IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA217/2023
[2024] NZCA 401

IN THE MATTER OF SOLICITOR-GENERAL'S REFERENCE FROM CRI-2022-404-212 ([2022] NZHC 31)
Referrer

Hearing: 30 April 2024

Court: French, Courtney and Collins JJ

Counsel: M J Lillico and W J Harvey for Referrer
T Mijatov as counsel assisting the Court

Judgment: 22 August 2024 at 3.30 pm

JUDGMENT OF THE COURT

We answer the question of law (arising from *Telford v Auckland Council* [2022] NZHC 31) as follows:

> **Was the High Court correct to conclude that conviction of a dog's owner is a precondition to an order for destruction being made under s 57(3) of the Dog Control Act 1996?**
>
> **Yes.**

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Is the conviction of a dog's owner for an offence under s 57(2) of the Dog Control Act 1996 (the Act) a precondition for making an order for the destruction of the dog under s 57(3)?

[2] That is the key issue before us for determination. It is an issue on which there is a conflict of High Court authority, with five decisions holding that conviction is a necessary precondition,[1] and four holding it is not.[2] As we shall explain, the division of opinion turns very much on the significance (if any) to be attached to a 2003 amendment to s 57.[3]

Background

[3] The issue has arisen in the following context.

[4] A Mr Robert Telford is the owner of an American Staffordshire Terrier named Suki. The dog, which was not registered, escaped from his property and ran to the nearby Waterview Reserve.

[5] The complainant was in the reserve. She was sitting at a public picnic table with her dog Charlie on a lead lying underneath the table. Suki suddenly ran straight across the reserve, grabbed Charlie by the throat and latched on. After approximately one minute, the complainant managed to get Suki to let go, but within a matter of seconds the dog had latched onto Charlie again, this time under one of his front legs. With the assistance of a bystander, the complainant finally managed to force Suki to release Charlie. The bystander locked Suki in a public toilet and contacted Animal Management.

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1 See *King v South Waikato District Council* [2012] NZHC 2264, [2012] NZAR 837 at [31]–[33]; *Walker v Nelson City Council* [2017] NZHC 750 at [34] (obiter); *Fountain v Auckland Council* [2018] NZHC 591, [2018] 3 NZLR 216 at [38]; *Adams v South Taranaki District Council* [2021] NZHC 3254 at [38]–[41]; and *Telford v Auckland Council* [2023] NZHC 31 at [78]–[86].

2 See *Turner v South Taranaki District Council* [2013] NZHC 1603 at [22]; *Epiha v Tauranga City Council* [2017] NZHC 979 at [12]–[14]; *Ingle v Auckland Council* [2020] NZHC 1164 at [55]–[60]; and *van Delden v Waitaki District Council* [2021] NZHC 2264 at [55]–[57].

3 See *Ingle v Auckland Council*, above n 2, at [60]; *van Delden v Waitaki District Council*, above n 2, at [55]; *Telford v Auckland Council*, above n 1, at [86]; *King v South Waikato Council,* above n 1, at [31]; *Adams v South Taranaki District Council*, above n 1, at [40]; and *Fountain v Auckland Council*, above n 1, at [34].

[6] Charlie sustained multiple puncture wounds and needed an overnight stay at a veterinarian clinic followed by further treatment the next day.

[7] Mr Telford was charged by the Auckland Council with an offence under s 57(2) of the Act, being the owner of a dog that attacked a domestic animal.[4] The offence is one of strict liability. That means the only act on the part of the defendant which the prosecution is required to prove beyond reasonable doubt is that the defendant is the owner of the attacking dog.[5] The only defence is a total absence of fault, which the dog owner must prove on the balance of probabilities.[6]

[8] In this case, Mr Telford accepted he was guilty of the offence under s 57(2). However, he applied for an order pursuant to s 106 of the Sentencing Act 2002 to be discharged without conviction.

[9] In the District Court, Judge T Singh granted Mr Telford a discharge without conviction for reasons related to Mr Telford's personal circumstances but made an order for Suki's destruction under s 57(3) of the Act.[7]

[10] Mr Telford appealed to the High Court against the making of the destruction order. Fitzgerald J held that a conviction was a necessary condition precedent to the making of such an order.[8] Accordingly, because Mr Telford had been discharged *without* conviction,[9] the District Court did not have jurisdiction to order destruction under s 57(3).[10]

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4 Dog Control Act 1996, s 57(1)(b).

