

**CITATION:** *McKenzie v Brisbane City Council* [2016] QCAT 267

**PARTIES:** Melissa Leanne McKenzie  
(Applicant)  
v  
Brisbane City Council  
(Respondent)

**APPLICATION NUMBER:** GAR085-16

**MATTER TYPE:** General administrative review matters

**HEARING DATE:** 22 June 2016

**HEARD AT:** Brisbane

**DECISION OF:** **Member Hughes**

**DELIVERED ON:** 22 June 2016

**DELIVERED AT:** Brisbane

**ORDERS MADE:** **1. The decision of the Brisbane City Council dated 22 February 2016 declaring 'Pretzel' a menacing dog is set aside and substituted with a decision to declare 'Pretzel' a dangerous dog.**

**CATCHWORDS:** ADMINISTRATIVE REVIEW – DANGEROUS DOG DECLARATION – MENACING DOG DECLARATION – whether declaration appropriate - where power to regulate dog discretionary – where circumstances of each matter must be considered – where as a matter of law a dog can be declared dangerous from isolated incident – where issue for Tribunal is whether dog 'attacked' or 'seriously attacked' as defined in relevant section - where dog bit person and caused injury – where finding of attack may be made even where dog acting protectively - where victim walking in public place with distressed child – where dog on leash with owner in presence of children – where community expects that mothers with children are able to walk in public spaces without fear of being attacked by a dog – where purposes of Act provide for responsible

ownership of dogs and impose obligations on dog owners – where evidence of general disposition does not obviate that attack occurred – whether current arrangements sufficient – where effect of a declaration is to impose legally binding conditions on the dog’s owner for the dog’s life – whether declaration disproportionate or unnecessary – where declaration consistent with purposes of Act – where infringement notice is different from declaration – where purpose of declaration is not to punish but to ensure public safety – whether ‘attack’ or ‘serious attack’ – whether ‘bodily harm’ – where punctures to skin, lacerations and bruising – where attack interfered with health and comfort – where attack placed child in vulnerable situation – where dangerous dog declaration has additional condition of wearing muzzle in public – where attack would not have occurred with muzzle – where muzzle will prevent similar attacks in furtherance of objects of Act to protect the community from damage or injury and ensure that dogs are not a risk to community health or safety

*Animal Management (Cats and Dogs) Act 2008* (Qld), sections 3, 4, 59, 81, 83, 89, 97, 98, Schedule 1

