17/12; [2012] VSC 195

SUPREME COURT OF VICTORIA

JOHNSON v BUCHANAN

Bell J

26 March, 11 May 2012

CRIMINAL LAW – DOG BITE CHARGE – VICTIM BITTEN WHEN HE ALLOWED HIS ARM TO GO OVER CHEST-HIGH DIVIDING FENCE AND DOWN INTO DEFENDANT'S PREMISES – DOG KEPT IN SECURE FRONT YARD AND TOO SMALL FOR SNOUT OR PAWS TO REACH TOP OF FENCE – WHETHER VICTIM WAS TRESPASSING – WHETHER BITE OCCURRED BECAUSE VICTIM WAS TRESPASSING – MEANING OF THE WORD "BECAUSE" – WHETHER STATUTORY DEFENCE OF TRESPASSING APPLIED – MAGISTRATE UPHELD DEFENCE OF TRESPASSING AND DISMISSED CHARGE – WHETHER MAGISTRATE ERRED IN LAW ON FACE OF THE RECORD BY UPHOLDING THAT DEFENCE AND DISMISSING CHARGE – TRESPASS – *SCIENTER*: *DOMESTIC ANIMALS ACT* 1994 (VIC) SS29(4), (9)(b).

B. kept a non-dangerous dog in his secure front yard. The dog was too small for its snout or paws to reach the top of that fence. One day E. who lived next door to B. was talking to his son in the driveway of his home. He leaned on and allowed his arm partially to protrude over the fence. As the arm went down, it was bitten by the dog, causing E. serious injuries. J., an authorised prosecution officer with the Moreland City Council charged B. as the owner of the dog, with a dog attack offence under the *Domestic Animals Act* 1994 (Vic) ('Act'). That the victim was trespassing was a defence. The charge was heard in the Magistrates' Court. On the hearing of the charge, B. admitted owning the dog, the bite to E. and the serious injury which it caused. B. relied on the defence that the bite occurred because E. was trespassing on his premises by allowing his arm partially to protrude over the fence. The magistrate upheld that defence and dismissed the charge. Upon application for judicial review—

HELD: Application for judicial review dismissed.

1. Section 29(9)(b) of the Act creates a defence where 'the incident occurred because ... a person was trespassing on the premises on which the dog was kept'. The defence is available in respect of all the offences specified in s29. As the defence applies if the incident occurred 'because' of the circumstances specified in s29(a)-(d), there must be a causal relationship between those circumstances and the attack or other criminalised conduct. The trespass defence in s29(9)(b) of the Act is available where the offence occurred because the person was trespassing in a criminal or civil sense.

2. The word 'because' in s29(9) of the Act operates to require a causal relationship between the incident (here the dog bite) and the trespassing of the person on the premises. The magistrate approached that question in a straightforward and common sense manner as a question of fact. On the facts which his Honour found, he concluded there was a 'sufficient nexus' between the victim's trespassory intrusion or encroachment and the bite. On that basis, he concluded that the bite had occurred 'because' of the trespassing. There was no legal error in that approach. His Honour interpreted and applied the causation test in the correct manner.

3. The proper interpretation of s29(9)(b) of the Act is that 'trespassing' means trespassing according to the common law of trespass. According to the common law of trespass, E. was trespassing when he allowed his arm partially to go over the dividing fence and down into the defendant's property. The magistrate did not err in law in so deciding. That conclusion was consistent with the common law right of persons to protect their property with a dog.

4. On the unchallenged findings which the magistrate made, the victim E. allowed his arm to go over the chest-high dividing fence and down into B.'s premises when he was leaning on that fence. E.'s action was casual and inadvertent, but it was conscious and voluntary. The incursion was very minor, but even minor physical incursions into someone else's property amount to trespass, unless authorised. It was not contended E. had express or implied permission to do what he did. The incursion was into B.'s airspace, but that too was a trespass. The incursion of E.'s arm into B.'s premises did not cause the defendant any damage, but damage is not an element of the tort of negligence. Applying the common law principles which governed the situation, the magistrate did not err in deciding that the victim had trespassed on the defendant's premises.

5. Neither did the magistrate err in law in deciding that E. was bitten because he was trespassing on the premises. B. kept the dog in the secure front yard of his home. On the found facts, the dog

was too small to reach the top of the dividing fence with its snout or its paws. E. was bitten when he allowed his arm to go over and down into B.'s premises when he was leaning on the fence. On those facts and on the proper interpretation of the statutory provisions, the magistrate was entitled to find that there existed the necessary causal link between the bite and the trespass and to conclude that the charge must be dismissed because the defence applied.

6. Accordingly, the application for judicial review was dismissed.

BELL J:

INTRODUCTION

1. Robert Stanley Ellis lived next door to Christopher John Gerald Buchanan in Oak Park. Their properties were separated along the side boundary at the front by a chest-high fence. Mr Buchanan kept a non-dangerous dog in his secure front yard. The dog was too small for its snout or paws to reach the top of that fence.

2. One day Mr Ellis was talking to his son in the driveway of his home. He leaned on and allowed his arm partially to protrude over the fence. As the arm went down, it was bitten by the dog, causing Mr Ellis serious injuries.

3. Glenn Johnson is an authorised prosecution officer with the Moreland City Council. He charged Mr Buchanan, as the owner of the dog, with a dog attack offence under the *Domestic Animals Act* 1994 (Vic). That the victim was trespassing is a defence.

4. The charge was heard in the Magistrates' Court of Victoria at Broadmeadows. Mr Buchanan admitted owning the dog, the bite to Mr Ellis and the serious injury which it caused. He relied on the defence that the bite occurred because Mr Ellis was trespassing on his premises by allowing his arm partially to protrude over the fence. The magistrate upheld that defence and dismissed the charge.

5. In this application for judicial review, Mr Johnson contends the magistrate erred in law on the face of the record by dismissing the charge when there was no or only a technical trespass.

CRIMINAL PROCEEDING

Charge

6. Section 29(4) of the Domestic Animals Act makes it an offence, punishable by fine against the owner, for a non-dangerous dog to attack or bite a person or animal causing death or serious injury. Under s29(9)(b), it is a defence if 'the incident occurred because ... a person was trespassing on the premises on which the dog was kept'.

7. Mr Johnson, who I will call the informant, charged Mr Buchanan, who I will call the defendant, on summons that at Oak Park on 13 February 2010 he breached s29(4) in that his dog bit and caused serious injury to Mr Ellis, who I will call the victim.

Evidence

8. Oral evidence was given at the hearing, after which the magistrate made findings and dismissed the charge. Under s10 of the *Administrative Law Act* 1978 (Vic), the magistrate's oral reasons, which I will set out below, form part of the record. Here I summarise the evidence for the purpose of understanding the magistrate's findings and the decision which his Honour made, as reflected in those reasons.[1]

9. Enzo Mercuri, a local law and environmental officer with the council, gave evidence about attending the scene. He told the court the victim was rushed to hospital by ambulance. The defendant was co-operative and knew nothing about the attack until he was told. The dog was later seized and taken to the pound.

