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R v Pacino: Extending the Limits of Criminal Negligence?

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Introduction

1. On 9 December 1996 Perth magistrate Richard Bromfield committed Giovanni Pacino to stand trial for the manslaughter of Mrs Perina Chokolich. Mrs Chokolich's death was the result of an attack on her by dogs owned by Mr Pacino. This is the first time in Australia that a person has had to face trial on a charge of unlawful killing in relation to a dog attack. Defence counsel, Mark Gunning[1], argued that because Mr Pacino could not have foreseen the attack he could not be found to be criminally negligent, and that the Crown was "extending the law far past what it had been extended before."[2] Prosecutor, Simon Stone, on the other hand, argued that a pack of dogs was a 'dangerous thing'[3] and that Mr Pacino was in breach of his duty by not confining the dogs and as such was criminally negligent.[4]

2. This paper shall look at criminal negligence in relation to the charges laid against Mr Pacino. First, criminal negligence shall be defined and compared with negligence at tort. Secondly, the facts surrounding the death of Mrs Chokolich shall be outlined. Next, the charges Mr Pacino faces will be laid out. The fourth part of this paper will give an overview of the historical development of s 266 of the Criminal Code.[5] The common law regarding 'dangerous things' will then be analysed, followed by an examination of the common law elements of criminal negligence. The next two issues to be looked at will be the notice of the propensity of the dogs given to Mr Pacino and knowledge of that propensity by Mr Pacino in relation to the attack. Finally, this paper shall apply the law, relating precedent to the facts. It will be argued that, as the law stands at the moment, the prosecution case does not meet the requisite standard to warrant a conviction of criminal negligence manslaughter.

Definitions

3. At common law criminal negligence is not to be confused with negligence at tort. Criminal negligence requires a greater standard of proof on those who wish to prove it (i.e. the Crown), as is indicated by Hewart LCJ in *R v Bateman*:[6]

> In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as "culpable," "criminal," "gross," "wicked," "clear," "complete." But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.[7]

4. This test for criminal negligence was followed in *Andrews v DPP*[8] by the House of Lords. In Australia the test was followed by the Queensland Court of Criminal Appeal in *R v Scarth*[9] and by the High Court in *R v Callaghan*[10] and *Evgeniou v R*.[11]

5. Negligence at tort, on the other hand, looks at the defendant's conduct in comparison to a standard of reasonable care.[12] In *Blyth v Birmingham Waterworks Co*[13] Alderson B defined the standard as:

> [T]he omission to do something which the reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or do something which a prudent and reasonable man would not.[14]

6. The distinction between the two standards can be seen in the case of *S. & Y. Investments (No. 2) Pty Ltd v Commercial Union Assurance Co. of Australia Ltd*.[15] In *S. & Y. Investments* due to damage to a hotel the manager, Holmes, slept in the bar at night with a loaded rifle for security reasons. Holmes hired an electrician, Logan, to carry out repairs to the hotel. While Holmes was in his room Logan and his workmate decided to help themselves to a beer from the bar. Holmes, on seeing movement in the bar but not recognising the intruder, fired a shot intending to scare the intruder, but not believing him to be in the line of fire. Unfortunately, Logan was fatally wounded. Holmes was charged and acquitted of the manslaughter of Logan. Of the shooting Maurace J stated:

> [T]he wounding of Logan was unintended: it was neither designed or looked for...As foolish as Holmes' actions were, I cannot get away from the view that it was, in all the circumstances, unlucky that Logan was actually hit, let alone killed as a result. In other words, if it be a relevant test, the wounding was not, without more, a probable consequence of Holmes' action.[16]

7. Despite the fact that the necessary standard for criminal negligence could not be met, Mrs Logan was successful in an action of negligence at tort for the death of her husband against S & Y Investments (No 2) for the sum of $188,000.[17] The company did not offer a defence that they were vicariously liable for Holmes' negligent action of discharging the firearm.[18] As can be clearly seen in this case the standard applied to a criminal action of negligence is higher than in a similar action in tort. Thus, the tort action was successful while the criminal action was not.

8. In Western Australia legislative provisions for imposing criminal liability in respect of negligence are set out in ss 262 to 267 inclusive, of the Code. Although the word 'negligent' is not found in any of these particular sections,[19] they do impose a duty that falls into two categories. The first is in ss262, 263 and 265 which impose a duty upon a person to do an act, which if not done results in injury or death of someone under his or her control. In *R v Macdonald & Macdonald*[20], Mr and Mrs Macdonald were convicted of the wilful murder of Mr Macdonald's fourteen-year-old daughter by failing to provide the necessities of life. They were convicted of having "brought about the death of the deceased by a series of acts consisting of- (1) Violence and ill-treatment; (2) Failure to furnish the deceased with proper clothing; (3) Starvation; (4) Neglect to obtain any medical advice when it was easily obtainable.[21] Of their duty under s 285[22] of the Queensland Criminal Code, Cooper CJ stated:

> It was the prisoners' duty, therefore, to provide the medical aid, food, and clothing, not according to any exaggerated opinion of supersensitive or over-refined person, but according to the plain common-sense ideas of the ordinary English people.[23]

9. In other words, the standard of providing the necessities of life may not be high, however, if breached, as they were in *Macdonald*, the person/s breaching will be charged under the provision for criminal negligence.

10. The second duty is found in ss 266 and 267. These two sections impose a duty on a person to have control over any dangerous thing, or to perform an act, so as to not injure or kill another person. It is this second duty that is the subject of this paper, in particular s 266, which shall be looked at in detail below.

