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Mapoles v. Mapoles, 360 So. 2d 1137 (Fla. 1st Dist. Ct. App. 1977)

Helio de la Torre

Torts—STRICT LIABILITY—DOG OWNERS VIRTUAL INSURERS FOR ANY DAMAGE CAUSED BY THEIR DOGS—*Mapoles v. Mapoles,* 350 So. 2d 1137 (Fla. 1st Dist. Ct. App. 1977).

The imposition of strict liability on owners of animals is founded on the belief that the owner should bear any loss caused by the animal even if the owner is not personally at fault.[1] Due to the harshness of this rule, a dog owner's liability is usually limited judicially to those consequences which result from some particular canine characteristic.[2] Such a limitation seems logical since it is the presence of the dog that creates the potential risk which in turn gives rise to the application of strict liability. In October, 1977, however, the Florida First District Court of Appeal in *Mapoles v. Mapoles*[3] radically departed from this tradition and vastly extended the liability of dog owners.

On December 3, 1971, Tim Astin and his girlfriend, Cam Mapoles, drove Tim's Volkswagen to her brother's home to pick up Cam's St. Bernard dog. Tim had placed a loaded shotgun in the backseat of his car earlier that morning after returning from a hunting trip, but Cam did not know the gun was there. Arriving at her brother's home, Cam called for the 175 pound dog, and Tim put him in the backseat with the shotgun. The gun discharged a few seconds later. A piece of metal torn from the side of the Volkswagen by the explosion struck Clayton Mapoles, III, a minor, who was standing nearby. The minor, who was the nephew of Cam Mapoles, was severely injured around the eye.[4]

The injured party and his father sued Cam Mapoles and her insurer, Auto-Owners Insurance Company, for negligence. The trial court entered an order granting plaintiffs' motion for partial summary judgment as to liability, and the defendants took an interlocutory appeal.[5] The First District Court of Appeal, in reversing the partial summary judgment as to liability, remanded the case to the trial court[6] to render final judgment based on the applicability of section 767.01, Florida Statutes.[7] On remand, the trial court entered a partial summary judgment for the plaintiffs on the issue of liability, reasoning that section 767.01 imposed strict liability on the dog

1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 75, at 492-94 (4th ed. 1971).
2. *See* text accompanying notes 37-41 *infra.*
3. 350 So. 2d 1137 (Fla. 1st Dist. Ct. App. 1977).
4. Brief of Appellants at 1-4.
5. Fla. App. Rule 4.2a (current version at FLA. R. APP. P. 9.130(a)).
6. Mapoles v. Mapoles, 332 So. 2d 373 (Fla. 1st Dist. Ct. App. 1976).
7. (1977). Section 767.01 provides: "Owners of dogs shall be liable for any damage done by their dogs to sheep or other domestic animals or livestock, or to persons."

owner under the facts of the case. The defendants then took a second interlocutory appeal. The First District Court of Appeal affirmed, Judge Robert Smith dissenting.[8]

Historically, if a person kept a dog known by him to be vicious and that dog subsequently bit a person, the owner was held liable. Conversely, if the owner lacked knowledge of the vicious tendencies of the dog and the dog bit a person, the owner was not held liable.[9] Thus, it was always necessary to prove the owner's scienter in order to recover for injuries caused by a dog.[10]

Proof that the owner had actual notice that his dog had previously bitten someone was not necessary to prove scienter. The owner's knowledge of the dangerous tendencies of the animal was sufficient. Liability was based solely on the theory that it was a nuisance to keep a dangerous animal, and no negligence in the manner of keeping was required.[11]

Disagreement arose, however, as to which defenses were allowed under the common law. Most courts allowed the defense of contributory negligence, but others held that this defense did not bar recovery. In those jurisdictions which did allow contributory negligence as a defense, the term actually denoted an assumption of risk rather than want of ordinary care as it is usually understood in the law.[12] Most courts also held that posting a warning sign was generally insufficient to enable the owner of a ferocious dog to escape liability.[13] If the injured person was engaged in the commission of a criminal act or tort, on the other hand, he was not allowed to recover for any injuries caused by the dog.[14]

Many legislatures have enacted statutes modifying or abrogating the common law scheme of dog owner's liability. A prevalent feature of such statutes is the easing of the unduly restrictive common law requirement of scienter,[15] as it is often difficult and at times impos-

8. 350 So. 2d at 1138-39.

