R. v. Presnail, 2000 ABPC 61

Date: 20000428
Docket: 90557166P10101,0102

IN THE PROVINCIAL COURT OF ALBERTA
CRIMINAL DIVISION

2000 ABPC 61 (CanLII)

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MARK DEREK PRESNAIL

REASONS FOR JUDGMENT OF THE HONOURABLE JUDGE A. A. FRADSHAM

Counsel: G. E. Haight for the Crown
J. M. Blumer for the accused

INTRODUCTION OF CHARGES AND ISSUES

[1] The accused is charged that he:

> "on or about the 7th day of March, 1999, at or near Calgary, Alberta, did wilfully and without lawful excuse kill, maim, wound, poison or injure a cat that was kept for a lawful purpose, contrary to section 445(a) of the Criminal Code of Canada", and that he:
>
> "on or about the 7th day of March, 1999, at or near Calgary, Alberta, did unlawfully and wilfully cause unnecessary pain, suffering or injury to an animal or bird, to wit: a cat, contrary to section 446(1)(a) of the Criminal Code of Canada."

[2] The issues to be resolved relate to (1) making findings of fact from the trial evidence; (2) determining the meaning of the words "maim", "wound", "injure", and the phrase "wilfully and without lawful excuse" as they are used in section 445(a) of the Criminal Code; and (3) determining the meaning of the phrase "unlawfully and wilfully cause unnecessary pain, suffering or injury to an animal" as it is used in section 446(1)(a) of the Criminal Code.

FINDINGS OF FACT

[3] On March 7, 1999, the accused, a woman named Hailey Spates, and a cat named Cleo lived together in apartment 301 - 1626 - 14 Avenue, S. W., Calgary. The relationship between the accused and Ms. Spates was turbulent, and Cleo had become such a point of contention that she was soon to be taken to an animal shelter. Cleo belonged to Ms. Spates.

[4] At 5 A.M. that morning, the accused, who the night before had gone drinking with his brother and some friends, returned home and woke Ms. Spates. Not surprisingly, they ended up in a quarrel. The accused decided that he would sleep on the living room couch because, in his words, "I didn't want to have nothing to do with her." As he was making up his make-shift bed, he discovered that Cleo had urinated and defecated on the couch.

[5] The accused's reaction to this discovery is a matter of some dispute. At trial, the accused testified that he rubbed the cat's nose in the faeces for training purposes (getting scratched in the process), and put the cat on the apartment's balcony. His evidence was that he then commenced cleaning the couch, and shortly thereafter Ms. Spates came into the living room enquiring as to the location of her cat. A discussion ensued, and it was determined that the cat was now on the lawn in front of the apartment building. The accused says that it must have jumped as he had known it to do before.

[6] The theory of the Crown is that the accused threw the cat off the balcony. The Crown relies on evidence of the landlady (Ms. May Phillips) who lived one floor directly below the accused's apartment. She said she saw what she thought was a cat drop by her window shortly after hearing sounds of an argument coming from the accused's apartment. I do not find Ms. Phillips' evidence on this point particularly helpful because she admits it was a motion she caught out of the corner of her eye. It does not assist me in determining whether the cat jumped or was thrown.

[7] However, there is evidence which does permit me to conclude beyond a reasonable doubt, and I do, that the accused threw the cat off the balcony. I make this finding of fact relying on several portions of the evidence:

(1) The injury suffered by the cat (which I will describe later) is consistent with the cat falling from the distance from the balcony in an uncontrolled fashion.

(2) The accused later told the police: "The cat was on the counter. It scratched me and bit me twice. I lost it. I admit it. I lost it. I chucked it against the wall and threw it outside. What would you guys do?" He also said to the attending officers: "I admit it. I tried to break the cat's neck. I admit that.....I'm the boss and it's called animal instinct." The accused testified that he was goaded into saying those things, and that his comments were meant to be sarcastic. I do not believe him. I accept that he said those things, and that he was not being sarcastic at all. I am of the view that he was making truthful admissions to the officers.

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(3) The accused testified that Cleo would often jump from the balcony to either the ground below, or to the Phillips' balcony below. Indeed he said this occurred twice a week. He said that when the cat jumped onto the Phillips' balcony, Mr. Phillips would sometimes hand the cat back up to the accused with a friendly comment. However, Mr. Phillips testified that he had never seen the cat except on the day it moved into the apartment. I accept the evidence of Mr. Phillips. I disbelieve the accused, and do not believe that the cat was in the habit of jumping from the balcony.

[8] I am satisfied that when the accused "threw the cat outside", it went over the balcony, and fell the three floors to the ground below.

[9] The accused testified that he went downstairs to retrieve the cat because Ms. Spates was concerned that "something might happen" to the cat. He said the cat was an indoor cat, and in fact had been involved in a fight with another cat just the night before. The accused said that Cleo had been cut in that fight and was "beaten up pretty bad". However, when pressed in cross-examination (a very able cross-examination, I might observe), the accused said the cat "wasn't seriously injured" in the fight, and that "it wasn't as bad as it looked." I do not believe the accused's evidence that he was going down to rescue the cat because of a concern for it.

