

Citation: Rosario v. Gladney et al.  
2000 BCSC 0214

Date: 20000204  
Docket: S044043  
Registry: New Westminster

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**CECIL ROSARIO**

PLAINTIFF

AND:

**CONSTABLE CHRIS GLADNEY AND  
THE ATTORNEY GENERAL OF BRITISH COLUMBIA**

DEFENDANTS

**REASONS FOR JUDGMENT**

**OF THE**

**HONOURABLE MADAM JUSTICE NEILSON**

Counsel for the Plaintiff

Paul G. Kent-Snowsell

Counsel for Defendants

Jeffrey Hayes

Date and Place of Hearing/Trial:

November 16, 17 & 18, 1999  
January 17, 18 & 19, 2000  
New Westminster and  
Vancouver, BC

**INTRODUCTION**

[1] This action arises from an incident in which the plaintiff was bitten by a police dog which was under the control of an RCMP officer, the defendant, Constable Gladney. Mr. Rosario advances claims of assault and battery, negligence, and wrongful detention.

[2] Mr. Rosario gave evidence on his own behalf. Constable Gladney, and Constables Maillette and McCarthy, both RCMP members who were present for some of the events in question, testified. As well, the defence called Jason Owen, a friend of Mr. Rosario who was with him on the night in question, and Jasbir Sandhu, a civilian witness to some of the events.

**THE EVIDENCE**

[3] Mr. Rosario is 27 years old. On August 7, 1997, he arranged to meet Mr. Owen after work to "have a good time" and celebrate his new job. Initially, he testified they met about 8:00 p.m., but later agreed it could have been as early as 5:30 p.m. He said they went to a bar in Surrey where he had a pint of beer. He thought they left the bar about 9:30 p.m. to drive to Richmond to meet two women.

[4] Mr. Rosario said that on the way to Richmond they stopped at a store to buy some mix which they drank with some liquor

Mr. Owen had in the car. Mr. Rosario thought this could have been rum, and said they each had a drink in cups a little bigger than a coffee cup. He said they did not have much liquor as they did not want to be intoxicated when they met the women. Mr. Rosario denied that he drank more than one beer in the bar, and one mixed drink of liquor in the car. He said he only drinks once in a while on special occasions, and this was special since he had a new job.

[5] He testified that they were driving to Richmond on Highway 91 about 10:30 or 11:00 p.m. when the cars in front of them braked suddenly, and Mr. Owen swerved to avoid them. He hit a barricade, throwing the car into the air, and seriously damaging it.

[6] Mr. Owen's memory of the evening was disjointed. He remembered calling Mr. Rosario on August 7, 1997, and picking him up in the late afternoon or early evening. He did not think it was a special occasion. He could not recall what they did before the accident, but did remember that they were drinking in his vehicle. He believed it was a mixed drink with spirits and they were sharing it from a cup. He was not sure how much they had to drink, but agreed he was impaired. He recalled driving on the freeway, but could not remember the accident. He was shaken up by it, and suffered injuries which

included two sprained ankles and facial lacerations.

Immediately after the accident, Mr. Owen recalled leaving the vehicle with Mr. Rosario. He said that he took the licence plate off his car, and then they went together into a field, ending up in a small ditch area with a thorn bush above them.

[7] Mr. Rosario testified that after the car came to a rest, he and Mr. Owen each asked if the other was okay. Mr. Owen then left the car. Mr. Rosario asked him why or where he was going, but he did not say anything. He saw Mr. Owen bend down in front of the car for a few seconds, and then go north, across a service road running parallel to Highway 91, and into a cranberry farm. Mr. Rosario said he initially sat in the vehicle wondering whether to wait for the police, or look for Mr. Owen. He decided to go and find his friend because he was concerned that Mr. Owen was injured and in shock, and possibly even suicidal. On cross-examination, Mr. Rosario agreed that the main reason he went to find Mr. Owen was because he was concerned that Mr. Owen had left to avoid the police as he had been drinking before the accident. He said he wanted to find Mr. Owen before he "did something stupid".

[8] Mr. Rosario followed his friend into the cranberry farm, calling for him. Mr. Owen eventually responded, and Mr. Rosario found him trapped in some brambles near a pile of

drainage pipes. He said there was a drainage ditch to the south of them, and the service road was adjacent to the ditch. Mr. Owen told Mr. Rosario that his shoes were still in the car. Mr. Rosario decided to return to the car to get the shoes, and to tell the police where they were.

[9] Mr. Owen could not recall much of his conversation with Mr. Rosario in the brambles. However, he did remember telling him that he was concerned because there was a bottle in the vehicle, and he had been drinking. Mr. Rosario went back to the car to get it. Mr. Owen was not certain whether he had asked Mr. Rosario to do this, or if Mr. Rosario went of his own volition.

[10] Mr. Rosario said he returned to the car, and saw that some Indo-Canadians had stopped at the scene. They asked him if he was all right. He said he was, and asked them to call the police. He told them the driver was in the bush. He went to get Mr. Owen's shoes, which were stuck under the pedals, and saw the liquor bottle in the car. He said he took it and threw it away to protect his friend. He then went back to join Mr. Owen who was still in the bush. Mr. Rosario agreed that he did not tell the Indo-Canadians where to find them. However, he denied this was because they wanted to avoid detection by the police.

