2001 CarswellNfld 189
Newfoundland Provincial Court

R. v. Clarke

2001 CarswellNfld 189, [2001] N.J. No. 191

Her Majesty the Queen and Maud Clarke and John Clarke

Gorman Prov. J.

Heard: May 11, 29, 2001
Judgment: July 17, 2001
Docket: 1300A-1063, 1300A-0998

Counsel: *Ms Brenda Duffy*, for Her Majesty the Queen
Mr. Bruce Short, for Mr. and Ms Clarke

Subject: Criminal

Headnote

Criminal law --- Wilful and forbidden acts in respect of certain property — Injury or causing cruelty to animals — Mistreatment of animals — Nature and elements of offence

Volunteer investigator for SPCA found several dogs in pens or chained on property of accused without food or water — Finding conditions unchanged on a third visit to site, volunteer investigator had dogs, including healthy dogs owned by owner, seized and placed in new homes — Veterinarian who examined dogs found some to be thin but not necessarily underfed, while others were generally in good condition and there was no evidence of dehydration — Accused and his wife were charged with cruelty to animals — Accused and his wife were acquitted — Evidence was not sufficient to prove beyond reasonable doubt that either accused or his wife wilfully caused dogs any pain, suffering or injury — There was no evidence wife either owned or had custody or control of dogs — Dogs which were thin were under temporary care of accused and their condition had not deteriorated while in his care — Mere fact dogs were thin was not proof of cruelty — Reliance by accused on advice of owner of thin dogs regarding feeding and treatment of eye condition was reasonable in circumstances and did not constitute recklessness or wilful act.

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s. 7 — considered

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s. 481 — referred to

s. 512 — referred to

s. 512(a) — referred to

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s. 542 — referred to

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s. 49 — referred to

s. 50 — referred to

s. 56 — referred to

s. 62 — referred to

s. 68 — referred to

s. 128 — referred to

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s. 319 — referred to

s. 319(2) — considered

s. 354(1) — considered

s. 388 — referred to

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s. 422 — referred to

s. 429 — considered

s. 429(1) — considered

s. 430 — referred to

s. 437 — referred to

s. 438 — referred to

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s. 440 — referred to

s. 441 — referred to

s. 442 — referred to

s. 443 — referred to

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s. 445 — referred to

s. 446 — considered

s. 446(1) — pursuant to

s. 446(1)(a) — considered

s. 446(1)(c) — considered

s. 446(2) — considered

s. 666(1) — considered

s. 733.1 [en. 1995, c. 22, s. 6] — referred to

Criminal Code, Act to amend the, S.C. 1895, c. 40
Generally — considered

TRIAL of accused on charge of cruelty to animals.

***Gorman, Prov. J.*:**

INTRODUCTION:

1 Mr. and Ms. Clarke are charged with "cruelty to animals", pursuant to s.446(1) of the **Criminal Code of Canada,**R.S.C. 1985. A number of dogs, some of which they owned and some of which they were temporarily caring for, were seized from them. Inexplicably this included dogs that were obviously well taken care of and in good condition. No explanation has ever been given to the Clarkes for the seizure of those particular dogs, and they have not been returned to them. One of those dogs was a Rottweiler. Mr. Clarke had a special and genuine affection for this particular dog. He routinely took this dog with him on weekend trips to the country. This dog loved to go swimming. One of the great tragedies of this case is that this dog and Mr. Clarke have been separated from each other, for a considerable period of time, because of these unfounded charges.

THE EVIDENCE

The Investigation:

2 On August 14 th , 2000, as a result of complaints received, Ms. Evelyn Hancock inspected an area off of Walbourne's Road in Corner Brook, Newfoundland. Ms. Hancock is a volunteer "investigating officer" with the Society for the Prevention of Cruelty to Animals (the S.P.C.A.). She discovered a number of dogs there. They were in pens or chained on. She did not see any food or drink and concluded that the dog houses were generally unsuitable. As she was concerned with the conditions that the dogs were being kept in she left a note which asked the owners to contact the S.P.C.A.. She did not take steps to seize the animals.