10. Brenton James Thompson, an animal management officer with the council, gave evidence of the dog being seized and taken away. He agreed the fence was of a standard paling type with capping which sloped down at the front to a height of 4 feet 6 inches. The defendant had been proactive in protecting his property. He did a test to see if the dog could jump as high as the top of the fence. The dog could not physically get its paws to the top of the fence. From an angle, he could see its face but, even when jumping, it could not get its snout up to the top of the fence.

11. The victim deposed to talking with his son in the driveway of his home. He described how, at one point, he leaned on the side fence. He said 'my arm partially went over the fence, but as it went over the fence I was bitten by the dog next door'. The bite was 'on the top and bottom' of his arm and the dog 'sort of pulled [him] down'. He could only get the dog to let go by distracting it with his other hand, which the dog also bit. The bite on his arm left 'two massive big holes' and there was a puncture and bleeding on the other hand. He was taken by ambulance to hospital for treatment.

12. It was the victim's evidence that he did not recall being told not to pat the dog. He did not try to pat the dog. The fence was low enough for him to rest his arm comfortably on. He had not measured it and did not know its exact height. He was not thinking about the dog at the time and did not see why he needed to. He was not anticipating being bitten. He may have rested his arm on the fence longer than momentarily.

13. The victim's son, Brett Daniel Ellis, gave evidence that he and his father were talking near the fence when the incident occurred. Brett's fiancée was also present. His father was leaning his right arm on the fence. The dog leaped up and latched on to his arm. He described the injuries which his father received. When bitten, his father was looking at Brett and not at the dog. His father's arm may have been partially over the fence but he was not looking at it. He had previously seen the dog jump up high enough for his head to be visible at the top of the fence.

14. Brett's fiancée, Kate Michelle Isaacs, testified to seeing the aftermath of the bite but not the bite itself. She had seen the dog jump up high enough for its head to be visible.

15. The defendant gave evidence about the dog and to fencing the property. The measured height of the side fence at the front was 4 feet 6 inches, with a 4 inch capping on top. The dog was excitable but not aggressive. When the victim moved in, the defendant explained that he should not pat the dog over the fence. The dog could not reach the top of the front fence, which was 4 feet high. The side fence was 6 inches taller at the front. The dog could not jump up as high as that fence.

Dismissal

16. It was on that evidence that the defendant relied on the defence of trespass. The informant submitted the defence did not apply because the incursion had been momentary and unintentional. Therefore there had been no trespass of the kind covered by the defence. He relied on the judgment of the High Court of Australia in *Simpson v Bannerman*[2] where that reasoning had been adopted in a civil case. He submitted the legislation should be read liberally because its purpose was to protect the public. He further submitted there was no causal link between the alleged trespass and the bite, which was caused by the propensity of the dog to bite and not any trespass.

17. The magistrate dismissed the charge on the ground that the incident occurred because the victim was trespassing on the defendant's premises and therefore the defence in s29(9)(b) applied. His Honour gave these reasons:

> I am satisfied also that [Mr] Ellis's actions at law can constitute a trespass if he intruded or encroached into the property and space occupied by this dog.
>
> I am satisfied that Mr Ellis did in fact invade the dog's space, given (a) his testimony that his arm partially went over the fence and, secondly, independently, independent evidence given by Thompson on behalf of the prosecution who conducted his own test in relation to this dog and his evidence about where the dog's paws and snout could reach or could not reach.
>
> In those circumstances the defence provided by subsection (9) of section 29 under this particular Act is open to the defence.

18. His Honour found the dog was not proved to have a propensity to bite. He decided there was 'a sufficient nexus' between the placing of the arm over the fence and the bite, which I take to be a finding that the 'because' test of causation in s29(9) was satisfied. He distinguished *Simpson* on the ground that it was a civil and not a criminal case.

APPLICATION FOR JUDICIAL REVIEW

Grounds

19. The informant made the application for judicial review by originating motion pursuant to r56.01(2) of the *Supreme Court (General Civil Procedure) Rule*s 2005 (Vic). He specified the grounds that the magistrate had erred in law and should have decided that:

> (1) the victim was not a trespasser under s29(9) of the *Domestic Animals Act*;
>
> (2) if there was a trespass, it was not covered by the defence in that provision;
>
> (3) the trespass had not caused the injury; and, (4) the legislation should have been interpreted beneficially.

I take these grounds implicitly to allege error of law on the face of the record for which judicial review in the nature of *certiorari* (quashing) is available.

20. In the hearing before me, the informant maintained these grounds, but in a refined form. No challenge was made by either party to the fact findings of the magistrate.

Submissions

Plaintiff

21. Relying on precedents,[3] the informant submitted the legislation should be interpreted consistently with its purpose, which was to protect the public from dangerous dogs. So interpreted, s29(9)(b) did not apply in this case.

22. He accepted there could be trespass by negligence. But in the present case, there was no recklessness, no intent and no negligence and therefore no trespass. The victim had simply put his arm partly into his neighbour's airspace and that was not negligence because it did not cause any damage. Damage was an essential component of negligence. Therefore there was no trespass by negligence. At most there was a single 'technical' trespass, which was not enough to constitute trespass or enliven the defence.

23. He relied on Simpson, which he said decided that where the victim's act was inadvertent, unintentional, did not cause damage and was not negligent, it was not trespass.

24. He submitted that, to be negligent, the victim's action in putting his arm over the neighbour's fence had to fall below the standard of self-care which was to be reasonably expected of an ordinary person. A casual and inadvertent act did not offend against that standard. People should not lose the protective benefit of the legislation and should remain protected against dog bites in such circumstances.

25. He submitted the defendant was obliged by s72(1) of the *Criminal Procedure Act* 2009 (Vic) to establish the defence of trespass. The onus was on him to show the victim had acted intentionally, recklessly or negligently in putting his arm over the fence. The line between private choice to have a dog and public protection against dog bites was whether there was trespass, which the defendant did not establish.

26. He accepted the word 'trespass' in s29(9) bore its technical legal meaning. But an unintentional, non-negligent act was not a trespass according to that meaning. The magistrate decided the trespass had been constituted by the victim's momentary and partial incursion into his neighbour's airspace, but that was insufficient. There had to be intention, negligence or recklessness and there was none of those things. It is not correct to examine the issue of intention by reference to the physical intrusion alone. The question was whether the victim had the intention of trespassing as a civil wrong. Thoughtless incursion was not enough.

27. As to causation, he submitted the magistrate had to decide whether the injury was caused by the very act of the victim in putting his arm over the fence. This was not a case like the release by a third party of dangerous dogs which go on to bite a person. In that kind of case, the cause of the bite is the release of the dogs. Here the injury was not caused by the victim putting his arm over the fence but by the dog's temperament, which was to bite.

Defendant

28. The defendant submitted the tort of trespass did not require damage at all because it protected the owner's right to possession of the property. Here there was intentional intrusion. The victim deliberately put his arm on and then partially over the neighbour's fence. This was a voluntary and not an involuntary act.

29. He accepted the magistrate did not say the trespass was intentional or negligent, but it could clearly have been either or both. Nobody suggested at the hearing it was negligent. All presumed it to be intentional. But it was open to the magistrate to decide the case on either basis and his Honour did not have to say which of the two applied. Where land was involved, a negligent act, even if unintentional, was enough. There had to be fault in the sense of intentional or negligent invasion, but that was so here. The magistrate just had to decide whether the intrusion was a trespass and that is what his Honour did.

