SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Farrar*, 2019 NSSC 46

Date: 20190205
Docket: Hfx No 470315
Registry: Halifax

Between:

Her Majesty the Queen

v.

Christopher Farrar

Judge:	The Honourable Justice Gregory M. Warner
Heard:	Evidence on November 13, 14 and 15, 2018 with oral submissions on December 24, 2018 and oral decision on February 5, 2019 in Halifax, Nova Scotia
Counsel:	Emma Woodburn, for the Crown Laura McCarthy, for the Accused

By the Court:

Part I Outline

[1] Christopher Farrar is charged with aggravated assault on the complainant, at his home in Dartmouth in the wee hours of December 27, 2016, contrary to s. 268(1) of the Criminal Code.

[2] At the risk of oversimplification, the accused and the complainant were known to each other and had been friendly, but their friendship had waned.

[3] On December 26th, the complainant showed up at the accused's residence. They ended up going to the accused's mother's home for a Christmas visit then returned to the residence where he lived with Haig Zakarian. They spent the evening of December 26th, into the morning of the 27th, socializing in his bedroom.

[4] About midnight another person (invited by the complainant) arrived and stayed. The guest shared cocaine with the accused, who borrowed money from the complainant to pay for it. The complainant was drinking beer. At some point the accused twice made racial slurs, to which the complainant objected. The complainant slapped the accused in the face twice. On the second occasion, the accused grab her, threw her on the ground and either stomped or knelt on her abdomen. The details of the physical altercation are in dispute.

[5] As a result of the altercation, the complainant immediately turned grey and became immobile. She was later taken to the hospital where, according to the three physicians who testified in the trial, it was determined that she had, among other injuries, a serious high-force trauma injury to her pancreas, which injury resulted in emergency treatment and two surgeries.

[6] The accused states that his application of force to the complainant was not excessive and was reasonable self-defence.

[7] The witnesses at trial were:

- the complainant;

- Dr. Chris Magee, the interim head of the emergency department at the QEII and Dr. Paul Johnson, a surgeon specializing in colorectal surgery, both of whom treated the complainant on December 27th;

- Dr. James Ellsmere, to whom the complainant was referred by Dr. Johnson and who performed surgery that lead to the eventual resolution of her pancreatic injury;

- Detective-Constable Kennedy, who on December 30th took photographs of the accused and scratches on his body, and at the trial, testified as to her observations of his injuries;

- Haig Zakarian, the accused's housemate; and

- the accused.

Part II Governing Principles

[8] In making my decision, I have considered and applied the following principles.

[9] *R v Lifchus*, [1997] 3 SCR 320 ("*Lifchus*"), relates to the standard of proof. It sets out the principle that the accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until the crown has, based on the evidence, satisfies me beyond a reasonable doubt that the accused is guilty.

[10] A reasonable doubt is *not* an imaginary or frivolous doubt; it is *not* based upon sympathy or prejudice. It is based on reason and common sense. It is logically derived from the evidence or the absence of evidence.

[11] Even if I believe the accused is likely guilty, that is *not* sufficient. In those circumstances, I must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy me of the guilt of the accused beyond a reasonable doubt.

[12] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high.

[13] To make my decision, I have considered all the evidence presented during the trial. I have chosen how much or how little I believed and relied upon each witness.

[14] Fact finding requires the court to assess both reliability and credibility. Reliability involves the assessment of the witness's capacity to observe, recall and

communicate accurately. Credibility involves the assessment of the witness's believability and truthfulness.

[15] In assessing the reliability and credibility of each witness's evidence, I have considered these factors:

a) honesty;

b) interest (but not status);

c) accuracy and completeness of observations;

d) circumstances of the observations;

e) memory;

f) availability of other sources of information;

g) inherent reasonableness of the testimony;

h) internal consistency, including consistency with other evidence; and,

i) demeanour but with caution.

[16] Demeanor was the central issue in the Supreme Court of Canada decision in *R v. NS*, 2012 SCC 72. All three reasons from the court described the role of demeanor in the assessment of a witness's evidence – the majority at paras 21 to 28, 41, 42 and 48; the concurring reasons at paras 64 and 77; and Justice Abella at paras 91, 98 to 108. The majority recognized that demeanor was not the most important of the factors that go into accurate credibility assessment (at para 27). There appeared to be agreement that determining credibility is not based on one single factor, but on the application of common sense to all the evidence which can be tested in a particular case, as espoused in *Faryna v. Chorney*, [1952] 2 DLR 354 (BCCA) at paras 9 to 11.

[17] The actual words used and demeanor - the "visible or audible form of self-expression manifested by a witness", together constitute the communication in court. At least as important, and most often more important, is the evidence of other reliable information - in this case, the medical evidence respecting the complainant's injuries; the photographs of the accused's injuries; the consistencies or inconsistencies between the accused's cautioned video statement of December 30, 2016 and his trial evidence; and the inherent reasonableness of the testimony.

[18] I am not required to believe or rely upon a witness' evidence in its entirety. As the trier of fact, I may believe or rely upon none, part, or all a witness's evidence and attach different weight to different parts of it.

[19] There is no magic formula for deciding what and how much to believe or rely upon, except the standard instruction judges give juries to use their common sense.

[20] Because the accused presented evidence, I have considered *R v W(D),* [1992] 1 SCR 742 ("*W(D)*"), which sets out the following principles:

- If I believe the evidence of the accused, I must acquit.

- If I do not believe the evidence of the accused, but I am left with a reasonable doubt by his evidence, I must acquit.

- If I do not believe and am *not* left in a reasonable doubt by the evidence of the accused, I may convict only if the rest of the evidence that I do accept proves his guilt beyond a reasonable doubt.

[21] In *R v Dinardo*, [2008] 1 SCR 788 ("*Dinardo*"), the court stated that an assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W(D)*. Assessments of credibility depend on context. What matters is that the substance of the *W(D)* instruction should be respected. I must turn my mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as whole, raises a reasonable doubt about his guilt.

