

ONTARIO COURT OF JUSTICE
(Central East Region)
Newmarket

BETWEEN:

HER MAJESTY THE QUEEN

and

MICHELL SHAND, JOSEPH SHAND

Accused

JUDGEMENT

<i>Counsel for the Crown</i>	Mr. R. Scott
<i>Counsel for the Defence</i>	Mr. H. Doan

KENKEL J.,

Introduction

1. Ms. Shand and her father are charged with three counts of animal cruelty contrary to s.446 of the *Criminal Code* in relation to Ms. Shand's dog.
2. This is a sad case in which an older family dog was neglected by the busy daughter who owned it, and by other family members who were in a financial crisis that led to eviction from their home.
3. The legal issues at trial include:
 - whether either accused wilfully abandoned the dog
 - whether Mr. Shand was an "owner" within the meaning of s.446
 - whether unnecessary suffering was caused by wilful neglect

Abandonment

4. The SPCA was called to the family home after they were evicted. Both counsel agree that the circumstances of the eviction show that the abandonment of the family pets was not voluntary. Count 2 is dismissed.

Owner or Person Having Custody/Control

5. Section 446 prohibits everyone from wilfully causing unnecessary pain, suffering or injury to an animal or bird.¹ It prohibits “owners” or persons having “custody or control” of an animal from permitting unnecessary suffering, and from failing to provide suitable food, water, shelter and care.² There is no evidence here that either accused intentionally caused the dog to suffer pain. The Crown’s case as against both accused is based on wilful neglect by persons who the Crown submits were “owners” or persons having “custody or control”.

6. The defence admitted that Ms. Shand was the owner of the dog in question and that admission was accepted by the Crown.

7. Ms. Shand lived with four other adult members of her family. Although her mother was involved in the feeding and care of the dog, she was not charged with any offence. Mr. Shand’s direct contact with the dog was limited to occasional short walks. On or about the date of the alleged offence, with his personal finances in ruins and eviction pending, the evidence indicates that he did not exercise even that limited level of control.

8. I agree with the Crown that a variety of circumstances might amount to “custody or control” of a domestic pet thus triggering liability under s.446. However, in this case I find that the Crown has failed to prove that Mr. Joseph Shand exercised “custody or control” on or about the date of the alleged offences.

Permits Unnecessary Suffering s.446(1)(a)

9. The Crown submits that Ms. Shand permitted unnecessary pain and suffering to be caused to her dog by wilfully neglecting to provide adequate care.

10. Dr. Baer assessed the dog for the S.P.C.A. and identified a number of issues:

- the dog was overweight
- there was some skin scalding on the thighs from urine
- there were extensive skin sores across the dog’s back and hind quarter
- the nails were overgrown
- it had very poor dental health

11. The dog was overweight, but not grossly obese. The dog's weight was the likely cause of the skin irritation from urine. Urine remaining in folds of the dog's skin caused irritation and would have caused discomfort. Dr. Baer testified that it would take at least a week of constant skin contact with urine to produce the irritation observed.

12. The dog had very poor dental hygiene. Dr. Baer explained that dental decay is a natural process and in part related to the age of the dog, but canine tooth decay can be controlled with hard foods, special "TD" diet, home care and professional cleanings by a vet.

13. The dog's fur was matted, and the nails were overgrown. The photographs marked as exhibits 3A, 3B, and 4 show a series of large open sores on the dog's shoulders, back, and all along the dog's right hind leg. These skin sores resulted from a skin condition that developed underneath the dog's matted fur. Although the sores had crusted, there was infection underneath. The crusted portion of the sores would have been visible to the eye. Dr. Baer testified that the skin condition would have taken several weeks to reach that state.

14. The remainder of the examination showed the dog was otherwise in normal health for its age. It was calm, good-natured, and the doctor did not observe any outward signs of pain.

15. Dr Baer stated that the condition of the dog's skin was her main concern. When treated by the S.P.C.A., the skin problems showed marked improvement within a week. They were fully resolved within two weeks.