[11] Mr. Sandhu testified that he had been driving west on Highway 91, and saw Mr. Owen's vehicle come quickly from behind, hit a light pole, and twist around. He and his friends stopped, and saw two men get out of the vehicle and run into the farm area, one with white skin and one with brown skin. The one with the white skin was bleeding. Mr. Sandhu said he and his friends offered assistance, and asked if they needed an ambulance, but the men told them to go away and ran off. He said they were "talking rough and not friendly". He was unsure whether the driver or the passenger took the licence plate. He said both were running around the car, and their actions made him think they had been drinking. One of the men came back and tried to open the trunk, then opened the door on the right and took something, and then took the number plate off the car. He then ran into the farm area. They did not see the men again. The first police officer arrived in 10 or 15 minutes, and looked for the men near the car and ditch without success. Another car with a police dog came in 10 minutes. Mr. Sandhu and his friends left.

[12] Mr. Rosario said he waited with Mr. Owen for the police to arrive. He agreed it would have been better and more expeditious to wait at the road and direct them to Mr. Owen, but he said he felt safer with his friend. He denied hiding

to avoid detection. Mr. Owen had no recollection of events until the police actually arrived.

[13] Constable Maillette testified that she has been with the RCMP since 1987. She was on highway patrol on August 7, 1997, when she received a call to attend a motor vehicle accident at 11:40 p.m. She arrived at the scene at 11:47 p.m. She examined the damaged vehicle and found the rear plate missing and an odour of liquor inside it. Civilians at the scene told her the occupants of the vehicle were two men, one dark and one Caucasian, the driver was possibly intoxicated, and one of them had taken the licence plate from the rear. They said the driver had taken off into the field, and the passenger had followed him. Constable Maillette went to the field and saw someone running and stumbling in a white shirt. She was concerned about possible injuries and the possible intoxication of the driver, so called for an officer with a police dog to come and assist in locating the men.

[14] Constable Gladney arrived at 12:03 a.m. with his police dog, Kaiser, and Constable McCarthy. Constable Maillette said she gave Constable Gladney the same information she had received from the witnesses at the scene, and pointed out where she had seen the person in the white shirt running. She said that Kaiser took off immediately with Constable Gladney.

She followed with Constable McCarthy. The field was difficult wet terrain. Constable Maillette and Constable McCarthy fell behind and lost sight of Constable Gladney and Kaiser.

[15] Constable Gladney testified that he was called to assist in the investigation of a hit and run at 12:23 a.m., and arrived at 12:43 a.m. Constable Gladney said that he has been with the RCMP for 19 years, five and a half years of which he has spent as a dog handler. He was promoted to Corporal in 1998. Kaiser is a German shepherd. He was two years old at the time of the incident, and weighed 70 to 75 pounds. Constable Gladney and Kaiser have worked as a team since spring 1996.

[16] Constable Gladney described the extensive training process for both RCMP and their handlers. The police dogs undergo training in a number of areas, including criminal apprehension and obedience. They are taught to grab a suspect and hold on to him with their mouths on the command "hag", and to release the suspect on the command "out". This is called the "bite and hold" method of apprehension, and it ensures that the handler makes the decision about how to approach a suspect, rather than the dog. There is another method of apprehension called "find and bark" which is not taught by the RCMP. A dog trained in this manner finds a suspect, and then

sits or lies by the person and barks. If the person moves, the dog bites the suspect on its own volition. With the "find and bark" method, the dog, rather than the handler, decides whether to bite.

[17] The Course Training Standard, a manual for the dog handler training course for the RCMP, was entered in evidence, as were Kaiser's training records. These set out the content and standards of training for RCMP dogs and handlers in considerable detail. By August 1997, Kaiser had reached the highest level of training in all areas for RCMP dogs.

[18] Constable Gladney said that when he arrived at the scene he spoke to Constable Maillot, who told him two men had been seen running away, one in a light shirt. One had removed the back plate from the vehicle and they had run north to a cranberry farm where she lost them. Constable Gladney said he thought the removal of the plate might indicate the vehicle was stolen. He did not realize the front plate was still on the vehicle. He also thought it possible the men had a weapon in the form of the tool used to remove the license plate. He testified his job was to locate the men with Kaiser. It was not part of his duties to arrest and remove them. However, he agreed that locating the men could include an element of controlling them, until other officers could arrest them.

[19] He put Kaiser in a tracking harness with an 18 foot line running from his shoulders to a loop which Constable Gladney put over his wrist. He gave Kaiser the command to track, and the dog located and followed a track in the area where Constable Maillette had last seen the men. They moved along at a fast jog. Constables Maillette and McCarthy followed behind, but he was focusing on the dog and did not know where they were. It was dark, and the dew made footing slippery. There was no noise. The dog does not bark while tracking. The track took 5 to 10 minutes and led through the cranberry field back toward the highway to a ditch by the Old Westminster Highway with bramble bushes in it, and a farm storage area with piping and old vehicle parts beside it. During the track, he did not hear any voices calling to identify themselves.

[20] Mr. Rosario said the area where he and Mr. Owen were waiting was between bramble bushes and some pipes. On the other side of the bushes to the south there was an embankment and ditch, followed by the service road, and then the freeway where they had left the car. They had been there about 20 minutes when he heard a dog barking. He stood up and saw a police officer with a hat on, coming towards them. The dog with him was barking and "going ballistic". They were about

15 to 20 feet away, and as they came closer Mr. Rosario said he put his hands up and said "we're over here". He directed them with his hands towards Mr. Owen and told them he was not a criminal, they were not dangerous, and they were unarmed. He explained he was the passenger and Mr. Owen was the driver, that he had just come to find Mr. Owen and bring him back. He said he was screaming this to the officer as the dog was barking. His hands were up. He thought the officer may have been yelling over the dog's barking, asking who the driver was.

