

Case Name:

R. v. Whelan

Between

**Her Majesty the Queen, and
Christopher Whelan**

[2013] N.J. No. 224

338 Nfld. & P.E.I.R. 242

Docket: 0113A00361

Newfoundland and Labrador Provincial Court
Judicial Centre of St. John's
St. John's, Newfoundland and Labrador

P.J. Goulding Prov. Ct. J.

Heard: April 24 and May 2, 2013.

Oral judgment: May 23, 2013.

(41 paras.)

Criminal law -- Criminal Code offences -- Wilful and forbidden acts in respect of certain property -- Cruelty to animals -- Trial of accused for cruelty to animals -- Accused convicted -- Accused's dog, Lady, was found tied up outside his house in an emaciated state -- Medical evidence showed that Lady's ribs, spine and hip bones were easily visible, and that she had lost 35 per cent of her body weight -- No disease was identified that could have accounted for Lady's condition -- Court rejected defence evidence that Lady was fed regularly -- Accused acknowledged Lady was in need of care, but did not take her to a vet in a timely manner.

Trial of the accused for cruelty to animals. The accused was the owner of a dog, Lady, who was found by passers-by chained to a wire behind the accused's house in an emaciated state. Witnesses described Lady as skeletal and pitiful with her hips and spine protruding. She was shaking and shivering. There was no food for the dog in the area. Both the Humane Society and the police were called by witnesses due to their concern over the dog's condition. The police officer who attended the scene determined that Lady, along with two other dogs on the property, needed to be removed for their safety and well-being. Lady was examined by a vet four or five days after she was apprehended. The vet found Lady was emaciated with ribs, spine and hip bones easily visible. Lady had lost a full layer of body fat and her muscle was wasting. She had lost over 35 per cent of her body weight. No disease was identified which could have accounted for Lady's condition. Defence witnesses testified that Lady was fed regularly. Although they noted her thin condition, they also testified that she did not seem to be in any distress. The accused testified that he had intended to take her to the vet to get checked out and was just waiting for his next paycheque to do so.

HELD: Accused convicted. The defence's evidence that Lady was being fed on a regular basis was not supported by the medical evidence. There was nothing else that could have accounted for her condition aside from not being fed the appropriate amount of food. The fact that the accused acknowledged that Lady was in need of medical care but did not provide that care in a timely manner demonstrated his recklessness. The Court was thus satisfied that the accused's care of Lady was a substantial or marked departure from reasonable care and that his failure to provide Lady with adequate care was a wilful act.

Statutes, Regulations and Rules Cited:

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 429(1), s. 446(1)

Court Summary:

Whelan was convicted of cruelty to animals by failing to provide suitable and adequate food for his dog as per s.446. (1) of the *Criminal Code*. The court accepted the testimony of a veterinarian and other witnesses as to the dog's emaciated condition and rejected his explanation that he had adequately cared for his dog.

Cases cited:

R v. Bennett, 2010 CarswellNfld 379 (NL Prov. Ct.).

R v. Clarke, 2001 CarswellNfld 189 (NL Prov. Ct.).

R. v. Hughes (1978). 34 N.S.R. (2d) 454 (Cty.Ct.).

R. v. Galloro. 2006 ONCJ 263 (CanLII).

R. v. Lifchus (1997), 118 C.C.C. (3d) 1 (SCC).

R v. Starr, [2000] 2 S.C.R. 144.

R. v. W.(D.) (1991), 63 C.C.C. (3d) 397 (Scc).

Statutes cited:

Criminal Code of Canada, R.S.C., 1985, c. C-46.

Counsel:

Sheldon B. Steeves: Counsel for Her Majesty the Queen.

Candace G. Summers: Counsel for the Accused.

EDITED ORAL REASONS FOR JUDGMENT

P.J. GOULDING PROV. CT. J. (orally):--

INTRODUCTION

1 Lady, the dog, was emaciated. Her ribs, spine and hip bones were easily visible from a distance. She had lost a whole layer of body fat and her muscle was wasting. Lady was infested by fleas. Two people independently of each other saw Lady chained to a wire behind her owner's house. They were so alarmed that they each contacted the authorities. One person phoned the Humane Society; the other called the emergency service number 911.

ISSUE

2 At issue in this trial is whether the Crown has proven beyond a reasonable doubt that the accused wilfully failed to provide suitable and adequate food, water, shelter and care for Lady.

