PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Wheadon*, 2016 NSPC 82

Date: April 12, 2016
Docket: 2453169-70
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Rene Lynne Wheadon

LIBRARY HEADING

JUDGE: The Honourable Judge Frank P. Hoskins, J.P.C.

DECISION: April 12, 2016

SUBJECT: *criminal law - defence of necessity - imminent peril - reasonable legal alternative - harm inflicted - care or control of motor vehicle while impaired - alcohol*

SUMMARY:

The accused attended a pub with her brother and some friends. While they were at the pub the accused's brother and his friend B became involved in a fight with two or three men in the parking lot. During the fight the accused attempted to intervene in order to remove B out of concern that he was being beaten up. The accused's brother directed her to open her car door and shoved B inside and directed the accused to drive away. The accused was concerned about the medical condition of B and drove out of the parking lot and through an intersection where she was stopped by police. The accused was taken to the police station for further investigation where

she was arrested and charged with having care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to section 253(b) of the *Criminal Code*, and with having care or control of a motor vehicle while her ability to operate a motor vehicle was impaired by alcohol or drug, contrary to section 253(a) of the *Criminal Code*. At trial the accused raised the defence of necessity.

HELD:

The accused is guilty of with having care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to s. 253(1)(b) of the *Criminal Code*.

In relation to the second count under section s. 253(1(a) of the *Criminal Code*, a conditional stay of proceedings is entered.

The criminal law recognizes necessity as an excuse for crime in circumstances that overwhelmingly impel disobedience. Not every set of circumstances amount to necessity and the defence of necessity is narrow and of limited application in criminal law. The law expects people to be able to resist most pressure from circumstances in which they find themselves. However, where a person's response to an imminent and overwhelming peril is involuntary, the law excuses that person for what they have done.

There are three elements in the excuse of necessity (1) clear and imminent danger or peril; (2) no reasonable legal alternative; and (3) a proportionality between the harm inflicted and the harm avoided. The first and second elements are determined on a modified objective standard and the third element is determined on a purely objective standard. If the Crown proves beyond a reasonable doubt that any of the elements or requirements do not apply, then the accused is not excused from criminal liability.

In this case, although there is a reasonable doubt with respect to the accused being in a situation of imminent danger and peril that excuses her initial decision to drive, imminent danger and peril was not present during all of the time that she had care or control of her vehicle, and as such there were reasonable legal alternatives to breaking the law. Further, the accused's actions were not proportional. The danger to B from being further assaulted and injured was far less than the danger to the

public from the offence committed. Damage to persons and property caused by impaired drivers is staggering. Particularly, as in this case, where, help was immediately and readily available, our society expects its citizens to obey the laws.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Wheadon*, 2016 NSPC 82

Date: April 12, 2016
Docket: 2453169-70
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Rene Lynne Wheadon

DECISION

JUDGE: The Honourable Judge Frank P. Hoskins, J.P.C.

ORAL DECISION: April 12, 2016

CHARGES: **THAT** on or about the 15th day of April, 2012 at or near Dartmouth, Nova Scotia, did unlawfully have the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to section 253(b) of the *Criminal Code*;

AND FURTHER, that she at the same time and place aforesaid, did have the care or control of a motor vehicle while her ability to operate a motor vehicle was impaired by alcohol or drug, contrary to section 253(a) of the *Criminal Code*.

COUNSEL: Robert Kennedy, for the Crown
Geoff Newton, for the Defence

Introduction

[1] Ms. Wheadon is charged with two offences; namely, operating a motor vehicle while impaired by alcohol, and with operating a motor vehicle while she had more than the legal limit of alcohol in her blood.

[2] Although this matter has been before the Court for an inordinate amount of time, it should be noted that the Court felt compelled to adjourn the matter on more than one occasion to provide Ms. Wheadon with the opportunity to retain legal counsel. Fortunately, Ms. Wheadon was able to retain Mr. Newton to her represent her.

[3] I wish to acknowledge the assistance of Counsel in cooperating with each other and with the Court in trying to expedite this proceeding, without prejudicing their respective interests. Your cooperation is much appreciated, as was your diligence and commitment to the professional traditions of the Bar.

[4] In this case, the Defence does not dispute that on the totality of the evidence, the Crown has established that Ms. Wheadon committed the two alleged offences as described in the *Information*.

[5] Mr. Newton, for the Defence, however, submits that Ms. Wheadon should be excused for having committed these offences based on the defence of necessity.

[6] As noted by the Supreme Court of Canada in *R. v. Latimer*, 2001 SCC 1, Ms. Wheadon has no burden to establish such a defence beyond a reasonable doubt or on the balance of probabilities. She does, however, have a preliminary burden to present some evidence to justify an examination of this defence: there must be an air of reality to the defence. If there is an air of reality to the defence based on the totality of the evidence, then the Crown must disprove one or all the elements of the defence

beyond a reasonable doubt. For example, the Crown must prove beyond a reasonable doubt that the defendant had a reasonable alternative. It is not up the defence to prove that Ms. Wheadon did not have an alternative.

[7] At the outset of trial, Mr. Newton, on behalf of Ms. Wheadon, announced that the issue of *necessity* is the central issue in this case.

[8] Accordingly, in order to expedite the trial, the defence waived the necessity of having a *voir dire* to determine the admissibility of statements made by Ms. Wheadon to the police.

[9] Furthermore, the Defence conceded that the Crown evidence established a *prima facie* case; in that, there is sufficient evidence on each and every essential element of both offences to warrant convictions. This concession included the admitting that all of the statutory preconditions for the admissibility of Exhibit 1, the Certificate of a Qualified Technician, had been met which includes the relevant provisions of s. 258 of the *Criminal Code.*

[10] Upon completion of the evidence, both the Crown and Defence, requested, and the Court consented, to permit filing of written briefs as the basis of final submissions.

[11] After reading the written briefs, however, the Court requested the attendance of counsel to clarify a few points raised from the evidence and from reading their respective briefs.

[12] In essence, the Court asked counsel to comment on whether or not there had to be some evidence that Ms. Wheadon consumed alcohol and had no intention to drive her car on the date and time in question.

[13] This question was raised by the Court for further discussion because there is no evidence on the record to establish that Ms. Wheadon voluntarily consumed alcohol; other than Exhibit 1, which contains the results of the breath analysis. Nor is there any evidence that she had no intention to drive her car from the Pub. I mentioned this because there is evidence that Ms. Wheadon was the only operator of the vehicle on the date and time in question, as Stephanie could not drive, and Rocky and Todd both had consumed alcohol during the evening.

[14] I raised this issue with counsel because it seems that the *defence of necessity* aims essentially at negating the *presumption of voluntariness* of the act, which the Crown must prove beyond any reasonable doubt, that the act was *voluntary*.

[15] I am grateful for counsel clarifying their respective positions on this point. I am also mindful that Crown counsel conceded that there is an *air of reality* to the defence as explicitly stated in its written submissions.

[16] The other issue raised from reading the written submissions related to statements Ms. Wheadon made to the police. It was agreed that her statements were admitted for the limited purpose of establishing that the officer had the requisite reasonable grounds to make a demand under s. 254 of the *Criminal Code.*

[17] Again, I am grateful for the written briefs and subsequent oral submissions of counsel.

[18] I have had the opportunity to carefully consider all of the submissions of counsel which were very helpful and I have considered all of the evidence that was proffered in this case.

[19] I will briefly summarize the surrounding circumstances which have emerged from the evidence presented, touch upon the law, and then provide my analysis,

which has led me to the result in respect to the issue of whether or not the Crown has proven beyond a reasonable doubt the two alleged offences.

[20] However, before I do that, it is appropriate to briefly comment upon the context in which this case arose.

[21] On April 14, 2012, Ms. Wheadon, her brother, her brother's friend, Todd Johnson, and her friend, Stephanie White attended a local pub in Dartmouth located in Highfield Park. Before attending the Pub, they socialized at Todd's residence where Todd and Ms. Wheadon's brother, Rocky, drank alcohol. Ms. Wheadon drove her vehicle from Todd's residence to the Pub, where she and the other three went inside to socialize. While they were inside the Pub, Rocky and Todd would occasionally leave the Pub to go outside to Ms. Wheadon's car to consume wine coolers.

[22] At some point during the evening, while socializing inside the Pub, Ms. Wheadon heard a "racus" outside the Pub, which caused her to go outside. Upon exiting the Pub she observed Rocky and Todd engaged in a fight with two or three men, which she later learned were bouncers of the Pub. She watched the fight for a couple of minutes, and then attempted to intervene because she was concerned that Todd was being beaten up. She and Rocky intervened and tried to extricate Todd from the altercation. At one point, Rocky told her to open the door of her car, which was parked in front of the Pub where the altercation was occurring. She opened the car door, and Rocky shoved Todd in the car and told Ms. Wheadon to drive away. She drove away. Rocky did not leave with her, nor did Stephanie White. Ms. Wheadon, frightened for the safety of Todd and concerned about his medical condition drove out of the parking lot, through an intersection and along Highfield

Park drive where she was stopped by the police. Ms. Wheadon was eventually taken to the police station for the purpose of further investigation.

