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STRICT OR FAULT LIABILITY FOR HARM BY DOGS

-Taposh Das[*]

ABSTRACT

The present paper seeks to address the ever-present dichotomy regarding the perception of dogs. While on one hand, man has claimed dogs to be a man's best friend but at the same time, the law regarding liability for dog-bites more often than not perceive dogs to be dangerous or vicious creatures. It is in such a contextual matrix that the author attempts to examine the evolution of dog-bite laws and the conscious change in pattern in the strict liability laws being more victim friendly in the present day. The owner examines this shift in the onus of proof in dog bite cases with primary focus on the English common law. Moreover, the author has attempted to examine and analyse contemporary dog bite cases in order to determine the tenets of applicability of strict liability due to harm caused by dogs.

Keywords: Strict liability, Fault liability, Scienter Action, Onus of Proof, Dog Bites.

[*] B.A.LL.B. (2nd year), WBNUJS, Kolkata.

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An assessment of the laws and principles regarding strict liability or fault liability for harm done by dogs makes apparent a considerable amount of contradiction and confusion in the different laws, its principles and interpretations that the various legislatures and courts have opined. A significant reason behind such contradiction and the lack of a uniform or similar statute or principle governing cases of injury caused by dogs may, in most probability, stem from the fact that dogs in society are not perceived as dangerous or ferocious animals. Dogs are easily domesticated and are largely owned by many people who perceive them to be loving, friendly creatures.[1] In contrast to this common notion regarding dogs, the dog-bite laws that are now prevalent in various countries naturally imply that dogs may be dangerous, ferocious or may prove to be a source of injury or harm to people or other animals.[2] But upon this typifying of dogs as dangerous or ferocious for the purpose of such dog-bite statutes or the imposition of strict liability on dog owners, there happens to exist a gap that makes it difficult or even impossible to reconcile these two deeply conflicting ideas of a dog being a 'man's best friend' and a dog being a possible threat.

Therefore, it can be said that the imposition of strict liability can, more often times than not, overlook or ignore the common relationship shared by human beings and dogs—that happen to perceive pet dogs as such intrinsic members of a human family that they are included in custody agreements, trusts and even sometimes accepted as accompanying guests in hotels[3]. This however is not to suggest that the imposition of strict liability on dog owners is not required or in any manner, is a measure unnecessary merely on the grounds of how dogs are perceived to be in the society or this particular human-canine relationship because the fact remains that although dog bites can be an infrequent phenomenon, the absence of dog bite laws or the imposition of strict liability on dog owners would leave such individuals directly or indirectly receiving a dog injury without any possible remedy at hand. This is merely to portray the contradiction between the dog bite laws and their interpretations in various

[1] PEW Research Center, Gauging Family Intimacy: Dogs Edge Cats (Dads Trail Both) 1 , http://pewresearch.orglassets/social/pdf/Pets.pdf (Mar. 7, 2006) (noting that eighty-five percent of dog owners consider their dog to be a member of their family).

[2] See e.g. Yakima Mun. Code (Wash.) § 6.18.020 (1987) (banning the ownership and possession of all Pit Bulls in the city of Yakima, Washington); Milwaukee Mun. Code (Wis.) § 78-22 (placing restrictions on the care and ownership of Pit Bulls and Rottweilers).

[3] See generally Gerry W. Beyer, *Pet Animals: What Happens When Humans Die?* 40 Santa Clara L. Rev. 617 (2000) (discussing the trend of humans leaving financial support in their wills to their companion animals).

common-wealth nations and the probable cause for the same. If one begins this assessment on this particular note that dogs are not naturally perceived as a naturally ferocious animal, a discussion regarding the English common law classification of animals becomes necessary. The English common law dictates classification of animals into ferae naturae and mansuetae naturae. 'Ferae naturae' refers to all such animals that are perceived to be innately dangerous, for instance, lions, elephants, zebras or bears, whereas 'mansuetae naturae' refers to animals that are perceived as harmless and are quite easily domesticated such as cats, dogs and horses.

