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Corresponding author: jovana.tomic@fpsp.edu.rs

LIABILITY FOR DAMAGE DONE BY ANIMALS IN PUBLIC ROADS

Jovana Tomić

Faculty of Business Studies and Law,
Union – Nikola Tesla University Belgrade, Republic of Serbia,
e-mail: jovana.tomic@fpsp.edu.rs

Abstract: *Frequent traffic accidents in public roads in the Republic of Serbia, caused by an animal (most often a dog) entering a public road, raise the question of liability for damage done, which is material in most cases, but there have been quite a few examples of injured parties claiming both non-material and material damage. In order to determine liability for damage done, it is first necessary to establish the status of animals in positive law, i.e. whether they are considered to be dangerous objects and whether in the case of damage done in a public road as a result of an animal getting into the road it is possible to apply the principle of strict liability for damage done by dangerous objects and dangerous activities. On the other hand, it needs to be determined if the issue of liability for damage done varies depending on the type of animal having done damage and if one should resort to the criterion of differentiating between dangerous and non-dangerous animals or if it would be better to differentiate between the actions of wild and domestic animals. In addition, it is required to precisely define the measures for protecting traffic in a public road from game and other animals as stipulated in national regulations and how the entity liable for damage done varies depending on the public road type, which is often point at issue in practice. The author aims to answer the question of application of rules of liability for damage done by animals in public roads because of frequent dilemmas both in theory and in practice about who should be liable for damage done in these situations, which, in turn, makes injured parties unclear on who to bring their claims for compensation of damage against, i.e. which party ought to have capacity to be sued in compliance with law of the Republic of Serbia if action is brought before a competent court. Finally, the author attempts to answer the question in which cases, in compliance with positive law, the party liable may be exempted from liability for damage done in a public road with an involvement of an animal, as well as which circumstances suggest shared, i.e. joint and several liability in the situations specified.*

Key words: *strict liability, damage done by animals, public road*

INTRODUCTION

There are two main systems of liability in civil law: 1) subjective element of liability, i.e. liability for fault and 2) strict liability, involving liability for dangerous objects and dangerous activities. The principle of strict liability applies to damage done by animals both in theory and in case law, but earlier research suggests that both principles were applied simultaneously. [1]

The Law of Contract and Tort (Official Journal of the Socialist Federal Republic of Yugoslavia, Nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, Official Journal of the Federal Republic of Yugoslavia, No. 31/93, Official Journal of Serbia and Montenegro, No. 1/2003 – Constitutional Charter and Official Gazette of the Republic of Serbia, No. 18/2020) – hereinafter referred to as: the LCT does not govern the matter. In case law, animals are treated as dangerous objects [2], the keeper, i.e. the owner of which is held liable for their behaviour under the principle of strict liability. That is why Articles 173-177 of the LCT apply if damage is done by an animal. The animal keeper is not necessarily the animal owner. The animal owner may have their animal kept by another person (e.g. a veterinarian, friend, relative, etc.), but the animal may also come into the possession of the so-called unauthorised holder against the owner's will. In these cases it is actual and not legal control of the animal that is relevant for liability for damage, with certain exceptions.

[1] Andrejević, M. (1964). Osnov odgovornosti za štetu koju pričini životinja, p. 71, https://heinonline.org/HOL/LandingPage?handle=hein.journals/copnis3&div=9&id=&page= .

[2] "The general notion of dangerous object refers to a movable or an immovable object which, in terms of its intended use, characteristics, position, place and method, poses an increased danger in use or otherwise to damage to the environment, which is why it ought to be controlled with greater care." From the Decision of the Supreme Court of the Republic of Croatia, Rev. 190/07 dated 27 March 2007 and taken over from: Zindović, I. (2020). Pravno određenje imaoca opasne stvari u kontekstu odgovornosti za štetu, *Bilten Vrhovnog kasacionog suda*, urednik Branislava Apostolović, br. 3, Intermex, Beograd, p. 75.

