

Citation: *City of Whitehorse v. Parry*, 2007 YKTC 31

Date: 20070327
Docket: T.C. 05-06647A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Faulkner

BETWEEN:

THE CITY OF WHITEHORSE

Plaintiff

AND:

NICOLE PARRY

Defendant

Appearances:
Karen Wenckebach
Ryan Parry

Counsel for City of Whitehorse
Appearing on behalf of the Defendant

REASONS FOR JUDGMENT

[1] FAULKNER C.J.T.C. (Oral): On January 22nd of 2006, Penny Ferbey was walking her female Terrier cross, Mix, in the Riverdale area of Whitehorse. According to Ms. Ferbey, Mix was attacked without warning by a much larger black dog. The black dog turned out to be Grizzly, a neutered male Ikeda-Shepherd cross owned by the appellant, Nicole Parry. Both dogs were off leash. Ms. Parry had stopped to talk to an acquaintance, Susan Staffen. When Ms. Parry and Ms. Staffen heard the commotion, they went to investigate and Ms. Parry attempted to pull her dog off of Mix. Ms. Ferbey

had also attempted to break up the fight and in the course of this attempt she received a number of bites on her arm.

[2] The dogs were eventually separated. At the time, Ms. Ferbey was not aware that Mix had been seriously hurt. Later, however, it became obvious that the dog had suffered critical injuries. The injuries and subsequent course of treatment were described by the attending veterinarian, Dr. Candace Marche in her report dated February 6, 2006. It reads as follows:

Mix was critically injured with multiple puncture wounds along her back and side and a hernia of her left body wall at the location of her last rib. In addition to the muscle along the left side of her spine being macerated, Mix's rib was shattered and her spleen and left kidney were dangerously protruding from the herniation in her muscle. Mix was taken to emergency surgery where it was found she also had a tear in her diaphragm, the muscles separating her chest cavity with her abdominal cavity. The diaphragmatic hernia was repaired and Mix had her chest tapped to remove the free air. I returned Mix's spleen and kidney to her abdominal cavity, removed the dead muscle tissue and repaired the muscle herniation. Mix's skin had been lifted up from her underlying muscle from her spine to her belly, causing a large pocket that required a drain to be in place for five days. Mix required two types of pain medication after surgery and three different antibiotics and was in hospital for two days.

The veterinarian went on:

The severity of Mix's injuries is unusual for an average dog fight. Most dog fights consist mostly of posturing, with a typical escalation resulting in skin punctures along the back of the necks, head or face, without the crushing type injuries sustained by Mix.

I should add that Mix has since recovered from her injuries.

[3] As a result of this incident, the City of Whitehorse ultimately took steps under its Animal Control Bylaw, specifically sections 84 to 88 of that bylaw, to have Grizzly declared a dangerous dog, and on May 26, 2006, Ms. Parry received notice that the City Bylaw Manager, John Taylor, had determined that Grizzly was a dangerous dog.

The bylaw provides for an appeal of that decision to this court and Ms. Parry appealed, hence the present hearing.

[4] A dog may be declared a dangerous dog in the following circumstances. A dangerous dog means:

Any individual dog that

- (1) Has bitten, injured, attacked or killed a domestic animal without provocation on public or private property;
- (2) Has bitten, injured or attacked a human being without provocation on public or private property;
- (3) Is kept for the purpose of providing security protection to persons or property;

and lastly:

- (4) Has shown the disposition or tendency to be threatening or aggressive.

[5] It was the allegations that Grizzly had bitten another dog and bitten, injured or attacked a human that led to the determination being made.

[6] The first question before the court is to determine the nature of the appeal in a case such as this. The City submitted, and the appellant conceded, that the appeal ought to be a normal appeal on the record, as opposed to a trial *de novo*. This view, with which I agree, is in accordance with the decision of the British Columbia Court of Appeal in *Re Galaxy Sports Inc.*, 2004 BCCA 284.

[7] The second question to be answered is the standard of review. An analysis based upon the decision of the Supreme Court of Canada in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, leads me to the conclusion that the standard of review in this case is that of reasonableness.

[8] First, it must be noted that there is no privative clause limiting the scope of the appeal. This suggests that there should be a reasonably thorough review of the impugned decision.

[9] Secondly, it appears to me that the degree of expertise involved in making the decision is not particularly high in this case, hence the degree of deference should be lower. It is true that the City Bylaw Manager would have greater familiarity than the Court with the question of animal control, but the issues to be dealt with are hardly arcane.

[10] Third, the questions to be decided are ones of mixed fact and law, again, suggesting a lesser degree of deference. Determining whether or not Grizzly bit another dog or a person is clearly a factual matter. Determining whether or not the bite was provoked is just as clearly a question of mixed fact and law, and, indeed, proved to be a contentious issue in this case.

[11] It is true that the Animal Control Bylaw, in general, and the dangerous dog provisions, in particular, are concerned with matters of public safety and welfare, suggesting a greater degree of deference. However, in my view, this factor is outweighed by the other three factors previously mentioned. I should add that it appears that Judge Overend of this court reached a different conclusion in the *City of Whitehorse v. Carey*, 2007 YKTC 6. Unfortunately, Judge Overend's reasons for decision are not yet available and so I do not have the benefit of his reasons for decision, nor am I aware whether or not the matter was fully canvassed in that case.

Judge Overend's conclusion was that the standard of review was that of patent unreasonableness.

[12] As I say, at the end of the day, in balancing all of the factors, and with all due respect to Judge Overend, I found the standard to be that of reasonableness. That said, I turn to a review of the decision. I should say at the outset that, obviously, given that the standard is reasonableness, the question to be answered is not whether or not the Court would have come to the same conclusion as the manager of Bylaw Services, but whether the decision of the manager was one that could have been reasonably arrived at.

