# QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2012 SKQB 317**

Date: **2012 08 07**
Docket: Q.B. No. 256 of 2008
Judicial Centre: Yorkton

---

BETWEEN:

AUSTIN ROSS, suing by his Litigation Guardian, SHELLY ROSS

PLAINTIFF

- and -

HEIDI DOERING VIDNES

DEFENDANT

- and -

JOHN ROSS and SHELLY ROSS

THIRD PARTIES

**Appearing:**

Wayne M. Rusnak, Q.C. for the plaintiff
Heidi Doering Vidnes appearing on her own behalf

---

JUDGMENT
August 7, 2012

DAWSON J.

---

[1] The plaintiff infant Austin Ross was bitten by a dog owned by the defendant, Heidi Doering Vidnes, on December 9, 2006 and sues for damages.

## THE FACTS



[2] The plaintiff Austin Ross was born February 7, 1999 and lived in the small town of Theodore, Saskatchewan. Austin's parents, Shelly Ross and John Ross, were separated at the time of the incident, but they shared custody and residency of Austin. Austin's father, John Ross, lived about four blocks from the home of the defendant. Austin's mother, Shelly Ross, lived about a block and a half from the home of the defendant.

[3] The defendant, Heidi Doering Vidnes, owned a St. Bernard dog. The St. Bernard is the dog that bit Austin. The defendant also had three other dogs. The St. Bernard was a large dog, around three feet tall. The dog weighed approximately 140 to 150 pounds. At the time of the incident, Austin was seven years old, was under four feet tall, and weighed around 65 to 70 pounds.

[4] The St. Bernard was a dog that was hard to control. There were numerous instances when the St. Bernard broke off his chain or leash and was seen running through the town of Theodore with the leash behind him. He had jumped up at people and barked at people. When off of his leash, he ran in the town, usually within a couple of blocks of his home. The St. Bernard would usually run in town with another dog. The St. Bernard was seen running about the town even after this incident.

[5] The St. Bernard was a physically intimidating dog. On one occasion, the St. Bernard ran at a woman walking on the street, causing her to draw back. On another occasion, the St. Bernard ran at Austin, to the end of its leash, but stopped before it got

to Austin, because of the leash. There were complaints of the St. Bernard running at large reported to the town office, which complaints were made before the St. Bernard bit Austin.



[6] Austin and the defendant's son, Kristen, became friends and began to play with each other in the fall of 2006. Austin was seven years old in the fall of 2006. The two boys often played in the defendant's yard. On one occasion, Austin came to the defendant's home and was playing with the defendant's childrens' toys in the yard, by himself. The defendant's children were in the house at the time. On that date, the defendant noticed her dogs were barking. The defendant saw that Austin was in her yard alone. The defendant asked Austin not to come into her yard and play with the toys, without her children being present. On another occasion, the defendant again heard her dogs barking. The dogs, including the St. Bernard in question, were tied up in her back yard. The defendant said that when she went out, she saw Austin hitting the St. Bernard with a long metal rod. After this, the defendant went to Austin's father's home and complained to him about Austin hitting the St. Bernard.

[7] On a later occasion, Austin punched Kristen. After this, the defendant told Austin's father that Austin was no longer welcome in their yard. The defendant filed a complaint with the police about Austin. However, even after this incident, Austin and Kristen continued to play together and Austin continued to go into the defendant's yard to play with Kristen. The defendant acknowledged Austin had been to her home many, many times and the defendant allowed Austin to play with her son in her yard. After the incident where the St. Bernard bit Austin, the defendant left a message on Austin's father's answering machine that Austin was not allowed at her home.

[8] The defendant testified that she only knew of one occasion where her St. Bernard was running loose in the town. She acknowledged that on that one occasion a man in town brought her St. Bernard home.

[9] On the day the St. Bernard bit Austin, December 9, 2006, Austin had been playing in the defendant's yard in the morning. The defendant said she was unaware that Austin was playing with Kristen that morning, or that he was in her yard. Austin went home for lunch. Once he was home, he realized that he had forgotten his skateboard at the home of the defendant.

[10] After lunch, Austin returned to the defendant's home to get his skateboard. Austin was on the front steps of the defendant's house. Kristen and the St. Bernard were both inside the defendant's house. Kristen was speaking to Austin from inside the house. Austin was outside the house on the steps speaking to Kristen. The upper part of the door of the defendant's home was missing its window or screen. The part of the door where the window or screen should have been was open to the outdoors. As Austin was speaking with Kristen, the St. Bernard lunged through the open window of the door and bit Austin. The St. Bernard put his paws on the bottom of the window opening where the window should have been and then the St. Bernard put his head outside of the window and bit Austin on the left side of his face. It happened very quickly.

