A LAWYER'S BEST FRIEND?

CLAIMS UNDER THE *COMPANION ANIMALS ACT 1998*

21 March 2018

1. Section 25(1) of the *Companion Animals Act 1998* (NSW) ("**the Act**") creates a statutory cause of action in damages for a person who suffers bodily injury caused by a dog *"wounding or attacking"* that person.

2. The claim lies against the *"owner"* of the dog.

3. Section 25 of the Act provides as follows:

(1) The owner of a dog is liable in damages in respect of:

(a) bodily injury to a person caused by the dog wounding or attacking that person, and

(b) damage to the personal property of a person (including clothing) caused by the dog in the course of attacking that person.

(2) This section does not apply in respect of:

(a) an attack by a dog occurring on any property or vehicle of which the owner of the dog is an occupier or on which the dog is ordinarily kept, but only if the person attacked was not lawfully on the property or vehicle and the dog was not a dangerous dog, menacing dog or restricted dog at the time of the attack, or

(b) an attack by a dog that is in immediate response to, and is wholly induced by, intentional provocation of the dog by a person other than the owner of the dog or the owner's employees or agents.

(3) This section does not apply in respect of a police dog or a corrective services dog.

(4) This section does not affect the liability apart from this section of any person for damage caused by a dog.

Who is the "*owner*" of the dog?

4. The definition is not limited to the registered owner of the dog. Indeed, the definition of the term is so expansive, the Act dedicates an entire section to it. Section 7 of the Act provides as follows:

(1) Each of the following persons is the "owner" of a companion animal for the purposes of this Act:

(a) the owner of the animal (in the sense of being the owner of the animal as personal property);

(b) the person by whom the animal is ordinarily kept;

(c) the registered owner of the animal.

(2) A reference in this Act to "the owner" of a companion animal is a reference to each and all owners of the animal.

(5) When a companion animal is ordinarily kept by an employee on behalf of his or her employer, the animal is for the purposes of this Act taken to be ordinarily kept by the employer and not the employee. This subsection does not prevent an employee being the registered owner of an animal and does not prevent the employee being an owner if the employee is the registered owner.

5. Of course, a diligent solicitor ought to easily be able to identify the registered owner of the dog. That being so, shouldn't the plaintiff just sue the registered owner, without troubling his or herself with the rest of section 7? If the registered owner of the dog is insured, or the owner of his or her own home, the answer might be *"yes"*. However, the dog's registered owner may be, for example, a tenant in a less desirable area, who has decided not to trouble himself with a hefty insurance premium. The registered owner might be an unemployed teenager, who is living with his parents. Further, some dog *"owners"* don't bother with the task of registering the animal at all. It is in those circumstances that one might have to consider in further detail the other provisions of section 7.

6. Whether a person can be brought within section 7(1)(a) or (b) will turn on the facts. The question of whether a dog is *"kept"* by a person appears to have a broad meaning. It has been given little judicial attention in the Superior Courts. In *Hatch v Wood-Davies* [2006] NSWDC 96 at [138] to [142], Neilson DCJ said as follows:

"Of course, 'keep' can be used in many ways. It does not mean to have, but to hold onto something. One could always use the word to keep a dog or to keep a cat as meaning to care for it, to provide it with sustenance, shelter, food and drink, but in my view it should not be given too narrow a meaning in the Companion Animals Act 1998, bearing in mind previous legislative history.

It appears to me that the phraseology 'keeping' a dog extends merely to maintaining its physical presence in a place or under that person's custody or power. It cannot extend as far as possession because the possessor of an animal is prima facie the owner of it, and therefore that person would fall within the provision of s.7(1)(a). If para (b) required actual possession of the dog, para (a) would be otiose as has been submitted by learned counsel for the plaintiff.

A person in my view can keep a dog merely by permitting it to stay or rest upon his or her property, by feeding it, by providing it with water, by providing it with a place of shelter. If an animal comes to my house and I permit it to stay in it, one might be forgiven for thinking that I was keeping it. If someone asked me whether I had just acquired a new cat and I said, 'No, It is a stray which has entered into my house and I have no intention of keeping it,' one might be forgiven for thinking that my visitor was correct in thinking that I was stupid not to eject the cat from my house.

Again, I accept therefore that permitting an animal to stay on one's premises, to use it as a place of shelter or repose habitually amounts to keeping it".

