

BETWEEN

AAC

APPLICANT

AND

ZZX

RESPONDENT

Date of Order:

17 August 2012

Referee:

Referee Edison

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZZX is to pay AAC the sum of \$1,490.52 by 4pm on 31 August 2012.

Facts

[1] In August 2011, ZZX's Staffordshire Bull Terrier, JA, escaped through a gap in the 1.8 metre fence at his property. The gap was caused by the gate not being latched correctly. That day, AAC's husband (XY) was taking KA (a Bichon Frise) out for a walk. XY took JA, without a leash, to the letterbox at the (unfenced) edge of their front garden, and then went back to the car parked at their gate, perhaps five metres away. KA appears to have stayed at the bottom of the garden and then roamed a few more metres away to the grass verge near the road, where she was attacked, twice, by JA. Despite XY's efforts to kick away the attacker, KA suffered injuries to her abdomen and jaw, and had to be operated on urgently. Specialist treatment was later necessary to reconstruct her jaw.

[2] ZZX was charged under s 57(2) of the Dog Control Act 1996 as the owner of a dog which attacked another dog. He was discharged without conviction under s 106 of the Sentencing Act 2002. He was ordered to pay, and has paid, reparations of \$1,500.00

[3] AAC now seeks a further \$2,500.00 in compensation for the cost of the medical treatment to KA. The medical invoices filed with the claim total \$3,987.36. ZZX disputes liability.

Law

[4] The relevant law is the Dog Control Act 1996 and the law of tort. Section 63 of the Act provides that the owner of a dog shall be liable in damages for damage done by the dog, without it being necessary to prove the dog had a previous tendency to bite, or that the damage was due to the negligence of the owner. The burden of proof is reversed, so that it is for the dog owner to prove the damage was not caused by any negligence on his or her part.

[5] It is a defence to a claim under s 63 that the damage caused was also the fault of the person claiming for the damage. The Contributory Negligence Act 1947 provides that, where a person suffers damage as the result partly of his own fault and partly of the fault of another person, the damages recoverable shall be reduced to such extent as is just and equitable, having regard to that person's share in the responsibility for the damage.

[6] Section 52 of the Dog Control Act provides that an owner must keep a dog under control at all times. Section 52A provides that a dog on its owner's land must either be under direct control at all times, or be confined so that it cannot freely leave the land.

[7] Section 11(3) of the Disputes Tribunals Act 1988 states that no claim shall be heard in respect of any damage or injury to any property where an offender has been sentenced, under s 32 of the Sentencing Act 2002, to make reparation in respect of that damage or injury. However, subsection (4) states that this does not apply in respect of any claim to recover any damages: "...in excess of the amount ordered to be paid to the applicant under any sentence of reparation".

Issues

[8] The issues are:

- (i) Were the reparations paid in full and final settlement of ZZX's liability;
- (ii) Is ZZX liable for the damage done by JA;
- (iii) Should any compensation awarded be reduced for contributory negligence on the part of XY; and
- (iv) What amount of compensation should be awarded.

[9] There was no dispute between the parties about the reasonableness of the medical costs, or KA's entitlement to specialist treatment.

Decision

[10] I find that the reparations ordered and paid do not operate to discharge ZZX from any further liability. Contrary to ZZX's view, I can see nothing in ss 32 or 106 of the Sentencing Act 2002 which would suggest that is how reparations operate. Indeed, s 32(3) appears to leave open the possibility that AAC may have a separate legal right to claim compensation. Section 11(4) of the Disputes Tribunals Act 1988 also appears to clarify that a civil right to compensation can co-exist alongside an order of reparation, and that the civil right can be enforced in respect of the loss suffered over and above the reparations. Therefore, AAC is entitled to claim compensation for loss over and above the \$1,500.00 paid in reparation.

[11] I find that ZZX is liable for the damage caused by JA, being the physical damage to KA, which resulted in the need for medical treatment. It is for ZZX to prove that there was no fault on his part which led to the attack on KA. ZZX told me that the gap in his gate was caused by high winds and one of the locks not being shut properly as a consequence; in his affidavit of 24 January 2012, at paragraph 16, he stated that his daughter may not have latched the middle padlock properly. At paragraph 9 of his affidavit, he accepted that he and his daughter failed to make sufficient checks of their fence on the day in question. I consider that ZZX owed a duty to take special care that his dogs could not escape from his fully-fenced section. I am not persuaded that the escape of his dogs had nothing to do with any actions taken by him or his daughter. The failure to make sufficient checks of the fence was surely an inadvertent error, and a one-off event by an otherwise responsible owner, but in my view it is still evidence of a lack of care in taking proper safeguards. It follows in my view that s 63 of the Dog Control Act imposes liability for the vet bills on ZZX, subject to the defence of contributory negligence.

[12] I find that the injury to KA was caused partly as a result of the fault of ZZX and partly as a result of the fault of XY. ZZX was at fault in not ensuring that JA remained confined. However, in my view XY was also at fault in not ensuring KA was under control on his property. XY took KA to the letterbox without the benefit of a leash, and left her there – however momentarily – while he went back to the car. KA was left free to leave the property. During this time, KA was potentially vulnerable to an attack of the kind that happened. For these reasons, I consider that AAC and XY have failed to take reasonable care to protect their own interests.

[13] I find that the compensation awarded should be reduced by 25 per cent to reflect a proper apportionment of fault. I am required to consider the causative potency and moral blameworthiness of both parties' conduct. ZZX's conduct meant that his two dogs were entirely unsupervised. The injury to KA would not have happened if not for the failure to shut the gate. As the owner of a powerful breed of dog, ZZX had the greater moral responsibility to ensure that his dogs were safely confined, in view of the damage they might foreseeably cause if they were free. JA was entirely unsupervised and roaming. In contrast, KA was only temporarily free of her owner's control. She was on her owner's property or immediately adjacent to it. It was, in my view, understandable if XY decided not to use a lead simply to take KA to the letterbox and then into the car. He turned away from KA only momentarily. It is unclear to me whether XY would have been able to protect KA any more than he did, if she had been on a leash or he had been closer to her. He might have been able to pick her up, but this would have depended on noticing the attack about to happen, and might have exposed him to injury. In short, I consider that ZZX's conduct is significantly more causative of the wounds suffered by KA than XY's conduct, and morally of greater blameworthiness for the reasons I have given.

[14] I find that AAC is entitled to claim the balance of the medical bills over \$1,500.00. Although both parties put the medical bills at \$4,100.00 at the hearing, the evidence presented supports a cost of \$3,987.36. A deduction of 25 per cent (\$996.84) from this amount for contributory negligence leaves \$2,990.52. This figure must be reduced by \$1,500.00 to give credit for the reparations already paid. I therefore award damages of \$1,490.52.