IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: **731/2017**
Date heard: **12 to 15 November 2018**
Date delivered: **27 November 2018**

In the matter between:

GERHARD CLOETE Plaintiff

and

CHRISTIAAN JACOBUS VAN MEYEREN Defendant

JUDGMENT

LOWE, J:

INTRODUCTION

[1] Plaintiff instituted action against Defendant claiming R2, 341.000.00 in damages arising from an attack upon him by three Pitbull type dogs in Rowan Street, Port Elizabeth on 18 February 2017 in the afternoon. Plaintiff was seriously injured to say the least.

[2] Plaintiff's claim is premised upon the *actio de pauperie* (strict liability), alternatively the *actio legis aquiliae* on the basis of negligence.

[3] Defendant initially placed in issue whether his dogs (three in number and which he did not identify) were those which attacked Plaintiff, pleading over that his dogs were kept behind locked gates, their access to the road being impossible under normal circumstances and, that if Defendant's dogs were those responsible for the attack, they had escaped (in the absence of any person from the family at the residence) and in circumstances in which *"an intruder attempted to break open the front door of the house and did, in fact, break open the gates which were supposed to restrict the movement of the dogs".* Liability and negligence were denied on any basis. (I should make it clear that the front door of the house is at right angles to the gates which lead directly onto the garden – the front door being accessed directly from the street area without needing to access the gates.)

[4] On the morning of the trial Defendant conceded that:

> "The Defendant's dogs were of mixed breed and not thorough bred pitbull dogs, although the dogs showed features, to varying degrees, of pitbull dogs."

[5] After two witnesses had been called by Plaintiff (on the first morning of the trial) Defendant inevitably conceded further that:

> "The Defendant was the owner of the three dogs which attacked the Plaintiff on 18 February 2017.
>
> During the attack on the Plaintiff the Defendant's dogs acted *contra naturum sui generis.*"

[6] In the result the only issues which remained as to liability (which had been separated from quantum for trial) were:

[6.1] Whether Defendant's defence against *pauperian* liability could succeed – that is whether the action of an intruder leaving the relevant gates open constituted an exception to *pauperian* liability; and

[6.2] If so whether Plaintiff could establish liability in the aquilian alternative based on negligence.

[7] Defendant bore the onus on 6.1 above, and Plaintiff in respect of the remaining issues.[1]

THE FACTS

[8] Much of what happened on the day in question is common cause and can be summarised as follows:

[8.1] Plaintiff, an odd job independent worker, with a trolley for clearing away refuse, was in Rowan Street minding his own business on the

[1] ***Trolip v Wattrus*** EL1416/14 (3016/14); ***Green v Naidoo*** 2007 (6) SA 372 (W) at [22].

afternoon of 18 February 2017. He was a convincing witness though understandably emotional.

[8.2] As he passed Defendant's home at 28 Rowan Street he heard the sound of dogs running from behind him and was then viciously attacked and pulled to the ground by Defendant's three dogs in the street itself.

[8.3] He had done nothing whatsoever to cause or provoke the attack and was lawfully present at the place of the attack.

[8.4] The attack was brutal despite his initial attempts to ward this off and he was very seriously bitten, in fact ultimately having his left arm amputated at the shoulder in a subsequent surgical intervention.

[8.5] He was saved from worse injury, or perhaps death, by the extremely courageous conduct of a passerby, Mr Jacques Van Schalkwyk who, without regard for his own safety, fought the dogs off Plaintiff and then kept them away from Plaintiff, he ultimately also being attacked by the same dogs.

[8.6] Whilst there were other persons in the vicinity after this attack had commenced, and the police in due course, ultimately it was Mr Van Schalkwyk who rescued Plaintiff – for which he is to be highly commended.

[8.7] The dogs themselves were owned by Defendant, one of whom had been a so-called *"rescue dog"* and the mother of the other two younger but fully grown dogs.

[8.8] They were *"mixed breed"* large dogs which showed pitbull dog features, but which were regarded and treated by the Defendant and his family as house dogs – sleeping indoors.

[8.9] The dogs had not been involved in any previous incident in biting or attacking any person.

[8.10] They had the run of Defendant's home and garden/yard which was walled, fenced and separated from access to Rowan Street by a double leaf metal bar gate which could be closed and locked, in the centre of the gate, by means of a padlock.

[8.11] The gates were kept closed at all times save if opened or lifted off their hinges for access reasons which was not a regular occurrence.

[8.12] Whether the gates were in fact padlocked on the day in question, as per Defendant's evidence, is disputed.

[8.13] On the day in question, and shortly prior to the attack, the gates were in the closed position, Defendant contending that they were padlocked by means of two padlocks.

[8.14] Subsequent to this an intruder opened the gates and then left them open (it is disputed by Plaintiff that the gates were locked at the time but Plaintiff had no evidence to gainsay that of Defendant in this regard).

[8.15] The Defendant's three dogs escaped from the garden through the open gates and attacked Plaintiff.

[8.16] The Defendant had left the house on the previous Wednesday and returned only on hearing of the attack. His wife had left the premises on the Friday before the attack, also returning prior to her husband, on hearing thereof.

[8.17] When leaving, both Defendant and his wife said the gates were closed and padlocked by means of two locks (the latter not common cause).

[8.18] Defendant's son was at the premises till the Saturday morning of the attack. His girlfriend Ms Meyer (who gave evidence) left the premises some time after him, being the last person to do so just before 14h00 on the day of the incident (no one else being at home), locking the

front door and front door security gate and observed she said, the closed gates (she could not say they were locked).

[8.19] Mr Visser, a neighbour, confirmed that the doors and gates, referred to above, were closed shortly before the attack – he having attempted to borrow a tool from Defendant, but no one was present. Not long after this he heard people screaming in the street – the attack had commenced.

[8.20] It follows that had there been an intruder this occurred in the short space of time described by Mr Visser, as he saw no damage to the front door.

[8.21] Ms Meyer said on her return, after the attack, the front door was damaged but the security gate was still locked and the garden gates were standing open.

[8.22] If the gates were padlocked, as testified by Defendant and his wife, the padlocks had been broken off by an intruder.

