IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

SHARON KINLEY,	:	NO. 03-01,239
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
SHARON BIERLY and DAVID SCHON,	:	
Defendants	:	Motion for Summary Judgment

OPINION AND ORDER

Before the Court are two motions for Summary Judgment, filed by Defendant Bierly on August 16, 2004, and by Defendant Schon, also on August 16, 2004. Argument was heard October 4, 2004.

Plaintiff and Defendant Bierly both owned horses and were boarding them on Defendant Schon's premises. Plaintiff was bitten by Defendant Bierly's horse, Dollar, as she was feeding both horses in a stall in Defendant Schon's barn, and has filed a Complaint alleging negligence against both defendants. In their motions for summary judgment both defendants contend Plaintiff has failed to produce evidence of a material fact essential to her cause of action, that is, that Dollar had vicious propensities known to defendants.

The basis for liability in an action such as this can be gleaned from the Supreme Court's examination of the cases preceding its ruling in Andrews v. Smith, 188 A. 146 (Pa. 1936):[1]

> That "the gist of the action for the subsequent misconduct of the dog, is for keeping it [where it may have an opportunity to injure persons] after knowledge of its vicious propensity," as set forth in Mann v. Weiand (supra), is the rule in England and in many other jurisdictions as well as in Pennsylvania, is evidenced by an examination of the cases. See May v. Burdett, 9 Q.B. 101, 115 English Reprints (44 King's Bench Division) 1213; Wheeler v. Brant, 23 Barb. (N.Y.) 324, and Kittredge v. Elliott, 16 N.H. 77.
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> In the first named case (which was a cause of action brought by plaintiff for injuries resulting from an attack by a monkey kept by defendants), Lord DENMAN, delivering the judgment of the court, said: "The conclusion to

[1] The ruling of Andrews v. Smith was relied upon by the Superior Court as recently as 1992, in Deardorff v. Burger, 606 A.2d 489 (Pa. Super. 1992).

be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed, without express averment. The precedents as well as the authorities fully warrant this conclusion. The negligence is in keeping such an animal after notice." In 1 Vin. Abr. 234, tit. Actions [Mischief by dogs, etc.] (H), pl. 3, it is said: "If a man has a dog that kills sheep, the master of the dog being ignorant of such quality, the master shall not be punished for this killing, but if he has notice of such quality, it is otherwise." Declarations averring misconduct in the keeping of a horse, a dog, or a bull, but omitting the scienter, have been held insufficient: Scetchet v. Eltham (Freem. K.B. 534); Mason v. Keeling (12 Mod. 332; 1 Ld. Ray. 606); Bayntine v. Sharp, 1 Lutw. 90.

In Cockerham v. Nixon, 33 N.C. 269, the rule is stated thus: "As soon as the owner knows or has good reason to believe that the animal is likely to do mischief, he must take care of him; it makes no difference whether this ground of suspicion arises from one act or from repeated acts. The only restriction is that the act done must be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of."

The minority judge in his dissenting opinion said that the "maxim that 'every dog is entitled to his first bite' is not supportable in law or justice." With this we agree. We do not understand that this maxim has ever found acceptance in the courts of this Commonwealth. A dog may show ferocious propensities without biting anyone and if he does so, it is his master's duty to see to it that he is not afforded an opportunity to take a "first bite." The theory upon which courts have so long ruled that liability for damages cannot be fastened upon the owner of a dog when that dog has bitten someone unless the owner knew of the dog's vicious propensities, is that it would be unfair to hold the owners of domestic animals that are normally harmless responsible for the vicious acts of these animals unless they were put on notice that the animal was vicious. In so holding, the courts have merely applied the principle that no man is responsible for injuries caused by his property unless he himself was guilty of negligence in his manner of controlling or not controlling that property. A tree in a yard might be blown over by the wind and injure a passer-by. The owner of that tree would not be liable unless he had actual or constructive notice that the tree was in such a physical condition as not to be able to withstand the force of any wind which would be likely to blow in that vicinity, i.e., that it had a "propensity" to fall. It is, of course, an owner's duty to ascertain so far as it is practicable to do so whether a tree or any other property of his has become a menace, and, if it appears so to be, to take proper steps to eliminate its menace, but