[13] In my view, there was clear and cogent evidence to support the finding made by the manager. First, it is not disputed that Grizzly got into a fight with Mix, inflicting a number of bites and serious internal injuries on the smaller dog. The appellant argues, however, that Grizzly must have somehow been provoked, as he is normally well-behaved, and an examination of him by a well-qualified dog trainer found him to be generally non-aggressive. Unfortunately for Grizzly, the only person who saw the fight start was Ms. Ferbey, who was clear that the attack by Grizzly was sudden and unprovoked. Ms. Parry and Ms. Staffen, the other witness to the events, were not there when the attack began and hence cannot say how the fight started.

[14] On behalf of the City, Ms. Wenckebach argued that there was further evidence of Grizzly's aggressiveness in Ms. Parry's admission at the scene, which is reported by both Ms. Ferbey and Ms. Staffen, that Grizzly had done this sort of thing before.

[15] I accept the appellant's argument that this admission is less damning than it might seem, in that, at the time, the extent of the injuries to Mix and to Ms. Ferbey were not known. Therefore, the admission may only have been a concession that Grizzly had previously been involved in dog fights, not that he had done something as serious as turned out had occurred in this case. Nevertheless, there is still, in my mind, convincing evidence upon which the bylaw manager could have found that Grizzly was the aggressor in the fight and the injuries inflicted on the other dog were indeed serious.

[16] The second issue was whether or not Grizzly bit Ms. Ferbey, and if he did, whether the attack on her was unprovoked. As the photos taken by the bylaw officers clearly show, Ms. Ferbey suffered a number of bites to her wrist and forearm, which subsequently required medical attention.

[17] The appellant argues that these bites may have been inflicted by Ms. Ferbey's own dog. This theory is supported by Ms. Ferbey's own admission that her dog Mix may have bitten her in the course of the fight. Nevertheless, if one reads her statement as a whole, and looks at the photos, it is clear that she was bitten several times, and Ms. Ferbey was quite clear that the appellant's dog inflicted all but one of these bites.

[18] The appellant also referred to the statement of Ms. Staffen, who offered the opinion that the bite she saw on Ms. Ferbey's wrist might have been caused by Ms. Ferbey's own dog, due to the size of the puncture wound. Even assuming that this assertion is correct, it is obvious that Ms. Staffen did not see the other bite marks, clearly shown in the photos. So again there is evidence upon which the bylaw manager

could have reasonably concluded that Grizzly had been the author of at least some of the bites on Ms. Ferbey's wrist and arm.

[19] Finally, the appellant argued that the attack on Ms. Ferbey must be considered as provoked because Ms. Ferbey attempted to wade into the middle of the fight to extricate her dog. The question of provocation is important because if one refers back to the bylaw, it indicates that the bite or attack must have been without provocation.

[20] The appellant's argument was that her dog was provoked by the actions of Ms. Ferbey in attempting to intervene and extricate Mix from the fight that she was so obviously losing. It may well be that Ms. Ferbey was unwise to attempt to get in the middle of the fight, and it may well be unsurprising that she got bitten. However, I cannot accept that this could be said to have provoked Grizzly into biting her. To so find would not accord with common sense, nor would it be good public policy to hold that a dog attacking another animal or human being could be excused if someone attempting to stop the attack was attacked or bitten.

[21] It is quite likely, as the report of the dog handler suggests, that Grizzly had no advance intention of biting Ms. Ferbey. In the midst of the dog fight, he reacted instinctively, as dogs do, to the intrusion by Mix's owner. This makes the attack on Ms. Ferbey more understandable but it cannot, as I have stated, be taken to amount to provocation, thereby excusing the attack.

[22] At the end of the day, I find that there was clear evidence to support the impugned finding and no showing that the decision proceeded on any faulty understanding of the law.

[23] The remaining matter to be considered is the appellant's attack on Mr. Taylor's decision on the basis of real or reasonably apprehended bias. Shortly after the incident, Mr. Taylor gave an interview to the Whitehorse Star about the attack on Mix and was quoted as saying that "That incident sounds pretty severe, so we'll likely look at more severe charges." On the other hand, in the same article, Mr. Taylor is quoted as saying:

Bylaw isn't jumping to conclusions about if the animal in question is a dangerous dog. After all the information on the incident is collected, the definition of bitten and attack will be examined to see if it applies to Ferbey's report. It is possible the dog may be defined as a nuisance animal.

[24] I think that in future, Mr. Taylor would agree that he would have been better to limit his comments to something along the lines of, "the matter is under investigation." However, in my view, the comments, taken as a whole, would not lead a reasonable person to conclude that Mr. Taylor had pre-judged the issue or exhibited bias against the Parrys or their dog Grizzly.

[25] In the result, the appeal against the decision must be dismissed and the bylaw manager's determination will stand.

[26] I should note two final things before departing from this case. I note that the bylaw provides that a person wishing to own or maintain a dog that has been declared to be dangerous must meet a number of onerous requirements, ranging from muzzling to fencing to carrying liability insurance and so on. However, s. 97 of the bylaw also provides that the bylaw manager may modify these conditions to suit the case. Given that this was Grizzly's first offence, the bylaw manager may wish to consider whether all of the requirements of s. 92 and s. 96 need to be imposed with their full rigour.

[27] The other thing I would add is to say that Grizzly has been very well represented throughout these proceedings. Mr. Parry conducted his defence in a first class fashion and I may be sending around some of the local lawyers to see you in the hopes that you can give them a few tips.

FAULKNER C.J.T.C.