NO. 1309A00837
IN THE PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

BETWEEN:

HER MAJESTY THE QUEEN

AND:

WILLIAM BENNETT

Heard: July 13, 2010.
Written Judgment Filed: July 20, 2010.
Appearances:
Mr. M. Fox for Her Majesty the Queen.
Mr. J. Goudie on behalf of Mr. Bennett.

JUDGMENT OF GORMAN, P.C.J.

INTRODUCTION:

[1] Mr. Bennett is charged with having failed to supply suitable and adequate care for an animal, contrary to section 446(1)(b) of the *Criminal Code of Canada*, RSC 1985 (the *Criminal Code*). For the reasons that will follow herein, I have concluded that the Crown has proven beyond a reasonable doubt that Mr. Bennett committed this offence. Let me explain my reasons for this conclusion by commencing with a review of the evidence presented at Mr. Bennett's trial.

THE EVIDENCE PRESENTED AT THE TRIAL

[2] Mr. Bennett resides in Deer Lake. He is the owner of a small dog (Sadie). Sadie was approximately sixteen months of age at the time that the incident leading to the present charge occurred. Mr. Bennett has owned Sadie since she was a puppy.

[3] During the summer, Sadie resides outside in a dog house which Mr. Bennett built. Mr. Bennett testified that the doghouse is weather proofed so that Sadie has a comfortable place to live.

[4] In early August of 2009, Sadie broke free from her collar and escaped. Mr. Bennett found her later that evening. He did not have a collar to replace the broken one and thus he decided to secure Sadie with a piece of rope. He tied the rope around Sadie's neck and secured it with a clasp. Mr. Bennett testified that he intended to purchase a new collar the next day, but forgot to do so.

[5] Approximately two weeks later, Mr. Bennett and his family (his spouse and two children) received some bad news. Mrs. Bennett's grandmother was seriously ill. It was suggested that they come to Grand Falls to see her immediately as it was feared that she would soon die. As a result, Mr. Bennett and his family decided to leave Deer Lake and drive to Grand Falls. Before leaving, Mr. Bennett arranged with his neighbour (Mr. Earle) to check on Sadie and to ensure that she was provided with food and water.

[6] After Mr. Bennett arrived in Grand Falls, he received a telephone call from Mr. Earle. Mr. Earle indicated that he had gone over to Mr. Bennett's residence to feed Sadie, but that she would not come out of her doghouse.

Mr. Earle thought there might be something wrong with the dog. Mr. Bennett contacted his aunt (Ms. Greta Marsh) and asked her to check on Sadie.

[7] Mr. Bennett told Ms. Marsh that Sadie had gotten off of her leash and that he had secured the dog with some rope. Mr. Bennett also indicated that he had forgotten that he had done so and was concerned that the dog might get caught up in the rope.

[8] After receiving this telephone call, Ms. Marsh and one of her other nephews (Mr. Melvin Hoyles) went to check on Sadie. Ms. Marsh testified that the dog was in a dog house on Mr. Bennett's property and would not come out of the doghouse. She indicated that Mr. Hoyles took Sadie out of the doghouse and that she noticed that a rope was tied tightly around the dog's neck. Mr. Hoyles was able to cut the rope off of the dog. Ms. Marsh testified that the dog's neck was injured. She described it as "a bad sight." Ms. Marsh could tell the dog was injured before the rope was removed, but she could not see the extent of the injury until the rope was cut.

[9] Ms. Marsh brought the dog to her house for the night. She called Mr. Bennett and indicated that the dog would have to be brought to a veterinarian. Mr. Bennett agreed and told her he would pay for the cost involved.

[10] Ms. Marsh brought Sadie to the Animal Health Centre in Corner Brook. Sadie was examined by Doctor Angela Martyn, a veterinarian. Dr. Martyn testified that this examination took place on August 20, 2009.[1]

[11] Dr. Martyn testified that Sadie was in "good condition." Her weight was normal and there were no indications of dehydration. Dr. Martyn indicated that the dog "looked well cared for." However, there was a serious injury to Sadie's neck. Sadie's skin was broken and the injury circled around her entire neck. Dr. Martyn testified that there was an "extremely noticeable smell" coming from the dog as a result of infection. Dr. Martyn described the wound as being "quite infected." She testified that the injury could have been caused by a rope being placed tightly around the dog's neck and cutting into the dog's skin. The wound was at its deepest in the front and pictures taken of Sadie show a significant injury to her in this part of her neck. Dr. Martyn indicated that the injury was approximately eight days to two weeks old.

