THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 636/2019

In the matter between:

CHRISTIAAN JACOBUS VAN MEYEREN **APPELLANT**

and

GERALD CLOETE **RESPONDENT**

Neutral citation: *Van Meyeren v Cloete* (636/2019) [2020] ZASCA 100 (11 September 2020)

Coram: CACHALIA, WALLIS and MOCUMIE JJA and LEDWABA and WEINER AJJA

Heard: 2 September 2020

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Summary: *Actio de pauperie* – defences – whether to be extended to include negligence of a third party not in control of animal – no extension justified.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Lowe J, sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Cachalia and Mocumie JJA and Ledwaba and Weiner AJJA concurring)

[1] At about 3.00 pm on Saturday, 18 February 2017, the respondent, Mr Cloete, an itinerant gardener and refuse collector, was on his way to the shops pulling the trolley in which he collects refuse down R Street in Rowallan Park, Port Elizabeth, after completing a job. For no reason, and without any warning, he was attacked by three dogs owned by the appellant, Mr van Meyeren. The dogs were cross-breeds, with a significant component of pit bull terrier. They savaged Mr Cloete to such an extent that neighbours who came to the scene thought he was dead. He survived, but his left arm was amputated as a result of his injuries. The present action is to recover damages from Mr van Meyeren.

[2] Mr Cloete's claim was pleaded under the *actio de pauperie* and, in the alternative, in negligence. The parties agreed to separate the issue of liability from quantum and the trial was heard before Lowe J in the Eastern Cape Division of the High Court, Port Elizabeth. He upheld Mr Cloete's claim and granted a declaratory order and costs. Leave to appeal was refused but granted on application to this court.

The facts

[3] These can be taken largely from the judge's summary. Mr Cloete was in R Street minding his own business. As he passed Mr van Meyeren's home he heard the sound of the dogs behind him and was then attacked and pulled to the ground. He had done nothing whatsoever to cause or provoke the attack and was lawfully present at the place where it occurred. He was unable to ward off the dogs, but a passer-by, Mr van Schalkwyk, fought the dogs off him and chased them away, while help was sent for. Ultimately the dogs also attacked Mr van Schalkwyk. They were finally chased away by the police firing shots at them.

[4] The three dogs rejoiced in the names Mischka, Zeus and Coco. Mischka was the mother of the other two, but all three were fully grown. Mr van Meyeren described them as housedogs that had the run of his home and garden and at night slept on his son's bed. The garden could be accessed from the street through the front door of the house, a gate adjacent to the garages and, potentially at least, another gate adjacent and at right angles to the front door. It was through the latter gate that the dogs gained access to R Street before the attack. Photographs taken after the attack show the one half of the gate open.

[5] Mr van Meyeren had been away from home in Sunday's River since the previous Wednesday and Mrs van Meyeren had gone to a family party. Their son and his girlfriend, Ms Meyer, were there on Saturday morning, but were out at the time, Ms Meyer having been the last to leave shortly before two in the afternoon to attend the same party as Mrs van Meyeren.

[6] Mr and Mrs van Meyeren testified that the gate through which the dogs escaped was customarily kept closed and locked with two padlocks. Mrs van Meyeren said that, if her husband needed to open it, he would simply lift it off its hinges. Be that as it may, the photographs taken on the day of the incident showed that the one half of the gate (the left hand side when viewed from inside the property) was open, while the right hand half appeared to be shut and closed by a bolt located on the pillar of the central frame and fastened into a socket in the ground. None of these photographs showed any padlocks or other fastenings for the gates.

[7] A close-up photograph, said by Mr van Meyeren to have been taken on the following Monday, showed the lower half of a gate with a bolt held in place by two heavily rusted padlocks. The shackle of one of these was bent inwards so that it could not close and the other one apparently did not lock, although the reason for this was not explained. It could be shut, but could simply be pulled open. Both locks were open in the photograph. The gate was constructed from unpainted circular tubular steel, with a single bolt on the left hand side when looking outwards from the inside of the property. The bolt had a long elliptical shackle at the top that fitted over an eye attached to the central gate post on the right hand

side of the gate. Like the padlocks, both the shackle and the eye were heavily rusted. The padlocks were hooked through the eye. The indication was that the bolt fitted into a socket in the ground. A tubular steel bar crossed the gate about half way up roughly level with the bolt. The one vertical bar shown in the lower section of the gate was covered with chicken wire, but neither it nor the chicken wire extended above the cross bar.

