

The appeals

[1] Mr Shepherd's dog savagely attacked his four year old son, causing serious injury. Mr Shepherd pleaded guilty to a charge reflecting as much under s 58 of the Dog Control Act 1996. He was sentenced to 300 hours' community work and 12 months' supervision.¹ Mr Shepherd appeals conviction on the basis he was wrongly advised the offence was one of strict liability. Auckland Council, with leave of the Solicitor-General, appeals sentence on the basis the sentence was manifestly inadequate. It seeks a term of imprisonment.

Background

[2] In July 2014 Mr Shepherd acquired a male Bullmastiff cross. The dog's previous owners told him not to leave it alone with his son. Mr Shepherd later posted a picture of the dog on Facebook with the observation: "Mess with me, I'll eat you alive, peace ho".

[3] On the afternoon of 2 August 2014, Mr Shepherd was at home cooking dinner with his mother. His son was outside playing with the dog. Mr Shepherd heard his son scream. He ran outside to find his son lying on the garage floor. The dog was attacking his face and head. Mr Shepherd picked up his son. The dog lunged aggressively at both. Mr Shepherd hit the dog several times with a hoe until it fled. It was later destroyed. The victim underwent emergency surgery for extensive injuries to his face and scalp. He spent a fortnight in hospital.

[4] Mr Shepherd was charged on 4 September 2014. He pleaded guilty on 3 March 2016. Mr Shepherd later sought leave to vacate his plea on the basis he had been misadvised the offence was one of strict liability. On 18 October 2016, Judge Eivers dismissed that application. Sentencing did not occur until 2 March 2017. Both appeals were filed later that month.

¹ *Auckland Council v Shepherd* [2017] NZDC 4354. The Judge also directed Mr Shepherd to undertake counselling, a parenting course and pay Court costs of \$130.

The appeal against conviction

[5] Section 58 of the Dog Control Act provides:

58 Dogs causing serious injury

The owner of any dog that attacks any person or any protected wildlife and causes—

- (a) serious injury to any person; or
- (b) the death of any protected wildlife; or
- (c) such injury to any protected wildlife that it becomes necessary to destroy the animal to terminate its suffering,—

commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 years or a fine not exceeding \$20,000, or both, and the court shall, on convicting the owner, make an order for the destruction of the dog unless satisfied that the circumstances of the attack were exceptional and do not justify destruction.

[6] On behalf of the appellant, Mr Tuck contends the provision does not create strict liability; rather, it requires a mens rea element by which the prosecution must establish (beyond reasonable doubt) the owner knew or believed the dog had a propensity to attack. Mr Tuck submits this requirement is necessary to ensure only truly culpable owners are exposed to the possibility of imprisonment. It follows Mr Shepherd's legal advice was wrong, and causative of a miscarriage of justice, for, his guilty plea was based on advice there was no available defence to the charge.

[7] The submission is directly contrary to a long line of authority. And unsustainable.

[8] In *Hamilton City Council v Fairweather*,² Baragwanath J considered a related offence provision gave rise to absolute liability if the dog was not under control at the time of the attack. In His Honour's view, the wide ambit of the term "control" avoided any problem with imposing absolute liability, by providing a suitable test to meet all conditions.³ Once a dog was uncontrolled, the Judge considered the owner should be

² *Hamilton City Council v Fairweather* [2002] NZAR 477 (HC).

³ At [54].

absolutely liable for the dog's actions. His Honour saw this approach as reflecting the purpose of the Act, observing:⁴

... The dominant message is that expressed in the short title – of Dog Control. The mischief addressed in *Hansard* makes plain that was the major purpose of the reform.

[9] In *King v South Waikato District Council*,⁵ Heath J considered Baragwanath J's approach could result in overbroad criminalisation. Heath J concluded strict liability was more consistent with legislative purpose. So too the availability of a total absence of fault defence (as discussed in the well known cases of *Civil Aviation Department v MacKenzie*,⁶ and *Millar v Ministry of Transport*⁷).

