IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CRI-2020-91-972
[2021] NZHC 1549

	BETWEEN	LEE RAYMOND HAENGA Appellant
	AND	PORIRUA CITY COUNCIL Respondent

Hearing: 16 June 2021

Appearances: S J Fraser for Appellant
H P Harwood and O J Maassen for Respondent

Judgment: 25 June 2021

JUDGMENT OF ISAC J

Introduction and summary

[1] Chop is a Pitbull Staffordshire cross. At Mr Haenga's call, Chop attacked a person causing him serious injury. Mr Haenga was convicted after a defended hearing of an offence under s 58 of the Dog Control Act 1996 (the Act). As part of Mr Haenga's sentence, the District Court made an order for Chop's destruction.

[2] Mr Haenga now appeals against both conviction and sentence. He says:

(a) the District Court was in error in finding that Chop was not under Mr Haenga's control at the time he attacked and bit the victim. Relying on *Hamilton City Council v Fairweather*,[1] Mr Haenga says that where a dog is under the control of its owner at the time it attacks, there is no offence committed under the Dog Control Act;

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1 *Hamilton City Council v Fairweather* [2002] NZAR 477 (HC).

(b) in relation to sentence, the District Court was wrong to find that there were not exceptional circumstances of the offence such that the order for Chop's destruction should not have been made.

[3] I have concluded that the conviction and sentence appeal should be dismissed. In summary the reasons are:

(a) The element of "control" considered in *Fairweather* has not been adopted in a line of subsequent High Court authorities. I prefer the reasoning and conclusions of the subsequent cases. Parliament cannot have intended that an animal owner who ordered a dog to attack another person could avoid criminal responsibility under the Dog Control Act by reason of having the dog under their control.

(b) There were no exceptional circumstances relating to the offence that warrant departure from the requirement for destruction of the dog. Chop was called upon by the appellant to intervene in a physical altercation Mr Haenga had begun and at a time when Mr Haenga was in the dominant position. Chop attacked the victim as he lay prone on the ground, with Mr Haenga on top of him. The attack was to the head and caused a disfiguring injury despite the victim's efforts to protect himself. It is fortunate that the injuries were not life threatening. What Chop perceived of the situation at the time he intervened in the altercation is not an enquiry that is open to the Court.

Background

[4] There is no dispute about the circumstances of the offending. They are accurately set out in the conviction judgment of the District Court.[2]

[5] At 10 pm on 7 November 2019 at a property in Whitby, the victim was at home making a bottle of milk for his eight-month-old daughter. He was in a relationship with Mr Haenga's daughter.

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2 *Porirua City Council v Haenga* [2020] NZDC 22438 [*Conviction decision*].

[6] Mr Haenga arrived at the victim's property very intoxicated.[3] He began accusing the victim of stealing his fishing gear. The argument escalated. Mr Haenga slapped the victim on the face, and the victim struck him back. A tussle ensued during which the victim ended up on the ground in the kitchen with Mr Haenga on top of him.[4]

[7] While Mr Haenga had the victim on the ground, he called to Chop, who was in a spare room. Chop came running into the kitchen.[5]

[8] As Chop approached the victim, the victim moved his arm to cover the side of his head from attack. The victim saw the dog coming at his face, and at that point, Chop bit the victim's earlobe, tearing part of it off.[6] The victim managed to get Mr Haenga off him and stood up, and the dog returned to the spare room.

[9] Mr Haenga was then heard by the victim to say "Good boy!" to Chop.

[10] Mr Haenga's daughter, who had seen or heard some of the altercation, then called the police.[7] When they arrived, Mr Haenga and the dog ran away.

[11] The victim spent a day in hospital and was permanently disfigured as a result of the attack. Unsurprisingly, the incident has left the victim with lasting physical and psychological injuries.[8]

[12] Mr Haenga was charged with being the owner of a dog that attacked a person causing them "serious injury", contrary to s 58(1) of the Act. In the alternative, he was also charged with an offence under s 57(1), which makes it an offence to be the owner of a dog which simply makes an attack on a person. The difference between the two provisions is the requirement under s 58 for serious injury.

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3 At [11].
4 At [12].
5 At [12].
6 At [13].
7 At [15].
8 At [20].

