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

**I TE KŌTI MATUA O AOTEAROA**
**WHAKATŪ ROHE**

**CRI-2021-442-2**
**[2021] NZHC 652**

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| UNDER | Section 229(1) of the Criminal Procedure Act 2011 |
| IN THE MATTER | of an appeal against conviction under the Dog Control Act 1996 |
| BETWEEN | DONNA MARY NEWLANDS<br>Appellant |
| AND | NELSON CITY COUNCIL<br>Respondent |

Hearing: 3 March 2021 (AVL); further material received 25 March 2021

Counsel: Appellant in person
G A Rainey for Respondent

Judgment: 29 March 2021

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**JUDGMENT OF ELLIS J**

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[1] Ms Newlands was convicted of two charges under the Dog Control Act 1996 (the DCA), namely being the owner of a menacing dog (an American Pitbull Terrier named Baloo) that:

(a) contrary to s 33E(1)(a) of the DCA, she allowed to be at large in a public place without a muzzle; and

(b) contrary to s 57 of the DCA, attacked a domestic animal—a Papillon named Jasmine.

[2] Ms Newlands pleaded guilty to the former charge and not guilty to the latter. But Judge Tuohy in the District Court found the second charge proven.[1] He sentenced Ms Newlands to pay $1,000 emotional harm reparation to Jasmine's owner, and he ordered that Baloo be destroyed.

[3] Ms Newlands now appeals both her conviction and sentence on the "attack" charge, but her principal focus is on overturning the destruction order. To succeed in that endeavour, she must either prevail in her conviction appeal or persuade the Court that Judge Tuohy was wrong to find that there were no exceptional circumstances that would warrant declining to make such an order.

**Facts**

[4] The facts as found by Judge Tuohy can be briefly stated.

[5] There is no dispute that Ms Newlands was Baloo's owner. On 17 December 2018 she took Baloo to Cable Bay. By dint of his breed, Baloo is classified as a "menacing" dog, so he is required to be muzzled in all public places. But on this occasion, Baloo was unmuzzled; Ms Newlands was planning to take him for a swim.

[6] Jasmine was with her elderly owner and other members of her family, nearby. The owner's daughter, Ms Vine, was sunbathing on the beach when she was roused by the growl of one dog and the yelp of another dog. When she looked up, she saw Baloo holding Jasmine by her back leg in his mouth.

[7] The family managed to extricate Jasmine from Baloo's grip. Her leg was bleeding. They wrapped Jasmine in a towel and drove to the vets. But Jasmine—who was 13 years old—died (most likely of shock) during the journey.

**Conviction decision**

[8] The Judge began by noting that in order for Ms Newlands to be convicted of the charge under s 57, it had to be proved that:

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1 *Nelson City Council v Newlands* [2020] NZDC 26674.

(a) she was Baloo's owner at the relevant time; and

(b) Baloo attacked Jasmine.

[9] If those two things were established, then the only defence available to Ms Newlands was if she could demonstrate total absence of fault on her part.

[10] As I have said, there was no dispute as to Baloo's ownership. As to whether Baloo had "attacked" Jasmine, the Judge said:[2]

> [9] What is meant by the word "*attacked*" the section is not defined, but it has been the subject of elucidation in a number of High Court cases. One often quoted is the decision of Miller J in the case of *Turner v South Taranaki District Council*. Miller J said this at paragraph [21] of that judgment:
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> > [21] "Attack" is undefined but the Act distinguishes among attacks and "rushing at" and worrying, and it insists that dogs that have attacked be muzzled in public, suggesting one would expect that attacks usually involve actual or attempted biting. Physical contact between dog and victim will suffice so long as it results from deliberate aggressive action. The legislation thus recognises that dogs are sentient creatures and that from a dog's perspective, contact need not always signify hostility.
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> …
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> [11] In an earlier case, *Jack v Manukau City Council* in 1999, Randerson J said that an attack requires some form of physical contact or injury between the dog and the person or domestic animal in question but that alone is not necessarily enough. An attack involves deliberate aggressive action on the dog's part. So that is the definition which I apply in considering whether the evidence in this case establishes that Baloo attacked Jasmine.

[11] After recounting Ms Vine's evidence (which was to the effect I have summarised above), the Judge noted that Ms Newlands' account differed in significant respects. He said:

> [21] She let Baloo off the leash when they reached the beach. She said that a small dog, which obviously was Jasmine, ran out towards Baloo "*yapping*", to use Ms Newlands' words. She said that Baloo sniffed it, was not interested and went down to the water with the small dog still following her yapping. She said the small dog, Jasmine, got between her and Baloo. She said that Baloo "*told it off*", to use her words, which in cross-examination was explained as "*growled*", so I took it that Baloo growled at Jasmine, but she said that Baloo did not attack Jasmine.

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2 Footnotes omitted.

> [22] She described what happened as Baloo picking up Jasmine and putting her down to one side. She said that Jasmine was crying so she picked her up. She said that then a woman, obviously Ms Vine, came screaming at her, took the dog out of her arms. She said that she got some of its blood on her shorts when she picked it up. She said the dog had a slight wound and it was ripped from her arms. She also said the old lady, meaning I think Ms Vine's mother, and the niece both apologised to her and that each party apologised to the other.