[8] Mr van Meyeren's photograph was difficult to reconcile with the photographs on the day of the incident. None of the features appearing from his photograph were visible on the photographs taken on the Saturday, although counsel said he could see them on his copy of the photographs. Even the bolt holding the one half of the gate closed in the Saturday photograph appeared to be in the reverse position to that in Mr van Meyeren's photograph. A more careful exploration of the factual position in regard to the gates and padlocks should have been undertaken at the trial in order to resolve these issues.

[9] There are other difficulties with the suggestion that the padlocks shown in Mr van Meyeren's photographs were in position, locked and holding the gates closed when he and his wife left the property on the Wednesday and Friday respectively before this incident. The shackle of the one padlock was so bent that it could not fit into the locking hole of the padlock. It is difficult to conceive of how any interference with it could have left it in that situation. Mr van Meyeren was asked how this could have happened and said he did not know. The extent of the corrosion and rust on the shackle suggested that it had been in that condition for some time. As to the other padlock there was no explanation

for it not remaining locked when closed. It too was extensively rusted and corroded and did not appear to have been closed for some time. But, if it could close, there was no explanation for it not remaining closed.

[10] All this bore upon the acceptability of Mr van Meyeren's explanation of how the dogs came to escape from the property through gates that were securely locked. The explanation was entirely a matter of speculation. Its only evidential base was the claim by him and his wife that the gate was locked with these two padlocks when they left the property, although they did not say that they had checked the two padlocks. Based on their having been closed and locked, Mr van Meyeren said that an unknown intruder must have attempted to gain access to the property via the gates and in doing so damaged the two padlocks in the manner shown. In turn this enabled the dogs to escape, either because the gate was left open or because it enabled the dogs to open it.

[11] How a potential intruder could have done this through the chicken wire and without attracting the attention of the dogs, which were not afraid to be aggressive as subsequent events were to prove, is a mystery. Ms Meyer said in her evidence that she saw the dogs there as she left the house. Why would they not have confronted an intruder? Why would the intruder force open these gates which did not lead into the house, instead of the front door? Ms Meyer said that the front door was 'broken open' when she arrived home, but in the photographs the front door is shown closed and apparently undamaged. Having forced open the gates, why did the intruder not carry on inside instead of disappearing? Had the intruder taken fright because of the dogs, one would have expected either that the dogs would have attacked the intruder, or that someone would have seen

them fleeing the scene. Mr Cloete said that he did not see anyone else walking in the street. Nor did he hear anything unusual. Other than an endeavour to suggest that he was intoxicated at the time this was not challenged. If the gates were opened as a result of some endeavour by an unidentified person to intrude it was remarkable that this occurred without the dogs being alerted and without anyone seeing the intruder.

[12] The intruder explanation also posed difficulties with the time line of events. Ms Meyer left the property at about 2.00 pm and the incident occurred at about 3.00 pm. During the intervening period a neighbour, Mr Visser, from […]9 R Street, went to borrow a tool from Mr van Meyeren at […]8 R Street and observed that the gates were closed. He knocked on the front door, but received no response. There was no suggestion that as he crossed the road from his own house a possible intruder was seen by him leaving the vicinity. When he discovered that Mr van Meyeren was not home he went back down the road to his own home and spoke to his father. He then came out again and went to the home of another witness Mrs van der Merwe who lived at […]1 R Street. There he obtained the tool that he was seeking and returned home. As he started work on his car he heard a commotion in the street and went to investigate. He found Mr Cloete lying injured in the road. Other neighbours had come out to see what caused the commotion. The three dogs were further down the road. At most a few minutes had passed since he was in the road. However, there was no suggestion that anyone who might have been the supposed intruder was about and when he had gone to the Van Meyeren home the gate was still shut. No neighbour came forward to say they had seen some other person in the street. How then did an intruder manage to open the gate, or least break

both padlocks, within what was at most a few minutes and then vanish? If there was an intruder he appears to have been as elusive as the Scarlet Pimpernel.[1]

[12] Notwithstanding these difficulties and the fact that neither Mr van Meyeren nor his wife were impressive witnesses, the judge said that he was unable on the probabilities to reject the evidence that the gates had been locked and that they must have been broken open by an intruder. In doing so he was particularly influenced by his view that, given crime statistics in urban areas, gates accessing a road are usually kept locked. This was not something of which he could properly take judicial notice. Nor was his view supported by the fact that three large and potentially dangerous dogs were being kept from the road by the very same gates. The fact that there were large and potentially dangerous dogs roaming the garden could equally well conduce to a lack of concern to lock the gates in the belief that the dogs would protect against intruders.

[13] The approach to this unsatisfactory and speculative evidence was incorrect. It overlooked the fact that the onus of proof rested on Mr van Meyeren. There is no obligation on a court to accept an improbable explanation of events merely because no other positive explanation is proffered, or the alternative seems to the judge even less probable.[2] There were at least two possibilities. The one was that the

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[1] Baroness Orczy *The Scarlet Pimpernel* Chapter 12.

