R. v. Dominic

British Columbia Judgments

British Columbia Provincial Court

Smithers, British Columbia T.S. Woods Prov. Ct. J.

Heard: March 31, 2008; February 23, 2009.

Judgment: May 8, 2009.

File No. 20048-1

Registry: Smithers

[2009] B.C.J. No. 949 | 2009 BCPC 145

Between Regina, and Corey Sean Dominic

(77 paras.)

Case Summary

Criminal law — Criminal Code offences — Wilful and forbidden acts in respect of certain property — Cruelty to animals — Accused convicted of wilfully and without lawful excuse killing a dog kept for a lawful purpose under s. 445(a) of the Criminal Code — The Crown's evidence regarding the basic fact of the accused's killing of the dog stood essentially uncontradicted — His level of intoxication, while heavy, was insufficient to deprive him of the minimal intent required for conviction of a general intent offence — Based on the jurisprudence, s. 445(a) created an offence of general intent that could not be defended by recourse to evidence of intoxication at the advanced level — Criminal Code, s. 445(a).

Criminal law — Elements of the offence — Specific versus general intent — Accused convicted of wilfully and without lawful excuse killing a dog kept for a lawful purpose under s. 445(a) of the Criminal Code — The Crown's evidence regarding the basic fact of the accused's killing of the dog stood essentially uncontradicted — His level of intoxication, while heavy, was insufficient to deprive him of the minimal intent required for conviction of a general intent offence — Based on the jurisprudence, s. 445(a) created an offence of general intent that could not be defended by recourse to evidence of intoxication at the advanced level — Criminal Code, s. 445(a).

Criminal law — Defences — Intoxication — Accused convicted of wilfully and without lawful excuse killing a dog kept for a lawful purpose under s. 445(a) of the Criminal Code — The Crown's evidence regarding the basic fact of the accused's killing of the dog stood essentially uncontradicted — His level of intoxication, while heavy, was insufficient to deprive him of the minimal intent required for conviction of a general intent offence — Based on the jurisprudence, s. 445(a) created an offence of general intent that could not be defended by recourse to evidence of intoxication at the advanced level — Criminal Code, s. 445(a).

Accused charged with wilfully and without lawful excuse killing a dog kept for a lawful purpose. It was alleged that he had stomped forcefully on the small dog twice, and then picked it up and threw it to the ground. It was not contested that a dog was killed on May 28, 2007 but the accused, citing his alcohol consumption that day and his heavily-intoxicated state, denied any recollection of having killed a dog or of having intended to do so. A key issue was whether the offence was an offence of general or specific intent.
HELD: Accused guilty as charged.

The evidence satisfied the court beyond a reasonable doubt that the dog was not a stray, that a Ms. Pete was the

keeper of the dog and that she exercised the control over it that an owner would exercise. As there was no evidence she kept the dog for an unlawful purpose, the dog was "kept for a lawful purpose" for the purposes of s. 445(a) of the Criminal Code. The Crown's evidence regarding the basic fact of the accused's killing of the dog stood essentially uncontradicted. The accused had admitted he could have been at the scene of the incident and that he could have subjected the dog to violent treatment. Although the court accepted he was heavily intoxicated, it did not believe he consumed as much alcohol as he claimed, nor that he was grossly impaired to the point of behaving in effect as an automaton. The overall picture of his functioning bespoke presence of mind, planned and purposeful behaviour and a much greater command of his faculties than he admitted to on the stand. Although he might not have a clear memory of what he did that day, it did not mean he didn't know what he was doing when he did it. His testimony did not raise a reasonable doubt that, notwithstanding his heavy intoxication, his mind was the controlling agency of his voluntary actions when he killed the dog. His degree of impairment, while significant, was insufficient to rob him of his ability to carry out, at the very least, a voluntary willed act. This level of intoxication was insufficient to deprive him of the minimal intent required for conviction of a general intent offence. Based on the jurisprudence, section 445(a) of the Code created a general intent offence. The s. 429(1) introduction of recklessness did not "add an extra mental element" but rather it subtracted one. It removed any need that might perhaps otherwise be thought to exist for proof in a Part XI offence that the accused actually knew or foresaw that his or her actions would cause a particular event. Section 429(1) thus enabled conviction on the strength of proof, without more, of the voluntary performance by the accused of actions constituting an actus reus which actions would "probably cause the occurrence of the event". Accordingly, and applying the jurisprudence, the court concluded that s. 445(a) created an offence of general intent that could not be defended by recourse to evidence of intoxication at the advanced level.

Statutes, Regulations and Rules Cited:

Criminal Code, *R.S.C. 1985, c. C-46, s. 429*(1), s. 455(a), s. 445(1)(a)

Counsel

Counsel for the Crown: L. Nugent.

Counsel for the Accused: I. Lawson and K. Whonnock.

REASONS FOR JUDGMENT

T.S. WOODS PROV. CT. J.

INTRODUCTION

1 Corey Sean Dominic ("Mr. Dominic") is charged under count 1 of Information 20048-1, Smithers Registry, with wilfully and without lawful excuse killing a dog kept for a lawful purpose. The offence is outlined in what was, on May 28, 2007 - the alleged offence date - s. 445(a) of the *Criminal Code*. (The provision is now numbered s. 445(1)(a).) That section incorporates the statutory definition of "wilfully" that s. 429(1) prescribes is applicable to all offences under Part XI of the *Criminal Code*.

2 There is a second count on the information alleging a breach of an undertaking that Mr. Dominic has admitted but the trial that is the subject of these reasons was concerned only with count 1.

3 The relevant portions of ss. 445(a) and 429(1) read as follows on May 28, 2007:

"445. Every one who wilfully and without lawful excuse

(a) kills ... dogs ... that ... are kept for a lawful purpose is guilty of an offence punishable on summary conviction;"

...

