Citation: *R. v. Johnson,* 2023 YKTC 8

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Docket: 21-00546
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REX

v.

JASON JOHNSON

Appearances:
Andreas Kuntz — Counsel for the Crown
David Tarnow — Counsel for the Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Jason Johnson is before me for trial in relation to an allegation of wounding Curtis Carlick thereby committing an aggravated assault contrary to s. 268 of the *Criminal Code*. The offence relates to an altercation between Mr. Johnson and Mr. Carlick in the Burwash area on September 15, 2021.

[2] The relationship between Mr. Johnson and Mr. Carlick is, or at least was, familial in nature. According to Mr. Carlick's grandmother, Alyce Johnson, Mr. Johnson has been treated as a member of the family since his mother entered into a relationship with

Ms. Johnson's brother when Mr. Johnson was two years old. Mr. Carlick described Mr. Johnson as being "like a cousin".

[3] On the offence date, Mr. Johnson, Mr. Carlick, and a friend named Thomas Widrig decided to drive around the Burwash area looking for moose. Over the course of the day, tensions developed between Mr. Johnson and Mr. Carlick culminating in a physical altercation.

Issues

[4] By all accounts, the altercation between Mr. Johnson and Mr. Carlick began as a consensual fight. Accordingly, what is ultimately at issue is whether Mr. Johnson should be held criminally liable for the injuries suffered by Mr. Carlick.

[5] The following issues must be resolved to make this determination:

- Firstly, as Mr. Carlick and Mr. Widrig provided very different versions of the events, an assessment of credibility is required to determine what facts have been proven by the Crown to the requisite standard of proof beyond a reasonable doubt;

- Secondly, do the facts establish wounding; and

- Thirdly, based on the facts as found, is the defence of consent available to Mr. Johnson or has consent been vitiated by virtue of the injuries suffered by Mr. Carlick.

Issue 1: Credibility and the Facts

Mr. Carlick's Evidence

[6] Turning to the first issue, Mr. Carlick's version of events is that on the day before the alleged offence, Mr. Carlick's cousin, Randy Johnson, caught a moose. For the purposes of this decision, I will refer to Randy Johnson by his first name to avoid confusion with the accused, Jason Johnson.

[7] As a Wildlife Monitor for the Kluane First Nation, Mr. Carlick inspected the kill and assisted Randy and Randy's father with the moose. Later that night, Mr. Carlick went to Randy's house in the Copper Joe subdivision to celebrate. Mr. Widrig was also present having driven up that day from Whitehorse. Mr. Carlick says that they were hanging out and drinking until 2:00 or 3:00 in the morning when Mr. Carlick returned to his own residence in Burwash. He says that Mr. Widrig came with him and stayed the night at his place.

[8] Mr. Johnson arrived the next morning at 9:00 or 10:00 with two 26-ounce bottles of Wiser's whisky. The three men immediately began drinking. After 20 to 30 minutes, they decided to go for a ride to look for moose. They departed in Mr. Widrig's truck with Mr. Johnson in the front passenger seat and Mr. Carlick behind in the rear passenger seat.

[9] Mr. Carlick says that they saw a moose but did not have a gun with them to shoot it. Mr. Carlick was adamant that he did not bring a rifle as it would not have been appropriate given his position as Wildlife Monitor.

[10] The group drove around for several hours stopping at a number of places including Destruction Bay where they purchased take-out from the Talbot Arms for lunch. They ultimately returned to Randy's house, but Mr. Carlick believes that Randy was not home.

[11] While sitting in the truck in Randy's driveway, Mr. Carlick says that Mr. Johnson became angry with him because they did not have a gun to shoot the moose they had seen. He apparently blamed Mr. Carlick for this. The two began to argue and swear at each other, then got out of the vehicle to fight.

[12] They both had their hands up, but Mr. Carlick threw the first punch. Mr. Johnson moved forward swinging at Mr. Carlick, who fell to the ground. He says he was on his hands and knees trying to get back to his feet when Mr. Johnson then kicked him twice in the left side of his face causing his eye to swell shut. Mr. Carlick believes Mr. Johnson may have kicked him a couple more times in the body while Mr. Carlick used his hands and arms to cover his head and face.

[13] They both got back in the vehicle. As they were driving away, Mr. Carlick told Mr. Johnson he was an idiot and should leave Burwash and never come back as he would not be welcome in the family again. He says they stopped, and Mr. Johnson got out of the truck, opened Mr. Carlick's door, and struck Mr. Carlick several times in the right side of his face. Mr. Johnson then grabbed Mr. Carlick by the collar of his shirt and pulled him out of the truck.

[14] As they had stopped 600 to 700 metres from his grandmother's residence, Mr. Carlick decided to walk to her house. She ultimately drove him to the health clinic in Destruction Bay and then to Emergency at Whitehorse General Hospital.

Mr. Widrig's Evidence

[15] As noted, Mr. Widrig provided a version of events which differed in a number of key aspects.

[16] Mr. Widrig agreed that he had driven up from Whitehorse the day before to go hunting with Randy Johnson. This initial plan did not come to fruition as Randy successfully harvested a moose that morning. Mr. Widrig arrived at Randy's residence in the early evening. Jason Johnson then arrived. Mr. Widrig believes that Mr. Carlick arrived sometime after that. They consumed a few drinks but were not up too late as they had started to formulate a plan for Mr. Widrig, Mr. Johnson, and Mr. Carlick to go hunting the next day.