[10] The accused did go outside to the cat. He says that he put his foot on the cat "like a gas pedal" so that he could pick it up. He described his actions in his examination-in-chief:

"A Well, I went downstairs and there was the cat sitting right beside the front door because our back balcony is matched with the front door. As soon as I opened the front door, she was already -- like she -- when I looked at her she was no longer in the same position. She walked over into the street, like walked towards the street.

So I walked -- I was walking towards her and I was calling her name. She stopped and she just looked at me. I then went down to pick her up and she started clawing my arms again when I was picking her up. Like she started swiping at my arms and she actually got me a couple times.

So I kind of stepped back and she was still sitting there. And I was cursing because it didn't feel too good. But what I did is I took my foot and I placed it on the side of her chest here because she was lying kind of like -- sitting like this with her back facing this way and she was kind of sitting kind of towards me, but she wasn't, if you know what I mean. Like she wasn't sitting directly in front of me but she was siting on an angle looking at me and turning her head looking at me.

So I put my foot like -- kind of like a gas pedal thing, put my foot like that

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to keep her there. And I reached down and she clawed me again. She turned her whole body around when she was on her back and she started clawing my hands when I tried picking her up. So I moved back and she moved forward.

Q Okay, what was the point of your putting your foot on her?
A Well so she would -- because I had boots on so she could just claw my boots, do nothing, and then I can grab her by scruff of the neck --

Q Okay.
A -- and nothing would happen.

Q And why did you intend to grab her by the scruff of the neck?
A Because there was no other way I could have grabbed her.

Q Okay. Do you have any recollection of what you were wearing clothing-wise?
A Yes. I -- yeah I do.

Q Can you tell us please.
A I had a jean -- or jeans on, a jean jacket, black shirt, and my big boots.

Q Okay. And so you're -- you have told the Court that you put your foot on --
A On the cat.

Q -- on the cat.
A To brace it so it wouldn't -- so it couldn't scratch me.

Q Okay.
A But I didn't do it hard enough obviously because she managed to turn herself around and scratch me again.

Q And what happened after that?
A I tried it again. She did it again. And -- and but this time when she did it again I kind of rolled my foot towards her and she rolled this way, like rolled forward. And I put my foot on her again, and then I was -- I managed to grab her by the back because she was then lying on her stomach, like laying on all fours lying down. I then grabbed her by the scruff of the neck."

[11] However, some of his actions were seen by May Phillips, and her husband, Robert Phillips. I find that Mr. Phillips' evidence is reliable. Ms. Phillips tended to "fill in blanks" in her evidence, and I am not confident in relying on it for specific detail. I do not say these

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things critically. I do not doubt her sincerity, but I have concerns about reliability. However, Mr. Phillips evidence was direct, and given in a fair, even-handed manner. He was unshaken in a thorough cross-examination. Mr. Phillips testified that he saw the accused kick the cat once with enough force to move it a "couple" of feet. Again, the injuries suffered by the cat were consistent with such a kick. I accept Mr. Phillips' evidence, and find that the accused kicked the cat when he came upon it. He then picked up the cat, and went west on 14th Street. In the words of Mr. Phillips: "...I saw him kick a cat one time and then I saw him just immediately thereafter swoop down and pick up the cat and head west on 14th Avenue, carrying the cat, which I thought was -- it looked very, very limp, just carrying it like this...." When asked how the accused was carrying the cat, Mr. Phillips said: "Just like you'd hold a towel in one hand like that, I don't know if it was by the scruff of the neck or upside down, but it was just a limp cat."

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[12] The accused testified that once he had the cat, he headed for the back of the apartment building because that was the door for which his key worked. He said that the cat "grabbed onto my shirt and literally ran up my shirt and jumped off the back of my shirt...", and at that point he abandoned any attempt to retrieve the cat. His evidence is that he then went upstairs to clean up his bleeding arms, back, and shoulders. He described his injuries as follows:

"Q No, no, how are your arms at the point that you finally picked up the cat?
A Oh, how are my arms. I didn't even look at them.

Q Didn't even look at them?
A No, because I was to busy picking up the cat, hearing Mae yelling, and I'm saying there's nothing to be worried about, and I walk around -- the first time I actually looked at my hands was when I got upstairs -- I was going up the stairs, I was looking at my -- in my wrist and forearms, and right here.

Q And how were they at that point?
A How were they at that -- they were bleeding quite a bit.

Q Profusely?
A I wouldn't say profusely but there was a steady flow.

Q Steady flow?
A Like steadily -- steadily drips coming out.

Q Lots of drips.
A Like my whole hand was turning red. Like the whole hand was covered in blood and my whole forearm.

Q And sorry, at what -- when was it that you noticed that?
A When I was going up the stairs.

