CITATION: R. v. Munroe, 2012 ONSC 4768
COURT FILE NO.: 10-4-054-00AP
DATE: 20120921

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	*Jason Gorda*, for the Crown/Respondent
	)	
– and –	)	
	)	
CHRISTOPHER MUNROE	)	*Tina Yuen*, for the Appellant
Appellant	)	
	)	
	)	
	)	**HEARD:** June 14, 2012
	)	

M.A. CODE, J.

REASONS FOR JUDGMENT

A. OVERVIEW

[1] The Appellant Christopher Munroe (hereinafter, Munroe) was charged in a four count Information with unlawfully killing one dog (known as Abby) and unlawfully wounding a second dog (known as Zoe), contrary to s. 455(1)(a) of the *Criminal Code*. The other two counts alleged wilfully causing unnecessary suffering to the same two dogs, contrary to s. 455.1(1)(a). The Crown proceeded summarily on all four counts.

[2] The four offences were alleged to have taken place during a two month time period from mid-April to mid-June 2008. The two dogs were small Boston Terriers and they belonged to Munroe's girlfriend Katherine Cappella. Munroe lived with her during the relevant time period at her house in Toronto.

[3] The charges were laid on August 28, 2008 and the trial took place before O'Donnell J. on October 19 and 20, 2009. The trial judge reserved judgment and delivered detailed written reasons on December 8, 2009, finding Munroe guilty on all four counts. On April 15, 2010, the trial judge sentenced Munroe to twelve months imprisonment and three years probation, as well as making a free-standing $12,964 restitution order and requiring 150 hours of community service. The trial judge also made a free-standing order banning the ownership of animals for twenty-five years, pursuant to s. 447.1.

[4] Munroe appeals from both conviction and sentence. The conviction appeal alleges that one error was made in O'Donnell J.'s careful and thorough reasons. This ground of appeal has no merit and can be quickly dismissed. The real issue in relation to the conviction appeal is the admissibility of a large body of fresh evidence, tendered by the Appellant pursuant to ss. 683(1) and 822(1). The Crown has tendered an equally large body of responding fresh evidence, while submitting that Munroe's fresh evidence is not admissible.

[5] The appeal was heard on June 14, 2012 and I reserved judgment.

B. FACTS

(i) The facts that were not in dispute

[6] The evidence adduced at trial was relatively short and simple, focusing mainly on the issue of whether Munroe had exclusive opportunity to injure the two dogs. Defence counsel conceded that the two dogs had been physically abused and injured by someone. As he put it in his closing submissions:

> There is simply no issue … that the two dogs … were physically abused. The sole issue … is whether the Crown has proven beyond a reasonable doubt that it is the defendant … who was the one that abused the dogs.

[7] The history of the relationship between Munroe and Ms. Cappella was also not in dispute. They testified that Munroe separated from his wife in October 2007 and that he then met Ms. Cappella and began dating her in November 2007. They both agreed that the relationship was happy and romantic in this early period. On April 14 or 19, 2008, Munroe moved into Ms. Cappella's home in Toronto and the relationship began to deteriorate. Ms. Cappella's sister lived in the house for the first three weeks but then she moved out. The sister had a job that involved shift work. After the sister moved out, Ms. Cappella and Munroe lived alone in the house.

[8] Ms. Cappella had three Boston Terrier dogs who were all in excellent health when Munroe moved in. They were small dogs, weighing under twenty pounds. There was an older male named Mr. Big. There was no evidence that he was ever abused in any way. The two females, Abby and Zoe, were age six and four. Abby was the smallest of the three dogs, weighing about ten pounds.

[9] Ms. Cappella and Munroe agreed that their respective work schedules meant that Munroe was alone with the dogs for a period of time during each working day. She worked from 8:30 a.m. to 4:30 p.m. at a government job in Toronto. He worked either the day shift or the afternoon shift at the Honda plant in Alliston. The day shift was from 6:30 a.m. until 3:00 p.m. As a result, Munroe would arrive home before Ms. Cappella during a week when he was on the day shift. The afternoon shift was from 4:30 p.m. until 1:00 a.m. As a result, Munroe would leave for work after Ms. Cappella had left for work during a week when he was on the afternoon shift.

[10] Ms. Cappella's sister moved out of the house on May 10, 2008. Munroe and Ms. Cappella left for a week long holiday in Mexico that same day. Ms. Cappella's parents lived near her house and they looked after the three dogs during the Mexico holiday. On May 17, 2008, Munroe and Ms. Cappella returned home from the Mexico holiday. It was after this holiday that Ms. Cappella noticed a change in Munroe's behaviour and the relationship began to deteriorate. He was no longer affectionate or accommodating and he seemed to intentionally try to annoy her. It was a significant change from the earlier period in their relationship. Munroe agreed that the relationship deteriorated after he moved in to Ms. Cappella's house. He attributed this change to the fact that he was spending weekends in Kitchener, visiting with his daughter from his prior marriage. Ms. Cappella agreed that this was a point of contention in the relationship.

(ii) The chronology of the injuries to the two dogs

[11] The chronological history of Abby and Zoe's injuries was not seriously disputed and much of it was confirmed by the veterinary records. It was also agreed that Ms. Cappella was always the one who discovered the injuries to the dogs and who then took the dogs to see a veterinarian. Munroe testified that he never noticed any of the injuries until after Ms. Cappella had discovered them and had shown them to him.

[12] The history of the injuries, and the actions taken by Ms. Cappella and the veterinarians, were as follows:

- On May 21, 2008, which was a Wednesday, Munroe was working the afternoon shift so he would have left for work in the afternoon. When Ms. Cappella returned home from work, Abby did not come to the door to greet her. This was unusual. Abby was lethargic and limp and would not get up off the couch. Ms. Cappella knew something was wrong and she saw that Abby's eye was clouded with blood. She took Abby to the Willowdale Animal Hospital. Dr. Krebs' report confirmed that Abby had uveitis (inflammation) of the right eye and was subdued and painful. Blood samples were taken and Abby was then sent home with Ms. Cappella. When Munroe was told of Abby's injury he advised Ms. Cappella that he had found a plant knocked over in the living room and he suggested that it may have hit Abby. He testified that he did not see any injury to Abby, from the potted plant or otherwise, prior to leaving for work that day. He agreed that Abby's eye, once he saw it, was "visibly full of blood";

- On May 22, 2008, Munroe was again working the afternoon shift. When Ms. Cappella returned home after work, she received a call from Dr. Krebs who had now received the results of Abby's blood tests. Dr. Krebs' report described the test results as "severe changes" and "abnormal blood values … more compatible with severe trauma (i.e. hit by car)." On Dr. Krebs' advice, Ms. Cappella again took Abby to the Willowdale Animal Hospital. Dr. Krebs examined Abby again and found "abrasions on her left foreleg, groin and chin that were not apparent the

day before", according to her report. Abby was kept overnight at the clinic for observation. Dr. Krebs' subsequent report, which is dated August 30, 2008, concluded with the benefit of hindsight that "trauma at the hands of a person (i.e. a severe kick), completely explains the abnormal blood tests, eye injury, and abrasions". However, at the time of the May 22, 2008 examination of Abby, "there was no history of major trauma";

- On May 23, 2008, Dr. Krebs advised that Abby should be transferred to the Veterinary Emergency Clinic in downtown Toronto. Ms. Cappella took the morning off work and transported Abby between the two clinics in order to have Abby examined by Dr. Mason, a specialist in internal medicine. Abby was kept at the Emergency Clinic over the weekend, for three nights. Ms. Cappella visited Abby at the clinic, over the weekend, while Munroe was away in Kitchener. Abby was lethargic and sleeping. Dr. Mason's report noted the injury to Abby's right eye, the elevated blood tests, as well as "bruising noted along medial surface of all four limbs, bruising on chin and under tongue, small laceration on left forepaw". The report stated that "the bruising that was noted gradually resolved but some scabs did develop in these areas. This is unusual for toxoplasmosis and leaves [us] with a possibility of trauma alone";

- On May 26, 2008, which was a Monday, Abby returned home from the clinic. Munroe was working the day shift during this week. He attended at the clinic with Ms. Cappella to pick up Abby but he was initially reluctant to go in the clinic and suggested that he would wait in the car. Ms. Cappella insisted that he come in with her, to get Abby, and he did. Abby seemed more alert when they picked her up but she was still not well;

- On May 27 and 28, 2008, Ms. Cappella noticed further injuries to Abby. Her anus was swollen and it had scabs on it, there was bruising on her stomach and chest, and there were scabs along the edge of her ear;

- On May 29, 2008, which was a Thursday, Ms. Cappella noticed small open wounds on the pads of Abby's rear paws;

- On May 31, 2008, which was a Saturday, Munroe again went to Kitchener to visit his daughter. That evening, Ms. Cappella noticed that Zoe had scabs on her anus. This was the first injury to Zoe that Ms. Cappella had noticed. On Sunday, June 1, 2008, Munroe returned to Ms. Cappella's house in Toronto;

- On Monday, June 2, 2008, Munroe was working the day shift so he would have returned home from work before Ms. Cappella. When she got home from work she noticed a large open wound on Zoe's stomach. It was approximately four centimeters long and two centimeters wide. Munroe testified that he had not noticed it but he agreed that Ms. Cappella showed it to him and that it was "big".