[23] Ms. Wheadon was charged with operating a motor vehicle while impaired by alcohol and operating a motor vehicle while she had more than the legal limit of alcohol in her blood.

Summary of the Evidence

[24] The Crown called two witnesses; Cst. Pike and Cst. Chambers. The Defence called the accused, Ms. Wheadon.

The Evidence of Cst. Lee Pike

[25] Cst. Lee Pike described his experience as a police officer and then explained his involvement in this case.

[26] He testified that on April 15, 2012, at approximately 1:20 am, he was on duty working general patrol duties in a marked police cruiser travelling along the Highfield Park Drive towards Victoria Road when he observed a Saturn, a car, pull out in front of him.

[27] The car came out of parking lot where the Parkside Pub is located, and crossed the intersection moving excessively slow, weaving back and forth within the lane and then over correcting hard and coming close to the curb. The car failed to stop at the stop sign. The brake lights on the car did not illuminate as it slowly moved through the intersection.

[28] It appeared that the driver of the vehicle was leaning over holding onto the passenger; it looked to him that something was going on in the vehicle, as he could only see two silhouettes in the vehicle. At that point, he noticed that Cst. Chambers

was approaching in a separate police vehicle. Cst. Pike radioed dispatch to inform that he was about to conduct a traffic stop of the Saturn vehicle. He then initiated the emergency equipment on his vehicle to stop the Saturn.

[29] Cst. Pike was approximately ten meters behind the Saturn before he engaged the police emergencies lights. He stated that the vehicle was swerving, and weaving back and forth until he stopped it. He estimated that he followed the vehicle for less than a minute before he stopped it. He followed it from 14 to 96 Highfield Park Drive.

[30] Upon stopping the vehicle, he and Cst. Chambers approached the vehicle. Cst. Pike stated that his focus was on the male passenger who had blood on his face, arms and shirt. Ms. Wheadon was the driver of the vehicle.

[31] Cst. Pike described the blood on the male passenger. There was a lot of blood on the passenger's face. There appeared to be injuries to the passenger's face, his nose and head. There was fresh blood coming out of his nose. It looked like he had a nose bleed. He added that he was standing close to the passenger when he made those observations and he used his flashlight. He called an ambulance as soon as he observed the blood on the passenger, which arrived immediately at the scene.

[32] Cst. Pike expressed the opinion that the passenger was in distress, and was very intoxicated; he was mumbling. Cst. Pike asked the driver, Ms. Wheadon what had happened to the passenger. She told him that he was assaulted outside of the bar.

[33] Cst. Pike stated that he observed the passenger walk to the ambulance while being assisted by the paramedics. He estimated that the passenger was treated in the ambulance for approximately 10 to 15 minutes.

[34] While at the scene Cst. Chambers instructed other arriving police officers about the assault that occurred outside the Parkside Pub. Those officers then went to the Pub to investigate.

[35] Cst. Pike testified that a person was charged with the assault on the male passenger, which occurred in the Parkside Pub parking lot.

[36] Cst. Pike also observed that there was blood on the dash of the car and passenger door-handle. He also detected a strong smell of alcohol emanating from the car, and he discovered a half-empty bottle in the car.

[37] Cst. Pike also described the area where the passenger was assaulted in the Parkside Pub Parking lot. He described the Parkside Pub Parking lot, and the businesses located next to it, including: Alexanders's Pizza which is directly adjacent to the Pub; the Needs Store, and the Ultramar Gas Station all of which are in the same parking lot and were open for business.

[38] He also added that when he drove by there were still people and cars outside in and around the parking lot.

[39] Cst. Pike stated that the driver of the vehicle, Ms. Wheadon, told him what had happen to the male passenger. She stated that the passenger was beat-up and assaulted, by a bouncer at the Pub.

[40] Cst. Pike observed that there was blood on Ms. Wheadon's clothing.

[41] Cst. Pike testified that the passenger was treated by the paramedics inside the ambulance. After the passenger was treated, he left the ambulance and walked away on his own volition, as he wanted to leave.

[42] Cst. Pike observed the passenger walk away from the ambulance towards his Alfred Street apartment where he lived, which is across from Victoria Road.

[43] Cst. Pike observed that Ms. Wheadon was in hand cuffs, and learned from speaking to Cst. Chambers that she was arrested for impaired driving. Cst. Chambers asked him to be the breath technician because he has been designated as a breath technician since 2009.

[44] Cst. Pike returned to the Dartmouth Police Station in his own police cruiser.

[45] At the station, Cst. Pike conducted the breath test on Ms. Wheadon by using the Data Master C, which he is qualified to operate as he is a qualified technician. Following the completion of both tests he completed Exhibit 1, which is the certificate of a qualified technician.

[46] He identified Exhibit 1, as the certificate he completed or filled out after he completed the breath tests on Ms. Wheadon.

[47] Exhibit 1, shows at 2:36 am, the first test, Ms. Wheadon's blood alcohol concentration was 100 milligrams of alcohol in 100 millititers of blood. The results of the second test, at 2:54 am, show that she had 90 milligrams of alcohol in 100 milliters of blood.

[48] Cst. Pike stated that he provided Exhibit 1 to Cst. Chambers because he was the investigating officer for the impaired charges.

[49] At the police station, Cst. Pike spoke to Ms. Wheadon, but did not recall her saying anything about the assault at the pub.

[50] On Cross-Examination, Cst. Pike stated that while he had no idea what was actually going on inside the car as he followed it, it was swerving.

[51] Cst. Pike also noted that the Parkside Pub, the Needs Store, the Pizza store and the other businesses are in the same building. He agreed that the business are close enough together that an assaulter could see the businesses in the parking lot.

[52] He also agreed that the vehicle was driving in the direction of Victoria Road after it left the parking lot, and went through a stop sign without stopping. He also agreed that there is a Needs Store located around the corner there; about a one minute drive away. He also agreed that the Needs store cannot be seen from the Parkside Pub.

[53] He agreed that the passenger's blood appeared fresh, and was advised that the injuries were caused by a bouncer from the Pub, which recently occurred, but he could not say when. He confirmed that a bouncer committed an assault on the passenger.

[54] He also agreed that the male passenger was very intoxicated; he mumbled, and there was a strong smell of alcohol emanating from him.

The Evidence of Cst. Dave Chambers

[55] Cst. Chambers testified that on April 15, 2012, he was working in uniform, driving in a marked police car working general patrol in the Highfield Park area travelling behind Cst. Pike, when he came into contact with Ms. Wheaton's vehicle.

[56] He estimated that the intersection where Ms. Wheadon drove through the stop sign is approximately 100 meters from the Parkside Pub Parking lot toward Victoria Road.

[57] Cst. Chambers stated that after they stopped the vehicle, he noticed that the male passenger was covered in blood, and the female driver had blood on her as

well. There was also blood on the gearshift. They were concerned about the male passenger so they contacted Emergency Health Services.

[58] Cst. Chambers noticed that there were several bottles of Bacardi Breezers, alcohol beverages, coolers, inside the vehicle, some in the back seat and around the front passenger seat and one under the driver's seat, which still had some fluid in it.

[59] His initial concern was with the passenger, so he called an ambulance, which arrived immediately.

[60] He stated that he spoke to Ms. Wheadon after she exited the ambulance, which was at approximately 1:55 am. While speaking to her he detected an odor of alcohol from her.

[61] Cst. Chambers stated that as a result of detecting an ordour of alcohol emanating from Ms. Wheadon, he read her the approved screening device demand from his notebook. The demand was made at 1:58 am. She complied and cooperated by taking the approved screening device test. He stated that he is qualified to operate the approved screening device and was satisfied that it was working properly.

[62] At approximately 2:00 am, Ms. Wheadon registered a failure on the approved screening device.

[63] Following that, at approximately 2:03 am, Cst. Chambers formed the belief, based on reasonable grounds, that Ms. Wheadon's ability to operate a motor vehicle was impaired by alcohol, based on the moderate odour of alcohol and the results of the approved screening device. He stated that she was definitely impaired as she was unsteady on her feet. He observed her walk. She tripped a bit on her feet which she said was the result of wearing high heels.

[64] Cst. Chambers demanded a breath sample from her for the purposes of conducting a breath analysis at the police station. Cst. Chambers provided Ms. Wheadon with the police caution, and her *Charter of Rights*. She declined to speak to a lawyer. He then demanded a sample of her breath be provided for the purposes of conducting a breath analysis.

[65] He also noticed that Ms. Wheadon was visibly upset, concerned and appeared to be in panic. She complained about the amount of blood on her and that her friend had been beaten up. He did not notice any physical injuries to Ms. Wheadon.

[66] Cst. Chambers stated that the passenger was not cooperative with the paramedics as they tried to assist him. The passenger's nose appeared to be broken as he was bleeding profusely. After the passenger was treated, he walked away from the ambulance in the direction of Victoria Road away from Parkside Pub.