3 Ms. Hancock returned to this area on September 5 th , 2000. The dogs were still there and in her view, still in poor condition. Once again she saw no food or drink. She placed a second note in the wire of the pen and left. Once again the dogs were not seized. Obviously she did not conclude that the dogs were in such poor condition that they should be seized.

4 On September 22 nd , 2000 she made her last trip to the site. The dogs were seized and taken to the City's dog pound and to a veterinarian.

5 Ms. Hancock was genuinely concerned about the condition of these dogs. She felt that they were not being properly taken care of or sheltered.

6 As I stated earlier, Ms. Hancock is a volunteer. The evidence clearly establishes that she is not in a position to conduct proper investigations under the **Criminal Code of Canada**. She does not have the training nor the time to do so. Placing her in such a position is unfair to her, and more importantly, to those who might be charged with a criminal offence as a result of one of her investigations. She is an advocate. She is not an independent investigator. She should not be investigating alleged **Criminal Code of Canada** offences. That a private organization such as the S.P.C.A. would be given the authority to investigate and sometimes to even prosecute an alleged **Criminal Code of Canada** offence is unacceptable. Private individuals and organizations cannot be allowed to usurp the responsibilities of the police and the Attorney General.

7 After the dogs were seized they were eventually found homes and placed in them. While at the pound, from September 22 nd , to October 5 th , 2000 the dogs were fed on a regular and proper basis. However, Ms. Hancock did not observe any noticeable weight gain nor is there any reliable evidence that weight gain occurred. The dogs were never weighed.

8 When Ms. Hancock seized the dogs she was accompanied by Mr. Wayne Peddle, the Animal Control Officer for the City of Corner Brook. Mr. Peddle has held this position for a number of years. He was not concerned about the pens or the dog houses. In his view they appeared suitable.

9 Mr. Peddle had seen these dogs on September 1 st , 2000. He did not have any concern as regards their physical condition. He did not feel, for instance, that they were being underfed or improperly cared for.

The Veterinarian:

10 The dogs were examined by Dr. Rhonda McDonald, a veterinarian. She described the physical condition of the dogs as follows:

(1) A Female Chow:

11 This dog had a thin body; a cough; a poor coat; and a discharge coming from her eyes. Dr. McDonald testified that she had very little body mass. Dr. McDonald was, however unable to say that this lack of body mass was caused by a lack of food; or if so, over what period inadequate feeding would have to have occurred to cause weight loss.

(2) A Male Chow:

12 This dog was also described as thin and had a pussy discharge coming from his eyes. However, as with the first dog, Dr. McDonald was unable to state that the dog had been underfed.

(3) A Second Male Chow:

13 This dog was also described as being thin. This dog's eyes were in good condition.

(4) A Male Rottweiler:

14 The Rottweiler was also described as being thin. This dog also had a skin condition.

(5) A Female Rottweiler:

15 The female Rottweiler was described by Dr. McDonald as being in very good condition.

(6) A Labrador-Cross:

16 This dog was in good shape, particularly for a dog that had recently given birth to five puppies.

17 The puppies had worms and lice, though their mother did not. Having worms is not an unusual condition for puppies. It is surprising however that the mother did not have lice if the puppies had this condition while under the care of the Clarkes.

Mr. Mullett:

18 Two of the Chows (one of the males and the female) are owned by Mr. Martin Mullett. He asked Mr. Clarke to take care of these two dogs for him. He visited the dogs regularly; and brought food for them. He testified that they appeared to be in good condition.

19 Mr. Mullett indicated that the two Chows have chronic eye problems and that he advised Mr. Clarke to treat them by using warm water.

Mr. Clarke:

20 Mr. Clarke testified that he followed the instructions given to him by Mr. Mullett and that the dogs were fed and provided with water on a daily basis.

21 Mr. Clarke testified that the male Rottweiler was an active dog that received considerable exercise and had difficulty maintaining his weight. This dog was, as well, according to Mr. Clarke, fed and provided with water on a daily basis. Mr. Clarke testified that this dog would sometimes knock over the bucket that contained water.

