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V. CRIMES AGAINST ANIMALS

(a) Overview

A somewhat unusual component of Part XI of the *Criminal Code* is the portion that addresses cruelty against animals. Despite being sentient creatures with the capacity to suffer pain, animals in Canadian society are treated exclusively as property by the law. Where a person inflicts harm to that property by killing or injuring it — or to put it in the terms of section 430, by destroying or damaging the property — recourse is already available through resort to the mischief provisions. It follows that the primary objective of sections 444 to 447.1 cannot really be to protect property at all,[1] and this becomes more evident once it is recognized that many of the provisions protect animals that cannot be considered personal property.[2] Indeed, the purpose of these offences is to recognize that animals suffer from human cruelty that should not occur in a civilized society.[3] Without question, the focus of the provisions is on the protection of animals from human harm and neglect.[4]

Although relatively recent,[5] provisions of this sort are now common throughout the Western world, the product of an emerging concern about the human treatment of animals. Still, by comparison to the modern legislative efforts enacted abroad,[6] Canada's provisions seem horribly antiquated, and reflect a view of morality towards animals that would have been understandable when

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1 This is probably an overstatement with respect to ss. 444-445, both of which focus on protecting the property of owners, and do not consider cruelty.

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2 Section 445.1(a) prohibits a person from causing unnecessary suffering to any animal or bird, regardless of whether such creature is owned or living in the wild. The latter category does not fall within a conventional definition of "property".

3 As Lamer J.A. noted in *Menard*, [1978] J.Q. no 187, 43 C.C.C. (2d) 458 at para. 28 (Que. C.A.), "men... impose on themselves a rule of civilization by which they renounce ... all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the choice of means employed". See also *Reece v. Edmonton (City)*, [2011] A.J. No. 876, 335 D.L.R. (4th) 600 at para. 56, *per* Fraser C.J.A, who notes that "this law... is now so ingrained in our society that it is considered a rule of civilization".

4 There are other strong rationales as well. Studies in the United States demonstrate that animal abusers will go on to commit more serious crimes against humans: R. Lockwood, "Animal Cruelty and Violence Against Humans: Making the Connection" (1999) 5 Animal Law 81.

5 The first anti-cruelty statute was *Martin's Act*, passed in 1822 by the British Parliament (3 Geo. IV, c. 71). See Simon Brooman & D. Legge, *Law Relating to Animals* (London: Cavendish, 1997) at 17-42.

6 *E.g.*, *Animal Welfare Act 1999* (N.Z.), 1999, No. 142; *Animal Welfare Act 2006* (U.K.), 2006, c. 45.

the provisions were last the subject of significant reform in 1953-54.[7] Sections 444 to 447.1 use tortured language, fail to address many important types of cruelty, and require a high level of *mens rea* for offences that are designed to protect creatures who exist in an extremely vulnerable and dependent relationship with their human owners. The federal government attempted to reform this part of the *Code* in 2001,[8] but its efforts were narrowly defeated in the Senate, leaving the current animal cruelty provisions — amongst the most limited of their kind in the world — in their existing sorry state.

Not all of the blame can be placed on Parliament. At a conceptual level, animal cruelty offences are notoriously difficult to apply and adjudicate, as they demand a delicate — and some would say impossible[9] — balancing of interests. The crux of whether a particular act constitutes an offence tends to focus upon whether the act was "necessary" in the circumstances. While this standard can be resolved quite easily in cases involving malicious or sadistic conduct, the test is not so easy to apply in other contexts. The reason lies in the fact that in practice, there exists a real lack of societal consensus regarding what constitutes the "unnecessary" treatment of animals. Despite public screams of outrage when media reports reveal animal abuse against household pets, the imposition of deliberate suffering upon animals is an entrenched part of Canadian society, as the agricultural industry alone raises and kills millions of animals every year.[10] It is no wonder that theorists – not to mention judges – have difficulty finding a rational way to sort out the "good" cruelty from the "bad", as the reality is that "[t]he moral perceptions of the public differ quite widely, sometimes inexplicably, from one manifestation of our interaction with animals to another, and a coherent underlying principle is often difficult to find".[11]

For the most part, the courts have approached this dilemma by taking a fairly conservative view of the legislation, imposing liability only where the

