"Liability for Animals that cause Personal Injury: Historical Origins & Strict Liability under the Animals Act 1971"

by Matthew Chapman

> *... if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner shall be put to death.*
>
> (*Exodus* c. 21: v 28-30)

Introduction

The general principles governing the liability of animal and pet owners for personal injury caused by their animals are now principally found in statutory, rather than scriptural, form. The commencement of the Animals Act 1971 on 1 October 1971 regularized the piecemeal and archaic common law rules that had previously controlled this area of the private law. The result was a slimmed down and rationalized system for the apportionment of liability and the recovery of damages.

However, while the law is now, essentially, statute-based elements of the old common law rules survive in certain key respects. For example, a variety of tortious remedies remain available to Plaintiffs in spite of the new legislative framework. These include trespass to the person and "ordinary" common law negligence. In addition, the modern law of strict liability, contained in the 1971 Act, itself draws heavily upon concepts known to the law before the introduction of the legislation. This article therefore commences with a discussion of the origins of the strict liability regime of the 1971 Act.

The history of liability for animals: the writ of scienter

In the beginning was the mediaeval writ *quod defendens quendam canem ad mordendum oves consuetem scienter retinuit*. Conveniently, this came to be known by an abbreviated title as the writ of *scienter*. As with most innovations in English law the genesis of this writ are, to use an appropriate cliché, shrouded in the mists of time. While the earliest specimen of a *scienter* writ has been traced back to 1362 the origins of the *principle* of *scienter* are of an even older vintage. The basis of the writ was knowledge: whether the owner of an animal that had caused personal injury was sufficiently aware, in advance, of his animal's viciousness. Thus, in the Bible the principle of *scienter* is referred to as having been used, *inter alia*, to distinguish the owner of a dangerous oxen who should be punished for his animal's misdemeanours from the owner who should be treated with clemency (*Exodus* c. 21: v 28-30) (see also, on the early origins of the writ of *scienter*, B S Jackson, "On the Origins of *Scienter*" (1978) 94 LQR 85). The principle of *scienter* later found its way into the law as it stood prior to 1 October 1971. Under the old law of strict liability a distinction was drawn between "*ferae naturae*" or *wild* animals and "*mansuetae naturae*" or *tame* animals (one of the chief advantages of the modern legislation is that it has swept away most of the latin terms that used to abound in this area). It was

established that if the animal that caused the damage was classified by law as a wild animal then the owner of it was, without more, liable for the damage. If, however, the animal was tame then (strict) liability would only follow if the owner of the animal had knowledge of its propensity for violence, mischief or fierceness. The distinction between wild and tame animals was based upon an assessment, on a case by case basis, of whether the animal in question was a "danger to mankind". This rather esoteric test was, in certain cases, refined to the question whether the animal came from a domesticated species or not. This created a good deal of difficulty: could a camel, to take one example from the case law, be classified by an *English* court as a tame animal (see, *McQuaker v Goddard* [1940] 1 KB; "the camel case").

The courts also faced difficulties in applying the *scienter* principle. The operation of this test which still retains its relevance for the present law may best be illustrated by reference to the facts of a well-known case. *Fardon v Harcourt-Rivington* (1932) 48 TLR 215 (HL) concerned a large Airedale dog. Mr Harcourt-Rivington, the owner of the dog, drove to Selfridges' in Somerset-Street, Oxfordshire and parked his car in an adjoining road. Viscount Dunedin LC, who delivered the leading speech, noted that the owner of the Airedale was not accompanied by a chauffeur (which fact was pertinent to the case later brought against the Airedale's owner). While Mr Harcourt-Rivington was shopping he left the Airedale in the back of the car. Mr Fardon, the unfortunate Plaintiff in the case, happened to walk past the car and observed that the Airedale was barking and jumping around. It smashed, by paw or nose, a glass panel in the car and a splinter from the same found its way into Mr Fardon's left eye which had to be removed. Mr Fardon brought an action against Mr Harcourt-Rivington under the *scienter* principle and in common law negligence. In its judgment, later approved by the House of Lords, the Court of Appeal decided that the Airedale had no propensity for violence, mischief or fierceness. It had, on the contrary, always been an ordinary tame dog. In these circumstances, Mr Harcourt-Rivington, being unaware of any propensity for mischief on the part of his pet, could not be held strictly liable for Mr Fardon's injury. As far as common law negligence was concerned Viscount Dunedin LC made it clear that the owner of an animal could only be held liable for failures to take precautions against "reasonable probabilities" and not against "fantastic possibilities" (at p 217). He held that the injury suffered by Mr Fardon fell into the latter category and Mr Harcourt-Rivington could not be held liable for the same.