THE CROWN EVIDENCE

3 Christopher Whelan (Whelan) owned two dogs: Lady, a Rottweiler mixed breed, and a miniature pinscher. He was also temporarily caring for another dog, a Labrador Retriever. On August 31, 2012, Loretta Carns was standing on his driveway adjacent to her property. She saw Lady who she described as skeletal and pitiful with her hips and spine protruding. Lady winced when she moved closer to pet her. She testified that the "dog was starving, almost dead. It could almost not stand up". When shown photographs of Lady taken shortly after by the police Ms. Carns commented that "the picture is not doing the dog justice when it comes to cruelty". There was no food for the dog in the area. She was so troubled by Lady's condition that she asked Perry Matthews who was working on her property to come over and see the dog. Ms. Carns went to the accused's house but no one was there. She left and called the Humane SOCIety.

4 Mr. Matthews testified that there was no food or water around the chained dog. There was an old dish that he speculated may have been blown there by the wind which may have contained a small amount of rain water. He described the dog as "starved to death", and the bones were protruding through its sides. He stated that the pictures did not adequately illustrate the poor condition of the dog that was shaking and shivering. His seven year old son who was with him at the time became distraught and searched through their truck looking for food for Lady. His son was continuously crying over the condition of the dog. When he learned that Ms. Carns did not know when the Humane Society would be able to come to the residence, he dialed the emergency number 911.

5 The police officer who responded to the call described Lady as being very, very thin. The shape of the dog's ribs and hip bones were clearly visible. The officer went to the house and knocked on the door. The officer noted that the house was filthy with a very strong pet odor. The nephew of the accused, Michael Whelan, told the officer that the accused was the owner of the dog. The accused explained to the officer that the dog's weight fluctuates. He said that he gave the dog a de-wormer pill about one month before and was going to make an appointment with the vet next week when he was paid.

6 The officer noted that Lady cowered and her back legs shook when the accused approached the dog. Based on the poor condition of Lady, the other dogs and the property, the officer determined that the dogs should be removed for their safety and well-being. He took photographs of Lady which were entered at this trial.

7 A volunteer from the Society for the Prevention of Cruelty to Animals (SPCA) took custody of the dogs which were removed from Whelan. She described Lady as "really thin looking" with her bones protruding. She gave the dog edible treats. It appeared to her that Lady was so hungry that she "couldn't get enough to eat". I take this to mean that Lady's hunger could not easily be satisfied. She gave Lady one bowl of food first but then Lady kept going to the garbage looking for more food. Lady was fed a total of two big bowls of dog food on that occasion.

8 Dr. Patricia Ryan, a doctor of veterinary medicine, was declared an expert at this trial. She examined Lady on September 5th and made these findings: emaciated, ribs, spine and hip bones were easily visible from across the room. The ridge along the scapula was prominent. Lady had lost a full layer of body fat and her muscle was wasting. The dog weighed 35 pounds. She determined that an appropriate weight for the dog would be somewhere between 50-55 pounds.

9 She described Lady as having a happy demeanor. She testified that inadequate nutrition or disease would explain

the weight loss. Lady had a dull coat which according to the veterinarian's evidence could be attributed to a disease, inadequate nutrition or poor quality of nutrition. Medical tests were performed and no disease was identified which could account for the dog's weight loss. Dr. Ryan testified that a dog's weight can fluctuate from summer to winter but not to the extent that would leave the bones of the dog palpable. The doctor testified that at the time of the examination there were no signs of dehydration but pointed out that Lady had been cared for in the dog shelter for five days and did not come directly to her from Whelan's residence.

10 The dog was energetic and did not look to be in fear; perhaps a little apprehensive. She did not show signs of any pancreatic condition which might prevent proper digestion. While the owner had mentioned that there was a possibility that Lady had worms, she noted that dogs with this condition are not emaciated. A dog would not be emaciated from worms alone. A recent treatment of worms could have led to some weight loss but it would not account for emaciation. The dog food purportedly given to Lady by the owner was at the low end of the scale of quality nutrition but the veterinarian testified that if a dog is fed adequate amounts of this type of dog food the dog would maintain its weight but it may affect the appearance of the dog's coat. With regards to the amount of dog food which should be given to a dog Dr. Ryan stated that she usually tells clients to feed the dog a little less than what it says on the side of the bag. A dog will generally become overweight if it is fed the amount recommended by the dog food manufacturer which is written on the side of the dog food bag. When the vet saw Lady again about two weeks later she determined that the dog had gained weight. This, she attributed, to the dog being fed the appropriate amount of food at the animal shelter.