The LCT uses the term "object holder"[3], which, according to a position presented in theory, comprises the object owner and the object keeper, as well as its user, expanding the circle of persons liable for damage and making the position of the injured party more advantageous.[4] The animal "holder" is liable under the strict liability principle when the animal does damage because "they have created and maintained a greater risk of damage to the environment by keeping the animal".[5] Under Article 175 of the LCT, if the object has been wrongfully seized from the holder[6], the party having seized the object will be liable for damage done by it if the holder is not responsible for that. Case law also recognises the position that "if the dangerous object has been wrongfully seized from the holder, they will not be liable for damage done by it but the party having seized the dangerous object if the holder is not responsible for that."[7] "The unauthorised keeper of the dangerous object is liable for damage done by it for as long as they have the object within their control. In addition to them, the holder of the object will also be liable if it is proven that they made it possible for the unauthorised keeper to get hold of the dangerous object through their fault. The holder is considered to be at fault if they have not taken all the required measures to retain the possession of the object."[8] The holder may be exempted from liability for damage done if they have had their animal used or kept by a third party,[9] unless damage is the result of a

[3] See Article 174 of the LCT.

[4] Zindović, I. (2020), pp. 77 and 80.

[5] Karanikić Mirić, M. (2019). *Objektivna odgovornost za štetu*, Službeni glasnik, Beograd, p. 175.

[6] "In theory and case law, animals are still automatically treated as objects, subject to major restrictions on the right of ownership under the provisions of the Law on Animal Welfare, which provides for an entire range of duties for owners and other people as regards protection of animals." Stojanović, N. (2018). Odgovornost za štetu koju životinja prouzrokuje prema Prednacrtu Građanskog zakonika Republike Srbije, *Zbornik radova Pravnog fakulteta u Nišu*, br. 81, p. 328.

[7] From the Judgment of the Supreme Court of Cassation Rev. 173/06 dated 1 February 2006, https://www.vk.sud.rs/sr-lat/rev-17306.

[8] *Ibidem*.

[9] See Article 176 (1) of the LCT.

hidden flaw of the animal of which the holder was aware but failed to let the third party know. [10]

Similarly, under the provisions of the Draft Civil Code of the Republic of Serbia (hereinafter referred to as: the Draft Serbian CC), in the event that the owner has the animal kept or looked after by persons or institutions professionally involved in keeping and looking after animals, the person or the institution shall be liable for damage done by the animal. On the other hand, if the owner were to have another person use the animal, or keep and look after it, they have to warn the person of the animal's flaws if they do not want to be held liable for damage done by the animal. [11]

Consequently, the position of domestic courts on the existence of strict liability for damage done by a dangerous object, provided that the damage has been done by an animal, has been accepted when the Draft Serbian CC was drawn up, meaning that liability for damage done by a domestic animal is covered in the section governing liability for dangerous objects or dangerous activities. [12] The Draft Serbian CC does not govern the matter of liability for damage done by wild animals, leaving it to be governed by special regulations. [13]

Interestingly, there is a concept quite to the contrary in legal science where only wild animals are considered to be dangerous objects, while domestic animals are considered to be ordinary objects, implying that damage done by them should be subject to liability for fault, based on the principle of presumption of fault. [14] From the perspective of comparative case law, a similar position can be found in Croatian case law, where wild animals are considered to be dangerous objects and

[10] See Article 176 (2) of the LCT.

[11] See Article 315 of the Draft Serbian CC.

[12] See Articles 314-316 of the Draft Serbian CC.

[13] See Article 317 of the Draft Serbian CC.

[14] See Stanišić, S. (2014). Pravna priroda građanske odgovornosti za štetu od životinja, *Godišnjak Fakulteta pravnih nauka*, Banja Luka, br. 4, p. 88

domestic ones are thought to be dangerous only if they display some dangerous characteristics.[15]

1. MEASURES FOR THE PROTECTION OF TRAFFIC IN A PUBLIC ROAD FROM GAME AND OTHER ANIMALS

The Law on Roads (Official Gazette of the Republic of Serbia, Nos. 41/2018 and 95/2018 – other law) – hereinafter referred to as: the LR differentiates between public and unclassified roads.[16] Given the importance of traffic connections, public roads are divided into (Class 1 and 2) state roads, municipal roads and streets.[17] The operation of public roads in the Republic of Serbia, being an activity of common interest, has been conferred on a public enterprise which, in its capacity as the public road operator, performs, either independently or by entrusting another legal person with certain duties within its purview, the duties comprised in the activity specified, as itemised in Article 9 of the LR.