[11] Austin had a toque on his head and the St. Bernard's mouth covered the left side of his face, from the point of the toque, down to almost the bottom of his chin. The bite was extensive. The St. Bernard tore much of the skin and the underlying flesh from Austin's face.

[12] Austin immediately left the defendant's home and ran to a neighbours. Austin's parents were called and Austin was taken to the Yorkton Union Hospital. From there, he was transferred to Saskatoon to the Royal University Hospital. He remained a patient in Saskatoon until his discharge three days later.

[13] Austin suffered the following injuries: flesh torn from the left side of his face including skin, nerves and fatty tissue; severe scarring from the left eye to the jaw line; some numbness to the left side of his face; and emotional trauma.

[14] Austin underwent surgery in Saskatoon and remained in hospital for a couple of days. He then returned home. The injury took a very long time to heal. The injury took six to eight months to heal over and during that time there was oozing and seeping from the wound. After eight months, the wound finally closed.

[15] During the recovery period there was a further complication. Austin had to undergo rabies shots. Austin received five rabies shots in the stomach, each five days apart. This was very traumatic and painful for Austin. Austin had to undergo the rabies shots because Austin's parents were unable to confirm with the defendant that the St. Bernard had had a proper rabies shot. This was very traumatic for Austin and he had to be physically restrained during each treatment.

[16] When Austin returned home from the hospital he could not attend school unless the wound was covered. At times the wound could not be covered, as it had to be left open to the air in order to heal. As such, Austin missed a good deal of school.

[17] Austin went back to the surgeon for a checkup 30 days after the first surgery. He went back to see the surgeon again a year following the surgery. He has also continued to have medical referrals to a pediatrician.

[18] Initially, the scar on Austin's face was very dark. It was described as a purple scar from his eye to his jaw line. That very dark color lasted about four and a half years. The scar is now less dark, but it is still very visible and pronounced on the left side of Austin's face from his eye to his jaw line.

[19] Austin has some loss of feeling in his cheek. Austin describes that it feels like there is a rope in his cheek.

[20] There is further plastic surgery recommended for Austin. Austin's parents testified that doctors hope to be able to do plastic surgery in the future, which may help to lessen the look of the scar.

[21] Austin's parents describe that Austin's personality has changed as a result of this injury. They described that prior to the injury, Austin was an outgoing, fun loving child. Since the incident, Austin has become withdrawn and does not make a lot of facial or eye contact. Austin sits with his head tilted downward to the side where the injury is. Austin will often attempt to cover his face, by either pulling a hat down over the left side of his face or by always wearing a hood, which comes around his face to cover his cheek. Austin maintained that demeanor while in the courtroom.

[22] Initially after the dog bite, the children at school were very supportive of Austin. But, eventually, they began to tease Austin, calling him “scar face” or “Freddie Kruger”. This was very difficult for Austin. Austin’s parents describe him as somewhat reclusive now. He is not social. His parents also advise that Austin’s school situation became so difficult that his family moved to another community to allow him to start over.

[23] Austin also has become very afraid and very fearful of dogs.

[24] Austin’s parents incurred special expenses associated with this incident. His mother missed three days of work while she stayed with Austin when he was in hospital in Saskatoon, losing total wages of $320.00. In addition, the family had to travel to Saskatoon and to Regina for medical appointments. They incurred travel expenses and meal expenses during those trips from Theodore and Yorkton to Regina or Saskatoon. Austin’s mother estimates that the total cost of meals for the medical attendances to be $252.00. Austin’s mother travelled 2200 kilometers to attend these various medical appointments. The rate for private vehicle expenses incurred by members of the public service is .3968 cents per kilometer, which equals a total of $872.96 for 2200 kilometers. In addition, there was an ambulance charge from Theodore to Yorkton of $40.00. The total of the special expenses is $1,484.96.

[25] The plaintiff, by his litigation guardian, claims against the defendant for damages under the doctrine of scienter and in negligence.

