

Responsibility for fencing and liability for escaped animals

This paper clarifies who is liable for escaped livestock from Greenham common. There are several key pieces of legislature that govern the matter, as outlined below. However, the interpretation of this legislation on common land is complicated, further complicated by the additional layer of legislation provided by the Greenham and Crookham Commons Act (2002). *Gadsden & Cousins on Commons and Greens (2020)*ⁱ provides the authoritative legal text for common land matters. Chapters 8 and 10 provide the comprehensive interpretation of the Animals Act 1971 in relation to liabilities arising from escaped livestock, and the fencing requirements and responsibilities associated with common land. Much of the text in those chapters has been summarised by BBOWT as part of this report for the Commission. However, legal advice would need to be obtained on a case by case basis to determine liability, if litigation for damage caused to people or property were sought by a claimant.

- The legislation governing liability for escaped animals is dealt with under *Section 4 and 5 of the Animals Act 1971*ⁱⁱ.
- *Section 10 of the Greenham and Crookham Commons Act (2002)*ⁱⁱⁱ outlines the responsibilities for neighbors to repair and renew the fencing adjoining the common.
- There is also a duty to fence against the common that needs to be taken into consideration, that is based on custom and supported in English common law.

One must first consider the duty to fence against the common, prior to establishing liability for the action of cattle trespass, and any potential damages caused.

Gadsden et al (2020) suggests that the primary duty to prevent straying lies upon the commoner. However, in spite of the general duty to contain cattle being on the part of the commoner, there is in practice a widespread acceptance that occupiers of land abutting a common are under a binding obligation to maintain fences so that animals on the common do not stray onto their property i.e. a duty to fence against the common. However, in the event of an escape through the fence, the onerous proof should lie on the commoner to establish that there has been a breach of a duty to fence.

Where a fence close adjoins a common in the absence of evidence to the contrary, the duty to fence is that of the adjoining land owner. Furthermore, Gadsden et al (2020) suggests that the duty to fence against a common may extend beyond the perimeter of the common to any land which may be reasonably expected to be affected by the livestock straying from the common. The extent of the duty will depend on the facts, but in *Spry v Motimore* it was held that the occupier of the enclosed land was required to adequately fence against cattle, with the land being situated 300-400m away from the common.

This duty to fence as a custom has been considered by the courts on several occasions in modern times, culminating with the decision in the Court of Appeal in *Egerton v Harding* in 1974. The judge concluded that a custom was proven, recognising that for a custom to be upheld as local law it had to be shown to be of immemorial origin, reasonable, continued without interruption and certain.

Therefore, Gadsden et al (2020) suggests that the way seems open for a proof of custom to fence against the common over the majority of common land wastes. However, where commoning remains active there ought to be little difficulty in establishing that the obligation is of immemorial origin, reasonable, certain and has been continued without interruption. Now, how this applies to Greenham and Crookham Common is complicated. The Greenham and Crookham Common Act 2002 restored, over a modified area, rights of common that were extinguished on Greenham Common, or rendered incapable of exercising on Crookham Common, because the land was acquired for an airbase under the Defence Acts and vested in the Secretary of State.

Subsequently it could be argued that there is not the customary duty to fence against the common because there hasn't not been a continues and interrupted obligation to do so, when the common rights ceased over the area. However, as section 10 of the Greenham and Crookham Commons Act 2002 puts that duty into legislation, it is consequently assumed that the relevant case law relating to a *duty to fence* can be attributed to that of an *obligation to fence* as outlined in the 2002 Act.

In regards to liability for straying animals from the common, commoners and therefore graziers who lease their rights from commoners, are potential defendants in respect of any livestock in their position. Gadsden et al (2020) suggests that the rules of cattle trespass may apply against the owner of cattle which strays onto adjoining properties, and there is in part an obligation to prevent cattle straying from the common land.

However, as outlined under common law, but more importantly due to the unclear relevance of a customary duty to fence against the common when rights have been extinguished and subsequently reinstated, under section 10 of the Greenham and Crookham Commons Act 2002, there is an obligation to fence against Greenham and Crookham common. This point is important, as section 5 of the Animals Act 1971 outlines exemptions from liabilities due to trespassing livestock, with subsection 6 outlining that there is no liability where straying would have not occurred but for a breach of duty to fence by a person having an interest in the land strayed upon.

