

Case Name:

McLean v. Thompson

Between

**Marjorie McLean, Claimant, and
Raymond Sydney Thompson, Sharon Gladys Thompson, Ryan
Thompson, Tanya Thompson a.k.a. Tanya Knowles, Defendants**

[2009] B.C.J. No. 2733

2009 BCPC 415

File No. 36630

Registry: Kamloops

British Columbia Provincial Court
Kamloops, British Columbia

S. Harrison Prov. Ct. J.

Heard: November 12 and 13, 2009.

Judgment: December 16, 2009.

(50 paras.)

Tort law -- Negligence -- Strict liability (Rule in Rylands v. Fletcher) -- Liability of owners of animals -- Claim by McLean after she was bit twice by a wolf-dog hybrid allowed in part -- Wolf-dog was owned by Tanya and Ryan Thompson -- Bites occurred at home of Sharon and Raymond Thompson -- Claim in scienter established -- Wolf-dog hybrids were animals ferae naturae and strict liability attached to any damage they caused -- No evidence to support claim in negligence or under Occupiers Liability Act.

Tort law -- Occupiers' liability -- Particular situations -- Liability for injury by animals -- Claim by McLean after she was bit twice by a wolf-dog hybrid allowed in part -- Wolf-dog was owned by Tanya and Ryan Thompson -- Bites occurred at home of Sharon and Raymond Thompson -- Claim in scienter established -- Wolf-dog hybrids were animals ferae naturae and strict liability attached to any damage they caused -- No evidence to support claim in negligence or under Occupiers Liability Act.

Claim by McLean after she was bit twice by a wolf-dog hybrid. The wolf-dog hybrid, Harley, was owned by Tanya and Ryan Thompson. The bites occurred at the home of Sharon and Raymond Thompson. Harley was in the yard at Sharon and Raymond's home when McLean visited. As McLean entered the yard, Harley lunged and bit her twice. Tanya Thompson was not present when the bites occurred. Harley had not previously been aggressive.

HELD: Claim allowed in part. McLean established her claim in *scienter* against Ryan and Tanya Thompson. Wolf hybrids did not occur in nature. They were a creation of humans. Wolf hybrids were unpredictable and that was where the danger was. Wolf hybrids as a class of animals were not harmless by nature but were animals *ferae naturae*. Therefore, strict liability would attach to any damage caused by Harley without any requirement requiring proof that he had a propensity to attack people and that his owners or keepers knew or should have known of it. Sharon and Raymond Thompson were not keepers of Harley when McLean was bitten. McLean did not make out her claim of negligence against Ryan and Tanya Thompson. Ryan and Tanya had seven years of experience with Harley. Nothing indicated Harley was a threat to bite someone. There was no evidence to support a claim under the Occupiers Liability Act.

Statutes, Regulations and Rules Cited:

Occupiers Liability Act, [R.S.B.C. 1996] ch. 337, s. 3

Prevention of Cruelty to Animals Act, [R.S.B.C. 1996] ch. 372,

Animals Act, 1971,

Dog Regulation and Impounding By-Law No. 502, s. 13

Counsel:

Counsel for the Claimant: R. Lammers.

Counsel for the Defendants Raymond Thompson, Sharon Thompson: E. Williamson.

Appearing on their own behalf: Tanya Thompson.

Appearing on their own behalf: Ryan Thompson.

REASONS FOR JUDGMENT

1 S. HARRISON PROV. CT. J.:-- The Claimant Marjorie McLean brought this action against the Defendants after she was bitten twice by a wolf-dog hybrid ("wolf hybrid") named Harley, owned and kept as a pet by Tanya Thompson (then Knowles) and Ryan Thompson ("the Thompsons"). The bites occurred on August 27, 2006, at the home of Raymond and Sharon Thompson ("the Thompsons Sr.") in Ashcroft, British Columbia. Raymond and Sharon Thompson are the parents of Ryan Thompson.

2 The claim is brought on three grounds: that the Defendants are strictly liable in *scienter* for the injuries caused to the Claimant without proof of negligence as Harley is argued to be a member of an inherently dangerous class of animals; that the Defendants are liable alternatively in negligence; and that the Defendants Raymond and Sharon Thompson are also liable under the provisions of the *Occupiers Liability Act*, [R.S.B.C. 1996] ch. 337. The purpose of this hearing is to determine the issues relating to liability, with the issue of damages to be addressed later, if necessary.

