

Autumn 2019

Weatherbys Hamilton Rural Newsletter

theSpecialist

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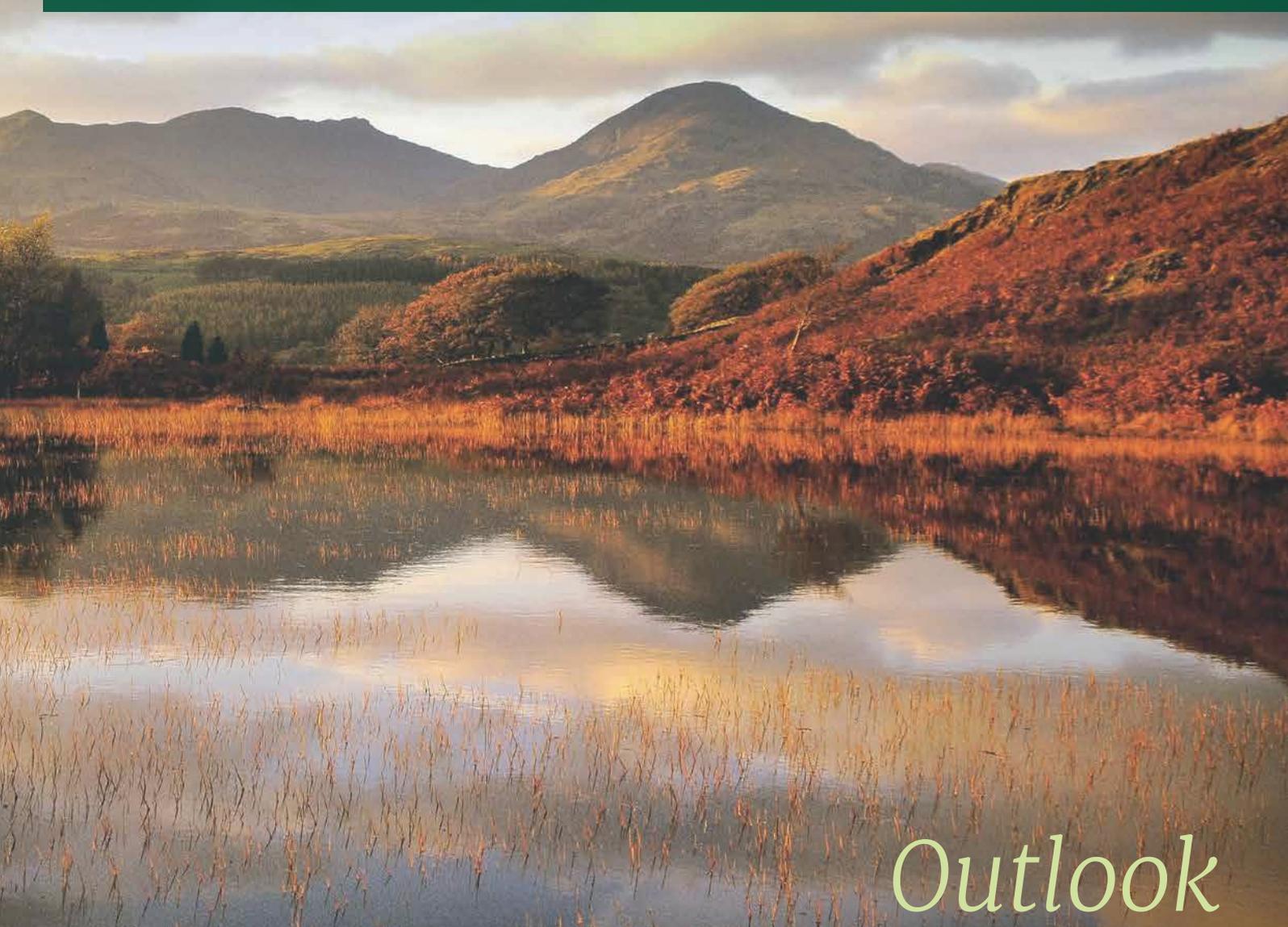
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WEATHERBYS
HAMILTON

Welcome to our Autumn 19 edition of *the Specialist*.

However intractable Brexit may appear it is insignificant compared to the challenges facing the environment. One way or another our relationship with Europe will be resolved, but that with nature may never be. Food production and conservation are in the front line if the world is going to change course. We are committed to maintaining the high quality of service and advice needed to help landowners adapt to these challenges and provide the insurance required to meet them.

Please do not hesitate to call one of our partners if there is anything that we can help you with.



Charles Hamilton

Chief executive



Animals Act – The problem of interpretation

It's never a good moment when livestock escapes or unexpectedly comes in to contact with the public.

