

**IN THE DISTRICT COURT
AT TAURANGA**

**I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA**

**CRI-2021-070-003774
[2022] NZDC 12499**

TAURANGA CITY COUNCIL
Prosecutor

v

HELEN TINA FRASER
Defendant

Hearing: 21 June 2022

Appearances: N Speir and B Cochrane for the Prosecutor
J Carter for the Defendant

Decision: 12 July 2022

RESERVED DECISION OF JUDGE I D R CAMERON

[1] Helen Fraser is the owner of a dog which bit the arm of a veterinary surgeon Dr Schneider, sadly causing her serious injuries. The dog is a Rottweiler named Chopper. Ms Fraser now faces a charge under s 58 of the Dog Control Act 1996 of being the owner of a dog which attacked a person causing serious injuries. Ms Fraser has defended the charge brought by the Tauranga City Council. It is a strict liability offence, but the defence is that there was a total absence of fault on Ms Fraser's part. There had been no previous incidents involving animal control. If convicted of this offence, s 58 of that Act requires the Court to make an order for the destruction of the dog, unless satisfied the circumstances of the attack were exceptional.

[2] It is accepted that on 4 October 2021 Ms Fraser contacted the veterinary clinic known as "Holistic Vets" in Fraser Street, Tauranga. This was for the purpose of making an appointment for Chopper to be neutered, he being a young two year old male at the time. He had not been to that clinic before, so was unknown to the persons at that clinic.

[3] There was evidence that during that phone call on 4 October 2021 Ms Fraser and the vet nurse Georgia Adams discussed the temperament of Chopper. Ms Fraser's evidence was that she told the nurse that he was wary of small dogs and anxious in unfamiliar surroundings and with persons he had not previously met. The evidence from Georgia Adams, and her manager Susan Mackey who was at the clinic's reception at the time, was to the effect that Ms Fraser told them that Chopper could be aggressive with other dogs but was friendly with people. Unfortunately, no contemporaneous notes of the discussion were produced. This would have assisted in clarifying which version was correct. I am not satisfied that Ms Fraser simply said the dog was friendly to people without adding the qualification that the dog could be anxious around people he did not know. There would be no reason for her to have withheld relevant information. However, what is clear is that the vet clinic identified from that phone call and the nature of the breed (recognised as potentially dangerous by the clinic) that safety precautions would need to be taken at the time of the consultation.

[4] Thus an appointment for the procedure to be performed was made for 10.20 am on 14 October 2021. It was clear from the evidence that this appointment was the last

in time in a morning list, specifically allocated to minimise the possibility of other dogs being around at the same time.

[5] Ms Fraser's evidence was that at about 8.30 am on 14 October 2021 she rang the vet clinic because she had not received paperwork that she was told would be sent to her. Her evidence was that she was told to collect the paperwork on arrival and she was to wait in the carpark with Chopper until the veterinary surgeon came out to assess the situation.

[6] The evidence of the practice manager Susan Mackey was that when Ms Fraser arrived and uplifted the paperwork she was told to leave Chopper in the car. I am satisfied that Ms Fraser was told to leave Chopper in her car for assessment. However, I find there was a real possibility Ms Fraser did not clearly hear that instruction, as acknowledged by the practice manager Susan Mackey. Susan Mackey stated that when she gave the paperwork to Ms Fraser she mentioned to her to leave the dog in the car until the vet was ready to come and see her. Her evidence was that there was no response from Ms Fraser, and that because of the background noise she is not even sure that Ms Fraser heard this. Also, Georgia Adam's evidence was that she thinks she told Ms Fraser to keep the dog in the car, but "can't completely confirm that".

[7] I note that Ms Fraser gave evidence that the reason she let Chopper out of the car after she had collected the paperwork was because he was slobbering all over her 13 year old son Billy, who was becoming agitated with that. So once back at the car, Ms Fraser's evidence was that she let Chopper out and walked him around parts of the carpark, and that at one point when she noticed a small dog she was able to change direction and divert Chopper down the side of the building so as to avoid any confrontation. Her evidence was that after she and Billy and Chopper had been waiting some 20 to 25 minutes for the appointment, she decided to enter the vet clinic building to enquire about the delay and return the completed paperwork. It was for these reasons that she stated that she left Billy with Chopper still on his lead outside the car, and proceeded to walk towards the vet clinic. She stated that as she approached the door the veterinary surgeon, Dr Schneider, came out to the carpark greeting her in a loud voice but did not stop. She stated Dr Schneider walked towards Billy and Chopper "yelling" out a greeting to Billy across the carpark. Dr Schneider was

wearing a mask at the time. Ms Fraser's evidence is that Dr Schneider got between her and Billy and Chopper and it was then that Chopper lunged at her twice, the second time biting her arm. Ms Fraser stated that she took immediate action by grabbing Chopper's jaws when he was still latched onto Dr Schneider's arm, and that resulted in Chopper releasing his grip. In her opinion, expressed in a written report following the incident, it is likely that the dog was "spooked" by Dr Schneider getting in between her and the dog and by the loud voice used by Dr Schneider while wearing a mask.