POSITION OF THE PARTIES

The Crown:

22 The Crown argues that the dogs were provided with inadequate shelter; food; water; and care. The Crown submits that this establishes the offence. Ms. Duffy points to Dr. McDonald's description of the animals and submits that this could only be caused by inadequate feeding. She also points to Ms. Hancock's testimony concerning the lack of food or water at the site.

The Accuseds:

23 Mr. Short submits firstly, that there is no evidence to connect Ms. Clarke to the offence. She did not own, a number of the dogs, and the care of the others was the responsibility of Mr. Clarke.

24 As regards Mr. Clarke, he points to the excellent condition of the Labrador-Cross as evidence that Mr. Clarke was taking proper care of the dogs. He submits that the two Chows, owned by Mr. Mullett, were not mistreated and were thin when Mr. Clarke was asked to take care of them. He submits that the evidence is insufficient to establish the commission of an offence.

ONUS AND STANDARD OF PROOF

25 In *R. v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.), the Supreme Court of Canada stated, at paragraph 13, that "the onus resting upon the Crown to prove the guilt of the accused beyond a reasonable doubt is inextricably linked to the presumption of innocence..." Proof beyond a reasonable doubt "does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or frivolous doubt" (para.36). For a trial judge to convict "more is required than proof that the accused is probably guilty (para.36). If a trial judge is only able to conclude that the accused is probably guilty then he or she must acquit (*R. v. Avetysan*, [2000] 2 S.C.R. 745 (S.C.C.) at para.14). In *R. v. Starr*, [2000] 2 S.C.R. 144 (S.C.C.) the Court held that the burden placed upon the Crown lies "much closer to 'absolute certainty' than to a 'balance of probabilities' " (at para.242).

26 The onus rests with the Crown throughout. If the accused's testimony or the evidence as a whole raises a reasonable doubt then the accused must be acquitted, even if the trial judge does not accept the testimony of the accused (*R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.)).

THE LEGISLATION

27 Sections 446(1) of the **Criminal Code of Canada** states:

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 bird;

(b) by wilful neglect causes damage or injury to animals or birds while they are being driven or conveyed;

(c) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it;

(d) in any manner encourages, aids or assists at the fighting or baiting of animals or birds;

(e) 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;

(f) 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

(g) 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 (f).

[28] "Wilfully" is defined in s.429(1) of the **Criminal Code of Canada** as follows: 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 so, 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. [1]

THE LEGISLATIVE HISTORY

OF SECTIONS 429 AND 446

OF THE CRIMINAL CODE OF CANADA

Section 429:

29 Section 429 of the **Code** was originally enacted as section 481, by virtue of **Criminal Code**, 1892, c.29. The definition of wilfully has remained generally consistent over the last one hundred and nine years, with one exception. By virtue of S.C. 1953-54, c.51, the provision was renumbered as section 371 and the words "or by omitting to do an act that it is his duty to do" were added. In my view these words only apply when the *actus reus* consists of an alleged omission to act.

Section 446:

30 Section 446 of the **Code** was originally enacted as s.512 of the**Criminal Code**, 1892, c.29. At that time the offence involved a person who:

[1] The word "wilfully" is found in numerous **Criminal Code** offence provisions. See for instance sections 49; 50; 56; 62; 68; 128; 129; 139; 148; 173; 181; 319; 388; 390; 422; 430; 437; 438; 439; 440; 441; 442; 443; 444; 445; and 733.1.

(a) wantonly, cruelly or unnecessarily beats, binds ill-treats, abuses, overdrives or tortures any cattle, poultry, dog, domestic animal or bird; or

(b) while driving any cattle or other animal is, by negligence or ill-usage in the driving thereof, the means whereby any mischief, damage or injury is done by any such cattle or other animal; or

(c) in any manner encourages, aids or assists at the fighting or baiting of any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature.

31 By virtue of **An Act Further To Amend The Criminal Code**, S.C. 1895, c.40, the words "any wild animal or bird in captivity" were added to section 512(a). The section was subsequently renumbered as s.542 (R.S.C.,1906, c.146).

