IN THE DISTRICT COURT
AT NAPIER

I TE KŌTI-Ā-ROHE
KI AHURIRI

CRI-2023-041-000983
[2024] NZDC 19313

NAPIER CITY COUNCIL
Prosecutor

v

KARENA KEREHOMA
Defendant

Hearing:	12 August 2024
Appearances:	R Argyle and J Libbey for the Prosecutor L Lafferty for the Defendant
Judgment:	12 August 2024

ORAL JUDGMENT OF JUDGE R J EARWAKER

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[1] Ms Kerehoma faces one charge pursuant to s 58 of the Dog Control Act 1996. It is alleged that, on 10 November 2022 at her address of 3 Scully Crescent in Onekawa, Napier, she owned a dog, namely a white and tan coloured male American Pitbull Cross named Nui, that attacked a person causing serious injury.

[2] There is no dispute that the dog, Nui, is owned by the defendant. There is no dispute that Nui on 10 November 2022 attacked a young child at the defendant's property, being a five-year-old niece of a person visiting the property, a Ms Renee Rapira-Elder. Nor is there any dispute that the attack caused the young child serious injury.

[3] Produced with the exhibit booklet is both photographs and medical information showing the child was attacked and had a serious wound around the eye area caused by the dog bite to the side of the face. As I say, the photographs establish that. That is not in dispute, so the elements of the offence are made out.

[4] As I say, the prosecution evidence is largely unchallenged in that regard. What is raised is the total absence of fault defence. It is clear that charges of this type are strict liability offences. Once the elements of the offence are established, then the defence can be available, but the onus shifts to the defendant to prove that she exercised all reasonable care to prevent the offence from occurring.

[5] The standard of proof is the balance of probabilities. Total absence of fault requires the defendant to take all reasonable steps to ensure the offending does not occur, meaning it is not sufficient for her simply to take reasonable steps to that end. On the other hand, the defence does not require that all possible steps to ensure the offending does not occur.

[6] The principles have been succinctly stated in a number of decisions, some of which have been referred to me. In particular, the decision of *Tauranga City Council v Fraser*, where Brewer J referred to an earlier decision of *Walker v Nelson City Council*, a decision of Williams J.[1]

[7] In the decision of *Walker*, Williams J said that owning a dog that attacks is a strict liability offence. The owner need not intend the attack nor need she be reckless or negligent in that regard, and at paragraph [22] Williams J said this, and he was referring to an earlier decision of Brown J in *Fairbrother v Porirua City Council*:

> [22] As Brown J notes, relying here on the comments of Brewer J in *King v South Waikato District Council (No 3)*, it is important not to confuse strict liability with negligence by importing into the absence of fault defence, notions of reasonableness.[2] 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.

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[1] *Tauranga City Council v Fraser* [2023] NZHC 723; *Walker v Nelson City Council* [2017] NZHC 750.
[2] *Fairbrother v Porirua City Council* [2015] NZHC 1452.

> [23] Total absence of fault requires a consideration of all circumstances. I take this to mean that, considering all the circumstances, the law requires there to be literally no practical step the appellant could have taken to avert the attack.

[8] At paragraph 25, Williams J said:

> [25] That said, 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. A standard set that high would remove entirely the culpability inherent in the notion of "fault" from the equation. The test is not total absence of causation, but total absence of culpability.

[9] Here, the circumstances are that on 10 November 2022, Ms Rapira-Elder was with a friend and her five-year-old niece travelling past 3 Scully Crescent where the defendant lived. The friend of Ms Rapira-Elder wanted to stop to go and see the defendant, which they did.

[10] When they arrived, they went through the door and were taken into the dining room where the defendant and two friends were. The child played in the lounge on Ms Rapira-Elder's phone.

[11] Ms Rapira-Elder said they arrived at about 12.30, one o'clock. She said she had never been to the address before and did not know the defendant, it was her friend who knew the defendant. She said that she was there for a couple of hours until the defendant's children came home and came in with a male, she assumed was the children's father.

[12] Ms Rapira-Elder said that when she arrived, there was some discussion about a dog she could hear, she thought was in the back bedroom of the house locked in. The defendant in her evidence disputed that the dog was inside and said that she had tied the dog up in the backyard area onto a clothesline.

[13] It seems there was a lead or a rope attached to the dog's collar which was about a metre or a metre and a half and the dog was tied there by the defendant. This was because she knew that guests were arriving, being the two friends that she had in the dining room, when Ms Rapira-Elder and her friend and the child arrived.