[2] *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 2 All ER 712 (HL). In that case a ship sank in calm waters and fair weather. At the trial two alternative explanations were proffered for this, namely, that it had struck a submarine object, or that its plates ruptured due to prolonged structural wear and tear. The judge regarded the former as inherently improbable and the latter as virtually impossible and found for the plaintiff. On appeal the House of Lords pointed out that there is no obligation on a court faced with two improbable versions to select the least improbable. It is always open to it to hold that the onus of proof has not been discharged. It rejected the notion that the court must follow Sherlock

gates were insufficiently secured to keep the dogs inside the Van Meyeren property. The other was the Van Meyerens' explanation that there must have been an intruder. The fact that the judge did not feel able to reject their evidence did not mean that he was obliged to accept it. The issue was whether on a balance of probabilities theirs was the only explanation for the dogs escaping. Unless that conclusion could be reached Mr van Meyeren did not discharge the onus of proof and the defence should have failed.

[14] Mr van der Linde SC, who appeared in this court for Mr Cloete, but not at the trial, said he was arguing the appeal on the basis of the judge's factual findings. It is accordingly necessary, notwithstanding my qualms about the premise of the hypothetical intruder, to determine whether the judge was correct that these did not constitute a defence to the pauperien action.

The *actio de pauperie*

[15] I trust legal historians will forgive me for not commencing the discussion by going back to the roots of the *actio de pauperie* in the Law of the Twelve Tables and the relevant passages in the Digest of Justinian. I refrain from doing so not simply because this has become overworked terrain,[3] but because the task was undertaken by this court in *O'Callaghan NO v Chaplin*,[4] where Innes CJ (with whom De Villiers JA

Holmes' dictum from *The Sign of Four* by Sir Arthur Conan Doyle that 'when you have eliminated the impossible, whatever remains, however improbable, must be the truth.' The issue is not which of several possibilities is the least unlikely, but whether any one of them is on a balance of probabilities the correct one. *Datec Electonics Holdings Ltd and Others v United Parcel Services Ltd* [2007] UKHL 23; [2007] 2 Lloyd's Rep 114 (HL) paras 48 and 50.

[3] *Loriza Brahman and Another v Dippenaar* 2002 (2) SA 477 (SCA) (*Loriza Brahman*) para 12.

[4] *O'Callaghan NO v Chaplin* 1927 AD 310.

concurred) in his customary lucid fashion, summarised the law as follows:[5]

'By our law, therefore, the owner of a dog, that attacks a person who was lawfully at the place where he was injured, and who neither provoked the attack nor by his negligence contributed to his own injury, is liable, as owner, to make good the resulting damage. The same principle applies to injuries inflicted by a dog on another animal, and to injuries inflicted by any animals falling within the operation of the pauperien law. It is confined of course to cases where liability is based upon ownership alone. Actions may be founded under appropriate circumstances on *culpa*, and they will be governed by the ordinary rules regulating Aquilian procedure. The conclusion is satisfactory for two reasons especially. In the first place it provides a remedy in cases where otherwise persons injured would be remediless. Instances must occur where a dog, a bull or other domesticated animal inflicts damage under circumstances which make it impossible to bring home negligence to the owner. Yet of two such persons it is right that the owner, and not the innocent sufferer, should bear the loss. And in the second place the adoption of *culpa* as the sole basis of liability would inevitably lead us towards the *scienter* test . . . which it is common cause is not the test which our law applies in cases of this kind.'

[16] The reference to the *scienter* test was a reference to the doctrine of the English common law that strict liability follows the owner of an animal if the owner was aware of the animal's proclivity to engage in the conduct that caused the harm. Thus if an owner was aware of their dog's tendency to bite people, the owner would be liable if the dog bit someone. In the result it is sometimes referred to as 'the one free bite' rule. If the owner was aware that the dog has a tendency to chase cyclists and the dog chases a cyclist causing them to fall off their bicycle and injure

[5] *O'Callaghan NO v Chaplin* at 329-330.

themselves, the owner will be liable.[6] In South Africa there is no such requirement and strict liability is imposed on the owner of the animal.

[17] In a clear statement of the policy justification for the continued existence of the pauperien action, notwithstanding that the original provision of the Roman Law that an owner could discharge their liability under the action by surrendering the offending animal to the injured party[7] had fallen into desuetude, Kotzé JA (with whom Stratford AJA concurred) arrived at the same conclusion as the Chief Justice, and said:[8]

'It is satisfactory to find that the *actio de pauperie* still forms part of our law . . . I think the conclusion is a sound one and just, for *if* a man chooses to keep an animal, and injury or damage is caused by it to an innocent person, he must make adequate compensation. The owner of the animal and not the person injured must bear the loss.'