9. *See* Houk, *Torts: Dog Owner's Liability in Florida*, 3 U. FLA. L. REV. 98 (1950). For an interesting historical perspective *see generally* Jackson, *Liability for Animals in Roman Law—An Historical Sketch*, 37 CAMBRIDGE L.J. 122 (1978).

10. W. PROSSER, *supra* note 1, § 76, at 501. "Scienter" refers to special notice of the character of the particular animal. Traditionally, notice must extend to the trait or propensity which has caused the damage.

11. *See* Houk, *supra* note 8, at 99.

12. *Id.* at 101.

13. *Id.*

14. *Id.* at 103.

15. ALA. CODE tit. 3, § 3-6-1 (1975); ARIZ. REV. STAT. ANN. § 24-521 (1956); CAL. CIV. CODE § 3342 (West 1970); CONN. GEN. STAT. ANN. § 22-357 (West 1958); IND. CODE ANN. § 15-5-12-1 (Burns 1971); IOWA CODE ANN. § 351-28 (West 1946); MASS. GEN. LAWS ANN. ch. 140, § 155 (West 1958); MICH COMP. LAWS § 287.351 (1948); MINN. STAT. ANN. § 347.22 (West 1945); MONT. REV. CODES ANN. § 17-409 (1947); N.J. STAT. ANN. § 4:19-16 (West 1937); OHIO REV. CODE ANN. § 955.28 (Page 1953); OKLA. STAT. ANN. tit. 4, § 42.1 (West 1910); R.I. GEN. LAWS

sible to prove. Many of these so-called "dog bite" statutes have eliminated this requirement on the part of the dog owner and replaced it with a standard of strict liability.[16]

Other such statutes fail to provide expressly for retention of any of the common law defenses described above.[17] Still others limit the defenses available to the dog owner to intentional provocation of the dog by the injured party,[18] by the injured party's tortious conduct,[19] or by both.[20] Generally speaking, recovery is allowed on the basis that the defendant owned the dog and that the dog caused the injury to the plaintiff.[21]

In 1881 Florida enacted its first dog bite statute which held that dog owners were responsible for stock killed or maimed by their dogs.[22] The single reported case which arose under this statute was

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§ 4-13-16 (1956); TENN. CODE ANN. § 44-101 (1956); UTAH CODE ANN. § 18-1-1 (1953); WASH. REV. CODE ANN. § 16.08.040 (1961); W. VA. CODE § 19-20-13 (1966); WIS. STAT. ANN. § 174.02 (West 1957). *See generally* Note, *Dog Owners' Liability: Statutory Effects*, 1960 DUKE L.J. 146; Note, *Dog Owner's Statutory Liability in North Carolina*, 45 N.C.L. REV. 1118 (1967).

16. *See Dog Owners' Liability: Statutory Effects, supra* note 15, at 147.

17. CAL. CIV. CODE § 3342 (West 1970); NEB. REV. STAT. § 54-601 (1943); R.I. GEN. LAWS § 4-13-16 (1956); TENN. CODE ANN. § 44-101 (1956); UTAH CODE ANN. § 18-1-1 (1953); W. VA. CODE § 19-20-13 (1966); WIS. STAT. ANN. § 174.02 (West 1957).

18. ALA. CODE tit. 3, § 3-6-1 (1975); ARIZ. REV. STAT. ANN. § 24-521 (1956); IND. CODE ANN. § 15-5-12-1 (Burns 1971); MICH. COMP. LAWS § 287.351 (1948); MINN. STAT. ANN. § 347.22 (West 1945); MONT. REV. CODES ANN. § 17-409 (1947).

19. IOWA CODE ANN. § 351-28 (West 1946); N.H. REV. STAT. ANN. § 466.20 (1968); N.J. STAT. ANN. § 4:19-16 (West 1937).

20. CONN. GEN. STAT. ANN. § 22-357 (West 1958); MASS. GEN. LAWS ANN. ch. 140, § 155 (West 1958); OHIO REV. CODE ANN. § 995.28 (Page 1953); OKLA. STAT. ANN. tit. 4, § 42.1 (West 1910).

21. *See generally Dog Owners' Liability: Statutory Effects, supra* note 15.