THE DEFENCE EVIDENCE

11 Martin Druken, a friend of the accused, testified that the accused was always kind to his dogs and that he fed them. Mr. Druken did notice, however, that Lady was getting "awfully thin" and told the accused. Several days later the dogs were seized.

12 Frank Whelan owned Lady before giving her to his son, the accused, about seven - eight months before she was removed. He testified that Lady seemed to be losing weight before he gave her to the accused. He did not see the accused mistreat Lady at any time. When he noticed she was getting skinny he suggested that the accused bring her to the vet. The accused said he would do so when he received his pay cheque.

13 Michael Whelan, the accused's nephew, helped with feeding Lady. He said she was fed in the morning and the evening. During the summer months she ate outside. He provided an account of her feeding regime and testified that a couple of hours after she ate, Lady's stomach would "blow up" and then quickly go down. This was not accompanied by vomiting or a bowel movement. The accused told him that he thought there was something wrong with Lady and that he was waiting to be paid the following week to pay for a visit to the vet. Michael Whelan testified that she had been given de-worming medication on one occasion. He was not sure how long the accused had owned Lady but thought it could have been six - seven months or two years. He testified that the dog began to get skinny when the dog came into the accused's care.

14 The accused testified that he had Lady for eight months and that she was in good condition when she was first given to him. It was only in the last month that she became noticeably thin. He said that Lady was initially nervous with people but when she was spoken to Lady would wag her tail. One month before she was seized he had given her de-worming medication. She seemed to maintain her weight but was not back to normal. She would vomit occasionally. He gave her a further dose about a week before she was taken from him. He described in his evidence her feeding schedule and that he fed her twice a day in accordance with the directions on the dog food bag. The day she was removed from his property she had been fed at 6:30am. He also stated that he would buy the cheapest dog food but on occasions when he could afford it he would buy a more expensive brand but that this made no difference to the dog's condition. The accused testified that when she ate her stomach would "blow up to normal". He was concerned about her health and was waiting until he received a cheque to bring her to the vet the following Wednesday. The accused testified that Lady would play and was not acting like she was sick. She did not seem to be in pain. He could understand why people who saw the photographs were "taken aback". It was his personal finances which prevented him from bringing

Lady to the vet.

THE LAW

15 Defence counsel provided two cases in the course of her submissions. Both were decisions of Gorman P.C.J. of this Court. They were *R v. Bennett*, [2010] N.J. No. 230, 2010 CarswellNfld 379 (NL Prov. Ct.) and *R v. Clarke*, [2001] N.J. No. 191, 2001 CarswellNfld 189 (NL Prov. Ct.).

16 In *Bennett*, the accused had tied a rope as a temporary measure around his dog's neck when her collar broke. He forgot about the rope and left the dog in the care of another person two weeks later. This person noticed an injury to the dog's neck and contacted the accused who told her he would pay the cost of a visit to the veterinarian. Upon examination the dog's neck had a deep wound which had become infected. The injury was approximately eight days to two weeks old. The dog was otherwise in good condition. Gorman P.C.J. held that by placing the rope around the dog's neck and leaving it there for an extended period of time without checking on it, there was an objectively foreseeable consequence that the dog would be harmed.

17 Two accused were acquitted of cruelty to animals in *Clarke*. A number of dogs either belonging to the Clarkes or being temporarily cared for by them were seized after a volunteer from an agency concerned with animal welfare saw the animals and thought they were not being properly treated. There was evidence, which the trial judge accepted, that the dogs were fed on a regular basis. Some of the dogs that were thin were being cared for by the accused temporarily and he had relied on the dog's owner for advice on their feeding and treatment of their eyes. While the accused's own dog was also thin there was no medical evidence that the dog was necessarily underfed and there was no evidence of dehydration.

18 No case law was submitted by Crown counsel.

19 Section 429(1) of the *Criminal Code* defines "wilfully" as follows:

Wilfully causing event to occur

429. (1) Everyone who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

20 In *R. v. Hughes* (1978), 34 N.S.R. (2d) 454 (Cty.Ct.), O'Hearn C.C.J. stated at p. 457:

The jurisprudence on foreknowledge in this instance does not require jury appreciation in detail of the consequences, but merely an awareness, possibly not too acute, on the part of the perpetrator that he is taking chances, that there is danger of damage of some kind likely to result from his conduct.