[22] In *R v Y(CL),* [2008] 1 SCR 5 (*"Y(CL)*"), the court stated that in the assessment of reasons for a verdict, the key is whether the correct burden and standard of proof are being applied, *not* what the words were used in applying them. *W(D)* offers a helpful map, not the only route. The purpose of *W(D)* is to ensure that a trier of fact understands that a verdict must not be based on a choice between the accused or other witness' evidence, but on whether, based on all the evidence, I am left with a reasonable doubt about the accused's guilt.

[23] In *R v Menard*, [1998] 2 SCR 109 ("*Menard*"), the court determined that the standard of proof beyond a reasonable doubt applies only to the final evaluation of guilt or innocence. It is not to be applied piecemeal to the individual items or categories of evidence.

[24] Evidence may be direct or circumstantial. As Justice David Watt writes in "Watt's Manual of Criminal Evidence 2018", (Toronto: Thompson Reuters, 2018), beginning at p. 48: "Direct evidence is evidence which, if believed, resolves a matter in issue. … The only inference involved in direct evidence is that the testimony is true."

[25] Watt writes at p. 49 that circumstantial evidence is any item of evidence, testimonial or real, other than the testimony of an eye witness to the material fact. It is any fact from which the existence of which the trier of fact may infer the existence of a fact in issue. It is for the trial judge to determine whether circumstantial evidence is relevant.

[26] Justice Watt identifies an important feature in circumstantial reasoning as follows:

> Where evidence is circumstantial, it is critical to distinguish between inference and speculation. An *inference* is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be *no* inference without objective facts from which to infer the facts that a party seeks to establish. If there is *no* positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture.

[27] Among the case law that he cites as relevant to the general principle of proof by circumstantial evidence are: *R v Stewart*, [1977] 2 SCR 748 ("*Stewart*"), to the effect that the trier of fact must consider all the evidence together, not each item separately; and *R v Elmosri* (1985), 23 CCC (3d) 503 (ONCA) ("*Elmosri*"), for the seminal proposition that in a criminal case, the crown must satisfy the jury or the trier of fact beyond a reasonable doubt that the accused's guilt is the only reasonable inference to be drawn from the proven facts.

[28] The framework for drawing inferences, citing different authority for the above points, is articulately set out in *R v Shields*, 2014 NSPC 21 ("*Shields*"), at paras 102 to 107.

[29] In *R v Villaroman*, 2016 SCC 33 ("*Villaroman*"), the court stated that in assessing circumstantial evidence, the court or jury should generally be cautious about too readily drawing inferences of guilt.

Part III Essential Elements

[30] I incorporate in my analysis Final Instruction #268 and #74-B from Justice Watt's Manual for its description of the essential elements of the offence and of self-defence.

[31] The crown must prove each of the following essential elements respecting aggravated assault and disprove at least one of the three elements of self-defence, all beyond a reasonable doubt.

[32] With respect to aggravated assault the crown must prove:

(a) The accused intentionally applied force to the complainant.

(b) The complainant did not consent to the force he intentionally applied.

(c) The accused knew that she did not consent to the force that he intentionally applied.

(d) The force he intentionally applied wounded, maimed, disfigured or endangered her life.

(e) A reasonable person, in the circumstances, would realize that the force intentionally applied would put the complainant at risk of suffering some kind of bodily harm, although not necessarily serious bodily harm or the precise kind of harm that the complainant suffered.

[33] It is not seriously contested that the accused intentionally applied force to the complainant, that she did not consent to the force and that he knew that she did not consent to the force that he applied.

[34] It was initially contested whether the force applied wounded, maimed, disfigured or endangered the life of the complainant. In closing submissions, the accused conceded that the force applied wounded the complainant. Nonetheless, in this decision, I have reviewed the evidence and law on this issue.

[35] It is contested that he intentionally applied force that he knew, or should reasonably have known, would put the complainant at risk of suffering some kind of bodily harm.

[36] The crown must prove beyond a reasonable doubt that the accused's intentional application of force contributed significantly to the wounding of the complainant.

[37] The crown does not have to prove beyond a reasonable doubt that the accused meant to wound, maim, disfigure, or endanger her life when he applied forced to her.

[38] The crown does have to prove, however, that a reasonable person, in the circumstances, would realize that the force he intentionally applied would put her at risk of suffering some kind of bodily harm, although not necessarily the serious bodily harm or the precise kind of harm that she suffered. Bodily harm is any kind of hurt or injury that interferes with an individual's health or comfort. It must be something more than just brief or fleeting or minor in nature.

[39] According to *R v Fontaine,* 2011 BCCA 140 (*"Fontaine*"), aggravated assault contains three additional elements beyond what is required for simple assault:

- the assault wounded, maimed, disfigured or endangered the life of the victim;

- the accused's conduct caused the victim to be wounded, maimed, disfigured or endangered;

- a reasonable person would have realized that his or her conduct would subject the victim to the bodily harm.

[40] As held in *R v De Freitas,* [1999] MJ No. 69 (MBCA) ("*De Freitas*"), aggravated assault is defined by reference to its consequences not to the way it is carried out. The offence becomes aggravated assault if the victim is wounded, no matter how the offence is carried out.

[41] The mental element of aggravated assault is the mental element of assault, coupled with objective foresight of the risk of bodily harm. The mental element of assault may be established by proof of intention, recklessness or wilful blindness. The aggravation in aggravated assault comes from the consequences. The focus in the external circumstances is on the nature of the consequences, not the nature of the assault.

[42] In *R v Godin*, [1994] 2 SCR 484 ("*Godin*"), the Supreme Court held that the mental element is objective foresight of bodily harm, not an intent to wound, maim or disfigure.

[43] The primary focus of the accused's closing submissions was self-defence. An accused who believes on reasonable grounds that force is being used or threatened against him, may do something that otherwise would be an offence, but be acting

lawfully and not guilty of any crime, provided that what he does is for the purpose of defending or protecting himself from that use or threat of force and is reasonable in the circumstances as he knew or honestly believed them to be. This is so even if he provoked the use or threat of force, or seriously injured the person who used or threatened to use force on him.

