IN THE COUNTY COURT AT CLERKENWELL & SHOREDITCH

Case No: C92YM024

Courtroom No. 9

The Gee Street Courthouse
29-41 Gee Street
London
EC1V 3RE

Thursday, 18th May 2017

Before:
DEPUTY DISTRICT JUDGE TOMLINSON

B E T W E E N:

MACIRIS ESTACIO

and

MARK HONIGSBAUM

MISS REID[?] appeared on behalf of the Applicant
MR J SILVA appeared on behalf of the Respondent

JUDGMENT
(Approved)

DDJ TOMLINSON:

1. Mr Silva and Miss Reid[?], thank you both very much. I must first of all pay tribute to both counsel who have brought to my attention what I think, from other studies, are all the main cases and the specific law. You have both been extremely helpful and very fair. I also thank the claimant for her evidence and the defendant. I think that they both gave their evidence in a straightforward and honest fashion and with the intention of assisting me to come to what is not an easy decision. Let me first deal with the findings of fact. I will then deal with the facts in issue and then the cases.

2. First, the findings of fact. I heard the claimant and I have found that she was not on the telephone at the time of this incident. The defendant, I believe, saw her or thought he saw her looking at her phone; that is possible but, having looked at the phone records, I am satisfied that there were three relevant calls. One, to tell the claimant's partner that she had successfully delivered their child, albeit late, to school. Two, again to the partner to say that there had been an incident, and three, a call then to the emergency services; police in this case.

3. Secondly, I find as a matter of fact, that the dog did in fact jump up at the defendant. That is a characteristic to which I will return later. Thirdly, I find, as a matter of fact, that there was a bite. I have seen the picture of the claimant's left breast, I have seen the puncture marks and the general marks on her brassiere and these things point to a bite. The shape of the wound and the indentations in her bra.

4. Fourthly, I have had the opportunity of looking at some very helpful photographs. We finally discovered that as the defendant came out of his house he turned slightly to the left, where he found his car, pointing in the same direction in which he was walking. Access would normally have been to put the dog in the boot but the zapper was not working that day, and he could not raise the boot automatically so he went to open the passenger door, (which was closest to him), with the key, which was in his right hand. He bent down to open the door. The dog was on a lead, the lead was in the defendant's left hand, and his evidence was that the dog was slightly to the side or behind him, but it was on the leash. At the end of the leash was something called a halti, which is designed to stop dogs from jumping up. The top part of the halti, as demonstrated by the defendant, goes over the dog's nose and it is designed to assist handlers to restrain dogs. I think that that is an element that I will come back to later when discussing the law.

5. Next, however, I find that on this particular day this particular defendant was concentrating on opening his car. He had seen the claimant walking towards him. He says that he saw her with her arms outstretched, clutching her phone. He was doing two things at the same time, restraining the dog and opening the car. It is not, in my judgement, a counsel of perfection to expect a dog handler to restrain a dog. With the benefit of hindsight, it is easy to say that the defendant should have kept a more tight hold of the dog but I am not using hindsight. In my judgement, bearing in mind that the defendant was doing two things at the same time, and expecting, as he did, that the claimant would look up, it ought to have been in his mind that she might equally not look up.

6. Behind him was a large plane tree, to his left and to her right there was a privet hedge. The space between him and his dog and the privet hedge and the tree was relatively small. In my judgement, the defendant should have kept a more tight hold on the leash, he held the

dog with one turn of the leash on his wrist and I believe him, but he should have held the dog more tightly so as to engage the nose of the dog with the underside of the halti to specifically do what the item was designed to do, because at that moment, on that day, on 4 October 2013, the claimant was walking between the dog and the hedge. It was, in my judgement, a relatively confined space. I think that the claimant found herself walking in to the defensible space of the dog. We know that the dog jumped down, we know there was a bite, so we know that the dog must have jumped up. I do not find that the dog latched itself on to the claimant's left breast, I do not think that the defendant had to pull the dog off. It was a natural thing for a dog to do when a dog finds itself with restricted space, where such restricted space is caused by a thing or a person that is unknown to the dog. It is a character trait of dogs that they do that.

