Citation: ☼ R. v. Fountain
2013 BCPC 0193

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Registry: Merritt

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

JIM FOUNTAIN

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE S.D. FRAME

Counsel for the Crown:	Ms. Alexandra Janse
Counsel for the Accused:	Mr. Raymond Phillips
Place of Hearing:	Merritt , B.C.
Date of Hearing:	May 23, 2013
Date of Judgment:	July 18, 2013

[1] Jim Fountain is a 75 year old man who lives on a patch of land on the Nooaitch Reserve near Merritt, British Columbia. He has had a colourful past including spending a good part of his life as a wrangler. In that capacity, he testified that if a horse was wounded while out in the wild, the rider shot it and left it. He is now living out his days with his wife and his aging dogs.

[2] Mr. Fountain had a horse but it was too young for him to ride. He wanted a horse he could ride and asked his son to find him one. His son found him a horse named Jake who had been rescued from a property where he had clearly not been cared for. Jake came to Mr. Fountain in an emaciated condition. It was clear to Mr. Fountain that he could not ride Jake in this condition. He decided to keep him anyway and feed him to see if he could get him into good enough health to ride.

[3] Mr. Fountain bought the best hay in the valley for Jake. He bought it from a gentleman named Allan Simpson. Mr. Simpson said he had seen the horse from time to time in a corral on Mr. Fountain's land. He drove by the property twice a week. The horse always had a steady supply of hay available to him. Mr. Simpson also said that he would sometimes stop in to see if Mr. Fountain needed more hay if he noticed that the supply might be getting low. Special Constable Wiltse was one of the SPCA special constables who ultimately attended Mr. Fountain's property. She testified that Jake was kept in a large pasture area and was eating hay from the back of a pick up. The hay was green which indicated it was good and fresh and there was a large amount. Dr. Robert Mulligan, the veterinarian who attended Jake on behalf of the SPCA and who testified at trial, said that he would be surprised to find that Jake had been fed the best quality hay in the province and would query the amount fed to him. If the hay were in

sufficient quantity and quality, he said parasites can cause horses to be chronically under weight. However, neither he or either of the special constables from the SPCA detected any signs of parasite load on the horse.

[4] Jake was certainly well loved by Mr. Fountain and probably was well cared for to the extent that a horse in this condition could be. Unfortunately, Jake did not thrive and heal as Mr. Fountain had hoped. Instead, Jake had a fall which resulted in a gash to his hip. Mr. Fountain used traditional medicines to try to heal the wound. He is a man of limited means and had never been to a veterinarian with any of his animals in all of his years. When the wound did not heal and birds began to pick at it, Mr. Fountain asked his son to go to a veterinarian to get some modern medicines.

[5] Mr. Fountain's son returned with some medicine which Mr. Fountain applied to the wound and taped shut with some duct tape. Mr. Fountain did as he was instructed but it did not heal the wound. The horse fell again. Mr. Fountain went back to the vet himself. The vet asked him how the horse was doing. He told her he was doing everything she had said to do. She gave him more salve and a penicillin injection. He felt that the veterinarian was very good and evidently had no reason to question her advice or manner of giving it.

[6] Mr. Fountain and his wife have a strong and spiritual connection with nature. Mr. Fountain said that his wife had special powers and communed with nature. He told a story of an ant hill growing in his wife's strawberry patch. He told her about it and she went out to speak to them to move on. While I suspect that she more likely spoke to the ant hill through the end of a can of Raid, he believes she has the power to speak with

nature and simply persuaded them to move house. For himself, he feels a brotherhood with his animals. He had intended to let the horse die naturally in the wilds once it was well enough to take it into the hills. He could not bring himself to shoot the horse and he had declined offers from others to shoot it for him.