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7 Parliament initiated minor reforms in 2008, boosting the penalties for these offences considerably. Previously, penalties for most of the cruelty offences were punishable on summary conviction, with a maximum penalty of 6 months' imprisonment. Now, the Crown can elect to proceed by indictment or summary proceeding. Wilful acts of cruelty, including the provisions in ss. 444 and 445, are punishable by a maximum of 5 years' imprisonment on indictment, and 18 months on summary conviction. Cases involving neglect in s. 446 are punishable by a maximum of 2 years. Section 447.1 now gives the courts power to impose prohibition orders upon offenders from owning animals, as well as ordering convicted accused to pay costs for expenses incurred to treat the injured animals.

8 See Canada, *Crimes Against Animals: A Consultation Paper* (Ottawa: Department of Justice, 1998); Bill C-15, *An Act to amend the Criminal Code and to amend other Acts*, 1st Sess., 37th Parl., 2001 (1st reading March 14, 2001).

9 See, *e.g.*, Gary Francione, *Introduction to Animal Rights: Your Child or Your Dog* (Philadelphia: Temple University Press: 2000).

10 As Elaine Hughes & Christiane Meyer, "Animal Welfare Law in Canada and Europe" (2000) 6 Animal Law 23 at 35, have noted:

> People capture, house, feed, transport, wear, ride, eat, slaughter, train, breed and experiment on animals. Animals are used for companionship, sport, research, food, clothing, therapy, entertainment, work and other cultural activities. Simultaneously, society struggles to preserve endangered species and to eradicate 'pests'. In all of these human-animal interactions, there is the potential for suffering or abuse.

11 Simon Brooman & Debbie Legge, *Law Relating to Animals* (London: Cavendish, 1997) at 73.

actions of the accused resulted in significant harm, and were motivated by malice or a similar imperative, or the result of exceptional levels of negligence.. Even then, defendants can escape liability where they raise a reasonable doubt about whether they were aware of the consequences of their actions. It is an undesirable state of affairs, and it is hardly surprising that most of the provinces have filled the lacuna by enacting very similar legislation — albeit with lesser *mens rea* protection for the accused — as a means of punishing those who negligently harm animals.[12]

There are a total of 10 different offences that can be committed against animals under the *Code*, but by far the most commonly raised are the wilful infliction of cruelty (section 445.1(1)(a)) and wilful neglect (section 446(1)(b)). These two crimes are dealt with first, while the remainder of the offences, all of which deal with very specific types of conduct, are addressed in a subsequent section.

(b) Cruelty to Animals

The crime of causing unnecessary suffering — historically referred to as wilful cruelty against animals — is set out in section 445.1(1)(a) of the *Code*. The section provides that every one commits an offence who wilfully causes or, being the owner, wilfully permits to be caused, unnecessary pain, suffering or injury to an animal or bird. There are thus three primary components to the offence: (1) the accused must cause, or permit to be caused, pain, suffering or injury to an animal or bird; (2) it must be committed wilfully; and (3) the pain, suffering or injury must be unnecessary in the circumstances. Each of these components shall be addressed in turn.

(i) Causes or Permits Pain, Suffering or Injury

As the primary clause targeting the wilful infliction of suffering, section 445.1(1)(a) places no restrictions on *who* can be accused of causing pain, suffering or injury against an animal. It follows that any person can be charged for inflicting such harm, although only an owner can be held liable for a wilful omission that permits harm of this nature to occur. Although the language is notably different from section 446(1)(c), which penalizes persons in "custody or control", along with owners, the jurisprudence seems to treat these two terms alike, with the term

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[12] *E.g.*, *Animal Protection Act*, R.S.A. 2000, c. A-41; *Animal Cruelty Prevention Act*, S.N.S. 1996, c. 22. Generally speaking, the provincial legislation is restricted to imposing fines or very short terms of imprisonment, though this is not always the case. Challenges to the provincial legislation in Ontario on constitutional grounds are currently underway. An early precedent suggests there is no constitutional problem in both levels of government enacting this type of legislation, as they serve different purposes: *Vaillancourt*, [2003] N.S.J. No. 510, 221 N.S.R. (2d) 175 (N.S. Prov. Ct.). The Ontario challenge should pose more difficult questions, as the offences there provide for penalties of up to 2 years' imprisonment for causing distress: *Ontario Society for the Protection of Cruelty to Animals Act*, R.S.O. 1990, c.O.36, s. 18.1(3).