Ms. Cappella phoned Dr. Mason and she thoroughly searched the house and the backyard, without success, to try to find anything that could have caused the injuries to both dogs;

- On the next day, June 3, 2008, Ms. Cappella took the two dogs to the Emergency Clinic to examine their latest injuries. Abby stayed overnight at the clinic and Zoe came back home with Ms. Cappella. Dr. Martin's report stated that Abby had " severe ulceration of her anus, vulva, and metatarsal toe pad of the right pelvic limb" and "a small crusted lesion on her left distal forelimb" as well as small lesions on her right eye and "crusted lesions on pinnae" (the external part of the ear). The report also noted that "the other Boston Terrier … was also showing signs of ulceration around her anus and her ventral abdomen". The report concluded that Abby's injuries "continue to be enigmatic in origin" and that some unknown "environmental substance" was suspected. Dr. Martin bandaged Abby's right rear limb;

- On June 4, 2008, which was a Wednesday, Ms. Cappella picked up Abby from the clinic after work and brought her home. After Abby's return, Munroe would change the bandage on her foot and would apply medication to it;

- The following week, which began on Monday, June 9, 2008, was the last week of Abby's life. Munroe was working the afternoon shift and so he would leave for work after Ms. Cappella had left the house. During this week, Ms. Cappella noticed swelling on Abby's body and could feel lumps on her side and on her leg, when stroking her. Abby was lethargic and would lie outside in the yard, at the farthest point from the house, and would not come back in. Ms. Cappella would have to pick her up and bring her back in;

- On Wednesday, June 11, 2008, Ms. Cappella again took time off work and took Abby to an eye specialist. Dr. Wolfer's report concluded that there was "bilateral uveitis" (inflammation) and he suspected "left retinal detachment". He recommended further testing, including but not limited to, "infectious or immune mediated causes of uveitis";

- On Thursday, June 12, 2008, Ms. Cappella noticed that Zoe had a large swollen area on her ribcage. That night, in the early hours of the morning when Munroe came home from work, Ms. Cappella awoke as she heard Zoe squealing in the next room. She got up and found Munroe handling Zoe, who was trying to get away. This incident will be described in greater detail below;

- On Friday, June 13, 2008, Abby died. Ms. Cappella was at work during the day. Munroe was at home until the early afternoon when he left for work. Around 1:30 p.m., Ms. Cappella came out of a meeting at work and checked her voicemail. There were a number of "panicked" calls from Munroe, asking her to

call him. She returned his calls but he did not answer. She was worried and kept calling and after several minutes Munroe picked up the phone and told her that Abby "was in really bad shape, that her breathing was changed". He did not know what to do and he had already left for work. He asked Ms. Cappella whether he should go back to the house and take Abby to the veterinarian. Ms. Cappella advised that she would call her parents and ask them to check on Abby. Ms. Cappella phoned her parents and they went over to the house. They found Abby dead, lying on the armchair in the living room. I will set out Munroe's account of the events of this day in greater detail below, when discussing the Application to adduce fresh evidence, as he has now provided a different version of the key events. Ms. Cappella went home immediately, after her parents had called and advised of Abby's death. In addition to finding Abby dead, Ms. Cappella noticed that the swelling to Zoe's ribcage had become "huge" and was now a "massive sack of fluid" that was "hanging down from her chest". Ms. Cappella called Dr. Mason and then immediately took Zoe, and Abby's corpse, to the Emergency Clinic. Dr. Mason recommended an autopsy of Abby in the hope that it would "shed some light on Zoe's condition", as he later put it in his report. Dr. Mason's report described Zoe as "having similar clinical signs (bruising, subcutaneous swelling, but no eye problems as of yet)" and also stated that Zoe had "markedly elevated" blood test results but "not as high as Abby". Zoe, Mr. Big and Ms. Cappella all stayed at her parents' home that night. I will describe what happened when Munroe returned home from work, late that night, in the next section of these reasons;

- On Saturday, June 14, 2008, Ms. Cappella and her mother took Abby's corpse to the University of Guelph for the recommended autopsy;

- During the following week of June 16, 2008, Ms. Cappella's parents cared for Zoe and Mr. Big during the day, while Ms. Cappella was at work. She would pick up the dogs after work. Zoe's injuries "improved a bit" that week. Munroe no longer had unsupervised access to the dogs;

- On Thursday, June 19, 2008, in the evening, Munroe was involved in a further incident with Zoe and the dogs appeared to be frightened of him. This incident will be described below in greater detail. That night, Ms. Cappella and Munroe agreed to end their relationship;

- On Friday, June 20, 2008, Ms. Cappella received the autopsy results. The veterinary pathologist, Dr. McEwen, found ten acute rib fractures on both sides of Abby's ribcage and five additional callused or healed rib fractures. The acute rib fractures were one or two days old, they were poking in and had punctured the lining of the chest cavity, and the lungs were partly collapsed. The callused rib fractures were "very difficult" to date but they were "probably over two and a half to three weeks" old, with an upper limit of "probably four to four and a half

weeks". The cartilage in Abby's ear was fractured in multiple places. She had very deep dermal lesions on her right hind paw pad that were "suggestive of a burn". There was bleeding in both eyes and separation of her retina. There was bleeding and inflammation of Abby's vulva. There were muscle injuries of various ages, some of them acute and some of them healing or scarring. Finally, there was extensive bleeding in all sections of the brain. There was no evidence of infectious or toxic disease. Dr. McEwen's report concluded:

> The ocular, hepatic, muscular lesions, multiple rib fractures and auricular cartilage fractures, subcutaneous hemorrhage are consistent with severe blunt force trauma. Acute, subacute and chronic lesions are present indicating multiple traumatic episodes. Severe animal abuse is a major concern in this case.

Ms. Cappella called the police that same evening, after she received the autopsy results;

- On Sunday, June 22, 2008. Ms. Cappella told Munroe to move out and he did move out the next day. Zoe progressively improved and she is now in perfect health.

[13] The defence brought out evidence concerning access to the backyard of the house. There were neighbours on all three sides of the wooden post and chicken wire fence that surrounded the backyard. There were wooden gates at each side of the house, leading to the backyard, which could be opened simply by lifting a latch. The dogs had once got out of the backyard as someone had left one of the gates open. This was prior to any of Abby and Zoe's injuries. Ms. Cappella and Munroe would leave the dogs in the backyard, while one or both of them was at home, but they would bring the dogs inside if no one was going to be home. Ms. Cappella had never seen a stranger in the backyard.

(iii) Evidence concerning Munroe's conduct towards the dogs, and their reaction to him, and evidence of Munroe's conduct towards Ms. Cappella

[14] Ms. Cappella gave evidence about how Munroe generally inter-acted with the dogs, and about how they responded to him, after he had moved into the house. She also gave evidence about his conduct towards her and towards the dogs during three specific incidents. Finally, she gave evidence about Munroe's conduct towards her shortly after the discovery that Abby had died.

[15] In relation to the first issue set out above, Ms. Cappella testified that Munroe played a lot with the dogs to the point that he was "completely consumed with them" and "almost obsessed with them". As time went on, "the dogs began avoiding him". It seemed to Ms. Cappella that Munroe would "torment them" by pitting one dog against the other. He "definitely favoured"

Mr. Big and "seemed to dislike Abby". For example, he would get them to fight over a toy and would encourage Mr. Big to take it away from Abby and would then praise Mr. Big and scold Abby, as if to make her jealous. He would also hold the dogs in ways that Ms. Cappella thought inappropriate, for example, throwing them in the air and putting them on their backs and exposing their stomachs. She would constantly tell him to stop but Munroe would just laugh and say that "he only did it to annoy me".

[16] Munroe testified and flatly denied any such conduct, although he agreed that he often played with the dogs. He never favoured one over the other or threw them in the air or held them on their backs. He agreed that Ms. Cappella did tell him that she thought he was favouring Mr. Big. He testified that he became close to the dogs by playing with them and caring for them and that he was very upset by Abby's death. Munroe agreed that the dogs were very important to Ms. Cappella and that she was an exemplary pet owner. He never saw her do anything inappropriate with the dogs.

[17] Ms. Cappella testified about three specific incidents involving Munroe's interaction with the dogs. As noted above in the chronology of the dogs' injuries, there was an incident involving Munroe and Zoe late at night on June 12, 2008. Ms. Cappella had noticed swelling on Zoe's ribcage that day after work. Munroe was working the afternoon shift and did not return home until late at night. Ms. Cappella was asleep and she heard Zoe squealing in the next room where the dogs slept. She got out of bed and went into the dogs' room. Munroe had lifted up Zoe from the large crate where the dogs slept. Zoe was "protesting by squealing and trying to get away from him". Ms. Cappella asked Munroe what he was doing. He said that he was trying to see what was wrong with her and he continued handling her. Ms. Cappella told him to leave Zoe alone and to stop handling her and causing her pain. It took awhile to get Munroe to put Zoe back in the crate as he kept "laughing off" Ms. Cappella's concerns. She was angry and was yelling at Munroe.

[18] Munroe acknowledged much of this late night incident with Zoe. He testified that he did pick up Zoe on this occasion, in order to make sure that she was alright. He looked at the injury to her belly, which he had not previously noticed. He agreed that Zoe made a noise, as it was uncomfortable for her. He also agreed that he did not put Zoe back in her crate at this point. Ms. Cappella then came into the room and told him to do so. At this point, he did put Zoe back in the crate. He denied arguing with Ms. Cappella, although he agreed that she was upset and raised her voice.

[19] Ms. Cappella recalled a similar incident with Abby on a night that was prior to the June 12th incident with Zoe. It was probably the week before. She awoke after hearing noise in the dogs' room. She went into the room and found Munroe handling Abby. The dog was protesting. Munroe ignored Ms. Cappella's requests to put Abby back in her crate. Munroe kept asking "why is she struggling with me" and Ms. Cappella replied, "because she's in pain, she wants you to leave her alone". There was an argument between them before Munroe let Ms. Cappella put Abby back in her crate. Munroe did not testify about this incident.

[20] The third and final incident took place during the week after Abby's death. By this stage in the chronology, Ms. Cappella was picking up Zoe and Mr. Big from her parents' house after work and was then bringing them home. The dogs were "noticeably trying to avoid" Munroe at this stage, to the point where Zoe tried to get in the shower with Ms. Cappella one evening. On another evening, while sitting on the couch watching television, the dogs would "scurry away" when Munroe approached. Finally, on the evening of Thursday, June 19th, Munroe was holding the dogs on their backs and tossing them in the air. Ms. Cappella was furious as Zoe still had swelling and Munroe was causing her discomfort. The dogs squeezed onto the couch beside Ms. Cappella and were shaking. She tried to get them to calm down by putting a blanket over them. They could not see Munroe, once they were under the blanket, and they finally laid down. Munroe did not testify about this final incident, other than providing a general denial of ever holding the dogs on their backs or throwing them in the air.

