

Court of Appeals Takes the Bull by Its Horns: Liability for Roaming Cattle and Other Domestic Animals

By Karen M. Richards

Introduction

In the last decade, the Court of Appeals consistently rejected a negligence cause of action to recover damages for personal injuries caused by a domestic animal.¹ Rather, the sole viable claim was for strict liability, which was established by evidence that the animal's owner knew or should have known of its vicious propensities.² This changed in May 2013 when the Court held that a landowner or the animal's owner may be liable under ordinary tort-law principles when a domestic animal is negligently allowed to stray from the property on which it was kept.³

The Rule Articulated in *Collier*

In 2002, the Court of Appeals in *Collier v. Zambito* discussed the traditional rule, which provides that if a domestic animal's owner knew or should have known of the animal's vicious propensities, the owner faces strict liability for the harm the animal causes as a result of those propensities.⁴ The Court explained vicious propensities as including:

the propensity to do any act that might endanger the safety of the persons and property of others in a given situation. Knowledge of vicious propensities may of course be established by proof of prior acts of a similar kind of which the owner had notice.

In addition, an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensi-

ties—albeit only when such proclivity results in the injury giving rise to the lawsuit.⁵

Although the traditional rule had existed in New York for almost 200 years, after *Collier* later courts would refer to it as “the rule articulated in *Collier*.”⁶

The only issue addressed in *Collier*, where a 12-year-old boy was bitten by the owners' dog while a guest at their home, was whether the owners should have known of the dog's dangerous propensities. In a 4-2 decision, the majority found that although the dog was excitable and confined to the kitchen when visitors were at the house, there was no evidence that its behavior was threatening or menacing.⁷ Accordingly, the Court affirmed the decision of the Appellate Division to grant the owners' motion for summary judgment and dismiss the complaint.⁸

Although the question of whether general negligence principles were applicable in cases involving animal-inflicted injuries was not addressed in *Collier*, four years later the Court addressed this question in *Bard v. Jahnke*.⁹ Mr. Bard was injured by a freely roaming breeding bull, but he was unable to recover under the strict liability rule because he could not show the bull's owner knew or should have known of its vicious propensities.¹⁰ He argued, in the alternative, that he could recover under a common-law cause of action for negligence without establishing the owner was aware of the bull's vicious propensities and pointed to Restatement (Second) of Torts as supporting his argument. Section 518 of the Restatement specifically referenced bulls and “provided generally that the owner of a domestic animal, which the owner does not know or have reason to know to be abnormally dangerous, is nonethe-

less liable if he intentionally causes the animal to do harm, or is negligent in failing to prevent harm” and also provided in part that the keeper of a domestic animal is required to know the animal's characteristics.¹¹

The Court rejected Mr. Bard's argument that the Restatement supported a negligence cause of action, noting that it had never held that particular breeds or kinds of domestic animals are dangerous or that male domestic animals kept for breeding are dangerous as a class. In a 4-3 decision, it thus declined to “dilute [its] traditional rule” by allowing “a companion common-law cause of action for negligence.”¹² Instead, it stated that “when harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in *Collier*.”¹³

The majority's rejection of the Restatement was, according to Judge R.S. Smith in dissent, “a mistake” that left “New York with an archaic, rigid rule, contrary to fairness and common sense that will probably be eroded by ad hoc exceptions.”¹⁴ He noted that before the majority's rejection of the Restatement, the “Court's opinions were consistent with the Restatement rule”¹⁵ and that it had never opined that the strict liability involved in *Collier* “is the only kind of liability the owner of a domestic animal may face—that, in other words, there is no such thing as negligence liability where harm done by domestic animals is concerned.”¹⁶

