

JERSEY / JUDGMENT

# Melim -v- AG [2012] JRC 134 (12 July 2012)

[2012] JRC 134

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## judgment

the deputy bailiff: 1. The appellant was presented before the Magistrate's Court on a representation under Article 11 of the Dogs (Jersey) Law 1961 ("the Law") on 27 th April, 2012, following a representation by Centenier Noel on behalf of the Connétable of St. Saviour that a seventeen month old husky alsatian cross dog named Dyson, belonging to the appellant, had not been kept under proper control. The Magistrate adjourned the matter to the following week because there was a busy list of cases that afternoon. On 4 th May, the Magistrate heard evidence from the appellant, who by that stage was represented by Advocate Marks. Miss Marks submitted a letter from the dog's vet who said that the dog had an amenable and gentle disposition, and that it related well to children. It was suggested to the Court that it would be helpful to have the evidence of an animal behaviourist before the Court decided what order should be made. At that time both the appellant and the Centenier proceeded on the basis that there was a single dog bite to the face of a six year old victim. We will come back to the facts in more detail shortly. The Magistrate's view was that the child had done nothing to provoke the bite. She was lying defenceless on the ground. He was in no doubt that a dog who bites a submissive child in such circumstances has to be considered dangerous, and he therefore ordered that the dog should be destroyed. The appellant appeals against that order. 2. On appeal, there were applications by both the appellant and the respondent to call further evidence. The appellant wished to call the evidence of an animal behavioural expert, Mrs Rosemary Barclay, and the Attorney General wished to call further medical evidence on the basis that there was more than one bite. At a directions hearing on 14 th June, sitting as a single judge, I granted both applications and ordered that the further evidence could be produced. There was no real dispute between counsel that it was appropriate to do so. In effect, the appellant had sought an adjournment from the Magistrate in order that the animal behaviour specialist might give evidence, and the Magistrate did not appear to have considered that application for an adjournment, and certainly gave no reasons for a decision not to adjourn. Once that further evidence was admitted, it was my view that further medical evidence should also be admitted because the photographs provided were not obviously consistent with the conclusion that there was necessarily only one bite. 3. On 3 rd July the Court heard the evidence, and gave its decision at the end of the day that the appeal succeeded and that the dog was not dangerous but the appellant had failed to keep it under proper control. Accordingly the Court ordered that for as long as the dog was kept in Jersey, it must be kept under proper control, and that meant that in public the dog must be kept on a leash and muzzled, and it

must undergo training for two years. The Court announced that full reasons would be given, and that there would be other comments in the judgment in relation to the evidence of Mrs Barclay in particular. We now give those

**reasons.**

The Facts 4. The representation of the Centenier in the Magistrate's Court asserted that at approximately 6pm on Friday 6<sup>th</sup> April, a six year old child was playing outside on the road near to a relative's house which she was visiting at Le Pré de Talbot. The appellant is a neighbour of that property, and her ten year old son was playing with the six year old visitor outside. The appellant's ten year old daughter was inside the house and the two children outside called for her to come outside to join them. As she did so, the dog managed to get out of the house as well and ran out into the road. In their excitement, the appellant's children ran after the dog shouting at him. He ran towards the victim, allegedly jumped at her and knocked her over, and in the course of that, she sustained a bite mark to the face. 5. It is clear that there were no adult witnesses to what took place. When the appellant heard the commotion she came outside to find the dog standing nearby but under the control of her children. She thought that the dog had knocked the victim down by accident and that the victim's injury must have been caused by her banging her face on the ground. 6. In fact the victim was taken to the hospital by her relatives, where the doctor in Accident and Emergency considered that she had suffered a single bite causing serious injury. His evidence was that she was calm but visibly in pain. There was deep laceration, full thickness down to the periosteum, ragged at the edges at the left nasal bridge, but not involving the obicularis, the muscle around the edge of the eye. The eye movements were all normal. The doctor noted that on the right cheek there were four puncture wounds which were full thickness through to the inside of the mouth. There was no septal haematoma, and no other injuries noted. The doctor's report at the time was that as a result of the deep thickness of the wounds and the extensive nature, the victim was referred to the Maxillo Facial team and she underwent surgery. The doctor's report concluded that the injuries were consistent with a single dog bite to the face. 7. The Centenier's representation concluded with a report that the appellant's twins had said they had seen the dog jump up at the victim. The dog was excited at being outside and was wagging his tail. They did not hear him growl or bark or behave aggressively. The appellant confirmed to the Police Officers attending the scene that the dog knew the victim, and that the victim had played with the dog on a number of occasions previously without incident. The dog was an extremely nice natured dog normally, she said, and she had never been concerned at any signs of aggression. The Officers saw the dog at the house and found it to be extremely friendly and not at all excitable during their visit. The Officers noted that he interacted with the twins and appeared to be nice natured, calm and well trained. 8. When the victim was spoken to in the presence of her uncle, she said that the dog had run over to her, knocked her over, smelled her face and then bit her on the face for no reason. She said the dog had not barked or growled at her. 9. Neither the Magistrate nor we have heard evidence from the children, for obvious