[21] It was on the night of this final June 19th incident that Ms. Cappella told Munroe that she wanted to end the relationship and he agreed. She felt that he was tormenting the dogs, when she had consistently asked him to stop, and that he had no respect for her wishes concerning the dogs. According to Ms. Cappella, Munroe was very detached during their conversation about ending the relationship. He said that he was not comfortable having responsibilities for the dogs. Munroe's recollection of this conversation was that they were simply upset about Abby's death. Otherwise, they did not discuss the dogs.

[22] Ms. Cappella's evidence about Munroe's conduct towards her, shortly after Abby's death, was to the general effect that he avoided her or failed to be supportive. As soon as she learned of Abby's death, after her parents had phoned her at work, she called Munroe. She asked him to come home as she needed his support. He was on his way to work and said that he would try to arrange it. He later phoned her from work and advised Ms. Cappella that he had been unable to get time off. He also advised her that he was going to Kitchener for the weekend. It was a Friday, June 13th, and so his afternoon shift finished one hour early, at 12:00 midnight. He said that he would stop by her parents' home, after work, to visit with her before he went on to Kitchener. Munroe did not arrive at her parents' home until about 2:30 a.m. He explained that he had accepted overtime that night and, as a result, had stayed late at work. He testified that he did not have to accept overtime but that it showed commitment to your work if you agreed to overtime.

[23] Once he arrived at the parents' home that night, both Ms. Cappella and Munroe agreed that they had a conversation outside on the front porch. Ms. Cappella's account was that Munroe accused her of keeping him in the dark about the gravity of Abby's condition. Ms. Cappella agreed that she did not tell Munroe about all of the trips to the various veterinarians, as Munroe had been critical of her for spending so much money on the dogs. She told him, during the front porch conversation, about taking Abby to see specialists. He reprimanded her for spending money on the dogs and for not telling him. Munroe's account of the conversation on the front porch was different. He testified that he was feeling guilty and he apologized for not taking Abby to the vet and for not doing more to help. He agreed that he did think that all the tests at

the veterinarian clinics were expensive. He also agreed that he did not help Ms. Cappella pay the veterinarians' bills.

[24] Munroe went to Kitchener for the weekend, after the late night conversation on the parents' front porch. Ms. Cappella and her mother took Abby's corpse to the autopsy in Guelph on the Saturday. She spoke to Munroe on the Sunday on the phone and asked him to come home early, as she had been upset all weekend. He agreed to come home around dinner time. He did not arrive in Toronto until after 9:00 p.m. Ms. Cappella was upset as she felt in need of support.

C. THE CONVICTION APPEAL BASED ON THE EXISTING TRIAL RECORD

[25] The only ground of appeal, advanced on the basis of the existing trial record, is that the trial judge erred in his assessment of Katherine Cappella's credibility. In particular, it is alleged that the trial judge relied unduly on this Crown witness's demeanour.

[26] Ms. Cappella's credibility was not a significant issue in relation to her account of the two dogs' injuries. This part of her evidence was not really challenged and it was largely corroborated by the veterinarians' reports. However, her credibility was an important issue in the case because she provided evidence of Munroe's behaviour towards the two dogs, his behaviour towards her, and the dogs' responses to Munroe. This body of circumstantial evidence raised some potential inferences concerning Munroe's culpability. Munroe testified and denied some of this conduct while admitting and explaining other aspects of the alleged conduct. Munroe also denied being responsible for the abuse of the two dogs. As noted, it was conceded at trial that the two dogs had been physically abused by some human agent. The only issue in dispute was the identity of the perpetrator.

[27] Given Munroe's denial that he was the perpetrator, and given the conflict between his testimony and Ms. Cappella's testimony in relation to some of the circumstantial evidence bearing on the issue of identity, the trial judge instructed himself on the principles that emerge from *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.). There is no question that the trial judge understood that the burden of proof remains firmly on the Crown when resolving conflicts in the evidence, and issues of credibility, in relation to an essential element such as identity. His instructions to himself on this point are impeccable.

[28] The alleged error is that the trial judge resolved the credibility issue, in favour of Ms. Cappella and against Munroe, by placing undue reliance on Ms. Cappella's demeanour as a witness. MacDonnell J. has helpfully summarized the law on this point in his recent decision in *R. v. Smith* (2011), 280 C.C.C. (3d) 111 (Ont. S.C.J.), where he stated the following:

> I acknowledge that the Ontario Court of Appeal has stated on a number of occasions that it is an error to base credibility decisions solely on the demeanour of witnesses: see, e.g. *R. v. J.F.* (2003), 177 C.C.C. (3d) 1 at para. 101; *R. v. Norman* (1993), 87 C.C.C. (3d) 153 at 173; *R. v. Gostick* (1999), 137 C.C.C. (3d) 53 at 59-61.

> …
>
> The Court of Appeal has never taken the position that it is improper for trial judges to consider the demeanour of witnesses when assessing the credibility or reliability of their testimony. Indeed , it has consistently affirmed that it remains a legitimate consideration: see, e.g., *R. v. Boyce*, [2005] O.J. No. 4313 (C.A.), and *R. v. Hull*, [2006] O.J. No. 3177 (C.A.). The Supreme Court of Canada has also repeatedly recognized the important role that demeanour can play in assessing credibility: see, e.g., *R. v. Lifchus*, [1997] 3 S.C.R. 320, at paragraph 128; *R. v. Gagnon*, [2006] 1 S.C.R. 621, at paragraph 20; *R. v. Jabarianha*, [2001] 3 S.C.R. 430, at paragraphs 30-31; *R. v. Devine*, [2008] 2 S.C.R. 283, at paragraph 28; and *R. v. Boucher*, [2005] 3 S.C.R. 499, at paragraph 49.

[29] In the case at bar, as I read the three relevant paragraphs in the trial judge's reasons, he set out five distinct factors or considerations that led to his favourable view of Ms. Cappella's credibility: first, she was "cautious" and "reluctant to overstate" or answer when she was unsure on a point; second, she had "a very detailed recollection" of the history of the two dogs' injuries; third, her account of Munroe's inappropriate conduct towards the dogs was not a recent invention, as she admittedly raised some of these concerns with Munroe at the time, and it was also corroborated to some extent by known facts; fourth, her "demeanour" did not show "a hint of anger" towards Munroe; and fifth, her "broader personality" appeared to be that of an "intelligent, compassionate person". These were appropriate factors to consider, when assessing Ms. Cappella's credibility, and they do not reveal any undue reliance on her demeanour. Indeed, the trial judge cautioned himself concerning "the limitations of demeanour evidence".

[30] When he came to Munroe's evidence, the trial judge noted the following four considerations that led him to reject that evidence and led to his unfavourable assessment of Munroe's credibility: first, Munroe's assertion "that he had an active, positive and affectionate relationship with the dogs" and that "he was very upset when Abby died" was contradicted by a number of known or admitted circumstances; second, his inappropriate or suspicious conduct towards the dogs, and "the way the dogs tried to avoid" him, was established by Ms. Cappella's testimony; third, Munroe had exclusive opportunity to cause the injuries to the two dogs, given the following four circumstances – he was home alone with them during the relevant time period, Ms. Cappella was admittedly not a suspect, no one else was alone in the house with the dogs, and it was "entirely implausible" for the defence to suggest that some unknown stranger had repeatedly waited and watched and then entered the fenced backyard, when the two dogs were let out, and had then injured them on "multiple occasions" in "broad daylight"; fourth, the timing of the dogs' injuries pointed to Munroe as they were in good health prior to his arrival at the house, the injuries and death of Abby occurred while Munroe lived at the house, and Zoe regained her health after his departure and suffered no further injuries.

[31] I am satisfied that the trial judge's reasons set out a large number of rational bases for accepting Ms. Cappella's evidence and for rejecting Munroe's evidence. There can be no

suggestion that he relied unduly on Ms. Cappella's demeanour as a witness when resolving the issue of credibility.

[32] Accordingly, the one ground of appeal relating to conviction that rests on the existing trial record must be dismissed. The conviction appeal can only succeed if the fresh evidence is admitted. I turn now to that further issue.

D. THE FRESH EVIDENCE APPLICATION

(i) Introduction

[33] The well known *Palmer* test for the admissibility of fresh evidence on appeal, pursuant to s. 683(1), was recently re-affirmed by a unanimous Court in *R. v. Walle*, 2012 SCC 41 at para. 75. Moldaver J., speaking for the Court, set out the traditional four part test in the following terms:

> The test for the admission of fresh evidence on appeal is well established. It consists of four components, identified in *R. v. Palmer*, [1980] 1 S.C.R. 759 at p. 775, as follows:
>
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *R. v. McMartin*, [1964] S.C.R. 484;
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Also see: *R. v. J.A.A.*, [2011] 1 S.C.R. 628 at para. 7.

[34] The broad "interests of justice" test set out in s. 683(1), as refined by the four *Palmer* criteria, seeks to achieve a balance between two distinct policy values. On the one hand, cogent fresh evidence can prevent miscarriages of justice and ensure the correctness of trial verdicts. On the other hand, routinely allowing litigants to pursue one theory at trial and, after it fails, to then pursue a different and new theory on appeal would undermine finality and integrity in the criminal justice system. See: *R. v. M.(P.S.)* (1992), 77 C.C.C. (3d) 402 at 411 (Ont. C.A.); *R. v. B.(G.D.)* (2000), 143 C.C.C. (3d) 289 at para. 19 (S.C.C.); *Reference Re Regina v. Gorecki (No.2)* (1976), 32 C.C.C. (2d) 135 at 144 (Ont. C.A.); *R. v. Dooley* (2009), 249 C.C.C. (3d) 449 at paras. 106-8 (Ont. C.A.).

[35] All of the fresh evidence tendered on the Application relates to the cause of Abby's death. The Crown concedes this was a decisive issue at trial, at least in relation to two of the four counts in the Information, and so the second *Palmer* requirement is not in issue.

[36] As to the first part of the test, the defence concedes that all of the fresh evidence could have been adduced at trial by the exercise of due diligence. Accordingly, there is no suggestion that the Application can meet the first *Palmer* requirement.

[37] In light of the above two parts of the test not being in dispute, the real focus of the argument was on the third and fourth requirements.

