COURT FILE NO.: 14330/02
DATE: 2004/06/16

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
IAN GARDNER	R. Abraham, for the Plaintiff
Plaintiff	
- and -	
GERARDUS DEBRUIJN AND JOHANNA DEBRUIJN	M. Forget, for the Defendants
Defendants	
	HEARD: April 15, 19, 20, 2004

REASONS FOR JUDGMENT

Minden J.

Introduction

[1] Ian Gardner ("the plaintiff") claims that on March 13, 2001, a dog that belonged to Gerardus DeBruijn and Johanna DeBruijn ("the defendants") bit off a portion of the tip of his right index finger.

[2] The defendants deny that their dog bit the plaintiff and in the alternative say that the plaintiff was largely responsible for what occurred.

Issues

[3] The issues at trial were:

1. Did the dog owned by the defendants cause the plaintiff's injury?

2. If the defendants' dog caused the injury, was this a "bite" or "attack" within the meaning of the Dog Owners' Liability Act, R.S.O. 1990, c. D.16?

3. If the Act applied rendering the defendants strictly liable, was there contributory negligence on the part of the plaintiff and if so, to what extent, and

4. What is the appropriate quantum of damages?

Overview

[4] The plaintiff and the defendants reside a few houses apart on Regional Road #19 in Port Perry, Ontario.

[5] At the time of the incident, the defendants' dog, Tasha, was a 140 pound, ten year old female, part German shepherd, part huskie. The plaintiff owned a dog named Ozzi who was then a ninety pound, two year old male, part rotweiler, part boxer, part terrier and part shepherd.

[6] The incident occurred in the evening of March 13, 2001 at the front of the plaintiff's property. The plaintiff exited his house and headed towards his car that was parked in the driveway. Ozzi was with him, but not on a leash. Upon leaving the house, the plaintiff noticed Tasha on the plaintiff's lawn, perhaps 40 to 50 feet from where he stood. Tasha was not on a leash and neither of the defendants was present. Tasha was unsupervised.

[7] Apart from the plaintiff, there were no other people in the immediate area.

[8] The plaintiff testified that the two dogs started growling. Within moments, the dogs ran towards each other. The plaintiff said that everything happened suddenly and he was unable to grab his dog before he took off. The dogs came together and commenced fighting. It was clear that this was not a play fight. Ozzi immediately gained the advantage and in a very short time was on top of Tasha who was lying on her back.

[9] The plaintiff testified that the dogs started to bite each other. Ozzi did not respond to the plaintiff when he yelled at him to break away. To prevent the dogs from harming each other, the plaintiff reached down and tried to pull Ozzi away by his collar. The plaintiff said that Tasha's head popped up and Tasha bit his finger. The plaintiff ran back towards the house where he briefly examined his finger in the light. Then he grabbed a shovel with the intention of returning to the dogfight. By the time the plaintiff turned around, the dogs had separated. Tasha was running home and Ozzi was moving back towards the plaintiff.

[10] A search for the severed portion of the finger was unsuccessful.

[11] Evidence was led concerning a prior altercation between the two dogs.

[12] One day in July, 2000, approximately eight months prior to the incident in question, both dogs were in front of the Doucette residence, located on the same street between the houses of the plaintiff and the defendants. It was widely known in the neighbourhood that Cindy Doucette

had "adopted" Tasha. She loved Tasha and routinely cared for and fed her in front of the Doucette house. On this particular summer day, the Doucettes, the plaintiff and others were present. Tasha began to whine. Cindy Doucette interpreted this as Tasha showing her displeasure with Ozzi's presence on her turf. Ozzi reacted by suddenly and viciously attacking Tasha. He locked on to Tasha's neck. The plaintiff, assisted by others, repeatedly pummeled and kicked Ozzi before they were finally able to pull Ozzi away. It was clear to everyone that Ozzi was out of control and that he had easily overpowered Tasha. This mismatch could have been fatal but for the intervention of those present.

[13] Ozzi's attack on Tasha in July, 2000 resulted in Tasha sustaining several significant and obvious wounds. Following the attack, the plaintiff attended at the defendants' residence to check on Tasha's condition and to apologize for what Ozzi had done to her. The plaintiff undertook in the future to have Ozzi tied up at all times.

[14] I accepted Cindy Doucette's evidence concerning this previous incident as believable and reliable.

How The Plaintiff's Injury Occurred

[15] Counsel on behalf of the defendants submitted that the plaintiff failed to establish that his injury occurred as a result of a dog bite from the defendants' dog.

