



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Abbott v. Kirsty MacGregor (dba Canine Adventure Den Day Care)*, 2019
BCCRT 155

B E T W E E N :

Jacqueline Abbott

APPLICANT

A N D :

Kirsty MacGregor (Doing Business As Canine Adventure Den Day
Care) and Danielle Eastveld

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Eric Regehr

INTRODUCTION

1. In this dispute, the applicant, Jacqueline Abbott, claims against the respondents, Kirsty MacGregor (Doing Business As Canine Adventure Den Day Care) and

Danielle Eastveld, for the cost of veterinary care for her dog, Zoey. Zoey was at Ms. MacGregor's dog daycare when Ms. Eastveld's dog, Allonso, bit Zoey.

2. Ms. MacGregor and Ms. Eastveld have already paid \$1,700 and \$1,400, respectively, towards Zoey's veterinary care. Ms. Abbott's pet insurance paid another \$2,500. Zoey's care cost a total of \$8,720.22 and Ms. Abbott claims \$3,120.22, which is the amount she remains out of pocket.
3. Ms. Eastveld says that Allonso had never shown a propensity to bite. Ms. MacGregor says that she took reasonable measures to prevent the incident and that Ms. Abbott signed a waiver.
4. The parties are each self-represented.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal 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.
6. 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 that there are no significant issues of credibility or other reasons that might require an oral hearing.
7. 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.

8. Under tribunal rule 126, in resolving this dispute the tribunal may make one or more of the following orders:
 - a. order a party to do or stop doing something;
 - b. order a party to pay money;
 - c. order any other terms or conditions the tribunal considers appropriate.

ISSUES

9. The issues in this dispute are:
 - a. Did Ms. MacGregor admit liability for the attack by pleading guilty to a Vancouver city bylaw infraction?
 - b. If not, is Ms. MacGregor liable for the attack?
 - c. Does the waiver release Ms. MacGregor from liability for the attack?
 - d. Is Ms. Eastveld liable for the attack?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the applicant must prove her case on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.
11. For the reasons discussed below, I dismiss Ms. Abbott's claims against both respondents.
12. As a preliminary matter, Ms. Abbott names Ms. MacGregor as the sole proprietor of Canine Adventure Den Day Care (daycare). As discussed in more detail below, the City of Vancouver prosecuted a bylaw offence about the attack Canine Adventure Den Daycare Inc., which pled guilty. The court order suggests that the daycare may operate through a corporation, not a sole proprietorship.

13. Ms. MacGregor did not raise this issue in her submissions and did not object to being named personally. Ms. MacGregor is the directing mind of the daycare whether it is a sole proprietorship or a corporation. She gave evidence and submissions on behalf of the daycare on all of the issues in this dispute. Therefore, because I have dismissed Ms. Abbott's claims, nothing turns on whether Ms. Abbott named the proper party because there is no order to enforce.
14. Ms. MacGregor is the operator of the daycare. Ms. Abbott began taking Zoey to the daycare in September 2016, on average 4 times per week. Zoey is a 60 pound Greyhound who was 4 years old at the time of the incident.
15. Zoey wears a muzzle. Ms. Abbott says that Zoey is very friendly and energetic and has no history of aggression. The reason for Zoey's muzzle is not in evidence.
16. When Ms. Abbott first took Zoey to daycare, she had to sign an application and waiver. On the application, Ms. Abbott guaranteed that Zoey had "no previous issues at home, park, other daycares or social situations".
17. On the waiver, Ms. Abbott agreed that Zoey had not harmed or shown aggression or threatening behaviour towards any person or any other dog. Ms. Abbott agreed to a waiver of "all liability which I or my dog may suffer, including specifically, but not without limitation, any injury or damage whatsoever arising from the Dog's attendance and participation" at the daycare. Ms. Abbott also agreed to a waiver that the daycare "will not be liable for any problems that might develop with the dog, including, but not limited to, injury, provided that reasonable care and precautions are followed".
18. Ms. Eastveld filled out the same forms when she first took Allonso to the daycare. Allonso's first day was March 24, 2017.
19. On April 15, 2017, both Zoey and Allonso were at the daycare. They were both in the "quiet" section of the daycare. A staff member was in the room but had her back turned to take a photo of 2 other dogs when she heard a scuffle. When she turned around, she saw that Allonso was on top of Zoey but jumped off when the staff

person shouted at him. Allonso had bitten Zoey on the back leg. Zoey was taken to an animal hospital.

