

ScJR
Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1999/S 191

BETWEEN ANN-MARIE SEARCHWELL CLAIMANT
A N D JOHN LENNON 1ST DEFENDANT
A N D MRS. LENNON 2ND DEFENDANT

**Mr. Maurice Frankson, instructed by Gaynair & Fraser
for Claimant**

Mr. Roderick Gordon for the Defendants

Heard: 17th, 18th December, 2003 and 5th March, 2004

MANGATAL J (Ag.)

1. Mr. and Mrs. Lennon were the owners of 24 dogs on the 8th August, 1998. Ann-Marie Searchwell rented a flat from them on premises at 2 Darlington Avenue, Kingston 8, St. Andrew. The Lennons reside in a house on the same premises. Unfortunately, on the morning of the 11th August, 1998 Miss Searchwell ventured into the washing area on the premises and was bitten by the Lennons' dogs. Miss Searchwell now claims compensation under the Dogs (Liability for Injuries By) Act. Further or alternatively,

she claims against the Lennons on the basis that the Lennons were guilty of negligence in supervising, controlling, or monitoring the dogs.

2. Miss Searchwell presented evidence that she rented the premises on 8th August, 1998. She was at the time employed to Chippies Banana Chips and was a stocktaker employed to a bar. On renting the premises, the Lennons assured her that the dogs would not attack or trouble her. She would get used to the dogs in no time and all she had to do was tell the dogs to move if they approached her, and they would then go away. On the 8th and 9th August 1998 she was escorted in and out of the premises. This was because she was afraid and not because there was any agreement or condition imposed by the Lennons that she should be accompanied.
3. Miss Searchwell denied being a bartender or that she came home to the premises between 1.00a.m.- 2.00a.m. the morning when the incident occurred. She further stated that when she arrived from work on Sunday the 9th August 1998 at about 5.00 p.m. Mr. Lennon escorted her inside the house. Miss Searchwell says "I later told Mr. Lennon on Monday 10th August 1998 that I wanted to wash my clothes" and asked Mr. Lennon if it was okay for her

to go outside by herself with the dogs and Mr. Lennon assured her that it was alright.

4. On the morning of Tuesday the 11th August 1998, Miss Searchwell opened the grill to go around to the back of the house to wash her clothes. She saw one of the dogs. The dog began barking at her. She then did what Mrs. Lennon instructed her to do. She stood there and said "move". This dog began barking louder and was subsequently joined by the other 23 dogs. She continued saying "move", louder and louder, over and over again for about a minute. One of the dogs jumped at her, and she dropped her clothes to the ground. The 24 dogs started to bite her up all over her body until the Lennons eventually heard the commotion and came to her assistance.
5. Miss Searchwell was taken to the hospital by Mrs. Lennon. Miss Searchwell spent approximately 1½ weeks in hospital. She says that at the end of the month she left the flat. She had returned for two (2) weeks after being discharged from the Kingston Public Hospital because she did not have anywhere else to go at that time.

6. The Lennons tell a different story. They say that when Mr. Lennon first met Miss Searchwell in August 1998 Mr. Lennon escorted Miss Searchwell and her boyfriend into the premises and that the first thing Mr. Lennon asked her was if she had a problem with dogs. Miss Searchwell gave a negative response to that question. Mr. Lennon in his witness statement said that he explained that the way he and his wife operated was that one or the other of them would have to escort her to and from the house. This would have to be done for three (3) weeks until the dogs were accustomed to her. It was made clear that this was a condition of the letting. Miss Searchwell agreed with this procedure and rented the flat. At the time Miss Searchwell told him she worked as a bartender. He says that he had no reason to disbelieve her as she would leave the house about 10.00 or 11.00 in the morning and return at 1.00 or 2.00 the following morning. He always answered the bell and went outside to meet Miss Searchwell. He indicates that the night before the incident happened, Miss Searchwell asked if she could borrow a pail the next morning as she planned to wash. He indicated that that was fine, and she should just call him when she was ready as he would have to escort her out. Mr. Lennon states

that he was shocked when he realized that Miss Searchwell had gone out alone in the dark. He and Mrs. Lennon had had the dogs for about four to five years before Miss Searchwell came to the premises. In those years the dogs had never attacked anyone.