The Facts[24]

11. At around 4.30 pm on Wednesday 7 June 1995 the body of 85 year old Mrs Chokolich was found by Mr Pacino and the deceased's grand nephew. Mrs Chokolich had died earlier in the day. The body was on the property owned by Mrs Chokolich and leased to Mr Pacino. The cause of death was severe injuries inflicted by dog bites.

12. Mr Pacino and his girlfriend had leased the 10-acre property since the beginning of 1995. However, Mrs Chokolich visited the property almost every day to tend a vegetable patch at the rear of the property. Mr Pacino was the owner of four dogs; a male and two female Rottweilers and a German Shepherd/Rottweiler cross female. It was his practice to keep the two female Rottweilers in the house and the other two dogs in a shed at the side of the house. Despite this practice the dogs were seen roaming at large on a regular basis. Further, because of complaints received, Mr Pacino was given a caution by the local ranger regarding the dogs' propensity to chase livestock and wildlife in the area.

13. Forensic testing showed that Mrs Chokolich was bitten approximately 80 times, the bites were to all parts of her body. The bite marks were mapped by two odontologists and were found to be consistent with the four dogs owned by Mr Pacino. There were also two human hairs found in the faeces of one of the dogs, however, the origin of these hairs could not be given with any certainty. And human hairs were found in the faeces of another dog, not owned by Mr Pacino, which was tested. It must also be pointed out that there was heavy rain during the day in question, which had a detrimental effect on any forensic evidence that may have been at the site surrounding Mrs Chokolich's body.

14. The main problem with the facts is that there were no witnesses to the actual event, therefore, what actually occurred prior to, during and after the attack on Mrs Chokolich is to a large degree speculation.

The Charges

15. Mr Pacino was charged with the manslaughter of Mrs Chokolich because of his alleged failure to control his dogs. The Crown's case is essentially based on the dogs being classified as 'dangerous things'. The charges were laid under ss266, 280 and 287 of the Code. S 266 of the Code states:

> It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

16. S 266 does not in itself create an offence, that is a person cannot be charged under this section on its own. In order for s 266 to be utilised the negligent act or omission must have resulted in a breach of another section of the Code. In Pacino's case the charges arise from his alleged lack of control over 'dangerous things', his dogs, which resulted in the death of Mrs Chokolich. Therefore, s 280 of the Code was implemented as the section that had been breached by the alleged negligent omission.[25] S 280 of the Code states:

> A person who unlawfully kills another under such circumstances as to not constitute wilful murder or murder is guilty of manslaughter.

17. Further, to complete the charges s 287 of the Code was also implemented, it states:

> Any person who commits the crime of manslaughter is liable to imprisonment for 20 years.

18. It must also be noted that the utilisation of s 266 in the laying of charges has further ramification because it negates any defence that may be raised under s 23 of the Code. S 23 begins with the words, "[s]ubject to the express provisions of this Code relating to negligent acts or omissions". Therefore, because s 266 is a provision which relates to 'negligent acts or omissions', the defence that the death of Mrs Chokolich was an event which occurred "independently of the exercise of his will, or...which occurs by accident"[26] is not available to Mr Pacino. This proposition is reinforced in *Hubert v R*[27] by Murray J, he stated:

> [T]he omission to perform the duty imposed by s 266 would only arise to negate the operation which s 23 would otherwise have to deny criminal responsibility upon the ground that an act or omission was unwilled or a relevant event occurred by accident.[28]

19. However, the defence of involuntariness or accident is not completely lost in all cases in which criminal negligence is alleged.[29] As Philp J noted in *R v Scarth*[30]:

> ...s 23 does not exclude involuntariness or accident from consideration in negligence cases, but merely makes their consideration subject to the express provisions of the code relating to negligent acts. Its primary intention is to secure, by the opening phrase, that on charges based on negligence, criminal responsibility is not ousted by the mere existence of involuntariness or accident; it does not intend that such matters are not to be considered on charges of negligence.[31]

20. This means that if the Crown cannot prove criminal negligence on the part of the defendant, he or she can still utilise the s 23 defenses.

Historical Development of s 266

21. The original model for the Code was prepared by the then Chief Justice of Queensland Sir Samuel Griffith for that State.[32] The 'Griffith Code' was drafted principally from the 'Stephen Code'[33] as well as the Criminal Codes of New York and Italy.[34] The 'Griffith Code' became operative in Queensland in 1900 and in 1902 was adopted by the Western Australian Parliament.[35]

22. S 266 of the Code was based on s 159 of the 'Stephen Code'[36], which read:

> Everyone who has in his charge or under his control anything whatever whether animate or inanimate, or who erects makes or maintains anything whatever, which in the absence of precaution or care may endanger human life, is under a legal duty to take reasonable precautions against and use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to perform such duty.

23. O'Regan points out that the similarities between the two sections are obvious, however, he notes that s 159's "description of the relevant thing was in more general terms."[37] S 159 states, "anything whatever...which in the absence of precaution or care may endanger human life," while s 266 uses the words, "anything...of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered." The two distinctions between the sections are that s 266 incorporates non-fatal effects of a breach of a duty of care and it also refers to the 'nature' of the particular thing. These two distinctions may seem indistinguishable when 'thing', in its ordinary use, will become dangerous when not used with due care (a motor vehicle being the most blatant example of which there is copious case law).[38] However, what of 'things' that become dangerous when used in a manner other than their ordinary use?

