The Dangerous Dogs Act 1991: A Criminal Act that is Dangerous to Dogs?

Steve Forster, Senior Law Lecturer Liverpool John Moores University

Abstract

For a short Act, the Dangerous Dogs Act 1991 has undoubtedly generated a significant amount of litigation and debate as to the ambit of its terms and application. This article therefore seeks to unravel and provide a comprehensive review of this controversial piece of animal legislation.

Introduction

According to NHS England, in the year 2018-19 8525 people were treated in hospital for being "bitten or struck by a dog", up from 8014 in the previous year and an 85% increase over the last ten years[1]. The most affected group according to the figures is the 0-10 age group and therefore young children are more at risk of being bitten[2]. Since 2000, on average 3-4 people are fatally wounded by a dog each year. Similarly, another vulnerable group are postal workers, with 2,484 recorded dog attacks by the Royal Mail on its workforce in 2018-19, an increase of 9% from the previous year[3]. This shocking figure led to the Communications Union launching a "bite back" campaign to better protect its members and highlighting some of the more graphic attacks on individual posties[4].

The Kennel Club, which supports the well-being of dogs, recognises that there are 211 different breeds of dog (pure and cross breed). All dogs, like humans, will have an instinctive temperament and, being canine, can cause injury of differing gravity from minor bites to more life changing and even fatal injuries. However, the individual circumstances surrounding a dog attack are likely to engage various factors, such as

- was there provocation?
- was it out of character and/or loyalty?
- does the dog have a propensity to bite?
- is the dog manifestly aggressive or inimical and why is this?
- is it the breed, or is it characterised/conditioned by its owner?
- who is at fault, the dog, its owner, or both?

In its annual animal well-being report the charity "People's Dispensary for Sick Animals" estimate 9.9 million pet dogs are living in the UK and cared for by 26% of the adult population. It is inevitable that a dog will come into conflict with another animal or person and cause damage and therefore engage both the civil and criminal law. Carelessness and complacency on the part of a dog owner can be a common feature in civil claims. However, the threat of civil proceedings alone to some is not sufficient to compel owners to take the necessary preventative measures to keep their dogs under proper control. Accordingly, the criminal law in the form of the Dangerous Dogs Act 1991 as amended by the Anti-social Behaviour, Crime & Policing Act 2014 seeks to safeguard and protect the public from the risk posed by dog attacks[5]. Whilst the statutory framework is relatively short, it has been criticised for a lack of effectiveness and fairness, especially on cost, unlawful breed labelling and destruction[6].

1 British Health & Social Care Information Centre

2 Some older victims may decide not to seek medical treatment or advice

3 www.royalmail.com/dog-awareness.

4 www.cwu.org

5 Dog attacks on livestock in dealt with in other legislation-see Dogs(Protection of Livestock)Act 1953

6 See the Kennel Club brief statement "Dangerous Dogs": Deal with the Deed, No the Breed" & also the report by

Background to the Dangerous Dogs Act 1991

In the late Eighties the Conservative government at the time was faced with two social menaces, one was joyriding and the other was savage dogs. Both were portrayed by the media as a form of lawlessness blighting local communities and immediate action was needed in order to robustly address it. The then Home Secretary Ken Baker in Parliament whilst acknowledging that a significant number of dog attacks occur not because of the specific breed, but due to "irresponsible owners" nonetheless singled out the American Pitt Bull Terrier for several widely reported savage attacks and stated that "the public are increasingly concerned about attacks by those vicious dogs and are entitled to look to the Government to take action to tackle the problem"[7]. The Home Secretary therefore felt justified in expediating the Bill through the Commons in just one day[8].

At the second reading of the Bill the Home Secretary was unequivocal in spelling out the aim of the Bill as a simple one, namely "to rid the country of the menace of these fighting dogs." He denied the Bill was an over-reaction by focusing on the breed rather than the owners, recognising that certain types of dog are inherently dangerous and therefore distinguishable from others in terms of public safety. The policy of the Act is therefore to control specific breeds used for fighting and further to impose criminal liability on owners that fail to ensure their dog is properly controlled. However, the Act has been denounced as ineffectual and unjustifiably demonising specific breeds as inherently dangerous, regardless of whether or not the dog displayed aggressive tendencies. In particular, the pit bull terrier is highlighted as a breed that is unfairly and unjustifiably targeted by the legislation. Lord Houghton, in a short debate in the House of Lords, felt the Act was one of the "most outrageous ever passed in Parliament" and called for

the RSPCA "Breed Specific Legislation-A Dogs Dinner."

7 HC Deb 22 May 1991 Hansard vol 191 cc945-58

8 See HC Briefing Paper No 04974, 26 March 2020, & Dangerous Dogs Bill (Allocation of Time) motion 10 June 1991

immediate reform[9].

Section 1 Prohibited Fighting Dogs

Section 1 of the DDA 1991 specifically designates four specific breeds of dog that are deemed to be a fighting type dog and therefore **per se** dangerous, these are **"any dog of the type known as"** the pit bull terrier, the Japanese tosa, the dogo argentine and the fila brazilero[10].

It is a summary imprisonable offence to contravene any of the specified statutory prohibitions in relation to such dogs[11]. Section 1(2) & (3) set out these prohibitions with the clear aim of targeting and preventing the breeding, especially commercial breeding[12], the selling, including offering or exposing for sale or exchanging, advertising and even giving for free[13]. Equally, if in a public place, the dog must be muzzled and on a leach, not to be allowed to stray or be abandoned, whilst under s.1(3) possessing or having custody of such a dog is unlawful, unless granted a certificate of exemption and all conditions therein have been satisfied.

In *R v Knightsbridge Crown Court Ex p Dunne* [1993] (unreported), the applicant had sought to argue that "type" denotes a breed specific and therefore unless the dog is of that breed status[14] it falls outside the legislation. This was rejected in its entirety by the High Court which rightly construed the word **"of a type known as"** in its ordinary sense of having substantially the same characteristics, or approximately amounting to, or being near to the whole.

Whether or not a dog is sufficiently of a type is obviously a question of fact and degree. To rule otherwise would have created both technical and evidential difficulties, especially in cases of dogs that have all the hallmarks and manifestations of a particular breed, but do not satisfy the purest criteria. To have adopted such a precise narrow construction as contended would have defeated the policy aims of the Act in public safety as opposed to breed preservation.