[14] There is a dispute about whether the dog was inside or not, or whether there was any discussion about the dog between Ms Rapira-Elder and the defendant who owns the dog. I do not consider that this apparent inconsistency matters a great deal in this particular case because of the circumstances of it. What is clear is that the dog was tied up in the backyard and, to that extent, I do accept what the defendant said about that.

[15] It appears to me that Ms Rapira-Elder may have, given the passage of time, and her obvious concern about what happened when the dog attacked the child and hearing dog noises, got confused. It seems clear that, given there was no door in the bedroom, the dog would have had to have come out of the bedroom, been taken down a hallway outside and then back in which seems unlikely.

[16] In my view, what has most likely happened is that Ms Rapira-Elder has heard the dog outside and assumed it was in the back bedroom. However, as I said, that does not in my view alter the situation a great deal in this case because it is undisputed that the dog was let in the front door of the property at the same time the child was coming through it seems the hall area or coming through from the lounge to the kitchen to talk to Ms Rapira-Elder about some programme on the phone she was playing with, and the dog, as soon as it entered the house, has immediately attacked the child. There is no dispute about that, nor is there a dispute that the defendant's ex-partner, Adrian Hawea, opened the front door to allow the dog to come in.

[17] The real issue is whether or not the defendant had taken all reasonable steps to ensure that the offence would not occur. In other words, to ensure that the dog was under control and not in a position to attack anybody and cause serious injury.

[18] Mr Hawea initially said that when he arrived at the property, he had come to see the children who it seemed had just arrived home from school. There were three children who had come through the front door. Mr Hawea then said that he did not know that the children were there but had come around to see the dog and to walk the dog. It seems that the dog is normally in the backyard area, which is a fenced-in area, or is inside the house with family.

[19] On this particular occasion, 10 November, it seems that Mr Hawea has arrived at the house, gone straight around the back, seen the dog was tied up by the clothesline, played with the dog a little bit, and then untied the dog and come around the front. So rather than go in the back door, he has come around the front, has opened the front door, it seems, to go in and tell the defendant that he was going to take the dog for a walk. It was then that the dog, when the door was open, rushed in and attacked the child.

[20] The defendant, Ms Kerehoma, said in her evidence that she did not know that Mr Hawea was coming around and that he frequently arrived unannounced, but he had permission to do that to see the children. They have four children together. Three of them lived with Ms Kerehoma and the remaining child lived with Mr Hawea at a different address.

[21] So, she said that she did not know he was coming. She said she had tied the dog up because she knew that visitors were coming, and she wanted the dog to be tied up in the backyard away from the visitors. She did not give permission for Mr Hawea to untie the dog. She did not know he was going to do that, and she did not know that he was going to bring the dog inside before taking it for a walk.

[22] It is on that basis that she advances the total absence of fault defence and says that she took all reasonable steps by tying the dog up in the backyard and she did not give permission for the dog to be untied and brought inside. So, on that basis, she said this was a situation that was out of her control and that she did not know or expect what happened to the child to happen. However, in my view, that does not answer or prove or establish the absence of fault defence.

[23] As the cases have said, the absence of fault defence is a high standard. It is a high test there for the protection of the public. As Williams J said in *Walker*, total absence of fault requires consideration of all the circumstances, and when considering all of the circumstances, the law requires there be literally no practical step the appellant could have taken to avert the attack.

[24] Here, there are a number of factors which should have put Ms Kerehoma on high alert as a dog owner. Firstly, the dog had been given a menacing classification. That menacing classification had been served on Ms Kerehoma on 26 November 2020. The menacing classification was there because of the breed of the dog.

[25] There had been an incident which was set out in the formal statement of the animal control officer, a Mr Feireraband, that on 10 November 2020, so two years earlier. Nui had been reported to the Council for chasing and trying to attack cattle or calves at a paddock alongside Willowbank Avenue. Nui was then classified as menacing due to its breed on 26 November 2020. On that occasion, it appears that Mr Hawea was walking the dog when it was chasing the cattle in the paddock.

[26] The classification requires a number of things. First, the classification requires that the dog be neutered. The reason for this given by Mr Feireraband is that means that the dogs are likely to have less aggression if they are neutered. Ms Kerehoma did not neuter the dog. She was aware of the obligation to but said she could not afford it. A responsible dog owner would have ensured the dog was neutered, particularly given it was a menacing classification.