Dangerous Things

24. When looking at whether 'things' which are not dangerous in their normal use yet become dangerous when used in a manner outside their normal use, the distinct lack of case law is obvious. Indeed, there are only two cases that are directly on point and few others that discuss the issue.

25. The first case that looked at issue of whether innocent 'things' are dangerous outside their intended use is *R v Dabelstein*[39]. This was an appeal to the Court of Criminal Appeal of Queensland against a manslaughter conviction. The appellant was convicted of the manslaughter of his partner after he had inserted the sharpened end of a pencil into her vagina. This action ruptured the vaginal wall causing a haemorrhage that resulted in her death.

26. On the issue of whether a pencil was a dangerous thing within s 289[40] of the Criminal Code of Queensland, there were two directly opposing opinions handed down. Wanstall J held that:

> It is my opinion that s 289 applied to this pencil in the hand of the appellant in the circumstances. This section is not, in my view, concerned only with the objective nature of the thing in question with its designed characteristics or functions - but also with the practical consequences of its being used or managed carelessly.[41]

27. Hanger J did not concur with this view and was just as strong in his view that the pencil did not fall within this particular section. He stated:

> In my opinion, the pencil was nothing of the kind. This section is designed...to deal with anything living or inanimate, which is innately dangerous; it is not designed to deal with things which are normally harmless, and only become harmful in particular circumstances.[42]

28. In giving his view, Hanger J rejected the dictum in *Hoffman v Neilson*[43], a case which, curiously, Wanstall J did not refer to in his judgment. The third judge, Stable J, did not comment on this particular issue.[44]

29. The second case that discusses whether things are dangerous in themselves or dangerous in the way they are used is *R v McCallum*[45], a case from the Supreme Court of Tasmania. The facts in this case are similar to that of *Dabelstien*, the only difference being that a candle was used instead of a pencil. The act and injuries were similar and consequences were the same. In *McCallum* Burbury CJ preferred the reasoning of Hanger J in *Dabelstein* rather than that of Wanstall J.[46] It was the opinion of Burbury CJ that:

> [T]he section[47] applies to things which have inherently dangerous characteristics, and require careful handling in putting them to the use for which they were designed if danger to life and limb is to be avoided.[48]

30. Burbury J also adopted[49] the view expressed by Windeyer J in *Timbu Kolian v R.*[50] It was Windeyer J's opinion, obiter dicta, that the reference was "to negligence in the use of things which are in their nature dangerous in ordinary use."[51] This interpretation by Windeyer J was also preferred by Prentice J in *R v Kalit*.[52]

31. In sum the narrow construction of a 'dangerous thing' espoused by Hanger J in *Dabelstein* has been the view that has been preferred when the courts have looked at this particular issue. However, this view is not shared by O'Regan,[53] who argues that the broad interpretation by Wanstall J in *Dabelstein* should be adopted.[54] Interestingly, to reinforce the view of Wanstall J, O'Regan relies on the case of *Jackson v Hodgetts*.[55] The reason why the use of *Jackson v Hodgetts* is of interest is because, as O'Regan readily admits, "[t]here was no discussion of the point of construction referred to in the earlier cases[56] but the approach adopted necessarily involves an acceptance of the wider view."[57] It is submitted that the reason why there was no discussion on the construction of s 289[58] of the Queensland Criminal Code in *Jackson v Hodgetts*, is because the appeal was in relation to the trial judge not instructing the jury that criminal negligence was an issue. The construction of s 289 was not an issue in *Jackson v Hodgetts*, therefore, the attempt to read something into the case which was not, and did not need to be, looked at by the Court does not add to the issue of whether a 'thing' is inherently dangerous or dangerous in its use. This also has implications in the Crown case against Mr Pacino because the Crown is using *Jackson v Hodgetts* as its authority in this case.[59] For the reasons cited above it is submitted that *Jackson v Hodgetts* is not an applicable authority in this case. Further, the Crown stated that *Jackson v Hodgetts* "has been followed, or referred to"[60] in the West Australian case of *Hubert v R.*[61] *Jackson v Hodgetts* was referred to in Hubert, however, it was not in relation to s 266 of the Code, but s 23, and to this Murray J states:

> It follows from what I have said above that in my respectful opinion one is not driven to that conclusion.[62]

32. In other words, the only principle in *Jackson v Hodgetts* looked at by Murray J in *Hubert* related to s 23 of the Code, the relevance of which is a minor issue in Pacino's case, and this principle was not followed.

33. Therefore, the first hurdle to be crossed by the prosecution is to establish that domestic dogs are innately 'dangerous things'. The weight of authority establishes that the 'thing' has to be inherently dangerous before s 266 of the Code comes into operation. It is submitted that a domestic dog does not come under the inherently dangerous category and, therefore, does not come within s 266 of the Code as the common law stands at the moment. Notwithstanding that there is little precedent to be followed in this particular area of law.

Elements of Criminal Negligence

34. When a charge of manslaughter is laid in relation to criminal negligence there are three central fundamentals to be looked at, they are: a duty of care, a standard of care and a gross departure from the standard of care.

