Hare v. Onofrychuk, 1999 ABPC 93

Date: 19991008
Docket: 9902600336

IN THE PROVINCIAL COURT OF ALBERTA
CIVIL DIVISION

BETWEEN:

David Hare

Plaintiff

- and -

Darryl Onofrychuk and Kaylene Onofrychuk

Defendants

JUDGMENT OF THE HONOURABLE JUDGE R.A. JACOBSON

COUNSEL:
Neil Dobson for the Plaintiff
Jeff Weidman for the Defendants

Background

[1] On the afternoon of July 2nd, 1998, the Plaintiff David Hare, was invited by the Defendant, Darryl Onofrychuk to come into the Defendants' backyard to see the Defendants' puppy. After the Defendant's other dog, "Boomer", had shown some hostile reaction to the Plaintiff, it suddenly lept towards the Plaintiff and caused a puncture wound to the Plaintiff's left cheek. The parties had been together for only a few minutes. Although this incident occurred almost instantaneously, there were distinct phases of interaction prior to the attack. There is a marked contradiction in much of the evidence between David Hare and Darryl Onofrychuk as to the events leading up to the incident, and the actual attack itself.

[2] By consent, the quantum of both special and general damages was agreed upon at $3,500.00, and the parties agree that the doctrine of scienter is not applicable.

[3] The evidence establishes that the Defendants, Darryl Onofrychuk and Kaylene

Onofrychuk were “occupiers” and that the Plaintiff, David Hare, was a “visitor” within the meaning of the Occupier’s Liability Act, RSA, 1980, c.O-3.

Issues

[4] 1. Are the Defendants liable to the Plaintiff in:

a. Negligence, and/or under
b. The Occupiers Liability Act?

2. Has the Plaintiff met the evidentiary burden of proof on a balance of probabilities of establishing the Defendants’ liability?

Summary of the Material Evidence

[5] The Plaintiff, David Hare, is a customs officer who resided next door to the Defendants. He has had some experience with dogs in his home and at work. His customs duties do not require him to handle dogs, however, he does come into contact with dogs in the course of his work. Approximately one year before the incident, Mr. Hare had “raised and socialized” a black lab puppy for the Government before that dog was sent on special field training for customs work. Apart from this incident he has no recollection of ever having been bitten by any dog. At the time of trial, Mr. Hare had another puppy for which he was responsible.

[6] The two Defendants, their son Matthew, and their dog “Boomer” moved into a house adjoining that of the Plaintiff in about June of 1997. There was limited but cordial contact between the Plaintiff and the Defendants. At the Plaintiff’s request, the Defendants paid one-half the cost of the fence erected between their respective properties in the Spring of 1998. Kaylene Onofrychuk had more contact with the Plaintiff than did her husband. On those occasions Boomer was usually with her.

[7] Boomer is a neutered crossbred boxer/yellow lab that the Defendants brought home when he was about 8 weeks old. In 1998 he was about four years old. Mrs. Onofrychuk describes Boomer as “their first child” who is a loving dog; good with kids, family and friends; would let Matthew “maul him”; was receptive (but allergic) to a cat that was introduced to the home; who barked when strangers appeared, but he did not

growl, nor bare his teeth.

[8] After the Defendants' second son, Joshua was born in early 1998, quite a few people came to visit the new baby. When they rang, Boomer barked, and then would go back to his bed.

[9] Both Defendants said that when they took Boomer to public areas that he was on a leash as required under the by-law and that they never had any problems.

[10] Mr. Onofrychuk described Boomer as a very "commandable" and friendly dog. Even though the dog did not have any formal obedience training, he responded to Mr. Onofrychuk's commands. The dog never bit anybody and there were no incidents or complaints of aggressive behaviour. He emphatically stated that Boomer never showed his teeth to anyone and that he did not growl except for growls initiating a bark. He did bark at strangers. Mr. Onofrychuk assumed this reaction to be protective or to announce the presence of strangers. Mr. Onofrychuk did not consider Boomer to be "any more protective than most" dogs. He was a playful, but not over excitable animal.