## ISSUES

1. Is the defendant strictly liable under the doctrine of scienter?

2. Is the defendant liable in negligence for the injuries to Austin?

3. If the defendant is liable in negligence, was Austin contributorily negligent?

4. If the defendant is liable, what is the appropriate quantum of damages?

## ANALYSIS

### *1. Is the defendant strictly liable under the doctrine of scienter?*

[26] John G. Fleming in *The Law of Torts*, 8th ed. (Sydney, Australia: The Law Book Company Ltd., 1987) indicates that dangerous animals are divided into two classes, and a domesticated dog, like the St. Bernard here, is classed as an animal *mansuetae naturae*. The result of this classification is that the owner of a dog can be held liable for an attack by the dog in one of two ways: the owner may be held liable under the doctrine

of scienter, which gives rise to strict liability; or, the owner may be held liable in negligence.



[27] In *Draper v. Hodder*, [1972] 2 All E.R. 210 (C.A.) cited in *Kirk v. Trerise* [1981] 4 W.W.R. 677, 122 D.L.R. (3d) 642 (B.C.C.A.), Lord Justice Edmund Davies, in discussing the distinction between the doctrine of scienter and negligence, stated at p. 217:

> A person keeping [a dog] which he knows has a propensity to do a particular kind of mischief is under an absolute duty to prevent it from doing that kind of mischief and is therefore liable without proof of negligence for any damage caused by the animal acting in accordance with that known propensity. But, to render the defendant liable, proof must be directed to his knowledge regarding the propensity of the individual animal whose activities have given rise to the institution of legal proceedings.

[28] Liability will only attach under the doctrine of scienter if the plaintiff can establish three conditions, as was set out in *Janota-Bzowska v. Lewis,* 96 B.C.A.C. 70, [1997] B.C.J. No. 2053 (QL):

> 1. that the defendant was the owner of the dog;
> 2. that the dog had manifested a propensity to cause the type of harm occasioned; and
> 3. that the owner knew of that propensity.

[29] The onus is on the plaintiff to demonstrate that the defendant here knew, or had reason to know, that her St. Bernard was dangerous. The St. Bernard need not have caused the specific type of harm that it inflicted on a prior occasion for the doctrine of

scienter to apply. In *Sparvier v. MacMillan* (1990), 82 Sask.R. 243, 67 D.L.R. (4th) 759, the court said at para. 9:

> [9] If the plaintiffs are to succeed on the bases of scienter, it must be established that the dog had mischievous or vicious propensities and that these propensities were known to the defendants. See *Usselman v. Bartsch* (1982), 17 Sask.R. 134; *Kirk v. Trerise et al.*, [1981] 4 W.W.R. 677; *Gill v. MacDonald et al.* (1977), 80 D.L.R. (3d) 21; *Richard et al. v. Hoban* (1971), 16 D.L.R. (3d) 679; *Thordarson et al. v. Zastie* (1968), 65 W.W.R. (N.S.) 555, and *Lindgren v. Karcha*, Sask. D.C. No. 57/81, J.C. Yorkton, July 24, 1984, Gerein J. (as yet unreported).
>
> [10] In Fleming, *The Law of Torts*, (7th Ed.), p. 332, the author states:
>
> > "When an animal of harmless species betrays its own kind by perpetrating damage, its keeper will not be held to strict liability unless actually aware of its dangerous disposition. This proof is known technically as 'the scienter' which derives from the old style declaration, charging the defendant with knowingly keeping a dangerous animal. The requisite knowledge must relate to the particular propensity that caused the damage...
> >
> > "In proving scienter, it is not necessary that the animal had actually done the particular kind of harm on a previous occasion; it is sufficient if, to the defendant's knowledge, it had manifested a trait to do that kind of harm, as where a dog habitually rushed out of its kennel and strained on its chain to bite passing strangers. Hence, the popular saw that 'every dog has one free bit' is not literally accurate.
> >
> > "Knowledge may be imputed to the defendant. If acquired by someone to whom he delegated full custody and control of the animal, it is imputed as a matter of law, in other cases it may be inferred that knowledge gained by a third party (for example, whilst having control of premises on which the dog was kept) had been communicated to him...

[30] In *Sparvier*, which was an action to recover damages suffered by the plaintiff when he was bitten by the defendants' dog on their farm, the Saskatchewan Court of Queen's Bench held that it is sufficient if, to the defendant's knowledge, the dog manifested a trait to do that kind of harm.