Q After you'd let the cat go.
A After the cat jumped off me, yes.

Q Okay. Probably feel the -- the blood coming off your arms could you?
A No, actually I -- when I was walking I just looked at them because I could feel the pain. It's like a burning thing and I could feel it swelling up like crazy."

[13] His evidence was that if he was scratched by the cat he would suffer an allergic reaction evidenced by swelling. Yet, the police who ultimately attended looked at his arms, but made no mention in their evidence of swelling. Constable Brooks gave the following evidence about the injuries to the accused:

"Q All right. And I'm sorry, at any point in time did you notice any apparent injuries with respect to the accused?
A Yes I did. I noted there was scratches on the accused's both inner arms, approximately three scratches on the right forearm and approximately two scratches on his left forearm.

Q All right. Can you describe -- and I'm sorry, what time was it that you noted that?
A It would have been approximately -- right when I dealt with him, approximately 0725. It would have been 15 minutes after the time that we attended.

Q All right.
A Approximately 0725.

Q Was there any -- were these scratches bleeding at all or was there any blood emanating from them?
A No, they were not, they were just scratches."

[14] I find that the accused significantly exaggerated his injuries in his evidence. His evidence is replete with such exaggerations. He earlier said that he would often bathe the cat. It seems very odd that someone who suffered such allergic reactions to the cat would be the one to bathe it. Though the bathing of the cat may be logical, it is very odd that the person for whom contact with the cat is so traumatic would be the one to have such close contact. This is particularly so when the cat did not belong to him, and he was not fond of it. I find his evidence inconsistent. He has tried to portray himself as both a concerned care-giver of the cat, and a victim of his allergic reactions to it. Though that might be the case with some people, I do not find it to be the case here. The accused exaggerated his injuries suffered on March 7th, and much of his other evidence. It is generally unreliable evidence.

[15] The accused and Ms. Spates then attended at the Phillips' apartment because of

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concerns about May Phillips' reaction to what she thought she had seen the accused do to the cat. She was of the view that the accused had thrown the cat down from his apartment, and then kicked it several times. Though not relying on her evidence, I have found that she was generally correct with the exception of the number of kicks administered by the accused. The accused believed that he and Ms. Spates needed to talk to May because "she's freaking out". During the ensuing conversation with Robert and May Phillips, oral notice to quit was given to the accused and Ms. Spates. Ms. Spates stayed in the Phillips' apartment (they were much more sympathetic to her plight), and the accused left. He went to a nearby convenience store to purchase something to eat.

[16] The police had been called, most likely by Mr. Phillips on instructions from his wife. The complaint was communicated to field officers as a "domestic" complaint, and they responded promptly, arriving at 6:46 A.M. Indeed, three officers attended; Constables Brooks and Plamondon, followed by Constable Brighton. When they received no response at apartment 301, they attended the Phillips' apartment where they spoke to the Phillips and Ms. Spates.

[17] Ms. Spates took the officers back to apartment 301, and gave them permission to enter and search the premises. The officers noted a small amount of blood on the hallway wall, and blood and what appeared to be cat hair in the bath tub. Constable Brighton described the blood in the tub as follows:

> "Q And give us some idea as to the quantity in the bathtub, was it just a little spot or what?
> A No, it's approximately about a foot in diameter of blood and to me it appeared like there was cat pad prints, the pads on the bottom of cat feet, it appeared there was prints from cat pads in the bathtub."

[18] As the officers were looking for the accused (as a result of information received from Ms. Spates), and since he was not in the apartment, Constable Brighton went outside to look for him and the cat. The officer exited the apartment building by the back door and, when he was about to leave the parking area, noted a man walking towards the building. The officer asked the man his name. The man he spoke to was the accused. Constable Brighton described what then happened as follows:

> "Q MR. HAIGHT: You say you questioned him?
> A Yes, I asked him his name.
>
> Q All right.
> A He indicated he was Marc Presnail.
>
> Q What conversation if any occurs at that point?
> A I asked him where the cat was, and he indicated the cat was out back. I asked him if the cat was dead and he said, 'Yeah, probably.'

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Q All right. Can you tell us why, or what purpose -- for what purpose did you ask the question 'where is the cat' first of all?
A Same reason as I stated before, basically concerned for the safety of the cat and to see if it was severely injured, if we could assist it and get it to the S.P.C.A. or Animal Control.

Q All right. And how about the following question, 'Is it dead?'
A Basically to find out where the cat was, and for the safety of the cat.

Q All right. But the question as to whether it was dead or not, what was the purpose of that question?
A Just concern for the cat --

Q All right.
A -- basically. Yeah.

Q So you say 'where's the cat', and what does the accused answer?
A 'It's out back.'

Q All right. Did he gesture at all?
A Not -- no, not from what I recall no.

Q And then the conversation is?
A 'Is it dead?'

Q And the answer?
A 'Yeah, probably.'

Q What if anything occurs then?
A At that point I arrested Mr. Presnail for cruelty to animals."

