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Repository Citation

Crawford H. Downs, *The Effect of Discharges in Bankruptcy on Torts Judgments with Respect to Keeping of Animals*, 6 La. L. Rev. (1945)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol6/iss3/7>

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language was held unnecessarily abusive was *Tresca v. Maddox*,⁴⁸ in which defendant called the plaintiff in a newspaper article "as mild a man as ever scuttled a ship or cut a throat." The court also held that the defendant's subsequent retraction of the statement should be considered only in mitigation of damages. In another case,⁴⁹ the court allowed recovery upon a general showing of personal enmity between the parties involved. The language used, however, was extreme, charging plaintiff with being of "an ungovernable temper, feeble minded, and unfit to teach." That accusation, coupled with the factor of previous ill feeling between the two parties, was enough to justify the court's position.

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THE EFFECT OF DISCHARGES IN BANKRUPTCY ON
TORTS JUDGMENTS WITH RESPECT TO
KEEPING OF ANIMALS

Section 17(a) of the National Bankruptcy Act provides, "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, *except* such as . . . (2) are liabilities . . . for wilful and malicious injuries to person or property of another. . . ."⁵¹

Undoubtedly the purpose and intention of Congress in enacting this measure was to allow the honest debtor to clean the slate of his financial burden. But an exception was provided so that the intentional tortfeasor would be unable to escape liability through the expediency of a discharge in bankruptcy. This exception is quite applicable, and certainly appropriate, to cases involving intentional wrongs or when the defendant's conduct is grossly shocking to moral sensibilities. However, in those cases where the rule of absolute liability obtains, a person may be held in

48. 11 La. Ann. 206 (1856).

49. *Sims v. Clark*, 194 So. 123 (La. App. 1940).

* A substantial part of the research work which led to the preparation of this comment was done by Mr. Rosenthal as a research project in the Torts course at Louisiana State University. Mr. Rosenthal served as a member of the armed forces and has been missing in action since December 13, 1944.

1. 52 Stat. 851, 11 U.S.C.A. § 35 (Supp. 1944).

damages for the injury caused even though he was neither an intentional wrongdoer or a morally blameworthy individual and would be unable to obtain a discharge in bankruptcy of the judgment levied against him.

This type of absolute liability afforded by law is exemplified in cases relating to blasting operations,² maintenance of nuisances,³ and keepers of animals.⁴ These torts, however, are characterized as wilful wrongs and the question arises whether or not these wrongs so characterized should prevent a discharge in bankruptcy, disregarding the moral element suggested in the act by Congress.

In a recent case⁵ it was held that the owner of a dog, known to him to be vicious, and who had been successfully sued by a person bitten by the dog, would be liable under the judgment despite an intervening discharge in bankruptcy. The court based its decision upon the fact that the dog was kept with knowledge

2. *Exner v. Sherman Power Const. Co.*, 54 F. (2d) 510 (C.C.A. 2d, 1931); *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395 (1886); *Fitzsimons & Connell Co. v. Braun & Fitts*, 199 Ill. 390, 65 N.E. 249 (1902); *Adams & Sullivan v. Sengel*, 177 Ky. 535, 197 S.W. 974 (1917); *Gossett v. Southern Ry.*, 115 Tenn. 376, 89 S.W. 737 (1905). Recovery is allowed under the majority view for damages resulting from concussions and vibrations due to blasting irrespective of negligence of the defendant. See *Watson v. Mississippi River Power Co.*, 174 Iowa 23, 156 N.W. 188 (1916); *Longton v. Persell*, 30 Mont. 306, 76 Pac. 699 (1904); *Wendt v. Yant Const. Co.*, 125 Neb. 272, 249 N.W. 599 (1933); *Louden v. Cincinnati*, 90 Ohio St. 144, 106 N.E. 970 (1914). Contra: *Bessemer Coal, Iron & Land Co. v. Doak*, 152 Ala. 166, 44 So. 627 (1907); *Lewis v. Dunbar & Sullivan Dredging Co.*, 36 N.Y.S. (2d) 897, 178 Misc. 980 (1942); *Comanche Duke Oil Co. v. Texas Pacific Coal & Oil Co.*, 298 S.W. 554 (Tex. Civ. App. 1927).

3. *Kafka v. Bozio*, 191 Cal. 746, 218 Pac. 753 (1923); *Lafin-Rand Powder Co. v. Tearney*, 131 Ill. 322, 23 N.E. 389 (1890); *Bowman v. Humphrey*, 132 Iowa 234, 109 N.W. 714 (1906); *Healey v. Citizens' Gas & Electric Co.*, 199 Iowa 82, 201 N.W. 118 (1924); *Hannem v. Pence*, 40 Minn. 127, 41 N.W. 657 (1889); *Stuhl v. Great Northern Ry.*, 136 Minn. 158, 161 N.W. 501 (1917); *Boyle v. Neisner Bros. Inc.*, 230 Mo. App. 90, 87 S.W. (2d) 227 (1935); *Smith v. City of Brooklyn*, 160 N.Y. 357, 54 N.E. 787 (1899); *Higginbotham v. Kearsse*, 111 W. Va. 264, 161 S.E. 37 (1931).

