Court of Appeal for British Columbia
Kirk v. Trerise
Date: 1981-03-23

W. H. K. Edmonds, Q.C., and S. H. Heringa, for appellants Trerise.

A. P. Pontages, for respondent Kirk.

(Vancouver No. CA 790821)

[1] 23rd March 1981. McFarlane J. A.:— This is an appeal from the judgment of Andrews J., pronounced 31st July 1979 (14 B.C.L.R. 310, 103 D.L.R. (3d) 78) whereby the appellants were held liable in damages to the respondent, who was bitten by their dog on 3rd January 1977. The trial judge held that the appellants failed to discharge the onus of proving that the dog was not of a mischievous nature. In the alternative, the trial judge found the appellants guilty of negligence founded on failure to take reasonable care and on s. 3 of the Occupiers' Liability Act, 1974 (B.C.), c, 60 [now the Occupiers' Liability Act, R.S.B.C. 1979, c. 303].

[2] There is no question of credibility involved and as the trial judge observed there is really no dispute about the facts. On 3rd January 1977, when the respondent was bitten, the dog, called Shane, was a little over three-years-old. It was an Afghan hound weighing about 60 pounds and had been an affectionate pet of the appellants since they acquired it as a three-month-old pup.

[3] The appellants had been away from their home for a holiday New Year's weekend. Mrs. Clark, mother of Mrs. Trerise, stayed at their home with the dog during their absence. The appellants had been home about half an hour and were in their kitchen with the dog when Mrs, Clark, accompanied by the respondent, arrived. Mrs. Clark, who had a key, unlocked the front door and entered the foyer with her friend. When the dog heard sounds of activity at the front door he went at once to that location, apparently to welcome the visitors after his fashion. He rose on his hind legs, placed his front feet on Mrs. Clark's shoulders or chest, and licked her face. He then proceeded to act in the same manner towards the respondent. At this point Mr. Trerise entered the foyer area and gained the impression that the respondent did not like the dog's attentions to her. Trerise "called to him to get down and he did that". The dog then eluded his master's attempts to grab and hold him and again reared up to Mrs. Clark and then again to the respondent. On this occasion the respondent's face, at the area of her upper lip, was bitten or torn by the dog's teeth.

[4] The evidence showed there was nothing in the dog's previous behaviour to indicate a propensity to bite or attack any person, or to jump or leap at any person, so as to knock anyone down or off balance. There was evidence that the appellants had taken steps to avoid the dog's customary form of greeting being presented to Mr, Trerise's mother and Mrs. Trerise's grandmother when they were visitors at the Trerise home. The former lady had had hip surgery and walked with a cane. The latter was an elderly lady suffering from cancer. The trial judge drew an inference from the apprehension of the appellants regarding possible harm to one or another of these ladies with which I will deal later. The dog had not jumped at, nor attacked, or pushed down either of them.

[5] The first aspect of the case that requires consideration is whether the trial judge was right in applying the principle which has been described as the common law doctrine of scienter. That doctrine, as applied in this province, places on the appellant owners in this case the onus of showing that they did not know or have the means of knowledge, that their dog "… was or is of a vicious or mischievous nature, or was or is accustomed to do acts causing injury".

[6] These words are taken from the Animals Act, R.S.B.C. 1960, c. 10 [now R.S.B.C. 1979, c. 16], s. 21 [am. 1973 (2nd Sess.), c. 114, s. 17(3)(6); see now s. 20]: vide *Nevill v. Laing* (1892), 2 B.C.R. 100 (C.A.), applied in *Bebbington v. Colquhoun* (1960), 32 W.W.R. 467, 24 D.L.R. (2d) 557 (B.C.C.A.). The evidence negatives clearly any suggestion that this dog "was or is accustomed to do acts causing injury", and shows that the animal did not have a vicious nature. The reasons for judgment of the trial judge and the arguments presented to this court were directed, inter alia, to the proper meaning to be given to the word "mischievous" in this context and its application to the facts of this case. The words used in the Animals Act, "vicious or mischievous nature", have their origin in decisions of judges at common law. They are a part of our legacy of judge-made law. My study of the cases discussed by counsel and of others referred to in them from *Cox v. Burbidge* (1863), 13 C.B.N.S. 430 at 439, 143 E.R. 171, to *Fitzgerald v. E.D. and A.D. Cooke Bourne (Farms)*, [1964] 1 Q.B. 249, [1963] 3 All E.R. 36 (C.A.), and *Draper v. Hodder*, [1972] 2 Q.B. 556, [1972] 2 All E.R. 210 (C.A.), leads me to the conclusion that the word "mischievous" in this context is affected by its association with "vicious", and that it involves and denotes the concept of fierce, ferocious, dangerous, attacking, causing harm or injury. It does not, in my opinion, include such ideas as playful, boisterous, demonstrative or excitable.

