Inadequacy of the provisions of the *Domestic Animals Act 1994* (Vic) in relation to dog attacks

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Introduction

In Victoria, for victims of dog attacks bringing claims for common law damages, they generally must establish:

- scienter – that the dog was of a naturally vicious breed; or had a known propensity to be vicious or mischievous and, in essence, had previously attacked or injured someone in circumstances like the incident now sued upon. This is called a claim in scienter, the word relating to knowledge (knowledge of a likelihood to injure someone before injuring the plaintiff).
- negligence – that there was negligence on the owner or the person in control of the dog at the time of the incident.

Under section 29 of the *Domestic Animals Act 1994* (Vic), there is a limited regime for compensation in a criminal Court, following a successful prosecution of an owner or person in control of a dog who has attacked someone, but that rarely assists an injured plaintiff as these claims are frequently overlooked when prosecuting persons under the provisions, if a prosecution occurs at all. Moreover, compensation in usually inadequate when one is awarded the same.

In most Australia jurisdictions, a scienter claim is but an anachronism, such has been the rise of statutory reform. Not so in Victoria.

Indeed, the law in relation to compensation for victims of dog attacks and other injuries caused by dogs, as it stands in Victoria, is anomalous. It needs to be brought up to date.

As was observed by Bell J in *Johnson v Buchanan* [2012] VSC 195 at [42]:

> "*Victoria never has had, and does not have, legislation creating a general right to recover compensation for damage caused by dog attack or provisions abolishing the need to prove the owner's knowledge of the mischievous propensity of the dog for the purposes of an action for damages at common law based on the doctrine of scienter, unlike most other jurisdictions . . .. Victoria had and has provisions conferring a power on the court*

in criminal complaint proceedings under the legislation to award such compensation. It had, but no longer has, any provision abolishing the need to prove the owner's knowledge of the dog's mischievous propensity in such a proceeding. It never had and does not have legislation cutting down or qualifying the common law of negligence or trespass or the doctrine of scienter in relation to dog attacks."

As will be seen from a review of the law in other States, reforms in Victoria would not only simplify the law, but at the same time make it more just and harmonious with other Australian jurisdictions.

Proposed reforms

Like other jurisdictions, we submit that, if a dog attacks a person, the law should be strict – the owner or person in control of the dog ought to be liable, unless a statutory defence applies e.g. provocation of the dog.

A plaintiff should not be having to get into the mind of the dog to work out what went wrong for it to attack a person or try to prove what the dog was like before the incident in circumstances where the plaintiff would often know little or nothing about the dog who harmed them.

Ancient thresholds imposed upon injured plaintiffs in this area, under the principles of scienter, cause unreasonably high burdens and need to be removed by way of statutory reform.

Nor should a victim have to try to sheet home a dog's behaviour to its owner or the person in charge of the dog at the time of the incident by proving negligence. Dogs act spontaneously. They might lash out unexpectedly. They cannot always be kept under lock and key. They are born to run and jump and play and sometimes be aggressive to strangers. Sheeting home negligence in such circumstances is no easy task.

Insurance is widely available for dog owners to cover incidents involving dogs, including home and contents policies. Responsible owners ought to take out such insurance, given the risks involved with dogs injuring others, like they do to cover their own dog's health needs.

In these circumstances, strict liability is appropriate.

Jolly v Kondos

The need for legislative reform is illustrated by the case of *Jolly v Kondos* [2021] VCC 1397. Here, the plaintiff had been seriously injured when knocked over from behind by a dog at an off-lead dog park, bringing a damages claim for her injuries based upon firstly the principles of "scienter", that is the knowledge of the vicious propensities and/or mischievous tendencies of the dog, such that the defendant, the owner of the dog, would be strictly liable for damages for injury and secondly in negligence, that the defendant owner failed to exercise control over the dog.

The defendant denied that the dog had previously displayed the requisite vicious propensities and/or mischievous tendencies prior to the incident in question.