reasons.

We have looked at the transcripts of the Officers' notebooks, and the summary of the position in the Centenier's representation appears to be fair and accurate. In our judgment, the facts of the incident appear to be that this relatively young dog escaped from the house and its excitement in doing so was probably exacerbated by the excitement of the children. 10. We now turn to the evidence which was given before us. We heard first of all from Dr. Gibbs, the doctor in the Accident and Emergency Department. He confirmed that there were other injuries which the child had suffered as a result of the dog's attack, but he did not include them in his report because he had not noticed them at the time. His attention was fixed, entirely understandably, on identifying the extent of the serious injuries and on trying to keep the child in the least stressful state that was possible at the time. His focus was rightly on treatment and care, and not upon the forensic evidence which might be considered at a later stage by a court and there is absolutely no criticism made of him whatsoever that his initial report was in some respects incomplete. 11. Dr Gibbs' evidence was that the wounds which the child had suffered were roughly in a single rectangle, and he thought therefore were the result of a single dog bite. He thought that there had been a snap and a pull - a puncture wound, and then a wound caused from drag as the child pulled away. He did not think there had been any shaking of the child by the dog. Had there been such shaking he would have expected a complex open nasal fracture, and not an open flap of the wound. The injuries suffered by the child were serious, life changing but not life threatening. 12. In cross-examination the doctor indicated that the UK experience was that there were some ten dog bites per hundred thousand people per annum. Eighty-five percent of them were suffered by children between the ages of nought and nine, and most resulted in facial injuries. He saw one such injury about every two weeks in Jersey. The injuries sustained by the victim in this case were in the more serious category of the injuries from dog bites he had seen in this Island. He accepted both in examination in chief and in cross-examination that there was room for a second view. He thought Dr Barrett's opinion was perfectly reasonable, but he did not agree with it - he did say, however, that the photographs could indicate more than one bite, and he also indicated that if the victim was on the ground, she would not have been able to pull back from the dog, and in those circumstances he would be less sure of his view that the wounds disclosed a pulling injury, and therefore less sure of his view that there was a single bite. 13. The Court also heard from Dr Martin Barrett, who is a forensic medical examiner to the States of Jersey Police, having been appointed to that position in 2000. He has an MSC in forensic medicine and bio-ethics, and an LLM, based on a body of work titled the Historical Development and Contemporary Dilemmas facing the Police Surgeon. He is a member of the Faculty of Forensic and Legal Medicine of the Royal College of Physicians. He performs approximately five hundred to seven hundred forensic medical examinations a year and in the course of his work as a forensic medical examiner, has experience of examining dog bites, that experience also deriving from working in the Accident and Emergency Department and in general practice. 14. Dr Barrett prepared his report upon the basis of the medical report of Dr Gibbs which he had seen, and the photographs of the injuries suffered by the victim. He also had seen a copy of the statement provided by and a report provided by Mrs Barclay, to whose evidence we will come shortly. Dr Barrett did not examine the