[11] Mr. Hare describes Boomer as being a "fairly big yellowy white dog" of 60-70 pounds with "lab like" characteristics, "but thinner". He was aware of but didn't notice Boomer when the fence was built. Afterwards, he sometimes heard Boomer growl on the other side of the fence. Basically Mr. Hare was not a stranger to Boomer, but he had had very little contact with the dog and was not frightened by him.

[12] The Defendants' backyard was enclosed by a six foot fence with a latched gate at the back. The lock serves to protect both children and dogs. The Defendants also built a dog run approximately 4 ½ feet by 15 feet with a chain link gate at one end, but there was a one foot gap through which a dog could get in or out. The Defendants claim that the primary purpose of the dog run was to prevent dog damage to the newly sodded lawn. It was a place for Boomer to "do his business". He had complete freedom in the backyard. Most of the time Boomer lived inside the home as a "family member" and was an almost constant companion of the Defendant, Kaylene Onofrychuk.

[13] On about June 14th, 1998, the Defendants acquired a second dog, a young black lab puppy called "Ben" who was about 6 weeks old on July 2nd, 1998. Initially Boomer was restrained and guarded in his reaction to the puppy, but eventually the two became "fantastic playmates".

[14] On the afternoon of July 2nd, 1998, Mr. Hare returned home after a computer course. Mr. Onofrychuk was working in his front yard. Because of his past experience with his government puppy, Mr. Hare inquired about the Defendants' new pup. After a brief exchange about the Defendants' puppy, Mr. Onofrychuk invited Mr. Hare into the backyard to see it - a shared interest and activity.

[15] They did not go very far into the backyard and were near the deck close to the doorway to the Defendants' house when the puppy ran up to the two men.

[16] From this point there are two different versions as to what occurred.

[17] Mr. Hare says that Boomer barked, growled and came up to him. Mr. Hare slowly lowered his hand to the dog to show friendship and gain acceptance. He has made the same gesture to other dogs to let them smell and to "show that you are not a threat". Boomer growled and showed his teeth. Mr. Onofrychuk told Boomer to go back. The dog moved back a few steps, but then came back at Mr. Hare, barked and continued to growl and bare his teeth. Meanwhile the puppy jumped up and wanted to play. Again, Mr. Onofrychuk motioned to Boomer and told him to get back. Mr. Hare bent down to pet the puppy, which was between him and Boomer.

[18] Either prior to this, or simultaneously, because of Boomer's behaviour, Mr. Hare asked Mr. Onofrychuk if Boomer was "okay with us?" Mr. Onofrychuk replied, "Yes", or, "It's fine". However, as Mr. Hare petted the puppy, Boomer growled. To Mr. Hare, this meant that the situation was "not okay", so he started to stand erect. As he did so, Boomer came forward, lunged and "slammed" into him, and bit him in the face, causing "incredible pain". Mr. Onofrychuk said that the injury was "not bad". He then took Boomer into the house at which time he also got a Kleenex for Mr. Hare.

[19] Mr. Hare believes that Mr. Onofrychuk gave at least two voice and hand signals for Boomer to go back. Each time the dog backed up 5 to 6 feet. Mr. Hare did not attempt to pet Boomer and he felt safe in the presence of the owner. If there was any risk, he expected Mr. Onofrychuk to advise him, or take precautions to protect Mr. Hare.

[20] Mr. Onofrychuk says that the puppy was to his left and Boomer was to his right. When Boomer backed, Mr. Onofrychuk told him to "stop", "stay" and "sit down". At one point he also commanded "Quiet!" As Mr. Hare bent to see the puppy, they talked about where Ben came from, the purchase price, and Mr. Hare's familiarity with the breeder. As Mr. Hare started to get up, Boomer left his sitting position beside Mr.

Onofrychuk and attacked Mr. Hare.

[21] Mr. Onofrychuk states that Boomer never moved back 5 to 6 feet and that he remained sitting beside Mr. Onofrychuk. There was no sign of provocation on Mr. Hare's part but Mr. Onofrychuk believes that Mr. Hare's movement startled Boomer. He is unsure whether Mr. Hare's injury was due to a bite, or if it was just a scratch from a dew claw. When he asked Mr. Hare if Boomer had bitten him, Mr. Onofrychuk states that Mr. Hare responded that he was "not sure", "not to worry", and that "he'd been bitten many times". Mr. Hare denies Mr. Onofrychuk's version of the incident.

