

In the Provincial Court of Alberta

Citation: R. v. Habermehl, 2013 ABPC 122

Date: 20130430
Docket: 100494145P1
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Robert Habermehl

Judgment of the Honourable Judge Bruce R. Fraser

Introduction

[1] The accused is charged with wilfully causing unnecessary pain, suffering or injury to a cat contrary to Section 445.1(1)(a) of the *Criminal Code*. He has pled not guilty and represented himself through a somewhat lengthy and protracted trial. The Crown called four witnesses being the owner of the cat and three veterinarians. They also called a peace officer with the Calgary Humane Society for the purpose of entering a *voir dire* to determine the admissibility of a statement by the accused to a person in authority. The Crown did this, not for the purpose of entering the statement in its own case, but to use it in cross-examination if the accused testified in the defence case. The statement was found to be admissible. The accused gave evidence on his own behalf for the defence.

Facts

[2] Ms. Melanie Heyd, now Manning was the owner of a cat named Minnie. She was also the owner of a dog named Bruce. Her evidence was that she met the accused some time in June 2009 and they began a relationship. She lived in an apartment with her animals and the accused either eventually moved in or continually stayed over. On September 5th she rented a house where they lived together. It appears that the animals were a subject of friction between them

because of their behaviour in the house and lack of discipline. The cat was a house cat, meaning it stayed in the house most of the time.

[3] The accused took exception to the cat's behaviour particularly because it climbed on the counters and scratched the furniture. It would also defecate or urinate in the house inappropriately. He wanted to take over disciplining the animals and did so from time to time causing Ms. Manning to become uncomfortable with his methods.

[4] There were a number of incidents leading up to the date of September 21, 2009. On one occasion the accused told her the cat bit him on the finger and would not let go even when the accused lifted it off the ground, let it fall to the floor and yelled in its ear. When it finally did let go the accused chased it into the bathroom and held its head under water. The accused had to go to a clinic to get medical treatment for his finger. The accused was a musician and the finger was important to his ability to play the guitar and this caused him to miss a 'gig' as he called it. The cat was punished for its behaviour.

[5] According to Ms. Manning the cat always used its litter box until September 18. She worked a day job and the accused was often home during the day alone with the animals. He called her this day and told her the cat defecated in its cat bed. He wanted to rub her nose in it and then lock her up in a small kennel in the basement without food or water facing the basement wall. He kept her there until the 21st of September on and off.

[6] The night of September 18, the cat was let out and Ms. Manning cleaned the kennel because the cat had urinated. While it was out it urinated in the living room near the musical equipment of the accused. He told Ms. Manning to go in the bedroom while he used a rug to corral the cat by slapping the floor near it. The cat ran to the kitchen and got up on the stove whereupon the accused got a corn broom and held the cat at the throat with the broom until he could grab it and put it back in the kennel.

[7] By September 21st the relationship was apparently breaking up. Ms. Manning left for work at 5:00 a.m., told her office she could not work that day and then went to her mother's place. The accused phoned her that morning and informed her he was moving out. She waited until about 2:00 p.m. and returned with her mother to get her animals. He had partially moved his belongings out of the house. The cat was inside the litter box which was cracked and had a hole in it. The cat appeared sweaty and her fur was puffed out. The accused had left a note on the cat post. He returned while she was there and told her not to talk to him. They immediately left with the animals.

[8] When they returned to her mother's home she noticed the cat had a lump on her side the size of a tennis ball. It was hot to the touch. The cat was lethargic. It had not had this injury before. The cat struggled to walk and appeared to be in distress.

[9] By September 23rd there was no improvement. Not having the funds to pay for a vet, Ms. Manning took the cat to the SPCA and surrendered it for treatment.

[10] Three veterinarians examined the cat and were called to give evidence. When it was brought to the SPCA on September 23rd, it was treated as an emergency and Dr. Cheema was paged to examine it. He found the cat was in extreme pain and resented being examined. He found swelling on the right side of the body the size of an orange and when he palpated the swelling he found a break in the muscular wall. She was sedated and X-rays were taken. They clearly showed a break on the right side wall where the intestines were herniated through the break and were sitting under the skin. With part of the intestines outside the wall and under the skin it was causing excruciating pain to the animal making it difficult to walk and painful to the touch.

[11] The cat was placed in a kennel and the next day, September 24th, it was examined by Dr. Howard. However, the cat would not allow itself to be examined. Dr. Howard could visually see the protrusion on the right side. She could not give it pain medication which it needed. The cat was not eating or drinking and was recoiled in the back of the cage. Dr. Howard could actually visually observe the large swelling on the side of the cat which she described as a traumatic injury to the body wall which caused loops of intestine perforated through the muscle wall sitting underneath the skin. This was confirmed when she looked at the X-rays. It was decided in consultation with Dr. Cheema that because the cat was under undue distress, the cat should be euthanised for humane reasons. Due to the distress they could not handle her and she would need extensive surgery and long term follow-up care. She had been surrendered and was not a good candidate for adoption. Therefore the decision was made to euthanise.