victim, and expressed his opinion based upon the documents which he had seen. In his view, there were four groups of injuries, mainly those to the left side of the nose, those to the upper part of the right cheek, those to the lower part of the right cheek and those to the left upper lip. The absence of abrasions suggested that the face was not in contact with a hard surface such as the ground. The injuries were therefore likely to be dog related. In passing, we note that accordingly the evidence of Dr Gibbs might be more relevant in the sense that if the victim's face was not on the ground, it may be that she was more likely to be able to pull away from the dog during the course of the attack, and therefore more likely that the injury sustained was in part a pulling injury. The strength of Dr Barrett's evidence, however, lay in his view that the overlay of injuries was such that it was hard to see how, for example, those to the left hand side of the nose and to the bottom right cheek could have derived from a single bite. Furthermore, although there was a cluster of six upper puncture marks on the right cheek, he thought four of those probably were caused by the dog's claws. Nonetheless there were two bite marks in that cluster which simply did not fit the dental arch of the dog, and in his view the spread of injuries suggested more than one bite. 15. The number of bites was capable of being relevant for two reasons. First of all, the number of bites might go to an assessment of the nature of the attack. Secondly the number of bites might go to the disposition of the dog. 16. On analysis of the expert evidence, it seems to us to be impossible to say on the balance of probabilities that there was more than one bite. We think that might well be so, but the evidence is simply not sufficiently conclusive. The two experts have given differing views and both of them appear to have reached reasonable conclusions, albeit their conclusions are different. We do not find on the balance of probability that there was more than one bite. 17. We now come to the other evidence as to the dog's disposition. First of all we noted that amongst our bundle of papers were a series of letters from a wide cross-section of people. All those letters suggest that the dog was not an aggressive animal, was friendly and was not vicious. Many letters attested to the way the dog was able to interact positively with children. 18. The appellant tendered evidence from Mrs Barclay. She is certificated as a Clinical Animal Behaviourist through the Association for the Study of Animal Behaviour. Certification is administered by the Accreditation Committee, which includes representatives from the British Psychological Society, the Royal College of Veterinary Surgeons and the International Society for Applied Ethology. Mrs Barclay said she was also Chairman of the Association of Pet Behaviour Councillors, a network of UK and European based behaviour councillors that have achieved high proven academic and practical standards available in the field of companion animal behavioural therapy. She provided a report dated 7 th May based on the dog's behaviour during a two hour session on that day within the home environment and an addendum which followed an hour's assessment on 29 th May whilst the dog was taken out for an hour on a walk, on a lead, and wearing a basket-type muzzle. She noted that the dog had been castrated, which was one of her recommendations in her report of 7 th May, castration being recognised to reduce excitability. 19. Her evidence before us was that in her view the incident arose from the children chasing the dog, and not the dog chasing the children. She thought that any dog could be dangerous in play. Although she agreed that if there had been more than one bite, that might have an impact on her view about how dangerous this particular dog was, her assessment of it was that the dog did not react aggressively or in an excited manner to situations

regarding humans, including small running, jumping, cycling or pedalling children. During the walk on which she took him, the dog showed no change in body language and remained relaxed with mouth slightly open, suggesting no change in arousal or emotional state, despite taking notice of people walking or on bicycles. In re-examination she confirmed that if the dog was muzzled and on a lead when in public, there would be no danger to the public in her view. The Law 20. This is an appeal against a decision of the Magistrate in circumstances where, for procedural reasons, further evidence has been given before us that was not available to the Magistrate. Accordingly we are in the territory of Knapp-v-AG