[21] By now the dog was about four feet away from him. Mr. Rosario said he could see two more officers approaching, about 15 to 20 feet away with their guns drawn. He felt more comfortable going toward them because of the dog, and told the officer with the dog that he wanted to do that. The officer did not respond. Mr. Rosario asked him twice more if it was all right to move towards the other officers, and the officer gave a facial expression like a smirk. Mr. Rosario believed he might have said something, but he did not hear what it was. Then Mr. Rosario told the officer that he was going to put his arms down and climb over the pipes toward the other officers. As he put his hands down the officer yelled "no". As Mr. Rosario put his hands back up, he said the officer let the dog

go. He initially said he saw the officer let the leash go, but then agreed he may not have seen the leash drop, but heard it hit the ground. The dog attacked his shoulder. It was on its hind legs. He was terrified and could see blood on his shirt. The dog began to push him down, but Mr. Rosario remained standing as he was scared. He was screaming at the officer asking why he had let the dog go when he did not do anything wrong. He said the officer just crossed his arms and looked away.

[22] As the other officers came closer, Mr. Rosario said he told the officer to grab the dog now, or else he would grab him. He went to grab the dog, and at some point the dog bit his hand. As the other officers approached, the officer quickly grabbed the dog's leash and the dog came off Mr. Rosario. He said his sweatshirt was torn and around his waist. He could see blood on his shirt. He was standing with his hands up. The dog was still barking, and he told the officer he was going to the other officers. The officer focused his attention on Mr. Owen.

[23] Mr. Rosario denied that Constable Gladney had told him to stand still with his hands up. He also denied he had trouble with his footing, or that he walked into the dog immediately before the attack.

[24] Mr. Owen had very limited recollection of these events. He recalled hearing people telling them to get out of there. He assumed it was the police. Mr. Rosario left first and Mr. Owen could not see him because of the embankment. The next thing he heard was Mr. Rosario saying "get the dog off of me". He had no recollection of the dog or any events after that until he got to the hospital.

[25] Constable Gladney testified that Kaiser's track led to a ditch, and Kaiser went into the ditch with his nose down. He remained at the crest of the ditch, which was five or six feet deep. Kaiser located Mr. Owen first. He was about 20 feet away from him, and three to four feet away from Kaiser, embedded in a bramble bush. Kaiser was barking and Constable Gladney shone his flashlight in Mr. Owen's eyes, and shouted at him to show his hands and stand up. Mr. Owen began to move when Kaiser suddenly shifted his focus to the left. Constable Gladney turned and saw Mr. Rosario, who had stood up quickly in the ditch, and was moving toward Kaiser. Constable Gladney said this took him by surprise. He shone the flashlight in Mr. Rosario's eyes, and yelled at him to stand still and show his hands. Constable Gladney said there was a lot happening very quickly and he and Kaiser were both confused. Kaiser was now barking at Mr. Rosario. Kaiser was 15 to 18 feet from

Constable Gladney and the line was taut. He was three to four feet from Mr. Rosario. Constable Gladney did not hear Mr. Rosario say anything. Mr. Rosario moved two to three feet closer to Kaiser with his hands by his sides in a relaxed position. Constable Gladney did not pull Kaiser back or give him a command. Kaiser then lunged at Mr. Rosario on his own accord. Constable Gladney pulled back on the line, dropped his flashlight, and lost his footing. He agreed that at this point he could not control Kaiser, and was trying to regain his footing.

[26] Constable Gladney saw Kaiser hit Mr. Rosario on his right shoulder with a raking motion. He thought he pulled Kaiser back before he bit, but as he came off Mr. Rosario he had his shirt in his mouth and his canines were embedded in it so he could not let go. Constable Gladney gave him the command "out" but Mr. Rosario was pulling on his shirt and pulling Kaiser towards him so he could not disengage. He then yelled at Mr. Rosario to let go of the shirt. He said Mr. Owen did the same. Finally, Mr. Rosario let the shirt go or it ripped, and Constable Gladney pulled Kaiser back and regained his footing. He said it was 20 to 30 seconds from the time the dog lunged at Mr. Rosario until he let go of the shirt.

[27] Constable Gladney said there was six inches of slack in the line at most when he lost his footing as the dog lunged. He testified that when he first saw Mr. Rosario there was not enough slack in the line for Kaiser to reach him. The gap was closed by Mr. Rosario advancing towards the dog. This was what allowed Kaiser to make contact with him when he lunged. Constable Gladney said he never dropped the leash, which remained secured around his wrist.

[28] Constable Gladney denied intentionally releasing Kaiser, or giving him the command "hag", to bite. He also denied that he asked Mr. Rosario who the driver was, or that Mr. Rosario explained who he was, and that he planned to move toward the other police officers. He said he did not hear Mr. Rosario say anything. As well, he denied crossing his arms and looking away while Kaiser attacked Mr. Rosario.

[29] Once Kaiser was back to a safe distance, he noticed Constables Maillette and McCarthy had arrived. These officers then took over, and Constable Gladney and Kaiser stood back and did not participate in the arrest and detention of Mr. Owen or Mr. Rosario.