32 The element of failing to supply food, water or shelter was added to the definition of the offence by virtue of **An Act To Amend The Criminal Code**, S.C. 1925, c.38, s.12. Section 542(a) was repealed and reenacted as follows:

(a) wantonly, cruelly or unnecessarily beats, binds, ill-treats, abuses, overdrives, tortures or abandons in distress, or having actual possession and control thereof in any way fails to provide and supply food, water and shelter for any cattle, poultry, dog, domestic animal or bird, or wild animal or bird in captivity, so that unnecessary suffering or injury is caused to the same;

33 As a result of, **An Act To Amend The Criminal Code**, S.C. 1930, c.11 s.11, the words "proper and sufficient food, water, bedding, care and shelter" were added to the offence definition.

34 In 1938 (**An Act To Amend the Criminal Code**, S.C. 1938, c.44, s.35) s.542(a) was repealed. The section was reenacted and the reference to the supply of food, water, bedding, care and shelter was deleted.

35 In **Criminal Code**, 1953-54, c.51, section 541 was reenacted as section 387 and the reference to the supply of food, water, care and shelter was returned to the offence definition. In addition the words "suitable and adequate" make their first appearance. This was a change from the wording in1930, which had referred to "proper and sufficient", food water and shelter.

36 In the last consolidation of Federal Statutes (R.S.C. 1985, c. C-46) the provision was reenacted as section 446. There have been no amendments since. On March 14th, 2001, Bill C-15, the **Criminal Law Amendment Act, 2001**, received first reading in the House of Commons. This Act proposes to make significant changes to s.446 of the **Code** including adding the words "recklessly" and "negligently" to the offence definitions.

WILFULLY

37 The inclusion of the word wilfully in portions of s.446 does not mean that the Crown has to prove an "evil intent". The word "wilfully" is generally "taken to mean intentionally but it is also used to mean recklessly" (*R. v. Toma*, 2000 BCCA 494 (B.C. C.A.) at para.15). In *R. v. Butler* (1984), 42 C.R. (3d) 268 (Ont. Co. Ct.) it was held, at page 272-273 that:

... wilful means nothing more than intentional as opposed to accidental...

38 It has been held that the definition of wilfully in s.429 of the **Code** was "intended to extend and broaden the meaning of the word 'wilfully' " (*R. v. Schmidtke* (1985), 19 C.C.C. (3d) 390 (Ont. C.A.) at p.393).[2] The Court, in ***Schmidtke***, held that this definition allows for the mental element to be established "by showing that [the accused] failed to meet the standards imposed on him by the offence section".[3]

39 In *R. v. Guess*, 2000 BCCA 547 (B.C. C.A.) , the British Columbia Court of Appeal, in the context of s.139 of the **Code**, held that the word wilfully "may be taken to connote the concept that the offence could not be made out on the basis of accidental or unknowing conduct" (at para. 30). In *R. v. Hnatiuk*, 2000 ABQB 314 (Alta. Q.B.), Madam Justice Veit, in the context of an offence under s.430 of the **Criminal Code**, concluded that the word wilfully means "knowingly, or deliberately" (at para. 46).

[2] Also see *R. v. Rese* (1967), [1968] 1 C.C.C. 363 (Ont. C.A.); *R. v. Muma* (1989), 51 C.C.C. (3d) 85 (Ont. C.A.); and *R. v. Dupont* (1977), [1978] 1 S.C.R. 1017 (S.C.C.).

[3] *R. v. Schmidtke* dealt with the offence of "mischief".

40 In *R. v. Docherty*, [1989] 2 S.C.R. 941 (S.C.C.), the Supreme Court of Canada considered the meaning of the word wilfully in the context of a charge of breach of probation (section 666(1) at the time). At page 947, the Court, per Wilson J., stated:

> Section 666(1) is clearly framed so as to require guilty knowledge in order to constitute a breach. The section prohibits an accused from wilfully failing or refusing to comply with a probation order. The word "wilfully" is perhaps the archetypal word to denote a mens rea requirement. It stresses intention in relation to the achievement of a purpose. It can be contrasted with lesser forms of guilty knowledge such as "negligently" or even "recklessly". In short, the use of the word "wilfully" denotes a legislative concern for a relatively high level of mens rea requiring those subject to the probation order to have formed the intent to breach its terms and to have had that purpose in mind while doing so.