22. Ch. 3294, § 1, 1881 Fla. Laws 94 (current version at FLA. STAT. § 767.01 (1977)).

In Wendland v. Akers, 356 So. 2d 368 (Fla. 4th Dist. Ct. App. 1978), the court noted some of the early modifications to this statute:

> It is interesting to observe, however, the historical background of this statute. As originally enacted in 1881, the wording was:
>
> > "That all owners of dogs shall be held liable and responsible for damages to sheep or other stock killed or maimed by their dogs." Chapter 3294, Laws of Florida (1881).
>
> Thus, damage to persons was not included. But in the 1892 Compilation, Section 2341 provided:
>
> > "Owners of dogs shall be held liable for damages *to persons* and stock killed or injured by their dogs." (Emphasis supplied.)
>
> We find no *legislative enactment* to include damages to persons within the scope of the statute.
>
> Later, in 1901, the legislature enacted Chapter 4979, Laws of Florida (1901), which provided:
>
> > "When any dog or dogs shall kill or in any way damage sheep or other domestic animals in this State, the owner of such dog or dogs shall be liable upon the action for damages to the owner of such sheep and other domestic animals for the damage committed upon the same by such dogs."
>
> But in the next Compilation in 1906, Section 3142 provided:

Ferguson v. Gangwer[23] in 1939. Defendant in that case appealed to the Florida Supreme Court, contending that the plaintiff's pleadings were fatally defective in that they failed to allege that the defendant's dog was vicious or that the defendant had knowledge of the dog's vicious propensities. The court held that such allegations were not necessary since the statute provided that dog owners would be responsible for any damage "done by" their dogs. Thus, the court's interpretation of this statute effectively eliminated the common law requirement of scienter.

In 1949, the legislature enacted section 767.04 of the Florida Statutes.[24] Although this section was said to have impliedly repealed section 767.01,[25] the Florida Supreme Court later decided that the two statutes were not inconsistent since section 767.04 imposes liability on the dog owner when the dog bites a person, while section 767.01 imposes liability for any damage caused by the dog.[26]

Section 767.04 creates liability when the injured person is either on public property or is lawfully upon private property. The statute recognizes two defenses: (1) provocation of the dog by the plaintiff and (2) the display by the dog owner, in a prominent place on his premises, of an easily readable sign containing the words "Bad Dog." The Florida Supreme Court upheld the constitutionality of

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"Owners of dogs shall be liable for any damage done by their dogs to sheep or other domestic animals or live stock, or *to person*." (Emphasis supplied.) Thus once again the compiler placed words in the Compilation which were not there when the act was adopted by the legislature. Although the validity of Section 767.01, Florida Statutes (1975), cannot now be questioned because of the rules relating to statutory re-enactments, Section 767.01 should be given a restrictive scope because the legislature never specifically included damage to persons within the purview of the statute, at the time of the enactment of these laws.

Id. at 369-70.

23. 192 So. 196 (Fla. 1939).

24. (1977). Section 767.04 provides:

The owners of any dog which shall bite any person, while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dogs, shall be liable for such damages as may be suffered by persons bitten, regardless of the former viciousness of such dog or the owners' knowledge of such viciousness. A person is lawfully upon private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon invitation, expressed or implied, of the owner thereof; provided, however, no owner of any dog shall be liable for any damages to any person or his property when such person shall mischievously or carelessly provoke or aggravate the dog inflicting such damage; nor shall any such owner be so liable if at the time of any such injury he has displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog."

25. Romfh v. Berman, 56 So. 2d 127 (Fla. 1952).

26. Sweet v. Josephson, 173 So. 2d 444 (Fla. 1965).

section 767.04 in 1970.[27]

Under sections 767.01 and 767.04 the plaintiff need prove neither the viciousness of the dog nor scienter.[28] The defendant, however, must actually own the dog for either statute to apply.[29] Section 767.01 makes the obligation of the dog owner virtually that of an insurer for damage done by his dog, whether caused by biting or otherwise.[30] Similarly, section 767.04 imposes absolute liability on the dog owner for any damage suffered by persons bitten by the dog in situations covered by the statute[31] so long as the exculpatory provisions are not applicable.[32]

As imposed by these statutes, liability of a dog owner is based on an obligation as insurer rather than on negligence.[33] Consequently, contributory negligence is no defense to a suit which seeks to hold an owner statutorily liable.[34] The defenses of assumption of risk[35]

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27. Carroll v. Moxley, 241 So. 2d 681 (Fla. 1970).

