

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Do v Brisbane City Council* [2020] QCAT 238

PARTIES: **MARIA-HUONG DO**
(applicant)

v

BRISBANE CITY COUNCIL
(respondent)

APPLICATION NO/S: GAR321-19

MATTER TYPE: General administrative review matters

DELIVERED ON: 25 May 2020

HEARING DATE: 25 March 2020

HEARD AT: Brisbane

DECISION OF: Member Paratz AM

ORDERS: **The decision of the Brisbane City Council, made on 7 August 2019, to declare the dog ‘Jay-Jay’ to be a regulated (dangerous) dog, is confirmed.**

CATCHWORDS: ADMINISTRATIVE LAW - ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – animals – where a decision to make a dangerous dog declaration was made - where the dog-owner alleged that the dog was provoked to attack by ongoing dispute between neighbours – whether provocation for the dog to attack was shown

Animal Management (Cats and Dogs) Act 2008 (Qld), s 89(1)(a), s 89(2), s 89(7)
Criminal Code Act 1899 (Qld), Schedule 1 s 1

Hermanussen v Brisbane City Council [2012] QCAT 710
Lee v Brisbane City Council [2012] QCA 284
Roy v Brisbane City Council [2019] QCAT 311

APPEARANCES &
REPRESENTATION:

Applicant: Self-represented

Respondent: A. Swindley, Brisbane City Council Solicitor

REASONS FOR DECISION

- [1] The Brisbane City Council ('the Council') made an internal review decision on 7 August 2019 confirming a prior decision to declare the dog 'Jay-Jay' a regulated (dangerous) dog under section 95 of the *Animal Management (Cats and Dogs) Act 2008 (Qld)* ('the Act').
- [2] Ms Maria Huong Do, the owner of the dog Jay-Jay, filed an application on 15 August 2019 to review the decision of the Council.
- [3] The facts relating to the incident in question are not in dispute:
- (a) Jay-Jay is a large brown Rhodesian Ridgeback dog. The owner says he weighs 59 kg.
 - (b) The dog that was attacked is called 'Fudge'. It is a white toy poodle. At the hearing it was accepted by the parties that it weighed 2.3 kg.
 - (c) On 26 November 2018, Fudge was being walked on a leash by its owner, along the footpath in front of Jay-Jay's owner's house.
 - (d) Jay-Jay rushed out of the open gate of its owner's house and seized Fudge by the neck and shook it. Jay-Jay released Fudge and then repeated the action.
 - (e) Fudge suffered serious injuries as a result of the attack, and required extensive veterinary attention, and surgery under general anaesthesia. The total cost of the veterinary bills was \$9,600.00
 - (f) Fudge made a full physical recovery from its injuries.
 - (g) Jay-Jay's owner has paid \$2,500 to Fudge's owner towards the veterinary costs.
 - (h) There are four dogs kept at Jay-Jay's owner's house.
- [4] The decision of the Council to issue a regulated dog declaration for Jay-Jay was stayed by order of the Tribunal on 13 September 2019, until determination of the review application.
- [5] No witnesses were required for cross examination, apart from Ms Do, the owner.
- [6] At the conclusion of the hearing I reserved my decision. This is the decision as to the review application.

Evidence and submissions of Ms Do

- [7] The owner of the dog, Fudge, was a woman ('the neighbour') who was renting the house at 11 Hanworth Street, East Brisbane, which is next door to the owner's house, from July 2018 to early January 2019.
- [8] Ms Do submits that 'extensive and ongoing provocative behaviour from the neighbour, her children, and the dog Fudge for 4 ½ months prior to the incident on 26 November 2008', together with 'events which occurred after that date are relevant and should be taken into consideration' in deciding the review application.¹

¹ Submissions of the owner filed on 4 October 2019, p. 1.