5 See *Newlands v Nelson City Council* [2021] NZSC 100 at [11]; *Auckland Council v Hill* [2020] NZCA 52, [2020] NZLR 602 at [47]; and *Epiha v Tauranga City Council* [2017] NZCA 511, [2017] NZAR 1664 at [6]–[7].

6 *King v South Waikato District Council*, above n 1, at [28]; *Simpson v Kawerau District Council* [2005] NZAR 529 (HC) at [28]; and Neil Wells and M B Rodriguez-Ferrere *Wells on Animal Law* (online ed, Thomson Reuters) at [26.4]. See also *Tauranga City Council v Julian* [2014] NZHC 2132, [2014] NZAR 1322.

7 *Auckland Council v* [*Telford*] [2022] NZDC 10026 at [22] and [26]. The relevant personal circumstances were Mr Telford's financial circumstances and the impact which a conviction would have on his job: see [17]–[22].

8 *Telford v Auckland Council*, above n 1, at [4] and [78]–[87].

9 A discharge without conviction under s 106(2) of the Sentencing Act 2002 is deemed to be an acquittal.

10 *Telford v Auckland Council*, above n 1, at [86].

[11] Although finding that destruction could not be ordered under s 57(3) due to the lack of a conviction, Fitzgerald J accepted the absence of a conviction would not preclude a destruction order being made under s 106(3) of the Sentencing Act.[11] Section 106(3)(c) provides that a court discharging an offender without conviction may make any order that the court is required to make on conviction. The Judge however declined to exercise that power because she considered in the circumstances of this case that public safety concerns did not require it.[12]

[12] The order for Suki's destruction was accordingly quashed.[13]

The Solicitor-General's application

[13] Auckland Council wishes to challenge the High Court decision and also resolve the conflict that currently exists in the High Court caselaw. However, the Council has no right of appeal. The only avenue for challenging the decision is for the Solicitor-General to refer a question of law to this Court under s 313(3) of the Criminal Procedure Act 2011.

[14] The Solicitor-General has therefore sought and obtained leave to refer the following question:[14]

> Was the High Court correct to conclude that conviction of the dog's owner is a precondition to an order for destruction being made under s 57(3) of the Dog Control Act 1996?

[15] In granting the Solicitor-General leave to appeal, the Court also appointed counsel Mr Mijatov to act as counsel to assist the Court, given the absence of a respondent party.[15]

[16] Finally, for completeness, we note that the same question can arise in cases other than those where a discharge without conviction has been granted. It could arise

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11 At [88]–[89]. Contrast *Ingle v Auckland* Council, above n 2, at [110]–[111], where Gordon J held that a dog destruction order under s 57(3) did not qualify as an order a court was required to make on conviction for the purposes of s 106(3)(c).

12 *Telford v Auckland Council*, above n 1, at [97].

13 At [98].

14 Leave was granted by Cooper P in a minute dated 12 June 2023.

15 Criminal Procedure Act 2011, s 314(4)(a).

for example where the person charged has been acquitted because the prosecution has failed to prove they were the owner of the attacking dog or where the person charged is the owner but has established the defence of complete absence of fault.

[17] We begin our discussion with a brief explanation of the relevant legal landscape and the decision of this Court in *Auckland Council v Hill*.[16] We then turn to the arguments advanced by the Solicitor-General.

Legal background

[18] The Act came into force in 1996. In 2003, it was amended as the result of a major review promoted by public outrage over a number of serious dog attacks.[17] As we shall explain, one of the amendments involved the repeal and substitution of s 57.[18]

[19] A key object of the Act is expressed to be to make better provision for the care and control of dogs.[19] Section 4 states the Act achieves this by:

(a) requiring the registration of dogs;[20]

(b) making special provision in relation to dangerous and menacing dogs;[21]

(c) imposing obligations on dog owners designed to ensure that dogs do not cause a nuisance to any person and do not injure, endanger or cause distress to any person;[22] and

(d) imposing obligations on dog owners to ensure that dogs do not injure, endanger, or cause distress to any stock, poultry, domestic animal or protected wildlife.[23]

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16 *Auckland Council v Hill*, above n 5.
17 Dog Control Amendment Act 2003; and *Halliday v New Plymouth District Council* HC New Plymouth CRI-2005-443-11, 14 July 2005 at [12].
18 Dog Control Amendment Act, s 35.
19 Dog Control Act, s 4(a).
20 Section 4(a)(i).
21 Section 4(a)(ii).
22 Section 4(a)(iii).
23 Section 4(a)(iv).