28. Carroll v. Moxley, 241 So. 2d 681 (Fla. 1970); Ferguson v. Gangwer, 192 So. 196 (Fla. 1939); Josephson v. Sweet, 173 So. 2d 463 (Fla. 3d Dist. Ct. App. 1964).

29. Reid v. Nelson, 154 F.2d 724 (5th Cir. 1946); Smith v. Allison, 332 So. 2d 631 (Fla. 3d Dist. Ct. App. 1976); Christie v. Anchorage Yacht Haven, Inc., 287 So. 2d 359 (Fla. 4th Dist. Ct. App. 1973). The court in *Smith* stated: "Because of the severe, potential consequences inherent in the statute, there is a clear burden on a plaintiff to show the defendant's actual ownership of the dog in question, and not merely to show possession or custody." 332 So. 2d at 634.

30. Mapoles v. Mapoles, 350 So. 2d 1137 (Fla. 1st Dist. Ct. App. 1977); Smith v. Allison, 332 So. 2d 631 (Fla. 3d Dist. Ct. App. 1976); Scott v. Gordon, 321 So. 2d 619 (Fla. 3d Dist. Ct. App. 1975); Hall v. Ricardo, 297 So. 2d 849 (Fla. 3d Dist. Ct. App. 1974); English v. Seachord, 243 So. 2d 193 (Fla. 4th Dist. Ct. App. 1971); Josephson v. Sweet, 173 So. 2d 463 (Fla. 3d Dist. Ct. App. 1964).

31. Carroll v. Moxley, 241 So. 2d 681 (Fla. 1970); Romfh v. Berman, 56 So. 2d 127 (Fla. 1952); Paskel v. Higgins, 337 So. 2d 416 (Fla. 4th Dist. Ct. App. 1976); Hall v. Ricardo, 297 So. 2d 849 (Fla. 3d Dist. Ct. App. 1974); Minisall v. Krysiak, 242 So. 2d 756 (Fla. 4th Dist. Ct. App. 1971); Josephson v. Sweet, 173 So. 2d 463 (Fla. 3d Dist. Ct. App. 1964).

32. Carroll v. Moxley, 241 So. 2d 681 (Fla. 1970); Knight v. Burghduff, 102 So. 2d 617 (Fla. 1958); Romfh v. Berman, 56 So. 2d 127 (Fla. 1952); Paskel v. Higgins, 337 So. 2d 416 (Fla. 4th Dist. Ct. App. 1976); Harris v. Moriconi, 331 So. 2d 353 (Fla. 1st Dist. Ct. App. 1976); Hall v. Ricardo, 297 So. 2d 849 (Fla. 3d Dist. Ct. App. 1974); Minisall v. Krysiak, 242 So. 2d 756 (Fla. 4th Dist. Ct. App. 1971).

33. Reid v. Nelson, 154 F.2d 724 (5th Cir. 1946); Carroll v. Moxley, 241 So. 2d 681 (Fla. 1970); Mapoles v. Mapoles, 350 So. 2d 1137 (Fla. 1st Dist. Ct. App. 1977); Allstate Ins. Co. v. Greenstein, 308 So. 2d 561 (Fla. 3d Dist. Ct. App. 1975); Knapp v. Ball, 175 So. 2d 808 (Fla. 3d Dist. Ct. App. 1965); Vandercar v. David, 96 So. 2d 227 (Fla. 3d Dist. Ct. App. 1957).

34. Allstate Ins. Co. v. Greenstein, 308 So. 2d 561 (Fla. 3d Dist. Ct. App. 1975); English v. Seachord, 243 So. 2d 193 (Fla. 4th Dist. Ct. App. 1971); Knapp v. Ball, 175 So. 2d 808 (Fla. 3d Dist. Ct. App. 1965); Vandercar v. David, 96 So. 2d 227 (Fla. 3d Dist. Ct. App. 1957); *cf.* Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (the doctrine of contributory negligence was discarded in favor of the comparative negligence doctrine as the law applicable in negligence actions).

35. Allstate Ins. Co. v. Greenstein, 308 So. 2d 561 (Fla. 3d Dist. Ct. App. 1975); Sand v. Gold, 301 So. 2d 828 (Fla. 3d Dist. Ct. App. 1974); Hall v. Ricardo, 297 So. 2d 849 (Fla. 3d

and proximate causation,[36] however, are recognized by the courts.

