

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL NO. 11/93

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BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN MORRIS BROWN DEFENDANT/APPELLANT
AND NATASHA SMITH
(BY HER NEXT FRIEND
EULALEE SMITH) PLAINTIFF/RESPONDENT

Sylvester Morris for the appellant

Donald Gittens for the respondent

May 30 and June 20, 1994

WOLFE, J.A.:

This is an appeal from the judgment of His Honour Mr. Noel B. Irving, Resident Magistrate for the parish of St. Elizabeth. At the end of the arguments, we allowed the appeal, set aside the judgment of the court below and entered judgment for the defendant with costs to be taxed if not agreed. Costs of the appeal fixed at \$500.00 was awarded to the appellant. These are our reasons for so doing.

The case may be appropriately billed as that of "the biting pig." On Sunday July 9, 1989, the plaintiff, an infant, was on lands belonging to Mr. Burchell Clarke, at Burnt Savannah in St. Elizabeth. She was assisting her grand-mother Jestina Thomas to pick mangoes. The defendant's pig was tethered on land, owned by one Mr. Grant, which adjoins Burchell Clarke's premises. As she was in the act of picking up mangoes she felt a bite to her thigh. She looked around and saw the pig. It would appear that the pig, which was tied on Grant's land, stretched across and bit the plaintiff.

The action was grounded in negligence. The particulars of claim alleged that "the attack and the resultant injuries were occasioned by the negligence of the defendant in so managing and/or controlling the said boar so as to cause it to run from his premises onto a public right of way where it bit the plaintiff." Alternatively the plaintiff averred that "the said boar was of a fierce and mischievous nature and accustomed to attack mankind, and the defendant wrongfully kept the said boar, well knowing that it was of such fierce and mischievous nature and so accustomed."

The learned Resident Magistrate, in his reasons for judgment, made the following findings, inter alia:

- (i) "That the defendant is negligent in tethering his hog in such a manner that it can, in (sic) unrestrained by the tether, enter upon or trespass on the lands of Mr. Clarke. That his breach of duty of care lay in his not being able to foresee that the trespass of his animal upon the lands of his neighbour was likely to do damage.
- (ii) That the assertion that the hog is a tame animal and there is absence of evidence of propensity to attack does not accord with common knowledge of the dispositions of boars.
- (iii) This court is prepared to say that although the boar was tethered to the Robin tree its ability to trespass unto Clarke's land amounted to technical 'escape' and in such an event the defendant is absolutely liable for any damage caused from such escape."

The following grounds of appeal were filed, inter alia:

- "A. The Learned Resident Magistrate erred in law when he held that the Defendant's tying of his animal on his premises fettered him with negligence.
- B. The Learned Resident Magistrate erred in law when he held that the Defendant must have been able to 'foresee' that his pig would have bitten the plaintiff an action which would have been against the tame nature of such an animal and there being no evidence that the pig had previously displayed any such propensity."

For purposes of determining liability in respect of injury occasioned by animals, they are divided into two classes, namely, dangerous or mischievous animals and tame or domesticated animals. It is a question of law whether a particular kind of animal falls into the dangerous or the tame class. See Filburn v. The People's Palace & Aquarium Co. Ltd. (1890) 25 Q.B.D. 258. The test to be applied is whether that kind of animal is by its ordinary nature dangerous to mankind. See Buckle v. Holmes [1926] 2 K.B. 125, 129. In the case of animals of the dangerous class, liability is strict. See May v. Burdett (1846) 9 Q.B. 101. In respect of tame animals, liability falls under three heads:

1. Damage due to mischievous propensity known to the owner.
2. Cattle trespass.
3. Ordinary liability in tort committed through the instrumentality of an animal under one's control for example, negligence, nuisance and assault and battery.

See Manton v. Brocklebank [1923] 2 K.B. 212.

A pig is clearly a domesticated animal and falls within the classification of tame animals. For the appellant to be liable, the act complained of must fall within any of the three heads mentioned (supra).

There was not one shred of evidence that the injury caused to the plaintiff was occasioned by the mischievous propensity of the pig which was known to the owner. Mr. Gittens for the respondent readily conceded this and categorically stated that he could not support the judgment on that basis. In the light of this concession, with which we agree, the finding of the learned Resident Magistrate "that the hog is a tame animal and there is absence of evidence of propensity to attack does not accord with common knowledge of the dispositions of boars" is untenable and cannot be supported. There is positive evidence that the pig had never bitten anyone before.

The finding of negligence based "upon the manner in which

the pig was tethered and breach of a duty of care in not being able to foresee that the trespass of his animals upon the lands of his neighbour was likely to do damage" is also not supported by evidence. The learned Resident Magistrate failed to come to grips with the fact that to be held liable the plaintiff would have had to establish that the defendant was aware of the propensity of the animal to cause the particular type of damage. The likelihood of the animal causing damage is clearly relevant to determine the existence of negligence. See Lathall v. A. Joyce & Son and others [1939] 3 All E.R. 854 and Toogood v. Wright [1940] 2 All E.R. 306.

In Aldham v. United Dairies (London) Ltd. [1940] 1 K.B. 507, Lord Greene, M.R. and du Parcq, L.J. equated the spontaneous action of an animal to the novus actus of a human being. So that even if a man is negligent in leaving his animal unattended or improperly tethered he will not be liable for any damage due to any violent departure from its ordinary docility. In other words, the damage must be the direct consequence of the negligence.

The third finding of the learned Resident Magistrate is posited on the basis that the pig was a dangerous thing and that its escape from the defendant's land brought it within the Rylands v. Fletcher principle. We need only repeat that the pig is not a wild animal, not a dangerous or mischievous animal but a tame or domesticated animal; hence the escape does not bring it within the principle enunciated in Rylands v. Fletcher.

For these reasons we allowed the appeal.

WRIGHT, J.A.:

I agree.

DOWNER, J.A.:

I agree.

Case referred to
① Wright v. Carter [1939] 2 All E.R. 125
② Wright v. Carter [1939] 2 All E.R. 125
③ Wright v. Carter [1939] 2 All E.R. 125
④ Wright v. Carter [1939] 2 All E.R. 125
⑤ Wright v. Carter [1939] 2 All E.R. 125
⑥ Wright v. Carter [1939] 2 All E.R. 125
⑦ Wright v. Carter [1939] 2 All E.R. 125
⑧ Wright v. Carter [1939] 2 All E.R. 125
⑨ Wright v. Carter [1939] 2 All E.R. 125
⑩ Wright v. Carter [1939] 2 All E.R. 125