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Dog Owner's Liability in Non-Bite Situations: Duty v. Cause -- Barking Up the Wrong Tree

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tempt as a crime in the ordinary sense—a public wrong punishable by fine or imprisonment. The court said that serious contempt was entitled to the constitutional guaranty of a jury trial, whereas a non-serious contempt would not necessarily be entitled to a jury trial. Whether or not the criminal contempt was serious would be determined by the severity of the punishment inflicted by the offended court. Although Bloom's offense appears to have been indirect criminal contempt, the court specifically discussed disorders committed in the courtroom (direct criminal contempts). It stated, however, that since they were petty offenses there would be no problem with the right to jury trial. Thus, the Supreme Court defines a direct criminal contempt as a crime in the ordinary sense, entitled to trial by jury if it is not a petty offense.

In the instant case the Third District Court correctly decided that the defendant was not entitled to trial by jury within the guidelines set out by *Bloom*. The court, bound by the mandate of *Bloom*, said that there would be no jury trial because the offense was not sufficiently serious but ignored the definition which was prerequisite to determining that a jury trial was not warranted, the definition that direct criminal contempt is a crime in the ordinary sense. Had the court applied this rule of law, it is not unreasonable to assume that it would have applied the criminal statute of limitations.[32] Since *Pendergast* and *Bloom* are applicable to the states, it is submitted that the statute of limitations[33] must be applied to both indirect and direct criminal contempt if there is to be equal protection under the Florida laws.

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DOG OWNER'S LIABILITY IN NON-BITE SITUATIONS: DUTY v. CAUSE—BARKING UP THE WRONG TREE

Defendant's male German shepherd was loose in the defendant's backyard for the purpose of stud service to another defendant's female shepherd. The backyard was enclosed by a four-foot-high chain link fence which was parallel with and adjacent to the sidewalk upon which the plaintiff's twelve-year-old son and two friends were walking. The dogs charged the fence and barked, frightening the children as they passed and causing them to run into the street where plaintiff's son was fatally injured by an oncoming automobile. The circuit court granted the dog owner's motion for summary judgment. On appeal to the Court of Appeal for the Third District, *held*, reversed: A jury should be permitted to determine whether, under the specific facts of this case, the

32. FLA. STAT. § 932.05 (1967).
33. *Id.*

damage to the decedent was "done by" the dogs. *Brandeis v. Fletcher*, 211 So.2d 606 (Fla. 3d Dist. 1968).

Common law strict liability[1] for dangerous animals was based upon trespass.[2] Strict liability was then expanded in *May v. Burdett*[3] to cover other injuries. Today, the owner of an animal is strictly liable only for the consequences that result from the extraordinary risk he has created by keeping the animal.[4] Determination of whether a risk is extraordinary

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1. Liability without fault is imposed upon a defendant who engages in some types of conduct which create:

> such risks of harm to others, even when the conduct is careful, that, though the creation of the risks is not itself unreasonable because of the social utility of the conduct, nevertheless it is unreasonable for the person injured to bear his own loss. We may state the rules of strict liability, then, in answer to the parts of the following general questions: (1) what types of conduct lawful in themselves are so hazardous (2) to certain classes of persons (3) that the actor must assume some risks of the consequences to those persons?

Harper, *Liability Without Fault*, 30 MICH. L. REV. 1001, 1006 (1932) [hereinafter cited as Harper].

It has also been said that the defendant must have breached a duty to use care for the plaintiff before the latter can bring an action in negligence.

> It is enough here to say, that defendant may have a duty cast upon him by virtue of a statute, a contract, a status or relation, such as master and servant, or by long declared policy of the law as in the case of the keeping of wild animals. But aside from such duties thus definitely fixed in the law, it is ordinarily said with reference to negligence cases that when a defendant should foresee harm to the plaintiff as a "probable consequence" of defendant's conduct, there arises the *duty to take care*, and a failure to exercise such care, if resulting in harm to plaintiff, is actionable negligence.

