torts* at 1002-5, para. 20-10 to 20-13; Markesinis and Deakin at 477-9.

³⁰ Animals Act 1971, s. 11.

³¹ Animals Act 1971, s. 5(5).

³² See Rogers at 483; Markesinis and Deakin at 484.

³³ Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air of 12 October 1929, 137 LNTS 11 as amended at The Hague on 28 September 1955 and by Protocols No. 3 and No. 4 signed in Montreal on 25 September 1975.

³⁴ As regards Germany, the Convention is made applicable to international travel through § 51 LuftVG, and its application is extended to internal travel at §§ 44-49 LuftVG. As regards France, the Convention has been made applicable to both international and internal travel by the Act 57-259 of 2 March 1957, JO, 3 March 1957, 2402, D 1957.Lég.109, now at Art. L. 321-3 and L. 322-3 of the *Code de l'aviation civile*. As regards the UK, the Convention has been introduced in the legal system through the Carriage by Air Act 1931 (22&23 Geo. 5, c. 36), repealed by the Carriage by Air Act 1961 (9&10 Eliz. 2, c. 27), as amended by the Carriage by Air and Road Act 1979 (c. 28).

³⁵ See Warsaw Convention, Art. 17 and 18.

LIABILITY NOT BASED ON CONDUCT

award.³⁶ The Warsaw Convention applies to liability for such damage to the exclusion of any other rule of contractual or delictual liability.³⁷ It contains its own rules concerning defences,³⁸ vicarious liability,³⁹ limitation,⁴⁰ joint and several liability⁴¹ and competent forum.⁴²

One of the weaknesses of the liability regime created by the Warsaw Convention is that the maximum sums recoverable have not been increased since 1955: they are still at SDR 100,000⁴³ per passenger for all claims arising from death or personal injury and SDR 1000⁴⁴ per passenger for all claims relating to baggage. International efforts aimed at raising those ceilings have been unsuccessful. Some States (in the EU and elsewhere) have increased them unilaterally for the airlines under their jurisdiction, and some airlines have voluntarily undertaken liability for higher sums. In view of the discrepancies arising between Member States, the European Community has taken action in the form of Council Regulation 2027/97 of 9 October 1997 on air carrier liability in the event of accidents.⁴⁵ The Regulation applies to all carriers licensed by an EU Member State,⁴⁶ and it makes no distinction between internal flights, intra-Community flights or international flights. In substance, it removes all ceilings applicable to liability arising from death or personal injury.⁴⁷ Furthermore, Community airlines must provide for advance payments of up to SDR 15,000 in case of injury, without prejudice to liability.⁴⁸

In addition to the regime of the Warsaw Convention, which governs liability towards passengers, both Germany and France have enacted specific liability regimes for the injury caused in the course of operating aircraft to persons or property on the ground. In the case of Germany, that regime is found at §§ 33-43 of the *Luftverkehrsgesetz*

³⁶ Warsaw Convention, Art. 22 (for injury to passengers or damage to baggage) and 22A (for damage to cargo).

³⁷ Warsaw Convention, Art. 24.

³⁸ Warsaw Convention, Art. 17(1), 17(2), 18(2), 20 and 21.

³⁹ Warsaw Convention, Art. 25A.

⁴⁰ Warsaw Convention, Art. 29.

⁴¹ Warsaw Convention, Art. 30.

⁴² Warsaw Convention, Art. 28.

⁴³ Warsaw Convention, Art. 22(1)(a). This sum amounts to approximately EUR 148 000.

⁴⁴ Warsaw Convention, Art. 22(1)(c). This sum amounts to approximately EUR 1480.

⁴⁵ [1997] OJ L 285/1. See the critical comment on the Regulation by E. Gjemulla and R. Schmid, "Die europarechtliche Neuordnung der Haftung bei Flugunfällen und ihre Auswirkung auf Luftfahrtunternehmen" (1998) 11 NZV 225.

⁴⁶ Regulation 97/2027, Art. 2(1)(b).

⁴⁷ Regulation 97/2027, Art. 3(1)(a).

⁴⁸ Regulation 97/2027, Art. 5.

(LuftVG),⁴⁹ and it closely resembles the regime of §§ 7-20 StVG as regards motor vehicle accidents.⁵⁰ In the case of France, the Act of 31 May 1924 introduced a similar regime.⁵¹

Finally, as regards **transportation by rail**, a regime of risk-based liability has been introduced by § 1 of the *Haftpflichtgesetz* (HaftPflG).⁵² Liability is imposed on the railway, tram and suspension railway operators for the death of a person, injury to the body or health or property damage that results from the operation of these means of transportation. The only means of exoneration is *force majeure* (*höher Gewalt*), except that when rail vehicles are running on public roads (as is often the case with tramways), a defense of “unavoidable event” similar to that provided in § 7(2) StVG can be raised.

⁴⁹ *Luftverkehrsgesetz* (LuftVG, Air Traffic Act), in the version promulgated on 14 January 1981, BGBl.I.61. The original Act dates back to 1922.

⁵⁰ The main difference lies in the available defences: there is no equivalent to § 7(2) StVG under the LuftVG, and *force majeure* (*höher Gewalt*) cannot be raised as a defence either. For a case where the regime of § 33 ff. LuftVG was applied, see BGH, 14 February 1989, *supra*, Chapter V, **5.G.14**.

⁵¹ Act of 31 May 1924, JO, 26 July 1924, D 1925.4.41, Art. 53, now Art. L.141-2 of the *Code de l'aviation civile*.

⁵² Civil Liability Act, in the version promulgated on 4 January 1978, BGBl.I.145. The original *Haftpflichtgesetz* dates from 1871.