35. In *Moore v R*[63] it was held by Poole J that there can be "no criminal responsibility, unless there is a duty to take care."[64] In the case of an omission, as in Pacino's case, the Crown must prove beyond a reasonable doubt that: (1) "the [defendant] owed a duty of care in law to the [deceased]";[65] (2) "that it was the omission of the [defendant to control his dogs] which was the proximate cause of [death]";[66] and (3) "that such omission by the [defendant] was conscious and voluntary, without any intention of causing death but in the circumstances which involved such a great falling short of the standard of care which the reasonable [person] would have exercised and which involved such a high risk that death would follow the omission merited criminal punishment."[67] Similarly, s 266 of the Code requires that the test "be regarded as that set by the common law cases where negligence amounts to manslaughter."[68] Therefore, there can be no criminal negligence manslaughter by the defendant except by a breach of a duty of care to preserve life or to avoid danger.[69]

36. The second element, the standard of care, requires care that is anticipated "of a hypothetical 'reasonable person' in the same situation as the defendant."[70] If a situation arises which a 'reasonable person' would foresee and take steps to avoid, then a person in these circumstances will be accountable for the way in which a 'reasonable person' would act rather than the way in which s/he did act. The test is an objective one. In *Nydam v R*[71] it was held that "[t]he weight of authority appears to favor an objective test rather than a subjective test."[72] The Court then went on to justify this claim, concluding:

> Finally, we draw support from the decision of the High Court in *Callaghan v R*. (1952), 87 C.L.R. 115...[I]t is a case which was concerned with the degree of negligence required to establish manslaughter under [s 266] of the Criminal Code of Western Australia. Its significance...is that the Court decided that the standard set by the Code for the degree of negligence punishable as manslaughter should be regarded as that set by the common law in cases where negligence amounts to manslaughter. The Court discussed many of the cases...and nowhere suggested that the standard of negligence set by the common law was to be measured by a subjective test.[73]

37. Therefore, in assessing the requisite standard of care, the test to be applied is not to look at whether Mr Pacino foresaw that the dogs would kill Mrs Chokolich, but whether a 'reasonable person' would have foreseen that this was a likely occurrence. In essence, what the jury has to decide is, could the 'reasonable person' have foreseen that this event would occur.

38. The final element of criminal negligence is that there has to be "a gross departure from the standard of care."[74] As outlined above,[75] there are varying degrees of negligence, a higher degree is required in criminal negligence than is required in tort negligence. Despite the difficulty in placing a precise definition on what amounts to a gross departure from the standard of care in criminal negligence, the courts have made the following statements in an attempt to clarify the phrase. In *Nydam v R*[76] it was held that following was required:

> In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention to cause death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that doing of the act merited criminal punishment.[77]

39. More recently Lord Mackay LC, in *R v Adomako*[78] stated:

> The essence of the matter...is whether having regarded to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount...to a criminal act or omission.[79]

40. As can be seen the definitions are not precise, however, one point is clear and that is that a mere departure from the standard of care will not suffice, there must be a departure that the 'reasonable person' would consider flagrant. This is a question of fact and as such is a matter for a jury to reach a decision on. [80]

41. A differing view for assessing a gross departure from the standard of care has been put forward.[81] It involves integrating and applying "a wider range of factors which are implicit in the concept of criminal negligence."[82] The factors, which have priority in this view, are:

    a. The objective degree of risk of causing death or grievous bodily harm: the higher the degree of risk the greater the blameworthiness of the accused.

    b. Whether the risk relates to causing death or grievous bodily harm: [the former being more blameworthy than the latter].

    c. Whether the risk of causing death or grievous bodily harm was foreseen by the accused: advertence is more blameworthy than inadvertence and advertence to the risk of causing grievous bodily harm.

    d. The difficulty of avoiding the risk: the easier it is to avoid the risk the more culpable the failure to do so.[83]

42. In essence, what is being put forward by this view is that reasonable foreseeability of the outcome of the negligent act should not be looked at when judging the degree of negligence of the defendant, rather, the act itself should be looked at. The courts in *Akerele v R* have approved this view.[84]

43. *Akerele* involved a doctor who inoculated thirty-six children against 'yaws' with sobita. In order to do this a powder had to be mixed with sterile water. The mixture prepared was too strong resulting in the death of five of the children. The doctor was convicted of manslaughter based on negligence. In quashing the conviction the Privy Council held:

> If...the only negligence on which reliance could be placed is the single act of dissolving the powder in water before giving the inoculations, it is immaterial that the symptoms were revolting or that the result made many persons ill. The act had already taken place, and its observed consequences, which only showed themselves at a latter date, could not add to its criminality. The negligence to be imputed depends on the probable, not the actual, result.[85]

44. Another factor that may be considered when looking at criminal negligence is contributory negligence. It is established law "that the question of contributory negligence [is] entirely irrelevant"[86] in cases of criminal negligence. However, the statement of Taylor J in *Evgeniou v R*[87] appears to modify this principle:

> [I]n considering whether the negligence of the accused was so culpable as to attract criminal responsibility it may often be difficult, if not impossible, to exclude from consideration the actions of the victim as one of the relevant circumstances.[88]

45. This means that contributory negligence by the victim may have an effect on the degree of negligence by the defendant. And as there has to be gross negligence in cases of criminal negligence, it may be that contributory negligence by the victim may reduce the defendant's culpability to a standard that does not amount to gross negligence.

Notice of Dangerous Propensity

46. The next issue to be looked at is the point raised by the Crown that notification by the local ranger to Mr Pacino, that the dogs chased and attacked wildlife, amounts to notice that the dogs have a propensity to attack humans. The view put forward by the Crown is that because Mr Pacino was given notice by the ranger of the dogs to act in such a manner towards wildlife, then this also amounts to notice that the dogs also have a dangerous propensity towards humans. This logic does not follow precedent.