20. Unfortunately, Zoey's recovery from the bite was very difficult, requiring multiple surgeries. There are nearly 30 veterinary bills in evidence. Eventually, Zoey made a full recovery.
21. Ms. Abbott says that when she initially contacted the daycare, the staff told her that the daycare's policy was that if a dog is injured in their care, it is up to the dog owner to pay the veterinary bills. Despite that policy, Ms. Abbott says that Ms. MacGregor agreed to pay \$700 towards the veterinary bills. Ms. MacGregor agreed to pay a further \$1,000 as part of the guilty plea in the bylaw prosecution.
22. Ms. Abbott says that when she first spoke to Ms. Eastveld, Ms. Eastveld agreed to help with the veterinary bills and paid her \$1,400.
23. In this dispute, Ms. Abbott does not argue that either Ms. MacGregor's \$700 payment or Ms. Eastveld's \$1,400 payment are an admission of liability. I find that these payments were voluntary payments reflecting the respondents' sense of moral obligation to help out with Zoey's care, and that they were not admissions of legal responsibility for the incident.

What is the effect of Ms. MacGregor's guilty plea?

24. On January 30, 2018, the daycare pled guilty to permitting, suffering or allowing Allonso to bite, attack or injure another domestic animal contrary to the City of Vancouver's animal bylaw 4.14. As mentioned above, Ms. MacGregor does not dispute that she is the directing mind of the daycare and that she was the person who appeared in court to plead guilty. The Court ordered the daycare to pay \$1,000 towards Zoey's veterinary care. Ms. Abbott says that Ms. MacGregor accepted full responsibility for Zoey's veterinary care by pleading guilty. Ms. MacGregor submits that she was pleading guilty to a bylaw offence but was not admitting negligence.

25. When a person pleads guilty in a criminal case, that guilty plea can generally be used as evidence in subsequent civil disputes about the same events. By pleading guilty, the defendant in the criminal case admits all of the facts necessary for the defendant to be convicted.
26. In the context of this dispute, I find that by pleading guilty, Ms. MacGregor admitted that the daycare allowed Allonso to bite Zoey. I also find that Ms. MacGregor admitted that the daycare failed to exercise due diligence to prevent the bite, which was a defence that Ms. MacGregor could have raised instead of pleading guilty. See *R. v. Namura*, 2014 BCPC 335.
27. In this dispute, by arguing that she was not negligent, Ms. MacGregor wants the tribunal to find facts different to what she admitted by pleading guilty. In general, it is an abuse of process to try to relitigate issues in this way. However, there are 3 circumstances when a person may be able to relitigate an issue that is covered by a guilty plea:

- The initial proceeding is tainted by fraud or dishonesty.
- There is previously unavailable evidence.
- Fairness dictates that the original result should not be binding in the new context.

See *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63.

28. There is no suggestion that there was any fraud or dishonesty in the bylaw proceeding or that there is any new evidence. Rather, Ms. MacGregor submits that she only plead guilty because the Judicial Justice said that she took reasonable action before and after the incident. As such, Ms. MacGregor does not believe that the guilty plea has any bearing on this dispute because she does not believe that she admitted negligence.

