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2021 BCPC 75

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IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

MACK JONES ALECK

ORAL REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE J.P. MacCARTHY

Counsel for the Crown:	L. Thomson, by phone
Counsel for the Defendant:	S. Sheets
Place of Hearing:	Duncan, B.C.
Date of Hearing:	February 9, 2021
Date of Judgment:	March 11, 2021

Introduction

[1] Mack Jones Aleck is before this court having been charged on a single information containing two separate counts arising from unrelated events that took place some days apart.

[2] The first count relates to an allegation of domestic assault. The second count relates to wilfully causing unnecessary pain, suffering, or injury to an animal. The Crown has proceeded summarily on both charges.

[3] The Crown called two police officers and a civilian complainant, being Doreen Harry, who testified that she was present during each of the incidents that have given rise to the charges against Mack Jones Aleck (the "Accused"). No expert witnesses were called and specifically none with respect to the second count on the Information.

[4] The Accused did not testify on his own behalf, as is his right to do so, without any adverse inference being drawn by this court. No other defence witnesses were called.

[5] The Complainant, Doreen Harry (the "Complainant") and the Accused have been in a domestic relationship for a considerable period of time. The Accused's conditions for judicial interim release allow for them to be in some contact. They are not presently permitted to reside together.

[6] The task of this Court is to determine whether or not Crown has discharged its burden and proven each of these charges beyond a reasonable doubt.

Description of Charges

[7] The charges against the Accused are as follows:

a) On Count 1, the Accused on or about October 27, 2019, at or near Duncan, British Columbia, did commit assault of Doreen Harry, contrary to s. 266 of the *Criminal Code*.

b) On Count 2, the Accused, from the 19th day of October, 2019, to the 27th day of October, 2019, inclusive, at or near Duncan, British Columbia, did wilfully cause unnecessary pain, suffering, or injury to an animal, namely: a kitten, contrary to s. 445.1(1)(a) of the *Criminal Code*.

Presumption of Innocence

[8] The obligation is upon the Crown to prove all elements of each offence beyond a reasonable doubt. If that occurs, then and only then can the court convict the accused person. Where reasonable doubt exists on any element of the offence charged, the accused must be acquitted. The burden of proof rests upon the prosecution throughout the trial and never shifts to the accused person.

[9] Reasonable doubt is not an imaginary or frivolous doubt, nor is it based upon sympathy or prejudice. Reasonable doubt is a doubt based on reason and common sense, which must logically be derived from the evidence or absence of evidence. The Crown must prove more than probable guilt. However, reasonable doubt does not involve proof to an absolute certainty, since that would be an impossibly high standard.

[10] The standard of reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities. In short if, based upon the evidence before the court, the finder of fact is sure the accused committed the offence then the finder of fact should convict, since this demonstrates that the finder of fact is satisfied of the accused's guilt beyond a reasonable doubt. (See *R. v. Lifchus*, 1997 CanLII 319 (SCC), [1997] 3 S.C.R. 320, and *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144).

Assessing Credibility and Reliability of Witnesses

[11] In this case, I have heard evidence from three Crown witnesses. There was no contradictory evidence presented by defence. However, I must still assess the credibility and the reliability of the witnesses who provided evidence. In doing so, I must weigh all of the evidence. In so weighing the evidence, I may reject or accept some or all of the witness's testimony, after having taken into account a multitude of factors which include, but are not limited to, appearance or demeanour, ability to perceive, ability to recall, motivation, probability or plausibility, and internal or external consistency.

[12] I must also direct myself that even honest witnesses may make mistakes in their evidence, or have errors of recollection, or may present upon the stand in a nervous or uncertain manner for reasons unrelated to the truthfulness of their testimony.

[13] It is an error in cases of contradictory evidence to simply weigh the evidence of one witness against the evidence of another. (See *R. v. Jackson*, 2007 BCSC 636; see also *R. v. Mann*, 2010 ONCA 342, [2010] O.J. No. 1094).

The Difference Between Credibility and Reliability of Evidence

[14] As noted above, I must have regard to the credibility and to the reliability of each witness's evidence. In *R. v. C.(H.),* 2009 ONCA 56 (CanLII), Watt J.A. explained the difference between credibility and reliability, at paragraph 41:

> [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
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> i. observe;
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> ii. recall; and
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> iii. recount
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> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514, at 526 (C.A.).

Factors to be Taken Into Account When Assessing a Witness's Evidence

[15] There are many factors to take into account when assessing a witness's evidence, some of which are:

1. Did the witness seem honest? Was he or she evasive or argumentative with counsel?
2. Did the witness have an interest in the outcome of the case?
3. Did the witness have a good memory about the event? Did any inability to remember seem genuine or an excuse not to answer questions?
4. Did the witness appear to be testifying as to what they actually heard or saw, or are they adding in details based on other sources?
5. Was the testimony of the witness reasonable and consistent? Was the witness's evidence consistent with the other evidence in the case?

6. Do any of the inconsistencies in the witness's evidence make their testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail?
7. Was the witness's evidence plausible?

(See: *R. v. Shields*, [2017] B.C.J. No. 2608; 2017 BCPC 395 at paragraph 60)

Perspectives for Assessing the Credibility and Reliability of Witnesses

[16] In assessing the credibility and the reliability of those witnesses who have provided any conflicting evidence about the alleged offences, the testimony of each witness can be considered from three perspectives:

a) their truthfulness; whether they are trying to tell the truth or intentionally lying when testifying;
b) their objectivity; whether they have been influenced by assumptions or emotions which may affect the accuracy of their perceptions; and
c) the accuracy of their observations; their abilities to observe, remember, and communicate accurately.,

[17] In the case of *R. v. Cuhna*, 2015 BCPC 60 at paragraphs 5 and 6, the Honourable Judge Merrick provides a useful review of the factors to be considered when assessing the testimony of a witness from these three perspectives:

1. Truthfulness

[18] Relevant factors for truthfulness include: previous inconsistent statements or occasions on which the witness has been untruthful; inconsistencies in testimony during direct examination and cross-examination; reliable evidence that conflicts with the testimony of the witness and the attitude and the demeanour of the witness. However, when considering demeanour, it is important to consider all the possible explanations for the witness's attitude, and to be sensitive to individual and cultural factors that may affect demeanour.