[22] Almost immediately, Mr. Onofrychuk put Boomer in the house and told his wife that Boomer had jumped and made contact with Mr. Hare. They do not appear to have been too concerned about the injury and made no subsequent inquiries even when Mrs. Onofrychuk saw the Plaintiff.

[23] Mr. Onofrychuk maintained that Boomer always comes on command and that on this occasion was sitting no more than 2 feet to his right. He denies that Boomer approached Mr. Hare twice or that Boomer growled and bared his teeth. After Boomer barked, Mr. Onofrychuk acknowledges telling Mr. Hare that "it was okay" and recognized that Mr. Hare acted on Mr. Onofrychuk's "reliance and control" of the dog. He had told his dog to be "quiet, sit and stay." It did not occur to him to put Boomer in the house or the dog run, nor to put him on a leash. He felt he was in reasonable control with Boomer to his right and Mr. Hare to his left.

[24] On cross-examination, Mr. Onofrychuk confirmed that Boomer had a collar. In fact, he "pulled" Boomer by the collar to sit down. Once the dog was sitting, Mr. Onofrychuk released the collar.

[25] On July 6th the Defendants put their property up for sale. They placed their dogs on a farm in order to facilitate showing their house.

[26] The defence admits that there was a puncture wound which could either be caused by a bite or a scratch.

<u>Findings of fact disclosed by the evidence</u>

[27] Mr. Onofrychyk's description of the incident and his emphasis that Boomer is a "commandable" dog is not borne out by his own evidence. Something obviously alerted him as to the necessity of getting his dog under control. He gave assurances in response to the Plaintiff's query of concern. Clearly the dog did not respond to the verbal commands and hand signals because Mr. Onofrychuk had to reinforce those commands and signals by physically pulling on Boomer's collar to make him sit. Mr. Onofrychuk felt he was in control because he had placed himself between the Plaintiff to his left and Boomer to his right.

[28] The factual situation has to be determined from both versions. Where there is conflict, I generally accept the Plaintiff's version of the incident. I also accept Mr. Onofrychuk's evidence that he gave assurances to Mr. Hare; that he also gave commands and attempted to control his dog, and that he eventually grabbed the dog's collar to gain control.

[29] What actually caused Boomer to attack Mr. Hare is a matter of conjecture and speculation. Mr. Onofrychuk considers that Mr. Hare's standing motion may have startled Boomer. However, Mr. Hare says he started to stand because he was apprehensive due to the dog's behaviour. All of the parties consider that Boomer could have been protective of his territory (the backyard), and/or, of the puppy. The evidence clearly establishes that Boomer's initial hostile conduct caused Mr. Hare concern and that Mr. Onofrychuk was aware of this concern. As he attempted to control Boomer, he gave assurance to Mr. Hare that the situation was "fine".

[30] Mr. Hare was not the author of his own misfortune. He did not act without due diligence in relation to Boomer. He did not accept risk willingly nor did he receive any warning. On the contrary, he relied on Mr. Onofrychuk's assurances which created a false sense of security and made him feel reasonably safe. He did not knowingly place himself in a position of immediate peril nor were his acts of holding out his hand to Boomer and subsequent petting of the puppy, knowingly, the cause of a dangerous situation. Mr. Onofrychuk recognized that although Boomer was not usually an excitable nor an aggressive dog, that on this occasion that he was required to keep Boomer under control and away from Mr. Hare. It had been necessary to use physical force to pull on the dog's collar in order to gain ultimate control. Mr. Onofrychuk knew that his control and supervision was essential in order to restrain or otherwise effectively prevent his dog from approaching Mr. Hare.

