

SOUTH AFRICA / JUDGMENT

Kohl v Grobbelaar (4962/2017) [2018] ZAECHGC 38 (22 May 2018) [2018] ZAECHGC 38

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

4962/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 4962/2017

Date

heard: 25 April
2018
Date

delivered: 22 May
2018
In

the matter between: PHILDENTIA
KOHL
Plaintiff
and
CHARL
GROBBELAAR
Defendant

JUDGMENT

LOWE, J:

- [1] In this matter Plaintiff's minor son Reece was attacked by a dog owned by Defendant, (a Bull Mastiff crossbreed) when Reece sat on a brick wall separating Defendant's property from a third party neighbour's property.
- [2] Reece was seriously injured (posterior and anterior section of his upper thigh). Plaintiff seeks recompense herefor in the actio de pauperie, and separating merits from quantum agreed on a Rule 37 Minute for trial as follows:

"1. The Plaintiff and the Defendant agree to the following:

1.1 the legal question to be determined by the above Honourable Court is whether the minor "Reece" was doli incapax (doli et culpa incapax) at the date of the dog attack on him and whether the Defendant, as owner of the Bull Mastiff crossbreed dog, is liable as owner for the injuries caused by his dog to the Plaintiff's son, Reece, an infans at the time;

1.2 if it is found that Reece was doli incapax (doli et culpa incapax) and Defendant liable as owner of the dog, then judgment be entered in favour of Plaintiff in respect of the merits of the claim and that the issue of quantum will stand over for determination at a later date.

2. The parties agree that the legal questions in issue between the parties can be decided by the above Honourable Court on the following

facts:

2.1 that the Plaintiff sues in her personal and representative capacity as mother and natural guardian of her minor child, Reece, who was born on 7 December 2010;

2.2 that the Defendant was/is the owner of a dog which is a brown Bull Mastiff crossbreed (the Bull Mastiff);

2.3 that the Bull Mastiff attacked Reece on 3 July 2016 (the attack);

2.4 that at the date of the attack, Reece was 5 years and 7 months old;

2.5 that the attack occurred when Reece climbed and sat on a brick wall bordering the premises of the Defendant and third party (the border wall);

2.6 that, prior to the attack, the Defendant:

2.6.1 repeatedly told Reece not to:

2.6.1.1 come into Defendant's property if the Defendant was not present to control the Bull Mastiff; and

2.6.1.2 climb the border wall on account of the Bull Mastiff;

2.6.2 fenced his property on three sides with wire mesh and the fourth with a brick wall;

2.6.3 Defendant was asleep, having returned from working night shift as a security guard.

3. The following documents, which are annexed hereto, will be used in support, to enable the above Honourable Court to decide upon the question of law:

3.1 the birth certificate of Reece Kohl;

3.2 the photographs of Defendant's premises as contained in pages 23 – 28 of Defendant's trial bundle; and

3.3 a photograph of Defendant's dog."

[3] Both parties were thus in agreement that the matter should be adjudicated on the above.

[4] It was subsequently agreed in respect of the wall height:

"On the Defendant's side of the wall, the wall, from bottom to top, at its lowest point, at the entry gate, depicted at DTB26, is 1,2m high, and at its highest point, is 1,45 m high."

THE LAW

[5] The following is set out in The Law of Delict in South Africa[1], and is a good starting point as to a proper understanding of the legal background to this Application as to the relevant issues in this matter:

"31.3.1 The actio de pauperie for harm caused by domestic animals

The owner of a domestic animal is strictly liable for the harm that the animal causes to another person when it acts contrary to its nature (contra naturum sui generis) and from inward excitement or vice (sponte feritate commota).

Strict liability for harm caused by animals is based on the consideration that animals create a source of danger in the human environment – they kick, butt, gore, stray on busy streets, attack, jump, chase and bite. Many other things also create danger, but the special risk involving animals is their instinctive, unpredictable behaviour and their mobility.

The law of liability for harm done by animals developed in South Africa on the basis of the strict liability regime of the Roman actio de pauperie and edictal remedies. After initial doubt about whether the actio de pauperie applied in South African law, the Appellate Division held in *O'Callaghan v Chaplin* [1927 AD 310] that it does form part of South African law, on the basis of a presumption of fault. Courts have now generally accepted it as an action based on strict liability.

...

31.3.1.2 Person who could be liable

The person liable is the owner of the animal at the time when the injury or damage was caused. Ownership is determined in accordance with the accepted principles of property law.

31.3.1.3 Type of behaviour – the contra naturam test

For liability under the *actio de pauperie* the animal must have acted *contra naturam sui generis*. In Roman Law the implication of this requirement was that the animal must have acted spontaneously and not as a result of an external factor, such a provocation. However, the owner was liable if the animal reacted to stroking or patting. The *contra naturam* rule has been described as a conveniently flexible concept to determine where the risk of damage or injury should lie. It was not meant to focus on the disposition of the individual animal (for example, whether it was a generally placid or unruly horse), nor on the disposition of the species concerned (for example, whether a horse or dog was by nature aggressive), but to indicate uncharacteristic behaviour of a domesticated animal in a human environment.