[8.23] The only holders of keys to the gate padlocks (Defendant said two in number) were Defendant and his wife.

[9] Plaintiff contested the evidence above only to the extent of whether the gates had indeed been padlocked at times relevant, it being argued that whilst the gates were closed the locks were a fabrication. It was argued that Defendant and his wife – the only witnesses as to the locked, as opposed to simply closed, gates were poor witnesses and ought not to be believed – though Plaintiff had no controverting evidence in this regard.

[10] This issue (the locking of the gates) is mainly, if not exclusively, relevant to alternative liability in delict on the basis of negligence.

[11] I will nevertheless deal herewith at this stage notwithstanding my main finding as to liability.

[12] Defendant said that the gates were almost always locked and only opened on rare occasions. Two locks were used of which he and his wife had the keys. He said they were locked on the day in question and the padlocks were broken away and damaged by an intruder. After the attack he did not observe the damage to the locks on the day, but simply closed the gates hooking the locks through the locking clasp. He did not attempt to lock same and only noticed the damage on the Monday, photographing same as per the Court exhibits relevant. At the time he closed the gates, after the attack, two of the dogs had been removed by the police, one remaining, having to be locked in and this dog was placed in one of two separate areas in the garden with closed but not locked gate.

[13] Mrs Van Meyeren confirmed that the gates had been locked with two padlocks, she and Defendant having the only keys. She did not know of the damaged locks and was extremely hesitant and unsure in her evidence as to the locked gate issue altogether. She suggested that the locks were seldom, if ever, opened her husband lifting the gate off its hinges if access was required for any reason. This Defendant had not mentioned at all.

[14] Notwithstanding that there was no evidence from Plaintiff on the lock issue, the Defendant's evidence falls to be assessed against the probabilities. Whilst far from impressive, and in instances contradictory, the fact remains that the probabilities point strongly towards the fact that in urban areas, with the crime statistics as they are, gates accessing a road are usually kept locked to avoid intruder access – this even more probable when three large potentially dangerous dogs are kept from the road by means of those very gates.

[15] Whilst unsatisfactory in various respects and analysed as set out in ***Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others*** [2] - I am unable, on the probabilities (and in the absence of controverting evidence), to reject the Defendant's evidence that the gates had been locked by Defendant and later broken open by an intruder.

[16] This being the case it must be accepted that the sole cause of the three dogs escaping is directly due to the locked gates having been broken open, and left open by a third party intruder, in the absence of the family.

[2] 2003 (1) SA 11 (SCA)

[17] In the result it is inevitable that the central basis for liability hinges on the *actio de pauperie* – negligence not being even remotely established, and accordingly the alternative plea in the *actio legis acquiliae* must fail.

PAUPERIAN LIABILITY

[18] The principle in this regard has a history which goes back to a time well prior to Roman Law. This was recognised in the Twelve Tables as summarised by *J C Zietsman*[3] in **Vicious Dogs: A Case Study from 2000 BC to AD 2000** [4] as follows:

> "Although it is written in archaic and concise Latin, the Law of the Twelve Tables (Warmington 1967:424-511) shows signs of early legal development such as assigning tutela or trustees for minor children, the insane (Tabula 5.7) and women (Tabula 5.1). There are however several more primitive elements, strongly resembling Hammurabi's lex talionis legal philosophy and also the case law formulation typical of Ancient Near Eastern enactments as expressed in Tabula 8.2:
>
> If a person has maimed another's limb, let there be retaliation in kind [Latin = talio] unless he makes an agreement for compensation with him.
>
> The text that is important for our purposes is Tabula 8.6 as it was preserved in a text by the lawyer Ulpian (3rd century AD) recorded in Justinian's Digest 9.1.1.pr.
>
> In cases where a four-footed animal is alleged to have committed pauperies [i.e. loss or damage], a right of action is derived from the Twelve Tables, which statute provides that that which has caused the offense (that is, the animal which causes harm) should be handed over or that pecuniary damages should be offered for the amount of the harm done.[9]

[3] *(University of Stellenbosch)*
[4] *Akroterion 45 (2000) 75-87*

It should be noted that “four-footed animal” refers to domesticated animals only and that wild animals causing damage are considered as a separate category not only in Roman law (D 9.1.1.10, “The action does not lie in the case of beasts which are wild by nature”) but also in the Ancient Near Eastern laws (for example LH 244, “If a man rents an ox or a donkey and a lion kills it in the open country, it is the owner’s loss.”)

Although the term “four-footed animals” was originally (with reference to the Lex Aquilia on wrongful damage to property) interpreted as domesticated grazing animals (Justinian Inst. 4.3.pr.-1) such as cattle, horses, donkeys, mules, pigs and goats typically used in an agricultural community (similar to the “goring oxen” examples in the Ancient Near Eastern laws), the term was extended to include specifically dogs (D 9.1.1.5) and eventually any animal “of some other kind” (D 9.1.4).

Pauperies is damage done without any legal wrong on the part of the doer since an animal (being devoid of reasoning) is incapable of committing a legal wrong (D 9.1.3). In this instance the owner is held responsible for damage caused by his animal merely because he is the owner: but he could avoid pauperien liability by handing the animal over to the victim in noxal surrender (noxae deditio) if he chose not to “offer pecuniary damages”.

If we accept Plutarch’s information about Solon’s laws as correct – and much of his evidence on other laws is confirmed by other sources (Gagarin 1986:65 n. 58) – it could be that the basic idea of avoiding pecuniary liability by handing over the offending animal and thereby holding the animal responsible for its voluntary action (as expressed by Aristotle) was indeed also part of Greek law.

But Roman law goes even further and stipulates: “Since the rule that liability for damage attaches to the physical corpus which caused the damage even in the case of animals, this action lies not against the owner of the beast at the time the damage was caused, but against whoever owns it when action is brought” (D 9.1.12). This principle is known as noxa caput sequitur, “the damage follows the animal.”