One of the public road operator's obligations with regard to the protection of traffic in a public road from game and other animals is to put up a safety wire fence, i.e. an engineering structure alongside a highway or an expressway, and in other roads as required.[18] This begs the question whether the public road operator or the legal person entrusted with duties within its purview should be liable for damage done in a highway as result of an animal entering the road if the safety wire fence was properly put up and free of defects at the time of the traffic accident. There is no uniform position on this in case law in the Republic of Serbia.

[15] Bukovac Puvača, M. (2009). „Sive zone" izvanugovorne odgovornosti – područja moguće primjene pravila o odgovornosti na temelju krivnje i objektivne odgovornosti za štetu, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 30, br. 1, p. 232.

[16] See Articles 3-8 of the LR.

[17] See Article 5 of the LR.

[18] See Article 92 of the Regulations on Traffic Signalling (Official Gazette of the Republic of Serbia, Nos. 85/2017 and 14/2021).

On the one hand, courts apply general rules of liability for dangerous objects for damage done in a public road. Accordingly, in the situation specified, the legal person "operating public roads is liable for damage inflicted on a third party in their capacity as a public road user, due to its failure to timely perform the duties of organising and controlling certain works as part of regular road maintenance" and "the act of entrusting a third party – contractor with road maintenance and protection duties shall not exempt it from liability for the damage".[19] According to the same judicial decision, the legal person operating state roads may potentially make a claim for recourse against the contractor with which it has entered into a contract for regular road maintenance and protection on the grounds of unjustified failure to comply with contractual obligations. On the other hand, in judicial decisions, the local self-government in whose territory is the section of the highway which a stray dog entered is quite often held liable for damage in a public road as a result of contact between a vehicle and a stray dog, in full compliance with the Law on Public Services and Utilities (Official Gazette of the Republic of Serbia, Nos. 88/2011, 104/2016 and 95/2018) – hereinafter referred to as the LPSU.[20] This kind of a decision is rendered especially if it is not proven during the proceedings that the safety wire fence in the highway was damaged or removed.

Finally, it is also possible to raise the question of liability of the operator of a public road in a situation when damage is done as a result of contact between a vehicle and an animal on a road that is not classified as a highway, meaning that there is no obligation to put up a safety wire fence. Since in that case the public road operator could not have breached the obligation of public road maintenance with regard to protection against game and other animals entering the public road, it should not be liable for the damage done by animals in roads that are not classified as Class 1 roads.

Traffic accidents in a public road most frequently take place when there is contact between a vehicle and a dog (of an unknown owner, as a rule), but quite

[19] Decision of the Court of Appeal in Belgrade, Gž 6152/2011 dated 5 July 2012, Paragraf.lex.
[20] See Article 3 (1) (14) of the LPSU.

often also as a result of wild boars, foxes and other wild animals straying into the public road (usually at night).

In theory, difference is made between domestic animals and dangerous animals.[21] In view of the fact that a domestic animal may also be dangerous and that a wild animal may be harmless to people in a state of rest (e.g. a doe), this paper will disregard the division. Further analysis of liability for damage done by animals will be based solely on the division of damage done by domestic animals, on the one hand, and wild animals, on the other hand.

2. LIABILITY FOR DAMAGE DONE BY DOMESTIC ANIMALS

In theory, there is a position that the owner is liable for damage done by domestic animals according to the rules of liability for fault.[22] The keeper of an animal "living under the control of people" has historically been regarded liable for damage done by it under the principle of presumption of fault.[23] Later on, this position was abandoned in case law and the principle of strict liability for damage done by dangerous objects started being applied to damage done by animals with reference being made to Articles 173 and 174 of the LCT. Even though damage in a public road may be done by a domestic animal of a known owner, it is the animals of unknown owners that most frequently cause traffic accidents involving a vehicle and a domestic animal (e.g. a dog).