7. Mrs. Lennon in her evidence stated that at no time did she tell Miss Searchwell the dogs were “okay” and that she could go outside on her own, or that if they barked at her she could just tell them to “move” and they would go away.
8. She states that they never had a problem with their dogs before with any tenant or visitor, because they are very careful with the safety of anyone who comes in or out of the property. She denies telling Miss Searchwell that she would get used to the dogs in no time. She gave Miss Searchwell a period of five to six weeks, where she and her visitors would be escorted in and out, day or night, as this time would allow her to get used to the dogs and the dogs to her.
9. Mrs. Lennon described the aftermath of the incident with the dogs and indicated that she took Miss Searchwell to the hospital. Miss Searchwell was crying, and she kept saying how sorry she was for going outside on her own. Miss Searchwell also said she did not

blame the dogs as she knew she should not open the gate and enter that area on her own. She admitted she was wrong.

10. On the second day in the hospital, Miss Searchwell, her aunt and her boyfriend, informed Mrs. Lennon they wanted two (2) years of rent-free accommodation as compensation for Miss Searchwell. On discharge from the hospital, she called Mrs. Lennon collect and asked her if she could come and fetch her. Mrs. Lennon replied "no". Miss Searchwell requested her to pay for a taxi and she agreed. Up to that point all medical expenses including hospital registration fees and medication had been paid by the Lennons.
11. Mrs. Lennon, states that the reason why Miss Searchwell left was that on the 12th of September, 1998, she requested payment of the rent which was now overdue and Miss Searchwell became mad with Mrs. Lennon since she thought the Lennons were going to let her live rent-free. Miss Searchwell left the following day, 13th September, 1998.
12. Miss Monica Martin, a household helper who has been employed to the Lennons since 1997, also gave supporting evidence about the Lennons' modus operandi regarding the dogs.
13. The main factual issues are as follows:-

- (a) Did Miss Searchwell agree with the Lennons that they would escort her around the premises for the first, three or six weeks of her tenancy?
- (b) Did the Lennons give Miss Searchwell a period of five to six weeks, where she and her visitors would be escorted in and out, day or night, as this time would allow her to get used to the dogs and the dogs to her?
- (c) Did Miss Searchwell ask the Defendants “Won’t the dogs attack, me or trouble me”, and was she told that as soon as the dogs approach her, she must say “move” and they will go away.
- (d) Did Miss Searchwell ask Mrs. Lennon if she was sure and did she say “Yes, they have never attacked any of the tenants before, so they won’t attack you.”
- (e) Did Mrs. Lennon tell Miss Searchwell that she would get used to the dogs in no time and that the dogs will bark at her, but that she should not run, instead she should just stand up and say to the dogs, “Move” and the dogs will eventually turn and go away.
- (f) Did Miss Searchwell tell Mr. Lennon on Monday 10th

August 1998 that she wanted to wash her clothes and did she ask Mr. Lennon if it was safe for her to go outside by herself, having regard to the presence of the dogs. Did Mr. Lennon then assure her that she could?

- (g) On the night before the incident happened, did Miss Searchwell ask if she could borrow a pail the next morning as she planned to wash. Did Mr. Lennon say fine, just call me when you are ready. Did he indicate that he would have to escort her out?

14. The main legal issues are as follows:-

- (a) What is the nature of the liability imposed under the Dogs (Liability for Injuries By) Act "the Act"?
- (b) What, if any, Defences are available in respect of claims under the Act?
- (c) Is Miss Searchwell deemed to be an owner of the dogs under Section 3 of the Act?
- (d) Did Miss Searchwell voluntarily accept the risk of being injured by the dogs?
- (e) Does the fact that Miss Searchwell agreed to live at the

premises where the dogs lived or were kept reduce the liability of the Lennons?