[67] Cst. Chambers testified that he wanted to speak to the driver. He detected a moderate odor of alcohol emanating from her, so he made a breath demand for an approved screening device.

[68] Ms. Wheadon complied with the officer's breath sample demand and accordingly he took her to the police station. At the police station, he detected a stronger odor of alcohol emanating from Ms. Wheadon. Ms. Wheadon declined to speak to a lawyer. She then provided samples of her breath for the purposes of analysis, which resulted in readings of 100 and 90 milligrams of alcohol in 100 millilitres of blood. He was present in the breath tech room while Ms. Wheadon participated in the tests.

[69] Following that, Cst. Chambers provided Ms. Wheadon with the certificate of a qualified technician, a copy of Exhibit 1, and explained why he was doing that, and he served her with an appearance notice to attend court.

[70] Cst. Chambers described where the Needs Store was located near Joseph Young on the date and time in question, but could not recall whether it was open. He added that the store is usually open.

[71] He also described the businesses that are located in the same parking lot as the Parkside Pub. He stated that they were open for business during the date and time in question. These businesses included: Alexander Pizza, Needs Store, the Ultramar Service Station and Tim Horton's, which are all within a few meters of each other. He added that he had been in the parking lot earlier that evening and there were people in the parking lot and the stores were open. He added that they are always open.

[72] Cst. Chambers testified that he observed approximately ten people standing outside the Parkside Pub when he arrived.

[73] He also stated that the bar staff usually wear regular black jackets.

[74] On Cross-Examination, Cst. Chambers agreed that the vehicle was travelling in the direction of a Needs Store along Highfield Drive which he believed was probably open.

[75] He also agreed that if a person was to stand outside the Pub, they could see all of the businesses located in the Park area.

[76] Cst. Chambers stated that he thought that the passenger sustained superficial injuries to his face, which included a broken nose. He also agreed that there was a lot of blood on the car, and on the passenger.

The Evidence of Rene Wheadon

[77] Ms. Wheadon testified that in April 2012 she resided at 4102 Walton Woods Road, in Hants County. She has lived there for approximately 13 years.

[78] She stated that on April 14, 2012, she drove to Dartmouth to visit friends. At that the time she was not familiar with the Halifax Regional Municipality area, other than knowing how to get to the shopping malls located in the area.

[79] She testified that on the evening of April 14, 2012, she and her brother, and Stephanie White attended Todd's house. While at Todd's house they socialized. Her brother and Todd drank alcohol while there, and she assumed that they had been drinking together earlier in the day.

[80] Ms. Wheadon could not recall the exact location of Todd's residence, but said it was in Dartmouth.

[81] She stated that they stayed at Todd's house for quite awhile, before leaving to go dancing. She recalled that Stephanie wanted to go dancing so they left Todd's and travelled to the Parkside Pub.

[82] Ms. Wheadon recalled that she, her brother, Stephanie, and Todd drove to the Parkside Pub. Ms. Wheadon drove the vehicle to the Pub. During their travel to the Pub they stopped at a Needs Store along the way. She recalled that the Needs store was located near Victoria Road.

[83] They arrived at the Pub at approximately 12:30 am. She estimated that after an hour of socializing in the Pub, he head a ruckus emanating from outside which caused her to look out the window. She observed her brother and Todd engaged in a fight in the parking lot with two or three men.

[84] She stated that she knew that her brother and Todd were drinking alcohol outside, in the car, as they were coming and going during the time that they were at the Pub.

[85] Ms. Wheadon testified that she exited the bar, observed the fight for a couple of minutes, and then tried to get them to stop. The fighting occurred near her vehicle, her car, which was parked in front of the Pub in the parking lot.

[86] She stated that she watched the fight for a few minutes and then asked for help to stop the fight, but noticed that the men fighting with Todd were bouncers from the Pub. She recalled screaming for help, but no one responded. She stated that she screamed for people to help, but everyone continue to watch. She said there were a few people watching, and no one was helping.

[87] She described her brother as being “pretty frantic” as he was trying to get the bouncer off of Todd because Todd was hurt. She stated, “that we were trying to get them to break it up”.

[88] She recalled two or three bouncers engaged in the fight, and described them as being big men with muscles. She recalled observing that Todd appeared to be injured as he was being struck by the bouncers. He appeared motionless, limp, as he was being struck by the bouncers, which scared her. She stressed that she and her brother, Rocky, could not get the bouncer off of Todd. She stressed that her brother tried to get the bouncer off of Todd who was “out cold”.

[89] At one point her brother opened the door of the car, shoved Todd in the car, and told her "to get him out of here". She entered the car and drove out of the parking lot with Todd in the car, who she believed was seriously injured, as he was not responding to her.

[90] Ms. Wheadon stated that she drove the car towards the Needs store that she had earlier attended that evening because she was not aware that there were other stores in the parking lot. She stated, "I didn't know the area".

[91] As she drove towards the Needs store, she observed the police emergency lights flashing behind her vehicle so, he pulled her car over and stopped.

[92] On Cross-Examination, Ms. Wheadon stated that she drove the car from Todd's house to the Pub, which was approximately a 5 to 10 minute drive. She could not recall exactly where Todd's house was located as she is not familiar with the streets in that area, but did agree with the suggestion that Alfred Street sounded familiar. She recalled that Todd's house was located off of Victoria Road.

[93] Ms. Wheadon described Todd as an acquaintance and Stephanie as her friend. She stated that she had been in Todd's company approximately a half dozen times, and she had dropped her brother off at Todd's house on previous occasions for work purposes.

[94] Ms. Wheadon stated that she did not drink any alcohol while she was at Todd's place. She commented that she drove her brother to Todd's place from Walton because he was staying at Todd's place as he was working with him.

[95] She stated that her brother and Todd had been drinking alcohol during the day, and added that her brother was not very intoxicated. She commented that her brother and Todd were drinking coolers and shots at the bar.

[96] Ms. Wheadon stated that she was at Todd's house for approximately one hour before they left to attend the Parkside Pub. She believed that Todd and her brother were drinking alcohol earlier in the day, as well.

[97] She also stated that Todd and her brother were both fighting with the bouncers, but added that her brother "was just trying to stop the fight." She observed the fight for "probably a few minutes", but it seemed like a long time for her.

[98] Ms. Wheadon stated that she screamed, and tried to pull at the bouncer's shirt as Todd was being struck. She recalled asking for help, but did not ask any one specifically, and that was when she realized that the men fighting her brother and Todd were bouncers from the Pub. She described the bouncers as being big, huge men with big muscles; they had big arms and heavy chests. She described Todd as being small; approximately 5'4" and 180 lbs. She added he has a regular build.

[99] Ms. Wheadon described her brother's size as being approximately 5'9 or 10", and 190 lbs.

[100] She agreed that she had initially watched the fight for a couple of minutes. And also stated that she was not aware of any issues between her brother and the bouncers before the fight began.

[101] Ms. Wheadon disagreed with the Crown's suggestion that her brother was "quite intoxicated" or "very intoxicated," she stated that she didn't think so. She added that he was drinking but he was not very intoxicated.

[102] She stressed that she and her brother got Todd into the car and she drove off to get him out of there. She stated that the incident happened very quickly.

[103] Ms. Wheadon clarified that the bouncers were fighting with Todd and her brother. She also mentioned that a female was involved; she was screaming at them trying to get in the middle of it. She did not know the female. She also stated that Stephanie stayed inside the Pub; she never came out of the Pub.

[104] She was asked what exactly she did by intervening in the fight. She stated that she was "yanking on a bouncer's shirt and he didn't even notice I was there". She was trying to get him to stop. She was yelling at him to stop.

[105] She also agreed that when she exited the bar she saw that her brother and Todd were in a fight with the bouncers. She observed this for a few minutes.

[106] Ms. Wheadon stated she did not have a cell phone in her possession, but probably had a quarter in her pocket. She added that she asked the bystanders to call for help. She could not recall anyone in particular, but remembered asking people that were there watching. She added that she was not speaking to anyone specifically, there were people standing there watching, and she asked them to call for help. She commented that was when she realized that the men fighting were bouncers.

[107] Ms. Wheadon was asked whether she thought about going into the bar to seek help. She stated no, "because we've got them broke up and that's when we got him into the car and I just got out of there. It was happening right by the car." She added that she did not think to go into the bar to get someone to call 911 because "it happened so quickly that we just got into the car to just to get him out of there." She added, from the time that she intervened it happened "really quick after that."

[108] She stated that she left her sweater in the Pub, and that Stephanie was inside the Pub; she did not come out of the Pub during the incident.

[109] Ms. Wheadon stated that she believes that her car keys were located in her car, in the ignition, as that is what she always does. She explained that she lives in the country and it is not uncommon to leave her keys in the car.