[17] Mr. Widrig stayed that night at Randy's residence, not Mr. Carlick's, waking at around 10:00 the next morning. He believes that Mr. Carlick returned to Randy's residence some time before lunch. It was unclear on Mr. Widrig's evidence when Mr. Johnson arrived at Randy's residence or whether he, too, had stayed the night.

[18] The plan to go hunting was finalized and Mr. Widrig, Mr. Carlick, and Mr. Johnson all hopped in Mr. Widrig's truck, with Mr. Widrig driving. Mr. Widrig says that, over the course of the day, Mr. Carlick and Mr. Johnson changed positions in the

vehicle from time to time, but, for the most part, it was Mr. Carlick who was in the front passenger seat with Mr. Johnson sitting in the rear behind him.

[19] The three men drove towards Burwash and observed a moose along the way. They went to Mr. Carlick's residence where Mr. Carlick retrieved his gun and some alcohol. Mr. Widrig says Mr. Carlick brought a 15 pack of beer. They also had a 26-ounce bottle of whisky from the preceding evening.

[20] From there, they drove to a cabin near the Kluane River where they spent 45 minutes or so talking and drinking. They then drove to a culture or fish camp site with a bunch of cabins where they spent roughly 30 minutes. From there, Mr. Widrig describes them driving around and drinking, making a couple of random stops along the highway. They returned to Mr. Carlick's residence where they dropped off the gun, then drove back to Randy's residence.

[21] Mr. Widrig says that Mr. Johnson and Mr. Carlick had been bickering at each other off and on for most of the day. When they arrived at Randy's residence, the two were yelling and swearing at each other. Both got out of the truck on the passenger side and squared up like they were going to fight. Mr. Carlick threw a big overhand right punch hitting Mr. Johnson. From there the two locked up grappling and punching each other. The fight moved around to the front of the truck where Mr. Widrig observed both Mr. Johnson and Mr. Carlick to fall to the ground. Given the height of the truck, Mr. Widrig lost sight of Mr. Carlick and Mr. Johnson for the approximately five seconds it took for him to get out of the truck and go around to the front where he observed both men rolling around on the ground. He grabbed one of them by the shirt to pull them

apart. He yelled at them to stop, telling them it was enough and to get back in the truck. Mr. Widrig says that the whole fight took less than 30 seconds.

[22] Mr. Widrig says that as they were getting back in the truck, Randy stuck his head out his front door and yelled to them to get off his property. Mr. Widrig noted that Mr. Johnson was red in the face from being punched, and that Mr. Carlick looked beat up and was bleeding. Mr. Widrig drove Mr. Carlick to his grandmother's residence where he dropped him off.

Findings of Credibility

[23] In assessing what facts have been proven in this case, the Crown concedes, and I agree, that Mr. Widrig was the more reliable witness of the two. While there were some difficulties with his recollection, Mr. Widrig freely admitted when he could not recall something. His evidence remained consistent throughout and he presented as a relatively independent and disinterested observer. He noted that he was friends with both Mr. Johnson and Mr. Carlick, and he did not display any partiality in giving his evidence. Furthermore, Mr. Widrig noted that, as the driver, he was careful about his alcohol intake and had consumed considerably less alcohol than either Mr. Carlick or Mr. Johnson.

[24] Conversely, there were a number of issues with the reliability of Mr. Carlick's evidence. Firstly, Mr. Carlick's evidence differed in key respects not only from that of Mr. Widrig as is evident from the foregoing summary, but also from that of his grandmother. He says that he arrived at his grandmother's residence with one shoe on; she says he had no shoes on. He says they were at the Destruction Bay health clinic

for 30 to 45 minutes and arrived in Whitehorse at 7:00 or 8:00 in the evening. She says they were at the health centre for two hours and arrived in Whitehorse between 10:30 p.m. and 11:00 p.m.

[25] I would note that Alyce Johnson was an extremely credible and reliable witness, and I have absolutely no difficulty accepting her evidence.

[26] Next, I note that there were some inconsistencies in Mr. Carlick's version of events. Most notably, he testified to falling to the ground as a result of Mr. Johnson punching him, but then suggested it was Mr. Johnson grabbing him by the head and kneeing him in the face which caused him to fall to the ground.

[27] The injuries described in or seen in the exhibits are also somewhat inconsistent with Mr. Carlick's version. One would expect the blows Mr. Carlick describes receiving to the right side of his face during the second assault to result in visible bruising, but there are no visible injuries to the right side of his face evident in the exhibits.

[28] Lastly, the reliability of Mr. Carlick's evidence is suspect given his level of intoxication. By his own admission, he had been drinking all night the night before and all morning. He agreed that he was very intoxicated and very "out of it". This degree of intoxication was confirmed by his grandmother. Furthermore, Mr. Carlick conceded that his memory of the events was compromised not just by alcohol but by both the passage of time and the significant injuries he had suffered to his head.

[29] Ultimately, I find Mr. Widrig's version of events to be credible and reliable. Where it conflicts with the evidence of Mr. Carlick, I prefer the evidence of Mr. Widrig.