2. Objectivity

[19] When assessing a witness's objectivity, it is important to bear in mind that such

objectivity may be influenced by the witness's expectations, the assumption of unproven facts, or by subsequent events.

3. Accuracy

[20] Factors that may affect the accuracy of a witness's testimony include the attentiveness of a witness during the period of observation and the circumstances of the witness's observations. The reasons for recalling an event and the length of time between witnessing an event and providing testimony about it may affect the accuracy of the witness's testimony and hence its reliability. Some witnesses may have difficulty communicating their evidence clearly, due to factors such as nervousness.

General Observations About the Testimony of the Witnesses

[21] All of the witnesses have the challenge of testifying about the Assault Incident and the Animal Incident, (as both are herein described), which took place almost over a year and a half ago, at the start of the trial.

[22] I must take into account that any alleged assaultive behaviour and any applications of force by either the Accused or the Complainant in the Assault Incident likely occurred in a very condensed timeframe.

[23] These are important factors when considering the reliability of the evidence, since the passage of time tends to cause memories to fade and past memories of situations get intermingled with each other. All of this tends to erode the quality of the evidence, as does the whole of the circumstances surrounding the events in question.

Demeanour

[24] Trial judges should not place too much emphasis on how a witness behaves while giving evidence when assessing their credibility. (See *R. v. Jeng*, 2004 BCCA 464 (CanLII), at paragraph 54).

[25] In court, witnesses are required to speak about difficult events in a very foreign and public environment. They are often nervous and feel significant pressure when undergoing a prolonged cross-examination. (See *R. v. Shields*, *supra*, at paragraph 74).

[26] After allowing for these considerations and having applied the various tests and considerations when assessing the evidence of witnesses and, in particular, their reliability and credibility, all of which are described in some detail above, I have reached the following conclusions about the witnesses.

[27] I found the evidence of both police officers to be reliable and credible.

[28] I have concluded that the Complainant was attempting to be both credible and reliable when presenting her evidence. However, given her existing domestic relationship with the Accused, I find that her evidence on the Animal Incident and her observations and conclusions about the Accused's behaviour immediately before and at the time of his physical interaction with the Kitten to be less compelling and must be regarded with some caution. This, in part, may be due to her subsequent reflections or in part, shaped by her reconciliation goals with the Accused.

The Court's Approach in Summarizing the Evidence

[29] For the purpose of these reasons I have broken the evidence into two categories.

[30] First is the evidence that surrounds the Assault Incident (as herein described) which was for the most part provided by the Complainant.

[31] Next is the evidence adduced by Crown regarding the Animal Incident (as herein described), which was entirely provided by the Complainant.

Summary of the Circumstances Relating to the Alleged Assault

[32] According to the evidence of the 40-year-old Complainant, Doreen Harry, she and the Accused have been in an "off again-on again" domestic relationship since 2013. In October of 2019 she was residing in a ground floor apartment unit (the "Apartment

Unit") in a complex located on Dobson Road, Duncan, British Columbia (the "Apartment Complex"). The Accused was residing with her.

[33] The Complainant and the Accused had been consuming alcohol from 6:00 p.m. and continuing for much of the evening of October 26, 2019, all of which preceded the events that gave rise to the assault allegations (the "Assault Incident"). The Accused and the Complainant had both been drinking two-litre jugs of alcohol coolers, which the Complainant described as the "strong stuff – seven percent alcohol". She consumed a two-litre jug on her own. They were watching TV.

[34] They got into an argument that started after midnight, approximately between 1:00 a.m. to 2:00 a.m. The argument apparently stemmed from the fact that for a significant period of time, and specifically preceding the Assault Incident, the Accused had been almost solely responsible for cooking for the two of them and for cleaning the Apartment Unit in which they both resided. The Complainant was not providing assistance to the Accused, and specifically when it came time to cleaning up the Apartment Unit that evening. The Accused used profane language, describing the Complainant as a "lazy bitch", while telling the Complainant that besides being lazy, she did not know how to cook or clean. Those comments upset her.

[35] The Complainant has suffered some significant on-going and long term medical issues, for which she has been prescribed medications at various times. Her health issues have required the Accused to shoulder a substantial portion of their household's domestic responsibilities.

[36] The Complainant is dependent upon this assistance from the Accused. She testified that the Accused provides her that necessary assistance, until he "gets mad" and then he leaves her at the Apartment Unit and returns to his mother's house. That has happened on more than one occasion.

[37] This dependency has been the situation for many years during their relationship and remained such at the time of the trial, but for the bail restrictions on contact that

were then in force. However, the Complainant wishes to remain in a domestic relationship with the Accused, and apparently so does he.

[38] The Complainant's evidence suggests that they finished drinking around 2:00 a.m. after the argument. They stayed up until sometime before 6:00 a.m. She wanted to talk to him about the matters giving rise to the argument. He wanted to go to bed to sleep off the alcohol consumption. She testified that she likes to "talk things out"; he does not.

[39] The Complainant testified that often after an argument, on the following day when he awakes, the Accused will say he does not remember it and tries to ignore it. She described this as him "running away from the problem".

[40] On this occasion after the Accused had gone to bed, he indicated to her that he did not want to argue anymore. She believed that he was not sleeping but rather he was mumbling and swearing; he was refusing to respond to her and tell her what was bothering him.

[41] Around 6:00 a.m., the Accused got out of bed, dressed, and gathered his belongings as if he were about to leave the Apartment Unit. He indicated that he was going to his mother's place. He told her that "we're done" and the only thing the Complainant was good for was "calling the cops". The Complainant did not want him to leave. She continued to want to talk to him about the problems and to "clear the air". She continued to be upset with him, again about him "running away from the problems".

[42] The Complainant knew that the Accused was upset with her. She then positioned herself in front of the main exit door as the Accused was attempting to leave. She grabbed him by his clothing, at the waist of his shorts, in an attempt to prevent him from leaving. He told her he wanted to leave and to let go of him. He continued in his efforts to leave the room, and in the course of doing so, he grabbed her by the shirt, below the neck, and pushed her out of the way.

