TRIAL BRIEF IN CASE OF

James Mansfield vs. Daniel O'Connor
Cause No. 4

JUNIOR MOOT COURT

By

Edwin J. McCarthy for Plaintiff
Joseph H. Farley for Defendant

STATEMENT OF FACTS.

James Mansfield in company with three others went upon the farm of Daniel O'Connor to hunt. This was without the permission and knowledge of O'Connor. O'Connor had signs tacked upon his fences on which was printed: "No hunting allowed on these premises." O'Connor owned and kept a big shepherd dog. This dog had the known habit of running to the fence and barking viciously at passers-by. On one occasion the dog had gone through the open gate and bitten a man, of which fact O'Connor had been informed.

Mansfield, on the occasion in question, had no knowledge whatever that O'Connor had a dog until the dog viciously attacked him and seriously wounded him, biting him three times in the leg. O'Connor was not at home at the time of the hunting trip of Mansfield, and knew nothing whatever about the matter until he arrived home later.

Mansfield brings action for the damages occasioned by the dog's biting.

Edwin J. McCarthy for Plaintiff.

Upon this state of facts we maintain that the defendant is liable to the plaintiff in an action of tort, for personal injuries inflicted by the domestic animal of the defendant.

The defendant is guilty of a tort. The keeping of this animal is more, than mere nonfeassance; it is aggression. The fact of the defendant's guilt rests not upon the nature of the class to which the dog belongs but rather upon its propensities to do evil.

PRIMA FACIE.

From the facts as set out in the statement concerning the vicious nature of the dog and his general reputation for attacking people and injuring them; and then the injury to the plaintiff by this animal, we contend that by reason of the substantive law in the decisions of the courts that there exists a prima facie case against the defendant. In support of this we offer the following cases: Partlow vs. Haggerty, 35 Ind. 178, the court says: "Whoever keeps a vicious animal; accustomed to attack and bite mankind, with knowledge of its vicious propensities, is *prima facie* liable for an action in damages." Further support is found in the case of Williams vs. Moray et al., 74 Ind. 25. The rule as discussed in the leading case of Muller vs. McKesson, 73 N. Y. 195, 29 Am. Repts. 123, is as follows: "It may be that in a certain sense, an action against the owner for an injury by a vicious dog or other animal is based upon negli-

gence; but such negligence consists, not in the manner of keeping or confining the animal, or the care exercised in keeping or confining him, but in the fact that he is ferocious, and that the owner knows it, and proof that he is savage and ferocious is equivalent to express notice . . . the negligence consists in keeping such an animal . . . In some of the cases it is said that from the vicious propensity and knowledge of the owner, negligence will be presumed, and in others that the owner is *prima facie* liable. This language does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal."

SCIENTER.

That the plaintiff is further entitled to damages because the defendant was possessed of knowledge of the vicious propensities of his dog and continued to keep the animal, being thus charged with *scienter*. "Not in the manner of the keeping of the animal, but any keeping after a vicious demonstration is *scienter*," case of Hammond vs. Melton, 42 Ill. App. 186. Other cases, Ahlastrand vs. Bishop, 88 Ill. App. 424, and Marsh vs. Jones, 69 Atl. 182.

DUTY AND LIABILITY TO TRTSPASSERS.

It is also a strong rule of law that the owner of a vicious dog is liable to any person subjected to personal injuries by such animal, be the party a trespasser or lisencee. In support of this contention we offer the leading case, in which the court said: "That where a boy was hunting in the defendant's woods and was attacked and bitten by a ferocious dog harbored by the defendant, he was entitled to recover for the damages altho he was a trespasser." Loomis vs. Terry, 17 Wend. 496, 31 Am. Dec. 306. In the case of Marble vs. Ross, 124 Mass. 44, the court held: "That the keeper of an animal known to be dangerous which injures another is held to the same degree of responsibility as in the cases of wanton injury, and the fact that the person injured is trespassing does not exhonorate the owner from his negligence in keeping the animal." The court also held in the case of Johnson vs. Patterson, 14 Conn. 1, 36 Am. Dec. 96, that "The keeping of a ferocious dog is unlawful on the same principle that spring guns, concealed spears, or poisoned food is unlawful to protect against trespassers." In further support of our contention that the defendant has been wantonly negligent in keeping this animal which has injured the plaintiff and that because of this keeping and this injury to the plaintiff said defendant is liable for the damage to the plaintiff we offer the following cases and text citations: Bigelow on Torts, pp. 248, 250; Sherfey vs. Bartley, 4 Sneed 58, 67 Am. Dec. 597; Woolf vs. Chalker, 31 Conn. 121, 81 Am. Dec. 175; Knowles vs. Mulder, 74 Mich. 202; Cooley on Torts, 345; Bishop Non-Cont. Law 1235 et seq.; 1 Thomp. Neg. p. 220, sect. 34; Miller vs. McKesson, 73 N. Y. 195, 29 Am. Repts. 123; Rider vs. White, 65 N. Y. 54, 22 Am. Rept. 600; also 14 L. R. A. 197, case of Conway vs. Grant.

