Supreme Court of British Columbia
Hall v. Sorley
Date: 1980-07-10

G. A. Major, for plaintiff.

K. M. Gill, for defendants.

(Vancouver No. C786430)

[1] 10th June 1980. TAYLOR J.:— The plaintiff, Mrs. Hall, was bitten by a large dog tethered in the back yard of the defendants, Mr. and Mrs. Sorley, after having first asked Mrs. Sorley if it was all right to pat the dog and having been told by her that it was.

[2] Mr. and Mrs. Hall had earlier agreed to purchase the house from Mr. and Mrs. Sorley and were dropping off their trailer there when the incident occurred. The Sorleys had told the Halls that the dog, Barney, was a guard dog and that they kept him because they were often away. The Halls had seen a real estate listing in which the dog was mentioned as a hazard. Mrs. Hall had seen a "Beware of Dog" sign in the window of the house and her husband had told her that the dog had lunged at him on a previous visit.

[3] Mrs. Hall asked Mrs. Sorley if she could "go and pet Barney". Both were then standing out of his range. Mrs. Sorley replied: "Yes, it will be all right, because I'm here and he even plays with my grandchildren. " Mrs. Hall stepped forward and the dog jumped up and bit her on her eyelid and on the forehead above.

[4] The plaintiff argues, firstly, that the dog was vicious by nature, so as to give rise to absolute liability, pleading s. 20 of the Animals Act, R.S.B.C. 1979, c. 16. In the alternative the plaintiff says her injury resulted from negligence on the part of the defendants, in keeping Barney and advising her that it would be all right to pat him. In the further alternative the plaintiff claims under the Occupiers Liability Act, R.S.B.C. 1979, c. 303, alleging that the premises were unsafe.

(a) *Absolute Liability*

[5] The law is not entirely clear with respect to "absolute liability" in relation to injury caused by dangerous animals which are under restraint. It has always been the law that a person who keeps a dog which he knows to have "vicious" propensities will be liable if the animal escapes and causes injury. The rule is simply stated by Lord Wright in *Knott v. London County Council,* [1934] 1 K.B. 126 at 138 (C.A):

> "Once knowledge of that propensity is brought home to the keeper of the dog, he keeps the dog at his peril, so that if it escapes from his control and attacks and injures anyone, he is liable apart from any question of negligence."

[6] The effect of s. 20 of the Animals Act, while by no means apparent from its words, is simply to place the onus on the keeper to show that he had no knowledge of the vicious propensity of the animal; this was held by Begbie C.J.B.C. to be the effect of the predecessor section, in *Nevill v. Laing* (1892), 2 B.C.R. 100 (C.A.), applied in *Bebbington v. Colquhoun* (1960), 32 W.W.R. 467, 24 D.L.R. (2d) 557 (B.C.C.A.).

[7] Absolute liability attaches, therefore, in cases of injury by a dangerous dog at large, by virtue of failure of the defendant to prove he was ignorant of its dangerous propensities combined with the fact of its escape; the liability is ' 'absolute" in the sense that the defendant cannot plead that the escape occurred without any fault on his part.

[8] The situation is obviously different in a case in which injury is done by a dog which remains in the custody of its keeper, that is to say a dog which has not' 'escaped" at all. The problem is dealt with by our Court of Appeal in *McNeill v. Frankenfield* (1963), 46 W.W.R. 257, 44 D.L.R. (2d) 132, and more recently by my brother Murray in *Parmenter v. Smith,* New Westminster No. C781354, 4th October 1979 (not yet reported), both cases involving facts in many respects analogous to the present case in that the dog was approached while tethered.

