

What You Should Know About Liability for Injuries Caused by Dogs at Home and at Large

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ABSTRACT

The law relating to liability of dogs for injuries to others has ancient origins in the law. The common law divided animals into two classes: “dangerous” and “harmless”. Dogs have been generally classified as harmless animals and in order for a person who kept a dog to be liable for any injury inflicted, the person needed to know from past conduct that the dog was likely to behave in a vicious way. As well as this action (known as scienter) for injuries caused by a harmless dog, the common law also allows for actions to be brought for negligence or nuisance for harm inflicted by a dog. Most states of Australia now have legislation relating to the ownership and control of dogs. Queensland is the only state that relies exclusively on the common law. In general terms the owner or person in control of the dog may be subject to both criminal and civil liability for any injuries that the dog inflicts. In New South Wales, however, liability does not extend to an injury suffered on land on which the dog is ordinarily kept. Both a comprehensive registration scheme for dogs and common rules for liability for injuries caused by dogs, whether on private or public land, would appear to be desirable.

INTRODUCTION

The Sydney Morning Herald of 16 July 1992 reported the following incident:

Boy, 5, to be scarred after dog attack

“Hoang Le of Glebe, planned to celebrate his 5th birthday on Tuesday by riding his pushbike with a few friends. Instead, the youngster spent the night undergoing facial surgery after being savaged by a crossbreed bull terrier-corgi in the afternoon. It was the third domestic dog attack on young children in New South Wales this month. Hoang needed 28 external stitches and a number of internal stitches after being bitten on the face by a dog, which had escaped through a neighbour's back fence about 4.00 pm.”

Mr Ian Scott, the Deputy Director of the Child Accident Prevention Foundation of Australia was reported to have said that “two to three small children present themselves to accident and emergency sections every day, many more go unreported.”

The Acting Manager of the Child Safety Centre at Camperdown, Ms Michelle Southsby, said the Centre received about 60 cases of dog attacks on children each year. In 75% of cases, the dog belonged to family or friends and most attacks occur in a child's home or in a neighbour's yard. Similar attacks by dogs on young children have received significant publicity around Australia during the last 12 months. In one attack a baby boy in Sydney died.

These incidents, especially those which have resulted in serious injuries, have generally led to suggestions that the current laws regulating dogs are inadequate. Thus, there have been:

- calls for stricter laws relating to the regulation of dogs
- proposals for harsher penalties on dog owners whose dog is responsible for attacking someone
- claims that certain breeds of dogs should not be permitted to be domestic pets (or even that they should not be permitted in Australia at all).

- There has also been widespread recognition that dog attacks on children generally lead to more serious injuries than attacks on adults and therefore, great care needs to be exercised when dogs are around young children. This paper examines the current legal regulation of dogs and focuses in particular on the legal liability of owners for their dogs.

LEGAL REGULATION OF DOGS

Dogs are regulated in many different ways. Local government by-laws often regulate the number and type of dogs which may be kept on domestic premises. There is legislation requiring dogs to be registered. The owner of a dog may commit an offence if the dog attacks or injures a person or animal. There is legislation to allow a person to recover damages for injuries suffered as a result of an attack by a dog. Compensation may be payable if a person's clothing is damaged as a result of an attack by a dog. A person may be sued under the law of nuisance or trespass for the behaviour of their dog. An owner of a dog may commit an offence if the dog fouls a footpath. Barking dogs may contravene noise pollution legislation or contravene health legislation. There is also legislation which prohibits cruelty to dogs (and other animals). Yet another form of regulation is the ban on the importation of certain breeds of dogs.¹ There are special laws and exemptions for guide dogs used by blind and deaf persons.

Despite such extensive regulation, questions continue to be asked whether the current laws relating to dogs are appropriate. Australia has a high level of ownership of dogs and there is general recognition of the beneficial effects for many people of keeping dogs as pets. Dogs are also specially trained to be used as watchdogs and for other security purposes. However, these personal and private interests must be balanced against the public interest in ensuring as far as possible that dogs do not cause harm or injury to others. If such harm or injury does result the issue to be resolved is what liability the owner or person in control of the dog should accept.