"429. (1) Every one who causes the occurrence of an event by doing an act ... knowing that the act ... 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."

4 That a dog was killed on May 28, 2007, is not seriously in dispute. However, citing his alcohol consumption that day and his heavily intoxicated state, Mr. Dominic denies any recollection of having killed a dog or of having intended to do so. This case therefore squarely raises the issue of the availability of intoxication as a defence - an issue that leads, inexorably, to an inquiry into whether the offence of "wilfully and without lawful excuse" killing a dog kept for a lawful purpose is an offence of general or specific intent.

WAS THE DOG KEPT FOR A LAWFUL PURPOSE?

5 A conviction for the offence with which Mr. Dominic is charged under s. 445(a) requires proof of, among other facts, the threshold fact that the dog that he is alleged to have killed was "kept for a lawful purpose". Mr. Dominic's counsel, Mr. Lawson, argues that there is no evidence before the court to satisfy this threshold requirement, citing an Ontario decision that holds that the section is intended to protect domesticated or domestic animals and is inapplicable to strays: *R. v. Deschamps*, *(1978), 43 C.C.C. (2d) 45* (Ont. C.J.). The court in *Deschamps* dismissed the charge in that case on the ground that the evidence did not disclose that a person who had provided some care for the cat in issue - which was shot dead by the accused because it was interfering with his garbage - exercised control over it to the point where she could fairly be described as its "keeper".

6 Crown counsel Ms. Nugent submits that, contrary to Mr. Lawson's submission, there is, in the present case, evidence before me that is sufficient to establish that one Marie Pete ("Ms. Pete"), who resided at #2 - 4156 - 2nd Avenue, Smithers, B.C., was the keeper of the dog that Mr. Dominic allegedly killed. I agree with that submission.

7 It was on the back step of Ms. Pete's home that the incident giving rise to the charge against Mr. Dominic was witnessed by her next door neighbour, Crown witness Jason Crocker ("Mr. Crocker"). When asked at trial where the dog lived, Mr. Crocker replied "In Number 2 of [the fourplex] where I stayed". He also testified that Ms. Pete would let the dog out of unit #2 in the mornings and that he would sometimes play with it.

8 Crown witness Cst. Andrew Hunter ("Cst. Hunter") - the RCMP member who led the investigation of the incident - was questioned at trial about how he dealt with the disposal of the body of the dead dog. His evidence was that he disposed of it at the request of Ms. Pete. Cst. Hunter described Ms. Pete's demeanour at that time as being "very upset with what had happened," referring to her in his testimony as the dog's owner. (Cst. Hunter's testimony in this regard was not adduced for a hearsay purpose but, rather, to prove his state of mind in taking and acting on instructions provided by Ms. Pete concerning the disposal of the dog's body.)

9 As I have indicated, all of this evidence, taken together, satisfies me beyond a reasonable doubt that Ms. Pete was the keeper of the dog and that she exercised the control over it - including that of giving instructions about the disposal of its body after its demise - that an owner of the dog would exercise. This clearly distinguishes the present case from *Deschamps.* There being no evidence or argument to suggest that Ms. Pete kept the dog for an *unlawful* purpose, I find that the animal that was the victim of Mr. Dominic's alleged attack was "kept for a lawful purpose" for the purposes of s. 445(a) of the *Criminal Code.*

IDENTIFICATION AND THE *ACTUS REUS*- DID MR. DOMINIC KILL THE DOG?

10 There is no real dispute that on May 28, 2007, someone killed a dog at the back of a fourplex unit located at #2 - 4156 - 2nd Avenue, Smithers, B.C. As I have noted above in these reasons, during his investigation of the incident Cst. Hunter attended at Ms. Pete's fourplex unit, determined that her dog was dead and took and acted on her instructions with respect to the disposal of its body.

11 Mr. Crocker was an eyewitness to the incident on May 28th and served as the Crown's main witness. As I have noted, he lived in unit #1 - the fourplex unit that neighbours unit #2 where Ms. Pete lived and where the dog was killed. Mr. Crocker gave extensive testimony about the events of that day. Not all of it was entirely satisfactory. The accuracy of Mr. Crocker's recollection of some details was successfully challenged on cross-examination. As well, there is a dated history of some *animus* between Mr. Crocker and Mr. Dominic that Mr. Crocker sought to downplay. But I do not believe that that history in any way propelled Mr. Crocker to give false evidence when he described the incident with the dog and identified Mr. Dominic as the perpetrator. Similarly, the frailties of Mr. Crocker's recollection did not affect his testimony about the specific incident that founds the charges against Mr. Dominic. Mr. Crocker's evidence regarding those critical facts, in both direct and cross-examination, was clear and unwavering.

12 The incident with the dog occurred within a broader context of partying and drinking at unit #2. At a certain point, in the evening (when it was still light), the noise and commotion increased and the sound of particularly loud banging caused Mr. Crocker to step outside his unit to see what was happening. When he got out he saw, standing behind his unit, to his left, at the steps leading into unit #2, a heavily intoxicated male in a state of great agitation, swearing loudly. Mr. Crocker immediately recognised that individual to be Corey Dominic.

13 Mr. Crocker testified that he then witnessed Mr. Dominic stomp down hard, twice, with his right foot, on Ms. Pete's small, brownish-white dog. For a moment, the dog remained on the first step of the short series of steps leading up and into unit #2. Then, Mr. Crocker said, he saw Mr. Dominic stoop down to pick the dog up and then throw it onto the ground near the bottom of the steps to unit #2 where it lay motionless and bloodied.

14 Mr. Crocker's evidence was that his view of these events was not obstructed by any person or obstacle. While he said that he was standing about eight feet from where Mr. Dominic and the dog were located, his attempt to estimate the distance by pointing to landmarks in the courtroom persuaded me that there may have been as much as 15-20 feet between them. In any event, it is clear to me that he had no difficulty in observing what he described or in recalling his observations of the incident itself.