[16] Counsel submitted that the plaintiff was a manifestly incredible and unreliable witness whose version of how he sustained his injury did not ring true. There were several significant inconsistencies, both internally and as compared with other evidence. He deliberately exaggerated the impact of the injury. The defendants' position was that as a result, the court should have serious reservations about the plaintiff's version of the incident.

[17] The defendants maintained that it was equally likely, if not more probable than not, that the plaintiff was bitten by his own dog or injured in some other way by his dog as he tried to pull him off Tasha. In my view, this position was to a large extent based upon two premises, first, that the March 13, 2001 incident must have occurred in virtually the same manner as the July, 2000 incident and not in the manner described by the plaintiff, and second, that Tasha's general demeanour was such that it was unlikely she would ever bite someone or another dog.

[18] The evidence was insufficient to support either premise. I was unable to infer from the circumstantial evidence that Ozzi locked on to Tasha's jaw and would not release his grip until beaten, as was clearly the case in the earlier incident. Similarly, I was unable to conclude that Tasha, generally considered to be friendly and non-aggressive, could not or would not bite, particularly if under attack.

[19] I have considered the plaintiff's version with some care and caution, recognizing that there were no other witnesses to the March 13, 2001 incident. I agree that it did contain some inconsistencies and discrepancies, both internally and when compared with his prior statement. However, I did not feel that these were of great significance. The plaintiff's testimony as to how he sustained the injury was relatively clear, cogent and consistent. His spontaneous conduct

following the incident was consistent with his version and inconsistent with his having immediately concocted a story in which he falsely accused the neighbours' dog.

[20] I accept the thrust of the plaintiff's testimony that the injury occurred as a result of Tasha biting him during the plaintiff's unsuccessful attempt to separate the fighting dogs. I am unable to say that this aspect of his evidence was anything other than a candid recitation of the event. To the extent that there was limited circumstantial evidence arguably supportive of the alternate theories, that evidence did not leave me in doubt as to the cause of the injury.

[21] The plaintiff has established on a balance of probabilities that the defendants' dog bit the plaintiff's right index finger.

Application of *Dog Owners' Liability Act*

[22] There was no issue that the defendants were "owners" within s. 1 of the Dog Owners' Liability Act.

[23] The defendants submitted that the plaintiff failed to establish that this was a "bite" or "attack" within the meaning of s. 2(1) of the Act. That section provides:

> 2(1) The owner of a dog is liable for damages resulting from a bite or attack by the dog on another person or domestic animal.

[24] It is likely the case that Tasha was attempting to fend off the attacking Ozzi at the time Mr. Gardner was injured. Nonetheless, as I have already indicated, I am satisfied that Tasha bit Mr. Gardner in the circumstances I have outlined. In my view, this finding triggers the application of the liability provision. Counsel on behalf of the defendants conceded that he was unable to find any authorities supporting his submission that the Act ought not to extend to a dog bite under these or similar circumstances.

[25] In my view, this was a bite within the meaning of s. 2(1) of the Act. Accordingly, the defendants are liable for the injury to Mr. Gardner and for any damages occasioned thereby, subject to the issue of contributory negligence.

Contributory Negligence

[26] Section 2(3) of the Dog Owners' Liability Act provides as follows:

> 2(3) The liability of the owner does not depend upon knowledge of the propensity of the dog or fault or negligence on the part of the owner, but the court shall reduce the damages awarded in proportion to the degree, if any, to which the fault or negligence of the plaintiff caused or contributed to the damages.

[27] The plaintiff acknowledged that Tasha was a friendly, old, sick dog. He also acknowledged that Tasha was not a housedog. He knew that she frequently roamed around the

neighbourhood generally and, more particularly, across the front of his property. He knew that his dog was younger, stronger and more aggressive.

[28] As I have already indicated, the plaintiff was present during and had witnessed the entire July, 2000 incident.

[29] The plaintiff testified that on March 13, 2001, the previous incident did not even enter his mind. It did not cause him to put Ozzi on a leash upon leaving his premises, notwithstanding his knowledge of Tasha's tendency to roam near and upon his property. He stated that notwithstanding the previous incident, he believed Ozzi would listen to him if he called him back and that, in any event, Ozzi would respond to being pulled by his collar.

[30] This belief, if actually held, was unreasonable in the circumstances.

[31] I accepted Ms. Doucette's evidence that the July, 2000 incident involved a very violent and aggressive attack by Ozzi upon Tasha and that it was deeply disturbing, if not traumatic, for all who witnessed it. The plaintiff apologized, appropriately, for his dog's actions on that occasion. His undertaking to the defendants reflected that he was then aware of what could happen if his dog were given the opportunity to confront Tasha again.