[1] The information alleges that the offence took place on August 26, 2009 and Ms. Marsh made reference to having been initially contacted on this date by Mr. Bennett. However, it appears that she was mistaken on this point as the examination of Sadie took place on August 20, 2009. I am satisfied in the circumstances of this case that the variance between the date listed in the information and the evidence presented is not a material one (see section 601(4.1) of the *Criminal Code*).

[12] Dr. Martyn shaved the area where the wound was located, cleaned it and bandaged it. Sadie was given antibiotics. During the examination, Sadie remained very calm.

[13] Mr. Bennett agreed that he had placed a rope around Sadie's neck, but denied that he had secured it "tightly." He indicated that after placing the rope around her neck, and prior to leaving for Grand Falls, he had fed and provided water to Sadie each day. He testified that during this two week period he did not see any signs of injury or discomfort nor was there any unusual odor. He indicated that he did not see any injury to Sadie's neck. Mr. Bennett testified that Sadie has very long fur. He indicated that as a result you could not see the rope that was around her neck.

[14] Mr. Bennett conceded that during the time between when he placed the rope around Sadie's neck until he left for Grand Falls he had not checked the rope or Sadie's neck. He indicated that he had not observed any signs of distress. He agreed that he would not usually secure a dog by the use of a rope around its neck because of the potential harm that this could cause to the dog. He agreed that he had intended to replace the rope with a collar, but as indicated earlier, he forgot about having placed the rope around Sadie's neck.

[15] Having described the evidence presented during the trial, it is now time to turn to the onus and standard of proof which applies.

THE APPLICABLE ONUS AND STANDARD OF PROOF

[16] The Crown has the onus of proving beyond a reasonable doubt that an accused person committed the offence with which she or he is charged. The onus placed upon the Crown has been described as being closer to the standard of absolute certainty than to the standard of proof on a balance of probabilities (see ***R. v. Lifchus***, [1997] 3 S.C.R. 320; ***R. v. Avetysan***, [2000] 2 S.C.R. 745; and ***R. v. Starr***, [2000] 2 S.C.R. 144). The onus remains with the Crown and never switches to the accused (see ***R. v. Briand***, 2010 NLCA 44).

[17] In any trial in which an accused person testifies, a trial judge may employ the three-step analysis set out by the Supreme Court of Canada in ***R. v. W.(D.)***, [1991] 1 S.C.R. 742. In ***R. v. C.L.Y.*** (2008), 227 C.C.C. (3d) 129, the Supreme Court of Canada indicated that the key to applying the onus and standard of proof when an accused person testifies is avoiding the trap of deciding guilt or innocence solely on whether or not the accused person's evidence is believed, i.e., the adoption of a forbidden line of reasoning.

[18] In ***R. v. Aspell***, [2010] A.J. No. 270 (C.A.), at paragraph 9, the Court of Appeal indicated that one of the objectives of the ***W.(D.)*** test "is to relieve

the trier of fact from the sense of obligation to decide between the conflicting testimony of two credible witnesses, because in such a contest reasonable doubt is too often overlooked or sacrificed." Similarly, in ***R. v. Kristensen***, [2010] A.J. No. 100 (C.A.), at paragraph 16, it was held that the Supreme Court's comments in ***W.(D.)*** constitute "a caution against deciding credibility issues with an 'either/or' approach." Finally, in ***R. v. Szczerbaniwicz***, [2010] S.C.J. No. 15, at paragraph 14, the Court noted that it "has frequently confirmed that it is the substance of that test that must be respected, not its literal tripartite incarnation."

[19] Having described the onus and standard of proof, the next issue is: what is the Crown required to prove when an accused person is charged with an offence pursuant to section 446(1)(b) of the *Criminal Code*?

THE ELEMENTS OF THE OFFENCE

[20] Section 446(1)(b) of the *Criminal Code* states as follows:

> Every one commits an offence who
>
> > being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

[21] As can be seen, this provision creates a standard of care for certain types of animals and it is a negligence-based offence. In ***R. v. Beatty***, [2008]

1 S.C.R. 49, it was held that the *actus reus* for negligence-based offences is defined solely by the words of the applicable statutory provision. Thus, a failure to provide adequate care will constitute an offence if the necessary *mens rea* is present. The *mens rea* for this offence must be interpreted in accordance with constitutional fault requirements and with Parliaments' "extended" definition (see ***R. v. Toma*** (2000), 147 C.C.C. (3d) 252 (B.C.C.A.), at paragraph 15) of the word "wilfully." Because the provision creates a duty of care, a purely subjective *mens rea* is not a required element of proof. As pointed out in ***R. v. Naglik***, [1993] 3 S.C.R. 122, at paragraph 33, the "concept of a duty indicates a societal minimum which has been established for conduct." In ***R. v. J.F.***, [2008] 3 S.C.R. 215, in considering the offences of criminal negligence and failure to provide the necessaries of life, the Court indicated that neither of these offences "requires proof of intention or actual foresight of a prohibited consequence." The trier of fact must "determine not what the [accused] knew or intended, but what he *ought to have foreseen*" (at paragraph 7).

