

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2016-004-012306
[2017] NZDC 26922**

AUCKLAND COUNCIL
Prosecutor

v

REBECCA LAUREL FOUNTAIN
Defendant

Hearing: 21 November 2017
Appearances: A Govind for the Prosecutor
D Meyer for the Defendant
Judgment: 21 November 2017

NOTES OF JUDGE S A THORBURN ON SENTENCING

[1] This is a matter in which I am asked to make decisions pertaining to the charging documents in which Rebecca Fountain has been charged and pleaded guilty to, as it happens, owning a dog namely Bear, a Gordon Setter Cross that attacked domestic animal, namely a cat and that it attacked a poultry, namely chickens on 15 July.

[2] Ms Fountain was walking her dog Bear in the Churchill Park designated dog off leash free roam area. She let Bear go and soon Bear sighted a cat in a nearby private property and took off, I think jumping a fence, then being aroused in respect to the presence of a cat, in fact found a cat, I think it might have been another one, which he grabbed in his mouth and obviously terrorised. He was stopped by the cat owner and the cat was obviously traumatised but it turns out after veterinary

assessment, and I think including x-rays, was okay. The cat initially appearing to demonstrate some hindquarter injury perhaps. However, in the same escapade Bear found some chickens and he simply killed the four.

[3] So Ms Fountain is charged, as I have said, with owning a dog that attacked under s 57 Dog Control Act 1996. In respect to a conviction, the Act makes destruction of such an animal mandatory unless there are exceptional circumstances that do not warrant destruction. Mr Meyer for Ms Fountain has given me helpful memoranda in respect, particularly to the principles of exceptional circumstances and the basis upon which such can be found, but in the absence of that these matters are strict liability and once the evidence is there by proof or plea a destruction order of the animal is a statutory consequence.

[4] The leading case appears to be *Halliday v New Plymouth District Council*,¹ a decision of Heath J who has pointed out, I believe in the way in which the case has been unravelled for me, that the Court if there are exceptional circumstances around the event can decide whether the exceptional circumstances allow the Court to exercise its discretion not to order destruction by having a look at an enlarged range of factors which include the nature of the attack of course, the history of the owner of the dog as a dog owner, whether the dog has behaved in this way in the past and the steps undertaken to prevent such an attack occurring and the reasons why those steps did not prevent the attack on the occasion in question. The threshold is actually particularly tight and clear and is a matter of course of great distress often for dog owners.

[5] In addition to the matter before me, Ms Fountain seeks through her counsel a discharge without conviction in respect to these two charging documents. So, I am going to deal with that quickly and I will grant that. I have no problem with that. I do not want to spend time for this matter has been occupying interminable silences and thought and submissions and so on, no disrespect of course to counsel on that, around the issue of destruction of the dog. But the issue of Ms Fountain's personal discharge is not difficult. She is a good citizen clearly who is an American citizen residing in

¹ *Halliday v New Plymouth District Council* High Court New Plymouth CRI-2005-443011, 14 July 2005

New Zealand, travel is part and parcel I accept of the expected routines of her life although she resides in New Zealand now with her teenage family. She is an artist by profession which has its own incumbent need for there to be flexibility of movement and so on in respect to lifestyle and income earning opportunities and so on.

[6] Added to that, that being without impediment in her reputation, the offences for which she is before the Court are not criminal in the sense of them being matters of mens rea. It is a strict liability matter which is to do with her being the legal owner and controller of a pet and something going wrong there. And so, this particular form of offending I think does not impact in the concerning way as regards criminal offending and I will discharge her because the consequences of a conviction in relation to the nature of her offending I have concluded are justifiably seen as outweighing or out of all proportion to the gravity of the offending in that context. So, she will get the benefit of a s 106 discharge.

[7] So, that moves me now to the very, very charged and emotive matter of the statutory scheme which requires me unless there are exceptional circumstances to order the destruction of Bear. The circumstances are quite straightforward. Bear went on his own agenda. He was released from the lead and that is perfectly okay. There is no abrogation of responsibility there, but he behaved in a way which demonstrates that he is a dog who is capable of attack and he did and badly other animals. There is no explanation for it other than that. I do not put any real store on the fact that Ms Fountain had a bad back and could not chase if she was able to. The narrative is pretty clear that Bear had that, as we say, rush of blood to the head, stimulated no doubt by the instinctive interest in other forms of competitive life or vulnerable life and behaved as a dog might behave when its impulses revert to the primitive which usurp the trained impulses and he did what he did.

[8] Is there anything exceptional in these circumstances? I have to conclude that there is not. I cannot see anything exceptional in the particular circumstances pertaining to Bear's behaviour which erode the injunction on the part of the Court to order destruction. A quick look at the cases where an order avoiding destruction has been allowed on the basis of exceptional circumstances seem to relate to some aberrant unpredictable event that has impacted on the dog but the dog itself being distracted by

something else that has dominated its behaviour. This is an exemplary decision without reserve, of course, and I am looking at the commentary in respect to Westlaw just to give an example.

[9] In *Rotorua District Council v Whakaue*,² on appeal the Court reiterated the Act mandates destruction unless exceptional circumstances can be put before the Court. The owner of which has the burden of establishing exceptional circumstances. In *Sefton v Manukau City Council*³ a small fox terrier bit the leg of a pedestrian walking outside a property and an order for destruction was made of the dog, and on appeal it was submitted the dog was a family pet and had not previously bitten anyone but the Court held that the order was mandatory. There were no special circumstances on those facts.

[10] And there are others including, of course, *Halliday v New Plymouth District Council* but on the basis of that, the conduct of Bear is more serious conduct than the conduct of the Fox Terrier who bit a person walking past the gate and that is a pretty simple scenario without anything else to say about it whereas in this particular case, Bear obviously was right out of control on an agenda known only to him of course, that was more than he could deal with, and he attacked and also killed other forms of life, poultry and the cat. And you will appreciate, and it is with great regret to Ms Fountain, that I do not believe the statutory threshold, notwithstanding Mr Meyer's submissions, has in fact been reached here at all for me to consider the other aspects of the broader approach and I order the destruction of Bear.

[11] So, my conclusions are that there is a s 106 discharge without conviction and an order for destruction of Bear. I will not make any reparation orders

S A Thorburn
District Court Judge

² *Rotorua District Council v Whakaue* HC Rotorua AP12/98, 16 March 1998

³ *Sefton v Manukau City Council* HC Auckland AP206/99, 11 April 2000