



Civil Resolution Tribunal

Date Issued: August 11, 2020

File: SC-2020-000763

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Smaill v. White*, 2020 BCCRT 892

BETWEEN:

TROY SMAILL

APPLICANT

AND:

SUZANNE WHITE

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Rama Sood

INTRODUCTION

1. This dispute is about injuries to a dog. The applicant, Troy Smaill, says his dog, Jasper, was injured by the respondent Suzanne White's dog, Piper, after Piper "pounced" on Jasper. Mr. Smaill claims \$5,000 for veterinary bills, lost wages, travel and accommodation costs, and emotional trauma. Ms. White denies she is responsible for Jasper's injuries.

2. The parties are each self-represented.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT 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 CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. Further, bearing in mind the CRT's mandate of proportional and speedy dispute resolution, I decided I can fairly hear this dispute through written submissions.
5. The CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
6. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUE

7. The issue in this dispute is whether Ms. White is responsible for the injuries to Mr. Smaill's dog and, if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, Mr. Smaill as the applicant must prove his claim on a balance of probabilities. While I have reviewed all the parties' evidence and argument, I refer only to what is relevant to my determination and to the extent necessary to give context to my reasons.
9. It is undisputed that at the time of the incident Jasper was a 17 pound 4 month old Jack Russel terrier puppy and that Piper was a 70 pound 7 year old labradoodle.
10. The parties agree that they met on September 25, 2018 while walking their dogs on a dyke outside an off leash park. While Mr. Smaill submits that the incident occurred on September 26, 2018, I find that was likely a typographical error and nothing turns on it. Mr. Smaill's wife, CB, was also present. Jasper was on a leash, Piper was not. The parties agree that they stopped so the dogs could interact. At this point, the parties' recall of events differ.
11. Mr. Smaill says that Piper "pounced" on Jasper during the introduction. According to Mr. Smaill, Ms. White stated that Piper got "nervous" when other dogs got close to his face. Mr. Smaill did not clarify whether she said this before or after Jasper was injured. He also says that after Jasper was injured, Ms. White offered to drive Mr. Smaill, CB, and Jasper home. Mr. Smaill says Ms. White repeatedly yelled "bad dog" at Piper as they walked to Ms. White's vehicle. He also says Ms. White apologized profusely and offered to pay part of Jasper's veterinary bill.
12. Mr. Smaill says that Jasper's femur was broken when Piper pounced on him and had to undergo surgery the next day. Mr. Smaill says the veterinary costs were \$5,230.24. Mr. Smaill provided 3 invoices from a veterinary clinic and a hospital that totaled \$9,462.85. He did not explain the discrepancy between the amounts but I

find this is irrelevant since Mr. Smaill has limited his claim to \$5,000. I infer that Mr. Smaill reduced his claim to \$5,000 to bring it under the CRT's small claims monetary jurisdiction.

13. Mr. Smaill provided a written statement from CB. CB stated that Piper approached Jasper and left Ms. White behind. She denies Ms. White called Piper or ran to control him. She stated they allowed Piper to approach Jasper since Piper was not aggressive. CB stated that they were watching the dogs when "out of nowhere", Piper got on his hind legs, pounced on Jasper and was "acting aggressive". Aside from pouncing on Jasper, CB did not explain how Piper was being aggressive. She stated Ms. White then grabbed Piper and repeatedly yelled "bad dog". CB agreed that Ms. White offered her and Mr. Smaill a ride. She stated Ms. White yelled "bad dog I don't know what gets into you sometimes" at Piper on the way to Ms. White's car. CB says Ms. White apologized and stated that Piper "gets a little weird when other dogs sniff his face especially smaller dogs."
14. Ms. White's version is significantly different than Mr. Smaill's and CB's. Ms. White admits Piper was not on a leash at the time but says she had full verbal control of him. Ms. White says she called Piper over and held her collar as Jasper and Mr. Smaill approached. She says she informed Mr. Smaill that Piper did not like puppies excessively jumping up at her neck and face and may growl. Ms. White says the parties permitted the dogs to meet and interact. She says CB dropped Jasper's leash to allow Jasper to approach Piper. Ms. White says that she let go of Piper's collar and the dogs moved to a spot between the parties to interact while the parties watched. She says she did not see any behavior that raised concerns. Ms. White denies that Jasper "excessively" jumped up at Piper or that she saw Piper pounce on Jasper or any aggressive play. Ms. White says the dogs played for a few minutes and moved to one side of the owners. Then Jasper yelped. From this I infer that Ms. White was not watching the dogs when Jasper was injured. She says CB picked up Jasper and his leash was tangled. She says that CB untangled it.