[38] The fresh evidence tendered on the Application can be divided into three distinct subject areas, all of which relate to the cause of Abby's death:

(i) first, there is evidence concerning whether Abby suffered from an underlying illness, known as vasculopathy or vasculitis;

(ii) second, there is evidence concerning whether Abby had a tendency to fall down stairs and, in fact, did fall down stairs on the day of her death;

(iii) third, there is evidence concerning the timing or age of some of Abby's callused rib fractures.

Each of these three bodies of evidence is challenged by the Crown and each one raises distinct issues concerning the admissibility of fresh evidence on appeal. I will analyze them in the order set out above.

(ii) The evidence that Abby suffered from vasculopathy

[39] The Appellant retained a veterinarian pathologist named Dr. Ehrhart at some point during the appeal process. He has sixteen years experience and he is employed at the College of Veterinary Medicine at Colorado State University in Fort Collins, Colorado. He submitted a final report to appellate counsel dated November 23, 2011, although it is clear that he had given earlier advice to counsel before his report was finalized.

[40] Dr. Ehrhart examined both *ante mortem* and *post mortem* slides, taken from Abby's organs and tissues, as well as *post mortem* photographs. He identified vasculopathy or vasculitis in five of the thirty-nine tissues that he examined. Vasculopathy is an unusual disorder of the blood vessels that leads to inflammation, lesions, and bleeding. It has many causes including disease and infection as well as unknown or idiopathic causes. The lesions are microscopic and difficult to find. Once a lesion is identified, it is a matter of interpretation as to whether the underlying cause is vasculopathy. Since it is a matter of interpretation, pathologists can disagree as to whether the cause of a particular lesion is vasculopathy.

[41] The Crown responded to Dr. Ehrhart's report with its own report from the original pathologist who examined Abby at the *post mortem*, that is, Dr. McEwen. She consulted with a second veterinary pathologist, Dr. Maxie, who is renowned for his expertise in cardiovascular pathology. Both of the Crown's pathologists have much longer experience than Dr. Ehrhart. It is arguable that Dr. Maxie is also more qualified on the topic of vasculopathy. Both Crown pathologists disagreed with Dr. Ehrhart's interpretation of the vascular lesions. Dr. McEwen testified that "I looked hard for vasculitis in this dog and I did not see it". Dr. Maxie agreed with Dr. Ehrhart that there was probably one vasculitis lesion found in Abby's tissues but he disagreed with the other four lesions identified as vasculitis by Dr. Ehrhart. He referred to them as "very common background lesions" that are found in as many as 26% of dogs "starting at two years of age". They are associated with aging and are of no significance "in terms of the eventual death of this dog". Dr. Maxie summed up his interpretation of the vascular lesions as follows:

> "So we would say mild chronic intramyocardial arteriosclerosis … it means it has these little bumps in the vessel and if we're going to be very complete we would record that as one of the diagnoses …[But] if I was doing the report, I wouldn't record that because I'd just regard that as a six or eight year old dog, normal background lesions, so I would probably overlook that …

[42] It can be seen that the three veterinarian pathologists all took slightly different positions on the question of whether Abby suffered from vasculopathy. In this regard, the case is different from a number of recent cases where the Crown conceded that the fresh evidence corrected errors made by Crown witnesses at trial, including Crown expert witnesses. See, e.g.: *R. v. J.A.A., supra*; *R. v. M.(P.S.), supra*; *R. v. Reeve* (2008), 233 C.C.C. (3d) 104 (Ont. C.A.).

[43] In my opinion, application of the *Palmer* criteria for the admission of fresh evidence, to this body of pathology evidence, turns on the fourth requirement. The first or "due diligence" requirement is also important. I will discuss this first criterion in greater detail below. At this point, I simply note the concession by the Appellant that Dr. Ehrhart's opinion evidence was available at the time of trial, by the exercise of due diligence, as defence counsel could have consulted with him or some other similarly-minded veterinarian pathologist. No affidavit was put forward from trial counsel to explain whether he did consult with a defence expert and, if not, why not. Munroe has filed an affidavit stating that he personally consulted with a veterinarian named Dr. Waddell who provided a negative opinion, consistent with the *post mortem* report, to the effect that the dogs had been abused. The Appellant conveyed this opinion to trial counsel and they decided to defend the case on the basis that some unknown third party had gained access to the backyard and had abused the dogs.

[44] I will have more to say about the absence of an affidavit from trial counsel, and about the case law concerning the "due diligence" criterion, when analyzing the other parts of the fresh evidence Application. Suffice it to say, at this stage, that a failure to meet the "due diligence" criterion means that there must be "some added degree of cogency" under the fourth criterion before the fresh evidence can gain admission. It is said that the fresh evidence must be

"compelling" in these circumstances. See: *R. v. Smith* (2001), 161 C.C.C, (3d) 1 at paras. 90-1 (Ont. C.A.); *R. v. Maciel* (2007), 219 C.C.C. (3d) 516 at paras. 36-55 (Ont. C.A.); *R. v. Dooley, supra* at paras. 107-9 (Ont. C.A.).

[45] In my view, Dr. Ehrhart's evidence could not have had any impact on the verdict at trial. His evidence does not touch on the two counts in the Information relating to Zoe. Furthermore, his evidence is vigorously challenged by the Crown's experts who are now bolstered by Dr. Maxie. Most importantly, Dr. Ehrhart himself concedes that vasculopathy, assuming in his favour that Abby suffered from it, cannot explain her many traumatic injuries. In particular, Dr. Ehrhart agreed that the ten acute rib fractures, the associated pleural tears, the injuries to Abby's eyes, and the acute bleeding in the brain were primarily the result of blunt force trauma. He also agreed that these injuries all occurred in the "same time window". Finally, he agreed that "quite a bit of force" was required to cause all of these injuries and that it would have to be repeated.

[46] The impact of an "underlying vascular lesion" on these blunt force injuries, according to Dr. Ehrhart, was simply to "exacerbate" them. There would be "an increased propensity to haemorrhage", that is, the bleeding associated with trauma would be "more severe" because of the underlying vasculopathy. Dr. Ehrhart agreed that there was no evidence of vasculopathy in Abby's eyes or brain or ribs but it remained a possible contributing cause of the bleeding in these areas, in Dr. Ehrhart's opinion, because he found it elsewhere in her tissue samples.

[47] In light of the above evidence, Dr. Ehrhart's opinion concerning vasculopathy had no legal significance. At best, it simply added to or exacerbated the primary cause of Abby's death, namely, blunt force trauma. See: *R. v. Smithers* (1977), 34 C.C.C. (2d) 427 (S.C.C.); *R. v. Nette* (2001), 158 C.C.C. (3d) 486 (S.C.C.); *R. v. Cribbin* (1994), 89 C.C.C. (3d) 67 (Ont. C.A.). When pressed in cross-examination, Dr. Ehrhart agreed with the key opinions of the Crown experts concerning the cause of Abby's death. He testified that:

> "…there's definitely signs of blunt trauma … I think those are things that Dr. McEwen and I agree on, that there is evidence of blunt trauma. I don't deny that. I never have … I say … that it is significant. I don't downplay it. There is definitely evidence of trauma and I don't downplay it … I believed that the final event probably that caused the death of this dog is extensive subdural haemorrhage and … trauma was a part of that and potentially the part … vasculitis or vascular lesions … could play in that was … it could exacerbate the amount of haemorrhage and when you have that amount of haemorrhage in a closed cranial vault there's going to be severe clinical signs."

[48] In her Reply Factum, Ms. Yuen conceded the limited impact of Dr. Ehrhart's evidence concerning vasculopathy:

> "Clearly there was trauma that caused rib fractures and the subdural hematoma that was likely the cause of death. The Appellant does not dispute that the presence of vasculopathy is no defence if he [Munroe] in fact inflicted that

> trauma. Again, vasculopathy is not relied upon for that purpose, but to explain the clinical findings that are non-traumatic in origin."

[49] In these circumstances, the evidence of Dr. Ehrhart is not admissible on appeal as it fails to meet the first and fourth *Palmer* criteria. In particular, it could not have had any impact on the verdicts at trial. In order to succeed, the fresh evidence Application has to advance some innocent explanation for Abby's many traumatic injuries. I now turn to that aspect of the Application.

(iii) The evidence that Abby had a tendency to fall down stairs and did fall down stairs on the day of her death

[50] The most controversial, and most important part of the fresh evidence Application, is the evidence that Abby had a recent history of falling down stairs and bumping into walls and that she had a fall down the stairs on June 13, 2008, shortly before her death. This evidence is advanced, for the first time on appeal, through an affidavit of the Appellant. He made no mention of these matters in his trial testimony and, arguably, gave contrary evidence. The Application then builds on this new foundation by proffering expert opinions from Dr. Ehrhart and from an English veterinarian, Dr. Martin, as to whether Abby's tendency to fall down stairs and bump into walls could explain her many admittedly traumatic injuries. This defence of accidental injury is inconsistent with the position taken at trial where physical abuse was conceded as the cause of Abby's injuries.

[51] The Appellant's affidavit, which is critical to this part of the Application, is dated December 14, 2011. In summary, it asserts the following four points:

(i) During the period of Abby's repeated injuries and her various trips to veterinarians, from May 21 to June 13, 2008, she was lethargic and weak and did not move around much. It was during this period that Munroe noticed Abby "walking into walls in the house and the fence in the backyard." He also saw her falling down the basement stairs "on numerous occasions, including the day she died";

(ii) There were "two separate occasions" when Munroe actually saw Abby fall down the stairs and "more than one other occasion" when he found her lying at the bottom of the stairs, indicating to him that she had recently fallen. In other words, he was aware of at least four incidents during the critical time period when Abby fell down the stairs, and perhaps more. The three dogs would jostle excitedly on a landing, at the door leading to the backyard, when they were to be let outside. This is when Abby would fall down the stairs leading from the landing to the basement. Photographs of the seven steps descending to the concrete basement floor were tendered;

(iii) On each of these occasions, after falling down the stairs, Abby "did not try to get up but just lay on the floor". Munroe would have to "go down to the basement, pick her up and carry her out to the backyard." On these occasions, Abby "did not play with the other dogs" in the backyard but "mostly just lay there". When Munroe called for the dogs to come back in, she did not come and he would have to "go out and carry her in";

(iv) Munroe discussed this situation with Ms. Cappella at the time and she said that Abby "was ill".