[30] Constable Maillette said that after losing sight of Constable Gladney and Kaiser, she relocated them when she heard a loud voice and screaming. She saw Constable Gladney

about 100 - 120 feet away near Highway 91 where a lamp post shone light on the field. She could not hear everything, but heard Constable Gladney say "don't move, drop it" many times. There was also an unfamiliar voice but she could not hear what it said. She believed she heard the dog bark and screams from someone other than Constable Gladney. She pulled her gun and ran toward the area.

[31] When she arrived, Constable Gladney was standing on pipes looking down, and Kaiser was running back and forth on his leash. She climbed up on the pipes and found Constable Gladney yelling at two people in the mud in the ditch below. She saw Mr. Rosario in a white shirt with something dark pulled on top of his head. She thought he was holding the licence plate in his hand. He looked scared and was trying to climb out of the ditch as fast as possible. Mr. Owen was standing still with both hands in the air.

[32] Constable Maillette said Constable McCarthy grabbed Mr. Rosario and helped him up. Mr. Rosario was frantic and screaming "my shoe, my shoe". She came face to face with him and noted an odour of alcohol. She helped him sit down and put his shirt back on. He told her he had been bitten by the dog and showed her his arm and hands. She warned him and handcuffed him. Constable McCarthy went back to get Mr. Owen.

[33] Mr. Owen was also arrested. Constable Maillette testified that he had a strong odour of liquor and showed signs of impairment. She described him as moderately to heavily intoxicated. She warned both him and Mr. Rosario, as she was still uncertain who was the driver. As long as she had any doubt about this, she treated them the same.

[34] Constable Maillette said that Mr. Owen had no shoes, and Mr. Rosario had one shoe on. He continued to complain that he had lost the other. She said he was talking as if he was intoxicated, about the dog bite, and also about his shoes, which he said were Italian and expensive. He said she would not be able to afford them, and he wanted them back. The officers went to look for the shoes but sank in the mud and did not recover them.

[35] Constable McCarthy testified that, after becoming separated from Constable Gladney, he relocated him when he heard his voice 150 meters to the south loudly commanding someone to stand still. He heard Kaiser barking as well. He could not see them, and heard no response to the command. He moved towards them, covering the distance in less than a minute. He saw Constable Gladney standing on an embankment with Kaiser, and two men about four feet below them in a

ditch. The dog was under control when he arrived. He never saw Kaiser in contact with the suspects.

[36] He drew his gun, and told Mr. Rosario to walk toward him. He placed him on the pipes and handcuffed him. He did not recall him being scared or upset, and said there was no indication he had been bitten. Mr. Rosario told him it was not necessary to handcuff him, he was not a criminal, he was uncomfortable, and he wanted his shoes. However Constable McCarthy did not recall him complaining about a bite or injury. He turned Mr. Rosario over to other members of the highway patrol, and then looked for a flashlight he had dropped. He believed he also looked for the lost shoes, and saw Constable Gladney search the ditch and find the licence plate.

[37] Mr. Rosario testified that when the other officers arrived, he climbed over the pipes to reach them. The female officer warned him, arrested him, handcuffed him, and he then sat on a log and waited. He was very upset. At one point when Constable Gladney was near, Mr. Rosario asked him why he let the dog go when he had just been explaining to him. Constable Gladney replied, "Shut up or I will let him go again".

[38] Mr. Rosario confirmed that he lost his shoe. He said he asked if he could go back and look for it, or if the officers would look for it, and they refused. He denied he was more concerned about his shoe than the dog.

[39] Constable Gladney testified that Mr. Rosario asked him why this happened and why the dog did not have a leash. He said he told him to back off or he would be bitten again. He noted there was blood on Mr. Rosario's clothing, and his sweatshirt was ripped but he was still wearing it. He did not hear him complain about his injuries, but he repeatedly asked for his shoes, saying they were expensive and he wanted them. He said that both Mr. Owen and Mr. Rosario looked spaced out, stoned or drunk, but agreed he was not close enough to smell liquor on them.

[40] Constable Maillette and other members of the highway patrol took Mr. Rosario and Mr. Owen to police vehicles. Mr. Rosario said that while he was in the car he saw Constable Gladney laughing at the side of the highway before he left.

[41] Constable Gladney said he walked back to Highway 91 with Kaiser. He denied saying anything or laughing at Mr. Rosario while he was in the police car.

[42] Constable Maillette drove Mr. Rosario to hospital at his request. She said he was still talking about his lost shoe. The smell of alcohol was bad enough in the car that she had to open a window. On arrival at the hospital when she saw the extent of the bite, she felt badly that she had pulled his arm when handcuffing him. Mr. Rosario told her that Mr. Owen was the driver, and she turned her attention to the investigation concerning Mr. Owen. Once she was certain that he was the driver, Mr. Rosario was released. She agreed that Mr. Rosario was polite and cooperative once he calmed down.

[43] At the hospital Mr. Rosario said his shoulder was cleaned and sutured, and a drain inserted under his arm. He was given a sling, a rabies shot, and antibiotics. No charges were laid against him. He complained about the incident to the RCMP two days later.

[44] Mr. Owen testified that he was charged with impaired driving, and pled guilty to that offence.

[45] Constable Gladney left the scene with Kaiser and Constable McCarthy. Constable McCarthy testified that while it was possible they talked about what had transpired, he was not aware that Mr. Rosario had been bitten until Constable Gladney told him some time later about Mr. Rosario's complaint. He had no notes of the events as it was not his

investigation, and he did not think they were significant at the time.