15 For his part, Mr. Dominic says that, by reason of the alcohol he had consumed earlier that day, he has no recollection of being at unit #2 or of having any encounter with a dog, either as described by Mr. Crocker or at all. In his evidence, Mr. Dominic admitted to knowing Ms. Pete - the resident of unit #2 - and to having been to her home on previous occasions to purchase marijuana. He also testified that Ms. Pete was one of a number of people who had been drinking with him at his foster brother's house earlier on the day the incident occurred. (More detail in that regard will be set out further on in these reasons.)

16 During cross-examination by Ms. Nugent for the Crown, Mr. Dominic admitted that after he left his foster brother's house, the route he followed may have taken him past Ms. Pete's house. He also said that he could have gone to Ms. Pete's house that night. After that, this telling exchange took place:

"Q. And, indeed, you could have gotten angry and kicked the dog, couldn't you?

A. Could have.

B. And you don't remember it today because you drank a lot?

C. Yes." (*Transcript*, Day 2, p. 40)

17 Either before or after calling 911 to report the killing of the dog (the evidence was equivocal), Mr. Crocker pursued Mr. Dominic as he fled the scene, but lost him not far from the fourplex. Cst. Hunter and one other officer arrived, and Mr. Crocker pointed them in the direction he thought Mr. Dominic had run. They commenced a search and eventually located Mr. Dominic and took him into custody.

18 It can be seen that the Crown's evidence regarding the basic fact of the killing of the dog, by Mr. Dominic, stands essentially uncontradicted. The Crown's evidence is augmented, if only slightly, by Mr. Dominic's own acknowledgements that he could have been at the scene of the incident and that he could have subjected the dog to violent treatment. I do attach some significance to the fact that Mr. Dominic did not respond to Ms. Nugent's suggestion with outraged denial or protestations that he would never treat a small animal that way (or words to that effect). Rather, he frankly acknowledged that he "could have" done so.

19 In these circumstances I do not consider it necessary to embark upon a full-scale credibility assessment of the kind associated with the authority of *R. v. W.D.*, *[1991] 1 S.C.R. 742*, at 757, as enlarged by Wood J.A. (as he then was) in *R. v. H.(C.W.)* *(1991), 68 C.C.C. (3d) 146* (B.C.C.A.). Mr. Dominic elected to call evidence but he really had no evidence to give to meet the Crown evidence regarding identification and the *actus reus* of the offence with which he has been charged. Hence, there is nothing concerning identification and the *actus reus* available to be subjected to a comparative analysis of the kind contemplated by *R. v. W.D.*

20 To summarize, then, the evidence that I have recounted above persuades me, beyond a reasonable doubt, that Mr. Dominic attended on May 28th at the back step area of Ms. Pete's unit in the fourplex where Mr. Crocker also lived. By stomping forcefully on its body twice, and then picking it up and throwing it to the ground, he killed Ms. Pete's dog. Identification and the *actus reus* of the offence are thus proven.

THE *MENS REA*- DID MR. DOMINIC ACT WILFULLY AND WITHOUT LAWFUL EXCUSE WHEN HE KILLED THE DOG?

21 As I have noted, Mr. Dominic defends the charge he faces principally by citing his state of intoxication on May 28, 2007. He testified that he was so severely intoxicated on that date that he has no actual recollection of any of the material events, including attacking Ms. Pete's dog. His counsel, Mr. Lawson, argues from that evidence that Mr. Dominic's severe state of intoxication prevented him from forming the guilty intent that the Crown must prove in order secure a conviction under s. 445(a).

22 The quantity of alcohol that Mr. Dominic consumed, and the rate at which he consumed it, are relevant facts in this case since he raises an intoxication defence.

23 Mr. Dominic testified that he went at about 4:30 p.m. or so on the day in question to the home of his foster brother, Will Macnamara, after concluding a meeting with his probation officer. Mr. Macnamara and five others - including Ms. Pete and some of those who Mr. Crocker said were later carrying on next door to his unit - were present and all were drinking heavily. Mr. Dominic testified that the available alcohol consisted of a case of 12 bottles of beer and five or six, two-litre containers of Cooler having a 7% alcohol content. It is argued on his behalf that the quantity of alcohol that he consumed while at Mr. Macnamara's house was sufficient to eclipse, and did eclipse, his mental functioning to a point where there is a reasonable doubt that he possessed the necessary *mens rea* or guilty intent to "wilfully and without lawful excuse" kill Ms. Pete's dog.

24 Mr. Dominic's evidence was not wholly consistent regarding the time he spent drinking, but the answer he gave most often was that he and his friends drank for about an hour or two at Mr. Macnamara's before coming to the end of their supply of alcoholic beverages. Mr. Dominic himself had two beers and, he said, two to three coffee mug-sized containers of Cooler from each of the five or six large bottles of Cooler on hand. When supplies were

exhausted, the others left in search of more alcohol. Mr. Dominic stayed back to sleep, saying that he was feeling "a little drunk" and "intoxicated", and that he did not wish to be found in that condition in public, given the abstention conditions by which he was then bound.

25 Mr. Dominic's evidence was that he slept at Mr. Macnamara's until about 9:00 p.m. or so. When he woke up, he checked his cell phone to determine the time and recognised that he had to move swiftly if he was to be back home in Hazelton and indoors by 10:00 p.m. as required by his court-imposed curfew.

26 While the stated purpose of the departure of Mr. Macnamara, Ms. Pete and Mr. Dominic's other drinking mates from the Macnamara residence was to bring more alcohol back for them to continue consuming, by 9:00 p.m. they still had not done so. Mr. Dominic denied any anger or irritation when he awoke to find that none of the group had in fact returned to include him in the continuation of their drinking session.