Despite these general rules, recent cases, dealing with situations in which the dog has not acted aggressively, are in conflict over the question of when the dog's actions should be considered an affirmative act for which the dog owner can be held liable under section 767.01. The issue of whether the dog's actions constitute an affirmative act relates to the rationale for the traditional limitation of strict liability. If the policy justification for imposing strict liability is that the owner, rather than the public, should bear the loss for damage "done by" his dog, then forcing the owner to pay for consequences not directly attributable to any canine characteristic offends traditional notions of justice.

In *Rutland v. Biel*,[37] a 76-year-old woman sought recovery for injuries sustained when she tripped over the defendant's dog. The Second District Court of Appeal, noting that in previous cases arising under section 767.01 the dog had acted aggressively,[38] held that the statute did not apply to situations in which the dog took no affirmative or aggressive action toward the injured party.[39]

In *Allstate Insurance Co. v. Greenstein*,[40] the Third District Court of Appeal agreed with the basic reasoning of *Rutland* but it greatly

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Dist. Ct. App. 1974); English v. Seachord, 243 So. 2d 193 (Fla. 4th Dist. Ct. App. 1971); Knapp v. Ball, 175 So. 2d 808 (Fla. 3d Dist. Ct. App. 1965); Vandercar v. David, 96 So. 2d 227 (Fla. 3d Dist. Ct. App. 1957); *cf.* Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977) ("assumption of risk" merged into comparative negligence).

In *Blackburn*, the court held that a defendant who raises "assumption of risk" as a defense will only be able to have the plaintiff's recovery reduced on a percentage of fault basis, the only exception being when the plaintiff assumes the risk of injury in writing or by actual consent. *See generally* Werrenrath III, *Comparative Negligence*, 1977 COMPARATIVE NEGLIGENCE AND CONTRIBUTION IN FLORIDA 1.

36. Smith v. Allison, 332 So. 2d 631 (Fla. 3d Dist. Ct. App. 1976); Scott v. Gordon, 321 So. 2d 619 (Fla. 3d Dist. Ct. App. 1975); Allstate Ins. Co. v. Greenstein, 308 So. 2d 561 (Fla. 3d Dist. Ct. App. 1975); Auerbach v. Alto, 281 So. 2d 567 (Fla. 3d Dist. Ct. App. 1973); English v. Seachord, 243 So. 2d 193 (Fla. 4th Dist. Ct. App. 1971); Brandeis v. Felcher, 211 So. 2d 606 (Fla. 3d Dist. Ct. App. 1968).

Brandeis held that under § 767.01, the damage must be "done by" the dog. This issue of causation was determined quantitatively—whether the animal's conduct was "a material, appreciative, or substantial factor in producing the plaintiff's injuries." 211 So. 2d at 607.

37. 277 So. 2d 807 (Fla. 2d Dist. Ct. App. 1973).

38. Christie v. Anchorage Yacht Haven, Inc., 287 So. 2d 859 (Fla. 4th Dist. Ct. App. 1973) (German Shepherd lunged at bicyclist); Auerbach v. Alto, 281 So. 2d 567 (Fla. 3d Dist. Ct. App. 1973) (dog ran into the street and began biting a motorcyclist's shoe); Brandeis v. Felcher, 211 So. 2d 606 (Fla. 3d Dist. Ct. App. 1968) (child frightened by dog jumping against the fence ran into the street and was struck by a car); Josephson v. Sweet, 173 So. 2d 463 (Fla. 3d Dist. Ct. App. 1964) (dog knocked plaintiff to the pavement); Vandercar v. David, 96 So. 2d 227 (Fla. 3d Dist. Ct. App. 1957) (dog's playful conduct caused plaintiff to fall).

39. 277 So. 2d at 809; *cf.* English v. Seachord, 243 So. 2d 193 (Fla. 4th Dist. Ct. App. 1971) (liability for non-bite damages suffered in attack by dog is within contemplation of § 767.01). In *English* the plaintiff reinjured his back jumping onto a car for safety when the dog growled and came up to the car's edge. Although the dog did not directly injure the plaintiff, the injury was the result of the canine characteristic of chasing and attacking.

