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Law of Tort: Tutorial No. 7 Liability for Injuries caused by Animals

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CASES:

Liability in Ordinary Negligence:

- *Kavanagh v Stokes* [1942] IR 596

Development of the Scienter Principle:

- *Forster v Donovan* 114 ILTR 104
- *Kavanagh v Centreline Ltd* [1987] ILRM 306
- *Duggan v Armstrong* [1992] 2 IR 161

Res Ipsa Loquitur and the Highway Rule

- *O'Shea v Anhold Horse Farm* Unreported Supreme Court, October 23, 1996

Liability for Dogs:

- *Control of Dogs Act, 1986*

How to Structure a Problem Question on Animals Liability:

Dogs: When the animal in the problem question is a dog, there is a descending scale of principles you must deal with in order to effectively answer the question.

(i) **Dogs Act:** In any question concerning dogs you must first assess liability under the Dogs Act 1986, which is strict.

(ii) **Scienter Principle:** The Dogs Act did not abolish the scienter principle, it simply made it redundant in most cases concerning injuries caused by Dogs. However, it is still relevant in certain situations. Liability under the Dogs Act is contingent on the fact that the injury was suffered in an attack. With this in mind, look at the following example. A dog has a history of chasing cars on the road as they pass by. One day, you drive past the house and the dog runs out onto the road. You swerve to avoid the dog and crash into a tree suffering serious physical injuries. Can you recover under the Dogs Act? Did you suffer the injuries in an attack? No. You must now look to the scienter principle. The Dog had a vicious propensity for chasing cars and let's say that the owner knew about it. Then you could recover.

(iii) **Negligence or any other Tort:** The final stage in the analysis is to look to negligence. Taking the previous example, let's say that this was the first time

the dog ever chased cars, and that normally he was a very friendly and docile animal. You cannot prove a vicious propensity therefore the scienter principle is not going to work. What do you do now? You look to negligence. In the unlikely event that you can't prove negligence, you look to any other principle available in order to get recovery. You will normally never have to go this far in a University problem question.

All other Animals: Again you are dealing with a descending scale of principles that you must address in a question.

(i) **Scienter Principle:** With all animals except dogs you begin your question with the scienter principle.

(ii) **Negligence and all other torts:** If you cannot establish that the animal had a vicious or a mischievous propensity then you must look to negligence. If you cannot establish negligence then you look to other torts to found an action. Again, it is highly unlikely that you will be unable to establish scienter or negligence in a University problem question.

Liability in Ordinary Negligence:

Kavanagh v Stokes

Facts:

The plaintiff was one of five girls who were paying guests of the defendant. They told the defendant that they were going to a dance and arranged that the door be left open so that they could get in when they came back. They arrived back at 11:30 and discovered that the defendant had released the guard dog. The dog barked loudly at them. The four other girls ran into the house, but the plaintiff stayed to pat the dog. The dog then bit her on the lip. It emerged that the dog had previously attacked a child.

Held: This case was decided in 1942, more than 40 years prior to the Dogs Act. If the case had occurred today there would have been no need to prove either negligence or scienter because there would have been strict liability for the injuries suffered in an attack. However, at the time, the court had a choice to either decide the case on the basis of scienter or negligence. The court decided that there was no need to consider the scienter principle because there was obvious negligence here.
They held that as the defendant was running a guest house, she owed a duty to her guests to provide reasonably safe access from the road to her hall door. By leaving the dog at large when she knew that the plaintiff and her friends would be returning was careless for the safety of her guests and not reasonable. She was therefore held liable for the plaintiff's injuries.

Scienter Principle:

"All animals are equal, but some animals are more equal than others"
Animal Farm, George Orwell.

The scienter (Latin for knowledge) principle is one of the special strict liability rules relating to animals that was developed by the common law. There is a distinction between wild animals and domestic animals.