41 Madam Justice Wilson also stated in **Docherty**, that a "full *mens rea* offence under the Criminal Code demands that the accused have an intent to perform the acts that constitute the *actus reus* of the offence". [4]

42 Based on this analysis, the Crown would have to prove, under s.446(1)(a) of the **Code,** that the accused intended to cause unnecessary pain or suffering to the particular animal. However, in *R. v. DeSousa* (1992), 76 C.C.C. (3d) 124 (S.C.C.) Sopinka J. at page 139, stated:

> ... In the circumstances of **Docherty**, the offence definition itself required intention in regard to all aspects of the *actus reus* and thus this proposition was not meant to be set down as an overriding principle of criminal law...

[4] This is often referred to as "perfect symmetry". Eric Colvin in his text **Principles of Criminal Law** (2d ed), 1991, Carswell, refers to **Docherty**, at p.121, as a "difficult decision to rationalize". Breach of probation is now found in s.733.1 of the **Code** and the word wilfully has been removed. The section now makes it an offence to fail or refuse to comply with a probation order "without reasonable excuse".

43 In *R. v. Buttar*, [1989] 2 S.C.R. 1429 (S.C.C.) it was suggested that certain reckless acts, even if "there might not have been a bad motive" will fit within the definition of wilfully.

44 In *R. v. Buzzanga* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), Mr. Justice Martin concluded that the word wilful does not have a fixed meaning in Canadian criminal law. Its definition depends on the nature of the provision in which it is contained. In the context of the "wilful promotion of hatred", contrary to s.319(2) of the **Criminal Code**, he concluded that the insertion of the word wilful required proof of "intentional promotion of hatred" (at pages 381-382) or foreseeing this consequence as certain or substantially certain.

45 In *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), the Supreme Court of Canada agreed with this interpretation of the word wilful. It concluded that, in the course of s.319(2) of the **Code** it mandated a "stringent standard of mens rea" requiring "more than merely negligence or recklessness" (at page 775). This judgment must however be read in its context. This interpretation, of the word wilful, was made in the course of a section one **Charter** analysis pursuant to the "minimal impairment" criteria, after a violation of section two of the **Charter** had been established. Therefore, if section 319(2) was going to be held to be constitutionally valid an analysis resulting in a limited application for the section, and a strict interpretation of the word wilful, was going to be required. The Supreme Court of Canada clearly wished to uphold the constitutionality of s.319(2) of the **Code**. In order to do so they appear to have felt compelled to adopt the stringent approach to the word wilful I referred to earlier.

46 The Ontario Court of Appeal in ***Schmidtke*** , points out that the word wilfully has "not been consistently interpreted and its meaning must depend on the context in which it is used. In some cases it is held to import a requirement for *mens rea*, in others to do no more than impose a requirement that the accused's conduct be voluntary and not to extend to his knowledge

of circumstances or foresight of consequences..." (at page 393). Determining the effect of the word wilfully in the context of s.446 of the **Code** requires a consideration of the *mens rea* of the offence and the constitutional status that the Supreme Court of Canada has given to subjective foresight.

47 The test for *mens rea* is generally a subjective one (offences of negligence being one exception). It is concerned with the accused's intent and his or her appreciation of the circumstances rather than that of a reasonable person. In *R. v. Bernard*, [1988] 2 S.C.R. 833 (S.C.C.), the Supreme Court of Canada, at page 880, indicates that criminal offences require a "blameworthy mental state". In *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 (S.C.C.), the Court concluded that moral blameworthiness is the guiding principle underlying *mens rea* in Canadian criminal law.