4. *Phillips v. Garner*, 106 Miss. 828, 64 So. 735 (1914); *Anmons v. Kellogg*, 137 Miss. 551, 102 So. 562 (1925); *Emmons v. Stevane*, 77 N.J. Law 570, 73 Atl. 544 (1909); *Crowley v. Groonell*, 73 Vt. 45, 50 Atl. 546 (1901) (the nature of the dog is immaterial if the owner knows he will injure people while acting playfully or otherwise).

5. *Jaco v. Baker*, 148 P.(2d) 938 (Ore. 1944). Accord: *Yackel v. Nys*, 258 App. Div. 318, 16 N.Y.S.(2d) 545 (1939) and *Beam v. Karaim*, 47 N.Y.S.(2d) 193 (1944). In each of these cases the owner harbored a dog known to be of a vicious, mischievous and dangerous nature. The dogs were allowed to roam at large. The courts did not investigate whether the owners were moral wrong-doers, but decided them on the issue of knowledge of the dangerous characteristics of the animals. This was wilful and malicious within the intentment of the bankruptcy act. See also *Humphreys v. Heller*, 157 Misc. 568, 283 N.Y. Supp. 915, 916 (1935), in which the court said: "Negligence in the ordinary sense is not the gravamen of the action . . .; the action is predicated upon a willful and intentional act, namely the keeping of a ferocious animal with knowledge of its viciousness."

of its propensities, which it termed a "wilful and malicious" act. No inquiry into the actual blameworthiness of defendant was instigated.

Imposition of strict liability upon those who were keepers of animals originated in the early English law. This rule, as it applied to owners and keepers⁶ of dogs, was stated in the case of *Smith v. Pelah*,⁷ decided in 1760. Fault was not predicated upon the basis of negligence, but ownership coupled with knowledge of the animal's viciousness. These two factors precluded the defendant's plea of reasonable care, contributory negligence of the victim or any other convenient defense posed by the wrongdoer. This rule has been extended into modern times, and as the usefulness of dogs becomes lessened in urban living there is a tendency on the part of some states to attach liability by statute based solely on possession.⁸ Therefore, with this strict rule firmly embedded in the law of our land, the necessity of interpreting and applying the varying degrees of negligence has not confronted the bankruptcy courts in the dog cases. The

6. Liability for injuries by dangerous animals is predicated upon possession rather than ownership. What constitutes ownership is determined by the factual situation involving possession as in any other chattel. The possessor must harbor the animal by assuming custody, management and control and the mere presence of the animal on the premises is not sufficient proof of ownership. The fact that the owner fails to immediately eject the animal from his premises does not necessarily indicate that he is responsible for the depredations caused by it. *Hays v. Miller*, 150 Ala. 621, 43 So. 818 (1907); *Trumble v. Happy*, 114 Iowa 624, 87 N.W. 678 (1901) (dog being found on premises infrequently does not constitute possession); *Alexander v. Crosby*, 143 Iowa 50, 119 N.W. 717 (1909) (harborer of a dog not known to be vicious not liable, as responsibility shifted to owner); *Whittemore v. Thomas*, 153 Mass. 347, 26 N.E. 875 (1891) (dog used occasionally to watch hogs, defendant not keeper); *Boylan v. Everett*, 172 Mass. 453, 52 N.E. 541 (1899) (occasional feeding and caressing of a dog does not constitute possession as a matter of law); *Redmond v. National Horse Show Ass'n*, 78 Misc. Rep. 383, 138 N.Y. Supp. 364 (1912). However, if one permits another to harbor an animal on his premises which he knows is dangerous, especially if he tenders food or shelter in any manner or exercises some degree of control or if he is designated head of the family and grants permission to a member of the family group to bring in an animal, he may be regarded as its keeper. *White v. Sens*, 13 La. App. 343, 127 So. 413 (1930); *Maillet v. Mininno*, 266 Mass. 86, 165 N.E. 15 (1929) (dog allowed to stay in the house at will and was given food, defendant held to be keeper); *Manger v. Shipman*, 30 Neb. 352, 46 N.W. 527 (1890) (wolf left by younger brother was kept tied near store and fed scraps—older brother held to be keeper); *Quilty v. Battie*, 135 N.Y. 201, 32 N.E. 47 (1892) (wife owned the premises, husband the dog, but she was held to be keeper by her acquiescence); *Harris v. Williams*, 160 Okla. 103, 15 P.(2d) 580 (1932).