21 Section 446(1) provides as follows:

Causing damage or injury

446.(1)Every one commits an offence who

- (a) by wilful neglect causes damage or injury to animals or birds while they are being driven or conveyed; or
- (b) being the owner or the person having the custody or control of a domestic animal

or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

22 Section 446 was discussed in *R. v. Galloro*, 2006 ONCJ 263 (CanLII) at paragraphs 7 and 8:

7. Section 446 imposes upon animal owners various legal duties with respect to care. Wilfully neglecting or failing to comply with those duties is a criminal offence. In assessing whether the provision of food and care was "suitable and adequate" on a criminal standard under s.446, in my view the Crown must prove more than a slight deviation from reasonable care. Evidence of a substantial or marked departure from reasonable care is required to prove the actus reus of the offence in s.446 (1)(c) beyond a reasonable doubt.
8. If the alleged failure to provide adequate care is proved, the court must then assess whether the failure was "wilful". "Wilfully" is defined in s.429 of the *Criminal Code* causing the occurrence of an event by doing or omitting to do an act pursuant to a legal duty, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not. The requirement that the accused's failure be "wilful" involves a subjective test. See: Kent Roach, *Criminal Law 3ed.* Irwin (2004) at p. 157. The reference to recklessness in s.429 also indicates a subjective standard as recklessness requires subjective advertence to the prohibited risk (as described in that section) and can be distinguished from negligence, which requires only that a reasonable person in the accused's circumstances would have recognized the risk. Roach, *Criminal Law 3ed.* at p. 162.

23 The Crown must prove the offence beyond a reasonable doubt. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. It does not involve proof to an absolute certainty. (*R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 (SCC).) Proof beyond a reasonable doubt is "much closer to an absolute certainty than to a balance of probabilities". (*R v. Starr*, [2000] 2 S.C.R. 144 at paragraph 242.)

24 In this trial the accused testified and therefore I am reminded of the principles set out in *R. v. W. (D.)* (1991), 63 CCC (3d) 397 (SCC) at 409 that I am not to confuse belief with doubt. Essentially if I believe the accused's denials, I must acquit. If I do not believe the accused's testimony but still have a reasonable doubt as to his guilt after considering his evidence in the context of the evidence as a whole, I must acquit. However, even if I do not believe the accused I must assess the evidence which I accept, to determine whether I am convinced beyond a reasonable doubt by the evidence of the accused's guilt.

POSITION OF THE PARTIES

25 Crown counsel argues that the accused as the dog's owner had a duty to provide her with adequate care or food. The description of the dog by the veterinarian as emaciated four - five days after she was removed from the accused's property points to the dog being underfed. He submits that the description by the accused's nephew of bloating is inconsistent with the medical evidence. He further argues that neither could the dog having worms result in the dog's extreme weight loss. He asserts that if the dog had been fed according to the dog food bag instructions then this would have resulted in the dog being overweight; not underweight.

26 According to Crown counsel the dog was not thriving. The dog was underweight. Although there was evidence of the accused's intention to bring the dog to the vet there was no evidence led about an appointment having been made. A reasonable person would have taken the dog to the vet. The accused did not meet the legal standard of care.

27 Defence counsel asserted that the descriptions by some witnesses that the dog was near death and trembling are exaggerated. She points out that the doctor noted that the dog did not appear to be in any pain or physical discomfort. Defence counsel argues that the accused was properly treating his dog for worms and that the other dogs in his

household were in good condition. This included the stray dog that the accused was making efforts to care for and locate the owner. She asserts that the defence witnesses all attested to the accused buying dog food and providing bowls of food for his dogs. Witnesses called for the defence also stated that the accused intended to bring the dog to the vet once he could afford to do so. She points to the accused's testimony that the dog had lots of energy and did not seem to be sickly.

28 Counsel for the defence argues that the accused fed the dog with an appropriate amount of dog food with a dog food which is sold in a popular chain store. He provided de-worming medication for his dog. She argues that even if the court is satisfied that the act is made out the accused took all proper care. Applying the principles enunciated in *Lifchus, Starr and W.(D.)*, she further argues that the Crown has not proven the case.

ANALYSIS

29 As trier of fact I can accept all, some or none of what a witness has to say. Inconsistencies with details on unimportant matters are unremarkable -- the human memory is fallible. However, a deliberate falsehood is always serious and could well affect and cloud a witnesses' entire testimony.

30 The evidence proffered by the Crown that Lady was emaciated with no medical cause is sufficiently strong to consider the evidence led by the defence. The evidence that Lady was being fed on a regular basis with a cheaper dog food is not supported by the expert medical evidence. If Lady had been fed in the manner described by the defence witnesses, this could account for her lack of a glossy coat. She may even have been overweight if she was fed the amount of dog food recommended on the package. It could not, however, result in her deplorable state. That Lady may have suffered from worms and was given de-wormed medication does not explain her emaciated condition. According to the medical evidence a dog either having worms or being treated recently for that condition would not cause this extreme amount of weight loss.

