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NOVA SCOTIA COURT OF APPEAL

[Cite as: Canada (Attorney General) v. Dingle Estate, 2000 NSCA No. 5]

Roscoe, Hallett and Flinn, JJ.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA ON BEHALF OF HER MAJESTY THE QUEEN in Right of Canada Appellant - and - MARGARET DINGLE, JENNIFER DINGLE, and Jennifer Lynn Dingle, Mary Patricia Dingle, and Margaret Ann Dingle, Executrices of the ESTATE OF WILLIAM DINGLE, Deceased Respondents	)	Michael J. Wood for the appellant Nancy I. Murray and Tricia L. Avery for the respondents Margaret & Jennifer Dingle Philip M. Chapman for the respondent Estate of William Dingle Appeal heard: November 22nd, 1999 Judgment delivered: January 12, 2000

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Roscoe and Flinn, JJ.A. concurring.

HALLETT J.A.:

[1] This is an appeal by the Attorney General of Canada from a decision of Justice Richard dismissing a subrogated claim that the respondents were negligent in creating a situation which allowed four dogs to escape from a dwelling and injure a mail carrier. The dogs got out of the dwelling by jumping up against the outside storm door and hitting the push bar which unlatched the door and caused it to open. The inside wooden door, which was usually closed, had been left partially open on the day in question.

[2] The dwelling was at 42 Woodward Crescent, Halifax, the home of William Dingle, the father of the respondents, Margaret and Jennifer Dingle. The Dingle sisters were adults who owned their own home but frequently left their three dogs at 42 Woodward Crescent. Mr. William Dingle owned the other dog.

[3] The action was first commenced against Mr. William Dingle. Later, when it was discovered that three of the dogs were not owned by Mr. Dingle, and when the appellant concluded that the daughters might have some responsibility for the events giving rise to the cause of action, an action was commenced against the Dingle sisters. Mr. William Dingle was discovered but died prior to the trial.

[4] At the outset of the trial, Justice Richard determined that the appellant's claim against the respondents Margaret and Jennifer Dingle was barred by the **Limitation of Actions Act**, R.S.N.S. 1989, c. 258, because it was not commenced within six years

from the date the cause of action accrued. He also dismissed the appellant's application made pursuant to s. 3(2) of the **Limitation of Actions Act** to set aside the limitation defence. In effect, he dismissed the appellant's claim against these two respondents.

[5] The action proceeded. The record shows that the parties had agreed that only liability would be dealt with at the trial with damages to be assessed later. It was also agreed that the trial would deal with the question of the liability as between the appellant and the respondents and as among the respondents and whether the mail carrier was contributorily negligent.

[6] The appellant does not seek to overturn the trial judge's dismissal of the action against Margaret Dingle or the Estate of William Dingle. The appellant asserts that the trial judge erred in failing to find that Jennifer Dingle was negligent. Jennifer Dingle had left the inner door partially open, as she had found it, when she dropped off her two dogs that morning.

[7] A Notice of Contention was filed by the Dingle sisters but it only applies if we find the trial judge erred in concluding that it was not reasonably foreseeable that the dogs could escape. Should this Court so decide, they assert that the trial judge erred in finding that the Estate was not negligent and that the trial judge erred in his provisional apportionment of fault. In his decision, after dismissing the appellant's action against all the respondents, the trial judge stated:

> Had I found that the failure to close and latch the inner door constituted a risk that was foreseeable in that it could be reasonably expected that the dogs could open the storm door and escape and cause a hazard to Richardson I would have found the third party, Jennifer Dingle, negligent.
>
> I would have found Richardson contributorily negligent in that his conduct was not consistent with what an experienced and trained postman would do to prevent possible injury from dogs. His actions merely increased his sphere of danger. I give no weight to his failure to carry pepper spray, which given the nature of the spray and the proliferation of animals would have been of little or no assistance.
>
> In this case I would have apportioned liability 75% against the third party, and 25% against Richardson.

[8] The Notice of Contention filed by the Dingle sisters concludes with the following:

> AND that the Respondents Margaret Dingle and Jennifer Dingle will ask that if this Honourable Court allows the Appeal of the Appellant herein and finds that the Learned Trial Judge erred in finding that it was not reasonably foreseeable that the dogs owned by the Respondents could open the door and escape from 42 Woodward Crescent in the circumstances that existed there on October 5, 1987;
>
> (a) THAT the Decision and Order for Judgment from which the within appeal is taken ought to be varied and there ought to be no finding of liability against the Respondent Jennifer Dingle as provisionally determined or at all;
>
> (b) THAT alternatively, the provisional division of liability ordered by the Learned Trial Judge be varied by this Honourable Court in accordance with the evidence among the Appellant; the Respondents Jennifer Lynn Dingle, Mary Patricia Dingle and Margaret Ann Dingle, Executrices of the Estate of William Dingle, deceased; and the Respondents Jennifer Dingle and Margaret Dingle personally, as this Honourable Court determines.