[52] As already noted, Munroe's evidence at trial and the position taken by the defence at trial were inconsistent with the fresh evidence affidavit in a number of ways.

[53] First, and most fundamentally, the implication that Abby accidently injured herself by falling down the stairs is inconsistent with the position taken by defence counsel at the end of the trial, namely, that Abby's injuries were caused by repeated physical abuse. Second, Munroe's new account of at least four falls down the stairs, that immobilized Abby such that she had to be picked up and carried outside and then picked up again and brought back inside, strongly suggests that Munroe knew that she was repeatedly injured from accidental falls during the critical time period. And yet at trial, Munroe testified on at least four occasions that he saw nothing happen that would explain Abby's injuries. During examination-in-chief, he testified as follows:

Q. Do you know how any of the injuries occurred that were referred to in the testimony of Dr. McEwen?

A. No, I do not.

…

Q. During this period of time [while living at Ms. Cappella's house] did you think of anything that otherwise caused these particular symptoms in the dogs? Did you have any idea as to the cause of the symptoms?

A. No, no.

Q. The cause of the lethargy referred to by Ms. Cappella?

A. No, just from what the vets were saying, I thought like, we thought they were sick. [Emphasis added].

In cross-examination, he gave similar evidence:

Q. In fact, Katherine told you about all of the injuries to the dogs.

A. Yes.

Q. And you, despite the fact that you spent significant periods of time alone with these dogs, looking after these dogs and caring for these dogs, you never noticed any of these injuries on your own?

A. No, no.

…

Q. And all of these injuries, the doctor's view is they were caused by trauma.

A. Yes, that's what the doctor said, yes.

Q. And you never saw anything, you never saw anything happen to Abby while you were watching her?

A. No, I did not.

Q. That would have given you concerns about broken bones or …

A. No, I did not.

Q. … anything like that.

A. No. [Emphasis added].

[54] The third area of inconsistency is the assertion in Munroe's new account that he discussed the incidents of Abby falling down the stairs with Ms. Cappella. At trial, he testified as follows:

Q. Were you worried about the dogs?

A. Yes I was.

Q. And did you ever make any suggestions to Katherine about a solution to the problem?

A. I was unaware of, I had no solutions. I did not know what was going on, she would just tell me about the tests that the dogs were having and we were just going from there. [Emphasis added].

[55] The fourth, and arguably most serious contradiction, concerns Munroe's account at trial of events on the day that Abby died. Not only did he fail to mention Abby's fall down the stairs, and having to carry her outside, but he gave a detailed account of letting all three dogs out into the backyard to play and of not noticing anything wrong with Abby until he had to bring her

back inside. In other words, the clear implication of his story at trial was that Abby was fine when he let her out to play but that she was somehow injured in the backyard, consistent with the defence theory at trial of an unknown intruder coming into the backyard and abusing the dogs. His evidence on this point was as follows, both in-chief and in cross-examination:

> Q. Now if I could direct you, sir, to Friday June 13, of the year 2008. This is the day that Abby died. What shift were you working that particular day?
>
> A. Afternoon shift.
>
> Q. And could you tell us when you awoke, where were the dogs?
>
> A. In the living room.
>
> Q. And would that be outside of their crate or in their …
>
> A. Outside of the crate.
>
> Q. And did you let the dogs out that morning?
>
> A. Yes, I let them out to play that morning.
>
> Q. And by dogs, I am saying all three dogs.
>
> A. Yes.
>
> Q. And did you let – did you bring the dogs in later that day?
>
> A. Yes, I did.
>
> Q. And did you notice anything out of the ordinary as it related to Abby?
>
> A. Yes, I did.
>
> Q. And describe for us that.
>
> A. I went outside to call the dogs to come in and only two of them came and I went around to see if – where Abby was in the backyard and she was laying beside one of the gates on the right-hand side …
>
> Q. Now by right-hand side, is this the right-hand side of the house as I'm facing the front door?
>
> A. Yes.
>
> Q. Okay.

A. And her breathing wasn't very good, so I brought her in and as usual I just tried to give her some water through a syringe and she – her breathing still wasn't getting better so I tried to call Ms. Cappella. I called her a couple times. I've left her some voicemails. I had to leave for work so I left for work and when I talked to her I was already on the way to work and I let her know what was going on and she told me that she would call her mom and her mom would come over.

…

Q. And that day when you left for work, where were you when you noticed that there was something wrong with Abby?

A. Well, after I got ready for work I went to bring the dogs in because I had to leave to go ….

Q. Mm-hmm?

A. And she didn't come and she was laying around the side of the house on the right-hand side and I went over and her breathing wasn't good so I picked her up and brought her in. I thought I could give her some water through a syringe, that might help, and that wasn't working so then I called Katherine to let her know what was going on. [Emphasis added].

[56] In summary, the Appellant's fresh evidence affidavit is inconsistent with his trial testimony and with the defence he advanced at trial, in the following four ways:

(i) First, he conceded at trial that the dogs were physically abused and he advanced a defence that some unknown backyard intruder was the perpetrator. Now, his defence is that the dogs were not abused and that their traumatic injuries, at least in Abby's case, were caused accidentally by repeated falls down the stairs;

(ii) Second, he repeatedly testified at trial that he never noticed any injuries to the dogs and "never saw anything happen" that might explain the injuries or that might be "the cause of the lethargy" in Abby. Now, he recalls at least four specific incidents that immediately caused Abby to be immobilized and that are said to explain her traumatic injuries;

(iii) Third, his testimony at trial was that he had "no solutions" to the problem of Abby's injuries, when discussing them with Ms. Cappella, because he "did not know what was going on". Now, he recalls discussing Abby's quite specific problem of falling down the basement stairs with Ms. Cappella, a problem to which common sense would suggest a number of "solutions" such as putting a barrier across the top of the basement stairs;

(iv) Fourth, his testimony at trial was that on June 13 he "let them out to play that morning", referring to "all three dogs". Now, he recalls letting only two dogs out to play because Abby was lying injured at the bottom of the stairs and she had to be carried out. At trial, his testimony was also to the effect that he first noticed "there was something wrong" or "out of the ordinary" when he called the dogs back in and saw that Abby was "laying beside one of the gates" in the backyard. Now, he recalls that Abby was lying injured at the bottom of the stairs before he carried her outside.

[57] In addition to the above contradictions, there are omissions in the Appellant's affidavit that are equally troubling. He never acknowledges or explains the contradictions between his new story and the evidence that he gave at trial and whether he is now recanting his trial testimony and, if so, why he is recanting. He never explains why he did not tell Ms. Cappella about Abby's fall down the stairs on the day she died, in either their phone calls or in their late night conversation on the front porch on June 13, 2008, if this was the apparent cause of Abby's serious injuries that day. He never discloses whether he told his trial lawyer about Abby's repeated falls down the stairs and, if not, why not. He never discloses how the new story eventually came out in an affidavit that is dated over two years after he was convicted on December 8, 2009.

[58] In relation to this latter omission, neither the original Notice of Appeal dated April 22, 2010 nor the Supplementary Notice of Appeal dated January 5, 2011 nor the fresh evidence Notice of Application dated January 5, 2011 make any mention of Munroe's new account being part of the fresh evidence Application or being a ground of appeal. The two latter documents, dated in early 2011, refer to a "Report of Dr. E.J. Ehrhart" and to a ground of appeal based on fresh evidence, to the effect that "the deceased dog's injuries were attributable to complications arising from natural causes (vasculopathy) and not human-inflicted trauma". It appears that appellate counsel was not yet in possession of the new story from the Appellant at the time when the fresh evidence Application was launched in early January, 2011. The new story from Monroe appears to have emerged, almost a year later, sometime around December, 2011. By that time, it would have been apparent that Dr. Ehrhart's fresh evidence about vasculopathy provided no explanation for Abby's traumatic injuries. The late emergence of Munroe's new story about Abby falling down the stairs is suspicious, as he has changed his trial evidence in a way that fills an otherwise fatal gap in the fresh evidence Application. And yet no explanation is proffered as to how and when and why this new story emerged at such a late stage.

[59] Finally, the most significant omission in this part of the fresh evidence Application is the absence of any affidavit from trial counsel, revealing whether Munroe had ever previously disclosed his new story about Abby's falls down the stairs. It would be essential and normal for counsel to question his client closely, when preparing for trial, about any possible accidental causes of Abby's injuries. There is no suggestion that trial counsel was incompetent or ineffective. Furthermore, Munroe was alive to the possibility of accidental causes of Abby's injuries as he had advanced the story about the potted plant falling over when Abby was first taken to the veterinarian on May 21, 2008. If Munroe did tell trial counsel about Abby

repeatedly falling down the stairs, it would be important to know why trial counsel decided not to lead this evidence at trial. On the other hand, if Munroe did not tell trial counsel, in spite of inquiries on this topic, it would be important to have some explanation from Munroe for his failure to be forthright with his lawyer. None of this information is included in the fresh evidence Application. I asked Ms. Yuen, during oral argument of the appeal, as to whether she had a waiver of solicitor and client privilege from Munroe. She advised that she did and yet no affidavit from trial counsel has ever been tendered.

[60] It can be seen that there are significant weaknesses in Munroe's new account concerning Abby falling down the basement stairs. The Appellant, however, points to one piece of potentially supporting evidence. The veterinary records for Abby indicate that when she was taken to the Emergency Clinic on May 23, 2008, her history was taken. It included the following notation: "fell down stairs a few years ago – no treatment". It is apparent that this notation does not suggest any recent falls nor does it suggest resulting trauma such as broken ribs. Dr. Martin's fresh evidence report indicates that it is unusual for dogs to fall down stairs and that he has never heard of a dog breaking ribs from falling down stairs. It normally results in bruising and sometimes results in other kinds of fractures. Nevertheless, Dr. Martin thought it was possible that a dog could break ribs from falling down stairs if there were circumstances that generated the significant force required to break ribs. He thought it unlikely that a dog would break ribs on both sides of the ribcage in the same fall (Abby had ten acute fractures on both sides of her ribcage). Dr. Ehrhart gave a similar opinion to Dr. Martin.

