Indexed as:
R. v. Smith

Between
Regina, and
Kathleen Smith and James Walker

[1991] Y.J. No. 171

Yukon Registry No. **90-07721**

Yukon Territorial Court
Whitehorse, Yukon Territory

Beaulieu Terr. Ct. J.

Oral Judgment: April 16, 1991

(19 pp.)

Counsel for the Crown: Diane L.M. Sylvain.
Counsel for the Defence and for Robert G. Kilpatrick: Shayne Fairman.

BEAULIEU TERR. CT. J. (orally):-- I should comment at the outset that most of you should be prepared to be patient for some time. I would normally, perhaps, be in a position to deal with this rather summarily; but the length of the time reguired to give this decision should at least reflect the fact that I thought it very important to deliberate on the matters of law and the facts very very carefully.

The accused, Kathleen Smith and James Walker are charged that on or about the 10th of September, 1990, they did wilfully permit to be caused unnecessary pain to a dog by failing to provide a suitably sized collar, contrary to s. 446(1)(a) of the Criminal Code.

The factual background consisted of an agreed upon statement of facts which was entered as Exhibit A, and it reads as follows:

"On September 10th, 1990, Andrea Lemphers, the president of the Humane Society, located at Whitehorse in the Yukon Territory, received a phone call from the Midnight Sun Veterinary Clinic asking her to attend their office.

Dr. Flemming and Dr. Royle of the clinic advised Andrea Lemphers that a dog had just been brought to the clinic by Blaise Orlanda Smith of No. 8 Aspen Road, Whitehorse, Yukon with an ingrown collar on its neck.

Andrea Lemphers attended the Midnight Sun Veterinary Clinic and at 7:14 p.m. on September 10, 1990, Andrea Lemphers phoned the R.C.M.P. and apprised them of the situation.

On September 10, 1990 at 7:20 p.m., Cst. Grace Allen attended the Midnight Sun Veterinary Clinic, along with Cst. Westover to investigate the matter.

Cst. Allen noted that the dog, a female husky cross, with grey and black markings called 'Bjourn', was asleep on the examination table and the dog had a wound, going around the circumference of the neck.

Cst. Allen seized the collar that the dog had been wearing, which will be tendered at this trial as Exhibit '1'.

Cst. Allen obtained reports from Dr. Flemming and Dr. Royle which will be tendered at this trial as Exhibits '2' and '3' respectively.

Cst. Allen also obtained photographs from Dr. Royle that Dr. Flemming had taken before, during and after the operation on September 10, 1990, at the clinic, which will be tendered at the trial as Exhibit '4', in bulk.

Further investigation by Cst. Allen revealed that the dog came to the accused's residence, Kathleen Smith and James Walker, at No. 8 Aspen Place in Whitehorse, in the Yukon Territory. [That should have read, came from the accused's residence.]

The dog's owner, Liam Smith, Kathleen Smith's sixteen year old son got the dog in January 1990 as a puppy, approximately two months old.

The collar that was removed from the dog at the veterinary clinic was the same collar that was put on the dog when he was a puppy."

Now, I have read this exhibit because it will be crucial to the examination of both the issue of law and fact later. I underline once more that this was an agreed upon statement of facts.

The Crown called two witnesses. Dr. Royle, a qualified veterinarian at the Midnight Sun Veterinarian Services in Whitehorse, and Liam Smith, the 16-year-old son of the accused Kathleen Smith.

Dr. Royle attended to the dog when it was presented on an emergency basis on September 10th, 1990. Her report was entered as Exhibit 3.

Dr. Flemming, who assisted Or. Royle, also prepared a report which was entered as Exhibit 2.

These two reports, coupled with Dr. Royle's viva voce evidence, revealed a rather repugnant, rather pathetic and gruesome state of affairs concerning the dog in question. On admission, the dog was depressed, timid, unkempt, thin, and dirty. A woven nylon collar was so imbedded into her neck that a piece of flesh extruded between the buckle of the collar. An infection from the imbedded

collar likely was the cause of a high fever. Heart and respiration rates, according to Dr. Royle, were high. A high dose of antibiotics and an injection of drugs were administered to decrease inflammation and relieve pain. Anesthesia was administered to permit the cutting of the collar with a scalpel, including the removal of the extruded skin from the buckle. There was a substantial wound as a result.