- [9] Ms Do says that she complained to the neighbour, by writing an anonymous ‘friendly letter’ which she put inside the neighbour’s letterbox, advising her of Fudge’s separation anxiety and excessive barking when there was no one at home with Fudge.²
- [10] Ms Do says that she then lodged a formal complaint to the Brisbane City Council regarding excessive dog barking from the neighbour’s residence on 23 July 2018.³
- [11] Ms Do says that she had multiple closed-circuit television cameras mounted on her house, and that after she saw faeces left on the front strip of the lawn adjacent to the footpath in front of her house, she checked the footage and saw the neighbour watching Fudge defecate whilst off a lead, and that the neighbour did not pick up the waste. The owner lodged a further complaint with the Council about that.
- [12] Ms Do refers to another occasion on 13 August 2018 when she saw the neighbour place Fudge on the lawn about two metres away from the boundary fence to ‘toilet’.⁴
- [13] Ms Do says that the neighbour’s son, on 24 October 2018, walked Fudge past her house and, as her dogs barked, the neighbour’s son started whistling and turned around to point ‘his rude finger’.⁵
- [14] Ms Do lodged a second noise complaint relating to Fudge’s excessive barking on 2 November 2018.
- [15] Ms Do says that on 14 November 2018 while she was returning home for a walk with her four dogs on a lead that she encountered the neighbour walking past on the road with Fudge not on a lead. She says that after a short exchange of words with the neighbour about Fudge not being on a lead, she turned around with her four dogs and proceeded to cross the road, and that Fudge rushed over and barked at herself and her four dogs. Ms Do immediately lodged another complaint to the Council about Fudge not being on a lead and rushing at her.
- [16] Ms Do relates events which occurred after the attack on 26 November 2018, relating to excessive barking by Fudge, and other events, such as the neighbour using her driveway to reverse and turn around in, and parking in front of her property.
- [17] In her submissions at the hearing, Ms Do submitted that these incidents showed that Jay-Jay knew who Fudge was, and had many encounters with Fudge. She said that she felt that Jay-Jay did what he did because of these negative encounters with the neighbour and her family.
- [18] Ms Do filed a letter from a Ms De Warren who stated that she was a ‘Medium, Healer and Animal Communicator’, and had appeared in media programmes. Ms De Warren said that she had conducted a reading with the dog Jay-Jay, and that immediately she was able to pick up from her communication with Jay-Jay that he was provoked. She said that the dog Jay-Jay told her the following:⁶

Jay-Jay had told me that he was aware of who this dog was and it had been a real troublemaker. Jay-Jay asked me to apologise to his mum (Maria) for

² Ibid p.2.

³ Ibid p. 2.

⁴ Ibid p. 2.

⁵ Ibid, p.3.

⁶ Letter Ms De Warren to ‘Whom it may concern’, dated 19 August 2019, p. 1.

putting her through this situation. He knows his mum loves him very much and does not want to cause his mum anymore problems.

- [19] The owner filed a letter from a woman, Ms Voss, who described herself as a doctor (with a degree described as 'DAnimSt'), and as a 'dog and cat behaviour specialist'. Ms Voss stated that she had had known the owner in a professional and personal manner for over five years. Ms Voss expressed the view that she believed that Jay-Jay may have been exhibiting 'a small amount of defensive aggression' which she described as follows:⁷

If Jay-Jay's intention was to kill Fudge he had ample opportunity. On face value it would appear that Jay-Jay and the remainder of the pack were being provoked by allowing Fudge run up to them barking and also toileting and meander on the footpath adjacent to their home in their view which resulted in negatively rousing the dogs. I believe Jay-Jay may have been exhibiting a small amount of defensive aggression, which is where a dog decides that defense is a good offence given the circumstance. Usually if the defensive dog delivers the first strike and are prone to abort or treat which you can see Jay-Jay doing this in the video footage.

- [20] Ms Do filed letters from two neighbours (one of whom was Ms Wehl) who said that they had seen Ms Do walking her dogs, and that they did not cause any nuisance.
- [21] Ms Do filed submissions in response to a later affidavit of Ms Wehl, which did refer to a nuisance being caused in an incident on 11 September 2019, and said that she was returning from her morning walk with Jay-Jay on a lead and muzzle, and that upon stepping off the kerb, a Minah bird flew straight at her, and gave her a huge fright, and that she ducked and fell as she tried swerving away from the bird. She said that she immediately got up and Jay-Jay was still in her control.