The Law

[31] In their submissions counsel do not strongly differentiate in the principles of common law negligence and the statutory obligations of occupiers. Counsel have submitted the following decisions:

> Caine Fur Farms Ltd.v.Kokolsky, [1963] SCR 315
> Bates v.Horkoff, [1991] AJ No.960, (Alta QB, Conrad J, now JA)
> Acheson v.Dory, [1993] AJ No.150, (Alta QB, Picard J, now JA)
> Lay v. Jaffary, [1995] AJ No.376, (Alta QB, Egbert J)
> Gulash v.Meier, [1997] AJ No.988 Alta QB, Gallant J)
> Alchimowicz v.Schram, [1999] OJ No.115 (Ont CA) which cited:
>> Wade v.Canadian National Railway, [1978] 1 SCR 1064; 80 DLR 214 (S.C.C.)

Two other cases are also relevant because they are closer in facts to the circumstances in the present case:

> Nasser v.Rumford, (1977), 5 Alta LR (2d) 84; (1978) 83 DLR (3d) 208 (Alta SCAD)
> Kirk v.Trerise et al, [1981] 4 WWR 677 (BCAA)

[32] In Nasser v.Rumford, supra, the Plaintiff, a real estate agent, pursuant to a MLS listing, came to the Defendant's front door to get permission to show the house. He knew there was "a bad dog" there. In fact there never had been any problems with the dog. It habitually ran within sniffing distance and would bark furiously and wag its tail. Although the owner's 12 year old daughter opened the door and the dog ran out barking, no attempt was made to restrain the dog. The dog did not jump on nor bump the Plaintiff. After one or two minutes the Plaintiff started backwards, lost his balance and fell over a planter 8 or 9 feet from the door. The Court of Appeal determined that the conduct of the daughter "ought to have been reassuring...that all was well" and in any event this was not a spontaneous case of backing up as the dog emerged, but "a deliberate decision to back away".

Moir, JA held at p.213:

The House of Lords made it clear that the duty owed in respect of an

> animal is, as far as negligence is concerned, to take care that the animal is not put to such a use as it may injure someone. It is clearly a case of foreseeability - to guard against probabilities but not to anticipate fantastic possibilities.
>
> ...to determine whether the premises are reasonably safe one must apply the test as to whether or not the danger was foreseeable.

[33] Based on past experience and no problems, there was nothing in the dog's "past behaviour that would require that she be locked up, muzzled or restrained." The outcome was most unusual and simply was not foreseeable. Moir, JA concluded:

> We must not test the question of foreseeability by looking at the unfortunate injury to the [Plaintiff] and then say it was foreseeable merely because it happened. That is not the test in law.

[34] The Appellate Division concluded that the Plaintiff was in effect the author of his own misfortune and considered the time element to be significant. "Any element of surprise or suddeness was gone." At p.215 Moir JA said:

> ...it is possible that a person coming to the [Defendant's] door would be frightened by the barking dog. If that person acted spontaneously and backed away, the injury may have been foreseeable. That is not what occured. The dog approached [him] "barking and sniffing". There was no spontaneous backing away but the deliberate and calculated backing up after an appreciable interval. The [Plaintiff] could and should have looked where he was going and no injury would have occurred. The injury came as a late over-reaction to the barking of a friendly dog. In my opinion, the happening was not foreseeable. There was no breach of duty owed...

[35] In Kirk v.Trerise, supra, the trial judge found that the appellants, Mr. and Mrs. Trerise, failed to discharge the onus of proving that their high spirited Afghan dog was not of a mischevious nature, and, in the alternative, they were guilty of negligence on the failure to take reasonable care under the Occupiers' Liability Act. Credibility was not an issue. The facts were not in dispute.

[36] The house and dog "sitter", Mrs. Clark entered the foyer of the house with her

friend, the Respondent, Mrs. Kirk. The dog welcomed them in his usual fashion for visitors. He rose on his hind feet, placed his front feet on Mrs. Clark's shoulders, and licked her face. He then attempted to act in the same manner to the Respondent.

[37] At that time, the master entered the foyer. Seeing that the Respondent did not like this attention, he called to the dog to get down and he did. The dog eluded attempts by the master to grab and hold him. The dog reared up again on Mrs. Clark and then again to the Respondent. On this occasion, the dog bit or tore the Respondent's upper lip.