The 1971 Animals Act adds to the stress by making the owner and/or keeper of an animal strictly liable for any damage to third parties or their property; crucially intent or negligence does not have to be involved.

It would be natural to assume that liability resulting from the activities of an inherently non-dangerous animal would require some negligence on the part of its keeper or owner, but a House of Lords ruling in late 2002 re-confirmed that strict liability under the Animals Act 1971, despite its controversial wording, continues to apply. The great Lord Denning was predictably prescient when he said at the time of the judgement *"The section is very cumbrously worded and will give rise to several difficulties in the future"*. Since then actions brought under the Animals Act have continued to be problematic for landowners and insurers to defend.

Where an animal causes damage to a third party, the Animals Act provides the prosecution with ample opportunity to

present a case for liability. In cases where the standard defences of contributory negligence, voluntary acceptance of risk and trespass are not applicable, claimants' solicitors invariably assume that the defendant will be automatically liable.

The most notoriously difficult part of the Animals Act to interpret, and therefore to defend, is where the damage *"is due to characteristics of the particular animal not normally found in animals of the same species, or not so except at certain times or in certain circumstances"*. The latter part of this sentence provides enough ambiguity to persuade a judge that what most people would consider natural behaviour, particularly in a tense situation, is in fact unnatural. If a horse kicks out at a car because a driver gets too close, most owners would not regard that as unusual behaviour. The Animals Act may easily beg to differ.

Whilst the effect of the 2002 judgement has probably not been as severe as anticipated, the number of cases where the Animals Act is cited has increased exponentially. But to the relief of insurers several recent judgements show that realism can prevail. A claimant recently brought a case against a client of

ours when she was forced to jump a fence because a herd of cows in a field which she had entered rushed towards her and caused her both injury and distress by her need to take drastic evasive action.

The judge's decision to dismiss the claim was as a result of the defendant's witnesses possessing valuable practical experience of farming the species of cow concerned and being able to portray this in an articulate manner. This proved more persuasive than a highly qualified expert in behavioural science and an emotional claimant. Reassuring evidence that common sense can prevail, but in its current format the Animals Act is going to retain its capacity to make the outcome of cases difficult to predict.



Environmental Impairment Liability v. Public Liability – The critical difference

Life is simple. Many think so where Public Liability (PL) and Environmental Impairment Liability (EIL) are concerned as both are included under the PL policy aren't they? The truth is rather different.

In 2003 a fire ripped through a white spirits factory on the Humber causing the Environment Agency (EA) to take immediate action and implement expensive preventative measures to stop foul water and contaminants causing a local ecological disaster. The EA operation cost many hundreds of thousands of pounds. The insurer – Royal Sun Alliance – was presented with the bill and refused to pay. It went to Court and Royal Sun Alliance was vindicated, the ruling being that an Environmental Impairment Liability (EIL) policy, rather than just a Public Liability (PL) policy, should have been in place. The factory company then successfully sued its insurance broker, claiming that it should have sold them an EIL policy and the landmark Bartoline judgement became part of case law.

In 2008 came another significant development; new legislation in the form of the Environmental Liability Directive which laid out stringent provisions and penalties and defined:

- Environmental damage and how it affects biodiversity
- How the polluter must be responsible for:
 - Clean-up
 - Compensation and Remediation
 - Complementary work (replacement) where the site has been damaged beyond repair.

The crucial point to note is that none of the above are covered by a PL policy but are by an EIL policy. An EIL policy also importantly covers costs incurred to prevent 'imminent damage'. It is sobering that following most pollution incidents 95% of the damage is invariably not covered by a PL policy.

PL v EIL - what does it cover?	PL policy	EIL policy
Gradual leakage and pollution	No	Yes
Own site clean up	No	Yes
Cost of work to prevent imminent damage	No	Yes
Reinstatement of flora and fauna	No	Yes
Damage to bio diversity	No	Yes
Cost of remediation	No	Yes
Compensation	No	Yes

A PL policy does cover third party property damage, injury or death but none of the categories listed above would be included under one. In our experience even those PL policies which sometimes optimistically include the 'Bartoline Extension' don't actually cover them either and wouldn't even have covered the Bartoline incident!

In the farming sector there can be major differences between insurers who provide specifically for EIL and those that include built-in coverage in an estate policy which can often be littered with exclusions. For example, the latter regularly exclude agricultural contracting and some other diversification. The bottom line is that it is crucial to ensure that there is no misunderstanding over the cover you have in place before, rather than after, the oil storage tank discharges insidiously in to the nearest water course.