- **Wild Animals:** The owner of a wild animal keeps that animal at his/her own peril. If the animal causes damage then the owner will be strictly liable for that damage. Because the animal is wild, there is a presumption that he knew of that animal's vicious propensity.
- **Domestic Animals:** In order to make the owner of a domestic animal liable for damage caused by that animal, the plaintiff must prove scienter. That is, the plaintiff must show that the owner of the animal had knowledge of a vicious propensity in the animal. In *Quinn v Quinn*, the defendant's sow attacked and killed the plaintiff's cow. Proof that the sow had previously attacked and killed fowl to the defendant's knowledge was sufficient to make the defendant liable.

Williams defined the principle as follows:

> *"The general principle in present day English Law is that, apart from cases in cattle trespass and the ordinary torts of negligence, nuisance ad so on, liability for damage caused by one's animal depends on previous knowledge o it's vicious nature. Such knowledge has originally to be proved in all cases, but in modern law it is presumed if the animal in question is one of a dangerous class. The principle is known as the scienter principle (from the words scienter retinuit in the old form of the writ), and proof of knowledge is called, somewhat ungrammatically, proof of scienter."*

Mischievous Propensity:

There are a number of key words that you should remember when trying to determine whether or not an animal had a mischievous propensity. It is a vicious, mischievous or fierce tendency. It is something in the animal which indicates bad blood. The mischievous propensity need not be a chronic or permanent condition in the animal. Thus, Kennedy J in *Howard v Bergin, O'Connor & Co* said:

> *"In my opinion, however, what is called 'mischievous propensity' may be as well a passing or temporary phase of character or temper of the particular animal as a chronic or permanent element of its nature ... I understand by the expression 'a mischievous propensity', a propensity to do mischief, a tendency to do harm or cause injury, whether, in one case,*

> *by some single characteristic action such as kicking or goring or biting or, in another case, generally when mischief may be done in any of a variety of ways."*

Therefore, knowledge of a passing phase may amount to scienter even though the defendant may have no knowledge of any previous disposition to such activity. According to *Line v Taylor* (1862) 176 ER 335, a dog who jumps upon people in play is not liable in scienter.

Wild or Domestic?

The criterion used to classify animals into wild or tame categories seems to be whether the animal belongs to a species which is a danger to mankind in general. In the American Restatement on Torts a wild animal is defined as:

> *"An animal that is not by custom devoted to the service of mankind at the time and in the place in which it is kept."*

It is an animal that belongs to a category which has not generally been domesticated and which is likely, unless restrained, to cause personal injury.
A domestic animal is defined in the same section as:

> *"An animal that is by custom devoted to the service of mankind at the time and in the place in which it is kept."*

The following are examples of animals that the courts have determined are either wild or domestic:

- **Wild:** Bears (*Wyatt v Rosherville Gardens Co)*; Zebras (*Marlour v Ball)*; Elephants (*Fitzgerald v ED & AD Cooke Bourne (Farms) Ltd; Behrens v Bertram Mills Circus Ltd)*.
- **Domestic:** Cats (*Buckle v Holmes)*; Dogs (*Kelly v Wade*); Cattle, Horses, Pheasant and Partridge (*Filburn v Peoples Palace Aquarium*); Bees (*O'Gorman v O'Gorman*). In the American case of *Pate v Yeager* 552 S.W.2d 513, the Court held that:

> *"monkeys of the type involved here are properly classified as animals which are capable of being domesticated or tamed. The evidence shows conclusively that Mr. Jim was domesticated. Therefore, in order to hold the defendants liable for injuries caused by Mr. Jim, there must be proof that the defendants knew that the animal was accustomed to do mischief."*

The experience of other countries is also taken into account in determining whether an animal is wild or tame. Thus, in *McQuaker v Goddard* an English court, taking into

account the realities of life in countries where the animal was indigenous, treated a camel as a domestic animal.