*Criminal Code Act 1899* (Qld), Schedule 1, section 1

*Queensland Civil and Administrative Tribunal Act 2009* (Qld), sections 20, 24

*Brake v. Gold Coast City Council* [2015] QCAT 52

*Halden v. Sunshine Coast Council* [2015] QCAT 456

*Harley v. Department of Justice and Attorney-General* [2012] QCAT 620

*Hermanussen v. Brisbane City Council* [2012] QCAT 710

*Kehl v. Board of Professional Engineers of Queensland* [2010] QCATA 58

*Lee v. Brisbane City Council* [2012] QCA 284

*Lee v. Brisbane City Council (No. 2)* [2012] QCATA 64

*McCahon v. Gold Coast City Council* [2014] QCAT 538

*O’Brien v. Gladstone Regional Council* [2015] QCATA 82

*Watts v. Tablelands Regional Council* [2012]  
QCAT 71

**APPEARANCES and REPRESENTATION (if any):**

**APPLICANT:** Melissa McKenzie appeared in person

**RESPONDENT:** Brisbane City Council represented by Nilusha Rajapakse, Solicitor, Brisbane City Legal Practice

**REASONS FOR DECISION**

**What is this Application about?**

- [1] Dogs cannot be allowed to attack innocent pedestrians, especially near or in the presence of children.
- [2] On 6 September 2015 at about 4.30pm, Ms Samantha Peterffy was pushing a bicycle along a gutter with her two and a half year old daughter on the seat, towards Ms Melissa McKenzie. Ms McKenzie was walking her Afghan Hound, 'Pretzel' on a leash and 'Halti' (a type of head restraint) with her own two children, aged six years and four years.
- [3] As Ms Peterffy passed Ms McKenzie, Pretzel leapt at and bit Ms Peterffy, causing punctures, bruising and inflammation to her left hip. All three children were within a square metre of the attack.
- [4] The Brisbane City Council initially declared Pretzel to be a 'Dangerous Dog', but upon review reduced this to the less serious category of 'Menacing Dog'. Ms McKenzie has applied to the Tribunal to review this decision.
- [5] The matter was initially listed as a hybrid hearing, but during the hearing both parties indicated there was little point in mediating as the Council was unwilling to alter its decision. The Tribunal therefore determined the matter after a full hearing.

**What does the Tribunal do?**

- [6] In a review application, the Tribunal's purpose is to produce the correct and preferable decision by way of a fresh hearing on the merits.<sup>1</sup> Ms McKenzie does not need to prove any error by the Council in its decision – the Council's decision is not presumed correct.<sup>2</sup> The Tribunal effectively "stands in the shoes" of the Council and makes its own decision.<sup>3</sup>

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<sup>1</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20.

<sup>2</sup> *Harley v. Department of Justice and Attorney-General* [2012] QCAT 620 at [8], citing with approval *Kehl v. Board of Professional Engineers of Queensland* [2010] QCATA 58 at [9].

- [7] The Tribunal may therefore confirm or amend the decision, set aside the decision and substitute its own decision or return the matter for reconsideration by the Council.<sup>4</sup>
- [8] The power to regulate a dog is discretionary<sup>5</sup> and even where an attack has occurred, the circumstances of each matter must be considered.<sup>6</sup>
- [9] Ms McKenzie submitted that Pretzel should not be declared a ‘dangerous’ or ‘menacing’ dog because: the unusual circumstances of the incident are contrary to Pretzel’s general nature; Pretzel is already strictly controlled; and a declaration would be disproportionate and unnecessary to prevent a recurrence.

### **What are the circumstances of the incident?**

- [10] Ms McKenzie did not dispute that Pretzel bit Ms Peterffy, but said that Ms Peterffy’s child had been screaming. Ms McKenzie emphasised that she alerted Ms Peterffy to the presence of a large dog and stopped “out of an abundance of caution”. Ms McKenzie said that despite this, Ms Peterffy continued towards her to within one metre and inside Pretzel’s comfort zone that included Ms McKenzie’s children.
- [11] Ms McKenzie sought to rely upon a report by Dr Cam Day, Animal Behaviour Veterinarian.<sup>7</sup> During the hearing, Dr Day said that in his view, for a dog to be ‘dangerous’ requires repeated behaviour. While Dr Day is an expert on animal behaviour whose opinion is to be respected, that is not the legal test for a finding that a dog is ‘dangerous’. As a matter of law, a dog can be declared dangerous even from an isolated event.
- [12] Dr Day assessed Pretzel and considered him to be a “serene, aloof, pleasant and sometimes slightly fearful dog”. In Dr Day’s opinion based on what Ms McKenzie told him about the incident, the elements were an ‘apparently’ distressed mother, a distressed child, the bicycle being pushed and Ms Peterffy, her child and the bicycle coming unusually close to Ms McKenzie’s family. In Dr Day’s opinion, Pretzel ‘reacted’ because:
- The ‘noises of distress’ shown by the mother and her child may have been a novel event for Pretzel creating a state of heightened vigilance and an ‘arousal cascade’ where anxiety-based aggression could have been catalysed;
  - Previous exposure to fast-moving bicycles may have sensitised Pretzel to slow-moving bicycles, stimulating his predatory drive/aggression; and
  - The mother, her child and the bicycle moving unusually close to Ms McKenzie and her young children could have stimulated protective aggression.

