Case Name:

R. v. Paish

Between
Regina, and Paish

[1977] B.C.J. No. 924

[1977] 2 W.W.R. 526

1 W.C.B 172

British Columbia Provincial Court
Kamloops, British Columbia

Barnett Prov. Ct. J.

Oral judgment: February 1, 1977.

(59 paras.)

Counsel:

D.L. Clarke, for the Crown.
R. Switzer, for the accused.

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1 **BARNETT PROV. CT. J.** (orally):-- Howard Paish is charged with having wilfully caused unnecessary injury to horses.

2 Mr. Paish, an environmentalist of some note, operates a guide outfitting business of substantial proportions in the Spatsizi Plateau area of northwestern British Columbia. The business was acquired through his company, Paish Ventures Limited, in 1973.

3 Horses are an essential component of Mr. Paish's guide outfitting business. They are used to transport hunters, guides, camp crew, supplies and game. Without horses the business simply could not operate.

4 During the 1975 season there were about 70 horses at Mr. Paish's Spatsizi operations. These horses carried a brand which is recorded in Mr. Paish's name under the provisions of The Stock Brands Act, R.S.B.C. 1960, c. 371. Most of the horses had been acquired during previous years; 22 had been acquired that spring in the Cariboo by Mr. Chris Kind, who was employed by Paish Ventures Limited during the 1975 season as operations manager.

5 An attempt was made during the trial to establish the proposition that some of the troubles which were encountered during the 1975 season stemmed from the fact that Mr. Kind had not acquired the right types of horses for heavy use in mountainous northern terrain and that the newly acquired horses, coming from the Cariboo, were not adapted to the climatic conditions prevailing in the Spatsizi, or the feed available there. The evidence did not support these suggestions.

6 In 1974 Mr. Paish's operations accommodated about 30 hunters; in 1975 there were 60 hunters. In 1974 there were about 45 horses in the working string; in 1975 there were about 55. One of the biggest problems during the 1975 season was that there were just not enough horses.

7 Hunting began 1st August 1975. The horses in the working string were in good condition. But problems were apparent by mid-August when the first hunting parties had returned to the base camp at Cold Fish Lake. A considerable number of the horses were exhausted and saddle sored. There was a meeting during which both Mr. Paish and Mr. Kind admonished the guides and other crew members on the need to take better care of the horses. There was some discussion about the possibility of acquiring more horses. But only four more horses were acquired and the tired and sored horses were back on the trail again in short order.

8 Mr. Kind left the operations in early September. Whatever reasons may have motivated that decision, I accept his testimony that at this time the horses were losing condition rapidly and that many were sored and should not have been used again without at least a couple of weeks rest in good pasture.

9 Testimony adverse to Mr. Paish did not come from Chris Kind alone. Indeed, during the trial his role was magnified beyond all realistic proportions and much of the evidence thus elicited had little or nothing to do with the real issues in this case.

10 Jim Nole is a native Indian from the settlement at Iskut, who was employed as a guide by Mr. Paish at Cold Fish Lake during the first two weeks of October 1975. He has worked as a guide in the area for many years. He said the horses were run down, skinny and sored. He did not think that they should have been used any more that season but, he said, they were used because "... we needed to use the horses to get to where we wanted to hunt or else you would have to walk all the time". While he agreed that some sored horses must be expected in guide outfitting operations, his comment, "but not that bad", said a great deal in the economical way of native Indian people.

11 Peggy McKenzie worked as a cook at Cold Fish Lake and other camps in the Paish operations from June until 11th October 1975. She has some knowledge of horses. She observed that the horses in the Paish operations were in "good shape" at the start of the 1975 hunting season but "very run down" in October when she left. In early October she was at Dawson Creek, an outcamp. There were about 10 or 12 horses there. There was only "very sparse" graze for them. Saddle sores were evident on all horses. Nevertheless, she said, they were being "used and used and used", with old, inadequate, and makeshift equipment. She mentioned an incident when a pack horse named "Chinook" was used late in the season. That horse had suffered very serious injuries earlier in the season and, while I do not attribute any blame to Mr. Paish over that incident and am satisfied that a good deal of attention was given to caring for the injuries, I do believe that only a desperate shortage of sound horses could have provided any excuse for pressing Chinook back into service.

12 Carl Pausch worked at Cold Fish Lake as a caretaker and carpenter during early October 1975. He had been there earlier in the season when the horses were in good shape but in October he observed that they were run down, thin to the extent that ribs were showing, and sored. He said the horses "had to be used" as hunters kept arriving and the hunting parties "were always screaming for horses". Mr. Pausch testified that he sometimes assisted in the unsaddling of the returning horses. On such occasions he observed bleeding sores. The horses would be turned out for a few hours in a pasture where very little feed remained and then be rounded up before daylight to be used again. Although Mr. Pausch made no pretense at being a horseman, I do not doubt the accuracy of his observations.

