



Vicarious liability for the harming of wild birds: A practical guide



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This article is intended to provide landowners and employers with a practical guide on the vicarious liability provisions in the Wildlife and Natural Environment (Scotland) Act 2011.

For the purposes of the Act a wild bird is one that is of a species that is resident in or a visitor to the EU in a wild state. It excludes game birds legally killed in season.

1. What does the Act do?

It has long been a criminal offence to unlawfully kill, trap or injure wild birds in Scotland. The Act, which came into force on 1 January 2012, restates this point. In addition, it also imposes vicarious criminal liability for employers where an employee has committed such an offence from 2012 onwards.

Vicarious liability is where one person is held responsible for the actions of another person. In this situation, it means that landowners could be held responsible for the actions of gamekeepers who commit an offence under the Act.

1.1 These provisions in the Act specifically target those who have rights for the management of the land in relation to the killing or taking of wild birds, the habitat of any birds, the presence of birds' predators, or the release of birds from captivity for shooting. This means that a landowner can be vicariously liable for an offence committed by their employee or agent, even where they have the legal right to kill wild game birds.

1.2 In practical terms, the person committing the underlying offence is likely to be a gamekeeper, and the person potentially subject to vicarious liability would be

the landowner or employer. However, it is important to bear in mind that a formal employment contract does not need to be in place for vicarious liability to apply.

1.3 The Act also applies where a person is 'providing relevant services' for someone with legal rights in relation to the management of wild birds on the land. This could potentially apply to sporting and / or farming tenants who are providing a service for the landowner.

2. What is a 'relevant offence'?

2.1 The Act refers to a list of offences from the Wildlife and Countryside Act 1981 which, in summary, includes the following as well as attempting any of the following:

- killing, injuring or taking any wild bird;
- damaging or destroying nests;
- taking or destroying a wild bird's egg;
- preventing a wild bird from using its nest, or disturbing a wild bird while it is building a nest or is near a nest containing eggs or young;
- disturbing dependent young of a wild bird or harassing any wild bird;
- setting traps or poison to kill, or setting them in a place likely to cause injury to any wild bird; and
- possessing a prescribed pesticide.

2.2 Where a gamekeeper, employee or other agent has



committed one of these offences, proceedings may be taken against the landowner under the vicarious liability provisions whether or not they are also taken against the offender.

The penalties for both a person committing the offence and for an employer held to be vicariously liable, are a maximum fine of £5,000, or a 6 months' prison sentence, or both. The Wildlife Crime Penalties Review has recommended an increase in these penalties.

The Review Group proposes that the maximum penalties are increased to 12 months in prison or a fine of £40,000 for more serious offences. In the Scottish Government's Response to the Review (published in February 2016) the then Minister for Environment, Aileen McLeod, agreed with this recommendation. She committed to compiling a list of offences to which the increased penalties would apply, with new legislation to be introduced during the next session of Parliament.

3. What defences are available to landowners and employers?

Where an offence has been committed by a third party, landowners may avoid conviction under the vicarious liability provisions in the Act if the two criteria for the defence are met.

Firstly, the landowner must show that they did not know that the offence was being committed by their employee or agent. Secondly, the landowner must also show that they took all reasonable steps and exercised all due diligence to prevent the offence from being committed.

As the case outlined below illustrates, both conditions of the defence must be satisfied in order to avoid vicarious liability. This places a pro-active duty on landowners to prevent offences being committed by their employees or agents. There are however some practical actions that landowners can take to ensure that 'all reasonable steps' are taken, outlined below.

4. Have there been any convictions?

Since coming into force, there have been two convictions of landowners under the vicarious liability provisions in the Act. The first of these concerned a gamekeeper who laid poison on the estate which killed a buzzard. As a result the gamekeeper was personally fined £4,450 and vicarious liability charges were brought against the landowner.

In the case against the landowner, there was no suggestion that the landowner had instructed the gamekeeper to lay the poison or even that he was aware that the gamekeeper was doing this. However, the

defence outlined above did not apply as the landowner had not taken all reasonable steps to prevent the offence from being committed. This makes very clear that turning a blind eye to the illegal practices of bad gamekeepers is not an option.

The landowner was fined just £675, although it was reported in the press following the conviction that the estate's subsidies were reduced by £66,000 as a result of the conviction.

The second vicarious liability case came as a result of a gamekeeper using an illegal leg hold trap which killed a buzzard. This time the landowner was given a fine of £3,200. This increased fine may represent a trend in the courts punishing landowners more severely.

A further vicarious liability case is currently on hold, awaiting the outcome of an appeal by the gamekeeper who committed the underlying offence.

5. What practical steps can be taken?

Although a necessary part of the defence is to show that the landowner was not aware that the offence was being committed by an employee, wilfully disregarding an offence or not taking action to prevent the offence being committed, will not avert a conviction for vicarious liability. Landowners and employers must take a pro-active preventative approach.

In practical terms, examples of taking 'all reasonable steps and exercising all due diligence' may involve:

- ensuring there is a written employment contact in place with wording obliging the employee to comply with all statutory obligations;
- issuing clear instructions to employees on the law and illegal activities;
- clearly outlining any activities that you may wish to be informed about before the employee carries them out;
- providing best practice guides and training to employees about their legal responsibilities;
- setting up spot checks of practices and regular reviews of employees to ensure that the law is being complied with; and
- ensuring good record keeping of all of the above.

Further Questions?

For further information or advice on any of the issues discussed in this briefing note, please get in touch with your usual Shepherd and Wedderburn contact.