30. He relied on *Ericsson (Australia) Pty Ltd v Popovski*[4] for the proposition that the court should not, in an application of this nature, interfere with findings of fact made by a magistrate or attempt to reinterpret such findings, even where the court may take a different view.

31. He submitted the victim had behaved at least recklessly. He had put his arm over the fence where the dog was. He did so voluntarily. The evidence showed the dog could not reach the top of the fence, so the arm must have been well over it. The intrusion was not simply aerial because the fence formed part of the property. There was no implied licence for the victim to do what he did – it was an unauthorised act.

32. He relied on the rule of construction that criminal legislation is not interpreted to enlarge the number of persons caught.

33. He submitted *Simpson* supported his case because the High Court found the victim's actions, though thoughtless, were trespassory. Under that decision, actions which were intentional or negligently thoughtless could amount to a trespass, which covered the field of the present case.

34. On causation, he submitted the sequence of events demonstrated the connection between the trespass and the bite. On the magistrate's findings, the dog could not reach the top of the fence and the victim had been told by the owner not to pat the dog. When the victim put his arm over the fence, it was followed immediately by the bite. Therefore there was a sufficient nexus between the doing of the act of trespass and the bite, as the magistrate correctly found.

DOMESTIC ANIMALS ACT

Legislative history

35. I will begin with the *Dog Act* 1864 (Vic). It made provision for the registration of dogs (ss4-10) and the seizure of dogs found at large (s11). It also allowed a person to recover a sum not less than 5 shillings nor more than 5 pounds over and above any damages recovered for damage to property or injury to person by reason of a dog rushing at or attacking any person, horse or bullock in a public place (s13).

36. The *Dog Act* 1884 (Vic) had expanded provisions for the registration of dogs (ss13-14) and seizure of dogs found at large (s14). It permitted the owner or occupier of enclosed land to destroy any trespassing dogs not under control (s19). It gave persons the right to recover, on complaint, a penalty against the owner of a dog which rushed, attacked, worried or chased any person, horse, cattle or sheep and also to recover compensation for any actual damage caused (s20). The provision went on to abolish the need, in a proceeding on such a complaint, for the complainant to prove a previous mischievous propensity on the part of the dog, knowledge of that propensity on the part of the owner or negligence on the part of the owner. The provision did not abolish the need for that proof in other proceedings, such as an action for damages at common law based on the doctrine of *scienter*.

37. These compensation provisions were considered in two early cases. From *Loft v Wade (No 2)*[5] it is clear that the right to obtain compensation was available only in a proceeding for a complaint and not as a general statutory cause of action. From *McKinnon v Dwyer*[6] it is clear that the right to obtain compensation in a complaint proceeding was separate from, and did

not derogate from, an action at common law for damages based on the doctrine of *scienter*. This highlights the limited nature of the abolition of the need to prove knowledge of the mischievous tendency of the dog. In other jurisdictions, the need for that proof was abolished for the purposes of the doctrine of *scienter* and not just in criminal complaint proceedings (see below).

38. The *Dog Act* 1958 (Vic) made provision along the same lines as the early legislation. The offence and compensation provisions (s26) were in the same form: compensation was available in criminal complaint proceedings; it was not necessary to prove the owner's knowledge of the mischievous tendency of the dog; *scienter* was not touched; and it remained necessary in civil proceedings based on that doctrine to prove that knowledge.

39. In *Trethowan v Capron*[7] Adam J held that, absent special circumstances giving rise to a duty of care, a dog-bitten trespasser could not, under those provisions, recover compensation from an owner exercising his common law right to guard his premises with a dog.[8] The judgment contains valuable statements about the common law and statutory liability of dog owners for compensation which I will later consider.

40. The *Dog Act* 1970 (Vic) consolidated and amended the law relating to dogs. It changed the drafting form but not the substantive content of the offence and compensation and the knowledge provisions (s22).

41. The current provisions of the *Domestic Animals Act* stem from the *Domestic (Feral and Nuisance) Animals Act* 1994 (Vic). The current s29 of the *Domestic Animals Act* is an expanded version of the 1994 provision. Section 29(1) as originally enacted made the owner[9] guilty of an offence if the dog rushed at, attacked, bit, worried or chased any person or animal and liable on conviction to a low fine. By s29(3) the owner was liable for any damage caused by the dog. Section 29(2) introduced defences, including the trespass defence now in s29(9)(b) which is at issue in the present case. The effect of s29(4) was that evidence that a person was apparently in control of a dog was presumptive proof of the ownership of the dog. There were no, and there still are no, provisions abolishing the need to prove, for any purpose, the owner's knowledge of the mischievous propensity of the dog. Section 101 repealed the *Dog Act* 1970. The express provisions in that Act (s22(2)(b)) abolishing the need to prove the owner's knowledge of the dog's mischievous propensity for the purposes of the power to award compensation in criminal complaint proceedings were not re-enacted. The current legislation remains in this form.

42. So that my later discussion of the authorities may be understood, I should emphasise that 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.[10] 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.

Current provisions

43. The general purpose of the *Domestic Animals Act* is to 'promote animal welfare, the responsible ownership of dogs and cats and the protection of the environment' (s1). For that purpose, the legislation makes provision (among other things) for 'a scheme to protect the community and the environment from feral and nuisance dogs and cats' (s1(a)). That protective scheme includes pt 3, which makes various provision for the control of cats and dogs.

44. The provisions of pt 3, as well as the other provisions of the Act, balance the rights of dog (and cat) owners with the rights to personal security and quiet enjoyment of the general community. The private right to own and keep dogs (including guard dogs) is not disturbed but is made subject to provisions relating to the control of dangerous dogs (div 3), menacing dogs (div 3A), restricted breed dogs (div 3B) and the powers and duties of local councils (div 4). Dogs on private property without permission are liable to be seized (s23(1)). To allow a dog to be at large (s24(1) and (2)) or in a place prohibited by a local council (s26(1)) is an offence. So is keeping a

dog that is, or allowing one to be, a nuisance (s32(1)). It is in this regulatory and protective context that the legislation, in that part, has provisions for criminal offences and civil liability in relation to dog attack (s29).

45. Section 29 makes provision for situations in a descending hierarchy of seriousness. By s29(1) and (2), the person in apparent control or the owner of a dangerous dog which attacks or bites a person is guilty of an offence punishable by imprisonment or heavy fine, unless it is a guard dog guarding non-residential premises. By s29(3) and (4), where a non-dangerous dog attacks or bites a person causing serious injury, the same persons are guilty of an offence punishable by moderate fine or, by s29(5) and (6), by lesser fine if the injury is not serious. By s29(7) and (8), the same persons are guilty of an offence punishable by lesser fine again where the dog rushes or chases any person.