[32] In view of what the plaintiff knew or ought to have known about both animals, he should have had Ozzi on a leash even for the short distance from the plaintiff's front door to his truck. He ought to have been mindful of the real possibility of Tasha's presence, of the prior incident and its aftermath, and of the likelihood that there would be a further altercation if both dogs had the opportunity to confront each other. In light of what the plaintiff had witnessed, he should not have assumed that in the event of a confrontation he would be able to control Ozzi if Ozzi were not under restraint.

[33] I think it more likely that the plaintiff did not even advert to Tasha's presence. Prior to leaving the house without putting Ozzi on a leash, he should at least have satisfied himself that Tasha was not in the vicinity. Instead, he failed to take these matters into account and took no precautionary measures. By acting as he did, the plaintiff took an unnecessary risk.

[34] Moreover, the manner in which the plaintiff attempted to separate the dogs, while no doubt a spontaneous, instinctive reaction, was nonetheless unreasonable. It involved a significant and foreseeable risk, given both the surrounding circumstances and what he knew or ought to have known about the two animals. Given the prior incident, it was virtually inevitable that this kind of intervention would lead to physical injury: see *Konkin v. Bertel*, [1988] B. C. J. No. 1716.

[35] The plaintiff's negligence contributed substantially to the damages he sustained. I would fix the proportion at 50%. Pursuant to s. 2(3) of the Dog Owner's Liability Act, I would reduce the damages to be awarded accordingly.

Loss of Income

[36] As a result of his injury, the plaintiff was unable to work for approximately seven weeks. The parties agreed that after deducting unemployment insurance, the total loss of income for this period was $941.00.

General Damages

[37] Immediately after the incident, the plaintiff attended at the emergency department of the Port Perry hospital. An emergency physician assessed his injury. The plaintiff received a tetanus shot and antibiotics. There was no fracture.

[38] Dr. T. Stryde, a plastic surgeon, was consulted. Dr. Stryde noted that the plaintiff had sustained what the physician described as an amputation wound to the tip of the right, second digit. He observed that there was about a one centimeter square defect of skin at the tip of the right second digit. The plaintiff had lost half of his nail and there was some bone exposed. Dr. Stryde recommended surgery, noting:

> "He will need that bone shortened a little bit to obtain soft tissue coverage and I think a full thickness skin graft is indicated to obtain good coverage."

[39] The following day, under local anaesthesia, Dr. Stryde performed a revision of the amputation with a full thickness skin graft from the plaintiff's forearm. Dr. Stryde opined that the operation was performed successfully.

[40] The injury caused pain, discomfort and resulted in a lack of sensation in the finger.

[41] Approximately one month after the incident, the plaintiff consulted Dr. M. K. Hampole, a specialist in plastic, reconstructive and hand surgery. In his report, dated April 17, 2001, Dr. Hampole noted that the plaintiff was experiencing pain and tenderness in the finger tip as well as marked sensitivity in the finger, particularly in cold weather. He also complained that he was unable to move the finger to full flexion.

[42] Dr. Hampole wrote:

> "Clinical examination reveals that the right index finger is approximately 1 cm. short compared to the normal left index finger. There is loss of nail, almost three fourths of it. The skin graft is taken well. The area of injury is quite painful, tender and is highly sensitive when it comes to touch and pressure.
>
> He is able to flex the d.i.p. joint almost to the 25 degree and he has the full extension.
>
> The function of the finger is limited as he is not able to use at the present time fully. He tells me that he uses the middle finger and ignores the index finger because of the sensitivity, pain and tenderness.

> If he continues to do this he may develop index finger deficit. This will be (a) very difficult thing when it comes to use the hand as whole. I have discussed with him to desensitize the finger and try to use it."

[43] Dr. Hampole also stated that the plaintiff was left with a disability "for the rest of his life" but added:

> "However this should be reassessed in a month (sic) time and report to be given."

[44] The plaintiff did not return for the recommended reassessment. Nor did he consult his family physician or any other physician concerning his injury. The plaintiff testified that he was told that nothing further could be done so he decided not to bother.

[45] At the time of the incident, the plaintiff was employed with M & R Automotive as a full-time apprentice auto mechanic. He remained there until approximately June, 2002.