> mere ownership alone of inherently and apparently harmless property does not carry with it liability for damages for an injury of which that property was the instrumentality. If a man kept a tiger or a venomous reptile on his premises and this animal or reptile inflicted injury upon another, the owner would be clearly liable because he would be chargeable with knowledge based upon the character of the animal or reptile that what actually happened was likely to happen. A decayed tree, or loose stones in or on a wall where they may fall, are obvious menaces to persons in their vicinity. (See Pope v. Reading Co., 304 Pa. 326, 334, 156 A. 106.) Animals such as horses, oxen and dogs are not beasts that are ferae natura, i.e., wild beasts, but are classed as mansuetae natura, i.e., tamed and domesticated animals, and their owners are not responsible for any vicious acts of theirs unless the owners have knowledge that they are likely to break away from their normal domestic nature and become vicious. Of all animals, dogs have probably been the longest domesticated and the vast majority of them can be allowed their freedom without imperiling the public safety.

Id. at 146-147 (emphasis added). Clearly, in order to establish defendants' liability, Plaintiff must prove that Dollar had vicious propensities and that defendants had knowledge of such.

Plaintiff contends she will be able to prove such through the testimony of her expert witness who will opine that Dollar was a stallion and that stallions are unpredictable. Plaintiff thus seeks to "charge" defendants with knowledge "based upon the character of the animal", but it appears from Andrews, supra, that such is proper only in the case of wild animals, and that horses have been determined to fall within the class of tamed and domesticated animals, owners of which "are not responsible for any vicious acts of theirs unless the owners have knowledge that they are likely to break away from their normal domestic nature and become vicious." Clearly, the focus in the case of a domesticated animal such as a horse, is on the previous behavior of the particular animal, not any reputation which may have been attributed to a particular group.[2]

[2] While Plaintiffs cite McIlvaine v. Lantz, 100 Pa. 586 (1882), for the proposition that stallions are known, as a class, to have vicious propensities and thus are removed from the general rule applicable to domestic animals, based on that Court's statement that "[t]he well-known habits and natural inclination of stallions, require a degree of precaution which the owner did not exercise", the Court does not read that case so broadly. In McIlvaine a stallion had jumped a fence and while on the road, led to the injury of a woman when she fell from her carriage as she attempted to get down from it in order to chase the stallion away. The Court was referring to the fact the stallion had jumped the fence which was alleged by the defendant to have been "common among farmers, and usually considered safe" and found no error in the trial court's leaving for the jury the question of whether the fence was "sufficient and safe for keeping in such animals as the stallion." The Court also noted the testimony of

Plaintiff does not claim to have any evidence of any prior act of Dollar which would support a finding that defendants had knowledge that Dollar had vicious propensities. Without such evidence, Plaintiff cannot prove a material fact essential to her claim and summary judgment in defendants' favor is appropriate.

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an uncontradicted witness that he saw the same horse at large on the public highway approximately a month prior to the incident in question and that on the date in question, two men in the defendant's employ saw the horse break from the yard, yet it was allowed to remain in the public highway for approximately five hours before the incident. With this evidence of the defendant's prior notice of his horse's propensity to jump the fence, the Court is reluctant to interpret McIlvaine to create an exception to the general rule, especially in light of the fact no other court has taken the opportunity to do so even though there are admittedly many types of domesticated animals which could be said to be known, as a class, to have certain propensities (such as pit bulls, for example).

ORDER

And now, this 5th day of October 2004, for the foregoing reasons, Defendants' Motions for Summary Judgment are hereby granted and judgment is hereby entered in favor of Defendants and against Plaintiff.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Christian Frey, Esq.
Michael Zicolello, Esq.
David Lingenfelter, Esq.
Gary Weber, Esq.