SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Rose*, 2017 NSSC 143

Date: 20170525
Docket: Hfx. No. 448859
Registry: Halifax

Between:

Her Majesty the Queen

Plaintiff

v.

Tyler Hubert Rose

Defendant

Decision

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	April 5, 6, 7 and 10 and May 16, 2017, in Halifax, Nova Scotia
Counsel:	Janine Kidd, for the Crown Mark Bailey, for the Defendant

By the Court:

Introduction

[1] The accused, Tyler Hubert Rose, faces three charges arising out of an incident that occurred in the parking lot of a tavern on the evening of March 21, 2015. After spending the afternoon playing crib and drinking in the tavern, Mr. Rose was accosted by another patron, Gregory Maclean in the parking lot. After a brief altercation which ended with Mr. MacLean on the ground and being helped up by other people on the scene, Mr. Maclean's daughter, Melissa Maclean, intervened and attacked the accused, who took refuge in his van. When Ms. MacLean continued to try to reach him through the driver's side window, the accused turned the van on and drove away. When the van began to move, Ms. MacLean fell to its side and was badly injured. The accused drove around to the front of the tavern, ran into a snow bank, turned around, and drove back to the rear again, where he collided with another vehicle.

[2] As a result of these events, the accused faces *Criminal Code* charges of impaired driving causing bodily harm (s. 255(2)), "over 80" (s. 255(2.1)), and dangerous driving causing bodily harm (s. 249(3)). The fourth count, assault with a weapon (s. 267(a)), on motion by the Defence, has been dismissed

Elements of the offences

[3] The elements of the offence of impaired driving causing bodily harm are set out in *R. v. Thompson*, 2010 ONSC 4691, [2010] O.J. No. 3635:

> 30 The elements of the charge of impaired driving causing bodily harm are (i) the operation of a motor vehicle in a manner (ii) that causes bodily harm to a person at a time when (iii) the ability of the accused to drive the vehicle is impaired. There is no element to the offence that focuses on the actual driving-related conduct of the accused or the manner in which the accused was driving and whether that manner of driving was criminally negligent. In contrast, while the offence of dangerous driving causing bodily harm also requires that the accused caused bodily harm to a person by the operation of a motor vehicle, its focus is not on the accused's physical or mental state, but rather on a modified objective evaluation of the manner in which the accused was operating the vehicle relative to the reasonably prudent conduct of other drivers having regard to the objective external conditions that were present in that place and time.

[4] Cromwell J summarized the elements of dangerous driving causing bodily harm in *R. v. Roy*, 2012 SCC 26, 2012 Carswell BC 1573:

> 28 In [*R. v. Beatty*, 2008 SCC 5] the majority of the Court spoke through the reasons of Charron J. which of course are the authoritative statement of the relevant principles. In brief, the Court decided as follows. The *actus reus* of the offence is driving in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably have been expected to be at that place (s. 249(1)(a) of the Criminal Code). The *mens rea* is that the degree of care exercised by the accused's was a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances (*Beatty*, at para. 43). The care exhibited by the accused is assessed against the standard of care expected of a reasonably prudent driver in the circumstances. The offence will only be made out if the care exhibited by the accused constitutes a marked departure from that norm. While the distinction between a mere departure from the standard of care, which would justify civil liability, and a marked departure justifying criminal punishment is a matter of degree, the lack of care must be serious enough to merit punishment (para. 48).

[5] The “over 80” offence requires the Crown to prove that the accused operated or had care and control of a motor vehicle, whether or not it was in motion, “having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood”: s. 253(1)(b). The breath demand is made when an officer has “reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol…” The demand must be made “as soon as practicable”: s. 254(3). The Crown must also prove that the complainant suffered bodily harm, as charged in this case under s. 255(2.1).

[6] The accused does not dispute that the essential elements of the offences are established on the evidence.

[7] The defence waived the necessity for a *voir dire* to admit the police statement given by Tyler Rose. It was, however, used only in cross-examination. The accused’s statement was not used to contradict him.

[8] The accused raises the defence of necessity. The Supreme Court of Canada set out the test for necessity in *R. v. Perka*, [1984] 2 S.C.R. 232. This defence is a recognition that “liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether

of self-preservation or of altruism, overwhelmingly impel disobedience" (*Perka* at para. 33.) The defence of necessity is recognized in Canada as an excuse, not a justification. The main criterion is the "moral involuntariness of the wrongful action… measured on the basis of society's expectation of appropriate and normal resistance to pressure" (*Perka* at para. 62). After the accused places sufficient evidence before the Court to raise the issue of necessity, the Crown must prove beyond a reasonable doubt that one, or more, of the following three elements was not present: (1) an urgent situation of clear and imminent peril; (2) there was no reasonable legal alternative; and (3) the harm inflicted was proportionate to the harm avoided.