owner in section 446(1)(c) applied to any person "having dominion and control" over the animals as well as those with exclusive legal ownership.[13]

The provision requires the inflicting of some form of "pain, suffering or injury", but to be clear, it does not protect the animal's life, however perverse such a result might seem at first instance. The needless killing of an animal, even by violent or vicious methods, will not constitute an offence where there is no evidence that the animal suffered during the process.[14] Subject to the restrictions of section 445.1, which we shall address shortly, it is not a criminal offence to put an animal to death, even if there was no need to do so in the circumstances.

Although the animal must suffer in some measurable way, this element of the *actus reus* does not require a high threshold of harm. So long as it can be shown that the pain reached a minimal level of physical discomfort, this aspect of the offence will be met, and the issue will become whether the infliction of such harm was necessary in the circumstances.[15] Since most animals are incapable of human speech, determining whether the animal actually suffered pain will occasionally be contentious. Expert evidence can be tendered to establish this element, but judges are also permitted to draw inferences from the available facts and circumstances.[16]

(ii) Intent

The pain, suffering or injury must be caused wilfully — or permitted wilfully, in the case of an owner — though as with the other sections in this Part, the term "wilfully" includes recklessness because of the definition of the term in section 429.[17] As usual, wilfulness should not be confused with motivation, and no proof of improper, cruel or malicious motive is required to ground a conviction under this section.[18] Despite the high level of *mens rea* required, cruelty against animals is still regarded as a crime of general intent, and thus drunkenness cannot be raised as a defence under section 445.1.[19]

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[13] *Paish*, [1977] B.C.J. No. 924, [1977] 2 W.W.R. 526 at 536 (B.C. Prov. Ct.).

[14] Elaine Hughes & Christiane Meyer, "Animal Welfare Law in Canada and Europe" (2000) 6 Animal Law 23 at 35, referring to the unreported decision of *R. v. Kohut & Melmoth*, Edmonton, 1997. See also *Ménard*, [1978] J.Q. no 187, 43 C.C.C. (2d) 458 (Que. C.A.).

[15] *Ménard*, *ibid.* As we shall see, the amount of pain caused is a very relevant factor in the balancing analysis, but as a precondition it must simply be shown that some pain, injury or suffering was caused.

[16] Unfortunately, judges often choose to ignore obvious signs of discomfort. See, *e.g.*, *McRae*, [2002] O.J. No. 4987 (Ont. S.C.J.) (a dog yelping and crying after being kicked was not conclusive evidence of suffering); *Miller*, [2003] Y.J. No. 170 (Y.T.S.C.) (dog being kicked "viciously" but no evidence of pain). One would hope that judges would be more willing to draw inferences of pain and suffering, especially where the acts in question were without justification.

[17] *Higgins*, [1996] N.J. No. 237, 144 Nfld. & P.E.I.R. 295 (Nfld. T.D.).

[18] *McHugh*, [1965] N.S.J. No. 3, [1966] 1 C.C.C. 170 (N.S.C.A.). Whether the act was committed for a cruel purpose will be considered in sentencing, however: *Paul*, [1997] B.C.J. No. 808 (B.C. Prov. Ct.).

[19] *Martens*, [1986] M.J. No. 76, 39 Man. R. (2d) 249 (Man. Q.B.).

There exists some controversy over what exactly must be performed "wilfully" in order to attract the penal sanction. The leading interpretation seems to be that of *Clarke*,[20] where the trial judge held that although the accused must wilfully commit the action that causes harm, he or she does not have to subjectively foresee or intend for that action to cause pain, suffering or injury. Such harm need only be objectively foreseeable. While perhaps desirable, this approach does not accord with the wording of the provision, and in particular, with the wording of section 429. The more logical interpretation was adopted in *Higgins*:[21] the accused must act in the knowledge that the act undertaken will probably cause pain, suffering or injury, and either intend or be reckless as to whether pain, suffering or injury occurs. Section 445.1 does not require advertence to a specific *type* of injury, but there must be some awareness that injury will probably materialize if the action is undertaken.[22]

Section 445.1(3) should probably be mentioned here as well. It provides that:

> For the purposes of proceedings under paragraph 1(a), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it damage or injury is, in the absence of any evidence to the contrary, proof that the damage or injury was caused by wilful neglect.