Green, *Are Negligence and "Proximate" Cause Determined by the Same Test?—Texas Decisions Analyzed*, 1 TEXAS L. REV. 243, 256 (1923). [Hereinafter cited as Green, *Texas Decisions*].

Thus, in this instance strict liability could be the imposition of a duty by the "long declared policy of law" without the necessity of the foreseeability test. However, in the instant case, the imposition of a duty would be "by virtue of a statute."

On the other hand, use of the "duty" concept in connection with strict liability has been criticized.

> [T]he duty concept is of value only where defendant is morally culpable, because duty is primarily a moral concept. It is so shot through with moral connotations that it actually misdescribes the character of the defendant's conduct in cases where there is no moral fault. . . .
>
> Thus the duty concept is inappropriate to characterize the strict liability cases. With the duty notion must go the possibility of a practical application of either Dean Green's or Professor Bohlor's technique for stating the law. If defendant has indulged in extra-hazardous conduct at all, he has engaged in conduct which may be the basis for legal liability. It is awkward to say that he has indulged in conduct which is the basis for liability to some persons for some general classes of injuries but not to other persons for other types of harms. It is much more intelligible to state that the defendant has engaged in a type of conduct which is a sufficient basis of liability, and then determine what consequences of such conduct he is liable for.

Harper at 1013-15.

> According to this technique the defendant is liable for consequences (1) which are of the general class of harms which make his conduct negligent, (2) if the person injured is of the general class of persons who are threatened by the defendant's abstract negligence, and (3) if the harm is brought about in a way as is not unjust to hold defendant liable therefor.

Id. at 1003.

2. De Terimino Michaelis, 12 Henrici 7 Keilway 1, 72 Eng. Rep. 153 (1688).

3. 9 Q.B. 101, 115 Eng. Rep. 1213 (1846).

4. W. PROSSER, THE LAW OF TORTS 513 (3d ed. 1964) [hereinafter cited as PROSSER].

depends upon the type of animal and its social utility.[5] "A distinction has been made between animals which, by reason of their species, are by nature ferocious, mischievous or intractable, and those of a species normally harmless."[6] It has been stated that animals belonging within the first category of species could never be regarded as safe, no matter how domesticated they are.[7] Therefore, common law strict liability within this category of species would not depend upon scienter,[8] as is the case with the second category of species.[9] Likewise, there is no scienter requirement when a statute imposes liability upon the owner of an animal for harm done thereby.[10]

In 1881, the Florida legislature enacted section 767.01 of the Florida Statutes, which provides that "Owners of dogs shall be liable for any damage done by their dogs to sheep or other domestic animals or livestock, or to persons." This statute has been interpreted to make the owner of a dog an insurer for the acts of his dog without the requirement of scienter,[11] and has also been held to relate to injuries inflicted by dogs "other than by biting."[12]

In all prior Florida cases[13] where liability under the statute has

5. *Id.* at 513-15.

6. *Id.* at 514. In the first category are included wolves, Hays v. Miller, 150 Ala. 621, 43 So. 818 (1907); bears, Crunk v. Glover, 167 Neb. 816, 95 N.W.2d 135 (1959); lions, Stamp v. Eighty-Sixth St. Amusement Co., 95 Misc. 599, 159 N.Y.S. 683 (Sup. Ct. 1916); elephants, Filburn v. People's Palace & Aquarium Co., 25 Q.B. 258, 59 L.J.Q.B. 471 (1890); and monkeys, May v Burdett, 9 Q.B. 101, 115 Eng. Rep. 1213 (1846). The second category includes cattle, sheep, dogs and cats. *See* PROSSER at 514 nn. 77-82.