[61] The contradictions between Munroe's trial evidence and his fresh evidence affidavit, the significant omissions in the material, and the lack of any real support for his account, as set out above, all combine to raise serious concerns in relation to the first, third and fourth *Palmer* criteria for the admission of fresh evidence on appeal. It is conceded that Munroe's new story was available at trial, and was not advanced at trial, and so the "due diligence" requirement is not met. The contradictions and omissions seriously undermine the credibility of Munroe's new account and so it must be determined whether it is "reasonably capable of belief". Finally, Munroe's new account, combined with the new expert opinions concerning traumatic injuries and accidental falls by dogs, must meet the fourth criteria of being reasonably capable of affecting the result at trial. All three of these questions are inter-related to some degree.

[62] I am satisfied that Munroe's affidavit, setting out his new account of Abby's falls down the basement stairs, fails to meet all three of the above *Palmer* criteria. It is, therefore, not admissible as fresh evidence on appeal.

[63] The first *Palmer* requirement, known as the "due diligence" test, is not applied as strictly in criminal cases as in civil cases. Major J., speaking for a unanimous Court, explained the reason for this different approach in *R. v. B.(G.D.)*, *supra* at paras. 19-20, and he also explained what an appellate court must determine in relation to the "due diligence" criterion:

> The due diligence criterion exists to ensure finality and order – values essential to the integrity of the criminal process … However, jurisprudence pre-dating *Palmer*

> has repeatedly recognized that due diligence is not an essential requirement of the fresh evidence test, particularly in criminal cases. That criterion must yield where its rigid application might lead to a miscarriage of justice … In determining whether or not the due diligence required by *Palmer* has been met, an appellate court should determine the reason why the evidence was not available at trial. [Emphasis added].

[64] The present Application does not allow the court to carry out the above direction in *G.D.B.* as no reason has been advanced in the evidence for the failure to adduce Munroe's new account at trial. No affidavit from trial counsel has been tendered and the Appellant's affidavit omits any discussion of whether he ever raised the matter with trial counsel and, if not, why not.

[65] In *R. v. Warsing* (1998), 130 C.C.C. (3d) 259 at para. 51 (S.C.C.), Major J. dealt with a fresh evidence Application that raised a defence of insanity for the first time on appeal. The Appellant had failed to include an affidavit from trial counsel. Major J. commented on the omission, speaking on behalf of a unanimous Court on this point:

> In this case the psychiatric evidence was undoubtedly available upon the exercise of due diligence. The respondent's counsel at the Court of Appeal, hampered by solicitor-client privilege, was unable to provide an explanation as to why the evidence of [a defence of insanity] was not led. This privilege could have been waived by the respondent and his failure to do so would usually weigh against admitting the fresh evidence, however that is only one factor. [Emphasis added].

Major J. went on to state that the "failure to meet the due diligence requirement is serious and in many circumstances would be fatal". However, in the context of credible evidence that the Appellant suffered from a mental disorder, the Court made "an exception to the general rule" and allowed a new defence to be raised on appeal, even in the absence of any explanation for the failure of counsel to raise it at trial.

[66] In the case at bar, unlike *Warsing*, there has been a waiver of solicitor and client privilege. Furthermore, there is no suggestion that the Appellant was suffering from a mental disorder at the time of trial, as in *Warsing*, that might explain why the new defence was raised for the first time on appeal. Also see: *Reference Re Regina v. Gorecki (No. 2)*, *supra* at 146. It is more difficult, in these less favourable circumstances, to excuse the Appellant's failure to give any "reason why the evidence was not available at trial", as Major J. put it in *G.D.B.*

[67] A case that is somewhat analogous to the present appeal on this point is *R. v. Dooley*, *supra* at paras. 62-4, where a fresh evidence Application was filed jointly by two co-Appellants. One of them, Tony Dooley, filed an affidavit from trial counsel that frankly set out a number of carefully considered reasons for not pursuing the expert medical evidence that was subsequently tendered by new counsel on the appeal. The other Appellant, Marcia Dooley, filed no such affidavit and offered no explanation for why she did not tender the evidence at trial. Doherty J.A., speaking for the Court, stated the following:

> Marcia Dooley joins in the application to adduce the evidence of Dr. Ramsay. She has not offered any explanation for not leading that evidence or similar evidence at trial. Clearly, Marcia Dooley's silence on appeal cannot put her in a better position than Tony Dooley, who has offered a comprehensive and credible explanation for the tactical decision made on his behalf at trial. Absent any explanation from Marcia Dooley, or a claim of ineffective assistance of counsel, this court must proceed on the basis that counsel for Marcia Dooley chose, for good reasons, not to challenge the Crown's medical evidence. [Emphasis added].

[68] Where appellate counsel has received a waiver of solicitor and client privilege and seeks to advance a new defence on appeal through fresh evidence, but without tendering any explanatory affidavit from trial counsel, it makes good sense to proceed in the manner set out in *Dooley* by Doherty J.A. Appellate counsel in such a case will have conferred with trial counsel and, if some explanation exists, will invariably tender an affidavit from trial counsel. In the absence of any explanation, it is logical for the court "to proceed on the basis that counsel [at trial] chose for good reasons" not to advance the defence, to paraphrase Doherty J.A. in *Dooley*.

[69] The failure to meet the "due diligence" requirement has an impact on the other *Palmer* criteria. In *R. v. Warsing*, *supra* at para. 20, Major J. stated that "the lack of due diligence will not always be fatal and will have to be weighed against the strength of the other criteria and the interest of justice." [Emphasis added]. In *R. v. McAnespie* (1993), 86 C.C.C. (3d) 191 (S.C.C.), Sopinka J. made a similar point, speaking for a unanimous Court:

> With respect to [the second ground of appeal], applying the factors in *Palmer and Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193, in our opinion, the proposed evidence ought not to have been admitted. Specifically, we are of the opinion that the respondent failed to satisfy the criterion of due diligence. While this factor is not applied strictly in criminal cases and is not to be considered in isolation, the strength of the other factors is *not* such that failure to satisfy the due diligence requirement in this case is overborne by other factors. [Italics of Sopinka J. in the original, underlining added].

[70] The proposition set out above in *Warsing* and *McAnespie*, that a failure to satisfy the "due diligence" requirement places a heavier burden on the other criteria, was addressed more fully in *R. v. Maciel*, *supra* at paras. 45 and 49-50 where Doherty J.A. again gave the judgment of the Court:

> Mr. Campbell [defence counsel] submits that evidence which could have been led at trial will be admissible on appeal if that evidence is "compelling": see *R. v. Warsing*, *supra*, at para. 51; *R. v. Lévesque*, *supra*, at para. 15. I agree that at some point, the cogency of the proposed evidence must trump the failure to lead that evidence at trial, even though it was available. The difficulty lies in fixing that point.
>
> …

> It is equally clear to me that to be "compelling", the evidence offered on appeal must do more than simply meet the conditions precedent to the admissibility of that evidence. Evidence offered on appeal to challenge factual findings at trial is inadmissible unless it is relevant to a material issue, reasonably capable of belief and sufficiently cogent that it could reasonably be expected to have affected the result at trial when considered in combination with the rest of the evidence: *Palmer and Palmer v. The Queen*, *supra*, at 205. In short, if the evidence is not sufficiently strong to compel the ordering of a new trial, it cannot be received on appeal.
>
> If the evidence could have been led at trial, but for tactical reasons it was not, some added degree of cogency is necessary before the admission of the evidence on appeal can be said to be in the interests of justice. Otherwise, the due diligence consideration would become irrelevant. An accused who did not testify at trial could secure a new trial by advancing an explanation on appeal that was reasonably capable of belief. It would not serve the interests of justice to routinely order new trials to give an accused an opportunity to reconsider his or her decision not to testify at the initial trial. [Emphasis added].

Also see: *R. v. Dooley*, *supra* at paras. 107-8.

[71] The "cogency" of the fresh evidence is assessed through the third and fourth *Palmer* criteria. The third *Palmer* criterion is that the fresh evidence must be "reasonably capable of belief'. This standard must not be confused with the ultimate credibility and reliability of the evidence, which is for the trier of fact at trial. Nevertheless, the third criterion cannot be ignored. As Rosenberg J.A. put it in *R. v. Babinski* (1999), 135 C.C.C. (3d) 1 at para. 52 (Ont. C.A.), speaking on behalf of the Court:

> If the appellate court, which has the obligation to consider the sufficiency of the fresh evidence, is satisfied that the fresh evidence is not credible and does not affect the credibility of the testimony given by the witness or another witness at the trial, the evidence cannot meet the third *Palmer* requirement, and it is inadmissible. To hold otherwise, would be to shirk the responsibility given to the appellate court by s. 683 of the *Criminal Code*, as interpreted in *Palmer*, to receive the evidence of witnesses on appeal. To admit a recantation without regard to its credibility simply because it was made, would run afoul of the admonition in *Palmer* at p. 205 that it would not serve the interests of justice to "permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice". In *R. v. Pizzardi* (1994), 72 O.A.C. 241, leave to appeal to Supreme Court of Canada dismissed December 9, 1994, this court made a similar observation. Lacourcière J.A. held at p. 246 that "It would be detrimental to the administration of justice to reopen trials merely because a trial witness has changed his mind or repudiated his evidence." [Emphasis added].

Also see: *R. v. Snyder* (2011), 273 C.C.C. (3d) 211 (Ont. C.A.); *R. v. McCullough* (2000), 142 C.C.C. (3d) 149 (Ont. C.A.).

[72] It is unclear whether Munroe has now recanted his trial testimony as he does not address this issue. He has certainly made a fundamental change in that testimony and he has offered no explanation for the change. At trial, he had no knowledge or understanding as to how Abby could have been injured. Now he recalls at least four specific incidents that are said to explain at least some of her traumatic injuries. Even more suspicious is the change in his story concerning the events of June 13, immediately prior to Abby's death. At trial, he let her out in the backyard to play and then found her lying immobile by the gate, suggesting that a stranger had entered through the gate and abused her. On appeal, he found her immobile at the bottom of the stairs, before she ever went outside, suggesting that an accidental fall down the stairs caused her injuries.