Based on this finding, I am satisfied beyond a reasonable doubt that Mr. Johnson and Mr. Carlick engaged in a fist fight which involved them punching each other repeatedly in the face, grappling and wrestling, and then falling to the ground where they rolled around continuing to wrestle until pulled apart by Mr. Widrig. I am left with a reasonable doubt as to whether Mr. Johnson kicked or kneed Mr. Carlick in the face, and whether there was ever a second assault.

[30] Not at issue on the facts are the injuries suffered by Mr. Carlick. The photographs taken by Alyce Johnson and filed as exhibit 2 in these proceedings show a gaping laceration in Mr. Carlick's chin, which he indicates required stitches and significant bruising around the left eye. In addition, medical records filed as exhibits 4 and 5 show that Mr. Carlick suffered a "left orbital floor and medial wall blowout fracture" requiring surgical reconstruction including the insertion of a plate, and a "left subcondylar fracture" or broken jaw requiring temporary insertion of screws. Mr. Carlick's jaw was wired shut for several weeks.

Issue 2: Wounding

[31] Turning to the second issue, neither counsel raised an issue regarding the sufficiency of the evidence on injuries in relation to what must be proven to establish an aggravated assault, likely as there is no doubt that Mr. Carlick did indeed suffer very serious injuries because of the fight. However, it must be noted that aggravated assault can be committed in a number of different ways, including wounding, maiming, disfiguring, or endangering life, each with different definitions of what must be established to prove the particular essential element.

[32] In this case, the information has particularized the mode of aggravated assault solely as wounding. Accordingly, I must be satisfied not just that Mr. Carlick suffered serious injuries but that the Crown has proven beyond a reasonable doubt that the injuries suffered amount to wounds.

[33] There is no definition of wounds or wounding in the *Criminal Code*. There are, however, conflicting interpretations of the term in the case law.

[34] In *R. v. Pootlass*, 2019 BCCA 96, the accused hit the complainant repeatedly on the head, resulting in a cut to the forehead that required stitches. The trial judge acquitted on aggravated assault on the basis the injury did not amount to a wound, but convicted the accused of assault causing bodily harm. On appeal, Bennet J. of the British Columbia Court of Appeal considered the interpretation of wounding at length before concluding at para. 113:

> To briefly conclude, a wound, as the word is used in s. 268(1) of the *Code*, is a break in the continuity of the whole skin that constitutes serious bodily harm. Serious bodily harm is any hurt or injury that interferes in a substantial way with the integrity, health or well-being of the complainant. This is a finding of fact, upon the application of the proper legal test. [emphasis added]

[35] Notable in this interpretation is that a wound requires a breaking of the skin.

[36] Conversely, the definition one finds in the Ontario jurisprudence is oft-stated as "to wound means to injure someone in a way that breaks or cuts or pierces or tears the skin or some part of the person's body. It must be more than something trifling, fleeting or minor, such as a scratch" (see *R. v. Green*, 2019 ONSC 884; *R. v. McQuinn*, 2021 ONSC 4884). While the primary focus is still on a break in the skin, this definition

appears to encompass a much broader range of injuries than that contemplated in the *Pootlass* decision.

[37] This distinction is relevant to the case at bar as two of the three serious injuries suffered by Mr. Carlick, the broken orbital bone and the broken jaw, do not involve any cut, tear, or other breakage of the skin.

[38] However, the third injury, the chin laceration, does involve a breakage of the skin. While there was no evidence led with respect to the number of stitches required, the photographs taken by Alyce Johnson show that the injury is well beyond a laceration that might meet the threshold definition of bodily harm. The cut spans Mr. Carlick's chin and can only be described as gaping open with a flap of loose skin. I am satisfied that this injury would amount to serious bodily harm, and, with the significant skin breakage, would meet either of the definitions of wounding.

[39] This is sufficient for me to conclude that the evidence establishes beyond a reasonable doubt that Mr. Carlick was wounded in the fight. Accordingly, I need not resolve the question of which of the definitions should be applied in this particular case. That being said, I am satisfied that the remaining serious injuries, if not wounds, would certainly meet the *Criminal Code* definition of bodily harm as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature".

Issue 3: Defence of Consent

[40] This then leaves the question of whether the defence of consent is available to Mr. Johnson based on the circumstances of the fight as described by Mr. Widrig. As noted, the issue is the impact of the extremely serious injuries suffered by Mr. Carlick in the fight on the availability of the defence.

[41] The defence of consent is implicit in s. 265(1)(a) of the *Criminal Code* which states that "a person commits an assault when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly" [emphasis added]. Section 265(2) notes that this provision applies to all forms of assault including aggravated assault.

[42] That being said, in 1991, the Supreme Court of Canada, in *R. v. Jobidon*, [1991] 2 S.C.R. 714, imposed limitations on the availability of consent as a defence in cases of assault where a victim has suffered bodily harm. As stated by the Court, the limitation was established on the basis of policy considerations, including: the social uselessness of fist fights; the danger they present to the maintenance of public order; the need to reinforce society's commitment to the sanctity of the human body; and the danger that the social taboo associated with acts of violence would lose its force if consent were recognized too freely as a defence. *Jobidon* has often been interpreted as meaning that a person cannot consent to the infliction of bodily harm.