- (f) Is there a Defence open to the Lennons that Miss Searchwell was negligent in entering the yard to go and wash her clothes and was she so negligent? Did Miss Searchwell bring the injuries on herself?
- (g) Are the Lennons liable in negligence for the dog-bites suffered by Miss Searchwell?

15. After carefully weighing the evidence presented by each side, I find as follows:-

- (a) Miss Searchwell did tell the Lennons that she was a bartender when she rented the premises. This is supported by the first paragraph of the Statement of Claim.
- (b) Mr. Lennon did tell Miss Searchwell that either himself or Mrs. Lennon would have to escort her to and from the house and that this would have to be done for at least three weeks until the dogs were accustomed to her. It was made clear to Miss Searchwell that this was a

condition of the letting. Miss Searchwell agreed to this procedure and subsequently let the flat.

- (c) Miss Searchwell was escorted in and out of the premises by the Lennons and this included when she returned to the premises at 1.00a.m. – 2.00 a.m..
- (d) The incident occurred only three days after Miss Searchwell rented the premises. I found it incredible that Miss Searchwell was unable to recall even in a general way, how soon after moving into the premises that the incident occurred.
- (e) The night before the incident happened, or the morning that it happened, Miss Searchwell returned to the premises between 1.00a.m. – 2.00 a.m. on 11th August 1998 and was escorted into the premises by Mr. Lennon.
- (f) Miss Searchwell asked Mr. Lennon if she could borrow a pail the next morning as she planned to wash. Mr. Lennon told her that was fine but that she must call him when she was ready as he would have to escort her out.
- (g) Miss Searchwell ventured into the wash area, while it was still dark, knowing that the dogs were still out.

16. I do not find it credible that the Lennons would simply have told Miss Searchwell to tell the dogs to “move”. If this was the way in which the Lennons dealt with the situation it is difficult to see why they would not just have told Miss Searchwell to tell the dogs to move on the 8th and 9th August 1998 instead of escorting her in and out. If she was, according to Miss Searchwell only escorted in and out on the 8th and 9th August 1998 because she was afraid, it would be reasonable to conclude that a day or two later she would still be afraid and that the Lennons would hardly then have told her it was alright for her to go out to the wash area alone. All parties agree that there was a “Beware of Dogs” sign on the gate.
17. The Lennons are older persons both of whom I found possessed a dignified and honest demeanour. They both impressed me as being careful persons who laid down certain rules and conditions that would allow for the peaceful and safe co-existence of their tenants and the dogs.
18. I find the account of the incident and the surrounding circumstances advanced by the Lennons more probable than that advanced by Miss Searchwell. In addition, based on the evidence given, and the

demeanour of the witnesses, I find Mr. and Mrs. Lennon, and their witness Miss Martin, more credible than Miss Searchwell.

19. Having made these findings of fact, I now turn to an examination of the legal issues.
- (a) The nature of the liability imposed under the Act
 - (b) What if any Defences are available in respect of claims under the Act

20. In trying to understand the nature of the liability under the Act it is useful to ponder why special legislation exists in the case of dogs. Although dogs have such physical attributes as enable them to inflict serious injuries on persons and property and have a natural tendency to chase and bother other animals, there are other animals which potentially could cause even greater damage. According to the Report of the New South Wales Reform Commission (1970), whilst making recommendations in respect of English legislation, referred to at page 14 of North's work *The Modern Law of Animals*, 1972, the answer would appear to be that:

“What places dogs in a special position is that despite their canine characteristics and the rapidly increasing urbanization of our society it is still popularly accepted

that, broadly speaking, dogs are privileged to roam and that, in ordinary circumstances the owner of a dog does not act unreasonably towards others in permitting it to do so. No like privilege is conceded to any other animal which is as likely as a dog to inflict serious injury. The position of dogs is special; and this warrants the imposition of special liability in respect of them."

21. The Jamaican Court of Appeal decision of **Wilson v Silvera**

(1959) 2 W.I. R. 40 is authority for the proposition

that –

(a) The Act does not create an absolute liability.

It relieves the claimant of proof that the keeper knew of the animal's vicious propensity and of the proof of negligence.

