Case Name:

Strynatka v. Forbes

Between
Orest Strynatka, claimant, and
Alison Forbes, defendant

[2002] B.C.J. No. 2589

2002 BCPC 481

North Vancouver Registry No. 0113258

British Columbia Provincial Court
North Vancouver, British Columbia

Baird Ellan C.J. Prov. Ct.

Heard: May 30, 2002.
Judgment: June 14, 2002.

(21 paras.)

Torts -- Negligence -- Animals -- Duty of possessor of domestic animals -- Foreseeability -- Dangerous, knowledge of, liability of owner -- Evidence and proof -- Defences -- Contributory negligence -- Apportionment of fault -- Consent, assumption of risk -- Implied consent, dangerous -- Damage awards -- Head injuries -- Facial injuries (incl. scarring).

Action by Strynatka for injuries and loss of profits resulting from an attack by Forbes's dog. Strynatka was playing a game of tug of war with the dog, which had his cap in its mouth, when the dog bit his face. His face was permanently scarred. Forbes was present, and could have controlled the dog, but he did not warn Strynatka or intervene to take control of the dog. Forbes knew the dog had nipped before when someone put their face near the dog's, and she had warned Strynatka not to do so on previous occasions. She had warned him not to play tug of war on previous occasions, and had intervened several times before when Strynatka had played tug of war. After the dog bit, Strynatka said "my fault". Strynatka argued that he was in shock at that time, and that Forbes was liable for not controlling the dog. Forbes argued that Strynatka was aware of the risk from previous warnings, which was demonstrated by his statement regarding his fault. Strynatka claimed that he lost clients because of the disfigurement of his face. He did not provide evidence of mitigation or of the cause of his losing clients.

HELD: Action allowed in part. Strynatka was equally responsible with Forbes for his injuries. Strynatka knew the risks from previous warnings and acted negligently in failing to abandon the cap to the dog or ask Forbes to get it back. Forbes negligently failed to intervene to control the dog in a situation similar to that in which she knew the dog had bitten before. Since she was present, and had intervened on previous occasions, and since she had better knowledge of

the dog's propensities, she was not absolved of responsibility by the doctrine of volenti non fit injuria. As Strynatka failed to prove the cause of his loss of clients, his claim for lost profits was dismissed. Damages for the bite were assessed at $2,500.

Counsel:

Orest Strynatka, appeared in person.
M. Pongracic-Speier, for the defendant.

REASONS FOR JUDGMENT

BAIRD ELLAN C.J. PROV. CT.:--

Introduction

1 On April 21, 1999, while the claimant, Orest Strynatka, and the defendant, Alison Forbes, were out for a walk, Ms. Forbes's dog bit Mr. Strynatka on the face, causing a wound that required 25 stitches. Mr. Strynatka seeks damages for pain and suffering and loss of income. The issues are whether the doctrine of scienter applies, whether the defendant was negligent, and whether the claimant assumed the risk or was also negligent. Put more simply, was the defendant aware that her dog was a hazard to the claimant, did she fail to prevent it from harming him, and did the claimant knowingly put himself at risk of being bitten?

Evidence

2 The evidence led by the claimant amply establishes that he suffered a substantial and debilitating injury, which has caused him continuing discomfort, embarrassment and a lingering fear of dogs. The scar has faded considerably, but is still visible close up, such that friends who have not seen him since the injury have expressed alarm.

3 Mr. Strynatka described the incident as follows. Following a dinner party at Ms. Forbes's place, Mr. Strynatka, another guest, Ms. Heath, and Ms. Forbes went for a walk with Ms. Forbes's dog, Max, a border collie. Mr. Strynatka stated that he had been playing fetch with Max, but ended the game. Max did not want to quit, and jumped up to grab Mr. Strynatka's baseball cap from his hand. Mr. Strynatka said "no" and attempted to retrieve the cap. The next thing he knew, he was bitten. Later in his evidence, Mr. Strynatka elaborated, stating he had once retrieved the cap from the dog, but that it had grabbed the cap again. Mr. Strynatka then bent toward the dog to pull with both hands on the cap in its mouth, and as he pulled back, the dog came up and bit his face.

4 Mr. Strynatka had known Max from puppyhood, and described him as an active well-trained dog. He was surprised by the incident. He recalled that Ms. Forbes had warned him previously that Max had nipped someone, but did not remember the details of that conversation. He said she had told him, "Do not get your face close to this dog, it will nip." He thought that might have been as much as a year before the incident.