[43] She did not fall to the ground but was forced back about three feet and, in the course of doing so, the right side of her head came into contact with a sliding glass door

in the same room which led outside to a patio. She sustained a bump on her head. After his departure, she phoned the police to report the incident; she stated that she thought she needed help for her safety.

[44] The Complainant agreed in cross-examination that the Accused never hit her and never threatened her. She also agreed she weighs about 187 pounds and the Accused weighs over 200 pounds, but said he is stronger than she is.

[45] The Complainant could not remember the date or even the year of the Assault Incident, but did recall the attendance of police officers on that date after she made the reporting call.

[46] Constable Wreggit testified that he was dispatched to the Apartment Complex around 7:09 a.m. on October 27, 2019, to investigate an alleged domestic assault. He was provided with the name of the alleged assailant and a description of him. Constable Westerhof had already arrived on the scene.

[47] Constable Wreggit spoke with the Complainant for approximately 20 minutes to half an hour. There were no observable injuries upon her. She complained about pain at the rear side of her head. He did not detect any level of "gross intoxication" or slurring or stumbling on the part of the Complainant.

[48] Constable Westerhof also was dispatched to the Apartment Complex. He had also been provided with a description of and the name of the Accused as the suspect in an alleged domestic assault incident. He observed a heavyset First Nations male, approximate 5'9" tall, walking away from the Apartment Complex with a bag of clothing in his hands. This individual fit the description given to him by the dispatcher. He approached the Accused, asked him if he were Mack Aleck, and received an affirmative response from that individual. He detained the Accused for approximately five to seven minutes while Constable Wreggit went to speak to the Complainant.

[49] Upon receiving further confirmation, Constable Westerhof arrested, Chartered, and warned the Accused, and then transported him to the RCMP detachment, where he

was given an opportunity to speak to his lawyer. Constable Westerhof testified that the Accused did not appear to be intoxicated and he was cooperative throughout.

Some Conclusions About the Evidence of the Assault Incident

[50] Based upon the evidence of the Complainant, the pushing of the Complainant by the Accused in these circumstances, while the Accused was in the process of departing, was intentional and amounts to an assault.

[51] However, the Complainant's evidence about the Accused attempting to leave while she was holding onto him and attempting to prevent him from departing also raises an air of reality to the defence of self-defence, which must be therefore considered by the court.

The Applicable Law

A. Applicable Provisions of the *Criminal Code* Relating to the Charge of Assault and Self-Defence

[52] The relevant provisions relating to assault and self-defence are found in ss. 265 and 266 of the *Criminal Code* and ss. 34 and 35 of the *Code*.

[53] Section 265 provides in part as follows:

> **265** (1) A person commits an assault when
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> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly . . .
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
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> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
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> (a) the application of force to the complainant or to a person other than the complainant;
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (c) fraud; or

(d) the exercise of authority.

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[54] Section 266 provides as follows:

266 Every one who commits an assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

B. Defence of Person and Defence of Property

[55] Also relevant are the defence of person provisions of the *Criminal Code* that read as follows:

34 (1) A person is not guilty of an offence if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person’s role in the incident;

> (d) whether any party to the incident used or threatened to use a weapon;
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> (e) the size, age, gender and physical capabilities of the parties to the incident;
>
> (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
>
> (f.1) any history of interaction or communication between the parties to the incident;
>
> (g) the nature and proportionality of the person's response to the use or threat of force; and
>
> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.
>
> (3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

[56] I understand that Crown and Defence both agree that these sections provide the applicable framework for the court's analysis of the alleged offence of assault and the defence of self-defence arising from the Assault Incident.

[57] The provisions of s. 35 of the *Criminal Code* which provides a defence relating to defence of property or defence of another person have no applicability to this case.

C. Consideration of the Defence of Self-Defence

[58] The present self-defence provisions of the *Criminal Code* came into force on March 11, 2013. Parliament's intention was to deal with the confusion surrounding the previous self-defence provisions of the *Criminal Code*, which were viewed by the Supreme Court of Canada and many academic commentators as being highly technical, excessively detailed, overlapping, and internally inconsistent. The prior ss. 34 to 37 of the *Criminal Code* were therefore replaced with a single self-defence provision now found in s. 34.

[59] It has been observed that:

> The new section 34 creates greater flexibility (discretion) in its application by doing away with a number of rigid requirements and instead substituting a general "reasonableness" standard. The new reasonableness standard is to be ascertained by the trier of fact considering, where relevant, a non-exhaustive list of nine factors none of which is a rigid precondition to reliance on self-defence and defence of others.
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> [See: Continuing Legal Education Society of British Columbia (Vancouver), *Canadian Criminal Jury Instructions,* Chapter 13, Section 135.1].

[60] The Supreme Court of Canada's decision in *R. v. Ryan*, 2013 SCC 3, provides useful guidance to this court when considering the defence of self-defence which is codified under s. 34 of the *Criminal Code*.

[61] The decision in *Ryan* references the earlier Supreme Court of Canada decision in *R. v. Hibbert*, 1995 CanLII 110 (SCC); [1995] 2 SCR 973, which considered the defence of duress and necessity on one hand and self-defence on the other.

[62] The Supreme Court of Canada in *R. v. Ryan* at paragraph 17 considered the reasoning of then Chief Justice Lamer in *Hibbert*, where he stated that all three defences apply in "essentially similar" situations. Each is concerned with providing a defence that would be otherwise criminal conduct because the accused person acted in response to an external threat (citing *Hibbert* at paragraph 60) and having being subjected to an external danger, the accused person commits an act that would otherwise be criminal, as a way of avoiding the harm that the danger presents (citing *Hibbert* at paragraph 50).

[63] In *Ryan*, the Supreme Court goes on to say, again continuing to cite *Hibbert*, as follows:

> 18 However, there are also significant differences among the defences. As Lamer C.J. explained,
>
> > [A] distinction can be drawn between self-defence, on the one hand, and duress and necessity, on the other, that might well provide a basis

> for a meaningful juridical difference. In cases of self-defence, the victim of the otherwise criminal act at issue is himself or herself the originator of the threat that causes the actor to commit what would otherwise be an assault or culpable homicide ... In this sense, he or she is the author of his or her own deserts, a factor which arguably warrants special consideration in the law. In cases of duress and necessity, however, the victims of the otherwise criminal act ... are third parties, who are not themselves responsible for the threats or circumstances of necessity that motivated the accused's actions." [Emphasis in original; para. 50.]