Applying the Scienter Principle:

Forster v Donovan:

Facts:

The defendant owned an Alsatian. The plaintiff was employed by the post office to deliver letters. On his first day on the job, he delivered a letter to the defendant's hall door. On that particular day, the Alsatian had been kept inside. The defendant had already placed a warning which read "Beware of Alsatian" at his gate and had erected a post box outside the house. When Mr. Donovan's wife realised that the postman had delivered to the hall door she immediately rang the post office. She warned them to tell the postman to deliver all letters to the post box because of the Alsatian. The post office never passed on the message. On the second day when the plaintiff delivered the letters to the hall door he was bitten by the Alsatian. Again, this case occurred prior to the Dogs Act 1986, therefore the plaintiff took his action under the scienter principle. He couldn't take an action in negligence against the plaintiff because there was obviously no negligence. The Donovans had taken all reasonable care to prevent the injury to the plaintiff.

Held:

The plaintiff succeeded because he was able to prove scienter.

> *"I have sympathy for the [Donovans], but when he keeps a dog, like the one referred to in evidence, he runs the risk of some person being injured. This defendant had knowledge of the propensity of the dog and accordingly, the plaintiff must succeed against him and there must be a decree against him."*

The judge went on to find that the Post Office was also negligent in not conveying the warning to the postman and that in the circumstances the plaintiff did not contribute to his own injury. However, in considering the issue of who should pay the damages, the judge gave effect to his sympathy for the Donovans y ordering the Post Office to provide a full indemnity to the Donovans. In other words, the Post Office had to pay the damages instead of the Donovans.

> *"The [Donovans were] required to keep the dog to protect [their] home and in the circumstances, I hold that full responsibility rests with the second and third named defendants. Accordingly, I give a decree for the agreed ... damages and costs with the benefit of an order for contribution amounting to full indemnity to the [Donovans]."*

Kavanagh v Centreline

Facts:

1st Plaintiff: He was jogging in a public park, when the escaped dog, a Doberman Pincer, gripped him around the legs and arms. He struggled with the dog before eventually breaking free. He was injured and sought recovery for those injuries.

2nd Plaintiff: This person got off the bus, and the dog followed him home. Just before he got inside, the dog attacked him. He tried to slam the door against the dog, but his left arm was caught. Eventually he freed himself.

The Gardai were called and the dog was captured. It turned out that the dog had been stolen from the defendant's premises, where he was a trained guard dog. The dog had been specifically trained to attack. The plaintiffs sued the defendant under the scienter principle, but the defendant tried to escape liability by claiming the defence of 'act of a stranger'.

Held:

The court held that a guard dog who had been trained to attack could be said to have a known mischievous propensity which would make the owner strictly liable under the scienter principle should the animal escape and cause damage of a kind similar to it's training.

> *"The liability of the owner of an animal for damage caused by that animal if it escapes is determined by the nature of the animal as known to the owner ... In the present case, the defendant's dog was not a dangerous animal per se. Nevertheless, it had a propensity known to its owner special to it, which was, that it was trained to attack and hold in certain circumstances. In my view, the owner of such an animal is strictly liable for damage caused when out of control, certainly when such damage arises from its known propensity ... the injuries to the plaintiff were caused by reason of this known propensity since they were caused while the animal was seeking to attack and hold."*

As regards the defence of 'act of a stranger', the court rejected the defendant's contention that it applied to scienter strict liability. The court cited the case of *Behrens v Bertram Mills Circus* as authority for this proposition. Barron J said that:

> *"Since this is a case of strict liability, it is not a defence that such behaviour could not reasonably have been anticipated nor that its escape was caused by the wrongful act of a third party."*

Duggan v Armstrong

This case offers us some interesting insights into the knowledge requirement of the scienter principle. Is actual knowledge required or can there be constructive knowledge of the vicious or mischievous propensity? Also, how do we determine the owner of the animal for the purposes of applying the scienter principle?