[110] Ms. Wheadon testified that she was unaware whether there was a telephone in the Pub because she did not look for one. She also stated that she does not recall whether there were other businesses in and around the Pub because she was not paying attention to that; she was concerned for Todd's safety.

[111] Ms. Wheadon stated that she looked around but was unaware that there was a Needs Store near the Pub. And she did not recall the Ultramar Gas Station when she arrived in the parking lot. She added she was not looking.

[112] Ms. Wheadon was asked whether she saw the pizza shop. She stated that she does not recall. She was asked whether she saw the Needs Store. She answered, "I probably did see them but I don't recall.". She added that she did not see the Needs store. She stated that she is not sure whether she saw the other stores in the parking area, because she doesn't remember looking for them.

[113] Ms. Wheadon agreed that she left the parking with Todd in the passenger seat and she went directly towards Highfield Park Drive; she did not drive anywhere else before going there.

[114] She stated that she drove out of the parking lot slowly because she was trying to revive Todd as he was knocked out and bleeding bad. She agreed that she was concerned about Todd's safety.

[115] Ms. Wheadon was asked why she didn't look around to see if there were any businesses in the area to seek help. She answered, "I was looking around, yes, and I was aware of the other Needs store, so that's where I was heading."

[116] She was also asked, “your friend is passed out in the passenger seat and you didn’t think to look around to see if there were any businesses in the area,” to which she responded by saying that, “I can’t remember, but I didn’t, I don’t recall seeing them no”.

[117] She stated that she tried to wake up Todd as she was driving away. She added, “yes, there was people still trying to chase after us and it was during the fight that I spun out of there”.

[118] The following question was then asked, “So, if I understand your evidence then, Todd gets into your vehicle, the passenger side, you drive away, there are people chasing after you?” She responded by saying, “It was bouncers and my brother, I left them all there and everything. I just drove away.” She was then asked, “Okay, well that’s not my question. My question was, were the bouncers running after your vehicle?” She answered, “Yes, yes. One of them definitely was. The one that he was fighting with was still right there, yes.” The Crown then asked, “Okay. My question is, did the bouncers run after your vehicle?” She responded, “I don’t know. I didn’t see if he was running behind. I didn’t look behind me.

[119] The exchange between Crown Counsel and Ws. Wheadon continued:

> Q. So when, and again, I take it you weren’t concerned about the bouncers pursuing you . . .
>
> A. Yes I was.
>
> Q. . . . because you slowed down when you approached Highfield Park Drive?
>
> A. I was concerned, yes.
>
> Q. Okay, but you slowed down your vehicle.
>
> A. I was trying to wake him up. I was concerned with him. That’s all I remember.
>
> Q. So your concern was about his safety, not about any risk of harm from bouncers behind you?

> A. We were already out of there by then. We had already pulled out of the parking lot and the intersection is further down there.
>
> Q. Okay. But when you were driving away from the parking lot, you indicated yourself you slowed down your vehicle and tried to shake Todd awake. You concern at that time was his safety and not any risk of harm from bouncers running behind . . .
>
> A. Correct.
>
> Q. Correct?
>
> A. Yeah.

[120] Ms. Wheadon was asked to comment on Stephanie White's sobriety. She was asked how intoxicated she was? She answered, "I couldn't answer. She was drinking.". She was asked, whether Stephanie had more or less to drink than her? She answered, "I couldn't answer". She also stated that Stephanie did not have her driver's license at the time.

[121] Ms. Wheadon stressed that she and her brother attempted to get the bouncers off of Todd, as he was hit. She could not recall whether or not her brother threw punches at the bouncers, because there were a lot of people doing things.

[122] Ms. Wheadon testified that she did not have a cell phone, neither did her brother, nor did Stephanie have a cell phone.

[123] It was suggested to Ms. Wheadon that it was her brother's concern about Todd, that caused her to drive away with him. She disagreed. She stated that she was helping him to get Todd out of the situation. She was helping.

[124] It was suggested to Ms. Wheadon that the bouncers were not running after her car. She stated that she did not look around, so she did not know.

[125] Ms. Wheadon agreed that her brother was a participant in the fight, and could not recall whether he had sustained any injuries.

[126] Ms. Wheadon then later stated that her brother was trying to help Todd. She could not recall whether her brother had thrown any punches.

[127] The Crown asked, “you agree with me that your memory of that night is quite cloudy as to what occurred?” She answered, “Lots of fighting, yes, cause there was so much people doing everything. I can’t remember the fighting exactly.”.

[128] Ms. Wheadon stated that she is unaware why the fight occurred.

[129] Ms. Wheadon agreed that she did not pull over her vehicle, or stop it, at any time, before the police stopped her.

[130] She also stated that she is not aware that she drove past a Needs store before she was stopped by the police.

[131] She also agreed that had she seen a business, she would have pulled in, or stopped there.

[132] Ms. Wheadon agreed that two police officers were present at the scene when she was stopped by the police.

[133] She stated that when the police pulled her over Todd was slouched over to the right side towards the passenger side door.

[134] She stated that she did not see Todd walk to the ambulance.

[135] Ms. Wheadon testified that she was driving to the Needs Store, that she had attended earlier.

[136] It was suggested to Ms. Wheadon that Todd was not passed out when the police became involved. She stated she was not sure, he started coming too; she assumed he did, because she did not see him. She did not see Todd treated by the

paramedics, as she was being attended to as well. Nor did she see Todd leave the scene.

[137] Ms. Wheadon recalled that Todd was passed out before the ambulance arrived.

[138] Ms. Wheadon was asked why Todd was put in her vehicle. She stated that she helped her brother put Todd in her car during the fight. She could not recall whether her brother was being struck when that occurred, because everyone was screaming and she was shoved out of the way.

[139] Ms. Wheadon was asked whether she thought about putting Todd in the vehicle and then locking the doors. She answered, that she did not think of that. It did not cross her mind. Her plan was to drive to the Needs Store at the intersection of Victoria and Highfield Park to seek help.

[140] She stated that she could not recall any other Needs store in the area; other than, the one she had earlier attended. She did not think that many businesses were open at that hour, but agreed that she did not look over in the parking lot next to the Pub. She added that she did not have time.

[141] Ms. Wheadon testified that she didn't believe that Todd had a cell phone.

[142] That is a brief summary of the evidence.

Burden of Proof

[143] The burden is upon the Crown to prove the allegations beyond a reasonable doubt.

[144] This legal or persuasive burden never shifts to the accused, Ms. Wheadon, it remains with the Crown throughout the trial.

[145] The issue in the present case is whether, on the whole of the evidence, the Crown has proven beyond a reasonable doubt that Ms. Wheadon committed the two alleged offences.

[146] In *Starr*, 2000 S.C.C. 40, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities.

[147] In *Lifchus,* [1997] 3 S.C.R. 320, the Supreme Court of Canada held that it is *not* sufficient to conclude that an accused person is - probably or likely guilty for a conviction to be registered.

[148] A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[149] In the present case, the credibility is an issue and thus I must considered the special instruction contained in the decision of the Supreme Court of Canada in *R. v W.D.*, [1991] 1 S.C.R. 742, wherein Justice Cory formulated a concise and uniform set of instructions which posed three questions for consideration of the accused's evidence.

[150] *W.(D.)* is concerned with how a trier of fact should apply the burden of proof in a criminal case where the accused testifies.

[151] In brief, I must remember that the issue is not whether I believe Ms. Wheadon but whether the evidence as a whole convinces me of her guilt beyond a reasonable doubt. If I believe the exculpatory evidence of Ms. Wheadon, an acquittal must

follow. However, even if I do not believe that evidence, I must ask myself, if it, nonetheless gives rise to a reasonable doubt. Finally, as the trier of fact, if I do not believe Ms. Wheadon and I am not left in doubt on the basis of her evidence, I must still address and resolve the most critical, in fact, the only question in every criminal case: Does the evidence as a whole convince me of guilt beyond a reasonable doubt?

[152] With respect to the demeanour of witnesses, I am mindful of the cautious approach that I should take in considering demeanour evidence of witnesses, as there are a multitude of variables that could explain or contribute to a witness's demeanor while testifying as eloquently expressed by Justice Saunders in *R. v. D.D.S.*, 2006 NSCA 34, at para. 77.

[153] The ultimate issue, as noted by Justice Binnie in *R. v. Sheppard*, 2000 SCC 26, is not credibility but reasonable doubt.

[154] Further, I am mindful that as the trier of fact, I may believe all, none or some of a witnesses' evidence. As the trier of fact, I am entitled to accept parts of a witness' evidence and reject other parts, and similarly, I can afford different weight to different parts of the evidence that I have accepted.

[155] I am also mindful that the proper approach to the burden of proof is to consider all of the evidence together and not to assess individual items of evidence in isolation. In other words, I must consider the totality of the evidence in determining whether the Crown discharged its burden of proving the offences beyond a reasonable doubt.

