



Civil Resolution Tribunal

Date Issued: April 12, 2019

File: SC-2018-006127

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Fulmer et al v. WINDLEY*, 2019 BCCRT 452

B E T W E E N :

Deborah Jean Fulmer and Pamela Faesen

APPLICANTS

A N D :

TODD WILLIAM WINDLEY

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. The applicant Deborah Jean Fulmer says that that respondent's dog, a Karelian Bear Dog (dog), attacked her dog, a Frenchton named Roskl, leaving puncture wounds in his neck. She says the attack occurred at the property of her sister, the applicant Pamela Faesen. The applicants ask to be reimbursed for their veterinary

bill of \$1,358.56. They also ask that the respondent's dog be put down or be permanently removed from the respondent's property.

2. The respondent says his dog broke loose from where he was chained in the yard. The respondent says he broke up the dogs as soon as he could. The respondent says Roskl had been off leash on his property immediately before the incident. The respondent says that his dog suffered bites to the face in the incident. The respondent asks that the dispute be dismissed.
3. The parties are each self-represented.

JURISDICTION AND PROCEDURE

4. 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.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, this dispute amounts to a "he said, she said" scenario with both sides calling into question the credibility of the other. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.
6. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the

court recognized that oral hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.

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 issue in this dispute is whether the respondent must pay the \$1,358.56 claimed by the applicants.

EVIDENCE AND ANALYSIS

10. This is a civil claim in which the applicant bears the burden of proof on a balance of probabilities. I have reviewed all of the evidence and submissions but refer to them here only as necessary to explain my decision.
11. On July 11, 2018, at about 7:30 p.m., the respondent's dog and the applicant's dog were involved in a physical fight at Ms. Faesen's property in Prince George, BC.
12. Sometime earlier, the respondent says that Roskl was off leash and entered his yard, where his own dog was harnessed and chained to a tree. Roskl then attempted to fight the leashed dog for about an hour, while the respondent

attempted to get Roskl to go away. The respondent says Mr. Heine Faesen, the applicant Pamela Faesen's spouse, came to get Roskl, after an hour.

13. The applicants agree there was an altercation between the dogs when Roskl first arrived, but they describe it as "brief". Either way, I find that Roskl went onto the respondent's property that day and fought with the respondent's dog who was leashed in the yard, before being removed back to Mr. and Mrs. Faesen's property.
14. The respondent says he spoke with Mr. Faesen, who said he would keep Roskl in their yard, since the dogs were not getting along. I accept this evidence as it logically follows from the encounter between the dogs and was uncontested.
15. The respondent says he then waited 10 minutes to be sure that Roskl had gone. At that point, he went inside for "20 seconds", when he heard the dogs fighting again. He went outside and found his dog had broken free of his chain and was fighting Roskl in the area near the property line between the two properties. The respondent says he called his dog, who came immediately. During the fight, Roskl suffered some puncture wounds.
16. When the dogs fought, they were observed by the applicants' respective granddaughters. It is uncontested, and I find, that the incident was only witnessed by the two granddaughters, with adults coming after hearing the children screaming.
17. After the adults broke the dogs up by yelling, the applicants took Roskl inside and checked him over. They found him to be in distress. They took Roskl to the veterinarian the next morning for care of his wounds.
18. Based on the photographs filed in evidence, I find that both Roskl and the respondent's dog suffered some bites during the incident. It is uncontested, and I find, that the incident occurred on the Faesens' property.
19. 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 his dog was not dangerous. As noted above, the applicants bear the burden of proof.

