Supreme Court of British Columbia
Martin v. Lowe
Date: 1980-01-29

V, A. Simpson, for plaintiff.

R. F. Barber, for defendants.

(Victoria No. 001258/79)

[1] 29th January 1980. RUTTAN J.:— The plaintiff's claim is for general and special damages for injuries suffered by reason ot the negligence of the defendants in allowing their St. Bernard dog to run free, not restrained by a leash, so that the plaintiff was knocked down by the dog on 29th October 1978 at the corner of Niagara and South Turner Streets in the city of Victoria.

[2] The plaintiff is a lady of 79 years of age, and on the day in question was walking with her husband on South Turner Street, returning from a stroll by the beach, towards her apartment at 440 Sim-coe Street. She noticed two young people, a young man and a girl, walk past her with a large dog in attendance. The dog came up and was smelling around the grass near the fence beside her. She carried on with the dog behind her, and says she heard a whistle. Suddenly, the dog came up from behind her on the sidewalk, forced its way between her legs, carried her for a short distance on its back, and then knocked her down as it ran by. As she fell down, she said she heard a crack as if a bone were broken. She was unable to stand on the left leg, but was helped up by her husband who supported her until a young lady came with a car and drove them back to their apartment. From there she went in the ambulance to the hospital where she remained for five days.

[3] Before leaving the scene of the accident, the dog came across to the young people and the girl caught the dog by the neck and held it. They called to the boy and he came over and gave them his name and address, which he wrote out for them on a piece of paper. The boy was the defendant Mathias Lowe and the girl was his girlfriend Margaret Wood. He admitted the dog was his, that he was walking with the dog not on a leash that day, that he did not see the accident, and that he did not call the dog to come to him before the accident happened,

[4] The plaintiff has claimed that the dog was owned by all three defendants. She said the defendant Mrs. Lowe came to call upon her the next day at the hospital and introduced herself as”Mrs. Lowe, the owner of the dog that knocked her down."

[5] Mrs, Lowe and her daughter, who was with her mother on that occasion, gave evidence in which they both denied that Mrs. Lowe made any such statement. On her part, Mrs. Lowe said that Mrs. Martin said it was no one's fault, that the accident occurred, nobody had been negligent, and that the Lord had just let it happen.

[6] Proof of ownership of the dog of course rests upon the plaintiff, and I am not satisfied that the burden of that proof as against all three defendants has been discharged. As proof of sole ownership the son, Mathias, produced a recepit for $25 for the purchase of a St. Bernard pup by him in March 1977. He agreed the St. Bernard was a purebred and that, normally speaking, he should have paid ten times that sum for the pup. Certainly, he could not have produced that amount of money at that time, being only sixteen years of age and unemployed. However, he said he did pay the $25 out of his own funds, and that the mother of the pup had not been registered and therefore the charge was only $25. He also admitted that at the time of the accident he was not living at home but was living with his girlfriend on Linden Avenue. The dog, however, could not be kept at his own apartment and was being cared for and fed by his parents. He said he paid his parents some money sufficient to pay for the dog's food.

[7] I am somewhat skeptical about the validity of the receipt, or that the son is the sole owner of the dog. However, the burden rests with the plaintiff and this might have been resolved by securing the dog licence for the current year which, presumably, would show who was me owner. I am not satisfied with the recollection of either lady as to the contents of the conversation that took place at the hospital, and therefore dismiss the action against Walter and Elizabeth Lowe.

[8] There is no doubt that the accident was caused by the dog, and that if there is any liability it does rest on the shoulders of the defen-dant Mathias Lowe.

[9] Defence counsel submits that the dog has not been shown to have had any vicious tendencies, and that in the circumstances of the case it was under reasonable control.

[10] The relevant city by-law respecting dogs, 6868, provides in s. 12 thereof as follows:

> "Subject to the preceding three sections, no person shall at any time cause or allow any dog owned by him to be upon a highway or public place anywhere in the city unless such a dog is on a leash or under the control of a competent person at all times."

[11] Mr. Barber submitted that in the circumstances of this case the dog was under the control of Mr. Lowe, who was a competent person.

[12] I do not agree. There is no suggestion the dog was behaving in a vicious or unruly manner, but it is a very large dog weighing 120 to 130 pounds and stands at least three feet tall by the head. Mathias Lowe admitted that the dog was out of his sight at the time of the accident. He knew or should have known the dog in seeking to rejoin its master, whether or not pursuant to a signal or whistle, would trot briskly down the road.