27 Mr. Dominic referred throughout his evidence to areas where his recollection of the events that followed the drinking session was, variously, poor or altogether absent. Determining that a good place to hitch a ride back to Hazelton was at the side of Highway 16 on the outskirts of the Smithers town site (where a Kentucky Fried Chicken outlet is situated), he chose back streets to make his way to that location. Mr. Dominic testified that he stood there for 10 or 15 minutes and, believing it would be better to get home late than not to get home at all, he began walking in the direction of Hazelton. It is then that the police arrived - he says, travelling into Smithers on Highway 16 and making a U-turn to pursue him. Mr. Dominic recalls running into the bush to avoid capture but then recalls nothing at all until finding himself in Cst. Hunter's cruiser. There is a further long gap and his recollection of events does not resume until the following morning when he says he awoke, naked and bleeding, in cells at the Smithers detachment of the RCMP.

28 Mr. Dominic said that he could not recall the route he followed to travel on foot from Mr. Macnamara's house to Highway 16, but remembers that he chose side streets and obscure areas so as not to be found by police in his intoxicated state. As I have noted, he admitted that his route could have taken him past Ms. Pete's fourplex unit, where the incident with the dog occurred, but he claimed no recollection of that. He went to some trouble to say that he would have had no reason to go there (even though Ms. Pete had been part of the drinking party at Mr. Macnamara's earlier that afternoon and was supposed to return with more alcohol for him and the others to share).

29 While Mr. Dominic's general recall of much of what transpired on May 28th was shaky and unclear, he was quite emphatic that he knew he left Mr. Macnamara's house around 9:00 p.m. because he recalls that he checked that timing on his cell phone (which he knows to have a reliable clock feature). He also stressed that his decision to leave when he did, and his actions thereafter, were driven by a concern that he make it home to Hazelton by 10:00 p.m. to avoid breaching his curfew condition, and by his knowledge that if he caught a ride by hitch-hiking that trip would take about 45 minutes.

30 Mr. Dominic said, during cross-examination, that he had been attempting to curtail his drinking at this time in his life and that he would only drink on alternate weekends. Generally (he said) he would indulge himself in a case of beer, over the course of one extended evening session. He testified that beer agreed with him and that earlier experience had taught him that Cooler drinks and hard liquor caused memory lapses, hangovers and generally had resulted in bad experiences. Thus, he said, it had for some time been his usual practice to avoid Cooler drinks and hard liquor.

31 There are numerous problems with Mr. Dominic's evidence regarding his claimed alcohol consumption and resulting level of intoxication. To begin, I will say that I find the patchwork character of his claimed memory lapses to be problematical for his credibility. It tells against his credibility, in my opinion, for Mr. Dominic to have no recollection whatsoever of the route he followed as he passed on foot through the Smithers town site to reach Highway 16 near the Kentucky Fried Chicken outlet, but then have a very detailed and vivid recollection of what happened before and thereafter for a considerable time.

32 Why would Mr. Dominic have the presence of mind to check his telephone for the time and then plan carefully to

get home by his curfew and remember that, but not remember a single detail about the route he purposely chose and followed immediately thereafter, through various back streets, to reach the highway without detection? Why would Mr. Dominic have a well-preserved recollection of the side of the highway he was on, the length of time he stood waiting unsuccessfully to hitch a ride and the thought process he went through in deciding to start walking (given the elapsing time) but have no recollection of the route he followed to reach the highway? Why would Mr. Dominic recall details about how long he waited before he started to walk along the highway, the point he reached when the police arrived, and even the direction of travel of the cruiser - before and after it made a U-turn - but not be able to say definitively, one way or another, whether he stopped at Ms. Pete's unit and killed a dog there?

33 The patchwork character of Mr. Dominic's memory lapses pervades his testimony. Mr. Dominic recalls the initiation of a police chase on foot, but not the chase itself or the struggle with Cst. Hunter during which, according to the constable's testimony, he became resistant and combative. He recalls being in Cst. Hunter's cruiser but not getting to it. He recalls being at the Smithers detachment but not driving to it.

34 Ms. Nugent for the Crown urges me to view Mr. Dominic's "selective amnesia" with scepticism. There is some force in that submission, given that the gaps in Mr. Dominic's recollection conveniently coincide with the points in the chronology when Mr. Dominic is alleged to have gone to Ms. Pete's fourplex unit, stomped on the subject dog and (later) engaged in combative resistance when Cst. Hunter sought to apprehend and arrest him. A conveniently selective memory has been recognised in other cases as a factor that can legitimately call a witness's credibility into doubt: see, for example, *R. v. Nicol*, [2004] S.J. No. 281 (Q.B.) and *R. v. Matthews*, [2008] N.S.J. No. 150 (C.A.).

35 For these and the reasons that follow, I have great difficulty accepting what Mr. Dominic said about the amount of alcohol that he drank and the effects of that consumption of alcohol upon his mental functioning.

36 Six people altogether are said to have been gathered at the Macnamara house, drinking together in the late afternoon of the day the incident with the dog took place. Mr. Dominic gave detailed evidence about his tendency to avoid Cooler drinks based on past bad experiences, including memory lapses, yet he says that on that day he drank Cooler drinks with abandon. No explanation was given for this apparently uncharacteristic departure from his usual pattern to avoid a type of drink that previously had caused him serious difficulty.

37 On Mr. Dominic's evidence, the gathering at Mr. Macnamara's house was a simple, somewhat spontaneous celebration of the lifting of a no-contact order between two spouses who were present. It was not portrayed as an angry or troubled binge-drinking episode where one might perhaps not be surprised to see Mr. Dominic greatly increase his normal intake and drink in a less discriminating way - embracing any alcohol that might come to hand, including copious amounts of a drink that had caused memory lapses and other bad experiences on earlier occasions.