29. There is no transcript of the proceeding before me. I do not accept that the Judicial Justice told Ms. MacGregor that she acted reasonably. If the Judicial Justice believed that Ms. MacGregor acted reasonably, they would not be permitted to accept a guilty plea because acting with due diligence is a defence. I therefore find it unlikely that the Judicial Justice would have told Ms. MacGregor that she had acted reasonably, or if they did, that the Judicial Justice was referring to the daycare's actions leading up to the attack.
30. Nevertheless, I accept Ms. MacGregor's evidence that she did not realize that by pleading guilty she was admitting that the daycare failed to act with due diligence. The defence of due diligence is a common law defence and is not explicitly set out in the bylaw, so it would not be obvious to a person without legal assistance that the defence existed. Ms. MacGregor did not have a lawyer at the bylaw hearing and her evidence in this dispute suggests that no one explained the defence of due diligence to her. Based on her evidence and submissions, I find that she read the bylaw and assumed that all she admitted to was that the attack happened at her daycare.
31. When the stakes are lower in a criminal case than in a subsequent civil case, it may be in the interests of fairness to allow a party to relitigate a defence despite a previous conviction: see *Toronto (City) v. C.U.P.E. Local 79*. I find that the stakes for Ms. MacGregor are higher in this dispute than they were in the bylaw prosecution, even though the monetary amount is not significantly higher. This is because I find that there is a difference to Ms. MacGregor and her business between admitting that an attack occurred at her daycare and admitting that her daycare was negligent in failing to prevent the attack.
32. I find that fairness dictates that the guilty plea is not binding on me in this dispute, insofar as the guilty plea is an admission of a lack of due diligence. I find that it is not an abuse of process for Ms. MacGregor to argue that she was not negligent.

If not, was Ms. MacGregor liable for the incident?

33. When there is a dog attack, the owner or keeper of the dog who causes an injury is not necessarily legally responsible for the attack. There are 3 ways a pet owner can be liable for a dog attack:

- occupier's liability.
- the legal concept known as "scienter".
- negligence.

34. The combined effect of these legal principles is commonly referred to as the "one bite rule", in which every dog gets one "free" bite without its owner being liable for any damages.

35. Although she is not Allonso's owner, I find that the same 3 legal doctrines apply to Ms. MacGregor. I will deal with scienter first.

36. First, while scienter is usually applied to dog owners, it also applies to "keepers" of dogs. A keeper is someone who accepts responsibility for a dog, such as a trainer or boarder: see *McLean v. Thompsons*, 2009 BCPC 415. I find that Ms. MacGregor was Allonso's keeper at the time of the incident.

37. For scienter to apply, Ms. Abbott must prove that Zoey had a propensity to attack other dogs and that Ms. MacGregor knew about it.

38. Ms. Abbott relies on an incident report that asks what warning signs there were prior to the incident. The staff person wrote that Allonso was "a very high energy, nervous dog who escalates too quickly". Ms. MacGregor responds that this assessment was with the benefit of hindsight. I note that Allonso's initial "report card" from the daycare refers to him as energetic and playful who "sure knows how to party". It also refers to Allonso as a "gentle giant". I find that the incident report does not prove that Ms. MacGregor or her staff knew that Allonso had a propensity to attack or bite.

39. I find that Ms. MacGregor and her staff did not know that Allonso had a propensity for aggression. Ms. Abbott has failed to establish liability in scienter as against Ms. MacGregor.
40. I find that Ms. MacGregor was an occupier of the property where the incident occurred, as she had control over the property as the operator of the daycare. I will address occupier's liability and negligence together, because in the context of this dispute, they are effectively the same thing. To succeed, Ms. Abbott must prove that Ms. Mac Gregor failed to take reasonable care to prevent the attack on Zoey.
41. This means that Ms. MacGregor can be liable if she should have known that Zoey was dangerous, even if she did not actually know that Zoey was dangerous. Ms. MacGregor's subjective awareness of whether Allonso had a propensity for aggression is not determinative.
42. Ms. Abbott makes 2 arguments that Ms. MacGregor should have known Allonso was aggressive.
43. First, Ms. Abbott notes that Ms. Eastveld's agreement and waiver is not properly filled out. In particular, while Ms. Eastveld did tick the box guaranteeing that Allonso had had no previous issues at home, park, other daycare or social situations, both Ms. Eastveld and the daycare failed to initial that question in the space provided. Ms. Abbott says that this should have put the daycare on notice that there may be an issue.
44. In the context of the entire agreement and waiver, I find that the failure to initial this question is not significant. Ms. Eastveld did tick the box, she just failed to initial beside it. In addition, Ms. Eastveld did initial beside the declaration that Allonso had not harmed or shown aggression or threatening behaviour towards any person or any other dog.
45. Second, Ms. Abbott says that Ms. MacGregor should have known Allonso was dangerous because he is a pitbull. While it is true, as Ms. Abbott points out, that some municipalities have designated pitbulls as dangerous, this does not mean that