7. Filburn v. People's Palace & Aquarium Co., 25 Q.B. 258, 59 L.J.Q.B. 471 (1890).

8. *Id.*

9. In this category, *terae domitae*, defendant's strict liability is limited to the particular risk (propensity) known to him, or which should have been known to him. Mann v. Stanley, 141 Cal. App. 2d 438, 296 P.2d 921 (3d Dist. 1956); Durham v. Barnes, 124 So.2d 792 (La. 2d Cir. 1960); Maxwell v. Fraze, 233 S.W.2d 262 (Kan. City Ct. App. 1961); Olson v. Pederson, 206 Minn. 415, 288 N.W. 856 (1939). For liability to attach, the injury must have been caused by that particular propensity known to the defendant. Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Netusil v. Novak, 120 Neb. 751, 235 N.W. 335 (1931); Note, *Absolute Liability of Owner of Vicious Dog for Injury Caused by Fright*, 13 NEB. L. BULL. 422 (1935). Thus, notice that a dog has once bitten a man would be sufficient to establish the scienter that he may do it again. Zarek v. Fredericks, 138 F.2d 689 (3d Cir. 1943).

10. "That section [Ohio Stat. § 5858] imposes an absolute liability upon the owner of a dog, and *scienter*, fault, negligence or contributory negligence are not involved in a proceeding thereunder." Dragonette v. Brandes, 135 Ohio St. 223, 224, 20 N.E.2d 367, 368 (1939); *accord*, Knapp v. Ball, 175 So.2d 808 (Fla. 3d Dist. 1965).

11. Sweet v. Josephson, 173 So.2d 444 (Fla. 1965), *aff'g* 173 So.2d 463 (Fla. 3d Dist. 1964); Knapp v. Ball, 175 So.2d 808 (Fla. 3d Dist. 1965). *Cf.* note 12 *infra*.

12. Defendant's motion for summary judgment against appellant injured by dog "other than by biting" was granted at trial. The court held that FLA. STAT. § 767.04 (1963), which relates *specifically* to dog bites, superseded and repealed FLA. STAT. § 767.01 (1963), which relates *generally* to harm "done by" dogs. The Third District Court of Appeal reversed, holding that FLA. STAT. § 767.04 (1963) superseded FLA. STAT. § 767.01 (1963) only in relation to dog bite situations. Sweet v. Josephson, 173 So.2d 444 (Fla. 1965), *aff'g* 173 So.2d 463 (Fla. 3d Dist. 1964). *See* Jarvis, *Torts, 1963-1965 Survey of Florida Law*, 20 U. MIAMI L. REV. 820, 835 (1966).

13. Reid v. Nelson, 154 F.2d 724 (5th Cir. 1946); Sweet v. Josephson, 173 So.2d 444 (Fla. 1965), *aff'g* 173 So.2d 463 (Fla. 3d Dist. 1964); Romfh v. Berman, 56 So.2d 127

been found, there has always been some form of direct contact between the dog and the injury.[14] In the instant case, the appellees argued that "since there was *no direct contact* between the minor decedent and either of the dogs, the owners are not liable for any damages resulting from the boy's death."[15] They relied upon *Schertz v. Indianapolis, Bloomington and Western Railway Company*,[16] wherein the court held that liability imposed by an Illinois statute[17] upon railroad corporations for harm "done by 'agents, engines, or cars' of such corporations to cattle, horses, or other stock"[18] was dependent upon actual collision.

In the instant case, the court began with "the premise that liability for non-bite damages suffered in an attack by a dog is within the contemplation of the statute."[19] Thus it dismissed appellee's argument, stating that in *Schertz* "the court held that the statute contemplated only actual collision when the statutory fence was not maintained . . . ,"[20] whereas in Florida it has already been held that non-bite damages were within the contemplation of the statute.[21] The court then went on to reason that since liability as an insurer is not contingent upon a showing of scienter or negligence of the owner,[22] it must depend "upon the question of whether the boy's death is damage 'done by' the appellee's dogs, *i.e.*, were the dogs the *cause* of the damage complained of by the plaintiffs?"[23]

(Fla. 1951); Ferguson v. Gangwer, 140 Fla. 704, 192 So. 196 (1939); Knapp v. Ball, 175 So.2d 808 (Fla. 3d Dist. 1965). *Cf.* Vandercar v. David, 96 So.2d 227 (Fla. 3d Dist. 1957); 66 A.L.R.2d 412 (1959).