[27] Secondly, the classification means that the dog was not allowed to be at-large or in any public place or in any private way except when confined completely within a vehicle or a cage without being muzzled in such a manner as to prevent the dog from biting but to allow it to breed and to drink without obstruction. Ms Kerehoma confirms she did not own a muzzle and that she walked the dog in public places without a muzzle.

[28] Further, and even more concerning, is that Mr Hawea did not even know that the dog had received a menacing classification. He did not know that the dog was required to be neutered and he had not been told that the dog required to be muzzled in public. In fact, he used to take the dog out without a muzzle. So, Ms Kerehoma was on alert that the dog had been classified as menacing and she had responsibilities which she did not comply with.

[29] On the basis that she had not neutered the dog alone, I would have found that there were not reasonable steps taken by her to establish the defence, but in this particular case, there is quite a lot more that satisfies me that Ms Kerehoma has not made out the test.

[30] Firstly, she tied the dog up in the backyard because visitors were coming into the house. She said in her evidence that this is what she did when visitors came. Secondly, she knew that Mr Hawea would sometimes come to see the children unannounced or take the dog unannounced, but she had never ever given any instruction to Mr Hawea that if the dog is tied up, he needs to check with her first as to why the dog was tied up.

[31] Mr Hawea did not know why the dog was tied up, but he did say that if he had known that there were people inside, he would not have untied the dog to let the dog in. I asked him why that was, and he really was not able to give me any satisfactory answer. He said that the dog was good with adults but did not say anything about the children.

[32] He confirmed he would not have taken the dog off had he known people were inside, yet Ms Kerehoma had never told him not to take the dog off the lead without checking with her first. That would have been a reasonable step for Ms Kerehoma to have taken to ensure that the dog did not menace or interfere with any visitors she had in the house.

[33] Both Ms Kerehoma and Mr Hawea said that there had never been any issue with the dog. The dog was good with their children. No concerns had ever been expressed about the dog in terms of its behaviour. However, the dog remains unregistered and so to some extent was off the Council radar.

[34] Because the dog remained unregistered, Mr Feireraband said that the Council was not able to keep track of the dog. Also, the dog was not on the Council's database as living at the Scully Crescent address. The dog was shown to be at another address, 23B Masefield Avenue in Napier. So, the fact the dog was not registered meant that the Council were not able to keep track of the dog in any event.

[35] In my assessment, Ms Kerehoma could have taken a number of relatively simple steps to ensure that the dog did not attack anyone. First, the dog could have been registered. Secondly, the dog could have been neutered and should have been neutered. Both registration and neutering were legal requirements. Thirdly, she needed to have told Mr Hawea that the dog had been classified as menacing. Fourthly, she needed to have given Mr Hawea clear instructions that if the dog was tied up at the back, he needed to check with her first as to why the dog was tied up and to check that there were no people inside.

[36] This is not a situation where examples were given in the authorities where a complete stranger cut the cord of a dog and let it off. This was a situation where Mr Hawea, who knew the dog, was familiar with the dog, knew the owners, knew the circumstances, had not been given proper instructions by the owner of the dog to ensure the dog did not menace anyone.

[37] The other thing about the situation that is relevant is the behaviour of the dog after it was taken in by the Council. The dog was taken into custody, it seems that was in late November. On 22 November 2022, the dog was seized and impounded.

[38] Whilst the dog was at the pound, it was placed in a dangerous dog cage, but the evidence was that the dog could not be approached. When a vet came to check on the dog, the vet was unable to enter the cage unless the dog was put into what is referred to as a crush cage where the dog was, as I understand the description, pushed up against a wall to ensure that it did not attack anybody.

[39] Even today, the dog had been in the pound for it seems quite some time, some 18 months, Mr Feireraband said that even today people do not feel safe around the dog. With that description, it seems to me that either this family, because of their love for the dog, did not see the dog the way other people did and seem to have been somewhat blind to the aggressive nature of the dog breed itself, which is why the dog was required to be neutered.

[40] So, for all of those reasons, I am satisfied that the absence of fault defence has not been made out. There were several steps that needed to and should have been taken, reasonable steps to ensure that this attack did not happen.

[41] Given that all of the other elements of the offence are accepted by the defence, given that the absence of fault defence has not been made out, I find that the charge has been proved.

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Judge R Earwaker
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 02/09/2024