

The Defence of Provocation for Dog Attacks

By Adam Watts

Dog attacks are an unfortunate occurrence that most local governments are required to deal with on a relatively frequent basis. As a serious offence under the *Dog Act 1976* subject to a maximum penalty of \$20,000 dog attacks are determined in court rather than by way of modified penalty. Whilst some dog attack charges are resolved by the accused pleading guilty, in many cases the charge is contested.

In its capacity as prosecuting authority, the local government must prove all elements and negate all defences beyond a reasonable doubt. Provocation is the defence mostly commonly raised in prosecutions for dog attacks – the defence position essentially being that the alleged attack was as a direct response to a provocative act or actions by the alleged victimised person or dog. This article examines provocation as a defence in the context of dog attacks with reference to recent case law and offers some guidance to local government enforcement officers responsible for investigating dog attacks.

Meaning of provocation

The term ‘provocation’ is defined under section 3 of the Act, which lists quite extensively the types of actions toward the alleged attacking dog by both a person or another animal which falls within the scope of the term. To summarise, the actions of a person (other than a person liable for the dog’s control) which may constitute provocation may include:

- teasing, tormenting or abusing;
- any assault or act of cruelty toward the dog;
- unlawful entry on land or premises, occupied by the dog owner, where the dog is usually kept;
- an intrusion of any vehicle in which the dog is present; or
- any threat or attack upon another person or animal that the dog could reasonably be expected to be protective.

The actions of another animal which may constitute provocation may include:

- an attack on the alleged attacking dog by the other animal;
- the other animal’s entry on any land or premises where the alleged attacking dog is ordinarily kept or of which the owner of the dog is the occupier; and
- any threat or attack upon another person or animal that the dog could reasonably be expected to be protective.

Judicial consideration

To date there is no binding judicial decision (decision of the Supreme Court or High Court) of precedent value that has clearly considered and determined the application of the provocation defence. However, following a successful prosecution by this firm for an attack under the Act, a written decision was delivered in October 2015 by Magistrate Mignacca-Randazzo

in the Magistrates Court, which in our view applies the correct position in respect of the threshold test for conduct that would fall within the scope of the provocation defence.

The most important extract from his Honour's decision is contained in his summary of the concept of 'assault' within the provocation definition under the Act, which states as follows:

'In my view the concept of "assault" used in the definition of "provocation" in the [Act] connotes an unlawful or wrongful use of force which is consistent with the other limbs or elements of provocation which all indicate wrongful or unlawful conduct.'

That is, for there to be an 'assault' it is not enough for an accused person to simply show that contact or force occurred. Rather the use of force present in the action must be indicative of wrongful or unlawful conduct which then triggered the response resulting in the alleged attack.

Application of 'wrongful or unlawful conduct' test

In a more recent prosecution in the Magistrates Court, we submitted that, although that decision is not binding, the Court should have due regard to and apply the same test summarised by Magistrate Mignacca-Randazzo. That is, to successfully rely on the provocation defence, the Court must be satisfied that the actions of a person or another animal toward the alleged attacking dog must amount to an unlawful or wrongful use of force or conduct.

That particular prosecution involved an attack on a young girl in a park which was not a prescribed dog exercise area. The defence position was that the girl, on the accused's version of events, placed her hands around the dog's face and in a fast movement pressed the front of her face onto the front of the dog's face, causing the dog to feel threatened and jump at the victim, biting and scratching her on the face. In our submission to the Court, even if it were to accept the accused's evidence of the actions of the child victim leading to the attack, the actions of the victim did not amount to wrongful or unlawful use of force or conduct. At the conclusion of the two day hearing, the court accepted the provocation defence did not apply and entered a conviction of the charge against the accused.

Summary

When investigating a dog attack a local government must attempt to assess whether it can demonstrate beyond reasonable doubt that the attack was not caused by provocation. In considering whether provocation may be in issue, the relevant threshold test requires a local government to attempt to determine whether the conduct of the victim (person or another animal) was wrongful or unlawful.

For further information please contact Adam Watts by email to awatts@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.