It must be noted here that common law regarding harm caused by dogs and how the same is actionable is quite heavily based on this common law classification of animals. Therefore, under the common law, injury inflicted by a dog had been made actionable under negligence and a specific form of strict liability which is known as the scienter action.[4] Now the scienter action dictates that if any animal falling within the mansuetae naturae category say, a dog inflicts harm then the owner of such dog would be liable only if the aggrieved party was able to prove that the particular dog had a vicious or mischievous predisposition or propensity towards doing such harm and also that the owner of the dog possessed knowledge of such propensity. This principle of instituting strict liability upon a dog owner, in essence, implies that since a dog is not usually a ferocious being, if a dog inflicts harm then the owner of such dog can only be made strictly liable if such dog is indeed a dog with decidedly ferocious and mischievous tendencies and to that effect poses a threat to the society and hence cannot be allowed by its owner to be within the purview of people or other animals for whom the dog may very likely constitute a threat. However, for a dog owner to act responsibly and take necessary precautions by keeping his dangerous dog outside the society of other people, the owner is required to know of such dangerous propensity and hence the second condition to impose strict liability under the scienter action is the owner's knowledge regarding the same.

A dog to be harmless is established as the normal disposition for a dog and if any dog exhibits dangerous characteristics, it is considered to be an abnormality, an anomaly or an exception.[5] Therefore, under common law strict liability, the liability incurred by the dog

[4] Gilbert Kodilinye, Strict Liability for Harm by Dogs: A Comparative Survey, 16 ANGLO-AM. L. REV. 174 (1987).
[5] .Restatement (Second) of Torts § 509, cmt. f (1977).

owner is in the act of keeping a dog that he knows to be dangerous.[6] Once it is proved that such owner knew his dog to be hostile and dangerous and had still kept such a dog, then whether the owner had taken necessary or more than necessary precautions to confine such dog so that it does not come in the society of other people stands immaterial. The taking or not taking of precautions does not absolve such dog owner of the liability imposed upon him regarding the injury caused by his dangerous dog. This could be better understood with an analysis of the case of Barger v. Jimerson[7]. The factual matrix of this particular case is that Joy Jimerson, the plaintiff, and the Bargers, the defendants were neighbours and the backyards of their respective premises were fenced. Now the Bargers, in their backyard, kept a large dog—a German Shepherd and it was never allowed out of this fenced enclosure except when on a leash. During the course of the trial, several witnesses testified that this dog seemed to be of a ferocious nature who would commence barking whenever it would see anyone appearing and run and lunge to the fence threateningly. Moreover, if any person wished to enter the premises of the Bargers' from the rear, it was then necessary to call upon the owner who would then hold the dog by its leash and restrain it to allow entry to such person. The plaintiff, Jimerson had also testified that the dog would bark at her ferociously every time she would go out into her backyard although she made attempts to appear kind and nice to the dog. Incidentally, the defendants then moved to another address where they kept the dog under similar conditions. But when in the morning of 27 March, 1952, the plaintiff went out to get the daily newspaper, she was alerted by a ferocious growling, saw the dog kept by the Bargers' coming at her and then the dog attacked her. The complaint alleged that the Bargers' upon knowing of the ferocious nature of the dog had still kept it which then resulted in injuries sustained by Jimerson. However what is important to note in the due course of the proceeding is that, the plaintiff had initially requested that the phrase—"and allowed said dog to run at large and loose" from their second cause of action but then again when the proceeding was nearing its end, had requested to reinstate the same. Here, and on this note, the court had dispensed a significant observation. The court held that whether the defendants, Bargers, had taken necessary precautions or not, whether they had let 'said dog run at large and loose' was immaterial. The court held that it could be easily deduced that the defendants had not been careless and had never harboured any intention of letting the dog run at large and loose. But the liability is accrued by the defendants on the very fact that they had

[6] Andrews v. Smith, 188 A. 146, 148 (Pa. 1936)
[7] Barger v. Jimerson, 276 P.2d 744, 744 (Colo. 1954).