Sustainable Farming – *We don't have an option*



David Wilson,
Farm Manager
Duchy Home Farm

It is safe to say that this is not the first time an article begins with the cliché “we live in interesting times” but I feel the phrase is more applicable today than ever.

For the first time, and with a growing sense of momentum, the word “sustainable” has some sort of meaning for most people. There is a growing awareness and unease, especially from the young, that the planet is damaged and that we cannot go on exploiting what has in the past been regarded as the Earth's infinite resources.

There are several definitions of the word “sustainable” in my ragged copy of a 1940-something Oxford Dictionary and, for me, the one that best sums it up is “to endure without giving way”. In short, if any element of our lives is not sustainable, it means we cannot go on doing it indefinitely.

The problems we face relating to the sustainability of our activities on this planet are numerous, complex and impossible to explain in a sound bite or strap line. As a result, we tend to focus on a particular area or two, often with strong feelings but we have gaps in our picture of what is required to make a difference to our ability to survive. A few examples of this would be plastics in the environment, threatened wildlife species, climate change, falling water quality, air pollution, loss of soils, farm animal welfare, rising CO2 levels - the list could stretch much further. The truth is, all

these things are related and need to be looked at in the round, as stated in Professor Mike Berners Lee's book *There's No Planet B*, a good if not slightly terrifying read. Because of the complexity of the whole picture, there is much scope for misinformation and the noisy argument around methane belching ruminants is a case in point. Ruminants are an easy target and a distraction from what we really need to do which is to leave fossil fuels in the ground; a reality too painful to contemplate and yet essential to our survival if global warming is to be kept to no more than 2°C.

Globally, food and farming are responsible for 23% of greenhouse gas emissions, which is quite a chunk, but only 16% of that 23% is created by the belching of methane from ruminants. In other words this amounts to less than 4% of the total. If lamb and beef are grass fed rather than grain fed, the carbon tied up in the grazed pasture more than compensates for the methane they emit. As a planet we need to eat less meat as part of a sustainable future, but that meat needs to be a rare treat of the highest quality, and from pasture fed ruminants whose grazing and dung play a vital part in creating a healthy soil. In the UK 65-70% of the land is pasture and much of that is on uplands where no other food can be produced.

I was lucky enough to be taken on to manage the Duchy Home Farm in 1985 which was the beginning of my journey into organic farming. We started like a timid early season bather, dipping little more than a big toe into the waters of organic farming by planting two fields of red clover and grass plus another field with

Sainfoin. All three fields produced good yields of fantastic quality forage; hay and silage as well as grazing. Not only were we getting the quality fodder from these two leguminous plants, but also a generous legacy of nitrogen that enabled us to grow the cereals later in the rotation. Out of a total of 1900 acres that we now farm, 300 acres is permanent pasture with the rest farmed in a 7 year rotation. This is comprised of 3 years of clover/grass, followed by winter wheat, spring oats, spring barley or spring beans and then winter rye. The livestock that graze these rich clover leys are 200 Ayrshire dairy cows, 100 beef suckler cows, 350 Lleyn ewes and, from time to time, a few outdoor rare breed pigs.

A central theme of the farm is genetic conservation and it is something HRH is keen both to support and actively engage with. Amongst the commercial breeds of livestock there are rare breed interlopers; in the dairy we have 10 Original Population Dairy Shorthorn cows and at Highgrove, as well as the Aberdeen Angus suckler herd, there are 2 smaller herds of Gloucesters and British Whites. Clover is the engine of the system and the facts speak for themselves. Clover can fix up to 250 kgs/hectare of nitrogen from the atmosphere into the soil using colonies of rhizobium bacteria on their roots and all free of charge - an amazing fact and the backbone of a sustainable system.

Another central theme of the farm is diversity at all levels, in contrast to global business' mantra of uniformity. The preservation of old and rare food genetics is extremely important and should

be an essential strand in any sustainability planning. According to some experts, we have lost around 90% of our food genetics in 100 years and, because of increasing multi-national control, that diversity is still falling. If nothing else, we should at least halt this decline so that we still have these genes to use when they will inevitably be needed. It is salutary to remember the origins of the Irish Potato Famine where a single high yielding variety of blight prone potato was grown, causing starvation on a huge scale.

Whilst not perfect and recognising that any farming is a compromise with the natural world, organic farming does provide most of the answers to the sustainable food question. Having to follow a strict rule book is not a bad thing and serves to stop us veering off into corner cutting. Thinking of all life forms as connected may help us make better decisions and focusing on creating healthy soil and gut biomes will automatically lead us in the right direction. Corporate greed and multi-national company domination will ultimately destroy us. We need a system of guidelines for capitalism that will incorporate the value of natural capital in a bottom line - easier said than done but essential to our survival as a species.