Essentially, this subsection provides that proof of a failure to exercise reasonable care or supervision permits the trier of fact to infer wilfulness, unless there is some evidence to the contrary. This subsection is unlikely to arise very often in practice, as most charges brought under section 445.1(1)(a) deal with intentional acts of cruelty, rather than a failure to exercise proper care. Ironically, this subsection is not applicable to section 446(1)(b), the neglect provision, where it would probably be most useful.

Still, the clause has some potential utility. In cases premised on neglect or the causing of suffering through neglect, charges can still be brought under section 445.1(1)(a), and it would not be necessary for the prosecution to prove any direct intention, as the trial judge could infer this intent using the presumption in subsection (3), unless evidence was raised to rebut it. So long as this section is read only to impose an evidentiary burden on the accused, there is nothing wrong with it, as the presumption is quite a logical one to draw. In the absence of evidence indicating otherwise, one generally should presume that a failure to exercise reasonable care was done wilfully. Once some evidence is available to indicate otherwise, however, the presumption will have no further effect, and the burden to prove the necessary intent remains at all times with the prosecution.[23]

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[20] [2001] N.J. No. 191 at para. 59 (Nfld. Prov. Ct.). See similarly *Gerling*, [2013] B.C.J. No. 2973 (B.C.S.C.).

[21] [1996] N.J. No. 237, 144 Nfld. & P.E.I.R. 295 (Nfld. T.D.). See similarly *Irving*, [2013] S.J. No. 375, 425 Sask. R. 1 at paras. 140-143 (Sask. Prov. Ct.).

[22] *Ibid.* at para. 14.

[23] *Higgins*, [1996] N.J. No. 237, 144 Nfld. & P.E.I.R. 295 (Nfld. T.D.).

(iii) What Is Unnecessary Pain, Suffering or Injury?

With the threshold for pain, suffering or injury being so low, it should be apparent that the key to a successful prosecution in most cruelty cases will involve establishing that the effect upon the animal was unnecessary in the circumstances. This element is clearly part of the *actus reus* and the accused's belief of the necessity of the action, while relevant as evidence, is not determinative. Thus in *Galloro,*[24] the accused was convicted for cutting off a portion of a dog's ear to "alleviate" seizures from which the animal was suffering, even though she honestly believed the act was necessary, because it was clear from the evidence that the procedure was medically unsound.

While not unknown to the criminal law, use of the term "unnecessary" in this context has proven highly problematic. As noted above, the word effectively imports a balancing test whereby the accused's purpose for inflicting the harm in question is measured against the degree of pain, suffering or injury visited upon the animal. What makes this test so challenging to apply is that there is no objective standard by which the relative justifications can be measured. As one commentator has suggested:

> ... [S]peaking of "necessity" in the context of cruelty prosecutions is not terribly helpful. It is not strictly speaking necessary for any animals to experience pain because of human activity … Typically to claim that a given amount or kind of animal pain or distress is "necessary" is to make two judgments: (1) that a human aim for which the pain (distress and so on) is imposed is legitimate or is sufficiently important to justify the animal pain; and (2) that the amount or kind of pain in question is in fact required for the achievement of that aim.[25]

This can be harder to apply than one might imagine. To be sure, no difficulty arises where the action in question is completely lacking in legitimacy, such as where the accused's sole purpose is some form of sadistic pleasure. Smashing a cat with a hockey stick for amusement cannot be considered "necessary" by any measure.[26] Strangling a dog out of anger in response to its having growled is equally unjustifiable.[27] But other cases are much more difficult to assess. Is calf-roping for sport "necessary", notwithstanding the practice's tendency to often cause grave damage to a calf's neck? Are industrial practices that confine animals to cages for their entire lives a *necessary* aspect of the agricultural business?