[43] However, in their 2004 decision in *R. v. Paice*, 2005 SCC 22, the Supreme Court of Canada clarified that *Jobidon* did not stand for the proposition that the defence of consent would never be available in cases of bodily harm. The Court noted:

10 Consent, as it applies to an assault in Canada, involves more than a factual finding that the parties agreed to fight. In *Jobidon*, for policy reasons and on the basis of common law principles, this Court set a limit on the legal effectiveness of consent in cases of consensual fist fights between adults. *Jobidon* marked a significant development in the law of assault. Writing for the majority, Gonthier J. meticulously surveyed the English common law, Canadian jurisprudence and relevant policy considerations before crafting an appropriate restraint on the effect of a consent to a fist fight between two adults. The test is essentially an adaptation of the English approach, mindful of the application of the *Criminal Code*.

11 In dealing with the issue of consent, the trial judge reviewed *Jobidon* and relied expressly on the following excerpt from the decision of the English Court of Appeal in *Attorney General's Reference (No. 6 of 1980)*, [1981] 2 All E.R. 1057, at p. 1059:

> ... it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent. [Emphasis added.]

However, the trial judge did not refer to the fact that this Court in *Jobidon* held that it was not open in Canada to adopt the English position without modification. The Court referred to the above-noted passage in the *Attorney General's Reference* case and stated, at p. 760:

> *Attorney General's Reference* makes it clear that a conviction of assault will not be barred if "bodily harm is intended and/or caused". Since this test is framed in the alternative, consent could be nullified even in situations where the assailant did not intend to cause the injured person bodily harm but did so inadvertently. In Canada, however, this very broad formulation cannot strictly apply, since the definition of assault in s. 265 is explicitly restricted to intentional application of force. Any test in our law which incorporated the English perspective would of necessity have to confine itself to bodily harm intended and caused. [Emphasis in original.]

12 Indeed, if the test were otherwise and a conviction possible if bodily harm were either intended or caused, the result would be to criminalize numerous activities that were never intended by Parliament to come within the ambit of the assault provisions and would go beyond the policy

> considerations identified in *Jobidon*. For example, if causation alone sufficed, a person who agreed to engage in a playful wrestling match with another could end up being criminally responsible if, even by accident, he caused serious bodily harm to the other during the course of play. This Court in *Jobidon* was very mindful not to overextend the application of the principle to like situations. …

[44] Accordingly, the availability of the defence of consent in a case of aggravated assault requires a determination of both causation and intention.

Causation

[45] The test for causation has been well-established in cases of homicide, manslaughter, and impaired or dangerous driving causing bodily harm or death. In *R. v. Nette*, 2001 SCC 78, the Supreme Court of Canada set out the standard of causation as follows:

> 44 In determining whether a person can be held responsible for causing a particular result, in this case death, it must be determined whether the person caused that result both in fact and in law. Factual causation, as the term implies, is concerned with an inquiry about how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result. Where factual causation is established, the remaining issue is legal causation.
>
> 45 Legal causation, which is also referred to as imputable causation, is concerned with the question of whether the accused person should be held responsible in law for the death that occurred. It is informed by legal considerations such as the wording of the section creating the offence and principles of interpretation. These legal considerations, in turn, reflect fundamental principles of criminal justice such as the principle that the morally innocent should not be punished: see Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 513; R. v. Vaillancourt, [1987] 2 S.C.R. 636, at p. 652-53; R. v. Stinchcombe, [1991] 3 S.C.R. 326, at p. 336; R. v. Creighton, [1993] 3 S.C.R. 3, at p. 17; Cribbin, supra, at p. 568. …

[46] In considering the question of factual causation in the case at bar, what is clear is that Mr. Carlick's injuries were suffered during the altercation. However, it must be

noted that the specific cause of each injury is unclear. Mr. Widrig did not observe any kicking or kneeing of Mr. Carlick's face by Mr. Johnson. On his evidence, which has been accepted, the altercation involved punching and a fall to the ground. There is no evidence before me to suggest that the fall may have caused the injuries. Mr. Carlick was adamant that his injuries were not caused as a result of falling. Mr. Widrig lost sight of both Mr. Carlick and Mr. Johnson as they fell. In the absence of evidence suggesting the injuries were indeed caused somehow in the fall, it is logical to conclude the injuries were most likely a result of the punches Mr. Johnson administered to Mr. Carlick's face.

[47] That being said, even if the fall was a contributing factor, factual causation does not require Mr. Johnson's conduct to be the direct and only cause of Mr. Carlick's injuries. In the 2011 decision of the Ontario Court of Appeal in *R. v. Kippax*, 2011 ONCA 766, the Court noted at para. 24:

> To prove factual causation, the Crown does not have [to] prove that an accused's conduct was either the direct or predominant contributing cause of the prohibited consequence, whether death or bodily harm. It is no defence for an accused to say that the conduct of another was a greater or more substantial cause of the death or injuries. The Crown need only prove that an accused's conduct was a significant contributing cause of the death or injuries or, said another way, that the accused's conduct was "at least a contributing cause ... outside the *de minimis* range": *Smithers*, at p. 519; *Nette*, at paras. 70-71; and *R. v. Hughes*, 2011 BCCA 220, 305 B.C.A.C. 112, at paras. 56 and 64.

