

BETWEEN

ADA

APPLICANT

ADB

SECOND APPLICANT

AND

ZXA

FIRST RESPONDENT

AND

ZWZ

SECOND RESPONDENT

Date of Order:

10 July 2013

Referee:

Referee Avia

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZXA is to pay ADB and ADA \$721.10 on or before 5.00 pm, Friday 6 September 2013. ZXA and ZWZ's counterclaim is dismissed.

Facts

[1] On Sunday 17 February 2013, ZXA and ADB were each walking their dogs along [the beach]. ZXA had her two golden retrievers with her, one of whom was CM. ADB was walking the family dog, DF. The dogs were in an off-leash area.

[2] DF ran towards a group of dogs that included CM. CM and DF became embroiled in a fight. To force CM to release DF, ADB and her partner, ADA, struck CM repeatedly on the head, with ADB using a rock. QP, a dog trainer, was nearby. He pushed CM's head underwater. Eventually CM released DF.

[3] DF and CM both required medical treatment after the fight. ZXA and ZWZ later decided that CM was unlikely to recover from the trauma of the incident and had CM put to sleep.

[4] ADB and ADA claim \$721.10 from ZXA, the sum they paid for DF's medical treatment. ZXA and ZWZ counterclaim \$999.00 as a contribution to CM's medical treatment and the loss of a stud fee.

Issues

[5] The issues to determine are:

- (i) Did ZXA have CM under control at the time?
- (ii) Is ZXA liable for the costs of DF's medical treatment?
- (iii) Did ADB have DF under control at the time?
- (iv) Did ADA and ADB take reasonable steps to force CM away from DF?

Decision

Did ZXA have CM under control at the time?

[6] A dog owner must keep his or her dog under control at all times (s 52, Dog Control Act 1963 (DCA)). Whether or not a dog is in control depends on the circumstances. In off-leash areas, Auckland Council states that a dog is controlled when, as well as being in sight of its owner at all times, a dog should immediately respond to its owner's commands.

[7] ZXA said when interviewed by Animal Control she did not know how the fight started. She later said it started because DF rushed up to CM. However, I do not accept the fight happened this way. One dog running up to another is typical canine behaviour and does not usually start a fight. Therefore, I do not consider this was the beginning of the fight.

[8] I find the fight was more likely to have been started when CM attacked DF. First, this is ADA and ADB's recollection. This is supported by the evidence of KR who said she saw the golden retriever (CM) attacked the small dog (DF) without provocation. KR was an independent witness to the incident as she did not know either party beforehand. Therefore I give her evidence significant weight. Further QP, who came on the scene shortly afterwards, said that CM was locked onto to DF. This being the case, it is more likely that CM had been the aggressor.

[9] If ZXA had CM under control at the beginning of the fight, she should have been able to prevent the attack from progressing. She tried to grab CM's back legs and lift him out of the water; however, this did not deter CM. The fact that she did not succeed with this manoeuvre shows ZXA cannot have had control over CM at the time.

[10] Further, as the fight progressed ZXA could not control CM as she had lost her balance and could not assist any further. It was not until after QP pushed CM underwater that CM's hold over DF was eventually broken.

[11] In light of this, I find that ZXA breached s 52 of the DCA by not exercising control over CM either at the start of, or during, the attack.

Is ZXA liable for the costs of DF's medical treatment?

[12] A dog owner is liable in damages for damage done by his or her dog (s 63, DCA). The law holds the owner strictly liable for the damage. This means the owner is liable regardless of whether the dog has shown no previous tendency to cause damage or whether the owner has been negligent.

[13] ZXA did not set out to have CM deliberately attack DF. Once CM attacked, ZXA tried as best she could to stop CM but was unable to do so. However, once an owner loses control of the dog, the law holds the owner liable regardless of whether he or she tried to restrain the dog.

[14] Therefore, ZXA must pay for FD's medical treatment. Any costs claimed should be reasonable. As both dogs' medical treatment cost approximately the same, it is likely that the sum ADA and ADB claim is reasonable.