The leading case on this topic shows how difficult such balancing can be. In *Ménard*,[28] Lamer J.A. — then a member of the Québec Court of Appeal — defined "unnecessary" in the following manner:

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[24] [2006] O.J. No. 2871 (Ont. C.J.).

[25] Jerrold Tannenbaum, "Animals and the Law: Property, Cruelty, Rights" (1995) 62 Social Research 539 at 577.

[26] *D. (L.)*, [1999] A.J. No. 539, 242 A.R. 357 (Alta. Prov. Ct.).

[27] *Greeley*, [2001] N.J. No. 207, 203 Nfld. & P.E.I.R. 10 (Nfld. Prov. Ct.).

[28] [1978] J.Q. no 187, 43 C.C.C. (2d) 458 (Que. C.A.).

> It is sometimes necessary to make an animal suffer for its own good or again to save a human life. Certain experiments, alas, inevitably very painful for the animal, prove necessary to discover or test remedies which will save a great number of human lives. [Section 446] does not prohibit these incidents, but at the same times condemns the person who, for example, will leave a dog or a horse without water and without food for a few days … in order to avoid the costs of a temporary board and lodging, notwithstanding that these animals would suffer much less than certain animals used as guinea pigs. Everything is therefore according to the circumstances, the quantification of the suffering being only one of the factors in the appreciation of what is, in the final analysis, necessary.[29]

He continued by emphasizing that necessity had to take into account the relative positions of humans and other animals:

> Thus men … do not renounce the right given to them by their position as supreme creatures to put animals at their service to satisfy their needs, but impose on themselves a rule of civilization by which they renounce, condemn and repress all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the choice of means employed. "Without necessity" does not mean that man, when a thing is susceptible of causing pain to an animal, must abstain unless it be necessary, but means that man in the pursuit of his purposes as a superior being, in the pursuit of his well-being, is obliged not to inflict on animals pain, suffering or injury which is not inevitable taking into account the purpose sought and the circumstances of the particular case. In effect, even if it not be necessary for man to eat meat and if he could abstain from doing so, as many in fact do, it is the privilege of man to eat it.[30]

This certainly sounds reasonable enough, but it actually creates an incredibly ambiguous test, for it provides no indication of what might constitute a legitimate purpose, aside from indicating that animals can be harmed to satisfy human need or desire. Not surprisingly, given the common uses of animals in society, the subsequent jurisprudence has tried to steer away from these difficult questions. Leaving aside easy cases involving disreputable acts motivated by sadism or indifference, there seems to be very little scrutiny of what constitutes a "legitimate" purpose for ill-treatment. Deliberately inflicting pain upon a horse might constitute cruelty in the abstract, but the same act is justified where the purpose is human entertainment, and the horse is intentionally irritated with a painful strap to perform more strenuous bucking in a rodeo contest.[31] A similar lack of clarity surrounds the use of the term "inevitable" in *Menard*. Is avoidable pain and suffering justifiable if it is part of a common industrial practice? Once again, the jurisprudence indicates that the necessity test does not

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[29] *Ibid.* at 464.
[30] *Ibid.* at 465.
[31] *Linder*, [1950] B.C.J. No. 30, 97 C.C.C. 174 (B.C.C.A.).

require animal owners to avoid suffering if less harmful measures would impose additional cost, and the common practice is used by most others in the industry.[32]

All things considered, the test seems to be weighted quite heavily *against* finding cruelty in almost any situation. At the moment, rationales such as economic need and the desire for entertainment are accepted as meaningful justifications, and consequently, the "unnecessary" test almost invariably tilts in favour of the accused to the detriment of the animals in question, except in extreme circumstances of animal abuse. On the other hand, if a stricter approach were taken, and these purposes were no longer regarded as legitimate, then numerous activities that currently have a high degree of societal acceptance or, at the very least, tolerance, (*e.g.*, hunting, rodeo, agricultural production involving veal production or battery chicken cages) would constitute a criminal offence. Given the implications of this reasoning, it is hardly surprising that the courts have chosen a less revolutionary interpretation of the provision — even if the results end up being rationally indefensible.