[12] The Judge concluded that he was satisfied beyond reasonable doubt that an attack was proved, reasoning:

> [24] Although Ms Vine's evidence was emotive in part, with use of words like "*an anguished yelp"* and "*the towel being drenched with blood"*, I do not think that she could be mistaken about having to pull Jasmine from Baloo's jaws. I prefer her evidence about what happened to that of Ms Newlands, who obviously cares deeply for her dog and I am sure is aware that the life of the dog is on the line in this case.
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> [25] The fact is also that there can be no doubt that Jasmine's wounds, even if they might be described as *"superficial"*, must have been caused by Baloo's teeth, in other words, by Baloo biting her. A dog can pick up an object and can engage in rough play either with another dog or with a human using its mouth without biting the object or the person or the dog with whom it is engaging. Ms Newlands herself confirmed that Baloo is capable of picking things up with her mouth without biting them.
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> [26] I am satisfied that Baloo did bite Jasmine and I am satisfied that he was holding Jasmine in his jaws and that Ms Vine had to pull Jasmine from his jaws. So I am satisfied that Baloo did attack Jasmine in the sense intended by s 57. She growled at her and then she took her into her jaws and bit her back leg sufficient to cause bleeding and it seems an obvious and proper inference that it was that action on Baloo's part which led to Jasmine's death.

[13] As to possible defences, the Judge addressed Ms Newlands' submission that s 57 did not create a strict liability defence and also her submission that such an offence was contrary to the presumption of innocence, the New Zealand Bill of Rights Act 1990, and the Supreme Court's decision in *R* v *Hansen*.[3] But he said:

> [31] To put it bluntly, the submission made is simply untenable and in the face of long established authority in the both the High Court and the Court of Appeal, which is binding on this Court, that this is a strict liability offence. I need only mention a few cases but every single case that I have ever heard of under this provision has proceeded on the basis that this is a strict liability offence.

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3 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

[14] He referred, in particular, to the decisions of the Court of Appeal in *Auckland Council v Hill* and *Epiha v Tauranga City Council* and to the decision of this Court in *Walker v Nelson City Council*.[4]

[15] As to the defence of total absence of fault, he said:

> [37] I turn to the potential defence that is available, total absence of fault. Unfortunately, this cannot possibly succeed in this case. The fact that Ms Newlands took a dog classified as a menacing dog onto a beach, to which the public had access, and were in fact present, without a muzzle, which is itself an offence, and then let it off the leash so that it was uncontrolled, demonstrates some degree of fault. Her plea of guilty to the charge under s 33E is an admission of that fault or at least one aspect of it.

*The destruction order*

[16] The Judge noted that the consequence of a conviction under s 57 is that, by virtue of subs (3), the Court must make an order for destruction of the dog unless it is satisfied that the circumstances of the offence were exceptional. He referred again to the Court of Appeal's decision in *Hill*, where the Court of Appeal said:

> [5] The first step in applying s 57(3) is to identify the relevant circumstances of the offence. What happened? This inquiry should focus on the immediate circumstances of the attack itself. The dog's history does not form part of the circumstances of the offence. Events that occur after the offence is complete—that is, after the attack occurs—also are not circumstances of the offence. The phrases "circumstances of the offence" and "circumstances of the attack" are equivalent in this context.
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> [6] The second step is for the court to ask whether the circumstances of the offence were exceptional and do not warrant destruction of the dog. Section 57(3) proceeds on the basis that the attack of itself establishes that there is a risk of the dog attacking again in similar circumstances. The focus is on whether those circumstances were sufficiently exceptional that that risk is remote, and does not justify destruction of the dog in the interests of public safety.
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> [7] It is not open to the dog's owner to argue that the dog can be expected to behave differently in similar circumstances in the future—for example, as a result of post-attack training. Rather, the focus is on the risk that the dog poses to people and animals assuming it can be expected to behave in the same way in similar circumstances.
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> [8] Nor is it open to the owner to argue that the s 57(3) test is met because the attack was caused or contributed to by a one-off failure by the owner to maintain effective control of the dog. Failures to control a dog are not

[4] *Auckland Council v Hill* [2020] NZCA 52; *Epiha v Tauranga City Council* [2017] NZCA 511; and *Walker v Nelson City Council* [2017] NZHC 750.

> exceptional circumstances of a kind that indicate that destruction of the dog is not warranted.
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> [9] Circumstances that were not exceptional at the time the attack occurred cannot become exceptional as a result of post-attack events. If there was nothing exceptional about the circumstances of the attack when they occurred—nothing out of the ordinary which can be identified as a relevant factor in the attack—the s 57(3) exception does not apply. In particular, assurances given by the current owner about the future management and control of the dog are not relevant to the s 57(3) inquiry.

[17] Applying these dicta to the case before him, the Judge concluded that there were no exceptional circumstances of the requisite kind. He made a destruction order accordingly.