[7] Mr. Fountain testified that everyone was telling him to shoot Jake. They had seen the condition he was in and how he was hobbling around. His children had offered to shoot the horse and he finally said they could. Apparently this did not transpire. Mr. Fountain testified that he loved Jake and considered him a friend. Jake was "put on the earth by the great father and deserves to die like I do". He felt that it was for God to decide when Jake would die. Although he knew something was wrong with Jake, he put some of it to Jake getting old. There was only small progress in weight gain from the time Jake came to the Fountain property. He found that horses did not gain weight when they are old and that this was normal.

[8] The horse failed to recover and failed to thrive beyond the small progress it had made since arriving at Mr. Fountain's property. Eventually, a concerned citizen reported Mr. Fountain to the SPCA. The SPCA attended the property to inspect the horse and to determine whether there was a matter requiring further investigation. They saw an emaciated horse hobbling from an ongoing injury. They persuaded Mr. Fountain to let them take the horse. There is a considerable discrepancy in the evidence between what Mr. Fountain believed was going to transpire and what Special Constables Wiltse and Kokoska believed was going to transpire. The special constables believed they told Mr. Fountain that by signing over the horse he was relinquishing ownership to the SPCA. They would then inspect the horse to determine whether it could be treated. If it

could be treated, they would obtain the necessary medical care and then adopt the horse out. If the horse could not be treated, then they would have it destroyed.

[9] Mr. Fountain believed that he was relinquishing the horse so that it could be put down mercifully. He testified that "these people" came and asked to take the horse away and he would not have to look after it anymore. He said they told him they would give Jake a shot and it would all be over. He thought that sounded merciful and so he agreed to relinquish the animal.

[10] In any event, the special constables had Mr. Fountain sign a document. Mr. Fountain is illiterate and could not read the document. I am not satisfied that the SPCA took any particular measures to ensure he understood what he was signing. Special Constable Wiltse said that she read the form to Mr. Fountain, could not recall whether he had indicated at the time he was illiterate, and said that most people found the legal language difficult to understand anyway. If that is the case, they need to look whether their forms are suitable for their purposes. In any event, neither the document nor the evidence disclosed that the SPCA told Mr. Fountain they may pursue criminal charges or any charges under the *Prevention of Cruelty to Animals Act*.

[11] Sadly, when the special constables had the horse inspected by Dr. Mulligan, he found that what appeared to be a superficial wound on the surface was in fact a deep wound which had become infected. It had spread down to the horse's extremities. This resulted in the horse limping with pain. Dr. Mulligan found a chronic draining wound which could only be fully inspected in the necropsy. He opined that it would take about a month for the injury to get into this condition. That timing accords with the evidence

that the whole time from injury to treatment to euthanasia was four to six weeks. Dr. Mulligan confirmed that the nature and extent of this injury would not be evident to a lay person.

[12] The photographs of the horse show a very old, very thin horse. Dr. Mulligan put the horse's condition at 2.5 on the Henneke Body Condition Scoring System. The scoring system is a scale of 1 to 9 with 5 being the desirable rating. The scoring system puts Jake at thin to very thin.

[13] Dr. Mulligan also said that he euthanized the horse because he felt it was the appropriate action to more fully explore the wound. The horse had not been amenable to palpating the wounded area and anesthetizing it would just put it at risk because of its emaciation. He determined the horse had poor prospects for survival and was lame. This meant it was in pain and moving because of discomfort.

[14] The larger infection was discovered on the necropsy. It had eaten away at the hip bone and caused the bone to become infected. This caused the hip to detach from the rest of the pelvis. He could not tell whether the detachment occurred in the initial injury or as a result of the infection. As a result of the wound draining inside rather than externally, there was a further wound on the inside of the leg at the knee joint. Because this type of infection takes time to happen, it indicated to Dr. Mulligan that the injury was chronic.

[15] Dr. Mulligan said to treat the injury would require an x-ray and aggressive antibiotic treatment. This was not done. Since the horse was at least 20 years old, he would have recommended euthanasia anyway. The surgery options and their costs

were not suggested to Mr. Fountain because he had relinquished ownership. His own veterinarian never inspected the horse or gave Mr. Fountain these options. Those options and costs are therefore largely irrelevant to this case.