[46] Constable Maillette agreed her notes do not mention Mr. Rosario. She prepared a Report to Crown Counsel immediately after the events with respect to a charge of impaired driving against Mr. Owen, and said this is her primary record of the events. She initially said there was no Report to Crown Counsel regarding Mr. Rosario, and no intent to charge him as Mr. Rosario was not under investigation. She later testified she had written another Report to Crown Counsel with respect to possible charges against Mr. Rosario of leaving the scene of the accident. This mentioned the dog bite. Her supervisor had later told her to destroy it. She denied that this was because of the dog bite, and said it was because her supervisor told her that no charge could be laid against a passenger in a hit and run matter.

[47] Constable Gladney made notes in his notebook about the incident. The only portion dealing with the encounter between Kaiser and Mr. Rosario reads as follows:

At this point, P.S.D. [police service dog] indicated one male hid there and when I instructed him to stand up a second male stood and P.S.D. lunged at him grabbing the front of his sweatshirt. I stood on the debris and piping and was in a position of poor footing halfway down the hill.

Suspect located and taken into custody by Cst. Maillette.

[48] Constable Gladney also completed a Police Dog Service Report regarding the incident, in which he rated Kaiser's performance as "good". This report describes the tracking in some detail, and indicates two males were found hiding in the bramble bush and taken into custody. There is no mention of the encounter between Kaiser and Mr. Rosario, or Mr. Rosario's injuries.

[49] On February 26, 1998, Constable Gladney and Kaiser underwent an Operational Performance-Control Profile by Staff Sergeant Haworth. Constable Gladney testified that he was not certain this assessment was related to the incident with Mr. Rosario. He agreed its purpose was to assess concerns regarding him and Kaiser, and that it accurately set out those concerns. He also testified that he agreed with everything Staff Sergeant Haworth said in the assessment.

[50] The written assessment by Staff Sergeant Haworth is generally commendatory of both Kaiser and Constable Gladney. In an aggression demonstration, it says that Kaiser showed no disobedience or defiance to commands, and released the suspect immediately on command. In its concluding paragraph the report states the following:

Cst. Gladney and Kaiser are an extremely capable team who are operationally sound in their performance. Kaiser is very independent and confident, and if not totally aware of the situation will react without direction in the defence of his handler. Cst. Gladney, very simply must improve his control when in close contact to suspects and remember at all times his dogs understanding of the situation comes first in every scenario. By ensuring Kaiser knows his place and, unless asked, must remain there; will quickly remedy any concerns of undue action [sic].

[51] Mr. Rosario testified that after the incident his shoulder was so painful that he could not move it. He took Tylenol 3 for the first week. It was difficult to sleep. The shoulder was bruised for two to three weeks. Photographs taken 10 days after the incident show a series of gashes from the top of his right shoulder to his armpit, and smaller healing wounds on the top of his right hand. His new job involved heavy lifting, but he was able to perform his duties with some difficulty, mainly using his left arm. He agreed he has been able to continue to do heavy work. However, he experienced pain, which would increase with activity, until mid 1998. By the trial, this had subsided, but he said he still gets a pins and needles sensation, and the shoulder is sensitive to touch. It will not move as quickly as it used to. He is able to work out, and participate in sports, but not as vigorously as before. He displayed his scars during

his testimony. From a distance, one Keloid scar about two inches long stands out. He says he is embarrassed by the scars when he wears clothing in the summer which reveals them, and finds he has to constantly explain them.

[52] Medical reports written in September, 1999 from Dr. Chow, Mr. Rosario's general practitioner, and Dr. Reeybe, a specialist in physical medicine and rehabilitation, were entered in evidence, pursuant to Rule 40A.

[53] Dr. Chow's report indicates Mr. Rosario was seen periodically following the injuries. He says they prevented him from performing his usual activities until October 1997. He was nevertheless encouraged to remain active in order to avoid deconditioning which would delay recovery. By January 26, 1998, Dr. Chow reported Mr. Rosario had a full range of movement in the shoulder with some tenderness and significant scarring still evident. By September 1999, Dr. Chow confirmed a full range of movement, with some tenderness remaining in the location of the scars, and pain on abduction. He describes a remaining partial disability, but says it is unlikely to be of such significance as to cause time away from work. He nevertheless characterizes Mr. Rosario's prognosis as guarded with respect to complete recovery, due to the lack of improvement over the past two years. He expects Mr.

Rosario will continue to experience some stiffness and discomfort which may require mild medication in the future.

[54] Dr. Reeybe saw Mr. Rosario once on March 30, 1999. He reported obvious scarring over the right shoulder, and a small scar on the back of the right hand. He found movement of the shoulder was full but painful, and noted some weakness in the grip of the right hand. He noted he was able to manage a heavy job, despite pain on repetitive movement. He said the scars were still tender, and would be permanent. With respect to prognosis, he said he does not expect other significant physical complications, and anticipated that the pain would gradually improve. He recommended continued activity.

[55] Mr. Rosario seeks an award of \$20,000 for non-pecuniary loss related to his injuries, and special damages of \$45 for his taxi ride home from the hospital, and \$89 for the sweatshirt which was ruined in the attack.