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<sup>3</sup> *O’Brien v. Gladstone Regional Council* [2015] QCATA 82 at [18].

<sup>4</sup> *Queensland Civil and Administrative Tribunal Act 2009*, s 24.

<sup>5</sup> *Brake v. Gold Coast City Council* [2015] QCAT 52 at [38].

<sup>6</sup> *Hermanussen v. Brisbane City Council* [2012] QCAT 710 at [15].

<sup>7</sup> Report of Dr Cam Day, Animal Behaviour Veterinarian, dated 27 November 2015.

- [13] Dr Day's tests were unable to replicate the circumstances of the incident and in particular, the presence of a screaming child.
- [14] Regardless, and unfortunately for Ms McKenzie, none of this alters the fact that Pretzel bit Ms Peterffy and caused her injury. The issue for the Tribunal to determine is whether Pretzel 'attacked' or 'seriously attacked' Ms Peterffy as defined in the relevant section.<sup>8</sup>
- [15] It is a question of fact for the Tribunal whether Pretzel 'attacked' or 'seriously attacked' Ms Peterffy.<sup>9</sup> The Court of Appeal has ruled that as a matter of law, nothing precludes a finding of attack even where the behaviour of the dog is a response to aggression from its victim.<sup>10</sup> This means that a finding of an attack may be made even if a dog was acting protectively.
- [16] It is not disputed that Pretzel bit Ms Peterffy and injured her. Dr Day suggested that Pretzel may have been startled by the approach of a lady with a screaming child, creating a predatory alert response. The Tribunal has previously expressed the view that even a stranger entering a property uninvited would not justify an attack causing serious injury.<sup>11</sup> Ms Peterffy was walking with her apparently distressed child past Ms McKenzie and her children in a public place. None of Ms Peterffy's actions amounted to an act of provocation. She and her child posed no threat.
- [17] Contrary to Ms McKenzie's submission, I do not accept that the "culmination of the factual circumstances leading to the incident are unlikely to ever be repeated" or "an isolated incident with unusual circumstances". Mothers walking with (distressed) young children on bicycles – who might even be crying or screaming - are an everyday event.
- [18] The community expects that mothers with children are able to walk in public spaces without fear of being attacked by a dog, particularly under the apparent control of its owner. I do not consider that this is abrogated or diminished by a mother and children "moving unusually close" to the dog or its owner. The purpose of the *Animal Management (Cats and Dogs) Act 2008* is not to regulate the supervision of children. Rather, its purposes relevantly include providing for responsible ownership of dogs, by imposing obligations on dog owners and on particular persons to ensure dogs do not attack or cause fear.<sup>12</sup>
- [19] Regardless of Dr Day's evidence about Pretzel's general disposition, the evidence is that in some circumstances with the right amount of emotion by others, Pretzel will bite to cause injury. I am not satisfied that the circumstances of the incident are a reason to not declare Pretzel a 'dangerous' or 'menacing' dog.

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<sup>8</sup> *Lee v. Brisbane City Council* [2012] QCA 284 at [11]; *McCahon v. Gold Coast City Council* [2014] QCAT 538 at [14].

<sup>9</sup> *Lee v. Brisbane City Council* [2012] QCA 284 at [11].

<sup>10</sup> *Lee v. Brisbane City Council* [2012] QCA 284 at [11].

<sup>11</sup> *Watts v. Tablelands Regional Council* [2012] QCAT 71 at [25].

<sup>12</sup> *Animal Management (Cats and Dogs) Act 2008* (Qld), ss 3, 4.