[9] On the first element, an urgent situation of clear and imminent peril, it is not enough that the peril is foreseeable or likely; it must be "virtually certain to occur": *R. v. Latimer*, 2001 SCC 1, [2001] S.C.J. No. 1, at para. 29. This is assessed on a modified-objective standard, meaning that in assessing the accused's conduct it is appropriate to consider "personal characteristics that legitimately affect what may be expected of that person" (*Latimer* at para. 33). In other words, "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" (*Latimer* at para. 33).

[10] The second element – that there was no reasonable legal alternative – is also assessed on the modified-objective standard (*Latimer* at para. 33).

[11] The third element is that the harm inflicted was proportionate to the harm avoided. The harm avoided must, at a minimum, be of comparable gravity to the harm inflicted. This is assessed on a purely objective standard (*Perka* at para. 44; *Latimer* at paras. 31 and 34).

[12] The fact that the accused was engaged in an illegal or immoral act when the necessitous situation emerged does not disentitle them from using the defence of necessity. The accused will, however, be disentitled from using the defence of necessity "if the accused's own "fault" (including negligence or recklessness) is responsible for the events giving rise to the necessity" (*Perka* at paras. 49-50). The accused cannot bring about the necessitous situation and then claim necessity as a defence. Further, the defence of necessity must be "restricted to those rare cases in which true 'involuntariness' is present" (*Latimer* at para. 27). It must "be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale" (*Perka* at para. 38).

The burden of proof

[13] Mr. Rose is presumed innocent unless the Crown proves his guilt beyond a reasonable doubt. The presumption of innocence means that he begins the trial with a clean slate, and that presumption remains until the end of the trial. It is only defeated if the Crown satisfies me beyond a reasonable doubt that he is guilty of one or more of the offences charged. Mr. Rose does not have to present evidence or prove anything; in particular, he has no burden to prove his innocence.

[14] A "reasonable doubt" can be described in the following way, based on the Supreme Court of Canada's decision in *R. v. Lifchus*, [1997] 3 S.C.R. 320, which was summarized by Warner J. in *R. v. Mosher*, 2007 NSSC 189, [2007] N.S.J. No. 275, at para. 5:

> 1. A reasonable doubt is not a doubt based upon sympathy or prejudice. Rather it is based upon reason and common sense.
>
> 2. It is logically connected to the evidence or absence of evidence.
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> 3. It does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt.
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> 4. More is required than proof that the accused is probably guilty; if he is probably guilty, I must acquit.
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> 5. Proof beyond a reasonable doubt is closer to absolute certainty than it is to probable guilt.

[15] I add that "absolute certainty" is an impossibly high standard which the Crown is not required to meet.

The evidence

[16] The general approach to assessing the evidence was well summarized recently in *R v AH*, 2017 ONCJ 201, [2017] O.J. No. 1427:

> 98 In assessing the credibility and reliability of evidence, I may accept all, some or none of the evidence of any witness. In considering the assessment of credibility and reliability of witnesses, I must do so in accordance with the burden of proof being on the Crown beyond a reasonable doubt. The reasonable doubt standard applies to issues of credibility and reliability of evidence. In general, [*R. v. W.D.*, [1991] 1 S.C.R. 742] holds that if I believe the evidence of the defendant, I must acquit. If I do not believe the evidence of the defendant, but it leaves me with a reasonable doubt, I must acquit. Further, even if the evidence of the defendant does not leave me with a reasonable doubt, I can only convict if the

> evidence as a whole persuades me beyond a reasonable doubt of the defendant's guilt.
>
> 99 Further, as I will discuss in more detail in relation to self-defence, if I find that there is an air of reality to the defendant's claim of self-defence, then the Crown bears the burden to negative at least one of the pre-conditions to self-defence beyond a reasonable doubt.

[17] With respect to how to approach the evidence, I refer to the remarks of Rosinski J. Rosinski J. in *R. v. A.G.P.R.*, 2011 NSSC 47, [2011] N.S.J. No. 102, quoting the words of Macdonald Prov. Ct. J. in *R. v. D.L.C.*, [2001] N.S.J. No. 554 at para. 8, as follows:

> And I certainly keep in mind in this case, as well, that the task of finding the facts ... involves the weighing of the evidence but it is certainly not an exercise in preferring one witness is evidence over that of another. And of course, that's because the doctrine of reasonable doubt applies to the issue of credibility ...
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> And I certainly keep in mind the test that I've indicated coming out of the Supreme Court of Canada. I'm going to indicate some aspects of a witnesses testimony that I find helpful and this determination is as follows. They are in no particular order:
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> 1. The attitude and demeanor of the witness. I ask whether the witness is evasive, belligerent, or inappropriate in response to questions and I keep in mind the existence of prior inconsistent statements or previous occasions where the witness wasn't truthful. Those are useful to me.
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> 2. I consider the external consistency of the evidence. By that I mean, and by that I mean, is the testimony of the witness consistent with independent witnesses which is accepted by me, the trier of fact; and
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> 3. I consider the internal consistency of the testimony. By that I mean, does the witnesses testimony or evidence change while on the stand.
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> 4. I concern myself with whether the witness has a motive to lie or mislead the Court. I consider the ability of the witness to originally observe the event, to record it in memory and recall the event; and
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> 5. Of course, the passage of time since the event in question is a factor in this regard. This is one factor in a lot of cases, and in this case, I find is most important.
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> 6. I concern myself with a sense of the evidence. Does common sense, when applied to the testimony of the witness, suggest the evidence is impossible, improbable or unlikely? And what other results are there when I apply my common sense to the evidence?
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> 28 As this list suggests, a witness' credibility is a mixture of their reliability; (are they accurately and honestly recalling or observing matters?) and impartiality;