The old farming saying of **“you need to live as though you are going to die tomorrow and farm as though you are going to live forever”** sums it up well, as does the maxim of **“healthy soil, healthy plants, healthy animals, healthy people”**.



Historic Houses – Raising revenue for the roof

By their nature historic houses are unique and many will open their doors to the public in order to generate revenue. This may range from commercial entertaining, weddings, films or photo shoots, to allowing gardens to be visited under the National Garden Scheme. This obviously makes an important financial contribution to their preservation but also allows their owners to share the enjoyment of their homes and landscapes with a wider audience. Inevitably this comes with increased insurance risk and it is important that insurers are informed when openings are planned.

Initially a full fire risk assessment will need to be undertaken to ensure that fire hazards are controlled, fire detection is in place and that there are safe means of public and private exit from the premises in the event of a blaze.

Wherever possible the visitors' entrance should be placed as far away from any significant concentrations of value as practicable, in order to fulfil the same "buffer zone" function that large atriums do in museums. Non-slip mats at all entrance and exit points will help reduce the travel of dust and grit into the high value areas as well.

Any person handling cash should be suitably trained and protected, and cash should be regularly collected and removed to a secure area. It is sensible to obtain advice from insurers on safe ratings so that they are adequate for the level of cash that is being held on the premises.

Overcrowding is undesirable - too many visitors at one time can cause damage to both structure and contents. The quality of the visitor experience is also marred if overcrowding makes viewing difficult and this can often lead to lower repeat visitor numbers. Equally importantly, overcrowding makes it harder for stewards and guides to provide high standards of security and visitor care, and puts personal safety at risk through accidental injury or slow evacuation in the event of an emergency. For very popular attractions, timed tour access is recommended to help to control the visitor flow.

Specialist insurers are generally happy to insure the risks of most normal commercial activities within the property if details are provided in advance. They require evidence that best practice is being followed, that the necessary risk assessment has been undertaken and that each activity can be controlled. It makes sense to work with a small number of trusted contractors, caterers, lighting and marquee companies. A good relationship where both sides understand how the other operates is not to be underestimated.

Don't make the mistake of thinking that filming is straightforward or represents easy money. A full film crew can run to thirty or more people (often well over a hundred for a major feature film) and they bring large amounts of equipment with them. It goes without saying that properties often need to be of a reasonable size to attract the attention of a production company in the first place. As a basic rule try to avoid the filming or photographing of any individual item, painting or piece of furniture, as it can then become a target for thieves. Any photographic shoots should be supervised and any artefacts should only be moved by the property's staff. The Historic Houses Association has produced a handbook, "Film & Photography for Historic Houses & Gardens" by Norman Hudson, which also contains a specimen agreement for a filming contract. See www.hha.org.uk for further information.

When a film enquiry is received it is sensible to contact your insurer first to discuss what requirements and levels of cover need to be arranged and what level of cover you should ask the film company to carry. Typically, we would recommend that the company has public liability cover in excess of £10m and that they are responsible for their own power supply.

Generally the feedback on film crews and casts is very positive and the project often proves a thoroughly interesting and enjoyable experience for the house owner and his staff. Whatever disruption it causes, there is no question that it can be invaluable in funding that long put-off refurbishment or new roof.

**TO FIND OUT MORE
WHY NOT GET IN TOUCH:**

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Personal Accident Cover – *Don't dismiss it*

Personal accident cover is often overlooked. Common arguments we hear include “it won't happen to us”; “no one person is that crucial to the business”; or “we can afford to pay someone else to do the work if need be”. Two of these comments might be true but one can't be.

There is a belief by some that Employers' Liability cover will automatically cover any mishap at work. It will provide cover, but only where negligence on the employer's part is established. In contrast, personal accident insurance provides cover when an accident happens irrespective of fault and you want to compensate either your employee or the business. It is worth remembering that most personal accident policies include cover for accidents that happen outside the workplace.

For many businesses their employees are their greatest asset. It is therefore logical to have cover in place that will look after them in the event of an accident and will help them return to work as quickly and painlessly as possible.

It is no secret that there are more accidents in the agricultural sector than in any other business sector in the UK. The knock-on effect is that there are more working days lost in our industry than in any other, which means that employees experience loss of earnings and employers are left short staffed. Where an employee lodges a claim for loss of earnings the situation is exacerbated. It is also not unusual for farms and estates to employ family members and the reassurance of a personal accident policy has emotional value as well.