5 On cross-examination, Mr. Strynatka agreed that he liked to play tug of war with the dog, and that he had been asked not to by Ms. Forbes. He also agreed that he had been asked not to hug or kiss the dog or blow in its face, and observed that it would growl if someone tried to do this, though it was all right to pat it on the head. Max had never tried to bite him before. Mr. Strynatka did not dispute that he had been told repeatedly in the past not to hug or kiss the dog, blow in its face, or play tug of war with it. He noted that the dog usually insisted that he play with it. Mr. Strynatka also agreed that following the incident, he exclaimed, "my fault, my fault," but commented that he must have been in shock.

6 Ms. Forbes testified that Max, who was now 8, had been trained extensively and responded well to hand, voice and whistle commands. She said he had no tendency to bite, and that Mr. Strynatka tended to tease the dog, frequently trying to hug and kiss it. She would ask him not to, explaining that he was not a hugging and kissing dog. In cross-examination she stated that dogs were not meant to be hugged or kissed, but then qualified that: "Working dogs are not meant to be hugged and kissed." She said she did not like Max to play tug of war, because in training she had learned that it sets the dog on an equal level to the person. Max was not allowed to play in the house or be in the kitchen.

7 After dinner, Ms. Forbes recalled, they had gone for a walk, and Mr. Strynatka had gone to get his ball cap out of the car. He began to play tug of war with Max, with his cap, in a crouched position. Ms. Forbes did not remember having said anything to Mr. Strynatka about his behaviour with the dog on this occasion, but noted she had told him many times before not to tease or play tug of war with him. Ms. Forbes did not actually see the incident, but surmised that Mr. Strynatka was continuing in this activity of playing tug of war with the dog, as he was 3 to 4 feet behind her, when she last saw him, still playing with the dog, just before she heard him exclaim.

8 When asked about the conversation Mr. Strynatka related about Max nipping on a prior occasion, Ms. Forbes recalled a prior incident of aggression, when a child had tried to eat out of Max's bowl, but said there had been no "physical interaction," and noted that Max was only 4 or 5 months old at the time.

9 Ms. Heath testified that she also had observed Mr. Strynatka playing tug of war with his cap, and described him as having held the cap close in front of his face and then pulled the cap away. She and Ms. Forbes were then walking ahead when they heard Mr. Strynatka exclaim. She also recalled Ms. Forbes having to ask Mr. Strynatka before dinner to stop blowing in the dog's face. She had herself been told by Ms. Forbes that Max was not a "huggy" dog and did not like people to get close to his face. She had since found him to be a responsive, intelligent and well-behaved animal.

Analysis

10 The cases cited before me establish that in order to find a dog owner liable for a dog bite, the owner must have known of the dog's propensity to behave in that fashion, before the incident. It is not necessary that the dog has previously exhibited the precise behaviour, but that its tendency toward this type of behaviour must have been previously perceived by the owner (see below).

11 The evidence in this case establishes that Ms. Forbes knew Max posed a hazard to people's faces if they placed them near him. She regularly warned people not to do so, and there can be no other reason for her to have done this than that she was concerned that he might cause them harm.

12 Further, I accept Mr. Strynatka's version of the prior conversation in which Ms. Forbes warned him of Max's propensity, to the effect that there had been an incident in which Max had nipped someone. This is more plausible as an explanation of Ms. Forbes's habit of warning people not to put their faces near Max than her own explanation that dogs are not meant to be hugged and kissed. Ms. Forbes's behaviour in this respect is more consistent with a concern that Max might become aggressive if provoked by excessive teasing or close attention than with a concern that such actions might interfere with his discipline or training.

13 The law as most recently expressed in Janota-Szowska v. Lewis, Holtzman & Holtzman, [1997] B.C.J. No. 2053, is that if it is established on the evidence that to the defendant's knowledge, the dog had "manifested a trait to do that type of harm," even if it has not actually done the particular type of harm, the doctrine of scienter applies. Here, as I have stated, the defendant's conduct establishes such knowledge on her part.

14 The doctrine of scienter places upon the owner who is aware of a propensity an absolute duty to prevent it from fulfilling that propensity. However, that duty would appear to be met where the dog is properly restrained, or the injured party is properly warned of the hazard or interferes with the animal: Hall v. Sorley and Sorley (1980), 23 B.C.L.R. 281.

