



Civil Resolution Tribunal

Date Issued: October 10, 2018

File: SC-2018-002309

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Nemeth v. Chong*, 2018 BCCRT 608

BETWEEN:

Jack Nemeth

APPLICANT

AND:

Jessica Chong

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about dogs and an incident that occurred at an off-leash dog park in the City of Port Coquitlam (City) when the parties' dogs were both off-leash. The applicant, Jack Nemeth, says that on June 27, 2017 the respondent's larger dog

Xander attacked his Chihuahua dog Binky and caused severe injuries. Based on the photo in evidence, Xander appears to a Labradoodle. The applicant claims \$5,000 for veterinarian bills and related future care expenses.

2. The respondent, Jessica Chong, says the incident occurred after Binky approached and growled at Xander. The respondent denies Xander has ever showed any prior aggression. The parties are self-represented.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find I can fairly resolve the dispute based on the documentary evidence before me. This conclusion is consistent with the court's observations of the tribunal's processes in the recent decision in *Yas v. Pope*, 2018 BCSC 282.
5. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
6. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

7. Is the respondent responsible for the applicant's dog's injuries and related treatment expenses?

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
9. Based on the applicant's veterinarian bills and the parties' own evidence, I accept that Binky's injuries at issue in this disputed were caused by a dog bite. I also accept that it was Xander who bit Binky, which is undisputed.
10. I accept that all parties love their pets. There is no evidence before me to support a conclusion that the respondent's dog Xander has ever been formally declared a dangerous or aggressive dog, either before or after the incident. Apart from the applicant's speculation that the respondent is hiding a history, there is also no evidence that Xander has a history of biting or attacking other animals or people. Contrary to the applicant's suggestion, what matters is Xander's history before he bit Binky. The fact that Xander bit Binky does not mean Xander was an "aggressive dog" at the time of the altercation such that the law of scienter, discussed below, should apply.
11. As noted above, it is undisputed that neither of the dogs were leashed at the time the applicant's dog Binky was injured.
12. There is some disagreement between the parties about whether Binky growled first at Xander. While I find the evidence supports the conclusion that Binky did growl first, I find little turns on this. The fact that Binky, a small Chihuahua, growled at Xander, a larger dog, does not necessarily mean the respondent ought to have done anything differently in the circumstances. I accept that Binky was the

aggressor, and was off-leash. I find the bite altercation between Binky and Xander occurred suddenly and quickly. That the bite incident occurred quickly is supported by both parties' accounts, the respondent's father's statement, and the statement of the respondent's witness, MP.

13. I accept the respondent's evidence that while MP signed the statement on May 11, 2018, he wrote the statement on June 28, 2017, the day after the incident. Based on the evidence before me, MP is not the respondent's friend or family member, but was an unknown bystander at the time of the incident. MP described Binky entering the area where Xander and other dogs were playing, and growling at the other dogs. MP said that Binky snapped twice at another large dog, and that the altercation between Binky and Xander happened quickly, but that it seemed Binky was "carrying on against Xander". MP concluded his statement that he would not hesitate to bring his dog back into the dog park with Xander. I find that MP's view was that Binky started the incident and that it began and ended quickly. I accept MP's evidence, which I find was unbiased.
14. I turn then to the law of liability for dog bites.
15. Since the repeal of the *Animals Act* in 1981 there is no legislation in BC reversing the onus so as to require the respondent dog owner to prove her dog was not dangerous. As noted above, the applicant bears the burden of proof.
16. Thus, in BC there are currently 3 ways for a pet owner to be liable for the action of their pet: a) occupier's liability, b) the legal maxim known as 'scienter', and c) negligence.
17. I will deal with scienter first, which means knowledge of the animal's poor behaviour or propensity to be aggressive. For scienter to apply, the applicant must prove that at the time of the attack: a) the respondent was the dog's owner, b) the dog had manifested a propensity or tendency to cause the type of harm that happened, and c) the dog's owner knew of that propensity (see *Xu v. Chen & Yates*, 2008 BCPC 0234, citing *Janota-Bzowska v. Lewis* [1997] B.C.J. No. 2053

(BCCA)). I find scienter does not apply here as there is no evidence before me that Xander had an aggressive history before the incident.

18. Section 3 of the *Occupier's Liability Act* states that an occupier must take reasonable care to ensure others on their property are reasonably safe from injury that the occupier ought to have foreseen. As the incident in this case occurred at a public off-leash dog park, I find the law of occupier's liability does not apply.
19. I turn then to negligence. The respondent has a duty of care to reasonably ensure her dog does not attack other animals or people. Again, I find that the respondent had no reason to believe Xander would be aggressive. This is supported by the various witness statements provided by the applicant, who say Xander was known to be a calm dog. It is relevant that all parties had their dogs unleashed. It is undisputed that the applicant permitted Binky, unleashed, to approach Xander, who was also unleashed. I have found that Binky was the aggressor and that the bite incident occurred quickly. I cannot find the respondent failed to react quickly enough. I find the applicant has not proved negligence. The fact that Xander bit Binky, after Binky growled, is not determinative. Again, all dogs were off-leash. The applicable law of negligence is not strict liability. I find the respondent acted reasonably in the circumstances, given her understanding of Xander's non-aggressive history. To prove negligence, the applicant must prove that the respondent knew or ought to have known that Xander was likely to create a risk of injury and that the respondent failed to take reasonable care to prevent such injury (see the Xu decision, cited above). The applicant has not proven either of those things.
20. The applicant relies upon the City's *Animal Care and Control* bylaw. However, I find that bylaw does not assist the applicant. The bylaw states that a dog's owner may allow a dog to be at large in an off leash area, if the owner "keeps the dog under control". The applicant did not keep Binky under control, as I find Binky was the aggressor. The bylaw also states that every animal owner "must not cause, permit or allow" their animal to display aggressive behaviour, and again I find

Binky was the aggressor. While the bylaw also says owners must not allow their animals to cause injury, I find that the respondent did not “allow” Xander to do so in that she reacted as quickly as possible to Xander’s response to Binky’s growling. Even if the respondent had violated the City’s bylaw, the respondent’s liability in this dispute would still be assessed under the law of negligence.

21. I find the applicant has not proven the respondent is liable for Xander’s attack on Binky or for the applicant’s claimed damages. Given this conclusion, I find I do not need to address the applicant’s damages claims in any detail.
22. The applicant was unsuccessful in this dispute. In accordance with the Act and the tribunal’s rules, I find he is not entitled to reimbursement of tribunal fees or dispute-related expenses.

ORDER

23. I order that the applicants’ claims, and thus this dispute, are dismissed.

Shelley Lopez, Vice Chair