[7] In reaching his decision on this branch of the case, the trial judge noted [at pp. 312 and 314];

> It is clear that both defendants were concerned over Shane's propensity to jump up on people. In fact when Mrs. Trerise's grandmother would visit, because of her age and infirmity, the dog would be restrained from jumping upon her …
>
> From the evidence, it is clear that the defendants knew of Shane's propensity to jump up on people, they knew that harm could result from this and at times they restrained the dog in order to prevent such injury. The defendants further knew the dog was highly excitable for the first few minutes whenever visitors attended. In the defendants' word Shane "was quite a character", "predictably unpredictable" and "quite a clown". Thus the onus of proving that Shane was not of a mischievous nature has not been discharged by the defendants. The plaintiff therefore succeeds on her first ground.

[8] In my opinion the concern of the appellants regarding their infirm and elderly relatives and the care they took to protect them does not justify the inference that they failed to discharge the onus of showing their dog was not of a vicious or mischievous nature within the meaning to be given properly to those words.

[9] It follows that if the appellants are to be held liable for the respondent's injuries it must be upon the basis of negligence. Counsel for the respondent submitted, and the trial judge has held, subject to considerations of foreseeability, that there was negligence in failing to perform the duty of care described in s. 3(1) and (2)(*b*) of the Occupiers' Liability Act. Putting aside the question whether the word "activities" in subs. (2)(*b*) should be held to include "keeping a pet dog in one's home", I find no difficulty in placing the appellants under a duty to take reasonable care to see that the respondent, who may be regarded as their guest, would be reasonably safe from injury which might be caused to her by their dog and which they did or ought to foresee. It is not suggested, and cannot be suggested reasonably, that it was negligence for the appellants to have this dog in their home. The evidence does not show, in my opinion, that the appellant Mr. Trerise acted unreasonably in his attempts to restrain the dog on the occasion when the respondent was bitten. It seems to me speculation that the use of words of command or steps other than those which Mr, Trerise adopted would have prevented the injury suffered by the respondent. I am also of the opinion that his prompt, although unsuccessful, attempt to grasp and hold the dog, when faced with the unexpected situation which had developed, precludes a finding of negligence against him.

[10] I would, therefore, allow the appeal and dismiss the action with costs in both courts.

[11] LAMBERT J.A. (dissenting);— Memnum Bacay of Noorjehani, also known as Shane, was a male Afghan hound, three years old. He weighed 60 pounds and on his hind legs

stood over five feet in height. He was swift, energetic, incredibly manoeuvrable, full of high spirits and impish. When anyone entered the house he became very excited. He would run to the entrance foyer, jump up on the new arrival, lick his or her face, jump down, dash around, jump up again, lick again, and so on until he was stopped or he ran out of energy or interest. His behaviour was characterized by high spirits and a state of intense excitement.

[12] Many visitors to the defendants' home were licked in the face. Some were thought not to have minded it, but some were known to have disliked it. If someone was coming in who was well-dressed, and who was expected, the defendants would hold the dog down and the event would not occur. All that had to be done was to put the dog in a sit and it would not happen.

[13] Shane had not knocked anyone over but the defendants were concerned that he might knock over either Mrs. Trerise's grandmother, who was about 70 years old and unsteady on her feet, or Mr. Trerise's mother, who had had hip surgery and walked with a cane. When either of them came to the house the Trerises handled that by holding on to the dog when the person came into the house and taking them, the person, to a seat and then letting the dog go.