46. As we have seen, s29(9)(b) creates a defence where 'the incident occurred because ... a person was trespassing on the premises on which the dog was kept'. The defence is available in respect of all the offences specified in s29. As the defence applies if the incident occurred 'because' of the circumstances specified in s29(a)-(d), there must be a causal relationship between those circumstances and the attack or other criminalised conduct.[11]

47. Section 29(11) gives the court a power to award compensation for any damage caused by the conduct of the dog where the person is found guilty of an offence. The power is enlivened by a finding of guilt; it is therefore not necessary for the person to be convicted or penalised. The provision does not create a general cause of action to obtain compensation for damage caused by dog attack or confer a power on the court to award compensation in proceedings generally. As the power to award compensation is confined to cases where the person has been found guilty of an offence, it does not apply where the person is found not guilty by reason of the trespassing defence.

Interpretation

48. The main submission of the informant was that a person is not 'trespassing' within s29(9)(b) where they have thoughtlessly placed part of their arm over a neighbour's fence. That submission raises a question as to the proper interpretation of the word 'trespassing' in the provision. The outcome of the case turns on the answer to that question.

49. As the heading to s29 stipulates, the section deals with the subjects of offences and liability in relation to dog attacks. The provisions which are relevant in the present case deal with the subject of offences in relation to dog attacks. The defendant was charged with a criminal offence against s29(4) and relied on the defence in s29(9)(b) that the bite occurred because the victim was trespassing on the premises where the dog was kept.

50. Although the general purpose of the *Domestic Animals Act* is protective and that might justify a liberal interpretation of provisions having that purpose, s29(4) is a penal provision and s29(9)(b) creates a defence against what otherwise would be criminal liability. As s29(9)(b) creates a defence to a crime, it has the same penal character as the provision creating the substantive offence (s29(4)), and must be interpreted accordingly.

51. The principle which must be applied in the interpretation of penal legislation where the meaning of the provision remains ambiguous or doubtful according to the ordinary rules of interpretation is that 'the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences'.[12] As Whelan J held in *R v Parr*[13] in a statement which was approved by Neave and Harper JJA in *Babic v The Queen*,[14] the interpretation favouring the subject can be adopted only where 'there is a genuine choice between two competing interpretations'.[15] It is not legitimate to use the rule of interpretation as a tool for artificially generating the ambiguity which must be present.

52. The words 'trespass' and 'trespassing' have a well-known legal meaning. It is an ordinary rule of interpretation that such words are usually to be interpreted according to that meaning. This is O'Connor J stating the rule in *Attorney-General (NSW) v Brewery Employes Union of New South Wales*:[16]

> Where words have been used which have acquired a legal meaning it will be taken, primâ facie, that the legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context.

53. Just as s29(4) and (9)(b) of the *Domestic Animals Act* are penal in nature, so s76(1) of the *Crimes Act* 1958 (Vic) was penal in nature. In *Barker v The Queen*,[17] the High Court was called on interpret the word 'trespasser' in that provision. Applying the principle enunciated by O'Connor J in *Brewery Employes Union of New South Wales*, the court treated 'trespasser' as a word having a technical legal meaning which should be interpreted accordingly.[18] Applying that interpretation, the majority[19] held a person who entered the premises of another for an unauthorised purpose was a 'trespasser' and potentially guilty of burglary if the other requirements of the section were satisfied.

54. The word 'trespassing' in s29(9)(b) of the *Domestic Animals Act* likewise has a well-known legal meaning. There is nothing in the language of the paragraph, the context of the section, the other provisions of the legislation or its purpose as a whole to suggest a contrary meaning was intended. According to the ordinary rule of interpretation, the word means trespassing in the accepted legal sense. Applying that ordinary rule of interpretation, I find no ambiguity in the meaning of the provision. If there were any ambiguity, however, it would be resolved by adopting the same interpretation for that would be the interpretation which favoured the subject.

55. While *Barker* was concerned with the scope of the criminal offence of trespass, this case is concerned with the scope of the defence of trespass to the criminal offence of dog attack. In law, 'trespassing' is a general term which encompasses criminal and civil trespassing. There is no reason to interpret it otherwise. It would be consistent with the common law right of a person to guard their premises against trespassers with a dog to interpret 'trespassing' according to its general legal meaning. The right extends to guarding premises against persons who might commit a criminal or a civil trespass. It is not confined to guarding premises against criminal trespassers. Therefore, in my view, the trespass defence in s29(9)(b) is available where the offence occurred because the person was trespassing in a criminal or civil sense.

56. In the present case, it was not and could not be suggested that the victim was trespassing in the criminal sense. The sole question at issue was whether he was trespassing in the civil sense. The question is, did the magistrate err in law in deciding that it was a trespass (in that civil sense) for the victim thoughtlessly to place his arm partially over his neighbour's fence? The common law of trespass will supply the answer to that question.

TRESPASS

General principles

57. Since *Semayne's Case*[20] the common law has recognised that 'the house of every one is ... his castle and fortress'.[21] Therefore the owner or person in possession can exclude others who have no permission or other legal right to enter. To enter without that authority is trespass. So decided *Entick v Carrington*,[22] which stated this general principle:

> our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.[23]

58. In *Barker*,[24] Mason J said the 'essence of trespass by wrongful entry consists in an entry without right or authority by one person on to the land of another who is in possession'.[25] Brennan and Deane JJ said at common law it was trespass where a person

> enters land in the possession of another without justification ... Justification may take a variety of forms including, *inter alia*, a paramount right to possession, some other statutory or common law right of entry, the leave and licence of the person in possession and, in the absence of negligence, involuntary and inevitable accident.[26]

Dawson J said trespass was a creature of the civil law whose 'meaning must be derived from cases in tort'.[27] It consisted of 'physical interference by one person with the possession of another and the commonest form is a personal entry upon land or buildings occupied by that other'.[28] It was constituted by intentional physical acts even where the person mistakenly believed they were not trespassing.[29]

59. These principles were confirmed by Brennan J in *Halliday v Nevill*,[30] whose dissenting judgment was approved and applied by the High Court in *Plenty v Dillon*.[31]

60. In *Halliday*, Brennan J adopted[32] the principle stated by Lord Camden LCJ in *Entick* that 'every invasion of private property, be it ever so minute, is a trespass'.[33] Brennan J also approved[34] the proposition laid down in *Semayne's Case*, to which I have referred, that everyone's house was their 'castle and fortress'.

61. The discussion of trespass in *Plenty* is extensive. Mason CJ, Brennan and Toohey JJ also approved[35] the statement in *Entick* that even a minute unauthorised invasion of private property was a trespass. Their Honours referred to the various forms of legal authority which might justify such an intrusion, including statutory permission and implied licence.[36] Gaudron and McHugh JJ also approved[37] *Semayne's Case* and *Entick*. Citing these and other authorities, their Honours said the 'policy of the law is to protect the possession of property and the privacy and security of its occupier'.[38] This draws attention to the point made by Lord Scarman in *Morris v Beardmore*[39] that the law of trespass has a human rights dimension. It protects the right to privacy of the home which is specified in art 8(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[40] In this State, that right is protected by s13(a) of the Charter of *Human Rights and Responsibilities Act* 2006 (Vic).[41] Reflecting the same policy, in *Coco v The Queen*[42] the High Court acknowledged the right of a person to exclude others from their property was a fundamental right or freedom which, therefore, could only be abrogated by legislation clearly and unmistakably evincing that intention.[43] In *New South Wales v Ibbett*,[44] Gleeson CJ, Gummow, Kirby, Heyden and Crennan JJ approved the judgments of Mason CJ, Brennan and Toohey JJ and of Gaudron and McHugh JJ in *Plenty*, as well as the judgment of Lord Scarman in *Morris*, and joined in 'emphasising the fundamental importance attached by the common law to the privacy of the home'.[45]