14. However, there have been cases in other jurisdictions where liability has been found without any direct contact. *See* Ethridge v. Nicholson, 80 Ga. App. 693, 57 S.E.2d 231 (1950); Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Netusil v. Novak, 120 Neb. 751, 235 N.W. 335 (1931); Note, *Absolute Liability of Owner of Vicious Dog for Injury Caused by Fright*, 13 NEB. L. BULL. 422 (1935).

15. 211 So.2d at 608.

16. Illinois had enacted a statute requiring all railroad corporations to erect and maintain a fence along their track.

> That statute provides, when the fences it requires shall be erected are not made as therein required, or when such fences are not kept in good repair, such railroad corporation shall be liable for all damages which may be done by the "agents, engines or cars" of such corporations, to cattle, horses, or other stock. On the hypothesis plaintiff's horse got on the track of defendant's road for want of such a fence as the law requires it to erect and maintain to inclose its track and right of way, and while on the tract the horse was frightened either by the approaching train, or the sound of the bell or whistle, or all of them combined, and in its flight was injured, either by jumping a cattle guard, or by coming in contact with a wire fence, or both, that no negligence or willful misconduct can be imputed to the agents of defendant in charge of the train at the time, and that no injury was done to the horse by any actual collision or contact with the engine or cars of the train, a majority of the court are of opinion the defendant is not liable.

107 Ill. 577, 579 (1883).

17. An act in relation to fencing and operating railroads, R.S. 1874, p. 807 (1874), *as amended* (1879).

18. 107 Ill. at 579.

19. 211 So.2d at 607.

20. *Id.* at 608.

21. Sweet v. Josephson, 173 So.2d 444 (Fla. 1965), *aff'g* 173 So.2d 463 (Fla. 3d Dist. 1964).

22. 211 So.2d at 607; cases cited notes 12 and 13 *supra*.

23. 211 So.2d at 607.

The court saw its problem as one of considering "whether the dogs' participation in or contribution to the end result was sufficient for a jury to consider the question of liability. . . ."[24] Relying upon the "increasingly liberal" position of the Florida courts "in allowing a jury to pass upon questions similar to this,"[25] and upon Professor Green's statement of proximate cause,[26] the court decided in the affirmative.

It is this writer's opinion that the court in the instant case confused proximate cause with duty.[27] In determining whether the defendant is to be held responsible for an injury to the plaintiff, the courts are faced with two important problems.[28] The first is the necessity of determining whether the conduct was negligent.[29] The second problem is the determination of whether the defendant's negligence caused plaintiff's injury.[30] Quite often these two problems are hopelessly confused.[31] The latter is a

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24. *Id.*

25. *Id.* at 609. *See* Sardell v. Malanio, 202 So.2d 746 (Fla. 1967); Mozer v. Semenza, 177 So.2d 880 (Fla. 3d Dist. 1965).

26. Professor Green suggests that the question is, in essence, a simple quantitative one—whether the defendant's conduct was a *material, appreciative,* or *substantial* factor in producing the plaintiff's injuries. If so, that is *enough* to enable the jury to find causation in fact.

L. GREEN, *infra* note 31, in 211 So.2d at 608.

27. Negligence of a particular defendant is determined by the reasonably foreseeable test—what the ordinary reasonable man should have foreseen as the probable consequences of his conduct. If he should have forseen injury to the plaintiff it can be said he owes the duty to exercise care toward the plaintiff; and failing to do so, he is guilty of negligence. Likewise, it is said that a man shall be liable for the consequences that he as a reasonable man should have foreseen as a result of his conduct. If such consequences were not reasonably foreseeable or probable, then they were not the proximate cause of the injury.

Thus, "the 'probability,' 'foreseeability' or 'anticipation' test is seemingly used both in determining the *existence* of negligence, and in determining *for what consequences* of such negligence a recovery may be had. It might be more accurate to say that our courts have apparently treated the *existence* of negligence and *causal relation* as the same problem, to be solved by the same formula." Green, *Texas Decisions* at 244.