19 In this passage, the Chief Justice alludes to two differences that "[may] well provide a basis for a meaningful juridical difference" between duress and self-defence (para. 50).

20 First, self-defence is based on the principle that it is lawful, in defined circumstances, to meet force (or threats of force) with force: "an individual who is unlawfully threatened or attacked must be accorded the right to respond": (M. Manning and P. Sankoff, *Manning Mewett & Sankoff: Criminal Law* (4th ed. 2009), at p. 532). The attacker-victim is, as the Chief Justice put it, "the author of his or her own deserts": para. 50. On the other hand, in duress and necessity, the victim is generally an innocent third party (see D. Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 511). Second, in self-defence, the victim simply attacks or threatens the accused; the motive for the attack or threats is irrelevant. In duress, on the other hand, *the purpose of the threat* is to compel the accused to commit an offence. To put it simply, self-defence is an attempt to stop the victim's threats or assaults by meeting force with force; duress is succumbing to the threats by committing an offence.

21 However, these are not the only differences between duress and self-defence. It seems to us that there are two other significant differences which must be taken into account.

22 One is that self-defence is completely codified by the provisions of the *Criminal Code*. Thus, Parliament has established the parameters of self-defence in their entirety. They are no longer found, even in part, in the common law. Duress, on the other hand, is partly codified and partly governed by judge-made law as preserved by s. 8(3) of the *Code*.

…

24 Despite its close links to necessity and duress, self-defence, on the other hand, is a justification (*Perka*, at pp. 246 and 269). It "challenges the wrongfulness of an action which technically constitutes a crime": (*Perka*, at p. 246; see also H. Parent, *Traité de droit criminel* (2nd ed. 2005), vol. 1, *L'imputabilité*, at pp. 587-88). For different views, see S.G. Coughlan "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002), *7 Can. Crim. L.R.* 147, at p. 158; see also Manning and Sankoff, at p. 342; and K. Roach, *Criminal Law* (4th ed. 2009), at p. 294.

> In determining whether the defence is available, less emphasis is placed on the particular circumstances and concessions to human frailty and more importance is attached to the action itself and the reason why the accused was justified in meeting force with force.
>
> 26 Given the different moral qualities of the acts involved, it is generally true that the justification of self-defence ought to be more readily available than the excuse of duress. And so it is. Unlike duress, self-defence does not require that any course of action other than inflicting the injury was "demonstrably impossible" or that there was "no other legal way out." Under the former self-defence provisions, for example, a person who is the victim of an unprovoked unlawful assault is entitled to use as much force as is necessary to defend himself, provided he does not intend to cause death or grievous bodily harm: S. 34(1) (see *Parent*, pp. 605-606). Under the recently adopted provisions in Bill C-10, self-defence is available in circumstances in which a person believes on reasonable grounds that force is being used against him or her and responds reasonably for the purpose of self-defence: s. 34(1).

[64] I note that the reference to *Perka* above is to the Supreme Court of Canada decision in *Perka v. The Queen*, [1984] 2 S.C.R. 232.

[65] As was noted above, in this trial I have heard evidence that the Accused committed the charged offence under Count 1 of assault in order to defend himself from the use or threat of force by the Complainant, and therefore it raises the defence of self-defence.

[66] In considering the defence of self-defence, I must instruct myself that the Accused does not have to prove that this defence applies. The Crown must prove beyond a reasonable doubt that this defence does not apply. If I am left with a reasonable doubt about whether this defence applies, the Crown has not proven its case beyond a reasonable doubt and therefore I must find the Accused not guilty.

[67] Although the term "self-defence" may be used in everyday language in a variety of ways, but in Canadian criminal law, the claim of self-defence by the accused person must come strictly within the section of the *Criminal Code* set out in s. 34. (See *Ryan*, at paragraphs 22 and 26, *supra*).

[68] Thus, s. 34 contains three essential ingredients. To rely on s. 34, all three

ingredients are required. If, after considering all of the evidence, I am convinced beyond a reasonable doubt that one or more of these ingredients was not present, then self-defence under s. 34 was not present and therefore the accused person cannot rely upon it.

[69] The three ingredients of s. 34 are:

1. the accused person believed on reasonable grounds that the complainant used force or made a threat of force against him;
2. the accused person committed the act that constitutes the offence of assault for the purpose of defending or protecting himself from that use or threat of force; and
3. the act committed by the accused person was reasonable in the circumstances.

[70] I note parenthetically that even if I find that these three ingredients in s. 34 of the *Criminal Code* were present, the accused person cannot rely on self-defence if the force used or threatened by the complainant was for the purpose of doing something that the complainant was required or authorized by law to do in the administration or enforcement of the law, unless the accused person believed on reasonable grounds that the complainant acted unlawfully. This consideration does not apply in this set of circumstances.

Positions of the Parties on the Charge of Assault

[71] Crown submits that this court should accept the evidence from the Complainant of the assault and convict the Accused on the charge of assault. Crown further submits that this court should reject the defence of self-defence, on the basis that Accused's response was unreasonable when he pushed her a distance of some three feet causing her to come into contact with the sliding glass door and thereby suffering a bump on her head.

[72] Defence says that the defence of self-defence has not been negated by the Crown, and that the actions of Accused were reasonable in the circumstances and only sufficient to extricate himself from the Complainant.

Consideration of the Three Ingredients of Section 34

Belief on Reasonable Grounds of Use or Threat of Force

[73] Upon considering this ingredient, based on the Complainant's evidence, I have concluded that when the Complainant grabbed the clothing of the Accused and would not release him, the Accused had reasonable grounds for honestly believing that the Complainant was using or threatening to use force against him. Given all of the circumstances, that belief was reasonable in the circumstances. "Force" simply means physical contact or touching, it does not have to involve physical violence, although it may. A threat of force can be made verbally, by gestures, or by acts, or a combination of all three.