The District Court's judgments

[13] In an oral judgment following conclusion of the evidence the Judge noted the offences were ones of strict liability. He then correctly identified the elements of the offences.[9]

[14] Mr Haenga did not give evidence, and so the trial turned on the Judge's assessment of the victim's evidence. The Judge found the victim was a credible and accurate witness, and:[10]

> …the evidence from [the victim] was in no way undermined in cross-examination. He was not under the influence of alcohol; he certainly was not questioned about that. In my view, he is an honest and forthright witness, and I accept all of the evidence he gave without hesitation.

[15] Having done so, the Judge rapidly concluded that Chop had attacked the victim, and that the injury caused was "serious harm". As Mr Haenga had subsequently become the registered owner of the dog, the Judge also readily found that he was Chop's owner at the time of the attack. Accordingly, all of the elements of the offence under s 58 had been established beyond reasonable doubt.[11]

[16] In a later sentencing decision,[12] the Judge rejected the appellant's submission that Chop was under the appellant's "control" at the time of the attack and, accordingly, the circumstances of the attack were truly exceptional and unlikely to be repeated given Chop would no longer be in Mr Haenga's care.[13] The Judge noted the fact Chop was prepared to attack and injure a person at the instruction of his owner was unequivocal evidence that the dog was unsafe to live in the community.[14]

[17] The Judge then ordered Mr Haenga to: pay reparation to the victim and solicitor's costs, serve 80 hours' community work and nine months' supervision, and

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9 At [4], [6]–[7].
10 At [32].
11 Those elements were first, that Mr Haenga was the owner of Chop; second, that Chop attacked the victim; and third, that Chop's attack had resulted in serious harm to the victim.
12 *Porirua City Council v Haenga* [2021] NZDC 8620 [*Sentencing decision*].
13 At [15].
14 At [17]. The Judge went on to note, at [18], that he did not intend to imply in the *Conviction decision* that the dog was under Mr Haenga's control at the time he attacked the victim.

prohibited him from owning a dog for five years pursuant to s 25 of the Act. Mr Haenga was also fined $500.

[18] An order for Chop's destruction was made under s 58, the Judge having found there were no exceptional circumstances relating to the attack.

Approach on appeal

[19] An appeal against conviction entered following a Judge-alone trial will only be successful if the appeal court finds that the trial court erred in its assessment of the evidence to such an extent that a miscarriage of justice has occurred, or that "a miscarriage of justice has occurred for any reason".[15]

[20] In *Sena v New Zealand Police* the Supreme Court examined the role of s 232(2)(b) and the general function of an appellate court.[16] The Court held that if an appeal court comes to a different view from that of the trial judge on the evidence, it follows that the lower court has erred and the appeal must to be allowed.[17] This approach does not mean the role of the appellate court is to consider the issues de novo as if there had been no hearing at first instance. It remains for the appellant to show that an error has been made, and in assessing whether there has been an error, an appellate court must take into account any advantages a trial judge may have had.[18]

Conviction appeal

Mr Haenga's argument

[21] For Mr Haenga, Mr Fraser argued that the evidence in the District Court established that Chop was under the appellant's control at the time he attacked the victim. He submitted the findings of the District Court in the conviction decision confirmed this, even though in the sentencing decision the Judge endeavoured to disavow having made any such finding.

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15 Criminal Procedure Act 2011, s 232(2)(b) and (c). Section 232(4) states a miscarriage of justice means any error, irregularity, or occurrence in relation to the trial that has created a real risk that the outcome of the trial was affected, or which resulted in an unfair trial.

16 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575.

17 At [38].

18 At [38].

[22] The element of control is important, it is said, because in *Fairweather*, Baragwanath J held that if a dog attacked while it was under control, no offence was committed under the Act.[19] Conversely, where a dog was not under control at the time of an attack, the owner was automatically responsible as a matter of absolute liability:[20]

> For the reasons that follow I reject the Council's first argument but accept the second. I hold that *an owner is automatically liable for a dog attack if the dog is not under control. But if the dog attacks while it is under control, no offence is committed*. Since the Council has conceded that the dog was at all times under control Dr Fairweather committed no offence and the Council's appeal against his acquittal must be dismissed.
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> (my emphasis).

[23] Mr Fraser then went on to note in detail aspects of the District Court's decisions which, he says, reflect an implicit, if not explicit, finding that Chop was under control at the time of the attack. He says that while later High Court decisions had declined to follow *Fairweather*'s classification of the offence as one of absolute liability, there had not yet been an explicit rejection of Baragwanath J's control test.