[10] Courtney J adopted the same approach in *MacKenzie v Auckland City Council*.⁸ Likewise Katz J in *Tauranga City Council v Julian*. Her Honour held the s 58 offence provision creates strict liability subject to a defence of total absence of fault.

[11] In *Fairbrother v Porirua City Council* Brown J observed in relation to the same section:⁹

Attack and control charges are strict liability offences. Once the elements have been made out beyond reasonable doubt, criminal responsibility can only be avoided if the [owner] establishes, on the balance of probabilities, the defence of total absence of fault.

[12] In the recent case of *Epiha v Tauranga City Council*, Woodhouse J rejected a similar argument in the context of s 57.¹⁰ The Judge agreed “fundamentally” with the reasoning laid out in the cases above. His Honour added:¹¹

I nevertheless observe that if s 57(2) was interpreted as requiring the prosecution to prove that an owner knew that the dog had a propensity to attack, that would in my judgment conflict materially with the other provisions of the Act that I have referred to – s 5 in respect of the obligations on owners, and s 4 in respect of the objectives of the Act.

⁴ At [53].

⁵ *King v South Waikato District Council* [2012] NZHC 2264, [2012] NZAR 837.

⁶ *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA).

⁷ *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA).

⁸ *MacKenzie v Auckland City Council* HC Auckland, CRI-2006-404-343, 6 December 2006.

⁹ *Fairbrother v Porirua City Council* [2015] NZHC 1542 at [42].

¹⁰ *Epiha v Tauranga City Council* [2017] NZHC 979.

¹¹ At [14].

[13] It follows the law in this area is settled. Even if it were not, the argument is unsustainable for four interrelated reasons.

[14] First, the proposed interpretation would add a new ingredient to the offence in the absence of legislative authority. Second, that ingredient would frustrate the offence provision as it would be very difficult to prosecute most cases, that is, those involving first offenders. How would the prosecution prove the owner knew the dog had a propensity to attack if the dog had not previously attacked? Third, the concept of propensity as an ingredient of an offence as distinct from a species of evidence (governed by the Evidence Act 2006) is to the best of my knowledge, unprecedented in the criminal law. Clear statutory language would be required to embed a hitherto evidential concept in an offence provision. Fourth, the proposed interpretation is inconsistent with the Act's broader scheme, as illustrated by s 5 of the enactment:

5 Obligations of dog owners

- (1) The obligations imposed on dog owners by this Act require every owner of a dog—
 - (a) to ensure that the dog is registered in accordance with this Act, and that all relevant territorial authorities are promptly notified of any change or address or ownership of the dog;
 - (b) to ensure that the dog is kept under control at all times;
 - (c) to ensure that the dog receives proper care and attention and is supplied with proper and sufficient food, water and shelter;
 - (d) to ensure that the dog receives adequate exercise;
 - (e) to take all reasonable steps to ensure that the dog does not cause a nuisance to any other person, whether by persistent or loud barking or howling or by any other means;
 - (f) to take all reasonable steps to ensure that the dog does not injure, endanger, intimidate, or otherwise cause distress to any other person;
 - (g) to take all reasonable steps to ensure that the dog does not injure, endanger, or cause distress to any stock, poultry, domestic animal, or protected wildlife;
 - (h) to take all reasonable steps to ensure that the dog does not damage and endanger any property belonging to any other person;
 - (i) to comply with the requirements of this Act and of all regulations and bylaws made under this Act.

[15] To elaborate, the Act imposes an embracing host of obligations on dog owners to ensure otherwise good pets do not annoy, harm or harass people or other animals. An owner must therefore “take all reasonable steps to ensure that the dog does not injure, endanger, intimidate, or otherwise cause distress to any person”. This obligation exists irrespective of whether the dog has a propensity to attack; it applies to *every owner of every dog*. To approach the Act in any other way would be contrary to its objectives.

[16] The argument also faces a practical difficulty. Mr Shepherd had been told not to leave the dog alone with his son. That advice recognised the dog could be dangerous. So, even the construction advanced by Mr Tuck in relation to s 58 could not avail the appellant of a defence on the acknowledged facts.