[20] The section at the heart of this case, s 57, relevantly reads as follows:

> **57 Dogs attacking persons or animals**
>
> (1) A person may, for the purpose of stopping an attack, seize or destroy a dog if—
>
> (a) the person is attacked by the dog; or
>
> (b) the person witnesses the dog attacking any other person, or any stock, poultry, domestic animal, or protected wildlife.
>
> (2) The owner of a dog that makes an attack described in subsection (1) commits an offence and is liable on conviction to a fine not exceeding $3,000 in addition to any liability that he or she may incur for any damage caused by the attack.
>
> (3) If, in any proceedings under subsection (2), the court is satisfied that the dog has committed an attack described in subsection (1) and that the dog has not been destroyed, the court must make an order for the destruction of the dog unless it is satisfied that the circumstances of the offence were exceptional and do not warrant destruction of the dog.
>
> (4) If a person seizes a dog under subsection (1), he or she must, as soon as practicable, deliver the dog into the custody of a dog ranger or dog control officer.
>
> (5) If a dog control officer or dog ranger has reasonable grounds to believe that an offence has been committed under subsection (2), he or she may—
>
> (a) seize and take custody of the dog; or
>
> (b) if seizure of the dog is not practicable, destroy the dog.
>
> …

[21] Several of the remaining subsections of s 57 confer additional powers on dog control officers, including the power to enter land or premises for the purposes of seizing a dog believed to have attacked a person or animal.[24]

Auckland City Council v Hill

[22] *Auckland City Council v Hill* is the only previous occasion on which this Court has been asked to determine an issue relating to the interpretation of s 57(3) since the 2003 amendment. In *Hill*, the Court was asked to decide whether events after the dog

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[24] Section 57(6)–(7).

attack could be taken into account in determining under s 57(3) whether a destruction order was not warranted due to exceptional circumstances. Exceptional circumstances existed.[25] The Court held that the dog's post-attack history could not be taken into account because the only relevant circumstances for that purpose were the circumstances of the attack itself.[26] That meant the dog's *pre*-attack history was also irrelevant.[27]

[23] Although not directed to the issue on appeal in this case, the *Hill* decision makes some important general observations about s 57(3). It notes for example that s 57(3) proceeds on the basis that the attack of itself establishes there is a risk of the dog attacking again in similar circumstances.[28] Thus s 57(3) was said to create a presumptive requirement for destruction (a "default rule") and is concerned with ensuring, in the interests of public safety, that there is no real risk that a dog will attack again.[29] The decision also notes that before concluding the exceptional circumstances warrant a reprieve, the court needs to be satisfied that the risk of a future attack is so unusual or unlikely that destruction is not necessary.[30]

[24] The issue of whether a conviction was a condition precedent to the making of a destruction order did not arise in *Hill* because the dog owner in that case had been convicted. The only statement in the *Hill* proceeding bearing directly on that issue was an assumption made in this Court's leave decision that a dog destruction order under s 57(3) can only stand if there is a conviction.[31]

The Solicitor-General's submissions

[25] As mentioned, the current wording of s 57(3) came about as the result of a 2003 amendment to the Act.[32] The Solicitor-General relies very heavily on the amendment.

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25 *Hill v Auckland Council*, above n 5, at [38].
26 At [79].
27 At [71].
28 At [6], [65] and [75].
29 At [65]–[66].
30 At [64].
31 *Auckland Council v Hill* [2019] NZCA 296 [*Hill* leave decision] at [11], citing *Fountain v Auckland Council*, above n 1.
32 Dog Control Amendment Act.

[26] Prior to 2003, the relevant section was s 57(5). It read as follows:[33]

> (5) The owner of any dog that makes any such attack commits an offence and is liable on summary conviction to a fine not exceeding $1,500 in addition to any liability the owner may incur for any damage caused by the attack; and, where the dog has not been destroyed, 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 of the dog.

[27] As will be apparent, the content of this pre-2003 provision is now comprised in two separate subsections, subss (2) and (3). Notably, the phrase "on convicting the owner" does not appear in subs (3).