Despite the rulings in *Collier* and *Bard*, courts continued to debate whether a negligence cause of action survived. One such court was *Bernstein v. Penny Whistle Toys, Inc.*, where the plaintiffs brought an action against the owner of a toy store, whose dog unexpectedly bit the plaintiffs' eight-year old child while she was petting the dog.¹⁷ At the Ap-

pellate Division, the dissent opined that the defendants owed an additional duty to the child beyond that of a pet owner who knows the pet has vicious propensities.¹⁸ In supporting its position, the dissent stated “it is important to recognize that [*Collier* and *Bard*] only discuss the animal owner’s liability.”¹⁹ An additional duty was owed because the defendants owned and operated a business, the primary purpose of which was to sell wares to and for children, and necessarily, their goal was to attract children into the store as customers. Consequently, “as proprietors of the business, in addition to the legal obligations of a dog owner, [the defendants] must also be held to the standard of care imposed by the law of premises liability, to maintain their premises in a reasonably safe condition in view of the circumstances.”²⁰ Further, the dissent did not view *Bard* “as eradicating the continued viability of prior cases which impose an enhanced duty toward children upon property owners who keep animals, where the presence and actions of children on the premises are reasonably foreseeable.”²¹

In response to the dissent’s position, the Appellate Division majority stated:

The dissent would circumvent the clear meaning of the Court of Appeals’ rulings by constructing a theory grounded in premises liability, the practical impact of which is to profoundly increase the exposure faced by individuals who own a domestic animal where that animal has shown no propensity for being vicious. The reality is that a significant number of these types of cases, including *Collier* and *Bard*, involve situations where domestic animals injured individuals on premises either owned or operated by the person who also owns the animal. In our view, such an expansion is

impermissible in light of the clear and unequivocal language contained within *Collier* and *Bard*.²²

Finding that “the Court of Appeals has squarely spoke on this issue”—that an owner’s liability is determined solely by the rule articulated in *Collier*²³—the majority thus affirmed the Supreme Court’s dismissal of the complaint against the dog’s owner, as there was no evidence the dog had exhibited a vicious propensity prior to the incident in question. The Court of Appeals unanimously affirmed the majority’s decision, thus rejecting the argument that in certain limited circumstances, such as those present in *Bernstein*, a negligence cause of action was viable.²⁴

Conversely, the Appellate Division in *Petrone v. Fernandez* was not divided in its opinion.²⁵ It unanimously recognized that a dog owner faced potential liability where a statutory leash law violation, “coupled with affirmative canine behavior such as a dog bite or an attack upon the plaintiff or where there is a history of prior violations,” could serve as a predicate for the owner’s potential liability.²⁶ In reaching this finding, the Appellate Division noted that neither *Collier* nor *Bard* addressed the question of whether negligence involving the violation of a leash law could result in liability when an unleashed dog causes harm. Further, it considered “dicta” the *Bard* Court’s statement, “when harm is caused by a domestic animal, its owner’s liability is determined *solely* by application of the rule articulated in *Collier*”²⁷ because it

does not appear to have been written by the Court of Appeals with ordinance-violation circumstances in mind.... Indeed, were we to interpret it in such a manner, protections provided by municipal leash laws could be severely weakened, if not eliminated altogether.²⁸

The Court of Appeals unanimously disagreed, noting that only a year

before, in *Bernstein*, it had rejected “the notion that a negligence cause of action survives *Collier* and *Bard*.”²⁹ Therefore, the owner’s “violation of the leash law was irrelevant because such a violation constituted only some evidence of negligence, and negligence is not a basis for imposing liability after *Collier* and *Bard*.”³⁰ Citing to *Bard*, the Court reiterated that “when harm is caused by a domestic animal, its owner’s liability is determined solely by application of the rule articulated in *Collier*—i.e., the rule of strict liability for harm caused by a domestic animal whose owner knew or should have known of the animal’s vicious propensities.”³¹

While the Court’s decision in *Petrone* was unanimous, Judge Pigott wrote “separately to make clear that, while [he] concur[red] with the majority,” he did so on “constraint” of *Bard*.³² In Judge Pigott’s view:

and for the reasons stated in Judge R.S. Smith’s dissent in *Bard*, it was wrong to reject negligence altogether as a basis for the liability of an animal owner. Negligence by the owner, even without knowledge concerning a domestic animal’s vicious propensity, may create liability.