[74] In coming to this conclusion about the existence of reasonable grounds for this honest belief, I am mindful at the point that the Complainant was grabbing the Accused's clothing and holding onto him, it does not appear the Accused had time for calm, detached reflection about how this engagement may accelerate. The evidence is clear. He wanted to leave and the Complainant was attempting to prevent him from doing so. That factor contributes to my conclusion about the Accused's reasonable belief of force or threatening of force being used against him by the Complainant.

The Purpose of Defending

[75] In my consideration of this ingredient, I am mindful that it applies if the Accused's act of committing the assault of the Complainant was for the purpose of defending or protecting himself from the Complainant's use or threat of force. Here I cannot be satisfied beyond a reasonable doubt that the Accused's act was committed for a purpose other than defending or protecting himself from the force being applied to him by the Complainant.

The Reasonableness of the Act

[76] My consideration of this ingredient leads me to conclude that the actions of the Accused during the Assault Incident in pushing the Complainant aside, in his attempts

to leave the room, were reasonable in the circumstances. In coming to this conclusion, I am mindful that, in the course of pushing the Complainant aside, the Accused did have hold of her shirt below the neck line and, based upon the evidence, it is likely that he was pulling it up in some fashion in the course of pushing her aside.

[77] Given the evidence about the Complaint's weight, it is unlikely that he was actually able to pick her up off the ground in the course of holding her shirt.

[78] In reaching this conclusion about the reasonableness of the Accused's action I have taken into account:

a) that the level of force being used by the Complainant was sufficient in order to impede the departure of the Accused;

b) the application of force by the Complainant was imminent insofar as she had grabbed the clothing of the Accused in her attempt to prevent him from leaving, and it does not appear that the Accused had many options available to him in order to depart, other than to apply force to the Complainant in the fashion that he so did;

c) the Accused was, at all material times, attempting to leave the room and hence the Complainant was the precipitator of the physical engagement;

d) no weapon or threat of weapon was used by the Accused;

e) while there is an apparent size and strength difference between the female Complainant and the male Accused, the relative weight and size of the Complainant was sufficient to impede the Accused's departure;

f) there is evidence to support that there were tensions within the long-term domestic relationship between the Accused and the Complainant, but there is no evidence of a pattern of on-going domestic violence;

g) the history of interaction and communication between the parties in the course of the Assault Incident leads me to conclude that the use of a push by the Accused which caused the Complaint to stumble, but not fall, was proportionate to the type of force being utilized by the Complainant in grabbing hold of the Accused's clothing while impeding him from leaving the room.

Conclusion and Decision About the Charge of Assault on Count 1

[79] Taking all of the above into consideration, at the very least, if I do not fully accept the evidence in support of the defence of self-defence, I am left with a reasonable doubt

by it. Accordingly, I must find the Accused not guilty of the allegation of assault on Count 1.

Summary of the Circumstances Relating to the Animal Incident

[80] Crown relied solely on the evidence of the Complainant with respect to the Animal Incident as hereinafter described. Again, the Accused did not testify in his defence which is his right to do so and no adverse inference is drawn.

[81] Approximately one week prior to the Assault Incident, another interaction between the Complainant and the Accused took place in the Apartment Unit which related to an animal and gave rise to the charge on Count 2 (the "Animal Incident").

[82] The Accused had obtained a young orange kitten (the "Kitten") from a friend and gave it to the Complainant approximately one week before the Animal Incident. The Kitten was described as being "tiny" and "the runt of the family" which I take as being the runt of the litter. Its age was uncertain, but based upon the Complainant's estimate, it was likely three to five weeks old. The Kitten was sleeping a lot at that time. The Kitten had never been taken to a veterinarian to have its health condition assessed nor to receive any shots.

[83] The Complainant described that she and the Accused were sitting on a couch side by side, with the Accused on her left. No other person was in attendance. Neither the Accused nor the Complainant had been drinking alcohol. The Kitten was in its cat bed, which was located on the floor beside the couch to her right. The Complainant said the Kitten was therefore about one foot from her and in her view from her seated position. She believed that the Kitten was sleeping. Thus, the Complainant was seated between the Accused and the Kitten, which was in its cat bed. The Accused was also seated above the Kitten.

[84] The Accused picked up a "selfie stick". This was described by the Complainant in her evidence as being a light metal pole, approximately two feet long, topped with an attached heavier metal head device which was designed to hold a camera phone, and to thereby permit the taking of self-portraits with the attached camera phone.

[85] The Complainant said that the Accused used the selfie stick, and specifically the heavier head device, to hit the sleeping Kitten three times on its head, such that the heavier head part came in contact with the Kitten's head through the use of an up-and-down motion. That caused blood to "gush" out of the top of the Kitten's head. The blood was sufficient to leave bloodstains on the blanket in the cat bed. The Complainant did not hear the Kitten make any noise while being hit. She did not immediately observe any injuries on the Kitten after being hit three times, other than the blood gushing from its head. There was no blood gushing from the Kitten's head prior to being hit by the Accused. She did not see any "signs of life" from the Kitten after being hit three times by the Accused.

[86] The Complainant testified that the Accused then picked up the Kitten and took it to the bathroom where he attempted to revive it. He was unable to revive the Kitten and all attempts were unsuccessful. It was apparent that the Kitten was dead. The Accused then put it in a garbage bag and took it to the garbage bins behind the Apartment Complex.

[87] The Complainant testified that she believed the Accused was upset because the Kitten was sleeping a lot and not playing. She conceded that he did not do or say anything to indicate that he was upset with the Kitten. She further denied in cross-examination that the selfie stick was an implement used by the Accused to play with the Kitten. She testified that immediately following the blood gushing from the Kitten and the unsuccessful attempts to revive the Kitten, the Accused told her he was sorry and said that he would get her another cat. She said that the Accused felt bad about killing the Kitten and he was crying.

[88] She too was crying because of the death of the Kitten and after the failed attempts to revive the Kitten. She declined the Accused's offer to get her another cat.

[89] In her evidence, she stated about the Accused: "I know he did not mean to hurt the cat." She further stated that he also told her that he did not know that he had hit the Kitten so hard.

[90] The Complainant did not report this Animal Incident to the police at that time. However, she did report it at the time that she provided her police statements concerning the Assault Incident.

