

Neutral Citation no. [2008] NIQB 12

Ref: **MOR7058**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **30/01/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

**ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF
FERMANAGH AND TYRONE**

BETWEEN:

ROSE NEESON

Plaintiff/appellant;

and

ALAN ACHESON

Defendant/respondent.

MORGAN J

[1] This is an appeal from the dismissal of a claim for personal injuries, loss and damage suffered by the plaintiff as a result of the alleged negligence and breach of statutory duty of the defendant, his servants and agents in and about the control and safekeeping of a dog on 1 January 2006.

[2] The plaintiff and the defendant were neighbours at Larch Drive, Sion Mills at the time of this incident. The defendant owned a male Rottweiler dog which he kept in the house which he shared with his wife. The dog was approximately 2 years old and the defendant had kept it for 9 or 10 months. The dog spent time in the garden and also in the house. The defendant's wife looked after her seven-year-old niece after school and the dog had never given any cause for concern in relation to the child. The plaintiff had also

become friendly with the dog. She used to feed it regularly across the wall between the two properties. The dog would eat the meat from her hand. It would put its 2 paws up on the wall and she would then pet it. She had become familiar with the dog and had no reason to fear it. The dog, Pedro, had apparently escaped over the wall of a couple of occasions causing inconvenience to traffic and a degree of apprehension to those in cars but was otherwise well-behaved.

[3] On the evening of 31 December 2005 the plaintiff and her husband attended the Recreation Club at Sion Mills. Although she says she did not start drinking until later in the evening the plaintiff accepts that she had quite a few drinks. She left the club sometime between 1:30 a.m. and 2 a.m. She and her husband walked home. As they approached her home the plaintiff saw that the Acheson's light was on and decided to go in to wish them a happy New Year. She described herself as being in a right state but knew what she was doing. She says that Mrs Acheson answered the door and invited her in whereas Mrs Acheson says that she met the plaintiff walking through the hallway into her home. The plaintiff's recollection is that after entering the living room she went after 15 or 20 minutes into the kitchen to wish Mr Acheson a happy New Year. Both Mr and Mrs Acheson say that she was first offered and had a drink in the living room.

[4] In any event all parties are agreed that the plaintiff decided to go into the kitchen apparently for the purpose of wishing Mr Acheson a happy New Year. Her recollection is that the dog was on her right hand side as she went in. She opened the door or in order to get to the kitchen and Mrs Acheson was behind her. Mr Acheson and his brother in law were in the kitchen and the plaintiff's recollection is that she first approached Mr Acheson and then approached the dog. She described how she got down on her hunkers close to the dog intending to put her cheek next to him. She said she had very little recollection of what happened next but became aware that she had been bitten. Mr and Mrs Acheson both said that the dog in fact was on her left and that she had approached the dog first. According to them she then stood up not realising that she had been bitten and that it was only when Mr Acheson pointed it out that she became aware of it. Neither Mr or Mrs Acheson, who gave evidence, actually saw the dog bite the plaintiff nor did they see any unusual movement or activity on the part of the dog which might have given warning that such an event was about to take place.

[5] Mr Acheson and his brother in law took the plaintiff to Altnagelvin hospital. The plaintiff had bruising over the left cheek and a through and through laceration to the right lower lip and left lower lip area. She required stitches and it took about three weeks for the physical injuries to heal. She is still aware of some altered feeling. She developed nightmares and her sleep was interrupted. After a couple of months this resolved considerably. She developed a phobia of dogs which continues.

[6] Article 29 of the Dogs (Northern Ireland) Order 1983 makes the keeper of a dog guilty of a criminal offence if the dog attacks any person. Article 53 of the 1983 Order makes a breach of a duty imposed under article 29 actionable. I am grateful for the analysis of the statute undertaken by Coghlin J in **Hampton a minor v Cranston and others** (10 September 1998 unreported) following Carswell J in **Morrison a minor v Miller** (1997 QBD unreported). The effect of these provisions is to impose a statutory duty which is co-extensive with the criminal responsibility of the keeper.

[7] The respondent accepts that he is the keeper of the dog and that it bit the plaintiff. He is, therefore, liable under the statute unless there is some defence in the general law available to him. In the course of the hearing counsel for the respondent submitted that this was a case to which the maxim *volenti non fit injuria* applied. I do not agree. The maxim can only apply in circumstances where the person injured has foreseen the danger. There is no evidence that the plaintiff in this case perceived any risk from the dog.

[8] The second submission advanced by the defendant is that in any event the plaintiff's actions constituted contributory negligence of such proportions that her appeal ought to be dismissed. This was apparently the basis upon which the claim was rejected in the courts below. For the plaintiff it was argued that contributory negligence was not available as a defence because there was no provision for it within the statute. The plaintiffs sought to draw some assistance from the provisions of the Animals Act 1971 which imposed strict liability in relation to livestock "except as otherwise provided by this Act". By section 5 of the 1971 Act a defence of fault was provided. I do not accept the defendant's submission. The statutory scheme under the 1983 Order is not to establish liability "except as otherwise provided by this Order". There is no reason to exclude defences that would otherwise be available under the general law. Contributory negligence is available by virtue of section 2 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948.

" 2.- (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage"

[9] I accept that the plaintiff was suffering from the effects of drink at the time of the incident. She was clearly able to walk home and indeed was apparently able to hunker down beside the dog. She had no reason to fear the dog with which she had been in contact virtually on a daily basis for a period of months. I consider, however, that her action in putting her face so close to

the dog was foolish. It seems clear to me, however, that no one in the kitchen expected the dog to react in the way that it did and I have concluded that the primary cause of these injuries was the unexpected reaction of the dog. I consider it appropriate to make a reduction of one third on the basis of the plaintiff's contributory negligence.

[10] Fortunately the plaintiff's physical injuries cleared up relatively quickly. She had a period of some months suffering from an adjustment reaction and has subsequently developed a phobia of dogs. I consider that the appropriate figure for general damages is £6,000 and will make an award of £4,000 taking into account contributory negligence.