[48] Here, as it is beyond doubt that Mr. Carlick's injuries would not have occurred but for the fight, and as Mr. Johnson was a willing participant in the fight, I am satisfied that Mr. Johnson's actions were a significant contributing cause of the injuries, thereby establishing factual causation.

[49] In terms of legal causation, the Supreme Court of Canada in *Nette* explored the requirements in greater detail continuing on at para. 45:

> **…** In determining whether legal causation is established, the inquiry is directed at the question of whether the accused person should be held criminally responsible for the consequences that occurred. The nature of the inquiry at the stage of determining legal causation is expressed by G. Williams as follows in his Textbook of Criminal Law (2nd ed. 1983), at pp. 381-82, quoted in Cribbin, at p. 568:
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> > When one has settled the question of but-for causation, the further test to be applied to the but-for cause in order to qualify it for legal recognition is not a test of causation but a moral reaction. The question is whether the result can fairly be said to be imputable to the defendant... . If the term "cause" must be used, it can best be distinguished in this meaning as the "imputable" or "responsible" or "blamable" cause, to indicate the value-judgment involved. The word "imputable" is here chosen as best representing the idea. Whereas the but-for cause can generally be demonstrated scientifically, no experiment can be devised to show that one of a number of concurring but-for causes is more substantial or important than another, or that one person who is [page514] involved in the causal chain is more blameworthy than another.

[50] While the Supreme Court made it clear in *Nette* that legal causation differs from intent, the two concepts are, in most cases, inextricably interlinked. The Court noted at para. 47:

> While causation is a distinct issue from mens rea, the proper standard of causation expresses an element of fault that is in law sufficient, in addition to the requisite mental element, to base criminal responsibility. The starting point in the chain of causation which seeks to attribute the prohibited consequences to an act of the accused is usually an unlawful act in itself. When that unlawful act is combined with the requisite mental element for the offence charged, causation is generally not an issue. For example, in the case of murder, where an accused intends to kill a person and performs an act which causes or contributes to that person's death, it is rare for an issue to arise as to whether the accused caused the victim's death. As I discussed in Cribbin, supra, where the jury is faced with a

> charge of murder and is satisfied that the accused intended to kill or intended to cause bodily harm that he knew was likely to cause death and was reckless as to whether death occurred, it will rarely be necessary for the trial judge to charge the jury on the standard of causation. In such a case, the mens rea requirement generally resolves any concerns about causation. It would be rare in a murder case where the intention to kill or to cause bodily harm likely to cause death is proven for the accused to be able to raise a doubt that, while he intended the result that occurred, he did not cause the intended result. …

[51] The necessary value judgment to be made in determining legal causation, namely whether a person should be held criminally liable for injuries caused in a consent fight has, in my view, been effectively determined by the Supreme Court in the *Jobidon* case, and affirmed in *Paice*, in concluding that consent will be vitiated in a consent fight where bodily harm is both caused and intended. Accordingly, I am satisfied that the question of legal causation is effectively answered through a determination of whether the evidence establishes the requisite degree of intention sufficient to vitiate consent in this case.

Intention

[52] In considering what must be established in terms of intention, the starting point, as noted by the Crown, is that aggravated assault is an offence of general intent. In *R. v. Foti*, 2002 MBCA 122, the Manitoba Court of Appeal summarized the law in relation to *mens rea* and aggravated assault as follows:

> 13 The mens rea necessary to constitute the offence of aggravated assault can be divided into two parts. First, there is the underlying unlawful act. In this case, that would be the assault. Second, there would be the mens rea necessary to constitute aggravated assault.
>
> …

> 20 The second part of the mens rea requirement for aggravated assault is objective foresight of the risk of bodily harm. One does not have to prove that the accused actually intended the serious wound that in fact resulted. All the Crown has to prove is that a reasonable person would inevitably have realized that the assault in question would subject another person to the risk of bodily harm. That was stated in a brief decision of the Supreme Court of Canada in R. v. Godin, [1994] 2 S.C.R. 484 at 485:
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> > The mens rea required for s. 268(1) of the Criminal Code, R.S.C., 1985, c. C-46, is objective foresight of bodily harm. It is not necessary that there be an intent to wound or maim or disfigure. The section pertains to an assault that has the consequences of wounding, maiming or disfiguring. This result flows from the decisions of the Court in R. v. DeSousa, [1992] 2 S.C.R. 944, and R. v. Creighton, [1993] 3 S.C.R. 3.
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> 21 In R. v. Brodie (C.A.) (1995), 60 B.C.A.C. 153, a case dealing with a charge of aggravated assault, the British Columbia Court of Appeal explained the decision in Godin, stating at para. 4:
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> > Reference to the decisions in DeSousa and Creighton [in Godin] establishes that "objective foresight of bodily harm" means objective foresight of risk of bodily harm. Thus the important question in this case is whether a reasonable person in the position of the accused would have foreseen that in doing what he did he exposed the complainant to any risk of bodily harm.