Under Article 3 (1) (14) of the LPSU, the local self-government shall arrange for an animal control department in its territory to catch, transport, look after and place abandoned and lost animals in an animal shelter. Given this provision of the LPSU, the local self-government in whose territory is the section of the road where the abandoned animal entered the road and did damage shall be held liable for damage done by the abandoned animal in a public road. It is also in compliance with the Veterinary Law (Official Gazette of the Republic of Serbia,

[21] Stojanović, N. (2018), p. 327

[22] Salma, J. (2005). *Obligaciono pravo*, Pravni fakultet u Novom Sadu, Novi Sad, p. 592.

[23] Karanikić Mirić, M. (2019), p. 184.

Nos. 91/2005, 30/2010, 93/2012 i 17/2019 – other law) – hereinafter referred to as: the VL that the local self-government shall arrange for an animal control department in its territory to catch and place abandoned animals in animal shelters,[24] which is an indication of joint and several liability of the local self-government and the public utilities company in charge of animal control.

German law does not consider escaped animals as domestic.[25] Further, liability for damage done by a domestic animal in German law is established depending on whether the domestic animal is kept to perform an economic activity or as a source of income for the holder of the animal.[26] Under Article 1320, the Austrian Civil Code also provides for liability for damage done by animals.[27] Under this provision, the animal holder is liable for damage done by the animal unless they can prove that they have ensured proper keeping and supervision of the animal.

Under the domestic law, vaccinated dogs must be permanently tagged in compliance with a special regulation,[28] i.e. Regulations on the Method of Tagging and Registration of Cats and Dogs (Official Gazette of the Republic of Serbia, No. 23/12). If the pet owner duly reports it missing it to a competent department[29] and there is a traffic accident on a public road caused by the missing animal entering the road, the owner will not be held liable for the damage. In that case, liability lies with the local self-government, which is under an obligation to ensure that abandoned and lost animals are collected, transported and looked after and to provide them with help, care and accommodation in a shelter under Article 66 (2) of the Law on Animal Welfare. Otherwise, if the animal has not been reported

[24] See Article 46 (1) (1) of the VL.

[25] Salma, J. (2005), p. 593, f. 2013.

[26] See Article 833 of the German Civil Code (German Civil Code BGB (gesetze-im-internet.de).

[27] Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch), https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622

[28] Article 56 (2) of the VL.

29 Within three days under Article 69 (1) of the Law on Animal Welfare (Official Gazette of the Republic of Serbia, No. 41/2009) – hereinafter: the LAW.

missing and it is properly tagged in compliance with regulations, the animal owner will be liable for damage done.

Moreover, it is possible to raise the question of liability in a situation when damage is done by an animal pulling a wagon. There is an opinion in legal science that the animal owner should be held liable in that case. [30]

3. LIABILITY FOR DAMAGE DONE BY WILD ANIMALS

Damage may be done to the game itself, but game may do damage, as well. Wild animals are considered dangerous objects and the rules of strict liability apply. This applies even when an animal does not pose a danger to people. As an illustration, a doe is not dangerous in a state of rest, but when it runs into a public road, it has a sudden, unpredictable and uncontrollable effect on road users, which is why a moving doe qualifies as a dangerous object. [31] Hairy game (wild boar, doe, hare, etc.) most frequently run into vehicles on public roads, while game birds or cats rarely do it. [32]

The fact whether wild animals are specially protected affects the matter of liability. Under the Law on Game and Hunting (Official Gazette of the Republic of Serbia, Nos. 18/2010 and 95/2018 – other law) – hereinafter referred to as: the LGH, game may be protected permanently or during closed season [33], depending if there is a permanent ban on hunting or just a ban during a certain period.

According to case law, damage done by game protected during closed season is subject to the rules of strict liability, as provided by Articles 173 and 174 of the LCT and one may be exempted from this liability under the conditions laid

[30] Stanišić, S. (2014), p. 92.

[31] From the Judgment of the Supreme Court of Serbia, Rev. 3393/92 date 26 November 1992, Ingpro. Taken from: Karanikić Mirić, M. (2019), p. 177.