Evidence and Submissions of the Council

- [22] The Council filed a comprehensive folder of material setting out the complaint made in relation to the attack upon Fudge, and the steps taken by the Council under the Act.
- [23] The Council also filed a further affidavit from a neighbour of the owner, Ms Wehl, who said that she had written a letter of support for the owner 'a few weeks ago' and felt she had been put in a difficult position at the time.
- [24] In her affidavit, Ms Wehl related an incident which occurred on 11 September 2019 when she was walking her dog Pearl. She stated that the owner was walking her big male dog on a lead on the opposite side of the road on the footpath, and that Pearl barked, and then the owner's dog barked and 'took off towards us'. She stated that the owner's dog pulled her onto the ground, and described the incident as follows:⁸

22. At the time of the incident I was very concerned for myself, and my dog Pearl's safety. Ms. Do's dog wasn't coming over to say hello. It was coming quickly at us, trying to get to us and barking aggressively.

23. Ms. Do was trying to control her dog, but it was too strong for her and pulled her over onto her stomach. The dog continued to come in a direction dragging Ms Do on her stomach.

⁷ Letter Dr Alisa Voss to the Tribunal, 3 October 2019, p. 2.

⁸ Affidavit of Ms Wehl, sworn 19 September 2019.

[25] Ms Wehl went on to comment:

25. I can't recall the name of the dog, but it is a male and very much larger than the other three (3) dogs. It is brown in colour and has short hair. I don't know the breed of dog but to me it looks like a pigging dog. A dog the people used to go pigging in the country. I am very wary of those type of dogs. I could identify the dog if required.

26. I also believe that Ms Do is trying to do the right thing, but this dog seems to me to be increasingly getting agitated and it is much too strong for her. All that it takes is for the lead to break and someone would get hurt.

Discussion

[26] There is no dispute as to the actual incident which occurred on 26 November 2018 when the dog Fudge was attacked by the dog Jay-Jay. The incident resulted in very serious injuries to the dog Fudge.

[27] Ms Do was not present at the time of the incident. She has relied upon her husband's account of the incident, and her observations from security camera footage taken from her house.

[28] Ms Do contends that Jay-Jay should not be declared a dangerous dog because he was provoked into attacking Fudge by a history of conflict between the neighbours.

[29] The Court of Appeal, in *Lee v Brisbane City Council*,⁹ considered a situation where a dog responded to another dog which was running towards it. Holmes JA described the situation as follows:

[5] The review tribunal found that in the incident in question another dog, a spaniel, had run out into the street and started barking at a German Shepherd. The German Shepherd took the spaniel in its mouth and shook it. The spaniel sustained a number of puncture wounds requiring veterinary treatment. The applicant submitted that the German Shepherd could not be said to have attacked the other dog because it had not begun the hostilities. The review tribunal considered that the definition in s 89(7) made it clear that the words 'seriously attack' involved some physical contact or assault. In any ordinary meaning of the word, the German Shepherd had attacked the spaniel – which had not previously made any contact with it – in a way causing bodily harm. The review tribunal expressed itself satisfied on the evidence that the German Shepherd seriously attacked the spaniel.

[30] Holmes JA went on to say that an attack could occur notwithstanding that it was in response to aggression from the victim:

[11]It may be accepted that the behaviour of the spaniel in running and barking could, as the appeal tribunal said, be characterised as an attack. But at issue was whether the German Shepherd had seriously attacked the spaniel, as that expression is defined in s 89(7). It will be a question of fact whether what a dog does amounts to an attack for the purposes of the section, and in deciding that question, hostile behaviour by the animal which is the victim may be relevant. There may be a factual issue, for example, as to whether one dog biting another is attacking or simply defending itself (although where there has been no physical contact preceding the bite, defence is a less likely conclusion). But as a matter of law, there is nothing in s 89 which precludes a finding of attack where the behaviour of the dog in question is a response to

⁹ [2012] QCA 284.

aggression from its victim. To put it another way, it is not a pre-requisite to a finding of serious attack by one dog on another that there be a finding that the second dog has itself done nothing which could be described as an attack.