13 Bob Welch was a witness called on behalf of Mr. Paish. Although I am satisfied that he does "know horses", because his testimony during direct examination was given in an obviously partisan manner, I place more value upon his testimony under cross-examination. During direct examination Mr. Welch expressed the opinion that the horses acquired by Mr. Kind were unsuitable and unable to perform the work required of them satisfactorily and in sound health. Nevertheless, he said that in October the horses generally, although a little thinner, were strong and healthy. He did not think that they had been abused in any way, he said. During cross-examination Mr. Welch acknowledged that a serious shortage of horses was evident early in the season and that it was then apparent that not all the hunters booked could be accommodated if proper horse care practices were to be followed. But, he said, "the alternatives that were open weren't up to me". He agreed that sored horses were used, explaining that one can "get by" using sored horses if they are properly padded and packed and lightly used. It was, he agreed, a situation where a choice had to be made - who was to suffer, the horses or the guide outfitter?

14 I turn now to consider the testimony of Mr. Paish himself.

15 While Mr. Paish sought to place certain material events of the 1975 season in a perspective which I could not accept, I do not suggest that Mr. Paish was, in any sense, an untruthful witness. In fact, he conceded that certain errors had been made. Mr. Paish and I differ in our assessments of the significance of those errors, however.

16 Mr. Paish realized soon after the hunting season began that there were not enough horses. He says that he attempted to acquire more horses, but could locate only four. He says that he was constantly urging the guides to adopt a different style of hunting - to do more watching and walking and less riding and to rotate the horses. He says that he attempted to persuade hunters to hunt on foot or by riverboat. And he says that feed for the horses at Cold Fish Lake was not a problem - that there was abundant good feed in the valley near the camp and that this was accessible to the horses. As to the use of sored and tired horses, Mr. Paish concedes that some horses with minor sores were used but he denies that this was the rule rather than the exception in the latter part of the season and he says that insofar as was humanly possible he made sure that tired horses were not used.

17 I do not accept Mr. Paish's assessment of the feed situation at Cold Fish Lake. I do believe there was ample feed nearby which could have been made available to the horses, but the evidence convinces me that the horses were, in fact, undernourished. I expect this was because the horses were worked long hard hours and either kept in or near the camps at night or hobbled (as Mr. Kind testified) so that they could not travel far enough to reach the good feed before being rounded up to be used again.

18 Mr. Paish approached the situation from the viewpoint of a businessman, and not from any loftier one. While he knew that there was a critical shortage of horses relative to the number of hunts booked, he did not cancel any hunts. So, as he agrees he realized at the time, the sored horses were used. They were used because, as a businessman, Mr. Paish considered that there was no alternative. Speaking of the time period material to the charges, he said the horses "showed signs of use but that is what they were there for".

19 I believe that more sored and exhausted horses were used than Mr. Paish is willing to concede and that their general condition was far worse than Mr. Paish's testimony would indicate. In other words, I accept the relevant testimony of Jim Nole, Peggy McKenzie, and Carl Pausch.

20 I accept the proposition that some soring of horses is inevitable in such operations; I do not accept the proposition that the situation at Cold Fish Lake during the 1975 season was normal or acceptable. It was not. And I am satisfied that Mr. Paish knew the extent of the situation.

21 At this point it becomes important, I believe, to recall that Mr. Paish is charged under s. 402(1)(a) of the Criminal Code, R.S.C. 1970, c. C-34, which speaks of wilfully causing unnecessary injury to animals, not under s. 402(1)(c), which speaks of wilfully neglecting or failing to provide suitable and adequate food and care for animals.

22 At the commencement of the trial, Crown counsel sought to amend the information by changing the wording of

count 2 to conform with that found in s. 402(1)(c) of the Criminal Code. I held that s. 402(1)(a) and (c) created separate and distinct offences and that the Crown's request went well beyond the bounds of a mere amendment. Section 721 of the Criminal Code precluded the swearing of a new information; therefore the trial proceeded on the information of 8th April 1976 with all its shortcomings.