40. 308 So. 2d 561 (Fla. 3d Dist. Ct. App. 1975).

extended previous notions of what constitutes an affirmative act. The defendant's dog in *Allstate* ran into a street after escaping from the front yard where he had been chained. When the plaintiff swerved his car to avoid hitting the dog, he lost control of his vehicle and collided with a utility pole. The court found that the dog had acted affirmatively to cause the plaintiff's injuries and held the dog owner liable under section 767.01.[41]

One year after *Allstate,* the opposite result, under an almost identical set of facts, was reached in *Smith v. Allison.*[42] Although the *Smith* court did not specifically decide whether the dog had acted affirmatively, it cited *Rutland* for the proposition that section 767.01 applies only when the dog has taken some affirmative or aggressive action.[43] The court stated:

> We view the application of the statute in the present case as improper in that the words "damage done by their dogs to sheep or other domestic animals or livestock, or to persons" does [*sic*] not include cases where the dog does not itself inflict any damage. Where, as in the present case, the damage results from some physical agency set in motion by a chain of events which may have been triggered by the presence of the dog, absolute liability should not be imposed.[44]

Thus the court rejected the argument that section 767.01 imposes absolute liability in every case where the actions of the dog are a factor in the plaintiff's ultimate injury. Instead, the court held that there must be a limit to the rule of absolute liability, and that this case exceeded that limit.[45] The court also noted that the statute required proof of the defendant's actual ownership of the dog in question and that, in this case, the plaintiff had failed to meet his burden of proof.[46]

The First District Court of Appeal addressed the issue of what constitutes an affirmative act under section 767.01 for the first time in *Mapoles v. Mapoles.*[47] Citing neither *Rutland v. Biel* nor *Smith*

41. *Id.* at 563.

42. 332 So. 2d 631 (Fla. 3d Dist. Ct. App. 1976). The plaintiff brought action seeking recovery for damages suffered after he lost control of his motorcycle when the defendant's dog ran into the plaintiff's path of travel on the roadway. Perhaps one factor which distinguishes *Smith* from *Allstate* is the size of the dogs involved (a small dog in *Smith* as opposed to a Great Dane in *Allstate*). Also, in *Smith* the plaintiff saw the dog from "some distance away" and perhaps could have taken some action to prevent the mishap, while in *Allstate* the dog "dashed" in front of the car.

43. 332 So. 2d at 634.

44. *Id.* at 633-34.

45. *Id.* at 633.

46. *Id.* at 634.

47. 350 So. 2d 1137.

v. Allison, the court relied on *Allstate Insurance Co. v. Greenstein.* It labeled the actions of Cam's St. Bernard and the act of the dog which ran into the street in *Allstate* as affirmative acts for which the dog owner is liable under section 767.01.[48] The court reasoned that if the defendant was the owner of the dog, and damage was caused to a person by the dog, then the owner should be liable for the damage done.[49]

The decision in *Mapoles* is irreconcilable with *Rutland* and *Smith.* In *Rutland,* the dog's yelp startled the old woman causing her to trip over the dog and fall. The court found the dog owner not liable under section 767.01 because the dog had not committed an affirmative or aggressive act.[50] Since barking is certainly a canine characteristic, the startling yelp of a dog seems more within the contemplation of section 767.01 than the behavior of the dog in *Mapoles.* Yet the *Rutland* court held that the statute did not apply.

Thus, under the *Rutland* rule, there is no support for the proposition that the dog in *Mapoles* acted either aggressively or affirmatively. The dog owner's boyfriend placed the Saint Bernard dog onto the rear seat of the Volkswagen. Although the court concluded that the dog and shotgun became entangled, resulting in the discharge of the shotgun, precisely what caused the gun to fire was not known. It could well have been merely the dog's weight or some movement caused by the activity of putting him into the car. The record contained no evidence to the contrary. Applicability of section 767.01 under these circumstances is questionable since placing any heavy object in the backseat might have produced similar results.

The holding in *Mapoles* is also in direct conflict with the *Smith* rationale. The court in *Smith* stated that the cases authorizing the imposition of liability under section 767.01 require that the act of the dog, while possibly short of an attack, at least be a direct cause of the injury.[51] The court disagreed, however, with the notion that section 767.01 could impose liability in *every* case where the actions of the dog were a factor in the plaintiff's ultimate injury.[52] Instead, it interpreted the statute as requiring that the dog itself inflict the damage, rather than merely trigger a chain of events which would ultimately produce an injury.[53]

The *Mapoles* court's mechanical application of section 767.01 ignored those judicial limitations developed in *Rutland* and *Smith.*

48. *Id.* at 1138.
49. *Id.*
50. 277 So. 2d at 809.
51. 332 So. 2d at 633.
52. *Id.*
53. *Id.* at 633-34.