[46] The plaintiff testified that as a result of his injury he had difficulties performing his job once he returned from his time off. He said that without the use of his right index finger he had problems doing detailed work that he otherwise would have been able to do. This included what he called "blind work" or detailed jobs that require the feel and touch between thumb and index finger, such as working with screws, nuts and bolts. Sometimes he requested help from other employees. More frequently, his employer assigned him jobs that did not involve fine work. For much of the balance of the plaintiff's term of employment there, his job entailed oil changes and tire work, rather than the detailed electrical work he preferred.

[47] The plaintiff's former employer at M & R Automotive, Martin Agnew, confirmed much of what the plaintiff said in this regard.

[48] The plaintiff testified that many years ago, when employed at a metal stamping plant, he sustained an injury to his left thumb. The dog bite injury to his "good" hand left him feeling that he was certain to lose out on future opportunities in the field of auto mechanics, and in particular, that he would be unable to achieve his long-time goal of working on the electrical side of the automotive trade.

[49] In October, 2002, the plaintiff obtained full-time employment as a mechanic with Taylor Ford. The plaintiff did not disclose his injury to his new employer for fear of not obtaining the position. As he was the most junior mechanic, his supervisor consistently assigned him general servicing work that did not routinely require him to use his index finger.

[50] In December, 2002, the plaintiff became a duly licenced mechanic. The plaintiff currently earns $18.00 per hour. He continues to be employed at Taylor Ford. Recently, his employer became aware of these proceedings and for the first time learned of the plaintiff's injury. The plaintiff's injury has never caused him to refuse any task assigned to him.

[51] The plaintiff testified that he has considered leaving Taylor Ford in order to start his own auto repair shop.

[52] The plaintiff testified that his finger is still very sensitive to cold and to the touch. It has not healed evenly and tends to bleed easily. When working, the plaintiff tries to avoid using it as much as he can. When he is not at work, the injury does not interfere with the performance of most routine tasks.

[53] The plaintiff testified that he feels the finger is unsightly and this, together with the continuing symptoms, disturbs him. I have reviewed the photographs depicting the plaintiff's finger.

[54] I was unable to accept the defendants' submission that the plaintiff has grossly exaggerated the impact of the injury. That said, I was struck by the plaintiff's decision not to seek any further medical attention in the face of a clear recommendation that there should be a re-evaluation. It may be, as his counsel suggested, that the plaintiff is by nature a "non-complainer". Nevertheless, if the plaintiff felt that his ability to work as a mechanic were actually on the line, it is reasonable to infer that he would have pursued the unequivocal medical advice.

[55] The evidence as a whole satisfied me that the injury has not prevented the plaintiff from continuing to work as a full-time auto mechanic. That he is currently planning to open his own shop led me to conclude that he is confident that he will be able to make the necessary adjustments so as to permit him to perform most of the jobs associated with that position and to otherwise cope with any problems posed by the way in which the injury has healed.

[56] The parties filed various authorities on the question of damages, including *Fiorino v. O'Neil*, [2001] B.C.J. No. 2298 (S.C.), *DeGroot v. Arsenault*, [1999] M. J. 489 (S.C.), *Church v. Myers*, [1998] B.C.J. No. 1755 (S.C.), *Menkerios v. Acklands Ltd.*, [1994] S. J. No. 659 (Q. B.) and *Ateliers de Moteur Completi-Tech Inc. c. St-Laurent*, [2002] J. Q. No. 5279 (Que. C.A.). I have considered those, as well as additional authorities, including *Witman v. Johnson*, [1990] M. J. No. 502 (Q. B.), *Ross v. Kelowna*, [1982] B.C.J. No. 499 (Co. Ct.) and *Murphy v. Crawford*, [1990] N. B. J. No. 212 (Q.B.).

[57] I would fix damages at $8,000.00. In light of what I have found to be the plaintiff's contribution to the injury, I would reduce that by 50%, leaving a total of $4,000.00.

Conclusion

[58] The dog owned by defendants bit the plaintiff's finger and caused his injury. The defendants are liable pursuant to s. 2(1) of the Dog Owners' Liability Act. The proportion of the plaintiff's contributory negligence is 50% and pursuant to s. 2(3) of the Act, the damages are reduced in that proportion.

[59] Damages for lost income are fixed in the amount of $941.00.

[60] Non-pecuniary damages are fixed in the amount of $4,000.00.

[61] Damages will be awarded in the total amount of $4,941.00 together with pre-judgment interest.

Costs

[62] If the parties are unable to agree on costs, they may within 21 days contact the Office of the Trial Co-Ordinator at the Whitby Court House to arrange a conference call.

Justice E. Minden

Released: June 16, 2004

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