

*Indexed as:*

**R. v. Schafer**

**Between**

**Her Majesty the Queen, and  
John Schafer**

[2000] O.J. No. 3658

Ontario Court of Justice  
Newmarket, Ontario

**Lampkin J.**

Oral judgment: August 14, 2000.

(37 paras.)

*Animals -- Cruelty to animals -- Animal control -- Rights of property owners against trespassing animals.*

Trial of Schafer for injuring a dog and wilfully causing suffering to the dog. Schafer was sitting across the street from his house at his neighbour's house when he saw a small white poodle run onto his lawn. Schafer went towards the poodle to try to stop it from relieving itself on his property. He waved his arms and made a kicking motion. The dog did not move on. Schafer then picked up the dog. He threw the dog about 15 feet away into the street. The dog did not get up. Three women had walked by and seen the incident. They were not the owners of the dog. Schafer and his neighbour took the dog to a nearby veterinary clinic for assistance. Schafer told the staff what he did. The dog was in a coma. He was transferred to an emergency care facility. The owner was contacted. The veterinarians stated that the dog was forcefully thrown.

HELD: Schafer was convicted for both offences. The owner had an obligation not to allow her dog to trespass on Schafer's property. Schafer had the right to remove the dog from his property. However, he did not take reasonable care to avoid injury in doing so. Schafer intended to throw the dog into the road. Although he was surprised at the injury and took action to remedy the situation, he was either wilfully blind as to the consequences or reckless whether harm and injury would result from throwing the dog. All he had to do was take the dog to the side of the road and put it down.

**Statutes, Regulations and Rules Cited:**

Criminal Code, ss. 429(1), 445(a), 446(1)(a), 446(2), 446(3).

Court Note:

Charges: S. 445(a) Criminal Code - Kill/Injure Animal -- S. 446(1)(a) Criminal Code - Cruelty to Animals

**Counsel:**

J. Gorda, for the Crown.

D. Hobson, for the accused.

---

**1 LAMPKIN J.** (orally):-- Dogs may be man's best friend. But when allowed to run loose, they may be the worst enemy of - or at least a nightmare to - a homeowner who takes pride in his property and works hard to keep his lawn in pristine condition. They urinate on the lawn causing ugly yellow patches. When they defecate on a low cut lawn, they leave an unsightly mess. If the grass is a bit high, the homeowner may step in the fecal matter, which is an unenviable experience. This case concerns the attempt of a proud homeowner to keep a dog off of his lawn.

**2** John Schafer is charged that on or about the 6th day of May, 1999, at the Town of Markham, he wilfully and without lawful excuse, injured a dog, the property of Heather Sherman, contrary to s. 445(a) of the Criminal Code.

**3** Mr. Schafer is further charged that on or about the said date, at the said place, he wilfully caused unnecessary suffering to a dog the property of Heather Sherman by throwing it against the pavement, contrary to s. 446(1)(a) of the Criminal Code.

**FACTUAL BACKGROUND**

**4** John Schafer is a retired gentleman who was for 19 1/2 years, a salesman of a manufacturing company. He is the owner and occupier of No. 5 Cobblestone Drive, Thornhill, where he has lived for the past 27 years. Cobblestone Drive is an asphalt-paved road that runs east to west. There is an upward slope in the road from west to east.

**5** Photographs of the property taken by John Moorhead, a licensed private investigator, on January 3, 2000, show that the house is set well back from the street. There is a large, well-kept lawn in front, running the length of the driveway from the street to the house, which was green, although it was well into winter. On the lawn itself there are two trees which were leafless because of the time of year. The larger tree appears to be a sunburst honey locust and is set back 10' 3" from the curb. There is a smaller tree set further back, circled by a bed for flowers which appears to be a catalpa, but which has no relevance to the case at bar. The lawn slopes down from the house to the road. Apart from having a company fertilize the lawn four times a year, Mr. Schafer does all of the maintenance of his property personally.