The Attack:

3 The facts of the case are not much in dispute. On August 27, 2006, after a two day drive, Ryan and Tanya Thompson of Hay River, N.W.T. arrived in Ashcroft, B.C. They were visiting Ryan's parents, Raymond and Sharon Thompson, and were to be married at the parental home later that week. The Thompsons brought with them their pet wolf hybrid, Harley. Harley was then a seven year old neutered male known to the Thompsons Sr. from previous visits.

4 Harley was in the yard at the Thompsons Sr. home on August 27, 2006. At about 4:00 p.m., the Claimant, Ms. McLean, attended the home with a gift of some harvest vegetables. Ray Thompson was at the garage as Ms. McLean approached and they spoke. Mr. Thompson said that his wife Sharon was in the house. As Ms. McLean approached, Harley, who looked like a large dog, jumped up and put his front paws on the waist-high fence. This made Ms. McLean nervous. She asked Mr. Thompson about the dog and he told her the dog was okay and that she should go in. Ms. McLean was reluctant to do so and Mr. Thompson said he would get the gate. As Mr. Thompson opened the gate, Harley lunged and bit Ms. McLean on the right leg. Mr. Thompson tried to get Harley under control but could not. The animal again attacked Ms. McLean, biting her a second time on the left thigh.

5 Mr. Thompson called his son Ryan out of the house to control Harley and his wife Sharon, a nurse, to assist Ms. McLean, who had been injured as a result of the bites. Ms. McLean was taken to the Ashcroft Hospital by her husband and treated. Tanya Thompson was not present at the Thompson home when the biting occurred.

Harley's Background:

6 Harley was purchased as a puppy by Tanya Thompson, having been whelped in December 1998. Ryan Thompson agreed to the purchase and he played an active role in keeping and training Harley. Ms. Thompson understood Harley to be a wolf hybrid, specifically a Malamute-wolf cross and was provided a certificate of birth by the vendors, the owners of the sire. The sire was stated to be an Arctic wolf-Malamute hybrid (63% wolf) and the dam was also stated to be an Arctic wolf-Malamute hybrid (52% wolf). Harley was purchased as a hybrid who was more than half wolf. Ryan Thompson said that he was not at first aware that Harley was a wolf hybrid, but that he was not concerned when he found out. Tanya Thompson considered Harley to be primarily a Malamute cross.

7 Harley came with an information sheet entitled "About Your New Wolf Hybrid Puppy" which offered some general information about hybrids including some caution about raising hybrids with children; feeding and training advice to dampen hunting instincts; and training and socialization to decrease aggressiveness, a characteristic "that you must not encourage in your wolf hybrid". Ms. Thompson was also provided with a booklet from her veterinarian entitled "Dogs: Preventing Aggression" to assist with inhibiting puppy bites. As Harley grew, Ms. Thompson found him responsive to training and to be generally obedient, but she was unable to train him to walk on a lead. As a result, in the summer of 1999, Harley was enrolled in a training kennel in Williams Lake and was taught to walk to heel on a lead.

8 The Thompsons both gave evidence that in the seven years they had owned Harley before he bit Ms. McLean, he had not been aggressive. Harley had never been a problem when people came onto their property. They had never received any complaints about Harley acting in an aggressive manner. Ms. Thompson said that once Harley had growled at a pet store Santa Claus but had calmed down for the ensuing photograph. He was not always good at veterinary visits and so he was muzzled for those. Harley had also been in two or three dog fights in public places as a result of which she and Mr. Thompson had decided to have Harley neutered. The Thompsons said that they treated Harley as they would have treated any large dog.

Expert Evidence:

9 The Claimant, Ms. McLean, and Defendants Ray and Sharon Thompson adduced expert evidence regarding wolf hybrids. The Claimant called Richard Polsky, Ph.D., who gave evidence by video link from Los Angeles, California. Dr. Polsky has an extensive academic background in the United Kingdom and United States in the field of animal behaviour and has published widely in veterinary and animal behaviour journals. He is one of about 50 certified animal behaviourists with the Animal Behaviour Society, which he described as an academic organization in the United States consisting of about 2,500 members. Dr. Polsky has presented to scientific, veterinary and other organizations on animal behaviours and has been qualified as an expert in canine behaviours in American courts many times. A few of those cases involved wolf hybrids.