## The appeal

[18] As noted earlier, Ms Newlands' appeal had two essential strands. The first was to impugn her conviction by arguing both that there was no "attack" by Baloo and also that the offence created by s 57(2) of the DCA was not one of strict liability. And the second involved the contention that the circumstances of the offence were exceptional and do not warrant the destruction of Baloo.

## Conviction appeal

*No "attack"?*

[19] Ms Newlands' primary position was, as it had been in the District Court, that Baloo had merely picked up Jasmine in his mouth and "put her to one side", and that this could not constitute an "attack". She also submitted—in material I permitted her to file after the hearing—that there were inconsistencies between Ms Vine's account of relevant events and her subsequent victim impact statement, particularly in terms of the seriousness of Jasmine's injuries.

[20] But on this point (as on all others), the Judge's reasoning is unimpeachable. Even putting his credibility findings to one side, there can be no dispute that Jasmine was at some point in Baloo's mouth and that, as a consequence, her leg was bleeding. The only available inference is that Baloo bit her. And that plainly suffices as an "attack" for the purposes of s 57(2).

*Section 57: a strict liability offence?*

[21] Ms Newlands contends that s 57 does not create a strict liability offence but rather one that requires proof of negligence. Notwithstanding her very able submissions in support of that proposition, there are some fundamental difficulties with it.

[22] The first is that I, like the District Court Judge, am bound by higher authority. I need refer only to the decision in *Epiha*, where the Court of Appeal said:

> [6] We agree with Woodhouse J that an offence under s 57(2) of the Act is one of strict liability. As he observed, the High Court has consistently followed this approach with respect to the offences in ss 57 and 58 of the Act. Apart from one decision concluding that the offence imposed absolute liability, it seems the strict liability analysis extends back at least as far as 1984 (in the context of the former legislation).
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> [7] We consider that this long-standing approach is clearly correct. This is a classic public welfare offence directed at protecting the public interest. There is no express mens rea element in the section. Once the prosecution has proved that the defendant is the owner of the dog that has attacked a person, the onus shifts to the defendant to prove total absence of fault on the balance of probabilities.

[23] The second is that Ms Newlands' specific contentions have already been addressed in the context of her application for leave to appeal the District Court's refusal to determine the question of strict liability in advance of trial.[5] Although she ultimately declined leave, Cull J canvassed Ms Newlands' submissions in some detail. She, too, concluded that she was bound by *Epiha*. And so did Associate Judge Lester when he struck out Ms Newlands' application for a declaration on the same matter.[6]

[24] Although that suffices to deal with this aspect of the appeal, I note that in the Supreme Court's leave decision in *Shepherd v Auckland Council* (issued after the Court of Appeal's decision in *Epiha*) it was acknowledged that the question of strict liability under the DCA has not yet been considered by that Court.[7] That consideration may yet occur.

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5 *Newlands v Nelson City Council* [2019] NZHC 1692.
6 *Newlands v Nelson City Council* [2020] NZHC 447.
7 *Shepherd v Auckland Council* [2018] NZSC 25 at [7].

[25] But as in *Shepherd*, the difficulty faced by Ms Newlands here is that even if s 57 *did* require proof of negligence, she would have been convicted in any event. As the District Court Judge also recognised, the reality here is that Baloo was required by law to be muzzled and he was not. And, regrettably, the fact that Ms Newlands had removed his muzzle so that Baloo could go for a swim cannot justify that compliance failure and would, necessarily, qualify as an absence of reasonable care.

[26] The conviction appeal must fail, accordingly.

**Were the circumstances of the offence exceptional?**

[27] The Court of Appeal in *Hill* stated that in order to determine whether there are any relevant exceptional circumstances, the circumstances themselves must first be identified.[8] Here, the relevant circumstances were that:

(a) Baloo was unmuzzled in a public place, where he was likely to encounter other dogs (and people); and

(b) when confronted by a smaller dog, Baloo attacked (bit) that dog.[9]

[28] The Court then made it clear that in determining whether the identified circumstances were exceptional (such that they do not warrant destruction of the dog), the focus must be on "whether those circumstances were sufficiently exceptional that that risk is remote".[10] That is because the underlying assumption is that the dog will behave the same way in similar circumstances.[11]

[29] If that analysis is applied here, there is no escaping the conclusion that the relevant risk is not remote. In the event that the same circumstances were to arise again (namely Baloo being unmuzzled in a public place and confronted by another dog), there is simply nothing to suggest that the ensuing events would be any different.

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8 *Hill,* above n 4, at [5].

9 Despite Ms Newlands' suggestion to the contrary, there is nothing to suggest that Baloo was acting in "self-defence", although I would be inclined to accept that Jasmine may well have barked or yapped at him (as small dogs often do, when encountering a larger one).

10 At [6].

11 At [7].

Accordingly, I agree with the District Court Judge that there is no basis for concluding that that destruction of the dog is not necessary, to remove the risk of a future attack.

**Result**

[30] While I necessarily have considerable sympathy for Ms Newlands' position and the distress this causes her, the appeal must be dismissed, for the reasons I have given.

Rebecca Ellis J

Solicitors:
Tasman Law, Nelson for Respondent