7. Another District Court decision provides a useful illustration. In *Meimaropoulos v Cheum* [2014] NSWDC 26, the plaintiff was a 68-year-old pensioner walking to the shops in a suburban street in which she lived. The journey involved passing by the defendants' home. As the plaintiff passed the property, a dog described as *"small and fluffy"* ran towards her, barking. The dog circled the plaintiff several times and attempted to jump up on her at least once, putting its front paws at knee level. The plaintiff was frightened by the dog. She took one or more steps backwards, tripping over the edge of the footpath and falling onto the

roadway. During the attack, a second small dog remained within the yard of the home, barking. The plaintiff sued Mr Cheum, his wife, and his elderly mother. All of the defendants lived on the premises from which the dog had emerged.

8. One of the dogs had been found by Mr Cheum in the streets and brought home as a family pet. The other was a gift from a friend of Mr Cheum's elderly mother, who was aged 79. Neither of the dogs were registered at the time of the accident. The dogs were subsequently registered in the name of Mr Cheum's mother. That fact had no bearing upon the question of ownership at the time of the accident. The evidence was as follows:

   (a) Mr Cheum's mother did not walk the dogs. They were walked by Mr Cheum's daughters;
   (b) Mr Cheum's mother paid for the dogs' food, and fed and cleaned up after them. The other members of the household also assisted with those tasks;
   (c) Mr Cheum had built an enclosure for the dogs and was responsible for securing the gate that kept them in the backyard;
   (d) Mr Cheum's wife would buy the dog's food, if Mr Cheum's mother asked her to;
   (e) Mr Cheum and his wife were the joint registered owners of the property on which the dogs were kept;
   (f) The whole family played with the dogs.

9. Gibson DCJ was satisfied that the dogs were ordinarily kept by all three of the defendants. The decision suggests that it will be difficult for any

member of a household in which a dog is kept to distance itself from being the owner of the dog for the purpose of the Act.

10. Absent satisfaction that one or more of the defendants is insured, a prudent plaintiff may decide to sue all of the members of the household, in the hope that, between them, they can raise the funds to meet any judgment that might be entered.

"Wounding or attacking that person"

11. In the paradigm case under section 25 of the Act, the matter will involve a dog aggressively biting the plaintiff, causing a puncture to the skin. The question of whether the plaintiff has suffered bodily injury by the dog *"wounding or attacking"* him or her will not be in issue. However, what about, for example, where a dog darts onto a road, thereby causing an accident? In considering the question, it is useful to consider the legislative history of section 25.

12. Prior to 1977, the owner of a dog in New South Wales was liable in damages *"for injury done to any person, property or animal by his dog"*[1]. The language was extremely broad. There was no requirement for attacking or wounding. The broad scope of the legislation was apparent in *Martignoni v Harris* [1971] 2 NSWLR 102. The owner of a car claimed for damage to it caused by a dog that had ran across the road and collided with it. Moffit JA described the conduct of the dog as involving, *"no more than the failure of the animal, in pursuing its desire as a living creature to move from one place to another, to pay sufficient attention to the presence of other users of the highway"*. The owner of the dog was held liable. Moffit JA concluded that the words *"injury done…by his*

[1] Section 19 *Dog and Goat Act 1898* (NSW) and section 20 *Dog Act 1966*

dog" "suggests some active participation by the dog, but not limited to an attack, in bringing about the injury"[2].

13. Subsequent legislation somewhat narrowed the strict liability regime. Section 20 of the *Dog Act 1966*, as amended by the *Dog (Amendment) Act 1977*, created liability for *"bodily injury caused by the dog wounding that person in the course of attacking that person".* That is, the strict liability provision required wounding in the course of an attack. In its present iteration, the Act does not, literally, require the wounding to have occurred in the course of the dog attacking the person. It merely requires bodily injury to have been caused by the dog wounding **or** attacking the person. That is, the terms *"wounding"* and *"attacking"* are used disjunctively. That, one would have thought, would have resulted in a significant broadening of the scope of the strict liability regime. The wording of the provision suggests that it will suffice for the dog to have wounded the person, without having attacked him or her. As discussed below, judicial interpretation of the provision has somewhat watered down the effect one would have thought it might have had.

14. In introducing the proposed amendment to the Act as it now is, Hon D G Gay said:

"There could be a situation where a dog grabs someone by the clothing, gives the person a good shaking up, without actually biting the person. The person could fall and hurt his back and, although not wounded he may have been pretty badly attacked. The Opposition amendment adds the word 'attack' so

[2] at 110-111

that if bodily injury is caused by attacking or wounding, the owner is liable for damage."