[9] The Estate of William Dingle filed a Notice of Contention that the trial judge's decision should be affirmed on grounds other than those given by the trial judge. It is further contended by the Estate that:

> If it is found on appeal that the learned Trial Judge's decision should be reversed on the grounds that the Respondent Estate was liable to the Appellant, then the Respondent Estate should in any event be fully indemnified by the co-Respondents Margaret and Jennifer Dingle for such liability, or alternatively, there should be no right of contribution or indemnity arising in favour of the co-

Respondents.

[10] Despite the filing of the Notices of Contention, the dominant position of all respondents on this appeal is that the trial judge did not err in finding that they were not negligent. The Notices of Contention are relevant only if this Court concludes that one or more of the respondents was negligent and further concludes that the trial judge erred in finding that the action against the Dingle sisters was barred pursuant to the limitation legislation or that he erred in dismissing the appellant's application made under s. 3(2) of the **Limitation of Actions Act**.

[11] The appellant does not contest the finding that the reaction of the mail carrier, Mr. Richardson, to the dogs contributed to the injuries he suffered nor does the appellant contest the trial judge's apportionment of fault (25%) to Mr. Richardson.

FACTS

[12] The facts giving rise to the cause of action are fairly straight forward. George Richardson, Jr. was a letter carrier employed with Canada Post. On October 5th, 1987, he was jumped upon by one or more of the four dogs that came out of the front door of the home of the respondent William Dingle at 42 Woodward Crescent, Halifax. The respondents, Margaret and Jennifer Dingle, while they did not live at their parents' home, would stay there from time to time.

[13] William Dingle owned Shandy, a Kerry Blue Terrier which was acquired to

provide companionship and protection to Mr. Dingle's wife who suffered from a serious infirmity. Dr. Margaret Dingle owned Sean, a Kerry Blue Terrier. Sean would frequently be left at 42 Woodward Crescent while Dr. Margaret Dingle was at work. Jennifer Dingle owned two dogs; a mixed breed named Hero and a Keeshond named Riva. These dogs would also be left at 42 Woodward Crescent when Jennifer Dingle was at work or pursuing other activities in Halifax. The Keeshond is a very small dog. The Kerry Blues are not large dogs but, rather, medium sized, standing 17 inches at the shoulder. The mixed breed, part collie and part beagle, is about the same size.

[14] It was quite common for the four dogs to be together at 42 Woodward Crescent. They were given free run of the house. The dogs were known to be excitable and bark at people they heard or saw through the picture window of the residence.

[15] The front entry of the Dingle house at 42 Woodward Crescent had an outer aluminum storm door with a push bar handle which opened the door from the inside. As a general rule, the inner wooden front door was kept closed although it was occasionally open.

[16] On the day of the incident Dr. Margaret Dingle, who had stayed at her parents the previous night, went to work in the morning, leaving her Kerry Blue in the care of her father. He was retired. On the day in question he was in his workshop in the basement. Jennifer Dingle arrived later in the morning to drop off her dogs, Hero and

Riva. She found the inner wooden door ajar and left it in the same position when she left the dwelling. Her trial evidence was that the inner door was slightly ajar, in other words, not fully closed.

[17] The mail carrier, George Richardson, arrived at Woodward Crescent shortly after lunch. He approached the Dingle residence from the side so as not to attract the attention of the dogs. As he approached the front door, he noticed that the inside door was open and the dogs were barking at the window in the storm door. He quickly placed the mail in the mail box and started walking down the driveway. He heard a loud bang and turned to see that the storm door had opened. The four dogs were running towards him barking loudly. The dogs circled him barking and jumping on or around him. Mr. Richardson responded by swinging his mailbag and kicking at the dogs. One of the Kerry Blue Terriers leapt and either bit him on the nose or scratched his face with his paws. After a neighbour cleaned up the blood on his face, Mr. Richardson continued on his mail route.

[18] Mr. Richardson did not work after this date. There is some question, yet to be resolved, as to the cause of his inability to work. That issue did not arise at trial as damages were to be assessed after the trial of the liability issue.

[19] On December 31st, 1987, Mr. Richardson elected to receive compensation under the provisions of the **Government Employees Compensation Act**, R.S.C. 1985, c. G-5, the effect of which is to permit the Crown to pursue a subrogated claim for the

injuries he suffered.

THE TRIAL JUDGE'S DECISION

[20] Justice Richard reviewed all the relevant evidence adduced by the parties. The following paragraph sets out particularly relevant aspects of the evidence which were specifically mentioned by Justice Richard in his decision.