[156] Before embarking upon my analysis in this case, let me stress that I am mindful of the distinction between credibility and reliability, which has been recently

addressed by Justice Watt in *R. v. H.C.*, 2009 ONCA 56, at para. 41, in delivering the judgment of the Ontario Court of Appeal, wherein he wrote:

> Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately: observe, recalled, and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence.

[157] Moreover, as Rowels J.A., in *R. v. R.W.B.*, [1993] B.C. J. No.758, at para. 28 observed:

> It does not logically follow that because there is no apparent reason for a witness to lie, the witness must be telling the truth. Whether a witness has a motive to lie is one factor which may be considered in assessing the credibility of a witness, but it is not the only factor to be considered.

[158] It trite to say that most criminal trials involve an assessment of the reliability and credibility of witnesses' testimony, this case is no exception.

[159] As this Court has commented many times in relation to the issue of credibility specifically, there is no category of witness who comes to court with an inherent degree of credibility built into their profession or position.

[160] Although it is true that police officers have, as part of their professional responsibilities, the obligation to observe and record information that comes their way in the course of their duties, each witness, including police officers, necessarily are required to be assessed on the strengths and weaknesses of their own specific testimony and how it stacks up to the evidence that is accepted by the court.

[161] Each witness has factors which may impact their reliability and accuracy of their testimony, which is something that can be considered independent of credibility. A witness who is not credible will never be reliable or accurate, but a

person who is well meaning and attempting to be truthful can lack reliability and accuracy.

[162] As observed by Justice Saunders in *D.D.S.*, there is no magic formula for deciding how much or how little to believe a witnesses testimony or how much to rely on it in deciding a case.

[163] What is required is a careful, thorough and thoughtful examination of all aspects of the evidence called in the case.

[164] This imposes an important and special obligation upon the court, as it requires a thorough, painstaking and careful examination of the all the evidence; mindful, that in assessing the issues of credibility and reliability.

The Defence of Necessity

[165] The seminal case in relation to the defence of necessity is the Supreme Court of Canada decision in *R. v. Perka*, [1984] 2 S.C.R. 232, wherein Justice Dickson stated at pps. 10 to 11:

> If the defence of necessity is to form a valid and consistent part of our criminal law it must, as has been universally recognized, be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale. That rationale, as I have indicated, is the recognition that it is inappropriate to punish actions which are normatively "involuntary". The appropriate controls and limitations on the defence of necessity are, therefore, addressed to ensuring that the acts for which the benefit of the excuse of necessity is sought are truly "involuntary" in the requisite sense.
>
> In Morgentaler, *supra*, I was of the view that any defence of necessity was restricted to instances of non-compliance "in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible". In my opinion this restriction focuses directly on the "involuntariness" of the purportedly necessitous behaviour by providing a number of tests for determining whether the wrongful act was truly the only realistic reaction open to the actor or whether he was in fact making what in fairness could

be called a choice. If he was making a choice, then the wrongful act cannot have been involuntary in the relevant sense.

The requirement that the situation be urgent and the peril be imminent, tests whether it was indeed unavoidable for the actor to act at all. In LaFave & Scott, Criminal Law (1972), at p. 388, one reads:

> It is sometimes said that the defense of necessity does not apply except in an emergency--when the threatened harm is immediate, the threatened disaster imminent. Perhaps this is but a way of saying that, until the time comes when the threatened harm is immediate, there are generally options open to the defendant to avoid the harm, other than the option of disobeying the literal terms of the law--the rescue ship may appear, the storm may pass; and so the defendant must wait until that hope of survival disappears.

At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable.

The requirement that compliance with the law be "demonstrably impossible" takes this assessment one step further. Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? Was there a legal way out? I think this is what Bracton means when he lists "necessity" as a defence, providing the wrongful act was not "avoidable". The question to be asked is whether the agent had any real choice: could he have done otherwise? If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of "necessity" and human instincts.

The importance of this requirement that there be no reasonable legal alternative cannot be overstressed.

Even if the requirements for urgency and "no legal way out" are met, there is clearly a further consideration. There must be some way of assuring proportionality. No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself we will not excuse him. According to Fletcher, this requirement is also related to the notion of voluntariness (at p. 804):

> ... if the gap between the harm done and the benefit accrued becomes too great, the act is more likely to appear voluntary and therefore inexcusable. For example, if the actor has to blow up a whole city in order to avoid the breaking of his finger, we might appropriately expect him to endure the harm to himself. His surrendering to the threat in this case violates our expectations of appropriate and normal resistance and pressure. Yet as we lower the degree of harm to others and increase the threatened harm to the

> person under duress we will reach a threshold at which, in the language of the Model Penal Code, "a person of reasonable firmness" would be "unable to resist". Determining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations. A valuable aid in making that judgment is comparing the competing interests at stake and assessing the degree to which the actor inflicts harm beyond the benefit that accrues from his action.
>
> I would, therefore, add to the preceding requirements a stipulation of proportionality expressible, as it was in *Morgentaler*, by the proviso, that the harm inflicted must be less than the harm sought to be avoided.

[166] The Supreme Court of Canada further observed in *R. v. Latimer*, 2001 SCC 1, at para. 27:

> Dickson J. insisted that the defence of necessity be restricted to those rare cases in which true "involuntariness" is present. The defence, he held, must be "strictly controlled and scrupulously limited" (p. 250). It is well established that the defence of necessity must be of limited application. Were the criteria for the defence loosened or approached purely subjectively, some fear, as did Edmund Davies L.J., that necessity would "very easily become simply a mask for anarchy": Southwark London Borough Council v. Williams, [1971] Ch. 734 (C.A.), at p. 746.
>
> Perka outlined three elements that must be present for the defence of necessity. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.

[167] Later on, the Court stated at paras. 29 to 31:

> To begin, there must be an urgent situation of "clear and imminent peril": Morgentaler v. The Queen, [1976] 1 S.C.R. 616, at p. 678. In short, disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur. In Perka, Dickson J. expressed the requirement of imminent peril at p. 251: "At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable". The Perka case, at p. 251, also offers the rationale for this requirement of immediate peril: "The requirement ... tests whether it was indeed unavoidable for the actor to act at all". Where the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril.

> The second requirement for necessity is that there must be no reasonable legal alternative to disobeying the law. Perka proposed these questions, at pp. 251-52: "Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? Was there a legal way out?" (emphasis in original). If there was a reasonable legal alternative to breaking the law, there is no necessity. It may be noted that the requirement involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable, but he must have no reasonable legal alternative. If an alternative to breaking the law exists, the defence of necessity on this aspect fails.
>
> The third requirement is that there be proportionality between the harm inflicted and the harm avoided. The harm inflicted must not be disproportionate to the harm the accused sought to avoid.

[168] With respect to the *test* that governs the defence of necessity the Supreme Court's instructive comments are apposite at para. 32 to 33:

> we need to determine what test governs necessity. Is the standard objective or subjective? A subjective test would be met if the person believed he or she was in imminent peril with no reasonable legal alternative to committing the offence. Conversely, an objective test would not assess what the accused believed; it would consider whether in fact the person was in peril with no reasonable legal alternative. A modified objective test falls somewhere between the two. It involves an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person. We conclude that, for two of the three requirements for the necessity defence, the test should be the modified objective test. Before applying the three requirements of the necessity defence to the facts of this case,
>
> The first and second requirements -- imminent peril and no reasonable legal alternative -- must be evaluated on the modified objective standard described above. As expressed in Perka, necessity is rooted in an objective standard: "involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure" (p. 259). We would add that it is appropriate, in evaluating the accused's conduct, to take into account personal characteristics that legitimately affect what may be expected of that person. …
>
> While an accused's perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, those perceptions remain relevant only so long as they are reasonable. The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open. There must be a reasonable basis for the accused's beliefs and actions, but it would be proper to take into account

> circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that he perceived imminent peril without an alternative would only succeed with the defence of necessity if his belief was reasonable given his circumstances and attributes. We leave aside for a case in which it arises the possibility that an honestly held but mistaken belief could ground a "mistake of fact" argument on the separate inquiry into mens rea.

[169] Lastly, Dickson, J., in *Perka,* clearly pointed out where the onus of proof lies where the defence of necessity is raised. He wrote, at p. 14:

> Although necessity is spoken of as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act. The prosecution must prove every element of the crime charged. One such element is the voluntariness of the act. Normally, voluntariness can be presumed, but if the accused places before the Court, through his own witnesses or through cross-examination of Crown witnesses, evidence sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue. There is no onus of proof on the accused.

[170] In *R. v. Hibbert,* [1995] 2.S.C.R. 973, the Supreme Court clearly pointed out that the Crown is not required to prove beyond a reasonable doubt that the accused's conduct failed on every element of the defence. Therefore, in the context of the defence of necessity, the Crown need only negative one of the elements of the defence. In other words, if I am satisfied beyond a reasonable doubt that any of the elements or requirements does not apply, then Ms. Wheadon is not excused from criminal liability.