23 The critical evidence relating to injuries caused to the horses is the testimony of Dr. Roberts. He is a doctor of veterinary medicine and has practised as such in Williams Lake for 18 years. He did not visit the Spatsizi or inspect the Paish herd of horses. Dr. Roberts testified that saddle sores are caused by the use of poor and poorly-fitted equipment and that a good horseman who cares for his horse and its equipment properly will not have a saddle sored animal. (Of course, inevitably, in Mr. Paish's business, most of the hunters are not good horsemen and therefore some saddle soring must, almost inevitably, be anticipated.) Dr. Roberts testified that depending on the extent and severity of saddle soring, healing may take many months. The cure is a combination of medication and rest on good pasture. He expressed the opinion that it is not common practice to use saddle sored horses and that such use can cause further, permanent injury. He said that horses with saddle sores "just shouldn't be used". Dr. Roberts has many years of experience as a veterinarian in the Cariboo where horses abound. I accept his testimony.

24 I turn now to consider the questions of law which arise from the facts and the charges and in doing so, I shall direct my attention to count 2 in particular. It reads:

> "Howard Paish between the 8th day of October, 1975 and the 14th day of October, 1975 at or near Cold Fish Lake, in the County of Prince Rupert, Province of British Columbia, being the owner, by wilful neglect did cause injury to animals, to wit: horses, while they were being used as pack horses and saddle horses by failing to give the horses proper rest."

25 The following questions arise:

1. Has the Crown proven that unnecessary injuries were caused to the horses "by failing to give the horses proper rest"?
2. If so, can it be said that Mr. Paish wilfully caused such injuries?
3. Assuming that the wording of the charge obliges the Crown to prove that Mr. Paish was the owner of the horses, has the Crown proven that fact?
4. Does the charge fail because it does not contain the word "unnecessary"?

26 Section 402, which appears in the Criminal Code under the heading "Cruelty to Animals", was enacted in 1955. The provisions of previous Codes had been more closely patterned after the wording of legislation in force in the United Kingdom. The legislative history and other useful commentary is found in the 1955 edition of Martin's Criminal Code at pp. 640-43. There are only a few relevant reported Canadian decisions. The editor of Martin's 1955 Code suggested that the Canadian decisions invariably return to the general principles laid down in the English decisions and, with those comments in mind, I propose to consider some of the decisions from the courts of the United Kingdom.

27 There are a number of cases where conduct essentially similar to that which occurred in the present case has been considered and condemned by the courts: see Greenwood v. Backhouse (1902), 20 Cox C.C. 196 (cruelly ill-treating, abusing and torturing two horses by causing them to be worked in an unfit state. The horses were suffering from old sores on the shoulders.); Small v. Warr (1882), 47 J.P. 20 (cruelly ill-treating, abusing, and torturing horses by working them while they were suffering from raw wounds); Hughes v. Mooney (1909), 43 I.L.T. 127 ("... causing and procuring a horse to be cruelly ill-treated by working same while in an unfit state." The horse was very lame and suffering from an old raw saddle sore.); Downie v. Fraser (1893), 1 S.L.T. 177 (cruelly ill-treating, abusing, and torturing a horse by causing it to draw a laden cart while it was suffering from open saddle sores and was in a frail and worn out condition); and Easton v. Anderson, [1949] S.C. (J.) 1 (cruelly ill-treating a horse by causing it to draw a loaded cart while it was suffering from a saddle sore).

28 The present charge does not speak of ill-treating and abusing horses - rather, it speaks of causing unnecessary injury. There is, in my opinion, no doubt that unnecessary injury was caused to the horses. (As to the meaning of "unnecessary", see the decision of the British Columbia Court of Appeal in Rex v. Linder, [1950] 1 W.W.R. 1035, 10 C.R. 44, 97 C.C.C. 174.) The essential question is whether or not it can be said that the horses were injured by failing to give them proper rest. While it is my opinion that this element of the charge could and should have been more definitively worded, either under s. 402(1)(a) or (c), having regard to the evidence and particularly the testimony of Dr. Roberts, I am satisfied that the Crown has proven that lack of proper rest was a material factor contributing to the injuries suffered by the horses. There were other and perhaps more important factors but the failure to give the horses proper rest was a material cause: see Regina v. Cato, [1976] 1 All E.R. 260 at 264-66, and Regina v. Kitching, [1976] 6 W.W.R. 697 at 714-15 (Man. C.A.).

29 Mr. Switzer submits that if unnecessary injuries were inflicted upon the horses Mr. Paish cannot be held criminally responsible. He points out that Mr. Paish did not personally cause injuries to the horses and submits that the evidence does not justify a conclusion that Mr. Paish was guilty of any wilfully wrong conduct.

30 The horses were in Mr. Paish's care and custody. When that proposition was suggested to Mr. Paish by Crown counsel, Mr. Paish's response was: "I accept that responsibility."

31 There are a number of decisions which establish the basic principles relevant to a consideration of these submissions.