**6** Peter Paterson has resided across the street at No. 16 Cobblestone Drive since October, 1972. He has been a neighbour and good friend of Mr. Schafer for the past 27 years and the two men visit each other. They both testified that there are many dogs in the neighbourhood, which are a bit of a nuisance, when they leave their excrement on their lawns.

**7** Sometime after 4:00 p.m. on May 6, 1999, Janice Chen, Jenny Chao and Gloria Ho were strolling on Cobblestone Drive near Mr. Schafer's home. A little white poodle ran onto Mr. Schafer's lawn towards the larger tree either to urinate or to defecate. Mr. Schafer and Peter Paterson were seated on two lawn chairs near to his front door about 30 to 35 feet from the curb. Mr. Schafer immediately left his chair and moved quickly towards the poodle. He wanted to stop the dog from relieving itself on his property. He went around the tree behind the dog, waving his arms and making a kicking motion to shoo the dog away. But his foot never hit the dog. In other instances when he did that to dogs on his property, they moved on. This dog did not move. It was still relieving itself.

**8** Mr. Schafer picked up the dog. Much time was spent in describing how Mr. Schafer picked up the dog. Mrs. Chen said that Mr. Schafer picked up the dog in an underhand motion but she could not recall whether he used one hand or both hands. He raised the dog approximately to the level of his head and threw it down with much force, pounding it to

the pavement. Mrs. Chao said that Mr. Schafer picked up the dog with both hands, raised it to the level of his face area and threw the dog forward with much force, in a pushing action.

**9** Mr. Paterson, who testified for the Defence before Mr. Schafer did, said that Mr. Schafer bent down and in a scooping motion held the dog by the fur on its back and tossed the dog forward, releasing it from about 2 1/2 feet from the ground. The dog rose slightly in the air. Mr. Paterson demonstrated a height, which, according to Mr. Hobson was 38 to 39 inches, and according to Mr. Gorda was about 48 inches. Much does not turn on the difference of opinion. Mr. Paterson did not think the toss was forceful. When, however, Mr. Paterson was asked by Constable Tetrault in August 1999, whether he could see the image in his mind of Mr. Schafer scooping and tossing the dog, he told the officer that it was difficult, that he was not sure that he could see clearly and that it happened quickly.

**10** Mr. Schafer said that he came up behind the dog on the house side of the tree. He confirmed Mr. Patterson's evidence that he reached down almost to the ground, grabbed the dog by the fur on the back and tossed it in an underhand manner in one quick action. The dog was still relieving itself. It was pointed out to him in examination in chief that he had just thrown the dog through the tree. He then explained that once he had picked up the dog, he moved towards the street because he had to get out of the way of the tree. He continued with bent knees, holding the dog about waist high and tossed the dog when he was about two feet from the curb.

**11** There are various estimates as to how far into the road Mr. Schafer tossed the dog. Mrs. Chao said that the dog was tossed into the centre of the road. Mr. Paterson estimated that the dog landed 15 to 18 feet from where Mr. Schafer was standing when he tossed the dog. Mr. Schafer said he used enough force to toss the dog into the centre of the road. Mr. Moorhead measured the width of the road as 26 feet. On Mr. Schafer's evidence, he used enough force to toss the dog 15 feet because he said that he was standing two feet from the curb when he tossed the dog. On January 3, 2000, three days short of eight months after the incident, he caused Mr. Moorhead to take some measurements and photographs. He placed an object on the road where he believed the dog landed. Mr. Moorhead measured that as being 8' 5" from the curb. That would mean he only tossed the dog 10' 5". On the other hand, if he were standing further back on the lawn nearer the tree, or had placed the object nearer the centre of the road as suggested by other evidence, then it would have been a toss in the area of 15 feet.

**12** When Mr. Schafer tossed the dog onto the road, he expected that it would be shaken up a bit and then run off. So too did Mr. Paterson. Neither expected the dog to suffer any injury. But the dog did not move.