47. In *Eather v Jones*[89] a colt foal[90] bit an eleven-year-old boy, which resulted in the loss of three fingers. The boy's father brought an action, on the child's behalf, in negligence against the owner of the foal, alleging that the owner was aware of the vicious propensity of the colt at the time the injuries to the boy were inflicted. In support of the allegation the plaintiff adduced evidence of three incidents involving the colt prior to the attack. However, in each of the three incidents no person was injured. Further, the owner submitted "that the propensity was not one to attack humans but only to attack other

animals."[91] At first instance the plaintiff was successful and was awarded damages of $15,000. This was overturned in the Supreme Court of New South Wales. The plaintiff then appealed to the High Court.

48. On the question of distinguishing between a propensity to attack other animals and a propensity to attack human beings, it was held that a propensity to attack other animals was not an indication that the colt had a propensity to attack human beings. As Barwick CJ stated:

> To be relevantly vicious, the animal must exhibit a tendency to attack *human beings* in a fashion and to a degree not usual in an animal of its kind. [92]

49. Mason J also held same view as Barwick CJ, stating:

> I prefer to rest this conclusion on the foundation that from the incident in question no inference could be drawn that the horse had a disposition hostile to *mankind*...[93]

50. However, in his dissenting judgment Murphy J was critical of "these unscientific beliefs which distinguish attacks on humans from attacks on other animals."[94] It was his view that this type of distinction is no longer valid and should be disregarded.[95] Nevertheless, the application of the principle in *Eather* to the Crown's inference that the ranger's notice of wildlife attacks also amounts to notice of a potential attack on humans does not follow. The High Court in *Eather* is perfectly clear that it does not follow that an animal that attacks other animals will also have a propensity to attack human beings. Therefore, the notice given by the ranger to Mr Pacino that his dogs were attacking other animals could not be seen as notice that the dogs were likely to attack a human being.

Knowledge of Propensity

51. It is established law that in animal cases the owner of the animal must have knowledge of the vicious propensity of the animal, also, as was established above, the knowledge must be of attacks on humans. In order for a prosecution to be successful "[t]he [Crown] must prove that the defendant knew of the vicious propensity of the animal."[96]

52. In *Draper v Hodder*[97] an infant was attacked by seven Jack Russell terrier puppies which had escaped from the owner and ran onto the plaintiff's property. The defendant had no previous knowledge of a propensity of violence of the dogs and the dogs had been on the plaintiff's property often, without incident. In his judgment Edmund Davis LJ stated:

> A person keeping an animal "mansuetae naturae," which he knows to have a propensity to do a particular kind of mischief, is under an absolute duty to prevent it from doing that kind of mischief, and is, therefore, liable without proof of negligence for any damage caused by the animal's

> acting in accordance with that known propensity. But to render the defendant liable, proof must be directed to his knowledge regarding the propensity of the individual animal whose activities have given rise to the institution of legal proceedings...It has further to be established that the dog owner had knowledge of propensity to do the kind of damage which gives rise to proceedings being instituted. For example, knowledge that a horse had previously bitten a goat or other horses would be insufficient to fix its owner with liability if it bit a man.[98]

53. In sum, the onus is on the Crown to show that the defendant had knowledge of the propensity of an animal owned by him or her to attack humans, it is not sufficient that the owner had knowledge of a propensity to attack other animals. Therefore, it is the onus of the Crown to show that Mr Pacino had knowledge that the dogs owned by him had a propensity to attack humans.

Applying the Law

54. As has been pointed out above it is the opinion of Hanger J in *Dabelstein*, that things must be innately dangerous to fall within s 266 of the Code, which has been preferred in cases dealing with this particular issue. It follows that the prosecution has to show that dogs are dangerous things per se in order to bring them within s.266 of the Code. While it may be clear that a motor vehicle or a rifle are things which are dangerous in themselves and a pencil or a candle are not, the question of which category dogs fit into is yet to be established in law. Therefore, the first problem faced by the prosecution, for it is on it that the burden of proof lies, is to show that dogs should be classified as innately dangerous thing and as such come within s 266 of the Code. Precedence holds that a domestic animal, and therefore dogs, do not fit into this category. However, if it can be established that dogs come within s 266 of the Code the next issue to be looked at is the elements of criminal negligence.

55. The first element of criminal negligence, a duty of care, can be established in this particular case if the prosecution show that the dogs are 'dangerous things' within s 266 of the Code. If it is established that the dogs were 'dangerous things' then there was a duty of care on Mr Pacino "to use reasonable care and take reasonable precautions to avoid such danger."[99] However, if the prosecution cannot show that the dogs are 'dangerous things' within s 266 of the Code then a duty of care may not be established. Therefore, the question of whether Mr Pacino had a duty of care to Mrs Chokolich is dependent on whether or not the dogs are a 'dangerous thing' within s 266 of the Code.

56. The second element, the standard of care, requires the foresight of the 'reasonable person'. Could a 'reasonable person' have foreseen that Mrs Chokolich was in any danger from the dogs? A hypothetical argument put forward by Mark Gunning was that if someone, who owned dogs and kept them in his or her back yard, employed a cleaner to clean their home, and it was part of the cleaner's duty to hang washing on a line in the back yard. If the cleaner was attacked by the dogs the first time that s/he went into the yard, then it might be that the 'reasonable person' could have foreseen the attack. However, if the cleaner had been employed for six months and had been hanging the washing throughout that period with no indication that there was any danger from the dogs, then the 'reasonable person' may find it difficult to conclude that there was a foreseen danger. Considering the facts, that Mrs Chokolich visited the property on almost a daily basis for about six months and the dogs were on the property, it is submitted that the 'reasonable person' may conclude that the dogs were familiar with Mrs Chokolich and that she was familiar with them. There is no evidence to suggest that the dogs had acted in a threatening manner to her prior to the attack. As such, it is submitted that, as the facts stand, a 'reasonable person' in Mr Pacino's position would have difficulty foreseeing the attack on Mrs Chokolich. Therefore, it is submitted that the prosecution may have difficulty in establishing that the requisite standard of care was not met.