[19] Constable Brighton took the accused back to apartment 301. The accused was in handcuffs, and was seated in the apartment while an appearance notice was prepared. Constable Brighton testified that after the accused was informed of his section 10(b) Charter rights, and given the standard police caution, the accused made a number of spontaneous remarks. I accept the officers' evidence about what the accused said. Indeed, the accused, for the most part, confirms their evidence as to what he said, though he says he was speaking sarcastically (which I do not believe). Constable Brighton gave the following evidence:

"Q MR. HAIGHT: Yes. The charter and caution happens. What if anything is said in response to the charter and caution?
A The accused states, 'I admit it. I tried to break its neck, put it out of its misery. It attacked me for no reason.'

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He further gets into a story that he arrived home from work I believe it was, indicates that the cat -- 'It shit and puked on the floor so I rubbed its nose in it. It just attacked me.'

Q This is the accused speaking?
A Yes it is.

Q Anything else said at that point?
A Yeah, he further -- further indicates, 'The cat was on the counter.' He went to get some water. 'It scratched me and bit me twice. I lost it. I admit it. I lost it. I chucked it against the wall and threw it outside. What would you guys do?'

Q While this being said by the police -- or pardon me, by the accused, was there any questioning going on?
A As far as -- as far as myself goes?

Q Just generally if you could tell us what other conversation was occurring besides the accused saying these things?
A Constable Brooks had asked the accused if the cat was bleeding from anywhere.

Q At what point did he say that?
A That was later on after the charter and caution, after the accused had made the previous statements.

Q Yes, what happened -- sorry, what was said?
A Constable Brooks asked, 'was the cat bleeding from anywhere?' 'Yeah, it was bleeding from the nose.'
Question, 'Anywhere else?' Answer, "just the nose. The cat did something to my arm.'

Q Who is speaking at this point?
A This is the accused speaking.

Q Yes.
A 'The cat did something to my arm. Damn rights I'm going to take it on. It's called animal instinct. I'll show him who is boss.'

Q While the accused is saying this, what was his demeanour like?
A The accused was angry at the -- at the attending officers."

[20] The accused was issued his appearance notice, and the officers left. Constables Brighton and Plamondon took one last look for the cat. They noted a trail of blood behind the

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apartment building leading into a yard across the alley. There were cat prints in blood on a door in that yard, and blood on the mat at that door. The officers were unsuccessful in locating the cat, and they left at approximately 8:10 A.M.

[21] At approximately 2 P.M. that day, Mr. Phillips was told of a cat found in a garbage dumpster in the alley by the apartment building. He attended the dumpster, and found Cleo half way down the dumpster. The cat had a blood covered face, and was making what Mr. Phillips described as a "sort of gurgling purring sound". He got a towel to cover the cat, but decided against moving it as he was concerned about causing it further injury. The Calgary Humane Society was called, and a humane worker (Ms. Sandra Bitner), and Constables Plamondon and Brooks attended. Ms. Bitner arrived at approximately 2:30 P.M. and found Mr. Phillips and the police officers already in attendance.

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[22] Ms. Bitner described what she saw, and did, as follows:

> "Q All right. And I'm sorry, this was in the dumpster that --
> A Yes.
>
> Q -- you saw this animal?
> A Yes.
>
> Q Can you describe what you noted with respect to the animal once you saw it?
> A The animal was so far wedged I couldn't determine what was – like I mean the animal was alive. I knew that right away because she looked up at me. But she was so far wedged in and under all this garbage and stuff I couldn't get to her right away. So I started to – to move the boxes and the debris around her and noticed that she had slid so far down that it was going to be even more difficult.
>
> And she had -- she had swelling and bruising and blood on her face. And she had blood on her chest. And she was -- she was -- she looked like she was sore so I wanted to be as delicate with her as possible. So I moved everything around. And then I managed to just reach in and scoop -- scoop the animal up and then put it down on the ground to see just to what extent was really wrong with this animal.
>
> Q Okay. And what did you find when you did that?
> A She could -- she could weight bear so that was -- she could hold her weight on all four paws, although one paw she held up and tucked in underneath her quite tightly, and that her abdomen had been quite well scuffed up, and that she had just general abrasions on her face and on her stomach. And that there was just dry blood on her fur.

Q Where on her fur?
A Across her face, across one paw, and on her abdomen.

Q Was the cat apparently conscious at this point?
A Yes. Yeah, she was -- she was alert but not overly responsive."

[23] The boxes in the dumpster were loose, cardboard boxes, and they were the only thing pressing against the cat. From the evidence from the attending veterinarian (which I will relate shortly), I am completely satisfied that the injuries suffered by the cat were not caused by the contents of the dumpster.

