Osgoode Hall Law Journal

Volume 3, Number 2 (April 1965)

Article 44

Caine Fur Farms Ltd. V. Kokolsky, [1963] S.C.R. 315

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Caine Fur Farms Ltd. v. Kokolsky, [1963] S.C.R. 315.

What is the liability of a dog owner for damage done by his dog when it is allowed to run free?

This issue was raised before the Supreme Court of Canada in the recently-decided case of *Caine Fur Farms Limited v. Kokolsky.*[1] The case involved the owners of two adjoining mink farms. The defendant, Caine Fur Farms Ltd., in contravention of a provincial statute and a municipal by-law, had allowed its dog to run at large during the whelping season, a time when female mink are easily agitated and if upset have a tendency to destroy their young. The dog got into plaintiff's compound and climbed on the tops of mink cages, causing the mink to destroy a large number of their young.

It was argued on behalf of the defendant that as the dog was a domestic animal, liability for damages caused by it could only arise if *scienter* were proved. Furthermore it was argued that, since dogs do not by the common law make their owners strictly liable for trespass, in the present case the defendant could not be held liable for the damage resulting from the dog's trespass.

The Court had little difficulty in dealing with these arguments. Relying on two cases, *Farden v. Harcourt-Rivington,*[2] a House of Lords decision, and *Fleming v. Atkinson,*[3] a decision of the Supreme Court of Canada, it reaffirmed the principle that, in dealing with cases of animal damage and animal trespass, negligence was a completely separate cause of action, to which the ordinary defences of the common law relating to animal damage and animal trespass did not apply. From this point the Court had no difficulty in finding that, in the circumstances, between the two mink farmers, there was a duty to keep the dog restrained, since the presence of a strange dog might agitate the mink. Letting the dog run at large is a breach of duty and the defendant is liable for the resulting damage.

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1 [1963] S.C.R. 315.
2 (1932) 146 L.T. 391.
3 [1959] S.C.R. 513.

Of special interest in the case was the part played by a provincial statute[4] requiring owners of dogs not to let their dogs run free during that particular period of time, and a by-law[5] covering the particular area, requiring dogs to be kept under restraint at all times. Counsel for the plaintiff had argued that these legislative enactments established an absolute statutory liability which would entitle one damaged by their breach to succeed in a claim for damages i.e. the legislation provided a separate cause of action. The Court did not find it necessary to determine this, and it is submitted that, according to the principles laid down in the case of *Commerford v. Board of School Commissioners of Halifax*,[6] a decision of the Supreme Court of Nova Scotia, this would have been difficult to establish.

But that the legislation had some effect was evident from the reasoning of Martland J.[7] He concluded that the legislation answered the contention made for the defendant that, under the common law, the owner of a dog could not be held liable for negligence for letting his dog run free. For this principle the plaintiff relied on the case of *Buckle v. Holmes*.[8] The Court had already pointed out that, though *Buckle v. Holmes* decided that dogs were a class of animal which did not by their trespass make their owners strictly liable, *Farden v. Harcourt-Rivington* decided that negligence was a supervening and separate cause of action. So it is obvious that, even if the legislation were not in force, the Court was prepared to hold that in the circumstances of this case, there was liability for negligence. Yet Martland J. concluded that the *legislation* answered the defendant's contention that by the common law the owner of a dog could not be held liable for letting his dog run free.

It is submitted that, from this reasoning, and from the similar reasoning of the Supreme Court of Canada in the case of *Fleming v. Atkinson*,[9] courts in this country are prepared to act as if the common law of England regarding animal trespass and animal damage had been changed by Canadian conditions and legislation. In *Fleming v. Atkinson*, plaintiff automobile driver was injured when his car struck and killed two cows of a herd which had been left grazing unattended on the highway. The Court held as in the *Caine* case, that there was negligence which superseded any defence based on the common law absence of duty to act to prevent the escape of animals onto the highway and absence of duty towards persons using that highway. The Court was astute to point out that differences in Canadian conditions rendered the English common law rules irrelevant in this respect.

Apparently there is a trend in these decisions to weaken the common law rules, and then act as if superseding negligence overrules

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4 The Game Act, R.S.A., 1955, c. 126, s. 44.
5 By-law No. 205 of The Municipal District of Strathcona.
6 [1950] 2 D.L.R. 207.
7 *Supra*, footnote 1, at p. 318.
8 [1926] 2 K.B. 125.
9 *Supra*, footnote 2.

their application anyway. However, it is germane to point out that there are two directions the courts can take at this juncture. One is to continue as they have, to resolve the cases in terms of negligence acting as if the negligence is something separate—and, as will hereafter be suggested, this is not wholly true; the other is to come right out and say that the common law position has been changed, and the basis of liability is different from what it was under the common law.

If the courts continue to follow the first course, it should be pointed out that they cannot help incorporating changes in the common law into their deliberations on negligence. It is clear that certain value judgments lie below the surface of the expression "breach of a duty of care." When it is said that a man has broken his duty of care what is meant is not only that he must be taken to have realized that his act or omission was likely to damage some other, but as well that there is a clash between two spheres—the freedom of action that the law allows him, and the things he cannot do lest he damage others. The greater the one sphere, the lesser the other. In the *Caine* case, the Court took into account the fact that the law, didn't permit the defendant to let his dog run free, in deciding that he had broken his duty of care. If the law had permitted him to let his dog run free, it would have been more difficult to find him guilty of breaking his duty of care. Behind the change in the law, prima facie external to the duty of care, but plainly, on closer examination, germane to it, are the thousand changing social conditions that link the two up.

Suppose, however, that the courts were to take the other course open to them—that of deciding that the common law position has been changed. In the *Caine* case, Martland J. did not find it necessary to determine whether or not an absolute *statutory* liability was imposed on the defendant, but it is submitted that, if the common law rule has changed, then an absolute *common law* liability could have been imposed on the defendant, so that he could be held strictly liable for trespass by a dog just as for a cow or a horse.

This has interesting implications assuming that most urban areas in this country have legislation in force imposing restraint on dogs, and that for these areas the courts would decide that the new common law rule applied, any person who suffered minor damage from a stray dog, such as injury to lawns and uprooting of flower beds could sue the owner of the dog for damages. This raises the perennial problem of the possibility of a "flood of litigation" and this might be one reason not to decide that the common law has been changed. Another possibility is that families in urban areas might decide that it was too much trouble to keep dogs, and the number of dogs in urban areas would decrease. This might be interpreted as good or bad, depending on the interpreter's feelings toward dogs.

If the common law rule is taken to have been changed, the problems of the person injured by a dog are not by any means over. Dicta in the *Buckle v. Holmes case*[10] indicated that, where an animal owner *is* liable for trespasses, it may be material to consider whether the damage it does is the result of a normal propensity. For damage done by the dog the Court in that case held, the owner is liable; but for damage resulting from an abnormal propensity not known to him, he is not liable. Thus, in a situation where a dog has caused real and extensive damage, the person damaged might prefer to rely on negligence which gives him a broader ability to claim for damages, than the strict liability for animal trespass.

It is submitted that the course the courts have been following is a preferable one to the alternative suggested. It is open to the courts to decide that legislation like the statute and the by-law in the *Caine* case only affects the individual's liability to the state, and leave the rights of the person damaged to what they were at common law. The law of negligence is the modern approach to the problem, and should be adopted, rather than retreating to old rules of strict liability, and as has been illustrated, the "negligence" approach leaves the courts free to take into account local legislation and conditions and extensive damage, as well as leaving them free to assess fault in the animal owner. B.I.M.A.