Even a superficial reading of the complete text of D 9.1 makes it clear that the Roman equivalent of the goring ox or biting dog is much more complex than the enactments of the Ancient Near Eastern and Greek sources. Since Roman law to a certain extent still features in South African courts, the complexity but also practicality of Roman law could best be illustrated to a modern reader with reference to a decision by the Court of Appeal, namely Lever vs Purdy 1991 (3) SA 17-26, from which I quote freely.

[9] References to the Digest will henceforth be abbreviated as D. For translations of Digest texts I have used Watson’s edition.”

[19] This then takes us to ***Lever v Purdy***[5]. Shortly summarised: Lever, the owner of a vicious dog, was overseas leaving Cohen in occupation and control of the premises and taking care of a dangerous dog. Cohen asked Purdy to come to the premises to attend to a video recorder. It was arranged that the dog would be locked away at the time. Purdy arriving called for Cohen, placing his right hand on a section of a closed wire mesh gate – the dog appeared and savaged Purdy who eventually managed to close the gate on the dogs nose – Cohen arriving at that time from inside the premises. Purdy sued Lever in the *actio de pauperie* and Cohen in the *actio legis aquiliae.* The action against Cohen was settled and did not proceed. That against Lever proceeded. Lever's defence was that he could not be held liable since Purdy was bitten by the dog as a result of Cohen's negligence. This was dismissed in the Provincial Division Appeal Court, but on Appeal to the Appellate Division (as it then was) the special defence or exception to the *actio* was upheld, and Lever found not liable.

[20] The majority judgment of Joubert ACJ carefully analysed the origin of pauperian liability from Roman times as follows (I set this out in extenso as to summarise same would be inadequate as a background to what follows):

> "Justinian's Roman law relating to pauperien liability of the owner of a domesticated animal, which by acting contrary to the nature of its class (contra naturam sui generis) and from inward vice (fera mota) caused damage, as subsequently developed in the Middle Ages until the second half of the 15th century, was received in the Netherlands. See De Blècourt-Fischer, *Kort Begrip van het Oud-Vaderlands Burgerlijk Recht* 7th ed 19. As part of Roman-Dutch law the law of pauperien liability regarding the damage done by domesticated animals was introduced into South Africa. According to the law of South Africa two important modifications were effected. The first related to the principle of noxal surrender *(noxae deditio)* which enabled an owner to avoid liability by surrendering the animal to the injured party while the second concerned that of *noxa caput sequitur*, according to which the owner at the time of *litis contestatio* was liable, not necessarily the owner at the time of the injury. These two principles were held by this Court to be obsolete. See *O'Callaqhan NO v Chaplin* 1927 AD 310 and *South*

[5] 1993 (3) SA 17 (AD) at 26

African Railways and Harbours v Edwards 1930 AD 3. Reliance on the negligence of a third party as a defence to the *actio de pauperie* is *res nova* as far as our case law is concerned. It now remains to consider our common law on this particular issue.

Justinian's law of pauperien liability is treated rather cursorily in Inst 4.9 pr but in somewhat greater detail in D 9.1. The latter source deals *inter alia* with those instances in which the culpable conduct of a third party causes a domesticated animal to act contrary to the nature of its class in injuring the injured victim. In such instances the owner of the animal was exonerated from pauperien liability to the victim. The latter could, however, claim damages from the third party under the *lex Aquilia*. The texts in question may be analysed and classified in two categories, namely:

First Category

This category comprises those instances in which a third party, as a mere outsider through his culpable conduct caused the animal to inflict the injury upon the victim, e.g. where the animal was provoked by him (D 9.1.1.6); or where he hit or wounded the animal (D 9.1.1.7).

This first category of texts may be supplemented by texts dealing with Aquilian liability of such a third party, e.g. where the third party scared a horse which a slave was riding with the result that the slave was thrown into a river and died (D 9.2.9.3); and where someone annoyed a dog and accordingly caused it to bite the victim (D 9.2.11.5).

The distinguishing feature of this category is that the culpable conduct of the third party consisted of some positive act such as provoking, striking, wounding, scaring or annoying the animal.

Second Category

This category relates to those instances in which a third party *in charge or control of the animal* by his negligent conduct failed to prevent the animal from injuring the victim. The relevant texts are the following:

D 9.1.1.4 (Ulpianus) :

'... quod si propter loci iniquitatem aut propter culpam mulionis, aut si plus iusto onerata quadrupes in aliquem onus everterit, haec actio cessabit damnique iniuriae agetur.'

Translation by *Watson et alii:*

'On the other hand, if an animal should upset its load onto someone because of the roughness of the ground or a mule driver's negligence or because it was overloaded, this action will not lie and proceedings should be brought for wrongful damage.'

I underlined the word injuriae because the medieval Glossator AZO (± 1150-1230 AD) wrote the following gloss on this text to elucidate the word in its context, viz that an *actio in factum* or *actio leqis Aquiliae utilis* lies against the muleteer or the person whose negligence caused the damage, since *he who provided the opportunity for the damage to be done is deemed to have caused it*. The gloss reads as follows:

'Iniuriae. id est in factum, vel utili Aquilia contra mulionem, vel eum, cuius culpa damnum est datum, qui enim occasionem damni dans, damnum dedisse videtur.'

(I may add in parenthesis that the lex Aquilia applied where the damage was directly caused by the body of the wrongdoer to the body of the injured person or to the damaged thing (*damnum corpore corpori datum*). Where the injury was, however, indirectly caused by the wrongdoer to the body of the injured person or thing *(damnum corpori non corpora datum)* the Praetor granted an actio utilis or in factum in order to extend Aquilian liability to such instances *(ad exemplum legis Aguiliae, D*9.2.53)). See Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 3rd ed p 589.

D 9.1.1.5 *(Ulpianus)* :

'Sed et si canis, cum duceretur ab aliquo, asperitate sua evaserit et alicui damnum dederit : si contineri firmius ab alio poterit vel si per eum locum induci non debuit, haec actio cessabit et tenebitur qui canem tenebat.'

Translation by Watson *et alii*:

'Take the case of a dog which, while being taken out on a lead by someone, breaks loose on account of its wildness and does some harm to someone else: If it could have been better restrained by someone else or if it should never have been taken to that particular place, this action will not lie and the person who had the dog on the lead will be liable.'