[18] Three years later De Villiers JA, giving the judgment in *SAR & H v Edwards*[9] said:

'The action lies against the owner in respect of harm (*pauperies*) done by domesticated animals . . . if the animal does damage from inward excitement or, as it is also called, from vice, it is said to act *contra naturam sui generis*; its behaviour is not considered such as is usual with a well-behaved animal of the kind.'

The endeavour in *Loriza Brahman* to persuade this court to abolish the pauperien action failed.

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[6] *Gallant v Slootweg* 2014 BCSC 1579. For a full treatment of the doctrine see the working paper of the Law Reform Commission, Ireland on Civil Liability for Animals, chapter 2, available at https://publications.lawreform.ie/Portal/External/en-GB/RecordView/Index/30539. The rule was sufficiently problematic that various statutes were passed in Ireland, England and Scotland in the 1800's to impose liability apart from the common law. See *Le Roux and others v Fick* [1879] 9 Buch 29 (*Le Roux v Fick*) at 34-35.

[7] This was called noxal surrender.

[8] *O'Callaghan NO v Chaplin* at 365-366.

[9] *South African Railways and Harbours v Edwards* 1930 AD 3 at 9-10.

[19] An element of anthropomorphism underlies the pauperien action. It attributes to domesticated animals the self-constraints that are generally associated with human beings and attaches strict liability to the owner on the basis of the animal having acted from internal vice. As De Villiers JA said:

'Dating back as this form of remedy does to the most primitive times, the idea underlying the *actio de pauperie*, an idea which is still at the root of the action was to render the owner liable only in cases where so to speak the fault lay with the animal. In other words for the owner to be liable, there must be something equivalent to *culpa* in the conduct of the animal.'

This anthropomorphism is reflected in the concept of the animal acting *contra naturam sui generis*. That is well described as follows:[10]

'The *contra naturam* concept seems, in fact, to have come to connote ferocious conduct contrary to the gentle behaviour normally expected of domestic animals. This imports an objective standard suited to humans. It is far more refined than behaviour literally *natural* to that species of animal. It is what *Voet*, 9.1.4, means when he speaks of *animalia mansueta feritatem assumunt.*'

If the conduct of the animal that caused the harm was due to its being frightened, or in pain, or provoked and it acted as any animal would in the circumstances, then it has not acted *contra naturam* and the owner is not liable.[11] The onus of establishing this rests on the owner of the animal. [12]

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[10] P M A Hunt 'Bad Dogs' (1962) 79 *SALJ* 326 at 328 quoted in *Solomon and Another NNO v De Waal* 1972 (1) SA 575 (A) at 582A-C.

[11] In *Loriza Brahman* para 19 Olivier JA expressed this as follows:

'As die skadestigtende optrede egter veroorsaak is omdat die dier skrikgemaak is, of leed of pyn aangedoen is of geprovokeer is, dan is die optrede nie *contra naturam* nie, maar juis ooreenkomstig die aard van 'n dier omdat alle diere so sal optree; en is daar geen aanspreeklikheid nie.'

'If the harm-causing occurrence was truly caused because the animal was frightened, or is suffering or in pain, or was provoked, then the occurrence was not *contra naturam*, but accords with the way in which all animals would behave and there is no liability.'(My translation.)

See by way of example *Cowell v Friedman & Co* 5 HCG 22.

[12] *Da Silva v Coetzee* 1970 (3) SA 603 (T) at 604A-B approved in *Loriza Brahman* para 20.

[20] In *O'Callaghan NO v Chaplin* two circumstances were identified in which the owner would not be liable. The first was where the injured party was in a place where they were not entitled to be. The obvious example would be that of a housebreaker bitten by a watch dog. Another would be where the animal was chained to restrain it and the injured party ventured within reach. However, in general, if the harm occurred in a public place, such as a public street, the owner would be liable.[13] The second exception was the relatively obvious one where the injured party or a third party provoked the attack by goading or provoking the animal. The application of these defences where children are involved may create problems, for example, where a child enters a neighbouring garden to retrieve a lost ball, or where one child teases a dog and the dog bites another child. I would also be hesitant to say that the homeowner was free from liability because the intruder was in the wrong place, if a watchdog savaged the intruder in the way these three dogs savaged Mr Cloete. However, these problems do not arise in this case and can be left for consideration when such a case arises.