Courts interpret the *contra naturam* rule inconsistently. Some cases refer to the innate wildness, viciousness or perverseness of the particular animal (a subjective approach), while others refer to what one could expect of a well-behaved animal of its type (an objective or ‘reasonable animal’ approach).

The policy that underlies recognising strict liability for harm caused by animals suggests that courts should not restrict liability for injury to the vicious or aggressive behaviour of animals.

To apply the *contra naturam* requirement, the focus should not be on the particular species or breed to which the animal belongs, but should be more general, on uncharacteristic behaviour of a domesticated animal in a human environment. However, courts tend to have a narrower focus, understanding this requirement to mean that the animal must have acted contrary to the nature of its genus. In other words, if a Rottweiler dog bites a person, the question is whether the dog acted contrary to the nature of well-behaved dog (which does not normally bite people) and not whether it acted contrary to the nature of a Rottweiler (which might do so).

31.3.1.5 Defences

The following are recognised defences to an *actio de pauperie*:

- Culpable conduct by the plaintiff that resulted in the harm will defeat a claim, for example, where the plaintiff provoked a dog and was then bitten. The degree of the plaintiff’s fault does not have to be very high – ‘substantial negligence or imprudence’ will defeat the claim. Contributory negligence will not result in courts apportioning damages in terms of the Apportionment of Damages Act. To date, courts have adopted an all-or-nothing approach, although not specifically excluding the possibility of apportionment.

· The owner can rely on the fact that the plaintiff was unlawfully present at the place where the harm occurred. There are different interpretations of this defence. Some cases require a ‘legal right’ for the plaintiff to be lawfully present (for instance by invitation or with consent of the owner or occupier), and others only a ‘lawful purpose’ (for instance to make a delivery). In most cases, the two approaches lead to the same result if the Court accepts that the owner or occupier of the place tacitly consented to the person entering for a lawful purpose.

Fourie v Naranjo and Another

Fourie’s dog had attacked and savaged his domestic worker. Naranjo hastened to the worker’s assistance and was in turn attacked and bitten by the dog and also by another dog (not owned by Fourie) that was on the premises for the purposes of mating with Fourie’s dog. Naranjo’s wife witnessed the incident. Naranjo sued in respect of the injuries he sustained and his wife sued for emotional shock and related medical expenses. The Court found that Fourie’s dog had acted *contra naturam sui generis* according to the objective test of the reasonable dog...”

(Footnotes omitted)

[6] In similar vein in Visser Law of Delict[2] the following is set out:

“To succeed in bringing the actio de pauperie, the following requirements must be met:

- (a) ...
- (b) ...
- (c) The animal must act *contra naturam sui generis* when inflicting the damage. This means that the animal involved must have acted, objectively seen, contrary to what may be expected of a decent and well-behaved animal of its kind. A dog that bites, a horse that jumps and an ox that butts, therefore, in principle, act *contra naturam*. However, this is qualified by the requirement that the animal must have caused the damage spontaneously from “inward excitement or vice” or *sponte feritate commota*. Therefore, as a rule, the animal does not act *contra naturam* if it is reacting to external stimuli. This rule is, however, not consistently applied by the courts...

Defences Important defences against the *actio de pauperie* have developed from the requirement of spontaneous conduct. They are *vis maior*, culpable or provocative conduct on the part of the prejudiced person, culpable conduct on the part of an outsider and provocation by another animal. All these cases have the effect of excluding liability, because the animal did not act from “inward excitement or vice” and consequently did not act *contra naturam sui generis*

...

- (d) The prejudiced person on his property must be lawfully present at the location where the damage is inflicted. The courts differ in their interpretation of this requirement. Some cases require a “lawful purpose” and others “legal right” on the part of the prejudiced person in order to establish a lawful presence at the location involved. The latter test is narrower than

the former, since a person who has a legitimate purpose may not necessarily have a right to be at the place. The “legal right” approach is nevertheless preferable, because one cannot always determine what the aim or purpose of property, being a lifeless object, is...”

In Footnote 44, the following:

“This conduct need not necessarily be accompanied by fault. Therefore even the conduct of a child younger than 10 years (who is accordingly culpae and doli incapax..... can provoke a dog sufficiently that it does not act contra naturam sui generis if it bites the child (Green v Naidoo 2007 (6) SA 372 (W) 378 – 379; see Scott in Boezaart and De Kock (eds) 110-114; Knobel 2010 THRHR 172).”