According to Dr. Royle's testimony, antibiotic treatment, proper grooming, and food resulted in a dramatic improvement and a return to normal temperature the day following surgery.

Dr. Royle opined that the collar must have remained unadjusted for months in order to cause such a result. In her view, the dog's discomfort from a tight collar should have been observable. While conceding that the infection from the wound might develop within one to two weeks, she was of the view that the wound itself would have required a longer time to develop. She did concede that the infection could have been present but masked for a time. It was her view that ownership of an animal requires the need to check such things as a proper fitting collar.

Liam Smith, the owner of the dog, was in Victoria, B.C., with the two accused when his brother Blaise telephoned, and his mother answered. The dog was his, and it had been obtained as a result of his insistence. He accompanied the two co-accused when the dog was picked from the litter. It was his dog and while others helped occasionally, including the co-accused, it was perceived to be primarily his responsibility, and that of his brothers, to care for the dog.

While he was sick and in the hospital during the summer, particularly in August, his brothers had taken care of the dog. Liam could recall asking his mother for another collar, but could not recall whether his request had actually registered with either her or Mr. Walker. It was his evidence that he checked the dog's collar from time to time and never thought it was too tight. He also testified that he checked it before leaving for Victoria. When his mother answered the phone in Victoria, according to Liam, she "flipped out" at the news of the dog's difficulties and she was very upset. To his knowledge, neither of the accused ever had any knowledge of a problem with the collar. In his view his mother was "an animal lover".

Both of the accused testified. Mr. Walker is a friend of the family for some 9 years and indicated that he first met the co-accused, Mrs. Smith, when he was boarding at her mother's home in Victoria. He described their relationship as being strictly friendship. While they share living expenses, there is nothing of a spousal nature to the relationship and he has never been involved in parenting the children.

He confirmed that while consulted about Liam's wish to have a dog, he expressed his desire that it be an outside dog because of his allergies. It was also understood, by Walker, that while dog food might be subsidized, neither he nor the co-accused mother would be responsible for the day-to-day care of the dog.

He admitted to having gotten the collar and helped Liam to put it on the dog. He was never approached later, nor was any indication ever given him that the collar might be a problem. Had there been such an approach or some knowledge on his part, he would have suggested that the collar be removed. In fact, it was his view that a collar for this particular dog was unnecessary because the pup always "stuck to" the other larger dog called Singer.

He, the co-accused, and her son Liam went to Victoria on August the 27th and returned on September 23rd. He recalled feeding the dog the night before they left. He did not notice anything

out of the ordinary. He described the dog as being active "just like a puppy". His contacts with the dog were almost nil at his insistence because of his allergies. When he did occasionally help by providing food, he basically did it from a distance and effectively just dropped the dish inside the kennel.

On September 10th, he recalled being upset at the phone call because he does not like pain for any animal. He too described the co-accused as being an animal lover who used to take in stray cats and dogs for their safety and attempt to try to find them homes.

The co-accused Kathleen Smith emphasized that her relationship with Mr. Walker was as Mr. Walker had described it, strictly that of friends. He was a friend and a boarder sharing living expenses and to that extent she had consulted him regarding obtaining the dog for Liam, just as she would have consulted any boarder particularily if there was a health issue involved. Because she herself suffers from rheumatoid arthritis it was clear at the outset that she would not be involved in the day-to-day responsibility of caring for the dog. To the extent that Liam needed help while away or ill, it was his brothers Blaise and Jason who would assist and walk or run the dogs, usually in the late evenings.

Upon learning of the problem with the collar by phone, she immediately told Blaise to cut it off. When informed that this appeared to be impossible, she directed him to get the dog to the vet soon and assure the latter that payment would be made. She was, in her view, "more than a little upset" and questioned Liam who assured her that he had been checking the collar. The only reference to a collar that she could recall was Liam's previous request for a leather collar. She had occasion to have her hand on the dog's collar at the end of July, and it was her recollection at that particular time, it was loose enough far her to put her whole hand in it. Her recollection was that the collar was put on around late April or May, and she could not recollect originally noticing anything that would suggest that the collar was small, nor that it was a "puppy collar". She, all along, assumed that the dog and the collar were being monitored; and that, therefore, it never crossed her mind to specifically ask about it.