The exception to pauperien liability in *Lever v Purdy*

[21] That brief outline of the pauperien action in South African law brings me to the decision of this court in *Lever v Purdy*,[14] a dog bite case, where a third exception was recognised to the strict liability of the owner of a domestic animal. It is best to start with its facts. Mr Lever was the owner of a dog that bit Mr Purdy. At the time of the incident Mr Lever was overseas and Mr Cohen was living in his home and looking after Mr Lever's admittedly vicious dog. At Mr Cohen's request Mr Purdy came to the house to adjust a television set. He was told about the dog and asked

[13] *Le Roux v Fick*; *Solomon and Another NNO v De Waal* ibid at 582C-F.
[14] *Lever v Purdy* 1993 (3) SA 17 (A).

Mr Cohen to lock it away before his arrival. Mr Cohen did not do so. When Mr Purdy reached the house at between 6:30 pm and 7:00 pm he walked up the path, put his hand on the gate and shouted for Mr Cohen. At this point the dog suddenly appeared and bit him, pulling him through the gate. When Mr Cohen emerged, he took control of the dog. After Mr Lever's return Mr Purdy sued him for damages.

[22] The question was whether Mr Lever could escape liability on the grounds of Mr Cohen's negligence, even though he had not provoked the dog to attack Mr Purdy.[15] The court said that he could. In this case Mr van Meyeren contended that the defence recognised in *Lever v Purdy* should be extended to exempt the owner from liability for harm caused by the animal where the harm would not have occurred but for the negligent conduct of a third party, irrespective of whether the third party had the custody or control of the animal. That requires in the first instance an analysis of what was decided in *Lever v Purdy.* There were two judgments, one by Joubert ACJ and another by Kumleben JA, both reaching the same conclusion. I will analyse each in turn.

[23] Joubert ACJ, in the majority judgment, considered the Roman Law of pauperien liability as contained in Justinian's Digest. Referring to various texts in D 9.1 he dealt with those instances in which the culpable conduct of a third party caused a domesticated animal to act contrary to the nature of its class in injuring the victim, with the result that the animal's owner was exempted from pauperien liability. These he divided into two categories. The first category consisted of cases where the culpable conduct of an outsider by way of some positive act, such as,

[15] *Lever v Purdy* at 20H-I.

provoking, striking, wounding, scaring or annoying the animal, caused the animal to inflict the injury upon the victim.[16] The second category related to those instances where a third party, in charge or control of the animal, by negligent conduct failed to prevent the animal from causing harm to the victim.[17] The difference between these two categories was this. In the first category the positive act of the third party caused the animal to injure the victim. In the second the third party's negligent failure to prevent the animal from injuring the victim created the opportunity for the animal to injure the victim, without causing it to do so. In both cases the conduct of the third party attracted liability under the Aquilian action and exonerated the owner from pauperien liability. After a survey of the Roman-Dutch writers, Joubert ACJ concluded that their law was the same as that set out in the Digest. As Mr Cohen's conduct fell in the second category, Mr Lever was not liable to compensate Mr Purdy for his injuries.

[24] Kumleben JA adopted a different approach. He agreed that in the first category of cases, where the third party incited or provoked the animal to behave *contra naturam sui generis* by striking, wounding, scaring or annoying it, the conduct of the third party caused the harm and pauperien liability was excluded. He identified what he described as a 'wider exception'[18] whether fault on the part of a third party causatively contributing to the injury caused by the animal would also constitute a defence. He illustrated this with the example of a visitor leaving a gate open thereby enabling a vicious dog to escape and attack some innocent

[16] *Lever v Purdy* at 21F-H.
[17] *Lever v Purdy* at 21H-24B.
[18] *Lever v Purdy* at 26F-I.

passer-by, suggesting that there was some authority in support of such a defence.[19] However, he added that this question did not need to be decided as the only question in the case was whether the negligence of a person to whom the owner had entrusted the custody and control of an animal relieved the owner of pauperien liability.

[25] Neither judgment cited any clear authority in favour of the existence of the exception. The closest to it was D 9.1.1.5 (a text by Ulpian), which in Watson's translation reads:

'Take the case of a dog which, while being taken out on a lead by someone, breaks loose on account of its wildness and does some harm to someone else: If it could have been better restrained by someone else or if it should never have been taken to that particular place, this action will not lie and the person who had the dog on the lead will be liable.'[20]

Joubert ACJ's judgment in *Lever v Purdy* was based solely on his reading of these texts. In his view they showed that a person having the custody or control of an animal, who through negligence failed to control it resulting in it injuring the victim, was liable under the Aquilian action and this constituted a defence exonerating the owner from pauperien liability.[21]

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[19] Van Leeuwen *Censura Forensis* 1.5.13.1; *Le Roux and Others v Fick* op cit fn 15, *Lawsa* Vol 1, para 378.