32 In Greenwood v. Backhouse, supra, an owner had been convicted of abusing horses by causing them to be worked in an unfit state. A case was stated to the King's Bench Division. That court noted that the defendant employed a man to care for the horses and was practically always away. The conviction was quashed. Lord Alverstone C.J. stated at p. 199:

> "... in this case, when the whole of the evidence is looked at, we do not think there is evidence of guilty knowledge on the part of the defendant. It has been recognised for a great many years that under this Act there must be some guilty knowledge."

33 In Small v. Warr, supra, the owner-manager of a colliery had been convicted of abusing horses by working them while they were suffering from raw wounds. There was no evidence that he had notice or knowledge of the condition of the horses. A case was stated to the Queen's Bench Division which quashed the conviction, holding that the appellant's apparent breach of his statutory duty to supervise daily the work of the mine did not afford a proper basis for conviction. At p. 21 Field J. stated:

> "No doubt if the certificated manager had seen the horses used he ought to be convicted. But the case says that there was no proof of any notice or knowledge of this cruelty on the part of the appellant. If such had been proved he ought to be convicted."

34 In Elliott v. Osborn (1891), 17 Cox C.C. 346, the importer of a large consignment of cattle had been convicted of cruelly ill-treating a bullock by neglecting to loosen the head-rope to which it was tethered, thus causing a wound in which the rope had become embedded. A case was stated to the Queen's Bench Division where it was noted that the defendant had many men under him and he had given specific orders to his foreman that he was to examine all the head of cattle as they arrived. The conviction was quashed. At p. 348 Smith J. stated:

> "The appellant did not know of the animal's condition. There is no evidence that the appellant wilfully abstained from knowing the condition of this bullock, or that he shut his eyes to the fact, which, in my opinion, would be sufficient evidence that he did know of the animal's condition."

35 In Whiting v. Ivens (1915), 84 L.J.K.B. 1878, an owner had been charged with cruelly ill-treating a horse by permitting it to be worked while in an unfit condition. There was evidence that he had noticed the poor condition of the horse some six weeks before the date of the alleged offence but that he omitted to take any steps to prevent it being

worked in such a condition and left the animal entirely in the hands of his horsekeeper. The Protection of Animals Act, 1911 (U.K.), c. 27, under which the charge was laid, provided:

> "1. - ...
>
> "(2) For the purposes of this section, an owner shall be deemed to have permitted cruelty within the meaning of this Act if he shall have failed to exercise reasonable care and supervision in respect of the protection of the animal therefrom". [Compare this provision to s. 402(3) of the Criminal Code.]

36 The justices had dismissed the charge, being of the opinion that there was no evidence to support it. A case was stated to the King's Bench Division which remitted the case to the justices to be heard. Lord Reading C.J. held at p. 1880: "... there was evidence upon which the Justices could, unless it were contradicted, come to the conclusion that the offence had been committed."

37 In the present case Mr. Paish, as owner of the horses, might properly have been charged with permitting unnecessary injury to be caused to the horses. However, in my opinion, the authorities (which are to be read with ss. 21 and 22 of the Criminal Code in mind) justify a finding of guilt upon the charge as laid: see Benford (Benfield) v. Sims (Simms), [1898] 2 Q.B. 641, 67 L.J.Q.B. 655; J. F. Archbold, Criminal Pleading, Evidence and Practice, 38th ed. (1973), pp. 1556-67, and Regina v. Sault Ste. Marie (1976), 13 O.R. (2d) 113, 30 C.C.C. (2d) 257, 70 D.L.R. (3d) 430 (C.A.), per Brooke J.A. at pp. 283-84, and per Lacouriere J.A. at pp. 294-95, adopting the reasoning of Morden J. found at pp. 273-74.

38 In reaching this conclusion I have relied upon general principles. I do not rely upon the statutory presumption contained in s. 402(3) of the Criminal Code. The words "in the absence of any evidence to the contrary" have been the subject of conflicting decisions in the British Columbia Court of Appeal and have not yet been interpreted by the Supreme Court of Canada.

39 Mr. Switzer submits that Mr. Paish's conduct cannot be categorized as wilfully wrong. I disagree: see Regina v. Wendel, 57 W.W.R. 684, 50 C.R. 37, [1967] 2 C.C.C. 23 at 29 (B.C. C.A.), and Regina v. McHugh, 50 C.R. 263, 51 M.P.R. 173, [1966] 1 C.C.C. 170 (N.S. C.A.).