[14] Over New Year's 1977 the defendants were staying with friends in a ski cabin at Whistler Mountain. Mrs. Clark, Mrs. Trerise's mother, was over from Vancouver Island, living in the defendants' house and looking after their dog. On 3rd January she was invited for lunch by the plaintiff, Mrs, Kirk, who was a friend. After lunch the plaintiff offered to drive Mrs. Clark back to the defendants' house and did so. Mrs. Clark asked the plaintiff to come in for a few minutes because Mrs. Clark had a gift for her. At that time the defendants had been home from Whistler for about half an hour. Mrs. Trerise was working in the kitchen. Mr. Trerise was sitting at the kitchen table chatting with her. Shane was also in the kitchen. He had a collar but it was not on. He was not restrained in any way and had clear passage to the entrance foyer and the front door. Mrs. Clark opened the front door from the outside with her own key, called out happily that she was home, and stepped into the entrance foyer. The plaintiff followed her over the threshold. Before the door was closed Shane came bounding round the corner from the kitchen. He jumped up on and around Mrs. Clark, He jumped up towards Mrs. Kirk, put his paws on her shoulders or chest, and bumped his head on Mrs. Kirk's face. While Shane was up on Mrs. Kirk for the first time, Mr. Trerise arrived from the kitchen, closely followed by Mrs. Trerise. Mrs. Kirk didn't like being jumped on or being licked. Mr. Trerise could see that she didn't like it. He

told Shane to get down and Shane did so. Mrs. Kirk turned to close the door, Shane scampered around excitedly and Mr. Trerise tried to get a hold on him, Mr. Trerise did not succeed. Shane jumped again on Mrs. Kirk. His teeth, either by a bite or a tear, lacerated Mrs. Kirk's nose and lip very seriously, causing a loss of a significant piece of tissue and a disfiguring injury.

[15] Mrs. Kirk's damages were agreed at the beginning of the trial and the trial judge considered only the issue of liability. He gave judgment for the plaintiff. He did so for two reasons. The first was that the defendants were liable on the basis of the principle usually referred to as scienter, and the second was on the basis of a breach of the duty to take such care as in all the circumstances of the case was reasonable, under s. 3(1) of the Occupiers' Liability Act, 1974 (B.C.), c. 60 [now the Occupiers Liability Act, R.S.B.C. 1979, c. 303]. The reasons of the trial judge are reported at (1979), 14 B.C.L.R. 310, 103 D.L.R. (3d) 78.

[16] I agree with the trial judge on both points. He had an opportunity of observing the witnesses and his conclusions on both points are conclusions of mixed fact and law. I do not think that he misdirected himself on the law and there is no basis for declining to defer to his vantage with respect to the facts.

[17] The modern law that determines the liability of an owner or custodian of an animal has evolved from the ancient resolution of the conflicting interests of husbandry and safety. That resolution is described fully and engagingly by Glanville Williams in Liability for Animals (1939). The root of the liability in the common law lay in the principle called scienter, from the words scienter retenuit in the old form of writ. Examples from the Rolls from 1387 to 1470 are given by Dr. Williams.

[18] The scienter principle has been reaffirmed to the present time by such masters of the common law as Holt C.J. in Mason v. Keeling (1699), 12 Mod. 332, 88 E.R. 1359; Lord Ester in Filbum v. People's Palace & Aquarium Co. Ltd. (1890), 25 Q.B.D. 258 (C.A.): and Lord Atkin in Pardon v. Harcourt-Rivington, [1932] All E.R. Rep. 81.

[19] Lord Atkin's restatement is particularly interesting because he couples it with the alternative ground of liability on the basis of negligence, in these words, at p. 83:

As I understand it, the case put forward by counsel for the plaintiff Was on two grounds. In the first place, he relied upon the liability of the owner of an animal of known mischievous propensities to keep it under control, with the consequence that damage caused by the mischievous propensities is damage which falls upon the person who fails to exercise the control. That is a liability which exists only in the case either of wild animals, which have by

their nature a mischievous propensity, or of tame animals which are known to the persons having control to have a particular mischievous propensity … But it is also true that, quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour — the ordinary duty to take care in the cases put upon negligence.

That brings us to the modern position. Liability may now be based on the principle of scienter, which relates solely to animals, though it has parallels in other dangerous escapes, or it may be based on the application of general principles of liability which may be categorized as negligence, nuisance, or statutory duty under the Occupiers' Liability Act, for example, and in which the animal is only the instrument which causes the injury.

[20] As Lord Justice Roskill points out in Draper v. Hodder, [1972] 2 Q.B. 556, [1972] 2 All E.R. 210 at 226 (C.A.), the judgment of Lord Atkin in the Far don case was delivered after argument in Donoghue v. Stevenson, [1932] A.C, 562 (H.L.), and before judgment in that case.