It is the *actio de pauperis* which will not lie against the owner, while the person who was in control of the dog and whose negligence caused the injury will be liable under the *actio leqis Aquiliae utilis*.

The second category of texts clearly establishes the principle of law that the owner of a domesticated animal, which *contra naturam sui generis* harmed a victim, may successfully avoid pauperien liability by proving as a defence that the harm was caused by the controller's negligence in his control of the animal.

These texts must, however, be read in conjunction with those texts which shed light on the Aquilian liability of a controller of a domesticated animal. The texts in question are the following: D 9.2.8.1 *(Gaius)*:

'Mulionem guoque, si per imperitiam impetum mularum retinere non potuerit, si eae alienum hominem obtriverint, vulgo dicitur culpae nomine teneri, idem dicitur et si propterinfirmitatem sustinere mularum impetum non potuerit : nee videtur iniguum, si infirmitas culpae adnumeretur, cum affectare quisque non debeat, in quo vel intellegit vel intellegere debet infirmitatem suam alii periculosam futuram. idem iuris est in persona eius, qui impetum equi, quo vehebatur, propter imperitiam vel infirmitatem retinere non potuerit.'

Translation by Watson et alii:

'Furthermore, if a mule driver cannot control his mules because he is inexperienced and as a result they run down somebody's slave, he is generally said to be liable on grounds of negligence. It is the same if it is because of weakness that he cannot hold back his mules - and it does not seem unreasonable that weakness should be deemed negligence; for no one should undertake a task in which he knows or ought to know that his weakness may be a danger to others. The legal position is just the same for a person who through inexperience or weakness cannot control a horse he is riding.'

D 9.2.11.5 (*Ulpianus*):

'Item cum eo, qui canem irritaverat et effecerat, ut aliquem morderet, quamvis eum non tenuit, Proculus respondit Aquiliae actionem esse : sed lulianus eum demum Aquilia teneri ait, qui tenuit et effecit ut aliquem morderet : ceterum si non tenuit, in factum agendum.'

Translation by Watson *et alii*:

'Again, Proculus gave an opinion that the Aquilian action lies against him who, though he was not in charge of the dog, annoyed it and thus caused it to bite someone; but Julian says the *lex Aquilia* only applies to this extent that it applies to him who had the dog on a lead and caused it to bite someone; otherwise, if he were not holding it, an *actio in factum* must be brought.'

Inst 4.3.8:

'Impetu quoque mularum, quas mulio propter imperitiam retinere non potuerit, si servus tuus oppressus fuerit, culpae reus est mulio. sed et si propter infirmitatem retinere eas non potuerit, cum alius firmior retinere potuisset, aeque culpae tenetur, eadem placuerunt de eo quoque, qui, cum equo veheretur, impetum eius aut propter infirmitatem aut propter imperitiam suam retinere non potuerit.'

Moyle's translation:

'... and similarly, if your slave is run over by a team of mules, which the driver has not enough skill to hold, the latter is suable for carelessness; and the case is the same if he was simply not strong enough to hold them, provided they could have been held by a stronger man.'

I indicated *supra* in discussing the first category of texts that the culpable conduct of the third party consisted of some *positive act* on his part, such as provoking, striking, wounding, scaring or annoying the animal causing it to act *contra naturam sui generis* and to injure the victim. What is the causative position concerning the negligent conduct of the third party in the second category of texts? Here, the third party happens to be *in charge or control* of the animal. Take the instance of a muleteer who is in control of his team of mules which he, on account of his inexperience or weakness, cannot restrain from running away *(impetus)* and injuring the victim. *His failure in exercising proper, i.e. reasonable, control over the mules provided them with the opportunity to continue their flight and run over the victim*. He is guilty of negligent conduct which resulted in the injury to the victim. He will incur Aquilian liability whereas the owner of the mules will be exonerated from pauperien liability. The *muleteer did not by any positive act cause the mules to run away*. The question of causality in regard to the conduct of the controller or handler of a dog is determined in the same manner by application of the same legal principles. By his negligent conduct he fails to exercise proper, i.e. reasonable, control over the dog in his care. He accordingly provides the dog with the opportunity to injure the victim. As a result of his negligent conduct he fails to prevent the dog from biting the victim. *He did not by any positive act cause the dog to bite*. His negligent conduct likewise renders him liable under the *Lex Aquilia*, whereas the owner of the dog will be exonerated from pauperien liability.

I now turn to consider the Roman-Dutch law. Unfortunately there is a dearth of Roman-Dutch authority on the nature of the culpable conduct of a third party in control of the owner's domesticated animal which injured the victim. The Dutch jurists, without any significant discussion or original contribution of their own, adopted the principles of Roman law as discussed *supra*.

Damhouder (1507-1581) in his *Practycke in Criminele Saken*, 1650, 142 Capital nr 3 concisely states the following:

'Van ghelijcken, indien dat yemandt bevolen waer te bewaren eenen Hondt, oft ander Beeste, ende dat hy sulcken Hondt, oft ander Beeste, van selfs ontbonde, ende uyt quaetheydt liet loopen, *oft dat sy van selfs ontliepen, door de qroote neqligentie, ende roeckeloosheydt van den bewaerder*, ende indien dat sulcken Hondt of Beeste, *alsoo yemandt quetste, in dit cas, soude den bewaerder* oft Knape *in de schuld vallen*, ende te *punieren zijn*, *ende niet den Meester*.'

(My italicising.)

Paul Voet (1619-1667), the father of the famous Johannes Voet, ad Inst 4.9.5 affirms the approach by Roman law to the Aquilian liability of a third party as controller or handler of a dog. The conduct of the controller amounts to negligence because he failed to restrain the dog from biting, or led it to a place where he should not have taken it. His passage reads as follows:

'An non ergo si canis pauperiem dederit, actioni directae locus erit? Id videtur velle Zoes. D hoc tit. verum contra expressum juris textum. Nam in D 9.1.1.5 statuitur hanc actionem, scil, de pauperie directam cessare; & nihilominus eum qui canem tenebat obligari. An Pesulonia vel Pesulania, vel ut alii consent Solonia lege ? Cujac. ad Paul 1 sent. tit. 15. An potius lex Aquilia ? Quae postrema sententia probabilior, cum damnum ejus culpa acciderit, qui canem vel non retinuit satis, vel per eum locum duxit, per quern duci non oportuit.'