### **Is Pretzel's current control arrangements sufficient to obviate a Declaration?**

- [20] Ms McKenzie submitted that a declaration is unnecessary because Pretzel is already under strict control. She said that Pretzel is always on a lead when outside her property. However, this was not sufficient to prevent the attack and indeed Pretzel was apparently restrained by a lead and 'Halti' when he bit Ms Peterffy.
- [21] Ms McKenzie also said that she and her partner already have a dedicated enclosure, with a six foot high fence and self-closing gates. However, this does not address the possibility of Ms McKenzie moving residence or her situation changing.
- [22] The effect of a declaration is to impose legally binding conditions on the dog's owner for the dog's life.<sup>13</sup> I am not satisfied that current arrangements that might already address – at least in part - those conditions are a reason to not declare Pretzel a dangerous or menacing dog.

### **Is a Declaration disproportionate or unnecessary?**

- [23] Ms McKenzie submitted that it is against the purpose of the Act and wholly disproportionate to impose conditions that include being on a leash, as this will inhibit Pretzel's ability to socialise in 'off leash' dog parks. However, Pretzel will still be able to socialise and have a quality of life if properly managed. This could include arranging play dates at home, obedience school and visiting breed-specific clubs.
- [24] Ms McKenzie also said that Pretzel needs to sprint in wide open spaces like those provided in 'off leash' dog parks. Although no expert evidence was provided on this, Ms McKenzie can choose an appropriate residence to accommodate Pretzel's needs.
- [25] Moreover, the Act's purposes specifically include providing for the effective management of regulated dogs and promoting the responsible ownership of dogs.<sup>14</sup> This is achieved by imposing obligations on regulated dog owners and obligations on particular persons to ensure dogs do not attack or cause fear.<sup>15</sup>
- [26] More specifically, the purpose of the chapter in the Act about regulated dogs is to protect the community from damage or injury, or risk of damage or injury from regulated dogs and ensure the dogs are not a risk to community health or safety and controlled in a way consistent with community rights and expectations.<sup>16</sup> Pretzel attacked a person going for a walk in a public place in the presence of nearby children. The effect of declaring Pretzel dangerous or menacing is to impose conditions prescribed by the Act<sup>17</sup> to ensure his effective control, so that an attack

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<sup>13</sup> *Halden v. Sunshine Coast Council* [2015] QCAT 456 at [19], *Animal Management (Cats and Dogs) Act 2008* (Qld), ss 81, 93, 97, 98 and Schedule 1.

<sup>14</sup> *Animal Management (Cats and Dogs) Act 2008* (Qld), s 3.

<sup>15</sup> *Animal Management (Cats and Dogs) Act 2008* (Qld), s 4.

<sup>16</sup> *Animal Management (Cats and Dogs) Act 2008* (Qld), s 59(1).

<sup>17</sup> *Animal Management (Cats and Dogs) Act 2008* (Qld), ss 81, 93, 97, 98 and Schedule 1.

does not recur. This is not disproportionate but entirely consistent with the objects of the Act.

- [27] Ms McKenzie also submitted that an infringement notice is already adequate penalty. The Tribunal has previously considered the distinction between offence provisions and provisions conferring a discretion in the *Animal Management (Cats and Dogs) Act 2008*:

*There is a distinction between section 89 and sections 194 and 195 of the Cats and Dogs Act. Sections 194 and 195 deal with offences of which a person may be convicted consequent on a dog's behaviour and fined. Section 196 provides a potential defence which may avoid a conviction. Section 89 is entirely different. It is concerned with circumstances where a relevant declaration may, not must, be made. A dangerous dog declaration may be made where the dog under consideration has "seriously attacked or acted in a way that caused fear to a person or another animal".*

- [28] Although the infringement notice purports to be for an offence in contravention of another provision of the Act, it still relates to an offence under the Act. It is not concerned with circumstances where a declaration may or may not be made under the Act.
- [29] The sanction for Ms McKenzie's failure to effectively control Pretzel was the infringement notice. The purpose of a declaration is not to punish, but to ensure public safety. The infringement notice is not a ground to not make a declaration imposing conditions to ensure public safety.