16. I accept Dr. Baer's evidence that the irritation caused by urine trapped in the folds of the dogs skin would have caused the dog unnecessary pain or suffering. I also accept Ms. Shand's evidence that her dog experienced discomfort and tried to "itch" or "lick" its back as a result of the skin condition. The remaining legal issue is whether this unnecessary suffering was "wilfully" caused.

Wilful Causation and s.446(1)(a)

17. The Crown must prove that the unnecessary pain or injury alleged in s.446(1)(a) was "wilfully caused" or "wilfully permitted to be caused". The term "wilfully" in this section is subject to a statutory definition,³ as well as a statutory presumption.⁴

18. Section 429 of the *Criminal Code* sets out a definition of "wilfully" applicable to these alleged offences. Under s.429, the Crown must show that

- the accused caused the event alleged
- by act or omission
- knowing that the act/omission would probably cause the occurrence of the event
- reckless as to whether it occurs or not

19. For a thorough analysis of sections 446 and 429, see: *R. v. Clarke* [2001] N.J. No.191 (Nfld. Prov.Ct.)

20. The use of the term “wilfully” and the inclusion of recklessness in the expanded s.429 definition of that word both indicate a subjective element.⁵ “Recklessness requires subjective advertence to the prohibited risk and can be distinguished from negligence, which requires only that a reasonable person in the accused’s circumstances would have recognized the risk.”⁶

21. On a charge under s.446(1)(a), there is also a statutory presumption of wilful causation where there is a failure to exercise reasonable care, subject to “evidence to the contrary”:

Evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering, damage or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering, damage or injury was caused or was permitted to be caused wilfully or was caused by wilful neglect, as the case may be.⁷

22. Evidence to the contrary that is adduced to rebut the presumption in s.446(3) with respect to a charge under s.446(1)(a) must tend to show that the accused did not wilfully cause or permit unnecessary suffering. The standard of proof that must be met to rebut the s.446(3) presumption is reasonable doubt.⁸ Even with the statutory presumption, there is no legal burden on the defence to call evidence. Evidence that leaves a doubt may be called by the defence, or it may be found in the Crown’s evidence.⁹

23. Ms. Shand testified that she noticed a “spot” on her dog’s back. The spot she described is actually a series of sores shown in the photograph marked Exhibit #3B. Ms. Shand was aware that the back sore required treatment and says she tried to medicate the area herself using Polysporin she purchased at a drug store. She stated she “did her best” to monitor and treat the dog’s condition.

24. Ms. Shand’s evidence of regular care wasn’t credible. It was contradicted by her responses in cross-examination, and contradicted by credible external evidence.

25. Dr. Baer testified that the skin sores were visible on initial examination, despite the dog’s matted coat. SPCA Agent Ms. Green also saw scabs and injuries on the dog’s back and right leg without parting the dog’s fur. Considering the size and number of the injuries as photographed, and the evidence of Dr. Baer as corroborated by Ms. Green, I accept that the injuries were visible to anyone in close proximity to the dog.

26. In this context, it is not credible that Ms. Shand noticed but one of the sores on the dog’s back and then applied regular treatment to that one area without noticing the rest of the injuries shown in Exhibits 3-B and 4. In cross-examination, Ms. Shand admitted that she was very busy on or about the date of the alleged offence. She admitted she had little

contact with her dog and was unaware of the extent of the skin sores, the state of its coat, and the length of its nails.

27. I accept that Ms. Shand was aware of the injury at an early stage and I accept her evidence that she was advised by a veterinarian to bring the dog in for treatment. She chose not to follow veterinary advice and she attempted her own remedy. Sadly, the evidence shows she did not even continue that limited effort. The evidence confirms her statements in cross-examination to the effect that she had little or not contact with her dog at the time of the alleged offence:

- the dog's fur was extensively matted showing that the dog had not been brushed for an extended period
- the dog's skin was inflamed by urine scalds, showing that it had not been washed for an extended period
- the dog's teeth were showed extensive decay consistent with poor oral hygiene
- the dog's nails were overgrown

28. The circumstances show a complete absence of basic regular care for the dog. If Ms. Shand had sat down to pet her dog even once during that period she would have immediately seen and felt the extensive injuries.