10 Dr. Polsky also runs Animal Behaviour Counselling Services, Inc. in Los Angeles and conducts hands-on training

with the owners of dogs and cats. Dr. Polsky is familiar with the professional and scientific literature regarding hybrids, of which there is not a great deal. He authored a peer-reviewed article in *Veterinary Medicine* (1995, Vol. 90 pp. 1122-1124) entitled "Wolf hybrids: Are they suitable as pets?" Dr. Polsky has also been involved in puppy training with wolf hybrids. After hearing argument, Dr. Polsky was qualified as an expert in the fields of animal behaviour and canine aggression, including wolf hybrids, and a person able to give opinion evidence in those areas.

11 Dr. Polsky's report was exhibited and he also gave evidence that wolf hybrids are a cross between two species, the domesticated dog, *canis familiaris*, and the wolf, *canis lupus*. Wolf hybrids are not themselves a distinct species and do not arise in nature. Dogs, he said, including Malamutes, have been domesticated over thousands of years and countless generations for qualities that suit them for life as companion or working animals in the human environment. Wolves by contrast are wild and survive in a niche where they are well adapted to hunting in small groups and have enhanced predatory behaviours. Wolves are naturally wary and fearful of people and wolf-involved human fatalities are rare. Wolf attacks on people are most likely to occur where the animals are confronted or enclosed.

12 Dr. Polsky was also of the view that wolf puppies don't take human training well, but can become habituated to people. He said in evidence that one can train a wolf or a wolf hybrid to be more manageable but the animal remains a wolf or a wolf hybrid. They will still have the genetic programming that nature has provided them. They are not domesticated animals.

13 In Dr. Polsky's opinion, wolf hybrids inherit sufficiently strong natural characteristics from their wolf antecedents to make them unpredictable, and therein lies the danger. This unpredictability persists even where an individual wolf hybrid presents with a favourable history with humans. Dr. Polsky was clear in expressing his view that the idiopathic aggression of wolf hybrids makes these animals potentially dangerous to keep as pets in an urban environment. Dr. Polsky said that this view is widely accepted in the scientific and humane communities in Canada and the United States.

14 Dr. Polsky referenced two peer-reviewed articles in the Journal of the American Veterinary Medical Association. (Cf. "Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998" *JAVMA*, Vol 217, No. 6, pp. 836 - 840, September 15, 2000; "Wolf hybrids - a biological time bomb?" *JAVMA*, Vol. 201, No. 3, pp. 381 - 382, August 1, 1992.) The first article ranked wolf hybrids sixth on a list of dog breeds involved in bite-related fatalities in the United States between 1979 and 1998. Pit bulls were at the top of the list, followed by Rotweilers and German Shepherds. In cross examination, Dr. Polsky agreed that the size of the population of wolf hybrids in the United States was not known, but said that he expected there was a much smaller wolf hybrid population compared to the populations of more popular breeds such as Pit bulls. Given comparable populations, he said, he expected that the rates of attack for wolf hybrids would be as high or higher than that of Pit bulls.

15 The British Columbia Society for the Prevention of Cruelty to Animals ("the SPCA") exercises statutory powers under the *Prevention of Cruelty to Animals Act* [R.S.B.C. 1996] ch. 372. Witness Dustin Eager, the manager of the Kamloops Branch of the SPCA, gave evidence that in 2009 the SPCA's Board of Directors approved a position statement opposing keeping, breeding or importing hybrids that have any degree of cross breeding between dogs and wolves. The reasons stated in the policy echo the concerns raised by Dr. Polsky in his evidence. The SPCA Operations Manual sets out that wolf hybrids will not be adopted out by the SPCA and that when such animals are surrendered they are to be euthanized. The evidence regarding the position statement and policy of the SPCA with respect to wolf hybrids tends to support Dr. Polsky's assertion that the concerns expressed about wolf hybrids are within the mainstream of accepted wisdom and that these are not novel assertions.

16 Mr. Corrie Walkley was retained by the Defendants Ray and Sharon Thompson and provided an expert's report which was admitted in evidence. Mr. Walkley's ability to give expert evidence on wolf hybrids was admitted by the parties, as was his report, without need of his attendance for the purpose of cross-examination. Mr. Walkley has owned wolf hybrids from 1996 to the present and was a breeder of wolf hybrids from 1998 to 2005. Mr. Walkley defined wolf hybrids as both wolf-dog hybrids and hybrids between different varieties of wolf, something which does not occur in nature.