Did ADB have DF under control at the time?

[15] There is insufficient evidence to conclude otherwise. DF ran up to a group of dogs. As I have already said, this in itself does not mean a lack of control as it is usual canine behaviour that happens when dogs exercise off-leash. Had ADB decided to call DF back to her and DF not responded, this may have been evidence that ADB failed to exert control over DF. However, I accept ADB's evidence that CM had already seized DF before ADB could attempt to exercise any control over him.

[16] ZXA and ZWZ say that DF rushed at CM to take the stick off him, which ADB refutes. If this had in fact happened, two dogs having a tug of war over a stick would have been normal canine behaviour. This would not have been sufficient to indicate a loss of control on ADB's part unless DF failed to obey her command. I have no evidence this was the case. ZXA and ZWZ say a tussle developed between the two dogs. I do not consider both dogs were involved a tussle. This is because the evidence shows CM attacked DF and did so before ADB had the opportunity to exercise control over DF.

[17] In light of this, I conclude that ADB had control over DF until he was attacked. From that point onwards she had no opportunity to exert control over DF as CM would not let DF go.

[18] As ADB had control over DF until the point she was prevented from doing so, ADB did not breach s 52 of the DCA. Therefore, she is not liable for the damage caused to CM.

Did ADA and ADB take reasonable steps to force CM away from DF?

[19] ADA and ADB were entitled to do what was reasonable in the circumstances to force CM away from DF. However, if they acted unreasonably, then this may be a reason for holding them liable for at least some of the damage to CM.

[20] An effective way to end a dog attack is to interrupt the attacker's air supply either by putting CM's head underwater as QP did, or by lifting the attacker up by the collar. Either way, the person doing this should have a degree of physical strength and enough confidence to carry out such a strategy. Another way of forcing one dog to let go of another might be to hurt the attacking dog enough so that it will let go. This is probably a less efficient intervention.

[21] Someone like QP, who is a dog trainer, might be expected to know about "gold standard" measures such as interrupting the air supply. However, I find it unreasonable to expect distressed owners to employ this strategy. Such people are not going to stand back, take time to assess the available options and choose the one that might cause the least harm, because in the meantime, their inaction could cause their dog to sustain serious injury or worse. Rather, the distressed owners are more likely to immediately grab anything that comes to hand, and do whatever occurs to them to force the attacker away from their dog.

[22] In the heat of the moment, I accept ADA and ADB did what was reasonable in the circumstances to force CM to let go. Their actions were aimed at hurting CM enough to let DF go. They were trying to force a bigger dog to let go of their smaller dog, while watching their dog suffering injury. They were also aware that ZXA was doing nothing to stop the attack. Even though ADB took a rock to CM, it was a case of grabbing anything that came to

hand: a desperate measure borne of a desperate situation. Therefore, I find this action reasonable in these particular circumstances.

[23] For these reasons, I do not consider ADA and ADB should be liable for the costs of CM's medical treatment.

[24] If I had found ADA and ADB responsible for CM's vet bills, they would not have been found liable for the loss of the stud fee. Any loss claimed should be foreseeable. Not all pedigree dogs are stud dogs. The reasonable person is unlikely to know whether a particular pedigree dog will be suitable for use as a stud dog. Therefore, such a loss is not foreseeable.

[25] ZXA and ZWZ's vet said he saw a dog bite on CM after the attack. Although ADB did not accept this, I prefer the judgment of a vet with 37 years' experience. However, the fact that DF bit CM is irrelevant. As CM attacked DF and would not let him go, it is likely that DF bit CM in an attempt to defend himself.

[26] ZWZ was most unhappy that ADB had spoken about the fight on the radio. He said ADB made libellous comments on air. Whether or not it was necessary for ADB to detour via radio during her search for justice is not the point; because the Tribunal does not have the jurisdiction to hear defamation claims, there was nothing to be gained by discussing the matter.

[27] While I have found ZXA liable, no one wins after such a horrifying incident. It and the consequences that followed were terribly distressing for all concerned.