Accordingly, s.5(5) which provides that, unless there is sufficient evidence adduced to the contrary, it will be presumed the dog falls into s.1, rightly imposes a persuasive burden on the owner to prove[15] that the dog is not an unlawful type if liability is to be avoided, was not disputed in **Ex Dunne**, and therefore rightly places a high level of diligence on an owner to ensure they do not contravene s.1 which accords with the legislative intent[16].

Whether or not a dog falls within one of the designated breeds will very much be dependent on expert opinion. To assist DEFRA have produced guidelines for relevant enforcers of the legislation[17]. Annex 2 lists commonly shared structural characteristics of the Pitt Bull type to assist with identification[18].

Nevertheless, the notion of a breed specific legislation has attracted considerable criticism for being ill-conceived and a disproportionate response that wrongly focuses on the breed as opposed to the conduct of the owner or person in charge. Both the RSPCA[19] and the Kennel Club believe we have reached a position in which s.1 is logically indefensible which ought to now be repealed and focus instead on the conduct of the owner, by squarely basing its case on the lack of both statistical and scientific evidence to suggest that the Pitt Bull Terrier is any more genetically aggressive towards people than any other type of dog could or would be in the right circumstances, and is therefore no more a risk to the public. A view very much shared by Lord Redesdale in the House of Lords[20]. However, the People for the Ethical Treatment of Animals

9 HL Deb 20 Jan 1993 vol 541 cc 933-39

10 An executive power exists under s.1(c) to add other breeds that have been bred for fighting or share such characteristics. The latter two breads were added by the DD (Designated Types) Order 1991 SI 1743

11 Section 1(4) & (7)

12 Includes cross-breading

13 Any form of advertisement offer, sale or exchange or

14 In this case a pit bull terrier type

15 This requires the owner to adduce sufficient evidence to discharge the more likely(probable) than not standard of proof, It is not for the prosecution to prove beyond doubt that the dog is a prohibited bread, but for the owner to establish this-see.

16 See **Bates v UK** 1996 App No: 26280/95, in which the UCHR rules that the imposition of a presumption was a proportionate response.

17 Designated Dog Legislation Officer

18 See DEFRA-Guidelines for Enforcers 2009 PB 13225

19 RSPCA-"Breed Specific Legislation-A Dogs Dinner" 2016 Report

20 Dog Control Bill-HL Hansard 24 April 2009 Col 1689

(PETA Foundation) takes an opposing view, rather than discriminating, s.1 protects the breed from over breeding, abandonment, harm and abuse, either as part of the dog fighting scene or as a status (Weapon dog). Indeed, the Charity goes further and believes the Staffordshire bull terrier should be a listed breed[21].

Notwithstanding these concerns, the Government, in its latest response to EFRA Committee Ninth Report[22], whilst recognising that any dog is capable of causing injury also recognises that there is a "disproportionately high number of attacks on people, including fatalities" inflicted by a prohibited breed that are often "illicitly moved" and "that the prohibition on possession of such dogs should remain for reasons of maintaining public safety"[23]. The shocking case of the fatal wounding of 9-year old Frankie Macritchie by the family's pit bull cross whilst left alone in the holiday caravan in Devon in April 2019, is a vivid illustration. Accordingly, s.1 of the DDA has the narrow but specific purpose to protect the public from serious attack by giving the police the necessary powers to intervene, especially against the problematic and growing influence that such breeds are being conditioned to be used either as a lethal weapon in criminal activity, or in illegally organised dog fighting[24], or purely for image or status[25].

A more wide-ranging set of measures have been implemented to address the impact caused by irresponsible breeders[26] and owners[27] along with other initiatives such as LEAD (Local Environment Awareness on Dogs)[28]. In addition, DEFRA has asked Middlesex University to undertake an extensive research review, not only into the causes of dog attacks, but how to prevent them and the effectiveness of current dog control measures and addressing dog ownership[29].

Dangerously out of Control: The Section 3 Offence

Whilst s.1 deals with specific breeds that are considered potentially dangerous, s.3 on the other hand does not distinguish dog type and creates two offences. Firstly if a dog is dangerously out of control in any place (either private or public)[30] in England & Wales, then either the owner (if under 16, then "head of the household" is substituted) or a person in charge at the time (unless a "householder case" or a s.3(2) statutory defence arises) is guilty of a summary offence (the primary offence) and liable to a fine and/or 6 months imprisonment.

If the dog injures someone or an assistance dog[31], then a second more serious indictable either-way offence is committed (the aggravated offence). If convicted on indictment then, dependent on the consequences, there are three possible levels of sentence. The maximum is 14 years for a fatal injury case, 5 years for non-fatal injury on a person, or if injury is to an assistance dog (whether fatal or otherwise) a maximum of 3 years imprisonment.

Voluntariness, Causation & Strict Liability

Regardless of their state of mind, the owner or person in charge of a dog will attract criminal liability if the dog is established to be danger-

21 See www.petra.org.uk, June 15 2018. PETRA is a UK based charity that seeks to protect the rights of animal

22 Environment, Food & Rural Affairs Committee "Controlling dangerous dogs) 9th Report 2017-19 HC 1040

23 Govt Response HC 1892 published on 28 Jan 2019,

24 League Against Cruel Sports-"Tackling Dog Fighting in the Community" Report & Dog Fighting & Serious Crime: The Facts & the Way Forward report, see also Milroy **et al** "Reporting of suspected dog fighting to the police, RSPCA & equivalents by veterinary professionals in the UK" 2018 Veterinary Record 1

25 See the illuminating insight into such dogs in Simon Harding's excellent research book "Unleashed: The Phenomena of Status Dogs & Weapon Dogs" 2012 Policy Press, see also the findings by Stephanie Monks Senior Policy & Projects Officer (Community Safety Unit of Greater London Authority) "Weapon Dogs: The Situation in London" Nov 2009

26 See Breeding & Sale of Dogs (Welfare) Act 1999, & Animal Welfare (Licensing of Activities Involving Animals(Regs 2018 SI/486 as amended by SI 2019/2093 which came into effect on 6 April 2020 to implement "Lucy's Law"

27 Gang violence injunction under s.34 of the Policing & Crime Act 2009, Criminal Behaviour orders under part 2 and Community Protection measures under part 4 of the Anti-Social Behaviour, Crime & Policing Act 2014

28 See DEFRA "Guidance on Dog Control & Welfare for Police & Local Authorities" Jan 2018, see also "Dealing with irresponsible dog ownership" Oct 2014

29 The research team have £70,000 worth of funding, to date the final report has yet to be published, see Hansard 7 March 2019 vol 655

30 Amendment to extend to any place inserted by s.106 of the ABCAct 20014, in consequence of the Jade Anderson case fatally wounded when attacked by 4 dogs whilst visiting a friend's house.