[24] Ms. Bitner took the cat to the Calgary North Emergency Veterinary Clinic where it was attended to by Corinne Chapman, a doctor of veterinary medicine. Dr. Chapman, whose evidence I accept, testified that Cleo was a female, long-haired, tabby, domestic cat of less than one year of age. She gave the following evidence about her examination of the cat:

"Q All right. Can you tell us please what you noticed firstly with respect to its apparent condition?
A The first things that were noted were the obvious bruising over the right side of her face. She had nasal discharge, bloody nasal discharge coming out of the right nares Her right eye had some scleral hemmorhage which is the white part of the eye, around it. The actual facial tissue itself was bruised and swollen. Her right ear was swollen as well and quite red. And there was -- she looked like she'd been a little bit wet almost I think, just kind of -- from I guess her experience in the garbage dumpster but she -- her coat itself was a little bit ragged.

Q How did it seem in terms of its temperament or demeanour?
A She was pretty shocky when I saw her, as far as most cats go that have been through some sort of trauma, she -- her -- she was alert and responsive. She was able to bear weight on all four feet et cetera, but she wasn't -- was fairly limp and -- and fearful. I mean she didn't exactly want to be picked up. And when I tried to pick her up to take her to the back she was painful in her chest.

Q How could you tell that?
A When I pick the cat up, most cats, unless they're really really afraid or vicious, will just sit in your arms. And with her she wanted to sit in my arms but she was trying to re-orient herself to get comfortable.

Q All right. What happens next please, what do you do next?
A The next thing that we did is we took her to the back and took some chest films, some pelvic films, and all four feet. We took all four legs, x-rays of all four legs, just to make sure that there was no evidence of

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fracture.

Q And was there?
A No. No. She was amazingly in all -- she was in fine form for --

Q All right.
A -- her experience. Her -- I should say though that her -- I believe it was her right cranial lung lobe was slightly deflated. There was evidence of something called pneumo-thorax which is not a pneumonia, it's just her -- from blunt trauma, the lung itself had collapsed slightly, and there was some air in the cavity outside of the lung.

Q All right. You say one of the lungs had slightly collapsed.
A Yeah.

Q All right.
A On her right side.

Q And I'm sorry you said this would be from blunt trauma?
A Yes. It is the only way that it can occur.

Q Anything else about the lung aside from the fact that it was collapsed?
A There was a slight amount of fluid build-up which can happen with again blunt trauma or just mere shock, or something to that effect. But it wasn't excessive. It was -- it was just a small amount. And it hadn't effected her breathing.

Q Any other apparent injuries that you noted with respect to this cat?
A All four feet, all of her claws were scuffed right down to the quicks. And again it's something I only notice with blunt trauma, cat being hit by a car, where they actually grab onto gravel of some kind or some sort of abrasive surface, and usually they're trying to get away or -- from being hit and skidding.

Q Okay. Just so I can understand that.
A Yes.

Q You say that's front blunt trauma. Is that direct blunt trauma then to the -- to the --
A Oh sorry, no, from a cat being hit by something or -- or having some sort of blunt trauma, they are either trying to get away on an abrasive surface and their feet grab on to try and get away, or they are pushed and they skid somehow.

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Q All right. And was that all four or just some?
A All four, yeah.

Q How long was the cat kept at your clinic?
A It was there for three days I believe and four nights.

Q All right. After the first day did you notice any other apparent injuries or anything unusual with respect to this cat?
A Yeah, by the -- I think it was her second day when she was staying with us, when she would eat she would growl, and the only time you see a cat growl at the same time they're eating is with some sort of jaw injury. So all I could think of was that she didn't have any evidence of a facture in her jaw, but that she has a bit of muscle trauma or muscle pain because she was growling, but still able to eat quite well.

Q What eventually happened to the cat?
A She went to the S.P.C.A.

Q All right.
A I guess the fourth day."

[25] Dr. Chapman estimated that Cleo would take three to four weeks to fully recover.

[26] Dr. Chapman testified that the injuries suffered by the cat were caused by blunt trauma, and that either falling from the apartment balcony, or being kicked could have caused the bruising, and the lung collapse. The scuffing of the nails down to the quick was consistent with the cat being kicked. Dr. Chapman testified that a fight with another animal could possibly have caused the injuries seen on Cleo. However, she clearly did not think that such a fight was the likely cause. Given the evidence before me, and the facts I have found from that evidence, I am satisfied beyond a reasonable doubt that all the injuries suffered by Cleo, and noted by Dr. Chapman, were the result of the actions of the accused (throwing the cat from the apartment to the ground below, and kicking the cat thereafter). The accused testified that any bleeding from the nose of the cat may have resulted from him rubbing the cat's nose in its faeces. However, he also said that he did not apply much pressure in that manoeuver. I do not believe that the blood from the nose resulted from anything other than the fall from the apartment, and the accused's assault on the cat thereafter.

[27] In summary, I find that the accused threw the cat against the wall in the apartment, and then he threw it from apartment 301 to the ground below. He went downstairs, and outside, where he kicked the cat. On his own admission, he, at some point, tried to break its neck.