[38] There was no propensity to bit or attack, nor to jump or leap at any person so as to knock anyone down or off balance. The Appellant's had taken steps to prevent the dog's customary form of greeting to Mrs. Trerise's mother (who had had hip surgery and walked with a cane) and to her elderly grandmother (who suffered from cancer and was unsteady on her feet). The dog had never jumped at, nor attacked, nor pushed down either of them.

[39] At p.681, McFarlane, JA for the majority held:

> In my opinion, the concern of the appellants regarding their infirm and elderly relatives and the care they took to protect them does not justify the inference that they failed to discharge the onus of showing their dog was not of a vicious or mischevious nature within the meaning to be given properly to those words [ie., as taken from the B.C. Animals Act].

As for negligence under the Occupiers Act, it was not negligence to have the dog in the home and in respect of Mr. Trerise's conduct:

> The evidence does not show...that Mr. Trerise acted unreasonably in his attempts to restraint the dog on the occasion when the Respondent was bitten. It seems to me speculation that the use of the words of command or steps other than those which Mr. Trerise adopted would have prevented the injury...I am also of the opinion that his prompt, although unsuccessful attempt to grasp and hold the dog when faced with the unexpected situation which had developed, precludes a finding of negligence against him.

[40] Leave to appeal to the Supreme Court of Canada was refused.

[41] The Occupiers Liability Act, RSA, 1980, c.O-3 - Under s.1(a) “common duty of care” means the duty of care of an occupier of premises provided for in s.5.

Section 5:

> An occupier of premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the care is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there or is permitted by law to be there.

Section 6:

> The common duty of care applies in relation to
> (a) the condition of the premises
> (b) the activities on the premises, and
> (c) the conduct of third parties on the premises

Section 7:

> An occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor as his.

Section 8:

> (1) The liability of an occupier under this Act may be extended, restricted, modified or excluded by express agreement or express notice but no restriction, modification or exclusion of that liability is effective unless reasonable steps were taken to bring it to the attention of the visitor.
>
> (2) This section does not apply with respect to a visitor who is an entrant as of right.

Section 9:

> A warning, without more, shall not be treated as absolving an occupier from discharging the common duty of care to his visitor unless in all the circumstances the warning is enough to enable the visitor to be reasonably safe.

[42] Certain principles of this legislation are outlined in Chapter 18, "Occupiers Liability" by Janet Ames in Volume 3 of Remedies in Tort, Rainaldi, 1987 (Carswell) Thomson Canada Ltd. Ames notes at p.18.21 #1 that occupiers' liability:

> ...is a branch of the law or negligence [which] imposes a less stringent duty of care on the part of an occupier to entrants upon land than that which is owed under the general law of negligence.

[43] Further at p.18.22.1 #4 that there is a distinction:

> ...special rules apply and there may be significant differences in liability depending upon whether the ordinary rules of negligence or the more restrict rules of occupiers' liability govern any given case.

[44] The elements of the cause of action are outlined at p.18-24 #6:

> For a plaintiff to succeed in an action based on occupiers' liability the following elements must be established:
>
> (1) that the defendant was an occupier of the premises on which the accident occurred;
> (2) that the defendant breached a duty of care owed to the Plaintiff
> (3) that the defendant's breach caused the Plaintiff's injury, and
> (4) that the Plaintiff suffered damage

[45] There is a statutory duty of care, p.18-79 #76:

> Occupiers' liability legislation imposes an affirmative duty on occupiers to take reasonable care for the safety of people on premises. The duty is not absolute. An occupier is not made a guarantor or insurer of the safety of persons coming on his premises, but is under an obligation to take such affirmative steps as are reasonable in the circumstances. In determining whether an occupier has discharged this duty in any particular case, it is necessary to apply the test of whether or not the danger was one which was foreseeable.

[46] "In summary, could the owner of the particular animal, with its particular

characteristics, in the particular circumstances, have reasonably foreseen the danger that could result in damage?": Bates v. Horkoff, supra. A similar approach was taken by Grandpre, J. in Wade v.Canadian National Railway, supra at p.1087:

> The rule is clear: the Defendant in this case can only be found liable if the injury was a reasonably foreseeable result of the situation created by it.