> (are they disinterested in the outcome of the case and do not favour any party over another?)...

[18] I note that it is necessary to be cautious when assessing demeanour. Giving evidence at trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds, have different abilities, values, and life experiences. There are simply too many variables to make the manner of testifying the only factor, or the dominant factor, in making findings.

[19] This is a regrettable set of circumstances that would likely have been avoided if less drinking had occurred during the afternoon of March 21, 2015. I point this out because it is the folly of excessive drinking that led to serious injuries being sustained and family relationships between individuals being strained if not ruptured.

[20] The general background to the incident is clear from the evidence. On March 21, 2015, the accused, the complainant, and the principal witnesses were at Angie's Bar and Grill on Akerley Boulevard in Dartmouth for a crib tournament. The tournament started after lunch, with perhaps two dozen people participating. Teams were composed of two players moving from table to table. Gregory MacLean was there with his daughter Melissa MacLean. They arrived in her vehicle just before lunch. Ms. MacLean's boyfriend, Daniel (Danny) Bull, met them there. Tyler Rose and his father, Clarence Rose, were also participating. They arrived in separate vehicles. The accused, a self-employed construction project manager, arrived in his work van. According to April Gwynn, who was working at Angie's that day as a bartender, the tournament started between noon and 1 p.m. and ended around 5 p.m.

[21] Most of those present were drinking throughout the afternoon, including the accused, the complainant, and many of the principal witnesses. The accused had eight or nine beers, as well as a vodka shooter after the tournament ended. Ms. Gwynn rated the accused's level of intoxication at eight or nine on a scale of ten.

[22] The accused's father, Clarence Rose, had four beers. Ms. Gwynn said he did not seem intoxicated. Greg MacLean and Melissa McLean were also drinking beer. Mr. MacLean had seven or eight draft beer, and testified that, while he was not drunk, he was too impaired to drive at the end of the afternoon. Ms. MacLean had four or five bottles of beer. Her father testified that he did not believe she was drunk. Ms. Gwynn remembered Mr. MacLean as being slightly intoxicated, while she believed the complainant was intoxicated. Another participant, Kathleen

Duncan, who only had a Caesar with her breakfast and a glass of wine about an hour before the end of the tournament, recalled that Ms. MacLean was unsteady on her feet at the end, and recalled steadying her with a hand on her back. Ms. Duncan's husband Randy Duncan had four or five beers during tournament. Danny Bull did not drink alcohol. Wendy Ruxton, Clarence Rose's partner, who arrived close to the end of the tournament, did not have any alcohol.

[23] At the end of the tournament, the participants paid to their bills and left the bar. During the tournament, Mr. Duncan and others noticed that the alcohol that Tyler Rose drank had a significant impact on his sobriety. Mr. Duncan testified that he told Clarence Rose that his son should not be driving. Mr. Rose and his father discussed whether the accused should drive his vehicle. Initially, the accused claimed that he fit to drive. On a scale of 0 to 10, with 0 being totally sober and 10 being totally intoxicated, he thought he was a 6 when sitting and a 7 when walking.

[24] In his testimony, Mr. Rose said that from the start of the tournament he had decided that he would not drive if he drank alcohol during the tournament. He had no fixed idea as to how he would get home after the tournament, he would not be driving. Clarence Rose testified that he convinced his son not to drive. He intended to move the van to the front parking lot, where it could be readily observed overnight, and either he or Ms. Ruxton would drive Tyler home.

[25] Tyler Rose testified that he and his father went out to the van after the tournament so that he could recover some papers from his van and to make a phone call to a customer. At the same time, he decided to have a cigarette. By this time, the accused was seated in the driver's seat of the van. Both Roses testified that Clarence was standing at the driver's door with his elbow at the open window. Both Tyler and Clarence testified that the van's engine was not on. Tyler finished his phone call by leaving a message on the customer's voicemail.

[26] Danny Bull, who was in his truck with Ms. MacLean waiting for her father to come out, said he concluded from the Roses' arm movements and tone that they were arguing. Greg Maclean then came out and stepped onto the running board of his truck, then went over toward the van.