[22] Section 446(1)(b) of the *Criminal Code* "is aimed at establishing a uniform minimum level of care to be provided for those to whom it applies, and this can only be achieved if those under the duty are held to a societal, rather than a personal, standard of conduct" (see ***Naglik***, at paragraph 34).

[23] As we have seen, section 446(1)(b) refers to “wilfully” neglecting or failing to provide adequate care to an animal. Thus, the offence it creates can be committed by an act or an omission. The word “wilfully” is defined in section 429(1) of the *Criminal Code* in the following manner:

> Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

[24] It has been held that the word "wilfully" is generally "taken to mean intentionally but it is also used to mean recklessly" (see ***Toma***, at paragraph 15). It has also been held that the definition of “wilfully” in section 429 of the *Criminal Code* allows for the mental element to be established "by showing that [the accused] failed to meet the standards imposed on him by the offence section” (see ***R. v. Schmidtke*** (1985), 19 C.C.C. (3d) 390 (Ont. C.A.) at page 393). Also see ***R. v. S.D.D.*** (2002), 164 C.C.C. (3d) 1 (N.L.C.A.)).

[25] Section 446 of the *Criminal Code* was originally enacted as section 512 of the *Criminal Code*, 1892, c.29. The provision Mr. Bennett is charged with was enacted on April 17, 2008, by virtue of *An Act to amend the Criminal Code (cruelty to animals)*, SC 2008, c.12, s.1. The present

wording of section 446(1)(b) is identical to the wording which was contained in the former section 446(1)(c), prior to April 17, 2008.

[26] In ***R. v. Clarke***, [2001] N.J. No. 191, I had the opportunity to consider the *mens rea* and *actus reus* requirements for the offence created by the former section 446(1)(c) of the *Criminal Code*. I concluded that it was not necessary for the Crown to prove subjective foreseeability of the consequences for a conviction to be entered under that provision. At paragraphs 62 and 63, I wrote as follows:

> The objective foreseeability requirement must be tailored to the specific offence (see *R. v. Nurse* (1993), 83 C.C.C. (3d) 546 (Ont. C.A.); *R. v. Swenson* (1994), 91 C.C.C. (3d) 541 (Sask. C.A.); and *R. v. Vang* (1999), 132 C.C.C. (3d) 32 (Ont. C.A.). Under s.446(1)(a) of the *Code* the Crown must prove that "pain, suffering or injury" was a reasonably foreseeable consequence. Under s. 446(1)(c) of the *Code* the reasonably foreseeable consequence relates to the provision of inadequate "food, water, shelter and care" for the animal. The Crown does not have to prove that the accused intended this consequence.
>
> In the context of s. 446(1)(c) of the *Code* the Crown must prove that the accused "wilfully" failed to provide food, water, shelter and care. This *mens rea* requirement can be established through proof of purposeful intention; by recklessness; or wilful blindness. In other words, the Crown must prove that the accused intentionally or wilfully caused the *actus reus*. The latter mode of proof is, in my view, constitutionally consistent with an offence that requires the provision of a basic level of care by the accused.

[27] At paragraphs 55 and to 56 of ***Clarke***, I described the *actus reus* and *mens rea* elements for a section 446(1)(c) offence in the following manner:

> Under s. 446(1)(c) of the *Code* the Crown must prove:
>
> > (1) that the accused is the owner or a person having custody of the animal; and that
> >
> > (2) the accused "wilfully" failed or neglected to provide suitable and adequate food, water, shelter or care for the animal.
>
> The *actus reus* for this offence requires proof that the accused failed to supply an animal with adequate food, water, shelter or care (an act and a result or consequence). The *mens rea* element requires proof that the accused did so "wilfully". In the context of s. 446(1)(c) of the *Code*, this requires proof that the accused intended this result or that a reasonable person would realize that his or her acts would subject an animal to the risk of receiving inadequate food, water, shelter or care.

[28] In ***R. v. Galloro***, [2006] O.J. No. 2871 (C.J.), it was held that evidence of “a substantial or marked departure from reasonable care is required to prove the *actus reus* of the offence in s. 446(1)(c) beyond a reasonable doubt.”