17 Mr. Walkley is a member of the Ktunaxa First Nation and said he has extensive traditional knowledge of wolves in the wild. He resides in Kimberley, British Columbia and has long been involved in providing learning opportunities on the subject of wolf hybrids for students and other interested groups. In preparation for his report, Mr. Walkley reviewed materials sent to him by counsel, referenced several unnamed reference books, had extensive telephone interviews with active breeders, researched the internet and referred to two one-page point-form documents which he attached to his report. Those documents were: "Living with a Wolf Hybrid" and "Wolf Hybrid Bill of Rights", the latter by Dr. Tom Gier.

18 The introductory paragraph to Dr. Gier's document states:

Whether I am 98% wolf or 2% wolf, I am still a wolf hybrid. I am not a dog and I do not act like a dog, I act like a wolf.

19 In "Living with a Wolf Hybrid" the document begins:

To put it in a nutshell - they are freaks of humans. I used to say "nature", but then thought better of it. Nature did not fashion this animal, man did. They have just enough dog in them to lack the good sense to be afraid of humans, and just enough wolf to be "undomesticatable". They cannot survive in the wild as a species as they cannot compete with a true competitor for food. They cannot be domesticated to the point of being left unsupervised with any regularity.

20 The latter document goes on to provide information and advice on the keeping of hybrids and cautions that care should be taken with small children in the presence of hybrids.

21 Mr. Walkley stated that all animals have the potential to become dangerous "but generally all animals are harmless." He said that danger comes into play when there is unpredictability, and the same is true of wolf hybrids. Many factors can contribute to unpredictable behaviour and those include features which are inherited. Mr. Walkley compared and contrasted what he considered to be the prominent features of the Malamute, which he stated was "very closely related to the wolf" with those of the wolf. Mr. Walkley concluded his comparison by saying genetics come into play "because it is virtually impossible to know what traits were pulled from the Malamute genetics and what traits were pulled from the wolf genetics."

22 In his report, Mr. Walkley framed the question he would address as "Whether, in your experience, Malamute wolf hybrids are by reason of their species normally dangerous, or, if they are a species ordinarily harmless." Mr. Walkley said that in his opinion and experience Malamute-wolf hybrids are by their nature ordinarily harmless. Mr. Walkley did not provide any clear basis for arriving at this conclusion. I found this surprising, given his earlier comments that the danger in wolf hybrids arises from unpredictability and also that it is virtually impossible to know which traits a wolf hybrid has derived from its dog antecedents and which from its wolf.

23 Mr. Walkley went on to opine that Harley, an animal he had never seen, had been tired from the travel, was uncomfortable in his new surroundings, and was startled by the combination of the sound of the gate latch and the collar-grab by Raymond Thompson. In these particular circumstances, Mr. Walkley said, Harley instinctively felt he was being backed into a corner. The result was that Harley "simply bit (Ms. McLean) out of fear". This opinion as to the cause of the bites is speculative and does not assist in determining whether wolf hybrids as a class of animals are normally dangerous or ordinarily harmless amongst humans.

Liability of Owners and Keepers of Dangerous Animals:

24 Strict liability for damage done by dangerous animals without proof of negligence by an owner or keeper has long been part of the common law. In *Janota-Bzowska v. Lewis* [1997] B.C.J. No. 2053, 96 B.C.A.C. 70, Mr. Justice Cumming, speaking for the British Columbia Court of Appeal said the following at paragraph 8:

Generally, dangerous animals can be classified in two categories: there are those which are inherently dangerous and those that are normally tame but where individual members of the group act ferociously or viciously. Fleming in *The Law of Torts*, Seventh Ed., (Sydney, Australia: The Law Book Company Limited, 1987) puts it this way at p. 331:

Dangerous animals are divided into two classes: (i) animals *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) animals *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. ... 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.

25 At common law the defendant owner or keeper of an ordinarily harmless animal, such as a dog, would not be held to strict liability unless he or she was aware of the dangerous disposition of the particular animal. This awareness, or *scienter*, is a matter to be proved in such cases by the claimant. Fleming in *The Law of Torts* (7th ed. p. 332) describes the doctrine of *scienter* as follows:

When an animal of the harmless species [animals *mansuetae naturae*] 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.