[20] Joubert ACJ also relied on Johannes Voet *Commentarius ad Pandectas* (Gane's translation) 9.1.6, which is almost verbatim the same, namely:
'Then again, if a dog, *when he was being led by someone*, escaped through his own rough temper and did damage to somebody, or killed another person's sheep, hens or geese, *and if he could have been more firmly held in by another* or ought not to have been led over such a spot, this action on *pauperies* falls away but there is room for a beneficial Aquilian action *against the leader*.' (Emphasis by Joubert ACJ). No regard appears to have been had to this in the case of *Carelse v City of Cape Town (Eksteen and another as third parties)* [2019] 2 All SA 125 (WCC), where the owner of the dog was held liable, even though the dog had been in the care of his son at the time.

[21] *Lever v Purdy* at 25I-26A.

[26] Kumleben JA relied on the same authority as recognising the exception. He accepted that a feature of pauperien strict liability was that the owner was the source of risk to the injured party. However, the main considerations influencing his conclusion that the exception existed appear from the following passage:[22]

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

A wider exception?

[27] Apart from the passing reference to the 'wider exception' at the outset of Kumleben JA's judgment, nothing in *Lever v Purdy* provides any support for the wider exception for which Mr van Meyeren contended. Counsel referred us to various passages in Joubert ACJ's judgment, but they all fell to be considered in the specific context, reiterated several times, that he was concerned with a third party in charge or control of the animal.[23] They cannot be taken as shedding any light on the present situation.

[28] The case of *Le Roux v Fick* hardly takes the matter further. The owner of a dog was proceeding in a cart along a public road and his dog was walking along the road with him. Some ostriches were grazing on a

[22] *Lever v Purdy* at 29G-I.
[23] See *Lever v Purdy* at 20H-I, 21F-I, 23H-J; 24B-C and E-F; 25D-G.

commonage beside the road and the dog, together with another one that had attached itself to the party, chased the birds, causing one to fall into a sluit and injure itself so badly that it died. After a full consideration of the authorities Smith J said: [24]

'… an action *de pauperie* lay in all cases of damage caused by animals when the damage was not brought about through the fault of the party using the animal *or of some third party*' (My emphasis.)

Those few words provide but slender support for the proposition that fault on the part of a third party in circumstances such as the present case exonerates the owner from liability.

[29] The passage from Van Leeuwen is likewise of little help. It reads:[25]

'I said *aut culpa hominis* (or negligence on the part of a human being) because if there is negligence on the part of the owner or *of anyone else*, this action lapses and a suit is brought under the *Lex Aquilia*, for example if a mule does damage because of the unevenness of the road, or the negligence of the muleteer, or because it was too heavily loaded or was provoked by someone, or if the animal acted in some way on account of human inexperience or negligence or when aroused by pain.' (My emphasis.)

The example of the muleteer is clearly not an example of the mule acting *contra naturam sui generis*. Nor is the example of the animal being aroused by pain.[26] Provocation by the victim or a third party has always been recognised as providing a defence. The reference to the animal acting in a way caused by human inexperience or negligence is too vague and general to be helpful.

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[24] *Le Roux v Fick* at 37.

[25] Simon van Leeuwen, *Censura Forensis* 1.5.13.3 (translated by Margaret Hewett, 1991). There is no corresponding passage in the discussion of pauperien liability in his *Commentaries on Roman-Dutch Law*.

[26] See *Cowell v Friedman & Co*, op cit, fn 13.

[30] The current edition of *Lawsa* is inconsistent on the subject. When dealing generally with the defences available to the owner of an animal sued under the *action de pauperie* it says that culpable conduct on the part of a third party avoids liability. However, in the section dealing with fault on the part of a third party it goes no further than *Lever v Purdy*, without suggesting that the exception in that case should be extended.[27] In the first edition cited by Kumleben J the author gave two examples of negligent conduct by a third party exonerating the owner from liability. The one was where the third party provoked or injured the animal and the other where a person having control of the animal was negligent. Neither supported an exception from liability extending any further than that recognised in *Lever v Purdy*.

[31] At best it seems to me that these rather cryptic references in and to the old writers on the Roman-Dutch law provide no clear authority in favour of extending an owner's exemption from liability for harm caused by their animal to instances where a third party's negligence is involved without the third party having the custody or control of the animal. Voet[28] mentions one example that appears to be inconsistent with the extension. He said that where A is persuaded by B's fraud to approach a horse that B knows is apt to kick, and A is kicked even though B did not provoke the horse, A's action is correctly brought against the owner on *pauperies*, although B may also be sued. But overall any development of the principles governing pauperien liability and the defences available to an owner is best sought in modern principles and circumstances, rather than

[27] *LAWSA* Vol 1 (3 ed, 2013) per C G van der Merwe and M A Rabie, paras 407 and 410. The first of these paragraphs was cited in the heads of argument, but not the second.
[28] Voet 9.1.5, Gane's translation, Vol 2, pp 539-540.

obscure references to ambiguous authorities drawn from a different era in a very different society.