[21] The dogs would bark and jump at the living room window when persons approached the house. The dogs had the run of the house. When the dogs were walked in the neighbourhood by the respondents they were on a leash. Neighbours testified that the dogs were not aggressive. Mail carriers testified that the dogs were aggressive. Justice Richard also heard evidence that the three larger dogs, the two Kerry Blues and the mixed breed, had all been subject to obedience training in their earlier years and received certificates from the Obedience School indicating they had learned from their training. The trial judge heard the evidence from Heather Logan, an experienced dog handler, breeder and kennel operator, who was qualified to give expert evidence on dog behaviour, socialization and training. She said that aggression is not tolerated in obedience training.

[22] After reviewing the evidence, the trial judge made the following findings:

> I have reviewed all of the evidence adduced over the 4 1/2 days of this trial and have summarized above that evidence which I feel is particularly relevant to the issue of foreseeability and negligence.

The defendant and third parties were conscientious dog handlers who tried to keep their animals in control. When outside the home the dogs were kept on leash and were trained to obey their handler.

The four dogs were excitable, rambunctious and playful but the preponderance of the evidence militates against the finding that these dogs were aggressive or vicious. These dogs served as watchdogs at the Dingle home, in that they caused a great fuss when anyone, particularly postman approached the home. The "in-house" conduct of these dogs could be misconstrued.

On 5 October 1987, the inside front door of the Dingle home was open but the storm door was secured and latched. Mr. Dingle was not aware of the open inner door since he had spent all of his time in the basement workshop. Mr. Dingle reasonably believed that the doors would be secured in the manner in which he had instructed.

As George Richardson approached the Dingle residence he heard the dogs barking and jumping but he did not realize that the inner door was open until he reached the mailbox located to the left of the entry way.

The close proximity of Richardson increased the level of excitement of the four dogs and they barked and jumped at the storm door with greater intensity. As Richardson moved away from the Dingle front entry, one of the dogs struck the crash bar on the storm door with sufficient force to spring the latch on the door and have it open. The dogs then circled Richardson who tried to fend them off by kicking, yelling and swinging his mailbag. These actions by Richardson served only to increase the level of excitement of the dogs.

[23] Based on these findings the trial judge then set forth his conclusions:

1. The defendant, Dingle did that which a reasonably prudent dog owner ought to do to prevent injury or damage to other persons resulting from the actions and conduct of those dogs. Dingle was confident that the front door was secure and that the dogs could not escape to the outside.

2. Jennifer Dingle, when she left her two dogs in the Dingle home in the late morning of 5 October, 1987 did not close and latch the inner door but merely left it ajar - the manner in which she found it. She did close the latch and storm door after depositing her dogs in the house.

3. Having regard to all of the circumstances I find that it is not foreseeable that these dogs, or any one of them, could hit the storm door bar with sufficient force to permit the door to open and the dogs to escape.

> 4. As an experienced postman with a history of encounters with dogs, Richardson did not react to the presence of the dogs in an appropriate manner. In fact, his conduct merely increased the excitement level of the dogs and caused them to act in a more rambunctious manner.
>
> Accordingly, I dismiss this action against the defendant and against the third parties [the Dingle sisters] with costs on a party and party basis. If counsel cannot agree on the appropriate scale for costs I will hear them on that issue.

ISSUES ON APPEAL

[24] The issues raised by the appellant are set forth in its factum as follows:

> Issue No. 1: - Did the trial judge err in his interpretation and application of the **Limitation of Actions Act**, R.S.N.S. 1989, c. 258 and, in particular:
>
> (a) Did the learned trial Judge err in assessing the commencement date of the limitation period?
> (b) Did the learned trial Judge err in concluding that the date of commencement of the action against the Defendants, Jennifer and Margaret Dingle, for limitation purposes was May 17, 1995?
> (c) Did the learned trial Judge err in concluding that the defendants, Jennifer and Margaret Dingle, had suffered prejudice sufficient to justify dismissing the Plaintiff's application under s. 3 of the **Limitation of Actions Act**?
>
> Issue No. 2 - Did the learned trial Judge err in finding that it was not reasonably foreseeable that the dogs owned by the Defendants could open the screen door and escape in the circumstances that existed at 42 Woodward Crescent on October 5, 1987?

DISPOSITION OF THE APPEAL

[25] As I have concluded that the trial judge did not err in finding that the respondents were not negligent, it is unnecessary to deal with the limitation issues.

[26] The essential argument of the appellant on the negligence issue is set forth in

paragraphs 50 to 53 of its factum.