Nevertheless, because I believe that the majority of this Court in *Bard* intended to restrict liability for animal-induced injuries to circumstances where there is strict liability, I cannot accept the Appellate Division’s position that the present case is distinguishable from *Bard* as a leash law negligence case. Consequently, I vote to reverse and, although I would not have joined the majority’s opinion in *Bard*, I must, on constraint of that decision, concur in the majority’s opinion in the present case.³³

The Court's decisions in *Collier*, *Bard*, *Bernstein*, and *Petrone* made it clear that there was no common-law negligence cause of action to recover damages for injuries caused by a domestic animal. The inability to assert a negligence claim precluded a plaintiff from prevailing against the owner of a domestic animal solely on the basis that the owner allowed the animal to roam or escape confinement. If an animal roamed from the property on which it was kept, even if it roamed because the owner failed to secure the animal properly, unless the plaintiff could prove the owner knew or should have known that the animal had vicious propensities, the owner was not liable for any harm the animal caused. This would change in 2013 with the Court's decision in *Hastings v. Sauve*.

Hastings v. Sauve

Even though years had gone by since the Court decided *Collier*, *Bard*, *Bernstein*, and *Petrone*, courts continued to express dissatisfaction that a negligence cause of action could not lie in cases where a domestic animal caused harm. One such court was the Third Department in *Hastings v. Sauve*, where the plaintiff, who was injured when her vehicle collided with a cow that had wandered onto a highway, alleged that the defendants were negligent in not properly confining the cow to pasture and by allowing it to wander onto the highway.³⁴ The Third Department advocated that traditional rules of negligence should apply in limited circumstances, such as those present in *Hastings*:

There can be no doubt that the owner of a large animal such as a cow or horse assumes a very different set of responsibilities in terms of the animal's care and maintenance than are normally undertaken by someone who owns a household pet. The need to maintain control over such a large animal is obvious, and the risk that exists if it

is allowed to roam unattended onto a public street is self-evident and not created because the animal has a vicious or abnormal propensity. Here, plaintiff was injured not because the cow was vicious or abnormal, but because defendants allegedly failed to keep it confined on farm property and, instead, allowed it to wander unattended onto the adjacent highway in the middle of the night, causing this accident. The existence of any abnormal or vicious propensity played no role in this accident, yet, under the law as it now exists, defendants' legal responsibility for what happened is totally dependent upon it. For this reason, we believe in this limited circumstance, traditional rules of negligence should apply to determine the legal responsibility of the animal's owner for damages it may have caused.³⁵

Nevertheless, although the Appellate Division noted its "discomfort" with the strict liability rule "as it applies to these facts—and with this result," it stated it was "not for this Court to alter this rule and, while it is in place, we are obligated to enforce it."³⁶ It thus found summary judgment was properly granted to the defendants because the plaintiffs only pled a negligence cause of action.³⁷

The Court of Appeals unanimously disagreed, reversing the order of the Appellate Division, and denying the defendants' motions for summary judgment. The panel of judges included Judge R.S. Smith and Judge Pigott, both of whom in earlier cases had criticized the Court's rejection of a negligence cause of action. The Court wrote:

This case, unlike *Collier*, *Bard*, *Bernstein*, and *Petrone*, did not involve aggressive

or threatening behavior by any animal. The claim here is fundamentally distinct from the claim made in *Bard* and similar cases: It is that a farm animal was permitted to wander off the property where it was kept through the negligence of the owner of the property and the owner of the animal. To apply the rule of *Bard*—that when harm is caused by a domestic animal, its owner's liability is determined solely by the vicious propensity rule—in a case like this would be to immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property.³⁸

Thus, as critics of the rule articulated in *Collier* had previously recognized, the *Hastings* Court also recognized that situations exist where an owner or keeper of a domestic animal may be liable for harm caused by the animal, even in the absence of knowledge concerning the animal's vicious propensity. It therefore held "that a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal—i.e., a domestic animal as that term is defined in Agriculture and Markets Law §108(7)—is negligently allowed to stray from the property on which the animal is kept."³⁹

Conclusion

The Court of Appeals distinguished *Hastings* from previous cases by pointing out that the cow, unlike the animals in previous cases decided by the Court, did not display aggressive or threatening behavior.⁴⁰ Thus, arguably, ordinary tort-law principles may apply to only a very narrow set of facts—where a domestic animal, as defined in Agriculture and Markets Law §108(7), is negligently allowed to stray from the property on which it is kept and causes injury not associ-

ated with aggressive or threatening behavior.