[28] Counsel for the Solicitor-General, Mr Lillico, accepted that under the pre-2003 provision, there could be no doubt that a conviction was a necessary prerequisite to the making of a destruction order. However, he submitted that had all changed when Parliament amended the provision by removing the phrase "on convicting the owner". In his submission, interpreted in light of the purpose of the Act, the amended wording of s 57 means a conviction is no longer needed. Parliament had intended to dispense with that requirement and the High Court had accordingly erred in reading it back in.

[29] Developing that central submission, Mr Lillico emphasised the concerns about public safety that had preceded the Dog Control Amendment Act 2003 (the Amendment Act). He also contended that the interpretation of s 57(3) adopted by the High Court in this case was contrary to the policy underpinning s 57 which, as noted in *Hill*, is to protect public safety. An owner, Mr Lillico argued, may as in this case, avoid conviction for reasons unconnected to the attack, but that does not mean the dog itself no longer poses a risk to public safety.

[30] The interpretation advocated by Mr Lillico, that a destruction order does not depend on the owner being convicted under s 57(2), is supported by four High Court decisions.[34] These include a post-*Hill* 2020 decision, *Ingle v Auckland Council*, where the Judge made the following observations:[35]

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33 Emphasis added.

34 *Turner v South Taranaki District Council*, above n 2; *Epiha v Tauranga City Council*, above n 2; *Ingle v Auckland Council*, above n 2; and *van Delden v Waitaki District Council*, above n 2.

35 *Ingle v Auckland Council*, above n 2.

> [56] An interpretation of s 57(3) which would permit the owner of a dog which has attacked a person to avoid the consequences of that attack because, for quite unrelated reasons connected with the personal circumstances of the owner and wholly unconnected to the risk the dog presents of a further attack, the owner has not been convicted of an offence under s 57(2), cannot be consistent with the public safety purpose of the provision.
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> [57] The Court must be satisfied the dog has committed a prohibited attack. This will arise in the course of enforcement proceedings. The attack establishes the factual basis for the mandatory order to destroy a dog. This part of the provision cannot be predicated on conviction; the text is clear. This interpretation is confirmed by the 2003 amendments, which removed the express precondition of conviction.

Analysis

[31] We have not found this case straightforward. As will be apparent, the arguments advanced by Mr Lillico have some force and we are sympathetic to them. We are conscious too of concerns that have been aired publicly in recent times about dog attacks posing a serious problem in several areas of New Zealand, including in urban settings.

[32] However, after careful consideration, we have concluded that, as an exercise in statutory interpretation, the legal arguments which hinge on the 2003 amendment are not sustainable. In our view, the removal of the words "on convicting the owner" in 2003 cannot properly be interpreted as evidencing a deliberate policy choice on the part of Parliament to significantly change the meaning and effect of the provision. Rather, we consider that the removal of the phrase is more correctly viewed simply as the consequence of a redrafting tidy up involving the separating out of one multi-clause subsection into two subsections.

[33] Our reasons for reaching that conclusion are as follows.

The text of s 57(2) and (3)

[34] To assist the reader, we again set out the two subsections:

> **57 Dogs attacking persons or animals**
>
> ...
>
> (2) The owner of a dog that makes an attack described in subsection (1) commits an offence and is liable on conviction to a fine not exceeding

> $3,000 in addition to any liability that he or she may incur for any damage caused by the attack.
>
> (3) If, in any proceedings under subsection (2), the court is satisfied that the dog has committed an attack described in subsection (1) and that the dog has not been destroyed, the court must make an order for the destruction of the dog unless it is satisfied that the circumstances of the offence were exceptional and do not warrant destruction of the dog.
>
> …

[35] As will be apparent from the opening words of s 57(3), it cannot be read in isolation. Its interpretation is necessarily coloured by subs (2).

[36] A dog destruction order can only be made in proceedings under subs (2). And they are proceedings where a dog owner has been tried on a criminal charge. There is a further link between the two subsections because both use the word "offence". Subsection (2) deals with the consequences of the commission of the offence on the owner on conviction, while subs (3) addresses the consequences for the dog. In our view, subs (3) clearly presupposes that an offence has been committed. However, it is the owner, and not the dog, who is subject to a conviction and, as a consequence, subs (3) makes no reference to conviction.