ANALYSIS

[29] It is not contested in this case that Mr. Bennett was the owner of a domestic animal. It is also not contested that Sadie was injured. In his testimony, Mr. Bennett conceded that the injuries described by Dr. Martyn were caused by the rope he had placed around Sadie’s neck, though he denied that it had been secured tightly. This was a proper concession for

him to have made as the evidence overwhelmingly establishes this as the cause of Sadie's injuries. Though it is not necessary to define the words "adequate care" in this case, causing or allowing the type of injury to an animal described by Dr. Martyn to occur clearly does not constitute the provision of adequate care. As noted by Mr. Goudie in his submission, this case concerns the *mens rea* element.

[30] As pointed out earlier, the *mens rea* element of the offence created by section 446(1)(b) of the *Criminal Code* can be committed by intentionally refusing to provide adequate care to an animal or by "wifully" doing so. In the context of section 446(1)(b) this latter method of commission involves a consideration of foreseeable consequences. As I said in ***Clarke***, at paragraph 52, "the reasonably foreseeable consequence relates to the provision of inadequate 'food, water, shelter and care' for the animal. The Crown does not have to prove that the accused intended this consequence." Having said this, it must be understood that Mr. Bennett is charged with a criminal offence for which a period of imprisonment could be imposed. Proof of civil negligence is insufficient in such a setting as the adoption of such a standard is inconsistent with the fundamental principles of justice protected by section 7 of the *Charter*.

[31] Section 7 of the *Charter* requires in the criminal law context proof of personal fault for a conviction to be entered (see ***Reference re: s. 92(4) Motor Vehicle Act***, [1985] 2 S.C.R. 486 and ***R. v. Ruzic***, [2001] 1 S.C.R. 687). Thus, though the Crown does not have to prove subjective foreseeability of the consequences set out in section 446(1)(b) for a conviction to be entered under that provision, it does have to prove that they were objectively foreseeable.

[32] In ***R. v. Hundal***, [1993] 1 S.C.R. 867, in the context of the offence of dangerous driving, the Supreme Court of Canada adopted an objective fault analysis, but one in which a "marked departure" from the standard of care expected of a reasonable person in the circumstances of the accused had to be proven. In ***Beatty***, the Court concluded that a finding of fault in a criminal context based on objectively dangerous conduct that constitutes a marked departure from the norm is constitutionally acceptable because "a reasonable person in the position of the accused would have been aware of the risk" and "would not have undertaken the activity."[2] However, even where the accused's actions constitute a marked departure from the standard of care prescribed by the offence provision, an accused will not be found criminally liable if a reasonable person in the position of the accused would

[2] In ***R. v. Tayfel*** (2009), 250 C.C.C. (3d) 219 (Man. C.A.), it was held, at paragraph 49, that "*Beatty* now provides the analytical framework for all negligence based offences."

not have been aware of the risk. The Supreme Court of Canada has referred to this as constituting a "modified objective test" (see ***Hundal***, at page 887). Thus in ***Beatty***, at paragraph 40, the Court summarized the test to be applied by stating that the "standard against which the conduct must be measured is always the same -- it is the conduct expected of the reasonably prudent person in the circumstances. The reasonable person, however, must be put in the *circumstances* the accused found himself in when the events occurred in order to assess the reasonableness of the conduct."

[33] Therefore, not all negligent care of an animal will constitute an offence under section 446(1)(b) of the *Criminal Code* (see ***Beatty***, at paragraph 45). The failure to provide adequate care must constitute a marked departure from the care a reasonable person would provide. If this marked departure is proven then the Court "must consider evidence about the actual state of mind of the accused, if any, to determine whether it raises a reasonable doubt about whether a reasonable person in the accused's position would have been aware of the risk created by this conduct. If there is no such evidence, the court may convict the accused" (see ***Beatty***, at paragraphs 48 and 49). These concepts were succinctly summarized in ***R. v. Gosset***, [1993] 3 S.C.R. 76, by the following comments (at pages 95 to 96):

> Once a marked departure from the standard of care is established, the focus of the investigation under penal negligence must shift, therefore,

> to the question of whether the accused was capable of recognizing that he or she had fallen short of the standard of care required in the circumstances by the charging section.

[34] These comments were expanded upon by the Supreme Court in ***R. v. Finlay***, [1993] 3 S.C.R. 103. In that decision the Court indicated that if "a reasonable doubt exists either that the conduct in question did not constitute a marked departure from that standard of care, or that reasonable precautions were taken to discharge the duty of care in the circumstances, a verdict of acquittal must follow...the objective assessment of fault also [has] to consider the capacity of an accused to meet the standard of care required in the circumstances, and the accused's ability to control or compensate for his or her incapacities. There is, however, no 'reverse onus' on an accused to establish on the balance of probabilities that he or she exercised due diligence in order to negate a finding of fault under s. 86(2)" (at paragraph 27).