(My underlining).

Van Leeuwen (1626-1682) in his C.F. 1.5.31.3 (as translated by Margaret Hewett, 1991) makes the following concise observations regarding pauperien liability, which are based on the principles of Roman law as expounded in the two categories of texts (*supra*) :

'I said *aut culpa hominis* (or negligence on the part of a human being) because if there is negligence on the part of the owner or *of anyone else*, this action lapses and a suit is brought under the *Lex Aquilia*, for example if a mule does damage *because of* the unevenness of the

road, or *the negligence of the muleteer*, or because it was too heavily loaded or was provoked by someone, or *if the animal acted in some way on account of human inexperience or negligence* or when aroused by pain (D 9.1.1.4, D 9.1.1.5, D 9.1.1.6, D 9.1.1.7, D 9.2.2 pr et seqq, D 9.2.27.5).'

(My italicising.)

Johannes Voet (1647-1713) in his *Commentaries ad Pandectas* book 9 title 1, founds his entire comment in respect of pauperien liability on the principles of Roman law, as elaborated on *supra*. In 9.1.6 he states *inter alia* the following (which is almost verbatim derived from D 9.1.1.5 *supra*) in relation to injury inflicted by a dog in the control of a third party as controller or handler:

'Sed &, si canis, cum duceretur ab abliquo, asperitate sua evaserit, & alicui damnum dederit, vel oves, gallinas, anseres alienas occiderit, si contineri firmius ab alio potuerit, vel per eum locum duci non debuerit, cessante hac actione de pauperie, contra ducentem utili Aquiliae locus est, D 9.1.1.5, D 9.2.11.5.'

Gane's translation:

'Then again, if a dog, *when he was being led by someone*, escaped through his own rough temper and did damage to somebody, or killed another person's sheep, hens or geese, *and if he could have been more firmly held in by another* or ought not to have been led over such a spot, this action on *pauperies* falls away but there is room for a beneficial Aquilian action *against the leader*.'

(My emphasis.)

In this passage *Voet* endorses the views expressed by Ulpianus in D 9.1.1.5, read with D 9.2.11.5, viz. that a third party in control of a dog, which owing to his negligent conduct injures a victim, is liable under the *Lex Aquilia*, whereas the owner of the dog will be exonerated from pauperien liability. These texts, as I indicated *supra,* fall in the second category of texts, and the remarks I made *supra* concerning the causality of the negligent conduct of the controller of the dog and the injury or harm to the victim are also applicable here. The negligent conduct amounts to a failure on the part of the controller to exercise proper, i.e. reasonable, control over the dog in his care. That negligent conduct provided the dog with the opportunity to injure the victim. *The controller did not by any positive act cause the dog to bite or harm the victim.*

Kersteman (1728 - ± 1793) in his *Aanhangzel tot het Hollandsch Rechtsgeleerdt Woordenboek*, 1772, vol 1 p 292 seqq. s v *Damnum ab Animalibus Datum* furnishes us with a translation in Dutch of *Voet* 9.1, which includes *Voet* 9.1.6, without any original comment or contribution of his own.

We are concerned with the application of these principles to the facts of the present matter. It is not necessary to consider whether they have any wider application. Cohen was at all relevant times in charge of and had control over the dog. He knew the propensities and nature of the dog. He even mentioned them to Purdy whom he led to believe that he would lock the dog away when Purdy called at the premises. Moreover, he knew when Purdy would arrive as pre-arranged by them. In the circumstances he owed Purdy a legal duty to take reasonable precautionary measures to contain or restrain the dog from biting him. Cohen's failure to adopt any reasonable precautionary measures in the circumstances amounted to negligent conduct. He accordingly provided the dog with the opportunity to injure Purdy and failed to prevent it from doing so. According to the second category of texts (*supra*), which Voet 9.1.6 endorses, Cohen as *controller* of the dog was in the circumstances guilty of *negligent conduct* which *resulted in* the injury to Purdy *despite the fact that he did not by any positive act cause the dog to bite Purdy*. Cohen's Aquilian liability to Purdy afforded Lever, the owner of the dog, a defence which exonerated him from pauperien liability to Purdy. See D 9.1.1.4, D 9.1.1.5, *Voet* 9.1.6, *Damhouder loc.cit*., *Paul Voet (loc.cit)*.

The Court *a quo,* in my judgment, erred in deciding that only the first category of texts afforded an owner exemption from pauperien liability."

[21] It follows from the above that the defence in this matter, put up as a special exception, is different from that raised in ***Lever (supra).*** The Appeal Court in ***Lever***, stated explicitly that it was unnecessary to consider whether the principles set out had a wider application than to the facts of that matter.

[22] In essence the majority found that the Roman and Roman Dutch texts provided for two categories of instances applicable to special defences in pauperian liability:

[22.1] The first category where a third party, through culpable conduct, caused the animal to inflict the injury on the victim – this requiring culpable conduct on the part of third party – a positive act such as provoking, wounding, scaring or annoying the animal. In this matter this category was not pleaded or proved nor did Defendant (correctly) suggest it was applicable.

[22.2] The second category is where a third party in charge or control of the animal and by his negligent conduct failed to prevent the animal from injuring the victim. The point is that this category makes it clear that to be applicable the third party must have been *"in charge or control of the animal"* and by negligent conduct failed to prevent the animal causing injury.

[23] Such instances exonerate the owner from pauperian liability – the victim could of course claim under the *lex aquilia* from the third party. In the second category

it was for the owner of the domesticated animal, which *contra naturam* harmed a victim, to prove the defence that the harm was caused by the *"controllers"* negligence in his control of the animal.