[31] Another crucial factor for liability to be established under the doctrine of scienter is the issue of control of the animal. If an animal is caged, chained, or leashed, but nevertheless manages to inflict injury on a plaintiff, it has been held, in some cases, that the doctrine of scienter is inapplicable. The doctrine of scienter has been applied only where the animal has escaped from the owner's control. In *Maynes v. Galicz,* [1976] 1 W.W.R. 557, 62 D.L.R. (3d) 385 (B.C.S.C.), the infant plaintiff put her fingers inside a wolf cage at the defendant zoo, and her hand was pulled inside the cage by the wolf. The court held that the doctrine of scienter was inapplicable, because the wolf had not escaped from the cage and it was sufficiently restrained. A similar view was taken in *Lewis v. Oeming* (1983), 24 Alta. L.R. (2d) 325, 42 A.R. 58 (Alta Q.B.), where a tiger properly housed in a safe enclosure injured the plaintiff. The Alberta Queen's Bench held that the concept of strict liability did not apply because, not only had the tiger remained in the control of the owner, but it was segregated into a part of the enclosure away from the main area where the plaintiff was reaching into. In *Hall v. Sorley* (1980), 23 B.C.L.R. 281, [1980] B.C.J. No. 1884 (QL) (B.C.S.C.), the plaintiff's action under the doctrine of scienter failed against the defendant whose dog bit her while she was visiting the defendant's backyard, because the guard dog was kept under proper restraint and the plaintiff knew of its dangerous propensities.

[32] Here, the defendant was the owner of the St. Bernard dog that bit Austin. The defendant's St. Bernard was known to break free from its chain and run around town, barking, and jumping at people. In one particular instance, the St. Bernard ran at a woman and she drew back. In another circumstance, the St. Bernard had run to the end of its chain, at Austin, and only stopped due to the fact that it was tied up. Taken as a whole, the St. Bernard had a manifested propensity to be aggressive and to cause the type of harm occasioned here.

[33] The issue here is whether the defendant had knowledge or was aware of the St. Bernard's propensity. The defendant denied knowing of the several circumstances where the St. Bernard got loose or acted aggressively. The defendant acknowledged that she knew of one occasion when her St. Bernard was loose in town. She knew that the St. Bernard barked at Austin when he was in their yard. While the defendant denies knowledge of the St. Bernard's aggressive propensities, I do not accept the defendant's evidence that she did not know that her St. Bernard was aggressive. The defendant said the St. Bernard was well-trained. But, there were numerous incidents of the St. Bernard breaking free. There were numerous complaints about the St. Bernard. There were several incidents where the St. Bernard ran and lunged at people, one of whom was Austin. On those occasions it was the leash that restrained the St. Bernard from causing harm. Theodore is a very small town. I am satisfied the defendant knew that her St. Bernard regularly broke free of its restraints, was aggressive and had the propensity to cause harm.

[34] In this case, there is also an issue as to whether the defendant's St. Bernard was within her control. The St. Bernard was located in the defendant's home during the incident, but was not restrained on a leash. It can be argued that the St. Bernard did not

escape the defendant's home, was not free to run at large, and was within her control. However, keeping the St. Bernard within the defendant's home however, does not mean that that was sufficient control to protect the public. Members of the public were permitted to enter the defendant's property and come to the door of her home. The defendant knew her door was missing the window and she knew the St. Bernard could reach the window. The amount of control exercised over the St. Bernard within the home was inadequate, as it was able to stick its head out of the door window. The St. Bernard was not restrained within the home. Any visitor at the door would be subject to an unrestrained dog. There was no evidence that the defendant had trained her children on how to control the St. Bernard at the door. The St. Bernard was not properly controlled and escaped the defendant's control at the time that it attacked Austin.

[35] I find that the doctrine of scienter does apply.

### *2. Is the defendant liable in negligence for the injuries to Austin?*

[36] I must also consider whether the defendant is liable in negligence. In *Morsillo et al. v. Migliano et al.*, [1985] 52 O.R. (2d) 319, [1985] O.J. No. 2657 (QL) (Ont. Dist. Ct.), cited with approval in *Sparvier*, the defendants were held liable in negligence when their dog bit a child playing in the defendants' yard. In that case, the defendants knew that the dog was prone to barking and lunging at people and the dog was penned in a fenced yard for that reason. Additionally, the defendants knew that children often played in and about their house and that the dog had attempted to attack children on other occasions. The court held that the defendants knew, or ought to have known, that if the dog got loose

with children around, it would likely attack a child. The court said the defendants in that case ought reasonably to have foreseen that a child might sustain injuries in the circumstances if preventative measures were not taken. The court found that the defendants took insufficient measures to remove the dog from a position of potential danger to the children playing in and around the house. The defendants did not warn their daughter as to the proper methods to move the dog or provide her with instructions as to keeping the dog away from other children by the use of a leash. The court held that the defendants had a duty to persons, like the infant plaintiff, to ensure that the dog was, firstly, restrained and, secondly, properly handled when it left the home. The court held damage caused by the dog bite was a foreseeable consequence of the defendants' failure to fulfil that duty.