He then cited two judgments to emphasize the principle.

[47] From the headnote in Ouellet v. Cloutier, [1947] SCR 521:

> The fact that it was possible that an accident might occur is not the criterion which should be used to determine whether there has been negligence or not. The law does not require a prudent man to foresee everything possible that might happen. Caution must be exercised against a danger if such danger is sufficiently probable so that it would be included in the category of contingencies normally to be foreseen. To require more and contend that a prudent man must foresee any possibility, however vague it may be, would render impossible any practical activity.

[48] And then:

> In The University Hospital Board v.Lepine; Monckton v.Lepin, Hall J., speaking for the Court, stated (at p.579):
>
> The question of whether there was or was not negligence in a given situation has been dealt with in many judgments and by writers at great length. One principle emerges upon which there is universal agreement, namely, that whether or not an act or omission is negligent must be judged not by its consequences alone but also by considering whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission.

[49] In fulfilling its duty as an occupier, it is not incumbent upon the Defendant to guard against every possible accident that might occur. It is only required to exercise care against dangers that were sufficiently probable to be included in the category of contingencies normally to be foreseen. The law imposes no duty to make an occupier "an insurer against all possible risks". Alchimowiz v.Schram, supra

[50] The correct question, then, in deciding whether an occupier has been negligent is to ask whether it could reasonably foresee a risk to visitors who exercise ordinary diligence. If the answer is yes, the occupier is negligent even if the Plaintiff failed to exercise ordinarily diligence:

> Lorenz v.Ed Mon Dev Ltd., (1991) 79 Alta LR (2d) 192 (Alta CA) cited in: Gulash v. Meier, [1997] AJ No. 988 (QB), Gallant, J.

[51] Under the Occupiers Liability Act the statutory duty requires the occupier "to take such care as was in the circumstances reasonable" to see that the visitor "was reasonably safe" in using the premises for the purposes for which he was invited as a visitor. What was reasonably foreseeable? Should Mr. Onofrychuk have eliminated or reduced the risk by removing the dog to either the house or to the dog run, or simply retain constant physical control by holding the dog collar?

Negligence: The principles of law applicable to liability for damage caused by a dog:

[52] At common law the dog has been placed in a favoured position, as compared with most of the other domestic animals. Like them, the dog did not involve its owner under the strict liability imposed in respect of the keeping of dangerous animals. Liability in respect of a dog, under that strict rule, would only arise if scienter were proved: Caine Fur Farms, supra.

[53] The owner of a dog is strictly liable for injuries caused by it if the animal was mischievous or vicious and the owner knew of these propensities. The owner, based on scienter (knowledge), is absolutely liable for any damage caused by the dog, notwith-standing that generally the common law recognizes that it is not in the ordinary nature of a dog to injure mankind: Bates v.Horkoff, supra

[54] The liability of a dog owner for damage caused by his dog did not necessarily have to be founded on the rule of strict liability relating to the keeping of dangerous animals. It might be established in negligence if, in the circumstances, a duty to take care in relation to the dog existed and there had been a breach of it: Caine Fur Farms, supra, per Martland, J., p.317. He then cited Lord Atkin in Fardon v.Harcourt-Rivington, (1932) 146 L.T. 391 at p.392:

> But it is also true, quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour - the ordinary duty to take care in the cases put upon negligence.

[55] An owner or keeper of an animal may quite apart from the scienter rule be liable for damage done by that animal if the owner or keeper puts it or allows it to be in such a position that it is reasonably foreseeable that damage may result: Draper v.Hodder, supra, per Davies L.J. at p.214.

[56] The negligence claim is subject to and limited by two qualifications Searle v.Wallbank, [1947] All ER 12 per Lord duParq at p.21:

> (a) first, special circumstances must exist that the dog, a tame animal of mild disposition, will act in some emotional way such as excitement or loss of temper that will render it likely that the dog will cause damage to people contrary to its ordinary nature, and
>
> (b) secondly, even if the Defendant's omission to control or secure the animal is negligent, nothing done by the animal which is contrary to its ordinary nature can be regarded, in the absence of special circumstances, as being directly caused by such negligence.

