DOG OWNERS' LIABILITY: STATUTORY EFFECTS

AT COMMON LAW, one who keeps a dog which he knows to be vicious does so at his peril.[1] But the law has traditionally recognized two defenses based on the nature of the injured party's conduct:[2] reckless or unreasonable assumption of risk and wilful provocation.[3] Thus, one who, with notice of the dangerous propensity of a dog, voluntarily and unnecessarily puts himself in the way of the animal is said to have assumed the risk and must bear the consequences. Recovery is similarly denied one who provokes attack by wilfully teasing or abusing a dog. On the other hand, contributing conduct which amounts to mere carelessness or inadvertence is not recognized as a defense.[4]

A number of states[5] have enacted statutes making the owner liable for harms inflicted by his dog, irrespective of whether the animal had previously manifested a vicious disposition and whether the owner had notice thereof. The apparent purpose of these so-called "dog-bite"

[1] "The gist of an action for damages by a vicious dog, whose propensities are known, is not negligence in the manner of keeping the dog; it is keeping the dog at all . . . ." Hunt v. Hazen, 197 Ore. 637, 639, 254 P.2d 210, 211 (1953). See 2 HARPER & JAMES, TORTS 833 (1956); PROSSER, TORTS 324-25 (2d ed. 1955).

[2] At common law the mere fact that the plaintiff is a trespasser at the time of being bitten by a vicious dog is no defense in an action against the owner. Eberling v. Mutillod, 90 N.J.L. 478, 101 Atl. 519 (1917); Sherfey v. Bartley, 36 Tenn. 21 (1856); Brewer v. Furtwangler, 171 Wash. 617, 18 P.2d 837 (1933). *But see*, Conway v. Grant, 88 Ga. 40, 13 S.E. 803 (1891); Loomis v. Terry, 17 Wend. 496 (N.Y. 1837).

[3] Burke v. Fischer, 298 Ky. 157, 182 S.W.2d 638 (1944); Sandy v. Bushey, 124 Me. 320, 128 Atl. 513 (1925); Muller v. McKesson, 73 N.Y. 195 (1878); Brown v. Barber, 26 Tenn. App. 534, 174 S.W.2d 298 (1943).

[4] Thus, provocation caused by a mere accident, as stepping upon the dog's tail or negligence in playing with the dog, will not bar recovery. Kelley v. Killourey, 81 Conn. 320, 70 Atl. 1031 (1908). It is commonly said that ordinary contributory negligence is not a defense because the defendant's liability is not based on negligence. See note 1 *supra*; Sandy v. Bushey, *supra* note 3.

[5] ALA. CODE tit. 3, § 102 (Supp. 1953); ARIZ. REV. STAT. ANN. § 24-521 (1956); CAL. CIV. CODE § 3342; CONN. GEN. STAT. § 22-357 (1958); FLA. STAT. ANN. § 767.04 (Supp. 1958); ILL. ANN. STAT. ch. 8, § 12d (Smith-Hurd, Supp. 1958); IND. ANN. STAT. § 16-214 (Supp. 1957); IOWA CODE ANN. § 351.28 (1949); MASS. ANN. LAWS ch. 140, § 155 (1957); MICH. COMP. LAWS § 287.351 (1948); MINN. STAT. ANN. § 347.22 (1957); MONT. REV. CODE ANN. § 17-409 (1955); NEB. REV. STAT. § 54-601 (1952); N.H. REV. STAT. ANN. § 466:19 (1955); N.J. STAT. ANN. § 4:19-16 (1939); OHIO REV. CODE ANN. § 955.28 (Page 1954); OKLA. STAT. ANN. tit. 4, § 42.1 (1951); R.I. GEN. LAWS ANN. ch. 4, § 13-16 (1956); UTAH CODE ANN. § 18-1-1 (1953); W. VA. CODE ANN. § 2152 (1955); WIS. STAT. § 174.02 (1955).

statutes is merely to abrogate the common-law scienter doctrine,[6] which often imposed upon the injured person a burden of proof tending unduly to restrict recovery. Even where the owner has no notice of his dog's vicious propensity, if the injured person's conduct is not of a nature which would have afforded the owner a defense at common law, it is considered just that any loss fall upon the owner.[7]

Many of these "dog-bite" statutes are so worded as not only to abolish the requirement of scienter, but also ostensibly to deny[8] certain common-law defenses. Yet, none of the statutes expressly abrogate these defenses, and there is discernible in the decisions a reluctance to abandon them, a reluctance to hold an owner indiscriminately liable for injuries caused by his dog.[9]

In the recent case of *Gomes v. Byrne*,[10] arising under the California statute,[11] the plaintiff, a door-to-door salesman, was bitten as he entered the gate of the defendant's fence-enclosed yard. The defendant's dog, of a diminutive variety, had followed along the inside of the fence, barking continuously, as the plaintiff walked along outside. The Supreme Court of California affirmed a judgment for the defendant, invoking the theory of assumption of risk. The majority did not feel it was necessary to pass upon the trial court's holding that contributory negligence was a defense under the statute.[12]

The California statute provides that an owner shall be liable "for damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place . . . regardless of the former

[6] Granniss v. Weber, 107 Conn. 622, 625, 141 Atl. 877, 878 (1928); Wojewoda v. Rybarczyk, 246 Mich. 641, 642, 225 N.W. 555 (1929).

[7] Granniss v. Weber, *supra* note 6.

[8] Many statutes explicitly provide one of the common law defenses, thereby impliedly excluding any other defense if the doctrine of *inclusio unius est exclusio alterius* is deemed applicable. See note 16 *infra*.