Facts:

The plaintiff was on holiday, and while she was going through the foyer of the defendant hotel owner's hotel, she was attacked and seriously injured. The dog was permitted to live around the hotel. The manager's 9 year old son knew that dog, and he also knew that it had a vicious propensity. The animal had previously tried to mount young girls. The problem was that in law, the owner of the hotel was presumed to be the owner of the dog, and he had no knowledge of the vicious propensity. Under the old common law, liability in scienter is attracted by possession or control rather than actual ownership of the animal. The old common law position was re-enacted and restated in Section 1 of the Control of Dogs Act 1986. There, the owner of the dog is defined as the occupier of any premises where the dog is kept or permitted to live or remain unless the contrary is proven. This incident occurred prior to the Act, therefore the old scienter principle applied.

Held:

The court dealt with the issue of mischievous propensity first. McCarthy J said that the requirement of vicious propensity did not mean that you had to show that the animal had previously attacked someone in the same way that it attacked you:

> *"One does not have to wait for the growling and frightening dog to bite somebody in order to know that it may do so; the requirement of scienter is not that the dog will bite somebody, but that having displayed a vicious propensity, it may do so."*

McCarthy J, giving judgment for the court, went on to deal with the type of knowledge required for the scienter principle. He seems to suggest that actual knowledge is no longer a requirement; instead constructive knowledge will be enough. That is, if it is something that you should have known about but didn't, then the court will presume that you did know about it. In this case, the only person who seemed to know about the vicious propensity of the dog was the 9 year old son of the manager of the hotel. The court imputed this knowledge to the father, and then, because the father was an employee of the owner, he imputed the knowledge to the owner, thereby completing the chain of knowledge necessary to impose scienter strict liability:

> *"Whatever about the direct knowledge of [the manage] ... his son had knowledge of complaints being made about the dog: such knowledge must be imputed to the father ... it goes*

> *against common sense that the family of the owner can have intimate knowledge of a dog's vicious propensities but the owner himself can escape liability unless one can prove direct communication to him … The knowledge of the manager is the knowledge of the owner."*

Constructive Knowledge:

Although the requirement for scienter had been actual knowledge in the past, there were some cases and situations where there was implied or constructive knowledge. Thus Williams said:

> *"To summarise the law: (a)Knowledge mens actual knowledge, but it is immaterial whether it be acquired (b) from personal observation or by hearsay, whether (c)* ***by the defendant himself or by his servant who has general charge of the animal,*** *and whether (d) a long time before or shortly before the injury complained of … Moreover, (e) both the vicious act and the defendant's knowledge of it may be proved by admission of a very general nature."*

In *Bennett & Another v Walsh* 70 ILTR 252 knowledge of a mischievous propensity by a nine year old girl was sufficient to render her father liable in scienter. It seems, therefore, that the Supreme Court were not as radical as may have first appeared by imputing the knowledge rather than requiring actual knowledge.
It is also important to remember that the original case was taken just before the Control of Dogs Act 1986 came into effect. If they had been able to avail of the Act there would have been no need to prove knowledge. This was probably in the minds of the judges in reaching their decision.

Res Ipsa Loquitur and Animals on the Highway:

O'Shea v Tilman Anhold and Horse Holiday Farm ("The Pegasus Case"):

Facts:

The plaintiff was driving along a public road when suddenly a horse suddenly landed on the roof of his car, causing him serious injuries. The horse was owned by the defendants and had somehow escaped from a field which was fenced adequately and which had a gate with an automatic locking mechanism. There was no way for the plaintiff to use the scienter principle because there was no evidence that the animal had a previous tendency to jump out of fields onto the roadway. They were therefore left to take their action in negligence. Again they had a problem. There was no way of proving that the defendant had been negligent. This is where the principle of res ispa loquitur applied.