[9] In the *McNeill* case, the plaintiff went to feed a dog which was chained to a line in the defendants' yard after obtaining the latter's permission to do so. The majority in the Court of Appeal held for the plaintiff, finding "absolute liability". Davey J.A. describes absolute liability in this context (at p. 257) by saying that there was a duty on the defendants "to confine or control" the dog "so that it should not do injury to others". He says that this duty has been breached when "the control or restraint that one assumes a keeper will put on a vicious dog proves insufficient to prevent the dog doing injury to someone lawfully about", imposing liability on the ground that the defendants "did not exercise sufficient control to prevent Duke biting [their] guest, whom they allowed to approach within range of the dog, *without telling her of the dog's vicious nature"* [p.258] (the italics are mine). Lord J. A., who concurred in the result, said (at p. 272) that such cases absolute liability "may be rebutted by showing that the plaintiff was the author of her own misfortune, in that she *meddled with or provoked the dog"* (the italics are mine). He found there was no evidence, however, in that case, of any such meddling or provocation.

[10] When a person is injured by a tethered dog, in what sense, then, can he assert that the master is "absolutely liable"? In what sense may the master not be heard to say that he exercised due care, that the mishap occurred without fault on his part?

[11] In the *McNeill* case, Davey J. A. says that absolute liability in such cases results from the keeper's control or restraint being "insufficient to prevent the dog doing injury to someone lawfully about", but finds such liability for the reason that the defendants allowed the plaintiff to approach the tethered dog without telling her of the dog' s vicious nature. Lord J.A. finds the defendants liable because they allowed the plaintiff to come within range of the dog without giving her any warning and goes on to say that absolute liability may be avoided by showing that the plaintiff "meddled or provoked the dog". From these observations I conclude that the "absolute liability" referred to arises in such cases when a person ' 'lawfully about" is bitten by a tethered dog without prior warning of the danger. In such circumstances, if the keeper cannot prove that he was ignorant of the propensity of the dog to bite, it will not avail him to say that he took all reasonable steps to make those on the property aware of the presence of the dog and that it was dangerous. To escape liability the keeper must show that the plaintiff in fact knew both that the dog was there, and that it was dangerous, when he or she went within its range.

[12] Thus the question whether or not "absolute liability" attaches in the present case turns wholly on the knowledge concerning the dog and its propensities which each of the parties had at the time.

(b) *Knowledge of the Parties*

[13] The defendants say they regarded Barney, an 85 pound German shepherd dog, primarily a pet, but quite clearly he had active duties as well; the reason why he was there was that the property had once been broken into and the Sorleys wanted to be sure this did not happen again.

[14] Mr. and Mrs. Sorley say they intended the dog to perform his service as a guard dog by barking only. But he had received no training as a guard dog and I am unable to accept that they had any reason to think he would in fact refrain from biting strangers if given the opportunity to do so. Mrs. Virginia Laflamme, the real estate agent who sold the Sorley home to the Halls and put the caveat canem in the terms of the ' 'multiple listing", testified that she was told by Mr. Sorley that he had himself been bitten by Barney. Mrs. Laflamme said she told the Halls this. Mr. Sorley denied that Barney bit him; he testified that the dog merely scratched him. I cannot find that the onus which lies on the Sorleys by

virtue of s. 20 of the Animals Act to show that they were unaware of the dog's propensity to bite has been met. I am satisfied that Mr. Sorley told Mrs. Laflamme that the dog was liable to bite visitors.

[15] What then of the knowledge of the plaintiff? Did Mrs. Hall know that Barney might bite her? Was she "meddling" in approaching the dog and trying to pat him?

[16] I am satisfied that Mrs. Hall knew, before the day on which she was bitten, that Barney was a potentially dangerous dog, and that he might bite. She knew it because of what Mrs. Laflamme had told her, because she had seen a copy of the "multiple listing" and also the notice in the window, and because her husband had told her that the dog lunged at him on an earlier visit. She knew the dog's function was to keep strangers away from the house. It was with this knowledge that Mrs. Hall, although a complete stranger to the dog, decided while standing out of its range in the back yard that she would like to approach Barney and touch him. She turned to Mrs. Sorley and asked if she could " go and pet Barney". Mrs. Hall knew there was a risk involved and was deciding whether or not to expose herself to it. She knew that Barney was a dog who might bite people, but she says she has a great affection for animals. I think she wanted to show herself that she could establish some rapport with this rather fearsome guard dog.