[24] The respondent's counsel in reply submitted that the concept of "control", or lack of it, is not an element of an offence under the Act. The control test is a gloss which is not supported by the plain statutory language. Alternatively, counsel submitted the Judge explicitly found that Chop *was not* under control at the time of the attack, and he was right to make that finding.

Analysis

[25] In *Fairweather*, a kitten strayed onto Mr Fairweather's property and was attacked by his dog. The property was surrounded by a 1.8m high fence. The District Court found Mr Fairweather to be a responsible dog owner who had done all that was reasonable to prevent his dog from attacking other animals and acquitted him. The local authority appealed to the High Court.

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19 *Hamilton City Council v Fairweather*, above n 1, at [6].
20 At [6].

[26] The issue in *Fairweather* was whether offences under the Dog Control Act were absolute or strict liability offences. As noted, the High Court favoured an approach that excluded liability from owners who kept a dog under control but imposed absolute liability on one who did not.[21]

[27] Baragwanath J saw this approach as reflecting the purpose of the Act,[22] and that the wide ambit of the term "control" avoided any problem with imposing absolute liability.[23] Importantly, in *Fairweather* the appellant local authority explicitly conceded that if its primary argument was not accepted by the Court, there was automatic liability for a dog attack if the dog was not under control.

[28] However, in a series of subsequent decisions the High Court has declined to follow *Fairweather*'s view that offences under the Dog Control Act involve absolute liability.[24] Instead, this Court has consistently found the Act creates offences of strict liability subject to a defence of total absence of fault.

[29] The difficulty for Mr Haenga's argument is that a necessary step in the reasoning in *Fairweather* was Baragwanath J's adoption of the control test. It was the control test which led him to conclude the Act created absolute liability offences. So, the subsequent decisions of this Court which have not adopted *Fairweather*'s essential finding necessarily involve a rejection of the control test.

[30] The question is put beyond doubt by the decision in *King v South Waikato District Council*.[25] In *King*, Heath J explicitly declined to adopt Baragwanath J's control test on the basis that it did not reflect the underlying purposes of the Act:[26]

> With respect to Baragwanath J, I conclude that the "control" test that he enunciated in *Fairweather* does not meet the purposes of the statute. I prefer an approach based on strict liability. This would require an owner to establish a total absence of fault defence, of the type discussed in *Civil Aviation Department*

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21 At [6].
22 At [53].
23 At [54].
24 See *Shepherd v Auckland Council* [2017] NZHC 1660 at [9]–[13]; *King v South Waikato District Council* [2012] NZHC 2264, [2012] NZAR 837 at [23]–[27]; *Tauranga City Council v Julian* [2014] NZHC 2132, [2014] NZAR 1322 at [18]; *Fairbrother v Porirua City Council* [2015] NZHC 1542 at [42]; *Epiha v Tauranga City Council* [2017] NZHC 979 at [14].
25 *King v South Waikato District Council*, above n 24.
26 At [26].

> *v MacKenzie* and *Millar v Ministry of Transport*, to be absolved from liability. I decline to follow *Fairweather*.

[31] I also agree with the respondent's submission that there is nothing in the language of ss 57 and 58 to suggest a control gloss should be read into them, nor do I agree with Baragwanath J that such a gloss can be drawn from the purposes of the legislation. On the contrary, given the Act's clear focus on public safety, and its requirement for a conviction before a destruction order can be made, I consider the interpretation advanced by Mr Haenga is untenable.

[32] 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.

[33] I therefore dismiss Mr Haenga's conviction appeal.

Sentence appeal

[34] As noted, Mr Haenga was convicted under s 58 of the Act, which provides:

> The owner of any dog that attacks any person or any protected wildlife and causes—
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> (a) serious injury to any person; or
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> (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,—
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> 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.