THE PURPOSE OF SECTION 446

48 The purpose of section 446 of the **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. L. (D.)*, [1999] A.J. No. 539 (Alta. 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). [5]

50 In *R. v. Menard* (1978), 43 C.C.C. (2d) 458 (Que. C.A.) the Quebec Court of Appeal, at page 463, concluded that the section does not "intend, as in the cases of assault among

[5] Also see *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.).

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.

ANALYSIS

[53] The manner in which we treat animals may be considered as a reflection of our own humanity, or lack thereof. It has been suggested that intentional cruelty to animals is an indicator of a "potential for increasing violence and dangerousness" against people (see the Federal Department of Justice's 1998, Consultation Paper, **Crimes Against Animals**). This does not mean however that the Crown's burden of proof is lesser for offences under s.446 of the **Code** than it is for any other offence in the **Criminal Code of Canada**. The Crown must, obviously, prove each element of the offence beyond a reasonable doubt.

54 Section 7, of the **Canadian Charter of Rights and Freedoms**, Constitution Act, 1982, requires proof of personal fault. This is now a constitutional requirement (*Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.)). In *R. v. Ruzic*, 2001 SCC 24 (S.C.C.) , the Court, at paragraph 32, stated that "moral blameworthiness is an essential component of criminal liability which is protected under s.7 as a principle of fundamental justice". In **Benard** the Court had noted that the morally innocent ought not to be convicted. This may require proof of subjective foresight and, at the very least, it will normally require a fault element based on objective forseeability in which more than mere inadvertence will

be required. This does not mean however, that our criminal law includes a constitutional requirement that the Crown prove intention in regard to the consequences of all offences in which a consequence is an aspect of the *actus reus*.

Moral Blameworthiness and Objective Fault:

55 In *R. v. Hundal* (1993), 79 C.C.C. (3d) 97 (S.C.C.) and *R. v. DeSousa* the Court held that an objective fault requirement is constitutionally sufficient for a number of offences, other than those referred to in ***Vaillancourt***, as requiring a "special mental element".

56 In *R. v. Creighton* (1993), 83 C.C.C. (3d) 346 (S.C.C.), Lamer, C.J.C. suggested, at page 354, that the *mens rea* element must always relate to the purpose of the offence. In ***DeSousa*** , however, Sopinka J. concluded that there is no constitutional requirement that the mental element, for every **Criminal Code** offence, extend to the consequences of the *actus reus* (also see *R. v. L. (S.R.)* (1992), 76 C.C.C. (3d) 502 (Ont. C.A.) at pp.512-515). Therefore the offence of unlawfully causing bodily harm, in s.269 of the **Code**, was held, by the Court in ***DeSousa***, to require proof that the accused intended to commit the unlawful act that caused the bodily harm and proof that a reasonable person would realize that the unlawful act would subject another person to the risk of bodily harm. The Crown does not have to prove an intention to cause bodily harm for a conviction to ensue under that section.

57 In *R. v. Godin* (1994), 89 C.C.C. (3d) 574 (S.C.C.) the Supreme Court of Canada, at page 575, in a brief oral judgment, stated:

> The *mens rea* requirement for s.268(1) of the Criminal Code, R.S.C. 1985, c. C-46, is objective foresight of bodily harm. It is not necessary that there be an intent to wound or maim or disfigure. The section pertains to an assault that has the consequences of wounding, maiming or disfiguring. This result flows from the decisions of this Court in R. v. DeSousa ... and R. v. Creighton...

58 It is not necessary therefore, for the Crown to prove subjective forseeability of the consequences for a conviction to be entered under s.446 of the **Code**. However, objective forseeability 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.

59 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 forseeability of the consequences of his or her act is sufficient. The accused's moral blameworthiness lies in causing the suffering by a wilful act. Perfect symmetry between *mens rea* and the consequences is not required under s.446 of the **Code** nor is it a constitutionally mandated requirement.

60 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. Sansregret* (1985), 18 C.C.C. (3d) 223 (S.C.C.) at pp.223-237 and *R. v. McHugh* (1965), [1966] 1 C.C.C. 170 (N.S. S.C. [In Banco]).

61 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* (1998), 132 C.C.C. (3d) 348 (Alta. C.A.).