[17] Mrs. Sorley's response, according to Mrs. Hall, was: "Yes, it will be all right because I am here and he even plays with my grandchildren." Was that a statement calculated to erase Mrs. Hall's knowledge that the dog was potentially dangerous? I think not. Mrs. Sorley was saying that she thought it safe to approach the dog because she was herself present and because the dog was capable of being gentle. That is not the same as saying that the dog was incapable of biting strangers, but rather the reverse.

[18] It might, perhaps, be said that both parties were in this case equally affected by knowledge, or scienter. The conduct of the plaintiff in stepping into the range of the dog and reaching down to touch it was in the nature of "meddling". The knowledge which the plaintiff had acquired distinguishes this case from *McNeill* and from the facts before my brother Murray in *Parmenter v. Smith.* I think it was sufficient to exclude the imposition of absolute liability.

(c) *Acceptance of the Risk*

[19] I turn to the question whether the injury can be said to have resulted from negligence on the part of the defendants, either jointly, in the place and manner in which

the dog was kept, or on the part of Mrs. Sorley in the nature of the response which she gave to Mrs Hall.

[20] With respect to the way in which the dog was kept, I accept the evidence of the expert called for the defendants that the area in which the dog was free to run was adequate, so that it cannot be said that any aggressive characteristics which he may have acquired resulted from his being tethered. Plainly there was nothing more which the defendants could reasonably have done in a physical sense to prevent the dog from reaching visitors such as Mrs. Hall. The plaintiff concedes that she deliberately walked into the range of the dog and that she could easily have kept clear of him. Nothing short of putting the animal in a cage while visitors were present could have prevented an accident of this sort from happening, and that would have been an unreasonable precaution.

[21] If there is liability on either defendant in negligence, it must be the result of what Mrs. Sorley said in answer to Mrs. Hall's question whether she could "go and pet Barney". The question clearly was understood as a request, not for permission, but for advice. Mrs. Sorley said that it would be all right to pet the dog because she herself was present and the dog had not harmed her grandchildren. If this statement was made in the sense of an assurance or warranty, I would be bound to say that it was a careless one. But I do not think it was made, or understood, in that sense. What was sought was an opinion. Mrs. Hall knew that the dog was potentially dangerous. Mrs. Sorley did not say that the dog would never bite strangers. She gave the opinion that the dog would not bite a stranger in her own presence, and that he could be trusted with small children. I am satisfied that this was her own honest opinion. I do not think it can be characterized as careless simply because it turned out to be wrong. I conclude, after some hesitation, that the case is one, not of negligence and contributory negligence, but of voluntary acceptance by Mrs. Hall of a known risk. Mrs. Sorley led her to believe that the risk was small, but there is no reason to conclude that the risk was in fact greater than Mrs. Sorley led Mrs. Hall to believe. The plaintiff has not established that there was any negligence on Mrs. Sorley's part in giving her opinion.

[22] In such circumstances the defence volenti non fit injuria must succeed, and the claim in negligence must fail. This finding disposes also, I think, of the claim under the Occupiers Liability Act. Section 3(3) of the Act states that "an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks". I have found that the plaintiff did knowingly accept the risk involved in approaching the dog.

(d) *Conclusion*

[23] Had the plaintiff's claim succeeded, I would have awarded general damages of $8,000 for pain and suffering and disfigurement, together with agreed special damages. While not required to remain in hospital overnight, Mrs. Hall had three hospital visits, one for closure of the wound over her eye and two for plastic surgery. Her disfigurement, while now almost entirely removed, was very pronounced immediately after the accident, and was not corrected until the second plastic surgery almost 18 months after the injury occurred. She suffered some pain and has a fear of dogs which will probably remain with her. For the above reasons, I am obliged to dismiss the action, but in the circumstances of the case, and having regard particularly to the uncertain state of the law, I cannot say the claim was imprudently brought, and would be reluctant to award costs unless persuaded that I must.

Action dismissed.