LAW AND ANALYSIS

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COUNT 1

[28] In count 1, the accused is charged with wilfully and without lawful excuse killing, maiming, wounding, poisoning, or injuring a cat that was kept for a lawful purpose. Several issues about the elements of the alleged offence arise, and I will deal with them separately.

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Lawful purpose

[29] Was this cat kept for a lawful purpose? Cleo was the house pet of Ms. Spates. The degree of custody and control of the cat required to find that the cat was "kept" clearly existed in this case: R. v. Deschamps (1978) 43 C.C.C. (2d) 45 (Ont. Prov. Ct.). There is no doubt that the cat was kept for a lawful purpose.

Kill

[30] It is equally clear that the accused did not kill, or poison the cat.

Wilfully and without lawful excuse

[31] Did he maim, wound, or injure it, and, if so, did he do so wilfully, and without lawful excuse?

[32] The accused made it clear that the cat belonged to Ms. Spates. At one point during his cross-examination, when being questioned about his allegation that the cat had been injured in a fight, he was asked: "And being a responsible and loving cat owner you thought maybe we [Ms. Spates and the accused] should take it to the veterinarian?" The accused replied: "I'm not a cat owner." I am fully satisfied that the accused had no proprietary interest in the cat. I am also fully satisfied that Ms. Spates, as the cat's owner, did not authorize the accused's acts towards the cat. I do not accept that the accused was in any way defending himself from the cat when he dealt with it as I have found. If anything, his unauthorized acts towards the cat caused it to try to defend itself. Consequently, if the accused maimed, wounded, or injured the cat, he did so wilfully, and without lawful excuse.

Maim

[33] As I said in R. v. D.L. (1999) 242 A.R. 357 at 360, "I take 'maim' in s. 445(a) to mean the same that it does in s. 244 [i.e.: to render the victim less able to defend him or herself: R. v. Schultz (1962), 133 C.C.C. 174 (Alta. C.A.); R. v. Innes and Brotchie (1972), 7 C.C.C. (2d) 544 (B.C.C.A.)]."

[34] The condition of being "less able to defend" one's self must be permanent (the facts in R. v. D.L., *supra*, were such that the permanence of the condition was not in issue). In Holden

v. Lancashire Justices [1998] E.W.J. No. 1125 (England and Wales, High Court of Justice, Queen's Bench Division), the Court discussed the term "maim" in relation to a charge under section 5(1)(d) of the Wildlife and Countryside Act 1981 (Imp.). In that case, the accused used a bird known as a jackdaw as a decoy to attract other jackdaws with a view to destroying them (they were considered pests). He possessed a licence to use the bird as a decoy, and the destruction of the birds so attracted was permitted in law.

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[35] The allegation was that the accused had used a decoy bird which was either "blind, maimed or injured" which was contrary to the legislation. The Crown submitted that the accused had maimed the decoy bird by clipping its wings so that it could not fly. However, clipped wings grow back after the bird's next molt. The issue became: did clipping the bird's wings maim the bird?

[36] Rougier, J. said, at paragraphs 10-14:

> "Therefore, to put the matter shortly, the whole point of this appeal centres on what is the correct definition of the word 'maimed'. As my Lord pointed out during the course of argument, maiming was, at any rate in the old days, a common-law (sic) offence.
>
> We were helpfully referred to the case of *R v Jeans* I Car. & Kir 539 where the Defendant was prosecuted under section 16 of the statute of 1827, which provided:
>
> > 'That if any Person shall unlawfully and maliciously kill, maim, or wound any Cattle, every such Offender shall be guilty of Felony, and being convicted thereof, shall be liable, at the Discretion of the Court, to be transported beyond the Seas for Life, or for any Term not less than Seven Years, or to be imprisoned for any Term not exceeding Four Years; and [this must have made the victim's mouths water], if a Male, to be once, twice or thrice publicly or privately whipped ...'
>
> The facts of the case in front of the learned judge were such that the injury, in this instance to a horse, had been declared to be one which, in the course of time, would heal. With admirable brevity Wightman J gave his decision by saying:
>
> > 'There is no such permanent injury inflicted on the animal in this case as will support the count for maiming. The prisoner must be acquitted.'
>
> We have not been provided with any definition, nor indeed any case, which suggests that that meaning of the word has, in any way, been altered or that any

> statute has provided a contrary definition. In those circumstances, in my opinion the word 'maim' does connote some permanent deprivation of some member or some permanent mutilation or crippling.
>
> If we now consider the situation as at the time named in the information, there were ten jackdaws who had their wings clipped. In the fullness of time, if nature had been allowed to take its course, those wings would have regrown. It is possible that the Defendant's licence might have been withdrawn. He might have had a change of heart and spared some of the jackdaws, or he might have thought that they were better used in some other capacity. As already mentioned, the justices had to concentrate their minds on the situation at the time. In those circumstances, in my opinion the birds were not maimed within the meaning of the Act and, therefore, the Defendant was wrongly convicted and this appeal should be allowed."