15. Ms. White says she provided her contact information to Mr. Smaill and asked him to update her after the veterinary visit. She says she mentioned donating to the veterinary bill as an act of compassion as they walked to the car. Ms. White says Mr. Smaill called her on September 27, told her Jasper had a broken leg, and that she was fully responsible for the veterinary bills. According to Ms. White, Mr. Smaill stated that the big dog always pays.
16. Ms. White says her veterinarian informed her it was difficult to determine the cause of a break and suggested several reasons. I note that the veterinarian did not examine Jasper. The veterinarian's alleged statements to Ms. White are hearsay. While the CRT is permitted to accept hearsay evidence, I place no weight on Ms. White's hearsay evidence about what her veterinarian said, given there is no explanation before me about why Ms. White did not obtain a statement from the veterinarian.
17. I accept Mr. Smaill's evidence that Piper pounced on Jasper. However, I prefer Ms. White's description of events before and after Jasper was injured. I find Ms. White's recollection is clearer and more detailed than Mr. Smaill's or CB's evidence. I also find there are discrepancies between Mr. Smaill and CB's statements that bring their reliability into question. For instance, Mr. Smaill did not state that Piper ran up to Jasper or that Piper acted aggressively at any point. Also, his recollection of the conversation while walking to Ms. White's vehicle differs from CB's version.
18. Further, I agree with Ms. White's observation that Mr. Smaill and CB's statements are inconsistent with a December 11, 2019 letter written by Mr. Smaill's lawyer to Ms. White. The letter did not state that Piper acted aggressively or that Ms. White repeatedly yelled "bad dog" at Piper. I find both points would be relevant for the purposes of assessing liability and would have been included in the letter if Mr. Smaill had told his lawyer about them.
19. Based on her own investigation, Ms. White says that Mr. Smaill has a history of providing false information and that CB is not an impartial witness. I find Mr. Smaill's past history is not relevant and I give Ms. White's evidence to that effect no weight. I

also find whether CB is impartial is not relevant considering my finding about the reliability of her statement.

The law

20. I turn to the applicable law. The onus is on Mr. Smaill to show that Ms. White is responsible for Jasper's injuries. In British Columbia there are three ways for an owner to be responsible for a pet's actions: a) the legal concept known as "scienter", b) negligence, and c) occupier's liability under the *Occupier's Liability Act* (OLA). Mr. Smaill relies on scienter and negligence as the basis for his claim. Mr. Smaill agrees that the OLA does not apply since it appears that the incident occurred on municipal or provincial land, and only Ms. White was named as a respondent.

Scienter

21. Scienter means knowledge of the animal's poor behavior or propensity to be aggressive. For scienter to apply, Mr. Smaill must prove that at the time of the attack:

- a. Piper had manifested a propensity or tendency to cause the type of harm that happened, and
- b. Ms. White knew of that propensity (see *Janota-Bzowska v. Lewis* [1997] B.C.J. No. 2053 (BCCA)).

22. Mr. Smaill says Ms. White was aware that Piper had a propensity to jump on other dogs who were near his face. I find Mr. Smaill's evidence does not support his allegation. According to Mr. Smaill, Ms. White stated Piper "got nervous" if dogs were near his face. According to CB, Ms. White stated Piper "got a little weird". I find these descriptions are more consistent with Ms. White's statement that Piper might growl and do not indicate that Piper would respond physically.

23. In her submissions, Ms. White says Piper has never shown aggression towards other dogs in the past. She provided written statements from 2 witnesses with dogs

that interact with Piper. The witnesses stated that they have never seen Piper act aggressively towards small dogs. Ms. White also provided a statement from her friend of 8 years that she has observed Ms. White speak to puppy owners about young dogs jumping at adult dogs. She stated she never saw Piper act aggressively towards any dog.

24. On balance, I am satisfied that Mr. Smaill has not proved that Piper has manifested a tendency to jump on other dogs. Therefore, I find that Mr. Smaill has not proven liability in scienter. I now turn to negligence.

Negligence

25. To succeed in negligence, Mr. Smaill must prove that Ms. White failed to take reasonable care to prevent the incident from occurring. Mr. Smaill says it was reasonably foreseeable that a large excitable dog that did not like other dogs close to his face would jump or pounce on other dogs and injure it. However, as stated above, there is no evidence that Piper was excitable or that he would jump or pounce on a dog that came near his face.
26. Mr. Smaill also says Ms. White knew or ought to have known Piper was likely to create a risk of injury and failed to take reasonable care. He says Jasper would not have been injured if Piper was leashed and if Ms. White had command and control over Piper. Mr. Smaill has not provided any explanation of how the incident could have been prevented if Piper was on a leash. The evidence shows the parties agreed to allow the dogs to be close to each other. There is no evidence that Piper suddenly ran or lunged at Jasper from a distance such that a leash would have prevented him from reaching Jasper. Likewise, there is no evidence that Piper did not respond to any commands from Ms. White or that Ms. White could have prevented the injury in the circumstances.
27. I find Mr. Smaill has not proved that Ms. White was negligent. Since I have found that Ms. White is not liable for Mr. Smaill's claimed damages, I do not need to consider the issue of damages.

28. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Since Mr. Smaill was unsuccessful, I dismiss his claim for CRT fees and dispute-related expenses.

ORDER

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

Rama Sood, Tribunal Member