Also, while cats and dogs have been treated as domestic animals under common-law, importantly, section 108(7) of the Agriculture and Markets Law does not include them in its definition, and therefore, the ruling in *Hastings* does not apply to them.⁴¹ As the *Hastings* Court stated, it did “not consider whether the same rule applies to dogs, cats, or other household pets; that question must await a different case.”⁴²

Endnotes

1. Agriculture and Markets Law § 108(7) defines a “domestic animal” as “any domesticated sheep, horse, cattle, fallow deer, red deer, sika deer, whitetail deer which is raised under license from the department of environmental conservation, llama, goat, swine, fowl, duck, goose, swan, turkey, confined domestic hare or rabbit, pheasant or other bird which is raised in confinement under license from the state department of environmental conservation before release from captivity, except that varieties of fowl commonly used for cock fights shall not be considered domestic animals for the purposes of this article.” N.Y. AGRIC. & MKTS. LAW § 108(7) (Consol. 2013). See *Collier v. Zambito*, 1 N.Y.3d 444, 446, 807 N.E.2d 254, 256, 775 N.Y.S.2d 205, 207 (2004); see also *Bard v. Jahnke*, 6 N.Y.3d 592, 597, 848 N.E.2d 463, 467, 815 N.Y.S.2d 16, 20 (2006). See also *Petrone v. Fernandez*, 12 N.Y.3d 546, 550, 910 N.E.2d 993, 996, 883 N.Y.S.2d 164, 167 (2009). See also *Bernstein v. Penny Whistle Toys, Inc.*, 10 N.Y.3d 787, 788; 886 N.E.2d 154, 856 N.Y.S.2d 532 (2008).
2. Although many cases specifically reference the animal owner’s liability, often the animal owner was also the owner of the property on which it injured the plaintiff. See *Dufour v. Brown*, 66 A.D.3d 1217, 1218, 888 N.Y.S.2d 219, 221 (3d Dep’t 2009) (stating “[a] person who harbors or keeps a [domestic animal] with knowledge of [its] vicious propensities is liable for the injuries caused by the [animal]”).
3. *Hastings v. Sauve*, 21 N.Y.3d 122, 126, 989 N.E.2d 940, 942, 967 N.Y.S.2d 658, 660 (2013).
4. *Collier v. Zambito*, 299 A.D.2d 866, 750 N.Y.S.2d 249 (4th Dep’t 2002), *aff’d*, 1 N.Y.3d 444, 446, 807 N.E.2d 254, 256, 775 N.Y.S.2d 205, 207 (2004).
5. *Id.* at 446-447, 807 N.E.2d at 256, 775 N.Y.S.2d at 207.
6. *Bard v. Jahnke*, 6 N.Y.3d 592, 599, 848 N.E.2d 463, 815 N.Y.S.2d 16; *Bernstein*, 10 N.Y.3d 787, 788, 886 N.E.2d 154, 155, 856 N.Y.S.2d 532, 533; *Petrone*, 12 N.Y.3d 546, 550, 910 N.E.2d 993, 996, 883 N.Y.S.2d 164, 167.
7. *Collier v. Zambito*, 1 N.Y.3d at 447, 807 N.E.2d 254, 775 N.Y.S.2d 205. The dissent found the dog’s behavior and its confinement to the kitchen created a question of fact as to whether the owners were aware the dog was a potential danger. The majority also noted that the owners were unaware of any prior incidents in which the dog had attempted to bite or attack anyone, but the dissent stated this “should not be dispositive” as the dog “had never been given the opportunity to do so.”
8. *Id.* at 448, 807 N.E.2d 254, 775 N.Y.S.2d 205. The Supreme Court in *Bard* found the bull’s owners “were subject to ‘some duty of enhanced care’ to restrain or confine the animal or to warn a human being who might come into contact with it,” and thus granted the owners’ motion for summary judgment because they were unaware Mr. Bard would be in the barn. The Appellate Division found that summary judgment was properly awarded to the owners but on the basis of the Court’s decision in *Collier*—there was no evidence the bull had prior vicious propensities.