31 Applies to a dog trained to give assistance to a blind or deaf person and other specified disabilities, see s.173 of the Equality Act 2010

ous[32]. Under s.10 this based on whether "on any occasion" there exists objective grounds for a reasonable apprehension of fear of injury (to another person, or an assistance dog, regardless if this materialises or not), unless the dog is being used for a lawful purpose by the police or Crown servant.

Whether or not a police dog handler falls within the scope of the exemption was considered by the Court of Appeal in *R v PY* [2019] EWCA Crim 17. Lord Burnett in giving the leading judgement ruled that as a matter of ordinary language, the meaning of being used in its statutory context "suggests the active engagement of the dog in a directed task or in support of the person concerned for an identifiable purpose." Critically for a dog handler this must form "part of a policing activity" as a question of fact and degree. Allowing a prosecution s.58 appeal against an adverse ruling, the Court ruled that whilst recreationally exercising his dog, the respondent officer was not engaged in a police activity when it injured a runner. The paramount importance of s.3 is to protect the public, not to give police dog handlers a blanket immunity from prosecution in all circumstances claiming "on duty" status. Whilst any genuinely held belief as to the dog's good nature, care and control may provide mitigating circumstances, they offer no excuse or valid defence. Nor, as observed by the LCJ Lord Burnett in *R v PY* [2019] EWCA Crim 17, will "an ability to avoid the statutory harm" exonerate the owner.

Clearly s.3 creates a form of strict liability[33] which relieves the prosecution of having to prove any culpable mental state on the part of the offender was first established in *R v Bezzina & Others* [1994] 1 WLR 1057. Rejecting the appellant's appeal against an adverse ruling of the trial Judge, applying the well served guidelines in *Sweat v Parsley* [1970] AC 132[34], the Court of Appeal ruled that whilst the presumption of mens rea was always very strong for truly criminal offences, Parliament in enacting s.3 had justifiably displaced the presumption by necessary implication, given the importance of the social concern and public safely surrounding dog attacks.

On a point of law, the appellant in *Rafiq v DPP* [1997] JP 161, had contended that crucially there must be present some apprehension of fear immediately before any liability arises for any resultant injury[35] was rightly rejected by the Court of Appeal as unsustainable. For Auld LJ, no such pre-condition arises on a straightforward application of s.10, whilst some cases will have an obvious factual time variance between an appreciable risk and the actual injury, equally in other cases the timing will "for practical purposes to be non-existent" and that in such circumstances it is "the act of the dog causing injury, a bite or otherwise, is itself capable of being conduct giving grounds for reasonable apprehension of injury." To have agreed with the appellant would have artificially strained the statutory language. Popplewell J on the other hand took a slightly different view to the same outcome, ruling instead that the expression "any occasion" was sufficiently wide to include any apprehended fear objectively arising from witnessing an attack.

Equally, in *R v Gedminintaite & Collier* [2008] EWCA Crim 814 the Court of Appeal, although mindful of the decision in **Rafiq**, ruled that s.10 is not exegetic to proving the s.3 offence. If the dog poses a threat or causes injury then it is acting dangerously within the meaning of the Act from which the handler could not escape liability. In the instance case given that the appellant's rottweiler, despite being on lead when it uncharacteristically bit an innocent passer-by causing a nasty injury, the trial Judge was right to conclude that this amounted to being dangerous sufficient to expose the appellant to conviction.

Similarly, in *R v Singh* [2011] EWCA Crim 1756, there was ample evidence that the appellant was still in charge of his dogs when they became dangerously out of control and caused injury. The conflict of evidence was the circumstances around the loss of control. The prosecution contended he deliberately released them, whereas the appellant claimed he had been attacked by the victim. Rejecting his appeal against conviction, the Court of Appeal ruled that there is a legal

32 Whether or not a person is in charge is a question of fact and degree, see **L v CPS** [2010] EWHC 341

33 See Lord Burnett in para 37 in **R v PY** [2019] EWCA Crim 17

34 In **R v Lane & Letts** [2018] 1 WLR 3647, Lord Hughes endorsed this as an "authoritative statement" of law, see also **Gammon v Att-Gen** [1985] AC 1

35 The appellant's German Sheppard dog had without warning bite the complainant from behind the shop counter.

distinction between being in charge and out of control and that "under s.3 one can be in charge of the dogs even when they are out of control" which, according to the Court, is consistent with the ruling in *Bezzina*. His Lordship averred "The Act imposes strict liability on a person who is either the owner or in charge of the dogs[36]. The whole point of the Act is to penalise those who allow dogs to get dangerously out of control."

Whilst creating a strict liability offence in s.3 potentially denies a defendant the ability to argue an "innocent mind" lacking any knowledge or awareness that the dog would bite in the circumstances, this does not make the trial unfair. In *R v G* [2008] 1 WLR 1379, the House of Lords ruled that whilst a defendant has a right to a fair trial under art 6 including being presumed innocent, it does not apply to the substantive criminal law. It is concerned with ensuring the criminal procedure is fair, not the offence itself fair, and that the burden and standard of proof still remain with the prosecution ensuring therefore a fair trial is maintained.

In *R v Lane & Letts* [2018] 1 WLR 3647, the Supreme Court in a detailed judgment recognised the importance of the presumption of mens rea being applied to all criminal liability as a principle of statutory construction, but equally it does not give the court an overriding power to ignore the principle of sovereignty and legality[37] vested in Parliament. This is significant if the statute is silent to mens rea, but the plain meaning of the words and policy unquestionably "demonstrate what was intended", then the presumption can be displaced by expressed or necessary implication. Even if the offence is one that is "truly criminal" in nature, seriousness and severity of punishment as opposed to being quasi-criminal, the imposition of strict liability applies if demanded by the Legislature (see *B(A minor v DPP* [2000] 2 AC 428, *R v G* [2008] 1 AC 821 *R v Brown* [2013] UKSC 43).