[21] The law of negligence has developed from its early 19th century inception to its 20th century flowering as a general law of a duty of care with respect to one's neighbour. In relation to animals, the law of negligence developed around the ancient principle of scienter. In Morris v. Baily, [1970] 3 O.R. 386, 13 D.L.R. (3d) 150, where the dog was high-spirited and playful, Gale C.J.O., for a division of the Ontario Court of Appeal that also included McGillivray and Laskin JJ.A., in confirming liability, said this at p. 154:

> It may be that liability based on *scienter* in respect of domestic animals has become for practical purposes indistinguishable from liability arising on the ordinary principles of negligence. The identity of result on either approach in the instant case would support such an observation, but we refrain from making such a pronouncement.

I agree that the understanding of each principle lends a new light to the understanding of the other and that in the area where liability may be under either, the principles may be said to be coalescing, so that the liability may truly be under both principles together. But it is my opinion that there is still room for a finding of liability under one of the principles in circumstances where the other would have no application. This is not such a case and I do not propose to explore that issue further.

[22] Scienter imposes an absolute liability on the keeper of a "real risk" animal. It is not a liability that arises only if the animal escapes. As Lord Esher said in Filburn v. People's Palace & Aquarium Co., Ltd., supra at p. 260:

… it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under the circumstances, unless the person to whom the injury is done brings it on himself.

Of course, with the development of legislation that permits the apportionment of liability on the basis of attribution of fault, there may be cases where the person who is injured is found to have brought it on himself, but, nonetheless, the keeper of the "real risk" animal should bear a part of the liability.

[23] The absolute liability, without fault, can, of course, still be analyzed in terms of negligence. The "real risk" animal presents such a potentiality for injury that the mere keeping of it is a breach of one's duty to one's neighbour. But that does not mean that one is liable to one's neighbour if no injury occurs. When the injury occurs the liability arises. The "real risk" animal can either be said to be kept at one's peril and thus to give rise to absolute liability without fault, or to be kept in breach of one's duty to one's neighbour and so to give rise to liability in negligence. The intertwining of the two grounds is summarized in this paragraph from Glanville Williams, Liability for Animals (1939), at p. 345:

To sum up the whole matter, the truth seems to be that in the past judges have attempted to lay down as a rule of law what should have been regarded as a proposition of fact, It is not usually negligent to keep a dog or a eat and allow it freedom, not because there is no duty of care with regard to these animals, but because in normal circumstances they are not reasonably likely to do harm. Usually it is only where the defendant knows that his dog or cat is vicious that he can be said to be negligent in keeping it; and he is then liable in *scienter* without any need for an action of negligence. But other cases of negligence may easily occur, and the defendant ought then to be liable without proof of *scienter*.

The intertwining of the principles is also revealed in the leading case of liability for animals in British Columbia, Nevill v. Laing (1892), 2 B.C.R. 100 (C.A.), a decision of Chief Justice Begbie, approved without additional reasons by the full court, particularly at p. 102 in the reference to May v. Burden (1846), 9 Q.B. 101, 115 E.R. 1213.

[24] I have used the term "real risk animal", I have done so in an attempt to avoid obscuring the legal concept by the perplexity caused by analysis of the shades of meaning of words. The words chosen by judges through the years to describe the characteristic that requires an animal of a domestic species to be classified with all animals of a wild species as a foundation for liability have had some variety.

[25] In Mason v. Keeling, supra, Lord Holt put the principles with respect to animals generally, in this way at p. 335:

… If they are such as are *naturally mischievous* in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the *ill quality* … (The italics are mine.)

[26] The generality of the phraseology of Lord Holt has become somewhat more specific in later cases and "vicious," "mischievous," "fierce," "ferocious," "cross," "savage," and "dangerous" have all been used. Sometimes a phrase has been adopted and "a particular mischievous propensity", "a propensity, through vice or playfulness", "some peculiarity which renders it dangerous" and "a particular propensity" appear in the cases.

[27] But the language must not be permitted to obscure the legal principle. That point was made by Lord Guthrie in Milligan v. Henderson, [1915] S.C. 1030 at 1046, where, referring to wild animals and domestic animals, he said:

The former are kept at the owner's or custodian's risk; while for injury to human beings by the latter there is no liability, unless the animal was known by its owner or custodian to have previously acted so as to be a source of danger, When I say a source of danger, I do so advisedly instead of using such expressions as "vicious" or "mischievous," It may well be that an owner who knew that his dog, although neither vicious nor mischievous, was in the habit of rushing at and after carriages and cyclists, would be liable if an accident occurred, directly or indirectly, through the action of a dog with such known habits.