[53] Thus, while aggravated assault is a general intent offence, the Crown must nonetheless prove that the harm caused was objectively foreseeable. The question, however, is whether the Crown must prove more in relation to intention in order to vitiate consent in light of *Jobidon* and *Paice*.

[54] In *R. v. Sullivan*, 2011 NLCA 6, the Newfoundland and Labrador Court of Appeal applied the *Godin* test with respect to intention in a consent fight situation. The case involved a fist fight outside a bar in which the complainant suffered a broken jaw. The trial judge found that in addition to uppercuts, the accused had kneed the complainant in

the face, thereby changing the nature of the fight that had been consented to such that the accused could not rely on consent as a defence, and convicted the accused. On appeal, the majority rejected this analysis noting "the test to be applied when assessing whether consent has been vitiated is whether serious bodily harm was caused and intended". With respect to the question of intention, Welsh J. referenced, the *Godin* test and held at para. 24:

> Applying this test to the case on appeal, it was not necessary for the Crown to prove that Mr. Sullivan intended to break the complainant's jaw. In the context of a consensual fist fight, in light of *Paice*, the necessary *mens rea* will be proven if it is established beyond a reasonable doubt that force was applied recklessly and the risk of serious bodily harm was objectively foreseeable.

[55] The Court held there was no basis to interfere with the trial judge's finding that the accused had kneed the complainant in the face, but suggested that even without that fact, the conduct of the accused was sufficient to vitiate consent, noting at para. 25:

> The facts as found by the trial judge lead to the conclusion that Mr. Sullivan acted recklessly in using his knee, particularly making contact with the complainant's face. Serious bodily harm was objectively foreseeable as a result of this action. Further, Mr. Sullivan was reckless in applying what are described as "uppercuts" to the complainant's face. Mr. Sullivan testified that he applied these "as hard as I could". While he followed this information with the comment, "At the time it wasn't very hard because I was pretty [beat] out", he also testified that "something had to give" when he administered those blows. In the circumstances, this action was reckless. The risk of serious bodily harm was objectively foreseeable as a consequence.

[56] Other cases have suggested that the Crown must prove, not just foreseeability, but that the accused intended to cause harm, although the cases differ between the

degree of harm the accused must have intended, with the most common phrases being intention to cause “serious bodily harm” or to cause “non-trivial bodily harm”.

[57] In *R. v. Oldford*, 2002 BCSC 800, the British Columbia Court of Appeal considered the test set out by the Supreme Court of Canada in *Jobidon*, namely that consent would be vitiated “between adults intentionally to apply force causing serious harm or non-trivial bodily harm to each other in the course of fist fight or brawl”, and noted two issues of concern in interpreting the test:

> 10 Gonthier J.'s statement of the test contains two potential ambiguities which must be resolved from an interpretation of the decision as a whole. First, it is not clear whether the word "intentionally" modifies only the ingredient of application of force or whether it also applies to the effect of the force in causing harm. In other words, is it only necessary for there to be an intention to apply force or must there also be an intention to cause "serious harm or non-trivial bodily harm"? The second potential ambiguity is whether the phrases "serious harm" and "non-trivial bodily harm" were intended to be synonymous or, alternatively, whether the phrase "serious harm or non-trivial bodily harm" was intended to be conjunctive or disjunctive?

[58] Tysoe J. resolves the former ambiguity, as was later clarified by the Supreme Court of Canada in *Paice*, in finding that there must be an intention, not just to apply force, but to cause harm.

[59] With respect to the second ambiguity, in *Paice*, the terms “serious bodily harm” and “non-trivial bodily harm” both appear. The Court uses the term “serious bodily harm” most frequently, but the decision does not expressly resolve the ambiguity in *Jobidon* regarding the degree of harm that must be intended to vitiate consent.

[60] In *Oldford*, at para. 14, the Court addressed this second ambiguity as follows:

> Turning to the degree of harm, it is my opinion that Gonthier J. was not intending to equate non-trivial bodily harm to serious harm (unless he meant that any non-trivial bodily harm would be considered to be serious harm). In my view, there is a spectrum of harm which lies between serious harm and non-trivial bodily harm. There can be harm which is non-trivial but which would not be considered serious. I believe that Gonthier J. was intending to convey that the consent would be negated if the accused intended to cause serious harm and that it would also be negated if the accused intended to cause non-trivial harm. After he formulated the test, Gonthier J. did specifically address the degree of harm contemplated in the test:
>
> > Finally, the preceding formulation avoids nullification of consent to intentional applications of force which cause only minor hurt or trivial bodily harm. The bodily harm contemplated by the test is essentially equivalent to that contemplated by the definition found in s. 267(2) of the Code, dealing with the offence of assault causing bodily harm. The section defines bodily harm as "any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature". (p. 495)
>
> The conclusion that Gonthier J. did not intend to equate "non-trivial bodily harm" to "serious harm" is evident from the decision in Jobidon itself. At p. 463, Gonthier J. recited that the trial judge found that Mr. Jobidon did not intend to cause serious bodily harm to the deceased. If consent was only to be vitiated if there was an intent to cause serious bodily harm, then the consent of the deceased in Jobidon would not have been vitiated and the Supreme Court of Canada would not have upheld the conviction. The Court did uphold the conviction because, although he did not intend to cause serious bodily harm, Mr. Jobidon did intend to cause non-trivial bodily harm to the deceased.