While the principle of knowledge seemed relatively clear in theory, and was applied without too much difficulty in *Fardon*, problems did continue to arise in practice as the case law developed. For example, there were difficulties in identifying the *nature* of the propensity of an animal, of which the owner should have knowledge, before liability would follow. In one case it was suggested that the owner should be aware of his animal's "propensity to attack", rather than the animal's mere propensity to be skittish or playful (which could lead to personal injury or other damage), (see, *Fitzgerald v E D & A D Cooke Bourne (Farms) Limited* [1964] 1 QB 249, 270 *per* Diplock LJ). It was also unclear how the principle of *scienter* applied as between persons who owned animals and those they employed to look after them where the latter had failed to look after an animal known to be dangerous with the care and skill that might have been expected of them by their employer. Ultimately, it became

obvious that the law would be benefit from a thorough review and overhaul and with this aim the Law Commission reported in 1967 upon *Civil Liability for Animals* (Law Com No 13) and the proposals and draft Bill contained therein became, with certain modifications, the Animals Act 1971 (the 1967 Report drew upon the recommendations of the Committee on the Law of Civil Liability for Damage done by Animals, under the Chairmanship of Lord Goddard (1953) Cmnd 8746).

The Animals Act 1971

The abolition of the old law of strict liability

A number of commentators were disappointed by the Law Commission's proposals and the Act spawned by them as a result of what was seen as the inherent conservatism of both. A particular concern was the fact that a number of "established classifications" remained from the existing law (albeit, without their latin monikers). However, while radical law reformers were dismayed by the caution of the provisions contained in the body of the 1971 Act it cannot be denied that it opened with bold intent by abolishing the archaic categories of strict liability and the old rule of common law liability for cattle trespass:

> *1 New provisions as to strict liability for damage done by animals*
>
> (1) *The provisions of sections 2 to 5 of this Act replace-*
>
> (a) *the rules of the common law imposing a strict liability in tort for damage done by an animal on the ground that the animal is regarded as ferae naturae or that its vicious or mischievous propensities are known or presumed to be known;*
>
> (b) *subsections (1) and (2) of section 1 of the Dogs Act 1906 as amended by the Dogs (Amendment) Act 1928 (injury to cattle and poultry); and*
>
> (c) *the rules of the common law imposing a liability for cattle trespass.*

Section 2 of the 1971 Act: strict liability

This section replaces the old categories of strict liability for wild and tame animals with a new scheme which remains heavily dependent upon the old notions of *ferae naturae* and *scienter*. In particular, as can be seen below, section 2 continues to distinguish dangerous from non-dangerous animals:

> *2 Liability for damage done by dangerous animals*
>
> (1) *Where any damage is caused by an animal which belongs to a dangerous species, any person who is a keeper of the animal is liable for the damage, except as otherwise provided by this Act.*
>
> (2) *Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if-*

(a) *the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and*

(b) *the likelihood of the damage or of its being severe was due to the characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and*

(c) *those characteristics were known to that keeper or were at any time known to a person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, were known to another keeper of the animal who is a member of that household and under the age of sixteen.*

(i) *Liability for personal injury caused by dangerous animals*

The basic principles applicable to this branch of the strict liability action, introduced by section 2 of the 1971 Act, are as follows:

- Liability follows without proof of fault - it is strict;
- It (probably) follows that recoverable damages are those directly caused by the dangerous animal, rather than those that are reasonably foreseeable (see, *Behrens v Bertram Mills Circus* [1957] 2 QB 1, 17 *per* Devlin J);
- The keeper of the animal is liable for "any damage" caused by the dangerous animal (which is defined, by section 11 of the Act to include "... the death of, or injury to, any person (including any disease and any impairment of physical or mental condition) ...");
- It does not matter that the keeper of the dangerous animal believed that it was tame or that he did not think it capable of acts of aggression or violence.