The Applicable Law

Applicable Provisions of the *Criminal Code* Relating to the Charge of Wilfully Causing Unnecessary Pain, Suffering, or Injury to an Animal

[91] The relevant provisions relating to wilfully causing unnecessary pain, suffering, or injury to an animal, all arising out of the Animal Incident, are found in s. 429(1) and s. 445.1 of the *Criminal Code* which provide as follows:

> **Wilfully causing event to occur**
>
> **429** (1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.
>
> **Cruelty to Animals**
>
> **Causing unnecessary suffering**
>
> 445.1 (1) Every one commits an offence who
>
> (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;
>
> (b) in any manner encourages, aids, promotes, arranges, assists at, receives money for or takes part in
>
> (i) the fighting or baiting of animals or birds, or
>
> (ii) the training, transporting or breeding of animals or birds for the purposes of subparagraph (i);
>
> (c) wilfully, without reasonable excuse, administers a poisonous or an injurious drug or substance to a domestic animal or bird or an animal or a bird wild by nature that is kept in captivity or, being the owner of such an animal or a bird, wilfully permits a poisonous or an injurious drug or substance to be administered to it;
>
> (d) promotes, arranges, conducts, assists in, receives money for or takes part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive birds are liberated

> by hand, trap, contrivance or any other means for the purpose of being shot when they are liberated; or
>
> (e) being the owner, occupier or person in charge of any premises, permits the premises or any part thereof to be used for a purpose mentioned in paragraph (d).
>
> **Punishment**
>
> (2) Every one who commits an offence under subsection (1) is guilty of
>
> (a) an indictable offence and liable to imprisonment for a term of not more than five years; or
>
> (b) an offence punishable on summary conviction and liable to a fine of not more than $10,000 or to imprisonment for a term of not more than two years less a day, or to both.
>
> **Failure to exercise reasonable care as evidence**
>
> (3) For the purposes of proceedings under paragraph (1)(a), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering or injury was caused or was permitted to be caused wilfully, as the case may be.

[92] From January 1, 2003, to April 16, 2008, the previous version of s. 445.1 was found in s. 446 of the *Criminal Code*, which read in part as follows:

> **Causing unnecessary suffering**
>
> 446 (1) Every one commits an offence who
>
> (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;
>
> **Punishment**
>
> (2) Every one who commits an offence under subsection (1) is guilty of an offence punishable on summary conviction.
>
> **Failure to exercise reasonable care as evidence**
>
> (3) For the purposes of proceedings under paragraph (1)(a) or (b), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering, damage or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering, damage or injury was caused or was permitted to be caused wilfully or was caused by wilful neglect, as the case may be.

[93] This version of the *Code* was in effect at the time of the British Columbia Supreme Court decision in *R. v. Hughes*, [2008] B.C.J. No.973, which placed significant

reliance upon the 2001 Newfoundland and Labrador Provincial Court decision in *R. v. Clarke*, [2002] N.J. No. 191. At the time of the decision in *R. v. Clarke*, s. 446(1)(a) read the same as at the time of *R. v. Hughes*.

The Legal Framework

[94] The Honourable Judge Gorman in *R. v. Clarke* provides an extensive and useful analysis of s. 429 and s. 446 (now s. 445.1) of the *Criminal Code*.

[95] At paragraphs 48 to 52, Judge Gorman says as follows with respect to s. 466 (now s. 445.1):

> [48] The purpose of section 446 of the [*Criminal*] *Code* is to prevent "unnecessary pain, suffering or injury" being caused to animals (see *R. v. Linder*, (1950), 97 C.C.C. 174 (B.C.C.A.). The offence can be committed by "wilfully" causing or permitting this to occur (s. 446(1)(a)), or by "wilfully" failing to provide an animal with suitable and adequate food; water; shelter; or care (s.446(1)(c)). It is this latter aspect of s.446(1) of the *Code* which is in issue in this case. The deeming provision contained in s.446(2) of the *Code* does not apply to s.446(1)(c).
>
> [49] In *R. v. D.L.*, [1999] A.J. No.539 (Prov. Ct.), it was held that what constitutes unnecessary "pain, suffering or injury is determined by the circumstances of each case, and what in those circumstances could reasonably have been avoided. If the pain, suffering or injury inflicted could have been reasonably avoided, while effecting the lawful purpose in the circumstances of the case, then the pain, suffering or injury was 'unnecessary' " (at para. 30).
>
> [Footnote 5: Also citing *R. v. Petzoldt* (1973), 11 C.C.C. (2d) 320 (Ont. Co. Ct) and *R. v. Paish*, [1977] 2 W.W.R. 526 (B.C. Prov. Ct)].
>
> [50] In *R. v. Menard* (1978), 43 C.C.C. (2d) 458 the Quebec Court of Appeal, at page 463, concluded that the section does not "intend, as in the cases of assault among human beings, to forbid through criminalization the causing to an animal of the least physical discomfort, and it is to this extent and no more, that one may speak of quantification..."
>
> [51] In *R. v. Menard*, the Court held, at page 464, that section 446 of the *Code* "condemns the person who ... will have a dog or a horse without water and without food for a few days, through carelessness or negligence...".
>
> [52] The reference to "unnecessary" pain or suffering signals a legislative intent that the wilful causing of any pain or suffering will not constitute an offence. Reference must be made to the extent or degree of

> pain and the purpose for inflicting it (see *R. v. Menard* at p. 464-465) including any societal benefits gained.

[96] To obtain a conviction against the Accused on the charge contained within Count 2, being the offence under s. 445.1(1)(a), Crown must prove: (a) that the Accused "wilfully" (b) caused unnecessary pain, suffering, or injury to the animal, in this case the Kitten.

[97] Therefore the *actus reus* of this definition of the offence requires proof that the Accused caused unnecessary pain, suffering, or injury to the Kitten. The *mens rea* requirement requires the Crown to prove that the Accused did so "wilfully". (See *R. v. Clarke* at paragraphs 67 and 68).

[98] The nature of the burden on the Crown with respect to s. 445.1 was considered further by the British Columbia Supreme Court trial decision in *R. v. Gerling*, 2013 BCSC 2503, [2013] B.C.J. No. 2973; (the "*Gerling* Trial Decision"). It followed the reasoning in the decision of *R. v. Hughes*.