[13] Liability in this case falls to be decided by the common law principles of negligence. The duty on the defendant was to take care that his property, be it animate or inanimate, was so under his control that it would not escape to do injury to persons properly and lawfully on the public way. Here the defendant's dog was not under leash and, as I find, was so out of control that he did not avoid the pedestrians on the sidewalk but ran right over one of them.

[14] Liability is not created per se by the by-law, but the by-law is significant as further evidence of the duty of care which exists. Counsel referred me to my own previous decision in the case of *Weld v*. *McMyn,* [1972] 5 W.W.R. 122, 28 D.L.R. (3d) 253 (B.C.S.C), and to the authorities I there referred to: *Fleming v. Atkinson,* [1959] S.C.R. 513, 18 D.L.R. (2d) 81, and *Caine Fur Farms Ltd. v. Kokolsky,* [1963] S.C.R. 315, 45 W.W.R. 86, 39 D.L.R. (2d) 134.

[15] In the *Weld v. McMyn* case, I found it was negligent to allow a dog to be at large on a highway in that particular situation. I said (at p. 124):

> "The duty is to prevent escape or letting an animal run at large, when that escape is liable to lead to damages to persons lawfully on the highway."

In that case a dog ran across the road into a motorcyclist. The circumstances were different, but the principle remains the same.

[16] Therefore, for the same reasons, I find here that there was negligence on the part of the defendant Mathias Lowe and he was solely responsible for the accident and injuries suffered by the plaintiff, Mrs. Martin.

[17] In assessing the damages suffered by Mrs. Martin, I accept the unchallenged medical evidence of Dr. Conley. Mrs. Martin first attended a Dr. Riley, and was treated by him for a month, but left him through dissatisfaction. Failure to produce this medical witness, or a certificate of his treatment, entitles me to conclude, as I do, that his evidence would be adverse as to her medical condition. However, Dr. Conley, when she treated her, found there was evidence of a fractured pelvis, which would not readily be apparent immediately after the accident. Dr. Conley's evidence was not challenged by the defence,

who called no medical evidence, and I therefore accept it as satisfactory for these purposes. Dr. Conley said in her letter dated 12th April 1979:

> "I understand that earlier x-rays failed to show any fracture. This is not surprising, as often a fracture shows on an x-ray only as it heals. In elderly people the healing phase is prolonged up to ten weeks and more. A repeat x-ray on January 24 showed good callus formation indicating that the fracture was healing well….
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> "In all it had taken twelve weeks for the fracture to heal. She still has difficulty in doing housework because of her low back strain. She has no previous history of back problems and it is unpredictable how long she may suffer from the injury. X-rays of the area revealed no boney [bony] injury."

[18] In a later letter dated 12th December 1979, Dr. Conley had this to say:

> "I have examined her on several occasions and there has been little improvement in her low back pain. She underwent a course of chiropractic manipulations to no avail. She was advised to do exercises at home which she has continued to do with some improvement; however, she still complains of back pain. I have referred her to the acupuncture clinic for treatments in the new year. At present she is unable to carry anything as it aggravates [aggravates] her back and has difficulty doing her housework. She is unable to sleep on her left side because of her residual pain in the fractured pelvis. I am not optimistic that there will be any improvement in her condition for a long time."

[19] Mrs. Martin confirmed that she still was unable to sleep on her left side and that she has continual low back pain.

[20] Mrs. Martin suffered an undisplaced fracture of the pelvis, and this healed up in three months. In a somewhat similar case, *Trotta v. B.C. Hydro and Power Authority,* B.C.S.C, Kamloops No. 962, 4th October 1979 (not yet reported), my brother Hutcheon awarded to a lady, 43 years of age, $9,000 for general damages. Mrs. Trotta had been suffering her disability for two years at the time of the trial, and it was estimated that she would have further trouble but that she would be permanently cured in time with no disability. Mrs. Martin's immediate disability was not so great, but she was left with a permanent condition, and I believe it can be accepted that for the balance of her life she will continue to have low back pain.

[21] No evidence was tendered of Mrs. Martin's life expectancy, but I can conclude that her reasonable enjoyment of life would extend for up to another five years. She was in good health before the accident and enjoyed doing her own housekeeping and going for walks with her husband and on trips to California. All of these activities are now seriously curtailed. For her pain and suffering and her permanent disability, I award the sum of $10,000, together with the agreed special damages and costs.

Judgment for the plaintiff against one defendant; action dismissed against the other two defendants.