62. It was made clear in *Entick* that a person who enters another's land without authority 'is a trespasser, though he does no damage at all'.[46] That damage is not an element of the tort of trespass was the basis of the judgment for nominal damages which was upheld by this court in *Dumont v Miller*[47] and the judgment of the Supreme Court of New South Wales in *Waters v Maynard*.[48] As Gaudron and McHugh JJ held in *Plenty*,[49] the interest which is protected by the law of trespass is the possession of property and the privacy and security of its occupier. In that case, Mason CJ, Brennan and Toohey JJ held the plaintiff was entitled to some damages simply because the entry was not justified. That was because, in an action for trespass, the plaintiff was entitled (by damages) to 'vindication of his right to exclude the defendants from his [property]'.[50] This statement of principle was approved[51] by Gleeson CJ, Gummow, Kirby, Heyden and Crennan JJ in *Ibbett*. Their Honours said the interest protected by the tort of trespass was 'the right to exclusive possession of [one's] place of residence, free from uninvited physical intrusion by strangers'.[52]

63. We saw in *Barker* the statement of Brennan and Deane JJ that it was not trespass for a person to enter the property of another, 'in the absence of negligence, [by] involuntary and inevitable accident'.[53] This principle was stated more fully by Dixon J in *Nickells v Melbourne Corporation*:[54]

> To break and enter another's close is trespass to land, and the user of a highway has no right to invade the possession of a frontager. But involuntary trespass to land is not always an actionable wrong. Just as in trespass to the person and in trespass to goods it has come to be the law that an unintentional injury to or interference with another's person or property on the part of the user of a highway is not actionable in the absence of negligence, so, if, in the course of any reasonable use of a public way, a man unintentionally damages neighbouring premises, the law does not hold him liable as a trespasser unless he has been guilty of negligence.[55]

64. So (absent negligence) it may not be trespass to intrude on another's property by running panic-stricken to escape a swarm of bees, in a vehicle which is running out of your control or by fainting and falling or the actions of a third party bringing about that result. That is the kind of unintentional conduct which is relevant where trespass is alleged in such circumstances.

65. The operation of trespass by negligence may be illustrated by reference to *League Against Cruel Sports Ltd v Scott*,[56] a case about dogs. The plaintiff claimed a declaration of trespass against

the masters of a hunt who regularly allowed their hounds to go onto a private but unfenced sanctuary for wild animals. Park J held:

> I have, therefore, come to the conclusion that, before a master of hounds may be held liable for trespass on land by hounds, it has to be shown that he either intended that the hounds should enter the land, or by negligence he failed to prevent them from doing so.
>
> In my judgment the law as I take it to be may be stated thus: where a master of staghounds takes out a pack of hounds and deliberately sets them in pursuit of a stag or hind, knowing that there is a real risk that in the pursuit hounds may enter or cross prohibited land, the master will be liable for trespass if he intended to cause hounds to enter such land, or if by his failure to exercise proper control over them he caused them to enter such land.[57]

His Honour held the hunt masters were liable for trespass by negligence as they failed to exercise proper control of the hounds.[58]

66. It is a trespass to go into the airspace of a person's premises without authority. The usual cases involve invasion of the airspace with physical structures[59] but it is equally a trespass to project something temporarily into that airspace.[60]

67. Applying those principles of trespass at common law to the facts as found by the magistrate, the informant's submissions must be rejected. The victim allowed his arm to intrude over and down into the defendant's property when he leant on the dividing fence. That physical intrusion into the defendant's airspace was a trespass and it was not something else because it was a very minor one. The victim's action was inadvertent. He did not intend to commit the tort of trespass and simply allowed his arm casually to go over and down into the defendant's property. The intrusion was nonetheless a trespass because it was voluntary and was not the result of an inevitable accident. It was intentional in the sense that it was conscious and voluntary. It was an action for which the victim was consciously responsible. Even if the trespass is to be seen as being unintentional, it was negligent because it resulted from the victim's failure to take care not to allow his arm to trespass on the defendant's property. No damage was caused by the victim's action. As damage is not an element of the tort of civil trespass, it was a trespass nonetheless.

68. The proper interpretation of s29(9)(b) of the *Domestic Animals Act* is that 'trespassing' means trespassing according to the common law of trespass. According to the common law of trespass, the victim was trespassing when he allowed his arm partially to go over the dividing fence and down into the defendant's property. The magistrate did not err in law in so deciding.

69. That conclusion is consistent with the common law right of persons to protect their property with a dog.

Protecting property with a dog

70. According to the common law, an animal is a species of property and may be owned and possessed as such. Furthermore, it is a person's legal right to keep a dog to guard their home or other premises so long at it does not interfere with the legal rights of others.

71. An early case was *Brock v Copeland*.[61] The defendant's employee imprudently entered the premises after it had been shut up at night. A guard dog which was usually quiet and gentle bit the plaintiff. The court dismissed his action on the case. In an oft-approved judgment,[62] Lord Kenyon held 'every man had a right to keep a dog for the protection of his yard or house' and that 'the injury had arisen from the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up'.[63]

72. The private right at common law of a person to keep a guard dog is subject to the doctrine of *scienter* and also to the law of negligence.

73. The doctrine of *scienter* has been much discussed in the decided cases,[64] most fully in this court by Adam J in *Trethowan v Capron*.[65] As his Honour explained, the liability of the owner depends on the category of the animal. Naturally savage animals such as lions or tigers (animals *ferae naturae*) are kept at the strict peril of the keeper: 'One who kept animals of this character was liable for injury caused by them irrespective of negligence or knowledge of their mischievous

propensities'.[66] Naturally tame animals, being friendly to people (animals *mansuetae naturae*), are kept free of liability at common law on the part of their keeper, absent proven negligence, subject to an important qualification. The owner is liable if they have knowledge (*scienter*) of the mischievous disposition of the animal:

> The keeper of such an animal, if known by him to have mischievous propensities, incurred, in relation to damage attributable to its known propensities, the same absolute liability as did the keeper of an animal ferae naturae.[67]

74. As to negligence, it was held in *Sarch v Blackburn*[68] that a person has no right to allow their fierce dog to injure persons who would lawfully use a path near the house and they could be liable in negligence in those circumstances. A case where such liability was established is *Draper v Hodder*.[69] There the owner was found liable for the injuries caused by his seven Jack Russell terrier puppies to a neighbour's child because he had not taken reasonable care to keep them secure and it was foreseeable that they might attack. Davies LJ said that, quite apart from the doctrine of *scienter*, an owner or keeper would be liable for permitting 'the animal to be in such a place as to give rise to a foreseeable risk'.[70] Roskill LJ examined the authorities and said the common law now applied 'to the owner or the keeper of a domestic animal the duties imposed by the ordinary law of negligence in addition to the more limited liability imposed upon him by the doctrine of *scienter*'.[71]

75. Applying these principles, if the victim here could establish that the defendant had knowledge of the mischievous propensity of the dog or had been negligent in his manner of keeping the dog, he might obtain compensation for the damage caused by the bite under the doctrine of *scienter* or the law of negligence. However, there is nothing in the principles of the common law in those respects to suggest the victim was not trespassing when the incident occurred.