LEGAL LIABILITY FOR DOGS

Much of the law relating to the legal liability for dogs is contained in the common law, although in many Australian states this has been modified to some extent by statute. The New South Wales Law Reform Commission in its 1970 report, *Civil Liability for Animals*, set out the following overview of the law in this area:

“The law as to liability for damage done by animals is a potpourri of special rules of medieval origin. These special rules, for the most part, are such as to give rights of action which are additional to the rights of action which, in modern times, lie in respect of damage generally, that is, whether or not the damage was caused by an animal. A person who has suffered damage caused by an animal can frame his action for redress on modern principles - for example, in negligence; or he can frame it under the special rules which are peculiar to liability for damage done by animals; or he can, by including separate causes of action in the one proceeding, get the better of both worlds - modern and medieval.”²

THE COMMON LAW

The scienter principle³

According to the scienter principle, the owner of a dog was responsible for any damage caused by the animal, provided the animal belonged to a species or class which was known to be dangerous.⁴ Alternatively, for the owner to be liable it was necessary to show that the owner had previous knowledge of the animal's vicious nature even though the species was generally regarded as harmless.⁵ A person with a dangerous animal was liable without proof of scienter. However, dogs were generally regarded as “harmless animals” and scienter was required. It was necessary to prove that the owner knew from past conduct that the animal was likely to behave in a vicious way. It was not sufficient to show that the animal behaved in a way typical for its species. Proof of the behaviour of the particular animal was required.

Another element that is required to establish liability is that the animal's behaviour must be serious:

“A good natured but boisterous dog which frightens people and other animals by constantly bounding up to them may not be vicious, nor may the dog which displays ferocity when guarding the personal property of its owner. The accepted view seems to be that, in order to be proved vicious, the dog must be shown to have behaved in a way which is 'offensive or hostile to man, if not to beasts' “.⁶

If *scienter* is proven strict liability follows. Thus it is no defence for the owner to show that he or she has taken every care to avoid the harm, nor that harm resulted from the unforeseeable act of a third party. The harm must however be direct and physical.⁷

Negligence

A person injured by a dog may also bring an action based on the law of negligence. An action in negligence is available either as a complement to the *scienter* action or as a substitute for it; for example, where a *scienter* action is no longer available (eg NSW, SA and ACT). To prove negligence, there must be a special risk of injury to others. The general nature of the incident that occurred must also have been foreseeable.⁸

To establish a claim in negligence, there is no need to show past vicious behaviour by the particular dog, nor is there any need to show that the harm resulted from an attack or other vicious conduct of a type known to have occurred in the past,⁹ although such matters may be relevant to the court's assessment of the foreseeable risks involved in the dog's conduct.¹⁰

Occupier's liability

Occupier's liability is also relevant to the liability for dogs. Occupier's liability is concerned with “the duty owed by occupiers of premises towards visitors, whether invited or uninvited, whose presence is lawful or unlawful, who suffer injury during the course of their visit.”¹¹

The High Court of Australia in *Australian Safeway Stores v Zaluzna*¹² set out the principles to be applied in determining whether an occupier of premises owes a duty of care to a person coming onto land:

“All that is necessary is to determine whether, in all the relevant circumstances, including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A pre-requisite of any such duty is that there be the necessary degree of proximity of relationships. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member.”¹³

Nuisance

The law relating to nuisance may be divided into two parts: public nuisance and private nuisance. Obstruction of a public highway may constitute a public nuisance, for example, if an animal makes a highway dangerous to use. Public nuisance has limited application to injuries caused by dogs. An action for private nuisance would be available, for example, where there is a dispute between neighbours relating to noise, smell, disease or disorder caused by a dog.¹⁴ Currently however, the law relating to nuisance has limited utility in the context of this paper.