[57] For the action of negligence, it is sufficient if the Defendants knew, or ought to have known of the existence of the danger, which does not necessarily arise from a vicious propensity of the animal, although perhaps some special propensity is required. Ellis v.Johnstone, supra, at p.297

[58] While the principles of negligence apply, there seems to be a requirement that a special propensity or special circumstance be found: Acheson v.Dory, supra

[59] The "special propensity" or "special circumstances" will depend on the facts of each individual case: Sgro v. Verbeek, (1980) 28 O.R. (2d) 712; 111 D.L.R. (3d) 479

[60] For the action of negligence, all that is necessary to prove is that the owner knew, or ought to have known, of the existence of the danger, which need not arise from the

vicious propensity of the animal. Although, as stated in Draper, perhaps some "special propensity" or "special circumstances" are required, and, as indicated there, the answer to that question must depend on the particular facts of each individual case: Gill v. MacDonald, (1977), 2 CCLT 249 (P.E.I.S.C.) Per MacDonald, J. at p.254.

[61] The Defendants need not guard against "fantastic possibilities". However, the Defendant must be mindful of risks that are "real", that is, of risks that "a reasonable person would not brush aside as far fetched or fanciful": Nasser v.Rumford; Draper v. Hodder; Bates v.Horkoff, supra

[62] The actual injury need not be anticipated. The proper test is not whether the particular type or actual physical harm suffered ought reasonably have been anticipated, but whether broadly speaking the injury was within the range of likely consequence. Draper v. Hodder, supra, at p.220.

[63] We must not test the question of foreseeability by looking at the unfortunate injury...and then say it was foreseeable merely because it happened. This is not the test in law: Nasser v.Rumford, supra

Analysis

Negligence

[64] Scienter liability results in strict liability even in the face of what may be faultless behaviour. That doctrine does not apply in this case. Our concern is with negligence law. In Acheson v.Dory, supra, Picard, J. (as she then was) stated:

> There is no doubt that negligence can be a basis for liability where the injury suffered was caused by an animal owned and under the control of the defendant...

[65] She had already specified that:

> In order to prove negligence, the Plaintiff must prove on a balance of probabilities that the Defendant owed [the Plaintiff] a duty of care, that he breached the standard of care of a reasonable person in the circumstances and that the result of the breach was that [the Plaintiff] suffered an injury

which was reasonably foreseeable to the Defendant.

[66] Apart from the strict liability imposed "by reason of knowledge of their propensities" the owner or person having control of an animal is subject, in the words of Lord Atkin in Fardon v.Harcourt-Rivington, supra, at p.217:

> ...the ordinary duty of a person to take care either that his animal or chattel is not put to such a use as is likely to injure his neighbours.

and, from Draper v.Hodder, supra, per Davies, LJ at p.566:

> ...certain modern authorities show clearly that an owner or keeper of an animal may, quite apart from the scienter rule, be liable for damage done by that animal if the owner or keeper puts it or allows it to be in such a position that it is reasonably foreseeable that damage may result.

[67] The principles of negligence law to damage done by animals are subject to two qualifications with the requirement that either "a special propensity" or "a special circumstance" be found. Picard, J.(as she then was) said that these restrictions should continue to be subject to critical review as "an example of one of the means the courts used to restrict liability prior to the more modern approach of controlling liability through the use of remoteness or proximate cause".

[68] Initially, I will follow the approach adopted by Picard, J. (as she then was) to determine whether there are "special circumstances" or "a special propensity".

[69] The particular facts of this case create a blend of "special circumstances" and "a special propensity". For that reason it may actually have been best to start with "proximate cause".

[70] Mr. Hare was not the author of his own misfortune nor did he voluntarily accept any risk.

[71] The Defendants knew that Boomer could be protective of the family and might be territorial in respect of activities within the yard. They did not consider their dog to be aggressive and certainly not vicious.

