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management and function, but it would seem that recognition of the possibility of being subjected to punitive damages would lead to better selection, training and control of employees.³⁴ The deterrent effect of punitive damages could be realized in regard to a municipal corporation as well as a private corporation. With the continuing growth of municipal corporations courts may accept this reasoning and award punitive damages against municipalities in an effort to prevent just such deplorable conduct as occurred in the *Fisher* case.

CHARLES GLIDDEN JOHNSON

MUNICIPAL LIABILITY FOR POLICE DOG BITES

Many cities use dogs to aid the police in preventing crime¹ and apprehending criminals. Occasionally one of these dogs bites an innocent citizen; this raises the problem of the remedies available to the injured person and of the liability of the municipality. Since the dog is owned by a municipal corporation, the doctrine of sovereign immunity presents a formidable hurdle.

In the recent case of *Harbin v. District of Columbia*,² a case of first impression in the District of Columbia, a canine patrol car was sent to investigate a suspected housebreaking in downtown Washington. Upon arrival, the officer was informed that the felon was escaping through a nearby alley and he commanded the police dog to arrest the suspect. In apparent confusion, the dog instead attacked and bit Harbin, who was innocently sitting on a step eating his lunch.

In his complaint, Harbin alleged the liability of the District of Columbia on three grounds: (1) failing to provide proper supervision

³⁴A case dealing with improper police conduct was *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955), involving the illegal seizure of evidence and its use at a subsequent trial. The dissenting judges thought the government should be held civilly liable for the action of the police officer. In this manner the evidence could be used and similar conduct in the future could be deterred. It would seem that punitive damages against the governmental body hiring the officer could further serve to prevent such police misconduct as was involved in this case and the principal case.

The following statement has been made supporting the view of the dissenting judges: "If in any community a substantial number of such actions become successful, the financial pressure would be felt at the administrative levels where policy is made, and pressure on the police to conform more closely to judicial standards would doubtless follow." Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 Calif. L. Rev. 565, 595 (1955).

¹Time, Oct. 5, 1959, p. 24; *The American City*, Oct. 1957, p. 173 at 175.

²336 F.2d 950 (D.C. Cir. 1964).

of the dog; (2) failing to properly train the dog; and (3) failing to otherwise take the necessary precautions for protection of the public against risk and harm generally to be reasonably anticipated."³ The District answered that the dog was being used in a governmental function, and therefore the municipality was protected by the doctrine of sovereign immunity.

The United States District Court agreed and rendered summary judgment on the ground of sovereign immunity. The United States Court of Appeals for the District of Columbia Circuit reversed, stating that the District had a duty to take precautions against a foreseeable injury, irrespective of the performance of a governmental function. The plaintiff should be allowed to present his case in order to determine if the District had taken such reasonable precautions.

As more dogs are adopted to police use, the problem of liability for injuries becomes increasingly important. While the public, through the police, has an interest in the use of dogs to prevent crime, the people also have an interest in protecting law-abiding citizens from injuries inflicted by the dogs.

The modern use of police dogs began in Baltimore in 1956.⁴ There are now 120 cities using from one to 75 dogs each.⁵ Broadly conceived, the function of these dogs is to deter crime throughout the entire city, and not to drive it from one section of the city to another.⁶

The dogs are used for searching and guard duties. When searching in dangerous areas of the city, the dog's keen eyesight and hearing can be used advantageously to protect his master.⁷ The United States

³Id. at 952.

⁴Handy, Harrington & Pittman, *The K-9 Corps; The Use of Dogs in Police Work*, 52 J. Crim. L., C. & P.S. 328 (1961). The training of these dogs for police duties began in 1920, with a school located at Greenheide, Germany. The idea spread to Ghent, Belgium, which became the world leader in the training of police dogs. The first canine corps was begun in the United States in New York in 1906. By 1911, there were 16 New York dogs patrolling Long Island. The second canine corps in the United States started a few years later, when Glen Ridge, New Jersey, purchased two of these dogs. The overall growth of canine corps was halted in the United States at this time because of public dissatisfaction.

⁵30 Municipal Year Book 418 (1963). According to this source, 30 cities are using one dog, and 22 are using two dogs. Between three and ten dogs are used in 51 cities; between 11 and 15 in eight cities; and between 16 and 75 dogs are currently being employed in nine cities. Of these, Washington, D.C., is the largest user with about 75 dogs on the police force.