[2011] JRC 118 , where for the reasons given by Birt, Bailiff in a full analysis of the Law, it is clear that the Court is not able to remit the matter to the Magistrate's Court for a new hearing, and must therefore reach its own conclusion as to whether it is satisfied that the dog is dangerous or is not kept under proper control. We have had to make that assessment on the basis of the evidence summarised above, in the knowledge that there is not much assistance to be gleaned from details of the incident itself, the only reports being those of the children involved, as described to the investigating officers. Article 11 of the Law is similar to but not identical with Section 2 of the Dogs Act 1871 , which confers on a court of summary jurisdiction the power to make an order, if satisfied that a dog is dangerous and not kept under proper control, directing that the dog be kept under proper control or destroyed. It is interesting that Section 2 confers that jurisdiction where a dog "is dangerous, and not kept under proper control" whereas Article 11 of the Law confers jurisdiction on the Magistrate's Court where the dog is considered to be dangerous or is not kept under proper control. In the instant case, that is relevant because the Court has found, for reasons we will shortly come to, that the dog is not dangerous, but there is no dispute that it was not kept under proper control, which founds the jurisdiction in the Court to make the orders which we have. 21. In the case of Briscoe-v-Shattock

(1999) 1 WLR 432 , the court was concerned with an appeal against an order that a dog be kept under proper control, a fight between that dog and the neighbour's dog having taken place where the neighbour's dog was fatally wounded. The appeal was based on the proposition that Section 2 of the 1871 Act had not been intended to be used for fights between dogs, and that the animal was not "dangerous". The court held that there was no reason to limit the ambit of Section 2 of the 1871 Act as was contended on appeal by the defendant but it also reviewed the approach to be taken to decisions as to whether a dog was "dangerous". The lead judgment was given by Lord Justice Brooke, who said that the correct approach was to construe the word "dangerous" by reference to its ordinary everyday meaning, and for the court to ask itself whether, on the facts, it was satisfied that the dog had a dangerous disposition. Brooke LJ made a full review of the various cases on this subject, both in England and in Scotland, and said this:- "It appears to me that the courts on both sides of the border show that what the court is to be concerned with is an analysis of the question whether, on the facts produced by the complainant, the justices are satisfied that the dog or dogs in question are dangerous in the sense that they have a dangerous disposition. As Lord Cooper said in MacDonald-v-Munroe , in an exceptional case "a single

act may ... reveal a dangerous disposition". In other cases it may be that the Justices would not be satisfied if evidence was only produced for the single act, but would require further evidence to satisfy them that the dog was dangerous within the meaning of the Act of 1871. At any event, I am satisfied that the meaning of the word "dangerous" should not be confined as meaning dangerous to mankind or dangerous to the livestock identified for particular protection by Parliament in relation to the Law of England. Dangerous is a word which the Justices are entitled to apply whatever the evidence is before them." 22. In his judgment at page 447, Sedley J said this:- "The word "dangerous" in Section 2 of the Dogs Act 1871 is not a term of legal art. In my judgment a dog is shown to be dangerous by evidence which satisfies the Justices that the description applies to it within the ordinary limits of the English language. The meaning of the word has not changed appreciably since 1871. What will have changed, as society has changed, are the circumstances in which a dog may be a source of danger." 23. These extracts show that the Law does not involve the adoption of the expression, popularly but incorrectly used, that "every dog is entitled to one bite". The question for the Court, usually for the Magistrate but in the unusual circumstances of this case, for us, is whether the dog is considered to be dangerous. One bite, particularly a severe bite, may well lead the Magistrate or the Court to the conclusion that the dog is dangerous. There are, no doubt, many who would take the view that a dog which has bitten a child in the circumstances which face us today can never be trusted again, and, if it belonged to them, should be destroyed. That however is not the legal test which we have to apply. The test we have to apply is whether the dog is of such a dangerous disposition, on the balance of probabilities, that the risk to the public is such that an order should be made for its destruction. In considering that test, the Court has to have regard to all the evidence surrounding the incident itself, but also the evidence of the dog's general disposition and, if it should be relevant, evidence of the characteristics of the breed in question. 24. In cross-examination of Mrs Barclay, Crown Advocate Yates sought to establish that the breed characteristics of Siberian huskies and German shepherd dogs respectively were such that the Court could conclude that a cross between the two was likely to produce a dog which was a natural hunter, a highly intelligent creature which if not kept occupied would be likely to become bored and mischievous. Mrs Barclay's answer to that was that the breed characteristics in this case could not lead her to any generalisations. There was always a danger with cross breeds of trying to identify which traits might be heritable and which might not, and all the evidence that is before us, save that of the bite itself, suggests that there are no conclusions to be drawn about either breed which would be helpful in this case. What we do say however is that there is no doubt that the cross between a Siberian husky and a German shepherd produces a large and powerful dog. It is essential that such dogs are properly trained from the outset, and it is irresponsible of any dog owner to keep a large animal in contained quarters in circumstances where it has not been properly trained. That is so in any event, but it is of course particularly so if the animal is likely to interrelate with children. 25. The victim in this case was a little girl aged six. She has suffered serious injuries which almost certainly, we are told, will require cosmetic surgery at some stage. Nothing we say in this