26 However, proof of knowledge of a vicious propensity does not apply to animals *ferae naturae*; animals which are by reason of their species normally dangerous. Animals of this class are never regarded as safe and liability attaches for the harm they may do without proof that the particular animal is savage.

27 Lord Justice Bowen in *Filburn v. People's Palace Co.*, 25 Q.B. D. 258, at p. 261, 59 L.J.Q.B. 471, said:

People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous though individuals may be trained, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal he keeps is likely to do mischief.

28 Fleming states that the test for classifying a species appears to be its special danger to mankind. Bears, zebras, tigers, elephants, chimpanzees, dingoes and coyote-dog hybrids have been branded as dangerous, camels have not. Classification of a particular species is a question of law for the court, to be decided either on the basis of judicial notice or expert evidence: *McQuaker v. Goddard* [1940] 1 KB 687 at pp. 700-701.

Is the Wolf Hybrid a Harmless Animal?

29 The question arises whether the wolf hybrid falls within the class of animals known to be harmless by nature; whether it is a breed of animal better characterized as wild or as domesticated; whether a wolf hybrid is in the class of animals *ferae naturae* or *mansuetae naturae*.

30 The evidence here is clear that wolf hybrids do not occur in nature; they are a creation of humans. It is also clear that wolf hybrids are wild and not domesticated animals in the sense that they are not the product of breeding over

countless generations. They carry the inheritance of their wolf antecedents to an unknown degree. As one of the writers referenced by Mr. Walkley said "They have just enough dog in them to lack the good sense to be afraid of humans, and just enough wolf to be 'undomesticatable'."

31 I accept the evidence of both Dr. Polsky and Mr. Walkley that wolf hybrids are unpredictable and that this is where the danger lies. I also accept Dr. Polsky's evidence that peer-reviewed studies have shown that wolf hybrids are likely over-represented in fatal attacks on humans. In my view, there is no doubt that even though some individuals in that group may be well-trained, well-behaved family pets, wolf hybrids as a group are in the class of animals *ferae naturae* and are not as a class harmless by nature.

32 So far as I am aware, this issue has not been judicially considered in the specific context of wolf hybrids. In *Sparvier v. MacMillan* [1990] S.J. No. 124, Justice Scheibel of the Saskatchewan Court of Queen's Bench dealt with an attack by a sled dog described as "part Husky, part hound and part wolf". That claim was brought in both *scienter* and in negligence, but the judgment asserted the animal to be a dog without any discussion of the significance of the animal's wolf antecedents or of animals *ferae naturae*.

33 The issue of whether coyote-dog hybrids are as a class dangerous animals was addressed in the 1926 Saskatchewan District Court decision of Doak D.C.J. in *Temple v. Elvery* [1926] 3 W.W.R. 652, [1926] S.J. No. 22. The animals concerned in that case were hybrids between a Great Dane and a coyote, or "prairie wolf" as it was also described. The animals were part of a team of sled dogs which had attacked the plaintiff as he had walked by. The argument of J.G. Diefenbaker, counsel for the defendant, was that the hybrids were dogs and that the defendant's knowledge of their vicious propensities must be proven by the plaintiff. That argument was unsuccessful.

34 Doak D.C.J. did not have the benefit of hearing evidence on the nature of coyote hybrids but considered the matter within the scope of those things of which he could take judicial notice. His comments are of assistance in the case at bar and support the conclusion that canid hybrids, including wolf hybrids, are animals *ferae naturae*.

16 I think then that, without going beyond the limitations of the rule respecting the duty to take judicial notice of facts of common knowledge, I am entitled to hold that an animal which is the result of a cross between a dog and a wolf cannot be treated as a dog, nor is its exterior form a safe criterion to go by in judging of its nature. It partakes of the nature of both parents, and while in some respects it may resemble its dog parent, it is in other respects potentially a wolf. It does not necessarily follow that such an animal will display the traits of a wolf because it is quite conceivable that the soft and gentle disposition of one parent may be transmitted to it rather than the wildness and ferocity of the other, but the reverse may be equally true. There is, therefore, no justification in my opinion for holding that the rule respecting domestic animals should apply to these animals. They may be more tractable than animals *ferae naturae* would be, but there is always the possibility of the wolf nature lurking beneath the surface ready to spring forth when provoked; and if such an animal, combined in itself the size, strength and sagacity of the Great Dane, with the savage disposition of a wolf it would be a much more dangerous animal than either of its parents.