57. The final element, a gross departure from the standard of care, is an extremely high standard that has to be proved by the prosecution. It has to be shown that Mr Pacino's omission was so gross in the circumstances that it would have been foreseen by the 'reasonable person' and s/he would have acted with due care in that particular situation. Given the way in which Mr Pacino had handled the dogs prior to the attack did not endanger Mr Chokolich, it must be shown by the prosecution that Mr Pacino's action on the day of the attack was a gross departure from that which would have been expected of the 'reasonable person'. Additionally, it is the omission that must be looked at and not the result of the attack. This means that it is the actions of Mr Pacino that are to be looked at in relation to criminal negligence and not the consequences to Mrs Chokolich. What is at the heart of this issue is "was there criminal negligence on the part of Mr Pacino" which led to the death of Mrs Chokolich, therefore, what must be looked at are the actions of Mr Pacino prior to the death of Mrs Chokolich rather than the death itself. Also, in relation to contributory negligence, although there is no evidence to confirm or deny, could it be that Mrs Chokolich in some way contributed to her own death by (a) letting the dogs out of the place which Mr Pacino states he left them, or (b) by in some way provoking the dogs to attack (eg hitting them with a gardening implement or attempting to take something away from them). This is conjecture, however, if there was some form of contributory negligence it may lessen the alleged negligence of Mr Pacino to a point which falls below the requisite standard required for criminal negligence.

58. Finally, the prosecution has to take a quantum leap to show that notice of the dogs' propensity to attack other animals is notice of a propensity to attack human beings. Further, it must also be shown that Mr Pacino had knowledge of the existence of the dogs' propensity to attack humans. If the ranger had given Mr Pacino notice of a propensity of the dogs to attack humans that may be sufficient notice to give Mr Pacino the required knowledge. But because there was no evidence of a propensity to attack humans no notice could be given and, as such, it cannot be said that Mr Pacino had knowledge required to foresee the attack on Mrs Chokolich.

Conclusion

59. In order for the Crown to successfully prosecute Mr Pacino for the criminal negligence manslaughter of Mrs Chokolich there are two key areas that have to be addressed. The first concerns the interpretation of s 266 of the Code relating to whether or not dogs are dangerous things. It is submitted that the law leans towards a narrow interpretation of s 266 and as such domestic animals, which includes dogs, does not come within the scope of this particular section. The second area which the Crown may have trouble addressing is that of knowledge. The view relied on at present by the Crown, that notice of attacks on animals is sufficient to place Mr Pacino on notice that his dogs were a danger to Mrs Chokolich, does not follow the law in this area. Therefore it is submitted that, as the law stands, the Crown will have a great deal of difficulty reaching the requisite standard to warrant a conviction.

Postscript

60. The trial of Giovani Pacino began in the District Court of Western Australia on 2 February 1998. On 11 February 1998 the Jury convicted[100] Mr Pacino of the manslaughter of Mrs Perina Chokolich. Defence counsel, Mark Gunning, was immediately instructed by Mr Pacino to appeal the conviction. On 17

February 1998 Mr Pacino was sentenced to one years imprisonment. Later the same day, after the appeal was lodged, Mr Pacino was granted bail pending the outcome of the appeal.

61. There are two aspects of this case which warrant comment following the trial: first is the grounds of appeal and second is the social ramifications of this case.

Appeal Grounds

62. The two grounds of appeal which are of interest in this paper are that Yeats DCJ erred by (a) instructing the jury using the broad interpretation of s 266 of the Code espoused by Wanstall J in *Dabelstein*;[101] and (b) by not allowing the s 24 defence of honest and reasonable belief to be left to the Jury.

63. The first of these grounds of appeal, relating to the interpretation of s 266, was covered in detail in this paper. It was argued that the broad interpretation put forward by Wanstall J in *Dabelstein* was not the view held in subsequent cases that have looked at this particular issue. However, this is the first time the Court of Criminal Appeal of Western Australia will have an opportunity to consider this issue and it is not bound by any of the previous decisions. Further, because of the implications of this case there is a strong likelihood the appeal may go to the High Court. Indeed, a High Court ruling on the interpretation of s 266 of the Code may be what is required to clarify the law in this area, particularly in the codified States.

64. The second ground of appeal relates to whether or not the s 24 defence of mistake of fact should have been allowed to be assessed by the Jury. It was argued by the defence that Mr Pacino had a honest and reasonable belief, albeit mistaken, that his dogs were friendly to humans. In particular to Mrs Chokolich, who had been visiting the property almost daily for six months. S 24 states:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provision of the law relating to the subject.