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[37] Lord Justice Brooke came to the same conclusion. He provided a more detailed, historical analysis of the term "maim" in the context of British animal welfare legislation, and, as I am of the view that it accurately defines the term "maim" as it is found in section 445(a) of our Criminal Code, I will take the liberty of quoting it at length. His Lordship said at paragraphs 15-20:

> "For many centuries for the common-law (sic) offence of maim, only a man, as opposed to a woman or jackdaw, might have been a victim of this offence. In earlier times writers of English criminal law were astute to distinguish between acts that permanently disabled and weakened a man rendering him less able in fighting and acts which merely disfigured him. The former were maims and the latter were not.
>
> Over many centuries of English common-law(sic) it was agreed that it was a maim to cut off disable or weaken an arm or a foot. According to Blackstone's Commentaries, it was also agreed that it was a maim to deprive a man of an eye, foretooth or:
>
> > 'those parts the loss of which in all animals abates their courage.'
> >
> > (See 4 Blackstone's Commentaries 205.)
>
> However, it was also accepted that it was not a maim to cut off a jaw tooth, an ear or nose, since such injuries were said not to affect a man's capacity for fighting. We are in a fairly esoteric corner of the law in this context. Bracton explained earlier that it was a maim to break a man's incisor teeth because 'such teeth are of great assistance in winning a fight'. (Bracton On the Laws and Customs of England, volume 2, page 410).

> As I have said, it was an essential ingredient of maim at common-law (sic) that the injury, which constituted the main, should be permanent. In 3 Blackstone's Commentaries at page 121, a maim is defined, from the point of view of a civil action for damages as:
>
> > 'a battery attended with this aggravating circumstance, that thereby the party injured is for ever disabled from making so good a defence against future external injuries, as he otherwise might have done.'
>
> This requirement of permanency in the injuries that were inflicted was carried forward by Wightman J in *R v Richard Jeans* [1844] 1 Car & K Reports 539 when he was concerned with the statutory offence of feloniously maiming a horse contrary to section 16 of the Malicious Damage Act 1827. In that case the Defendant had pulled off part of a horse's tongue, but the wound had healed and it was proved that the horse was able to work as well as before. The only lasting inconvenience from the injury to the tip of its tongue was that it could not eat its corn quite as fast as before. The Defendant was found not guilty, as Rougier J has said, following the judge's ruling that there was no such permanent injury in the case as would support the count for maiming.
>
> I am quite satisfied, for the reasons given by Rougier J, that the concept of permanent injury is inherent in the word 'maim' as found in section 5 of the Wildlife and Countryside Act 1981."

[38] The cat in the case at Bar suffered significant injuries, but they did not permanently render the cat less able to defend itself. Once the injuries healed, the cat would have the same defensive capabilities as before. The evidence of Dr. Chapman as to the ability of cats to heal was as follows:

> "Q All right. And Doctor, earlier you used the adverb 'amazingly' in describing the fact that the cat looked like it was going to recover.
> A Mmm hmm.
>
> Q Can you describe why you say 'amazingly'?
> A Well for the kind of trauma that she must have endured to cause the chest -- the lung to collapse that much, and the -- the shock that she was in, and all of the bruising over her -- the right side of her head and her chest, I'm always amazed at how well cats do when they are injured.
>
> Q All right.
> A And they do recover a lot faster than most animals."

As it was, the cat was released to the S.P.C.A. in four days. There was no permanence to the

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injuries inflicted on Cleo. Accordingly, I cannot find that the accused "maimed" the cat as that term is used in section 445 (a) of the Code.

Wound

[39] Did the accused "wound" the cat? I am of the view that the word "wound" in section 445(a) bears the same meaning as that word does when it appears in sections 244 and 268. In R. v. Littletent (1985) 17 C.C.C. (3d) 520 (Alta. C.A.), Moir, J.A., speaking for the Court, said at p. 521: "...the authorities clearly show that a breaking of the skin is necessary to constitute 'wounding'."

[40] A more complete summary of the law relating to "wounding" is found in Volume 11 of Halsbury's Laws of England, 4th edition, (Lord Hailsham of St. Marylebone), (Butterworths, London, 1976). At paragraph 1199 (pp. 637-638) the following is found:

> "In order to constitute a wounding there must be an injury to the person by which the skin is broken; the continuity of the whole skin must be severed, not merely that of the cuticle or upper skin. The skin severed need not, however, be external, but it is not sufficient to prove merely that a flow of blood was caused, unless there is evidence to show where the blood came from. It is not necessary that any instrument should have been used, as an injury caused for instance by a kick may be a wounding."

[41] Finally, unlike "maiming", the word "wound" "does not import a permanent injury": R. v. Haywood (1801) Russ & Ry 16 at 17 (Court of Crown Cases Reserved) (U.K.).