**13** At the time when he picked up the dog, Mr. Schafer had not seen the three women walking towards his property. By the time the dog landed on the road he saw them. Mrs. Chao remembered Mr. Schafer saying that he did not like dogs on his lawn. He asked if the dog belonged to them. They answered in the negative. Both Mrs. Chen and Mrs. Chao saw blood on the road near the head of the dog.

**14** Mr. Schafer realized that the dog was seriously injured. Mr. Paterson joined him at the side of the road. Mr. Schafer got a shovel, placed the dog on it and took it up on his lawn. He and Mr. Paterson decided that the dog must be taken to a clinic for assistance. They took the dog to the Thornhill Veterinary Clinic. Mr. Paterson remained outside while Mr. Schafer entered the clinic with the dog.

**15** Ms. Kristine Neville, a veterinary assistant and receptionist, said that about 4:00 or 5:00 p.m., Mr. Schafer put the carton with the dog in it on the desk and said he had an injured animal. He wanted to leave it and have them take care of it. She asked if it was his pet and he told her "No". Nor did he know who was the owner. He indicated that he was leaving. She told him that he could not just drop off an animal. He therefore waited.

**16** Ms. Neville asked what happened. He said if he told her, she was not going to like it. She told him to start from the beginning. He told her that the dog wandered onto his lawn and proceeded to defecate thereon; that he screamed and yelled at it which did not do any good, so he picked it up and threw it. He then told her: "So I'm just going to leave it here and I'm going to go". She told him that he just couldn't leave an animal there. He said that he was sick and tired of

dogs defecating on his lawn.

**17** Dr. Vivian Ungar, a Doctor of Veterinary Medicine, examined the dog at the Thornhill Clinic and found that it was severely injured. Mr. Schafer asked if she could fix the dog and send him the bill. He explained that he was not the owner and that he had thrown the dog which was on his lawn. Dr. Ungar checked the tag and ascertained the name and telephone number of the owner. She called the number and a Mr. Sherman answered and said they would be right over.

**18** Dr. Ungar assessed the dog whose name is Joey, and realized that it was in a critical condition. It was comatose and not responding to stimuli. There was damage to its nervous system demonstrated by rhythmic fluttering around the eyeballs, which is usually caused by a head injury. The injuries were extensive and the prognosis was guarded. It needed round the clock monitoring which her clinic was unable to provide. In addition she did not have some of the drugs necessary to treat Joey. She spoke with Dr. Geoffrey Toole of the Willowdale Animal Clinic and it was decided to send the dog there.

**19** Dr. Ungar said that Mr. Schafer seemed very nervous and extremely upset. She felt he was very sorry to be in the situation and was trying to remedy it.

**20** Upon the arrival of Mrs. Sherman and her son, there was close to pandemonium. She announced her arrival loudly, using the vilest and most obscene language imaginable, even before she was told who Mr. Schafer was. Ms. Neville could hear her even before she entered the front door. Dr. Ungar, Ms. Neville and another co-worker tried to calm her down. Mr. Schafer apologized for the harm done to the dog.

**21** Both Dr. Ungar and Ms. Neville told Mrs. Sherman many times that the dog must be taken immediately to the Willowdale Animal Clinic because it was seriously injured. Mrs. Sherman continued to rant and rave and to swear at Mr. Schafer. She said that she had called the police, which Dr. Ungar had already done. She said many times that she was calling the media, which surprised Dr. Ungar. Dr. Ungar got the impression that Mrs. Sherman's concern was not the immediate health of her animal but the media attention that the incident would engender. Eventually Mrs. Sherman sent her son with Joey to the Willowdale Animal Clinic.

**22** Dr. Geoffrey Toole is a Doctor of Veterinary Medicine. He operates the Willowdale Animal Clinic which is a 24-hour a day clinic, 7 days a week. He was qualified as an expert to give opinion evidence on trauma suffered by small animals.