[27] While he was smoking, Tyler Rose heard a voice from the far side of a truck that was parked close to his van. This was Greg MacLean, telling him not to drive the vehicle, or else he would come over and pull him out of it. According to Mr. MacLean, Tyler replied that he was all right to drive, and that he needed the van for work. Mr. MacLean also said he volunteered to drive Tyler home. He testified

that Tyler told him that if he had to get out of the van, he would kick his butt. Clarence Rose stated that shortly after Mr. MacLean's call to his son, Mr. McLean appeared at the driver's door of the van, pushing him out of the way and attempting to remove the accused from the van by grabbing him his shirt or jacket.

[28] Mr. MacLean's evidence was that he came out to the parking lot to meet his daughter and Mr. Bull, who were already in Mr. bull's truck. He saw Tyler Rose seated behind the steering wheel of a white Chevrolet van, talking to his father, Clarence Rose, who was standing outside the van. Mr. MacLean said he was concerned about the possibility of Tyler Rose driving. He walked over to the van and heard Tyler say that he was all right to drive and that he needed the van for work. Mr. MacLean said he volunteered to drive Tyler home, and Tyler replied that he was okay to drive. He also said that Tyler told him that if he got out of the van that he would kick his butt. His attempt to straighten things out did not work. Clarence Rose was outside the vehicle, on his right, when Mr. MacLean arrived at the driver's door. He was less certain as to whether he put his hands on the accused, initially saying he did not believe he had, but subsequently accepting that it was possible he pulled Mr. Rose out of the van.

[29] The accused's evidence was that while Mr. MacLean was trying to extricate him from the van, he turned in his seat, unlatched the door, and kicked it open with his two feet, pushing Mr. MacLean away from the van. He then got out of the van, and fought with Mr. MacLean. The two men's evidence differs on what happened during this altercation. Mr. MacLean believed that he did not strike the accused, while Tyler claimed that Mr. MacLean hit him at least six times in the face and the side of the head before they fell to the ground. Mr. MacLean, similarly, said Tyler was hitting him, and he lost his glasses. At some point they stopped fighting, and, according to Clarence and Tyler, they offered their hands to Mr. MacLean to help him up off the ground. Mr. MacLean was not clear on who helped him up, if anyone did.

[30] Tyler and Clarence Rose both testified that Mr. MacLean came over uninvited and intervened in their discussion. Even Mr. MacLean concedes that he had no business intervening. He explained that he was trying to help.

[31] Danny Bull said that when he saw (from his own truck) that Tyler Rose and Greg MacLean were on the ground, he got out, pulled Tyler off, and held him against the van. He said Tyler told him the dispute had nothing to do with him. He said he offered Tyler a ride home and told him it was not worth fighting over. He said he released Tyler after about thirty seconds. Mr. Bull said the van door was

open. He said shut off the engine, took the keys out of the ignition, and gave them to Clarence Rose, who had asked for them. I note that the other evidence does not support Mr. Bull's claim that the van was turned on at this time.

[32] Melissa McLean was seated in the back seat of the truck when the altercation between her father and Tyler occurred. She stated that Tyler was in the driver's seat of the van and that he got out of the van and hit her father, causing him to fall to the ground. Tyler then leaned over him. Clarence was just behind Tyler. She testified that she saw her father on the ground and left the truck to help him up, and to help find his glasses. She said someone was holding Tyler Rose nearby. She remembered nothing after that until she woke up in a puddle.

[33] Mr. MacLean did not recall whether his daughter had any part in the altercation, though he denied that she hit Tyler Rose.

[34] The evidence of Clarence and Tyler Rose was strikingly different. Tyler Rose said that as he tried to help Mr. MacLean up off the ground, Ms. MacLean appeared and hit him with a closed fist. He said he grabbed her by her hair, threw her to the ground, and held on to her hair for ten or fifteen seconds, while she kept swinging at him. He said he did not hit her. He said she called her partner, Danny Bull, for help. Mr. Bull intervened and pushed him away from both MacLeans, against the van. When Mr. Bull released him, the accused got back into the van, closing and locking the driver's door. The window was still down, however, and according to the accused, Mr. MacLean, Mr. Bull, and Ms. MacLean came to driver's door and were attacking him. He said he grabbed his phone to call 911 to report the assault, but he did not get the window up. He said Mr. Bull was reaching in to unlock the door.

[35] At the point, the accused said, he was frantic. Ms. MacLean was at his left shoulder trying to grab him. He said she then ran to the passenger side, got in, and punched him several times. (Mr. MacLean did not recall Ms. MacLean getting into the van.) He was still occupied with Tyler Rose, and Mr. MacLean was shouting at him. He said he pushed Ms. MacLean out of the van and locked the passenger door. The window was up on that side. She then came across the front of the vehicle and returned to the driver's side window.