Perhaps surprizingly, the Act does not itself provide any definition of an "animal". It has, for example, been queried whether bacteria would be included as "animals" (see, P M North, *The Modern Law of Animals* (1972), p 22, n 5). It does, however, provide some content for the meaning of "dangerous animal" and makes certain key changes to the old notion of *ferae naturae*. Section 6(2) of the Act provides that a species will be dangerous if: (1) it is a species "which is not commonly domesticated in the British Isles"; and (2) the fully grown animals of the species "normally have such characteristics that they are likely, unless restrained, to cause severe damage" or "any damage they may cause is likely to be severe." It has been argued that the 1971 Act's focus upon "domestication", rather than upon the inherent propensity or dangerous nature of a species, is misplaced and that hybrid animals kept as pets (eg.dog/wolf hybrids) may fall through a hole in the law (see, J Marston, "Wolf in wolf's clothing" (1996) 146 NLJ 244). The definition of dangerous animals provided by the Act is, however, now limited to animals that are not commonly domesticated in the British Isles. Thus, to adopt the example drawn from the case law given above, a camel could be a dangerous animal despite the fact that it is domesticated throughout large parts of the world.

(ii) *Liability for personal injury caused by non-dangerous animals*

The wording of section 2(2) of the 1971 Act has, on a number of occasions, been the subject of "adverse judicial comment". Criticism of this subsection was recently alluded to by Russell LJ in *Jaundrill v Gillett*, *The Times*, 30 January 1996 (CA). The basic principles of liability under this subsection are as follows:

- The personal injury or other damage, "if caused by the animal", must have been likely to be severe;
- The animal must be shown to have abnormal "characteristics" or a particular propensity;
- These characteristics must be known to the keeper of the animal, the keeper's servant in charge of the animal or a member of the keeper's family under the age of sixteen (also defined as a keeper);
- There must be a causal link between the abnormal characteristics and the injury or other damage complained of.

The scope and limits of this area of strict liability are amply illustrated by *Curtis v Betts and another* [1990] 1 WLR 459 (CA), a case involving "dangerous dogs" before the enactment of the Dangerous Dogs Act 1991. In this case the Defendants were the keepers of a bull mastiff dog, "Max", weighing around 11 stone, that attacked the Plaintiff, a ten year old neighbour of the Defendants, and caused him grave injuries. The evidence was that the Plaintiff had approached Max while he and another dog were being taken from the Defendants' house to a waiting Land Rover that was used to transport them to a local park for exercise. The Plaintiff brought an action for damages for personal injury relying, *inter alia*, upon the provisions of section 2(2) of the Animals Act 1971. Evidence was given to the effect that bull mastiffs tended to react aggressively when they were defending the boundaries of their territory and that the Defendants' dogs had a tendency to jump up, bark and growl when they were exercised in the Defendants' yard. At first instance the learned trial judge held that liability had been established under section 2(2) of the 1971 Act. The Defendants appealed. Slade LJ, for the Court of Appeal, rejected the suggestion that the correct approach to the construction of section 2(2)(a) of the 1971 Act was to consider whether the animal had such abnormal characteristics that it was likely that, if it did cause damage, the damage would be severe. Rather, Slade LJ endorsed the following test:

> *The broad purpose of requirement (a), as I read it, is to subject the keeper of a non-dangerous animal to liability for the damage caused by it in any circumstances where the damage is of a kind which the particular animal in question, unless restrained, was likely to be severe, provided that the Plaintiff can also satisfy the additional requirements (b) and (c).* (at p 463D-E)

It was clear to the Court of Appeal that Max was a dog of the bull mastiff breed and, therefore, if he did bite anyone the damage caused was likely to be severe. It was for this reason that section 2(2)(a) was satisfied.

Slade LJ went on to consider the construction of section 2(2)(b). The effect of this was, he said, that even if section 2(2)(a) were satisfied the Defendant would *still* escape liability if the likelihood of damage was attributable to potentially dangerous characteristics of the animal which are normally found in animals of the same species. Slade LJ identified one exception to the generality of the section 2(2)(b) test. He stated that the mere fact that a particular animal (Max) shared characteristics with other animals of the same species (viz. other dogs) did *not* preclude the satisfaction of the section 2(2)(b) test provided that the likelihood of damage was due to characteristics normally found in animals of the same species only at particular times or in particular circumstances corresponding to those in which the damage actually occurred. It was concluded by the Court of Appeal, after some discussion, that the learned trial judge had correctly concluded that Max tended to react fiercely when defending what he regarded as his own territory, which included the rear of the Land Rover. Accordingly, the likelihood of severe damage had been shown to be due to Max's territorial characteristics normally found in animals of the same species only at particular times or in particular circumstances.