[44] The onus is on the crown to prove beyond a reasonable doubt that the accused was not acting in lawful self-defence.

[45] In his Manual, Justice Watt suggests that the trier of fact may consider as many as three issues, each of which represents an essential aspect of self-defence. He expressed the issues as questions:

1. Did the accused believe on reasonable grounds that force was being used or threatened against him?

2. Did the accused do something to the victim for the purpose of defending or protecting himself from the use or threat of force?

3. Was the accused's conduct reasonable in the circumstances?

He summarizes the three elements as: reasonable belief, purpose, and reasonable conduct.

[46] As expressly stated in s. 34(2) of the *Code*:

> In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including but not limited to, the following factors:
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> a) the nature of the force or threat;
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> b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
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> c) the person's role in the incident;
>
> d) whether any party to the incident used or threatened to use a weapon;
>
> e) the size, age, gender and physical capabilities of the parties to the incident;

> f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
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> f.1) any history of interaction or communication between the parties to the incident;
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> g) the nature and proportionality of the person's response to the use or threat of force; and
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> h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[47] With respect to the accused's belief, it must be reasonable in the circumstances as he knew, or honestly, even if mistakenly, believed them to be. The issue is whether a reasonable person in the same circumstances would have the similar belief that force was being used or threatened against him. A reasonable person is sane and sober, not exceptionally excitable, aggressive or fearful, a person who has the same power of self-control that we expect people to exercise in society today.

[48] The second essential element of self-defence is that the accused's conduct must be for the purpose of defending or protecting himself from the victim's threat or use of force. In determining the purpose, the court is to look at what the accused and victim said and did before, at the time of and after the act, as well as the history and nature of any prior or existing relationship between the parties.

[49] With regards to the third element - whether the accused's conduct was reasonable in the circumstances, the circumstances are those that the accused knew or believed them to be at the time.

[50] Persons who defend or protect themselves cannot be expected to know exactly how to respond to or deal with the situation or to know how much force to use to achieve his purpose. What is reasonable may include several alternatives. The issue is not whether the accused believed on reasonable grounds that he had no other course of action available to him, but rather what the accused did was reasonable in the circumstances as he knew them and reasonably believed them to be.

[51] As with the first element, the third element involves a reasonable person who is sane and sober, and not exceptionally excitable, aggressive or fearful. He has the same powers of self-control that we expect persons to exercise in society today. The reasonable person has the same characteristics and experiences as the accused that

is relevant to his ability to respond to what he reasonably believed was the use or threat of use of force. The reasonable person is a person of the same age, gender, physical capacity, as well as past interaction and communication with the victim, as the accused. The same factors as identified above from s. 34(2) of the *Code* apply to the determination of the reasonableness of his conduct in the circumstances.

Part IV Analysis

1. Whether the assault wounded, maimed, disfigured or endangered the complainant's life?

[52] The evidence relevant to the fourth essential element of aggravated assault came from the complainant and accused, but most particularly from Drs. Magee, Johnson, and Ellsmere.

[53] Dr. Chris Magee was qualified to give opinion evidence. He was the interim head of the emergency and trauma department at the QEII and was on call when the complainant was brought in in the morning of December 27, 2016. He testified that the initial, physical examination showed the following symptoms and injuries:

a) a bump and bruising on the bridge of the nose;

b) bruises and petechiae on the neck;

c) tenderness on the back and right elbow;

d) significant abdominal pain accompanied by low blood pressure.

[54] The latter symptoms were a sign to Dr. Magee of a serious injury to an internal organ. Among other tests, he ordered a CAT scan which showed a significant Grade IV injury to the pancreas, involving the pancreatic duct.

[55] The pancreas is normally a well-protected organ, behind the stomach, and protected by the rib cage. The pancreas produces insulin and other enzymes for the digestive system and releases juices into the bloodstream.

[56] The CAT scan showed pancreatic juices on the outside of the pancreas, in the abdominal cavity. He admitted the complainant to surgery based on the CAT scan and brought Dr. Paul Johnson into the picture.

[57] He described the possible causes of the petechia on the neck and eliminated all but trauma caused when a person tries to breathe out against an obstruction; that

is, when the wind pipe is closed off. The bruising in the same area suggested an external force caused the petechia.

[58] He described the pancreatic injury as being very rare, because of the pancreas' location, up and under the rib cage and protected by other organs. He said it would be caused by trauma - as a result of a high-speed motor crash or by a penetrating trauma, such as by a gun shot or stabbing. He stated that if this injury had resulted from a high-speed motor crash, he would have expected to see other injuries to other organs.

[59] In 5 years of residency and 18 years in emergency medicine, he had seen maybe five and certainly less than ten injuries to the pancreas. They are very rare. The injury could only be caused by application of a significant amount of force. This injury would not be caused by simply walking on someone's abdomen or kneeling on their abdomen.

[60] On cross-examination, when asked whether the petechia could be caused by friction, he replied in the negative, based on the totality of the circumstances he saw. He rejected the suggestion that someone pulling at clothing from the front could have caused the petechial hemorrhaging. He testified that it would take more force to injury the pancreas than to injury a rib. He had only seen a pancreatic injury like this in high-speed motor vehicle crashes and one or twice from penetrating injuries from a stabbing or gun shot.

[61] Dr. Paul Johnson, a surgeon specializing in colorectal surgery, had 14 years of experience in acute care, trauma and general surgery. He was qualified to give opinion evidence.

[62] He saw the complainant after the CAT scan. The scan showed a laceration to the head of the pancreas, and disruption of the pancreatic duct. His fear was that a pancreatic injury is usually associated with other internal injuries and delay in treatment could result in poor results by reason of the leakage or drainage from the pancreas.

[63] His concern was that the CAT scan may not have picked up all her internal injuries. He got permission to operate. He opened her up and explored her abdomen. He confirmed the CAT scan results and found no other injured organs.