[37] Here, the defendant was aware that Austin had a history of entering her yard to play with her son, and that he entered her yard even when Kristen was not around. The defendant knew Austin had been at her home many, many times. The defendant knew that the St. Bernard had a history of breaking free and knew or ought to have known the St. Bernard lunged at people on other occasions. The defendant knew that Austin had provoked the St. Bernard on a previous occasion and knew the St. Bernard barked at Austin. The defendant knew or ought to have known that if the St. Bernard got loose, with a child around, it could jump at a child and cause injury or harm if preventative measures were not taken. The defendant was under a duty of care to take preventative measures as outlined in the *Morsillo* case in order to protect children playing in and around her home from injuries that may be inflicted by her dog. The defendant should have ensured that the St. Bernard was properly restrained from guests visiting at the door

of her home. There was no evidence she instructed her children on the proper methods of restraint of the St. Bernard.



[38] If Austin was welcome in the defendant's yard, the defendant was under a duty of care to Austin and she breached that duty. The damages sustained by Austin were a foreseeable consequence of the defendant's failure to fulfill that duty.

[39] The defendant argues that Austin was a trespasser and that as such, she did not owe a duty of care toward Austin. I must consider whether Austin was a trespasser.

[40] The defendant testified that she told Austin and his father that Austin was not to come to her home. While I am satisfied the defendant told Austin's father on an earlier date that Austin was not to come to her home, I am not satisfied she told Austin. I am satisfied Austin was not aware that he was not welcome at the defendant's home. Austin did not know he was not to attend the defendant's home.

[41] As the defendant had told Austin's father that Austin was not to come to her home, then I must decide if Austin was a trespasser or was under an implied licence to attend on the date of the incident.

[42] In *Veinot v. Kerr-Addison Mines Ltd.*, [1975] 2 S.C.R. 311, 51 D.L.R. (3d) 533, the Supreme Court of Canada considered the issue of whether an entrant was a trespasser or had been provided with an implied licence. The court said at p. 538:

> The implication of a tacit permission arising from other intrusions upon an owner's land could not be made, under the concept of implied licence,

> unless it could be shown that the owner was aware of such intrusions, and, even if he was aware, it had to be shown that he permitted such intrusions on his land and not merely tolerated them.



[43] In this case, the defendant was aware of Austin's intrusions onto her property. While the defendant had told Austin's father, on an earlier occasion, that Austin was not to come to her home, Austin continued to attend. The evidence is clear that the defendant permitted those intrusions and did not merely tolerate them. Austin had been at the defendant's home "many, many times" according to the defendant. The defendant allowed Austin to play in her yard after she had told his father he should not come to her home. In fact, Austin was playing at the defendant's home in the morning on the date of this incident. The evidence is clear that Austin was not a trespasser. Austin was allowed in the defendant's yard. At the very least, Austin was under an implied licence to attend the defendant's home on the day in question. The defendant owed him a duty of care, and she breached that duty by failing to take adequate measures to restrain the St. Bernard and to keep her premises in a state so as to ensure the St. Bernard could not harm a child at her door.

[44] If I am incorrect and Austin was a trespasser, then I must consider what is termed an occupier's duty of "common humanity".

[45] The Supreme Court of Canada in *Veinot* considered an occupier's duty of common humanity. The court held that if the plaintiff is a trespasser, but the defendant in all the circumstances could anticipate the presence of trespassers, then the defendant owed a duty to treat the trespasser with the duty of "common humanity". The Supreme Court of Canada held that this duty arises only if the occupier had:

> [A]ctual knowledge either of the presence of the trespasser on the premise or of the facts that made it likely that the trespasser would come onto the land, and also actual knowledge of the facts concerning the condition of the land or activities carried out on it that were likely to cause injury to a trespasser who was unaware of the danger.