[27] The appellant asserts:

> The question of foreseeability is simply one issue which the Court must consider in determining whether a party was negligent. In fact, it is more appropriate to describe the test in terms of assessing the reasonableness of the risk that was assumed rather than foreseeability of the result. This is indicated by the decision of this Court in *Bottomley v. Nova Scotia (Attorney General) et al.* (1996), 148 N.S.R. (2d) 81. In that case, the trial Judge dismissed the plaintiff's action on the basis that there was no risk of harm to him in the activity that was undertaken and also that the injury was not foreseeable. The appellant argued that the trial Judge erred in not finding that there was a "possibility of risk" of injury in the task undertaken. The Court described the test to be applied in the following passage from p. 82:
>
> > The test in these circumstances was not whether there was a "possibility" of some risk in the task, but whether the activity created an unreasonable risk of harm as noted by G.H.L. Fridman in **The Law of Torts in Canada** (1989), Carswell at p. 239:
> >
> > > ..... Applying the test of "reasonable foresight", the trier of fact, whether jury or judge, must attempt to resolve the issue of whether what ultimately happened was a risk that any reasonable man would have appreciated and so guarded against by taking appropriate precautions. There is always some degree of risk in any act or omission. Hindsight may reveal that the risk was real and palpable, not remote and unlikely. But hindsight may not be employed to resolve the question. What is material is what was or ought to have been foreseen as being the <u>probable or likely outcome</u> of what was done or not done by the defendant and whether the risk was an unreasonable one to run in the circumstances. .....

[28] After referring to and reviewing the decision of the Privy Council in **Wagon Mound (No. 2)**, [1966] 2 All E.R. 709, counsel for the appellant submits:

> What these authorities indicate is that in any claim in negligence the Court must consider whether the risk <u>which existed was such that a reasonable person would</u>

> have appreciated it and taken precautions to prevent it from arising. By simply referring to the foreseeability of the dogs' escape, the learned trial Judge seems to have narrowed his focus and did not consider how a reasonable person would have reacted in all of the circumstances and particularly in light of the steps which were necessary to avoid the risk. When one applies that analysis to the particular circumstances of this case, it is submitted that a reasonable person in the position of Jennifer Dingle ought to have appreciated the risk that the dogs could escape if the inside door was left open in light of their habit of running to that area and jumping if someone approached the home. Jennifer Dingle chose to leave the inside door open even though she knew that was an extremely unusual circumstance. If she had closed the door, the risk of escape, no matter how slight, would have been eliminated and the attack would not have occurred. It appears that she did not do so because she was in a hurry to drop off the dogs and leave. It is submitted that a reasonable person would have assessed the risk of escape and eliminated it by the simple act of closing the door and failure to do so amounted to negligence. (emphasis added)

[29] The test described by this Court in **Bottomley v. Nova Scotia (Attorney General) et al** (1996), 148 N.S.R. (2d) 81 is the correct test to be applied in negligence actions in assessing whether there was a duty of care and a breach of that duty in a particular case.

[30] In **Canadian Tort Law**, 6th Edition, Allen Linden captures the essence of what an action based in negligence consists of where he stated at p. 116:

> Conduct is negligent if it creates an unreasonable risk of harm.

[31] Persons in their dealings with others are required to exercise a standard of care described by Fridman, **The Law of Torts in Canada**, (1989) volume 1 at p. 290 as follows:

> The care to be taken is that of a "reasonable and prudent man". Such a person is not an extraordinary or unusual creature; he is not required to display the highest skill of which anyone is capable. He is not a genius who can perform unusual feats. Nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not avoid to do anything a prudent man would do. .....

[32] In **Remedies In Tort**, Volume 2, Klar, Linden, Cherniak & Kryworuk, at page 16.1-37 set out the classic definition of negligence from **Blyth v. Birmingham Waterworks Co.** (1856), 11 Ex 781, 156 E.R. 1047 as follows:

> the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. .....

[33] In determining whether there is an unreasonable risk created by a defendant's acts or omission, three factors are considered: the magnitude of the risk, the importance of the conduct and the cost of eliminating the risk (Klar, **supra**, 16.1-52.7).

[34] As to the duty of care Klar states in paragraph 131, p. 16.1-98

> A person is only required to meet the standard of care where he has an obligation or a duty to be careful. Thus, duty is "the relation between individuals which imposes upon one a legal obligation for the benefit of the other", while the standard measures whether the conduct met the obligation. A discussion of duty centres around its existence, while the standard of care clarifies what the duty is.

[35] Klar makes the point that the concept of duty invokes the notion of reasonable foreseeability. As Klar points out one does not owe a duty to the world or a duty in the air. The duty must be owed to the plaintiff who must be within the foreseeable range of injury (page 16.1-100.1, paragraph 136).

[36] In **Dubois v. Penny** (1995), 145 N.S.R. (2d) 50 (S.C.), Justice Goodfellow outlined the duty owed to others by an owner of an animal on the owner's premises. He

stated in paragraph 10 as follows:

> The duty upon one who owns, controls or harbours an animal is a duty of reasonable care for the safety and security of all who might come into contact with the animal. The standard of this duty of reasonable care will be mandated by the circumstances that exist at the time of the alleged negligence. The standard will depend upon many factors including the size, natural tendencies of the animal, the historical propensities of such animal, that have been exhibited, the proximity and composition of the public that is likely to come into contact with the animal, etc., etc.

