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Judgment: approved by the Court for handing down
(subject to editorial corrections)

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

**JONATHAN CANAVAN (A MINOR) BY HIS MOTHER
AND NEXT FRIEND, CATHY CANAVAN**

Plaintiff;

and

CECIL SCOTT AND JEAN SCOTT

Defendants.

COGHLIN J

The plaintiff, Jonathan Canavan, was born on 10 March 1993 and on 21 March 1996, when he was just three years of age, he was attacked by a dog when he was visiting farm premises with his father at 8 Ballymaconaghy Road, Newtownbreda, Belfast as a result of which he sustained personal injuries. For the purpose of obtaining compensation in respect of these injuries the plaintiff initiated proceedings against the defendants, Cecil Scott and his sister, Jean Scott. The farm buildings and land at No 8 Ballymaconaghy Road are owned and farmed by Cecil Scott although he himself lives across the Ballymaconaghy Road at No 9. The second-named defendant, his sister, Jean Scott, resides in the farmhouse at No 8.

The factual background to the incident is fairly straightforward and did not give rise to a great deal of dispute between the parties. The plaintiff and his parents reside at Rocky Road, Castlereagh and the defendants have been known to the plaintiff's father for many years. Indeed, it appears that, after leaving school, the plaintiff's father worked for Cecil Scott for about five years. Cecil Scott was invited to and attended the wedding of the plaintiff's parents. The plaintiff's father gave evidence that there were always dogs around the farm and that he was present on the farm when Cecil Scott brought home a dog called Prince which was later to attack his son. Cecil Scott agreed in cross-examination that Prince was always to be found at No 8, that it did not perform any farm work and was more of a pet than a working dog.

Shortly before the attack, a man asked the plaintiff's father if he knew where it would be possible for him to obtain some bales of hay and the plaintiff's father contacted Cecil Scott who agreed to sell some bales. A price was agreed and Cecil Scott said that he would leave the bales in the hayshed where they could be collected by the plaintiff's father. Mr Canavan took a trailer attached to his car and the plaintiff accompanied him to the farmyard. Cecil Scott agreed that he knew that the plaintiff frequently accompanied Mr Canavan when he visited the farmyard and accepted that he had never objected to him doing so. While his father was engaged in loading the bales of hay, the plaintiff was standing at the trailer when the dog named Prince pounced on him and knocked him to the ground. The plaintiff suffered bites to his face and, particularly, to the region around his nose. The plaintiff's father was able to rescue his son and the boy was taken into the farmhouse where Jean and Cecil Scott helped to clean him up. He was subsequently taken to first the City and then to the Ulster Hospital.

The plaintiff's father had believed that Cecil Scott was the owner of Prince relying, essentially, upon the fact that it was Cecil Scott who had brought the dog to the farm. On the day following the attack, the plaintiff's father went to the farm in order to recover the bales of hay and he said that, upon that occasion, Cecil Scott said that the dog "would have to be put

down". Cecil Scott denied that he made any such remark.

During the course of the subsequent treatment of the plaintiff for his injuries it became apparent that, at some time in the future, it might be necessary to incur expenditure as a result of plastic surgery. When he learnt this, the plaintiff's father returned to the farm in order to ask Cecil Scott whether he had any relevant insurance. It appears that Cecil Scott told the plaintiff's father that he would "look into" the question of insurance and let him know the result. However, it was common case, that Cecil Scott did not communicate further with the plaintiff's father upon this topic and, in due course, the plaintiff's father consulted a firm of solicitors.

In the course of giving evidence Cecil Scott confirmed that he had brought Prince to the farm as a puppy, but explained that this had been for the purpose of giving the dog as a Christmas present to Jean Scott. He maintained that, after giving the dog to Jean Scott, he himself had nothing more to do with it and the dog lived with Jean Scott on and around the farm premises at 8 Ballymaconaghy Road. This was confirmed by Jean Scott who said that Cecil Scott had bought the dog for her as a pet and guard dog. She said that she took "all to do" with the dog and that the animal was licensed in her name. The dog was not tied up, but had the free run of the yard and associated lands.

