SMALL CLAIMS COURT OF NOVA SCOTIA
Cite: Nickerson v Van Norden. 2017 NSSM 47

SCCH No.466466

BETWEEN:

Tammy Nickerson

Claimant

– and –

Alexandra Van Norden and Ryan Foss

Defendants

Adjudicator: Augustus Richardson, QC

Heard: September 19, 2017

Decision: September 27, 2017

Appearances: Tammny Nickerson, claimant
Alexandra Van Norden and Ryan Foss, defendants

DECISION

[1] Is a dog in Halifax entitled to one free bite? If not, is the owner of a dog not known to be vicious liable for any injury caused when his or her dog attacks another dog? Those are the questions posed by the facts of this case.

[2] At all materials times the claimant and the defendants lived in the same apartment building in Halifax. The claimant owned a Yorkshire Terrier called “Twig.” The defendants owned a German Shepard called “Bella.”

[3] On July 4, 2017 the claimant’s daughter took Twig out for a walk. They exited their apartment, and proceeded along the hall way to a door that led to the outside. At that moment Ms Van Norden was returning from being outside with Bella. The door opened. The two dogs saw each other. Ms Van Norden’s evidence was that the dogs were startled and lunged at each other. What is clear is that Bella took hold of Twig, biting down hard. The claimant’s daughter and then the claimant’s husband tried to pull the two dogs apart, as did the defendants. In the course of the

fracas both Ms Van Norden and the claimant's daughter suffered some scratches or bites from the dogs as they (the dogs) struggled with each other.

[4] Twig got the worst of it, not surprisingly, given the discrepancy in size between the two dogs. The claimant took her to the vet. The cost of treating Twig was too much for her to take on. She signed over Twig to someone at the vet who offered to adopt her. Twig was then euthanised.

[5] There was no evidence at the hearing that the defendants knew or ought to have known that Bella was vicious, or that their dog had or might have any propensity to attack a person or another dog, let alone Twig. Nor was there any evidence that Bella was running free.

[6] The claimant searched for a replacement for Twig. A Yorkshire Terrier puppy would have cost somewhere in the range of $1,800.00. That was too much for the claimant. So she found a "re-homed" dog on the internet.

[7] The claimant seeks damages of $1,800.00 for the replacement of a Yorkshire Terrier, $100.00 in pain and suffering, and $200.00 in costs. She relies upon s.197 of the Halifax Regional Municipality Charter, SNS 2008, c.39, which provides as follows:

> **Proof at trial**
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> 197 Upon the trial of an action brought against the owner or harbourer of a dog for any injury caused, or damage occasioned by, such dog, it is not necessary to prove knowledge by, or notice to, the owner or harbourer of any mischievous propensity of the dog. 2008, c. 39, s. 197.

[8] The question then becomes this: does s.197 of the Halifax Charter do away with what would otherwise be necessary in a claim based on negligence—proof that the owner knew, or ought to have known, that the dog might cause injury to a person or property, and failure to take steps to guard others against such injury?

[9] The law on this point is maddeningly complex and obtuse. But as I understand it, the common law divided animals into two types: those which as a class were considered to be dangerous in their own right (such as lions, elephants and the like), and those which as a class were not so considered (such as cats and dogs and other domestic animals). An owner of an animal falling in the first class would be strictly liable for any damage caused by the animal. It

was not necessary, in other words, to establish that the owner knew the animal had a propensity to cause harm: it was assumed.

[10] The owner of an animal (such as a dog) in the second class was in a different position. The law was not prepared to assume—or deem—that an owner of a particular animal within that class knew it was or could be dangerous. A plaintiff injured by such an animal thus had to prove that the owner actually knew that his or her particular animal had a propensity to cause harm. That in the common law was referred to as *scienter*. This principle, as has been observed, is the origin of the old saying that a dog "is entitled to one free bite." But it was difficult to prove such knowledge in the case of owners of domestic animals. Hence legislation like s.197 was enacted in various jurisdictions to do away with the requirement that a plaintiff prove that the defendant owner knew that his or her dog had a violent predisposition: see the discussion in *Brewer v. Saunders* 1986 CanLII 4009 (NSCA) at paras. 9-13; and see *Lupu v. Rabinovitch* 1975 CanLII 979 (MB QB); *Wilk v Arbour* 2017 ONCA 21 at para.31; *Purcell v Taylor* 1994 CanLII 7514 (ON SC) at paras.8-10.

[11] As I read those same authorities, enactments like s.197 did away with the need to prove *scienter*, but they did not create strict liability. The plaintiff is still required to prove negligence on the part of the defendant owner. So, for example, a dog that was constantly barking at people might give rise to a duty on the owner to keep the dog under close control, even though the dog had never gone beyond barking. Failure to maintain control over such a dog might give rise to liability in negligence in the event the dog moved beyond barking to attack a person or another animal.

[12] In the case before me the claimant proceeded on the basis that liability was strict. She read s.197 as requiring no more than proof that the defendants' dog attacked and injured hers. She did not introduce any evidence to establish negligence on the part of the defendants. There was nothing to show that what happened was anything other than sudden and unexpected on the part of both owners. There was nothing to show that the defendants failed to keep reasonable control of Bella.

[13] In the absence of such evidence I have no option but to dismiss the claim.

DATED at Halifax, Nova Scotia
this 27th day of September, 2017

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Augustus Richardson, QC
Adjudicator