Claim No: SCCH - 476994

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Bowles v. Wilton*, 2018 NSSM 55

BETWEEN:

SABRINA BOWLES

Claimant

- and -

LISA WILTON

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on August 7, 2018

Decision rendered on August 20, 2018

APPEARANCES

For the Claimant	self-represented
For the Defendant	self-represented

BY THE COURT:

[1] This case involves a fairly common but unhappy scenario. Two dogs met in an unfriendly encounter. The larger dog bit the other (smaller) dog, causing significant injury. The owner of the smaller dog (a 6-year old Shihtzu named Max) seeks damages in the amount of $1,500.00, made up mostly of $1,338.69 for veterinary bills together with some credit card interest and incidental costs.

[2] The owner of the larger dog, a Pit Bull/Labrador mix named Blazer, pleads that her dog was provoked, and that it had no known previous propensity for biting.

[3] On the day in question, April 6, 2018, the Claimant had just returned home from grocery shopping and allowed her dog Max to exit her home, without a leash, to greet her as she unloaded the groceries from her car. This something that she does from time to time. The Claimant says that Max typically stays on their property when allowed out unleashed. On the day in question, at that same moment, the Defendant (who lives nearby but not on the same street) was walking Blazer on the sidewalk. Blazer was on a leash. It appears that Max approached Blazer aggressively, at which point Blazer bit Max quite severely. There was a significant gash on his underbelly near the anus. The injury required surgery, stitches and antibiotics. Max would likely have died without emergency vet care.

[4] The Defendant claims that Max bit Blazer first, on one of his paws. The Defendant produced a photo purporting to show the paw injury, which is barely visible. I am not convinced that Max bit Blazer first, as the few seconds of an encounter between two raging dogs can be quite chaotic. It is just as probable

that Max bit Blazer in response to being bitten by Blazer. In any event, the injury to Blazer was near-trivial in comparison to that endured by Max. Blazer did not need veterinary care.

[5] The history of Blazer is relevant. He was a rescue dog that the Defendant had only owned for a couple of months. According to the Defendant, Blazer had never shown any signs of aggression toward other dogs or people. She believes that there would have been no problem if Max had been on a leash and the dogs had been properly introduced. As a precaution, she now muzzles Blazer when he is walked in situations where he might meet unfamiliar dogs.

[6] The central question for the court is whether the Defendant is responsible, in whole or in part, for the damage to Max.

[7] Halifax Animal Services was called and did an investigation. The end result was that the Defendant received a ticket for owning a dog that attacks another person or animal, under s.13 of the HRM Bylaw A-700, which reads:

> 13. (1) The owner of:
> (a) any animal, or
> (b) a dangerous dog
> which attacks any person or other animal is guilty of an offence.

[8] Clearly this creates a strict liability quasi-criminal offence, but it does not speak to the owner's civil liability. That subject is raised by s.197 of the Halifax Regional Municipality Charter, a provincial statute, which provides:

> 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.

[9] What is the effect of this section?

[10] One interpretation is that this imposes strict liability on owners for damage caused by their dog, whether or not they were aware of any propensity to violent behaviour. In the early development of the law in this area, the courts required "*scienter*" which is basically knowledge on the part of the owner that the dog had the potential for violence. Often this was hard to prove. The law of negligence generally requires some behaviour on the part of the owner that falls below a reasonable standard, before saddling that owner with financial responsibility. Once someone knows of their dog's propensity, they are negligent in failing to take precautions such as leashing or muzzling. Prior to that, the owner had an excuse.

[11] I have looked at the case law on the subject, and turned up a case in this court decided in 2017 by Adjudicator Richardson, *Nickerson v Norden*, 2017 NSSM 47 (CanLII). I do not entirely agree with the result, but because it is this court's most recent pronouncement, and also because it provides a good summary of the underlying law, I will quote it in full:

> [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

> 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 (NS SC), 1986 CanLII 4009 (NSCA) at paras. 9-13; and see *Lupu v. Rabinovitch* 1975 CanLII 979 (MB QB); *Wilk v Arbour* 2017 ONCA 21 (CanLII) 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.

[12] Where I part company with Adjudicator Richardson is his conclusion that notwithstanding s.197, a Claimant still has to prove negligence. As I read the cases, the doctrine of *scienter* was a way of looking at the blameworthiness of the animal owner. Clearly, if the owner knew that his dog was dangerous, that would be negligence. On the other hand, an owner who was innocent of any such knowledge would not be negligent, because how was he or she to know that something like this would happen?

[13] Doing away with *scienter* must mean that an owner is liable for his dog's behaviour, regardless of his lack of knowledge of the dog's propensity, so long as that behaviour is *per se* mischievous. What else could it mean? Such legislation would be meaningless if the Claimant still had to prove negligence. This is admittedly a form of strict liability, though not absolute liability. Strict liability allows for defences such as due diligence. Absolute liability would not allow for any escape. Apart from the *Nickerson* case, I am not aware of any Nova Scotia authority that would hold otherwise. I believe this finding is consistent with older Nova Scotia authority such as *Brewer v. Saunders*, 1986 CanLII 4009 (NS SC - AD).

[14] This is also consistent with the law in some other jurisdictions which have legislated an end to *scienter*, such as Manitoba: see *Lofstrom v. Hydamaka*, 2013 MBQB 220 (CanLII).

[15] Of course, the law of negligence still applies, and a Claimant may prove negligence, based on the evidence, and a Defendant may plead contributory negligence based on anything that the Defendant may have done that falls below a standard of reasonableness. The necessary element of negligence, if one is needed, is the fact that Blazer's behaviour was vicious and dangerous. The effect of the statute is that the Claimant does not have to prove that the Defendant knew that Blazer had the potential to behave as he did.

[16] I accordingly find that the Defendant is liable for the damage that Blazer caused.

[17] That does not conclude the inquiry, as there is still the question of contributory negligence.

[18] I believe the Claimant must bear some responsibility by not having her dog leashed, or otherwise within her control. I apportion her liability at 50%. I note that the Defendant's stated position was that she was prepared to share the cost equally, and in the end, this was a reasonable position to take.

[19] In the result, the Defendant will pay to the Claimant one-half of her proved cost of veterinary case, namely $1,338.69/2 = $669.35.

[20] The Claimant has also claimed the cost of credit card interest, travel to and from the emergency vet, photocopies as well as the cost of filing this claim. I am awarding the Claimant an additional sum ($80.65) that will bring the award up to $750.00, one half of the $1,500.00 she claimed.

Eric K. Slone, Adjudicator