Trespass

The law relating to trespass has some application to the behaviour of dogs. Trespass involves the intentional infliction of harm on a person or an intentional and wrongful entry on to the property of another.¹⁵ Trespass to a person may arise in the situation where a dog is used as a guard dog. If a dog is incited by someone to attack someone else, this may constitute an assault and if the person is injured, a battery. Damages may be awarded for such a trespass.¹⁶ Such conduct may also constitute a criminal offence. In relation to trespass there is no requirement for the owner to have knowledge of the dog's previous viciousness. The owner of a dog may also be liable in trespass if he or she intentionally incites a dog to enter onto land belonging to another person. However if the dog wanders onto land accidentally or unintentionally an owner is entitled to recover it. If the dog causes any damage while on another person's land, the owner or occupier of the land is entitled to use appropriate measures to avert the danger either to himself or herself or to other animals on the land.¹⁷

STATUTE LAW

Much of the common law relating to injuries caused by dogs has been modified by legislation in all Australian states, except Queensland. This legislation specifies the liability of an owner, or person in control of a dog, for any damage it causes. For example, in New South Wales, the ownership and control of dogs has been regulated since 1830 when the Dog Nuisance Act was passed. The Dog Act 1966 sets out the current regulations relating to dogs.¹⁸ According to the New South Wales Law Reform Commission's report, Liability for Injuries Caused by Dogs:

“The aim of the 1966 Act was clearly to reduce the nuisance caused by the large numbers of stray dogs found in public places without impinging too much on the rights of responsible dog owners.”¹⁹

There was no requirement in the Act that a dog should be contained on private property and no provision was made for constraint of a dog whilst in public places apart from the special provision made for some species which were thought to be dangerous. The Act also imposed civil and criminal liability although these had existed in earlier legislation in New South Wales.

THE CURRENT LAW IN NEW SOUTH WALES

The liability for injuries caused by dogs is still a combination of common law and statute law in New South Wales. The main features of the current law are set out below:

Duty to contain and control ²⁰

- All dogs in New South Wales must be registered and must carry a registration disc on their collars. The owner of a dog commits an offence if the dog is not registered (Dog Act, s5).
- A dog must be contained on private property. It is an offence to allow a dog to wander the streets or to enter certain designated public places, such as schools, playing fields and swimming areas (Dog Act, s5, 8 and 9). Council officers are authorised to impound dogs that are unaccompanied (Dog Act, s10). Such dogs may be sold or destroyed by the council after seven days unless the name and address of an owner is on the dog's collar in which case the action to sell or destroy may only be taken after an owner has been given 14 days notice of the seizure.
- A dog in a public place must be kept under the “effective control of some competent person by means of an adequate chain, cord or leash” (Dog Act, s8).
- It is an offence if the owner of a dog allows it to defecate in a public place (Dog Act, s9B).

Liability for behaviour on public land

- The owner of a dog commits a criminal offence if the dog is allowed to attack or cause injury to a person or animal on public land or on land on which the dog is not ordinarily kept. It is significant that this provision is limited to public land and would not for example cover the situation where an attack occurs within the boundary of the property where the dog normally resides, or within the motor vehicle of the owner of the dog. The court has power to direct an owner to take such steps as it deems necessary to prevent a recurrence of the conduct or it may order the dog to be destroyed (Dog Act, s6(3)). The owner of the dog is not liable if the attack was an immediate response to, or wholly induced by the actions of someone other than the owner or of another animal (Dog Act, s6(2)).
- A person authorised by a local council may kill, remove or destroy any animal which is at large in any public place if in his or her opinion the animal is a danger to the public safety or is diseased or injured as to be past recovery (Local Government Act 1919, s300).
- The owner of a dog also attracts civil liability and damages may be recovered in respect of bodily injury to a person caused by the dog wounding that person ... in the course of attacking that person (Dog Act, s20). A person may also recover losses for damage to clothing caused by a dog during an attack. As with criminal liability, civil liability does not extend to an attack that occurs at the home of the dog nor if the attack is induced or intentionally provoked by another person (Dog Act, s20(2), s20B(2)). The amount of damages that may be reserved may also be reduced if there has been contributory negligence by the person injured (Dog Act, s20C).
- The common law of negligence and occupier's liability, nuisance, and trespass to the person are still available in New South Wales to compensate a person for injury and damage caused by a dog. Thus a person has the option of relying on these common law actions or relying on s20 of the Dog Act. Reliance on the common law creates the possibility of recovering a wider range of damages. Indirect or consequential damage may be recovered as well as the direct damage for the injuries.