[24] It is the second category upon which Defendant attempts to rely. However but for the plea as to breaking the locks and opening and leaving the gate open there was no plea or evidence establishing the requirement of a third party controller's negligence as required or at all. The causative position of negligent conduct of the third party, in the second category, relies on the third party being in control, or in charge, of the animal – the argument thus failing on the majority judgment at the first hurdle – as per the Roman Law. In the Roman-Dutch Law (as pointed out) Van Leeuwen (as quoted in the majority judgment) suggests that if there is negligence on the part of the owner *"or of anyone else"* the pauperian *actio* lapses. Joubert ACJ finds this issue to fall within the second category and further that the issue of causality of the negligence (initiated by control of the animal), is the negligence of the controller. The finding in favour of ***Lever***, on appeal, relied on Cohen's control over the dog and his negligence.

[25] *Mr Coetsee* for Defendant recognised the above but argues for an extension of the second category referring to the minority (concurring) judgment by Kumleben JA (Nienaber JA concurring) which upheld the appeal but on a somewhat different approach.

[26] The crux of *Mr Coetsee's* novel argument for Defendant relies heavily on the following passage in the judgment of Kumleben JA in ***Lever (supra)***[6] :

> "A further qualification (the 'wider exception') is at this stage controversial. I refer to the question whether fault on the part of a third party, short of conduct falling within the established exception, which causatively contributes to injury arising from an animal acting *contra naturam sui generis*, is similarly an answer to a pauperien claim. For instance, the negligence of a visitor to premises who leaves a gate open giving access to a yard within which a vicious dog is confined. There is authority favouring or pointing towards the recognition of this exception. (See Van Leeuwen C.F. 1.5.31.3; *Le Roux and Others v Fick* 1879 Buch 29 at 37; and Joubert (ed) *The Law of South Africa* vol 1 para 378 at 225.) However, this question as far as this court is concerned, remains an open one and for the purposes of this appeal need not be decided.
>
> The pertinent and only question calling for decision in this case is whether the culpable conduct of a person to whom the owner entrusts custody and control of an animal relieves the owner of liability which would otherwise by virtue of the *actio de pauperis* have existed (the 'exception in issue'). This exception has thus two components: the delegation of control to some person and causative negligence on his part."

[27] As will be appreciated the passage makes it clear that the *"wider exception",* that is whether fault on the part of the third party (short of conduct falling within the established exception) being the *causa causans* of the harm suffered, and causatively contributing to injury arising from the animal concerned, acting *contra naturam*, was an issue not relevant to the ratio in ***Lever*** and the learned Judge's comments on the extension of the exception are obiter.

[28] It is this wider exception for which *Mr Coetsee* contends and who correctly points out is an issue as yet undecided in our law, and there appears to be no South African authority directly on the issue and little academic guidance.

[29] *Mr Coetsee* however relies on the reference to ***Van Leeuwen*** and ***Le Roux v Fick (supra)*** and argues that the negligence of the intruder who left the gates

[6] page 26G-I

open but did no more and was not in control of the dogs – is sufficient to bring the *"wider"* exception into operation as a complete defence to pauperian liability.

[30] Currently I have not had my attention drawn to any case authority which has dealt herewith nor am I aware of such a case.

[31] It is relevant to note that Kumleben JA[7] stated:

> "The first sentence of this text plainly deals with pauperien liability. The second, as clearly and in stated contrast, gives an illustration of Aquilian liability. One cannot deduce that the animal or mule in this second illustration acted *contra naturam sui generis*: in fact the opposite is the more natural inference. That being the case the pauperien action will not lie, not because the Aquilian remedy is available, but because the animals behaved *secundum naturam sui generis*. I cannot accept in reference to this text that the *mere fact* that an injured party has an independent cause of action (the Aquilian one) against a wrongdoer *ipso jure* excludes another remedy (the pauperien action) to which an injured person is in law entitled. After all, in the parallel situation of vicarious liability, the actions against both the master and the servant co-exist.
>
> As regards our common law writers, I endorse the observation of Eloff DJP in the judgment of the court a quo at 437 A - B that they, following the precedent of the Justinian texts on which they comment, are casuistic in their approach. No explicit statement of exceptions to pauperien liability is laid down by them nor is one manifestly discernible. As pointed out in the other judgment, there is a general dearth of Roman Dutch authority dealing with the limits to this cause of action. However, having said this, I respectfully agree that the passage cited in that judgment from Damhouder's. *Practycke in Criminele Saken cap* 142 No 3 and Johannes Voet *Commentarius ad Pandectas* 9.1.6 are in point and can validly be relied upon as authority for the recognition of the exception in issue."

[32] In a careful analysis of the basis for pauperian liability, as may be relevant to the exceptions, Kumleben JA acknowledging that the creation of risk (the source of danger) is a reason put forward as justification for strict liability featuring in our own law in certain circumstances, said that this cannot be regarded, of itself, determinant of the content or ambit of the principle as follows:

> "At 438C-D of the judgment of the Court *a quo* it is stated that:
>
> 'The policy of the law in imposing strict liability on an owner of a domestic animal is that he creates a source of danger and should be answerable even if the neglect of another contributes

[7] at 27 G.

to the event causing damage. Only conduct of a third party which occasions the animal to behave in the manner complained of will relieve him of liability.'

This principle is likewise relied upon in a note by Prof C G van der Merwe on the decision of the Court *a quo*, which decision the writer endorses: see (1992) 109 *South African Law Journal* 398 particularly at 401 and 402. It is true that the creation of risk is a reason put forward as justification for strict liability featuring in our law in certain circumstances. (On risk liability generally cf *Minister of Law and Order v Nqobo* 1992(4) SA 822(A) at 832E - 834A). But the underlying reason for such a principle is not in itself the determinant of its content or ambit. As pointed out by Schreiner JA, though in reference to vicarious liability, in *Carter & Co (Pty) Ltd v McDonald* 1955(1) SA 202(A) at 211H:

'...(T)he fact that a main reason for the existence of the principle of the master's liability may be that he has created a risk for his own ends does not mean that wherever by his words or actions he has created or increased the risk to other persons he is liable. It is often useful to examine the reason which probably gave rise to the rule, in order to discover the rule's limits, but the reason, even if certainly established, is not the same as the rule.'