**ISSUES**

[56] During argument, Mr. Rosario's counsel indicated that he had abandoned some aspects of his claim, and the issues were narrowed to the following:

- I. Did the attack by Kaiser on Mr. Rosario constitute an assault?
- II. Did Constable Gladney falsely imprison Mr. Rosario?
- III. Was Constable Gladney negligent in the performance of his duties with respect to Kaiser's attack on Mr. Rosario?
- IV. If the answer to Question III is affirmative, was Mr. Rosario contributorily negligent?
- V. Damages.

**ANALYSIS**

[57] Before embarking on an analysis of the issues outlined above, I make the following observations with respect to the reliability and credibility of the witnesses' evidence.

[58] Mr. Rosario was quiet and soft-spoken. He was clearly affronted by what he views as the unprovoked attack by Kaiser. He described the events with clarity and a degree of outrage. While he was generally credible, he was not forthcoming with respect to some aspects of his evidence. For example, I think it likely he drank more alcohol than he was prepared to admit, based on the time that he and Mr. Owen spent drinking, the fact that they continued to drink in the vehicle after leaving the bar, Mr. Sandhu's account of his encounter with Mr. Rosario, the smell of alcohol which Constable Maillette noted

on Mr. Rosario when she apprehended him, and his behaviour on apprehension, particularly his preoccupation with his shoes. I also find that Mr. Rosario downplayed his activities and those of Mr. Owen which were designed to avoid legal responsibility for their actions, such as removing the bottle from the car, and concealing themselves in the bushes. For example, I do not accept Mr. Rosario's evidence that he stayed with Mr. Owen in the bushes because it was "safer" there, but find this was a decision taken in the hope they would not be detected when the police came to investigate the accident.

[59] I also have some concerns about the reliability of Mr. Rosario's evidence due to his consumption of alcohol, the shock of the accident, and the rapidity with which events unfolded when Constable Gladney and Kaiser arrived on the scene. I cannot accept that Mr. Rosario was able to measure events with the precision he expressed during his evidence. His recollection is at odds with the evidence of all other witnesses on some details such as the uniforms and hats worn by the officers, whether the dog was barking as it approached, and whether he was on flat ground, or in a ditch with Mr. Owen, as related by all other witnesses.

[60] I do not believe Mr. Rosario was deliberately misleading in his account of events, but I conclude that he has to some

extent reconstructed the events in a manner favourable to him. As a result, I question the accuracy of some of his recollections, and weigh his evidence with that in mind.

[61] I approach Constable Gladney's evidence with the same concern about reliability. While I accept that he was attempting to provide the court with an accurate account of the events, by his own admission he was both surprised and confused when he encountered Mr. Rosario, and things moved swiftly. I consider that this has some influence on the accuracy with which he recalls the events, particularly with respect to such matters as precise estimates of distances and times.

[62] Mr. Rosario's counsel argues that an adverse inference should be drawn with respect to Constable Gladney's credibility due to his failure to describe the altercation in his notebook or Police Dog Service Report, as well as his late disclosure of Staff Sergeant Haworth's report. With respect to the latter, Constable Gladney was not asked why this document was disclosed so close to trial, and I am not prepared to draw an adverse inference without having heard his explanation. However, I do find it surprising that he did not describe the incident fully in the notes and report he was required to make at the time. Clearly, this was an unusual

occurrence, and his failure to do so leads me to infer that he felt it reflected negatively on him and Kaiser.

[63] I found Mr. Sandhu credible, although he freely admitted that he had forgotten some of the events with the passage of time. Where he was clear in his recollection, I prefer his evidence to that of Mr. Rosario as to the latter's behaviour after the accident.

[64] I also found Mr. Owen a credible witness. However, I appreciate his recollection was severely limited, due to intoxication and the aftermath of the accident. I weigh his evidence with that reservation.

[65] I found Constable Maillette a credible witness. She gave her evidence in a straightforward manner, which did not appear to favour either Mr. Rosario or Constable Gladney. I draw no adverse inference from the limited account of the event in her notebook, or from her subsequent destruction of the Report to Crown Counsel which dealt with Mr. Rosario. In my view, she provided a plausible explanation for this, and I found nothing else in her evidence to indicate she was other than forthright.

[66] I had some concern about the credibility of Constable McCarthy. He recalled very little of the events. While

Constable Maillette described Mr. Rosario as very upset, Constable McCarthy did not remember that although he dealt directly with Mr. Rosario. Moreover, he testified that he did not know that Mr. Rosario had been bitten by Kaiser. Nor did he recall discussing this with Constable Gladney until some time later, after Mr. Rosario had laid a complaint. I find it difficult to accept that Constable McCarthy did not realize Mr. Rosario had been bitten. His shirt was torn, and he was bleeding. As well, it is difficult to believe that Constable McCarthy, who was in training to be a dog handler, did not discuss the events immediately afterwards with Constable Gladney. Overall, I formed the impression that Constable McCarthy was deliberately limiting his evidence to minimize the negative impact it might have on the issues I must decide.

[67] I return to the issues set out above.

**I. Did the attack by Kaiser on Mr. Rosario constitute an assault?**

[68] I find that Mr. Rosario has failed to establish that the attack by Kaiser constituted an assault.

[69] In order to establish an assault, Mr. Rosario has to prove that Constable Gladney intentionally let Kaiser attack

him. The only evidence in favour of this is Mr. Rosario's own testimony that Constable Gladney "let the dog go", and he heard the leash drop. Constable Gladney described Kaiser's leash and harness in some detail. The leash is 18 feet long, and has a loop which goes around Constable Gladney's wrist. The entire apparatus is made of nylon, with no hardware which would make a noise if it were dropped. Constable Gladney testified that he always keeps the leash around his wrist when Kaiser is tracking.