[46] *Veinot* set out four factors that need to be considered in considering whether an occupier was in breach of the duty of common humanity:

> 1. Gravity and likelihood of the probable injury;
> 2. Character of the intrusion;
> 3. Nature of the place where the trespass occurred; and
> 4. Knowledge that the defendant had or ought to have had the likelihood of the trespasser being present.

[47] The Supreme Court of Canada also indicated a possible fifth factor to be considered in determining if a defendant breached the duty of common humanity: the cost to the occupier of guarding against the danger, relative to financial and other resources. The presence of the fifth factor limits the duty to take reasonable steps to ensure the trespasser avoids danger. The Supreme Court of Canada in *Veinot* at pps. 546-47 held that where the likely trespasser was a child, too young to understand a warning, discharging the duty may involve providing reasonable physical obstacles to keep the child away from danger.

[48] The factors as described in *Veinot* take into account the diverse character of the entrants who fall within the category of trespasser. *Pannett v. McGuiness Co.*, [1972] 3 W.L.R. 387 (C.A.) at p. 390 states that "a wandering child or a straying adult stands in a different position from a poacher or a burglar. You may expect a child when you may not expect a burglar." Similarly, in *Harris v. Birkenhead Corp.*, [1976] 1 W.L.R. 279

(C.A.) the court held that an open window, that may not present a danger to an adult, may present a grave peril to a small child.



[49] In *Laviolette v. Canadian National Railway* (1986), 69 N.B.R. (2d) 58, [1986] N.B.J. No. 712 (QL) (N.B.Q.B.), an infant plaintiff was severely injured when, in the process of climbing onto a slow moving train, he fell under the wheels. The infant plaintiff was held to be a trespasser, based upon the evidence provided by the company's employees that they consistently had to remove children from its property and never tolerated their presence. The New Brunswick Queen's Bench adopted the concept of "common humanity" as outlined in *Veinot* and held that the defendant company owed the infant plaintiff a duty to treat him with common humanity. The court found that the defendant company could reasonably anticipate the presence of an infant trespasser. *Laviolette* cites with approval *Wade v. Canadian National Railway Co.* (1976) 14 N.S.R. (2d) 541, [1976] N.S.J. No. 365 (QL) (N.S.C.A.) that the attractiveness of an object or area may prove that the occupier should know that children will come to it, or that the occupier should know it is a danger for children, who do not fully realize the danger.

[50] In this case, the defendant knew that Austin would frequently spend time on her property with her son and even when her son was not there. Further, she knew that her St. Bernard would bark when Austin was in her yard. She knew that on one occasion the St. Bernard was aggravated by Austin who was prodding it with a metal rod. The defendant knew or should have known that if Austin entered her premises and provoked the St. Bernard, or was alone with the St. Bernard, there would be a danger that injury may occur. The defendant knew the St. Bernard was twice as big as Austin and there was a risk of grave harm.

[51] The character of Austin's intrusion in approaching the defendant's door was minimal. The door of the defendant's home is a place common for people to attend upon. The repeated presence of Austin on the defendant's property led her to know that he (i.e., the trespasser) could be present.

[52] The defendant should have expected that a child may enter her property, especially based upon Austin's past propensity to do so. Consequently, allowing the St. Bernard access to the exposed window and door may have been a greater danger to Austin, over adult members of the public, such that the defendant should have taken precaution against it.

[53] Here, the defendant should have been able to anticipate that children (like Austin) would be attracted to her property, based upon the dogs, toys in the yard, and her son as a playmate. Further, she knew or should have known that her St. Bernard dog posed to be a potential danger to unsupervised children and that those children may not appreciate the danger.

[54] The defendant should have gated off the front door of her home, so that the St. Bernard was not free to be near the door or lunge through it. Screens could have been placed on the windows to be in use while the St. Bernard is inside the home. The defendant could have taught the children proper restraints for the St. Bernard when answering the door. These would be financially fiscal measures that the defendant could have pursued in order to guard against any danger her St. Bernard would impose to trespassers or the general public. The defendant breached her occupier's duty of common humanity.

[55] I find that Austin was not a trespasser but was welcome at the home or was there under an implied license on the date in question. I find that the defendant breached the duty of care she owed to Austin and is liable in negligence. Even if Austin was a trespasser, the defendant was in breach of the occupier's duty to treat the trespasser with "common humanity" and is liable for Austin's injuries.

[56] The defendant is liable for Austin's injuries.