[73] The new story is not "reasonably capable of belief" given all the inconsistencies and omissions outlined above. Indeed, it appears that Munroe is willing to change his story to suit whatever defence is being advanced.

[74] The fourth *Palmer* criterion requires that the fresh evidence "could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result". In *R. v. Taillefer and Duguay* (2003), 179 C.C.C. (3d) 353 at para. 78, the Supreme Court of Canada elaborated on the meaning of the fourth *Palmer* requirement:

> That test is more exacting than the mere reasonable possibility test: it assigns the applicant the burden of showing that the failure to disclose probably affected the result of the trial. [Emphasis of LeBel J. in the original].

Also see: *R. v. Dooley, supra* at paras. 101-5. As already noted, the *Maciel* line of authority sets a higher standard, requiring that the evidence be "compelling", in a case like the present one, where there is no explanation for the failure of "due diligence".

[75] Given my conclusion that Munroe's new story is not credible, his affidavit and the additional expert evidence concerning accidental falls by dogs could not reasonably have affected the verdict. The expert evidence, standing alone, was simply speculative. Dr. Ehrhart and Dr. Martin had never seen or heard of a dog breaking its ribs by falling down stairs. They simply offered the opinion that it was not impossible to conceive of this happening in the right circumstances. For example, Dr. Ehrhart testified as follows:

> Q. Right. So the vasculopathy would not have caused the ribs to fracture.
>
> A. No they would not have.
>
> Q. And in your experience, falling down the stairs would not have caused them either.

A. I think there would have to have been a number of extenuating circumstances, that's correct.

Q. All right. So you would agree with me that it would be highly unusual.

A. I think there would have to be a number of extenuating circumstances. Do I think it's impossible? No, I don't think it's impossible. Do I think it's something that most dogs would – would happen after most dogs fall down the stairs? I would say no. [Emphasis added].

[76] The Crown's responding experts have never seen or heard of dogs breaking ribs due to falling down the stairs. Dr. McEwen testified that a small dog like Abby would not generate the considerable force required to break ribs, simply by falling down stairs, and would certainly not generate the force needed to break multiple ribs on both sides of the rib cage. Dr. Mason, the specialist at the Emergency Clinic who was seeing Abby, testified in response that no one ever mentioned Abby having fallen down the stairs during the relevant time period. Ms. Cappella also filed an affidavit, in the Crown's response to the fresh evidence Application, stating that Abby never walked into walls or fences and "did not seem to have any issues with her coordination". Ms. Cappella stated that Munroe had once reported to her that Abby "had a fall down the stairs leading to the back door" at a point when she "had a cast on her back leg" and "was already in bad shape". There is no suggestion that Munroe had ever reported Abby falling down the stairs to the basement nor that Munroe had "ever given any indication of what he thought might be causing her injuries or illness". In particular, on the day that Abby died, Munroe only reported that "he thought she may have suffered from being left in the heat outside, possibly heat stroke or dehydration".

[77] The totality of the fresh evidence bearing on the issue of whether Abby's traumatic injuries were caused by accidental falls down the basement stairs does not meet the fourth *Palmer* criterion. It also does not meet the more exigent *Maciel* standard. The expert opinions of Dr. Martin and Dr. Ehrhart, concerning the remote possibility of a dog breaking ribs from a fall down stairs, have no air of reality in the absence of some credible evidence that Abby actually did fall down the stairs at the relevant time. Munroe's new story to this effect is not credible. Indeed, Munroe and Ms. Cappella are consistent on the point that Munroe said nothing on June 13, 2008 about Abby falling down the stairs in their various discussions on that day about her failing health and death. This may well explain why trial counsel did not tender any such evidence, assuming that Munroe told this story to trial counsel. The suggestion that Munroe witnessed Abby fall down the basement stairs, causing her to become obviously injured and immobilized shortly before she died, and yet he said nothing about it to Ms. Cappella, is simply incredible. It could only have done further damage to Munroe's credibility if he had advanced this story at trial, while admitting that he had kept Ms. Cappella and the veterinarians in the dark about these matters.

[78] In conclusion on this part of the fresh evidence Application, it should be noted that the new story about accidental falls down the stairs bears some resemblance to *R. v. Chalmers*

(2009), 243 C.C.C. (3d) 338 at paras. 88-93 (Ont. C.A.). In that case, the Appellant advanced a new theory on appeal, through fresh expert evidence, to the effect that the deceased wife of the accused was killed due to an accidental fall from a horse. At trial, the defence advanced was that a third party "phantom killer", as Blair J.A. put it, had caused the wife's death. No affidavit from trial counsel appears to have been tendered, offering some explanation for the failure to advance a defence of accident at trial through expert evidence. There also appeared to be sound reasons for counsel's decision not to advance a defence of accident at trial, given other evidence in the case. Finally, the expert evidence tendered on appeal was speculative. In all these circumstances, Blair J.A. concluded that the first, third and fourth *Palmer* criteria were not met. He excluded the fresh evidence.

[79] For similar reasons, I would not admit the fresh evidence relating to the accidental fall theory in the present case.

(iv) The evidence concerning the age of the callused rib fractures

[80] The third and last part of the fresh evidence Application concerns the age of the callused rib fractures. This evidence seeks to extend the time frame for some of Abby's injuries and to thereby cast doubt on the trial judge's finding of exclusive opportunity.

[81] It will be recalled that Abby had ten acute rib fractures, at the time of death, that were all within one or two days old. She also had five callused or healing rib fractures. The age of these older fractures was indeterminate. Dr. McEwen testified repeatedly that it was "very difficult" to date them but that they were "probably over two and a half to three weeks" old, with an upper limit of "probably four to four and a half weeks". Dr. McEwen was reluctant to give an upper limit because "there are a lot of things that affect bone healing in animals". She stressed to counsel and the court that she would only provide her qualified opinion as to an upper limit "if I absolutely have to".

[82] The Appellant concedes that it is "impossible" to accurately date the outside age of healing or callused rib fractures in a dog by simply looking at an x-ray or a photograph. As Ms. Yuen put it in her Factum on the fresh evidence Application:

> … both Dr. Ehrhart and Dr. Martin explain, the only thing that can be ascertained by looking at the callus alone, is how long it would minimally take for a callus of that size to develop. The difficulty is that the callus can remain that size for months, or potentially even years, so that an outside timeframe is impossible to determine, particularly when dealing with ribs as opposed to other bones. Ribs cannot be immobilized because they constantly move with breathing and therefore tend to form malunions and take longer to heal than other bones. [Emphasis added].

Dr. McEwen took samples of three of the five callused fractures, for further microscopic analysis. The other two callused fractures were recorded only in photographic images.

[83] In spite of the admitted uncertainty in this area of forensic veterinary pathology, and the lack of microscopic samples for two of the five healing fractures, the Appellant has attempted to advance new outside estimates for Abby's five callused rib fractures. Dr. Ehrhart agreed with Dr. McEwen's minimum time frame of "two to two and a half to three weeks". However, he extended the upper limit to as much as eight weeks, testifying:

> "That could be four weeks, five weeks, six weeks, eight weeks. I think that's possible." [Emphasis added].

As I read Dr. Ehrhart's evidence, he framed the outside time limits in terms of "possibilities" whereas Dr. McEwen framed the outside time limits in terms of "probabilities". In this sense, their evidence is arguably consistent on the issue of outside time limits.

[84] Dr. Ehrhart agreed with Dr. McEwen that the ten acute rib fractures were within one to two days old. He also agreed with Dr. McEwen as to the difficulty of providing an outside time frame for callused rib fractures, testifying:

> "I hundred percent agree with Dr. McEwen's statement that fractures and calluses are difficult to place a time period on. I agree with her on that."

Dr. Ehrhart referred to his opinion concerning a "possible" outside time limit as simply "a loose time frame". In his report he stated:

> … the rib fractures cannot be dated with any certainty to four and a half weeks … Time line on these [callused rib fractures] is difficult to definitely identify but would be at a minimum possibly two to three weeks to develop that extent of a cartilagenous callus. The longer time point is even more difficult to determine … Looking at calluses in gross image alone … it is impossible to determine the age of the lesion – fractures ranging from months to years old would appear indistinguishable." [Emphasis added].

[85] In addition to Dr. Ehrhart's opinion concerning a possible eight week outside time limit for the five callused rib fractures, the fresh evidence Application includes a report from a veterinary radiologist, Dr. Elissa Randall. She examined the x-rays taken of Abby on one of her earliest trips to see a veterinarian, on May 22, 2008, and discovered one acute rib fracture that had been missed by the treating veterinarians. Dr. Randall's report stated the following about the age of this fracture:

> "It is likely that the fracture is less than seven to ten days old. The oldest estimated age of the fracture would be approximately two weeks. The bone quality of the rib is normal, making it most likely that this is an acute traumatic fracture and not a pathologic fracture." [Emphasis added].

[86] I am satisfied that this body of fresh evidence concerning the age of Abby's rib fractures is not admissible. As with the other parts of the fresh evidence Application, it fails to meet the

first *Palmer* requirement and there is no explanation from trial counsel concerning the "due diligence" issue. More importantly, it fails to meet the fourth *Palmer* requirement. Much of the evidence is harmful to the Appellant. Dr. Ehrhart agrees with Dr. McEwen about the likely age of the ten acute rib fractures found at the time of Abby's death and Dr. Randall has now added another "acute traumatic fracture" that was likely "less than seven to ten days old" on May 22, 2008. None of this evidence would have helped Munroe at trial as it is consistent with the Crown's theory, and the trial judge's finding, of exclusive opportunity.

[87] As to the five callused rib fractures "possibly" being as old as eight weeks, at the time of Abby's death on June 13, 2008, this would push the outside time frame for these injuries back to April 18, 2008. This is exactly when Munroe moved in with Ms. Cappella. Although Ms. Cappella's sister was also living in the house at that time, the evidence was that her job involved shift work.