62 The objective forseeability 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.

63 In *R. v. Vinokurov*, 2001 ABCA 113 (Alta. C.A.), the Alberta Court of Appeal concluded that the *mens rea* requirement for an offence under s.354(1) of the **Code** could not be established by resort to the doctrine of recklessness (also see *R. v. Adey*, unreported judgment, No.1300A-01158 (Nfld. Prov. Ct.) [2001 CarswellNfld 162 (Nfld. Prov. Ct.)]. This was based, in part, on the inclusion

of the word "knowingly" in that section. [6] The word "wilfully", particularly the manner in which it is defined in s.429 of the **Code**, denotes a very different and lesser form of *mens rea*.

SECTION 446(1)(c) OF THE CRIMINAL CODE OF CANADA

64 In the context of s.446(1)(c) of the **Code** the Crown must prove that the accused "wilfully" failed to provide food, water, shelter and care. This *mens rea* requirement can be established through proof of purposeful intention; by recklessness; or wilful blindness. In other words, the Crown must prove that the accused intentionally or wilfully caused the *actus reus*. The latter mode of proof is, in my view, constitutionally consistent with an offence that requires the provision of a basic level of care by the accused.

Summary of the *Actus Reus* and *Mens Rea*Elements:

65 Under s.446(1)(c) of the **Code** the Crown must prove:

[6] In *R. v. Jorgensen* (1995), 102 C.C.C. (3d) 97 (S.C.C.) the Supreme Court of Canada, at page 136, held that the word "knowingly" indicated that Parliament had chosen to adopt "an onerous standard of proof".

i that the accused is the owner or a person having custody of the animal;

and that

ii the accused "wilfully" failed or neglected to provide suitable and adequate food, water, shelter or care for the animal.

66 The *actus reus* for this offence requires proof that the accused failed to supply an animal with adequate food, water, shelter or care (an act and a result or consequence). The *mens rea* element requires proof that the accused did so "wilfully". In the context of s.446(1)(c) of the **Code**, this requires proof that the accused intended this result or that a reasonable person would realize that his or her acts would subject an animal to the risk of receiving inadequate food, water, shelter or care.

67 Under s.446(1)(a) of the **Code**, the Crown must prove:

i that the accused "wilfully"

ii caused unnecessary pain, suffering or injury to the animal.

68 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.

CONCLUSION

69 In this case, the Crown's argument rests upon an allegation that the Clarkes failed to provide proper food, water and care. The evidence is not sufficient to establish, beyond a reasonable doubt, that either accused wilfully caused the dogs any

pain, suffering or injury (see *Society for Prevention of Cruelty to Animals v. Lowry* (1894), 17 L.N. 118 (Que. Mag. Ct.)).

70 The Crown must prove that the accused "wilfully" neglected to provide suitable and adequate food, water or shelter. There must be evidence of what would be suitable or adequate in the circumstances and that the accused fell below this standard. No such evidence was presented in this case.

71 Section 446(1)(c) of the **Code** includes both a subjective and objective element. The Crown must prove that the accused was aware of the animal's condition and the effect of his or her actions. However, it would not be a defence for the accused to argue that, in his or her personal view, adequate food and water were supplied. This

latter element has an objective element. The word adequate is not be determined on a subjective basis. A certain standard of care must be expected and demanded.

72 A review of the elements of s.446(1)(c) of the **Code** illustrates that the Crown has failed to prove the offence charged.

i The Owner or a Person

Having Custody or Control

73 The evidence establishes beyond a reasonable doubt that Mr. Clarke was either the owner or had the custody or control of these dogs. This latter element requires a degree of control over the animal which was established by the Crown in this case (See *R. v. Deschamps* (1978), 43 C.C.C. (2d) 45 (Ont. Prov. Ct.), and *R. v. Pacific Meat Co.* (1957), 119 C.C.C. 237 (B.C. Co. Ct.).

74 The evidence does not however, establish that Ms. Clarke played any role in the care of these dogs. This element of the offence has not been proven in relation to her. There was evidence of purported verbal comments to the contrary. However, these comments were not recorded verbatim and I accept Mr. Mullet's evidence on this point.