[36] Mr. Bull denied that Ms. MacLean ever got into the van. He maintained that she was behind him. Clarence Rose said that Ms. MacLean, along with Mr. MacLean and Mr. Bull, was at the driver's door window trying to hit Tyler. He said she left the window, went around the front of the van, and got in through the

passenger door. He said she was near the console, striking at Tyler, and he pushed her out of the van and locked the door behind her. According to Clarence Rose, she then went around the front of the van again continued to strike at Tyler at the driver's window.

[37] According to Tyler Rose, Ms. MacLean latched onto his back with her nails, and Danny Bull and Mr. MacLean were at the window. He realized that the keys were no longer in the vehicle and thought that if he did not get out of there he would be hurt. They were getting more agitated by the minute. He said he wondered if they had weapons. (Nothing in the evidence suggests that there was any basis for the accused to think there was any threat from weapons of any kind.) He then found the spare key in the cup-holder. He started the engine, put the van in drive, and stepped on the accelerator. Ms. MacLean was still hanging onto his neck (according to the accused), or to the door frame or mirror (according to his father) as he started off.

[38] Danny Bull's evidence was that he did not see Ms. MacLean at the passenger side of the van, and that she was behind him in the instant before the van started. He could not say whether she was trying to reach inside the van. He said that when the van started he stepped in front of it to stop the accused from moving it, standing about a foot in front of the vehicle, then jumped out of the way when it started off. Tyler Rose denied that anyone was in front of him when he started off, and I conclude that Mr. Bull did not step in front of him. I am satisfied that Mr. Bull was still beside the van, as was Mr. MacLean, and that everyone stood back, except Ms. MacLean. However, she lost her grip as the van moved forward.

[39] According to Clarence Rose, when the engine started, Ms. MacLean changed her position from striking to holding on with both arms inside the door. As the van moved forward, she slid and that the rear wheel went over her body. Danny Bull, however, said she was trying to get her father back to the truck when she was struck, although he said he did not see how it happened. Clarence Rose, as well as being one of the more sober individuals on the scene, gave evidence in a straightforward manner who I concluded was being careful not to let partiality to affect his evidence. He was clearly distraught by the complainant's injuries. By contrast, Mr. Bull, though perfectly sober at the scene, appeared to be remembering events in the light of loyalty to Ms. MacLean. Generally speaking, when Clarence Rose's recall of events is contradicted by that of one of the other principal participants, I accept Mr. Rose's evidence. (I also prefer it to the accused's evidence that the complainant was grabbing at his neck at this point.) Accordingly, I accept his evidence that in the moment leading up to the accused

moving forward in the van, the complainant was holding on to the inside of the driver's door, from which she fell, resulting in her injuries.

[40] Tyler Rose's evidence was that he drove around the building, to the front, and returned. He said he was looking for his father and intended to leave the area. Between the drinks and the fight, he said, he was very dizzy and confused. He claimed he was running for his life. On his return to the rear parking lot he lost his brakes, slid on the ice, on the ice and ran into Danny Bull's truck. Mr. Bull said he heard a crunch when the accused drove into his truck. Greg MacLean subsequently pulled Tyler Rose out of the van.

[41] After the incident, April Gwynn, the bartender, called 911, and the fire Department, police, and EMS responded. A 911 call was received around 6:15 p.m. (from which I conclude that the tournament ended closer to 5:30 or 5:45 than to the scheduled 5 p.m.) Until they arrived, a number of individuals attended to Ms. Maclean, who had landed in a puddle in the rear parking lot after the accused drove away.

[42] Constable Dylan Carter of the Halifax Regional Police arrived on the scene shortly after 6:15 p.m., finding Ms. MacLean being attended to in the rear parking lot. He found Tyler Rose sitting on the tailgate of a pickup truck. He observed that Mr. Rose had bloodshot eyes and there was a smell of alcohol on his breath. He asked Mr. Rose simple questions to determine what happened, but he appeared to have difficulty concentrating. He was not responding to questions. All he was saying was, "lock me up, lock me up." He placed the accused under arrest for impaired driving, and subsequently for dangerous driving, before 6:45 p.m., and gave him a standard police warning.

[43] After arresting Mr. Rose, Cst. Carter took him to the Dartmouth police station, about five minutes away, for further processing, including administration of the breathalyzer, a demand having been made. Constable Carter, a qualified technician, followed standard pre-test procedure, and Mr. Rose provided two samples of his breath which was received directly into an approved device. The first test, conducted at 7:25 p.m., resulted in a reading of 150 mg of alcohol in 100 ml of blood. The second test was conducted at 7:45 p.m., resulting in a reading of 130 mg of alcohol in 100 ml of blood.

[44] Constable Carter noted that he had dealt with Ms. Rose before, as a complainant, when he was sober, and said his comportment on that occasion was quite different. During the two or three hours Mr. Rose was with him at the station,

he said, he seemed to calm down compared to his state in the parking lot at Angie's. Around 9 p.m. Mr. Rose had a panic attack and asked to be seen by Emergency Medical Services.