[64] He described the severity of the pancreatic injury as a serious Grade IV injury, but not, in this case, life threatening. He opined that the injury could lead to a long-

term narrowing of the pancreatic duct and to infection of the abdominal cavity from the leakage of fluids.

[65] When he operated on the complainant, he found swelling with blood and fluids collecting in the abdominal cavity. There had been bleeding around the pancreatic head. He placed two drains in the abdomen, and connected them to plastic tubes, to drain any further blood or fluids.

[66] On January 13, after a follow-up CAT scan, he discharged the complainant. He saw her in his clinic on January 26, 2017. He noted persistent pancreatic fluid collection, which was of such concern that he referred the complainant to a pancreatic specialist, Dr. James Ellsmere.

[67] He was asked how the injury could occur. He opined that it would require a penetrating, high-force impact.

[68] He noted that he had never seen an injury to pancreas with no other associated injuries. Usually the injury is associated with a high-impact auto or ATV accident or gun shot or stab wound. He was aware from a colleague of an isolated pancreatic rupture as a result of the patient being kicked by a horse. He opined it would require significant force to cause the injury to the complainant.

[69] When asked whether the injury could be caused to a person lying on the ground if the other person stomped on that person or put their knee on her abdomen, he opined that it could occur from both, but it would require "full force" or their full body weight to come down heavily on the person lying on the ground.

[70] On cross-examination, he agreed that when he discharged the complainant from the hospital on January 13, 2017, his notes regarding care of the drains after the discharge did not suggest on-going internal bleeding from the pancreas or from blood vessels. The bleeding at the head of the pancreas had stopped on its own.

[71] Dr. James Ellsmere is a general surgeon with an impressive *curriculum vitae*. He was qualified to give opinion evidence.

[72] The complainant was referred to him by Dr. Johnson as a result of her ongoing abdominal pain and pancreatic fluid discharge to the area around the pancreas, which was being collected through the drains inserted by Dr. Johnson on December 27th. Dr. Ellsmere evaluated her on February 9, 2017. He found she still had significant abdominal pain and a dilated pancreatic duct with elevated enzyme or fluid

collection at the head of the pancreas. He diagnosed her with a pancreatic duct obstruction.

[73] To deal with complications, such as infections from the bleeding and fluid migration, he recommended an ERCP procedure. This is a debriding of the pancreatic duct to reduce fluid collection and remove material that promotes infection.

[74] He carried out the procedure on March 28th. He was able to cut the muscle between the bile duct and the pancreas (a procedure he called a "sphincterotomy") and cannulate her biliary system but was unable to cannulate her pancreatic system. He opined that the operation reduced the pressure on her pancreatic system.

[75] A check up on May 4th confirmed that the pancreatic system had been depressurized and that most of the complainant's symptoms had been reduced. Dr. Ellsmere reported that a CAT scan on September 21, 2017, confirmed the resolution of her pancreatic condition.

[76] A summary of the complainant's evidence is that she and the accused were enjoying themselves and drinking beer in his room in the house he shared with Haig Zakarian. About midnight, she called a friend (Steve) to come over with cocaine and lent the accused $100.00 to buy it from Steve. Steve stayed. The accused used the n… word. The complainant objected and slapped him in the face lightly. He grabbed her by the throat, slammed her back on the bed and pushed his hand on her nose so as to smother her. She erroneously believed he has broken her nose. In a short time, the accused said the n… word again. She smashed him on the left side of his cheek with an open hand. The hit was not hard enough to move him, but made his eyes roll back.

[77] At that point he turned into a monster, grabbed her by the neck, hit her head, flung her around, put her on the floor and violently stepped or kneed her. She heard a pop in her body and could not move. Steve offered to call an ambulance, but she said no because she thought she only had a broken rib. She slept for a couple hours and came to at about 8:30 a.m. Steve and the accused were still there talking. She asked for ice; the accused flung it at her. She gathered her things up and went home. She was throwing up and called her friend to take her to the hospital. An ambulance showed up and took her to the hospital.

[78] A summary of the accused's trial evidence is that the complainant slapped him twice in the face, he reached out, grabbed her, took her and put her on the ground.

She was trying to kick him. To keep his balance and prevent her from continuing to kick up at him, he knelt on her abdomen. She instantly stopped kicking and could not move.

[79] He testified that she was sick and asked for a bucket. She was helped to lie down on the bed. He says that she continued to scream profanities at him. After an hour, she got up and left.

[80] The first issue is whether the assault "wounded, maimed, disfigured or endangered" the complainant's life.

[81] Dr. Johnson stated that while the pancreatic injury was a high grade, Grade IV injury, it was not, in this instance, life threatening.

[82] The Oxford Dictionary defines "maim" as "to wound or injure, so that part of the body is permanently damaged".

[83] The word "wound", as a noun, is defined in the Oxford Dictionary as an injury to body tissue caused by a cut, blow, hard or sharp impact, etc., especially one in which the skin is cut or broken; an external injury. As a verb, it means to inflect a wound or physical injury on a person or body.

[84] In *R v. MacNeil*, 2012 NSPC 106 ("*MacNeil*"), the court stated:

> [15] Plainly, wounding must amount to more than "minor" bodily harm. (*Hilderman, paragraph 14*) "Bodily harm" assault is an intermediate level of assault, with simple assault being the least serious form of assault and aggravated assault being the most serious. As noted in *Vincent*, paragraph 14: "Parliament intended to reflect the increasing gravity in the definition and penalty for each kind of assault."
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> *Bodily Harm or Wounding?*
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> [16] Bodily harm itself lies along a continuum: there will be bodily harm that falls at the lower end and bodily harm that is more significant. To illustrate my point with examples, one-punch assaults charged as assault causing bodily harm have included such injuries as a black eye, bruised and swollen face, cut on the nose, and a bruised shoulder (*R. v. Sandoval, [1995] A.J. No. 1013 (P.C.)*) and, more significant injuries that led to unconsciousness and hospitalization (*R. v. Bennett, [2006] A.J. No. 540 (P.C.), paragraphs 2 and 27*) As I mentioned earlier, for injuries to amount to "wounding", they must amount to more than "minor" bodily harm.
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> …