[8] Dr Schneider's evidence was that when she came out of the building she saw Chopper on a lead and being held by Ms Fraser's son adjacent to the bonnet of Ms Fraser's vehicle. She stated that Ms Fraser was standing beside the car. Her evidence was that she greeted them both and then when she was about two metres from Chopper he lunged at her, grabbing her right forearm and causing significant injury including a broken bone. As a result, she was unable to work effectively for a considerable period of time.

[9] Dr Schneider's evidence differed from Ms Fraser's evidence in certain respects. Dr Schneider undoubtedly suffered a traumatic event and it is to be expected that other less significant details immediately preceding the attack may not have been accurately recalled. On the other hand, Ms Fraser as a witness to the attack had no reason to exaggerate those details. I prefer the evidence of Ms Fraser as to what occurred. In particular, I accept Ms Fraser's evidence that Dr Schneider got between Ms Fraser and Billy and the dog and was talking in a loud voice.

[10] Under cross-examination from Mr Carter for the defence, Dr Schneider agreed she knew that the clinic's plan was for Chopper to remain in the vehicle until she came out and was able to assess the situation. Her evidence was that it was routine for the practice to ask for a dog to be kept in the car when there might be some behavioural issues and so that the dog's demeanour could be assessed while it was still in the car. Dr Schneider stated that where appropriate, following such an assessment in the car, the owner would be asked to hold the dog to enable her to sedate it by injection to its rear end. Her evidence was that once sedated, the dog could then be taken through to the surgery.

[11] Having confirmed in evidence that the clinic's plan was to carry out an assessment of Chopper while he remained in the car, Dr Schneider was asked repeatedly why she did not require the clinic's plan to be followed. In particular, she was asked why, when she exited the building, she did not immediately speak with Ms Fraser or her son Billy about returning the dog to the car, but instead walked over to within two metres of the dog.

[12] Dr Schneider gave various explanations for not so doing. One was that there was a risk that the dog could have reacted adversely to an attempt to put it back in the car and in the opinion of Dr Schneider there was then potential for the dog to have dragged the boy while still holding its lead, and with that the possibility of an attack on another dog.

[13] The difficulty with this explanation is that all the evidence points to Chopper showing no aggression whatsoever prior to his attack on Dr Schneider. The evidence of Ms Fraser was that he was sitting quietly on his lead when being held by Billy, which evidence I accept. Also, Ms Fraser's evidence is that she and Billy acquired Chopper when he was a young puppy, and that he had been part of their family for two years. Her evidence was to the effect that Chopper and Billy got on well together and Chopper was accustomed to being walked by Billy on lead to parks and the like. She stated "Chopper knew Billy was one of his owners", and that Chopper "always listened to him as well". Dr Schneider conceded that when she came outside there were no other dogs in sight. There is simply no basis for there having been a concern about an increased risk had she required Chopper to be returned to the vehicle.

[14] Another explanation by Dr Schneider for not requiring the dog to be returned to the car was that she had no opportunity to do so. Again I am unable to accept that explanation. Even on her own evidence, when she exited the building there was some distance between where she was and Billy and the dog. At that point she had the option of speaking with Ms Fraser or Billy to instruct them to return the dog to the car. Dr Schneider stated that communication was difficult because of the mandatory wearing of masks. With respect, that difficulty would have been alleviated by a simple removal of the mask for the purpose of making oneself heard. Also, as I have already

accepted, Dr Schneider walked straight past Ms Fraser and so had ample opportunity to stop and speak with her. However, she did not avail herself of that opportunity.

[15] Another reason Dr Schneider proffered was to the effect that when she saw the dog out of the car showing no aggression she envisaged that an assessment could take place outside the car, followed by her leading the dog to the rear of the clinic (so as to avoid other dogs). However, on her evidence, she had no opportunity to follow that course. She stated, p 22 line 3 and following (notes of evidence):

But the plan isn't always to keep the dog in the car. We've got to move from there and it could have been that if Chopper was in the car I could have assessed and then said "okay let's take him out [*sic*] the car now. He was [*sic*] the bonnet and needed to be assessed."

[16] The difficulty with that explanation is that it provides no reason for a departure from the clinic's plan to assess and if necessary sedate the dog within the confines of the car.