Ms. MacGregor should have known that Allonso, in particular, was dangerous. I note that Vancouver does not have such a bylaw. The breed of a dog, standing alone, does not establish that the particular dog has a propensity for aggression. See *Levesque v. Miko et al*, 2001 BCPC 96.

46. I find that there was no way for Ms. MacGregor to reasonably believe that Allonso was dangerous.
47. Ms. Abbott makes 2 arguments that Ms. MacGregor failed to take reasonable care of Zoey, which apply even though I have found that Ms. MacGregor had no reason to believe that Allonso was dangerous.
48. First, Ms. Abbott says that because Zoey had a muzzle, the daycare should have kept a closer eye on Zoey. She says that Zoey was unable to protect herself. I infer that Ms. Abbott believes that Zoey was therefore more vulnerable to attack than a dog without a muzzle. Ms. Abbott did not lead any expert evidence about dog behaviour or the impact of a muzzle on dog interactions. I have insufficient evidence to conclude that a reasonable dog daycare would pay extra attention to a muzzled dog due to an increased risk of attack.
49. Second, Ms. Abbott says generally that the daycare failed to properly supervise the dogs. The incident report says that the staffperson in the room at the time of the attack had her back turned while taking a photo of 2 other dogs. She also said that Allonso immediately stopped when she yelled at Allonso. While the bite was severe, the fact that it was only one bite suggests that the attack was brief. I also accept that a dog daycare will generally have more dogs than people, which necessarily means that dogs will, at times, interact without a person directly watching them. I find that the daycare and its staff did not fail to take reasonable care of Zoey at the time of the attack.
50. In conclusion, I find that Ms. MacGregor is not liable for the dog attack. Because of my finding, I do not need to address the parties' arguments about the waiver.
51. I dismiss Ms. Abbott's claims against Ms. MacGregor.

Is Ms. Eastveld liable for the incident?

52. The same legal principles of scienter and negligence apply to the question of whether Ms. Eastveld is liable for the incident. Occupier's liability does not apply because Ms. Eastveld had no control over the daycare's property.
53. With respect to negligence, I find that Ms. Eastveld cannot be held liable in negligence because she was not caring for Allonso at the time of the incident. She left Allonso in the care of a professional dog daycare and there is no evidence that that was not a reasonable decision.
54. Rather, Ms. Eastveld's potential liability is in scienter. However, there is no evidence that Ms. Eastveld was aware of Allonso having a propensity to attack other dogs. Ms. Abbott says that when she first contacted Ms. Eastveld she asked whether Allonso had ever attacked another dog and Ms. Eastveld said "no". Ms. Eastveld also said that Allonso had been in another daycare with no problems.
55. Ms. Eastveld's professional dog walker provided a statement to the Vancouver bylaw officer who investigated the incident, which is in evidence before me. The dog walker said that they had been walking Allonso for 2 years in a group of dogs and had never observed Allonso do anything aggressive.
56. I find that Ms. Abbott has not proven that Ms. Eastveld knew that Allonso had a propensity to attack other dogs and has not proved scienter.
57. I dismiss Ms. Abbott's claims against Ms. Eastveld.
58. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. The applicant has not been successful, so I decline to order the respondents to reimburse her for her tribunal fees or dispute-related expenses.

ORDER

59. I dismiss the applicant's claims and this dispute.

Eric Regehr, Tribunal Member