[17] The conviction appeal is dismissed.

The appeal against sentence

[18] As will be recalled, s 58 creates an offence punishable by a maximum period of three years’ imprisonment or a fine not exceeding \$20,000, or both, in relation to the owner of a dog that attacks and causes serious injury to any person or any protected wildlife. The offence provision is only one of two in the Act to provide for a term of imprisonment. The other is s 54, which creates an offence for a dog owner who fails to provide proper care for the animal. That offence is punishable by a maximum term of imprisonment of only three months, or a fine of \$5,000. It follows the Legislature has identified dog attacks as deserving particular sanction. History underscores the point.

[19] The maximum penalty in relation to s 58 used to be three months’ imprisonment. But from 1 December 2003, the maximum penalty was increased twelve-fold to its current level.¹² As Courtney J observed in *MacKenzie v Auckland City Council*, the amendment is “indicative of Parliament’s intention to express society’s concern at the serious consequences of dog attacks”.¹³

¹² Dog Control Amendment Act 2003, s 37.

¹³ *MacKenzie v Auckland City Council*, above n 8, at [25].

[20] Few cases have reached the High Court. And only three terms of imprisonment appear to have been upheld.¹⁴ A clear majority have attracted non-custodial responses, as the attached table reveals. Doubt attaches to whether current sentencing levels reflect Parliamentary intention as expressed through substantial uplift of the maximum penalty.

[21] In the District Court, the Council contended for a starting point of 18 months' imprisonment. Mr Shepherd, however, advanced argument in support of a non-custodial sentence. The Judge's response is not entirely clear. Having cited at length the parties' respective submissions, Her Honour said:¹⁵

That does not detract at all from the fact that it is not a good thing that your son was attacked by the dog. Also, in my opinion the circumstances relating to you, the offender, would make imprisonment inappropriate because this is offending against your own son, you reacted immediately to assist him, you have an ongoing relationship with your son and you must live with what has occurred to your son, which is your responsibility, Mr Shepherd, and unwittingly (what I mean by that is you did not intend it) it was your fault because the dog was a dog that should have been under better control. You must live with that for the rest of your life.

That is where I differ from Mr Marchant and consider that a sentence short of imprisonment is appropriate. However, as I indicated earlier, it would be a fairly lengthy term of community work. Another matter I have taken into account under the Sentencing Act 2002 is s 16(2) where I believe that the purpose and principles of sentencing can be achieved by other than a term of imprisonment.

I therefore convict and sentence you to 300 hours' community work (which can be converted to training) and 12 months' supervision, to undertake such counselling as directed by the probation officer and to undertake a parenting course or any other course as directed by the probation officer. You are to pay \$130 Court costs.

[22] On the basis of these remarks, the Judge appears to have rejected the Council's starting point in favour of a "short sentence of imprisonment". It also appears the Judge considered mitigating features justified the substitution of a non-custodial sentence rather than a short prison term. No recitation of authority is required for the propositions sentencing notes should identify a starting point and attendant methodology in reaching the ultimate sentence.

¹⁴ *Owens v Police* HC Auckland A44/02, 13 June 2003; *Campbell v Police* HC Wanganui CRI-2008-483-13, 9 June 2008; *Dwyer v South Taranaki District Council* [2012] NZHC 3580.

¹⁵ *Auckland Council v Shepherd*, above n 1, at [19]–[21].

[23] Mr Marchant submits the Judge erred in failing to adopt a starting point of 18 months' imprisonment, and mitigating features could not justify a non-custodial sentence. In short, Mr Marchant contends the sentence is manifestly inadequate.

[24] Mr Tuck acknowledges the Judge's remarks were "unorthodox", but submits the response was "humane" and otherwise within the Judge's discretion. Mr Tuck emphasises a term of imprisonment would affect the ongoing relationship between Mr Shepherd and his son.

[25] The strictures in relation to Crown appeals against sentence are well known. The core proposition is that a Crown appeal against sentence will be allowed only when the sentence is manifestly—meaning clearly, plainly or obviously—inadequate. Curial restraint is required for obvious reasons.