[61] In my view, Tysoe, J.'s reasoning is persuasive, and I would adopt his articulation of the test set out in para. 12:

> …Hence, the test in my view is that the consent to a fist fight is vitiated if the accused (i) intended to apply force, (ii) <u>intended to cause non-trivial bodily harm</u> and (iii) did cause bodily harm. [emphasis added]

[62] The first and third parts have essentially already been addressed in this decision. The intention to apply force is implicit in Mr. Johnson's consent to engage in the fight, and, as already noted, I am satisfied that Mr. Johnson did cause harm to Mr. Carlick sufficient to establish wounding.

[63] Before addressing the second part, the intention to cause non-trivial bodily harm, I would note that the element of objective foreseeability of the injuries, as referenced in *Sullivan*, remains an additional element to be proven, irrespective of the question of consent, as it would be in any aggravated assault per *Godin*.

[64] In terms of intention to cause non-trivial bodily harm, I note that Mr. Johnson did not testify in these proceedings, as is his right. However, this means there is no direct evidence before me of his subjective intentions in applying force to Mr. Carlick. Thus, intention must be inferred from the circumstances.

[65] I have reviewed cases with factual similarities, specifically consent fist fights, to assist in making this determination. It should be noted that some of the cases are charges of assault causing bodily harm rather than aggravated assault, but the legal issue remains the same.

[66] In *R. v. Storey*, 2010 NBQB 86, a decision of the New Brunswick Court of Queen's Bench, as it then was, the accused approached the complainant's vehicle and challenged him to a fight. The Court found that the complainant, still seated in the vehicle, consented in both words and actions. He spat in the accused's face and swung at him. The accused blocked the blow and struck the complainant three times in the face. The Court went on to find that consent was vitiated as the accused intended to

cause bodily harm. Ferguson J. reached this conclusion on the basis that the accused was much bigger than the complainant; he had a positional advantage as the complainant was seated in the vehicle while he was standing blocking the complainant's exit; the injuries, a broken jaw and splintered orbital bone, similar to the case at bar, were indicative of significant force used in the punches; and the accused struck the complainant in a vital and fragile area of the body from a position where it was reasonable to assume that serious injury was inevitable.

[67] In *R. v. W.(G.),* [1994] 18 O.R. (3d) 321 (C.A.), the Ontario Court of Appeal upheld a conviction in relation to two 16-year-old males who met and exchanged words then pushes, followed by blows. The appellant struck the complainant in the face at least three times. As a result, the complainant's nose was broken and required surgical repair. Doherty J. made the following comments in relation to these facts when viewed through the policy considerations identified in *Jobidon*:

> The pertinent findings of fact include the appellant's intention (to cause serious harm to the complainant), the nature of the force he applied to the complainant (three blows with the fist to the face), and the consequence of his actions (bodily harm to the complainant). Bearing these findings of fact in mind, the policy concerns identified in Jobidon militate against holding that the complainant's consent should nullify the appellant's culpability. The appellant's actions were more than "socially useless", they were dangerous and he intended that they be dangerous. His conduct and state of mind accompanying that conduct demonstrate a total disregard for the bodily integrity of the complainant. The appellant's actions posed as significant a threat to public order as did Jobidon's. Furthermore, it is very important that young persons appreciate the "social taboo" associated with solving disputes by resort to physical violence.

[68] In *R. v. J.M.* (2001), 53 W.C.B. (2d) 71 (Ont. Ct. J.) a decision out of the Ontario Court of Justice, the accused punched the complainant outside of the locker room after

a hockey game, knocking out two of the complainant's teeth. The complainant then punched the accused knocking him unconscious. The trial judge found that the complainant had not consented to fight but found that the fact the complainant dropped his hockey equipment to submit to the inevitable was sufficient to raise the question of honest but mistaken belief in consent. In addressing the question of intention vis-à-vis consent as a defence, while only one blow was struck, the Court considered the policies underlying the *Jobidon* decision, particularly the social uselessness of fighting, and stated: "The blow was a substantial one. Any blow to the head with fists forcibly applied is dangerous, in my opinion, and bodily harm is foreseeable every time you punch someone in the face" (para. 33).

[69] In *R. v. S.K.,* 2009 ONCJ 452, another decision of the Ontario Court of Justice, two athletic male youth of similar size agreed to meet away from school grounds for a fight. Once there, the two grabbed each other by the shirt and exchanged punches. One punch thrown by the accused hit the complainant in the temple causing him to fall back. Both fell to the ground and were pulled apart by others present. Later it was learned that the punch to the temple had fractured the complainant's skull, severed an artery, and caused an epidural bleed, requiring emergency surgery.

[70] The trial judge found at para. 116:

> …This was not a scuffle. Here, the similarly aged defendant punched someone in the face with great force. A great deal of harm is always foreseeable from such a punch, especially delivered by a strong young man with an athletic build and prowess.

[71] With respect to intent, the accused testified that he did not intend to cause bodily harm but agreed that he intended to punch the complainant in the head and that such punches are given to hurt the recipient. He further agreed that anytime you punch someone in the head, there is a good chance you are going to hurt them.