20. 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.
21. Occupier's liability is where damage happens on property controlled by the occupier. I find occupier's liability is not relevant here because applicants are the occupiers here, not the respondent.
22. Scienter 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)).
23. I find that scienter is proven here. It is undisputed that the respondent owns the dog. Based on the respondent's own evidence, he was aware that his dog had previously broken from his chain when provoked by loose neighbourhood dogs, resulting in, to quote him, "the attacking loose dog sustaining tooth marks" when his dog attacked.
24. That is, the applicant admits that his dog had manifested a tendency to break from his chain if provoked, and to bite another dog. That is precisely what he says occurred in the altercation with Roskl.
25. Turning to negligence, the respondent had a duty to take reasonable care of his dog, and, knowing of his dog's propensity, to keep it from breaking loose if other dogs were nearby. I find that the respondent ought to have known, particularly following the encounter with Roskl earlier the same day, that the chain was unlikely to be enough to prevent his dog breaking free to try to continue the standoff. That is,

he should have leashed or contained his dog at that point, knowing that Roskl had been off leash and provoking his dog for, he says, an hour.

26. I find that the applicants have established a breach in the duty of care owed by the respondent to his nearby neighbours, to keep his dog reasonably restrained in the circumstances. I further find that this failure caused the loss, namely the injuries to Roskl.
27. Having said that, I also find the applicants contributorily negligent. They failed to keep Roskl contained or on leash after, as they admit, he arrived and visited on the respondent's property and had a "brief altercation" with the respondent's dog. As dog owners, they should have been aware of the difficulty of an off-leash dog approaching a leashed dog, particularly where Roskl was only a visitor to the neighbourhood. The applicants say that they were then warned, by Mr. Faesen, about the respondent's dog, and so they took precautions by placing him on a leash and taking him to a different area.
28. Either either a few moments or a few hours later, depending on whether I accept the applicants' account or the respondent's, but either way that same day, Roskl was off leash when the respondent's dog broke his chain and came onto the Faesens' property.
29. I find that Roskl was also not properly supervised or leashed at that time, particularly given that there were no adults who immediately witnessed the encounter between the dogs. Given that Roskl was on his own (aunt's) property and did not himself have an established propensity for aggression, on the evidence, I find the applicants to be contributorily negligent for 40% of the damage they suffered.
30. I accept the applicants' veterinary bill of \$1,112.58 as the cost of care for Roskl's injuries in the encounter with the respondent's dog. I do not allow the \$190.33 the applicants spent at Ospika Pet & Farm Supplies for items including pig's ears, brushes and a bed, since there was no evidence proving that these costs were a

consequence of Roskl's injuries, rather than things that Roskl would have needed in any event.

31. Turning to the request for an order that the respondent's dog be destroyed, I refuse to resolve it under section 10 of the Act. I find that the British Columbia Society for the Prevention of Cruelty to Animals (SPCA) is the appropriate agency to assess that question and to pursue any related remedy in the BC Supreme Court, as set out in section 25 of the *Prevention of Cruelty to Animals Act*. Section 25 deals with an order of custody, and so it applies equally to the claim that the respondent's dog be removed from his home, which I also refuse to resolve. I leave it to the applicants to pursue enquiries with the SPCA, should they feel it necessary.
32. I find that the respondent owes the applicants 60% of the veterinary bill, or \$667.55, due to his liability in negligence and scienter. I will calculate prejudgment interest under the *Court Order Interest Act* from July 13, 2018, when the veterinary bill was paid, to the date of this decision, which I find reasonable.
33. 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. I find the applicant is entitled to reimbursement of \$125 in tribunal fees and \$50 for dispute-related expenses to serve the Dispute Notice.

ORDERS

34. Within 30 days of the date of this decision, I order the respondent to pay the applicants a total of \$850.69, broken down as follows:
 - a. \$667.55 in reimbursement for 60% of the veterinary bill,
 - b. \$8.14 in pre-judgment interest under the *Court Order Interest Act* calculated from July 13, 2018 to the date of this decision, and
 - c. \$175 for \$125 in tribunal fees and \$50 in dispute-related expenses.

35. The applicants are entitled to post-judgment interest, as applicable.
36. I refuse to resolve the applicants' claims to have the respondent's dog destroyed or removed from the respondent's property.
37. I dismiss the applicants' remaining claims.
38. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.
39. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Julie K. Gibson, Tribunal Member