The landlord, ordinarily not liable for the negligent acts of his tenants, is held accountable for injuries caused by a vicious dog if the lessor retains control over entire premises. See *In re Lorde*, 144 Fed. 320 (E.D.N.Y. 1906).

7. *Smith v. Pelah*, 2 Str. 1265, 93 Eng. Rep. 1171 (1760).

8. Cal. Gen. Laws (1931) Act 384a, § 1; Fla. Comp. Gen. Laws Ann. (Skillman, 1927) § 7044; La. Act 111 of 1886, § 5 [Dart's Stats. (1939) § 381]; Utah Rev. Stat. Ann. (1933) § 24-D-1.

bankrupt's act under these circumstances is characterized, whether rightly or wrongly, as wilful and malicious.

In many cases, such as those involving violation of automobile guest statutes, conversion and others, the courts attempt to individualize the situations and distinguish the conduct of the person involved by declaring him to be simply negligent, grossly negligent or finally guilty of an intentional wrong constituting a wilful and malicious act. This procedure seems to accord with the intent of the lawmakers as an interpretation of the section of the bankruptcy act under discussion. How are we then to justify the arbitrary position assumed by the courts, as in the principal case, where no effort is made to investigate and determine the moral character of the bankrupt's conduct?

Any claim that the courts have perfectly interpreted and applied the term "wilful and malicious injury" to all of the varying situations relating to automobile cases in the many jurisdictions would be wholly unsupported by the decisions.⁹ Acts by automobile drivers which have been held under guest statutes to be only gross negligence, or less, have been regarded by the bankruptcy courts as wilful and malicious conduct, and judgments based on such conduct are frequently preserved in the face of an intervening discharge.¹⁰

9. In *re Longdo*, 45 F.(2d) 246 (N.D. N.Y. 1930), where defendant bankrupt drove his car at an excessive rate of speed around a line of vehicles waiting for the traffic signal to change and crossed into a main intersection, injuring pedestrian. This court granted the discharge of his liability; even though his act was reckless and wanton, it was not a wilful wrong. In *Greene v. Lane*, 87 F.(2d) 951 (C.C.A. 7th, 1937), the Illinois court refused to discharge a judgment against the bankrupt who had wantonly driven his car through a stop signal and struck appellee. See also *Bordonano v. Senk*, 109 Conn. 428, 147 Atl. 136 (1929); *Rogers v. Doody*, 119 Conn. 532, 178 Atl. 51 (1935); In *re Dutkiewicz*, 27 F.(2d) 334 (W.D.N.Y. 1928); In *re Tillery*, 16 F. Supp. 877 (1936); *Saueressig v. Jung*, 246 Wis. 82, 16 N.W.(2d) 417 (1944), where the driver was intoxicated and operating the vehicle in a reckless and wanton manner yet the judgment was discharged. Contra: In *re Wilson*, 269 Fed. 845 (D. Md. 1920).

An even more confusing position is taken by the Vermont court which refuses to discharge a liability incurred for damages resulting from an intentional violation of a statute. *Ex Parte Cote*, 93 Vt. 10, 106 Atl. 519 (1918). This decision has been held to be incompatible with the interpretation given the term "wilful and malicious injury" in most jurisdictions because of its liberality. It is, however, analogous to the position taken by the cases in the dog situations in that it is an arbitrary rule relating to the defendant's conduct in violating a statute.

10. *Romer v. Kaplan*, 315 Mass. 736, 54 N.E.(2d) 673 (1944). Defendant drove carelessly over a rough road despite the pleas of a passenger who had recently been operated on. Held, not gross negligence under the Massachusetts rule which implies intent as a necessary element to liability. But see *Kennard v. Palmer*, 143 Ohio St. 1, 53 N.E.(2d) 652 (1943). The driver was guilty of wilful and wanton negligence when he drove his car from one side of the road to the other at excessive rate of speed not heeding pleas from a guest. Injury resulted. See also *De Simone v. Pedonti*, 308 Mass. 373, 32

The cases in which courts have found judgments for the conversion of property stand in interesting contrast with the animal cases. The tort of conversion, like that of harboring a vicious animal, usually enjoys the legal reputation of an "intentional" wrong. Also in the conversion cases, like those which involve the keeping of dangerous animals, the defendant's conduct has a large variety of moral complexions. Some conversions are highly reprehensible in nature, while others are entirely blameless from an ethical point of view and bear the stigma of "misconduct" only through sheer legal implication. In bankruptcy proceedings the courts have mediated among the various types of conversions and have sought to determine each case in the light of the moral factors involved.¹¹

An assault is commonly regarded as the prototype of anti-social, and hence "wilful and malicious" misconduct. Even here, however, there are strong indications that the courts may refuse to preserve arbitrarily judgments based on assaults against the bankruptcy discharge.¹² This position seems to be defensible. One who has been found to have exceeded the legitimate bounds of self defense and has struck the "unnecessary blow" may still not

N.E.(2d) 612 (1941); *Driscoll v. Pagano*, 313 Mass. 464, 48 N.E.(2d) 11 (1943); *Corrigan v. Clark*, 36 A.(2d) 631 (1944).