[37] Subsection 3 could have included a reference to the conviction of the owner but that would, in our assessment, have been unnecessarily repetitive — subs (2) has already made clear that the subsections are dealing with consequences flowing from conviction. It is sufficient for the fact of conviction to be implicit, because as Mr Mijatov put it, we are "in the world of … criminal prosecution". Mr Mijatov also reminded us of a previous decision of this Court in the context of the Land Transport Act 1998 where it was held that it was necessarily implicit in the word "prosecution" that a conviction would be required.[36] Here, similarly, the provision has the word "offence".

[38] Mr Lillico sought to resist this analysis by arguing that the use of the word "offence" in subs (2) should not colour the meaning of the same word in subs (3).

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[36] *Solicitor-General's Reference (No 1 of 2020) from CRI-2018-004-9139, District Court at Auckland* [2020] NZCA 563 at [41].

While conceding that *Hill* was not directly on point, he argued it illustrates that there is ambiguity in the word "offence" and that the term "circumstances of the offence" in subs (3) can be interchangeable with the term "circumstances of the attack". In his submission, the word "offence" can, therefore be interpreted simply as a focus on the physical quality of the offence, the actus reus, "without looking at much else".

[39] We disagree with the contention that "offence" does not bear its usual meaning of "crime", thus of necessity entailing all the elements required for conviction.[37] Section 57(2) relevantly states that "the owner of a dog that makes an attack described in subsection (1) commits an offence and is liable on conviction". In our view, the word "offence" as it appears in subs (2) unambiguously refers to the crime created by s 57(1). That is made clear by the phrase that follows immediately after the word "offence" in subs (2), namely "*and* is liable on conviction".[38] There could be no liability on conviction unless all the elements of the offence were established.

[40] We accept that *Hill* is authority for the proposition that the word "offence" as it appears in subs (3) can be equated with "attack", but that ruling relates solely to the different issue of exceptional circumstances.[39]

[41] We acknowledge a further point that was made by Gordon J in *Ingle* and also relied upon by Mr Lillico to the effect that even if Parliament's use of the word "offence" in s 57(3) denotes the usual meaning of a crime (that is, all of the elements of the offence), that does not necessarily import conviction. There is a distinction between proof of an offence and entry of a conviction and the two should not be elided.[40]

[42] However, attributing a deliberate intention on the part of Parliament to have drawn a distinction for public safety reasons between proof of an offence and entry of

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37 The Crimes Act 1961, as enacted, defined "crime" as "an offence for which the offender may be proceeded against by indictment". From 1 July 2013, the words "an imprisonable offence" were substituted for "a crime": s 6 of the Crimes Amendment Act (No 4) 2011, which came into force on that day. See also A P Simester and W J Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [1.2], which defines crime broadly as an event that is prohibited by law and can be followed by prosecution in a criminal proceeding and thereafter, punishment.

38 Emphasis added.

39 *Hill v Auckland Council*, above n 5, at [67].

40 *Ingle v Auckland Council*, above n 2, at [38] and [42].

a conviction for the purposes of s 57(3) is problematic. The argument presupposes that making proof of an offence the only intended precondition for the destruction of a dog will always promote safety concerns. However, that assumption is ill-founded. Depending on the circumstances, there may be public safety concerns arising from an attack regardless of whether the offence itself is proven or not. If, for example, the offence is not proved because the defendant is not the owner, there is no offence, but nevertheless the dog may well still pose a risk to public safety.

[43] Another difficulty with interpreting s 57(3) as not requiring a conviction is that a dog destruction order is a sentence,[41] and as a matter of general principle, a sentence cannot be imposed in the absence of an offence *and* a conviction. That is the general principle which underpins the sentencing and criminal justice regime. To ascribe an intention on the part of Parliament to depart from that orthodoxy, would require a clear and direct statement in s 57(3) to that effect. But there is none. The Solicitor-General's argument requires accepting that Parliament chose to affect such a change by the oblique method of removing the phrase "on convicting the owner" while retaining the word "offence". And that, in our view, is a stretch.

[44] We are reinforced in this analysis by two other factors: the lack of legislative material reflecting an intention to alter the court's jurisdiction to make a dog destruction order; and the wording employed in other offence provisions in the Act.

Legislative materials leading to the 2003 amendment

[45] If it had been Parliament's intention to make what would be a significant change, it is reasonable to have expected some reference to that proposed change in the legislative materials. However, as Mr Lillico conceded, there was little legislative material indicating the intention behind the 2003 amendments to s 57(3). The only reference to destruction orders under what would become s 57(3) to which we have been referred is contained in a departmental report to the Local and Environment Committee.[42]

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41 *Hill* leave decision, above n 31, at [10].