⁶Handy, Harrington & Pittman, *supra* note 3, at 336.

⁷The uses of police dogs in searching include such places as: wooded areas, factories, waterfront areas and docks, parks, parking lots of public arenas, theatres, sport parks, residential areas, abandoned buildings (where the dog searches from room to room and then from floor to floor), tenement and slum areas, construc-

Government uses dogs to guard important installations,⁸ and department stores now use them in guarding warehouses at night.⁹ Dogs have been trained to track criminals and point out articles discarded by the subject along the escape route.¹⁰ Very recently, German Shepherds and Doberman Pinschers have been used to control crowds, especially race riots, and have been credited with the preventing many injuries.¹¹

Statistics show how useful well-trained police dogs have become. In Baltimore, dogs assisted in 175 arrests in 1957.¹² The next year this figure rose to about 500,¹³ and in 1959, 685 arrests were credited to the K-9 corps.¹⁴ These increases have been in part the result of inno-

tion sites, and schools. They are extremely useful when searching for escaped criminals, "escape" artists, and lost persons. Handy, Harrington & Pittman, *supra* note 3. These dogs can also be trained to find stolen property located either inside or outside a house. Sloane, *Dogs in War, Police Work and on Patrol*, 46 J. Crim. L., C. & P.S. 385 (1955).

⁸At the present time there are about 5,000 police dogs guarding U.S. Air Force and Army bases all over the world, particularly missile sites and isolated areas. U.S. News & World Report, Dec. 28, 1959, p. 56.

⁹This was begun in 1952, when Marshall Field's department store in Chicago put dogs in its stores and warehouses at night to stand guard. The dog would walk with the night watchman and flush out burglars and prowlers who had hidden in the building. They were later trained to walk specific assigned patterns, or beats, alone and press a button on the floor, located at 15 minute intervals along the route, if everything were in order. When there was any sign of fire, smoke, water leakage, or prowlers the button was not pressed. Also in 1952, Macy's of New York began using Doberman Pinschers for the same type of duty and have successfully eliminated night burglaries. Handy, Harrington & Pittman, *supra* note 3; Sloane, *supra* note 7.

¹⁰Often police departments specifically train bloodhounds for these functions. Chapman, *Dogs in Police Work*, 51-54 (Public Administration Serv. 1960). So much faith has been placed in their ability to follow a scent that a bloodhound's "testimony" can be admitted as evidence in a trial if a proper foundation has been laid concerning the "pedigree of the dogs, their acuteness of scent, training and experience in trailing persons under fairly-similar conditions, their reputation for such taking the scent of human beings and following it unhesitatingly and faithfully." 2 Alexander, *The Law of Arrest*, 1165 (1949). The oral statements at the trial or written certificates, by one who knows the pedigree, registration, and the dog's training are direct evidence and are not hearsay.

A well-trained police dog can also be extremely useful in tracking a criminal, for he can pick up the suspect's scent left on crushed grass and even on hard surfaces. When fully trained, these dogs can follow this scent laid 1½ hours earlier. Handy Harrington & Pittman, *supra* note 3, at 332.

¹¹This was done in Collins Park, Delaware, where the state police brought police dogs into a residential neighborhood to break up a race riot. After the crowd had been dispersed, the dogs stood regular night watch with their masters to deter any further violence. *Life*, March 9, 1959, p. 39.

¹²Chapman, *supra* note 10, at 38.

¹³*Supra* note 1.

¹⁴Chapman, *supra* note 10, at 38.

vations made by the police departments to increase the over-all effectiveness of K-9 transports,¹⁵ and Alexandria, Virginia, has experimented with attaching citizen's band radio on the harness of the dogs, so that commands can be received from several blocks away.¹⁶

A disadvantage of using police dogs becomes evident when an innocent citizen is attacked by one of these dogs supposedly used for his protection. It is extremely difficult for an injured person to recover damages because the municipal owner is free to invoke the doctrine of governmental immunity to defeat any claim made against it. In the *Harbin* case, the Court of Appeals seemed to compare the District of Columbia to a private individual in searching for a basis of liability. It is the general rule that for a private owner to be liable, the dangerous propensities of the dog must have been known by him. This theory goes back to the common law, where the owner was financially responsible when the viciousness was such as to put him on notice of the likelihood of harm reasonably anticipated by an ordinary prudent man.¹⁷ Unless modified by statute, this is still the law today.

