

CITATION: Holt v Department of Justice and Attorney-General (Victim Assist Queensland) [2014] QCAT 308

PARTIES: Richard William Holt
(Applicant)
v
Department of Justice and Attorney-General
(Victim Assist Queensland)
(Respondent)

APPLICATION NUMBER: GAR107-13

MATTER TYPE: General administrative review matters

HEARING DATE: 26 June 2014

HEARD AT: Brisbane

DECISION OF: **Senior Member Oliver**

DELIVERED ON: 2 July 2014

DELIVERED AT: Brisbane

ORDERS MADE: **1. The decision of the respondent dated 14 February 2013 is confirmed.**

CATCHWORDS: VICTIMS ASSIST – where applicant involved in an altercation – whether the applicant contributed to his injury – where conflicting versions of events.

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Mr Holt in person.

RESPONDENT: Mr James representing the respondent.

REASONS FOR DECISION

[1] Mr Holt was the subject of an assault by Steven Marsh on the afternoon of 17 August 2011 while he was taking his daily walk in suburban Camira. As a result of the assault, he sustained an injury to his shoulder.

[2] Because of the assault, he made an application for victim assistance under the *Victims of Crime Assistance Act 2009* (Qld). The respondent initially rejected the application because, on the material produced with the

application, it was not satisfied that an act of violence had taken place. However after further inquires the respondent accepted the application but contended that the applicant's conduct contributed to the injury and reduced the financial assistance provided by 50%.

- [3] Mr Holt then filed an application to review the respondent's decision in the Tribunal. In undertaking a review of a decision of an administrative body, the function of the Tribunal is to produce the correct and preferable decision by way of a rehearing on the merits.¹ The Tribunal can have regard to the evidence that was placed before the decision-maker and any further evidence that was adduced subsequently or at the hearing.
- [4] The issue for determination is whether, in the circumstances of the case, Mr Holt should be held in any way responsible for the injury he sustained because of the assault.
- [5] Part of Mr Holt's regular walk was along a power line reserve adjacent to Czarnecki Street at Camira. As he walked past the rear of a house at 40 Czarnecki Street he was confronted by a large white dog. He continued to walk but he was harassed and menaced by the dog. As this has occurred before, Mr Holt carried with him an air horn to deter the dog. On this occasion, as he had done previously, he activated the horn when the dog approached him.
- [6] After he had walked some, he estimates, 80 metres with the dog still menacing and harassing him while still sounding the horn, the owner of the dog Mr Marsh, who resides at 40 Czarnecki Street ran to Mr Holt and attempted to secure the dog. In this process there was a minor altercation and Mr Holt was either pushed with Mr Marsh's hand or struck with the end of the a garden rake, and fell to the ground.
- [7] Police were called to the scene, Mr Holt was interviewed but decided at that time that he was not going to make a formal complaint about the conduct of Mr Marsh.
- [8] However, on 26 April 2012 Mr Holt did make a formal complaint to the police about the conduct of Mr Marsh. The police investigated and conducted a record of interview with Mr Marsh. In the record of interview, Mr Marsh admitted that he did push Mr Holt with his hand. This caused him to fall to the ground. Mr Holt's version is quite different in that he said Mr Marsh pushed him in the stomach with the handle of a garden rake and as a result he fell to the ground and Mr Marsh fell on top of him.
- [9] Police have provided a compact disc video of the interview with Mr Marsh and at the hearing, a hard copy or transcript of that interview was produced by Mr Holt. It is evident from that interview that an assault did occur and therefore, there was an act of violence within the meaning of s 25 of the *Victims of Crime Assistance Act 2009*. In a statement of reasons on 14 October 2013 the respondent conceded that there was an

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'), s 20.

act of violence and assessed compensation. However, the decision-maker also formed the opinion that Mr Holt contributed to his own injuries and the assessed amount was reduced by 50 per cent.