[16] Dr. Mulligan said the body condition of the horse contributed to its inability to fight the infection. He said the type of emaciation he saw did not occur over a week or two. He said it could happen in a month or two if starved, which was clearly not the case, or if fed poor grade feed it could take a year, which was also not the case. I must accept on Dr. Mulligan's evidence that Jake came to Mr. Fountain in an emaciated condition. Mr. Fountain fed him quality feed and in good quantities, but it was ultimately not enough to bring Jake into good health. At the time that Jake fell and injured his hip, his body condition was still too poor for him to properly be able to fight the infection.

[17] Dr. Mulligan found that Jake's teeth were in good condition and was not what he expected of a horse that was that thin or that age. It was on the basis of the condition of the teeth that Dr. Mulligan estimated the horse's age at 20. He agreed the horse could be as old as 25, but would not agree it could be as old as 30. Interestingly, Special Constable Kokoska thought the horse was in his late 20s.

[18] The only recourse Dr. Mulligan could see for a horse this old was to euthanize it. This was done and Mr. Fountain was charged.

[19] Dr. Mulligan testified that the proper policy in veterinary medicine, and the policy followed at Kamloops Large Animal Veterinary Clinic where he practices, is to inspect an animal before providing treatment. He testified that they do not dispense medication over the counter unless they have a relationship with the client, have examined the

patient before, and have prepared a treatment plan. This is so a diagnosis is not missed and they are not prolonging a disease that can otherwise be treated.

[20] This was not the procedure followed by the veterinarian who gave the medication to Mr. Fountain's son, and who also provided a replacement prescription to Mr. Fountain. Certainly it would have cost considerably more for the veterinarian to attend and look at Jake but there is no explanation why she did not do this. There is every indication that Mr. Fountain did exactly what he thought he was required to do by sending his son to the veterinarian. It is evident from that veterinarian's notes that this was not sufficient. The son told the veterinarian the horse had fallen and had a scrape. This obviously did not communicate to the veterinarian the extent of the injury. Had the veterinarian inspected Jake, she might also have determined that this nearly 30 year old horse was in very poor condition requiring much more than an antibiotic ointment for a wound. Certainly she ought to have pursued this when Mr. Fountain returned for more medication. She did not.

[21] I was provided with a number of cases: ***R. v. Draney***, Kamloops Registry 88552 (May 5, 2011) P.C.J.; ***R. v. Hughes***, [2008] B.C.J. No. 973 (B.C.S.C.); ***R. v. Ryan***, [2004] B.C.J. No. 1940 (B.C.S.C.); ***R. v. Ryder***, [1997] O.J. No. 6361 (O.N.C.J.); ***R. v. Galloro***, 2006 O.N.C.J. 263; and ***R. v. Marohn***, 2012 B.C.P.C. 0198.

[22] In ***Draney***, the court was dealing with a number of horses knowingly kept in a malnourished and emaciated state close to starvation. Mr. Draney argued that he had used good faith efforts to restore the animals to good health. In that case, the SPCA had already seen the horses in the emaciated state and spoke with Mr. Draney about

their proper care. There was not proper feed and water available. They were given a small amount of poor quality hay and were in very thin body condition. In that case, the horses had evidence of external and internal parasite loads. The veterinarian said that the feeding of the horses had been grossly inadequate for several months or completely absent for about one month.

[23] The Crown offered the ***Draney*** decision for the proposition found at paragraph 82 that regardless of the state in which Mr. Draney had received the horses, the issue was whether the care provided by him once they came under his control amounted to wilful neglect or failure to provide suitable and adequate food, water, shelter and care. The wilfulness may be found whether there is failure or neglect from intentional acts or omissions, or whether it results from recklessness or wilful blindness. Judge Harrison said at paragraph 100:

> [100] Once causation is established, the cases draw a distinction as one might expect between those circumstances where the suffering caused to animals arises from a deliberate infliction of harm and those where people out of good motives, however ineffectively, attempt to better the circumstances of animals, but thereby prolong or compound the suffering of the animals. There is some merit in the argument that if the aid efforts of a Good Samaritan falls short, the criminal law should not be too quick to find that wilfulness has been made out.