Held:

Animals on the Highway:

An immunity used to exist in respect of damage caused by animals that have strayed onto the highway. In such cases the owner of the animal was not liable at common law. The rule was established in *Searle v Wallbank*. The rule was consistently limited in application over the years. Thus, in *Cunningham v Whelan* the court held that the immunity did not apply where animals were straying onto the road in sufficiently large numbers to cause an obstruction. In *Brock v Richards* the court held that an animal might have been known to have such characteristics as to impose upon its owner a duty to take steps to prevent it from endangering the public by getting onto the highway and exhibiting its characteristics to the danger of the users of the highway. In *Gombeg v Smith* the court held that the rule did not apply where the animals were brought onto the highway. Next, the court in *Howard v Bergin O'Connor & Co* said that the immunity was limited to rural conditions, because city dwellers should be under an obligation to fence. Supporting this view, McWilliam J in *Gillick v O'Reilly* said that:

> *"An unfenced road running through rough mountain pasture gives rise to different considerations from those arising on a modern main motor road running through fenced farm land and I cannot see any logical reason for a principle which ignores the entirely different circumstances of each when considering the duty owed to users of the road."*

Legislative intervention finally removed the immunity under Section 2 of the Animals Act 1985, which imposes a duty on landowners to fence in their animals unless they were in an area where fencing was not customary and where they also had a right to place the animal on the land in question. This was confirmed in the present case by Keane J. He stated that:

> *"Section 2 of the Animals Act 1985 has abolished the somewhat anomalous immunity from the ordinary law of negligence which the owners of land for which animals strayed on to the highway previously enjoyed. It has not, however, imposed any form of absolute liability on such persons."*

Res Ipsa Loquitur:

Scott v London: There must be reasonable evidence of negligence, but:

(i) where the thing is shown to be under the management of the defendant, and;
(ii) where the accident is such that as in the ordinary circumstances does not happen if those who have the management use proper care;
(iii) this affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

In an ordinary negligence action, the plaintiff must show that the defendant was negligence. However, where there is a situation that a plaintiff cannot prove negligence, but the accident is something that could not have happened but for negligence, then the court will presume negligence. Therefore, the onus is now on the defendant to prove that he was not negligent. The courts use the principle of res ipsa loquitur to alleviate injustice in situations of obvious negligence but where the plaintiff is unable to satisfactorily prove it for some reason.
The plaintiff was entitled to rely on the principle. In *O'Reilly v Lavelle*, the plaintiff, while driving her car, collided with a calf. Johnston J held that res ipsa loquitur applied and on the facts before him imposed liability on the defendant cattle owner. He stated:

> *"Cattle properly managed should not wander on the road and therefore the burden of proof in this case shifts to the defendant to show that he took reasonable care of his animals. I believe that there is no matter more appropriate for the application of the doctrine of res ipsa loquitur than cattle wandering on the highway."*

The horse in this case was under the management and control of the defendant's and Keane J considered it:

> *"self-evident that a horse will not normally escape from lands on the public road if adequate fencing is provided and any gates are kept in a closed position."*

Even though the principle applied, the defendants were able to discharge the onus of proof in this case. The defendants were able to show that they had taken reasonable care in keeping the animal in. They provided experts who said that the fencing was adequate and that the only way the horse could have escaped was if he was driven out by somebody.

> *"If the defendants had taken all precautions a reasonable person in their position ought to have taken to prevent the horse from escaping, the fact that the horse succeeded was not the result of any negligence on their part."*

<u>Dogs Act 1986:</u>

I will now highlight and summarise the important sections from this Act.

Section 1: The first section of most statutes is a definition section. This is the case in the Dogs Act. Section1 provides some important definitions for later sections.

- **Damage:** Includes death or injury to any person and encompasses disease, physical impairment, mental impairment and damage to property.

- **Livestock:** A very inclusive definition. It includes cattle, sheep, horses, swine, all equine animals, poultry, goats and domestic deer.
- **Owner:** As previously discussed, the owner of a dog is the person who occupies the premises where a dog is kept or permitted to live or remain unless the contrary is proven.
- **To Worry:** This is important for section 9 of the Act. To worry means to chase, kill or attack livestock in a way which is reasonably expected to cause death injury or suffering to livestock or financial loss to the owner. A very broad definition.