76. The informant's other submissions are best analysed in the context of the authorities which deal with dog bites to trespassers.

Dog bites to trespassers — Common law

77. In the present case, the prosecutor contends the trespass defence is not available because the victim's incursion of his arm over the fence was a technical trespass if it was a trespass at all. The defendant contends the dog was properly bounded by a fence which the victim breached and the *Domestic Animals Act* was not intended to qualify a person's common law right to guard his own property with a dog.

78. In general, a trespasser cannot complain when they are bitten by a properly bounded guard dog. That principle was stated by Tindal CJ in *Sarch*[72] in these terms:

> If a man puts a dog in a garden walled all round, and a wrong-doer goes into that garden and is bitten, he cannot complain in a Court of justice of that which was brought upon him by his own act … we must see first whether the plaintiff had a justifiable and reasonable cause for being on the spot …[73]

79. The principle has been frequently applied. In *Marlor v Ball*[74] the plaintiffs foolishly went into a secure stall where they were injured by zebras. AL Smith LJ held 'the plaintiff did something which he had no business to do … meddling'.[75] The farmer in *Lowery v Walker*[76] was held to be under no duty to protect habitual trespassers from his potentially dangerous but well-fenced horses. On the general principle that a person could not recover where the injury was due to their own fault, the farm employee in *Rands v McNeil*[77] lost because he had gone into the well-secured box of a bull which he knew to be dangerous. Jenkins LJ made reference to the established qualification for liability for animals, including 'trespass by the injured party, where this was what brought him into contact with the dangerous animal'.[78] The principle was accepted and applied in this court by Adam J in *Trethowan*.[79]

80. The principle is not unqualified. Even trespassers are owed a certain duty of care. The owner of property is not entitled to take protective measures which are intended to or might recklessly cause harm to a trespasser.[80] There may be something in the nature of the premises or the way a dog is kept or keeps guard which places the owner under a particular duty of care notwithstanding the trespass.[81]

81. Applying these principles, if the victim here could establish that the defendant breached some legal duty which he owed to the victim, he might be able to recover compensation under the civil law despite the trespass. However, there is nothing in the common law with respect to dog bites to trespassers which suggests the victim in the present case was not trespassing when the incident occurred.

Statute

82. As we have seen, the potential civil liability of the keeper of a dog with a propensity to bite to pay compensation has been extended in legislation in virtually all common law jurisdictions, except Victoria. In those jurisdictions, the legislation removes the requirement for the victim to prove knowledge of the mischievous propensity of the dog. The informant relies on cases deciding under that legislation, which I here consider.

83. In *Wilkins v Manning*,[82] the plaintiff trespassed on the defendant's premises and was bitten by a guard dog. He sought to recover compensation on the basis that the statutory liability was absolute. The Court of Appeal of New South Wales overturned the verdict in favour of the plaintiff. It held the statute simply removed the need to establish knowledge of the propensity of the dog to bite and did not allow a trespasser to recover against an owner who was lawfully using a dog to guard their premises.[83] GB Simpson J applied the principle which was stated by Tindal CJ in *Sarch*[84] to which I have referred. Unlike the present case and *Simpson*, the trespass in *Wilkins* was not a minor one.

84. As we have seen, the plaintiff in the present case relies on *Simpson*[85] because the plaintiff in that case succeeded in a compensation claim under the New South Wales legislation although he was a technical trespasser. He was walking in a public street and placed his hand on the top of the defendant's fence. The defendant's dog jumped up and seized the plaintiff's hand, inflicting injuries. The verdict was overturned on appeal and the High Court restored the plaintiff's verdict.

85. The issue before the High Court was whether the plaintiff could recover even though he had placed his arm on the fence. At trial in the District Court, it was held that the plaintiff's act was a trespass but that he could still recover. That judgment was reversed by the Court of Appeal of the Supreme Court of New South Wales. In the High Court, Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ held that the statutory liability, although not unlimited, was established where the person did 'no more than thoughtlessly place part of his body within the close where the dog roam[ed]'.[86] Starke J agreed but based his judgment on the common law principle that a dog owner was bound to take reasonable care not to allow a dangerous dog to injure a passer-by.[87]

86. *Simpson* was discussed in this court by Adam J in *Trethowan*,[88] another case where a trespasser sought to fix statutory liability on a dog owner. As we have seen, s26 of our *Dog Act* 1958 provided that, in a criminal prosecution found proven, the court could make a compensation order without the need to prove the owner's knowledge of the mischievous propensity of the dog. The defendant appealed against a compensation order made in favour of a person who had trespassed into the workshop of their garage.

87. Granting judicial review, Adam J held the statute operated to 'exclude liability to trespassers where the circumstances [were] such that no liability would attach at common law'.[89] His Honour went on to endorse 'the ancient and established common law right in a man to guard and protect his own property by any lawful means so long as he does not thereby interfere with the legal rights of others'.[90] Therefore a trespasser could not obtain statutory compensation 'for what may be regarded as self-imposed injuries'.[91]

88. A case remarkably like the present was *Rigg v Alietti*.[92] The plaintiff was talking to her neighbour and waved her hand over the dividing fence when the dog leapt up and bit it, causing serious injury. The trial judge dismissed the claim for statutory damages.[93] The Full Court of the Supreme Court of Western Australia upheld the plaintiff's appeal. Following *Trethowan*, the court held there was no statutory liability in favour of trespassers.[94] But, following *Simpson*, it held there was a statutory liability in respect of (in the words of Burt CJ) 'what might be called a technical trespass, as by placing one's hand on the top of a boundary fence'.[95]

89. It is understandable that in *Simpson* and *Rigg* the courts interpreted the statutory civil

liability provisions as extending to persons who suffered serious injury as a result of dog bites which occurred during purely technical and inadvertent trespassing. But it was not decided in *Simpson* that the incursion was not trespassory. It was decided in *Rigg* that the incursion was not trespassory because it occurred in the course of a conversation between the victim and the defendant and in the defendant's presence.[96] That was a finding that the victim had implicit permission to do what she did. There was no contention to that effect in the present case and the circumstances were wholly different.

90. The present case is not a civil liability case. The question before the magistrate was whether the defendant had committed the dog-attack crime in s29(4) of the *Domestic Animals Act* with which he had been charged. In s29(9)(b) there is a statutory defence to the charge if the bite occurred because the victim was trespassing where the dog was being kept. On the proper interpretation of that provision, whether the victim was trespassing is to be determined by reference to the common law principles, as the magistrate correctly decided. The cases concerning the civil liability provisions do not determine that question.

91. The magistrate did not err in law on the face of the record in interpreting and applying the statutory trespass defence. On the unchallenged facts which his Honour found, the victim was trespassing such as to enliven that defence.

CAUSATION

92. It remains to consider the causation ground of appeal. In the informant's submission, the magistrate erred in law in deciding that the dog bit the victim because he was trespassing. He submits the dog bit the victim because of the dog's temperament.