[35] I note the Act refers to the "destruction" of the dog. Such wording reflects the fact that animals have historically been classed as personal property that can be "destroyed". Of course, most New Zealanders would not classify their dog as an inanimate object that can be "destroyed". But neither does the Animal Welfare Act,

which recognises animals are sentient.[27] Although sentience is not defined in the Animal Welfare Act, it refers to the capacity to have feelings and requires a certain level of consciousness and intellectual capacity.[28]

[36] The Dog Control Act's reference to 'destruction' is therefore surprising. Sentient beings are generally not 'destroyed'; they are put to death or killed. Of course, the Dog Control Act serves a different purpose to the Animal Welfare Act. The Dog Control Act is very much focussed on public safety and control of dogs, whereas the Animal Welfare Act serves to impose obligations on people in charge of animals. Given the Animal Welfare Act's recognition of the sentience of animals, the continuing reference to destruction in the Dog Control Act remains curious, as does its classification of a destruction order as a criminal sentence. One might think that the question of public safety and what is to be done with a dangerous dog ought to be unshackled from the criminal responsibility of its owner.

Were there exceptional circumstances?

Mr Haenga's argument

[37] Mr Haenga's sentence appeal rests on obiter comments in the Court of Appeal's decision in *Hill*.[29] In *Hill*, the Court provided examples of situations where it considered the circumstances of the attack might be exceptional such that they did not justify destruction of the animal. The common theme running through those examples is a dog responding to a threat either to itself or its owner:

> [76] If for example the owner of dog A was rushed or attacked by dog B, and dog A attacked dog B in order to protect its owner, a Judge might well conclude that the circumstances were exceptional and do not warrant the destruction of dog A.
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> …
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> [84] … If the circumstances of the attack are exceptional, in the sense that the dog can properly be seen as not intrinsically dangerous — for example where the dog's owner was under attack, or where the dog was provoked —

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27 Animal Welfare Act 1999 Long Title as amended by the Animal Welfare Amendment Act (No 2) 2015.

28 Jane Kotzmann "Recognising the Sentience of Animals in Law: A Justification and Framework for Australian States and Territories" (2020) 42(3) Sydney Law Review 281 at 282.

29 *Auckland Council v Hill* [2020] NZCA 52 at [76] and [84].

> then a court may be satisfied that the circumstances of the offence were exceptional and do not warrant destruction of the dog.

[38] Mr Haenga submits that the Judge expressly found in his sentencing decision that Chop attacked the victim "of his own volition" and did so when there was a "fight" occurring between Mr Haenga and his victim. Mr Haenga submits that Chop entered a room while a fight was occurring involving his master. It is suggested that the situation facing Chop was on all fours with one of the Court of Appeal's illustrations of exceptional circumstances in *Hill*.

[39] Accordingly, it is said the District Court erred when it failed to find exceptional circumstances and ordered Chop's destruction.

Analysis

[40] I am unable to accept Mr Haenga's suggestion that the events that unfolded in the victim's kitchen were on "all fours" with the situations illustrated in *Hill*.

[41] Unlike those illustrations, Mr Haenga was the undisputed aggressor. He began a physical altercation with the victim by slapping him. By the time he called Chop into the room, Mr Haenga was on top of the victim, who was lying prone on the floor.

[42] In those circumstances, there could never have been a legitimate reason for Mr Haenga to summons his dog into the room, other than to encourage the animal to inflict injury on the victim. Mr Haenga was in a dominant position, and the use of his dog was a dangerous and unjustified use of force.

[43] As noted above, it is by mere luck that far more serious injury did not occur given Chop attacked the victim's head.

[44] Nor is it appropriate to engage in an analysis of the circumstances as Mr Haenga's dog perceived them, as Mr Fraser sought to do. This was a deliberate effort by the appellant to involve his animal in a physical altercation. Chop did so, on the undisputed evidence, immediately. In light of the animal's willingness to attack the

victim in a prone position, the very concerns identified by the Court of Appeal in *Hill* as underlying the requirement for destruction are triggered:[30]

> … The reason for a default rule that the dog should be destroyed is that the Act proceeds on the basis that where a dog has attacked once, there is a risk that the dog will behave in the same way again in similar circumstances. That risk must be removed by destruction of the dog, unless the risk is immaterial because the circumstances of the attack were exceptional and a repeat of those circumstances is most unlikely. …

[45] I am not satisfied the risk of further attack is *immaterial*. That is so whether Chop is no longer in Mr Haenga's ownership in the future, or otherwise.

[46] Accordingly, I decline Mr Haenga's sentence appeal.

[47] This is no doubt a distressing outcome for Mr Haenga, but the appeal must be dismissed for the reasons I have given.

Result

[48] The appeal against both conviction and sentence is dismissed.

Isac J

Solicitors:
Liberty Chambers, Wellington for Appellant
Simpson Grierson, Wellington for Respondent

[30] At [65].