[26] This case has four aggravating features. First, Mr Shepherd was on notice the dog could be dangerous in connection with children. He had, essentially, been told as much. Second, the injuries were serious, and inflicted to the victim's head and face. Had Mr Shepherd not promptly intervened, the victim could have sustained especially serious harm—or worse. It bears repeating the victim was hospitalised for a fortnight. Third, Mr Shepherd appears to have taken pride in the dog's dangerous character, to wit the Facebook post. While an element of bravado may have influenced the post, this aggravating factor underscores the first. Fourth, the victim was especially vulnerable. His age meant he was defenceless.

[27] However, even with this combination, I am not persuaded an 18-month starting point was required. As Mr Marchant accepted, this level of sentence is unprecedented, and derived exclusively from English sentencing guidelines.¹⁶

[28] English sentencing guidelines have been treated by our Courts as helpful in relation to a number of domestic criminal offences.¹⁷ However, care is obviously required to ensure the offence provisions in the respective jurisdictions align. The

¹⁶ Sentence Council of England and Wales *Dangerous Dog Offences: Definitive Guideline* (1 July 2016).

¹⁷ *R v Clode* [2008] NZCA 421, [2009] 1 NZLR 312 at [52]; *S(CA853/10) v R* [2011] NZCA 324, [2011] 3 NZLR 606 at [31]; *R v Davidson* [2008] NZCA 484 at [24].

starting point advanced by Mr Marchant is based on an English offence which attracts a higher maximum penalty (of five years' imprisonment).¹⁸

[29] Given the (four) aggravating features discussed above, and the 2003 legislative amendment—which courts must respect—a starting point of between 12 and 15 months' imprisonment was required. This range represents 33 percent to 42 percent of the available maximum, not more. It is deliberately conservative. It follows the Judge erred when apparently concluding a “short sentence” of imprisonment would suffice.

[30] As to mitigating features, Mr Shepherd intervened immediately. He did not contest the dog's destruction, and at least initially was remorseful. It is unfortunate Mr Shepherd's attitude later hardened to one in which he was not responsible for what had occurred. Mr Shepherd's attempt to vacate his guilty plea and related conviction appeal dilute the credit that could otherwise be afforded in connection with guilty plea entry. Taken together, the mitigating features above could not warrant a discount of more than 20 percent. So, assuming a starting point at the bottom of the available range, the sentence ought to have been not less than nine and a half months' imprisonment.

[31] This level of sentence is obviously well above that imposed on Mr Shepherd. But the case is at the cusp for curial intervention because of an unusual combination of factors. The offence occurred in 2014. Three years have now passed since the attack. The victim was then four. He is now seven. The case has been before the courts for all of this period. While Mr Shepherd has been responsible for much of the delay, criminal litigation is often stressful for everyone involved. A late prison sentence could interfere with the relationship between Mr Shepherd and his son. It is not unfair to describe the case as stale. A prison term now would have an element of retrospectivity. Importantly, there is no evidence the victim has suffered permanent scarring or ongoing psychological harm.

¹⁸ Dangerous Dogs Act 1991 (UK), s 3(1).

[32] Standing back, these factors are dispositive in combination. However well deserved, a sentence of imprisonment would now be unjust. The sentence appeal is dismissed.

