PERSONAL INJURY

Bard Still Bites

Rule prohibiting negligence claims for harm caused by domestic pets upheld

By Jeffrey T. Baron

If you've noticed a lot of tail wagging lately, it might be because the New York Court of Appeals in *Doerr v. Goldsmith*[1] just published one of the most dog-friendly decisions ever. The main issue before the *Doerr* Court was whether to overrule the high courts' heavily criticized 2006 Bard rule[2], which prohibited negligence claims in cases where the harm was caused by a canine or other animal.

The Bard Court held that cases against the owner or harborer of an animal could proceed only under a theory of strict liability, triggered once plaintiff proves that defendant had prior notice of the animal's harmful proclivities. Under the Bard rule, the negligent acts or omissions of the animal's owner in causing or contributing to the plaintiff's harm are completely irrelevant, including violations of local leash laws. Justice Smith's dissent in Bard criticized the majority's decision as archaic, rigid, "contrary to fairness and common sense," and likely "to be eroded by ad hoc exceptions."

The first such exception arrived in the 2013 case of *Hastings v Sauve*[3], where a cow was negligently permitted to stray from a farm and onto a highway, accidentally causing injuries to a passing motorist. The Court of Appeals recognized a "fundamental distinction" between cases where domestic pets engage in atypical vicious or aggressive behavior and cases where farm animals engage in emblematic errant or dangerous behavior, wandering away and causing harm. The Hastings Court saw fit to carve a narrow exception to Bard's negligence prohibition where farm animals (i.e. "domestic animals" as defined by Agriculture & Markets Law §108(7)), stray from the property where they are kept. The court refrained from deciding whether domestic pet owners might also be subject to liability under ordinary tort law principles where their pets cause harm without engaging in vicious or aggressive behavior. The court insisted that question would have to await a different case, which brings us to Doerr.

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Plaintiff Wolfgang Doerr was riding his bicycle on a road in Central Park toward a location where defendant Julie Smith and her boyfriend Daniel Goldsmith were standing on opposite sides of the road from each other. Goldsmith was kneeling down and holding Smith's dog. Smith chose this inopportune moment to beckon her dog, which faithfully ran toward her and directly into plaintiff's path. Unable to stop his bicycle in time, plaintiff struck the dog and flew from his bike into the annals of legal history.

In keeping with the Bard rule, the Supreme Court on a defense motion for summary judgment dismissed the *Doerr* case because the dog had no prior harmful proclivity when its owner beckoned it into the path of the plaintiff's bicycle. The Appellate Division reversed[4] based upon the "fundamental distinction" referenced by the *Hastings* Court. They sidestepped the Bard Rule, shifting focus from the dutiful behavior of the dog to the derelict actions of the defendant. They likened the case to one where someone tosses a ball into another person's path, thereby launching an instrument of harm. Defendant appealed to the Court of Appeals.

On June 11, 2015, in a 4-3 decision, the New York Court of Appeals reversed the Appellate decision and granted summary judgment to defendant Julie Smith, dismissing Doerr's case. The high court examined the history of animal liability in New York, weighed considerations of logic and fairness against societal expectations, insurance ramifications, and judicial consistency, and chose to double-down on the Bard prohibition against negligence claims for injuries caused by domestic pets.

In a controversial concurring opinion, Judge Sheila Abdus-Salaam rejected the Appellate Division's ball analogy, pointing out that a ball, once tossed, is constrained by the laws of physics, while a dog has an actual choice. It was, the judge maintained, the volitional behavior of the dog that caused the harm, and not the act or omission of the owner. After all, a dog won't always follow its owner's command, and we can't possibly know what a dog is actually thinking when it acts or fails to act. On the other hand, the judge allowed, if the defendant had "tossed" the dog across the road, a negligence claim would have likely been viable. Thus, under the majority rule, a defendant who gracelessly tosses a ball to her dog in a crowded park can be held liable for negligence if the ball hits someone, but not if her dog lunges to catch the errant ball and crashes into someone.

Judge Abdus-Salaam acknowledged that the Bard rule will seem "unsatisfactory" in "a few cases," but she cited various policy reasons in support of her decision to uphold Bard. For one thing, it is an "easy to apply bright-line rule."

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SOCIAL MEDIA

Avvo.com Ratings: in Defense of a Colleague and Perhaps His Nemesis

By Mona Conway

By way of an interesting coincidence, I came upon an article in *The Suffolk Lawyer* about Avvo.com. Not having an opportunity to read the February 2015 edition, I was using the newspaper for packing materials and happened to spot a photograph of my good colleague Glenn Warmuth. Having recently requested that Glenn provide me with a peer review on my Avvo profile, I came to realize that my request was adding salt to a wound. For this I must openly apologize to him and my other colleagues, who may have been irritated by such a request.

