

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

20/5
A.P. No.92/94

612

BETWEEN

AGNEW

Appellant

A N D POLICE

Respondent

Hearing: 12 May 1994

Counsel: No appearance of or for the Appellant
Miss C.E. Clark for the Respondent

Judgment: 13 MAY 1994

JUDGMENT OF TIPPING, J.

This appeal against conviction is going to succeed on a point not mentioned either by the Appellant or by the Judge below. Mr Agnew was charged by notice of prosecution for minor offence that he "owns dog that rushes vehicle". As the Judge himself pointed out, this was a very abbreviated description of the offence created by s.56(5)(b) of the Dog Control & Hydatids Act 1982. No prejudice, however, derived from the abbreviation. The provision in question makes it an offence to be the owner of a dog which "rushes at any vehicle in such a manner as to cause or be likely to cause an accident". The word "at" in the expression "rushes at any vehicle" is important in this case. It was not included in the way the charge was framed and this no doubt distracted the Judge's attention from its significance when he convicted Mr Agnew after a defended hearing.

The complainant, Mr Davidson, was driving his car on the main Sumner to Mt Pleasant Road. He was driving in a line of traffic when, according to his evidence, "a dog just shot across the road from a property on the right hand side". Mr Davidson swerved in an attempt to avoid the dog but, as he put it, "I hit the dog or the dog hit me". Another witness, this time for the defence, a Mr Machirus, described the event in this way: "I saw the dog hit the car or the car hit the dog, I don't know".

Section 56(5) of the Act as a whole, so far as is relevant, provides:

"(5) Where any dog in any public place -

- (a) rushes at or startles any person or any stock or poultry in such a manner that any person is killed, injured or endangered or any property is damaged or endangered; or
- (b) rushes at any vehicle in such a manner as to cause or be likely to cause an accident, -

the owner of the dog commits an offence

The expression "rushes at any vehicle" in paragraph (b) is mirrored by the expression "rushes at or startles any person" in paragraph (a). To rush at a person or vehicle seems to me to imply some intent on the part of the dog to focus on the person or vehicle. While hostility may not necessarily be involved, i.e. a friendly dog may be just as much caught as a hostile one, the idea of rushing at a person or vehicle contemplates at least that the person or vehicle is intentionally the subject of the dog's attention.

In this case the most that can be said is that the dog, which was admittedly owned by Mr Agnew, came out of his property and was running either into the road or across the road when it came into contact with Mr Davidson's car. It is not possible to infer from the evidence as a whole that Mr Agnew's dog was rushing at Mr Davidson's vehicle. The

most that can be said is that it rushed into the path of Mr Davidson's vehicle but that is not the same thing. It is inherently unlikely that the dog deliberately ran into a moving car. The descriptions of Messrs Davidson and Machirus, which are very similar, suggest considerable doubt whether the dog hit the car or the car hit the dog.

Subsection (5)(b) cannot be construed as if it read: "where any dog in any public place behaves in such a manner" or something similar. It was on the evidence more than possible that the dog was simply running willy nilly into or across the road with no focus on Mr Davidson's vehicle at all. In short, it was not proved beyond reasonable doubt that Mr Agnew's dog rushed at Mr Davidson's vehicle.

As noted above, Mr Agnew did not appear in support of his appeal and was not represented. He filed written submissions which covered a number of matters but not the foregoing. It is not necessary to discuss the points which Mr Agnew did put forward because his appeal must succeed in any event. It is fair to record that Miss Clark for the Respondent, when the point was put to her, acknowledged its force and did not feel that she could present any cogent submissions to uphold the conviction.

This conclusion does not affect such civil liability as Mr Agnew may have to Mr Davidson for the damage to his vehicle caused by the dog. The reparation order which was part of the penalty cannot, of course, stand. The appeal is allowed. The conviction is set aside. The fine, the order for costs and the reparation order are quashed. There will be no order for costs in this Court.