[10] Section 85(2)(a) of the *Victims of Crime Assistance Act* provides:

(2) In deciding the amount, the government assessor may have regard to, and may reduce the amount that would otherwise be payable to the applicant on the basis of, the following –

(a) the extent to which the applicant's conduct directly or indirectly contributed to the injury suffered by the applicant as a direct result of the act of violence in relation to which assistance is sought

[11] The particulars of Mr Holt's conduct said to have contributed to the injury is the use of the air horn continuously which, it is submitted provoked the dog to act in a menacing fashion and also its continued use after Mr Marsh arrived on the scene and tried to withdraw the dog. It is submitted that had Mr Holt desisted in continuously operating the horn, if that finding of fact is made, then Mr Marsh would have been able to remove the dog without incident.

[12] Given the conflicting versions of events by both Mr Holt and Mr Marsh, and in the absence of any witnesses or evidence to support one version or the other, the police chose not to proceed with any charges against Mr Marsh. The effect of this is that there remains, some uncertainty as to what actually occurred on the particular day.

[13] If I were to accept Mr Holt's version of events, then clearly there could not be said to be any provocation on his part. Similarly, if I accepted Mr Marsh's version of events then there would be a basis to reduce the assessed amount for contributory conduct by Mr Holt. In fact, on Mr Marsh's version the extent of the contribution by Mr Holt could be as much as 100 per cent.

[14] Mr Holt was cross-examined about the events of the afternoon of 17 August 2011, and his use of the air horn. He told the Tribunal that he had previous experience with this particular dog barking and menacing him so he decided that the use of the air horn might be a suitable deterrent for the dog. He had used the air horn on previous occasions with some success however, he also acknowledged that air horn certainly aggravated the dog and it did not immediately run off back to its yard.

[15] On this occasion, even on the evidence of Mr Holt, the air horn certainly aggravated the dog and caused it to continue to bark, circle and menace Mr Holt. There is no evidence as to what the dog might have done had the air horn not been used, it may have been a case of simply barking but causing no real threat to Mr Holt. I note in the record of interview, Mr Marsh described the dog as a five-year-old Labrador which had a very placid nature. It is general knowledge that Labrador's are not a savage dog. There is no evidence from the local city council that the dog is on a menacing dog register.

- [16] Mr Holt having moved well past Mr Marsh premises, and by continuing to use the horn, it is open to conclude that this contributed to the behaviour of the dog. I am inclined to accept the evidence given to police that when Mr Marsh arrived, he told Mr Holt in no uncertain terms to stop using the horn even though Mr Holt did not necessarily agree with this. He did seem to acknowledge that Mr Marsh wanted him to stop using the horn.
- [17] Commonsense would dictate that as soon as the owner of the dog arrived on the scene, it should have been left to the owner to handle the dog and remove it. This, it seems to me is what Mr Marsh was attempting to do but was hampered in these endeavours because of the continuous use of the horn. When Mr Holt did not desist, tempers flared and Mr Marsh then pushed Mr Holt out of the way. It seems to me, that once there was a touching and Mr Holt falling to the ground whether or not a rake handle was used or whether it was Mr Marsh's push with his hand the consequences are the same. There was an act of violence.
- [18] I have carefully read the record of interview with Mr Marsh. Although it is difficult to make any judgment as to its credibility, his responses to questions put to him by police were entirely consistent throughout.
- [19] Relevantly, it seems to me that Mr Holt's use of the air horn was ill advised and although one is not an animal behavioural expert, commonsense suggests that continued use of the air horn is likely to aggravate the animal. Mr Marsh did his best to extricate the dog from the situation but in doing so, as I have said, tempers flared and there was the push.
- [20] Having regard to all of the evidence that has been put before the Tribunal, it does seem to me to be a reasonable conclusion that Mr Holt did contribute to the incident resulting in the act of violence. It is therefore open to the Tribunal, standing in the shoes of the decision-maker to come to the conclusion that there should be a reduction in the assistance by an amount of 50 per cent.
- [21] Therefore, the order of the Tribunal is that the decision of the respondent dated 14 February 2013 is confirmed.