From the common law theory two distinct bases for liability of dog-owners have developed. Under the first, the owner or possessor is liable on a negligence theory. This theory has been developed and applied by the courts. The second is statutory liability, which holds the owner absolutely liable for *any* damages caused by his dog.

When applying the negligence theory,¹⁸ the courts have used various terms to describe the same basic idea. Some courts require proof of *scienter*.¹⁹ A theory of nuisance has been another basis for imposing liability on the keeper of a dog which causes a foreseeable injury to

¹⁵This has doubled the mobility of the whole K-9 Corps, while allowing each team to remain in constant radio contact with police headquarters. *The American City*, March 1962, p. 31.

¹⁶*The American City*, Feb. 1964, p. 28.

¹⁷*Bachman v. Clark*, 128 Md. 245, 97 Atl. 440 (1916).

¹⁸*Williams v. Moray*, 74 Ind. 25 (1881).

¹⁹*Owen v. Hampson*, 62 So. 2d 245 (Ala. 1952). *Scienter*, according to definition, is knowledge or reasonable anticipation of the dog's dangerous propensity. The law does not look to the sufficiency of the knowledge, but states that any knowledge of the animal's propensity to either bite or attack, whether done in anger or in play, is sufficient. 2 Harper & James, *Torts* § 14.11 (1956).

This kind of knowledge may be manifested in the dog's vicious disposition, a desire to attack or annoy people or other animals. It may be based on knowledge of past circumstances in which the dog has bitten or attacked; and can be inferred from the fact that the dog is kept confined and even from its reputation in the neighborhood. Prosser, *Torts* § 75 (3d ed. 1964).

members of the community.²⁰ Wilful neglect of a duty is still another term used to describe this basis of liability.²¹

Contributory negligence is often permitted as a defense when the complaint alleges negligence.²² This was taken a step further in *Nelson v. Hansen*,²³ when the Supreme Court of Wisconsin applied the comparative negligence statute to weigh the relative fault of each party in finding a basis of assessing damages.

Under the absolute liability theory, imposed by statute, an owner or possessor of a dog is liable for *any* damages, regardless of his knowledge of the dog's dangerous propensities.²⁴ The applicable District of Columbia statute appears to impose this type of liability,²⁵ but in *Murphy v. Preston*,²⁶ an 1887 case, the court required the allegation and proof of *scienter*. Thirty-five years later this interpretation was again considered and approved,²⁷ and in 1961, the interpretation

²⁰Turner v. Shropshire, 285 Ky. 256, 147 S.W.2d 388 (1941).

²¹Jones v. Carey, 9 Del. (Houst.) 214, 31 Atl. 976 (1891).

²²See generally 66 A.L.R.2d 916 (1959), for a coverage of this defense. Also, Grummel v. Decker, 294 Mich 71, 292 N.W. 562 (1940); Muller v. McKesson, 73 N.Y. 195 (1878).

²³10 Wis. 2d 107, 102 N.W.2d 251 (1960). Wisconsin has a statute which imposes absolute liability on a dogowner. The statute allows recovery "without proving notice to the owner or keeper of such dog or knowledge by him that his dog was mischievous..." Wis. Stat. § 174.02 (1963). But the court felt in this case that the comparative negligence statute was applicable because of the contributory negligence of the plaintiff. This is the first time this statute has been used in dog bite cases, and states: "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering." Wis. Stat. § 331.045 (1963).

The use of this statute is unusual in a dog bite case, but a use that will probably see greater application as comparative negligence statutes become more prevalent. For a general discussion of this case see 1961 Wis. L. Rev. 673.

²⁴This result was reached in *Reid v. Nelson*, 154 F.2d 724 (5th Cir. 1946). The statute here involved was Fla. Stat. Ann. § 767.01 (1964). The negligence of the dog owner was referred to but dismissed, for the statute makes the owner of a dog absolutely liable for any damages done by it to either persons or animals.

²⁵D. C. Code § 47-2005 (1961). This section does not mention the necessity of proving the owner's or possessor's knowledge of the dog's dangerous propensities. The statute reads as follows: "Any person owning any dog so recorded in the collectors office shall be liable in a civil action for any damage done by said dog to the full amount of injury inflicted."