[70] No one heard Constable Gladney give Kaiser the command "hag", to attack. Constable Gladney denied doing so. Nor was there anything in the events as described by either Constable Gladney or Mr. Rosario which suggested it was necessary for Constable Gladney to order Kaiser to attack.

[71] I find there is insufficient evidence to support Mr. Rosario's contention that Constable Gladney deliberately unleashed Kaiser and ordered him to attack.

**II. Did Constable Gladney falsely imprison Mr. Rosario?**

[72] Mr. Rosario argues that when Constable Gladney told him to stand still at the outset of their encounter, this constituted false imprisonment. I reject that submission. On

Mr. Rosario's evidence, he did not even hear that command. Nor did he obey it. To succeed on this claim, Mr. Rosario must prove total confinement. The evidence falls far short of that.

**III. Was Constable Gladney negligent in the performance of his duties with respect to Kaiser's attack on Mr. Rosario?**

[73] Trained police dogs and their handlers are assets in the work of the RCMP. However, RCMP dog handlers clearly owe a duty to citizens to take reasonable care in controlling and handling their dogs as they perform their duties. The issue here is whether Kaiser's attack on Mr. Rosario constituted a breach of that duty by Constable Gladney.

[74] The only witnesses who were able to describe the attack were Mr. Rosario and Constable Gladney. Their evidence was in accord on one significant point: Constable Gladney did not order Kaiser to attack Mr. Rosario by giving him the command "hag". Instead, Kaiser attacked Mr. Rosario on his own initiative.

[75] On Mr. Rosario's account, he asked Constable Gladney three times if he could move toward the other officers where he felt safer. Constable Gladney gave no verbal response, so Mr. Rosario told him he was going to move, and began to put

his hands down. Constable Gladney shouted "no", and Kaiser attacked Mr. Rosario.

[76] On Constable Gladney's account, he was dealing with Mr. Owen when Mr. Rosario stood up quickly from the bushes and surprised him. Constable Gladney yelled at him to stand still and show his hands. He said both he and Kaiser were confused. Mr. Rosario did not respond to the instructions, but moved closer to Kaiser. His hands were relaxed by his sides. Constable Gladney did not give Kaiser any command. Nor did he pull him back. Kaiser lunged at Mr. Rosario, and Constable Gladney lost his footing, losing control of Kaiser for about 20 to 30 seconds.

[77] Both Mr. Rosario and Constable Gladney agreed that throughout the encounter they were shouting, the dog was barking, and events were moving swiftly.

[78] Considerable documentary and oral evidence was led with respect to the training of police dogs generally, and Kaiser in particular. Both Kaiser and Constable Gladney had completed all levels of training at the time of this incident. Both the dogs and their handlers undergo extensive training in a number of areas, including obedience, criminal apprehension, and controlled aggression. The training manual and records make it clear that maintenance of control over the dog by the

handler at all times is central to this training. In particular, in learning apprehension and aggression, the dogs are taught the "bite and hold" method. With this method, the handler, rather than the dog, makes the decision about how to approach a suspect, and the dog will only grab the suspect with its mouth on the command "hag". The dog does not attack on its own volition. I find this evidence sufficient to establish the standard of care expected of RCMP dogs and their handlers, and find that standard includes control of the dogs at all times. The dogs are to attack only on the command of their handlers.

[79] I accept that events moved quickly during the confrontation with Mr. Rosario, but I can find nothing which Mr. Rosario did on his account, or on the account of Constable Gladney, to justify the attack by Kaiser. Mr. Rosario did not present any imminent threat. His arms were either above his head, or by his side in a non-threatening manner. Constable Gladney did not say that he saw anything in his hands to suggest he was armed. The fact that Constable Gladney did not give the order "hag" indicates that he did not perceive Mr. Rosario to be a threat. I do not accept the defence contention that Mr. Rosario deliberately walked into Kaiser. It is possible he was unsteady on his feet due to the loss of

his shoe, the uneven footing in the area, and the effect of alcohol and shock from the accident. I accept that he may have made some minor inadvertent movement toward Kaiser, but I find it unlikely he would purposely walk toward a large, agitated German Shepherd. I find instead that the gap between Mr. Rosario and Kaiser was closed when Kaiser lunged toward Mr. Rosario of his own accord.

[80] I find that this action by Kaiser was essentially the "find and bark" method of apprehension, in which the dog, rather than the handler, decides whether to bite a suspect. This method is specifically not taught by the RCMP. It is contrary to Kaiser's training. In this instance, the effect of his lunge was compounded by the fact that it caused Constable Gladney to lose his footing, and he was unable to regain control of Kaiser quickly, prolonging the attack.

[81] I appreciate that both Constable Gladney and Kaiser were confused. However, in my view that does not excuse the failure to maintain control of the dog. I would think control remains particularly important during moments of confusion and surprise if innocent civilians are to escape unnecessary attacks from police dogs.

[82] Moreover, other options were open to Constable Gladney before Kaiser lunged. He could have given him the commands

"heel" or "down" before the attack, which would have had the effect of bringing Kaiser under control while he remained in the vicinity of Mr. Rosario and Mr. Owen. Constable Gladney could also have pulled Kaiser back and waited for the arrival of Constables Maillette and McCarthy who were close at hand.

