

05/71

## SUPREME COURT OF VICTORIA

**ANDERSON v COTTON & ORS**

Crockett J

9 March 1971

**PRACTICE AND PROCEDURE – APPLICATION OF AMENDING ACTS OF PARLIAMENT – WHETHER RETROSPECTIVE OR PROSPECTIVE – PRESUMPTION TO BE APPLIED – AMENDMENTS MADE BY THE DOG ACT 1970 – WHETHER SUCH AMENDMENTS CAN HAVE APPLICATION TO A CAUSE OF ACTION BASED ON A PREVIOUS ACT – WHETHER AMENDMENTS TO BE GIVEN RETROSPECTIVE OPERATION: DOG ACT 1958, S26; DOG ACT 1970, S22.**

**HELD:** Claim under the 1970 Act failed on the ground that the amendments made to the Act were not retrospective.

1. The presumption in respect of legislation is against retrospection. According to *Halsbury*, 3rd Ed., Vol. 36, p423 "the general rule is that all statutes other than those which are merely declaratory, or which relate only to matters of procedure or evidence are, *prima facie*, 'prospective'; and retrospective effect is not to be given to them unless by express words or necessary implication it appears that this was the intention of the legislature."

2. In relation to the submission that the amendments made were merely procedural, the alteration of the nature of the damage which could be claimed under the 1970 Act went to a substantive part of the cause of action.

3. The enlarged definition of "owner" altered the substantive rights or liabilities of persons who may have been affected by the 1970 legislation. This was something which could have had a very real effect in the present case because, certainly as the third defendant, at all events, was concerned, so far one of the causes of action relied upon to maintain liability on his part was such that as pleaded it would seem he would not be an owner as defined before 1970, but very well might be under the new legislation.

4. It was clear that substantive rights were affected by 1970 *Dog Act* which was proclaimed on the 23 December 1970. Accordingly, the claim made in the alternative under Paragraph 13 of the amended Statement of Claim, resting upon the *Dog Act* 1970, failed.

**CROCKETT J:** This is a claim for damages in respect of injuries said to have been suffered in 1966 when one or two dogs attacked and injured the plaintiff. The action is brought against three named defendants two of whom, on at least one view of the cause of action said to exist, are said to have been the owners of the dog or dogs, and the third to have been an agent of those owners, and who was exercising the dogs at the time of the attack.

Before the case was opened, and after the jury was empanelled, and in the jury's absence, I raised with senior Counsel for the plaintiff the question as to whether the precise cause of action that was intended to be relied upon could indeed be extracted from the statement of claim as it then stood.

Whilst it was clear enough, I think, that an action at Common Law where damage was caused by a dangerous animal was pleaded, or also a claim for damages based upon negligence was pleaded, there were serious difficulties in understanding those causes of action as they related to the specific defendants which I discussed with Counsel and which need not now be alluded to.

It seemed to me that before the case was opened it was essential that amendments be undertaken to the Statement of Claims with the object of setting out in writing what were claimed to be specific causes of action which were sought to be relied upon, whether cumulatively or in the alternative. That in large measure has been done since the expiration of the adjournment granted for that purpose.

I also raised with Counsel before the granting of the adjournment the question as to whether or not there should be included in the plaintiff's claim an action for damages based upon the *Dog Act*. No such cause of action has been pleaded. It seemed to me that it was possible that the draughtsman of the Statement of Claim did have in mind some such action because of the use of terms in the Statement of Claim such as "owner" or "occupier of premises" which appear in the various *Dog Acts*, which probably have little relevance to the devolution of responsibility at Common Law.

When the Statement of Claim was being re-drafted, Counsel took the opportunity of considering whether an additional cause of action should be pleaded, erected upon the provisions of the *Dog Act*, and in the event a paragraph was added in which a claim was made in which relief was based on the 1958 *Dog Act*, or alternatively on the 1970 *Dog Act*.

Counsel for the defendant has not had time to plead to the new Statement of Claim. He has told me that in addition to the admissions or denials which were made in the earlier defence, and which can be now ascribed to the appropriate paragraphs in the redrafted Statement of Claim he wished only to plead to the new paragraph of the Statement of Claim, which is Paragraph 13, that no cause of action exists in law. I have taken him as so pleading for the purpose of the argument which has since transpired. Both Counsel are agreed, as indeed, am I too, that the validity of that plead to Paragraph 13 on the part of the defendant should be determined before Counsel for the Plaintiff opens to the jury.

Accordingly argument has transpired with a view to obtaining my ruling of that question. I now proceed to give that ruling.