As a general rule for a defendant to be criminally liable he must, from his act or omission, have caused the harmful consequence, especially for serious homicide offences[38]. Whilst it is entirely possible for Parliament to impose absolute liability for any involuntary consequence, this must be unequivocally expressed[39]. Otherwise, to criminalise the act of mere presence for a consequence that was entirely the fault or cause of another would be a serious erosion of long-established principles of criminal liability.

In *R v Robinson-Pierre* [2014] 1 WLR 2638, the Court of Appeal had to specifically address whether the s.3 offence is still committed even if the defendant in charge of the dog did not voluntary create the situation in which the dog was dangerously out of control. In this case the police had sought to execute a search warrant on the appellant's premises by forcing the front door. This resulted in several police officers being attacked by the appellant's dog. In allowing the appeal against conviction, whilst confirming s.3 is an offence of strict liability, the Court of Appeal nonetheless ruled that Parliament had not intended to criminalise simple owner/possession of a dog, under s.3. The prosecution still had to prove the appellant was at least in charge of the dog at the material time and therefore able to control it. The offence does not create a form of absolute liability and the court in *Greener v DPP* (1996) (unreported) was wrong to conclude otherwise.

Accordingly, it is a necessary ingredient to the offence that there is some more than minimal causal/contributary connection between the act or omission in the charge of the dog and it becoming dangerously out of control (prohibited state of affairs). The trial Judge had therefore misconstrued the legislative intent by directing the jury to the contrary.

To have imposed criminal liability on a defendant dog owner for his dog being dangerously out of control, not as a consequence of his act or omission but the direct fault/responsibility/actions of another, would have extended the ambit of the offence beyond its permitted statutory language.

36 See statutory defences below for a wider appraisal of being in charge.

37 R v PWR [2020] EWCA Crim 798

38 See the recent Judgment in R v Broughton [2020] EWCA Crim 1093,

39 See opinion of Lord Hughes in R v Hughes [2013] 1 WLR 2462 para whilst Parliament can create harsh offences "it is not to be assumed to have done so unless that interpretation of its statute is compelled, and compelled by the language of the statute itself" and in "unequivocal language", see also Larsonneur [1933] 24 CrAppR 74

In cases of this nature, the degree of control the defendant is able to exercise will be critical to the determination of guilt, especially if it is in defiance of a control order under the Dogs Act 1871. If the intervention of a 3rd party is the sole reason for the dog being dangerously out of control, then no liability can arise. Nevertheless, Pitchford LJ giving the leading Judgment of the Court observed that, if subsequently the defendant fails to take reasonable steps (an act or omission) to assert control of the dog, it is sufficient evidence to establish that he contributed to the harmful consequences and liability is imposed not for the initial voluntary act of another, but the subsequent failure to act reasonably in the circumstances[40].

Whilst the Court referred to the Supreme Court ruling in *R v Hughes* 2013] 1 WLR 2461, Pitchord LJ took a different approach by concluding that the act or omission on the part of the defendant can be with or without fault. However, this must now be considered in light of the s.3 offence subsequently becoming a homicide offence in the case of a fatal dog wounding with a 14-year sentence imposed and the Supreme Court Judgment in *R v Taylor* [2013] 1 WLR 2461 in which an identical change was made to the Aggravated Vehicle Taking Act 1991. Having overruled the decision in *R v March* [1997] 1 CrAppR 67, Lord Sumpton endorsed the legal test derived from *R v Hughes* [2013] 1 WLR 2461 concluding that it is incumbent on the prosecution to prove some element of fault on the part of the offender in the control (act or omission) of the vehicle which contributes to a death as strong authority that the same test equally applies to the s.3 offence.

Statutory Defences: Not in Charge & Householder Cases

In order to ameliorate any potential unfairness arising from the imposition of strict liability, there are two possible statutory defences available to the defendant. Firstly, under s.3(2) a defendant can escape liability, provided he can prove that another person he reasonably believed to be a fit and proper person was in charge of the dog(s) at the offending time.

Given the issue of public safety, it is both justified and proportionate for the defendant to shoulder a persuasive burden of factually establishing a reliable and realistic defence beyond that of the disingenuous (*Adam v HMA* [2013] HCJAC 14, & *R v Harter* [1988] Crim LR 336). The crucial element to defence is based on the defendant's actual knowledge and state of mind. It does not compel him to prove an essential element to the offence, but a particular fact in his defence and therefore perfectly reasonable to expect the defence to adduce sufficiently reliable evidence in support, rather than simply put the prosecution to strict proof.

Whether or not the defendant has delegated charge responsibly is a question of fact and degree to be determined by the tribunal of fact[41]. However, whilst a court should be slow in rejecting any defence evidence and then only if it is perverse or outrageous (see *R v Harter* [1997] (unreported)[42] & *R v Wang* [2005] 1 WLR & *Dunleavey* [2021] EWCA Crim 39), this does not prevent the trial Judge from withdrawing the defence or directing that the evidence does not support a finding which could reasonably be inferred that there had been a change of charge.

In *R v Huddart* [1998] EWCA Crim 3342, the Court of Appeal refused to interfere with the decision of the trial Judge that a transitory change of the person in charge between family members whilst at home and within close proximity does not come within the scope of the defence. In this case the defendant's his wife opened the back door to allow the dog out, only for it to escape and cause injury. The defendant was at all times still in charge and it would simply be "artificial and contrary to the purpose of the subsection" to rule otherwise. Likewise, in *L v CPS* [2010] EWHC 341, the High Court dismissing the appellant's appeal against a s.3 conviction, ruled that it is perfectly possible for two people to be in charge and that whilst there was a temporary change of physical control, this "did not prevent the appellant from remaining in charge. He had the right and the power to take the dog back at any time and was able to control the dog"[43].

40 See para 35-46

41 See L v CPS [2010] EHWC 341

42 the appellant's appeal was allowed on the basis a failure to give a specific direction amounted to a material irregularity.