[31] The relevance of provocation was discussed in *Roy v Brisbane City Council*¹⁰ where a Kelpie cross medium-size dog known as ‘Keziah’ bit a young girl on the back of her leg leaving three puncture wounds. The incident occurred in an off-leash dog park. A contention was raised that the girl had provoked the dog.

[32] The Member commented on the possibility of provocation being relevant:

14. Dr Roy (the owner of Keziah) contends that as Ophelia (the girl) was coming towards her waving a stick in the air and shouting at her two dogs and telling Zeus (another of Dr Roy’s dogs) to go away she may have provoked Keziah into becoming excitable which led to the biting incident. However, Mr Mayer-Miller was watching Ophelia and noted that Keziah was very jumpy, and more energetic than the other two. Though he noticed the stick in Ophelia’s hand, he said she was not waving it around and was not threatening any of the dogs, bearing in mind that Ophelia is eight years old. On this version, Keziah’s attack on Ophelia was clearly unprovoked and unwarranted. I am prepared to accept this was the case. Although provocation is not necessarily a defence, there may well be circumstances where the conduct of the victim was the direct cause of a dog to bite.

[33] In *Hermanussen v Brisbane City Council*¹¹, the Tribunal considered a situation where an argument was occurring between a man and a woman, and a dog, Zeus, (a male Australian cattle dog) owned by the woman, bit the man. The Member noted that the dog was protecting its owner:

[22] I am also satisfied that there was an argument occurring at the time between Mr Boyle and Mrs Hermanussen and that Zeus was acting in a protecting way towards his owner. Mrs Hermanussen went on to the neighbouring property to speak to Mr Boyle about the fence. Accounts of the interchange are widely varying, depending on who gives the evidence. I am satisfied that Mrs Hermanussen was upset when she first approached Mr Boyle, as she thought he was packing up to leave the job, and the agreed fence work was incomplete.

[23] Mr Boyle says that that was not the case, but clearly things escalated between them, and I am satisfied despite Mr Boyle’s evidence that he met fire with fire. Zeus picked up on the anger of his owner and Mr Boyle, and Zeus was not sufficiently controlled by Mrs Hermanussen during the incident, even though he was on a lead, to prevent him from biting Mr Doyle.

[34] The Tribunal found that the dog Zeus, when he is provoked or when he considers that he is afraid, bites, and that is the way that the dog reacts. The Member went on to find that, in the circumstances, a declaration as a menacing dog would be sufficient to enforce sufficient control of Zeus in the future, considering his age and conditions.

[35] Section 89(1)(a) of the Act provides that a local government may, by complying with the requirements of that part, declare a particular dog to be a declared dangerous dog.

¹⁰ [2019] QCAT 311.

¹¹ [2012] QCAT 710.

[36] Section 89(2) of the Act provides that:

(2) A dangerous dog declaration may be made for a dog only if the dog –

(a) has seriously attacked, or acted in a way that caused fear to, a person or another animal; or ...

[37] The expression ‘seriously attack’ is defined in s 89(7) as:

(7) In this section –

seriously attack means to attack in a way causing bodily harm, grievous bodily harm or death.

[38] Bodily harm and grievous bodily harm are defined in schedule 2 of the Act as having the meaning given by the *Criminal Code* section 1.

[39] The *Criminal Code*¹² defines bodily harm and grievous bodily harm as follows:

bodily harm means any bodily injury which interferes with health or comfort

...

grievous bodily harm means—

(a) the loss of a distinct part or an organ of the body; or

(b) serious disfigurement; or

(c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available.

[40] A report of Dr Wilson BVSc(Hons), FANZCVS (small animal surgery), a Small Animal Specialist Surgeon, describes the injuries caused to Fudge, and the treatment, as follows:¹³

Diagnosis: Dog attack wounds to the right side of the neck with secondary crush injuries and dehiscence of tissues around this site following the bite injury.