(c) Neglecting Animals in One's Care

Neglect amounting to cruelty can occur in two ways under the *Code*. Section 446(1)(a) addresses harm caused during the transport of animals, punishing any wilful neglect causing damage to animals while they are being driven or conveyed. This subsection seems to be nothing more than an extension of the wilful neglect provisions in section 445.1(1)(a) to "non-owners" who take temporary custody of animals during transport, and nothing more need be said of it.

The primary neglect provision is set out in section 446(1)(b). It imposes an offence upon anyone who:

> (b) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

To prosecute under this section, it must first be proven that the accused is the owner or has "custody or control" over the animal. As with section 445.1(1)(a), this section is not designed to assign responsibility over any animals that happen to be on a person's property. A person must voluntarily assume responsibility for an animal for there to be a finding of custody or control, though the court will infer such responsibility from a person's actions even where such custody is

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[32] *Pacific Meat Co.*, [1957] B.C.J. No. 98, 119 C.C.C. 237 (B.C. Co. Ct.). Katie Sykes has suggested that the courts have been too conservative here, and proposes a different way of approaching this problem. See Katie Sykes, "Rethinking the Application of Canadian Criminal Law to Factory Farming" in Peter Sankoff, Vaughan Black and Katie Sykes, eds., *Perspectives on Animals and the Law in Canada* (Toronto: Irwin, 2015) at 22.

denied in court.[33] Once this control is assumed, section 446(1)(b) effectively imposes a duty to provide food, water, shelter and care.[34]

Still, not every failure to perform this duty will amount to a criminal offence, as the section does not punish negligence regarding the treatment of animals, but only the *wilful* failure or neglect to provide suitable and adequate food, water, shelter and care for the animal. The unusual wording of this section – it is the only provision requiring a finding of wilful negligence in the *Code* – has caused a number of difficulties in its interpretation.

The problems start with the interpretation of the *actus reus*. The wording seems straightforward enough, as it speaks of the need to provide "suitable and adequate food, water, shelter and care", and it clearly does not demand perfection. What will be considered "suitable and adequate" will undoubtedly vary with the circumstances, including the type of animal in question, with the burden of proving that the treatment was unsuitable and inadequate falling upon the prosecution. The section does not "seek to establish a universal standard for the feeding or sheltering of animals".[35]

Unfortunately, the jurisprudence has adapted the standard of criminal negligence in determining what constitutes a reasonable standard of care. In *Galloro*,[36] a decision that has been quite widely adopted,[37] the trial judge held a conviction should only result where the failure or neglect constituted a "marked departure from reasonable care".[38] With respect, this cannot be correct. As we discussed earlier,[39] the marked departure standard exists to ensure that a constitutionally adequate level of *mens rea* exists for every criminal offence. It protects the person who makes a mistake without awareness of what they are doing. But it is completely unnecessary with respect to s. 446, which clearly requires a high level of subjective *mens rea*. Adding a marked departure threshold amounts to a rewriting of the statute, which states that suitable and adequate food, water, shelter and care must be provided. As far as the *actus reus* is concerned, proof that such things have not been provided beyond a reasonable doubt should suffice to warrant a conviction. This is logical as a matter of law and policy. Once a person takes charge of an animal, they are responsible for taking care of it; surely, requiring the animal to be treated in a suitable and adequate manner is not too much of a burden to impose.

Sadly, the *mens rea* aspect of the crime has proven equally problematic. Though there should be no need to establish that the conduct was a marked departure from what the ordinary person would have done, the wilfulness

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[33] *Deschamps*, [1978] O.J. No. 3757, 43 C.C.C. (2d) 45 (Ont. Prov. Ct.); *D. (L.)*, [1999] A.J. No. 539, 242 A.R. 357 (Alta. Prov. Ct.).

[34] Care includes medical care where such attention is required: *Galloro*, [2006] O.J. No. 2871 (Ont. C.J.).

[35] *Clarke*, [2001] N.J. No. 191 at para. 78 (Nfld. Prov. Ct.).

[36] [2006] O.J. No. 2871 (Ont. C.J.).

[37] See for example, *Bennett*, [2010] N.J. No. 230 (N.L. Prov. Ct.); *Marohn*, [2012] B.C.J. No. 1289 (B.C. Prov. Ct.); *Whelan*, [2013] N.J. No. 224, 338 Nfld. & P.E.I.R. 242 (N.L. Prov. Ct.).