> *Anticipation of injury as applied in the determination of negligence and proximate cause should not be confused. The former is an element of negligence, while the latter is used to denote the relative position of cause to effect in ascertaining whether cause is so related to effect as to bring negligence in union with the result rendering liable a negligent actor for certain consequences.*

Id. at 423, 438, citing Collins v. Pecos & N.T. Ry., 110 Tex. 577, 212 S.W. 477 (1919).

28. Green, *Texas Decisions* at 246.

29. Every person owes a duty to every other person to exercise care to avoid harming him. The determination of the question as to whether the plaintiff has a *right* not to be harmed and whether the defendant owes plaintiff a *duty* not to harm him is one of policy to be decided by the judge.

Negligence is the failure by one defendant to exercise that degree of care needed to avoid harming that particular plaintiff. The existence of negligence, *i.e.* the violation of the duty, is a question of fact to be determined by the jury. L. GREEN, RATIONALE OF PROXIMATE CAUSE 11-43 (1927) [hereinafter cited as L. GREEN, RATIONALE].

30. Use of the "probable consequence" rule for the determination of the first problem is quite legitimate. However "to attempt to make a second use of [the rule] in order to determine [the proximate cause] issue is to pervert its use." Green, *Texas Decisions* at 247.

31. The primary function of the judge is to comprehend the purpose and scope of a rule of law or the purpose and scope of a statute:

> [T]he court must determine whether the hazard to which a plaintiff has been subjected falls within the range of the protection of the rule invoked by him. But this primary function must in no way be confused with the judge's second function

question of fact to be decided by the jury,[32] while the former requires a determination of policy by the court.[33]

In the instant case, the court tried to reconcile the issue of causation with the fact that there was no direct contact.[34] This is an attempt to define the limits of liability—a policy consideration—in terms of proximate cause.[35] "The scope of the protection given by any rule must have a boundary; the risk under which a defendant is placed must have a limit."[36] Limitations of responsibility should be based upon considerations of policy and not facts of causation.[37] It is the writer's opinion that although the court began with the correct premise—that liability for non-bite damage was within the contemplation of the statute—it begged the question by deciding the case on the issue of proximate cause, rather than by making the outright policy statement that non-contact damage suffered in an attack by a dog is within the contemplation of the statute.[38]

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which comes into play when a judge refuses to submit a case to the jury because under the facts there can be only one reasonable inference drawn.

L. GREEN, RATIONALE at 69.

32. Berglund v. Hild, 135 A.52 (N.J. 1926).

33. Does the harm which plaintiff encountered fall within the limits of protection afforded by the rule of law upon which the plaintiff is relying? L. GREEN, RATIONALE at 11-34.

34. "[I]f the negligence element is properly solved in a case, the causal connection problem ordinarily gives little difficulty. It is usually so clear that it does not present an issue at all." Green, *Texas Decisions*, at 423, 444.

35. L. GREEN, RATIONALE at 37. *But see* II HARPER & JAMES, THE LAW OF TORTS 1132-34 (1956) and PROSSER at 282.

36. *Id.*

37. *See* Green, *Duties, Risks, Causation Doctrines*, 31 TEXAS L. REV. 42 (1962); *cf.* Green, *The Submission of Special Verdicts in Negligence Cases—A Critique of the Bug Bite Case*, 17 U. MIAMI L. REV. 469. *But* see II HARPER & JAMES, THE LAW OF TORTS 1132-34 (1956), PROSSER at 282.

38. By allowing the case to go to the jury, the court, in effect, made a policy determination as to duty.

> By virtue of the fact that the judge is the dominant factor of the dual tribunal set up for these cases, the moment a case is passed to the jury, that moment the judge has necessarily ruled that there is a duty upon the defendant, who will be held responsible if the jury concurs in the case as presented to them. . . . [I]f he consciously holds there is a duty he will submit the case to the jury on the negligence and other issues if there is any evidence raising them.

Green, *The Duty Problem in Negligence Cases*, 28 COL. L. REV. 1014, 1029-30 (1928).