Having maintained a profile on Avvo for many years now (Internet years, that is), I was rather stunned by the revelation of Avvo's dark side. Indeed, Mr. Warmuth's investigation uncovers another "perfect scam" insulated from legal liability. However, as a veteran of Avvo, and at the risk of seeming to promote the company, I feel obligated to share the lighter side of this quasi-social-networking site.

I "claimed" my Avvo profile in about 2009. At that time, it seemed to me to be the closest online forum to accomplish a vision for our profession that I had hoped for a decade ago. (I had suggested a similar network to the Suffolk County Bar Association on a few occasions to enhance legal networking on the local level). Avvo offered the potential for genuine local networking as well as a bridge between lawyers and those in need of legal help. Avvo was barely a blip on the web at that time, so my motivation was primarily altruistic. Those in need of legal help or wanting a quick answer to a simple legal question post their issues on Avvo and let the lawyers give their input. The site is free to the layperson and a nice thing to do by lawyers, who are not well known for their non-billable generosity of time. The added presence on the Internet doesn't hurt either. In addition, connections can be made, attorney-to-attorney on a local level as well as across the country.

Mona Conway

Like most of my colleagues, I have been a member of LinkedIn and have a professional Facebook page. For all the time and attention that I have given these social networks, I have found them to be largely useless. Perhaps I'm missing something, but most of what I have seen on LinkedIn and Facebook appears to be nothing more than a contest of collection. Members collect "contacts" or "friends," and interactions are devoid of meaningful social networking. Even for the legal profession, having some social networking profile has become a necessity, lest we all be deemed shrewd-less luddites. Apparently, Avvo is giving new meaning to the phrase "peer pressure." While Mr. Warmuth's Avvo rating is a mediocre 6.6-out-of-10 by default, those who could give him his true "industry recognition" would rank him at 11 (playing on Glenn's '80's movie reference). Likewise, the same or inverse of which may be said for many members of the bar.

My two-cents is that social networking is a necessary evil or at least a nemesis against reality, the force of which cannot be overcome at the present time. Like so many Internet industries, Avvo's methods do not seem to be above-board. I must state — with all due respect to my colleagues who despise its underhandedness — that Avvo has genuine usefulness. The non-legal community seems to be benefiting from the one-stop, online legal advice shop and attorneys can demonstrate their specialty knowledge in the same arena. It is a strange win/win situation with an ironically unjust result for the non-players of this game.

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Second, it keeps liability within manageable limits," third it encourages "domestic favorites," such as the dog and cat to "romp unguarded," which arguably comports with societal expectations. And fourth, disturbing Bard would run afoul of "the critical considerations of stare decisis."

Chief Judge Lippman dissented, insisting the majority decision "contradicts any sensible logic," as "[d]efendants are immunized under this rule from the consequences of their own negligent actions for no reason other than that a dog happened to be involved in the accident." He called for a second exception to the Bard rule where the owner not only set in motion a chain of events, but "directed the animal to engage in conduct that caused direct and immediate harm." Judge Abdus-Salaam rejected this proffered standard since it would require the fact-finder to speculate as to what really went on inside the mind of the dog.

Judge Fahey, joined by Judge Pigott in his dissent, attacked the flimsy legal foundation of the Bard prohibition and endorsed overruling that case altogether and joining the vast majority of other U.S. states in adhering to the Restatement doctrine, i.e. permitting a common law claim for negligence whenever the owner fails to prevent his or her animal from causing harm. Remarkably, New York is the only state in the union that expressly rejects the Restatement approach.

Judge Fahey downplayed the importance of "unguarded canine romping," reiterating the language from Justice Kaye's 1990 dissent in a similar case[5]: "[w]hatever may have been the expectation in an earlier, more agricultural age, it is no longer expected that dogs will roam the highways of this State at will." On the issue of stare decisis, Judge Fahey pointed out that the holding of Bard collides with a "prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience…the Restatement position."

Judge Abdus-Salaam concluded that the "obvious shortcomings" of the Bard rule did not necessitate the disturbance of precedent on the issue, stating "[w]e do not cast aside precedent unless it has become unworkable, increasingly irrational and/or increasingly unjust over time…none of those things has occurred."

So for now, a plaintiff injured by a domestic pet must prove, without exception, that defendant had notice of the dangerous proclivities of the animal. The court did leave open the possibility of liability for "supervision of an animal undertaken with the intent to cause harm to another or with conscious disregard of a known and unjustifiable risk of harm to another."

Judge Abdus-Salaam suggested that the viability of the Bard Rule should now be considered "settled." This may be wishful thinking.

Note: *Doerr v. Goldsmith* was decided concurrently with the case of *Dobinski v Lockhart*, which is not discussed herein due to editorial constraints.