[42] A careful review of Dr. Chapman's evidence discloses that there was a bloody nasal discharge coming from the right nares (nostril). However there is no evidence about a breaking of the skin giving rise to that discharge. As noted in Halsbury's, *supra*, a wound can be internal (i.e. not externally visible), but the mere presence of blood is not enough to prove a wound. The evidence has to show the source of the blood. At times, the court can draw the necessary inference, but inferences must be based on proven facts; otherwise they are no more than speculation. It may be that if the matter had been more fully explored with Dr. Chapman that the evidence would have proven the existence of a "wound". However, the evidence, as presented, does not permit me to draw an inference that the bloody nasal discharge resulted from a "wound" (i.e.: the severance of the continuity of the whole skin).

[43] Accordingly, I cannot find that the accused wounded the cat.

Injure

[44] In my opinion, the word "injure", as it is found in section 445(a), should be given its

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ordinary meaning. The Shorter Oxford English Dictionary on Historical Principles, 3rd edition, (Clarendon Press, Oxford) defines "injure" as "to do hurt, or harm to; to damage; to impair". Collins Dictionary of the English Language, (Collins, London, 1985) defines "injure" as "to cause physical or mental harm or suffering to; hurt or wound".

[45] Applying the common theme of those definitions, the evidence is overwhelming that the accused injured the cat: its face was bruised, there was a bloody, nasal discharge, the right eye had "some scleral haemorrhage", the right ear was swollen and red, its right cranial lung lobe was slightly deflated resulting in a pneumo-thorax, and all its claws were scuffed down to the quicks.

[46] I find that the accused injured the cat. I have previously explained that the cat was kept for a lawful purpose, and that any injury caused by the accused was wilful and without lawful excuse.

[47] Consequently, I find the accused guilty of count 1 [section 445(a)].

COUNT 2

[48] In count 2 the accused is charged with unlawfully and wilfully causing unnecessary suffering or injury to the cat. Again, I shall consider the elements of the alleged offence separately.

Unlawfully and wilfully

[49] There is no doubt that the acts of the accused were wilful as that term is defined in section 429(1). Likewise, the accused had no lawful authority, legal justification, excuse, or colour of right to do what he did [see: section 429(2)].

Unnecessary suffering or injury

[50] I repeat what I said in R. v. D.L., *supra*, at p. 362:

> "It is important to note that determining what is 'unnecessary' requires one to consider what lawful purpose is being effected. In R. v. Amomim [1994] O.J. No. 2824 (Ontario Court of Justice -- Provincial Division), the Honourable Judge Silverman adopted at paragraph 22 the following analysis of Lamer, J.A. (as he then was) in R. v. Menard (1978) 43 C.C.C. (2d) 458 (Que. C.A.) at pp 465-466:
>
> > 'Thus men, by the rule of s. 402(1)(a) [the then applicable Criminal Code section], do not renounce the right given to them by

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> their position as supreme creatures to put animals at their service to satisfy their needs, but impose on themselves a rule of civilization by which they renounce, condemn and repress all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the choice of means employed. "Without necessity" does not mean that man, when a thing is susceptible of causing pain to an animal, must abstain unless it be necessary, but means that man in pursuit of his purposes as a superior being, in the pursuit of his well-being, is obliged not inflict on animals pain, suffering or injury which is not *inevitable* taking into account the purpose sought and the circumstances of the particular case. In effect, even if it not be necessary for man to eat meat and if he could abstain from doing so, as many in fact do, it is the privilege of man to eat it.
>
> Considered in terms of the purpose sought the expression "without necessity" must be interpreted taking into account the privileged position which man occupies in nature.
>
> Considered in terms of the means by which one seeks the purpose which is justified, the expression "without necessity" takes into consideration all the circumstances of the particular case including first the purpose itself, the social priorities, the means available and their accessibility, etc. One does not kill a steer in the same way that one kills a pig. One cannot devote to the euthanasia of animals large sums of money without taking into account social priorities. Suffering which one may reasonably avoid for an animal is not necessary. In my opinion, in 1953-54 the legislator defined "cruelty" for us as being from that time forward the act of causing (in the case in issue), to an animal an injury, pain or suffering that could have been reasonably avoided for it taking into account the purpose and the means employed.'

I take R. v. Amomim, *supra*, and R. v. Menard, *supra*, to stand for the proposition 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 that pain, suffering , or injury was 'unnecessary'."

[51] The accused had no lawful purpose when he threw the cat against the wall. He had no lawful purpose when he threw the cat from the third floor apartment to the ground below. He had no lawful purpose when he kicked it. He had no lawful purpose when he tried to break its

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neck.

[52] The evidence leaves no doubt that the cat felt pain, and was injured as a result of the unlawful acts of the accused. The only possible inference from the evidence is that it suffered. Since all the pain, suffering, and injuries were not in furtherance of a lawful purpose, they were, by definition, “unnecessary”.

[53] I find the accused guilty of count 2 [section 446(1)(a)].

[54] Dated at the City of Calgary, in the Province of Alberta, this 28th day of April, 2000.

A. A. FRADSHAM
A Judge of the Provincial Court of Alberta

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