> [19] An assault is characterized as an aggravated assault when it involves injuries at the upper end of the injury spectrum, injuries that either endanger life, or disfigure, or maim, or wound. Surely then, wounding has to be bodily harm that sits at that end of the severity scale where disfigurement and maiming also belong.
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> [20] For the law to be coherent, there must be something that distinguishes wounding from serious bodily harm where the nature of the injuries alone do not make the distinction clear. In such cases, the distinguishing characteristic has to be the permanence or long-lasting effect of the injuries. In this respect I find the *S.E.L.* decision to be the most helpful to my analysis. …

[85] The complainant suffered a very serious, pancreatic rupture that required two surgeries and the implanting of tubes in her body to stop the flow of pancreatic fluids and depressurize her pancreatic system. One doctor stated that her injuries were not life threatening. Her injuries were serious and are long-lasting. She still has large unsightly scars from the surgeries.

[86] The assault on the complainant wounded her. The injury exceeds the seriousness of "bodily harm" referred to in s. 267(2) – assault causing bodily harm. (See *R v. Moquin*, 2010 MBCA 22 ("*Moquin*"))

[87] The accused did not contest this element of the offence in closing oral submissions. I find that the crown has proven this element of the offence.

2. Whether the accused intentionally applied force that he knew, or should have reasonable known, would put the complainant at risk of suffering some kind of bodily harm.

[88] The accused said that he did not stomp on the complainant or drive his knee forcefully into the complainant when he grabbed her, turned her, put her on her back on the floor and put his knee on her to stop her for balance and to prevent her from continuing to kick him.

[89] As noted at paras 35 to 42, the crown needs not prove that the accused intended to wound her, but rather than a reasonable person in the circumstances would realize that the force that he applied would put her at risk of suffering some kind of bodily harm, although not necessarily serious body harm or the precise bodily harm that she suffered. Objective foresight of risk of bodily harm is described not simply as objective intention but includes recklessness and wilful blindness.

[90] The complainant was a small woman and the accused was a large man with advanced fighting skills. He was a wrestler and wrestling coach, had boxed, regularly worked out, and appeared to be in very good physical condition.

[91] The complainant and accused knew each other well. They were friends. Their friendship included physical contact, but not of a hurtful nature; for example, their physical interaction when walking home from the accused's birthday celebration in March 2015 when she jumped on his back, to which he became annoyed and threw her off his back into a bush. Their friendship had waned after the summer of 2016, until the complainant made contact at Christmas. They had spent time together at the home of the accused's mother on Boxing Day and returned to his home to socialize when the assault occurred.

[92] The medical evidence from all three doctors established that it would take far more than dropping a knee on the complainant's abdomen in the manner described by the accused to cause the "high grade" (Grade IV) injury to her pancreas. The medical evidence is inconsistent with the accused's description of how he dropped or drove his knee on the accused's abdomen.

[93] The court is often faced with a concern about the reliability of oral evidence. Seldom does a court accept all a witness's evidence as reliable. Instead, the court accepts the evidence that is most consistent with common sense based on the totality of the evidence, and where available, independent witnesses and real evidence. The complainant in this case had, by her own admission, gaps in her recall of the events of December 27, 2016. She clearly was in error or confused about some facts.

[94] For example, she thought that she was in the hospital for about two months, but, in fact, was released after two weeks and returned several times thereafter for further assessment and treatment. She stated that she was treated for head injuries from being thrown around like a rag doll, but the more reliable medical records and evidence confirm a lump and bruises on her nose, together with neck, elbow and back injuries, but no head injuries except to the swelling at the bridge of her nose. She was unsure whether the accused stomped on her with his foot or with his knee when she was on her back on the floor.

[95] In this case, the court has discounted some of the complainant's evidence as unreliable, and sometimes hyperbole - based in part on her lack of understanding of the medical treatment she received. The rest of her evidence was detailed and made sense. Much of her evidence was confirmed by independent, trustworthy evidence.

[96] The same analysis was applied to the accused's evidence, but with a twist. Whenever I was inclined to disbelieve or doubt his evidence, I asked myself whether his evidence raised a reasonable doubt about what happened, and if it did, I gave the benefit of that doubt to the accused.

[97] The accused was consuming drugs and alcohol during the evening and into the early morning. This affected his behavior. I find, and it is not contested, that the racist word was used in the presence of the complainant. The accused knew she objected to the use of the n… word. Twice she slapped him in the face - the second time with such force that he was stunned. He responded by using vulgar language directed at the complainant in the presence of Steve to the effect that she could not tell him what he could say in his house; he took off his shirt at some point and threw the complainant on the floor. He was upset at being slapped by the complainant in the presence of Steve for using the n… word.

[98] The video record of the accused's statement to the police on December 30th, 2016, differed considerably from his evidence at trial - both the words he used and his physical demonstration of how the altercation occurred. I find that the accused's video statement reflects more accurately than his trial evidence his perception of the altercation.

[99] The photographs of the accused of December 30th showed a scratch on his left chin and the middle of his chest. This is consistent with the complainant's evidence that the accused had taken off his shirt in a show of bravado.

[100] The crown has established beyond a reasonable doubt that a reasonable person, in the circumstances that the accused found himself, would have realized that the force that he applied, which I conclude had to involve driving his knee into her abdomen with very significant force, would put the complainant at risk of suffering some kind of bodily harm. I conclude that he did not consider at all what force he was applying to the complainant when he drove his knee into her abdomen. He was, at the very least, reckless or wilfully blind as to the risk of bodily harm to the complainant.

3. Self-defence

[101] A more detailed review of the evidence is required to deal with this issue.

[102] The complainant and accused testified they met in approximately 2013, when both were working on the same Halifax construction project. She was a single parent who had worked several jobs at a time before a car accident. At the time she met the

accused, she was doing massages and had just started working as an outdoor hoist (elevator) operator on the construction site where the accused worked. He was single and a construction worker.