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[1] *Doerr v. Goldsmith, 2015 NY Slip Op 04752 (2015)*
[2] *Bard v. Jahnke, 6 N.Y.3d 592 (2006)*
[3] *Hastings v Sauve, 967 N.Y.S.2d 658 (2013)*
[4] *Doerr v. Goldsmith, 978 N.Y.S.2d 1 (App Div., 1st Dept 2013)*
[5] *Young v. Wyman, 76 N.Y.2d 1009 (1990)*

Do These Regs Have Legs? *(Continued from page 20)*

check, while the other will be used in conducting a state criminal records history search.

Section 5 of the Senate bill adds a new "notarial record requirement" when a notary or a commissioner of deeds "perform acts involving conveyances of residential real property in the City of New York."[11]

Although there are exceptions to the definition of "conveyance," the types of transactions to which this new requirement would apply are far-reaching.[12]

In addition to relatively routine information (date, type of instrument, property description, etc.) the proposed "Notarial Record" must also contain "the right thumbprint of each person whose signature is being notarized."[13]

While the notary is still expected to examine satisfactory evidence of the identity of the signatory, "satisfactory evidence" will now include:

> "the absence of any evidence or information that would lead a reasonable person to believe that the person whose signature is being notarized is not the individual he or she claims to be,"

"together with" a valid driver's license, passport, or similar document.[14]

Unless the Notarial Record "was created by a notary public in the scope of his or her employment with a title insurance corporation, financial institution, law firm, or attorney at law," it must be delivered to the City Register within fourteen days of its creation. In those cases where the record was created by an employee of a title company, lender of law firm, it must be delivered to the employer within the fourteen-day window. In either case, the Notarial Record "shall be retained for seven years."[15]

A Notarial Record cannot be disclosed except to (1) federal, state or City agencies as required for official business,[16] or to "a grantor or grantee of the residential property."[17]

Conclusion

Space limitations, as well as uncertainty surrounding the fate or final form of these proposals, prohibit extended analysis of the permutations and pitfalls lurking therein. But, beware—they are certainly present! For instance, the fingerprinting proposal applies to "applicants," which may lull existing notaries into thinking they are exempt from the requirement. But, existing notaries must submit an "application" for reappointment in order to continue exercising their office.

We encourage that these proposals be examined carefully and that one reflect on the impact each could have on the practice.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely read land title law newsletter "Constructive Notice." For more information, visit www.LandTitleLaw.com.

[1] 11 NYCRR §227 (proposed).
[2] Penal Law §175.35.
[3] Penal Law §175.35 (2) (proposed).
[4] CPL §255.25 (proposed).
[5] CPL §255.25 (1) (proposed).
[6] CPL §255.25 (2) (proposed).
[7] CPL §§255.25 (1), 255.25(9) (proposed).
[8] CPL §§255.25 (3), 255.25(6) (proposed).
[9] CPL §255.25 (4) (proposed).
[10] CPL §255.25 (5) (proposed).
[11] Executive Law §135-c (proposed).
[12] Executive Law §135-c (2)(A) (proposed).
[13] Executive Law §135-c (3)(H) (proposed).
[14] Executive Law §135-c (4) (proposed).
[15] *See* Executive Law §135-c (5) (proposed).
[16] Executive Law §135-c (6)(A) (proposed).
[17] Executive Law §135-c (6)(B) (proposed).

Commercial Division Judges *(Continued from page 3)*

was suggested that we arrange a seminar and invite the judges to speak. Laurel Kreitzing (also a member of the committee) suggested that we gather the Commercial Division Judges of both counties for a "meet the Long Island Judges evening." Laurel on behalf of the State Bar, Kevin Schlossler on behalf of the Nassau County Bar, and me on behalf of the Suffolk County Bar, began to organize the event. Through the joint efforts of the three Bar Associations, we were able to gather the six Long Island Commercial Divisions Judges, and give the lawyers the chance to talk to the judges during the hour long "cocktail" party and to listen to the insights that each judge discussed during the program that followed.

Robert Haig, chair of the Commercial Division Council, gave a short talk on the background of the task force and council. This was followed by a series of questions posed to the judges. The format was to have one from Suffolk and one from Nassau assigned to each question. The judges were active in the discussion and actually all participated in commenting on each of the questions.

The program was "sold out" and there were 180 Long Island lawyers who attended and hopefully became more knowledgeable as to the new rules, how each judge views them and would implement them in their own parts. Based on the popularity of the program, it is the intention of the Bar Associations to offer similar seminars in the future so that the bar can be appraised of the changes, the judges' outlook, and help make the Commercial Division more efficient and appealing to the litigants and attorneys.

We are extremely fortunate on Long Island to have six knowledgeable judges who are passionate and caring about improving the commercial division and making their parts attractive to the lawyers and the litigants.

Note: Harvey Besunder is a partner at Bracken, Margolin, Besunder LLP. He served as Law Secretary to Suffolk County District Court Judges from 1969 to1971 and was Assistant County Attorney in Suffolk County from 1971-1979. Mr. Besunder was President of the Suffolk County Bar Association from1993-1994. He has extensive experience in real estate, tax certiorari, condemnation, commercial litigation and contested estates.