

**IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE**

**CRI-2022-463-000110
[2023] NZHC 723**

IN THE MATTER of s 58 of the Dog Control Act 1996

BETWEEN TAURANGA CITY COUNCIL
Appellant

AND HELEN TINA FRASER
Respondent

Hearing: 3 April 2023

Appearances: J L Libbey for Appellant
Respondent in person

Judgment: 4 April 2023

JUDGMENT OF BREWER J

This judgment was delivered by me on 4 April 2023 at 10 am

Registrar/Deputy Registrar

Solicitors:
Rice Speir (Auckland) for Appellant
(Copy to Respondent in person)

Introduction

[1] On 12 July 2022, Judge IDR Cameron dismissed a charge laid against Ms Fraser under s 58 of the Dog Control Act 1996 by the Tauranga City Council (the Council).¹ Section 58 provides:

The owner of any dog that attacks any person or any protected wildlife and causes—

- (a) serious injury to any person; or
- (b) the death of any protected wildlife; or
- (c) such injury to any protected wildlife that it becomes necessary to destroy the animal to terminate its suffering,—

commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 years or a fine not exceeding \$20,000, or both, and the court shall, on convicting the owner, make an order for the destruction of the dog unless satisfied that the circumstances of the attack were exceptional and do not justify destruction.

[2] The offence created by s 58 is an offence of strict liability. Only a complete absence of fault will excuse the owner of a dog which causes serious injury to a person.

[3] Ms Fraser’s dog, a two year old Rottweiler weighing some 50 kilograms, did cause serious injury to a person. The dog, “Chopper”, bit a veterinary surgeon on the arm fracturing the ulnar.

[4] Judge Cameron found a total absence of fault on the part of Ms Fraser and dismissed the charge accordingly.

[5] The Council applied for leave to appeal Judge Cameron’s decision, and leave was granted by Wylie J on 3 November 2022. The point of appeal identified by Wylie J is:

Did the Judge’s finding that the victim was in effective control of the situation at the time of the attack lead the Court into error in its assessment of the total absence of fault defence?

[6] This Judgment decides the appeal.

¹ *Tauranga City Council v Fraser* [2022] NZDC 12499.

Background

[7] In October 2021, Ms Fraser arranged with a veterinary clinic to take Chopper there to be neutered. He had not been to that clinic before. Ms Fraser gave evidence that when she telephoned the veterinary clinic to make the appointment she told the nurse that Chopper was wary of small dogs and anxious in unfamiliar surroundings and with persons he had not previously met.

[8] Ms Fraser drove with Chopper and her 13 year old son to the veterinary clinic on the morning of 14 October 2021. On arrival she went into the clinic and uplifted the necessary paperwork. Ms Fraser went back to the car and she let Chopper out into the carpark because he was slobbering all over her 13 year old son. Chopper was on a leash and Ms Fraser walked him around parts of the carpark. At one point she noticed a small dog and so she changed direction and diverted Chopper down the side of a building to avoid any confrontation.

[9] Ms Fraser was expecting the veterinary surgeon to come out into the carpark to assess how they would deal with Chopper. But after some 20-25 minutes that had not happened and so Ms Fraser decided to go back to the clinic building to inquire about the delay and return the completed paperwork. She left Chopper outside the car and gave his leash to her 13 year old son.

[10] As Ms Fraser walked towards the clinic building the victim, Dr Schneider, came out to the carpark. Dr Schneider was wearing a Covid mask. Ms Fraser's evidence was that Dr Schneider greeted her in a loud voice and walked towards the 13 year old and Chopper "yelling" a greeting to the 13 year old. It was then that Chopper lunged at Dr Schneider twice, the second time biting her arm. Ms Fraser took immediate action to cause Chopper to release his grip and she was able to get the dog back in the car.

[11] Judge Cameron blamed Dr Schneider for the attack:

[22] In the result, I consider that Dr Schneider was responsible for determining how the situation should be handled from the moment she walked out of the clinic and saw Chopper out of the car. From that point she was in a position to take appropriate steps to maintain and exercise control. She failed though to take any steps to maintain and exercise control, despite having every

opportunity to do so. Had she done so, the incident would have been avoided. I consider that Dr Schneider put herself in a position where she was vulnerable to attack by a dog who had not been assessed for safety purposes.

The appeal

[12] The Council submits that Judge Cameron reversed the test for total absence of fault. He focused on what Dr Schneider did or did not do instead of taking account of what Ms Fraser, as Chopper's owner, did or did not do.

[13] The Council submits that the Judge should have held that, knowing that Chopper was anxious in unfamiliar places and dealing with unfamiliar persons, Ms Fraser should have kept Chopper in the car or, at the very least, herself have kept control of Chopper by holding on to his leash and sending her 13 year old son into the clinic to make inquiries about when the veterinary surgeon would come out.

[14] Ms Fraser, in submissions on her own behalf, squarely blames Dr Schneider for Chopper's attack, submitting that Dr Schneider must be held accountable for her negligence. Ms Fraser, despite me making the issue clear to her, appeared unaware that it was her behaviour which was under scrutiny.

Decision

[15] I agree with the Council. Judge Cameron erred in his consideration of the test.

[16] The onus was on Ms Fraser to prove that she was totally without fault. In other words, that there were literally no practical steps she could have taken to avert the attack. The Council's submissions summarise the law:

10 The High Court in *Walker v Nelson City Council*² considered the high bar for the defence of total absence of fault. In summary:

- a. "It is important not to confuse strict liability with negligence by importing into the absence of fault defence, notions of reasonableness. Total absence of fault is a threshold that is a good deal higher than behaviour which is reasonable in the circumstances. The bar is set so high because strict liability offences are designed to privilege the protection of public welfare over other interests involved";³

² *Walker v Nelson City Council* [2017] NZHC 750.

³ At [22].

- b. “Total absence of fault requires a consideration of all circumstances. [Williams J found this to mean that], considering all the circumstances, the law requires there to be literally no practical step the applicant [here, the respondent] could have taken to avert the attack”,⁴
- c. “Total absence of fault does not mean that the owner must remove any possibility of any kind of attack no matter how remote that possibility might be, before being able to access that defence”.⁵

11 More recently, the High Court in *Haenga v Porirua City Council*⁶ established that “ultimately, it is irrelevant, in terms of criminal responsibility, whether the dog was under control, or not, at the time of an attack. The central question will be whether a defendant can prove they took all reasonable steps to prevent an attack” and as such the actus reus of the offence is not something for which they are at fault.

[17] It was irrelevant whether Dr Schneider could have acted differently, thus making the attack on her less likely. It was irrelevant whether Dr Schneider was responsible for determining how the situation should be handled. It was irrelevant whether Dr Schneider put herself in a position where she was vulnerable to attack by a dog who had not been assessed for safety purposes.

[18] Ms Fraser could have taken two simple steps. She could have kept Chopper in the car. Or, and this might not have been enough, she could have kept physical control of Chopper herself rather than leaving the dog with her 13 year old son.

[19] It follows that I answer the issue on appeal, “Yes”.

Result

[20] The appeal is allowed.

[21] The Judge’s dismissal of the charge is quashed.

[22] I enter a conviction against Ms Fraser.

⁴ *Walker*, at [23].

⁵ At [25].

⁶ *Haenga v Porirua District Council* [2021] NZHC 1549 at [32].

[23] I remit the case back to the District Court for sentencing.

Brewer J