[37] In that case the plaintiff was on the defendant's property where she was bitten by a dog owned by the defendant. Justice Goodfellow dismissed the action.

[38] The appellant's counsel puts considerable reliance on the decision of the Ontario Court of Appeal in **Morris v. Baily** (1950), 13 D.L.R. (3d) 150. That part of the decision relevant to the appeal we have under consideration is set forth on p. 153 where the Court set out the facts and then its conclusions as follows:

> ..... The dog, a collie, was two and a half years old and had achieved a substantial size, weighing some 90 lbs. The accident occurred about 7 p.m. in the month of October and the plaintiff described the evening as "getting dark". The dog ran across the front lawn of the defendant's home, which is located in a quiet, residential area of the City of Ottawa, and down a slope towards the sidewalk where the plaintiff was walking. There was evidence at trial that the dog often barked and ran at people, although it was not suggested that the dog was vicious. The trial Judge found that the dog had a propensity to run at people, barking, and to stop short of coming into contact with them. He further found the defendant was aware of this propensity. Indeed, the defendant's wife acknowledged that the dog had this propensity and that it was confined to the house during the time when the delivery of mail was customarily made, since the postman had threatened to discontinue the defendant's deliveries unless the dog was restrained.
>
> I agree with the trial Judge that the defendant had a duty to persons like the plaintiff to restrain the dog and that the damage which ensued when the plaintiff fell to the sidewalk was a foreseeable consequence of his failure to fulfil that duty whether or not the plaintiff's fall was caused by the dog's actually striking her or by her own apprehension and conduct occasioned by the manner of the dog's approach.

[39] **Morris v. Baily** is distinguishable on its facts as is the reality in most negligence actions. In **Morris v. Baily** the dog in question was a 90 pound collie and the defendants knew of the propensity of this large dog to run at people barking but stopping short of them. There is no evidence that the respondents' four dogs had a propensity to run at people and, furthermore, unlike the 90 pound collie, they were not unlawfully at large but confined to the house unless put out in the fenced back yard or when they were walked on a leash in the neighbourhood.

[40] Justice Richard was required to assess the reasonableness of the risk that was assumed by Jennifer Dingle when she did not close the inner door. In my opinion that assessment required the trial judge to consider whether it was reasonably foreseeable that a risk was created by the failure to close the inner door. Reasonable foreseeability of risk is an essential component of the test as to whether or not an act or omission created such an unreasonable risk of harm to others that a reasonable man would have appreciated and guarded against such a risk.

[41] The appellant's primary submission on the appeal is that the trial judge erred in failing to find Jennifer Dingle was negligent. Therefore, the appellant has asked us to review the evidence and review the trial judge's findings of fact and his legal conclusions from such findings.

[42] What is the scope of appellate review with respect to findings of fact and

findings that involve legal conclusions from those fact findings?

[43] The two most often quoted decisions of the Supreme Court of Canada on the scope of review from a trial judge's findings of fact are **Stein v. Kathy "K"**, [1976] 2 S.C.R. 802 and **Toneguzzo-Norvell (Guardian ad Litem of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114.

[44] In **Stein v. The Ship "Kathy K"**, the Supreme Court of Canada established a test for an appellate court in reviewing findings of fact by a trial judge. **Stein** was an action in negligence. The trial judge made certain findings of fact and from these findings held that the plaintiff was 25% at fault for the collision of two vessels and the defendant 75% at fault. The Federal Court of Appeal, by a majority, set aside the judgment rendered at trial and dismissed the action.

[45] The Supreme Court of Canada concluded that the Federal Court of Appeal, in finding that the plaintiff's vessel was 100% at fault, erred in ignoring the findings of fact by the trial judge. The Court held that:

> Although findings of fact made at trial are not immutable, they are not to be reversed by an Appellate Court unless it can be established that the trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at trial. Applying this test to the present case, it could not be concluded that the trial judge was plainly wrong in any of the relevant findings of fact made in the course of his reasons for judgment.

[46] In **Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital**, the

question was whether the Court of Appeal was justified in substituting its assessment of the life expectancy of the plaintiff for that of the trial judge. There was conflicting evidence; one expert testifying that the plaintiff could expect to live to 25 or 30 years of age; another, that with excellent care, provided she lived to age 10, she could expect to live into her forties. The respondent's expert was of the view that the plaintiff's life expectancy was 7.6 years.