Defences

As outlined above, it is a defence to both criminal and civil liability under the New South Wales Dog Act that the attack occurred on the land where the dog normally resides or if the attack is induced or intentionally provoked by another person. It would also be open to argue that the person injured has voluntarily assumed the risk of injury or been the author of his own harm. Damages would also be reduced if there has been contributory negligence. The fact that a person has entered land lawfully or is a trespasser does not affect liability under the Dog Act in New South Wales.

CURRENT LAW IN QUEENSLAND

There is no equivalent of the New South Wales Dog Act in Queensland. Thus the liability for an injury caused by a dog is governed by the common law. A person injured would therefore have to rely on the actions based on the old scienter principle and more modern law relating to negligence and occupier's liability, nuisance, and trespass.

SHORTCOMINGS WITH THE CURRENT LAW IN NEW SOUTH WALES

The current law in New South Wales has been criticised primarily on two grounds. First, if a person is injured on land belonging to the dog owner, no criminal offence is committed pursuant to the Dog Act 1966. Furthermore the civil liability of the dog owner would be limited to the law of negligence and occupier's liability. Persons who are required to enter private property as part of their employment (eg Telecom technician, Water Board meter reader) argue that the legislation does not provide them with sufficient protection. Secondly, a person injured by a dog, whether on private or on public land has only limited civil remedies available.

Clearly in determining what is appropriate in such situations, involves a balancing of competing interests. The owner of the dog has rights to privacy and in general terms to use private property as he or she sees fit. Against this, there is a general public interest in persons being able to enter private property without fear of harm.²¹ Under the law of occupier's liability a dog owner would need to be conscious of the danger offered by the dog to all persons who may be reasonably expected to enter the property.²² Thus, for example, the person responsible for reading meters for the Water Board should be able to enter private property to read the meter and the owner of a dangerous dog may be required to take precautions to ensure that this may occur in a safe manner. There is clearly no unrestricted right to have a watch dog. If a person keeps a dangerous or potentially dangerous dog on his or her property, then he or she may be liable for any injuries suffered by a person coming onto the property. An owner who wishes to exclude all uninvited guests may thus be required to appropriately fence the property so that persons such as children who are innocent trespassers entering the land do not suffer injuries.

Certain persons in the community have a right to enter private property which is given either by the common law or by statute. For example, members of the police force in pursuit of a criminal may enter private property. Members of the fire brigade are given statutory rights of entry to take possession of property after a fire has occurred. Other groups within the community have a need to enter private premises ie suppliers of gas, oil, water and electricity as well as postmen and process servers. This latter group will generally not have any statutory or direct legal authority to enter private property. While the law recognises a distinction between these two groups, the law does little to ensure that those with specific authority are able to exercise it in relative safety.

Persons with a lawful right of entry do have the right to defend themselves against injury by dogs. This right extends to inflicting such injury on the dog as is reasonably necessary in defence of themselves or their personal property. However the degree of force used must be in proportion to the harm apprehended. There is also a specific defence provided for in the *Dog Act* which allows a person to destroy a dog that “attacks or causes injury to any person or animal” (*Dog Act*, s13). Significantly, this provision does not extend to a dog which attacks or causes injury on land or premises occupied by the owner of the dog or on land on which the dog is ordinarily kept. Thus a lawful entrant using self defence would need to rely on common law rights rather than those provided for in the *Dog Act*.