#### **Did Pretzel 'attack' or 'seriously attack' Ms Peterffy?**

- [30] A 'dangerous dog declaration' may be made only if the dog has seriously attacked, or acted in a way that caused fear to another person or animal, while a 'menacing dog declaration' may be made if the attack was not serious.<sup>18</sup>
- [31] 'Seriously attack' means to attack in a way causing bodily harm, grievous bodily harm or death.<sup>19</sup> 'Bodily harm' and 'grievous bodily harm' have the meanings provided in the Criminal Code.<sup>20</sup> Relevantly, 'bodily harm' means any bodily injury which interferes with health or comfort.<sup>21</sup> To her credit, Ms McKenzie accepted that Pretzel did bite Ms Peterffy and caused her injuries as described and those injuries caused 'bodily harm' as defined.
- [32] Ms Peterffy stated that she suffered deep punctures, bruising and inflammation to her left hip.<sup>22</sup> This was corroborated by Dr Cos Doucas, who examined Ms Peterffy on the day of the incident and found that she had an injury on the left side of her abdomen consistent with a dog bite<sup>23</sup> and photographs taken minutes after the incident showing lacerations to

<sup>18</sup> *Animal Management (Cats and Dogs) Act 2008* (Qld), s 89(2).

<sup>19</sup> *Animal Management (Cats and Dogs) Act 2008* (Qld), s 89(7).

<sup>20</sup> *Lee v. Brisbane City Council (No. 2)* [2012] QCATA 64 at [23].

<sup>21</sup> *Criminal Code Act 1899* (Qld), Schedule 1, s 1 definition of 'bodily harm'.

<sup>22</sup> Affidavit of Samantha Jane Peterffy sworn 24 May 2016 at [8].

<sup>23</sup> Medical Certificate of Dr Cos Doucas dated 7 September 2015.

Ms Peterffy's left abdomen.<sup>24</sup> Ms Peterffy's injuries broke and inflamed her skin, causing bleeding and bruising and thereby interfering with her health and comfort.

- [33] I am satisfied that the attack caused Ms Peterffy bodily harm and is a 'serious attack'.

**Should Pretzel be declared a 'dangerous dog' or a 'menacing dog' in all the circumstances?**

- [34] The key difference between declaring Pretzel a 'dangerous dog' and a 'menacing dog' is the additional requirement for Pretzel to wear a muzzle in public if declared dangerous.

- [35] I am not satisfied the circumstances warrant a lesser declaration than dangerous. The Dog Attack (Human) Risk Assessment Tool used by Council as a guide delivered a score of 46, suggesting Pretzel is high risk and should be declared dangerous unless mitigating or aggravating circumstances exist.<sup>25</sup>

- [36] Pretzel is a large dog weighing approximately 30 kilograms. He bit Ms Peterffy despite being under the control of Ms McKenzie on a leash and 'Halti' and while in the presence of children. Although Pretzel did not attack a child, the attack placed Ms Peterffy's child in a vulnerable situation and could have easily caused fear or distress for the children who were present. Had Pretzel been muzzled, the attack would not have occurred.

- [37] Declaring Pretzel a dangerous dog will impose the additional obligation of having Pretzel wear a muzzle while in public and prevent similar attacks. This furthers the objects of the Act to protect the community from damage or injury and ensure that dogs are not a risk to community health or safety.

- [38] Having committed a serious attack in the circumstances I have considered, it is appropriate to declare Pretzel a 'dangerous dog' rather than a 'menacing dog'.<sup>26</sup>

**Conclusion**

- [39] The 'correct and preferable' decision is that the Council's decision dated 22 February 2016 declaring 'Pretzel' a menacing dog is set aside and substituted with a decision to declare 'Pretzel' a dangerous dog.

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<sup>24</sup> Photographs dated 6 September 2015 at 4.26pm and 4.34pm.

<sup>25</sup> Affidavit of Tania Moore, City Safety and Animal Attack Officer, sworn 24 May 2016 at [9].

<sup>26</sup> *Animal Management (Cats and Dogs) Act 2008* (Qld), s 89(2) and (3).