65. In order for s 24 to be excluded from the defence it must be shown that it has been excluded from s 266 of the Code.[102] There is no express or implied exclusion within the wording of s 266. However, it could be argued that an implied exclusion arises within the manslaughter element of the charge. The manslaughter definition[103] encompasses all deaths which do not constitute murder or wilful murder, therefore, any death which is not "authorised or justified or excused by law"[104] may not afford the excuse of honest and reasonable belief[105] Barwick CJ expressed doubt of the application of s 24 in *Marwey v R*,[106] he stated:

> I take leave to question whether the necessity of doing the fatal act can properly be said to be a state of fact for the purpose of applying s24.[107]

66. Nevertheless, it follows that if the s 24 defence is applicable to s 266 and the appeal is allowed on this ground then the criminal negligence element will be removed from the offence. This leaves the appeal courts to rule on whether the s 24 defence applies to manslaughter. If the appeal courts find that s 24 does not apply to the manslaughter charge then Mr Pacino would possibly have to be retried on this particular charge. However, because the negligence element of the charge may not be present the defence of accident or unwilled act in s 23 would be available as a defence. In sum, the options open are dependent in the approach taken by the Appeal Courts.

Social Ramifications

67. If this appeal is unsuccessful there are serious social ramifications which affect the public at large. First, if it is held that the broad interpretation of s 266 of the Code is the one which should be followed, everything comes within the definition of 'dangerous things' and the words "of such a nature" may as well be deleted from this section. This means that a pencil, candle or domestic animal are 'dangerous things' and as such any person who uses them, or anything else, in a manner which is negligent is liable to be prosecuted for criminal negligence.

68. The second point to be made is that there will be no distinction between feral and domestic animals. As the law stands at the moment there is a strict liability on any person who has an animal that is classified as ferae naturae (wild by nature).[108] However, an animal which is classified as mansuetae naturae (tame by nature) requires negligence by the animal owner or knowledge on the part of the owner of a propensity of violence of the animal in question.[109] If this appeal is rejected by the appeal courts it will mean that the distinction between feral and domestic animals will no longer exist and all animal owners will be held to be strictly liable for any acts or omissions by them in the control of their animals. What must not be lost sight of is that Mr Pacino was prosecuted under the Criminal Code and not the Dog Act. Therefore, that it was dogs that committed the attack is of little relevance, the same charges could have been laid if Mr Pacino owned horses and they killed Mrs Chokolich.

69. In sum, if this appeal is rejected by the Appeal Courts the limits of criminal negligence will be extended far beyond what they are at present and every animal owner will be put on notice that they have a strict liability to control that animal.

Conclusion

70. This case is of great interest because it is the first time the Court of Criminal Appeal in Western Australia and, possibly, the High Court has had a chance to address the issue of criminal negligence manslaughter by an animal attack. In one way, from a legal theorist's perspective, the finding of guilty by the Jury is what was needed in order to clarify the common law in this area. If the status quo remains then animal owners will have the same responsibilities controlling their animals as they did prior to this judgment. However, if the Appeal Courts find that there was criminal negligence on the part of Mr Pacino then every animal owner is put on notice that their animal has the potential to injure or kill a person and as such precautions must be taken to control their animal. Failure to control animals, regardless of the animals' prior temperament, will result in the owner facing similar charges to that which Mr Pacino had to face, and was found guilty of. In sum, this case has the potential to have a great deal of influence on the way society treats all animal and animal owners in the future.

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- Evgeniou v R [1964] 37 ALJR 508
- Hoffman v Nielson [1928] St R Qd 364
- Geraldton Fisherman's Co-op Ltd v Munro [1963] WAR 129
- Hubert v R, unreported, SCt of WA; Library No 930425; 5 August 1993
- Lean v R [1988] 1 WAR 348
- Long v Chubbs Australian Co Ltd (1935) 53 CLR 143
- Marwey v R (1977) 138 CLR 630
- Moor v R [1926] SASR 52
- Nydam v R [1977] VR 430

- Pacino v Tilley, unreported, SCt of WA; Library No 960371; 16 July 1996
- R v Adomako [1994] 3 WLR 288
- R v Bateman [1927] 19 Cr App R 8
- R v Bunney (1894) 6 QLJ 80
- R v Callaghan (1952) 87 CLR 115
- R v Dabelstein [1966] Qd R 411
- R v Kalit [1971-72] P&NGLR 124
- R v McCallum [1969] Tas SR 73
- R v Mcdonald & Macdonald [1904] St R Qd 151
- R v Scarth [1945] St R Qd 38
- R v Taktak (1988) 14 NSWR 226
- S. & Y. Investments (no 2) Pty Ltd v Commercial Union of Australia Ltd. (1986) 82 FLR 130
- Tasmania v Victoria (1934-1935) 52 CLR 157

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Notes

[1] Pricipal: Gunning Barristers and Solicitors.

[2] Caccetta, W, "Pacino committed for trial" The West Australian 10 December 1996, 24

[3] Ibid

[4] Ibid

[5] The Criminal Code of Western Australia 1913 (hereafter "the Code")

[6] (1927) 19 Cr App R 8

[7] Id at 11-12

[8] [1937] AC 576, per Lord Atkin at 582-583

[9] [1945] St R Qd 38

[10] (1952) 87 CLR 115

[11] [1964] 37 ALJR 508

[12] Davis, M, Torts (1995), 13

[13] 156 ER 1047

[14] Id at 1049

[15] (1986) 82 FLR 130

[16] Id, at 137-138

[17] Sutton, K, Insurance [1987] at 443

[18] Ibid

[19] The word 'negligent' or 'negligence' only appears in s 364 of the Code. It is a defence for the publication of defamatory material.

[20] [1904] St R Qd 151

[21] Id at 52

[22] s 285 is the same as s 262 of the WA Code.