The law does not provide any clear guidance on the balancing of interests between those of the dog owner and the person who enters private property. In general terms it may be argued that a person with a lawful right to enter land, (at least where the owner is made aware beforehand of the visitor), should be entitled to greater protection than a trespasser or uninvited caller. In relation to the latter group there may be some voluntary assumption of risk. If such persons were aware or made aware of the risks before they enter, it could be assumed that they should know to exercise care and use their discretion. If such persons enter and are injured, should they be able to argue self-defence when they knew the risk before they entered the property? This assumes of course that such a person is aware of the dangerous nature of a particular dog or the possibility of attack.

PROPOSALS FOR REFORM

The New South Wales Law Reform Commission in its report, *Liability for Injuries Caused by Dogs* (1988), made the following recommendations for change to the law in New South Wales:

- That the general law or any statutory scheme of occupier's liability substituted for it apply to harm caused by dogs on the owner's land.
- That those seeking lawful entry to private land for statutory purposes whose previous attempts have been thwarted because of actual or likely savage behaviour of a dog be able to apply to a magistrate for an order to assist their entry.
- That a new offence be created which would impose criminal liability for serious injury which the owner or person responsible for control of the dog foresaw would occur but against which no reasonable precautions were taken. Such a crime would be committed where it could be shown that the dog was savage and the owner encouraged or directed it to attack or where the owner did not exercise effective control over it although aware of its capacity to attack and cause injury. The crime could be committed on either public land or on the owner's land.

- Further, that a provision be inserted in the Dog Act which would allow a magistrate, upon complaint that a dog is dangerous and is not kept under proper control, to order the owner of the dog to keep it under control or ultimately to order that the dog be destroyed.

The Commission also recommended that all harm caused by a dog whilst outside its owner's property should attract strict civil liability. This report was completed in 1988 but none of the Commission's recommendations relating to liability for injuries have been implemented.²³ The Dog Act has been amended since that time but principally in relation to giving greater power to council officers to impose on the spot infringement notice for certain offences against the Dog Act. The main offences covered by such on the spot fines relate to the registration requirements, allowing a dog to be unleashed, and allowing a dog to be in a prohibited place.

Reforms in other jurisdictions

In England there have been a number of changes to the law in recent years. These changes have been stimulated by many of the same factors that have caused reassessment of the laws in Australia. The Dangerous Dogs Act of 1989 was passed as a result of extensive media coverage of a series of attacks on people by uncontrolled dogs. This Act, which amended the Dogs Act 1871, increases the power of a court to order destruction of a dog, imposes a much higher fine (up to £400) for failing to keep a dog under control and allows a court to disqualify a person from having custody of a dog if the person has failed to comply with an order made under the Dogs Act 1871 or where a court has issued a Destruction Order under that Act. More recently in 1991 the government announced that certain breeds of fighting dogs (pitbull terriers and tosas) would be prohibited in England. The RSPCA in England has suggested a national dog registration scheme. It has argued that a comprehensive national dog registration scheme would be more likely to protect both the public and their pets and reduce the number of animal cruelty cases currently dealt with by the courts.¹⁹

The RSPCA in Australia has also urged that tough dog control laws should be adopted nationally. Model legislation has been developed in Victoria with the co-operation of the RSPCA to impose rigid controls on dangerous dogs. Under the proposed legislation, the Companion Animals Bill 1991, there would be a comprehensive registration system for all companion animals, including cats and dogs, administered by local councils. Councils would have the power to require certain species of companion animals to be registered. Special registration provisions would apply to dangerous dogs. For example, a dangerous dog on its owner's premises would be required to be kept indoors or in an enclosure which was childproof and constructed so the dog cannot escape. The owner would be required to display a warning sign at all entrances to the premises if a dangerous dog was kept on the premises. Dangerous dogs would be required to wear a special identification collar. If a dangerous dog is taken off the owner's premises, it would be required to be muzzled and under the effective control of some person by means of a chain, cord or leash. These provisions would not prohibit the use of a guard dog provided the dog was guarding non-residential premises.