[45] Constable Julien Ayotte, who assisted Cst. Carter with the breathalyzer at the station, said that when he first came into contact with him, Mr. Rose was emotional and crying. He noticed a smell of alcohol in the room when he walked in. He smelled the odor of alcohol on Mr. Rose's breath. During the two hours he was with him, he said, Mr. Rose was emotional and crying, and his demeanor did not change. When he spoke to him and Cst. Carter, he was up and down emotionally.

Agreed facts and findings of fact

[46] The Crown and the accused have settled on certain admitted facts. It is agreed that the offences took place in a parking lot at Akerley Boulevard in Dartmouth, NS, on March 21, 2015, and the identity of Mr. Rose as the accused is agreed. It is agreed that Mr. Rose was driving the vehicle that injured Ms. Maclean. It is agreed that the Certificate of a Qualified Technician was personally and properly served on Mr. Rose by Cst. Dylan Carter on March 21, 2015. The continuity and accuracy of photographs of the scene, the accused's vehicle, and the victim's injuries, taken on or shortly after the date of the alleged offences, are agreed.

[47] Finally, certain facts concerning Ms. MacLean's injuries and medical treatment are agreed, including the nature of the complainant's injuries. These included a fractured right femur with bone splinters, and the bottom part of the femur moved sideways; a commuted fracture of the socket of the right hip; the complete dislocation of the ball of the right hip, with soft tissue hematoma in the surrounding area; fractures of the left posterior seventh and eighth ribs; a very small pneumothorax on the left side; the left ear almost completely torn off; and abrasions and bruises to the head, chest, arms, hands, legs, and feet. It is also agreed that the emergency room consultation dictated by Dr. Yves A. Leroux, the Operative Report about the repair of the injured ear, written by Dr. Phillip Rasmussen, and the Operative Report about the orthopaedic surgery, written by Dr. T. Duncan Smith are accurate summaries of the medical treatment of the victim's injuries.

[48] Based on the evidence discussed above and the entirety of the evidentiary record, I make the following additional findings of fact, which supplement the agreed facts already described:

> 1. The complainant, the accused, and their respective fathers spent the afternoon of March 21, 2015, playing in a crib tournament at Angie's Bar and Grill on Akerley Boulevard in Dartmouth, NS, as did the complainant's boyfriend, David Daniel Bull. The tournament started around 1 p.m. and ended between 5:30 and 5:45 p.m.
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> 2. The complainant, the accused and their respective fathers had several drinks of alcohol during the afternoon. The accused had numerous drinks and was intoxicated when he left the bar. The complainant's father was also intoxicated when he left the bar, as was the complainant herself.
>
> 3. After the tournament, the accused's father, Clarence Rose, had to persuade the accused not to drive his van. They went out to the van, in the parking lot, and the accused got into the van, emptying his pockets while his father stood at the open driver's side window talking to him.
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> 4. The complainant's father, Greg MacLean, left the bar and was en route to joining the complainant and Mr. Bull in Mr. Bull's truck at the same time the accused and his father were discussing whether the accused would drive or move the vehicle. Rather than getting into Mr. Bull's vehicle, Mr. MacLean went over to the door of the defendant's van, pushed Clarence Rose, and intervened and interrupted in the discussion that he was having with the accused.
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> 5. Mr. MacLean's intervention led to a physical altercation between him and the accused, which ended with Mr. MacLean on the ground.
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> 6. Seeing her father on the ground, the complainant left Mr. Bull's truck and had a further altercation with the accused. Danny Bull became involved as well. He removed the keys from the van's ignition and tossed them to Clarence Rose. He then held the accused against the van briefly. This situation ended with the accused getting back into the van, occupying the driver's seat, with the driver's side window down and the door locked.
>
> 7. Subsequently, the complainant grabbed at the accused through the open window of the van. She then went around to the passenger's side, entered the van through the front passenger door, and hit the accused. The accused pushed her out of the van and locked the passenger door behind her.
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> 8. The accused attempted to start the engine, but the keys had been removed from the ignition by Mr. Bull. The accused found a spare key in the cup-holder and started the engine as the complainant moved back to the driver's door, attempting to hit him and grabbing at him through the open window. He put the truck into gear. Danny Bull and Greg MacLean moved away from the driver's door window. Melissa MacLean continued to hold on, attempting to fight the accused. The accused stepped on the accelerator while the complainant was hanging off the

truck, either holding onto the accused, the door, or the mirror. As he started to move away, she lost her grip and fell.

9. While the complainant was attacking the accused, Clarence Rose, Greg MacLean and Danny Bull were also in the vicinity of the driver's door. Greg MacLean and Danny Bull were not attacking the accused.

10. As the accused began to drive away, the complainant fell by the side of the van, and the rear wheels ran over her, causing her injuries.

11. The accused drove from the rear parking lot to the front, hit a snowbank, got free, and returned to the rear parking lot, where he ran into Mr. Bull's truck.