11. *Russell v. Peters*, 219 Iowa 708, 259 N.W. 197 (1935). Tenant disposed of all his crops, including the one-half share due lessor. Judgment excepted from discharge. With this case compare *Continental Livestock Co. v. King*, 283 Mich. 495, 278 N.W. 661 (1938) and *Damato v. Ambrose*, 122 N.J. Law 539, 6 A.(2d) 189 (1939). In these cases the bankrupt converted property or money but the court failed to find the specific intent element necessary to constitute a wilful injury. See *Baker v. Bryant Fertilizer Co.*, 271 Fed. 473 (C.C.A. 4th, 1921); *In re Frazzetta*, 1 F. Supp. 122 (W.D. N.Y. 1932); *In re Nordlight*, 3 F. Supp. 486 (S.D. N.Y. 1933); *In re Binskey*, 6 F. Supp. 789 (S.D. N.Y. 1934); *In re La Porte*, 54 F. Supp. 911 (W.D. N.Y. 1943); *Kavanaugh v. McIntyre*, 210 N.Y. 175, 104 N.E. 135 (1914); *Woelfe v. Giles*, 184 S.W.(2d) 177 (Tenn. 1945); *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934).

12. *In Thibodeau v. Martin*, 140 Me. 179, 35 A.(2d) 653 (1944); *Gorczyca v. Stanock*, 308 Ill. App. 235, 31 N.E.(2d) 403 (1941); *Thompson v. Judy*, 169 Fed. 553 (C.C.A. 6th, 1909); *In re Conroy*, 237 Fed. 817 (C.C.A. 2d, 1916); *In re Wernecke*, 1 F. Supp. 127 (W.D. N.Y. 1932); *In re Pacer*, 5 F. Supp. 439 (W.D. N.Y. 1933), the bankrupt assaulted the judgment creditor and his act was held to be wilful and malicious. But see *In re De Lauro*, 1 F. Supp. 678 (D.C. Conn. 1932); in which it was held that under the Connecticut law, a general judgment for assault does not necessarily import wilfulness even though alleged in the complaint. *Contra: Peters v. United States ex rel. Kelley*, 177 Fed. 885, 888 (C.C.A. 7th, 1910). The court said: "By the law of Illinois (or generally elsewhere) a judgment for damages under a count for trespass *vi et armis* cannot lawfully be rendered except upon proof of a wilful and malicious injury." It was strongly urged upon the court that in pleas of *castigavit*, *son assault demense* and the replication *de injuria*, a recovery could be had for an excessive use of force employed beyond reasonable chastisement and the judgment would not be conclusive upon the court that the offender was guilty of a wilful and malicious assault.

be regarded as guilty of conduct so anti-social in nature as to preclude his taking final refuge behind a discharge in bankruptcy.

Therefore, it might be suggested that since the courts are willing to individualize the various situations involving moral conduct of the bankrupt, it would be appropriate to proceed in this manner in the animal cases. The defendant, as in the principal case, would be discharged in bankruptcy under this procedure if his act in keeping the dog was not for the purpose of committing an intentional wrong or in reckless disregard of the safety of others. The arbitrary rule of fixing liability based on defendant's knowledge of a single prior attack by the animal would be dispensed with.

CRAWFORD H. DOWNS

ACTION BY THE FEDERAL TRADE COMMISSION
AGAINST UNTRUTHFUL ADVERTISING
SINCE 1940

As a part of a symposium in the *George Washington Law Review* under the title "Unfair Competition and the Federal Trade Commission,"¹ Professor Milton Handler discussed twenty-seven methods of competition which have been condemned as violative of Section 5 of the Federal Trade Commission Act. The introduction traces the reaction of the courts toward the work of the Commission from its inception in 1914 to the time of the publication in 1940. Under various subsections, a resumé of the work of the Federal Trade Commission in preventing untruthful and misleading advertising is discussed and an array of the cases set forth. As a supplement to this latter phase of the above work, this study seeks to show subsequent developments in the principles of what constitutes untruthful and misleading advertising as applied by the Commission, and brings the cases up to date, discussing in somewhat greater detail the application of these principles to the factual situations involved.

Something of a requisite maturity seems to have been attained in the work of the Federal Trade Commission. Progressing from its earliest decisions in which only the grossest type of misstatements were forbidden as untruthful (which decisions only too often were then set aside by the courts), the Commission is

1. Handler, *Unfair Competition and the Federal Trade Commission* (1940) 29 *Geo. Wash. L. Rev.* 399.