40 Mr. Switzer's remaining submissions do not deal with the merits of the case; rather, they are technical in nature.

41 Firstly, Mr. Switzer submits that the Crown's case must fail because the Crown has alleged that Mr. Paish was the owner of the horses when, in fact, Paish Ventures Ltd. owned the horses. For the present purposes I am prepared to assume that that allegation was not mere surplusage.

42 When it was suggested to Mr. Paish by Crown counsel that Paish Ventures Ltd. was "his" company, Mr. Paish responded, "precisely".

43 Also, it is to be recalled that the horses carried a brand recorded under Mr. Paish's name under the provisions of The Stock Brands Act.

44 Crown counsel submits that for the present purposes Mr. Paish can be regarded as owner of the horses. I agree. In Wynne v. Dalby (1913), 30 O.L.R. 67, 16 D.L.R. 710 at 714 (C.A.), Meredith C.J.O., in delivering the judgment of the court, said:

> "The word 'owner' is an elastic term, and the meaning which must be given to it in a statutory enactment depends very much upon the object the enactment is designed to serve."

45 Wynne v. Dalby has been followed over the years by the courts of Ontario (Haberl v. Richardson, [1951] O.R. 302, [1951] 3 D.L.R. 34 (C.A.)); the principle it established has been adopted in British Columbia (Singh v. McRae, [1971] 5 W.W.R. 544 at 548, 21 D.L.R. (3d) 634), and in criminal cases (Re Harasymko and The Queen (1973), 13 C.C.C. (2d) 82 (Man.)).

46 In my opinion Mr. Paish, the person having dominion and control over the horses, must be considered their owner in this case.

47 Mr. Switzer's final submission is that the Crown's case must fail because the omission from the information of the word "unnecessary" is the omission of an essential averment which renders the charge a nullity.

48 I accept the submission that the qualification "unnecessary" is an essential element of a charge under s. 402(1)(a) of the Criminal Code.

49 Crown counsel submits that the allegation that Mr. Paish caused injuries to the horses "by wilful neglect ... while they were being used as pack horses and saddle horses by failing to give the horses proper rest" is tantamount to saying that the injuries were caused unnecessarily.

50 This issue did not arise during the trial. At the outset of the trial there was considerable argument over various applications by the Crown to amend the wording of both counts in the information. During the course of that argument I expressed the opinion that count 2 was preferred under s. 402(1)(a) of the Criminal Code and Mr. Switzer made no motion to quash count 2 as he might have done and as is contemplated in such cases by s. 732(1) of the Criminal Code. However, during the course of writing these reasons I drew the matter to counsels' attention by letter and requested written submissions, which I have now received and considered.

51 In my opinion the two cases which best illustrate and contrast the issues are Regina v. Solowoniuk (1960), 129 C.C.C. 273, a decision of the British Columbia Court of Appeal, and Regina v. Rese, 2 C.R.N.S. 99, [1967] 2 O.R. 451, [1968] 1 C.C.C. 363, a decision of the Ontario Court of Appeal.

52 In the Solowoniuk case the appellants had been charged and convicted of unlawfully obstructing a peace officer engaged in the lawful execution of his duty. They appealed on the ground that this was a charge unknown to the law in that they were not charged with wilfully obstructing the peace officer. The appeals succeeded.

53 In the Rese case an offence of mischief was alleged. The relevant portion of the information omitted the word "wilfully" but described the offence as a conspiracy "to unlawfully damage public property, namely bridges, by painting thereon the sign commonly known as the 'Swastika'." Laskin J.A. (as he then was) delivered the judgment of the court. He held that the information was not fatally defective, saying (at p. 102), "... I am compelled to conclude that it is in any rational sense impossible to have an agreement to damage property which does not import wilfulness."

54 In the present case I am compelled to conclude that an allegation that injuries were caused to animals by wilful neglect is, in every sense, equivalent to saying that the injuries were caused unnecessarily.

55 To use the language of Davey J.A. in Regina v. Wixalbrown, 43 W.W.R. 449 at 457, 41 C.R. 113, [1964] 1 C.C.C. 29 (B.C. C.A.), I regard the charge in the present case "as a case, not of a total omission of a material averment, but of a material averment imperfectly stated."

56 See also: Rex v. Cornell (1904), 6 Terr. L.R. 101, 8 C.C.C. 416 at 422 (C.A.), and Anderson v. Wood (1881), 19 Sc. L.R. 142.

57 In the result, my decision is that the Crown has sufficiently alleged an offence against Mr. Paish and proven him guilty of it beyond any reasonable doubt. I so find.

58 I am satisfied that count 1 has particular reference to the incident involving the horse "Chinook". That charge will be dismissed.

59 I want to express my appreciation to counsel for their excellent work.

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