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Downs J

Sentences imposed under s 58 of the Dog Control Act

Case name	Facts	Starting point	Final disposition
<p><i>Georgiou v Police</i> HC Wellington AP89/97, 21 May 1997</p>	<p>The offender, a 22 year-old woman, was walking her German Shepherd/Bull terrier cross past a primary school at 3.15 pm. The dog attacked a young schoolboy. The attack inflicted serious injuries to the boy's leg which required 64 sutures.</p> <p>The offender suffered from Crohn's disease and was a sickness beneficiary. She pleaded guilty and surrendered the dog.</p>	<p>No starting point identified.</p>	<p>The District Court imposed a fine of \$800 and ordered two-thirds of that to be paid to the victim.</p> <p>On appeal, Gendall J refused to discharge the appellant without conviction but reduced the fine to \$500 on account of her circumstances.</p>
<p><i>Owen v Police</i> HC Auckland A44/02, 13 June 2003</p>	<p>The offender's dog inflicted serious injuries on a seven-year-old girl who was playing in a public reserve. The child's forehead, upper cheeks and general head area were extensively ripped by the dog's fangs. One of her eyes was detached from its socket. Twenty-three hours of remedial surgery was necessary. The reserve where the attack took place required dogs to be leashed. The dog was unleashed. The dog had previously attacked a cat and was required under the Dog Control Act to be muzzled in public places. It was not muzzled at the time of the attack.</p> <p>The owner did not come forward to admit ownership of the dog. He was not arrested until five days after the attack but eventually pleaded guilty.</p>	<p>The District Court Judge did not identify a starting point.</p> <p>On appeal, Priestley J said an appropriate starting point would have been around 75 to 80 days of the 90 day maximum.</p>	<p>The District Court Judge imposed a sentence of two months' imprisonment.</p> <p>Priestley J upheld the sentence of two months' imprisonment.</p> <p>(The max penalty under s 58 at this time was three months' imprisonment)</p>
<p><i>Day v Manukau City Council</i> HC Auckland CRI-2004-092-3996, 1 July 2005</p>	<p>The offender's dog bit a 66-year-old female victim while she was walking along a public footpath. The dog bit off a two centimetre portion of her ear and punctured her right forearm and right thigh. She remained in hospital for some days and her ear was left permanently disfigured.</p> <p>At the time of the attack the owner was in Australia on a working holiday. She was a responsible mother of two and well regarded. She pleaded guilty.</p>	<p>The District Court Judge fixed a starting point of eight to nine months' imprisonment.</p> <p>On appeal, Frater J did not identify an appropriate starting point.</p>	<p>The District Court Judge imposed a sentence of four months' imprisonment and gave leave to apply for home detention.</p> <p>Frater J allowed the appeal and substituted a sentence of 150 hours community work.</p>
<p><i>MacKenzie v Auckland City Council</i> HC Auckland CRI-2006-404-343, 6 December 2006</p>	<p>The victim entered an enclosed yard and was thereupon attacked by two dogs who inflicted serious injuries requiring hospitalisation.</p> <p>The owner already had a conviction under s 57 of the Dog Control Act in respect of the same dogs for which she had received a fine. Against this, the owner had expected the victim to go through the front door rather than through a side gate. She also had placed on her property a sign "Beware of the dog" and had erected two other general signs which prohibited entry.</p>	<p>No starting point identified.</p>	<p>The District Court Judge imposed sentence of six months' imprisonment.</p> <p>On appeal, Courtney J substituted a sentence of 150 hours' community work.</p>