[103] On the first day they met, she joined him and a co-worker for lunch. They became friends but not romantic partners. They ate lunches together. When the accused was laid off from that job, they kept in touch. He said that they went for take-out, they socialized, he did maintenance work for her and her parents and, one winter, he shovelled her driveway. They would often just hang out together.

[104] The accused had been a high-school wrestler and coached wrestling. He had sparred (boxed with pads). He used weights in his room and a bench-press in the living room at his residence on Pleasant Street in Dartmouth, where he lived with Haig Zakarian. The accused kept in good shape. He was much larger and in better shape than the complainant.

[105] It was clear from the evidence of both the complainant and accused that they would spar with each other (my phrase) and have other physical contact. None of it was considered serious or hurtful. Sometimes the accused would get annoyed and tell the complainant to stop.

[106] The accused and the complainant had different perspectives regarding the assault and some of the background.

[107] The accused described an incident that occurred on his birthday, March 29, 2015. He and his housemate decided to go to the Celtic Corner Pub in Dartmouth to celebrate his birthday. The complainant and two of her friends came along. The complainant has no specific recollection of an incident between them. When she asked whether the accused had pushed her into a flower bush after leaving the pub that evening, she could not recall.

[108] Mr. Zakarian, a marine electrician who lived with the accused, recalled that the complainant used to hang out at the accused's place. He testified that the accused invited him to get drunk at the Celtic Corner to celebrate his birthday. The complainant and two friends came over to celebrate and drink a few beers.

[109] As they were walking home, the complainant hit the accused. To Mr. Zakarian, it seemed "playful". Then the complainant jumped on the accused's back and the accused deflected her into the bushes. The accused told her to stop and some of her friends told her to stop horsing around in the street, but it continued to the accused's house. Their interactions were uncomfortable; at one point, the accused

tried to restrain her. The complainant would push, kick and hit the accused to get a reaction.

[110] On cross-examination, Mr. Zakarian said that their hitting was playful. He thought that it might have been flirtatious, but they were not laughing.

[111] The accused described the same birthday incident. He stated that the complainant was carrying on a little aggressively, as was "her nature", throwing shots, kicks, and slaps. As she was drinking, she was getting louder and "touchier". It did not bother him, but he told her to stop several times. At his home, when dancing to music, it escalated. He and her friends told her to stop. He eventually grabbed her in a bear hug and Mr. Zakarian told her and her friends to leave. When she got drunk, she got aggressive – nothing noticeable, but annoying.

[112] In July 2016, she was at his house and offered to drive him to work. He did not need her to drive him to work, but he accepted her offer. He became very annoyed when instead of driving him to work, she made several stops at different retail outlets and her home. After that, he wanted nothing to do with her.

[113] On December 25, 2016, a student renting from him called him to advise him that someone was in his room. He came home and found home-made chocolates on his bedtable. He called the complainant and told her it was unacceptable for her to walk into his house when he was not there.

[114] The next day, the complainant called him several times to hang out. He said no. In the meantime, his mother had called him to come over to Cole Harbour for a Christmas visit. The next thing he knew, the complainant was calling him from her car in his driveway. He went down to her car to talk to her. She had been to his mothers with him before. He agreed that she could drive him to his mother's and visit.

[115] At his mothers, they drank margaritas. When they left, he had presents and his mother gave him a case of beer. The original intent was that the complainant was going to drop him off and go do a massage, but the appointment was cancelled. The accused said that he was planning to return to a party he had been to the night before on Primrose Street. The complainant says she dropped him off at Primrose Street and lent him $20.00 to buy drugs. The accused denies that he borrowed money from her to buy drugs. He said that he left the Primrose Street apartment because the complainant was alone, and he felt sorry for her. At that point, his plan was to go home with her, "to hang out, not watch tv – listen to music – have beer and relax".

[116] The accused states that the complainant said she knew a guy who had drugs, particularly, marihuana and coke, and asked if she could invite him to come over. The accused said that he did not usually use coke, but he stated that he jumped on the chance that night. He said he had to borrow from the complainant, who lent to him, $100.00 to buy cocaine.

[117] Steve, a guy he did not know before, came over at about midnight with what was supposed to be coke. The accused paid him for coke. The accused states that the powder he snorted did not seem like coke, but Steve continued to use it. The accused did not say that he asked for his money back. Steve stayed all night and hung out with the accused and complainant.

[118] The accused states that they were all drinking beer. The complainant drank six or seven; he drank four and Steve had one or two. At one point, he testified that the complainant was also rolling marihuana on the night stand in the corner.

[119] In his direct examination, the accused first gave his evidence in narrative form, which narrative was followed up by specific questions. In the narrative portion, he stated that the altercation with the complainant began when he was speaking to Steve about poor communities in society. He or maybe Steve used the n… word. He was sitting at the head of his bed; the complainant was sitting next to him and Steve was on the floor next to the window.

[120] The first time the n… word came up, the complainant stated she did not like it. She slapped him on the side of the face "not aggressively, not bad". The accused replied that he could say what he wanted in his own house and who was she to say that he could not say the n… word.

[121] The second time she slapped him really hard on his head. He grabbed her shoulder and called her an f… b… She got up and walked to the night stand. He commented to Steve that he had just got sucker punched, at which point he took her and put her on the ground. She tried to kick. He went down on her with his knee on her abdomen.

[122] In direct examination, he was asked particulars about this incident. He stated that the complainant smoked marihuana quite a bit. He repeated that when Steve came over, it was about 12:00 and when he left it was about 8:00 or 9:00 in the morning. He stayed for 90% of the evening, Steve was on the window sill; he and the complainant were on the bed. Most of the evening was spent talking and listening to music.

[123] He repeated that they were sitting side-by-side on the bed when she slapped him. He turned towards her and grabbed her shoulders and asked her what the f… she thought she was doing. She stood up and walked towards the night stand. He stood up and exchanged words with Steve about who the f… she thought she was. At that point, she sucker-punched him and hit him on the right side of the head. He was blindsided. He reached out, grabbed her, twisted her around and put her on the floor.