43 For the meaning of in charge in the context of the RTA 1988 see Bate [2004] EWHC 2811 & Jaman [2004] EWHC 101

The householder defence in s.3(B) was inserted by the Crime & Anti-Social Behaviour Act 2014 and partially incorporates s.76(5A) of the Criminal Justice & Immigration Act 2008[44] in the use of force in self-defence. The defence specifically gives additional protection against any intruder who is subsequently attacked by a resident dog provided the statutory conditions are satisfied. To be a householder case, the injured party when confronted by the dog must either be in a building or part of it, that is a dwelling or forces accommodation[45], or is entering it or part of it as a trespasser in the civil context.

Equally, regardless of whether not the injured party is a trespasser, the defence applies if the defendant is present at the time and subjectively believed him to be a trespasser, even if mistaken in that belief. This is based solely on the defendant's state of mind and whether or not they honestly and genuinely believed them to be a trespasser, even if objectively that belief was unreasonable, provided such a mistake is not as a consequence of voluntary intoxication (see *R v Hatton* [2008] 1 CrAppR 16 & *R v O'Grady* 1987] All ER 420). However, this rule of public policy does not extend to a subjective mistaken belief, caused by a mental disorder, that they are acting in self-defence and it will be interesting to see whether this would apply to dangerous dogs. Especially if there is some voluntary aspect to the manifestation of the mental condition, such as the abuse of cannabis (see **R v Oye** [2013] EWCA Crim 1725, & *R v Coley* [2013] EWCA). The statutory expression used are similar to those relating to the offence of burglary in s.9 of the Theft Act 1968, the very offence the intruder is likely to be committing. There is no definition of a building within the provision and therefore it is a question of fact and degree in the circumstances. For helpful guidance in a different context the offence of squatting and s.144(2) of the Legal Aid, Sentencing & Punishment of Offenders Act 2021 provides that a building includes "any structure or part of a structure (including a temporary or moveable structure)."

As to a building being a dwelling, (s.78(8B)) states that this includes a building which is partially a dwelling and partially a place of work, provided there is a means of internal access. This will therefore give protection to shop owners who live on the business premises. Less obvious dwelling places can include a vehicle or vessel[46]. In *R v Coleman* [2013] EWCA Crim 544, the Court of Appeal ruled that a narrow boat clearly came within the ordinary meaning of a vessel and therefore constituted a dwelling. Whilst in all other circumstances, it is to be given its ordinary meaning which in *Hudson v CPS* [2017] EWHC 841 is based on fact and degree, not law, and can therefore include a dwelling as a building which is not being occupied at the time, but is treated and remains a dwelling with a purpose of being lived in The more habitable the building, the more it becomes a dwelling.

Unlike self-defence, the appropriate use of force does not apply and therefore a difficult issue that may arise in any householder case is whether the dog acted instinctively to protect the property, or whether the owner or person in charge encouraged the dog to attack. In such a case where no offence is committed under the Act, other more serious offences are likely to be considered, such as assault. In this situation the defence becomes one of self-defence if deemed a householder case under s.76, subsection (5A), based on the force being objectively reasonable, even if disproportionate overall[47]. If the dog is specifically used to protect property, then the Guard Dogs Act 1975 will apply in such a situation.

Exemption and Destruction Orders

The termination of a dog is undoubtedly a draconian step, necessitated only by protecting the public from harm and therefore subject to strict judicial determination on a case by case basis. There are two distinct destruction schemes under the Act. However, these are encased in a web of conditions and qualifications that are often contradictory, confusing to apply and difficult to navigate. Nevertheless, the High Court in *Webb v CC of Somerset* [2017] EWHC 3311, set the compass point to the legislative aim which is

44 Inserted by s.45 of the Crime & Courts Act 20013

45 Defined in s.96 of the Armed Forces Act 2006

46 In a different context s.8 of the Protection of Harassment Act 1997 provides that a dwelling includes a tent and caravan.

47 For detailed guidance see **R v Cheeseman** [2019] EWCA Crim 149, **R v Ray** [2017] EWCA Crim 1391 & **Collins** [2016] EWHC 33

"to protect the public by destroying dangerous dogs, while sparing those dogs which, subject to the specific requirements of the legislation, can be shown not to be dangerous."

If the dog comes before court due to criminal proceedings under s.1 or 3, then s.4 applies (a s.4 & 4A conviction case), whereas s.4(B) specifically deals with unlawful dogs prohibited in s.1 that have been seized by the police (a s.4(B) case) and cannot be returned to the owner, or there is no prosecution (for instance the owner cannot be located). Prior to 1997, all s.1 prohibited dogs had to be destroyed, regardless of whether or not the dog is a physical danger to the public. Such an arbitrary rule was considered inhumane and a gross injustice, especially to pit bull terriers. As a result, this unfortunate situation led to an increase in seized dogs, inordinate delay and prolonged periods in custody with increased costs and appeals, making the legislation almost unworkable[48].

This directly led to the passing of the Dangerous Dogs (Amendment) Act 1997 and the insertion of a new contingent destruction order into s.4 (as amended by s.107 of the ASBCP Act 2014). A prohibited dog usually comes to the attention of the police either on report of a s.1(3) offence or concern of residents or general seizure of the dog under s.5. In this instance, if the police decide not to charge or report the alleged offence, but the dog is nonetheless determined to be a s.1 dog, then disposal of the dog must be considered under the statutory framework contained in s.4B.

Section 4B Non-Conviction Destruction & Exemption Regulations

Section 4B comes into effect through seizure of a prohibited dog and cannot be returned to the owner without incurring liability under s.1 (s.4B(1b) case), or a lack of prosecution involving any dog seized by the police (s.4B(1a) case). If the dog is not of a banned breed, then the court has an unfettered discretion whether or not to order destruction, subject to the risk the dog would pose to the public, or impose a control order under the Dogs Act 1871.

If the dog is prohibited then the "default assumption" as stated in *Beth v Maidstone CC* [2019] EWHC 2019 under s.4(B) is mandatory destruction unless and only if the dog does not constitute a danger by satisfying the strict criteria under s.4(B)(2) & (2A) in rebuttal. To avoid incurring liability under s.1 and the immediate mandatory destruction of a prohibited dog under s.4B(1b), the owner[49] must ensure that the dog is exempt by applying for an exemption certificate in accordance with the Dangerous Dogs Exemptions Schemes (England & Wales) Order 2015 SI 138 (reg 9). Crucially, exemption status is subject to the Court being satisfied that that the dog does not pose a "danger to public safety"[50] (s.4B(2) condition) and the making of a CDO under s.4B(3) in order to give time for the applicant to apply for an exemption certificate.