chosen to keep a dog that was ferocious in nature. At this point, the court had also elaborated on what attaches ferocity or viciousness as an attribute to a dog. The court opines that a dog does not have to have a history of biting or in actuality attacking people in order to establish a ferocious nature. A vicious propensity of a dog may also be understood by a natural fierceness or mischievous disposition which may lead the dog to attack or bite on some occasion. Therefore, although this German Shepherd had never attacked anybody before but because of the ferocious nature that he regularly exhibited to people it made all such reasonable individuals to be aware of the possibility of being attacked by it. Therefore, this dog decidedly had a propensity for ferociousness. And on the note of whether the defendants had knowledge of such dangerous propensity, the court opined that apart from the obvious assessment of its ferocity that the defendants must have done based on the dog's usual behaviour, the fact that the defendants always ensured that the dog was kept confined also suggested very clearly that they were aware of its dangerous disposition. Therefore, the defendants were held liable under strict liability for the harm caused to the plaintiff by their dog.

However, more often times than not, whether the owner of a dog had knowledge of its vicious propensity is extremely difficult to prove.[8] And it is an uncontestable fact that this scienter action principle of strict liability confers the onus of proof, or the burden to prove that said dog had a propensity for danger as well as the dog owner's knowledge of the same, all upon the plaintiff which then proves to be quite inconvenient for the plaintiff. Therefore, strict liability regarding harm done by dogs in common law is slightly preferential or in favour of the dog owners. This is best reflected through the case of Sinclair v. Okata[9]. In Sinclair v. Okata, a plaintiff who happened to be a little boy of two years was bitten by a German Shepherd. This dog, Anchor, had bitten on four previous occasions and hence the plaintiffs argued that the dog had a well-established propensity for ferocity which was evidently known by the owners. However, the defendants put forth an expert who analysed all the four previous biting incidents and concluded that each of them was an instinctive reaction natural to any dog. The expert opined that each such biting incident was induced by overstimulation, protective instincts and chase instincts which were all normal behavioural responses of all dogs. Therefore, the plaintiffs in this particular case failed to prove that the

[8] Lynn A. Epstein, There Are Not Bad Dogs, Only Bad Owners: Replacing Strict Liability with a Negligence Standard in Dog Bite Cases, 13 ANIMAL L. 129 (2006).
[9] Sinclair v. Okata, 874 F. Supp. 1051, 1059 (D. Alaska 1994).

dog had a propensity for danger, despite the dog having bitten four times before. And since it was established by the expert on behalf of the defendants that the dog was not of a dangerous disposition, it was thereby also implied that the defendants had no knowledge of the same. Hence, the court denied the plaintiffs' motion for summary judgement as to strict liability. It can be deduced that the analysis followed in the judgment of the Sinclair case that if a certain response of a dog is natural although dangerous, then the dog cannot be considered ferocious as it was merely eliciting a natural behavioural response. If the same analytical principle was employed to the Bargers' case, then the natural ferociousness of the dog that was established from the facts of the case should have led the court to pass a judgement away from the imposition of strict liability.[10] Therefore, the court has taken various stances while ascertaining whether a dog has a propensity for danger and such consequent knowledge on the part of the owners ranging from holding in regard a dog's natural ferocious behaviour or characteristic as a dangerous predisposition to even concluding that a dog who had bitten more than once to not possessing any propensity for danger. But whatever the stance, the fact remains that under the common law strict liability for harm caused by dogs, seeking redressal as a plaintiff is a difficult affair.[11] The burden to prove that the dog's dangerous disposition and the owner's knowledge of the same is a tedious and more often times than not, a quite impractical task. This difficulty in proving scienter and the growing need for more laws that are preferential to the victim led to many courts and legislatures to depart from the common law and create laws that impose almost absolute liability over the dog owners. Therefore, modern day strict liability laws regarding harm caused by dogs can be perceived as victim-friendly laws.[12] Based on the same, several states have made laws and interpreted the same by eliminating the requirement of scienter. This implies that there has been one significant shift from the common law notion of strict liability as the modern laws have reversed the onus of proof from the plaintiffs to the defendants. For instance, Section 20 of the Animals Act, 1979 of British Columbia states—"In an action brought to recover damages for injuries caused by any domestic animal or any dog, it shall not be necessary for the plaintiff, in order to entitle him to a verdict ... to adduce any evidence that the defendant knew, or had the means of knowledge, that the animal ... was or is of a vicious or mischievous nature, or was or is accustomed to do acts causing injuries". However this section was interpreted by the