93. As we have seen, the defence in s29(9)(b) of the *Domestic Animals Act* is available 'if the incident occurred because – … (b) a person was trespassing on the premises on which the dog was kept'. I have concluded there was no legal error in the magistrate's conclusion that the victim here was 'a person [who] was trespassing' on those premises. The question is whether his Honour correctly decided that the bite occurred 'because' of that trespass.

94. On my earlier analysis, the word 'because' in s29(9) operates to require a causal relationship between the incident (here the dog bite) and the trespassing of the person on the premises. The magistrate approached that question in a straightforward and common sense manner as a question of fact. On the facts which his Honour found, he concluded there was a 'sufficient nexus' between the victim's trespassory intrusion or encroachment and the bite. On that basis, he concluded that the bite had occurred 'because' of the trespassing. There is no legal error in that approach. His Honour interpreted and applied the causation test in the correct manner.

95. The dog was not alleged to be and was not found to be a dangerous dog. Yet the informant submits the bite was caused by its temperament. That submission must be rejected. It may be the informant is really submitting the bite occurred because of the dog's actions and not because of the trespass. That amounts to the submission that the causation test in s29(9)(b) was not satisfied because the dog bite occurred because the dog bit the victim. Of course that circular submission must be rejected. It is based on an incorrect understanding of the nature of the causation test in s29(9). The test in the provision looks to the causal relationship between the incident and the trespass. Applying the test in a common sense way as a question of fact as the magistrate correctly did, the question was whether there was a sufficient nexus between the incident (the bite) and the trespass. Here the victim's arm was bitten when he allowed it to go over and down into the defendant's premises. The dog was present in the bounded yard of those premises, into which the victim placed his arm. There was no other causal act which required potential consideration. The magistrate did not err in law in deciding that the defence applied in those circumstances.

96. For those reasons, the magistrate did not err in law on the face of the record in interpreting and applying the trespass defence in s29(9)(b) of the *Domestic Animals Act* and this application for judicial review must be dismissed.

CONCLUSION

97. In my view, the magistrate did not err in law in dismissing the charge against the defendant on the basis of the trespass defence in s29(9)(b) of the *Domestic Animals Act*. His Honour did not err in interpreting and applying that provision.

98. On the unchallenged findings which the magistrate made, the victim allowed his arm to go over the chest-high dividing fence and down into the defendant's premises when he was leaning on that fence. The victim's action was casual and inadvertent, but it was conscious and voluntary. The incursion was very minor, but even minor physical incursions into someone else's property amount to trespass, unless authorised. It was not contended the victim had express or implied permission to do what he did. The incursion was into the defendant's airspace, but that too is a trespass. The incursion of the victim's arm into the defendant's premises did not cause the defendant any damage, but damage is not an element of the tort of negligence. Applying the common law principles which govern the situation, the magistrate did not err in deciding that the victim had trespassed on the defendant's premises.

99. Neither did the magistrate err in law in deciding that the victim was bitten because he was trespassing on the premises. The defendant kept the dog in the secure front yard of his home. On the found facts, the dog was too small to reach the top of the dividing fence with its snout or its paws. The victim was bitten when he allowed his arm to go over and down into the defendant's premises when he was leaning on the fence. On those facts and on the proper interpretation of the statutory provisions, the magistrate was entitled to find that there existed the necessary causal link between the bite and the trespass and to conclude that the charge must be dismissed because the defence applied.

100. The application for judicial review will therefore be dismissed. I will hear the parties on the question of costs.

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[1] See *Easwaralingam v Director of Public Prosecutions* (2010) A Crim R 122, 127 [22], 128 [24] (Tate JA, Buchanan JA agreeing).
[2] [1932] HCA 43; (1932) 47 CLR 378 ('Simpson').
[3] *Gubbins v Wyndham City Council* [2004] VSC 238; (2004) 9 VR 620, 632 [36] (Hansen J); *Serbanescu v Herter* [2004] VSC 358 (22 September 2004) [23] (Williams J).
[4] [2000] VSCA 52; (2000) 1 VR 260, 265 [14] (Brooking JA, Ormiston and Charles JJA concurring).
[5] (1898) 24 VLR 216, 218-219 (Holroyd J).
[6] [1906] VLR 28, 30 (Madden CJ). See also *Lane v Casey* (1886) 12 VLR 380 (Higinbotham J, Williams and Holroyd JJ agreeing)
[7] [1961] VR 460 ('*Trethowan*').
[8] Ibid 466.
[9] Section 3(1) contained an extended definition of 'owner' to include the keeper of or the person who had the care of the animal.
[10] See for example s19 of the *Dog and Goat Act* 1898 (NSW) which was considered by the High Court in Simpson [1932] HCA 43; (1932) 47 CLR 378. Section 19 provided:
The owner of every dog shall be liable in damages for injury done to any person, property, or animal by his dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner.
[11] *Council of City of Lake Macquarie v Morris* [2005] NSWSC 387; (2005) 63 NSWLR 263, 273 [46] (Johnson J), citing *Fagan v Crimes Compensation Tribunal* [1982] HCA 49; (1982) 150 CLR 666, 673 (Mason and Wilson JJ), 678 (Brennan J) and *Kavalee v Burbidge* (1998) 43 NSWLR 422, 443 (Mason P).
[12] *Beckwith v The Queen* [1976] HCA 55; (1976) 135 CLR 569, 576 (Gibbs CJ), citing *R v Adams* [1935] HCA 62; (1935) 53 CLR 563, 567-568 (Rich, Dixon, Evatt and McTiernan JJ); RJE v Secretary to the Department of Justice [2008] VSCA 265; (2008) 21 VR 526, 552 [99] (Nettle JA); *Loader v The Queen* [2011] VSCA 292 (28 September 2011) [48] (Nettle JA, Warren CJ and Ashley JA agreeing).
[13] [2009] VSC 166; (2009) 21 VR 590.
[14] (2010) 28 VR 297, 308 [54].
[15] [2009] VSC 166; (2009) 21 VR 590, 594 [16].
[16] [1908] HCA 94; (1908) 6 CLR 469, 531 ('*Brewery Employes Union of New South Wales*').
[17] [1983] HCA 18; (1983) 153 CLR 338 ('*Barker*')
[18] Ibid, 341-42 (Mason J), 355-56 (Brennan and Deane JJ).
[19] Mason, Brennan, Deane and Dawson JJ, Murphy J dissenting.
[20] [1572] EngR 333; (1604) 77 ER 194 (Court of King's Bench).
[21] Ibid 195.
[22] [1765] EWHC J98; (1765) 95 ER 807; (1765) 19 St Tr 1029 ('*Entick*').
[23] Ibid 817.
[24] Barker [1983] HCA 18; (1983) 153 CLR 338.
[25] Ibid 341.
[26] Ibid 356-57 (footnotes omitted).
[27] Ibid 370.