It must also be borne in mind that liability without fault runs counter to fundamental legal precept, though in certain instances considerations of social policy no doubt justify its existence. Where the owner of an animal has taken care to entrust it to another as its custodian, the former has ex hypothesi no means of exercising control over it. Competing interests are plainly at stake. Should the owner in such a case be held liable in the absence of any fault on his part or should the injured person be restricted to an action against the negligent custodian? Dictates of fairness and justice, to my mind, favour the owner and warrant the recognition of the exception in issue."

[33] In ***Le Roux and Others v Fick***[8] the following appears:

"The result of the law *si quadrupes* and of the ædilitian edict and of their extension by means of *utiles actions* seems to have been that an action *de pauperie* lay in all cases of damage caused by animals when the damage was not brought about through the fault of the party using the animal or of some third party."

[34] In the result on the above the extension of the second category of exception to a case such as this remains open and finds some support, for this potential exception, in ***Van Leeuwen*** and ***Le Roux v Fick (supra)*** although in my view by way of a somewhat tenuous and generalised comment. There appears to be no support for such extension in the Roman Law as referred to above even on a *"wider application"* thereof. As pointed out in ***Lever*** it seems that the Dutch Jurists simply adopted the Roman Law with little comment. Whilst ***Van***

[8] (1879) 9 Buch 29 at 37

Leeuwen in the text referred to very briefly adverts to the lapse of pauperian liability if there is negligence on the part of the owner *"or of anyone else"*, the suit then to be under the *lex aquilia.* ***Le Roux*** takes the matter no further than this.

[35] It seems to me that the examples given by ***Van Leeuwen*** are considerably removed from a case such as this nor is such a case recognised, as I understand it, in the underlying Roman Law.

[36] Indeed in ***Brahman and Another v Dippenaar*** [9] and in our post Constitutional era the Supreme Court of Appeal held that the *actio,* more than 24½ Centuries old, remained part of our Law – there being no reason to abandon same – more especially as the phenomenon of risk-liability was becoming more prevalent and had a useful role to fill as to an owners liability for damage caused by domesticated animals.

[37] The remedy, said the Court, was not unconstitutional or *contra bonis mores* – the Courts duty being to expand or curtail it depending on the circumstances.[10]

[38] Risk liability in deserving cases was justified, said the Court, and on the facts of that matter there was no practical reason for denial of the *action*.

[9] 2002 (2) SA 477 (SCA)
[10] At para 15, pg 484 C/D – D/E

[39] In 1927 the Appellate Division considered ***O'Callaghan NO v Chaplin***[11] as to pauperian liability:

At 329 Innes, CJ held:

> "But the liability of an owner must be limited in accordance with the principles of the Civil Law. I entirely agree with the ruling in *Drummond v Searle* that one of those limitations must be that the injured person, or the injured animal, was lawfully at the place where it was injured. It was not so laid down in the *Digest,* but there is no *lex* inconsistent with that view, and the limitation is one which is obviously necessary. A trespasser upon property, if he were bitten by the watchdog, could not sue the owner merely because he was owner. He might conceivably, and under special circumstances, base his claim on *culpa;* but not on ownership. I also agree with LAURENCE, J., in thinking that there must have been no "substantial negligence or imprudence" on the part of the person injured—by which I understand no unreasonable conduct contributing to the injury. The basis of that limitation of the owner's liability is to be found in the *Digest.* If the injury were due to provocation by the injured person no compensation could be claimed *de pauperie.* (*Digest* 9.1. secs. 6 and 8). And I think that the example given by Paulus (*Dig.* 9.1. sec. 2) points to negligence as a ground of defence. The case put was that of a man entering a shop or inn being bitten by a savage dog; the *actio de pauperie* would lie, it was said, if the dog was at large, but not if he were tied up. No reason was given, but the obvious reason would be that a man who saw the dog chained ought not to have gone near it. And that is the reading given to the passage by Oosterga, *Cens. Belg.* (9.1. sec. 2): — *"laesus agere non potest quia ipse in culpa fuit, cur se in tabernam receperit et canem ibi non observaverit loro alligatum et forte latrantem."* So that there is direct authority for the application in pauperien actions of the fundamental principle that no man can recover damages for an injury for which he has himself to thank. By our law, therefore, the owner of a dog that attacks a person who was lawfully at the place where he was injured, and who neither provoked the attack nor by his negligence contributed to his own injury, is liable, as owner, to make good the resulting damage."

[11] 1927 AD 310

At 366 Kotzé JA held:

> "Coming now to the case before us, we have to deal with a claim for compensation where a child was bitten by a dog in the house of its owner, the defendant. Dogs, as we have seen, were considered by Roman law as falling both under the head of animals doing damage *contra naturan (pauperies)*, and under the head of animals doing damage *secundum naturam.* It is because of their natural inclination, or as the cases express it "their vicious propensity to do mischief," that dogs have been placed in the latter category, and even been spoken of as animals *ferae naturae*, which in legal strictness they are not. The fact, however, remains that the edict of the Aediles places both a dog and an ordinary boar in the same class as other harmful animals, including those which are wild by nature. But dogs, like other domestic animals, are also considered capable of committing *pauperies.* It will entirely depend on the circumstances of each particular instance, whether an action *de pauperie* or one under the edict is the suitable remedy. That an action *de pauperie* will be available against the owner of a dog biting an innocent person, that is a person who was lawfully at the place where he was bitten, is beyond doubt, both in the law of Holland and of South Africa. The liability of the owner of the dog is based on his ownership of the animal; but this liability is not an absolute one attaching under all circumstances. The case put by *Paulus*, of a person entering an inn and bitten by a dog kept chained there, shows that the owner will in that instance not be liable; whereas if the dog be at large *(solutus)* an action *de pauperie* will lie against its master. The reason for this is, that the fact of the dog chained up serves as a warning to people entering the inn not to approach too near the animal (Oosterga *ad Dig.* 9.1.2.1; *Voet* 9.1.6). The *lex* in question indicates that, where due precaution has been taken by an owner to prevent his dog doing mischief, the Pauperian action will fail against him. If a person is bitten by a dog so chained up, he will be considered, through his absence of caution, to have brought the injury upon himself, and the owner of the dog can set up that defence. Another illustration, showing that the owner's liability, based on the ownership of the dog, is not absolute, is given by Ulpian in *lex* 1.5. of the same title in the *Digest*. As I have already mentioned, Ayliffe, in his Commentary on the *Pandects,* also states that, if a man is lawfully at the house of another, the master must take care of his dog, and if he does not and the man is bitten by the dog, the action *de pauperie* will lie against the master. *(Pand.* Bk. 4. *Tit.* 33, p. 591). Damhouder likewise, in the second paragraph quoted from his *Criminal Practice*, already set out in an earlier portion of this judgment, says substantially the same."