Therefore, a person is not liable under section 4 of the Animals Act 1971 for either damage caused or expenses incurred where it is proved that the straying would not have occurred but for a breach of a duty to fence by any other person. It is worth highlighting that where there is a duty to fence against the common, there is no specified standard of fencing required, apart from ensuring it can contain animals '*behaving normally*'.

Nevertheless, Gadsden et al (2020) highlights that whilst a *grazier* should not be liable for damage caused by their animals escaping due to a damaged boundary fence that is not their responsibility, there is a general continuing duty not to allow his livestock to stray and if the straying does continue he is in breach of the duty and is liable for any expenses incurred. Additionally, no defendant may allow his livestock to continue to stray after a reasonable time has elapsed even where the 1971 act seems to exempt him totally from liability.

Whilst a commoner may be held liable for damage to land or property where animals stray from the common, when it is not their duty to fence against the common they may recover their losses via an indemnity action against that person who had the responsibility. That is because it is the persons whose neglect first caused the animals to stray who is responsible for the consequences.

When considering straying animals over multiple boundaries, when there is no duty to fence on the part of the claimant (C), the livestock owner (A) will be liable for the damage caused by the livestock, however, they (A) will be able to recover their losses under the indemnity action from person (B) who did not maintain their responsibilities to fence against the common and whose land the animals first strayed from.

In *Right v Baynard* the court refused to accept that a grazing commoner (A) should be excused his liability to C because of B's actions i.e. they were negligent in their duty to fence against the common. The argument that C should be able to recover directly from B has been rejected judicially (Gadsden et al, 2020).

Recommendation 1 - Graziers to identify areas that require repair and notify BBOWT as part of their duty to ensure their animals do not escape from the common.

Recommendation 2 – BBOWT to write to all adjacent landowners, on behalf of the partnership (WBC, BBOWT and GCCC) to notify them of their obligation to fence against the common, and that they may be liable for damages caused by livestock going through their property and on to other land or roads

ⁱ Cousins, E. F., Honey, R., Craddock, H. (2020) *Gadsden & Cousins on Commons and Greens. 3rd Edition*. Sweet and Maxwell

ⁱⁱ [Animals Act \(1971\)](#)

[Section 4: Liability for damage and expenses due to trespassing livestock.](#)

(1) Where livestock belonging to any person strays on to land in the ownership or occupation of another and—
(a) damage is done by the livestock to the land or to any property on it which is in the ownership or possession of the other person; or
(b) any expenses are reasonably incurred by that other person in keeping the livestock while it cannot be restored to the person to whom it belongs or while it is detained in pursuance of section 7 of this Act, or in ascertaining to whom it belongs; the person to whom the livestock belongs is liable for the damage or expenses, except as otherwise provided by this Act.

(2) For the purposes of this section any livestock belongs to the person in whose possession it is.

[Section 5: Exemptions from Liability](#)

(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.

(2) ...

(3) ...

(4) ...

(5) A person is not liable under section 4 of this Act where the livestock strayed from a highway and its presence there was a lawful use of the highway.

(5A) A person is not liable under section 4A of this Act in respect of a horse which strays from a highway when its presence there was a lawful use of the highway.]

(6) In determining whether any liability for damage under section 4 of this Act is excluded by subsection (1) of this section the damage shall not be treated as due to the fault of the person suffering it by reason only that he could have prevented it by fencing; but a person is not liable under that section where it is proved that the straying of the livestock on to the land would not have occurred but for a breach by any other person, being a person having an interest in the land, of a duty to fence

ⁱⁱ [Section 10 of the Greenham and Crookham Commons Act \(2002\)](#):

Obligation to fence land against Common

Where the Council exercise any power (by virtue of a consent under section 194 of the Law of Property Act 1925 (c. 20), as applied by section 35 (Application of section 194 of Law of Property Act 1925) below or otherwise) to erect a fence between the Common or any additional open space and adjoining land, the occupier of the adjoining land shall have the obligation to repair and, where necessary, to renew the fence.