42 Department of Internal Affairs *Local Government Law Reform Bill (No 2) and Supplementary Order Paper (No 79) — Amendments to the Dog Control Act 1996: Report for Local Government and Environment Committee* (September 2003).

[46] The report refers to a submission complaining that a presumptive requirement for destruction of dogs found to have attacked was too harsh.[43] The report responded to that submission by clarifying that the requirement for courts to issue destruction notices for dogs involved in attacks was intended to send a message to dog owners that dangerous dogs would "not be tolerated".[44] Importantly, however, the response also said that the requirement had "been in effect since 1996 and its repeal is not supported".[45] There is no suggestion or recommendation in the report that a dog destruction order should be made easier to obtain. Rather, the response to the submission is that Parliament should retain the status quo.

[47] We accept of course that the driving forces behind the Amendment Act were safety concerns and a perceived need to tighten up dog control, but that was addressed through a raft of other new measures such as increasing the statutory obligations on owners, increasing fines for deliberate and serious wrongdoing, and banning the importation of certain breeds of dogs.[46]

Other offence provisions in the Dog Control Act

[48] The second factor reinforcing our interpretation of s 57(3) is the wording employed in other sections of the Act, including most notably s 58. Section 58, which was amended in 2003,[47] reads:

> **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,

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43 At 76.
44 At 77.
45 At 77.
46 See Dog Control Amendment Act, s 17 and pt 5.
47 Dog Control Amendment Act, s 37. The amendments involved an increase in the available sentences.

> 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.

[49] As Mr Lillico accepted, there is undoubtedly a conviction threshold to making a destruction order under s 58. As he also accepted, the public safety concerns in the category of attacks governed by s 58 are greater than the attacks governed by s 57. He attempted to justify this on the basis that as an offence under s 58 carried more serious consequences than the offence under s 57, a conviction threshold was required. Yet if the Solicitor-General's interpretation of s 57 were correct, it would result in the perverse outcome that the more serious the attack, the more difficult it is to have the dog destroyed. It does not make sense that Parliament would have intended that outcome.

[50] Acknowledging the force of this, Mr Lillico also suggested the retention of the phrase "on conviction" in s 58 could be attributed to a failure of drafting, and that "imperfect expression of the policy and drafting in one section doesn't mean it hasn't been achieved in another section". We are not however persuaded that the lack of harmony between the two sections can be so easily dismissed, especially as the inconsistencies arising from the Solicitor-General's interpretation are not limited to s 58.

[51] Take for example, s 57A. It is a new provision that was added as part of the suite of amendments in 2003.

[52] Section 57A regulates rushing dogs, including dogs who rush at people in a manner that causes a person to be killed, injured or endangered.[48] Subsection (2) of s 57A states that:

> (a) the owner of the dog commits an offence and is liable on conviction to a fine … in addition to any liability that he or she may incur for any damage caused by the dog; and
>
> (b) the court may make an order for the destruction of the dog.

[48] Dog Control Act, s 57A(1)(a).

[53] Mr Lillico relied on this provision as supporting his interpretation. However, we take the contrary view. The linking of paras (a) and (b) by the word "and" strongly suggests that consideration of whether to make a destruction order is to be undertaken at the same time as consideration of fines and other penalties. It thus necessarily follows conviction. The separating out of dog destruction orders into their own subclause does not in our view signify an intention to make such orders independent of a conviction. The much more likely explanation is that this was simply done for ease of drafting. The focus of para (a) is the owner, whereas the focus of para (b) is the dog. Adding a reference to destruction of the dog in para (a) which talks about "any liability [of the owner] for any damage caused by the dog" would obviously make for somewhat clumsy syntax.

[54] Then there is s 33ED, which was introduced by s 14 of the Dog Control Amendment Act 2006. It provides a territorial authority must classify a dog as dangerous or menacing if:[49]

> (a) the owner of the dog has been convicted of an offence against ss 57(2) or 57A(2)(a); and
>
> (b) no destruction order has been made by the court concerned.