**23** He examined Joey within an hour or two of the incident. He described Joey as a 9-year-old male "teacup" poodle. It was a very small animal weighing five to six pounds. The dog was in a semi-comatose condition. Its claws were ripped and some were still bleeding. There was bleeding under the white of its left eye. Its eyes were jiggling back and forth in their sockets with a fast phase of juggle to the right consistent with injury to the left side of the brain. He tried to prevent swelling of the brain by administering anti-inflammatory steroids. It had an uncontrollable head tilt to the left. There was trauma to the liver and bleeding. There was no initial evidence of spinal injury. X-rays did not reveal any fracture of the skull. Injuries of that nature occur if a dog is hit by a car or dropped from a height. The injuries were consistent with a severe blow to the head and other parts of the body. He said that the dog was thrown with quite a bit of force. Joey was monitored 24 hours a day.

**24** Dr. Toole classified Joey's condition as poor to critical with little hope of survival - no more than a 50/50 chance. He said that Joey survived because he was taken to the clinic very quickly and immediate emergency treatment, including oxygen and steroids, was administered. Four days later he had a Veterinary Neurologist, Dr. Sue Cochrane, examine Joey.

**25** Constable Tetrault arrived at the Thornhill Clinic shortly after 5:00 p.m. As soon as he had parked his vehicle, Mr. Schafer approached him and said:

"The dog came on my lawn - walked right over to the tree and started doing his duty. I screamed

and yelled at it and it kept right on doing it. So I picked it up and threw it down on the ground. I Just get so God damned sick of dogs pooping on my lawn."

**26** Constable Tetrault stopped him at that point and took particulars of his name and address and sent him home.

**27** When Constable Tetrault arrived at work the next morning, there were already 18 contacts from the media with respect to this matter. When he went onto Cobblestone Drive later, the event had already been turned into a media circus. There were several media vehicles present. So he returned later. He attended first on Mr. Paterson who arranged for him to meet Mr. Schafer. At 5:16 p.m., he commenced to take a cautioned statement from Mr. Schafer which has been admitted into evidence. The officer did not ask Mr. Schafer how he threw the dog and no explanation was given.

## SUBMISSIONS AND LEGAL ISSUES

Relevant Legislation.

**28**

The following sections of the Criminal Code are relevant to the case at bar.

S. 429(1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omissions 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.

- (2) No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right.

S. 445. Every one who wilfully and without lawful excuse;

- (a) kills, maims, wounds, poisons or injures dogs, birds or animals that are not cattle and are kept for a lawful purpose, is guilty of an offence punishable on summary conviction.

S. 446(1) Every one commits an offence who;

- (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or bird.
- (2) Every one, who commits an offence under subsection (1) is guilty of an offence punishable on summary conviction.
- (3) For the purposes of proceedings under paragraph (1)(a) or (b), 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.

By-Law Number 5-94 of The Corporation of the Town of Markham.

#### S. 4 ANIMAL CONTROL

- (1) No person shall allow a dog or cat to run at large in the Town.
- (2) For the purpose of the Section, a dog or cat shall be deemed to be running at large when found in any place other than the premises of the owner of the animal and not under the control of any person.

#### S. 6 TRESPASSING OF ANIMALS

- (1) No person who owns, harbours, or possesses any animal shall permit it to run at large, or to trespass on any public or private property.

**29** On behalf of the Defence, Mr. Hobson, in his review of the evidence, submits that Mrs. Chen was somewhat biased in her evidence by using language such as Mr. Schafer, "pounded the dog into the ground", on more than one occasion in an attempt to show that Mr. Schafer was brutal in his treatment of the dog. He submits that Mrs. Chao was a very reliable witness. He submits further that Dr. Toole's evidence is neutral and that he did not disagree with the manner in which Mr. Schafer said he threw the dog. He submits that both Mr. Paterson and Mr. Schafer were articulate and have been respectable residents of the street for many years. They both described the toss of the dog, which neither expected to result in such severe injuries. They both showed concern for the dog and rushed it to receive medical attention that ultimately saved its life.