Treatment: Fudge’s treatment has included: pain relief, intravenous fluids, antibiotic therapy and surgical exploration and debridement of the wounds under general anaesthesia. Postoperatively, an active suction drain was placed into the wound to ensure that the dead space and underrunning of tissue at the surgery site would close. On top of this, a cervical wrap was applied to assist with reducing swelling and ensure ongoing protection of the wound. This will stay in place with Fudge whilst she is at home until final wound assessment.

[41] The injuries caused to Fudge clearly constitute bodily harm or grievous bodily harm.

[42] The dog Jay-Jay has therefore seriously attacked the dog Fudge, and a dangerous dog declaration may be made. The use of the word ‘may’ in section 89(1) indicates a discretion in the decision-maker whether to make a dangerous dog declaration.

¹² *Criminal Code Act 1899 (Qld)*, Schedule 1 s 1.

¹³ Report Dr Wilson, 3 December 2018, p 2.

- [43] The relevance of the argument raised by Ms Do, as to provocation, is as to whether the exercise of the discretion to make a dangerous dog declaration should be exercised in this matter.
- [44] The cases of *Lee*, *Roy*, and *Hermanussen*, referred to previously, all relate to immediate provocation, which might be described as provocation ‘in the heat of the moment’.
- [45] In those cases, the dog was responding to either another dog running at it and barking, or a child allegedly swinging a stick, or in the heat of an argument involving the dog’s owner.
- [46] In this matter, there was no direct provocation of any sort by the dog Fudge. It is uncontested that the dog Fudge was simply being walked on a lead on the footpath past the open gate of Ms Do’s house.
- [47] The dog Jay-Jay ran directly from Ms Do’s house and seized Fudge by the throat without any direct provocative act by Fudge.
- [48] Ms Do’s argument is that the dog Jay-Jay was aware of conflict between Fudge’s owner and its owner, and that this served to provoke Jay-Jay.
- [49] Ms Do has filed evidence from a self-described ‘Medium’, Ms De Warren, who purported to have talked to the dog Jay-Jay. Ms Do was unable to point to any instance in which such evidence by that ‘Medium’ had been accepted by any Court or Tribunal.
- [50] I completely dismiss the evidence of Ms De Warren, as lacking any credibility.
- [51] Ms Do has also filed evidence from an associate of hers, Ms Voss, who purports to be a doctor. Her report by does not indicate the basis of any such qualification, other than the curious post-nominal of (DAnimSt), which is not a familiar qualification.
- [52] I consider the comments of Ms Voss as to a dog legitimately displaying ‘defensive aggression’ to be confused and unconvincing; and her use of the expression ‘a small amount of defensive aggression’ in this matter, where the much larger dog Jay-Jay has twice seized the much smaller dog by the throat, and has inflicted very serious injuries on the much smaller dog, to be minimising a very serious attack.
- [53] I do not place any credible weight on the evidence of Ms Voss.
- [54] The evidence of Ms Wehl raises a strong allegation that the dog Jay-Jay does display aggressive behaviour towards other dogs and people, other than the neighbour and Fudge. I consider that Ms Do was downplaying the severity of the incident, which occurred on 11 September 2019, in her evidence.
- [55] The evidence in this matter clearly indicates a deliberate and sudden attack by the dog Jay-Jay upon a much smaller dog, which had done nothing to provoke it at the time.
- [56] Ms Do has adduced no credible evidence supporting her contention that Jay-Jay only acted defensively as a result of a long history of provocation. I do not accept that the dog Jay-Jay was provoked to attack Fudge by the history of previous conflict between its owner and the neighbour.
- [57] I am satisfied that the elements of Section 89 of the Act are made out, and that a declaration of the dog Jay-Jay to be a declared dangerous dog should be made.

[58] I confirm the decision of the Brisbane City Council, made on 7 August 2019, to declare the dog Jay-Jay a regulated (dangerous) dog.