[171] It is noteworthy, that necessity is an excuse preserved by s. 8(3) of the *Criminal Code.*

[172] In view of all of the foregoing, let me briefly summarize the law of necessity before I apply it to the circumstances of this case.

[173] In essence, the criminal law recognizes necessity as an excuse for crime, provided certain requirements are met. Necessity is based on a realistic assessment of human weakness. It recognizes that a liberal and humane criminal law cannot require strict obedience to laws in genuine emergencies, where normal and human instincts, whether of self-preservation or helping others, overwhelmingly impel disobedience.

[174] An excuse, like necessity, does not suggest that what a person charged did was right. An excuse concedes that what was done was wrong, but does not hold the person responsible for it because of the circumstances in which the conduct took place.

[175] It is unjust to punish violations of the law in circumstances in which a person had no other viable or reasonable choice available. The conduct was wrong, but we excuse it because it was realistically unavoidable.

[176] Not every set of circumstances amounts to necessity. The law expects people to be able to resist most pressure from circumstances in which they find themselves. Where a person's response to an imminent and overwhelming peril is involuntary, however, the law excuses that person for what he or she has done. But not otherwise.

[177] The accused does not have to prove that he or she did was involuntary because it was necessary. It is for the Crown to prove beyond a reasonable doubt that what the accused did was voluntary, the result of free choice.

[178] There are three elements in the excuse of necessity:

a. Clear and imminent danger or peril;

b. No reasonable legal alternative; and

c. A proportionality between the harm inflicted and the harm avoided.

[179] If I have a reasonable doubt about each of these elements, then I must find Ms. Wheadon not guilty.

[180] If I am satisfied beyond a reasonable doubt that any one of these elements does not apply, Ms. Wheadon is not excused from criminal liability for what she has done on the basis of necessity.

The Application of the Defence of Necessity

[181] I have had an opportunity to assess and consider the evidence in relation to this matter. Clearly, this is a case where credibility and reliability are of importance. I have had the opportunity to watch carefully and listen intently to all of the witnesses, particularly Ms. Wheadon's evidence.

[182] As previously mentioned in this case, there is no issue in respect to whether or not the Crown proved all of the essential elements of both alleged offences as the evidence clearly establish these essential elements beyond a reasonable doubt. The central issue is whether or not the Crown proved beyond a reasonable doubt that the defence of necessity does not apply in this case.

[183] As expressed in *Latimer*, the defence of necessity is narrow and of limited application in criminal law.

[184] In this case, based on the totality of the evidence, particularly Ms. Wheadon's evidence, there is an air of reality to that defence, as conceded by the Crown.

[185] Obviously, in applying the defence of necessity to the facts of this case, the credibility and reliability of Ms. Wheadon's evidence is of significance. Before

embarking upon my analysis of each legal requirement for the defence of necessity, it seems appropriate at this juncture to make some general comments about Ms. Wheadon's trustworthiness as a witness.

[186] Having carefully listened to and observed Ms. Wheadon when she provided her testimony, she seemed to be a credible witness, but there were certain aspects of her evidence that undermined her reliability, which I will address later in these reasons when I address the elements of the defence of necessity, which are evaluated on the modified objective standard as previously described.

[187] In my respective view, Ms. Wheadon was not a very compelling or persuasive witness. While she seemed to have provided her evidence to the best of her abilities, at times she seemed to be unclear, confused, or forgetful. Put differently, she was neither a convincing or persuasive witness who possessed a strong detailed recollection of the entire incident, nor was she confident in answering questions. For example, she seemed somewhat equivocal in respect to her brother's involvement in the altercation. At one point in her testimony she clearly stated that her brother and Todd were both engaged in a fight with the bouncers, and at other times in her evidence she suggested that her brother was only trying to help Todd; by trying to get them to stop fighting with Todd. When she was pressed on this point by Crown Counsel who asked whether her brother threw any punches, she answered that she could not recall. The following exchange may explain why she cannot recall. The Crown asked: "So would you agree that your memory of that night is quite cloudy as to what occurred?" Ms. Wheadon answered, "Lots of fighting, yes, cause there was so much people doing everything. I can't remember the fighting exactly." She also stressed in her evidence that the incident happened very quickly and "it was pretty crazy.".

[188] Further, Ms. Wheadon's evidence concerning whether the bouncers pursued her car as she drove away undermines her reliability. When first asked about whether there was anyone running after the car as she was leaving the scene, she clearly and unequivocally stated that, "yes, there was people trying to chase after us and it was during the fight that I spun out of there.". The Crown then later asked, "So, if I understand your evidence then, Todd gets into your vehicle, the passenger side, you drive away, there are people chasing after you?" Ms. Wheadon answered, "It was the bouncers and my brother – I left them all there, I left my brother there and everything. I just drove away.". The Crown then asked, "Okay, well that's not my question. My question was - were the bouncers running after your vehicle?" She answered, "Yes, yes, one of them definitely was. The one that he was fighting with was still right there, yes.". The Crown then asked, "Okay, now my question is, did the bouncers run after your vehicle?". Ms. Wheadon's responsed, "I don't know. I didn't see if he was running behind. I didn't look behind me." Then later on in the cross-examination, the following exchange between the Crown and Ms. Wheadon took place:

> Q. Okay. Do you agree that at that time, where were the bouncers?
>
> A. They were still there.
>
> Q. Okay. But as you drove away, you agree they weren't running after your car?
>
> A. I didn't look behind me, I don't know.
>
> Q. Okay. So then you have no reason to believe that they were running after your vehicle then?
>
> A. Yes, I did. They were still trying to fight with him yes.
>
> Q. No, when you're driving them away from the scene?
>
> A. No not when we're driving away. No.

[189] One aspect of Ms. Wheadon's evidence which is somewhat problematic, and undermines her reliability is that she only has a vague recollection of the existence of stores that are adjacent to the Parkside Pub, in the same parking lot area.

[190] Ms. Wheadon stated that she could not recall seeing the Ultramar Gas Station, as she was not looking. She did not recall seeing the Pizza Shop; she stated, she probably did see them but she couldn't recall. She also stated that she did not see the Needs Convenience Store. She was asked whether she recalled seeing other businesses that were in the parking lot, and she answered - " I, I'm sure I did, I just don't remember looking at them".

[191] Notwithstanding that she is not familiar with the Halifax Regional Municipality, it is hard to believe that she did not see the stores because she drove into the parking lot, where the stores are located and had driven by the stores to gain entrance into the Pub: she stated that she parked her car in front of the Pub. The Tim Horton's Store, the Needs Store, and Alexander Pizza, are all within meters of each other, and next to the Parkside Pub, and were apparently open on the date and time in question.

[192] I realize that the Ultramar Gas Station is to the right of the parking lot, but it is in that same area, and it is a significant land mark with rows of gas pumps.

[193] I will now address the three legal elements to the defence of necessity.

a. Clear and Imminent Peril or Danger

[194] This element refers to the circumstances that Ms. Wheadon faced when she operated her car while her ability to so was impaired by alcohol.

[195] In this case, Ms.Wheadon does not suggest she herself faced any peril; instead she identifies a peril to Todd stemming from an ongoing assault by a bouncer.

[196] As stated in *Latimer,* to begin, there must be an urgent situation of clear and imminent peril. In short, disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur. At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and take a counsel of patience unreasonable. This requirement must be accessed on a modified objective standard, based on the subjective belief of Ms. Wheadon assessed on a reasonableness standard.

[197] In other words, would a reasonable person with a normal ability to resist pressure consider himself or herself in such danger. In evaluating Ms. Wheadon's conduct, I must take into account her particular circumstances and personal characteristics, including her ability to perceive the nature and extent of the danger.

[198] The defence agrues that Ms. Wheadon is an unsophisticated woman, who genuinely believed in order to save Mr. Johnson from further assault and injury she had to remove him from the imminent danger and peril. This is supported by her testimony of her brother putting Mr. Johnson in the vehicle and yelling at her to leave with him. The danger was so imminent that Ms. Wheadon believed it was necessary to remove Mr. Johnson right away to prevent further assault.

[199] The Crown contends, on the other hand, that the circumstances surrounding the altercation outside the Pub was a fight which Ms. Wheadon watched for a few minutes before she complied with her brother's demand to remove Todd from the situation. The Crown submits that the accused's evidence regarding the seriousness of the situation at the bar should be treated with skepticism, as the accused's brother, who was also an active participant in the fight with the bouncers, stayed at the scene after the accused and Todd left. The threat was clearly not so serious and imminent

that the accused's brother felt it necessary to leave the scene in the accused's car as well, despite the fact that such an option was available to him.

[200] Having considered the totality of the evidence, particularly Ms. Wheadon's evidence, I accept that she was frightened and concern about the physical condition of Todd when she observed that he was being struck by the bouncer. She described her brother as being "pretty frantic" as he was trying to get the bouncer off of Todd because Todd was hurt. Ms. Wheadon stressed that Todd appeared to be injured as he was being struck by the bouncers. He appeared motionless, limp, as he was being struck by the bouncers, which scared her. She also emphatically stated that she and her brother tried to get the bouncer off of Todd who was "out cold".