The law: S. 446(1) of the Criminal Code provides that a person who wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal ... (emphasis mine)

And then proceeds under ss. 3 to provide that:

> "Evidence that a person failed to exercise reasonable care or supervision of an animal ... [leaving some parts of it out now for the purposes of this case] thereby causing it pain, suffering ... or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering ... or injury was ... or was permitted to be caused wilfully."
>
> The Code also provides under s. 429(1) that:
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> "Every ... [person] who causes the occurrence of an event by doing an act or by omitting ... 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 [which includes 446] wilfully to have caused the occurrence of the event."

It therefore would appear clear that the Crown must prove, in this particular case, that the co-accused were owners of the dog.

Now, there is no definition of ownership in the Criminal Code. However, ownership generally signifies a person "in possession, having care or control and management". A person who owns something generally has a recognized right to enjoy and to do with it as he pleases, even to spoil or destroy within the law. While it may be possible for someone to have dominion or control over a thing while title is in another, the true meaning of ownership will generally be gathered from the particular circumstances; and it is, of course, possible to have joint owners or part owners.

The Oxford dictionary defines owner as "one who owns or holds something, one who has the rightful claim or title to a thing".

Were Mr. Walker and Mrs. Smith owners of this dog? The evidence before the Court was that Liam, the 16-year-old son, after agitation got his wish and obtained the dog as his. Exhibit A, to which I referred at the outset of this judgment, in number 10, thereof reads, "The dog's owner, Liam Smith, Kathleen Smith's sixteen year old son got the dog in January 1990 as a puppy, approximately two months old".

Secondly, Liam testified to having been charged in Youth Court as the owner and being involved in a diversion project as a result of his accepting responsibility in relation to these very same circumstances.

Thirdly, it would appear that he and the two co-accused intended that Liam would have the rightful claim and title to the dog.

Fourthly, Exhibit 3, Dr. Royle indicates that the dog was brought in by "brother of the owner".

The question raised is: did either of the co-accused retain any part of the ownership so as to amount to joint or co-ownership with Liam? In my view, Mr. Walker could be said to have done so only with great difficulty. And I conclude that he was not an owner of the dog at the material time. Indeed, the activities that might be interpreted as indicia of ownership such as the occasional feeding, even the provision of the collar, is something that could be done by virtually any one friend or member of the family.

Mrs. Kathleen Smith's situation is a little less clear. While she consulted Mr. Walker and while he shares expenses including dog food, she would appear, at least at first blush, to have greater and more effective control regarding what might or might not happen to the dog, even after the initial decision to obtain it.

Indeed, the phone call to Victoria could be interpreted as seeking direction from a person who was at least part owner or co-owner or perhaps even the owner, but then there is no evidence before the Court to clarify whether or not it was indeed the mother or the son Liam that was to be contacted. Therefore, the phone call to Victoria could be just as consistent with a call to the owner Liam that was received by his mother who in turn gave firm directions that could just as easily have been given by any other non-owning adult in the circumstances.

After the main submissions were made by both Crown and defence counsel, I inquired of defence counsel whether, in light of his submissions, he was conceding ownership on the part of his clients. While unsure about the accused Walker, he conceded that the mother might be found to be an owner. I remain uncertain, in the circumstances, whether I would be bound in law by that con-

cession. Had it been made prior to the end of the evidence, it might have been more appropriate to have such an interpretation placed on it. Be that as it may, I'm still left with an agreed statement of facts, and some viva voce evidence, as well as exhibits, three which I've mentioned, which point clearly to the 16-year-old son of the accused Mrs. Smith being the owner of this dog. It would appear that the co-accused Kathleen Smith could, at best, be described as a co-owner, bearing in mind the degree of control and care that might be required or inferred from her actions. However, I'm not convinced that those actions, including the commitment to see that the veterinarian be paid, necessarily invite a conclusion that she was an owner.

While I could dismiss these charges against both of the accused because I am not satisfied beyond a reasonable doubt on the element of ownership, I feel it necessary, in the light of the peculiar circumstances and the nature of this particular case, to proceed to examine the law and the evidence, even on the assumption that one might be in error in not qualifying the co-accused as owners.