29. The defence submits that even if Ms. Shand had been aware of the extent of the dog's skin problems, she couldn't have afforded veterinary care. That was not her evidence. Ms. Shand testified that if she had been aware of the full extent of the problem she would have taken her dog to a veterinarian for treatment and make arrangements to pay.

30. The veterinary evidence indicates that the injuries to the dog's skin result from the lack of basic care including brushing the coat and regular bathing. Once the neglect had resulted in sores on the dog's back, Ms. Shand noticed the dog's discomfort as it tried to "itch" and "lick" itself. She became aware of a sore or sores on the back and contacted a veterinarian. She was told to bring the dog in for treatment but ignored that advice. She testified in examination-in-chief that she monitored the dog's injury and did the best she could, but the evidence shows she was busy with work and school and paid little attention to her dog in the weeks leading up to the discovery of the dog by the SPCA.

31. Ms. Shand was:

- aware of at least one open sore on her dog's back
- aware that the injury required regular treatment
- aware that she had been told by a veterinarian to bring the dog in for treatment
- aware that she needed to monitor the injury
- aware that her dog was in discomfort as a result of the skin sores

32. While she did not intend to cause her dog to suffer, I find she was reckless as to whether or not her dog's injury healed, reckless as to the extent of injury to her dog, and reckless as to the suffering that predictably resulted from the lack of proper care.

33. Considering all of the evidence at trial as a whole, I can find no credible evidence that leaves a doubt that the injuries to the dog and the resulting pain and suffering were wilfully caused or permitted to be caused by the accused.

Failure to Provide Suitable Care s.446(1)(c)

34. Ms. Shand is further charged with wilfully failing to provide suitable and adequate care.

35. The definition of "wilfully" in s.429 applies to this offence, but the statutory presumption in s.446(3) does not.

36. Ms. Shand met some of the requirements of care in s.446. Her dog was well fed and had adequate water at all times. It lived indoors with the family and slept on a pillow in the master bedroom.

37. However, as discussed above, on or about the date of the alleged offence the accused was occupied with her own busy life and had little or no contact with her dog. She ignored her dog's injury and the veterinary advice she had been given. The predictable results of her neglect during this period are shown in the photographs taken by the SPCA.

38. The evidence shows Ms. Shand's failure to provide routine care likely caused the skin sores on her dog's back and leg. Had the dog been regularly brushed and washed, the injuries could have been prevented. Even after detecting injury, she continued to fail to provide basic care. She did not treat the injuries beyond an initial attempt at her own remedy. She did not brush her dog, wash it, nor did she trim the dog's nails. She was either reckless or indifferent as to her dog's condition. I find that Ms. Shand failed to provide suitable and adequate care for her dog and that her failure was "wilful" within the meaning of s.429, and s.446(1)(c).

Conclusion

39. All counts as against Mr. Shand are dismissed. Count 2 as against Ms. Shand is dismissed.

40. Considering all of the evidence as a whole, I find that the Crown has proved counts 1 and 3 as against Ms. Shand beyond a reasonable doubt.

41. In this case there is a factual nexus between the two section 446 offences as the same act of the accused underlies both. I will hear submissions from counsel as to whether there is a sufficient nexus between the offences so as to engage the rule against multiple convictions.¹⁰

Delivered at Newmarket,
March 26th, 2007

Hon. Justice Joseph F. Kenkel

¹ *Criminal Code* s.446(1)(a)

² *Criminal Code* s.446(1)(a), s.446(1)(c)

³ *Criminal Code* s.429

⁴ *Criminal Code* s.446(3)

⁵ *R. v. Galloro* [2006] O.J. No.2871 at para.8, Kent Roach, *Criminal Law* 3ed. Irwin (2004) at p.157

⁶ *R. v. Galloro* [2006] O.J. No.2871 at para.8, Kent Roach, *Criminal Law* 3ed. Irwin (2004) at p.162

⁷ *Criminal Code* s.446(3)

⁸ *R. v. Boucher* [2005] S.C.J. No.73

⁹ *R. v. Boucher* [2005] S.C.J. No.73 at para.15

¹⁰ *R. v. Prince* [1986] 2 S.C.R. 40