15 In this case, it is clear that the claimant had been warned and was aware of the risk posed by putting his face near the dog. In addition, this was not an unrestrained animal in the classic sense: it was under the supervision and control of its owner. Further, on any view of the evidence, it was a combination of the defendant's actions and the dog's propensity that created the hazard. I agree with Ms. Pongracic-Speier's submission that the issue in these circumstances is reduced to an assessment of negligence, and whether the doctrine of volenti non fit injuria applies.

16 Negligence exists where the owner knew or ought to have known of the risk of injury and failed to take reasonable care to prevent it: Janota-Szowska v. Lewis, Holtzman & Holtzman. I have found that Ms. Forbes knew of the risk that Max would cause injury if provoked. I also find that she also observed Mr. Strynatka engaging in behaviour she knew was likely to provoke the dog, and failed to warn him or attempt to restrain her dog. Max was on the evidence a responsive dog who was capable of restraint, and Ms. Forbes was sufficiently concerned by games of tug of war on prior occasions to warn Mr. Strynatka or restrain and remove the dog. On this occasion she declined or failed to intervene, stating that he had been previously warned, though the evidence is clear that she perceived his behaviour as creating a risk and Max would likely have ceased his aggression if she had done so. I find Ms. Forbes was negligent in that she perceived the risk, had an opportunity to prevent it, and failed to take reasonable care to do so.

17 As regards the doctrine of volenti non fit injuria, or assumption of the risk, the case law establishes that it applies "where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff and that the plaintiff did not expect him [or her] to." Dube v. Labar, [1986] 1 S.C.R. 649, at para. 6. In this case, while the claimant had been warned about the behaviour in question, that is, provoking the dog to behave in an aggressive fashion or putting his face near it, the presence of the defendant and her prior history of intervening when she perceived the claimant's actions to be excessive, and her better knowledge of the inherent risk in the type of behaviour she observed, in my view negate the argument that the claimant absolved her from responsibility for Max's behaviour. She, being the owner of the dog, was the person in a position to perceive the likely consequences of the activity and to control it, and Mr. Strynatka cannot be said to have had full knowledge of those consequences or to have fully assumed the risk of harm so as to negate liability on the part of the defendant.

18 The final question is whether the claimant was also negligent? In my view he clearly was. Whether he was playing tug of war or attempting to retrieve his cap is immaterial, since he had the opportunity to withdraw from the engagement with the dog before he was bitten. On his own evidence, he had retrieved the cap once, and the dog had again taken it from him. He persisted in attempting to retrieve it a second time and putting himself in a place of risk, bending near the dog, when his prior knowledge suggested that the dog would take this as a game and that this type of activity with the dog was unwise. He continued challenging the dog, rather than abandoning the cap or asking Ms. Forbes to intervene. His exclamation, that it was his fault, constitutes a recognition of the risk he had created. In all the circumstances, I find that the claimant was equally at fault.

General Damages

19 Assessments of general damages for dog bites resulting in permanent scarring range on the case law from about $1000 to $5000. Cases involving children tend to be a bit higher than those involving adults, presumably on the theory that children are less able to overcome the trauma of a dog bite. In Mr. Strynatka's case, the scarring is relatively faint, and the lingering fear he experiences is undoubtedly less extreme than where a small child is involved and the attack is unprovoked. In all the circumstances, I assess general damages at $2500, of which half will be the responsibility of the defendant.

Loss of Income

20 Mr. Strynatka asserts that his income was lower in the years following the incident than it was in those preceding it. Whether or not a downward trend is shown on the evidence, there are several problems with proof of this loss. Firstly, there were other factors brought to light that could have affected Mr. Strynatka's client base. Secondly, there was no objective evidence led to show that any clients were in fact deterred by his appearance. Thirdly, he has a duty to

mitigate, and despite embarrassment about his appearance, he was obliged to make efforts to acquire new clients, and he has not shown that he did so. In the end I am not satisfied that a loss of income has been established.

Order

21 There will be judgment for the claimant in the sum of $1250, payable forthwith. Each party will bear their own expenses. Any outstanding issues relating to expenses or payment may be dealt with by the Registrar.

BAIRD ELLAN C.J. PROV. CT.

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