[32] Mr van Meyeren wished us to develop the common law by extending the exception to liability under the pauperien action recognised by this court in *Lever v Purdy*. This is a power vested in the high court, this court and the Constitutional Court by s 173 of the Constitution. It is to be exercised in accordance with the interests of justice. When exercising the power, we are enjoined by s 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights. Before adopting any development it is incumbent on a court to (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.[29]

[33] The underlying reason for the existence of the *actio de pauperie* is that as between the owner of an animal and the innocent victim of harm caused by the animal, it is appropriate for the owner to bear the responsibility for that harm. Dekker, in a note to the passage from Van Leeuwen's *Commentaries* dealing with the *actio de pauperie*, said:[30]

'… there is no absurdity in obliging him to make compensation whose animal has caused the damage, or who has excited and goaded it on to the damage of another …'.

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[29] *Mighty Solutions (Pty) Ltd t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34; 2016 (1) SA 621 (CC) para 38.

[30] Van Leeuwen's *Commentaries on Roman-Dutch Law* 3.39.5 and 3.39.6 in the edition revised and edited by Decker (Kotzé's translation, 1923) Vol 2, pp 319-320 fn (c).

This rationale is almost precisely the same as that of Innes CJ and Kotzé JA in *O'Callaghan NO v Chaplin*, namely that, in general, ownership of an animal should carry with it strict liability for any harm done by the animal. In other countries, hampered by the English common law *scienter* rule, that position has been enshrined in statute for nearly two centuries.

[34] Counsel for Mr van Meyeren said that he did not rely on any specific provision of the Bill of Rights. He did not suggest that the existing more limited exceptions offended the spirit, purport and objects of the Bill of Rights. In that he was correct because the only relevant provisions of the Bill of Rights point in the opposite direction. They are the right to bodily integrity in s 12(2), the right to dignity in s 10 and, as the facts of this case demonstrate, the right to life in s 11. These are the rights that the *actio* exists to protect and it is right that we prefer to develop the *actio* in ways that afford protection to them.

[35] Counsel submitted that given the level of crime in South Africa people are entitled to protect their persons and homes against criminals.[31] That is a proposition that would be uncontroversial even were the crime level lower. He went on to submit that not all the population can afford to live in gated and secure estates, or to install state of the art alarm systems. They may be compelled to rely on their dogs to guard their homes against criminals. Thus far the submission cannot be faulted, subject to the reservation mentioned earlier as to the degree of harm that a dog may do to an intruder. Deterrence or restraint of an intruder is one thing. Killing

[31] *Dorland and Another v Smits* 2002 (5) SA 374 (C) at 384.

or seriously injuring them is another. Only in extreme circumstances is it permissible to shoot and kill an intruder in self-defence. Why then should it be permissible to keep a dog that, irrespective of the level of threat, may kill or maim them? Innes CJ spoke only of a trespasser being bitten by a watchdog.[32] However, that question does not need to be answered in this case.

[36] The problem arises at the next stage of the argument. These dogs did not harm an intruder in their owner's home or premises, within whatever limits may be permissible in law. They escaped from the premises and attacked an innocent passer-by. However extensive may be the right to keep dogs for protection in the home, it is irrelevant to cases where the dog causes harm outside the home. Mr van Meyeren does not dispute that the requirements of pauperien liability were satisfied. He sought to escape liability on the basis that what occurred here was not his fault. But absence of fault has never been a basis for avoiding pauperien liability. It proceeds on the basis of strict liability arising from ownership of the animal that caused the harm. Absence of fault is a ground for resisting Aquilian liability, not a claim under the *actio*.

[37] Where the actions of the victim or third parties are held to exonerate the owner of an animal from pauperien liability, it is because those actions directly caused the incident in which the victim was harmed in circumstances where the owner could not prevent that harm from occurring. That is why provocation of the animal by the victim or a third party exonerates the owner. It is also why in *Lever v Purdy* the negligent

[32] *O'Callaghan NO v Chaplin* at 329.

failure by a third party to control an animal in their custody and under their control exonerated the owner. The result in that case would have been no different if Mr Lever had placed the dog in kennels for the duration of his absence. These causes are not extrinsic to the conduct that caused the harm. They are directly linked to it. An extrinsic cause such as leaving a gate open and allowing animals to escape from the owner's property has nothing to do with the behaviour of those animals once they have escaped. If they are naturally vicious or dangerous, as appears to have been the case with the dogs in this case, that merely creates a wider opportunity for that characteristic to manifest itself in harming innocent persons.

