IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MIRAMICHI

Citation: 2013 NBQB 134
Date: April 8, 2013 **Docket: NSC-138-2012**

Between:

Guylaine Mina Russell

- and -

Anne-Berthe Aventriep

Before: **Justice Fred Ferguson**

Date of hearing: **March 22, 2013**

Date of decision: **April 8, 2013**

Appearances:

Guylaine Mina Russell **- *per se***
Charles Antoine Bourgeois **- for the Defendant**

FERGUSON J.

INTRODUCTION

[1] This Simplified Proceeding action, brought pursuant to the provisions of Rule 80 of the *Rules of Court of New Brunswick,* concerns an altercation between two dogs that occurred early one summer morning in the month of August 2012 along the main highway in Hardwicke, New Brunswick. The Plaintiff, Ms. Russell, claims that her six year old fifteen pound Pomeranian-Terrier mix was attacked by a much larger four year old thoroughbred German shepherd that she thought weighed approximately fifty to sixty pounds. Ms. Russell's dog suffered serious injuries that resulted in veterinary bills of $2,962.52 Ms. Russell wants all of the money she spent for the dog's treatment reimbursed by the Defendant.

[2] The Defendant asserts that there is a complete absence of evidence that her German shepherd had any known dangerous propensity and alleges that the Russell dog provoked the incident that led to its injuries. Ms. Aventriep adds that there is an absence of any evidence that, as the owner of the German shepherd, she was in any way negligent in how she handled her dog that day.

[3] The incident began when the Russell's dog bounded out of the family home in Hardwicke, NB heading towards the nearby highway where the German shepherd was being walked on her leash by Ms. Aventriep at the edge of the highway.

[4] Ms. Russell testified that she had no knowledge of the shepherd's disposition. Both dog owners claim that their dogs are friendly animals by nature and that they have never been involved in any violent incidents with other animals or humans. The Aventriep's shepherd came to Canada as a pup from Germany. It was intended to be trained by its original owner for use as a service dog with the R.C.M.P. or some other agency providing public security. According to Ms. Aventriep, the importer, who lived in Prince Edward Island, had the dog for the first year or so of its life. However, the dog had one molar tooth missing and was disqualified from such work for that reason. Ms. Aventriep's daughter acquired the dog from the importer. After a few months she gave the dog to her mother. It has lived happily and uneventfully with the Aventriep family in Hardwicke since that time. It was four years of age at the time of the incident.

THE EVIDENCE

[5] On either August 24th or 25th, 2012, while the Defendant walked her dog on its leash early that summer morning on the edge of the highway in Hardwicke, the Plaintiff's dog emerged from their nearby home along with Ms. Russell, her sister-in-law and two nieces. Ms. Russell forgot her coffee in the microwave inside the home and returned to the kitchen to retrieve it while the dog ran out the door unleashed. It was not uncommon for the dog to run loose as it is a rural part of the county with houses that are not built close to one another. In fact, the Russell dog is only leashed for trips to the animal clinic.

[6] Upon seeing the shepherd on the edge of the other side of the highway, the Russell dog ran out to and crossed the highway. Some barking ensued and, according to the Defendant, the Russell dog became aggressive. Both dogs then began barring their teeth and growling at each other. That soon led to the shepherd initiating physical contact by seizing the Russell dog by the abdomen and shaking her several times in its mouth. The uncontradicted evidence of the shepherd's owner is that she commanded her dog to "let go" in German, a command the dog had learned as a pup. The

dog initially refused to do so but then complied after repeated commands to the same effect.

[7] Ms. Russell, who by this time was at the scene, testified that her dog was lying prone of the ground with all four legs outstretched. The dog had excrement dripping from her rectum and was bleeding in the abdominal area from undetermined wounds. Seconds later the shepherd grabbed the Russell dog again, this time by the neck as it attempted to stand up. The Russell dog was shaken a second time and then finally released by the shepherd. She was taken home by Ms. Russell. The shepherd and her owner went home as well and then Ms. Russell, after unsuccessfully attempting to contact local animal hospitals, left for the animal clinic in Moncton where the dog was treated for several days.

[8] No useful purpose to the proper disposition of this case would be served by detailing the reaction of Ms. Russell and her two young sons to the incident, suffice it to say that there was great upset in the family caused by it. This included Ms. Russell having to stop in Richibucto on the way to the animal clinic in Moncton in order to reattach a blister bandage over the wounds to the dog's abdomen when it detached and her sons became hysterical.

[9] As noted, the Defendant claims that the Russell dog was the aggressor in crossing the road and barking in such an aggressive manner that the altercation between the dogs was provoked. However, it is clear from the evidence that the bravado displayed by the Russell dog, if indeed it was aggressive towards the shepherd, was not an aggression rooted in the true strength and ferocity of the much smaller dog.

[10] Photographs of the dog taken after treatment show a series of significant sutured wounds in the abdominal area consistent with the evidence led by the Plaintiff. As a result of the incident the Russell's do not let their dog out unsupervised. The shepherd still lives in the community and is regularly walked both on and off her leash by her owners; more specifically, on the leash by Ms. Aventriep and off the leash at times by Mr. Aventriep.