The 1958 *Dog Act* contained a section, which was s26, prescribing the cause of action for recovery of compensation in terms then described as "actual damage" on complaint being made, and s30 of the same Act provided, amongst other things, that such a complaint was to be heard before a Court of Petty Sessions. These two Sections, although subject to certain amendments in the meantime, are the equivalent of the legislative provisions which existed in ss20 and 24 respectively in the *Dog Act* that was in force in 1886 in Victoria.

The Full Court of this Court in that year in *Lane v Casey* [1886] VicLawRp 93; (1886) 12 VLR 380, held that the combined effect of these two sections was to limit any claim for compensation for injury done by a dog upon a person to a claim in a Court of Petty Sessions, although it did not preclude a claim based upon ordinary Common Law actions by way of action taken in this Court. The essential difference, of course, is that if a person suffering damage could avail himself of the provisions of the *Dog Act*, he had certain evidentiary provisions assisting him in the proof of ownership which was made the vehicle of liability under the statutory provisions, and also was absolved from the necessity of proving what at Common Law was required as an element in the cause of action known as "scienter".

Although in 1961 there were extensive amendments to the 1958 Act, I think the decision in the case of *Lane v Casey* remained in effect until 1970.

Accordingly I am of the view that there is no cause of action given the plaintiff under the *Dog Act* of 1950 as amended and as pleaded as one of the causes of action in Paragraph 13. Accordingly I hold there is no cause of action under the provisions of the *Dog Act* 1958.

However, there came into force on 22 December 1970 a completely new *Dog Act* which did not have the provisions of the old s30. Furthermore, the expression "actual damage" was omitted in what had previously been s26 as were the words "on a complaint." The other provisions of what had been s26 find their place in s22 of the 1970 *Dog Act*.

It seems to me that the use of the word "damage", the elimination of the reference to proceedings by complaint and of what had previously been the provisions of s30 in the 1958 Act seem to me to make it clear that claims for damages for injuries suffered by an attack upon a person by a dog can be brought in any Court without any limit on the nature of the damages that can be proved, whether they be actual or consequential or past or prospective.

It is because of this construction that can be placed upon the 1970 Act that it is sought to found a cause of action in the present proceedings upon these provisions. The difficulty, however, with which Counsel for the plaintiff is met is that the actual attack and injury suffered occurred in 1966. Counsel for the plaintiff accordingly seeks to have me rule that the 1970 Act is retrospective in its operation to cover the 1966 attack by a dog or dogs upon his client so as to give him a cause of action based on the 1970 Act here today.

Mr Francis conceded that the presumption in respect of legislation is against retrospection and I think I correctly stated the principle in taking it from *Halsbury*, 3rd Ed., Vol. 36, p423 where it is said that "the general rule is that all statutes other than those which are merely declaratory, or which relate only to matters of procedure or evidence are, *prima facie*, 'prospective'; and retrospective effect is not to be given to them unless by express words or necessary implication it appears that this was the intention of the legislature."

I have said that Counsel for the plaintiff acknowledged the validity of that proposition, but he has sought to persuade me that the provisions of the 1970 Act where they alter the law in the fashion I have already outlined are merely procedural. The submission has been that there always was a claim for damage, that procedurally it was limited to a claim to be made in a Court of Petty Sessions, and that the enlargement of the jurisdiction to include an action that can be brought in this Court is no more than procedural.

This is a valiant attempt, I think, to overcome the ordinary presumption. But I believe it must fail. I think it fails because substantive rights, in fact, are affected. I think that whilst the arena in which the combat can be undertaken might be a matter of procedure only, the alteration of the nature of the damage which can now be claimed under the 1970 Act as compared with the existing legislation plainly goes to a substantive part of the cause of action.

Moreover, I think the enlarged definition of "owner", as Counsel for the defendants has reminded me also alters the substantive rights or liabilities of persons who may be affected by the 1970 legislation. This is something which could have very real effect in this particular case because, certainly as the third defendant, at all events, is concerned, so far one of the causes of action relied upon to maintain liability on his part is such that as pleaded it would seem he would not be an owner as defined before 1970, but very well might be under the new legislation.

Accordingly I think it is clear that substantive rights are affected by 1970 *Dog Act* which I am told was proclaimed on the 23 December 1970. I again borrow a passage from *Halsbury*, the same edition, p424; "The Courts have frequently held (His Honour reads)...as it existed when the action was commenced". I think that is the passage which affects the present pending proceedings. Accordingly, I am of the view that the claim made in the alternative under Paragraph 13 of the amended Statement of Claim, resting upon the *Dog Act* 1970, also fails, and I so rule.

**APPEARANCES:** For the plaintiff Anderson: Mr CH Francis QC with him Mr A Hooper, counsel. For the defendants Cotton and Ors: Mr BJ Doyle, counsel. S Edward, Carroll & Co, solicitors.