[201] I accept that Ms. Wheadon panicked and feared that Todd had been seriously injured. I accept that she believed that Todd was in imminent danger or peril when she observed him being struck by the bouncer and appeared motionless, or limp. However, her subjective belief, no matter how firmly held, is not sufficient to meet the first element of the defence, as I must ask whether a reasonable person similarly situated as Ms. Wheadon, having taking into account her particular circumstances and her personal characteristics, including her ability to perceive the nature and extent of the danger, would have found the situation was one of imminent peril. In other words, Ms. Wheadon's perceptions remained relevant only so long as they are reasonable.

[202] Having considered the nature and circumstances surrounding the assault upon Todd, including his physical condition as he was being struck by the bouncer, I have a reasonable doubt that Todd was in imminent danger or peril. Put differently, I am not satisfied beyond a reasonable doubt that the Crown proved that Todd was not in clear and imminent danger or peril.

[203] Having reached that conclusion, I must go on to the address the next element in the excuse of necessity, which is that there was no reasonable legal alternative.

b. No Reasonable Legal Alternative

[204] The next element in the excuse of necessity has to do with the availability of reasonable legal alternatives to what Ms. Wheadon did. Could she realistically have acted to avoid the peril or prevent the harm without breaking the law? Was there a legal way out for Ms. Wheadon?

[205] This question involves a realistic appreciation of the alternatives open to Ms. Wheadon. She does not have to be put in the last resort imaginable, but she must have no reasonable legal alternative. If there was a reasonable alternative to breaking the law, necessity is not an excuse.

[206] In deciding whether Ms. Wheadon had no reasonable legal alternative to what she did, I must consider whether a person, with the degree of resistance to pressure that we expect of reasonable members of our society would be able to see an alternative course of action, a legal way out. In considering this question, I am mindful that I must take into account Ms. Wheadon's particular circumstances and personal characteristics, including her ability to see that alternative legal courses of action were available in the circumstances.

[207] If I am satisfied beyond a reasonable doubt that there was a reasonable legal alternative to what she did, necessity does not excuse Ms. Wheadon from criminal liability. If I have, however, a reasonable doubt that there was no reasonable legal alternative to what she did, I must go on and address the third element of the defence of necessity.

[208] The Crown submits, at paragraph 26 of its brief that Ms. Wheadon made a conscious and voluntary decision to operate her motor vehicle while impaired. There were legal alternatives available to her that she chose not to avail herself of:

> 1. There were many people present at the scene. The accused made no attempts to ask someone to call the police or to alert other pub staff. The accused did not confirm whether there was a pay phone in the bar: "I wasn't looking". She stated during cross examination that she was not aware if there was a payphone in the bar. The accused could have asked to use a phone in the bar to call for emergency assistance or ask another patron to call for assistance on a cell phone;
>
> 2. The accused could have sought help at the several businesses adjacent to the Parkside Pub. These businesses were open late. They included, at the very least, a pizza shop, gas station, Tim Hortons, and convenience store. She stated that she did not even look to her left, as she drove through the parking lot, to confirm whether there were other businesses attached to the bar, a consideration, in the Crown's submission, was warranted in these circumstances.
>
> The Defence suggests that the nearby open businesses would not have provided the accused with sufficient distance to be free and clear from further assaults. With respect, the only evidence on this point from the officers includes the fact that the open businesses were visible from the Parkside Pub. There is no evidence to establish the distance between these locations.
>
> The accused's lack of awareness of the presence of other adjacent businesses further raises credibility concerns, in particular her assertion that she was not aware that a gas station was located in the same parking lot. The accused mentioned several times during her testimony that she was unfamiliar with HRM this should not impact her human ability to observe landmarks in her direct line of vision;
>
> 3. To limit the amount of time she was in care and control of the motor vehicle, she could have stopped long before she was pulled over by the police. She stated that she was not aware of anyone pursuing her vehicle, so any imminent threat would have no longer been present. Instead, the accused drove her car down Highfield Park Drive. The Parkside Pub is set back from Highfield Park Drive. Once she reached the parking lot threshold, she could have stopped the car and ceased care and control. Simply put, the accused drove too far, putting the public at unnecessary risk.

[209] The defence submits, at p. 3 of its brief that:

> Ms. Wheadon tried to seek assistance inside the Parkside Pub. Upon doing so, she learned it was the staff and security of the pub that was assaulting Mr. Johnson. Ms. Wheadon upon cross-examination testified that she did not have a cell phone to call for assistance. Her only thought was to remove the bloodied and beaten Mr. Johnson from a dangerous situation in order to avoid further injury and harm.
>
> The Crown through its questioning of Ms. Wheadon appears to be suggesting that Ms. Wheadon had the alternative option of going to one of the businesses close by to seek assistance. In *R. v. Pleau,* the Honourable Judge Scovil states how easy it is to assume the position of "armchair quarterbacks" and suggest many alternatives. In assuming Ms. Wheadon could have gone to businesses in the nearby area, the Crown is failing to assess Ms. Wheadon's beliefs she faced an urgent situation of clear and imminent harm on a modified objective standard. Additionally, as confirmed by both Constables, the nearby businesses were closed at that time and the ones that were open would not have provided them the distance to be free and clear from further assault.
>
> Ms. Wheadon faced clear and imminent danger and peril on April 15, 2012. Upon seeing Mr. Johnson being assaulted and covered in blood, her only thought was to get Mr. Johnson out of the immediate harm to avoid further serious injury. It was her objective belief that she was facing clear imminent danger and peril and the only solution was to remove Mr. Johnson from the area.
>
> Ms. Wheadon felt in the circumstances that she had no other legal alternative other than to drive Mr. Johnson away from the scene where he was being assaulted to prevent further serious injury to an already bloody and injured person.

[210] Having carefully considered the totality of the evidence, particularly Ms. Wheadon's evidence, I am satisfied that the Crown has proven beyond a reasonable doubt that Ms. Wheadon's actions of driving her car were voluntary.

[211] I am satisfied that the Crown proved beyond a reasonable doubt that there was a reasonable legal alternative to the course of action that Ms. Wheadon undertook. In other words, there was a reasonable alternative to breaking the law. Let me explain.

[212] In my view, there were several reasonable legal alternatives open to Ms. Wheadon that would *not* expose the public to the risks involved in her operation of

a motor vehicle while her blood alcohol level was in excess of the legal limit. They include:

> 1. Ms. Wheadon could have locked the car doors after Todd Johnson was placed in the car, and ignored her brother's command to drive away. With the doors locked she could have sounded the horn of the car to call attention to the vehicle, and demand that Rocky seek assistance by having someone call 911. There were several people in the parking lot, and the immediate businesses were open; or
> 2. She could have locked Todd in the vehicle, and asked her brother to remain with Todd while she sought help from someone in the parking lot with a cell phone to call 911, or by entering one of the open businesses in the parking lot to ask someone to call 911. Given that there were a number of people in the parking lot area in and around businesses, this was a reasonable alternative.

[213] Moreover, there were other *reasonable alternatives* open to Ms. Wheadon that would have minimized the risk to the public, and which would have involved her driving the vehicle a short distance, including:

> 1. Driving to the Tim Horton's Store, or to the Ultramar Gas Bar Station which are both in the parking lot in order to seek assistance as there is no evidence on the record that anyone was in pursuit of the vehicle, or
> 2. Ms. Wheadon could have driven away from the scene to another location in the parking lot as there was no one in pursuit of the vehicle. She then could have run into one of the businesses that were open to seek assistance, or sought assistance from someone in the parking lot as there were people in the area. Given that the location contained a number of businesses and the number of people in the parking lot, assistance would likely have been imminent.

[214] It should be noted that there is no evidence on the record that the bouncers attempted to prevent Todd from being put into the vehicle, nor is there any evidence to suggest that anyone was in possession of weapons or some kind of instruments that could have been used to gain entry into the locked vehicle by smashing the windows of the car.

[215] The indisputable evidence is that Rocky, in a panicked state, demanded that Ms. Wheadon drive away with Todd in the vehicle. There is no evidence as to why Rocky felt it was necessary for Ms. Wheadon to drive Todd away from the scene, other than he may have felt it was necessary to diffuse the situation or protect Todd from further assaultive behavior as stated by Ms. Wheadon. Regardless, Rocky did not leave the scene.

[216] There is evidence, however, that Ms. Wheadon did not turn her mind to what she was doing; as she stated she was not thinking; she complied with her brother's demand and drove away from the scene. Her brother did not leave the scene, which is rather particular because it suggests that the circumstance of imminent danger or risk were no longer present when Todd was put in the car. This is not a situation where Ms. Wheadon locked the car doors and someone was attempting or threatening to gain access into the vehicle to cause further harm to Todd, which would necessitate moving the vehicle.