This requires the court to not only assess the broader behaviour of the dog, but also consider whether the owner or person in charge is deemed a "fit and proper person" capable of managing the dog and any other relevant circumstances (s.4B(2A)). Any exemption is then subject to a contingent destruction order being in place and satisfactory fulfilment of certain specified mandatory conditions within a two-month period(reg4(3)). These include that the dog being neutered, insured and microchipped. The exemption certificate itself must contain nine specified compliance requirements listed in regulation 10, including any additional requirements the courts deems necessary for the proper management of the dog. Any breach will result in the revocation of the certificate and potential criminal liability[51].

Part 3 of the Regulation in effect reverses the decision in *R (Sandhu) v Isleworth Crown Court* [2012] EWHC 1658, in which the High Court had ruled that a 3rd party could be granted the certificate in the absence of the owner. Any substituted person must themselves be a fit and proper person and that the owner has either died or is longer capable of managing the dog due to ill health (reg 12). The regulations also allow the court to grant an interim order which is a form

48 See Lords Hansard 20 Jan 1993 vol 541 col 933-56

49 Must be a natural person, not a charity or business and the application is to the magistrates and a two week notice period given to the police (Reg 13)

50 See reg 4 &s.4B(2)

51 See regulation 19

of dog type bail including, if a dog is seized by the police. According to DEFRA who administer the exemption scheme the cost of running the scheme increased by a further £8,000 from 2016 to £62,699 in 2018, at the same time 3,574 dogs were currently registered, with all but 12 of these being of the pit bull type[52].

In *Garrett v CC of West Midlands Police* [2020] EWHC 1866, the High Court emphasised that s.4(B) is "not offence based, nor is it incident based", it governs disposal of a dog that has been seized and a potential risk to the public. Accordingly, an application under s.4(B) "is freestanding of any offence" being committed, and does not necessarily relate to any specific incident(s) arising, only the pre-condition of seizure. Recognising the 6-month time limit to bring proceedings under s.127 of the Magistrates Court Act 1980 is an important safeguard, it cannot be said that s.4(B) involves a formal complaint to a specific incident, rather it administratively seeks to invoke the court's power of disposal of a seized dog in police custody by the Chief Constable. Whilst the seizure of a dog under s.5 itself may have been a response to a reported incident, it is the seizure that forms part of the "matter of complaint" under s.4(B), not the earlier incident that led to it.

For this reason, the High Court ruled that for the purposes of s.127, the date of seizure is "the earliest point in time" from which the time limit commences and not the date of the reported incident as contended by the appellant. To have adopted such a narrow construction of s.127 would potentially undermine "the strong public interest purpose of the 1991 Act, namely to protect the public from dogs deemed to be dangerous" by necessitating prompt reporting of the incident to the police. Referring to *RSPCA v Webb* [2015] EWHC 3802 on a similar point under the Animal Welfare Act 2006, the High Court observed that, whilst both criminal and civil jurisdiction fall within the 1991 Act, they are both "different and separate in nature" including the imposition of relevant time limits under s.127.

Section 4 Destruction on Conviction Order

On the other hand, in dealing with a dog following a conviction for a s.1 & 3 offence, s.4 obligates the court to make a destruction order for a s.3 aggravated offence unless satisfied that the dog is not a danger to the public under s.4(1)(A) & (B). In the case of a non-aggravated offence the Court has the discretion to only order destruction if it is necessary to do so[53]. In *R(Kileen) v Birmingham Crown Court* [2018] EWHC 174, Hickinbottom LJ neatly summarised the correct approach to be taken by the court in the case of an aggravated s.3 offence in line with the guidance found in **R v Flack** [2008] EWCA Crim 204. It follows that the court must order the destruction of the dog unless "by adducing expert evidence or lay evidence, relating to such matters as the dog's behaviour, demeanour and general past behaviour" the applicant can, on a balance of probabilities establish that the dog no longer poses any risk, or if it does, that this can be appropriately controlled under a contingent destruction order fulfilling the statutory objective. Both in **Flack & Kileen** the court emphasized that, before reaching a decision on a mandatory destruction order they had considered the criteria for a contingency order.

Crucially, at the same time as making a destruction order, the court can also disqualify the owner from having custody of a dog for any period it thinks fit. Once a destruction order is made and subject to any right appeal to the Crown Court by the owner (provided they are not the offender) against a destruction order the dog must then be handed to the police otherwise they commit a specific offence (s.4(8)).

Contingent Destruction Order under s.4A: A form of "Death Row"

A contingent destruction Order (CDO) is an alternative to the mandatory destruction of the dog in circumstances that would make it unjust and arbitrary. The court must under s.4A(4) be satisfied that the dog will be kept under proper control sufficient to reduce the risk to the public and if necessary, impose strict conditions. A form of supervision or "death row" with the risk of impending death and subject to a duty of care on the owner. Each case will be fact specific and whilst the Judge in *R v Hill* [2010] EWCA Crim 2999 was wrong not to consider the imposition

52 Obtained under a Freedom of Information Request dated 17 April 2019. (www.gov.uk/defra)

53 See the Judgment in **Kelleher v DPP** [2012] EWCA Crim 2978

of a contingency order, given the importance to allow the applicant every opportunity to show the dog can be properly controlled, without the evidence destruction is inevitable.

Importantly, distinguishing the decision in *Davies* [2010] EWCA Crim 1923 on the facts, the court in **Kileen** noted that any failure to refer to the statutory criteria or relevant authorities, does not automatically render any destruction order unlawful as contended by the applicant**,** since "the question is one of substance not form," the critical aspect is the approach taken on the facts "not whether they recited the sources from which the obligation to do so arose"[54]. Similarly, the Court of Appeal in ***R v Baballa*** [2010] EWCA Crim 1950 noted that the same criteria in *Flack* equally applied to possession of a prohibited dog under s.1(3), in this case American pit bull type. Before a CDO can be granted, the owner must apply for a certificate of exemption within two months (see above), otherwise the dog must be destroyed. The court clearly has a wide discretion under s.4A(5) to attach strict control conditions as is necessary to ensure public safety. This provides a fair solution in the right circumstances. The onus is then on the person in charge to ensure compliance.