[28] Ibid.
[29] Ibid.
[30] [1984] HCA 80; (1984) 155 CLR 1 ('*Halliday*').
[31] [1991] HCA 5; (1991) 171 CLR 635, 639, 644 (Mason CJ, Brennan and Toohey JJ), 647 (Gaudron and McHugh JJ) ('Plenty'); see also *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, 454 (Toohey J).
[32] *Halliday* [1984] HCA 80; (1984) 155 CLR 1, 10.
[33] (1765) 19 St Tr 1029, 1066.
[34] *Halliday* [1984] HCA 80; (1984) 155 CLR 1, 11-12.
[35] *Plenty* [1991] HCA 5; (1991) 171 CLR 635, 639.
[36] Ibid 639-40.
[37] Ibid 647.
[38] Ibid 647.
[39] [1981] AC 446, 464 ('Morris') (Lord Scarman's judgment was cited with approval by Brennan J in Halliday ((1984) [1984] HCA 80; 155 CLR 1, 10) and Gaudron and McHugh JJ in *Plenty* ((1991) [1991] HCA 5; 171 CLR 635, 647).
[40] Opened for signature 4 November 1950, 213 UNTS (entered into force 3 September 1953). Article 8(1) provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.
[41] Section 13(a) provides: 'A person has the right — (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; ...'
[42] [1994] HCA 15; (1994) 179 CLR 427.
[43] Ibid 437-38 (Mason CJ, Brennan, Gaudron and McHugh JJ, Deane and Dawson JJ agreeing).
[44] [2006] HCA 57; (2006) 229 CLR 638 ('*Ibbett*').
[45] Ibid 646 [30].
[46] *Entick* [1765] EWHC J98; (1765) 95 ER 807, 817.
[47] (1873) 4 AJR 152.
[48] (1924) 24 SR (NSW) 618, 622 (Street ACJ, Gordon and Campbell JJ).
[49] *Plenty* [1991] HCA 5; (1991) 171 CLR 635, 647.
[50] Ibid 645.
[51] *Ibbett* [2006] HCA 57; (2006) 229 CLR 638, 646 [30].
[52] Ibid 646 [29].
[53] *Barker* [1983] HCA 18; (1983) 153 CLR 338, 357.
[54] [1938] HCA 14; (1938) 59 CLR 219.
[55] Ibid 225.
[56] [1986] 1 QB 240.
[57] Ibid 251-252.
[58] Ibid 254-55.
[59] See *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334 (McNair J); *Lawlor v Johnston* [1905] VLR 714 (Madden CJ); *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* [2007] VSCA 311; (2007) 20 VR 311 (Ashley and Dodds-Streeton JJA and Cavanough AJA).
[60] *Davies v Bennison* [1927] Tas LR 52, 56 (Nicholls CJ), approving *Kenyon v Hart* (1865) 122 ER 1188 (Lord Blackburn).
[61] [1794] EngR 357; (1794) 170 ER 328 ('*Brock*').
[62] See *Deane v Clayton* [1817] EngR 472; (1817) 129 ER 196, 206 (Park J), 213 (Gibbs CJ); *Jordin v Crump* [1841] EngR 879; (1841) 151 ER 1256, 1258 (Alderson B); *Wilkins v Manning* (1897) 13 WN(NSW) 220, 220 (GB Simpson J), 222 (Cohen J); *Cummins v Granger* [1977] 1 QB 397, 405 (Lord Denning MR, Ormrod and Bride LJJ agreeing).
[63] *Brock* [1794] EngR 357; (1794) 170 ER 328, 329.
[64] See *May v Burdett* [1846] EngR 736; (1846) 115 ER 1213, 1217 (Lord Denman CJ); *Cox v Burbidge* [1863] EngR 116; (1863) 143 ER 171, 174 (Williams J and Willes J, Keating J concurring); *Stiles v The Cardiff Steam Navigation Co* (1864) 33 LJ QB 310, 311-12 (Crompton J), 312 (Blackburn J) (both emphasising that knowledge of the dangerous propensity of the dog was a necessary element of the doctrine of *scienter*); *Filburn v People's Palace and Aquarium Co Ltd* (1890) 25 QBD 258, 261 (Bowen LJ); *Marlor v Ball* (1900) 16 TLR 239, 240 (Court of Appeal); *Baker v Snell* [1908] 2 KB 825, 829 (Cozens-Hardy MR), 833-34 (Farwell LJ), 834 (Kennedy LJ); *McQuaker v Goddard* [1940] 1 KB 687, 695-96 (Scott LJ), 699 (MacKinnon LJ) (Clauson LJ agreeing); *Draper v Hodder* [1972] 2 QB 556, 569 (Edmund Davies LJ); *Cummins v Granger* [1977] 1 QB 397, 404 (Lord Denning MR, Ormrod and Bridge LJJ agreeing).
[65] [1961] VR 460 ('*Trethowan*').
[66] Ibid 463.
[67] Ibid.
[68] *Sarch v Blackburn* (1830) 173 ER 1239, 1240 (Tindal CJ) ('*Sarch*').
[69] [1972] 2 QB 556.
[70] Ibid 566.
[71] Ibid 579-80.
[72] *Sarch* (1830) 173 ER 1239.
[73] I have taken the quotation from the judgment of GB Simpson J in *Wilkins* (1897) 13 WN (NSW) 220, 221.
[74] (1900) 16 TLR 239.
[75] Ibid 240 (Collins and Romer LJJ concurring).

[76] [1910] UKHL 1; [1910] 1 KB 173, 186 (Vaughan Williams LJ), 195, 197 (Kennedy LJ) (Buckley LJ dissenting); reversed by *Lowery v Walker* [1910] UKHL 1; [1911] AC 10 (House of Lords) because the plaintiff was found not to be a trespasser.
[77] [1955] 1 QB 253, 257-58 (Denning LJ), 267 (Jenkins LJ), 269-70 (Morris LJ).
[78] Ibid 266.
[79] *Trethowan* [1961] VR 460, 466 (Adam J).
[80] *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] UKHL 3; [1929] AC 358. See also *Bird v Holbrook* [1828] EngR 580; (1828) 130 ER 911 where the Court of Common Pleas referred to *Brock* [1794] EngR 357; (1794) 170 ER 328 but nonetheless held in favour of the trespasser for injuries sustained from a spring gun.
[81] *Trethowan* [1961] VR 460, 466 (Adam J); see generally *Hackshaw v Shaw* [1984] HCA 84; (1984) 155 CLR 614.
[82] (1897) 13 WN (NSW) 220.
[83] Ibid, 220-21 (GB Simpson J), 221-22 (Cohen J).
[84] (1830) 173 ER 1239.
[85] Simpson [1932] HCA 43; (1932) 47 CLR 378 (Gavan Duffy CJ, Starke, Dixon, Evatt and McTiernan JJ).
[86] Ibid 383.
[87] Ibid 384-85.
[88] *Trethowan* [1961] VR 460.
[89] Ibid 465.
[90] Ibid 466.
[91] Ibid.
[92] [1982] WAR 203 ('*Rigg*').
[93] Section 46(2) and (3) of the *Dog Act* 1976 (WA) provided the owner may be liable for damages for injury done by their dog without proof of knowledge of dangerous propensity.
[94] [1982] WAR 203, 206 (Burt CJ, Kennedy and Olney JJ agreeing).
[95] Ibid.
[96] Ibid 207 (Burt CJ, Kennedy and Olney JJ agreeing).

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