²⁶16 D.C. (5 Mackey) 514 (1887). At the time of this decision, the civil liability statute for dog owners was exactly the same as it is today. In spite of this the court followed the common law theory of liability.

²⁷*Bardwell v. Petty*, 286 Fed. 772 (D. C. 1923). It is important to note that in this opinion the court said the statutes of the District of Columbia passed in 1878 had been amended, but that the civil liability of dog owners was not altered in

originally stated in 1887 was declared to be the existing law in the District of Columbia.²⁸

Both of these theories allow an injured person to recover against a private individual,²⁹ but a different situation arises when a municipal government owns the dog. The traditional defense of sovereign immunity protects the municipality in situations in which an officer or employee negligently causes an injury while performing a governmental function.³⁰ Recently, however, some courts have abrogated this doctrine, thus permitting the injured citizen to recover against a municipal corporation.³¹

The courts in the District of Columbia have expressed the desire to eliminate this immunity, but have stated that it can only be done by Congress.³² The doctrine has been limited somewhat by Congress,³³

any way. From this, the court assumed that Congress knew of the *Murphy v. Preston* decision, *supra* note 26, and the interpretation propounded there and felt that if the statute were then left unchanged, unmodified, or unamended for a long period of time, the interpretation given in that case by the District of Columbia court was in accord with intent of Congress embodied in the statute.

²⁸*Karlow v. Fitzgerald*, 288 F.2d 411 (D. C. Cir. 1961).

²⁹A corporation can also be held liable as a dogowner. *Tidal Oil Co. v. Forcum*, 189 Okla. 268, 116 P.2d 572 (1941). The liability here was based upon the maintenance of a nuisance, and furthermore: "That corporations may be liable as keepers and harborers of vicious dogs is well established." *Id.*, 116 P.2d at 574.

³⁰The origin of this doctrine is in the theory that the king can do no wrong. Prosser, *Torts* § 125, at 996 (3d ed. 1964). This definition of sovereign immunity doctrine has recently been stated in *Banks v. City of Albany*, 83 Ga. App. 640, 64 S.E.2d 93 (1951); and *Ahrend v. Kansas City*, 173 Kan. 26, 243 P.2d 1031 (1952).

³¹This trend began with the case of *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1952); *Annot.*, 60 A.L.R.2d 1198 (1953), and affirmed in *Ragans v. City of Jacksonville*, 106 So. 2d 860 (Fla. Dist. Ct. App. 1958). The same decision has been made in various other jurisdictions. *Archer v. City of Cisco*, 211 S.W.2d 955 (Tex. Ct. Civ. App. 1948) (officer personally liable for using excessive force in making arrest; *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962) (making school districts, municipal corporations, and other governmental subdivisions liable, and eliminating the defense of sovereign immunity subject to any subsequent legislation); and *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961) (eliminating the judicial doctrine altogether for future cases).

³²*Calomeris v District of Columbia*, 125 F. Supp. 266 (D.D.C. 1954) 226 F.2d 266 (D. C. Cir. 1955); *Capital Transit Co. v. District of Columbia*, 225 F.2d 38 (D. C. Cir. 1955).

³³D. C. Code, § 1-922 (1961): "Hereafter the District of Columbia shall not assert the defense of governmental immunity in any suit at law in which a claim is asserted against it for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligence or wrongful act or omission of any employee of the District occurring as the result of the operation by such employee, within the scope of his office or employment, of a vehicle owned or controlled by the District: Provided, That in the case of a claim arising out of the operation of an emergency vehicle on an emergency run the District shall be liable only for gross negligence . . ."

but is judicially applied in most circumstances in which governmental functions are involved.³⁴

In attempting to circumvent the immunity that would probably exist,³⁵ the court in the *Harbin* case seemed to treat the District as a private dogowner, and thereby considered the maintenance of a police dog a proprietary function. This theory underlies the whole opinion and is specifically emphasized by the District's adoption of a means "purely private in nature, for the accomplishment of a particular result."³⁶

In performing a proprietary function a private means is adopted by the government for its own special benefit in serving the public.³⁷ Here the government is acting beyond its immunity and becomes subject to liability similar to that of an individual.³⁸ When the nature of the function is governmental and thereby performed for the common good of all, the immunity usually applies.³⁹ Acts traditionally performed by a municipality are also considered in making the distinction between governmental and proprietary functions.⁴⁰

Even if the use of police dogs is considered as a governmental function, there still may be a means of assessing liability for injuries caused by these dogs. In the majority of states⁴¹ the maintenance of a nuisance in performing a governmental function is an exception to sovereign immunity.⁴² The nuisance theory has been applied to private dog owners on the ground that the keeping of a dog known to

³⁴Supra note 32.