38 The vast majority of Mr. Dominic's alcohol consumption on the day in question, he says, consisted of the Cooler drink. As I have already mentioned, he said in his direct testimony he had two to three coffee mugs of Cooler from each of the five or six two-litre bottles that were available to him and his friends. The Coolers and the two beers went down, he said, in one to two hours.

39 Mr. Dominic's claimed rate of alcohol consumption during the afternoon of May 28th invites close scrutiny.

40 A two-litre bottle holds approximately eight coffee mugs of Cooler, if (conservatively) one accepts that a coffee mug holds about the same amount as an Imperial cup. Mr. Dominic's own account of his consumption has him drinking a disproportionate amount of the Cooler, given the presence of the other five drinkers who were sharing the available supply. For each bottle, on *his* account, Mr. Dominic would have consumed two to three cups, leaving only five or six cups from each two-litre bottle to be shared among the other five. Mr. Dominic's insistence that he was drinking twice as much Cooler as the five others who were present leads me to believe that he exaggerated his consumption, particularly given his other evidence that he had had negative experiences with Cooler drinks.

41 The sheer volume and rate of Mr. Dominic's claimed consumption also leads me to train a sceptical eye on his

testimony. Working with the lowest consumption that Mr. Dominic's testimony contemplates, given the ranges he stated - that is, two beers plus two mugs of Cooler from each of the five available bottles of Cooler over two hours - he would on his account still have had 10 mugs full of Cooler plus two beers, for a total of 12 drinks in two hours. On that scenario, he would have been finishing, on average, one drink every 10 minutes throughout the entire, two-hour session.

42 The upper end of the ranges Mr. Dominic gave in his evidence regarding his consumption has him consuming 18 mugs full of Cooler plus two beers, all in the space of *one* hour. That would amount to an average of one drink every *three* minutes. I am left to wonder whether that is humanly possible. Certainly, I feel justified in viewing that evidence with scepticism.

43 I find it impossible to reconcile this evidence of consumption - even taking Mr. Dominic at the lowest quantity and rate contemplated by the ranges he gave - with his testimony that he "felt a little drunk" at the time the drinking session ended and the others left. Neither does it square with the purposeful planning he did, when he awoke, to get home by his curfew, including working out a time estimate and an inconspicuous route of passage through Smithers to reach the highway (which he negotiated without assistance).

44 Undoubtedly, Mr. Dominic was under the influence of alcohol on May 28, 2007. Mr. Crocker and Cst. Hunter's testimony both confirm that he was heavily intoxicated that evening. However, I cannot accept that someone who claims to have consumed as much alcohol as he says he did within, at most, two hours, would be in a condition to reason, plan, navigate and remember what he admits to remembering as well as he did.

45 To summarize on this point, I will say that while I accept that Mr. Dominic was intoxicated, even heavily intoxicated, on the offence date, I do not believe that he consumed as much alcohol then as he claimed. Similarly, I do not believe that such alcohol as he *did* consume rendered him grossly impaired, to the point of behaving in effect as an automaton. The overall picture of Mr. Dominic's functioning that was revealed in his evidence bespeaks presence of mind, planned and purposeful behaviour and a much greater command of his faculties overall than he admitted to having on the stand. In this important respect, Mr. Dominic's evidence was internally inconsistent. The casualty of that internal inconsistency was his credibility on the crucially important subjects of his alcohol consumption and its effects upon his mental functioning on the offence date.

46 In this regard I would also add, parenthetically, that while it may be true that Mr. Dominic does not remember now everything he did on May 28th, there is an important distinction to be drawn between that and his having been rendered senseless by extreme alcohol impairment - that is, to the point where his mind could not have been, in law, the controlling agency of voluntary actions. Ms. Nugent drew that distinction forcefully and effectively in her closing submissions, saying:

> "... [W]hat courts say time and time again, is that there is a great distinction between someone being so drunk at the time that they did not know what they were doing, and someone was drunk enough at the time that it hampers their memory now.
>
> And in my respectful submission, without expert evidence to assist the court, it is the latter conclusion that is the correct one. That being that Mr. Dominic drank enough on May the 28th, 2007, that he now no longer has a clear memory of what he did that day. That doesn't mean he didn't know what he was doing when he did it."

47 I find myself in agreement with that submission.

48 For the purposes of the *R. v. W.D.* formulation, I disbelieve Mr. Dominic's testimony about the extent of his alcohol consumption and its effects upon his mental functioning. Neither does his testimony raise in my mind a reasonable doubt that, notwithstanding his heavy intoxication, his mind was the controlling agency of his voluntary actions on May 28, 2007, when Mr. Crocker witnessed him kill Ms. Pete's dog. Accordingly, I find as a fact that Mr. Dominic consumed less alcohol than what he claimed to have consumed in his testimony, and that the degree of his impairment, while significant, was significantly less than what he claimed when he gave his testimony. To put it

more pointedly, I find as a fact that Mr. Dominic's degree of impairment, while significant, was not sufficient to rob him of his ability to carry out, at the very least, a voluntary willed act.

49 How does that level of intoxication fit within the classifications of intoxication for purposes of finding *mens rea* and determining criminal culpability?

50 As is explained by the majority in *R. v. Daley*, *[2007] S.C.J. No. 53*, when courts consider the interplay between intoxication and the *mens rea* or guilty intent requirement in most criminal offences, they must acknowledge three levels of intoxication.

51 "Extreme" intoxication, akin to automatism - if proven by recourse to, along with other evidence, expert psychiatric opinion - will negative voluntariness altogether. That is, extreme intoxication robs an accused of his or her ability to carry out a voluntary willed act. Thus, proof beyond a reasonable doubt of extreme intoxication at the time the *actus reus* was committed will always preclude conviction of any offence having a *mens rea* element.