15. Plainly, it was the intention of Parliament that the strict liability regime would apply, notwithstanding the fact that a dog had not actually bitten a person. That intention was consistent with judicial interpretation of the *Dog Act 1966*, as amended by the *Dog (Amendment) Act 1977*. In *Eadie v Groombridge* (1992) 16 MVR 263 ("***Eadie***"), a man was riding a motorcycle when a dog emerged from a house, ran parallel with the motorcycle for a short distance, before turning towards it. The plaintiff tried to avoid the dog, but collided with it, killing the dog and injuring himself. At first instance, the plaintiff succeeded, both in negligence and under the *Dog Act 1966*. The defendant appealed the finding in negligence. The Court of Appeal rejected the appeal. Meagher JA (with Handley JA agreeing) commented that he would have also dismissed the appeal from the finding made under the *Dog Act 1966*. His Honour concluded[3]:

"One can be 'wounded' by a dog even if the beast does not lacerate one's flesh. It is well established that an accused whose conduct has indirectly caused the wounding of another may be convicted for that wounding. In R v Halliday (1889) 61 LT 701 at 702 Lord Coleridge CJ said:

'If a man creates in another's mind an immediate sense of danger which causes such a person to try to escape, and in doing so he injures himself, the person who creates such a state of mind is responsible for the injuries which result.

…

[3] at 264

I can discern no reason why wounding which is an indirect result of an attack by a dog should fall outside the section"

16. Handley JA considered that *"attacking"* by a dog *"is an act of hostility or aggression"*[4].

17. *Zappia v Allsop* [1994] NSWCA 355 ("***Zappia***") was factually similar to *Eadie*. The same result followed. Clarke JA (with Handley JA agreeing) upheld the finding of liability under the *Dog Act 1966*:

"… No reason in principle appears why an owner should be liable if his or her dog directly wounds a person but not liable if the person evades a direct wound and thereby sustains another, and more serious, injury.

For those reasons I respectfully agree with the cited statement of Meagher JA and there is no need to consider whether it was dictum or part of the ratio of Eadie".

18. It is clear that the statutory reference to wounding in the *Dog Act 1966* extended to an injury caused to the person who was being attacked, taking action to avoid the attack. That principle remains good law. However, the decisions in *Eadie* and *Zappia* are of limited assistance in considering the effect of section 25 of the Act. The reason being, unlike section 20 of the *Dog Act 1966*, section 25 of the Act does not require wounding in the course of a dog attacking a person, it merely requires *"wounding or attacking"*. That gives rise to the question, *"can there be wounding, without attacking?"*

[4] at 265

19. In *Coleman v Barrat* [2004] NSWCA 27 *("**Coleman**"),* the plaintiff was riding her horse down a street, when a dog ran across the street, barking, in front of her and the horse. The horse shied away from the dog, radically changing its travel direction, causing the plaintiff to be thrown to the ground. Gzell J (with Sheller and Beazley JJA relevantly agreeing), observed that the Act no longer required *"the dual elements of wounding in the course of an attack"*[5]. Counsel for the plaintiff/appellant pointed to section 27(1) of the Act, which provided that the owner of a dog was liable in damages in respect of injury to another animal caused by the dog attacking or chasing it. It was argued that there was a dichotomy between attacking and chasing, and chasing was insufficient to invoke liability under section 25.

20. Gzell J (with Sheller and Beazley JJA relevantly agreeing), considered that submission correct, however, it did not affect the outcome because the plaintiff had been thrown from the horse as a result of the *"aggression of the dog"*[6]. That was sufficient to enliven strict liability under the Act, and it was not necessary to consider the dichotomy between attacking and chasing.

21. The question remained outstanding, *"will there be strict liability where a person is wounded, without being attacked?"* One might have thought the wording of the legislation is plain. The Act requires either wounding or attacking. That is, strict liability will be found, even absent an attack. The question came for determination by the New South Wales Court of Appeal in *Sarkis v Morrison* [2013] NSWCA 281 ("***Sarkis***"). In *Sarkis*, a