In Footnote 14, the following is emphasised as to capacity:

“...The law requires that the person concerned must at least have the mental and intellectual capacity to comprehend and avoid the danger in a particular situation.”

[7] Whilst the Minute appeared to put in issue whether Reece was doli et culpae incapax (paragraph 1.1), on fact in argument it was accepted, and correctly so, that this was indeed the case and that the only issues in reality were:

7.1 Whether Reece’s presence on the boundary wall of Defendant’s property was such that the dog did not act contra naturam this constituting provocation such that in biting the child it did not act contra naturam (such provocation not needing to be accompanied by fault on the child);

7.2 Whether the child was lawfully present on the wall at the location where the attack and infliction of damage took place.

[8] The above brings into play the defences of culpable and provocative conduct referred to in the authorities above, regardless that the child was culpae incapax, and the requirement that the child must have been lawfully (a legal right to be there alternatively having a lawful purpose) on the boundary wall for liability to ensue. In this regard and in terms of the Child Justice Act 75 of 2008 (Sections 7 and 11) a child 9 years or younger is irrebutably presumed to be doli incapax, and therefore, as an example, is not accountable for trespass.

[9] I will deal with each issue in turn below.

[10] The Provocation issue:

10.1 I have set out in general terms the legal issues relevant. On the stated case the only relevant facts are that Reece climbed and sat on a brick wall bordering Defendant’s premises.

10.2 The dog photo demonstrates a large dog which clearly was able to reach Reece on the top of the wall by means not explained.

10.3 The onus fell on Defendant in this matter to prove that Reece’s behaviour constituted provocation in the sense required (substantial negligence or imprudence) causing the animal not to act contra naturam.[3] For provocation to be effective it must be the causa causans of the animal’s intemperate action[4]. In Green v Naidoo[5], the Court held that:

“The answer must be in the affirmative. In the circumstances found to have existed one would be hard put to find that Taz had acted from ‘wildness’ when acting aggressively towards a person who approached in these circumstances. It is not simply a case of Taz snapping at a child petting him. A dog would be acting in accordance with its nature (and indeed in accordance with human nature) to act in defence of a perceived intrusion or predation upon its food and to act in defence of its body. As was said in Swart v Honeyborne 1981

- (1) SA 974 (C) [at 795G-Eds] concerning a watchdog, ‘(i)t is not to be expected, however, that a well mannered and obedient dog will remain docily lying on his back in the event of an apparent threat to the premises which it is his natural function to keep guard

over’. In Portwood (supra),* the Chief Justice commented that ‘(m)ost animals do possess a protective instinct in respect of what they regard as their own territory and I have no doubt that a savage dog would be more likely to bite persons coming on to its owner’s property, which property it would regard as its own’. There are also numerous earlier judgments which exemplify the proposition that the person injured must not have provoked the attack. In Kettle v Storm

- (1893) 14 NLR 275 the plaintiff’s minor daughter in entering a tent occupied by other children trod upon the defendant’s dog, which thereupon bit her, and the Court held that the plaintiff could not obtain damages; in Storey v Stanner (1892) 1 HCG Laurence J said that if the plaintiff had walked up to the dog when it was chained up and struck it with some clothes, that would have been ‘such improvidence’ on his part as to exempt the defendant from liability for the bite plaintiff got from the dog in consequence of his action; in Harmse v Hoffman 1928 TPD 572 (1928 2 PH 15) respondent, on entering a bar trod on a dog’s tail and when it yelped stooped down to pat it, whereupon the dog bit him in the face. On appeal it was held that the action in stooping down to pat the dog when it was in an excited condition owing to having been trodden on was an ‘imprudent act’ on his part and the cause of the injury.”

10.4 However this notwithstanding the view of the authorities, which I must apply, is whether the dog (whatever kind, a Pitbull as against a Labrador for example) in biting a person acted contra naturam. Put otherwise whether it acted contrary to the nature of a well behaved dog which, as is pointed out in The Law of Delict do not

normally bite people and not whether the dog acted contrary to the nature of for example a Boerbull, Rottwieler or Pit Bull (which might do so).

I thus adopt the objective or reasonable animal approach, and in casu the question is what in the circumstances present would or could one expect from a well behaved dog (the reasonable dog).

10.5 However in this matter on the agreed facts there is nothing to suggest that Reece did any more than sit on top of the boundary wall. There is clearly no indication that he physically went any further entering upon the property of Defendant, and the wall was, as I have said, not by any means a low wall. There is nothing to indicate that this behaviour constituted any particular external stimuli which would have indicated that the dog did not act contra naturam. I agree with

the quotation from the Law of Delict referred to above, that the focus should probably not be on the particular species or breed to which the animal belongs but more generally on uncharacteristic behaviour of a domesticated animal in a human environment.

10.6 In this matter on the facts before me a well behaved dog (the reasonable dog) would not have attacked a child simply due to the child having climbed and sat on top of the boundary wall without more[6].