[47] The trial judge decided that the plaintiff had a life expectancy of 22½ years from the date of the trial. The British Columbia Court of Appeal said there was no basis for this conclusion and reduced the life expectancy by seven years. It was in this context that Justice McLachlin stated what has become an oft quoted principle of law with respect to the scope of appellate review from findings of fact by a trial judge at p. 121:

> The question is whether the Court of Appeal was justified in substituting its assessment of life expectancy for that of the trial judge.
>
> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141, at pp. 188-89 (*per* L'Heureux-Dubé J.), and all cases cited therein, as well as *Geffin v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388-89 (*per* Wilson J.), and *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-8 (*per* Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

[48] This statement by McLachlin, J. <u>does not mean</u> that a court of appeal can only interfere with conclusions of the trial judge that involve consideration of both facts

and the application of law to the facts, such as a finding that a defendant was or was not negligent, if there is palpable and overriding error. The statement in **Burnaby Hospital** simply means an appeal court is not to interfere with evidentiary conclusions made by a trial judge unless there is palpable and overriding error. A mere error by a trial judge in concluding that a defendant was negligent in the circumstances would warrant an appellate court interfering with such a finding.

[49] In summary, on this appeal we must assess two issues; first, whether the trial judge made palpable and overriding errors in his findings of fact; and secondly, whether he erred in concluding that the respondents, and more particularly Jennifer Dingle, were not negligent. The latter issue raises a question of mixed law and fact. On the latter issue, this Court must re-examine the evidence to determine if the trial judge erred in concluding that it was not foreseeable that the dogs could open the outer storm door. On this issue the palpable and overriding error test has no application. Simply put, on the second issue, we must determine if the trial judge was wrong to conclude on the evidence that the respondent Jennifer Dingle was not negligent. In making this assessment we are bound by the findings of fact by the trial judge unless he has made a palpable or overriding error in arriving at those findings.

[50] In my opinion, the trial judge's findings of fact and evidentiary conclusions are supported by the evidence. He found that the dogs were not aggressive. By implication he rejected the evidence of the mail carriers and accepted the evidence of neighbours and the respondents that the dogs were not aggressive. The trial judge was conscious

of the mail carriers' evidence as he reviewed their evidence in his decision. It is clear that he did not ignore their evidence nor misconstrue it. The trial judge found that the dogs were excitable, rambunctious and playful and that the preponderance of evidence militates against the finding that the dogs were aggressive or vicious. In arriving at this evidentiary conclusion he did not commit a palpable or overriding error. The evidence supports his finding.

[51] On the second issue, the trial judge did not err in finding that, considering all of the circumstances, it was not reasonably foreseeable that the dogs or any one of them could hit the storm door bar with sufficient force to permit the dogs to open the door and escape. Dr. Margaret Dingle, on this issue, testified as follows:

> Q. And what can you advise His Lordship as to the nature of the outside or storm door on the front of the house at 42 Woodward?
> A. Well, on the outside the door would be a push button. On the inside of the door there would be a bar across the door.
> Q. Yes. And can you indicate to His Lordship, then, how easy or otherwise it was to activate the bar on the door and to open that storm door?
> A. Well, if you were careful and pressed the bar just by the mechanism, then it was fairly easy within a few inches of the mechanism. But if it was over further, it was actually fairly tough. In fact, we had occasions that guests couldn't get out, that we'd have to let them out.
> Q. Okay. When you say "near the mechanism" to what are you referring?
> A. Well, the part that would sort of -- you'd push in.
> Q. The catch, perhaps?
> A. Yeah. Right by the -- yeah. Right by the catch mechanism.
> Q. Yes. If you pushed the bar at that spot and very close to that spot, then, was it easy or difficult to open the door?
> A. It was easy to open the door.
> Q. And if you pushed in any other spot along the bar, would it be easy or difficult to open the door, in your experience?
> A. A lot tougher.
> Q. Pardon me?
> A. Much tougher.
> Q. And was that the situation in 1987?
> A. Yes.
> Q. Now, to your knowledge, had the dogs escaped from the house prior to the incident that brings us here in 1987?

A. Not that I was aware of, no.
Q. And before the incident in October of 1987, did you have any reason to believe that the dogs could escape from 42 Woodward Crescent if the inner doors were ajar or open and the storm door closed?
A. No.

[52] The late Mr. Dingle was also questioned on discovery about the storm door as follows:

Q. Now, in terms of the storm door. The outside storm door. In your experience using that door prior to October of 1987 was it an easy door to open?
A. No, it was not an easy door to open. The push bar upon being pushed in the middle, would not have opened the door.
Q. Okay. And how would you open the door?
A. I quickly discovered that by pulling the door towards me right at the latch and twisting. It would open very easily.
Q. And what part of the push bar -- what part of the door would you have to operate in order to open it.
A. Usually within four to six inches of the catch itself. .....
Q. And the storm door when it was closed. Would you have the ability to open it by pushing on the bottom of the door -- the panel?
A. No.
Q. And I notice that the door has three panels. Were all those panels in on October '87?
A. Yes. The bottom one was aluminum fixed. The top one is glass fixed. And middle one is a window that slides upwards exposing the screen. The inside -- the centre panel would have been down that day. That was the normal configuration.
Q. Which means the glass would be ---
A. The glass would be there but not the screen.
Q. Okay. Had this -- prior to this incident had this storm door ever been opened by any of the dogs?
A. No. This is before the incident? No.
Q. Prior to this incident had it occurred to you, given your use of the door, that this door could be opened by the dogs?
A. I assumed that it could not. I felt quite certain that it could not.