52 By contrast, "mild" intoxication - that is, intoxication sufficient only to relax inhibitions and bring on or facilitate the display of socially unacceptable behaviour - has "never been accepted as a factor or excuse in determining whether the accused possessed the required *mens rea*": *Daley* at para. 41. (See also, *R. v. Daviault*, *[1994] 3 S.C.R. 63* at 99.) Thus, proof of intoxication at the mild level will never be sufficient to call *mens rea* into doubt.

53 Between those two poles on the continuum is found "advanced" intoxication. The majority in *Daley* described this degree of intoxication as follows:

> "This occurs where there is intoxication to the point where the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite *mens rea* ... A defence based on this level of intoxication applies only to specific intent offences." (at para. 41)

54 The evidence, as a whole, has persuaded me that Mr. Dominic was intoxicated beyond the mild level, but his impairment had not reached the extreme level. In other words, he was at the time in question in a state of advanced intoxication. Both Mr. Crocker and Cst. Hunter observed him on the offence date in what both recognised to be a "heavily intoxicated" state. His impairment took him beyond being simply disinhibited and prone to act in socially unacceptable ways. But, as I have discussed in detail above, Mr. Dominic's self reports of "feeling a little drunk" at the relevant time, coupled with evidence of his high level of functioning following the drinking session at the Macnamara house, are inconsistent with, and exclude beyond a reasonable doubt, the possibility that Mr. Dominic's degree of intoxication then was so extreme that his condition was "akin to automatism". Proof of impairment at the extreme level must, in any event, be based at least in part upon psychiatric evidence: *Daley* at para. 45. No such evidence was called here

55 I repeat that while it may be true that Mr. Dominic does not now remember killing a dog at Ms. Pete's unit on May 28th, the mere fact that alcohol may have interfered with his present recollection of that incident does not go to the question of whether alcohol deprived him of the ability to act voluntarily and commit the offence at the relevant time. As I have said, evidence abounds that Mr. Dominic *did* possess the ability to act voluntarily at the time the offence was committed and his claimed inability to remember his voluntary acts does not deflect me from my conclusion that his degree of intoxication was advanced and not extreme.

DOES S. 445(A) CREATE A GENERAL OR SPECIFIC INTENT OFFENCE?

56 As I have noted above, the Supreme Court of Canada has held in *Daley* that proof of intoxication at the advanced level will only avail as a defence - by negativing the required *mens rea* - in circumstances where the offence in issue is a specific intent offence.

57 The distinction between general and specific intent offences was helpfully described in these terms by Sopinka

J. in *Daviault* (who was in dissent on another point in that case but whose explication of the distinction set out below was endorsed by the majority):

> "General intent offences as a rule are those which require the minimal intent to do the act which constitutes the *actus reus*. Proof of intent is usually inferred from the commission of the act on the basis of the principle that a person intends the natural consequences of his or her act. Without attempting to exhaust the policy reasons for excluding the defence of drunkenness from this category of offences, I would observe that it is seldom, even in cases of extreme drunkenness, that a person will lack this minimal degree of consciousness. Moreover, these are generally offences that persons who are drunk are apt to commit and it would defeat the policy behind them to make drunkenness a defence.
>
> Specific intent offences are as a rule those that require a mental element beyond that of general intent offences and include 'those generally more serious offences where the *mens rea* must involve not only the intentional performance of the actus reus but, as well, the formation of further ulterior motives and purposes' (per McIntyre J. in *R. v. Bernard*, *[1988] 2 S.C.R. 833*, at p.880). These are often referred to as 'ulterior intent' offences. See *Majewski*, [1977] A.C. 443. Professor Colvin, in 'A Theory of the Intoxication Defence' (1981), 59 Can. Bar Rev. 750, correctly points out that it is the further intent in addition to the basic intent that is the hallmark of ulterior intent offences. The policy behind this classification is in part the importance of the mental element over and above the minimal intent required for general intent offences. This distinction demands that the accused not be convicted if the added important mental state is negated by the drunken condition of the accused. Failure to prove the added element will often result in conviction of a lesser offence for which the added element is not required. One example is the offence of assault to resist or prevent arrest which is a specific intent offence. Absent the intent to resist arrest, the accused would be convicted of assault *simpliciter*, a general intent offence." (at paras. 116-117)

58 The authorities across Canada do not speak with one voice with respect to the *mens rea* element in the offences in Part XI of the *Criminal Code* to which s. 429(1) applies (including s. 445(a) which is at issue here). However, there is binding appellate authority in British Columbia, citing and applying venerable Ontario appellate authority, that holds that such offences are general intent offences.

59 R. v. Toma, *[2000] B.C.J. No. 1804* (C.A.) was a mischief case (mischief being a Part XI offence). In that case, the court rejected an argument that the extended s. 429(1) definition of "wilfully", in effect, made mischief a specific intent defence. In so doing, Rowles J.A. (Mackenzie and Saunders JJ.A. concurring) adopted and approved the approach to that issue taken by the Ontario Court of Appeal in *R. v. Schmidtke*, *[1985] O.J. No. 84* (C.A.) and the Ontario County Court in *R. v. Butler*, *(1984), 42 C.R. (3d) 268*. With respect to *Schmidtke* in particular, Rowles J.A. stated, at para. 17, the following:

> "... Robins J.A. similarly concluded that the offence of mischief charged under what is now s. 430(1)(a) of the Criminal Code is an offence of general rather than specific intent and that the requisite mental element for mischief requires proof of no more than an intentional or reckless causing of the actus reus."