[38] *Galloro*, [2006] O.J. No. 2871 at para. 7 (Ont. C.J.).

[39] See Chapter 4.

requirement does mean that the prosecution must prove that the accused turned his or her mind to the situation and intentionally or recklessly failed to act. In *Bennett*,[40] the trial judge appears to have ignored this requirement entirely. There, the accused owned a small dog. After an incident in which the dog broke free from its collar, the accused secured the dog with a rope around her neck. He intended to buy a new collar, but forgot to do so. He then left on a vacation and a relative, who was looking after the dog, found that the rope was tight around the dog's neck, causing injury.

The trial judge accepted the accused's testimony, and noted that "he did not intend for her to be harmed by tying the rope around her neck". He also accepted that the accused forgot to switch the rope for a collar. Nonetheless, a conviction was entered, on the grounds that:

> A reasonable person in [the accused's] position would have been aware of the risk involved in securing a dog by tying a rope around her neck and would not have left the dog secured in this manner for such a long period of time... That a dog would have been harmed by tying a rope around its neck for an extended period of time is an objectively foreseeable consequence. [The accused's] decision to place the rope around the dog's neck and leave it there for approximately two weeks without once checking to see if it was causing any injury to the dog constitutes a marked departure from the standard of care demanded...

In the abstract, this is all quite reasonable – but it does not seem to accord with what s. 446 actually requires. It is difficult to see how forgetfulness equates to wilful neglect.

This is not the only anomalous interpretation. In *Clarke*,[41] the trial judge suggested that "[t]he Crown must prove that the accused was aware of the animal's condition and the effect of his or her actions", though it would not be a defence for the accused to argue that, in his opinion, adequate food or water were supplied where this was not the case.

This interpretation is also problematic, as there is nothing in the section requiring the accused to know the animal's condition and the effect his or her non-compliance was having. As noted above, the accused does have to be aware that food, water, shelter or care was not being provided, allowing forgetfulness to amount to a valid excuse, but it is unclear why a specific knowledge of the effects caused by a deliberate failure to provide sustenance is required. Surely a person who knows that he or she has an animal, is supposed to provide it with food and wilfully chooses not to, should be held liable, regardless whether the person was subjectively aware of the animal's condition or the effects the failure to provide was having. In contrast to section 445.1(1)(a), proof that the injury was wilfully caused is not a requirement of this provision.

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[40] [2010] N.J. No. 230 (N.L. Prov. Ct.). The commentary is not intended to suggest that the accused's conduct was sound, but merely to point out that the conviction does not seem to accord with the section's requirements.

[41] [2001] N.J. No. 191 at para. 71 (Nfld. Prov. Ct.).

All of this discussion should make one matter abundantly clear: the wilful neglect provision is in serious need of reform. The *Code* desperately requires at least one crime of cruelty against animals to be premised on a criminal negligence standard without any regard for the accused's mental state. Animals under someone's care live in a state of extremely vulnerability, and those who choose to take on the responsibility of caring for such animals should be held to an appropriate standard of care. It is no longer morally acceptable to allow an owner of animals to cause devastating harm to animals and simply plead ignorance of the effects of poor care, as occurred in *Heynan*,[42] where a horse owner was acquitted of starving his animals on the basis of his mistaken belief that horses could obtain their own food in winter.

(d) Specific Offences Towards Animals

In addition to the primary prohibition against causing unnecessary suffering and the general offences addressing neglect, there exist a number of very specific crimes involving animals. Each of them has historic origins, and — with the exception of section 445 — they seem to be used only rarely in modern times.

Section 444 creates the specific offence of injuring or endangering cattle.[43] The section punishes any wilful killing, maiming,[44] wounding, poisoning or injuring of cattle, and also prohibits the placing of poison in a place where it might be consumed by cattle. Amazingly, the section protects both owned and wild cattle,[45] which effectively places these animals in an exalted position of safety, preventing them from human injury regardless of whether they are someone's property or not.[46] This probably was not the intention of the drafters, as there is no logical reason to distinguish cattle from other animals. The section is clearly designed to protect the interests of those who own these animals because of their value.