9. *Bard*, 6 N.Y.3d at 592, 599.
10. *Id.* at 596. The bull had regular contact with other farm animals, farm workers, and the defendants’ family, and concededly had never displayed any hint of hostility and had never attacked any farm animal or human being prior to attacking Mr. Bard.
11. *Id.* at 598.
12. *Id.* at 599.
13. See *id.* at 599 (noting the “common shorthand rule for our traditional rule—*the ‘one-bite rule’—is a misnomer” since an animal’s propensity to cause injury can be proven by something other than prior comparably vicious acts); see also *Perrotta v. Picciano*, 186 A.D. 781, 782 (1st Dep’t 1919) (stating the popular theory that “every dog is entitled to one bite finds no support in the decisions of the courts of this state”); accord *Conroy v. Sperl*, 209 A.D. 804 (1st Dep’t 1924); accord *Palmer v. Hampton*, 129 Misc. 417, 418 (N.Y.C. City Ct. N.Y. Cnty. 1927); see also *Tessiero v. Conrad*, 186 A.D.3d 330 (3d Dep’t 1992) (stating “[t]he fact that an animal may have previously responded by biting does not automatically establish, as a matter of law, either vicious propensities or knowledge thereof”).
14. *Bard*, 6 N.Y.3d at 599 (Smith, J., dissenting) (Judge Smith noted the majority’s rejection of the Restatement made the Court of Appeals “the first state court of last resort to reject the Restatement rule”).
15. *Id.* at 600.
16. *Id.* at 601.
17. *Bernstein v. Penny Whistle Toys, Inc.*, 40 A.D.3d 224, 225 (1st Dep’t 2007), *aff’d*, 10 N.Y.3d 787 (2008).
18. *Id.* at 226.
19. *Id.*
20. *Id.*
21. *Id.* at 227.
22. *Bernstein*, 40 A.D.3d at 224.
23. *Id.*
24. *Bernstein v. Penny Whistle Toys, Inc.*, 10 N.Y.3d 787, 788, 886 N.E.2d 154, 155 (2008).
25. *Petrone v. Fernandez*, 53 A.D.3d 221 (2d Dep’t 2008), *rev’d*, 12 N.Y.3d 546 (2009).
26. *Id.* at 221, 229.
27. *Id.* at 228.
28. *Id.*
29. *Petrone v. Fernandez*, 12 N.Y.3d 546, 550, 910 N.E.2d 993, 996 (2009).
30. *Id.*
31. *Id.* (citing *Bard v. Jahnke*, 6 N.Y.3d 592, 599, 848 N.E.2d 463, 468 (2006)).
32. *Id.* at 551. (J. Pigott, concurring).
33. *Id.* at 552.
34. *Hastings v. Sauve*, 94 A.D.3d 1171, 941 N.Y.S.2d 774 (3d Dep’t 2012) *rev’d*, 21 N.Y.3d 122, 989 N.E.2d 940 (2013). Defendant, William Delarm, assisted by defendant, Albert Williams, operated a cattle-shipping business and used a corral on property owned by defendant, Laurier Sauve, to temporarily store the cattle, including the cow in question, before they were shipped for slaughter. There was evidence that the fence separating Sauve’s property from the road was overgrown and in bad repair.
35. *Id.* at 1173.
36. *Id.*
37. *Id.* at 1172.
38. *Id.*
39. *Id.*
40. See, e.g., *Collier v. Zambito*, 1 N.Y.3d 444, 447 (2004) (stating that an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities).
41. *Filer v. Adams*, 106 A.D.3d 1417, 1419, 966 N.Y.S.2d 553, 556 (3d Dep’t 2013) (stating that while dogs are not listed as domestic animals, they have been treated as such under common-law).
42. *Hastings*, 21 N.Y.3d at 126.

Karen M. Richards is an Associate Counsel, Office of General Counsel, the State University of New York.