[88] In summary, the fresh evidence concerning an outside time frame for the callused rib fractures is weak and uncertain, by the forensic pathologists' own admission. It is a species of expert opinion evidence that is inherently speculative. Furthermore, it simply fails to negative the Crown's evidence that Munroe had exclusive opportunity to commit the offences for the vast majority of the relevant time period. He undoubtedly had exclusive opportunity at the time of the ten acute rib fractures, which clearly contributed to death. It is very likely that the five callused rib fractures were caused by the same means as the ten acute rib fractures. Munroe would have had exclusive opportunity to cause these five further injuries during most of the "loose time frame" estimated by Dr. Ehrhart. It must be remembered that the fourth *Palmer* requirement, as interpreted in *Taillefer*, *supra*, and in *Dooley*, *supra*, means something more than a "mere reasonable possibility" that the verdict would be affected. It cannot be said that this evidence, combined with the other trial evidence, "probably affected the result of the trial".

(v) Conclusion

[89] None of the fresh evidence is admissible and the Application must be dismissed. As noted previously, none of the fresh evidence relates to the two counts in the Information concerning Zoe. Its impact on the two counts relating to Abby is not such as to meet the *Palmer* criteria, for the reasons set out above.

E. THE SENTENCE APPEAL

[90] As noted at the beginning of these reasons, the trial judge sentenced Munroe to twelve months imprisonment and three years probation. In addition, he ordered "psychiatric treatment" as a term of probation and he ordered restitution in the amount of $12,964. This was a substantial sentence, given that the maximum period of imprisonment on summary conviction is eighteen months and given that Munroe was a relatively young first offender with a good work record, a positive Pre-Sentence Report, and a strong supportive family.

[91] The Crown had sought a sentence of six to nine months imprisonment and two years probation. The defence had sought either a six month conditional sentence or an intermittent jail sentence. The sentence imposed was, therefore, significantly in excess of the Crown's position. The restitution also somewhat exceeded what the Crown had sought.

[92] The trial judge reserved judgment at the end of the sentencing hearing for about a month. He then delivered thorough and careful written reasons for sentence. The Appellant raised a number of grounds of appeal against the sentence imposed. Most of these grounds simply re-argued matters that were well within the trial judge's reasonable range of discretion. In particular, I would not interfere with what was arguably the trial judge's most important decision, namely, his refusal to impose a conditional sentence in the particular circumstances of this case. The trial judge reasoned, in substance, that the offences were simply too serious and that they remained unexplained such that a restorative approach, involving use of a conditional sentence, was inappropriate. He stated the following:

> The sheer and persistent brutality of these offences, the inherent cruelty both to the dogs and to Ms. Cappella, Mr. Munroe's domestic partner, the lack of any remorse on Mr. Munroe's part, the absence of a rehabilitative plan and the defencelessness and vulnerability of Abby and Zoe convince me that a conditional sentence would not satisfy the principles of sentence set out in the *Criminal Code*.

These were appropriate considerations and the trial judge's decision on this issue was neither unreasonable nor does it disclose any error in principle.

[93] However, I am satisfied that the trial judge made one error in principle and that was in determining the length of the custodial sentence. He began by noting that Parliament had recently increased the sentence available for these offences, on summary conviction, from six months to eighteen months, and had also provided for the option of indictable proceedings. These April 17, 2008 amendments to the *Criminal Code* were in force at the time of the present offences. The trial judge then proceeded to assess the gravity of the particular offences in this case and to set out the applicable sentencing principles. He stated the following:

> Where do Mr. Munroe's offences fall within the range of offences prosecutable under sections 445 and 445.1 of the *Criminal Code*? I can only conclude that they are well within the upper range of offences that would be prosecuted by summary conviction. Put otherwise, any offence substantially more serious than these offences, or even these same offences committed by an offender with a previous record, for example, would most likely be prosecuted by indictment.
>
> When faced with a series of calculated, violent and serious attacks against a pair of defenceless victims entrusted to Mr. Munroe's care, I must also conclude that specific deterrence is of tremendous importance in this case. General deterrence is also a significant consideration. Parliament has expressed the people's will in relation to penalties for these offences and it is important that the court not

> confound that clearly stated intention. That will also requires the court, through both its reasons and its sentence, to denounce Mr. Munroe's infliction of months of pain and suffering on these two dogs. The nature of the offences is serious and Mr. Munroe's degree of responsibility is as the relentless driving force behind it.

[94] I agree with the trial judge that the gravity of these offences fell "within the upper range of offences that would be prosecuted by summary conviction". Therefore, a twelve month sentence was an entirely appropriate starting point, when considering offence-based sentencing principles such as denunciation and deterrence. What the trial judge failed to do was to continue his analysis by then acknowledging that the length of the custodial sentence, in the case of a first offender with Munroe's strong antecedents, "should be as short as possible" and should be determined only after "consideration [is] given to the rehabilitation of the offender". The Court of Appeal recently summarized the law on this point in *R. v. Batisse* (2009), 241 C.C.C. (3d) 491 at paras. 32-34 (Ont. C.A.):

> The principle of restraint operates in three ways in the present case. First, it is an important consideration because the appellant was a first offender. As such, the restraint principle requires that the sentencing judge consider all sanctions apart from incarceration and where, as here, incarceration must be imposed, the term should be as short as possible and tailored to the individual circumstances of the accused: see *R. v. Priest* (1996), 110 C.C.C. (3d) 289 (Ont. C.A.).
>
> Second, the principle of restraint requires the sentencing judge to consider rehabilitation in determining the appropriate length of the sentence. In lowering a sentence given to a first offender, this court stated in *R. v. Blanas* (2006), 207 O.A.C. 226 at para. 5:
>
> > [G]eneral deterrence cannot be the sole consideration. The appellant is relatively youthful and has no prior record and appears to have the full support of her family and community. Appropriate consideration must be given to the rehabilitation of the appellant.
>
> In serious cases and cases involving violence, rehabilitation alone is not the determinative factor – general deterrence and denunciation are also significant factors to be considered. However, as this court ruled in *R. v. Dubinsky*, (2005), 64 W.C.B (2d) 230 at para. 1, it is an error to focus almost exclusively on general deterrence and fail to consider individual deterrence and rehabilitation, especially when sentencing a first offender. [Emphasis added].

[95] This is the approach that the Crown had taken, stressing the gravity of the offence but recommending a shorter range of sentence of six to nine months, given Munroe's status as a relatively young first offender with excellent antecedents, a good Pre-Sentence Report, and strong family support. In short, the trial judge erred in over-emphasizing denunciation and deterrence and in failing to apply the principles set out above in *Batisse*.

[96] I am satisfied that a sentence of six months imprisonment, for this offence and this offender, achieves the proper balance of denunciation, deterrence and rehabilitation. The sentence is in addition to thirteen days of pre-trial detention, spent in protective custody, making it effectively a seven month sentence. There are few precedents to guide the appropriate range of sentence in a case like this, given the recent legislative change in the available penalties. However, two cases are helpful. In *R. v. Power* (2003), 176 C.C.C. (3d) 209 (Ont. C.A.), the Court upheld a ninety day sentence under the old legislation for the torture and killing of a cat. It was described as "within the category of worst offence" and as a case of "torture for torture's sake", albeit committed by a first offender who had pleaded guilty and expressed remorse. An effective sentence of seven months in the case at bar is more than double the sentence in *Power*. In *R. v. Connors*, [2011] B.C.J. No. 168 (Prov. Ct.), Quantz J. imposed an effective sentence of six months imprisonment, under the new legislation, for the violent killing of a dog by blunt force trauma. The dog suffered many similar injuries to Abby in the case at bar. The accused was not a first offender and he lacked Munroe's other positive antecedents. Quantz J. exhaustively reviewed the case law under the old legislation, where discharges, conditional sentences, and short intermittent sentences had routinely been imposed for the cruel and sadistic killing or injuring of cats and dogs. An effective sentence of seven months imprisonment in the present case, for a first offender with Munroe's otherwise impeccable antecedents, recognizes the change in the appropriate range of sentence brought about by the April 17, 2008 legislative reforms.

[97] The Crown concedes that two minor errors were made in the ancilliary orders. I agree with the Crown's concessions. First, the $12,964.61 restitution order included compensation to Ms. Cappella for moving and storage costs of $1,767.44. These expenses do not fall within s. 738(1)(b) as "pecuniary damages" for "bodily or psychological harm … including loss of income or support". Accordingly, the restitution order should be reduced to $11,197.17. This payment will compensate Ms. Cappella for expenses such as her veterinary bills, autopsy costs, lost salary, and psychotherapy costs. Munroe has the ability to pay this restitution order, given his strong work record, and it is another consideration that properly informs the total sentence and the length of the custodial portion of the sentence. See: *R. v. Popert* (2010), 251 C.C.C. (3d) 30 (Ont. C.A.); *R. v. Castro* (2010), 261 C.C.C. (3d) 304 (Ont. C.A.).

[98] The second error in the ancilliary orders is the term of probation requiring "psychiatric treatment". The trial judge was properly concerned by the need for Munroe to address the underlying causes of his conduct. However, "psychiatric treatment" is a form of medical treatment and it requires informed consent under our law, absent any legislative or common law exceptions based on lack of capacity and/or necessity. A better way to achieve the trial judge's objective was already set out in the balance of this term of probation where he directed Munroe as follows:

> "He shall attend for assessment and counselling … as directed by his probation officer, and shall provide proof of compliance and any releases required by his probation officer to monitor compliance."

This remaining part of the order is appropriate and the "psychiatric treatment" wording, which I have edited out in the above quote from the order, can simply be deleted. See: *R. v. Rogers* (1991), 61 C.C.C. (3d) 481 (B.C.C.A.); *R. v. J.J.L.* (2001), 152 C.C.C. (3d) 572 (Man. C.A.); *R. v. Sookochoff* (1999), 133 C.C.C. (3d) 532 (Sask. Q.B.).

F. CONCLUSION

[99] In the result, the conviction appeal is dismissed and the fresh evidence Application is denied. The sentence appeal is allowed and the custodial portion of the sentence imposed at trial is reduced from twelve months to six months, the free-standing restitution order is reduced from $12,964.41 to $11,197.17, and the limited part of the term of probation that requires "psychiatric treatment" is deleted. Otherwise, the sentence shall remain as imposed at trial.

M.A. Code J.

Released: September 21 , 2012

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ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

CHRISTOPHER MUNROE

REASONS FOR JUDGMENT

M.A. Code J.

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