[83] I find that Constable Gladney's inability to control Kaiser in these circumstances, and the resulting attack on Mr. Rosario, amount to a breach of the standard of care expected of police dog handlers and their dogs.

[84] I find support for that conclusion in the fact that Constable Gladney chose not to reveal the extent of the attack in his notes of the event, or in the Police Dog Service Report which he was required to complete. There is no doubt that he knew Mr. Rosario had been bitten by Kaiser, and suffered injuries. This was an unusual and significant event, and his failure to record it indicates to me that he knew it should not have happened, and he did not want it known. As well, his comment after the attack to Mr. Rosario, to the effect that he should back off or he would be bitten again, was inappropriate. It suggests a defensive response characteristic of someone who knows his dog has behaved badly and inappropriately.

[85] Finally, I note the evaluation done of Constable Gladney and Kaiser by Staff Sergeant Haworth in February 1996. I appreciate Staff Sergeant Haworth did not give evidence, but Constable Gladney testified that he agreed with everything in the assessment. The only critical comment in it exhorts Constable Gladney to improve his control of Kaiser when he is in close contact to suspects, to remedy any concerns of undue action. This also supports the conclusion that the dog's behaviour with Mr. Rosario breached the expected standard of care.

[86] Accordingly, I find Constable Gladney was negligent in failing to maintain control over Kaiser through his dealings with Mr. Rosario, and I find that negligence caused Mr. Rosario's injuries.

**IV. Was Mr. Rosario contributorily negligent?**

[87] The defendants argue that Mr. Rosario was contributorily negligent in three respects:

- (a) he concealed himself in the bushes;
- (b) he violently resisted lawful arrest;

- (c) he walked into the police dog against the direct commands of Constable Gladney.

[88] I find that Mr. Rosario's actions in leaving the scene of the accident, removing the bottle, rudely refusing the assistance of Mr. Sandhu and his friends, and remaining in a dark and concealed area with Mr. Owen, all lead to the conclusion that both Mr. Rosario and Mr. Owen were attempting to avoid police detection. I reject Mr. Rosario's evidence to the contrary. It makes no sense that the hidden area of the ditch was "safer" as he testified, or that he was better able to help Mr. Owen by hiding with him, instead of alerting the police to his whereabouts. Constable Maillette was present at the scene of the accident for some time before Constable Gladney and Kaiser arrived. She and her police vehicle would have been easily visible if Mr. Rosario looked out of the ditch. Yet Mr. Rosario did not approach her to alert her to their whereabouts. It was only when Kaiser began to track them, and detection became inevitable, that Mr. Rosario revealed himself to the police. At that point he may well have intended to co-operate with the police, but his earlier actions had already led Constable Gladney to conclude that he was dealing with people who were deliberately attempting to evade the police. During submissions, Mr. Rosario's counsel

stated that Mr. Rosario and Mr. Owen should not have been doing what they were doing. I agree with that statement.

[89] There is no evidence of violent resistance to arrest by Mr. Rosario, and I reject any suggestion of contributory negligence on that ground.

[90] I have found that Mr. Rosario did not walk into Kaiser. However, on his account of the events, Kaiser was close to him, agitated and barking. Mr. Rosario says he asked Constable Gladney's permission to move away several times, and receiving no response, moved away. I think a reasonable person in this situation would have awaited some assurance that the dog was under control before moving away.

[91] During his testimony, Constable Gladney stated that the way a track ends is left to his discretion as the dog handler, but the suspect has input as well. Here, I find that Mr. Rosario was partly at fault for the events which led to his injuries.

[92] The case of *C.(T.L.) v. Vancouver (City)* (1995), 13 B.C.L.R. (3d) 201 (B.C.S.C.), also involved circumstances in which a police dog bit a suspect during apprehension. There, the court found the plaintiff 50 per cent at fault as the plaintiff was in the midst of committing a crime when the

police officer and dog found him. In my view, Mr. Rosario's share of the responsibility should not be that significant on these facts. Accordingly, I find Mr. Rosario 25 per cent at fault, and the defendants 75 per cent at fault.

**V. Damages**

[93] Both parties have presented cases dealing with quantum for non-pecuniary loss in similar fact situations. In *LeBlanc v. Leger*, [1995] N.B.J. No. 5 (Q.B.), injuries from a dog bite resulted in permanent scars and complaints of pain and weakness four years after the accident, and \$20,000 was awarded for non-pecuniary loss. In the dog attack reported in *C.(T.L.) v. Vancouver (City)*, *supra*, the plaintiff suffered a broken arm and painful scars on both legs. There the court also awarded \$20,000 for non-pecuniary loss.

[94] In my view, Mr. Rosario's injuries are not as serious as those described in these two cases, and \$15,000 would be an appropriate award for non-pecuniary loss.

[95] Mr. Rosario will also recover special damages in the amount of \$134, being the cost of the taxi from the hospital, and the sweatshirt ruined in the attack.

[96] Pursuant to s. 21 of the **Police Act**, R.S.B.C. 1996, c. 367, the defendant, the Attorney General of British Columbia is responsible for the damages arising from the actions of Constable Gladney, and judgment is accordingly ordered against that defendant for 75 per cent of \$15,134.

[97] Liability for costs will be in the same proportion as the respective liability of the parties, in accordance with s. 3 of the **Negligence Act**, R.S.B.C. 1996, c. 333.

"Neilson, J."