[28] I do not propose to dwell further on the judicial epithets for animal behaviour. In many cases the words chosen are those thought appropriate by a judge in putting a question to a jury on the specific facts before them. If the animal had hurt someone by an act of ferocity then the jury would be asked if the keeper knew that the animal was ferocious. If the animal had hurt someone by being frolicsome or mischievous, then the question would be put to the jury in those terms.

[29] Like Lord Guthrie, I think that it must be the danger, that is, the degree of risk of harm, that is the determining factor. In Ceylon, an elephant was classed as a domestic animal and a frolicsome or playful elephant may create a high risk of injury. Mere playfulness could bring the scienter principle into effect. But a frolicsome or playful cat creates no risk of harm. The cat would have to have a vicious propensity before the scienter principle would apply. In the same way a small dog might have to be fierce, but a large dog might only have to be frolicsome, before the scienter principle came into operation. Of course, if the harmful propensity was to lie on the face of babies, through excess of affection, with the risk of smothering them, then words like vicious and mischievous would be equally inappropriate.

[30] Before leaving the question of language I refer to s. 21 [am. 1973 (2nd Sess.) c. 114, s. 17(3)0); see now s. 20] of the Animals Act, R.S.B.C. 1960, c. 10 [now R.S.B.C.

1979, c. 16], as it was in effect when the incident occurred. It was in these terms, including the heading, which may be relied on for interpretation purposes, and the marginal note, which may not:

Damages — Scienter

Proof of Scienter Not necessary.

21. In an action brought to recover damages for injuries caused by a domestic animal, it is not necessary for the plaintiff, in order to entitle him to a verdict, to aver in a pleading, or to adduce evidence that the defendant knew, or had the means of knowledge, that the animal, for the injuries caused by which the action is brought, was or is of a vicious or mischievous nature, or was or is accustomed to do acts causing injury; but the plaintiff, if otherwise entitled to a verdict, shall not be deprived thereof by reason of the absence of any such averment or the non-production of such evidence.

This section is a successor to s. 30 of the Mischievous Animals Act C.S. (B.C.) 1888, c. 5, referred to by Chief Justice Begbie in Nevill v. Laing supra, which was in these terms:

30. It shall not be necessary for the plaintiff to aver in any pleading, or to prove, that the dog was accustomed to bite men, but the plaintiff, if otherwise entitled to a verdict, shall not be deprived thereof by reason of the absence of such averment or evidence.

The section is about pleading and about evidence. It relaxes what might in some cases have been a requirement of pleading and of proof. It moves the burden to the defendant. It is settled in British Columbia that that is all it does. I refer to Nevill v. Laing and to Bebbington v. Colquhoun (1960), 32 W.W.R 467, 24 D.L.R. (2d) 557, a decision of this court. It does not affect the substantive law and was not intended to do so. In a case where it is established that the defendant knew of the propensity of the dog to lick the faces of visitors to the defendant's home, in a state of high excitement, and in circumstances where there was a real risk that it would eventually snap at someone who did not like being licked, the section does not impose any requirement of substantive law that the dog be of a vicious or mischievous nature or that it be accustomed to do acts that had previously caused injury. Most notably, the use of the words "vicious" and "mischievous" in the section does not impose a requirement of substantive law in British Columbia that the harmful propensity of the dog must be shown to be one that can be classified as "vicious" or as "mischievous" before the scienter principle will be applied in British Columbia. A legislative statement that it is unnecessary to allege or prove that a dog is mischievous, cannot be interpreted as imposing a statutory requirement of substantive law that, before liability can be imposed, either through the scienter principle or otherwise, the dog must be mischievous.

[31] So I turn from the law to the facts. Did Shane have a particular propensity that made him a danger? Was there a real possibility of serious harm from that propensity? Was the propensity known to the defendants? Should the defendants have foreseen the possibility that someone would be hurt by Shane's known propensity for jumping up, while in a state of intense excitement, on strangers and bumping and licking their faces with his tongue out and his teeth exposed? Do people who are having their faces licked unexpectedly by a 60 pound dog, five feet in height, push the dog away or put up their hands to protect their faces? Do highly excitable dogs snap when hit by a hand?