[124] She kept coming at him with her arms moving. He had been almost knocked out by her blow to the head. He did not know what he grabbed when he grabbed her and pulled her down. He released her and was trying to regain an upright position when he saw her foot come up. He tried to get out of the way of two or three kicks. He dropped his weight onto the ground - lowered himself, his knees onto her, at which point everything stopped.

[125] On cross-examination, he stated that he got back to his place between 10:00 and 10:30 p.m. with the plan to hang out, listen to music, have beer and relax.

[126] He said that he first time he used the n… word, she objected. He said that he could say what he wanted. She got up and moved to the nightstand between him and Steve, to what he thought was to roll a joint. He said that when the n… word was said again, they both stood up and he got a full punch on the right side of his face that almost knocked him out. She kept coming at him, he grabbed her, put her on her back. She kicked him, he lost his balance, he dropped his legs to stop her legs with no thought about where he would land. She immediately went grayish. He thought she was going to be sick. He eventually helped her into the bed. She asked for a bucket and demanded socks.

[127] He wanted her to be gone. When asked if he was concerned in the morning when she intended to leave by driving and he said: honestly, he just wanted her to get out.

[128] On cross-examination, he did not recall if he took his shirt off during the night.

[129] As noted before, he admitted that he was a wrestler in high school and had coached wrestling. He had sparred. He used weights and the bench press in order to keep in shape. He acknowledged that when she slapped him really hard, he called her a profanity. When he did so, he was not worried about her hitting him. He did not know he was being set up for a sucker-punch. He had no fear for his safety at that point. He did not expect to be sucker-punched.

[130] He acknowledged from the pictures taken by Constable Kennedy of him on December 30 that there were no bruises, red marks or other evidence of the sucker punch to his jaw.

[131] He denied grabbing her by the neck.

[132] He was cross-examined with regards to the video statement he gave to the police on December 30, 2016, and the discrepancies between that video statement and his evidence at trial. In this part of the decision, I refer to the page in the transcript of the video evidence that was introduced in court.

a) The accused admitted that he may have exaggerated when he told the police in the video that the complainant drank the whole case of beer. (transcript, p. 45).

b) He admitted that at the bar in 2015 there were not eight people there, as he stated, but only a couple of people at his table (transcript, p. 69)

c) When it was pointed out to him that he told the police that the complainant had laid in the bed for five to six hours before she awoke and left to go home, and that in his trial evidence, he said that she was only in bed for one to two hours, he replied that he did not know when the assault happened. (transcript, pp. 51 and 65)

d) When it was pointed out that in the police statement he said that after the complainant slapped him hard, she jumped up and got behind Steve and that is when she nailed him, whereas at trial he said that the complainant got up and walked to the night table in the corner at the head of bed and sucker punched him from behind, he stated that the police statement was incorrect. (transcript, pp. 63 and 64)

e) He acknowledged that in the police statement he did not say that the reason Steve came over was to deliver cocaine. (transcript, p. 31)

f) He acknowledged that he told the police that he got the scratch on his chest because he did not think that he had a shirt on and at trial he says that he did not know if he had a shirt on when he got the scratch to his chest. (transcript, p. 50)

g) He acknowledged that his statement to police regarding the complainant's second hit arose when she came over top of Steve and smashed him in the jaw differed from his trial evidence that she sucker-punched him from some where around the night table in the corner. (transcript, p. 49)

h) He acknowledged that in his police statement he made an analogy to the effect that if a cow was hypothetically punched, it will kick the person across the room; he explained that the analogy was simply a reference to self-preservation. (transcript, pp. 71 and 76)

i) When directed to his police demonstration of how he went down on the complainant during the incident (transcript, pp. 47 and 48) and his words to the police (transcript, p. 50): "boom, I drive my knee into her side", and at page 71, "I drove my knee down on her" was incorrect, because he did not jump into the air and drive his knee down but rather unconsciously went down on her abdomen.

[133] The complainant basically confirmed the accused's evidence about how they became friends and regularly eat lunch together. He shovelled her drive way, helped her move and would "dog sit" for her. They would watch documentaries together and talk about things.

[134] She testified that on December 25th she, with a niece and nephew, delivered chocolates to the accused. She stated that she got in touch with him the next day, Monday, December 26th, to go to lunch. He said that his mother had invited him to visit. She had visited his mom with him in the past.

[135] She drove him to his mother's home in Cole Harbour. They had a good visit. They drank margaritas. She was driving him home from his mothers. He wanted to go pick up some drugs and she gave him $20.00 for drugs, which she assumed was for coke. She had intended to go to Halifax to do a massage. When she dropped him off at Primrose Street, she had a text cancelling the massage appointment. When he came out to the car, she took him home and decided to stay, to chill out and to relax with him. She was planning to drink beer.

[136] When they were at his house, the accused said he wanted more drugs. She knew Steve as a result of operating an Air BNB, knew that he did coke and drugs and knew that he could supply some. She called him to come over and lent the accused $100.00 to buy coke from Steve.

[137] Steve showed up at about midnight and she saw the accused and Steve doing what she assumed was crack cocaine. She did not recall if she smoked any marihuana that night. She was sitting on the bed; the accused was sitting at the head of the bed and Steve was sitting on the floor to the left.

[138] Steve and the accused used the n… word. She reacted that she was going to leave. The others said to calm down.

[139] She playfully pointed her finger at him to tell him not to say the n… word again. Within minutes the accused said the n… word again, and she slapped him. He grabbed her by the throat, slammed her down on the bed and crushed her nose into her face. She laid there. Steve said no and the accused stop.

[140] She stood up and said: you can't put your hand in my face. She smashed him in the face with her open hand and hit the left side of his cheek. She hit him hard enough to make his eyes roll back in his head. At this point, he turned into a monster, grabbed her neck, hit her head, flung her around and put her on the floor. Her initial evidence was that he stepped on her. She heard a pop in her body and could not move. Steve wanted to call an ambulance, but she said no, because she thought it was just a broken rib.