[35] In ***R. v. Tayfel*** (2009), 250 C.C.C. (3d) 219, the Manitoba Court of Appeal considered ***Beatty*** and summarized the principles involved in assessing the *mens rea* component for negligence-based offences in the following manner (at paragraph 51):

> For negligence-based offences, the *mens rea* is rarely about an accused's positive state of mind "such as intent, recklessness or wilful blindness" (at para. 27). Rather, the enquiry most often is about whether there has been an absence of the requisite mental state of care

> to establish the necessary blameworthy state of mind. This engages the modified objective test, which, as explained by Charron J., is the objective test for civil negligence, modified in two ways. Firstly, it is modified by the requirement of a marked departure from the civil objective standard. Second, it is modified to allow for exculpatory defences for those circumstances where "a reasonable person in the position of the accused would not have been aware of the risk or, alternatively, would not have been able to avoid creating the danger" (at para. 37).

[36] In ***R. v. O'Keefe*** (2009), 293 Nfld. & P.E.I.R. 133 (N.L.S.C.), Mr. Justice Handrigan neatly set out the last component of the ***Beatty*** test by indicating that in order to establish commission of the offence of dangerous driving, the Crown must prove that “there was no lawful justification, excuse or explanation for why [the accused] drove as he did” (at paragraph 10).

[37] In this case, the evidence establishes that Sadie was well cared for by Mr. Bennett over an extended period of time. She was provided with adequate food, water and shelter. There is no evidence that Mr. Bennett ever intentionally harmed Sadie and I conclude that he did not intend for her to be harmed by tying the rope around her neck.

[38] The evidence presented in this case establishes beyond a reasonable doubt that after Sadie broke free from her collar in early August, 2009, Mr. Bennett tied a rope around her neck in order to prevent a further escape. There is no evidence that Mr. Bennett secured the rope so tightly that it cut into Sadie’s skin. Mr. Bennett intended the rope to be a temporary measure

until he purchased a new collar the next day. However, he forgot to do so. Mr. Bennett knew, as would a reasonable person, that leaving a dog secured by a rope around its neck would place the dog in danger of being harmed by that rope. This was why he never intended for the rope to be a permanent fixture.

[39] After placing the rope around Sadie's neck, Mr. Bennett had contact with Sadie everyday for approximately two weeks thereafter. He fed her and provided her with water. However, he did not check the rope. Mr. Bennett testified that during this time period he did not see any signs of Sadie being in pain or discomfort. However, when Ms. Marsh checked Sadie, shortly after Mr. Bennett left for Grand Falls, she could see that Sadie was injured. Though the full extent of the injury could not be seen until the rope was removed, it was obvious to Ms. Marsh that Sadie was injured before the rope was removed. If Mr. Bennett had checked the rope or Sadie's neck before he left for Grand Falls he would have observed the same thing. I conclude that the injury to Sadie did not occur after Mr. Bennett left for Grand Falls. It was an ongoing event as a result of the rope twisting around the dog's neck over a period of time. Mr. Bennett knew that there was a rope around Sadie's neck and he appreciated the danger it posed to her, but he took no steps to alleviate this danger. Placing a rope around a dog's neck for one

night might not constitute a marked departure from the standard of care required of dog owners by section 446(1)(b) of the *Criminal Code*, but doing so for an extended period of time can.

[40] Being Sadie's owner, Mr. Bennett had a lawful duty to ensure that she was provided with adequate care. He failed to do so. A reasonable person in Mr. Bennett's position would have been aware of the risk involved in securing a dog by tying a rope around her neck and would not have left the dog secured in this manner for such a long period of time. In addition, Mr. Bennett appreciated the danger involved in leaving Sadie secured by a rope around her throat. He would have replaced the rope with a collar, but he forgot to do so. That a dog would be harmed by tying a rope around its neck for an extended period of time is an objectively foreseeable consequence. Mr. Bennet's decision to place the rope around the dog's neck and leave it there for approximately two weeks without once checking to see if it was causing any injury to the dog constitutes a marked departure from the standard of care demanded by section 446(1)(b) of the *Criminal Code*. No legal justification or excuse for this behaviour exists. Thus, the Crown has proven that Mr. Bennett committed the *actus reus* and *mens rea* elements of the offence with which he is charged.

CONCLUSION

[41] For the reasons provided herein, the Crown has proven that Mr. Bennett committed an offence, contrary to section 446(1)(b) of the *Criminal Code*.

[42] Judgment accordingly.