[55] The word "and" in our view clearly denotes that both preconditions must be satisfied. The two preconditions also go in tandem sequentially, again strongly suggesting that the assessment of whether to make a destruction order under ss 57(2) and 57A must be undertaken as part of the sentencing, which necessarily follows conviction.

[56] The Solicitor-General's interpretation of s 57 is also not easily reconciled with the fact that the existence of a conviction is one of the preconditions in s 33ED. To be consistent with the Solicitor-General's interpretation, the condition in subs (1)(i) should read "the owner of the dog has been *prosecuted* for an offence against section 57(2) or 57A(2)(a)". If public safety concerns are engaged in s 57, they must be engaged equally in s 33ED, if not more so. And yet Parliament has unequivocally

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[49] Section 33ED. We note that s 33ED(2) provides two limited exceptions.

chosen to make conviction a condition precedent to the classification of a dog as dangerous.

[57] Similarly, s 32 also presents issues for the Solicitor-General's interpretation. It deals with the consequences of a dog being classified as dangerous. Section 32(1)(a)–(f) lists the obligations imposed on the owner of a dog as a result of the classification. The section then goes on to say in subss 2 and 3:

> (2) Every person who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding $3,000.
>
> (3) If a court convicts a person of an offence against subsection (2), the court must also make an order for the destruction of the dog unless satisfied that the circumstances of the offence were exceptional and do not warrant destruction of the dog.

[58] Section 32(3) unequivocally establishes that the conviction of the owner is a precondition to destruction. Yet, it is dealing with a category of dog that has been classified as dangerous for reasons which include that the owner has previously been convicted of the offence under ss 57(2) or 57A(2).[50] We note too that, as mentioned at [19], provision for dangerous dogs is expressly cited in s 4 as a means of achieving the Act's purposes. Again, as in the case of s 58, it does not make sense that destruction of a dangerous dog, which in some cases will pose a greater risk to public safety than a dog within the ambit of s 57, is subject to a precondition which the Solicitor-General claims that Parliament deliberately removed from s 57(3).

[59] Another of the offence provisions under the Act is s 62. It creates the offence of allowing a dog to be at large or in a public area unmuzzled, where that dog is known to be dangerous or to have attacked any person, stock, poultry or property. That provision uses the following wording:[51]

> (4) A person who contravenes subsection (2) commits an offence and is liable on conviction to a fine not exceeding $3,000, and the court may, *on convicting the person*, make an order for the destruction of the dog.

[60] The level of fine ($3,000) is the same as for the offences created by ss 57, 32 and 57A. Yet, if the Solicitor-General's interpretation is correct, for some unknown

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50 Section 33ED(1)(a).
51 Section 62(4) (emphasis added).

reason, conviction is not a prerequisite to a destruction order under ss 57 and 57A, but is under ss 32 and 62.

[61] In considering other provisions of the Act, we have not overlooked sections which allow for the immediate destruction of dogs seen in the vicinity of protected wildlife or running at large among stock or poultry.[52] No prosecution or conviction is required before destruction. Mr Lillico relied on these provisions as supporting the proposition that, in the context of dog destruction, the Act's emphasis is on what the dog has done. However, we are not persuaded that for present purposes these provisions are significant, limited as they are to scenarios in rural settings where something must be done immediately and the person on the spot will generally have the means to destroy the dog humanely.

[62] In our view the provisions which are the most significant are those which create the offences. And, at best for the Solicitor-General, those provisions show inconsistencies in wording. The lack of a single uniform formula clearly detracts, in our assessment, from the suggestion that there is a coherent policy permeating the imposition of dog destruction orders. We have been unable to discern any.

Conclusion

[63] Drawing all these threads together — the text of s 57, the legislative materials leading to the 2003 amendment, and the wording of other offence provisions in the Act — we conclude that the answer to the question referred by the Solicitor-General must be "Yes".

[64] It is an answer that may be greeted with dismay by regulators. But if so, the remedy lies with the legislature. Given its subject matter, the Act should be particularly clear and certain — however, the number of occasions it has come before the senior courts for interpretation suggests otherwise.

[65] Finally, we wish to thank counsel for the quality of their submissions.

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[52] Sections 59 and 60.

Outcome

[66] We answer the question of law (arising from *Telford v Auckland Council* [2022] NZHC 31) as follows:

> Was the High Court correct to conclude that conviction of a dog's owner is a precondition to an order for destruction being made under s 57(3) of the Dog Control Act 1996?
>
> Yes.

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