S. 446(1) of the Criminal Code provides: "every one commits an offence who (a) ... wilfully permits to be caused ..." (and that is qualified by being the owner). The question then becomes whether even if the co-accused were, in fact, found to be owners of this dog, they, as owners, wilfully permitted to be caused unnecessary pain, suffering and injury to the dog. Not only must it be pain, suffering or injury, but it must be proven that it was "unnecessary pain and suffering". It is not, therefore, the amount of pain but whether it was unnecessary.

To prove wilfulness, the Crown can rely on sub-s. 3 and lead evidence of a failure to exercise reasonable care or supervision. Subject to any evidence to the contrary, if that lack of reasonable care and supervision caused the pain, injury or suffering, it would be proof that the accused caused it wilfully. It's to be noted that such presumption can be rebutted by evidence to the contrary; and, in my view, such evidence need not necessarily be called by the defence. In that sense, it is not the bete noir, reverse onus, that has come up in many Charter cases.

The defence, if the need is perceived, need only call evidence such as to raise a doubt on the issue. The Crown also may rely on s. 429(1) which provides that the accused may be deemed to have wilfully caused the occurrence. Here, however, in order to do so, the Crown must establish that there was an act done or that there was an act omitted when there was a duty to do so -- to do an act, that is -- knowing that the act or the omission would probably cause an event to occur and that the accused were reckless whether the event occurred or not.

Under s. 446(3), it would appear that the Crown need only call evidence on failure to exercise reasonable care and supervision which caused the dog to suffer pain and suffering. If there is no evidence to the contrary, then the pain and suffering is wilful. Presumably if there is evidence to the contrary, the Crown will still be required to prove the element of wilfulness and could rely on 429(1) and resort to "deemed" wilfulness. Here, however, proving an act or a failure to act where there was a duty to act, and proving the elements of knowledge regarding the causal relationship between the act or the omission and the occurrence, or proving the attenuate recklessness in that regard would appear to place a higher burden on the Crown. More significantly, sub-s. 2 of 429 would seem to be clearly different from sub-s. 3 of 446 because in the former there is a requirement that the defendant not merely provide evidence to the contrary, but that he must "prove" that he acted with legal justification or excuse and with colour of right.

The presumption under 446(3) becomes engaged by the presence of evidence to the contrary which could but need not necessarily be called by the defence. There may be evidence to the contrary in the Crown's case. However, even if the defence chooses to rebut the presumption by calling some evidence on the issue, it need only raise a reasonable doubt.

The situation under 429 strikes me as being quite different. It is my respectful view that although this was not formally raised in this particular case that sub-s. 2 of 429 would have a difficult time surviving a Charter challenge because it requires that the accused prove legal justification or excuse and colour of right.

The other difference, of course, between 446(3) and 429 is that 429 applies to all of part II of the Code, whereas 446(3) applies only to paras. (a) and (b) of that particular sub-section. Lastly, it appears that the "pain, suffering", would appear to be more frowned upon than abandonment which, interestingly enough, is not qualified by wilful as is the case for wilful neglect or failure with respect to providing food, water, shelter, and care.

Restricting myseif for the moment to sub-s. 1 of 429, it would still be necessary for the Crown in this case, in order to prove the element of wilfulness, to establish that the two accused, given their shortcomings and strengths, actually foresaw the consequences or circumstances. The law is that "wilfully" means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. See R. v. Senior, [1899] 1 Q.B. 283. What the accused did or omitted, they did or left undone with intent, that is, wilfully. That is what would be required. In R. v. Vaillancourt (1987), 60 C.R. (3d) 289 states that:

> ... as a general rule, principles of fundamental justice require proof of a subjective mens rea with respect to ... prohibited act[s] ...

but it is not always subjective. There must at least be objective foreseeability.

Could or should the accused, as reasonable persons, have foreseen that the owner of this dog and his helpers would not properly ensure that the dog's collar was appropriate and not causing harm. Did they actually, subjectively, or should they or could they or ought they have foreseen that Liam would not properly ensure the proper fitting of the collar on an objective basis? More specifically, with respect to this charge, did they actually or should they have reasonably foreseen on August 27th that Blaise would not be capable of ensuring the dog's proper care and supervision, including the collar situation, while they were away?