[24] That is precisely the circumstances Mr. Fountain found himself in with Jake.

[25] Judge Harrison went on to conclude that the outcome of the actions were objectively foreseeable and must have been apparent to Mr. Draney. At paragraph 103, Judge Harrison said:

> [103] It is not a defence to a charge of neglect or failure to provide suitable food or necessary veterinary care that the accused could not afford to provide it or preferred not to.

[26] While Mr. Fountain had limited means and could not afford veterinary care, he did pursue it and did as he was instructed by that veterinarian.

[27] The ***Ryder*** decision was one where 14 horses were kept in appalling conditions with no bedding, grooming or worming. In that case, the owner had defended his lack of care saying that he could not afford to get a veterinarian to come in and help him. The court held that if a person was unable to look after the horses from a grooming, health and eating standpoint, then the owner had an obligation to give them up. The court considered an earlier decision of the Alberta Provincial Court in ***R. v. Heynan***, [1992] A.J. No. 1181, where a person had overwintered horses in a field where there was inadequate feed. The person had gone back to look at the horses but not attended to them closely. They were emaciated, with some of them starving to death. Wilfulness was not found in that case. In this case, Mr. Fountain did provide not only adequate quantities of feed, but high quality feed. He also sought out veterinary care when his own traditional remedies failed. Ultimately, when the SPCA offered to take Jake and euthanize him, Mr. Fountain recognized his obligation to give Jake up.

[28] The ***Hughes*** matter was a decision where a cat was badly injured so the accused put it in a microwave in order to euthanize it. The decision in that case articulated the objective standard of reasonable foreseeability that actions would cause unnecessary pain, suffering and injury. It is remarkably irrelevant to this case.

[29] The ***Ryan*** decision was provided for the proposition that the charge under the *Prevention of Cruelty to Animals Act* is a strict liability offence.

[30] The ***Galloro*** decision outlines the requirements to satisfy the criminal standard under s. 446:

> 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.
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> 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* as 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 accuseds' 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.
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> 9 For a very thorough review of the legislative history of sections 446 and 429, and a detailed analysis of those sections see: *R. v. Clarke* [2001] N.J. No. 191 (Nfld. Prov. Ct.)
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> *Wilfully Causing Unnecessary Pain s. 446(1)(a)*
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> 10 Section 446(1)(a) prohibits the wilful causing of pain, suffering or injury that is unnecessary to an animal or bird. What constitutes "unnecessary" pain, suffering or injury is determined by the circumstances of each case including the purpose of the act, the social priorities, and the means available to accomplish the purpose. *R. v. Menard* (1978), 43 C.C.C. (2d) 458 (Que. C.A.). If the pain or suffering could have reasonably been avoided while effecting the lawful purpose in the circumstances of the case, then that pain or suffering was unnecessary. *R. v. D.L.* [1999] A.J. No. 539 (Alta. Prov. Ct.) at para. 30.

> 11 By virtue of s. 429, wilfully under this section involves an act or omission that the accused knows will probably cause pain or injury where the accused either intends that result or is reckless to that result. Section 446(1)(a) does not require proof that the accused intended to act cruelly or that he or she knew that their acts would have this result. *R. v. Clarke* [2001] N.J. No. 191 (Nfld. Prov. Ct.) at para. 61.