This interpretation of section 444 is strengthened by the related offence in section 445, which protects dogs, birds or animals that are not cattle and are kept for a lawful purpose.[47] These domestic or owned animals are also protecting

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42 [1992] A.J. No. 1181, 136 A.R. 397 (Alta. Prov. Ct.).

43 The term "cattle" is not used in the ordinary sense here. Section 2 defines "cattle" to include an animal of the bovine species by whatever technical or familiar name it is known and to include any horse, mule, ass, pig, sheep or goat. Acts of this kind would also qualify as mischief under s. 430, as they would damage or destroy another's property, but given the unlikelihood of such cattle being worth $5,000 or more, would only be punishable by up to 2 years' imprisonment if prosecuted under that section.

44 This term would seem to have the same meaning as s. 268, that being a permanent injury that renders the animal less able to defend itself: *Presnail*, [2000] A.J. No. 526, 264 A.R. 258 (Alta. Prov. Ct.).

45 *Brown*, [1984] B.C.J. No. 1386, 11 C.C.C. (3d) 191 (B.C.C.A).

46 An owner, of course, is permitted to kill or injure his or her own animals on the grounds of colour of right: s. 429(2).

47 A stray or wild animal is not encompassed by this provision: *Deschamps*, [1978] O.J. No. 3757, 43 C.C.C. (2d) 45 (Ont. Prov. Ct.). A "stray" animal is one that is not owned or kept, and this designation does not apply to an animal that temporarily leaves its owner's residence: *Sunduk*, [1999] S.J. No. 185, 178 Sask. R. 157 (Sask. Q.B.).

from killing, maiming and the like, but the offence is a less serious one, only punishable on summary conviction. To be clear, this section does not protect lawfully owned animals from being killed. It merely protects them from being killed by *someone other than the owner*. Animals have no right to life, and owners are entitled to dispose of them at any time without fear of prosecution under section 445,[48] though the manner in which the animal is killed might amount to cruelty under section 445.1(1)(a).

Section 445 does permit a person to commit one of the prohibited acts where there is a lawful excuse for the conduct. Obviously, an individual has the right to kill, maim or wound an animal in self-defence in the face of an attack, or to protect another person or animal from such an attack.[49] Other legislation may also provide a defence to this charge.[50] Where the animal is a dog, for example, provincial legislation may allow certain conduct as a means of protecting oneself or one's property.[51]

Section 445.1 lists a number of specific crimes relating to animals. Staged animal fights are prohibited by section 445.1(1)(b), which prohibits anyone from encouraging, aiding or assisting in such a fight, whether it involves animals or birds. Section 445.1(4) provides an evidentiary presumption of encouragement where a person is present at such a fight. Strangely, keeping premises for the purpose of animal fighting is not an offence, although section 447 prohibits the keeping or maintaining of a cockpit for cockfighting.

Section 445.1(1)(c) prohibits the administering of a poisonous or injurious substance to any domestic animal or bird, or wild animal kept in captivity. This section appears almost entirely duplicative of section 445(1)(b), although it also imposes liability on owners who wilfully permit such substances to be administered as well.

Finally, section 445.1(1)(d) imposes liability for canned bird hunts, whereby birds are trapped and then liberated specifically for the purpose of being shot at. Section 445.1(1)(e) punishes the owner of property who permits such activity to take place.

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[48] Killing of an animal by, or at the direction of, an owner effectively amounts to a lawful excuse: *D. (L.)* (1999), 242 A.R. 357 (Alta. Prov. Ct.).

[49] *Greeley*, [2001] N.J. No. 207, 203 Nfld. & P.E.I.R. 10 (Nfld. Prov. Ct.).

[50] See *Yuke (Private Prosecutor) v. Angus*, [1995] O.J. No. 575 (Ont. Prov. Div.), affd [1996] O.J. No. 5431 (Ont. Gen. Div.); *Robinson*, [2014] B.C.J. No. 2016 (B.C.S.C.).

[51] *E.g.*, *Livestock, Poultry and Honey Bee Production Act*, R.S.O. 1990, c. L.24, s. 2, which states that: "Any person may kill a dog, (a) that is found killing livestock or poultry [or] (b) that is found straying at any time, and not under proper control, upon premises where livestock or poultry are habitually kept."