**30** On the law, Mr. Hobson submits that s. 445(1)(a) refers to animals kept for a lawful purpose and does not refer to stray animals. He submits that the Crown must prove, (1) that the action was wilful, and there was no lawful excuse. He submits that by reason of s. 429(1) of the Criminal Code, count one charging an offence against s. 445(1) should be dismissed. With respect to the second count, Mr. Hobson submits that the Crown must show recklessness on the part of Mr. Schafer or a reckless disregard whether or not harm would be caused by his action and that the test is subjective and not objective. He submits that there was no planning on Mr. Schafer's part and that he showed immediate regret and remorse. He submits that the Crown must prove that Mr. Schafer recognized the consequences and the probable result. He submits that a teacup poodle has a special construction which the ordinary man does not know. He submits further that Mr. Schafer had a legal right to remove the animal from his property and that s. 429(1) and (2) are defences to the second count under s. 446 of the Code.

**31** Mr. Hobson relies on a number of authorities.

**32** On behalf of the Crown, Mr. Gorda submits that the Defence attempts to make Mr. Schafer the victim. He submits that the after the fact behaviour of Mrs. Sherman and the Press is not relevant. The issue before the court is the action of Mr. Schafer and his intent. He submits that both Mrs. Chen and Mrs. Chao were credible, independent witnesses. Mrs. Chen said that Mr. Schafer looked very angry when he threw the dog down. Both independent witnesses and the two veterinarians say that much force was used. Mr. Schafer himself said that he believed at least that the dog would be shaken up. He submits that Mr. Schafer was either wilfully blind or reckless whether injury would be caused by his toss or throw. He submits that Joey was not a stray and that the Defence admitted that it had an owner. He submits that the Crown has proved both counts beyond a reasonable doubt and that the By Law does not apply,

**33** Joey was not a stray animal. Mrs. Sherman was admittedly its lawful owner. Under the By Law of the Town of Markham, she had an obligation not to allow her dog to run at large or trespass on the property of Mr. Schafer. Mr. Schafer had every right to remove the dog from his property.

**34** Both section 445(a) and 446(1)(a) under which Mr. Schafer is charged require that the injury be caused wilfully. With respect to the offence under s. 446(1)(a), the failure to use reasonable care as a result of which the pain or injury is suffered is, in the absence of evidence to the contrary, proof that the pain or suffering was caused wilfully.

**35** The evidence of the veterinary doctors corroborates the evidence of Mrs. Chen and Mrs. Chao that the dog was forcefully tossed or thrown whether it was underhand, as the Defence testified, or thrown from about shoulder height. I go further and say that it could not have been a gentle toss as the Defence contends.

**36** There is no question that Mr. Schafer intended to throw the dog onto the road. He was surprised at the injury suffered. But in throwing the dog with such force, he was either wilfully blind as to the consequences or reckless whether harm and injury would result. In *Sansregret v. The Queen* [1985] 1 S.C.R. 570, Mr. Justice McIntyre speaking for the Supreme Court of Canada said at page 582:

"... Recklessness, to form a part of the criminal mens rea, must have an element of the subjective  
... It is, in other words, the conduct of one who sees the risk and who takes the chance."

Mr. Schafer was dealing with a small, five or six pound animal, fragile to anyone who had eyes to see. There is no suggestion that the animal attempted to bite him so that he had to get rid of it in a hurry and toss it away. In fact, the opposite is true. When he picked up the dog, it was still relieving itself. All he had to do was to take it to the side of the road and put it down gently. He was two feet from the curb when he threw it with the intention that it should land in the centre of the road, some 15 feet away. He tossed it with such force that it suffered severe injuries. Injuries as if it had been hit by a car or dropped from a height. The force used was excessive. While he had a legal justification or a colour of right to remove it from his property, he also had an obligation to take reasonable care to avoid injury. His actions fell well below the standard of taking reasonable care to avoid injury. Exasperating is it may be to the proud homeowner, there is no right to harm a dog wilfully simply because it trespasses on his property - just as there is no right to kill the animal in similar circumstances. *R. v. Comber* (1975) 28 C.C.C. (2d) 444.

**37** There will be findings of guilt to both offences.

LAMPKIN J.

qp/s/qlala/qlhcs