[17] On the question of whether the correct approach was to require the dog to be put back in the car, the evidence of the practice manager Susan Mackey is relevant. Her evidence was that on the morning of 14 October 2021, and knowing that the clinic's plan was to have Chopper remain in the car for assessment, she observed that Chopper was outside the car. Her evidence was that she then intended to go outside and ask Ms Fraser to wait with the dog in the car "because obviously we hadn't seen this animal to assess it". Her evidence was that before she had a chance to go outside and speak to Ms Fraser she saw that Dr Schneider had gone outside to introduce herself. Thus Susan Mackey, an experienced veterinary practice manager, obviously believed that the dog should have been put back in the car before being approached.

[18] In addition, Christine McCulloch, gave evidence. She is a senior veterinarian employed by Holistic Vets. Her evidence was to the effect that in the circumstances which prevailed it would have been desirable for the responsible clinician to speak with the owner about the dog being outside the vehicle.

[19] Dr Schneider was also cross-examined about not suggesting to Ms Fraser that she put a muzzle on Chopper, given that these were available at the clinic to reduce

the risk of an attack. Her explanation was that not all dogs are muzzle-friendly and that it may have exacerbated the situation. However, the defence called Christine Devi to give evidence. She owns a two year old Rottweiler called Rex. She stated that in about June or July 2021 she attended the same veterinary clinic because her dog had an under-belly rash. On the day of the appointment, she was told by the clinic to keep the dog in the car until the vet came out. She did so and it was Dr Schneider who came out to the car. The dog was still inside the car. She stated that Dr Schneider asked her to put a muzzle on the dog, even though it was not suggested that the dog was aggressive in any way. Ms Devi further stated that she had never owned or used a muzzle on the dog, so to comply with that instruction she used a muzzle available from the clinic. She stated the consultation in the surgery was with the dog muzzled. Dr Schneider could not recall the event. However, I accept Ms Devi's evidence in its entirety.

[20] Thus there is evidence that with the very same breed, only a few months prior to October, the clinic had required the dog to be kept in the car prior to assessment, and as an additional precaution required the dog to be muzzled, even though it had not been muzzled before. I find Dr Schneider's explanation for not speaking with Ms Fraser about Chopper being muzzled unconvincing.


[21] In cross-examination, Ms Fraser agreed with Mr Speir for the Tauranga City Council that had Chopper remained in the vehicle the risk of an attack would have been lessened. She also agreed that in hindsight she regretted leaving her son Billy with the dog while she went into the clinic to return paperwork and to enquire as to the delay. Despite this, an objective assessment of the situation is required so as to determine who had the effective control of the situation and from what point. I find that the circumstances were that Dr Schneider, a very experienced veterinary surgeon of some 22 years, was confronted with a situation where a new client had not followed the clinic's instructions to keep her dog in the car until assessed for safety purposes. Dr Schneider had never met or seen the dog before. Dr Schneider knew at the very least that the dog was unpredictable with other dogs. The very purpose of having the dog in the car was to ascertain whether the dog could be safely let out of the vehicle or would require sedation before so doing. The evidence establishes that knowing that the clinic's safety plan had not been followed, Dr Schneider chose not to speak to

Ms Fraser or her son Billy about returning the dog to the car or alternatively muzzling the dog. Instead, Dr Schneider walked past Ms Fraser and got between her and Billy and the dog, masked and speaking in a loud voice. I agree with Ms Fraser's opinion that these factors are likely to have spooked the dog. Dr Schneider walked directly to a point some two metres away from Chopper. Chopper then lunged at Dr Schneider twice and fastened his jaws around her forearm, causing serious injuries. Billy held onto the lead but the dog was too strong to be held on a tight lead. At no time while in the carpark prior to the attack had Chopper shown any signs of aggression whatsoever. I accept the evidence of Ms Fraser that Chopper was sitting quietly on a lead being held by her 13 year old son Billy.

[22] In the result, I consider that Dr Schneider was responsible for determining how the situation should be handled from the moment she walked out of the clinic and saw Chopper out of the car. From that point she was in a position to take appropriate steps to maintain and exercise control.¹ She failed though to take any steps to maintain and exercise control, despite having every opportunity to do so. Had she done so, the incident would have been avoided. I consider that Dr Schneider put herself in a position where she was vulnerable to attack by a dog who had not been assessed for safety purposes.

[23] Thus the defence of total absence of fault is established, and the charge is dismissed.

[24] Counsel have leave to apply for any other ancillary orders. Counsel for the defendant may file an application for costs by written memorandum by no later than 21 days following the release of this decision, and any reply is to be filed within 14 days of such application.


I D R Cameron
District Court Judge

¹ *King v South Waikato District Council* [2012] NZHC 2264 at [28].