Mr Cahill QC with Mr Ross McKelvey appeared on behalf of the plaintiff while the first-named defendant was represented by Mr Ferrity. Default judgment was obtained against the second-named defendant on 16 September 1998. While the plaintiff relied upon both negligence and liability under the Dogs (Northern Ireland) Order 1983 in his pleadings, the claim in negligence was not pursued and the arguments of both sides concentrated upon the relevant provisions of the Dogs Order. I am indebted to both sets of counsel for the care and clarity with which they presented their respective submissions. Ultimately, the real issue was whether the first-named defendant was a "keeper" of the dog so as to make him liable to the plaintiff in accordance with Articles 29 and 53 of the Dogs (Northern Ireland) Order 1983 ("the Dogs Order").

Article 53 of the Dogs Order provides as follows:

"53(1) Without prejudice to any right of action which exists apart from the provisions of this Order, breach of a duty imposed under Articles 22, 25, 26, 28 and 29 shall, so far as it causes damage, be actionable."

Article 29(1) of the Dogs Order provides:

"Subject to the provisions of this Article, if a dog attacks any person or worries livestock the keeper of the dog and, if it is in the charge of a person other than its keeper, that person shall also be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £200."

Article 2 of the Dogs Order deals with interpretation and sub-paragraph 3 defines the keeper of a dog in the following terms:

"(3) Subject to paragraphs (4)-(6), a person is the keeper of a dog if -

- (a) he owns the dog or has it in his possession; or
- (b) he is the head of a household of which a member under the age of sixteen owns the dog or has it in his possession;

and if at any time a dog ceases to be owned by or to be in the possession of a person, any person who immediately before that time was the keeper of the dog by virtue of the preceding provisions of this paragraph continues to be the keeper of the dog until another person becomes the keeper of the dog by virtue of those provisions.

...

(6) A person shall not be treated as the keeper of a dog by virtue of his possession of it if he proves that his possession of it is transitory and that some other person has habitual possession of it.

(7) The occupier of any land where any dog is found shall be deemed to be the person who keeps that dog unless he proves -

- (a) that he is not the keeper of the dog; and
- (b) that the dog was permitted to remain on the land without his knowledge."

Mr Ferrity submitted that Article 2(3) of the Dogs Order allowed for there to be only one keeper of a dog at any material time and that, since it was clear that, at the time of the attack, the dog was both owned by and in the possession of Miss Jean Scott there could be no liability on the part of the first defendant. In relation to Article 2(7) of the Dogs Order he submitted that the first defendant had succeeded in proving that he was not the keeper of the dog at the material time and that Article 2(7)(b) was really "unnecessary surplusage" in a rather poorly drafted Order.

On behalf of the plaintiff, Mr Cahill QC submitted that Article 2 permitted a dog to have more than one keeper at the material time and that the first defendant was constituted such a keeper by virtue of Article 2(3)(a) in that the dog was in his possession and also by virtue of Article 2(7).

In Hampton (a minor) v Cranston and others (unreported - NI High Court 10 September 1998) I referred to the judgment of Mr Justice Carswell, as he then was, in Morrison (a minor) v Millar (unreported - NI High Court 1997) when he observed at page 3:

"The construction of the Order contains many difficulties which were thoroughly and effectively highlighted by counsel on each side. It sets out to lay down a comprehensive system of licensing of dogs by local authorities, control of dogs by the local authorities and offences relating to failure to obtain licences for dogs or to keep them under proper control in various specified respects. Civil liability is imposed, almost as an afterthought, by Article 55, which I shall discuss in more detail."

As I indicated in my judgment in Hampton's case, I respectfully agree with the criticisms of the Order articulated by Mr Justice Carswell, as he then was, but it seems to me that even in the context of the Dogs Order a court should be very slow to conclude that a provision, or some part thereof, was simply "surplusage" and served no useful purpose.

The primary purpose of the Dogs Order appears to have been to provide a comprehensive system of licensing of dogs by local authorities, control of dogs by local authorities and offences relating to failure to obtain licences for dogs and to keep them under proper control in various circumstances. As I have already indicated, I agree with the observation that civil liability appears to have been imposed as "an afterthought". The main purpose of Article 2(3) appears to be to ensure that, at all material times, there is an identifiable keeper of the dog. The draftsman has used the terms "the keeper" rather than "a keeper" and, in my view, this is to be contrasted with the approach adopted by the draftsman in relation to the rather similar provisions contained at Section 6(3) of the Animals Act 1971.