[12] Dr. Clark is an animal diagnostic pathologist. He performed an autopsy, known as a necropsy, if performed on an animal, on the cat on September 24th at approximately 8:00 p.m. in the evening. When he opened the cat he found at the point of the swelling, several inches of intestine outside the body wall behind the rib on the right side under the skin. There was a four centimetre tear in the abdominal wall. He found two acute rib fractures high up on the right hand side. One fracture had penetrated into the lung cavity. Inside the abdomen he found areas of severe haemorrhage. He also found small fractures of the liver near the herniated area which he attributed to trauma. He determined, given the localized area of the obvious trauma to the right side of the abdomen, the broken ribs, the penetration of one into the lung and the shallow fractures to the liver surface, the cause was blunt force trauma. It was not caused by a sharp object but something more blunt. He ruled out being run over by a motor vehicle. He estimated it occurred between 24 and 72 hours before saying this was a ballpark figure emphasizing the difficulties in making an accurate calculation.

[13] The accused gave evidence for the defence and spent some time describing the relationship between he and Ms. Manning. According to him Ms. Manning was the aggressor in commencing a relationship that he had little interest in. He submitted a letter dated August 20, 2009 from her that could best be described as a love letter showing her adoration for him that

supported his view. He described living with her and her dog and cat in her apartment, going camping with her and moving into a rented house with her leased in her name.

[14] He also described a time in July when Ms. Manning took the dog out while he was in bed and a strange lady came in the apartment and he held her there until Ms. Manning returned. She acted strange, was asked to leave but did not right away. He said they moved into the house on September 5, 2009. He entered photos of the house to show there was animal hair in the drains and scratches at the door indicating the previous tenants must have had animals. He also explained a number of financial transactions that indicated Ms. Manning had more money than she said, some of the money coming from him and his parents.

[15] He described an incident in mid-September when he was home alone with the animals and stopped a dog and cat fight by pulling the cat off the dog, and the cat, which he described as feral, biting his finger and would not let go. He held the cat by his finger above his head and then dropped it on the floor and still it would not let go. He then pressed his head against the cat's head and screamed in its ear hoping to damage its ear drum to make it let go. He then pushed it against the wall and eventually it let go and scurried into the bathroom. He chased it and grabbed it by the scruff of the neck and held its head under the bathtub tap for a couple of seconds. His finger was bleeding so he went to a clinic where he was treated, administered drugs and a tetanus shot. He explained this finger was very important to him because he was a musician and a guitar player.

[16] He said he never harmed the cat, he did not do anything to the cat, and the last time he saw the cat it was fine. However, he did not explain anything about the activities on September 21st, 2009, when he was home alone with the cat until he moved out and Ms. Manning came back to take her animals to her mother's place.

[17] There followed a very thorough, effective and efficient cross-examination by the Crown of the accused. As to the day of September 21st, 2009, he admitted no one else was staying at the house the night before or that day that he was aware of other than himself and Ms. Manning. He admitted he became very upset over the cat biting his finger. In mid-September the cat defecated in the house and as a result he pushed the cat's face in the faeces. After both incidents he put the cat in a kennel. A few days later, he estimates September 17th, the cat was hissing around his musical equipment. He told Ms. Manning to go in the bedroom and shut the door. He took a rug and whipped the floor beside the cat to scare it and to teach it that it was not acceptable behaviour. He chased the cat behind the dog kennel, then on the couch and then into the kitchen where it jumped on the island and then on the stove. With a corn broom he held it against the back of the stove and he told Ms. Manning to come out and get the kennel. He then released it into the kennel. He admitted the cat was put in the kennel on a number of occasions for up to 10 hours or more.

[18] He admitted he wanted to use physical 'touching' to discipline the cat and referred to a quotation in the bible to support his view that humans ought to rule over animals.

[19] On the night of September 20th, 2009, he admitted he and Ms. Manning had a discussion that resulted in him sleeping on the couch and it appeared to him their relationship was over. She got up and left early the next morning. The cat had been secured in the basement in the kennel that night and the next morning.