[9] See, *e.g.*, Gagnon v. Frank, 83 N.H. 122, 139 Atl. 373 (1927); Schraeder v. Koopman, 190 Wis. 459, 209 N.W. 714 (1926).

[10] 333 P.2d 754 (Cal. 1959).

[11] CAL. CIV. CODE § 3342.

[12] The trial court denied recovery on the grounds that "(1) plaintiff was not a business visitor or invitee on the premises; (2) that plaintiff was negligent in entering defendant's premises; and (3) that plaintiff assumed the risk." 333 P.2d at 755. The majority in the California Supreme Court said, "Since we have concluded that the record sustains the finding that plaintiff assumed the risk, it is unnecessary to consider his contention that . . . contributory negligence is not a bar to recovery under the Dog Bite Statute." *Ibid.*

The dissenters did not regard the plaintiff's conduct as amounting to assumption of risk, and asserted that "ordinary contributory negligence is not a defense to liability under Civil Code section 3342." *Id* at 756.

viciousness of the dog or the owner's knowledge of such viciousness." While such terms arguably manifest legislative intent to impose liability in all cases except where the injured person is a trespasser, the lower California courts[13] have observed a less rigid policy toward owners' liability. Thus, in *Smythe v. Schacht*,[14] decided under the same statute, the court expressly denied that the legislature intended to make the owner's liability "absolute" and thereby "render inoperative certain principles of law such as assumption of risk or wilfully inviting injury, which over a long period of time have been established in our system of jurisprudence."[15]

Statutes in a large number of the states expressly recognize two defenses, wilful provocation and trespass,[16] and it is reasonably certain that the defense of reckless assumption of the risk[17] will be judicially retained. In states where statutes have not expressly retained the common-law defense of wilful provocation, the courts have usually given it effect in actions brought under the statutes.[18] In fact, as previously stated, no statute has directly abrogated the standard defenses based on the nature of the injured party's conduct, and only in Ohio[19] have all defenses not expressly retained been deemed abrogated. Thus, the instant case comports with the general policy manifest in other states, in that all the judges recognize assumption of risk as a defense under the statute, despite the literal language of the California law.

Beneath this general attitude of practical liberalism toward recovery, however, there has been a somewhat uneven application of the law.

[13] See, *e.g.*, Elsworth v. Elite Dry Cleaners, Dyers and Laundry, 127 Cal. App. 2d 479, 274 P.2d 17 (Dist Ct. App. 1954); Smythe v. Schacht, 93 Cal. App. 2d 315, 209 P.2d 114 (Dist. Ct. App. 1949).

[14] *Supra* note 13. This case was cited by the dissenters in the instant case.

[15] *Id.* at 321, 209 P.2d at 118.

[16] Arizona, Connecticut, Florida, Illinois, Massachusetts, Michigan, Minnesota, Montana, Ohio, and Oklahoma have provided both defenses. Alabama and Indiana have retained "wilful provocation," and Nebraska, New Hampshire, and New Jersey have made "trespass" a defense. In addition, Connectitcut, Massachusetts, and New Hampshire have barred recovery to one injured while "committing a tort." In Iowa, a plaintiff is barred if he was "doing an unlawful act directly contributing to said injury." See note 5 *supra*.

[17] See Vandercar v. David, 96 So. 2d 227 (Fla. Dist. Ct. App. 1957); Raymond v. Hodgson, 161 Mass. 184, 36 N.E. 791 (1894); Wojewoda v. Rybarczyk, 246 Mich. 641, 225 N.W. 555 (1929); Lavalle v. Kaupp, 240 Minn. 360, 61 N.W.2d 228 (1953); Legault v. Malacher, 166 Wis. 58, 163 N.W. 476 (1917).

[18] See, *e.g.*, Gagnon v. Frank, 83 N.H. 122, 139 Atl. 373 (1927); Legault v. Malacher, *supra* note 17.

[19] See Dragonette v. Brandes, 135 Ohio St. 223, 20 N.E.2d 367 (1939).

At least in one state[20] the courts have taken the statutory language literally and have emphatically refused to place any restrictions whatsoever on the owner's liability. At the other extreme, there are courts[21] which have interpreted the general erosion of statutory language by judicial decision as granting them license to impose liability even more sparingly than under common-law rules. Thus, the aggregate effect of these statutes has been to create an unsettled state of affairs in the law.

It is submitted that, of several judicial attitudes, the position assumed by the courts of Minnesota[22] effectuates the most desirable policy. In that state *every* dog owner is placed in the same position as one who under the common law knowingly keeps a vicious dog. Accordingly, it is understood that the owner may avail himself of the traditional common-law defenses of assumption of risk and wilful provocation as well as any other defenses expressly provided by the legislature. Since this seems consonant with the intention of the several legislatures, it is unfortunate that the legislatures did not specifically spell out this intention and thus avoid the confusion which has marked judicial application of the "dog-bite" statutes.

[20] See, *e.g.*, Dragonette v. Brandes, *supra* note 19; Hill v. Skinner, 81 Ohio App. 375, 79 N.E.2d 787 (1947); Siegfried v. Everhart, 55 Ohio App. 351, 9 N.E.2d 891 (1936).

[21] See, *e.g.*, Raymond v. Hodgson, 161 Mass. 184, 36 N.E. 791 (1894); Gagnon v. Frank, 83 N.H. 122, 139 Atl. 373 (1927); Schraeder v. Koopman, 190 Wis. 459, 209 N.W. 714 (1926).

[22] See, *e.g.*, Lavalle v. Kaupp, 240 Minn. 360, 61 N.W.2d 228 (1953).