### *3. If the defendant is liable in negligence, was Austin contributorily negligent?*

[57] The court in *Laviolette, supra*, noted that when examining whether a child is contributorily negligent, age alone is not the test of knowledge or appreciation; the issue is whether a child can appreciate fully the specific kind of risk or danger involved. The test that has been developed to be applied to children, is a subjective-objective test. The subjective question should be asked first, because if it is answered in the negative, then no liability can be incurred. The subjective question is whether the child, having regard to his age, intelligence, experience, general knowledge and alertness, is capable of being negligent.

[58] At the time of the attack, Austin knew the St. Bernard had a propensity to bark (it had done this to him before) and he knew the St. Bernard would lunge at him while on his leash. However, having regard to his intelligence and age, Austin did not know and could not be expected to know the St. Bernard, while inside the defendant's home, would lunge through the door of its home at him. Austin was at the defendant's

door with no dog in sight. Austin could not expect that the St. Bernard would lunge through the door of the home to attack him, especially while a member of the household was present.

[59] Beyond that in these circumstances, Austin was not contributorily negligent in approaching the door of the defendant's home and speaking to her son. Indeed, adults of the general public would be permitted to approach the door in the manner that Austin did.

[60] There is no evidence in this case that Austin provoked or aggravated the St. Bernard on the day that he was bitten. He was simply standing outside the door talking to the defendant's son. As the Ontario District Court in *Morsillo, supra* held, where there is no evidence that the infant plaintiff provoked or aggravated the dog, the child was not contributorily negligent. Austin is not contributorily negligent.

[61] I find the defendant liable in negligence for Austin's injuries. The defendant owed Austin a duty of care and breached that duty. The harm the St. Bernard caused to Austin was foreseeable. Even if Austin was a trespasser, the defendant owed him a duty of "common humanity" which she breached by not taking the adequate precautions to protect child trespassers in and around her home. Austin could not have anticipated the St. Bernard would lunge out the door. Austin did not provoke or aggravate the St. Bernard on the day of the incident. Austin was not contributorily negligent.

### *4. If the defendant is liable, what is the appropriate quantum of damages?*



[62] A review of authorities from various provinces set out a range of general or non-pecuniary damages for injuries similar to the ones sustained here by Austin. In *M.(S.) v. Rousseau*, 2011 QCCS 3905, [2011] J.Q. No. 10045 (QL), a 42 year old plaintiff was bitten in the face by a dog and part of his nose was chewed off. He had three surgical interventions, but was left with part of his nose missing. The plaintiff was left traumatized by the incident and was awarded $65,000.00 in 2011.

[63] In *Burton v. Daciw* [2003] O.J. No. 3941 (QL) (Ont. Sup. Ct.), the 24 year old plaintiff was struck beside the right eye with a beer bottle, resulting in a gash two to three inches long and about an inch wide. She was treated in emergency. Her eye was sutured and she was given a tetanus shot. Her eye was not damaged and no bones were broken. External sutures were removed about a week later. She suffered pain beside her eye for four to six months, first on a daily basis, and then intermittently. As well, she suffered intense migraine headaches; at least three a week for the first six months, which subsided to about twice a month later. The discoloration of the scar near her eyes was noticeable for about eight months. The scar, although light, is permanent. She suffers some eye droop when she is tired. The general damages were fixed at $50,000.00.

[64] In the *Guimond v. Guimond Estate* (1996), 183 N.B.R. (2d) 125, [1996] N.B.J. No. 591 (QL) (N.B.C.A.), the plaintiff, age 13, suffered extensive facial lacerations requiring a total of 78 stitches. Most of the lacerations were in the area of the forehead, with lesser injuries to the cheek and nose. Cosmetic surgery was performed on

the plaintiff's forehead. The remaining scars were not immediately noticeable under the hair. The plaintiff suffered headaches and was assessed general damages which included the possible loss of future earning capacity at $35,000.00, which amount was increased on appeal to $50,000.00.

[65] In the case of *T.(N.) c. 9107-3932 Québec inc,* 2008 QCCS 1429, [2008] J.Q. No. 2947 (QL), a five year old plaintiff was injured when she was struck by falling snow and ice. She suffered lacerations to her face. She required local anaesthesia while her wound was sutured. The sutures were taken out eight days later. The plaintiff's mother massaged the wound three to four times a day for one year. The plaintiff was teased about her injury by her nursery school classmates and was left with a visible scar under her left eye. She was awarded $38,000.00 general damages.