[10] Lynn A. Epstein, There Are Not Bad Dogs, Only Bad Owners: Replacing Strict Liability with a Negligence Standard in Dog Bite Cases, 13 ANIMAL L. 129 (2006).
[11] Id.
[12] Id.

court in a leading case[13] to not being an abandonment of the scienter principle but merely a shift in the burden of proof from the plaintiff to the defendant whereby the defendant would incur liability upon such injury caused but can still escape such liability by either proving that the dog did not have a propensity for danger or that he did not possess any knowledge for the same. This interpretation however was perceived by many to having defeated the purpose of the aforementioned section because upon giving the plaintiff the opportunity to give evidence as to his dog not being fierce or him not knowing of such propensity, it then also would compel the plaintiff to attempt to negate such contention which in effect would mean the plaintiff having to prove what this section is exempting him from proving. In contrast to this British Columbia statute however, the statutes in force in Nova Scotia[14], Saskatchewan[15], Alberta[16] and various other Australian and Canadian statutes impose a nearly absolute liability. This could be illustrated by Section 52 of the Dog Control Act, 1979-81 of South Australia provides— "the person liable for the control of a dog shall be liable in damages for any injury caused by the dog". One must note that this imposition of near absolute liability could often be perceived as harbouring such notion that equates dogs with other 'dangerous animals' to facilitate such statutes and imposing such legal liability on their owners.

After a detailed assessment of the various positions that dictate a range of laws and principles regarding the strict liability for harm caused by dogs, an assessment of the position of India on the issue becomes necessary. The Indian position on strict liability regarding animals and in particular domesticated animals is substantially influenced by and hence reflects the English common law principles. Indian courts therefore have recognised the classification of dangerous and not dangerous animals whereby dogs fall into the latter of the two categories. Therefore, similar to the English common law, a dog owner would be strictly liable only if his dog is of ferocious disposition and he had knowledge regarding the same. A dog owner is also required to take such reasonable precautions to the utmost foreseeable extent. However, having failed to do so, owning a dog with a propensity for danger and fully knowing of such propensity would make such owner strictly liable for the injury caused by such dog. But a dog owner may escape strict liability if it is established that he had taken all reasonable precautions and the injury caused by the dog was a behaviour or was in a circumstance that he could not have possibly foreseen. Apart from the English common law principles, i.e., the

[13] Bebbington and Bebbington v. Colquhoun, 24 DLR (2d) 557(1960) .
[14] Stray Animals Act RSNS 1967, c. 294, s. 11.
[15] Animals Protection Act RSS 1953, c. 321, s. 5.
[16] Domestic Animals (Municipalities) Act RSA 1955, c. 88, s. 69.

principle of scienter action, that are employed by Indian courts to impose strict liability on dog owners for injury caused by dogs, there exists another rule for ascertaining animal liability that involves cattle. This is governed by the Cattle Trespass Act, 1871 in India. In simple words, cattle trespass occurs when cattle owned by someone strays and enters into someone else's property and damages such property. Upon such happening, the liability is placed on the owner. The aforementioned Act provides that if a cattle animal goes astray and trespasses on land of another and causes damage to such land, the owner has the right to seize the animal that has caused such damage. However, if such animal has not caused damage and has merely trespassed, the owner of the land does not enjoy this right. If such an animal causes damage to public roads, canals or embankments, then the person who is responsible for the maintenance of such public property like the police enjoys the right to seize the animal. It is the duty of the police to then take such animal to the nearest pounds within the next twenty-four hours.

Therefore, to conclude, as far as strict liability for harm caused by dogs is concerned, India still follows the English common law principles and employs the rule of scienter of action in ascertaining such strict liability.