[99] In the *Gerling* Trial Decision, Mr. Gerling faced charges of wilfully causing unnecessary pain or suffering or injury to an animal (contrary to s. 445.1(1)(a)) and wilfully neglecting or failing to provide suitable and adequate food, water, shelter, or care (contrary to s. 445.1(1)(b)). The charges arose from the seizure by representatives of the BCSPCA of 14 dogs from Mr. Gerling's dog-breeding facility. Crown relied upon expert evidence concerning the significantly poor, distressed, and painful conditions of the dogs when seized and the length of time required to develop these health conditions. At the time of seizure, there were observations made of these dogs about their fecal and urine coat staining and coat matting, mite infestations, foot conditions, and chronic dental pathology. Mr. Gerling's evidence was to the effect that the animals were seen regularly by a veterinarian and that there was no intention of harming these dogs. His lawyer argued that on the evidence it could not be concluded that he wilfully caused unnecessary pain or suffering to the dogs, or wilfully neglected or failed to provide suitable and adequate food, water, shelter, and care for the dogs.

[100] The *Gerling* Trial Decision noted at paragraphs 127 and 128 that *R. v. Hughes*

determined that it was unnecessary for the Crown to prove subjective foreseeability of unnecessary pain or suffering of the consequences for a conviction to be entered under s. 446 (now s. 445.1) of the *Code*.

[101] In the *Gerling* Trial Decision, Justice Truscott noted that Justice Cole in *R. v. Hughes* had cited with approval *R. v. Clarke*, and then went on to say as follows:

> [129] In that decision [being a reference to *R. v. Clarke*], the trial judge said the following:
>
> > It is not necessary therefore, for the Crown to prove subjective foreseeability of the consequences for a conviction to be entered under s. 446 of the *Code*. However, objective foreseeability of the consequences of the *actus reus* of s. 446 is constitutionally required. The definition of the word wilfully in s. 429 of the *Code* is, in my view, sufficient to comply with this constitutional requirement.
> >
> > [Reference note: see *R. v. Clarke* at paragraph 58.]
> >
> > The Crown does not have to prove any ulterior motive nor does the Crown have to prove that the accused knew that the animal was suffering or that he or she intended for the animal to suffer. The Crown must prove that the accused acted wilfully and caused the *actus reus* knowing that suffering was a likely result or that a reasonable person would realize that this was a likely result. In other words, objective foreseeability of the consequences of his or her act is sufficient. The accused's moral blameworthiness lies in causing the suffering by a wilful act…
> >
> > [Reference note: see *R. v. Clarke* at paragraph 59.]
> >
> > This *mens rea* element can be proven by reasonable inferences from the accused's actions or through the doctrines of wilful blindness or recklessness see *R. v. Sansegret* (1985), 18 C.C.C. (3d) 223 (S.C.C.) at pp. 223-237 and *R. v. McHugh*, [1966] 1 C.C.C. 170 (N.S.C.A.).
> >
> > [Reference note: see *R. v. Clarke* at paragraph 60.]
> >
> > As a result, section 446(1)(a) of the *Code* does not require proof that the accused intended to act cruelly or that he or she knew that their acts would have this result. Cruelty is a consequence, as is bodily harm under s. 267 of the *Code* (see *R. v. Dewey* (1999), 132 C.C.C. (3d) 348 (Alta. C.A.).
> >
> > [Reference note: see *R. v. Clarke* at paragraph 61.]
> >
> > The objective foreseeability requirement must be tailored to the specific offence (see *R. v. Nurse* (1993), 83 C.C.C. (3d) 546 (Ont. C.A.); *R. v. Swenson* (1994), 91 C.C.C. (3d) 541 (Sask. C.A.); and *R.*

> *v. Vang* (1999), 132 C.C.C. (3d) 32 (Ont. C.A.). Under s. 446(1)(a) of the *Code* the Crown must prove that "pain, suffering or injury" was a reasonably foreseeable consequence. Under s. 446(1)(c) of the *Code* the reasonably foreseeable consequence relates to the provision of inadequate "food, water, shelter and care" for the animal. The Crown does not have to prove that the accused intended this consequence.
>
> [Reference note: see *R. v. Clarke* at paragraph 62.]
>
> The *actus reus* of this definition of the offence requires proof that the accused caused unnecessary pain, suffering or injury to the animal. The *mens rea* requirement requires the Crown to prove that the accused did so "wilfully". In the context of s. 446(1)(a) of the *Code* this requires proof that the accused intended such a consequence or that a reasonable person would realize that his or her acts would subject an animal to the risk of unnecessary pain, suffering, or injury.
>
> [Reference note: see *R. v. Clarke* at paragraph 66.]

[102] The *Gerling* Trial Decision then went onto to state that s. 429 of the *Criminal Code* defines what it means to "wilfully cause an event to occur".

[103] In the *Gerling* Trial decision at paragraph 132, in convicting Mr. Gerling, Justice Truscott concluded as follows:

> [132] Applying this description to the word "wilfully" as set out in s. 429 of the *Code* and as further explained in the judgment of *R. v. Clarke, supra*, and accepting the opinion of Dr. Steinebach as to how long the distress in these dogs had existed, I find that Mr. Gerling acted wilfully and caused the *actus reus* knowing that suffering was a likely result or that a reasonable person would realize it was a likely result.

[104] The *Gerling* Trial Decision was appealed by Mr. Gerling who asserted, in part, that the trial judge erred in law in finding no subjective element in the *mens rea* requirements set out in s. 429(1) of the *Code*.

[105] The British Columbia Court of Appeal in *R. v. Gerling*, 2016 BCCA 72, [2016] B.C.J. No. 264; (the "*Gerling* Appellate Decision"), upheld the conviction. In doing so, the Court of Appeal noted that the trial judge erred in his consideration of the test for *mens rea* for the offences. However, when applying the correct tests to the evidence and findings of fact of the trial judge, the conviction was unassailable.

[106] The Court of Appeal then went on to say that, insofar as the trial judge applied an objective test as he was entitled to do so under s. 445.1(1)(a), if there was no evidence to the contrary, there was ample evidence to support a conclusion that a reasonable person would have foreseen the risk and taken steps to avoid it. Mr. Gerling's failure to do so was a marked departure from that standard of care; that is he acted wilfully.