17 It seems to me, therefore, that unless the experience of mankind went to show that the result of such a cross would not transmit the wild nature of its wild parent to the offspring the person in charge of an animal of this kind is bound to treat it as having potentially the traits of its wild parent, and will therefore be responsible for any damage done by it.

18 In this particular case, then, in the absence of any evidence tending to show a contrary effect as the result of human experience, I am bound to hold that the animal or animals which attacked

the plaintiff must be considered as essentially wild animals.

35 I find this reasoning persuasive and applicable to wolf hybrids, all the more so in light of the expert evidence adduced here. In my view, it is clear that wolf hybrids as a class of animals are not harmless by nature but are animals *ferae naturae*. It follows that strict liability will attach to any damage caused by Harley without any requirement requiring proof that he had a propensity to attack people and that his owners or keepers knew or should have known of it. On the facts before me this is sufficient to establish liability in Harley's owners and usual keepers, Tanya and Ryan Thompson.

36 Before leaving this area, I should mention that Ms. Williamson, counsel for Raymond Thompson and Sharon Thompson submitted that the oral evidence of Dr. Polsky should be given little weight as his evidence in chief went beyond the scope of his report and that this worked an unfairness to her clients, in that they did not have an opportunity to respond to his evidence. In my view Dr. Polsky's oral evidence was in conformance with the tenor of his report and could not have taken the parties by surprise. Ms. Williamson's cross-examination of Dr. Polsky was in any event thorough and capable. If counsel felt it advisable to adjourn to consider calling rebuttal evidence, she did not apply to do so. Tanya Thompson also capably cross examined Dr. Polsky on behalf of both herself and Ryan Thompson.

The Scope of Liability in *Scienter* - Owner and Keeper?

37 The Claimant asserted that the liability in *scienter* which attaches to the owner of a wolf hybrid who bites a person likewise attaches to the animal's keepers; that the Thompsons Sr. were keepers of Harley and therefore also liable for the injuries to Ms. McLean. The Thompsons Sr. submitted that liability attaches only to the owners. The latter argument relied on an excerpt from *Janota-Bzowska v. Lewis* decision at paragraph 20 that in *scienter* the plaintiff must establish:

- i) that the defendant was the owner of the dog
- ii) that the dog had manifested a propensity to cause the type of harm occasioned, and
- iii) that the owner knew of that propensity.

38 I do not take this reference to exclude keepers of dogs from liability, given that Mr. Justice Cummings was here positing what had to be proven in a case against a dog owner. Support for this view is found earlier in his reasons at paragraphs 11 and 12 where Cummings J.A. quoted both Fleming (see paragraph 25 above) and Chief Justice Begbie in *Nevill v. Laing* (1892), 2 B.C.R. 100, on the well established liability of keepers.

39 Fleming in *The Law of Torts* (6th ed. pp. 332 - 333) addresses the issue expressly, in terms of both the common law and the *Animals Act, 1971*, an English act, as follows:

Responsibility devolves not on the owner as such but on the "keeper", i.e. whoever harbours and controls the animal, like a trainer who kept in his stables someone else's horse that he knew to be accustomed to bite, or an occupier who took care of a vicious dog left on the premises by a previous tenant. But the mere fact that an occupier has tolerated an animal, which he neither possesses nor owns, to stay on his land is not sufficient.

40 In this context "keeping" implies the assumption of a responsibility or the acceptance of a charge or duty in respect of an animal. In the case at bar, I am not satisfied that it has been shown that Raymond and Sharon Thompson were keepers of Harley on the occasion that Ms. McLean was bitten. They certainly provided a place for Harley and his owners to stay during the home visit, but Harley was never away from the control and responsibility of Tanya or Ryan Thompson. In opening the gate and in attempting to control Harley on Ms. McLean's approach, Raymond Thompson did not by virtue of those acts alone become Harley's keeper. In respect of this aspect of the claim against Raymond and Sharon Thompson, the Claimant's case must fail.

The Claim of Negligence

41 To succeed in an action for negligence, the Claimant is obliged to prove on a balance of probabilities that the Defendants knew or ought to have known that Harley was likely to create a risk of injury to third persons, including the Claimant, and that the Defendants failed to take reasonable care to prevent such injury: *Janota-Bzowska v. Lewis*, at para. 23.