[32] I believe that a temperamental dog in a highly excited state presents a real possibility of biting, particularly if it is pushed away or touched by a stranger who is trying to divert its advances. The fact that the risk arises from an excess of good nature rather than from a mean disposition makes no difference to the risk. The propensity of Shane to become very excited, to jump up, to lick the faces of strangers, and to dash around in the small space of the entrance foyer was well-known to both defendants. They both had scienter. The risk of harm was acute. If there had been a second bite the application of the scienter principle would have been in no doubt. In my opinion the fact that it was a first bite makes no difference in the application of the principle in this case, since the risk of the first bite was a real risk, having regard to the particular propensity of the dog. On that basis I would agree with the trial judge that there was liability in this case on the application of the scienter principle.

[33] I also agree with the trial judge that liability in this case is made out by the application of the customary principles of negligence, as those principles work themselves through s. 3 of the Occupiers' Liability Act, which reads as follows:

3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that any person, and his property, on the premises, and any property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to

(*a*) the condition of the premises; or

(*b*) activities on the premises; or

(*c*) the conduct of third parties on the premises.

(3) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks.

(4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent upon him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person.

[34] The negligence in this case lies not in failing to pull the dog away from Mrs. Kirk, though that was not done, nor in failing to make the dog sit after it first jumped up on Mrs. Kirk, though that was not done, nor in failing to keep a collar on the dog so that there would be some prospect of success in grabbing him, though that was not done, but in keeping the dog in a place when it could have untrammelled access to the entrance foyer of the house.

[35] The fact that keeping the dog in that way was a breach of the duty of care with respect to Mr. Trerise's mother, with her hip problem, where the risk was foreseen and recognized by the defendants, does not mean that I am required to consider whether that type of injury is of the same class as the plaintiff's injury. Because, in this case, the biting or tearing injury to some neighbour, such as the plaintiff, was, in my opinion, entirely foreseeable, and a real risk.

[36] In my opinion the scienter principle, as applied in British Columbia, with the change of onus under s. 21 of the Animals Act, operates in harmony with the law of negligence, so that it can no longer be said in British Columbia, as Glanville Williams has said of the scienter principle in Liability for Animals, at p. 361:

It assumes every keeper of a so-called harmless animal to be an ignoramus, and gives him a legal moratorium in which to learn its ordinary nature at his neighbour's expense.

[37] Before concluding these reasons I propose to refer to the passage quoted by the trial judge from the reasons of my brother Aikins in Weiss v. Young Men's Christian Assn. of Greater Vancouver (1979), 11 B.C.L.R. 112, where he discusses the Occupiers' Liability Act in these words, at p. 118:

In my view, s. 3(1) is comprehensive, in the sense that it fully and clearly imposes a duty on an occupier and defines the standard of care necessary to fulfil that duty. Thus, in my judgment, it is unnecessary to an understanding of the standard prescribed by the subsection to refer to any of the specially formulated standards of care laid down in the common law cases. Indeed, to do so is more likely to mislead than assist in understanding what the subsection says. I add only that if the standards are indeed identical then it is unnecessary to go beyond the statutory definition; if they are not, then it will lead only to error to consider any standard other than the one prescribed by the statute.

What is said in that passage applies in that case and in any case where the standard of care determined at common law is the same as or less rigorous than the standard of care imposed by s. 3(1). But I know that my brother Aikins would not have overlooked s. 3(4).

[38] If the common law imposes a higher standard of care in relation to activities on the premises than the standard imposed by s, 3(1), then the higher standard will apply. In my

opinion, keeping a dog on the premises is an activity on the premises, and in my opinion, the scienter principle may be said to impose a higher standard of care, that of keeping the animals at the peril of the keeper, than is imposed by s. 3(1). It is not necessary for me to consider this question further since in my opinion the standard of care imposed by s. 3(1) was not observed by the defendants in relation to Mrs. Kirk, either with respect to the scienter principle, or with respect to what I have called negligence but which might, with equal accuracy, be called breach of the statutory duty under the Occupiers' Liability Act.

[39] In my opinion the trial judge did not err either in law or in fact. He determined liability by the application of the scienter principle and on a finding of negligence. I would not interfere with either that application or that finding. I would dismiss the appeal.

[40] Hutcheon J. A. (concurring);— For the reasons given by McFarlane J.A., I would allow the appeal [14 B.C.L.R. 310, 103 D.L.R. (3d) 78] and dismiss the action with costs in both courts.

Appeal allowed.