CONCLUSION.

We might continue for an indefinite time citing and abstracting cases in support of our contention that the defendant is liable for these injuries to the plaintiff; but we believe that

we have plainly shown these points; first, that the plaintiff has a prima facie case against the defendant, because of the keeping of the dog; second, that the defendant is fully liable for these injuries because he was well possessed of scienter, thus increasing his own liability because of this knowledge, and third, that, even regarding the trespass, the defendant is liable to the plaintiff for this injury because he was possessed of scienter and was negligent in keeping such an animal upon his premises. Therefore we contend that the plaintiff had a right to the security of his person, and that the defendant owed him a duty even tho he was a trespasser to provide such security from an animal in said defendants keeping, and therefore he is liable for the damage incurred by the plaintiff. We ask the court to render the decision for the plaintiff, James Mansfield.

Joseph H. Farley for Defendant.

From the facts the court can readily see that the plaintiff was a licensee on the premises of the defendant. In Cooley on Torts, page 1268, we find this definition of the position of a *licensee*: "The general rule supported by the authorities, is that the owner or occupant of premises owes no duty to licensees and trespassers, further than to rferain from wilful acts or injury." In support of this contention we quote the case of Indiana Refining Co. vs. John J. Mobley, Appellee, 24 L. R. A. 497 N. S., Ky. Court of Appeals.

Facts: The appellee went upon the grounds of the appellant company with their permission to solicit insurance from their employees. While there he was injured by the exploding of a steam boiler. The evidence brings out that the boiler was negligently handled and cared for by the employees of the company and as a result it exploded. Appellee sues to recover $5000 for injuries received. The court held that a licensee while on another's premises did nothing to produce his injury, but it was caused wholly by the negligence of the property owner, does not render the latter liable therefor, if there was merely passive, and not wilful negligence.

It is necessary at this point to distinguish between passive and wilful negligence and the best way to do this is by defining both terms. In St. Louis R. R. Co. vs. Holsman, 57 S. W. 770; Victor Coal Co. vs. Muir, 26 L. R. A. 435, we find: Wilful negligence is meant not strictly negligence at all to speak exactly, since negligence implies inadvertence, and wherever there is an exercise of the will in a particular direction, there is an end of inadvertence, but rather an intentional failure to perform a manifest duty which is important to the person injured.

On the other hand, "Passive Negligence" is nothing more than carelessness. When a person fails to do something that he might have done, yet is under no responsibility to do this act yet had he done so he might or might not have averted possible danger, he is guilty of carelessness or commonly called Passive negligence. By this definition it is plain to be seen that the defendant in this case was guilty of only passive negligence and not of wilful negligence and therefore he cannot be held liable because by the weight of authority the owner or occupant of land owes no duty to a licensee further than to refrain from wilful acts or injury.

In Harry Benson by his next friend vs. Baltimore Traction Co., 20

L. R. A. 714, the facts are: The plaintiff was a member of the graduating class of the Baltimore Manual Training School. The principal of the school received written permission from the defendant company to have the class inspect the plant. The basement was poorly lighted and the plaintiff was unable to see the vat and the guide failed to warn him of the fact that it was there and as a result he fell into the boiling water and was badly scalded. As a result of the burns thus received the plaintiff was confined to his bed for a long time and has been permanently injured. He brings this action to recover.

The court held that one of a class of students to whom permission is given upon request to inspect a power house cannot recover for injuries received by falling into an uncovered vat of boiling water while making the inspection of the premises.

Ritz vs. City of Wheeling, 31 S. E. 993; Bennett vs. Railroad Co., 102 U. S.; Galveston Oil Co. vs. Morton, 7 S. W. 756; Railroad Co. vs. Bingham, 28 O. St.; Carleton vs. Steel Co., 99 Mass. 216; and many others support the doctrine "that a mere licensee who is injured by any dangerous machine or contrivance on the land or premises of another cannot recover damages unless the contrivance is such that the owner may not lawfully erect or use or when the injury is inflicted wilfully, wantonly or through the gross negligence of the owner or occupant of the premises.

Search vs. Blackburn, 4 Car. & P. 297, decides that a man has a right to a fierce dog for the protection of his property, but he has no right to put the dog in such a situation in the way of access to his house that a person innocently coming for a lawful purpose may be injured by it. It is said that if a man puts a dog in a garden walled all around, and a wrong-doer goes into the garden and is bitten he cannot complain in a court of justice of that which was brought upon him by his own act. Loomis vs. Terry, 17 Wend. 497, 31 Am. Dec. 306. A man may use a ferocious dog as a protection against unseasonable trespassers.

In conclusion, to summarize our points: 1st, Mansfield was a trespasser on the property of O'Connor; 2nd, the owner or occupant of land owes the trespasser no duty except that he shall not wantonly cause him to be injured; 3rd, defendant was not guilty of wilful negligence in the case, but merely of passive negligence. It is therefore our contention that plaintiff has no right of action against our client.. In view of the facts and the numerous decisions of the courts, and the leading authorities, we pray judgment of the court for defendant.