42 I accept the evidence of the Thompsons regarding the raising of Harley. Harley had exhibited no signs of aggression towards people during the seven years that he lived with the Thompsons. Harley did not have any established propensity for the sort of aggressive behaviour which would have put the Thompsons on notice that he posed a risk to visitors. On the date of the attack Harley was not running free but was contained in a fenced yard. He was in the presence of Raymond Thompson. Mr. Thompson Sr. opened the gate for Ms. McLean to enter the yard when Harley lunged at her twice, despite Mr. Thompson's presence and his efforts to bring Harley under control. The evidence established that Harley's actions were sudden, unexpected and out of character. To that extent, Harley's actions were not reasonably foreseeable by any of the Defendants.

43 The Claimant relied on s. 13 of the *Dog Regulation and Impounding By-Law No. 502* of the Village of Ashcroft, to show that Harley, if unleashed, should have been contained in a fenced area in the rear yard. This was said to be indicative of an reasonable standard of care. It was submitted that the existing fence did not meet the standard set by the by-law because the fenced area also encompassed the front yard. Given that Ms. McLean approached the house via the rear gate it is hard to see how stricter compliance with the by-law could have had any impact on the outcome.

44 The Claimant asserted that the fact that Harley was a wolf hybrid was a factor to be taken into account in negligence. Counsel for the Thompsons Sr. responded that the breed of dog has no bearing on the issue of foreseeability and its propensity for biting. *Shelvey v. Bicknell* [1996] B.C.J. No. 1179 (B.C.C.A.) was cited in support. In that decision at paragraph 20 Mr. Justice Goldie commented:

In the circumstances of this case the findings of fact preclude negligence on the part of the owner in the absence of a known propensity on the part of the animal to behave in a manner requiring appropriate precautions. No such propensity on the part of this animal was established. To attribute to the animal propensities on account of its breed alone would require a more compelling evidentiary base than is present here.

I note however that in *Shelvey v. Bicknell*, the case involved a dog, not a hybrid animal rated at more than 50% wolf. In any event, the body of evidence regarding wolf hybrids adduced in this case no doubt meets the "more compelling evidentiary base" referred to by Goldie J.A.

45 The Claimant relied on the SPCA position statement to support the proposition that a higher standard of care is required with wolf hybrids. That position statement suggests that wolf hybrids should be contained in secure runs and muzzled when out of such containment. Whatever the current value of this SPCA position statement, it was not passed until 2009, three years after the attack on Ms. McLean, and it could not have been considered by the Thompsons.

46 The Claimant submitted that the Thompsons knew or should have known of Harley's potential for aggression. However, I accept their evidence that they did not have information of this sort from their breeder, their veterinarian or from their trainer. On the information they had, or should have had, I do not consider that Harley's wolf antecedents ought have weighed sufficiently into the equation to overwhelm the Thompsons' seven years of experience with the animal and so have obliged them to take greater precautions than they took.

47 I consider that the Claimant has not made out the claim of negligence against Tanya or Ryan Thompson or indeed Raymond Thompson in respect of his actions at the garden gate.

48 There is no evidence to support a finding of negligence against Raymond or Sharon Thompson under the

provisions of the *Occupier's Liability Act* [R.S.B.C. 1996], ch. 337, s. 3. They were under an obligation to take reasonable care to ensure that Ms. McLean, their guest would be reasonably safe on their property. As I have already found, it was not reasonably foreseeable in these circumstances that Harley would suddenly bite Ms. McLean. Based on the knowledge of Harley which they reasonably had, there was no reason to believe that Ms. McLean would be at risk on their property from the actions of Harley.

The Result

49 The Claimant has succeeded in establishing the claim in *scienter* against Tanya and Ryan Thompson, but has not established a claim against them in negligence. The claim against Raymond and Sharon Thompson has not been established in *scienter*, negligence or under the provisions of the *Occupiers Liability Act* and is accordingly dismissed.

50 The trial will proceed on the issue of damages as against Tanya and Ryan Thompson and the matter will be added to the list on January 11, 2010, 9:30 a.m. in Courtroom 2B to fix a date for both continuation of the trial and for any applications arising out of the hearing to this point. The parties should be in a position to accurately estimate the hearing time required for the continuation of the trial.

S.R. HARRISON PROV. CT. J.

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