CONCLUSION

In general terms it can be said that the law imposes liability for injury caused by a dog both "at home and at large". In some states a criminal offence may be committed by the owner of a dog if the dog attacks someone. However, the primary liability is civil, that is, a person injured may bring an action for damages against the owner or person in control of a dog for any injury suffered as a result of an attack by a dog.

The trend in the law over the last 10 years is towards greater regulation of dogs. More stringent registration requirements are being imposed, penalties are being increased on dog owners for what might be called "anti-social" behaviour and the scope of civil liability for a dog owner is being expanded. There are no doubt many complex factors leading to these changes, including the increasing size and population densities of our cities, the increasing numbers of animals that are being kept as pets or companions and perhaps a greater community awareness of legal rights. It may be that there is now less tolerance of unsatisfactory behaviour by a dog. The role the media plays in this process should not be underestimated.

A comprehensive registration scheme for dogs is perhaps the most effective first step in dog regulation. Dogs that are allowed to roam free and which cause injury to innocent persons can be a significant problem. In legal terms unless an owner or controller of a dog can be identified it is impossible to impose any liability. Registration would help in achieving this. There is also clearly a need for dog owners to take responsibility for the actions of their dogs. This is especially so of dangerous dogs and the approach that is being taken in Victoria to impose special obligations on owners of dangerous dogs would appear to be justified.

Footnotes

- ¹ From 30 June 1992 the following dogs were exhibited from importation into Australia: dogo Argentino, fila Brasleiro, Japanese tosa and American pit bull terrier or pit bull terrier: Customs (Prohibited Imports) Regulations (Amendment) 1992.
- ² NSWLRC, Report on Civil Liability for Animals (LRC 8, 1970) para 5.
- ³ The word scienter derives from Latin and refers to the fact that the relevant act has been done knowingly or wilfully.
- ⁴ G Williams, *Liability for Animals* (1939) 293. These animals were referred to as *ferae naturae*.
- ⁵ Referred to as *mansuetae naturae*.
- ⁶ LRC 52, at 21.
- ⁷ *Behrens v Bertrams Mills Circus Ltd* [1957] 2 QB 1.
- ⁸ *Johnston v Frazer* (1990) 21 NSWLR 89; *Hanson v Matthew Bros Contractors Ltd* (1990) 55 SASR 183. Courts in Australia in recent years have held that all negligence cases are to be approached on the basis of a generalised duty of care without seeking to formulate precise and different rules of care for different categories of relationships.
- ⁹ *Draper v Hodder* [1972] 2 QB 556(CA)
- ¹⁰ *Ellis v Johnstone* [1963] 2 QB 8
- ¹¹ R P Balkin and JLR Davis, *Law of Torts* (Butterworths, 1991) at 240.
- ¹² (1987) 162 CLR 479
- ¹³ *id*, 488
- ¹⁴ The New South Wales Law Reform Commission currently has a project on Neighbour and Neighbour Relations which contains some discussion of the issues which lead to disputes between neighbours: NSWLRC Neighbour and Neighbour Relations DP 21, 1991.
- ¹⁵ JG Fleming, *The Law of Torts* (Law Book Co, 1987) 17-21, 328.
- ¹⁶ Fleming, 335.
- ¹⁷ Fleming, 335-336.
- ¹⁸ This Act has been amended several times since 1966. The most recent major amendment being the Dog Amendment Act 1988.
- ¹⁹ LRC 52 para 2.19.
- ²⁰ For further details see LRC 52, Ch3.
- ²¹ Animals Act 1977, s8.
- ²² *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 61 ALJR 180
- ²³ The Commission's Report is currently under consideration by the Government in NSW.

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