

SAINT CHRISTOPHER & NEVIS

IN THE COURT OF APPEAL

Magisterial Appeal No.438 of 1992

BETWEEN:

LUCILLE REID

Appellant

and

DOREEN TYSON

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice Dennis Byron J.A.
The Honourable Mr. Justice Satrohan Singh J.A.

Appearances: Mr. H. Benjamin for the Appellant
Mr. K. Liburd for the Respondent

1993: March 24;
1993: September 27.

JUDGMENT

BYRON J.A.

This is an appeal against an award by the learned Magistrate for District "A" for \$500.00 damages and costs for personal injuries caused by a dog bite which the appellant's dog inflicted on the Respondent at George St. Basseterre, St.Kitts.

The only witness who gave evidence at the trial was the Respondent. She described the incident in this way: -

"I was on the street where Defendant is living. On my way coming up the Dog attack me. It ran out of defendant shop and it bit me on my lower left leg and went back in the shop."

The Respondent also attested that the Appellant's son offered her \$30.00 to pay the doctor but she did not take it. The appellant did not offer any evidence but relied on a submission that there was no case to answer.

The issues raised by this appeal are whether: -

1. The failure to lead evidence on the "scienter" doctrine was fatal.
2. It was open to the Magistrate to find for the appellant on the ordinary law of negligence.

3. Whether it was open to the Magistrate to find for the appellant on the basis of an offer for compensation or an admission of liability.

1. "Scienter"

It was an admitted circumstance that there was no evidence on record to suggest that the appellant knew that her dog had the propensity to attack people.

The legal principles were clearly expressed in the leading case of **DRAPER v HODDER** [1972] 2 All E.R. 210 where liability for personal injuries caused by dogs was fully examined. In dealing with the issue of *Scienter* Edmund Davies L.J. said at p.217: -

"A person keeping an animal '*mansuetae naturae*' which he knows has a propensity to do a particular kind of mischief is under an absolute duty to prevent it from doing that kind of mischief and is therefore liable without proof of negligence for any damage caused by the animal's acting in accordance with that known propensity. But, to render the defendant liable, proof must be directed to his knowledge regarding the propensity of the individual animal whose activities have given rise to the institution of legal proceedings."

This principle was applied in our jurisdiction in the case of **MENDES v PHILBERT** 16 W.I.R. 255.

I therefore rule that the failure of the respondent to lead evidence that the appellant knew that her dog had a propensity to bite human beings, was fatal to a claim based on strict liability for the personal injuries suffered from the dog bite.

2. Negligence

There is no doubt, however, that as expressed by Roskill LJ at p. 227 in **DRAPER v HODDER** (supra) the common law applies "to the keeper of a domestic animal the duties imposed by the ordinary law of negligence in addition to the more limited liability imposed on him by the doctrine of *scienter*".

Negligence is based on a factual finding that in the circumstances of the case there was a duty to take care. In cases where a tame dog bites someone, the existence of the duty to take care is usually established by evidence of knowledge of the likelihood of the dog inflicting the injury. A Court cannot infer negligence from the fact of the dog bit alone.

The basic principle that the burden of proving the essential

elements of liability lies on the claimant applies with equal force to the ordinary law of negligence. The necessity for laying an evidential basis for liability resulting from negligence in relation to domestic animals was emphasized in **SYCAMORE v LEY [1932] All E.R. Rep at 101** by Greer LJ when he said: -

"He (ie the owner or breeder of the dog), may, in my judgment, be liable for the conduct of a dog which has not been taken out of the category of tame animals if he puts it in such a position and in such circumstances as render it likely that the dog will get excited, will lose its temper, and will cause damage to people lawfully passing along the highway; and if this were a case where there was any evidence of that kind, that the dog was at that time likely in the events that happened in Bermondsey on the occasion in question to lose its temper and bite somebody lawfully passing along the road, and had done so, and there was no further evidence in the case, I should have thought that it would be enough to enable the case to be taken to the jury."

In this case there was no evidence adduced of any circumstance from which a Court could find that there was any duty for the appellant take precautions against the dog attacking the respondent. There was therefore no evidence capable of supporting a finding of liability under the ordinary law of negligence.

Offer of Compensation

Learned counsel for the respondent submitted that it was unnecessary to adduce evidence on *Scienter* because the appellant had admitted liability and made an offer of compensation. I refer to ancient authorities which rebut this proposition. **English and Empire Digest - Blue Band Edition Replacement Volume 2 p.383 No.570: -**

"In an action on the case for keeping a dog which bit plaintiff, it is not sufficient to show that the dog was of a fierce and savage disposition, and usually tied up by defendant, and that defendant promised to make a pecuniary satisfaction to plaintiff after the latter had been bitten by the dog - **BECK v DYSON [1815] 4 Camp. 198.**"

English and Empire Digest - Blue Bird Edition Replacement Volume 2 p.385 No.591: -

"Defendant's dog, a large Newfoundland, in a moment of playfulness, jumped over a small wall into a garden in which plaintiff was digging a hole, falling heavily on plaintiff and injuring his back: - Held (1) it was not proof of *scienter* that defendant had offered plaintiff a

couple of sovereigns as compensation; (2) no action lay -
SAUNDERS v TEAPE & SWAN [1884] 51 L.T. 263; 48 J.P. 757."

I do not think it necessary to cite supporting judicial authority for the obvious proposition that whether the conduct of a party to litigation amounts to an admission of liability is a matter of fact. In this case the learned Magistrate did not express any findings on this issue and in my judgment there was no evidence which would have enabled him to so find.

The testimony of the respondent was that the appellant told her: -

"She just come from doctor with blood pressure and she can't take on no dog bite."

and later that day the respondent spoke to the appellant's son who gave her \$30.00 to pay the doctor but she did not take it.

In my judgment this evidence does not permit a finding that there was any admission of liability. There was no verbal admission, and the offer of \$30.00 could be attributable to ordinary human sympathy.

In the circumstances I allow the appeal, and set aside the award of the learned Magistrate. Costs to the Appellant.

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 C. M. D. BYRON
 Justice of Appeal

I concur.

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 SIR VINCENT FLOISSAC
 Chief Justice

I concur.

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 SATROHAN SINGH
 Justice of Appeal