Section 9:
This section imposes a duty on the owner of the dog, or the person who is in control of the dog, to keep the dog on their premises or, if they are outside their premises, to keep the dog under effectual control.
This section also creates criminal liability for the owner or the person in control of the dog if the dog worries livestock. A dog is not permitted outside the premises of the owner or the premises of the person in charge of the dog unless the dog is kept under effectual control. If the dog escapes from the premises or the control of the either the owner or the person in charge of the dog, and if he worries livestock, then the owner or person in charge of the dog will be guilty of an offence.

Section 21: This is the touchstone of civil liability under the Dogs Act. It imposes strict civil liability on the owner of the dog in two circumstances. It is different from Section 9 in that it is only the owner who is made liable.

(i) Where a person has suffered damage in an attack by a dog, there will be strict liability without the need to prove knowledge of a vicious or mischievous propensity or negligence. Remember that damage includes death, injury and physical and mental impairment. Also remember that the damage must happen in an attack for there to be strict liability. A recent case in the High Court, *Quinlisk v Kearney* has provided some judicial guidance on the definition of attack. In that case the court said that:

> *"Damage caused in an attack on a person need not involve physical contact. The word attack has been judicially defined as including assault which does not, necessarily, involve battery. Commentary on the section suggests that physical contact may arise where a person falls and injures themselves when getting out of the way of an attacking dog … It is clear that section 21 does not impose liability for any injury other than "damage caused in an attack on any person". Accordingly, where a dog runs onto the road and a motorcyclist collides with it causing himself injury, the necessary ingredients of attack may not be present."*

(ii) Where the dog has caused an injury to livestock, there will be strict liability without the need to prove negligence or knowledge of a mischievous propensity. This section is somewhat confusing, because we are not given a definition of injury. Is it the same as damage, in which case why didn't they just use the word damage, or is it something different? Does it include death? Surely to be injured also requires that the animal still be alive? Wouldn't it be absurd if you get compensation for injury to an animal but not for the death of an animal? These are issues that should be raised in the problem question on animals liability. Show the lecturer that you are thinking about and analysing the legislation as well as applying it. There was similar wording in the previous Dogs Act 1906, which made the owner of the dog strictly liable for injury caused to cattle. The problem of interpreting 'injury' arose in two cases, both with conflicting results.

In *Campbell v Wilkinson* 43 ILTR 237, the plaintiff was driving two foals along a public road when a young dog rushed out of the defendant's house and barked at the foals. The foals got frightened, broke away and were not recovered until the next day. Both foals died from injuries received during the night. The court disallowed the plaintiff's claim saying that the damage done did not amount to "injury" within the Dogs Act 1906. By way of contrast, in *Fleming v Graves* 31 ILTR 143, the Circuit Court interpreted the word injury very generously. In that case, two fox terriers belonging to the defendant chased the plaintiff's sheep out of a field where they proceeded down a public road up a railway embankment and onto a railway line where they were killed by a passing train. Gibson J held that although the sheep were not injured by biting or worrying, nevertheless the Act covered this indirect injury.

Section 23: This section provides a defence for shooting a dog if the following conditions are satisfied:

(a) the dog was shot while worrying or if it was about to worry livestock and there were no other reasonable means to prevent it **or;**
(b) the dog was a stray in the vicinity of injured or killed livestock **and;**
(c) the defendant reasonably believed that the dog had been involved in the injury or killing **and;**
(d) there were no practicable means of seizing the dog or finding out who owed it **and;**
(e) the person who shot the dog was also the person in charge of the livestock **and;**
(f) he notified the Gardai within 48 hours that the dog had been shot.

Section 23(a) should be read on its own, and Section 23(b), (c), (d), (e) and (f) should be read together.

Cattle Trespass: Please read Page 672 – 674, McMahon and Binchy, 3rd Edition.