[40] Considering the above, I can find no convincing support either in principle or flowing from the Rules as to pauperian liability justifying the extension of a pauperian defence or exception as contended for by *Mr Coetsee.* Indeed on the facts of his mater I can see no practical reason for the denial of pauperian liability nor do I consider there to be any convincing argument, or logical reason, to extend the second exception to include a third party's causative negligence, as in this matter (the third party not being in control of the dogs however).

CONCLUSION ON THE MERITS

[41] In the result in this matter:

[41.1] The usual requirements of pauperian liability were conceded by Plaintiff after an initial and abortive attempt to avoid the ownership issue.

[41.2] The usual defences or exceptions were not raised, save as set out below, and there was no fault on the part of Plaintiff, an entirely innocent passerby lawfully present on the adjacent public road.

[41.3] Reliance on the negligence of a third party (but who was not in control of the dogs) was raised as a complete defence – this being the intruder who left the gate open.

[41.4] There are no facts present in this matter, pleaded or proved, bringing into operation the concept that culpable conduct of a third party causing

a domesticated animal to act *contra naturam* exonerates the owner from pauperian liability (the first category) – for example where the third party provoked the animal by hitting or wounding same – that is, no positive act *vis-a-vis* the animal itself.

[41.5] Similarly it is clear that the third party intruder relied on, was not in charge, or control, of the dogs and failed (as such) by negligent conduct to prevent the animals injuring the victim – that is, no causative conduct amounting to a failure to exercise proper control over the dogs (the usual second category referred to above).

[41.6] Finally I am unable to find any substantial or indeed logical reason which warrants the extension of either exception to the instant case. The first category is patently not such as to be so extended nor was same argued. The second category, relied upon in argument, fails to present, to my way of thinking, any logical basis for such further extension beyond someone (a third party) being in control of the animal concerned and failing to exercise proper control – giving the domesticated animal the opportunity of injuring the victim. To do so would, in my view, go far beyond the pauperian liability exception (defence) envisaged in the authorities as referred to above. It would be completely unprecedented and unjustified having regard to both the exception rule established in pauperian liability and the principle underlying same, and as set out in paragraph [40] above.

[42] In the result the defence fails and Plaintiff's claim on the merits succeeds, in pauperian liability.

COSTS:

[43] Normally the costs order would be simply that Defendant pays Plaintiff's costs on a party and party scale, Plaintiff having been successful on the merits.

[44] However, Plaintiff seeks, in addition, a punitive costs order in respect of half a day's costs – being the first half day of trial.

[45] Plaintiff argues that in the amended plea, as it was at commencement of trial, Defendant had no knowledge as to whether it was his dogs that had attacked Plaintiff, was simply a tactical plea, putting Plaintiff to the proof of ownership and that Defendant's dogs attacked Plaintiff and not some other dogs being responsible.

[46] As a result of this Plaintiff led witnesses on the first day of the trial to establish ownership, the attack by the dogs owned, and that they acted *contra naturam* (also denied but then later conceded at the commencement of the first day of trial).

[47] It became apparent from the evidence that the dogs were unquestionably Defendant's dogs (owned by him), they were covered in blood (when he arrived)

and identified at the scene by people living close by – and moreover were *"put down",* shortly after the incident, on the Defendant's instruction (something avoided by Defendant in answer to a request in this regard in particulars for trial).

[48] Defendant and his wife conceded, in their evidence, that they were fully aware, on the day of the attack, that it was their dogs which were responsible, having arrived at the scene after the attack, the clear facts then and there indicating, without doubt, that Defendant's dogs were responsible.

[49] In the light hereof it is extremely difficult to understand why this was not admitted in the Plea, on the basis of Defendant's knowledge of the surrounding facts.

[50] It was argued that not having been present at the time of the attack and not having thus so-called firsthand personal knowledge of the attack, justified this.

[51] I do not agree. This kind of tactical pleading is to be deprecated.

[52] In the result, I consider that Plaintiff should have his costs for the first half day of trial on an attorney and client basis.

[53] Lastly in my view, this matter, which is an extremely large claim and one moreover raising a point of law *res nova,* more than justified the employment of two counsel as a wise and reasonable precaution.

ORDER:

1. Judgment is granted in favour of Plaintiff, based on the *actio de pauperie*, against Defendant, who is held liable for Plaintiff's damages caused by and arising from the dog attack upon him on 18 February 2017, as proved or agreed.

2. The Defendant shall pay the Plaintiff's costs of suit, on the scale as between party and party, save that the costs of the first half day trial (being 12 November 2018) shall be on the scale as between attorney and client, all with interest calculated thereon at the legal rate as from 14 days from date of taxation until date of final payment, such costs to include:

    2.1 the costs of two counsel;

    2.2 the costs of one inspection *in loco;*

    2.3 the costs of preparing the photographs for trial;

    2.4 the costs of preparing heads of argument.

3. The remainder of the issues are postponed *sine die.*

_____

M.J. LOWE
JUDGE OF THE HIGH COURT

Obo the Plaintiff:	Adv P Mouton and Adv N Barnard
Instructed by:	Lessing, Heyns, Keyter & Van Der Bank Inc., Port Elizabeth

Obo the Defendant:	Adv D Coetsee
Instructed by:	BDP Attorneys c/o Smith Tabata Inc., Port Elizabeth