Section 6(3) of the 1971 Act provides as follows:

"Subject to sub-section (4) of this Section, a person is a keeper of an animal if -

- (a) he owns the animal or has it in his possession; or
- (b) he is the head of a household of which a member under the age of sixteen owns the animal or has it in his possession;

and if at any time an animal ceases to be owned by or to be in the possession of a person, any person who immediately before that time was a keeper thereof by virtue of the preceding provisions of this sub-section continues to be a keeper of the animal until another person becomes a keeper thereof by virtue of those provisions."

The Animals Act of 1971 specifically stated in its short title that one of its purposes was "... to make provision with respect to civil liability for damage done by animals ...". In that context Section 2 which dealt with liability for damage done by dangerous animals also specifically referred to any person who is "a keeper" of the animal as being liable for such damage. I note that in Treanor (a minor) v Loughran and Newry & Mourne District Council [1989] 4 NIJB 103 O'Donnell LJ, referring to the Dogs Order, said, at page 108:

"The intention of the Act is quite clearly to protect the public and to provide generally for the control and licensing of dogs.

In my view it was also clearly intended to provide a remedy against the owner and/or keeper of a dog for injuries or damage sustained by a breach of any of the duties imposed on them by the Order."

However, in that case, the learned Lord Justice was concerned with a claim brought by a person who had been subjected to an attack by a dog against a local authority on the basis that the local authority had been in breach of its statutory duty to control stray dogs contrary to Article 22. In the event, the learned Lord Justice found that the legislature never intended the District Council to be liable in damages for failure to enforce the provisions of the Order and he did not have to consider the specific argument that there could be more than one keeper of a dog at any material time.

Doing the best that I can with this rather unhappily drafted Order, I would be inclined to the view that Article 2(3) probably contemplates only a single keeper of a dog and that it does so in the context of making that person liable for a relevant criminal offence or control obligation. However, I do not need to decide this point for the purposes of these proceedings since I am satisfied that, on the balance of probabilities, at the time of the attack upon the plaintiff, it has not been established that Cecil Scott either owned or had possession of the offending dog. I approach the concept of possession in the same way as I did in Hampton (a minor) v Cranston and others on the basis of the generally used legal definition connoting voluntary possession by actual or potential physical control with knowledge of the nature of what is possessed or controlled. In the circumstances, I am not satisfied that the plaintiff has established on a balance of probabilities that Cecil Scott voluntarily assented to being in possession or control of the animal.

However, paragraph (7) of Article 2 of the Dogs Order applies specifically to a person who occupies any land where a dog is found and provides that such a person shall be deemed to be the keeper of the dog unless he or she proves that he or she is not the keeper of the dog and that the dog was permitted to remain on the land without his or her knowledge. It seems to me that this paragraph is independent of the definition contained in paragraph (3) and,

indeed, even if it is established that he or she was not the keeper of the dog at the material time a person may still be deemed to be the keeper of that animal if the animal was permitted to remain on the occupier's land with his or her knowledge. This raises the possibility that a person may be proved to be the deemed keeper of a dog despite the fact that he or she is able to show that another person was the keeper within the meaning of sub-paragraph (3) provided that the dog was permitted to remain on the land with his or her knowledge. The alternative interpretation is that paragraph (7) only falls to be considered where it has not been possible to identify the keeper in accordance with paragraph (3) and it is necessary to resort to the concept of a "deemed" keeper. In such circumstances where the occupier of the relevant land can only assert that he or she is not the keeper he or she must also show that the dog was on the land without his or her knowledge. Not without considerable reluctance I have come to the conclusion that the latter is the more likely interpretation, bearing in mind the primary purpose of the legislation and the relationship between the paragraphs. Accordingly, it seems to me that it is not legitimate to resort to paragraph (7) where the keeper has been clearly identified in accordance with paragraph 3 - in this case Jean Scott.

I have read the medical reports from Mr Millar FRCS, consultant plastic surgeon, and Dr Loughrey, consultant psychiatrist, and I have also had the benefit of seeing photographs of the plaintiff shortly after the incident. I have also seen the condition of the plaintiff's nose and face as it is today. There is no doubt that this must have been a very frightening and distressing experience for the plaintiff, who was only just three years old at the time of the attack. I suspect that the speed and extent of his recovery is probably a tribute to the concerned care and common sense showed by his parents. There is some degree of permanent scarring at the tip of his nose and I assess general damages at £15,000.

There will be judgment for that sum against the second defendant and judgment for the first defendant against the plaintiff.

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Plaintiff;

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JUDGMENT

OF

COGHLIN J