[107] The Court of Appeal further stated that, insofar as the applicable test was subjective, Mr. Gerling's evidence offered no explanation for the condition of the dogs and showed that he was aware of their condition. There was no evidence that he had a plan to relieve the distress of the dogs. Rather, Mr. Gerling's evidence was that he saw no distress. His evidence did not affect the result.

[108] In coming to these conclusions, Justice Chiasson for the Court of Appeal stated as follows:

> ***Mens rea***
>
> [25] Under both ss. 445.1(1)(a) and 446(1)(b) of the *Criminal Code*, the Crown must prove that the accused acted wilfully.
>
> [26] For the purposes of s. 445.1(1)(a), "in the absence of any evidence to the contrary", evidence that a person failed to exercise reasonable care or supervision causing pain, suffering or injury, is proof that the pain, suffering or injury was caused or permitted wilfully (s. 445.1(3)).
>
> [27] In my view, where there is no evidence to the contrary, the test under s. 445.1(1)(a) is objective. Determining whether there is an absence of reasonable care or supervision is an objective exercise. Where there is evidence to the contrary, the Crown must prove wilful conduct and s. 429(1) of the *Criminal Code* applies. It engages a subjective element: "knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not".
>
> [28] Section 429(1) also applies to s. 446(1)(b).
>
> [29] This approach was neither advanced by the Crown at trial nor followed by the trial judge. In my view, that was an error. The issue becomes whether the conviction can be sustained in light of Mr. Gerling’s testimony.

Positions of the Parties on the Charge of Unnecessary Pain, Suffering, or Injury to an Animal

[109] The Crown argues that the purported actual intention of the Accused when he hit the Kitten is not determinative of his guilt on this offence.

[110] Rather, Crown argues that the Accused should be convicted on Count 2 on the basis that it was objectively foreseeable that to hit the Kitten in the manner he did would result in the Kitten sustaining an unnecessary injury.

[111] Defence argues that this Court should conclude that there was no intention on the part of the Accused to either injure or to kill the Kitten, and that on the objective standard there is insufficient evidence to come to that conclusion, and hence the Accused should be found not guilty.

[112] While the Crown relies on *R. v. Hughes*, supra, and Defence relies upon *R. v. Higgins*, infra, neither Crown nor Defence drew the court's attention to either the *Gerling* Trial Decision or to the *Gerling* Appellate Decision. I found both of these decisions to be most helpful in reaching a decision in this matter.

Analysis of the Animal Incident

Some Conclusions Arising from the Evidence of the Animal Incident

[113] The Accused did not testify in this matter before me. The only evidence before this court was that of the Complainant. Her evidence is sufficient for Crown to prove the *actus reus* of the offence. Her evidence is that Accused hit the tiny Kitten three times on its head with the heavy metal top portion of the selfie stick, causing an open, then bleeding wound. Her evidence supports the finding of fact that this hitting, which occurred not once but three times, was done intentionally and not accidently by the Accused.

[114] There is inadequate evidence about the pain and suffering that the Kitten may have endured because of these three hits.

[115] However, there is sufficient evidence that the Accused caused injury to the Kitten in the form of the wounds to the head, and with a resulting gushing of blood, which shortly thereafter was followed by the death of the Kitten.

[116] I am satisfied that the injury inflicted upon the Kitten was "unnecessary" in the context of s. 445.1(1)(a), and as that concept is explained in *R. v. Clarke* and in *R. v. Menard*, *supra*. Simply put, the Accused was obliged not to inflict pain, suffering, or injury which was not inevitable in these circumstances. In other words, the injury sustained by the Kitten in this case could have been avoided by the Accused and was therefore unnecessary.

[117] The Complainant suggested in her evidence that she did not think that the Accused meant to hurt the Kitten by hitting it on the head three times, while positioned above the Kitten, and while using an up-and-down motion and making contact with the heavy portion of the selfie stick. She also testified that the Accused told her that he did not know that he had hit so hard, thereby resulting in the significant injuries.

[118] But I must also mindful she has also testified that she believed that the Accused was upset with the Kitten because it was sleeping so much and when it was awake it was, as I take it, in a lethargic condition.

Discussion

[119] If I do not accept the above as "evidence to the contrary", then Crown can rely on the objective test under s. 445.1(1)(a) to meet the requirement of wilfulness for causing unnecessary injury to an animal. On that basis, I am of the view that Crown has discharged its burden and a conviction should be entered.

[120] If I do accept this as "evidence to the contrary", then Crown must prove wilful conduct and s. 429(1) applies, which thereby engages a subjective element, namely: "knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not." As noted in *R. v. Higgins*, [1996] N.J. No. 237, citing *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, recklessness in itself requires an awareness that there is a danger that the conduct in question could bring

about the results prohibited by the criminal law and a willingness nevertheless to proceed despite the risk. Specifically at page 582, McIntyre J. observed:

> …Recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective… It is, in other words, the conduct of one who sees the risk and who takes the chance.

[121] Here I will accept, as some “evidence to the contrary”, the Complainant's conclusions in her evidence noted above as to her belief that the Accused did not mean to hurt the Kitten by hitting it three times in the fashion described above. I find that she came to that conclusion based in part upon the self-serving statements of the Accused made to the Complainant, to the effect that he did not believe that he had hit the Kitten hard enough to cause the injuries. Again, I am being mindful that this belief is inconsistent with her observations of Accused being upset at the Kitten. I do not accept the ultimate accuracy of this evidence to the contrary. That said, it is some evidence to the contrary.

[122] However, I am satisfied, on an application of the subjective test, that the Accused knew (or at the very least should have known) his act of hitting the tiny Kitten three times on the head with the heavy end of the selfie stick would probably cause unnecessary injury to the Kitten. Alternatively, I find that he was reckless as to whether that event would occur or not.

Conclusion

[123] I therefore find the Accused guilty as charged on Count 2, being the offence under s. 445.1(1)(a) of the *Code*.

Decision

[124] Based on all of the foregoing, the Accused is therefore not guilty on Count 1 of assaulting the Complaint, and is guilty of wilfully causing unnecessary injury to the Kitten on Count 2.

(JUDGMENT CONCLUDED)