[53] The only evidence in any way contradictory of Dr. Dingle's evidence[24] that the door was not easy to open other than by pressing the bar at a point within a few inches of the latch, is that of Steven Douglas Topple, an insurance adjuster who carried out the investigation of the incident on behalf of Mr. William Dingle's insurers. He testified that the aluminum bar on the inside part of the storm door was about two

and a half feet long, the width of the door, and that you would push on it to release the door latch mechanism. He was asked the following questions and gave the following answers:

> Q. Did you operate that mechanism yourself?
> A. Yes.
> Q. And what comment, if any, do you have with respect to how easy it was or difficult it was to open the door?
> A. It would have been possible for the door to be opened by a push. It wasn't a difficult operation.

[54] Under cross-examination by counsel for the Estate, Mr. Topple was asked the following questions and gave the following answers with respect to the push bar:

> Q. Mr. Topple, when you say that you recall that it was possible to open the door with -- by pushing the handle, do you recall what -- I take it that you pushed the handle yourself, did you?
> A. Yes.
> Q. Do you recall at what point in the handle that you pushed?
> A. I would have pushed --
> Q. Do you recall?
> A. No, I don't recall.

[55] I am satisfied from a review of the evidence that the push bar could be opened without difficulty so long as the bar was pressed firmly near the latch. Otherwise it was sufficiently difficult to open that guests from time to time had to be assisted in opening the door. There was no evidence that the dogs had ever opened the door before nor evidence that they had ever attacked anyone.

[56] Heather Alma Logan testified on behalf of the Dingle sisters. She was qualified as an expert on behaviour and training of dogs and able to give evidence as to their propensities, etc. Ms. Logan was intensely cross-examined by counsel for the appellant by references to authoritative texts on dog behaviour, the nature of the cross-

examination related particularly to events that would cause a dog to be aggressive when their home territory appears to be invaded. She testified that the degree of aggressiveness is often linked to the genetic factors of the dog and that Kerry Blue Terriers, like other guardian breeds, are programmed to protect. Towards the conclusion of a lengthy cross-examination by the appellant's counsel, Ms. Logan was asked the following questions and gave the following answers:

Q. I want to try and summarize a few points, I think, that flow from those, Ms. Logan, and ask you whether you agree with these statements. Would you agree with me that territorial aggression is a strong and natural thing for dogs, perhaps more so depending on the particular breed?
A. Yes.
Q. Would you agree that dogs may display the behaviour at home, but do not display it elsewhere?
A. Yes.
Q. Would you agree that the territorial aggression would be more enhanced if the dogs are enclosed in a restricted area?
A. Yes.
Q. Would you agree that it would be more intense if they become excited?
A. Yes.
Q. And that they become excited by the activity of other dogs?
A. Yes.
Q. Would you agree with me that territorial aggression is more intense if they are unsupervised?
A. Yes.
Q. Would you agree that it is more intense if they're allowed to exhibit that behaviour without the owner intervening to correct it?
A. Yes.
Q. Would you agree that it's more intense if it's rewarded by a successful result such as the postman leaving in response to aggression?
A. Yes.
Q. And would you also agree with me that owners who take your course and any other introductory training course would learn how to manage that protective aggression through socializing and obedience training?
A. Yes.
MR. WOOD:
Those are my questions. Thank you.
THE COURT
Thank you. Mr. Chapman
CROSS-EXAMINATION BY MR. CHAPMAN [Counsel for the Estate of William Dingle]
Q. Ms. Logan, I want to ask you a couple of questions about the concept of territorial aggression, first of all, and as Mr. Wood has used that label. Would you agree with me that territorial aggression can be exhibited simply by barking?
A. Yes.

Q. And that it can be exhibited and simply because a dog barks doesn't mean he's going to take it any farther?
A. That's right.
Q. And in fact, the textbook "Behaviour Problems of Dogs" contains a statement:

> "The dog may choose to express his protectiveness by only barking.

A. Yes.
Q. Now, in the absence of any prior indication from the dog that it wished to do anything else, would you normally conclude that that's how a dog expresses its aggressive or its territorial behaviour?
A. Yes.