Personal accident benefits normally include:

- Weekly payments covering the employee's salary for up to 2 years
- Weekly payments covering part of the employee's salary for up to 2 years if only part of their job can be performed
- Lump sum payments of up to £50,000 (and in some cases more) for what are known as Capital Benefits (death, long term disability, loss of sight or limbs). The policy can also extend to include illnesses if required.

Remember, personal accident cover is not healthcare insurance and that the differences between even those healthcare providers considered to be industry leading can be startling, especially in the area of rehabilitation following an accident.

Finally on the subject of accidents, if you have cover with a reputable household insurer you will more than likely have provision within your contents cover for making alterations to your home if one of your household is unfortunate enough to suffer life-changing injuries.

Contractors – *Check out their cover*

Most of us are only too delighted when we find a good plumber or decorator and rush to use them without hesitation. The same applies in agriculture and contractors who are reliable and competent are usually in high demand and used year after year by estates.

This familiarity makes it all too easy not to ask the contractor to provide evidence of their public liability policy, or even ask them whether they have the cover. From the contractor's side, volunteering a copy of a policy is a sign of professionalism in itself.

It goes without saying that it is vital that the contractors you use do have the necessary public liability cover in place, and particularly that it extends to the type of work that they are doing for you. A general maintenance contractor may have public liability cover with an indemnity limit of say £5,000,000 but there could be a major issue if they stray outside that description and carry out a type

of work that is not covered, such as structural works on a cottage for example.

The risk of not checking your contractor's insurance could lead to the cost of any damage caused by them falling on your shoulders and end up with the injured party seeking compensation from you or your insurer.

It will often be a condition of the insurance policy covering your own property that any contractor or third party working on it or on your land must have a minimum level of public liability cover themselves. This should be clearly laid out in your policy documentation and be easy to check. Invariably the required limit will mirror your own.

What do you do if your contractor doesn't have the correct insurance cover in place? Our advice is either to ask them to obtain the correct cover or seriously consider using another contractor. Allowing a contractor to start a job without insurance is a risk not worth running.

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Stradivarius – The Multi-Millionaire!



When we launched the inaugural Weatherbys Hamilton Stayers' Million in March 2018 there were plenty who were quick to write it off as an impossible challenge. It wasn't feasible to expect a horse to win four top class long distance races in the successive months of May, June, July and August and it was a commercial gimmick that would be quickly forgotten.

How wrong, and expensively so, they were! In the last two years, Stradivarius' achievement in winning the Stayers' Million twice has succeeded in making him one of the most popular horses in training and in the process has catapulted the Stayers to the forefront of the public's imagination. This has been the primary purpose of the whole project and has re-awakened interest in horses which not only remain in training long enough for racegoers to form an attachment to them but where the races themselves create a narrative.

The extension of the qualifying races to include four in Europe made no difference of course to the incomparable Stradivarius but we were delighted with the added dimension that it gave to the series. In particular the opportunity to visit Hoppegarten racecourse for the Oleander-Rennen was most memorable.

Situated in a stunning forest on the Eastern edge of Berlin, it was once home to 1,000 horses in training and Germany's answer to Chantilly and Newmarket. Trapped in a time warp for 45 years on the wrong side of Checkpoint Charlie, it has since been gloriously revived and its inclusion in the Stayer's Million series was a fitting acknowledgement of the contribution that German staying blood has made to the development of the thoroughbred in Europe.

The line up for the Gold Cup at Ascot, the first of the three main races for the Million, saw five horses in with the chance of winning it: Stradivarius, Dee Ex Bee, Master Of Reality, Cross Counter and Called To The Bar. The fact that the first four mentioned were the first four to finish was in itself a ringing endorsement of the qualifying race selection. Stradivarius then galloped on relentlessly to win at Goodwood for his third Goodwood Cup in a row, before proceeding to take his second Million in the Lonsdale Cup at York in August. However, in fighting every fight, Dee Ex Be also merits particular mention. Trained by Mark Johnston, a major supporter of the staying horse, he not only won two of the qualifiers but then proceeded to run a gallant second to Stradivarius in each of the races at Ascot, Goodwood and York. This is the sort of consistent rivalry that is rare in races over shorter distances and is yet another attraction of the long distance versions.

We were once again a popular visitor to Clarehaven Stables with the cheque for £100,000 for the staff's share of the Weatherbys Hamilton Stayers' Million. Behind every great horse there is a great team and the flashy chestnut with four white socks has done all of them and Weatherbys Hamilton proud. Stradivarius is a truly exceptional horse and he has been spectacularly successful in putting the Stayers back on the map. We are privileged to have been part of the story.



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