31 I reject the defence evidence that Lady was being fed the appropriate amount of food.

32 It is now necessary to assess the entire evidence to determine whether the Crown has proven the actus reus beyond a reasonable doubt.

33 Lady was examined by the veterinarian five days after she had been removed from Whelan. During that time she was at the animal shelter where, presumably, she was given nourishment. She was still 15-20 pounds under weight. She had lost in excess of 35% of her body weight. The evidence of all the witnesses establishes that she was very thin the day she was seized. According to the volunteer from the SPCA, Lady was also very hungry when she was removed from the accused's property. There was no medical condition which was responsible for her weight loss. While there was some testimony from witnesses called by the defence that Lady's stomach would swell after eating and then return to normal, there was no medical abnormality detected either through the full physical examination or the full regime of blood tests which would account for such behaviour. She suffered from no pancreatic condition which would prevent her from keeping her food in her stomach. A couple of weeks later the veterinarian saw Lady at the clinic and noticed that she had gained weight. This confirms to me that Lady would have been healthy if she had been provided with adequate care.

34 I distinguish this case from *Clarke* where the trial judge accepted that the dogs were fed on a regular basis. Further, in this case, unlike in *Clarke*, there is medical evidence to support that Lady was underfed.

35 The Crown witnesses who first saw Lady's condition acted with urgency to try to alleviate her undernourishment. Photographs which were entered into evidence show a dog that is dangerously thin. She had lost a whole layer of body fat and her muscle was wasting. The accused testified that the dog was not in pain or acting as he would expect if the dog was ill. The veterinarian confirmed that a dog which is malnourished would be hungry all of the time. The accused further testified that he was going to take the dog to the vet the following week when he received income because he did not know the cause of her being so thin. One defence witness testified that the dog seemed to be losing weight before

the accused was given the dog. This was about 7-8 months before the dog was removed from the accused's property. Another defence witness testified that the dog started to get thin when the accused got the dog; however, he could not say if this was 6-7 months before the dog was seized or two years. The accused stated that it was only in the last month that she started to get skinny. This inconsistency is troubling. It causes me to disbelieve the accused. On one analysis it could lend support to the Crown theory that the dog was losing weight over a protracted period of time due to inadequate feeding.

36 Whelan told the police officer who attended the scene that he had given de-wormer medication to Lady about one month before she was seized. During his testimony he stated that he had given her the de-wormer medication on two occasions; the first was about one month prior and the second time was one week before she was seized. I find this inconsistency also troubling and it causes me to doubt that the accused is telling the truth. The fact that the other two dogs in the care of the accused were in better condition than Lady does not support defence counsel's assertion that Whelan was properly caring for her. Lady's skeletal condition with no medical explanation can only be attributed to starvation and lack of proper care. His failure to address Lady's condition with urgency is in marked contrast to the Crown witnesses who sought immediate assistance for her. Their behaviour reflects not only their concern but demonstrates that Lady was in distress for a protracted period without proper and basic nutrition.

37 All of this evidence satisfies me beyond a reasonable doubt that the accused's care of Lady was a substantial or marked departure from reasonable care.

38 Now I must consider whether the accused's failure to provide Lady with adequate care was wilful. The accused acknowledged the dog was losing weight. During the trial he maintained that he did not know the reason for her condition but intended to bring her to a vet the following week. I find his explanation incredible. It is impossible that Lady was being properly nourished and for her to have been found in such a deplorable state. It defies the medical evidence; it defies common sense. Even if the accused had delegated the task of feeding Lady from time to time to his nephew, he acknowledged that she needed medical care. His failure to provide it in a timely manner when the dog was in such a desperate state demonstrates his recklessness. The accused must have known the risk. He testified to her playful mood. This is in marked contrast with the evidence of Ms. Carns and Mr. Matthews who saw a dog described as shivering, cold, and starving. The police officer also noted the interaction between Lady and the accused. He observed the dog cowering and her back legs shook when the accused approached. She did not wag her tail in the manner the accused described when she was approached by other people. The police officer also acted with haste to remove Lady from the accused's property.

39 I am satisfied beyond a reasonable doubt that the Crown has proven that the accused's failure to provide Lady with adequate care was a wilful act.

40 Considering all of the evidence I am satisfied that the Crown has proven all of the essential elements of the offence beyond a reasonable doubt.

41 He is convicted.

P.J. GOULDING PROV. CT. J.

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