[5] at [37]
[6] at [39]

dog ran onto a road and collided with the front wheel of a motorcycle. It was not in issue that the dog had not attacked the plaintiff. The trial judge, Truss DCJ, found that the owner of the dog was strictly liable, in circumstances where the dog had wounded the plaintiff, but not attacked him. That is, there was no act of aggression on the dog's part. The owner appealed, pointing to the broad consequences that would follow if her Honour's finding was upheld, for example, a person could recover damages in circumstances where they tripped over a sleeping dog, and suffered some form of laceration as a result. Basten JA (with MacFarlan JA and Ward JA agreeing)[7] upheld the appeal. Basten JA summarised the task faced by the Court as follows:

"…The present case appears to be the first under the Companion Animals Act which has to consider whether the fact that the plaintiff was wounded as a result of active conduct of the dog, not directed at the plaintiff or indeed at any person or thing, is sufficient to give rise to strict liability on the part of the owner"[8]

22. In concluding that the owner was not liable, Basten JA considered:

"…the word 'wounding' is a gerund derived from the verb 'to wound' which, when used in its transitive form and in relation to bodily injury means 'to inflict a wound on (a person, the body etc) by means of a weapon; to injure intentionally in such a way as to cut or tear the flesh': Oxford English Dictionary Online. In s.25, an injury to a person 'caused by the dog wounding…that person' involves a transitive form of the gerund. Further, 'wounding' is a form of 'attacking' and, from its position in the sentence, takes its meaning from its context. It is not used in the sense of a consequence, that is

[7] at [38] and [39]
[8] at [29]

a wound being part of a bodily injury, but in the sense of an injury being caused by the dog conducting itself in a particular manner.

According to the reasoning in the earlier cases, it may be sufficient that the dog does not touch the person but (a) causes injury to the person by colliding with the bicycle or motorcycle being ridden by the person, or (b) by causing the horse on which the person is riding to buck and throw the rider[9], or (c) by causing the person to take evasive action which in turn results in an injury. However, whether any of these effects falls within the term 'wounding' will be irrelevant if some act of aggression is required because they will be part of the injuries caused by 'attacking' the person.

In this sense, wounding is a form of attacking. That would allow the whole of the section to be internally consistent, so that the same conduct of a dog will create liability in respect of damage to personal property and the exceptions in subs (2), defined by reference to 'an attack by a dog' will cover all of the conduct which would otherwise fall within subs (1), to the extent that the independent preconditions in each exception are satisfied.

One consequence of this approach is to render the words 'wounding or' in paragraph ((a) otiose. In other words, if wounding does not cover conduct in which there is no form of attack by the dog, wounding will have no separate effect. That may be so, but the form of the provision is explained by the amendment accepted in the course of the Parliamentary debate. Thus, the purpose of inserting the words 'or attacking' was to expand the scope of liability of the owner beyond about which would be achieved by use of the term 'wounding' alone. It does not appear that the intention was to add a requirement for an aggressive act where none existed. No doubt it is true that

the same effect could have been achieved by removing the word 'wounding' and replacing it with 'attacking'. However, as explained by Clarke JA in Zappia, it is not difficult to suggest clearer and more succinct forms of drafting"[10]*'*

23. His Honour concluded:

"The expression in s.25(1)(a) of the Companion Animals Act 'caused by the dog wounding or attacking that person' should be understood as limited to conduct involving an element of aggression or other deliberate conduct directed towards that person by the dog. As accepted by Moffitt JA in Martignoni (see at [10] above), inaction on the part of the dog will not suffice. Whether 'wounding' requires that a distinction should be drawn between overenthusiasm and aggression, as suggested by Sheller JA in addressing 'attacking' in Eadie (see at [20] above), need not be decided. However, the section does require that there be conduct directed at the plaintiff. Where a dog causes bodily injury without any aggressive or other deliberate intent on its part, there will be no liability in the owner under s.25".[11]

24. The following principles can be extracted from the cases discussed above:

    (a) It is insufficient to attract liability under section 25 to show that the plaintiff has suffered the consequences of being wounded. The concept of wounding requires consideration of the manner in which the dog has acted. Wounding is a form of attacking.

[10] at [30] to [33]
[11] at [36]

Liability under section 25 won't follow, absent attacking behaviour;

(b) An attack involves an act of aggression or other deliberate conduct by the dog, not just its mere involvement in the events;

(c) The offending dog need not necessarily have touched the plaintiff;

(d) The fact that a person is injured in avoiding an attack, as distinct from directly by the attack, will not take the matter beyond section 25;

(e) Arguably, chasing alone, absent aggressive behaviour, will be insufficient to attract liability under section 25. Although, practically speaking, it may be difficult to draw a clear distinction between *"chasing"* and *"attacking"*.