[32] Šporčić, I. (2014). Odgovornost za štetu nastalu na javnoj cesti zbog naleta na divljač, https://hrcak.srce.hr/file/187586.

[33] See Article 20 (1) of the LGH.

down in Article 177 of the LCT.[34] Game protected during closed season may do damage in or outside a hunting reserve. If damage is done in a hunting reserve by game protected during closed season, it must be compensated by the hunting reserve user.[35] On the other hand, damage done by permanently protected game must be compensated by the state, i.e. the ministry in charge of environmental protection.[36] If damage is done outside a hunting reserve by game protected during closed season, it must be compensated by the competent ministry, i.e. provincial authority in the territory of an autonomous province,[37] if the owner or the user of the area outside the hunting reserve has taken statutory measures for the prevention of damage.[38]

If a wild animal is not specially protected, the liability lies with the state or the local self-government managing assets in common use, according to the rules of strict liability.[39]

Under the LGH, "the user of a hunting reserve, the owner and user of land, water and forests where the hunting reserve is situated, as well as the owner and user of areas outside the hunting reserve where there is game shall take all the required measures to prevent damage that may be done by game to people or property".[40] The Regulations on the Measures for Preventing Damage by and to Game and the Method for Assessing the Damages (Official Gazette of the Republic of Serbia, No. 2/2012) stipulate that in all the hunting reserves used by the Public

[34] Judgment of the Supreme Court of Cassation, Rev. 2039/2016 dated 28 December 2017, https://www.vk.sud.rs/sr-lat/rev-20392016-obligaciono-pravo-%C5%A1teta-od-divlja%C4%8Di-podeljena-odgovornost.

[35] Article 88 (2) of the LGH.

[36] Article 88 (3) of the LGH.

[37] In theory, this kind of a statutory solution is thought to be wrong and the explanation is that the legal person and not an authority of the legal person should be liable for damage. More specifically, "the state or the autonomous province and not ministries or provincial authorities shall be liable for damage done by protected game". See Karanikić Mirić, M. (2019), p. 186.

[38] Article 88 (6) of the LGH.

[39] Salma, J. (2005), p. 593.

[40] Article 87 of the LGH.

Forest Management Enterprise 'Srbijašume' the Department of Hunting, i.e. the Department of Hunting and Fishing "shall make requests with the road operator to put up speed limit traffic signs and the 'game on the road' sign in all public roads where damage may be done to game in a hunting reserve, in areas outside the hunting reserve and in areas not used for hunting in order to prevent damage done to game by vehicles".[41] This certainly refers to public roads where regulations do not provide for a safety wire fence to be put up to protect traffic on the road from game and other animals. If damage is done by animals entering a public road where there is an obligation to put up a safety wire fence, the public road operator shall be liable for damage done to the public road users as it is "under an obligation to carry out all the work involved in regular maintenance of a highway to prevent damage done by vehicles hitting animals" and if the public road operator believes it is not at fault for damage done, "the burden of proving the fact that it has taken all the measures to prevent the movement of animals on the road and the protected highway area" lies with it.[42] To the contrary, if damage is done on a road where the public road operator is not under an obligation to put up a safety wire fence, the hunting reserve user and the public road operator will be jointly and severally liable if the public road is not properly marked by a speed limit traffic sign and the 'game on the road' sign. However, if the public road is properly marked, the driver of a motor vehicle may be solely liable for damage done to the vehicle if they fail to adjust their driving to road conditions, which may be observed in case law, too.[43]

[41] Article 3 (1) (12) of the Regulations on the Measures for Preventing Damage by and to Game and the Method for Assessing the Damages.

[42] Judgment of the Supreme Court of Cassation, Rev. 4860/2020 dated 18 February 2021, https://www.vk.sud.rs/sr-lat/rev-48602020-31281.

