

# Who let the dogs out? Beware of liability claims

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The prevalence of crime in South Africa prompts many home owners to have vicious dogs in the hope of safeguarding their property and deterring burglars. However, dog owners and their insurers should be wary of attracting liability under the *actio de pauperie* (the actio) for harm caused by domesticated animals. Under this actio, a victim of a dog bite can claim damages from a dog owner without having to prove fault.



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In the recent Eastern Cape High Court matter of *Cloete v Van Meyer* (case no. 732/2017 - "the Cloete-case"), the plaintiff instituted a claim for damages against a dog owner under the *actio de pauperie*. The plaintiff had been attacked when three dogs escaped from their owner's property, after a third-party intruder had opened the locked gate. In the circumstances, the dog owner denied liability. However, the plaintiff did not do anything to provoke the dogs and he was lawfully present in the public road where the attack took place. As a result of the attack, the plaintiff lost his left arm and instituted a claim for R2,4 million.

The court found in favour of the plaintiff on the separated issue of liability in the judgment of 27 November 2018.

Having regard to the facts of this case, the court had to revisit the history of the *actio de pauperie* with specific reference to one of the recognised defences available to dog owners. Other defences to claims under the *actio de pauperie* fall outside the scope of this alert.

## The recognised defence

The defence was confirmed in the seminal judgment of *Lever v Purdy* 1993 (3) SA 17 (AD), where a dog owner was absolved of liability on the basis that control of the animal had been delegated to a third party who failed to adopt reasonable precautionary measures to prevent the animal from injuring the victim when he could and should have done so. In order to succeed with the recognised defence, a dog owner would have to prove that he delegated control of the animal and that the controller was negligent in exercising control over the dog. Should this defence succeed, the victim may have a claim in delict against the controller under the *actio legis aquiliae*.

## Extension of the defence

In the Cloete-case, it was argued on behalf of the dog owner that the recognised defence should be extended to include negligence of an intruder, who did not exercise control over the dogs, but merely left the gate open. This argument finds support in the *dictum of Le Roux v Fick (1879) 9 Buch 29* where it was said that, “... *an actio de pauperie lay in all cases of damage caused by animals when the damage was brought about through the fault of the party using the animal or of some third party*” (our emphasis). The possibility of an extension of the recognised defence was also mentioned obiter in the Lever-case.

Although Judge Lowe in the Cloete-case acknowledges that the proposed extension finds some, though tenuous, support in *Le Roux v Fick*, the court ultimately held that an extension of the pauperian defence, to include a defence founded on a third party’s negligence who was *not in control of the dogs* (our emphasis), is not justified by logic nor by the existing rules in respect of pauperian liability.

## Discussion

The competing interests of dog owners seeking to protect their property, on the one hand; and the interests of dog bite victims in having a remedy to claim damages without having to prove fault, on the other hand; must be carefully considered to determine the necessity of an extension of the recognised defence. The Cloete-case made reference to the case of *Brahman and Another v Dippenaar 2002 (2) SA 477 (SCA)*, where it is specifically stated that it is the court’s duty to expand or curtail the operation of the actio where circumstances warrant same. It follows that it is open to a court to extend the aforesaid recognised defence, should it be deemed necessary, having regard to public policy considerations.

An application for leave to appeal was heard on 21 February 2019 and leave to appeal was denied. A petition to the SCA for leave to appeal may be in the interests of legal certainty for both dog owners and insurers.

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