The exceptions is subsection (2)

25. Section 25(2) effectively specifies two circumstances in which the strict liability created by section 25(1) will not apply. They are:

(a) An attack by a dog occurring on any property or vehicle of which the owner of the dog is an occupier, or on which the dog is ordinarily kept, but only if the person attacked was not lawfully on the property or vehicle and the dog was not a dangerous dog, menacing dog or restricted dog at the time of the attack; or

(b) An attack by a dog that is in immediate response to, and is wholly induced by, intentional provocation of the dog by a person other than the owner of the dog or the owner's employees or agents

26. It is convenient to first mention section 25(2)(b). I am unaware of the provision having been given judicial consideration. I simply comment

that one would have thought reliance upon the subsection will cause a defendant some difficulty, in circumstances where the attack has to be shown to be *"wholly induced by"* (as distinct from partially induced by) *"intentional provocation of the dog"* (as distinct from accidental provocation).

27. Section 25(2)(a) has been considered by the New South Wales Court of Appeal in *Simon v Condran* [2013] NSWCA 388 ("***Simon***"). The author appeared in *Simon*, both at first instance, and on appeal. In *Simon*, the plaintiff and defendant were neighbours. The plaintiff's dog strayed onto the defendant's property. The plaintiff followed the dog and was bitten by the defendant's dog. At first instance, the defendant successfully argued that section 25(1) of the Act did not apply, because the plaintiff's presence on the defendant's property was unlawful. The defendant's dog was not a dangerous, menacing or restricted dog. The plaintiff argued that she had entered the defendant's property by necessity, thereby making her presence there lawful. The defendant argued that reason that the plaintiff's dog had been allowed to stray onto the defendant's property, was because of the plaintiff's negligence in letting it do so and, further, that the plaintiff was in breach of section 12A of the Act, in that she had failed to take all reasonable precautions to prevent her dog from escaping her yard.

28. Section 12A of the Act provides as follows:

12A Preventing dog from escaping

(1) The owner of a dog must take all reasonable precautions to prevent the dog from escaping from the property on which it is being kept.

29. The neighbours had lived in their respective homes for many years. The dogs were old adversaries. There had, over the years, been various attempts to fence the properties, so as to confine the animals to their respective properties. Relevantly, the defendant's fencing achieved that goal. The plaintiff's fencing did not. The plaintiff's dog was able to escape the confines of his property. Indeed, he did so on the day of the accident.

30. The owners of the dogs were each well aware of the long-standing antagonism between the animals.

31. On the day of the accident, the plaintiff was in the outdoor area of her premises, awaiting the arrival of a friend. She let her dog off its *"run"* and observed it to be face-to-face with the defendant's dog, with fencing between them, but with the dogs walking towards the point at which the boundary fence ended. At that time, the plaintiff's friend arrived, causing the plaintiff to be momentarily distracted, following which she heard a fight break out between the dogs. The plaintiff went underneath the defendant's house, at which time she saw the head of her own dog in the mouth of the defendant's dog. The plaintiff, acting in the heat of the moment, began striking her own dog on the head. She was bitten by the defendant's dog.

32. There was no issue that section 25(1) applied. The question was whether section 25(2)(a) applied. That question turned upon whether the plaintiff was lawfully on the defendant's property at the time of the attack.

33. The common law recognises a defence of necessity to conduct which would otherwise amount to trespass to land, unless, that necessity had

been brought about by the negligence or breach of the Act by the trespasser. The defendant/respondent argued, and the primary judge and Court of Appeal accepted, that the necessitous trespass has been occasioned by the plaintiff's own negligence and breach of section 12A of the Act. Section 25(1) of the Act did not apply. The plaintiff's claim failed.

34. *Simon* serves as a useful demonstration of the operation of section 25(2). It is an example of how a simple statutory cause of action can quickly descend into a technical argument about common law principles.

Other important matters

35. The following further points of importance should be borne in mind:

(a) Section 25(1) does not apply in respect of a police dog or a corrective services dog[12];

(b) An action in negligence is available as an alternative to a claim under section 25(1)[13];

(c) Where the damage suffered by the plaintiff was partly the result of negligence on the plaintiff's part, a reduction for contributory negligence will be made[14]

S.J.Holmes

Edmund Barton Chambers

21 March 2018

[12] Section 25(3) of the Act
[13] Section 25(4) of the Act
[14] Section 28 of the Act