[31] In the ***Gallaro*** case, approximately 16 dogs and assorted small animals had been seized. Some of the animals were found to have been fed poorly and others not provided adequate medical care. There were infections found and inadequate housing noted. At paragraph 56, the court found that:

> 56 ... The dreadful condition of these 16 dogs, the history of non-compliance with OSPCA orders including the orders served in relation to these dogs, and all of the evidence as to the circumstances in which the dogs were kept shows beyond any doubt that the dogs had not been provided with adequate food or care as alleged. There was a marked departure from the standard of care reasonably expected of animal owners. The history of non-compliance with OSPCA orders and the non-compliance with a specific order issued with respect to these 16 dogs shows that the failure to provide suitable and adequate food, shelter and care was wilful.

There is no such history remotely like that in this case. In four to six weeks, Mr. Fountain sought out and followed veterinary advice, then took the advice of the SPCA on their first visit.

[32] In the ***Marohn*** decision, the owner of a horse was charged under the *Criminal Code* and the *Prevention of Cruelty to Animals Act* for failing to feed his horse Buddy. The horse was emaciated but Mr. Marohn had been in an acute financial and medical situation which prevented him from feeding the horse properly. The court determined whether or not this constituted wilfulness under s. 446 of the *Code*. The court found the accused to be a kind hearted person who had good intentions. Despite his injuries and inability to support the horses, he permitted them to be collected on his property. He did so with full knowledge of the cost and expense associated with maintaining those

horses. The SPCA offered to take four of the horses for him but he declined. He made some efforts to find alternative locations for the horses but his efforts were inadequate. The court found that the Crown had proved the elements required in s. 24(1) of the *Prevention of Cruelty to Animals Act* and further found that failing to accept the assistance and to seek out proper food for the animals was wilful, knowing that failure to do so would lead to distress or emaciation of the horse. Mr. Fountain's circumstances fall entirely within what the court expected of Mr. Marohn.

[33] Mr. Fountain is charged with wilfully causing or, being the owner, wilfully permitting to be caused unnecessary pain or suffering or injury to an animal contrary to s. 445.1(1)(a) of the *Criminal Code*. There is nothing in the evidence before me that sustains that charge. There was nothing wilful in Mr. Fountain's actions and nor was he negligent or wilfully blind as to whether his actions caused or permitted to be caused unnecessary pain or suffering or injury. Quite the opposite. He made every effort to nourish the horse to health and then to treat it after it injured itself. It was reasonable for him to seek out veterinary medicine when his own traditional medicines failed. It was reasonable for him to expect that when he was provided the medication through his son the veterinarian was acting appropriately. It was equally reasonable when he replenished the medication to expect that the veterinarian would pursue any concerns she might properly have. I acquit Mr. Fountain of this charge.

[34] Mr. Fountain is also charged with, being a person responsible for an animal, causing or permitting the animal to be or to continue to be in distress contrary to s. 24(1) of the *Prevention of Cruelty to Animals Act*. There is no question this horse was emaciated and that it was in pain. Mr. Fountain was doing his best to address that pain.

He fed it the best hay, he treated it with traditional medicines and he sought out veterinary care. Even with an abundance of food on hand, the horse did not thrive. Even with the attempts at treating the wound, it did not heal. If the horse were to live, it needed something more. While it appeared obvious to some of Mr. Fountain's acquaintances that the horse should be euthanized, it was not evident to the attending veterinarian or the special constables that further care would not prove viable.

[35] I find that Mr. Fountain did everything reasonable in the four to six week timeframe of Jake's injury. It is reasonable, prior to the injury, to continue to feed and nurture Jake so long as he continued to show some weight gain. Had time gone on much longer after the injury, it would not have been reasonable for Mr. Fountain to simply continue to apply ointment and give injections.

[36] With a strict liability offence, the Crown needs only to prove the *actus reus*. An accused person avoids liability by proving that he took all reasonable care in the circumstances. I am satisfied that Mr. Fountain did so. As it is, the evidence does not support the contention that Mr. Fountain caused or permitted Jake to be, or continue to be, in distress. I acquit Mr. Fountain of the charge.

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S.D. Frame
Provincial Court Judge