³⁵*Bar v. District of Columbia*, 202 F. Supp. 260 (D.D.C. 1962). This was a case involving a police dog in which the court stated, by the way of dictum, that under the present case law the municipal owner probably would not be liable if one of these police dogs bit an innocent person while making an arrest.

³⁶336 F.2d at 953.

³⁷*McSheridan v. City of Talladega*, 243 Ala. 162, 8 So. 2d 831 (1942); *City of Houston v. Wolverton*, 154 Tex. 325, 277 S.W.2d 101 (1955).

³⁸*Reirson v. City of Minneapolis*, 118 N.W.2d 223 (Minn. 1962).

³⁹*Hillis v. City of Huntsville*, 274 Ala. 663, 150 So. 2d 240 (1963); *Banks v. City of Albany*, supra note 30; *Walker v. City of Cedar Rapids*, 251 Iowa 1032, 103 N.W.2d 727 (1960); *Stouffer v. Morrison*, 400 Pa. 497, 162 A.2d 378 (1960).

⁴⁰*Housing Authority v. Commonwealth Trust Co.*, 25 N.J. 330, 136 A.2d 401 (1957). Also, *Cloyes v. Township of Delaware*, 23 N.J. 324, 129 A.2d 1 (1957).

⁴¹This position is described in 56 A.L.R.2d 1415 (1957). The District of Columbia adopted this majority holding in *Roberson v. District of Columbia*, 86 A.2d 536 (Munic. Ct. App. D.C. 1952) (dictum).

⁴²This principle was also given recognition in *Krantz v. City of Hutchinson*, 165 Kan. 449, 196 P.2d 227 (1948); and *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943).

The jurisdictions that do not recognize this exception apply the immunity to all governmental functions. *Bojko v. City of Minneapolis*, 154 Minn. 167, 191 N.W. 399 (1923); *Davis v. Provo City Corp.*, 1 Utah 2d 237, 265 P.2d 415 (1953).

be vicious constitutes a nuisance. Under this reasoning, a police dog would clearly be considered a nuisance, and a means would thereby be provided to avoid the immunity doctrine.

The District of Columbia does not have a tort claims act that would permit the plaintiff to recover under the circumstances of the principal case.⁴³ There is, however, a statutory enabling provision that permits the three District Commissioners to settle a claim against the District, if a private individual would be *prima facie* liable.⁴⁴ In the *Harbin* case the court seems to be suggesting that a settlement of the case under this statute would be the best result. Such a settlement would allow an injured citizen to be compensated for his injury without having to overcome governmental immunity.

Immunity generally exists when a municipal corporation is performing a governmental function. A means must be found to avoid this immunity and permit recovery in cases involving injuries caused by police dogs, if a fair result is to be reached. The proprietary and nuisance classifications provide such a means of avoiding immunity, and open the door to possible recovery. It is submitted that the legislature should take affirmative action and eliminate the sovereign immunity doctrine, and thus avoid the necessity of resorting to such classifications to allow recovery against the municipality.

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⁴³*Douffas v. Johnson*, 83 F. Supp. 664 (D.D.C. 1949). In this opinion, the court also stated that the Federal Tort Claims Act does not have a provision to include the District of Columbia.

⁴⁴D.C. Code, § 1-902 (1961) provides in pertinent part that: "The Commissioners of the District of Columbia are empowered to settle, in their discretion, claims and suits, either at law or in equity, against the District of Columbia whenever the cause of action—

"(a) Arises out of the negligence or wrongful act, either of commission or omission, of any officer or employee of the District of Columbia for whose negligence or acts the District of Columbia, if a private individual, would be liable *prima facie* to respond in damages, irrespective of whether such negligence occurred or such acts were done in performance of a municipal or governmental function of said District. . . ."