(i) Shelter:

75 The evidence as regards the shelter, provided for the dogs, is insufficient to establish a violation of s.446 of the **Code**. These dogs were being kept outside in the

summer on a temporary basis. The shelter provided was adequate in the circumstances of this case.

(ii) Water:

76 Ms. Hancock did not see any water on her visits to the site, however they were of short duration. I found Mr. Clarke to be a very credible and believable witness. I accept his testimony that water was provided to the dogs on a daily basis. I note that there is no evidence of dehydration in relation to any of the dogs.

(iii) Food:

77 A number of the dogs were thin. However, they were under the control of Mr. Clarke for only a temporary period of time and their condition had not deteriorated while in his care. The dogs that he owned were in good condition, and I accept his evidence concerning his Rottweiler. The mere fact that an animal is thin is not *ipso facto* proof that a violation of s.446 of the **Code** has occurred.

78 This section seeks to prevent cruelty to animals. It does not seek to establish a universal standard for the feeding or sheltering of animals. The fact that a dog is thin

does not establish that the dog has been improperly treated or denied adequate food. The evidence in this case simply does not prove, beyond a reasonable doubt, that Mr. Clarke failed to provide adequate food to any of these dogs. Falling below what the S.P.C.A. deems appropriate is not necessarily proof of an offence.

79 I accept Mr. Clarke's evidence that the dogs were fed on a daily basis. My impression of Mr. Clarke is that he is a person who cares for animals and has a love of dogs. He relied on Mr. Mullett's advice concerning the feeding of Mr. Mullett's dogs and the treatment of their eyes. His reliance on this advice was reasonable in the circumstances and does not constitute recklessness, wilful blindness or a wilful act. As I stated at the beginning of this judgment, one of the tragedies of this case is that Mr. Clarke's dogs, which were in good condition, were seized as well. There never was any explanation provided at trial, nor apparently was one given to Mr. Clarke, for this action. At the very least he is owed one.

Summary

80 In summary the evidence presented in this case has failed to establish that Mr. or Ms. Clarke breached any of the provisions contained in s.446 of the **Code**. The charges are dismissed.

Accused acquitted.

Citing References (10)

Treatment	Title	Date	Type	Depth
Distinguished in	**1.** R. v. Whelan 2013 CarswellNfld 253 (N.L. Prov. Ct.)	May 02, 2013	Cases and Decisions	
Followed in	**2.** R. v. Gerling 2013 BCSC 2503 (B.C. S.C.)	Dec. 10, 2013	Cases and Decisions	
Considered in	**3.** R. v. White 2012 CarswellNfld 258 (N.L. Prov. Ct.) **Judicially considered 2 times**	Aug. 03, 2012	Cases and Decisions	
Considered in	**4.** R. v. Bennett 2010 CarswellNfld 379 (N.L. Prov. Ct.) **Judicially considered 2 times**	July 20, 2010	Cases and Decisions	
Considered in	**5.** R. v. Hughes 2008 BCSC 676 (B.C. S.C.) **Judicially considered 3 times**	Mar. 14, 2008	Cases and Decisions	
Considered in	**6.** R. v. Tri-Tex Sales & Services Ltd. 2006 CarswellNfld 226 (N.L. Prov. Ct.) **Judicially considered 1 time**	July 27, 2006	Cases and Decisions	
Considered in	**7.** R. v. S. (J.) 2003 CarswellNfld 222 (N.L. Prov. Ct.)	Oct. 02, 2003	Cases and Decisions	
Referred to in	**8.** R. v. Shand 2007 ONCJ 317 (Ont. C.J.)	Mar. 26, 2007	Cases and Decisions	
Referred to in	**9.** R. v. Galloro 2006 ONCJ 263 (Ont. C.J.) **Judicially considered 8 times**	Apr. 07, 2006	Cases and Decisions	
—	**10.** Cournoyer et Ouimet Code criminel annoteJurisprud 446, JURISPRUDENCE	2004	Secondary Sources	—