[66] In *Zhan v. Kumar* [2008] O.J. No. 1102 (QL), 2008 CarswellOnt 1564 (WL Can) (Ont.Sup.Ct.), a plaintiff was injured when he was attacked and bitten by a dog. The plaintiff's face was bitten twice and he suffered multiple lacerations over both cheeks and nose area. Most of the lacerations were superficial and healed well, although the one on his cheek required stitches and further surgery. The plaintiff underwent lengthy medical treatment, including two operations on his face and he was left with some residual numbness and pain, though his scars were not particularly noticeable. The plaintiff also suffered from some depression and anxiety from the injury and was awarded $35,000.00.

[67] In *Kowalchuk v. Britton,* 2000 SKQB 328, 197 Sask. R. 112, a child who was three and a half years old was bitten on the face by a dog. Immediately after the incident, she was taken to hospital and received stitches to close the wounds. Complications

developed and she was hospitalized for three days. The wounds to her face eventually healed leaving scar tissue on her left cheek. It was hoped the scar would disappear over time, but this did not occur. Some eight years later the scar was described by her doctor as prominent scarring, about 1.5 centimeters on the left upper cheek and lower cheek. The plaintiff underwent dermabrasion, which improved the scar to some extent. The child's scars were apparent even when she wore makeup, and very noticeable when she did not wear makeup. The plaintiff was awarded $25,000.00 general damages.



[68] In *Kerins v. Deroche* [2004] O.J. No. 2259 (QL) (Ont. Sup. Ct.), a 20 year old male was injured when he was assaulted by having a glass smashed in his face. The injury ripped the skin off his nose, cheek and eye, requiring 200 stitches to close the wounds. He was taken by ambulance after the assault and was administered 25 needles to freeze his face. There were one or two small fragments of glass in his left eye. He had to wear a bandanna while outside to protect the scars from the elements for six to ten months post-surgery. One year post-accident, he still felt numbness in his lip and two years post-accident he underwent a scar revision. He was left with permanent scarring on his face and he remained self-conscious about the scars. He became introverted and lost interest in activities. He was awarded $45,000.00 damages.

[69] In *Guignard c. Compagnie d'assurances Missisquoi,* 2006 QCCS 59, [2006] J.Q. No. 234 (QL), a plaintiff, aged eight, suffered severe facial lacerations after being bitten by a dog. She received sutures in the emergency room and convalesced at home. She had to use a straw to eat for a week and suffered nightmares of fear. The lacerations affected her diction for about a year. Over time the scars did improve and would likely improve further. She had some psychological damage. The award was $45,000.00 total.

[70] In this case I observed Austin's scar. It is pronounced and very noticeable. As would be expected of a child, he is very self-conscious of the scarring, as was described by his family. He has been teased about the scarring and now even maintains a posture and wears clothing to hide his face.

[71] I have considered the various authorities referred to me by counsel as they relate to Austin's injuries, the severity of the injuries, the need for surgery, the length of convalescence, the need for rabies shots and the emotional impact of the incident and injuries. I am mindful that Austin's scarring is permanent and noticeable. I conclude that this is particularly distressing for this young man, entering his formative years as a teenager. Furthermore, he will no doubt continue to be asked about the scarring for the rest of his life and this will continue to cause him concern and embarrassment. He will need further surgery.

[72] The incident giving rise to this accident occurred in December of 2006 and damages must be assessed at that date. In my opinion an appropriate sum to compensate Austin for his injuries would be $55,000.00.

[73] I am also satisfied that Austin's mother has established the claim for special damages of $1,484.96.

[74] I am of the view that this is an appropriate case to award pre-judgment interest. In my opinion Austin's litigation guardian was entitled to see what effect the scarring would have on him over time, and whether the scars themselves would disappear as he grew older. I believe it is appropriate that his guardian waited until Austin reached

an age close to adolescence before pursuing the action to a final conclusion and accordingly award pre-judgment interest on the damages as I found them to be.

[75] The Saskatchewan Hospital Service Plan claim, including pre-judgment interest, is $5,416.50. The plaintiff is entitled to recover that amount.

[76] The plaintiff claimed cost of future care but presented no evidence to support this head of damage and so no damages are awarded in this regard.

## CONCLUSION

[77] The plaintiff shall have judgment against the defendant in the sum of $55,000.00, plus pre-judgment interest from December 9, 2006 to the date of judgment, plus judgment in the sum of $6,901.46, plus taxable costs.

J.
C. L. DAWSON