[11] The final portion of the evidence relevant to the outcome of the matter relates to the date on which the incident took place. The Defendant testified that: "I had it in mind" that it was Friday the 24th of August because her husband had been trying to obtain receipts for tuition from the university he attended and needed them before the

weekend as the school was not open on Saturday. It must be noted that the Defendant, a retired public school teacher, spoke with a strong accent. It was clear that English was not her first language. It may be that her choice of words was simply her best effort to describe, in a language that was not her maternal language, what it was she wanted to say without intending to appear imprecise.

[12] The Plaintiff tendered her Visa receipt for the dog's treatment as well as the receipt from the clinic dated the 25th of August 2012. She said there was a requirement that she pay a significant portion of the fees, estimated by the clinic, in advance of the commencement of treatment, once they arrived at the clinic, or else it would not have been carried out. Counsel for the Defendant submits that, in the event that damages are awarded, if the visit to the animal clinic was the day after the attack then Ms. Russell did not mitigate her damages by attending at the first reasonable opportunity.

[13] Applying the principles of credibility assessment set out by the Supreme Court in *F.H. v. MacDougall* [2008] 3 S.C.R. 41 (S.C.C.) it is clear that the more reliable testimony is that of Ms. Russell. Her Visa bill of August

25th, 2012 together with her evidence of unsuccessfully trying to find an animal hospital open in northern New Brunswick on Saturday was compelling. On the other hand, Ms. Aventriep's evidence, while possibly the product of a slight language challenge in English, was less so. Although, as shall be seen, nothing turns on the finding, I find that the incident took place on August 25th, 2012.

ANALYSIS

[14] The Plaintiff, who is self-represented, launched her action based upon a false notion that the Aventrieps were strictly liable for the injuries inflicted upon their dog by the much larger German shepherd. The Aventrieps, through their counsel, defended this case on the basis that the common law doctrine of *scienter* applied and that there was no proof their dog was dangerous and known to be so by them.

[15] The law that applies to cases of this sort is rooted in the nature of various animal propensities. The consequent liability for the acts of an animal owned or harboured by a person is regulated by one of two common law doctrines of strict liability and *scienter* depending upon the type of animal being accused of dangerous or mischievous behaviour.

[16] Beyond these two common law principles, in certain instances, it may be asserted that an owner, or a person in possession of or harbouring an animal, has been negligent in the way in which the animal has been handled, or not properly handled as the case may be, and thus liable for the actions of that animal. See, is this latter regard: *Leblanc v. Legere* (1995), 157 N.B.R. (2d) 26 (N.B.Q.B.) per Creaghan J. at paragraph 4. See, also, *Mosillo et al. v. Migliano et al.* (1985), 52 O.R. (2d) 319 (O.Dist. Ct.) and *Sparvier v. MacMillan* (1990), 82 Sask.R. 243 (S.Q.B.). In *Richard v. Hoban* (1970), 16 D.L.R. (3d) 679 (N.B.C.A.) Bujold J.A. noted:

> The common law liability of owners of animals is stated in Halsbury's Laws of England, 3rd. ed. Vol. 1, page 663, para. 1267 in the following words:-
>
> "The law assumes that animals which from their nature are harmless, or are rendered so by being domesticated for generations, are not of a dangerous disposition; and the owner of such an animal is not, *in the absence of negligence*, liable for an act of a vicious or mischievous kind which it is not the animal's nature usually to commit, unless he knows that the animal has that particular vicious or mischievous propensity; proof of this knowledge, or scienter, is essential. But where this knowledge exists, the owner keeps such an animal at his peril, and is answerable in damages for any

> harm done by the animal, even though the immediate cause of the injury is the intervening voluntary act of a third person." [Emphasis added]

[17] There is no evidence to support a finding that the owner in this case was negligent in how she handled her shepherd that day. The Plaintiff is thus restricted to asserting that the legal liability for the actions of the shepherd should be founded on the common law applicable to the actions of the specific type or nature of the animal, in this case a domestic German shepherd dog. That basis is, as shall be seen, in *scienter*.

[18] The specific principles underlying owner/harbourer responsibility for the actions of an animal under her care were succinctly set out in *The Law of Torts,* John Fleming, The Law Book Company Australia, 6th edition 1983 at p. 329:

> Dangerous animals are divided into two classes: (i) *ferae naturae* like bears and lions, which by reason of their species are normally dangerous, although individuals may be more or less tame; and (ii) *mansuetae naturae*, like cows and dogs, which as a kind are ordinarily harmless, though individuals may harbour a vicious or dangerous disposition. Animals of the first category are never regarded as safe, and liability attaches for the harm they may do without proof that the particular animal is savage. The law rigidly ignores the world of

> difference between the wild elephant in the jungle and his trained brother in the circus. But as regards the second class, it must be shown that the *particular* animal was dangerous and that the defendant knew, or had reason to know, it. There is also this other difference that the very risk inherent in animals *ferae naturae* is that, in perpetrating harm, they are coming true to nature and are acting in accordance with the instinct of their species, whereas liability for a dangerous animal *mansuetae naturae* is based upon the fact that it has acted contrary to the nature of its kind. Responsibility is accordingly limited to these particular hazards.