60 In *Schmidtke*, the court considered arguments suggesting that the language of the predecessor section to s. 429(1), and in particular its references to "recklessness" as a component of the extended definition of "wilfully", raised mischief to a specific intent offence, such that intoxication, by negativing *mens rea*, could serve as a defence. The court rejected those arguments. Robins J.A., for the court, stated the following at pp. 3-4:

> "That definition [in the predecessor to s. 429(1)] manifestly was intended to extend and broaden the meaning of 'wilfully' and has been so construed: *R. v. Rese*, *[1968] 1 C.C.C. 363* (Ont. C.A.); *R. v. McHugh*, *[1966] 1 C.C.C. 170* (N.S.C.A.); *R. v. Dupont* *(1977), 22 N.R. 518* (S.C.C.) affirming *1976, 22 N.R. 519* (Alta. C.A.). The mental element on the part of an accused is satisfied by showing that he failed to meet the standards imposed on him by [the predecessor to s. 429(1)]. The introduction of recklessness as an element of the offence results in mischief being properly classified as an offence of general and not of specific intent: *Majewski*, supra, per Lord Elwyn-Jones L.C. at 270; Glanville Williams, *Text Book of Criminal Law*, (1978) 43;1 Smith & Hogan, supra, 632-636.
>
> However, apart from the definition extending the meaning of 'willfully", I would reach the same conclusion. On the approach to the designation of specific and general intent crimes prescribed by the Supreme Court

in *George*, [1960] S.C.R. 871, and affirmed in *Leary*, [1978] 1 S.C.R. 29, *it appears to me that the requisite mental element for mischief requires proof of no more than an intentional or reckless causing of the actus reus. I would not hold the requisite mental element to include both an intention with respect to the actus reus and an intention with respect to the achievement of some ulterior purpose beyond that achieved by the act itself*." (emphasis added)

61 His Lordship went on, at page 4, to observe:

"It would be anomalous in the extreme to find that while the respondent's drunkenness would afford him no defence had he assaulted someone, it affords him a complete defence when he destroys or damages property. In my opinion, where an accused's inability to have the knowledge or appreciate the consequences of his conduct is brought about by his voluntary consumption of liquor or drugs his self-induced drunkenness is irrelevant to a charge of mischief."

62 Inasmuch as the s. 429(1) definition of "wilfully" applies to all Part XI offences - including the s. 445(a) offence of wilfully and without lawful excuse killing a dog kept for a lawful purpose with which Mr. Dominic is charged - I consider the reasoning in *Toma* and the cases (like *Schmidtke*) that it approves and adopts to be equally applicable to the case at bar. Applying that reasoning here, the fact that the evidence establishes that Mr. Dominic was in an advanced state of intoxication when he killed Ms. Pete's dog does not furnish him with a defence. That level of intoxication was insufficient to deprive Mr. Dominic of the minimal intent required for conviction of a general intent offence. For ease of reference, I again quote Sopinka J. in *Daviault* who stated that in a general intent offence, "[p]roof of intent is usually inferred from the commission of the act on the basis of the principle that a person intends the natural consequences of his or her act" (para. 116).

63 I infer from the facts established by the evidence before me that Mr. Dominic wilfully caused the death of Ms. Pete's dog because its death was the natural consequence of his voluntary act of stomping down hard on it twice and then picking it up and throwing it to the ground. In my view, this reasoning parallels that in *R. v. DeSousa* (1992), 76 C.C.C. (3d) 124 (S.C.C.) in relation to the *mens rea* element of the offence of assault causing bodily harm under s. 269 of the *Criminal Code*. In *DeSousa*, the Supreme Court of Canada held that proof that the accused intended to commit the unlawful act that caused the bodily harm where a reasonable person would recognise that the unlawful act would subject another person to the risk of bodily harm will suffice for the purposes of proving *mens rea*. The same is true, *mutatis mutandis*, with respect to the offence under s. 445(a) with which Mr. Dominic is charged.

64 My conclusion that s. 445(a) creates a general intent offence finds support in the analysis of Pettit Baig P.C.J. in *R. v. H.S.*, [1995] O.J. No. 1428 (Ont. C.J.). In that case, the accused was charged with both sexual assault and wilfully killing a dog kept for a lawful purpose. The learned trial judge found that the accused had consumed at least 14, and possibly as many as 21, beers over a five and one-half hour period leading up to the offences. Despite that level of consumption, the accused was found (implicitly) to have been in an advanced but not extreme state of intoxication. Both offences being offences of general intent, the necessary *mens rea* could be inferred from the *actus reus* for each and the intoxication defence thus did not avail.

65 At paras. 51-52 of his decision in *H.S.*, Pettit Baig, P.C.J. summed up his conclusions regarding alcohol consumption and *mens rea* as follows:

"... [A]m I satisfied, given the onus, which is on the accused, that he was so intoxicated that he was in a state akin to automatism or insanity? The answer to that question is, no.

There is no doubt the accused was very drunk, and that, in that state, his ability to control the anger and rage which he harboured within himself was greatly diminished. *However, I am satisfied beyond a reasonable doubt that the accused was able to form the minimal intent required for conviction of general intent offences.*" (emphasis added)

66 In my opinion, the reasoning in that passage from *H.S.* is of equal application to the facts of the case at bar.

67 Ms. Nugent, for the Crown, drew to my attention the Yukon case of *R. v. Swanson*, *[1989] Y.J. No. 194*. In that case, the Yukon Territory Court of Appeal came to the conclusion that s. 429(1), when applied to an arson charge (a Part XI offence), made the offence of arson a specific intent offence.