[141] She went to sleep on the bed and when she came to, the accused and Steve were still talking. She needed ice because she could not move. He flung the ice at her. She stood up, gathered her things and drove to her home on Bedford Highway. She called a friend; an ambulance showed and took her to the hospital.

[142] She was asked what the accused was like under drugs. She replied that that he became less articulate and more aggressive and boisterous, like an ape. He would take his shirt off, flex his nipples and dance more.

[143] She said that they had one or more margaritas and beer at the accused's mother's home, and she had 1 or 2 beers at the accused's home before Steve arrived. She was not drinking alone. She said she was not impaired but had a slight buzz. When Steve arrived, the accused gave him money and they went to a table in the corner. She did not watch them. The accused's speech became slurred, but he did not get aggressive until the n… word was said, and she slapped him.

[144] On cross-examination, she said the radiologist told her that her pancreas was in two parts and the doctors said it was detached and that blood had escaped. She thought she was in the hospital for one and a half months; she thought until February 13. She stated that after the accused hurt her, she could not clean houses or give massages. She did not have to borrow money from friends before this incident but did after.

[145] She acknowledged that she had never seen anyone use crack cocaine, but she had experience with persons who used drugs when she worked at Colonial Community Services in Dartmouth for three years. She insisted that whatever drug he was on that night caused him to slur his speech.

[146] She acknowledged attending the accused's house with chocolates. The next day they spoke on the phone and he asked for more chocolates. She went with the accused to visit his mother. It was a good visit until his mother scolded him, when they left and returned to his home. There she was drinking beer and maybe a little marihuana.

[147] She confirmed that she contacted Steve for drugs for the accused. She was not certain of his last name, but thought it was Champlain. She lent the accused $100.00 to buy drugs.

[148] She denied that she kept trying to get at the accused after he put her on the floor. She said: "I never had a chance to kick him". He had her by the throat, choking her. She disagreed with the suggestion that she did not pass out but kept screaming at him. She said it was Steve, not the accused, who recommended that she call an ambulance.

[149] She acknowledged that, in hindsight, she may have been confused about how long she was in the hospital.

[150] She acknowledged that she was not sure whether the accused used his foot or knee on her stomach. He stood over her with his hands in the air and roared, after he put her down. He never punched or slapped her.

Analysis of Self-defence

[151] As outlined at paras 43 to 51 of this decision, and in paras 107 to 113 in *R v Levy*, 2016 NSCA 45, the crown must disprove beyond a reasonable doubt one of the three elements of self-defence described in s. 34(1), and the court shall consider in its assessment of the evidence all the relevant circumstances, including those enumerated in s. 34(2) of the *Criminal Code*.

First Question: Whether the accused believed on reasonable grounds that force was being used against him or that a threat of force was being made against him?

[152] The complainant hit the accused twice. I accept the complainant's evidence that the first slap was a light tap and that the second hit has a hard smack with an open hand that would have hurt.

[153] The crown has not disproved beyond a reasonable doubt that the accused believed on reasonable grounds that force was being used against him.

Second Question: Whether the accused's actions were for the purpose of defending himself from the complainant's two slaps?

[154] I find that the crown has disproved this element of the defence beyond a reasonable doubt.

[155] The accused grabbed the complainant by the neck. The first time he put her down on the bed and palming his hand on her nose with such force as to leave a lump, bruises and swelling on the bridge. The second time, he grabbed her by the neck and threw her on the floor and drove his knee into her abdomen.

[156] Accompanying these actions was the fact that he verbally objected to the complainant telling him that he could not use the n… word in his own house and using profanities to describe her in a disrespectful manner. The accused was not afraid of the complainant. They knew each other well. He had received kicks and slaps from her in the past, in what was described by him and Mr. Zakarian as a non-aggressive and "playful" manner. The accused described this as part of "her nature".

[157] I find that the accused was under the influence of drugs at the time of the assault. Whether the drug was cocaine or another drug, he acknowledged on cross that he did not ask for the money back that he had borrowed from the complainant to buy cocaine from Steve.

[158] I find that he was embarrassed to be told by the complainant, in front of a guest, that he could not say what he wanted in his own house. He simply lost his temper. He grabbed her by the neck (consistent with the injuries to her neck), threw her on the floor and, to use his word in the police video, "drove" his knee into her abdomen with very significant force and clearly without regard to the amount of force that would be reasonable in the circumstances.

[159] His actions were not for the purpose of protecting himself, but to react to the complainant's challenge to his use of racist word in conversation with their guest.

[160] The relative size, gender and physical capacities of the complainant and accused is consistent with the court's conclusion that he was not afraid of the complainant or anything she might do to him.

[161] I previously indicated that I do not accept all the evidence of the complainant. I do so, not because she was untruthful, but rather that some of her evidence was unreliable. However, on the essential aspects of the events and their relationship, I accept her evidence as truthful and reliable.

[162] She acknowledged on cross-examination when she may have been wrong in her direct examination.

[163] The accused's version of the incident to the police on December 30th varied greatly from his evidence at trial. Where his evidence differed from that of the complainant, I reject it, and it does not cause me any doubt with respect to the evidence of the complainant that I accept, most of which is corroborated by the injuries she received.

Third Question: Was the accused's conduct reasonable in the circumstances?

[164] If, for any reason, I am in error with respect to the second element of self-defence, I find that the accused's conduct was not reasonable in the circumstances that he knew or believed them to be at the time.

[165] I accept that he would not be expected to know exactly how much force to use, if, in fact, his act of grabbing the complainant by the neck, throwing her on the ground, and driving his knee into her, was for the purposes of defending himself. His evidence as to how he brought his knee down onto her is rejected.

[166] It was not a matter of him going over the line by applying too much force in a reasonable matter. The accused's use of excessive force was because defending himself was not on his mind in the first place and, to the extent that he was under the influence of the drug that he had purchased from Steve, he was not capable of acting rationally and reasonably.

Part IV Finding

[167] I therefore find the accused guilty of aggravated assault.

Warner, J.