In *CC of Merseyside v Doyle* [2018] EWHC 2180, the High Court ruled that a contingent destruction order is not a criminal sanction or punishment, but a civil measure to ensure that the dog is kept under proper control. If breached, the Court in the explicit wording of the s.4A(4)[55] can order the dog's destruction under s.4(4) which can be made at any time. To insist that an s.4(4) direction be made at the same time as the order as contended by the respondent would unnecessarily tie the hands of the court and be ineffectual, procedurally something Parliament could not have intended. Alternatively, s.63 of the Magistrates Court Act 1980 can be invoked which gives the court wide discretion under its civil jurisdiction by allowing the court to make "any necessary orders under s.4(4) or whether it should be varied, suspended or revoked".

Reconciling the operation of the two Schemes

However, in *Grant v Sheffield Crown Court* [2017] EWHC 1678, the High Court felt that s.4(B) is "more prescriptive" than s.4 & s.4(A). There exists no legitimate bases to include or incorporate the extended power in s.4A into s.4B. Both schemes are self- governing. Accordingly, under s.4B, there are "two sequential steps". Firstly, the Court must decide whether, on the evidence, the dog is to be destroyed. If no, then and only then, it must consider the second step of exemption and a stay of execution. Unlike, a s.4 case, a court applying s.4B does not have the benefit or option of suspending destruction, before deciding whether the dog must be destroyed for public safety.

The court has a stark choice to make, if the dog is inherently dangerous it must be destroyed, unless there is strong evidence to the contrary, only then can a court offer the option of formal exemption and a contingent destruction under s.4B(3). However, this potentially creates an inconsistency when dealing with a s.1 dog such as a pit-bull terrier being treated differently. Under s.4B it is at greater risk of destruction due to its status and inherent dangerousness, whereas under s.4 despite having caused injury it can be given reprieve under the supervision of a contingent destruction order.

Acknowledging this potential inconsistency, the High Court in *Beth v Maidstone Crown Court* [2019] EWHC 2029, nevertheless ruled that this does not undermine the underlying purpose of s.4B and the intention of Parliament which is to "outlaw certain breeds" deemed to "represent a danger to public safety and should be destroyed," unless proved otherwise. Accordingly, neither in *Webb v CC of Somerset* [2017] EWHC 3311, nor in *Henderson v Met Police* [2018] EWHC 666, did the court oppose the principle that the merit of any control measures only arises "after the individual pit bull has been assessed as not being a danger to the public" and not before.

For this reason, "the approach to s.4B" in "*Grant* was correct" and that whilst *Flack* has been approved by the Court of Appeal in subsequent cases and binding on court, this was in the context of offences under s.3 and therefore has no bearing on the operation of s.4B orders. Further

54 See also the Judgment in **R v Kierman** [2019] EWCA Crim 574 **R v Wharton** [2019] EWCA Crim 2188 & **Hooker v Ipswich Crown Court** [2013] EWHC 2899,

55 "unless the owner of the dog keeps it under proper control, the dog shall be destroyed"

support can be found in *Dodsworth v CC of West* **Yorkshire** [2019] EWHC 330, in which the court ruled that the Crown Court Judge had correctly applied the decision in **Grant** to the facts.

Assessing whether the dog constitutes a danger to the public safety is therefore subject to s.4B(2A) which as the Court stated in **Beth** "is aimed at matters touching on the dangerousness of the dog itself, not on matters which might control or minimise the risk it presents." Such control mechanisms are "conceptually distinct" to addressing the proclivities of the type of dog[56]. Each case will be dependent on its own particular background facts and the findings of any expert evidence.

Meaning of a "Fit & Proper Person for the time being in Charge"

The critical aspect under either scheme is whether the dog "constitutes a danger to public safety," This requires the court to not only consider the characteristics of the dog, but also whether the owner or person in charge is deemed to be a fit and proper person to manage the dog (s.4(1A & B & s.4B(2A)) in all the circumstances. If the owner fulfils their responsibilities under both the Act and the exemption regulations, then the dog can be properly managed and controlled to protect the public and no issue arises.

However, whether or not the statutory language in s.4(B) permits a change of keeper for a s.1 exempt dog was resolved in the High Court in *Webb v CC of Somerset & DFRA* [2017] EWHC 3311. The appellant had moved abroad and left his pit-bull terrier in kennels breaching the exemption certificate by failing to keep the dog at his home address, but wished to transfer responsibility to another (a 3rd party)[57]. In an extensive and detailed Judgment Beatson LJ firstly rejected the narrow contention of the Chief Constable that once a s.1 dog has been or is currently subject of an exemption order, then, unless the narrow exception in article 12 on substitution applies, the dog must be destroyed, regardless of whether another can offer adequate care and protection.

Such an approach would however mean an owner who had never taken steps to exempt their dog being able to apply for a CDO and allowing a person in charge to then apply for exemption, yet such a remedy being denied to a dog that had been exempted who seeks a new keeper, but is prevented by s.1(3) & article 12.

Equally, the Appeal Court rejected the contention of the appellant, that a broader understanding can be found in order to avoid a draconian destruction of a dog not deemed a risk to public safety by construing any other relevant circumstances in s.4B(2A) to include another person who is not otherwise, for the time being, in charge of the dog to take responsibility. To adopt this approach would leave exempted dogs without an owner at the mercy of regulation 12, whilst dogs that are not exempted and therefore illegal being potentially under the control of a new keeper.

Mindful of the statutory reversal of the decision in **Sandu** and ensuring the police must be able to strictly monitor and control ownership of s.1 dogs by limiting the class of eligibility, the High Court ruled that the legislative purpose of the Act contradistinguishes the control of exempt dogs which must be dealt with under the 2015 regulations scheme (and therefore article 12-18 substitution), and that non-exempt dogs should be separately dealt with under s,4B . It is also entirely consistent with the policy aims of the legislation, that only the owner or a fit and proper person who for the time being is in charge of a dog is able to apply for exemption & CDO to the exclusion of all others, including persons in the future. This rightly ensures a change of keeper/ owner is not an administrative procedure.