10.7 In the circumstances I conclude that the dog acted contra naturam.

[11] Lawful Presence

11.1 Reece sat upon the Defendant's boundary wall. The question is whether, on what is before me, Reece can be said to have been unlawfully present in that position on the wall or that Reece did not have a lawful purpose therefore. The real question it seems to me is to what extent a child below 10 years of age, perched on top of a boundary wall separating two properties, can be said to have been unlawfully on Defendant's property such as to raise a defence of unlawful presence.

11.2 In this matter the only facts relevant placed before me were that Reece climbed and sat on a "brick wall bordering the premises of Defendant and a third party" and that on several occasions prior to the attack Reece had been repeatedly told by Defendant not to come onto his property if he was not present and not to climb the boundary wall on account of the dog.

11.3 There was certainly no tacit consent given by Defendant to this, if that is what is required.

Defendant however bears the onus in this regard. Whatever of the two approaches "lawful purpose" or "legal right" is adopted makes little difference on the facts of this matter as Reece was clearly not on the wall by invitation or with consent of Defendant, nor did he have a lawful purpose therefore, to the extent that he was in fact on Defendant's property.

11.4 The real question it seems to me is to what extent a child perched on top of a boundary wall separating two properties can be said to have been on Defendant's property at all, such as to raise an issue of unlawful presence .

11.5 The question is whether the child was lawfully present at the place where the attack occurred, that being where he sat on a wall bordering the premises of Defendant and a third party. In any terminology in this instance a boundary is a line separating two properties – in this case demarcated by a wall. There is nothing on the agreed facts before me which indicates that Reece was on this wall without the permission and consent of the third party.

11.6 It would seem to me unduly technical, and indeed wrong, to conclude that in the circumstances Reece not having Defendant's consent, rendered his position on top of the wall as having been unlawful. It seems to me that his position on the wall (off the ground) apparently with the third part's consent (as the contrary is not stated and Defendant bears the onus of this defence)[7] cannot be categorised as unlawful presence on Defendant's property.

11.7 In any event and even if I am incorrect in respect of the above, lawful presence cannot be divorced from a minor below 10 years of age being *doli et culpa* incapax. Not only could Reece not exhibit fault or culpable action, let alone criminal conduct, but he also could not commit the criminal act of trespass.

11.8 It should be emphasized that the *actio de pauperie* is a special action and is necessarily narrow in its scope. It is thus that the range of persons who are entitled to claim is necessarily limited. [8] The class of persons who may do so is limited to those persons who are lawfully on Defendant's land when bitten. I was not referred to any authority that suggests that a child below 10 years old and thus *doli et culpa* incapax is excluded from claiming relief under the *actio de pauperie* even if a trespasser on a Defendant's property, being irrebuttably presumed not capable of unlawful culpable conduct whether actually negligently or with intent. It would seem to me that such child has a pauperian claim even if found to be on Defendant's property without direct lawful entitlement or tacit consent.

11.9 In the result if I am incorrect, and the child on the facts placed before me was in fact on Defendant's property, the claim nevertheless succeeds, the child being *culpa et doli* incapax.

[12] In the result Plaintiff's claim on the merits succeeds and the following order issues:

1. The minor Reece was *doli et culpa* incapax at the time of the dog attack upon him.
2. The owner of the dog concerned, being Defendant is liable, as the dog owner, for the injury caused by the dog in the attack upon Reece, Plaintiff's son.
3. Judgment is given in favour of Plaintiff in respect of the claim against Defendant as to the merits of that claim in the *actio de pauperie*, the issue of the quantum of that claim to stand over for further adjudication.
4. Defendant is liable for Plaintiff's costs in the action in respect of the issue of liability.

M.J. LOWE

JUDGE OF THE HIGH COURT

Obo the Plaintiff:

Adv JJ Bester

Instructed by:

Wheeldon Rushmere & Colse, Grahamstown

Obo the Defendant: Mr AF Basson

Instructed by:

Enzo Meyer Attorneys, Grahamstown

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- [1] 2nd Edition, Oxford University Press 376 – 380
- [2] 7th Edition, Neethling – Potgieter – Visser, pages 382 to 384
- [3] See *Levy v Purdy* 1993 (3) SA 17 (A).
- [4] *Sarah v Edwards* 1930 AD 3 at 10.
- [5] 2007 (6) SA 372 WLD at [32]
- [6] In my view the matter is distinguishable on the facts from *Swart v HoneyBorne* 1981 (1) SA 974 (C)
- [7] *Vermaak v Khoza* 1979
- (1) SA 578 (N) 582: *Fourie v Naraju* 2008 (1) SA 192 (CPA)
- [8] *Veiera v Rensburg* 1953 (3) SA 647 T at 651
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