

Liability of Dog Owners

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At common law most courts held that a defendant was not liable for injuries caused by his dog unless he had knowledge of the vicious propensities of the animal. After he knew that the dog had bitten or would bite, he kept the dog at his peril and was liable for the damage done. The same result was sometimes reached in a more round-about way by using the language of negligence, and saying that defendant's liability depended on negligence, but that if scienter were proved, negligence would be conclusively presumed. This approach was sometimes misunderstood, as in the Ohio case of *Hayes v. Smith*,¹ where the court held that a defendant would not be liable for keeping a known vicious dog unless he was negligent in the keeping.

Since December 24, 1814, there have been Ohio laws that dogs that kill or injure sheep may be killed and the owner or harbinger of such dog is liable for the damage done.² In 1877 the statute declared that the owner would be liable for dogs that "kill, worry or injure any sheep, lamb, goat or kid." In 1900 this was amended to read that the owner or harbinger of any animal that chases, worries, injures or kills any sheep, lamb, goat, kid, animal or person shall be liable for the damage done. This was passed on April 10, 1900, exactly thirty-five days after *Hayes v. Smith* was decided. It not only destroys the effect of that case but it goes beyond the common law, since it imposes liability for a biting dog regardless of scienter.

The simplest way to amend a statute is to add words to the existing form, and so "person," in spite of its greater importance, is preceded by the sheep and goats. Sheep may be injured by dogs that chase and worry them and the words seem particularly appropriate to such conduct. Owners of dogs have been held liable for such losses,³ but the words have also been applied to a dog that raced an automobile.⁴ General Code Section 5838 provided that a dog that chases, worries, injures or kills a sheep, lamb, goat, kid, domestic fowl, domestic animal, or person can be killed and the owner or harbinger of such dog shall be liable to a person damaged for the injury done.

The statute has been strictly construed by the Ohio courts. It "imposes an absolute liability upon the owner of the dog, and

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¹ 62 Ohio St. 161, 56 N.E. 879 (1900).

² 13 LAWS OF OHIO 34 (1814).

³ *Job v. Harlan*, 13 Ohio St. 485 (1862).

⁴ *Silverglade v. Van Rohr*, 107 Ohio St. 75, 140 N.E. 669 (1923).

scienter, fault, negligence or contributory negligence are not involved in a proceeding thereunder."⁵ Where the suit is based on the statute, "it is not essential to aver and prove the known vicious character of the dog or negligence of the owner."⁶ The statute is plain and it is not the province of the court to introduce exceptions by construction.⁷

In the first and last of the cases cited in the preceding paragraph, plaintiff was injured in attempting to separate fighting dogs, one of which belonged to the plaintiff or his son, and in one of the cases,⁸ it is clear that plaintiff's dog began the fight, although it is equally clear that defendant's dog bit the plaintiff.

The statute has been applied when the injury is caused by acts other than biting. In *Silverglade v. Van Rohr*, *supra* note 4, defendant's dog raced plaintiff's car and got in the way. Plaintiff's attempt to avoid the dog was unsuccessful, and after hitting it, he lost control of the car, ran into a tree and was injured. The court said that it was only necessary for the plaintiff to prove that it was the defendant's dog which chased or worried him and that as a proximate result he was injured. In *Bevin v. Griffiths*,⁹ the defendant owned a large police dog with a skin disease which caused it to rub up against articles for relief. Plaintiff, a maid in defendant's home, alleged that it threw itself against her and caused her to fall against a door and suffer damage. In *Bailey v. Prickett*,¹⁰ the dog leaped upon a boy on roller skates, forcing him into the road where he was hit by a passing car.

In *Kingsley v. Yocom*,¹¹ the plaintiff was bitten by a dog which was tied. There were "cross dog" signs on the premises which the plaintiff alleges he did not see. Although the court considered the plaintiff a trespasser, it was held that the statute imposed absolute liability and created no exception for trespassers.

On this point the recent act of the Legislature, Amended Senate Bill No. 12, altering numerous sections relating to dogs, changes the law. Whereas the last sentence of Section 5838 had provided: "The owner or harbinger of such dog shall be liable to a person damaged for the injury done," it will now read "The owner or keeper shall be liable for any damage or injuries caused by a dog unless such damage or injury shall have been occasioned to the

⁵ *Dragonette v. Brandes*, 135 Ohio St. 223, 20 N.E. 2d 367 (1939), discussed in 5 *OHIO ST. L. J.* 433 (1939).

⁶ *Lisk v. Hora*, 109 Ohio St. 519, 143 N.E. 545 (1924); *McIntosh v. Doddy*, 81 Ohio App. 351, 77 N.E. 2d 260 (1947).

⁷ *Siegried v. Everhart*, 55 Ohio App. 351, 9 N.E. 2d 891 (1936).

⁸ *Dragonette v. Brandes*, *supra* note 5.

⁹ 44 Ohio App. 94, 184 N.E. 401 (1932).