[38] The assumed intruder in this case had no responsibility to Mr van Meyeren in relation to his dogs. They did nothing in relation to the dogs. They interfered with the locks on the gate thereby enabling the dogs to go into the street and attack Mr Cloete. But responsibility for the dogs had not passed from Mr van Meyeren to the intruder in the way in which it had passed from Mr Lever to Mr Cohen. It still resided squarely with him as the owner of the dogs. It was contended on his behalf that he should not be held liable, because he took appropriate steps to ensure that the dogs could not escape from the premises.

[39] I repeat that stripped of everything else Mr van Meyeren's argument is nothing more than a claim that Mr Cloete's injuries were not his fault. Counsel recognised this, as he first sought to persuade us that control of the animal by the person whose negligence allowed them to escape, was not a requisite for the extended exception to operate. In my view that cannot be accepted as it is destructive of the need for there to be

a direct link between the third party's conduct and the behaviour of the animal that caused the harm in order for the owner to be exonerated from liability. While the third party's conduct might be causally linked to the harm, it stands at one remove from it, in that it may be a necessary condition for the harm to occur, but the harm would not necessarily occur as a result thereof. For example, if the owner came home and rounded the dogs up before they could do any harm it would be avoided. That is not the case in the instances where a third party's conduct exonerates the owner from liability.

[40] Kumleben JA laid store on the principle of our law of delict that liability goes hand in hand with fault. However, the principle is by no means universal in its application. In the field of vicarious liability the nature of the relationship between the wrongdoer and the party sought to be held liable is what determines liability. The fault of the wrongdoer for all practical purposes is treated as if it were the fault of the party being held liable. Under some statutes, especially those dealing with environmental matters, civil liability is imposed irrespective of fault.[33] There are criminal statutes that impose strict liability. For nearly two hundred years in South Africa owners of animals have been held strictly liable for harm done by domesticated animals. This court has rejected the argument that this should be abolished because it was not based on fault. It would in my view be inappropriate to undermine the principle of strict liability for harm caused by domesticated animals by extending the exception in *Lever v Purdy*.

[33] See for example s 28 of the National Environmental Management Act 107 of 1998; Section 9 of the Marine Pollution (Control and Civil Liability) Act 6 of 1981.

[41] Kumleben JA also took the view that in considering the competing interests of the owner who had not been at fault and the injured party who had a claim based on negligence against the custodian of the dog, considerations of fairness and justice favoured the owner. I am unconvinced that this was a correct balancing of interests if one takes the interests of justice into account in accordance with the constitutional values already mentioned. In *Lever v Purdy* the injured plaintiff's claim based on negligence was worthless as it was settled without any amount being paid to Mr Purdy. Many people go on holiday and leave their homes in the care of house sitters. Those may be friends, the children of friends, students, retirees or young people seeking to supplement their income. Their financial ability to meet a claim for damages arising from the family dog biting a passer-by will probably be limited. The same is true of the dog walkers postulated by counsel, although if they are negligent the owner may be vicariously liable. By contrast the dog's owner is likely to be able to obtain insurance cover against the risk of the animal biting someone as part of a conventional household insurance policy.

[42] Many people in South Africa choose to own animals for companionship and protection. That is their choice, but responsibilities follow in its wake. Whatever anthropomorphic concepts underpin pauperien liability, the reality is that animals can cause harm to people and property in various ways. When they do so and the victim of their actions is innocent of fault for the harm they have caused, the interests of justice require that as between the owner and the injured party it is the owner who should be held liable for that harm. In taking that view I find myself in the company of the majority of this court in *O'Callaghan NO v*

Chaplin. Nothing has occurred in over ninety years since that case was decided to change the view of the interests of justice taken in that case. The endeavours to suggest that they have changed in more modern times is misplaced. If anything with the growth of urban living, the vastly increased number of pet animals, especially dogs, in our towns and cities and the opportunities for harm that they pose, that view of where the interests of justice lie has been strengthened. People are entitled to walk our streets without having to fear being attacked by dogs and, where such attacks occur, they should in most circumstances be able to look to the owner of the dog for recompense.

Result

[43] In the result the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	D J Coetzee
Instructed by:	BDP Attorneys, Tyger Valley; Honey Attorneys, Bloemfontein
For respondent:	H J van der Linde SC (with him N Barnard)
Instructed by:	Lessing, Heyns, Keyter & Van der Bank Inc, Uitenhage Van Wyk & Preller Inc, Bloemfontein.