12. On his return, he was pulled out of the truck by Greg MacLean.

13. 911 was called and Constable Dylan Carter of the Halifax Regional Police services responded to the call and arrived at the scene shortly after 6:15 PM on March 21, 2015.

14. Constable Carter observed that Tyler Rose had bloodshot eyes and detected an odor of alcohol from his breath. He also observed that the accused had difficulty answering questions. He placed the accused under arrest for impaired driving, and subsequently for dangerous driving, before 6:45 p.m., and gave him a standard police warning.

15. Constable Carter made a demand on Mr. Rose to provide a sample of his breath suitable for a chemical analysis to determine the proportion of alcohol in his blood.

16. Constable Carter transported Mr. Rose to the Dartmouth police detachment and arrived at the detachment at excess p.m. on March 21, 2015.

17. Constable Carter, a qualified technician, followed standard pre-test procedure and Mr. Rose provided two samples of his breath which was received directly into an approved device and the first test conducted a 7:25 PM on March 21, 2015 resulted in a reading of 150 mg of alcohol in 100 mL of blood and the second test was conducted at 7:45 PM resulting in a reading of 130 mg of alcohol in 100 mL of blood.

18. Tyler Rose's consumption of alcohol at Angie's Bar and Grill on March 21, 2015, was voluntary.

[49] As noted earlier, the accused has conceded that the elements of the three offences are made out. I agree.

Dangerous driving causing bodily harm

[50] I am of the view that the Crown has established all of the essential elements of this offence beyond a reasonable doubt. Mr. Rose has conceded that he operated a motor vehicle which caused injuries to Melissa MacLean on March 21, 2015, at 50 Akerley Drive, Dartmouth, NS, that he operated the motor vehicle in a manner

that was dangerous to the public, and that such operation of his motor vehicle caused Melissa MacLean bodily harm.

[51] I have taken into account the nature, condition and use of the place where the driving occurred, and the circumstances surrounding the causing of the bodily harm to Melissa MacLean. I am satisfied that the operation of the vehicle in this case was more than careless. It was a marked departure from what a reasonable, prudent driver would do in the circumstances. The fact that Mr. Rose did not intend to cause the physical injuries sustained by Miss MacLean is not relevant. The issue is not whether Mr. Rose meant to cause bodily harm or to endanger the life of Melissa MacLean or for that matter anyone else who was or might have been there at the time.

[52] There is no question that the Crown has established that Melissa McLean sustained bodily harm as a result of Mr. Rose operating his motor vehicle on the date and time specified as set out in the agreement statement of facts. The nature and extent of the resulting injuries sustained by Ms. MacLean are outlined in the various medical reports filed by agreement.

Impaired operation of a motor vehicle causing bodily harm

[53] To succeed, the Crown has to establish three elements beyond a reasonable doubt. The first is that Mr. Rose operated a motor vehicle. The evidence leaves no reasonable doubt that this element has been established. Secondly, that Mr. Rose intended to operate a motor vehicle after he had consumed alcohol. I am satisfied beyond a reasonable doubt that Mr. Rose consumed alcohol, namely beer and vodka, at the tournament. According to the evidence of April Gwynn, the bartender, Mr. Rose purchased between eight and nine beers during the tournament. Mr. Rose himself testified that he had at least seven beers, as well as a vodka shooter after the tournament ended. Other witnesses, including Clarence Rose, stated that Tyler Rose was not in any condition to operate a motor vehicle on account of the alcohol he had consumed that afternoon.

[54] Finally, I am also satisfied that Mr. Rose's ability to operate a motor vehicle was impaired by alcohol. It is not an offence to operate a motor vehicle after drinking alcohol; however, it is an offence to operate a motor vehicle if the consumption of alcohol impairs his ability to operate the vehicle. Constable Carter stated that he met with Mr. Rose shortly after 6:15 p.m. on March 21, and observed that Mr. Rose had bloodshot eyes. He noted an odor of alcohol and extreme difficulty in answering questions he posed to him. Constable Carter expressed the

opinion that he thought that Mr. Rose's ability to drive a motor vehicle was impaired by alcohol. Although he did not observe him driving, it is to be noted that Mr. Rose drove his van around the building, and on returning to the rear parking lot, was unable to apply his brakes in time to avoid a collision with another vehicle.

[55] I also find beyond a reasonable doubt that the accused's impaired ability to operate his vehicle caused Melissa MacLean's bodily harm.

Driving with a blood alcohol content over .80, causing bodily harm

[56] The Crown has to establish all of the following elements in order to find the accused guilty on this count. In addition to establishing that the accused operated a motor vehicle, the Crown must establish that the accused's blood alcohol level exceeded 80 mg of alcohol in 100 ml of blood, that the blood alcohol level in excess of the legal limit resulting from his voluntary consumption of alcohol and that the blood alcohol level in excess of the legal limit was a cause of the accident that resulted in bodily harm to Melissa McLean.