[72] There does not appear to be a marked difference between the parties in knowledge

and ability with respect to dogs and their behaviour. The Plaintiff had little knowledge about the propensities or character of Boomer. Boomer's attitude and repeated hostile behaviour continued despite Mr. Onofrychuk's voice and hand signals. Mr. Hare expressed his concern to Mr. Onofrychuk and relied upon Mr. Onofrychuk's reassuring responses which created a false sense of security.

[73] The Defendants owed a standard of care to Mr. Hare, who had expressed concern arising out of Boomer's behaviour and relied upon Mr. Onofrychuk's assurances that everything was fine. Mr. Onofrychuk knew that Mr. Hare relied upon him and that it was necessary for him to gain and maintain control of his dog. He also placed himself between Boomer and the Plaintiff. Unfortunately he released physical control and the dog continued to show a hostile reaction to Mr. Hare. This created a special circumstance. It was reasonably foreseeable that Boomer might attack Mr. Hare.

[74] Ordinarily, Boomer's owners would not be concerned that he would attack humans. In their opinion he was a tame, docile, commandable dog who was a member of their family. On this occasion, Boomer exhibited behaviour towards Mr. Hare that caused Mr. Hare to express concern to the owner. Mr. Onofrychuk acknowledged this concern. He attempted to gain control through voice and hand signals. This was not successful and he had to physically seize the collar and compel the dog to sit. Mr. Onofrychuk knew that it was necessary to keep Boomer apart from Mr. Hare but he failed to do so. There was a special propensity limited in time and to this setting.

[75] What was the appropriate standard of care in all of the circumstances? Mr. Onofrychuk did not consider it necessary to warn the Plaintiff. However, he made reassuring comments and exercised physical control over the dog. Mr. Onofrychuk felt there would be no harm if he kept his dog seated to his right with Mr. Hare to his left. Mr. Onofrychuk's conduct in these circumstances confirm that he knew it was necessary to control Boomer and to keep him away from the Plaintiff.

[76] The foreseeable harm was that Boomer could cause fear or come in contact with Mr. Hare. In fact, Boomer charged, leaped and injured Mr. Hare. This harm was reasonably foreseeable and Mr. Onofrychuk was mindful of the risk. He breached the standard of care by failing to take reasonable care under the circumstances.

Occupiers Liability Act

[77] The Defendants were not required to be insurers against all possible risks.

[78] Special circumstances had arisen out of Boomer's behaviour towards Mr. Hare. Mr. Onofrychuk gave assurances that everything was fine and then took physical control of Boomer with the intention of keeping the dog and Mr. Hare apart. He also tried to be a barrier or intermediary between them.

[79] Mr. Onofrychuk was required to take such care as in this special circumstance was reasonable to see that Mr. Hare, a visitor was reasonably safe in using the premises for the purposes and activities for which he was invited, ie., to see and examine the puppy.

[80] Mr. Onofrychuk could have eliminated all risk by placing Boomer in the house, or in the dog run, or by retaining actual physical control.

[81] Mr. Hare exercised due diligence and was not negligent nor aggressive in any manner.

[82] The dog's hostile reaction to the Plaintiff created an unusual danger which the Defendant knew required him to effectively control his dog, otherwise it could reasonably be foreseen that the dog could cause harm to the Plaintiff. The Defendant failed in "his affirmative duty" to properly provide for the reasonable safety of his visitor.

[83] The Defendant Kaylene Onofrychuk had no knowledge of the situation in her backyard.

Conclusion

[84] In the special circumstances of this case, the Defendant, Darryl Onofrychuk is liable for the damage caused by the Defendants' dog, both in common law negligence and under the Occupier's Liability Act.

Finding

[85] The Plaintiff, David Hare shall have judgment against the Defendant, Darryl Onofrychuk in the sum of $3,500.00. The Defendants have agreed to pay costs to the Plaintiff in the sum of $300.00.

DATED at the City of Lethbridge, in the Province of Alberta, this 8th day of October, A.D. 1999.

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Ronald A. Jacobson
Judge of the Provincial
Court of Alberta

RAJ/sk