[23] Above note 14 at 170

[24] See Pacino v Tilley, unreported; SCt of WA; Library No 960371; 16 July 1996. This was an appeal in relation to charges laid under s 33D(1) of the Dog Act 1976 regarding the dog attack on Mrs Chokolich. Mr Pacino appealed against conviction and the destruction of the dogs. Both grounds failed.

[25] The word omission is used because the charge is in relation to Mr Pacino's failure to control his dogs.

[26] See s23 of the Code.

[27] Unreported; CCA SCt of WA; Library No. 930425; 5 August 1993

[28] Id at 17

[29] King, M J Section 23 of the Criminal Code of Western Australia (1990), 5

[30] [1945] St R Qd 38

[31] Id at 51

[32] Colvin, E & Linden-Laufer, S, Criminal Law in Queensland and Western Australia (1994), 4

[33] Ibid: The 'Stephen Code' was prepared, but not enacted, in England in the 1870s principally by Sir James Stephen.

[34] Above note 22 at 4

[35] Ibid

[36] O'Regan, R S QC, "Dangerous Things and Criminal Liability Under the Griffith Code" (1995) 128

[37] Id at 129

[38] Ibid

[39] [1966] Qd R 411

[40] The equivalent of s 266 of the Code.

[41] Above note 39 at 430

[42] Id at 416

[43] [1928] St R Qd 364

[44] Because Wanstall J is in the majority it is held that his view is precedent. This is incorrect. It is submitted that because there was equal division on the point relating to construction of s 289, the view of Wanstall J cannot be ratio decidendi. For High Court support of this view see: Tasmania v Victoria (1935-1935) 52 CLR 157, per Rich J at 157 and Dixon J at 183. Also see: Long v Chubbs Australian Co. Ltd 53 (1935) CLR 143; per Rich, Dixon, Evatt and McTiernan JJ at 151.

[45] [1969] Tas SR 73

[46] Id at 76

[47] The section Burbury J was referring to was s 155 of the Tasmanian Criminal Code. This section is similar to s 266 of the Code.

[48] Above note 44 at 77

[49] Id at 76

[50] (1968) 119 CLR 47

[51] Id at 57

[52] [1971-72] P&NGLR 124 at 127

[53] O'Regan, R S, "Dangerous Things and Criminal Liability under the Griffith Code", (June 1995) 128-132

[54] Id at 131

[55] (1989) 44 A Crim R 320

[56] The cases referred to were Dabelstein, Timbu Kolian and McCallum.

[57] Above note 52 at 131

[58] s 266 of the Code

[59] As stated by the Crown Prosecutor, Simion Stone, in a Directions Hearing before Yeats DCJ on 5 December 1997.

[60] Ibid.

[61] unreported; CCA SCT of WA; Library No. 930425; 5 August 1993

[62] Id at 22

[63] [1926] SASR 52

[64] Id at 67

[65] R v Taktak (1988) 14 NSWLR 226, per Carruthers J at 250

[66] Ibid

[67] Ibid

[68] See: Callaghan v R (1952) 87 CLR 115 at 124

[69] The Laws of Australia, 10.1 'Homicide' para [152]

[70] Ibid

[71] [1977] VR 430

[72] Id, at 440

[73] Id, at 445. The objective test was further approved by the High Court in Wilson v R 1992 174 CLR 313, Per Brennan, Deane and Dawson JJ at 341.

[74] Above note 68 at para [156]

[75] See" Definitions" above

[76] [1977] VR 430

[77] Id, at 445

[78] [1994] 3 WLR 288

[79] Id, at 296

[80] Ibid

[81] Above note 68 at para [158]

[82] Ibid

[83] Ibid

[84] [1943] AC 255

[85] Id at 264

[86] R v Bunney (1894) 6 QLJ 80; per Griffiths J at 83

[87] (1964) 37 ALJR 508

[88] Id at 511

[89] [1975] 49 ALJR 254

[90] Animals are divided into two categories at common law: ferae naturae (wild by nature, eg a lion) and mansuetae naturae (tame by nature, eg a dog). Both dogs and horses fall into the same category manuetae naturae, therefore, the same legal rules apply to both. The legal rules in relation to animals mansuetae naturae are; "the owner was only liable where the plaintiff could prove that the defendant: (a) was negligent, of (b) had knowledge, ie scienter, of the mischievois or vicious propensity of the animal." See: Marantelli, S & Tikotin, C, The Australian Legal Dictionary (1985), 272-3

[91] Id, per Murphy at 261

[92] Id, at 255

[93] Id, at 259

[94] Id, at 262

[95] Ibid

[96] Ibid

[97] [1972] 2 QB 556

[98] Id at 569. Also see Jones v Linnett [1984] 1 Qd R 570, per Ryan J at 574-575.

[99] See s 266 of the Code

[100] This verdict is not surprising when the emotive issues of the case are analysed: the death of an old lady, a pack of big dogs, a defendant who did not come across well in the media and the media hype surrounding the case from the moment the death occurred two and a half years previous.

[101] [1966] Qd R 411

[102] See: Geraldton Fisherman's Co-op Ltd v Munro [1963] WAR 129

[103] See: s 280 of the Code

[104] See: s 268 of the Code

[105] This question has not come before the WA appeal courts. However, it has been held that "[s]ection 24 has no relevence to ss 248 and 249", which relate to self defence. See: Lean v R [1988] 1 WAR 348; per Malcolm CJ at 349 and Brinsden J at 351.

[106] (1977) 138 CLR 630

[107] Id at 637

[108] Above note 89

[109] Ibid 1

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