judgment in any way diminishes the sympathy which we feel for her and for her family as a result of this nightmare of an incident for them. Nonetheless, we have to decide whether this dog is of a dangerous disposition. A bite of this kind, if there were no other evidence, might well be sufficient for us to reach that conclusion, and indeed that was the approach which the Magistrate took, because he had little other evidence. But we have had more evidence produced to us, and it is all to the effect that this particular dog does not have a dangerous disposition, notwithstanding the bite to the victim in this case. In our view, the evidence which we have seen and heard all suggests that the bite occurred in the heat of the moment when an excited young dog which had not been properly trained became more excited in the presence of some excitable children, and reacted in the way that it did. 26. The appellant admits that she did not keep the dog under proper control, and that was an admission sensibly made. We agree that the dog was not kept under proper control and we therefore order that in future it should be kept under proper control. Because we are concerned with the potential for risk to the public, the Court emphasises that "proper control" for the purposes of this order means that the dog, when in a public place, must be kept muzzled and on a leash. In her report, Mrs Barclay suggests that the dog should continue to have basic reward training, and that the owners indeed will be educated accordingly in learning how to play more appropriately with him. We therefore order that within the scope of an order that the dog be kept under proper control is included an order that the dog should undergo basic reward training to learn that "jumping up and mouthing have no effect but sitting calmly and waiting does". We consider the training should continue for a further two years. 27. The addendum report of Mrs Barclay suggests that she should monitor the dog's behaviour on a quarterly basis to note his progress and to continue with the education of the owner and her family. The Court considers that this is desirable, although it makes no order to this effect. 28. These conditions and recommendation are the basis upon which this appeal has succeeded. 29. Finally we turn to one other point which was raised with us, which is capable of being misunderstood. It transpires that the landlord of the premises where the dog was kept had never given consent for dogs to be kept there. Accordingly the appellant is not permitted to keep the dog on those premises. It has been suggested that instead the dog might be taken to France to live with the appellant's daughter there. That daughter has a substantial property with an enclosed garden. The Court wishes to make it plain that if it considered that the dog was dangerous and ought to be destroyed, there would be no question of saving such a dog in order that it could be visited upon persons outside the jurisdiction, whether in France or elsewhere. The dog's location is not relevant to the question of whether it is dangerous to the public, other than perhaps for the statement that dogs kept in small confined areas may be more likely to become a danger than those which are not. This Court is not in the business of exporting dangerous dogs to France, and no part of the order which we have made should be construed in that manner. Given the practical difficulties which the appellant has in accommodating the dog at present, it may well be that she will take the view that the dog should go to live with her daughter in France. The orders which the Court has made do not prohibit that, but they do not encourage it either.

Authorities Dogs (Jersey) Law 1961. Knapp-v-AG

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