[20] The morning of September 21st, 2009, the accused went down to the basement to find the cat howling as he described it. He thought it was because the furnace came on. No one else was in the house. He took the cat out of the kennel and it started to scratch him so he put it back in and went back upstairs and put music on to drown out the howling. He went back down a second time, took the cat out and told her she better be good. This time it did not try to scratch him and he took her upstairs. The cat sat in his lap and was behaving. He believed the cat liked his body heat. Eventually he put her down and started to walk away and the cat defecated on the floor. He came back saying, "No, no, bad kitty", and picked her up by the scruff of the neck to take her back downstairs. As he did so she urinated in a big arc into the kitchen and down the stairs. He put her back in the kennel. When he described putting her in the kennel he used what appeared to be a throwing motion with his arm, however when closely cross-examined about that he at first agreed he used a throwing motion so as not to get bit, he then subsequently said he set it into the kennel and did not throw it into the kennel. He did not agree he was upset by this. He then went upstairs to clean up. He did not agree he was either upset or excited but when he was referred to his statement to the SPCA officer shortly after the incident, he agreed he was excited.

[21] He could not find the scooper to clean up the mess and phoned Ms. Manning and learned she was not at work. Feeling the relationship was over he started packing to leave. He said he had no further interaction with the cat who was left in the kennel. He agreed the mop broke as he was cleaning up.

[22] He said Ms. Manning phoned and he told her he was packing. She broke up with him and told him to leave. He agreed he left the note for her on the cat stand. He left around 11:00 a.m. He returned around 3:00 p.m. to get the rest of his equipment and belongings and Ms. Manning was there. He said he told her he wanted her to pay back some money and what the cat had done. He eventually agreed he told her he was sorry about her cat. He disagreed he told her he could not handle her anymore. He does not recall saying anything about going to gaol.

[23] In re-direct he reconfirmed his evidence he did not throw the cat into the kennel but he had to be firm with an animal like that when he released it.

[24] That is all the evidence that was called.

Analysis

[25] The accused is adamant that he never caused the injuries to the cat on the 21st of September. The cat did not have those injuries the night before that Ms. Manning observed when she took the cat to her mother's place after picking it up some time after 2:00 p.m. from her place. This is when the accused was present at the house and told her he was sorry about her cat. The injury, Ms. Manning observed was on the side of the cat and was a lump the size of a tennis ball that was hot to the touch. The injury was confirmed by veterinarians at the SPCA on September 23rd after examination and X-rays and diagnosed as a break in the muscular wall where the intestines were herniated through the wall and lay under the skin causing excruciating pain, difficulty to walk and painful to be touched. The protrusion was described as the size of an orange. The injuries were attributed to blunt force trauma and included two rib fractures. I am satisfied from all the expert evidence that this blunt force trauma that caused these injuries could only have been administered by a person with deliberate intent to injure. They are too severe to have been caused accidentally.

[26] The position of the Crown is as follows: The accused had exclusive opportunity to be the one who caused the injury. The only realistic time the injuries could have occurred is after Ms. Manning left the house in the morning and before she returned in the afternoon if she is to be believed. The only person who was home with the cat during that time was the accused. Only he knows what happened. Only he could have caused it. The cat of course cannot speak.

[27] The issue here is who caused the injuries to the cat by blunt force trauma to its side. No other older injuries discovered during the autopsy are pertinent nor is the decision to euthanise whether one agrees with that decision or not. The charge is wilfully causing unnecessary pain, suffering or injury to a cat. Wilfully as defined in Section 429.1 of the *Criminal Code* and again in *R. v. McHugh*, [1966] 1 C.C.C. 170 (N.S.C.A.); 50 C.R. 263, includes reckless acts that caused the event as well as acts done with a bad motive or evil intent. I am satisfied that whoever caused these injuries, given their severity, did so with a wilful intent. The issue, then, is who caused the injuries.

[28] To determine this the court needs to analyze the credibility of Ms. Manning and the accused. There is no credibility issue with the three expert witnesses, I accept their evidence. The evidence of Officer Wardell was heard in a *voir dire* and only for the purpose of determining admissibility of the statement he took from the accused. His evidence was not admitted in the trial proper. The statement was only used for the purpose of cross-examination of the accused. Although I marked it as an exhibit, I will not treat it as evidence.

[29] Ms. Manning's evidence certainly left something to be desired. In cross-examination by the accused many answers were anything but spontaneous. The long periods of silence before answering were never explained, were unnatural and inexplicable. The defence submissions raised many minor inconsistencies throughout her evidence particularly to do with their relationship and their interaction with her animals. He questioned her reason for surrendering the cat to the SPCA because she could not afford the examination fees by a veterinarian when she appeared to have an income that could cover at least the initial \$60 to \$100 fee she estimated.