[57] As noted above, the accused does not dispute that he was driving the motor vehicle. The Crown has also satisfied me that the accused he did so while his blood alcohol level exceeded 80 mg of alcohol in 100 ml of blood. Constable Carter made the demand for a sample of his breath within two hours of Mr. Rose driving the vehicle. Constable Carter testified that he was a technician authorized to conduct a chemical analysis, and that Mr. Rose had a blood alcohol level of 150 mg in 100 ml blood, based on an analysis which was conducted at 7:20 p.m. on March 21, 2015, and a second chemical analysis conducted at 7:35 p.m., showing a blood alcohol level of 130 mg of alcohol in 100 ml of blood.

I am satisfied beyond a reasonable doubt that Mr. Rose's blood alcohol level in excess of the legal limit was caused by his voluntary consumption of alcohol. An additional essential element of the Crown must prove is that Mr. Rose's blood alcohol level in excess of the legal limit was a cause of the accident resulting in bodily harm to Melissa MacLean. It is agreed by the defence that Ms. MacLean sustained significant personal injuries. I am satisfied beyond a reasonable doubt that the accused's blood alcohol content was a significant cause of the accident resulting in the bodily harm to Melissa McLean. To arrive at that conclusion, I have considered the fact that the blood alcohol level exceeding the legal limit was more than a trivial or insignificant cause of the accident resulting in the bodily harm sustained by Melissa MacLean.

Necessity

[58] The only issue requiring determination is whether the Crown has disproven the defence of necessity. As noted earlier, necessity requires (1) an urgent situation of clear and imminent peril, which is virtually certain to occur; (2) there must be no reasonable legal alternative; and (3) the harm inflicted must be proportionate to the harm avoided.

[59] I have considered the authorities submitted by counsel on behalf of the Crown and the defence. In addition, I have considered several additional cases: *R. v. Van De Walle*, 2004 ONCJ 72, 62 W.C.B. (2d) 58; *R. v. Kravshar*, 2005 ABPC 313, [2006] A.W.L.D. 364; *R. v. Sekhon*, 2007 ABQB 315, 73 W.C.B. (2d) 794, affirmed 2008 ABCA 171, leave to appeal refused [2008] S.C.C.A. 297; *R. v. Turchanikov*, 2016 ONCJ 135, 129 W.C.B. (2d) 133; *R. v. Rajagopal*, 2008 ONCJ 200, 77 WCB (2d) 371; *R. v. Hunt*, 2016 ONCJ 147, 129 W.C.B. (2d) 30; and *R. v. B-A(A).*, [2002] OJ No 4839, 56 W.C.B. (2d) 120.

[60] On the evidence, I am satisfied beyond a reasonable doubt that the accused did not face an "imminent peril" that was almost certain to occur. While I accept that in his state of voluntary intoxication the accused perceived himself to be in danger, I cannot conclude that this had a reasonable basis in the circumstances. The accused was faced with one intoxicated woman assailing him through the open window of his van. I accept his father's evidence that as the vehicle began to move, Ms. MacLean did not have the accused by the neck. Contrary to the accused's evidence, the other individuals on the scene were not threatening him at that point, and there was no reasonable basis for him to fear a weapon of any kind. Additionally, I do not believe he felt as threatened as he claimed, given that he returned after driving around to the front of the building, looking for his father, who was not in any apparent danger. The accused had the alternative of simply exiting the van out the passenger's door and retreating from the scene; alternatively, he could have tried to close the driver's side window. He could have called 911 or asked his father to do so; he could also have moved the vehicle slowly rather than accelerating rapidly. Finally, I am satisfied beyond a reasonable doubt that the harm inflicted by the accused's action – namely, serious bodily

injury resulting from running over the complainant with his van – far outweighed any harm he avoided, which I find was minimal in the circumstances.

[61] **Self defence.** The accused did not ultimately rely on the defence of self-defence at trial. However, I wish to point out that in the circumstances of this case, it is my view that there is no air of reality to self-defence. The fundamental flaw in this instance would be the lack of proportionality between the harm apprehended and the force used by the accused in response. Under s. 34 of the *Criminal Code*, I note that there are three elements to the defence: (1) reasonable belief, (2) purpose, and (3) reasonable response. I am of the view that the evidence would negative each element beyond a reasonable doubt, so that the Crown would have succeeded in establishing the non-applicability of self-defence.

Conclusion

[62] I accordingly find the accused guilty on all three counts. Pursuant to the principle in *R. v. Kienapple*, [1975] 1 S.C.R. 729, I conclude that a conviction should be entered on the .08 charge, but not on the impaired driving charge, on which I enter a conditional stay: see *R. v. Brogan*, 2008 NSPC 42, [2008] N.S.J. No. 313, at para. 152; *R. v. Moriaux*, 2012 MBPC 20, [2012] M.J. No. 77, at para. 88; *R. v. B.K.D.*, 2010 BCPC 259, [2010] B.C.J. No. 2108, at para 36.

J.