Whilst the expression being in charge at the time is used in a different context in s.3 to s.4, as a matter of construction the phrase should nonetheless be applied consistently and not constrained to an unnecessary narrow application. They "are ordinary words which are capable of applying to a range of situations" in which "the language of the statute is broad enough to encompass anyone who, for whatever reason and in whatever way, is in charge of the dog for the time being", including a volunteer or someone who walked the dog. Accordingly, "for the time being" sufficiently covers evidence of past or present contact with the dog, but cannot as

56 A point raised and discussed in **Hunter v Procurator Fiscal** [2019] HCJAC 19

57 The appellant also allowed the insurance to lapse.

a matter of ordinary language extend to future contact. Ultimately each case will be dependent on its own individual assessment of the facts and the degree of responsibility that can be ascertained.

In *Henderson v Met Police* [2018] EWHC 666, the High Court agreed with the decision in **Webb** that only the owner or a person in charge for the time being has standing to challenge a destruction order on the grounds that this interferes with their article 8 right to a family and private life. To have ruled, as the defence had contended, that those with a "legitimate interest" have article 8 standing, would have meant extending such rights "to a wider class of individuals" including those who take a laudable interest in caring for the dog, which is well beyond the scope of the legislation. The Court was fortified in its ruling by reference to a s.1 or 3 prosecution case, in which only the accused can challenge the prohibited status of the dog, and that it would be surprising indeed if "a much wider category of individuals has such standing" as opposed to a criminal case under the Act. Equally, the fact that only the owner can appeal against a destruction order (s.4(2)) further strengthens this position.

Significantly, in *Stronge v Met Police* [2021] EWCA Crim 766, the High Court, despite the attractive arguments of the claimant to the contrary, ruled that given the DDA 1991 was "intentionally restrictive", any transfer of ownership to a 3rd party, even with good cause, would be unlawful unless the strict statutory conditions are met and confirmed in both the decisions of **Webb** & **Henderson**. Equally, as in this case, it would be an "unlawful exercise of any discretion on the part" of the police to facilitate a transfer of ownership of a dog lawfully seized of which they are responsible and accountable for under the legislation, to support an appeal against a destruction order in circumstances that the law does not permit. Whilst the Dog Trust was willing to care for the s.1 dog called Bleu initially, the future location of the dog and any strict control measures could not be assured.

As the court noted at para 34 the "restrictive nature of these provisions is controversial and strong views are held about them" and that perfectly healthy dogs maybe destroyed solely because of their owner not being a fit and proper person to care for them. However, the logic of re-homing s.1 dogs cannot influence police operational policy under the current legislation but is a matter for both Government and Parliament.

Deciding whether or not a person is a "fit and proper person" was reviewed in *Dodsworth v CC of West Yorkshire* [2019] EHWC 330, in which the High Court considered this is to be a "mixed question of law and fact" following the observations made in *Grant v Sheffield CC* [2017] EWHC 1678. Essentially the words carry their ordinary meaning within the statutory context that the court must be satisfied that the dog does not pose a danger.

The focal point "is at the time of the hearing" which includes not just the characteristics and past behaviour of the person, but also their suitability and capability across a range of situations, such as environment, health, general responsibilities, work and other demands. All these circumstances amount to a "value Judgment" and whether the person would not only be proactive in keeping dog under proper control, but also react to any unforeseen eventualities.

The court also made it clear that whilst an aggrieved party can challenge an adverse ruling by way of case stated or Judicial Review, the appeal court would be slow to interfere with the findings of the lower court who is obviously better placed to carefully assess the evidence and all the circumstances, and then only if there is a misapplication of the statutory provisions or the decision "was plainly and obviously wrong." Provided the evidence has been carefully considered and evaluated and both parties have been given an opportunity to test and probe the credibility and reliability of the evidence, then as ruled in **Burrell v CPS** [2019] EHWC 667 it cannot be argued that there was procedural unfairness.

Jurisdiction & Sentencing

Both s.1 possession of prohibited breeds and s.3(1) dangerously out of control without injury amount to summary only offences punishable by fine (£5,000) and or 6 months imprisonment. If aggravated by injury, then this becomes an either-way offence with a maximum sentence of 5 years on indictment. In the case of a fatal injury this is classified as an indictable only offence

with a maximum sentence of 14 years imprisonment and must therefore be dealt with in the Crown Court. This creates a homicide offence in the same form as that under the Aggravated Vehicle Taking Act 1991.

However, for the purposes of s.40 of the Criminal Justice Act 1988, a non-aggravated offence is not a specified link summary offence and cannot therefore be joined in the same indictment or be added at a later date under s.6(3) of the Criminal Justice Act 1988, to the aggravated offence, despite the two offences potentially arising out of the same facts. Without careful consideration it is easy to misconstrue the jurisdictional power of the court, a point highlighted in ***R v Hill*** [2010] EWCA Crim 2999, in which the Court of Appeal had no option but to quash the appellant's conviction for a non-aggravated offence wrongly added to the indictment. In terms of sentencing, the court must apply the revised definitive guidance issued by the Sentencing Council which came into effect in July 2016 in terms of level of sentence, including discretionary disqualification from owning a dog under s.4(1)(b).

The SC has recently conducted an assessment of the guidelines publishing its findings on the 21 October 2020[58]. In terms of sentencing of a s.3 aggravated (non- fatal injury), it found overwhelmingly that the most common sentence outcome was non-custody, mainly a fine but also a community order. The report did note a slight decrease in the use of conditional discharge for this offence and a small increase in other sentences following the amendments to the legislation.

The report did note that custody was rarely used (only 2-3% of cases) and then usually a year or less in length. In respect of fatal injury, court data was limited to 2018 & 19 with only three offences. Of the three, one resulted in a 10-year sentence, another was suspended and the third resulted in a fine. For the offence of injuring an assistant dog, the SC noted that less than 20 offences were recorded each year with sentencing ranging from absolute discharge to immediate custody, but again no trends could be established given the low conviction rate. For an s.1 prohibited dog offence between 2011-17, there was an average of between 130 to 260 offenders, with a fine being the common punishment. Overall, the SC felt there was "no immediate need to revisit the guidelines" but instead decided to monitor any sentencing trends.

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58 www.sentencingcouncil.org.uk