[57] Ms. Logan was further cross-examined by Mr. Chapman, with respect to obedience training. She was asked the following questions and gave the following answers:

Q. So would it be normal in the training mode for the owner to have the dog on lead to make the dog sit and prevent the dog from interacting with the stranger?
A. Yes. That would be appropriate.
Q. And the intent of that is?
A. To teach the dog to behave around strangers.
Q. And it doesn't necessarily make a dog aggressive, does it?
A. Not at all.
Q. In fact, it wouldn't.
A. No.
Q. In fact, I would suggest to you that it would encourage the dog not to go near strangers, wouldn't it?
A. Right. Just sit there.
Q. And the assumptions that were presented to you regarding dogs escaping the house and surrounding a mailman, would you expect that if the dogs were motivated by aggression in that situation that the dogs would bite at the mailman's legs?
A. Yes.
Q. Tear at his clothes?
A. Yes.
Q. Bite at his arms?
A. Yes.
Q. And would you assume that if, indeed, that was not the case, that there were no bites, no torn clothing, no bites on the arms that those dogs would not be motivated by aggression?
A. Yes.
Q. Would you agree that Kerry Blues are barkers?
A. Yes.
Q. And they bark at just about anything, don't they?
A. Yes.
Q. And simply because they bark does not mean they are aggressive, does it?

A. No.
Q. Kerry Blues are not known to bite, are they?
A. No, they aren't.

[58] There was no evidence that the dogs bit the mail carrier's arms or legs or that his clothing was torn by the dogs.

[59] Did the trial judge err in finding that the respondents, and in particular Jennifer Dingle, were not negligent? In my opinion, it was reasonably foreseeable that the four rambunctious dogs, excited by a person, particularly a mail carrier, approaching the residence, could, if they escaped from the residence, injure a person by jumping upon that person. The issue is whether Jennifer Dingle's failure to close the inner door created an unreasonable risk of harm to persons approaching the residence. Jennifer Dingle knew the dogs were excitable when persons approached the residence. She knew they barked loudly and jumped up at the picture window and on the rare occasion the inner door was left open they would go to the storm door and jump against it. One must ask whether Jennifer Dingle knew or ought to have known that the dogs could jump up against the storm door and cause it to unlatch and open. The heart of the appellant's argument is that with these conditions there was a significant risk that one of the dogs, in jumping against the door, would strike the push bar on the storm door and cause it to open thus allowing the four dogs to rush out of the dwelling. The appellant argues that although the risk of the dogs causing harm to a person approaching the dwelling may not have been high, the solution being to close the inner door was so simple that Jennifer Dingle was negligent in failing to do so.

[60] The appellant asserts that the trial judge erred in considering only whether it was reasonably foreseeable that the dogs could escape the dwelling by hitting the push bar. The appellant asserts that this is too narrow a test. I agree with the appellant's counsel that the essential question is whether Jennifer Dingle's failure to close the inner door created an unreasonable risk of harm to the mail carrier. Having said that, I am of the opinion that, in effect, the trial judge applied the correct test. Inherent in determining, in any given circumstances, if there is an unreasonable risk of harm as a result of an act or omission is an assessment by the court of all of the circumstances to determine if such harm could be reasonably foreseeable by the reasonable person were he or she in the shoes of the defendant at the time.

[61] I am satisfied that a reasonable person in Jennifer Dingle's shoes on the day in question, with the knowledge she had of the storm door and the prior behaviour of the dogs, would not have contemplated that the dogs could unlatch the screen door by jumping against it, as it could only be opened without difficulty by pushing on the bar near the latch. It would be a fluke for the dogs to open the door by hitting the bar within that few inches. It would not be something that would enter the mind of a reasonable and prudent person in the circumstances Jennifer Dingle found herself in when she left the inside door ajar, notwithstanding that she knew the dogs were excitable and jumped up at the window or the storm door, if the inner door was open, when a mail carrier approached the house.

[62] While it would have been simple to close the inner door, the escape of the

dogs was not a risk that a reasonable person would have appreciated considering the difficulty of opening the storm door. Therefore, while it would have been very easy to have avoided what eventually happened in this case, on the facts, it is not a particularly relevant consideration given that leaving the inner door open did not create an unreasonable risk of harm under all of the circumstances.

[63] Having reached this conclusion it is not really necessary to decide if the respondents could only be found liable if it was also reasonably foreseeable that the dogs would attack the mail carrier if they got out of the house. However, I would make the following comment. We are bound by the finding of the trial judge that the dogs were not aggressive. It follows that it would not be reasonably foreseeable that there was a risk of the dogs attacking anyone in the event they were able to push open the storm door.

[64] Having reviewed the evidence and the trial judge's reasoning, I am satisfied that the trial judge did not err in reaching the legal conclusion that Jennifer Dingle was not negligent.

[65] I would dismiss the appeal with costs to the Estate of William Dingle in the amount of $2,500.00 plus disbursements and costs to the respondents Jennifer and Margaret Dingle of $2,500.00 plus disbursements.

Hallett, J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.