[43] "It was established during the proceedings that fault for damage lay with the claimant alone, who, within the meaning of Article 45 of the Law on Road Traffic Safety, failed to adjust the speed of the vehicle to the road conditions and did not pay attention to the existing traffic sign "game on the road for 9 km", which is why there was contact between the doe and the vehicle and the resulting damage." From the Decision of the Supreme Court of Serbia, Rev-163/92 dated 26 February 1992. PSP 1/992. Taken from Počuča M. i Tepavac, R. (2012). Šteta koju prouzrokuje divljač i njena naknada, http://www.cepib.org.rs/wp-content/uploads/2012/08/36.pdf, p. 157.

4. EXEMPTION FROM LIABILITY FOR DAMAGE DONE BY ANIMALS

Under Article 177 (1)(2) of the LCT, the holder shall be exempted from liability if they prove that damage results from a cause outside the object, the effect of which could not have been predicted, avoided or eliminated, and also if they prove that damage was done solely through an action of the injured or third party which they themselves could not have predicted and the consequences of which they could not have avoided or eliminated.[44] It is force majeure and in certain cases it can include characteristics of the case.[45] If the injured party has contributed to damage in part, the LCT provides for shared liability of the holder and the injured party.[46] If a third party has contributed to damage in part, the LCT provides for joint and several liability of the injured party and the object holder.[47]

In addition to public road operators, whose liability for regular public road maintenance arises from the law, companies having entered into a contract for regular public road maintenance with the public road operator are often considered jointly and severally liable in practice. These companies should only be liable for damage resulting from failure to perform or from inadequate performance of the contract, which is not often the case in practice.

The question is who should be liable for damage when it is presumed to be done by animals and there is no physical evidence to substantiate it. As a rule, injured parties involved in a traffic accident in a public road due to contact with an animal stop their vehicles and call traffic police to conduct a scene investigation. Police officers regularly conduct a scene investigation when called and inspect the section of the road where the accident happened as specified by the injured party. Then they write in a formal note or report if they have noticed any damage to the

[44] The same under Article 309 (1)(2) of the Draft Serbian CC.

[45] More information in: Jovanović, N. (2020). Opšti osnov ugovorne odgovornosti u srpskom pravu, *Pravo i privreda*, br. 1, p. 44-45.

[46] See Article 177 (3) of the LCT.

[47] See Article 177 (4) of the LCT.

Paragraphs 3 and 4 of Article 177 of the LCT were fully incorporated in the Draft Serbian CC. See Article 309 (3)(4) of the Draft Serbian CC.

vehicle, if they have observed any traces of blood or animal remains by inspecting the wider perimeter, i.e. if they have found a dead animal, stating that damage was most likely done as a result of contact between the vehicle and an animal. If police officers do find the evidence specified while inspecting the wider perimeter, they always make photographs serving as evidence on the cause of damage and provide them to the injured party along with the formal note or report. If there is no such evidence on the scene, police officers usually state that they have not observed any animals on or next to the road or any traces that would indicate that there was a traffic accident involving the vehicle specified and an animal on that day.

In order for the injured party to be able to compensate for damage done by animals in a public road, they have to submit appropriate evidence along with their claim. If there is no such evidence, one may ask the question if a statement by the injured party would be sufficient to have the damage compensated.

CONCLUSION

Liability for damage done by animals is a specific case of liability not governed by the LCT. The position of the courts in the Republic of Serbia is that this comes down to liability for damage done by a dangerous object, which has been repeatedly confirmed by judicial decisions and which in time has also become the position of the legislator. Namely, this type of liability has been recognised by the Draft Serbian CC as part of liability for damage done by a dangerous object. As there are many unjustified claims for damages, particularly in the cases where damage is done by an abandoned domestic animal, in theory it is recommended that this be treated as liability for fault presumed relatively.

As the matter of determining liability for damage done by animals is not uniformly regulated and there is no uniform approach to the subject matter, it is accompanied by legal uncertainty in the domestic legal domain, which ought to be eliminated in the interest of a large number of injured parties. In the Republic of Serbia insurance companies compensate injured parties for damage done in a public road by animals entering the road if the party held liable for damage has in place a liability insurance contract with an insurance company, which greatly alleviates the injured party's risk of being left with no compensation for the

damage inflicted. Nevertheless, this refers only to some individual cases, while most of them are still settled before a competent court.

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