7. I am not going to concern myself with the barking of the dog and the claimant says she heard a dog barking but she cannot say that it was this dog in particular. Whether or not the dog yelped, because the claimant had stood on it, I do not know, I cannot say and, frankly, neither can the claimant nor the defendant. However, what I can say and what I do find is that neither of the exceptions drawn to my attention by Miss Reid apply in this case. This case falls fairly and squarely within the ambit of the Animals Act 1971. That Act is an Act of strict liability. We are not concerned here with negligence, although it could have been argued that the behaviour of the defendant, who is a perfectly honourable man, fell short of the behaviour that he should have exhibited in these particular circumstances, on that particular day, in this particular place. I find, as a matter of fact, that there was a puncture to the left breast of the claimant and I know that because the GP said so. So did the claimant.

8. We turn now to the Act. As I have said this is an Act of strict liability and the claimant's counsel, Mr Silva, helpfully provided me with a copy of the Act and it is worth reminding ourselves that the claimant has to vault all three hurdles of Section 2(2), (2)(a), (2)(b) and (2)(c). We know that because the word and appears at the end of (2)(a) and at the end of (2)(b). I am also helped by the claimant's skeleton argument on this, where he perfectly encapsulates what I have to look at. He draws my attention to *Amanda Tapp v (1) Trustees Of The Blue Cross Society (2) Kerry Palmer* (2013) CC, which I shall come back to later, but it is, in my judgement, the most helpful of all the cases. As I have said I have found that the dog did bite the claimant; however, it is not necessary for me to find that this is not normal behaviour, which brings us in due course to (2)(c).

9. In *Tapp*, which is a case heard by Recorder Verduyn, he found that the emphasis should be on the biting aspect of the behaviour or the characterisation of the animal concerned. He described it as aggression. I do not think that this dog was particularly aggressive and I accept what the defendant says when he says that he had never noticed the dog behaving this way before. However, it is essential when it comes to the matter of biting that damages of a kind which are caused by the dog was likely to be severe. In *Tapp* the judge found that biting came well within that characterisation. He went on to say, at paragraph 19, that, 'In ordinary circumstances', he was talking about horses, but in this case, you can apply the word 'dog' where the word 'horse' appears, 'Dogs do not bite in ordinary circumstances'. However, he found (and I also find) that in particular circumstances at particular times a dog may well bite. The judge in that case referred to Dyson's LJ judgment in *Welsh v Stokes & Anor* [2007] EWCA Civ 796, which I will refer to later. Suffice to say that Dyson regarded as immaterial that there was no evidence that the animal in that case had ever acted

in that way before. This is the particular part of the Act, the 1971 Act, that has given people most difficulty but which I have been led to today with particular clarity, by Mr Silva.

10. It is not something which dogs do ordinarily but it is something that dogs do at particular times and in particular circumstances and one of those particular times and circumstances is where a dog might feel itself threatened or a dog might find itself in a constrained space and I find, as a matter of fact, that in this case this dog on that day did find itself in a constrained space. It was not properly held back by its keeper. I think that the animal probably became frightened and it did what dogs do in those circumstances and it bit her. It bit this claimant. What is clear from *Tapp* and *Welsh* is that it is clear that the Animals Act does not require me to identify the particular circumstances so long as what happened is a characteristic of the animal, a dog in this case, which arises in particular circumstances, which I have already referred to. Using the words of the judge in *Tapp*, it seems clear to me and I could not have put it any better myself, that in these particular circumstances they led the dog to bite even though the dog in this case, and here I do refer to the statement of the walker, who was not able to appear today, but I accept that the dog in this case was relatively easy to manage and if you like 'docile'.

11. That deals with *Tapp*. I have considered carefully the cases of *Whippey v Jones* [2009] EWCA Civ 452, which is a negligence case and the case of *Clark v Bowlt* [2006] EWCA Civ 978, and I particularly refer to, as I was by counsel, H4 on page one of the extract. However, I do not find that those cases particularly help me. I am, however, driven to the case of *Mirvahedy v Henley & Anor* [2003] UKHL 16 and at paragraph 43 the learned Lord Nicholls said, 'In other words' (he was talking about a horse but I shall substitute the word dog):

> 'In other words if the tendency of the dog to bite when sufficiently alarmed is to be regarded as a normal characteristic of dogs in particular circumstances, hence, a dog with this characteristic will meet the requirement in 2(2)(b) of the Animals Act. A normal but dangerous characteristic of a species will usually be identifiable by reference to particular times or particular circumstances'.