After the linguistic and intellectual contortions required in the construction of sections 2(2)(a) and 2(2)(b) of the Act the knowledge test contained in section 2(2)(c) is comparatively light relief. The subsection requires that the "keeper" of the animal in question has *either* actual *or* imputed knowledge of the propensities of the animal (as defined by the case law under sections 2(2)(a) and (b) described above). Constructive knowledge will not suffice for the purposes of establishing liability: it is not enough that the animal's keeper *ought* to have known of the wayward habits of his pet. Knowledge of the propensities of a particular animal can be imputed to the keeper of the animal by his servants and/or agents. The Act provides that the keeper will be liable if the relevant characteristics, what I have termed the propensity, of the animal were "at any time known" to the person in charge of the animal as the "keeper's servant", or where "another keeper" of the animal, below the age of sixteen, knew of the animal's propensity and was a member of the keeper's household. The use of the phrase "at any time" would seem to refer to the time when the knowledge of the animal's propensities was acquired, rather than the time of injury: it is (and was) a key element of the *scienter* principle that the keeper or his servant must have *advance* knowledge of the animal's tendency to behave in a particular way. It would seem to follow that if one servant of the keeper has knowledge of an animal's propensity and yet another servant, without such knowledge, is "in charge" of it at the time that it causes injury then the keeper cannot be held liable (see, *Charlesworth & Percy on Negligence* (8th ed, 1990), para 13-26). It is clear that a wide construction will be given to the loosely drafted term "household" which would include, *inter alia*, family members, relatives, and any other persons who may participate to a substantial degree in the life of the collective household unit (see, *Wawanesa Mutual Insurance Co. v Bell* [1957] SCR 581, 584 *per* Rand J).

(iii) *The "keeper" of the animal*

The Act itself provides a definition of "keeper" at section 6(3) and (4) which state:

> *(3) Subject to subsection (4) of this section, a person is a keeper of an animal if-*

(a) he owns the animal or has it in his possession; or

(b) he is the head of a household of which a member under the age of sixteen owns the animal or has it in his possession;

and if at any time an animal ceases to be owned by or to be in the possession of a person, any person who immediately before that time was a keeper thereof by virtue of the preceding provisions of this subsection continues to be a keeper of the animal until another person becomes a keeper by virtue of those provisions.

(4) Where an animal is taken into and kept in possession for the purpose of preventing it from causing damage or of restoring it to its owner, a person is not a keeper of it by virtue only of that possession.

Thus, the Act provides explicitly that a person with possession of an animal can be a keeper of it *even though he does not also own it*. The Act further provides for the liability of the keeper to continue while ownership of the animal or possession of the same is being transferred from one individual to another. Indeed, it is also conceivable that two or more persons could face concurrent liability as keepers in respect of the same animal. Clearly, Plaintiffs can be faced with the dilemma of which Defendant to sue in cases where more than one person is "keeper" for the purposes of the Act.

(iv) *Defences*

Section 5 of the 1971 Act provides the keeper with three defences to the (qualified) "strict" liability that would otherwise flow from section 2 (and from sections 3 and 4 considered fully below). The list is exhaustive:

- contributory negligence (section 5(1));
- *volenti non fit injuria* (section 5(2));
- trespassing Plaintiff (section 5(3)).

The *volenti* defence is not available to an employer whose animal has injured an employee in circumstances where the risk [of injury] is "incidental" to the employee's employment (see, section 6(5) of the Act). The Law Commission explained that the rationale of this change in the law was that the employer was the person in the best position to minimize the harmful consequences of his enterprize through the use of insurance (Law Com No 13, para 20).

The "trespass" defence provided by the Act is qualified by the requirement that it be proved:

... either -

(a) that the animal was not kept there for the protection of persons or property; or

(b) (if the animal was kept there for the protection of persons or property) that keeping it there for that purpose was not unreasonable. (section 5(3))

In the well known case of *Cummings v Grainger* [1977] QB 397 (CA) it was held that the use of an Alsatian dog as a security measure at a lock up scrapyard premises was not unreasonable; Lord Denning MR recognized that guard dogs had, for centuries, been used in this way and that such use was not, in principle, unreasonable. Clearly, the use of a panther for the same purpose would be unlikely to be reasonable.

Matthew Chapman