¹⁰ 15 Ohio L. Abs. 336 (1933).

¹¹ 34 Ohio App. 226, 170 N.E. 180 (1929).

body or property of a person, who, at the time such damage or injuries were sustained, was committing a trespass on the property of the owner, or was teasing, tormenting or abusing such dog on the owner's property."

Section 5838 now begins: "A dog that chases, worries, injures or kills a sheep, lamb, goat, kid, domestic fowl, domestic animal, *except a cat or another dog* or person can be killed at any time or place . . ." The phrase "except a cat or another dog" is the new matter. In the printed Amended Senate Bill No. 12 there is no comma after dog. Can it have been intentional? If strictly construed, it means that one can kill a dog that chases, worries, injures or kills a sheep or a chicken, but not one that chases, worries, injures or kills a cat, dog or person. A dog may chase a boy, his master, in play and should not be killed. But is there any reason why a dog which kills a boy cannot be killed as promptly as one which kills a lamb or a kid? In all probability these difficulties will continue to arise as long as we keep on using the model of the sheep killing statute to solve personal injury problems.

License fees have been changed. In the past it cost one dollar for a dog license unless the dog was an unspayed female, in which case the cost was \$3. In the future the amounts will be the same, since the statute¹² states that a registration fee of two dollars must be filed with the application. Kennel owners have had to pay a fee of \$10 which would entitle them to tags for not more than 5 dogs.¹³ Now additional tags may be obtained at the rate of \$1 per tag. If there was not enough money in the dog and kennel fund to pay for livestock injured or destroyed by dogs, the county commissioners could set the license fees at an amount sufficient to cover the damage. The increase must now be in the ratio of \$2 for each dog¹⁴ instead of the \$1 and \$3 distinction of the earlier act. If there were an excess of more than \$1,000 in the dog and kennel fund, after paying all claims, the excess was to go to a society for the prevention of cruelty to children or animals. Even here the effects of inflation are felt, and in the future, only the excess over \$2,000 will be paid. If there is no such society in the county, any excess over \$5,000 was to go to the county general fund. From now on it will be the excess over \$10,000.¹⁵

An old Ohio case held that a dog could not be the subject of larceny, although it was conceded that a civil action might lie for

¹² OHIO GEN. CODE § 5652.

¹³ OHIO GEN. CODE § 5652-1.

¹⁴ OHIO GEN. CODE § 5652-7a.

¹⁵ OHIO GEN. CODE § 5653.

the theft.¹⁶ For nearly a century Ohio statutes have provided that a dog which has been listed and valued for taxation as personal property and on which the tax has been duly paid, should be considered personal property.¹⁷ The new act repeals Section 5837 but it enacts Section 5652-1b. Under the new law, any dog duly registered under Sections 5652 and 5652-1 (dog license fees paid) or any dog not required to be licensed under those sections (dog less than three months old or brought into the state after January 20) shall be so considered.

There are changes in the penal statutes affecting animals. They illustrate the growing importance of veterinarians and the increasing attention that is being given to the so-called small animals.

The General Code, Section 13361, provided that anyone maliciously killing any of fifteen kinds of animals (horses, cows, sheep, goats, etc.) should be imprisoned in the penitentiary from one to five years if the animal was worth \$35 or more, and, if the value was less than that, he should be fined from \$20 to \$200 or imprisoned for not more than three months or both. This has been changed to cases where the killing was malicious or wilful and without consent of the owner, and to exempt veterinarians acting in an official capacity. To the fifteen types are added, "dog, cat or other domestic animal." The penalty remains the same for killing animals worth less than \$35, but for the more valuable animals the penalty now is \$50 to \$500 fine, or imprisonment from three months to a year or both. One to five years in the penitentiary was a heavy penalty for this crime and the change seems reasonable.

Section 13362 (the poisoning statute) makes similar changes and provides that whoever "maliciously or wilfully and without consent of the owner administers poison except as is administered by a state licensed veterinarian . . ." It also adds cats or any other domestic animals to the list.

The Legislature apparently hopes to reduce the number of stray animals with the Section 13368 which it has enacted.

"Whoever, being the owner or keeper of a dog, cat, or other domestic animal, abandons the same shall, upon conviction thereof, be fined not less than \$10 nor more than \$100."

While Sections 5652, 5652-1 and 5652-7a were amended in Amended Senate Bill No. 12 and Section 5652-1b was enacted, Section 5652-16 received separate treatment. Amended Senate Bill No. 329, dealing with the confinement of dogs during a rabies quarantine, was passed one day later but approved two days ear-

¹⁶ *State v. Lymus*, 26 Ohio St. 400 (1875).

¹⁷ OHIO GEN. CODE § 5837.

lier than No. 12. Section 5652-16 has been reworded and clarified but the new act apparently is not intended to make any substantial change in the law. The owner or keeper of a dog shall keep it confined to the premises or in a suitable pound or kennel during such quarantine, but a dog may be permitted to leave the premises of the owner or keeper if under leash or under the control of a responsible person.