[217] Furthermore, there is no evidence that the bouncers, the attackers, told Ms. Wheadon to leave the scene or face further assaultive behavior. The only person who told her to leave the scene was her brother, who was under the influence of alcohol, and in a panicked state.

[218] While I understand and appreciate that she subjectively believed that she had no choice but to leave given the circumstances, particularly at her brother's

insistence, the analysis does not end there. I am required to apply a modified objective test of the totality of the circumstances, as described earlier in these reasons.

[219] Alternatively, even if I did conclude that it was necessary for Ms. Wheadon to drive away from the scene, she could have easily stopped the vehicle somewhere in the parking lot, such as at the gas pumps of the Ultramar Gas Station which is located at a reasonable distance away from the scene; at the far end of the parking lot. I make this point because the circumstances of imminent risk or peril were no longer present when she put distance between herself and the bouncers by driving away in the car. I find that there is no evidence that anyone attempted to enter her vehicle or for that matter chased after it. Moreover, I am mindful that she did not look to ascertain whether anyone was pursuing her vehicle, or look around in the parking lot to see what businesses appeared to be open, notwithstanding the proximity of the businesses that were open, including the Tim Horton's Store.

[220] Ms. Wheadon did, however, consciously turn her mind to what she had to do, which was drive to the Needs store down on Highfield Park Drive; the store she had attended earlier in the evening.

[221] When Ms. Wheadon made the decision to drive to the Needs Store on Highfield Park Drive, she was in the parking lot where all of the businesses are located. She made a conscious decision to drive to the Needs store. This decision required her to turn her mind too what she should do. She obviously made that decision in dire circumstances, while under the influence of alcohol. Thus, it seems to me that if she was able to make that decision in these circumstances, then she should have been able to consider her immediate surroundings as there was no longer

an imminent danger, or threat of danger when Ms. Wheadon drove away from the scene.

[222] In my view, Ms. Wheadon's response that she neither looked nor thought about attending the businesses in the immediate parking lot, falls far short of the response of a reasonable person similarly situated as Ms. Wheadon. A similarly situated person as Ms. Wheadon; that is, a person in the same situation as Ms. Wheadon, and with the same personal characteristics as her, would have seen an alternative course of action to take.

[223] Let me be clear, I realize that Ms. Wheadon does not have to be put in the last resort imaginable, but she must have no reasonable legal alternative.

[224] I am also cognizant of Judge Scovill's comments in the *R. v. Pleau*, 2013 NSPC 116, at para. 8, wherein stated, "while we can all assume the position of an armchair quarterback and put forward a multitude of 'what ifs'". I have also considered the remarks of Justice Barry in *R. v. West*, [1994] N.J.No. 303 (N.L.S.C.), at para. 17, wherein he wrote:

> These are difficult sorts of cases. There is a danger of "Monday morning quarterbacking" by, in hindsight, placing too heavy a burden upon individuals to explore all possible alternatives before breaking the law in reaction to an immediate peril. This risks ignoring the fact that reasonable human beings may err in the agony of the moment, when faced with imminent peril. But, ultimately, I conclude there are policy reasons for a conservative approach, as indicated in Berriman, where Gushue J.A. stated, at p. 242:
>
> > ... the harm inflicted could have been much worse than the harm sought to be avoided had she, in her intoxicated state, struck a pedestrian.
>
> Thus, the danger to society of having drunken individuals driving to seek aid in a perceived emergency, justifies the insistence of Courts that there be "no reasonable legal alternative". See, Perka, at pp. 138-9. Only exceptional circumstances permit the defence.

[225] The law appropriately imports a modified objective test that takes into account the situation and characteristics of the particular accused person.

[226] In reaching the decision that there was a reasonable legal alternative available to Ms. Wheadon, as well as a reasonable alternative that would have minimized the risks to the public, I have, indeed, applied the modified objective standard as described earlier in these reasons.

[227] In conclusion, although I have a reasonable doubt with respect to the first element; that is, that Ms. Wheadon was in a situation of imminent danger and peril which would have excused her initial decision to drive, I am satisfied beyond a reasonable doubt that the evidence establishes that the imminent danger and peril was not present during all of the time that she had care or control of her vehicle, and as such there were reasonable legal alternatives to breaking the law.

[228] In light of this conclusion, it is not necessary to address the third element, but I will because it has been addresses by counsel.

[229] The third requirement or element for the defence of necessity, proportionality, must be measured on an objective standard. The evaluation of the seriousness of the harms; that is, the comparison between the harm inflicted and the harm avoided. A subjective evaluation of the competing harms would, by definition, look at the matter from the perspective of the accused person who seeks to avoid harm. As stated in *Latimer*, the proper perspective is an objective one because evaluating the gravity of an act is a matter of community standards infused with constitutional considerations. Therefore, the proportionality requirement must be determined on a purely objective standard.

[230] The issue under this requirement has to do with the proportionality between the harm, the risks to the public of an impaired driver, and the harm Ms. Wheadon avoided; further harm or injury to Todd Johnson.

[231] Necessity excuses unlawful conduct only if the harm avoided by doing what Ms. Wheadon did is comparable to, or clearly greater than, the harm she caused. I must compare the harm caused by Ms. Wheadon's unlawful conduct with the harm avoided by the same conduct. In doing that, I must ask myself whether a reasonable, fair minded person would consider the harm Ms. Wheadon avoided by her conduct was comparable to, or clearly greater than the harm caused. This requires me to balance the relative seriousness of the harm caused and the harm avoided. I must be satisfied beyond a reasonable doubt that the seriousness of the harm avoided prevails over the harm caused.

[232] I find that the danger to Todd, from being further assaulted and injured, was far less than the danger to the public from the offence committed. Damage to persons and property caused by impaired drivers is staggering. Particularly, as in this case, where, help was immediately and readily available, our society expects its citizens to obey the laws.

[233] In the present case, Ms. Wheadon drove out of a parking lot and entered onto Highfield Park Drive, which is a busy thoroughfare surrounded by businesses and densely populated housing. Indeed, had it not been for the police stopping Ms. Wheadon, she would have continued to drive along Highfield Park Drive to the Needs Store close to Victoria Road. There is no question that Ms. Wheadon's decision to drive placed the public at great risk, as evidenced by her driving. Cst. Pike's observations are apposite:

> The car came out of the parking lot where the Parkside Pub is located, and crossed the intersection moving excessively slow, weaving back and forth within the lane and then over correcting hard and coming close to the curb. The car failed to stop at the stop sign. The brake lights on the car did not illuminate as it slowly moved through the intersection.
>
> It appeared that the driver of the vehicle was leaning over holding onto the passenger; it looked to him that something was going on in the vehicle, as he could only see two silhouettes in the vehicle.

[234] While being distracted and in an intoxicated state, Ms. Wheadon drove her vehicle. Her decision to drive to the Needs Store on Highfield Park Drive exposed the public to the risks of misery and carnage caused by impaired driving. As observed by the Supreme Court in Canada, in *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at para. 16, wherein the Court commented:

> Every year drunk driving leaves a terrible trail of death, injury heartbreak and obstruction. From the point of view of numbers alone it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.

[235] In assessing proportionality, I have also considered the nature and extent of the Todd Johnson's injuries and the potential risk of greater harm if he was not extracted from the situation.

[236] Having considered the totality of the evidence it is difficult to ascertain the actual injuries sustained by Todd; other than that he sustained a broken nose which caused him to bleed profusely. He was only briefly examined by the paramedics because he refused their assistance. He walked away from the paramedics on his own volition in an intoxicated state. It is reasonable to infer from the circumstances that the paramedics determined that Todd's injuries did not warrant hospitalization as he walked away on his own volition. In other words, it is reasonable to infer from the totality of the circumstances that Todd's injuries were not life threatening or

serious enough to necessitate immediate and further attention at the hospital; otherwise he would have been transported to the hospital for further examination.

[237] It should be noted I am mindful that Ms. Wheadon believed Todd injuries to be serious. Notwithstanding her subjective belief, this is not a situation where objectively there was a risk of irreparable harm as a result in a delay in obtaining medical attention.

[238] In my view, the circumstances of this case do not satisfy an appropriate balance between these competing interests. The potential danger to Todd is far less than the risk of danger to the public from the offence committed.

[239] Having considered all of the evidence, I am satisfied beyond a reasonable doubt that the harm Ms. Wheadon caused was equally or more serious than the harm she tried to avoid. Therefore, the defence of necessity does not excuse Ms. Wheadon from criminal liability.

[240] For all of the foregoing reasons, I find that the Crown has proven beyond a reasonable doubt all of the essential elements of both offences as described in the Information. However, Ms. Wheadon can only be convicted of one offence because of the *R. v. Kineapple*, [1975] 1 S.C.R. 729, principle, therefore I find her guilty of the first count on the *Information,* which is having the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded 80 milligrams of alcohol in 100 milliliters of blood, contrary to s. 253(b) of the *Criminal Code*.

[241] Accordingly, with respect to the second count, a conditional stay of proceedings is appropriate in the circumstances.