(b) Other defences which are open at common

law such as trespass and negligence or contributory negligence on the part of the claimant may still be raised.

22. Upon whom is liability imposed under the Act?

Section 3 is the relevant section. It reads:-

"3. The occupier of any house or premises where any dog is kept, or permitted to live or remain at the time of such injury shall

be deemed to be the owner of such dog, and shall be liable as such, unless the said occupier can prove that he was not the owner of such dog at the time the injury complained of was committed and that such dog was kept or permitted to live or remain in the said house or premises without his sanction or knowledge.

Provided always, that where there are more occupiers than one in any house or premises let in separate apartments, or lodgings or otherwise, the occupier of that particular part of the premises in which such dog shall have been kept or permitted to live or remain at the time of such injury, shall be deemed to be the owner of such dog."

23. According to the Interpretation Act, to occupy includes, in addition to its ordinary signification, to use, inhabit, possess or enjoy the premises in respect whereof that verb is used, otherwise than as a mere servant and for the mere purpose of the care, custody, and charge, thereof.
24. (c) Is Miss Searchwell deemed to be an owner under Section 3 of the Act?

Counsel for the Lennons has argued that the definition of occupiers applies to both the Lennons and Miss Searchwell and that by virtue of section 3 Miss Searchwell is deemed an owner of the dogs. In other

words, the dogs were kept or permitted to remain with Miss Searchwell's sanction or knowledge.

25. Who is the owner and who is the occupier of the premises where the dogs are kept?

The Lennons are clearly the owners of the dogs. In my view, the flat rented to Miss Searchwell is the only area in respect of which Miss Searchwell could be said to be the occupier. It is really the Lennons who are the occupiers of the remaining portion of the premises. The dogs were kept in the Lennons' kennels or otherwise on the premises, not in the flat rented to Miss Searchwell. Miss Searchwell could not in my view be said to be the occupier of the premises where the dogs were kept or permitted to live or remain. The proviso to Section 3 applies to the owner of that particular part of the premises in which such dog shall have been kept or permitted to live or remain at the time of such injury. I therefore concluded that the Lennons are the occupiers. It is to be noted that the section makes no reference to the occupier in terms of where the incident takes place. That to my mind is a concept independently dealt with under the Occupier's Liability Act. The person who is deemed owner is not the occupier of the place where injury takes place, but is the occupier of the premises where the

dog was kept. In terms of the wash area, in any event, I find that, Miss Searchwell was at best a licensee with regard to that area of the premises. Her lease did not cover that area of the premises. Counsel for the Defendants in response to questions from the court indicated that he is not arguing that Miss Searchwell was a trespasser. However, in so far as the Lennons had attached conditions to the licence to go into the wash area, i.e. that Miss Searchwell was not to enter that portion of the premises unescorted by them, I think that it is highly arguable as a matter of law that at the particular place and point in time when the incident occurred, Miss Searchwell was a trespasser. If Miss Searchwell was a trespasser that would afford a Defence under the Act. A licensee who exceeds his license is a trespasser – see **Clerk & Lindsell on Torts** 17th ed. Para 17-47, p. 864 – and the case there cited **Wilcox v. Kettel** [1937] 1 All E.R. 223.

26. (d) Did Miss Searchwell voluntarily accept the risk of being injured by the dogs?
- (e) Does the fact that Miss Searchwell agreed to live at the premises where the dogs lived or were kept reduce the liability of the Lennons? I do not think that the maxim *voluntati non fit injuria* applies in this case. I also do not

think that her agreement to live at the premises reduces the Lennons potential liability in relation to the dogs.

*“The question is not whether the injured party consented to run the risk of being hurt, but whether he consented to run that risk at his own expense so that he and not the party alleged to be negligent should bear the loss in the event of injury. In other words, the consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk” – per Lord MacDermott in **Kelly v. Farrans Limited [1954] N.I. 41** (my emphasis)*

27. (f) Was Miss Searchwell guilty of negligence? Did she bring the injury on herself?

In my view, Miss Searchwell was the author of her own misfortune.