12. I have dealt with the circumstances in this case. *Mirvahedy* is the leading case and is referred to in *Welsh v Stokes* by Dyson LJ.

13. I am satisfied in this case that that Section 2(2)(a) of the Act is complied with. 2(2)(a) says:

> 'Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if (a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe'.

I think this dog in these circumstances, was not restrained and it was likely that this dog in these circumstances would cause a bite and that it would be severe, in other words to

puncture the skin. (2)(b) is more problematical because it falls in two limbs, but it concerns the characteristics of a dog in this case and it uses the tortuous language that only a person in the drafting department of the House of Commons, could use and which really should not appear in an Act like this. It uses the words, 'Not normally', instead of 'abnormal' or 'freak', but I think that limb (1) is satisfied in this case and I think that limb (2) is also satisfied.

14. The particular characteristics of this dog were not normally found in dogs of that species. The dog behaved abnormally for that dog. What the dog did at that particular time and in those particular circumstances was perhaps abnormal but, as I have said, these circumstances and these characteristics of that dog are caught by 2(2)(b) of the Animals Act 1971, which brings us to the most difficult part, which is 2(2)(c), and this is dealt with by Dyson in *Stokes*. It is commonly thought by dog owners, it seems to me, that if Little Timmy has never done this before it is entitled to its first bite, but that is not what this Act says.

15. Dyson says that he was told by counsel that a keeper is not liable for a one-off circumstance of a mischievous dog or horse, as I think it was in that case. He was led by counsel to conclude that he should not find in favour of the claimant where the animal behaved in a one-off way. The dog in this case is an absolute sweetheart. We know that because the defendant has told us as much, he has never behaved in this way before but unfortunately for the defendant, the Act has taken care of that because it says in 2(2)(c) that those characteristics, were known to the keeper or that keeper or were at any time known to a person, e.g., a handler, or the head of the household. What it means is that the keeper or the head of the household or the owner, if you like, has to know that dogs, in this case, are likely to portray certain characteristics, e.g., jumping up and biting, in certain circumstances; not that this dog has never done it before and 'therefore I cannot be liable because the dog did it once'. It is a misunderstanding of the Act that leads people to believe that. Furthermore, we know that because no less than Dyson LJ said so. He said, 'I do not agree', with what Miss Rodway, for the defendant, had suggested.

> 'I do not see why a keeper's knowledge that a horse has the characteristic of normally behaving in a certain way in particular circumstances cannot be established by showing that the keeper knows that horses', substitute dogs for horses, 'As a species normally behave in that way in those circumstances. Indeed', and he refers here to *Mirvahedy*, 'Shows that subsection (2)(b) may be satisfied where the characteristic is displayed by the animal in the same particular times or circumstances as by other animals of the same species. It is a general characteristic of horses to bolt in the particular circumstances'. You might say, in adapting this case that it is a general characteristic of dogs to bite in these particular circumstances. 'It makes no sense to require a keeper, if aware of that general characteristic, to have some additional and more particular knowledge'.

It is unfortunate for dog owners that that Section of that Act applies.

16. I have also concerned myself with reading the case of *Goldsmith v Patchcott* [2012] EWCA Civ 183, where I think it was Jackson LJ commented that, 'In the decision of *Welsh*, with which I respectfully agree, it illustrated the truth of Lord Nicholls' observation in *Mirvahedy* that in most cases where 2(2)(a) is satisfied, the requirement of 2(2)(b) will also be satisfied'. He commented that he could not see what service 2(2)(b) provided.

17. Once one fights through the thickets of the subsections, it can be seen that 2(2)(c) does broadly achieve the objective stated by the Law Commission which was, in my judgement, to provide a remedy for claimants in these particular circumstances where animals of this particular kind are involved.

18. Accordingly, and in summary I find that the claimant has proved her case and that she is entitled to general damages.

End of Judgment

Transcript from a recording by Ubiqus
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This transcript has been approved by the judge.