Furthermore, that court ignored the underlying intent of this statute—to protect an agrarian society.[54] Today imposing strict liability under the formula expressed in *Mapoles* could stimulate considerable litigation and confusion. There are a great many dogs in Florida and they could be involved in a host of situations which could result in liability for their owners.

Judge Smith suggested a more reasonable approach to the imposition of strict liability under section 767.01. In his dissent in *Mapoles,* he pointed out that nothing in the case indicated that the shotgun was fired as a result of the canine characteristics for which the legislature had intended to make the dog owner an insurer.[55] "I had understood," Judge Smith explained, "that strict liability has been confined to consequences which lie within the extraordinary risk whose existence calls for such special reponsibility . . . . Strict liability for dog biting, barking, chasing, jumping, vicious or rambunctious conduct, yes. For passive movement which discharges a shotgun, no."[56]

Judge Smith's statement is consistent with the limitations traditionally placed on strict liability. Although imposing strict liability on persons who create a special risk to the community may be necessary, the courts generally have held that such liability should be limited to damage directly resulting from the risk created and should not extend to every harm to which an individual's conduct may have given rise.[57]

The idea that a person should be held strictly liable for creating a special risk, even though there is no fault, has generated a great deal of debate.[58] In general, experience has shown that strict liability is a viable and reasonable alternative to the fault concept in a complex, industrial society.[59] Strict liability is particularly well suited for businesses which can widely distribute losses to customers as part of the price of their goods or services.[60] However, the notion of strict liability should be tempered when applied to private individuals since they are unable to pass on their losses.

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54. Wendland v. Akers, 356 So. 2d 368, 369 (Fla. 4th Dist. Ct. App. 1978); Smith v. Allison, 332 So. 2d at 633.

55. 350 So. 2d at 1138.

56. *Id.* at 1139.

57. *See generally* W. PROSSER, *supra* note 1, § 79, at 517; RESTATEMENT (SECOND) OF TORTS § 509, Comment i at 18 (1977).

58. *See generally* Sheldon, *Return to Anonymous: The Dying Concept of Fault,* 25 EMORY L.J. 163 (1976); Coleman, *The Morality of Strict Tort Liability,* 18 WM. & MARY L. REV. 259 (1976); Foster, *Some Comments in Favour of the Abolition of Fault Law,* 8 AKRON L. REV. 57 (1974).

59. *See* Sheldon, *supra* note 58, at 164.

60. *Id.* at 202.

Insurance offers a possible solution for these individuals, but it is not realistic to expect every dog owner to obtain insurance. Indeed, for most it would be financially impossible. Thus, they would be personally liable any time their dogs became involved in any set of circumstances, no matter how bizarre, which resulted in an injury to another person.

The fact that the injured plaintiff in *Mapoles* was an innocent bystander and a minor, and that the defendant was fortunate enough to be insured, may have influenced the court. The court probably placed considerable emphasis on the insurance factor, as it did not even explore the possible negligence of the dog owner's boyfriend, Tim Astin, in leaving a loaded shotgun in the backseat of his automobile. Instead, the court opted for imposing strict liability under section 767.01, thus guaranteeing recovery for the young plaintiff who had suffered severe, disfiguring injuries.

Although shifting the financial burden from the innocent plaintiff is attractive, the court achieved this result at the expense of distorting the applicability of section 767.01. Prior to *Mapoles,* a dog owner was considered an insurer of only affirmative or aggressive acts by the dog. *Mapoles* effectively eliminates this requirement. In fact, under *Mapoles,* the mere presence of the dog may be enough to invoke the statute.[61]

The conflicting district court decisions interpreting what constitutes an affirmative act require that either the Florida Supreme Court or the state legislature resolve whether section 767.01 should be limited to situations where the injury results from some canine characteristic, or whether the statute applies to any situation in which a dog is involved and a person is injured. Until that decision is made, the courts should view *Mapoles* as nothing more than an anomaly in the case law interpreting section 767.01.

HELIO DE LA TORRE

61. Judge Smith, dissenting in *Mapoles*, stated: "[The majority] impose[s] liability simply because in a general sense the dog's presence caused the shotgun to fire. By this draconian reading of the statute, the owner is absolutely liable although dogness played no more a part than if the trigger had been jolted by a cat or a falling sack of groceries." 350 So. 2d at 1138-39.