I have found that she disobeyed the Lennons express instructions not to go to the wash area unescorted. Indeed, this was a condition of the letting. I accept Counsel for the Lennons submissions that, after only three days on the premises, and Miss Searchwell could not have been very familiar with the dogs (they all looked alike to her), any reasonable person would expect that if you come upon the dogs suddenly from behind a closed door, you would startle them and one would have no way of knowing what their reaction to that would be.

28. I find that the Lennons are not liable to compensate Miss Searchwell under the Act because she negligently brought the injury upon herself. I am also of the view that she would be a trespasser in respect of the wash area at the relevant time and hence that too would be a good defence to her claim under the Act.
29. It is to be noted that the Act does not do away with other kinds of liability for example the general common law liability under the tort of negligence, or for that matter for example, Occupier's Liability & Employers Liability. In the Scottish case of **Hill v. Lovett** 1925 L.T. 1991, (See also Ch. 20 of Clerk & Lindsell on Liability for Animals) the Plaintiff suffered serious injury as a result of being bitten by one of two dogs owned by her employer, when she entered his garden to clean the windows. Neither dog had attacked a stranger before but they were known to be pugnacious. The Plaintiff succeeded against her employer at common law on the ground of breach of duty in failing to provide her with a safe place of work and against her employer and his wife under the Occupier's Liability Act. The claimant here has, as an alternative to liability under the Act, pitched a claim in negligence. That claim it would seem to me is really in essence a claim based upon the fact that the Lennons were

the occupiers of the area where the incident took place, i.e. the washroom, as opposed to being the occupiers of the area where the dogs were kept. It is my view that a claim under the Occupier's Liability Act either together with, or alternatively to the claim in negligence at common law should have been brought. However, a claim under the Occupier's Liability Act would have had to be specifically pleaded – see Bullen & Leake & Jacob's Precedents of Pleadings, 13th edition, page 713.

30. (g) Are the Lennons liable in Negligence?

As regards the straight claim in negligence, I see nothing on the evidence to support a contention that the Lennons were negligent in their supervision control or monitoring of the dogs. They kept the dogs for their protection and let them out at night until an appropriate time in the morning. The dogs were still out providing security at the time of this incident; a fact known to Miss Searchwell. In any event, as I have said it was Miss Searchwell's own negligence that brought the injuries upon herself. It cannot be said that the Lennons were in breach of any duty whatever. Further, it would appear that the Lennons warned Miss Searchwell of the presence of the dogs

outside at certain hours, and this warning would be such as to enable Miss Searchwell to be reasonably safe if the claim had been formulated under the Occupier's Liability Act. See Sections 3 (1), (2), (4), (5) and (7) of the Occupier's Liability Act.

31. I found the facts in **Brock v. Copeland** Vol. CLXX English Reports, p. 328, not dissimilar to the facts in this case. It was held that in an action on the case for keeping a dog accustomed to biting, if the dog was kept on the defendant's premises and the injury received in consequence of the plaintiff imprudently going on them, the action cannot be maintained. But when there is either a public way, or the owner of a mischievous animal suffers a way over his close to be used as a public one, if he keeps such animal in his close, he shall answer for any injury any person may sustain from it. At p.329, it is reported:

"It was given in evidence that the Defendant was a carpenter, and that the dog was kept for the protection of his yard: that he was kept tied up all day, and was at that time very quiet and gentle, but was let loose at night. It was further proved that the plaintiff, who was foreman to the defendant, had gone into the yard after it had been shut up for the night, and the dog let out; at which time the injury happen, the dog having then bit him.

On this evidence Lord Kenyon ruled, that the action would not lie. He said that every man had a right to keep a dog for the protection of his yard or house: that the injury which this action was calculated to redress, was where an animal known to be mischievous was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public: that here the dog had been properly let loose; and the injury had arisen from the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up."

32. In all the circumstances therefore I find that Miss Searchwell has not discharged the burden of proving on a balance of probabilities that the Lennons are liable for compensating her for the unfortunate injuries which she suffered as a result of dog bites on August 11, 1998.
33. There will therefore be judgment for the Defendants with costs to be taxed if not agreed.