Wilful implies a

> ... deliberate purpose to accomplish something forbidden; a determination to execute one's own will in spite of and in defiance of law.

See Regina v. Griffin (1935), 63 C.C.C. 286, [1935] 2 D.L.R. 503.

I heard submissions on the issue of recklessness and wilful blindness. It is my understanding that recklessness entails a knowledge of a danger or risk and persistence in a course of conduct which creates a risk that a prohibited result will occur. The culpability arises or is justified in the concept of recklessness by the consciousness of the risk and proceeding in the face of it. Here, again, I would have to be satisfied beyond a reasonable doubt that the accused knew that without their active daily and direct supervision and intervention before and particularly during their ab-

sence in August and September, there was a risk of pain and suffering to the dog as a result of the collar, and despite knowing about this risk, they persisted in their plans to go to Victoria and leave Blaise, a 20-year-old family member, in charge of the dog.

The concept of wilful blindness is distinct from recklessness in that the person has become aware of a need to inquire about an issue, but declines to persue the inquiry for fear of knowing the truth. Ignorance is the preferred choice of that person. Culpability here is justified because the person deliberately fails to inquire when he knows there is reason to inquire. Granville Williams in his treatise on the criminal law suggests that this particular concept only applies where it can almost be said that the defendant actually knew. The person suspects the fact, realizes its probability, but refrains from obtaining the final confirmation because he wanted, in the event, to be able to deny knowledge. It requires, in effect, a finding that the defendant intended to cheat the administration of justice. "Any wider definition would make the doctrine of wilful blindness undistinguishable from the civil doctrine of negligence in not obtaining knowledge". I take assistance also from the case of Vaillancourt cited earlier that a trier of fact must be satisfied beyond a reasonable doubt with respect to each essential element of the offence. Here, where sub-s. 3 of 446 may assist with respect to a presumption of wilfulness, it is subject to evidence to the contrary on the issue of reasonable care and supervision. And, while s. 429 has a deeming section, and recognizing the potential constitutional flaws of sub-s. 2, it would still require the ultimate proof beyond a reasonable doubt with respect to knowledge and satisfaction that the accused knew of a probable cause of the occurrence and that they omitted or were reckless in that regard. The element of wilful failure on the part of the accused would still have to be proven beyond a reasonable doubt.

On the facts of this case, while I may be satisfied that the accused were negligent, at least in the civil sense, I am not satisfied beyond a reasonable doubt that they wilfully permitted to be caused unnecessary pain to the dog by failure to provide a suitably sized collar as laid out in the Information. What distinguishs this from negligence is the mental element. While there may be just cause for concern and dismay that such a situation should have occurred, I must decide the case on the law and our fundamental principles of criminal justice, not those of civil liability. One of the only persons that might have been able to shed some additional light on the circumstances of this particular case was the person referred to as Blaise, the 20-year-old, who had previously taken care of or assisted in taking care of the dog. Indeed, he was in charge of the dog during the crucial period of time. But that evidence is not before me. For the rest of it, the accused conceivably in the civil sense could be recognized, and particularly Mrs. Smith, as having a duty of care toward a minor son. Again, I stress in the civil sense, of a parent, having a duty of care with a result that she may or may not be found responsible for damages as a result of his negligence. However, I hasten to point out that the criminal law does not recognize third party liability. Indeed, the old "contributing to juvenile delinquency" was expressly excluded from the Young Offenders Act legislation, fundamentally because that was more in the nature of a civil responsibility rather than a criminal law concept.

In the result, therefore, on the review of all of the facts in this particular case and the law, I must acquit the accused, but I do so underlining once again that I trust that counsel will be in a position to explain to his clients that the dismissal of this charge and the acquittal does not by any stretch of the imagination reflect any disregard for the concern and the dismay that may have been occasioned as a result of this activity, and I would trust that both of the accused, as well as members of their family, would think twice before becoming involved with pets or animals in the future unless they are prepared to undertake a greater sense of responsibility for them.

The order will go accordingly.

BEAULIEU TERR. CT. J.