The public policy reasons for limiting the liability of owners/harbourers for the acts of domestic pets are readily apparent.

[19] While some jurisdictions have moved to enact legislation to alter the common law as I have previously set it out, New Brunswick has not done so. The Province briefly flirted with the idea of enacting legislation to regulate the owners of dogs of certain specific breeds. However, that legislative proposal was never enacted and proclaimed by the Legislature of the Province. See: Bill 55, The Restricted Dogs Act, First Reading May 28th, 2004.

[20] The principal legislative initiative on the subject of dog control in New Brunswick was enacted pursuant to the *Municipalities Act,* S.N.B., ch. M-22 in the form of Regulation 84-85, O.C. 84-345, filed May 9th, 1984. That regulation is generally aimed at dog control and includes provisions to regulate the seizure of dogs. The regulation gives certain powers to Dog Control Officers and also creates offences for non-compliance with the various aspects of that short Regulation. None of the provisions of the regulation are relevant to this case.

[21] This German shepherd dog is a domestic animal by class, specifically, a family pet. Thus, the basis of the claim for damages is restricted solely to the operation of the doctrine of *scienter.* In *Richard v. Hoban* (*supra*) Bujold J.A. explained the doctrine of *scienter* in this way:

> With regards to proof of scienter, Halsbury (supra) at para. 1268 states:-
>
> "The evidence of the scienter must be directed to the particular mischievous propensity that caused the damage. In order to recover for the bite of a dog on a human being, it is necessary to show that the owner had notice of the disposition of the dog to bite mankind; it is not enough to show that the dog had previously bitten a goat; but proof of a general savage or ferocious

> disposition towards mankind, and that it had a habit of rushing at people and attempting to bite them, is sufficient without proof of any actual previous bite."

There is no good reason not to apply the same legal reasoning to the biting of one dog by another in the particular circumstances that occurred here or for the biting of another animal by a dog. See, in this regard: *Leclair v. Gionet* [2012] N.B.J. No. 343 (N.B.Q.B.), in which a Rottweiler dog was alleged to have mortally wounded a calf less than a year old. See, also, *Davis v. Markey and Markey* (1993), 133 N.B.R. (2d) 226 (N.B.Q.B.) in which one dog attacked another.

[22] In *Richard v. Hoban* (*supra*) Bujold J.A. summarized the essential elements of proof of *scienter.* Speaking for the majority he said:

> In the instant case the Respondents had to prove three things: (1) that it was the dog in question which inflicted the injury; (2) that the dog had a mischievous propensity to commit the particular act of injury, and (3) that the owner knew of such propensity; in other words, had *scienter*.

[23] There is no evidence that Ms. Aventriep had any, or should have had any, reason to know of any dangerous or

mischievous propensities of her German shepherd dog. The Plaintiff knows of none either, according to her testimony. It would appear that the German shepherd had been living in Hardwicke with its owners for more than two years at the time. Both families live in close proximity to each other in a rural part of the Miramichi and would likely be well aware of any reputedly dangerous dogs living in that small close knit community.

CONCLUSION

[24] It is not surprising that the Russell dog was allowed to run loose, not only on the day in question but also on a regular basis, given the rural nature of Hardwicke, NB. It paid a heavy price for its interest in the German shepherd even though the shepherd was leashed at all times.

[25] Ms. Russell has clearly established that the Defendant's dog did inflict the injuries sustained by her dog. However, she has not been able to establish that the Aventriep's German shepherd dog had a mischievous or dangerous propensity to cause the injuries that occurred or that the Aventriep family, particularly Ms. Aventriep, knew, or had reason to have known, that their dog had such a

propensity. As a result, Ms. Russell's claim for damages must fail.

[26] In closing, although neither party raised the issue, something should be said about the fact that the Aventriep shepherd was leashed and was being escorted on that leash at all times by her owner Ms. Aventriep. In *Ross v. Vidnes* [2012] W.W.R. 289, 402 Sask. R. 291 (S.Q.B.) Dawson J. made the following observation concerning the restricted application of the doctrine of *scienter* when he noted at paragraph 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.

[27] The Defendant has not asserted that *scienter* has no application to the facts of this case because of the fact that the shepherd was leashed at all times as she was walked by her owner. If the Defendant had contended that *scienter* did not apply it would have added another legal hurdle for Ms. Russell to overcome by virtue of the finding I previously made that, in all of the circumstances, Ms. Aventriep was not negligent. I will make no finding that because the shepherd was leashed *scienter* has no application.

[28] At the close of final submissions counsel for the Defendant adopted the position that if Ms. Russell failed to establish liability there should be no order as to costs. That was, in my view, the appropriate position to take. The

action is dismissed. There will be no order with respect to costs.

Fred Ferguson J.C.Q.B.