Many of the inconsistencies cause concern for the credibility of her overall testimony particularly the status of their relationship and her professed extreme love and concern for her animals or that she was terrified the accused was going to kill her when there was no apparent basis for that belief. However, that concern for her credibility does not extend to the simple testimony of what she did and what she found on the 21st of September or the treatment of the cat by the accused over the previous three weeks. Much of her evidence in that respect has been more or less corroborated by the accused. The biting of the finger, the defecating, the disciplining, the putting in the kennel are all admitted by the accused, as is the fact she left the house early the morning of the 21st, they were breaking up, she returned in the afternoon as did the accused and the finding of the note. She could give no evidence as to what occurred that day after she left. That evidence all comes from the cross-examination of the accused. The discovery of the injuries to the cat by Ms. Manning partially when she picked up the cat and confirmed after she took the cat to her mother's place I accept. The injuries are corroborated by the examining veterinarian some two days later. I accept she discovered the injuries and her description of them as she testified. Therefore, I have no hesitation accepting the parts of her evidence as to when the injuries to the cat must have occurred and who had exclusive opportunity at that time, even though her overall credibility may be questionable.

[30] The accused's credibility is crucial. If I believe the accused that he did not harm the cat as he said, then of course I must acquit. If he raises a reasonable doubt by his evidence that he harmed the cat and caused the injuries, then likewise I must acquit. It is only if I do not believe him and his evidence does not raise a reasonable doubt, and all of the evidence considered together convinces me that he caused the injuries to the cat could I convict. Therefore, I must closely analyze his credibility.

[31] My first concern as to his credibility is the fact during his direct evidence he made no attempt to explain what happened during the critical time the injuries to the cat must have occurred, that being during the day of September 21st. His evidence centred on his relationship with Ms. Manning, that she was the aggressor in chasing him; about Ms. Manning never disciplining her animals or knowing how to do so; about how the cat was feral and somewhat evil or bad mannered, and about how it viciously bit him and he had to discipline it and the repercussions it caused him.

[32] In cross-examination another picture emerged. From the beginning he was combative with the Crown wanting to know why he was asking certain questions rather than answering them. He was often evasive in his answers. He often had to be referred to answers he had given in his statement to Officer Wardell that were inconsistent with his evidence. He was taken through a series of events prior to September 21st that certainly would have created some hostility toward the cat yet he would not admit he was even upset.

[33] The series of incidents included the biting of the finger; the defecating on the floor; the cornering with the broom on the stove; confining it to the kennel in the basement against the wall; all leading up to the 21st of September when the cat howls and will not stop, the attempt at

scratching, then the defecating again on the floor, the urinating on the stairs and the manner of having to return it to the kennel in the basement.

[34] Throughout all these series of events the accused admits to no animosity towards the cat or antagonism at any time and particularly not on September 21st. He would have this court believe he was not upset and simply placed the cat back in the kennel in a way that it would not bite or scratch him and that is the last interaction he had with the cat and he does not know how the cat was injured. There is no explanation for the damage to the cat's litter box Ms. Manning found when she returned to the house to collect her animals.

[35] Overall, I find his evidence to be incredible and lacking in credibility. Clearly the cat was seriously injured during the time he was with it in the house and before Ms. Manning came home. The injuries were caused by blunt force trauma. He was the only one there who could have caused it. Yet he says he did not harm the cat and it was not injured when he last saw it. He has no explanation for what happened to the cat. His evidence in this respect is incredulous and not believable. I do not believe him that he did not injure the cat nor that it was not injured when he last saw it. His evidence does not raise a reasonable doubt that he caused the injuries.

Conclusion

[36] I find that he had exclusive opportunity to cause the injuries to the cat. No one else could have done so. I find that due to the series of incidents leading up to September 21st with the cat coupled with the breakup between him and Ms. Manning, the problems he explained he had with the cat on September 21st led him to become exasperated with the cat and recklessly injured it by causing the blunt force trauma. I have no idea how he did it but it probably occurred when he returned it to the basement and the kennel as he explained, if that is true. I find injuring the cat, was wilful, intentional and reckless. I note the pathologist gave a ballpark figure of the trauma occurring in the previous 72 hours which would be a few hours outside the time he says he left the house. However, that time is an estimate and a ballpark figure meaning it cannot be relied upon for exactness or accuracy. I am satisfied it is close enough to his exclusive opportunity and that the injuries did not occur after Ms. Manning returned to retrieve her animals.

[37] I find based on all the evidence and in all the circumstances, I am satisfied beyond a reasonable doubt the accused caused the injuries to the cat which caused unnecessary pain and suffering. I find the accused guilty as charged.

Dated at the City of Calgary, Alberta this 30th day of April, 2013.

Bruce R. Fraser
A Judge of the Provincial Court of Alberta

Appearances:

M. Dalidowicz
for the Crown

No Counsel
for the Accused