One immediately apparent difficulty in this claim, and others like it, is that the plaintiff in such a situation will rarely be in a position to prove the propensities of the dog, as often they have not come across the dog before. In this case, some evidence was called about the past bad behaviour of the dog, including scratching and bruising someone and attacking another dog, after extensive searching for relevant witnesses. That evidence indicated behavioural issues with the dog, but not behaviour of a similar kind to the Plaintiff being knocked by the dog from behind. Scienter therefore imposed a high bar indeed too high a bar for the Plaintiff. This claim failed.

As to negligence, the dog was running in an off-lead dog park, which was the very purpose of the dog park, and although the owner was not with the dog at the time, there was no evidence that she expected it to act in the way that it did at the time of the incident, such that she ought to have taken some steps to prevent the incident. Past poor behaviour of the dog was found to be irrelevant to the incident.

The Victorian regime, therefore, can be said to have a 'gap' in the law that other jurisdictions have seen fit to fill. It has the effect of absolving the owner of a dog which causes harm, injury, loss and damage, in most circumstances. As a matter of practicality, where a claim will not succeed under the principles or scienter or negligence, to succeed in a claim of this type, one must fall within the scope of the criminal offences set out in section 29 of the *Domestic Animals Act 1994* (Vic), and rely upon the relevant local government taking the steps to engage in the

prosecution and then afford the victim an opportunity to seek compensation under that prosecution. In our experience, that rarely happens and, when it does, compensation is generally inadequate.

The Position in other states

New South Wales

The New South Wales legislation, the *Companion Animals Act 1998* (NSW), regulates the area of dog attacks in sections 25 to 28. These provisions provide that the owner of a dog is liable in damages for both 'bodily injury' and 'damage to personal property'. In other words, the law of strict liability applies, with limited statutory defences available.

Exceptions are provided where the attack occurs on the owner's land or vehicle and the victim was not lawfully on the property or vehicle, that is, in a guard dog scenario, and where the attack from the dog was intentionally provoked.

Section 26 has the effect that liability continues notwithstanding the death of the victim. Section 27 provides that the owner of a dog is liable also for death or injury to another animal (excluding vermin). Section 28 applies the principles of contributory negligence to such claims.

South Australia

In South Australia, the *Dog and Cat Management Act 1995* (SA), provides for the liability in relation to dog attacks, principally in section 66.

The provision is straightforward. Subsection (1) provides as follows:

> "The keeper of a dog is liable in tort for injury, damage or loss caused by the dog."

Proof of knowledge of the animal's "vicious, dangerous, or mischievous propensity" is specifically not required in such claims. Nor is it necessary to prove any negligence, and thus owners are strictly liable.

However, the usual defences that would be available in tort do apply. There are also some exceptions. Sub-section (4) provides for contributory negligence principles to apply in such claims.

Western Australia

The *Dog Act 1976* (WA) provides for damages claims in section 46. The effect is similar to the NSW position and is another strict liability regime. The key provisions are contained in sub-sections (2) and provide that the owner of the dog, or a person deemed to be the owner, shall be liable in damages for injury and for damage to property that occurs as a result of dog attacks. Once again, contributory negligence principles are imported into the regime.

Subsection (3) removes the necessity for proof of either the 'previous mischievous propensity' or 'knowledge of that propensity on the part of the owner or a person deemed to be the owner'.

Summary

The three jurisdictions reviewed above demonstrate the type of legislative approach which both simplifies and clarifies the law, and it is submitted, makes it more just by providing a strict liability regime.

In our submission, Victoria should adopt a similar approach to these States, which would result in more just outcomes for victims of dog attacks, and reinforce in the minds of dog owners, the true responsibility that they are taking on in owning a dog. This also ought to be seen in the context of insurance being available for owners to insure against the risks of their dogs injuring or killing others.

Moreover, to move to a strict liability regime would have the benefit of harmonising Victoria's position with that of the majority of other States in Australia.

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