Case name	Facts	Starting point	Final disposition
<p><i>Campbell v Police</i> HC Wanganui CRI-2008-483-13, 9 June 2008</p>	<p>The offender owned a Pitbull Terrier cross which had been classified as a dangerous dog. It escaped from her property by jumping a fence and attacked a young girl. The injuries were described as relatively minor for a charge brought under s 58. Upon learning of the attack, the owner drove while disqualified to retrieve the dog. When spoken to by Police she denied knowing the dog's location but eventually pleaded guilty after arrest.</p>	<p>The District Court Judge adopted a starting point of six months' imprisonment. Reduced on appeal to four months' imprisonment.</p>	<p>The District Court imposed a sentence of six months' imprisonment (no discount for guilty plea). Gendall J imposed a final sentence of three months' imprisonment.</p>
<p><i>Bartlett v Police</i> HC Invercargill CRI-2009-425-20, 22 September 2009</p>	<p>The offender was looking after a Neapolitan Mastiff and a Bullmastiff. The victim, a retiree, was delivering pamphlets on a street when the two dogs attacked her. She received several puncture wounds and one large laceration. The injuries required medical treatment for several weeks and caused permanent scarring. The dogs also charged at police officers who had been called to the scene.</p>	<p>The District Court Judge did not identify a starting point. French J said the appropriate starting point was "well below a term of imprisonment".</p>	<p>The District Court Judge imposed 375 hours of community work. French J dismissed the appeal.</p>
<p><i>Dwyer v South Taranaki District Council</i> [2012] NZHC 3580 (21 December 2012)</p>	<p>The offender owned a Pitbull Terrier. It was secured on his property by a long leash which enabled it to roam the backyard as well as access most of the interior of the house. The victims were visitors who were drinking inside the house at the time of the attack. The dog jumped on an adult female, bit her on the shoulder and tried to drag her to the ground. It then attacked an adult male, latching on to his right arm causing a puncture wound and another deep wound to his inner forearm. Another guest tried to leave the house via a window. The dog fastened on to her leg causing a large puncture wound in her ankle area. She was in hospital for two days. When police and animal control authorities were called, the owner was holding the dog at the front of the property. He made threats to the police he would release the dog. He then released the dog and frustrated police attempts to retrieve it. He eventually pleaded guilty.</p>	<p>The District Court Judge adopted starting point of 12 months' imprisonment. On appeal, Allan J said the appropriate starting point was eight months' imprisonment</p>	<p>The District Court Judge gave credit for guilty pleas and imposed a sentence of 10 months' imprisonment. Allan J gave one month credit for guilty plea and a substituted sentence of seven months' imprisonment.</p>

Case name	Facts	Starting point	Final disposition
<p><i>Howard v Christchurch City Council Dog Control</i> [2014] NZHC 2996 (27 November 2014)</p>	<p>The offender owned a Rottweiler. On the day of the attack, the offender took his dog to a dog park. He watched from a distance of 50 metres as his dog circled a mother and her two children. The dog mauled one of the children who was sitting on the ground. It latched onto the child's legs and buttocks. The child required urgent medical attention. He received deep puncture wounds and lacerations on his legs and buttocks.</p> <p>The owner was indifferent to the attack and said the children should not be in the dog park. The owner was a pensioner of limited means with a knee injury.</p>	<p>No starting point identified.</p>	<p>The District Court Judge imposed 300 hours of community work, ordered fines totalling \$2,000 and ordered reparation of \$8,000 to the mother.</p> <p>Whata J reduced reparation to \$4,000 because of the pensioner's limited means but upheld the balance of orders.</p>
<p><i>Button v Auckland Council</i> [2014] NZHC 477 (13 March 2015)</p>	<p>The offender owned two Bull Terriers. They attacked an elderly woman and her small terrier as they walked down the woman's driveway. The dogs killed the terrier and caused injuries to the woman. The nature of the injuries suffered by the woman is not recorded in the judgment.</p>	<p>No starting point identified.</p>	<p>The District Court Judge imposed fines totalling \$1,600 for the attacks plus court costs and reparation totalling \$2,934.</p> <p>Ellis J allowed an appeal because of the offender's limited financial means. Ellis J ordered the owner to pay reparation of \$1,000 and court costs of \$260.</p>
<p><i>Fairbrother v Porirua City Council</i> [2015] NZHC 1452 (26 June 2015)</p>	<p>The offender owned two Bull Terriers. They were supposedly well trained. The offender came across a husband and wife at the beach who expressed an interest in bull terriers. The offender and the couple engaged in conversation. Towards the end of the conversation, the wife reached down to pat one of the terriers. It jumped up and bit her on the lower lip. About 40 percent of her lower lip was bitten off. She required extensive surgery and ongoing medical treatment. She later encountered difficulties speaking and eating and her facial appearance was altered.</p> <p>The owner concealed the dog from authorities and frustrated attempts to find it. The dog was not found until some 17 months after the incident.</p>	<p>No starting point identified.</p>	<p>The District Court Judge imposed 200 hours of community work and ordered payment of approximately \$15,651 in various fines, court costs, reparations and other disbursements.</p> <p>Brown J declined an appeal against the Judge's refusal to discharge the offender without conviction.</p>