[72] Ultimately, the trial judge held, at para. 141, that the accused:

> … did intend to cause bodily harm to the victim. Although he did not intend G.M. to suffer the particular grievous injury that he ultimately did, he did intend to cause him some harm. He knew it would be more than trivial. He expected to leave bruises on G.M. It was objectively foreseeable that a fist to that part of the head would engender bodily harm. He took that risk when he hit G.M. there.

[73] In *R. v. C.L.,* 2011 BCSC 857, the British Columbia Supreme Court upheld a conviction for assault causing bodily harm in circumstances where two classmates exchanged words and pushes and the 17-year-old appellant then punched the complainant in the face, breaking his nose. The appeal judge reviewed many of the foregoing cases and found:

> 63 To intend to do something is to do it deliberately. If there is no direct evidence of intent, the Court will have to use common sense and infer from all of the evidence whether an accused person intended to do something.
>
> 64 The question in the present case is whether there was sufficient evidence for the trial judge to conclude that the accused actually intended to cause more than a non-trivial injury when he struck the complainant in the face with his fist.
>
> 65 The trial judge in the present case talked about intent to cause harm in paras. 17-20, which I have referred to in para. 7 of my decision. The trial judge found that C.L. did not have the specific intent to cause the nature of the harm that he did cause. However, the learned trial judge concluded that he did intend to apply force and certainly to cause more than trivial harm. The learned trial judge reached this conclusion based on the nature

> of the assault, the fact that it was to the face with a closed fist, and that it was with some force administered by a "strapping, athletic young man".
>
> 66 It is true that only one blow was struck, but again that was largely a circumstance of the particular fight. The blow struck was sufficient to knock M. to the ground, and the fight continued on the ground with wrestling until the parties were separated.
>
> 67 I am satisfied that the evidence was reasonably capable of supporting the trial judge's conclusion. In other words, that he could have reasonably reach the conclusion he did upon the evidence.
>
> 68 The trial judge had the opportunity to observe these two young men give their evidence and reach some conclusions about their levels of maturity. He also had sufficient evidence to conclude that C.L. did intend to cause more than non-trivial harm; he intended to win the fight, that meant by stopping M. He may not have intended to break M.'s nose, but he certainly intended to hit him in the face with significant force, and it was objectively foreseeable that he could cause the nature of the injury he did.

[74] There is a common theme in these cases, namely that it is objectively foreseeable that punches to the face will result in serious bodily harm, and that when such blows are administered with force, the assailant is routinely found to have intended to cause non-trivial bodily harm, thereby vitiating consent.

[75] The only case I located in my review that did not reach this conclusion was that of *R. v. M.(S.),* [1995] 22 O.R. (3d) 605 (C.A.), an Ontario Court of Appeal decision in which two teenage girls exchanged words in a restaurant, where the complainant more than likely slapped the appellant, and the two were asked to leave. Outside, the accused hit the complainant on the side of the head with her purse, grabbed her by the hair, pulled her head down, and struck at her five or six times with her other hand. The complainant suffered a quarter inch cut and swelling to her nose. No stitches were required. The Court noted, while not a consent fight, the appellant had an honest but mistaken belief in consent. The Court held that the appellant could rely on this as a

defence given the absence of any intention to cause serious harm and the relatively minor bodily harm that was caused.

[76] In the case of Mr. Johnson, I am satisfied, based on the following circumstances, that he intended to cause Mr. Carlick non-trivial bodily harm:

- The two had been bickering and arguing for the better part of the day;

- By the time they arrived back at Randy's residence, they were yelling and swearing at each other. Based on this, I am satisfied that both of them were extremely angry with the other;

- Things had come to a head, and both got out of the vehicle intending to settle the dispute physically;

- Mr. Johnson was the bigger of the two, though this by no means dissuaded Mr. Carlick who was no stranger to fighting and could hold his own;

- While Mr. Carlick threw the first punch, both of them were punching each other in the face. Given the level of anger both exhibited, and the injuries suffered by Mr. Carlick, I am satisfied that these blows were administered with force, and as noted in many of the cases, where blows are deliberately administered to the face of another, bodily harm is not just foreseeable, but probable; and

- I am satisfied that both Mr. Johnson and Mr. Carlick punched each other with the clear intention of causing the other bodily harm.

[77] In the circumstances, consent is vitiated per the limitation established in *Jobidon*.

[78] In conclusion, I find that Mr. Johnson intentionally applied force to Mr. Carlick in what began as a consent fight; that he caused Mr. Carlick's injuries, at least one of which amounted to a wound; that the injuries suffered by Mr. Carlick were objectively foreseeable, and that Mr. Johnson intended to cause more than trivial bodily harm to Mr. Carlick, thereby vitiating consent. As a result, I must find Mr. Johnson guilty of committing an aggravated assault on Mr. Carlick.

[79] In so concluding, I am mindful of the fact that Mr. Carlick was clearly a willing and equal party in this fight. As noted, I am satisfied that he too fully intended to cause non-trivial harm to Mr. Johnson. Ultimately, I am satisfied that Mr. Carlick is very much an equal author of his own misfortune. That however is an issue to be addressed in sentencing.

_____

RUDDY T.C.J.