68 The reasoning in *Swanson* is irreconcilable with that in *Toma* which, as a decision of the British Columbia Court of Appeal, I consider to be binding upon me. I appreciate that, there being common membership between the courts of appeal of British Columbia and the Yukon Territory, this affords what may appear to be a slender, if technically sound, basis for declining to follow *Swanson*. The concern is compounded by the fact that *Toma* does not refer to *Swanson*. Nevertheless, the two jurisdictions are distinct and from the perspective of a strict, *stare decisis* analysis, *Toma* is binding upon me and *Swanson* is not: see *Peter Kiewit Sons Co. v. U.C.T.E., Local 20221*, *[1998] B.C.J. No. 1494* (S.C.) at para. 5 and *Ursich v. Wilson*, 2004 YTSC 77 at para. 2. For me to ignore that reality would be to imperil the legitimacy of *this* decision.

69 But moving beyond a strict, *stare decisis* analysis, I will say as well that, in my respectful opinion, the logic in *Toma* is more compelling than that in *Swanson.* As Ms. Nugent argues, it would be anomalous if assault, assault causing bodily harm and sexual assault would, uncontroversially, continue to be recognised by our law to be general intent offences for which advanced intoxication is no defence while charges of wilfully injuring or killing a dog or committing mischief or arson should be elevated to the status of specific intent crimes for which advanced intoxication *would be* a defence. That would be the effect of accepting the reasoning in *Swanson* in preference to that in *Toma*. In my view, not being bound to do so, I would be loath to introduce through my reasons in this case a dissonant note in the otherwise generally harmonious pattern of the law's approach in British Columbia to the guilty intent requirement in offences that are outwardly comparable in many important respects.

70 I also consider it significant that the court in *Swanson* does not appear to have had *Schmidtke* cited to it.

71 *Schmidtke*, as I have stated, is a seminal decision with respect to s. 429(1) and the *mens rea* requirement for Part XI offences. It has been applied repeatedly, including in *Toma* (which, in turn, has often been cited and followed). By the time that *Swanson* had been decided, *Schmidtke* had been cited three times, in each case favourably, by appellate courts: see *R. v. Jacobsen*, *[1987] N.W.T.J. No. 164* (C.A.), *R. v. Muma*, *[1989] O.J. No. 1520* (C.A.) and *R. v. St. Pierre*, *[1987] S.J. No. 630* (C.A.). The fact *Schmidtke* was not apparently before the court in *Swanson* does, in my respectful view, somewhat impair the persuasive force of the non-binding decision in that Yukon Territory case.

72 Mr. Lawson argued before me that s. 429(1) "adds to the mental element" of s. 445(a) the requirement that "there must be proof that the accused knew the probable consequences of his act". He contended that "there's no way to read that and then conclude it is merely a general intent that would be required. Knowing the consequences of your act ... could not be more clearly an extra element - an extra mental element ...". Mr. Lawson submitted that, for this reason - and for the policy reasons given by Sopinka, Gonthier and Major JJ. at paragraphs 110 *et seq.* of their dissenting judgment in *Daviault*- the decision in *Swanson* is superior on its logic and its interpretation of the language of s. 429(1) and he invited me to follow *Swanson* in preference to *Toma*.

73 Quite apart from being prevented by the binding authority of *Toma* from accepting Mr. Lawson's invitation, I consider (with respect) that his submission is clearly and convincingly refuted by the specific discussion in *Schmidtke* of how the notion of recklessness extends the meaning of wilfully in s. 429(1). I have quoted the passage once before in these reasons, but I reproduce the salient portion again:

> "The mental element on the part of an accused is satisfied by showing that he failed to meet the standards imposed upon him by [s. 429(1)]. *The introduction of recklessness as an element of the offence results in mischief being properly classified as an offence of general and not specific intent ..."* (at p. 3, emphasis added)

74 The s. 429(1) introduction of recklessness does not "add an extra mental element", as Mr. Lawson says, but rather it subtracts one. It removes any need that might perhaps otherwise be thought to exist for proof in a Part XI

offence that the accused actually knew or foresaw that his or her actions would cause a particular event. Section 429(1) thus enables conviction on the strength of proof, without more, of the voluntary performance by the accused of actions constituting an *actus reus* which actions would "probably cause the occurrence of the event".

75 Accordingly, and applying Toma, I conclude that s. 445(a) of the *Criminal Code*- which makes it an offence to wilfully and without lawful excuse kill a dog kept for a lawful purpose - creates an offence of general intent that cannot be defended by recourse to evidence of intoxication at the advanced level.

CONCLUSION

76 In summary and conclusion, the evidence led at the trial of the charge that, on May 28, 2007, in Smithers, B.C., Mr. Dominic wilfully and without lawful excuse killed a dog kept for a lawful purpose, has persuaded me beyond a reasonable doubt that:

(a) Ms. Pete's dog was a dog "kept for a lawful purpose";

(b) Mr. Dominic was the person who killed Ms. Pete's dog. He did so by stomping down hard on it, twice, with his right foot and then picking it up and throwing it to the ground;

(c) Despite his having consumed a substantial amount of alcohol over a comparatively short period, Mr. Dominic was not in a state of extreme intoxication "akin to automatism" but, rather, was in a state of advanced intoxication;

(d) In stomping down hard on Ms. Pete's dog twice, and then picking it up and throwing it to the ground, Mr. Dominic acted voluntarily. The *mens rea* element of the general intent s. 445(a) offence can in this case be inferred from the performance, by Mr. Dominic, of the acts of stomping hard on the dog twice and then picking it up and throwing it to the ground. In forming that inference I invoke the principle that a person intends the natural consequences of his or her voluntary acts; and

(e) Mr. Dominic's advanced, but not extreme, state of intoxication impaired his functioning but it did not deprive him of the ability to form the minimal intent required for conviction of the general intent offence under s. 445(a) with which he has been charged.

77 Accordingly, I convict Mr. Dominic of wilfully and without lawful excuse killing Ms. Pete's dog, contrary to s. 445(a) (as it then was) of the *Criminal Code.*

T.S. WOODS PROV. CT. J.
