

SUPREME COURT OF YUKON

Citation: *Liedtke-Thompson v. Gignac*,
2013 YKSC 9

Date: 20130204
S.C. No. 11-A0009
Registry: Whitehorse

Between:

TINA LIEDTKE-THOMPSON

Plaintiff

And

PAUL GIGNAC

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Susan Roothman
Debra L. Fendrick

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a sad tale of conflict between long-standing friends and neighbours involving mutual allegations of inappropriate sexual suggestions and violence. The unfortunate incidents occurred during a social event on the property of the defendant, Paul Gignac, and his wife, Darcie Gignac, in the late evening hours of May 1 and the early morning hours May 2, 2009.

[2] The plaintiff, who now goes by Tina Liedtke, says that, on the evening of May 1st, she was invited to join Mr. Gignac, his wife and a number of guests, who were

drinking beer, playing darts, and listening to music. The socializing was mainly taking place in and around a detached shop at the rear of Mr. Gignac's property, although there was periodic movement by some guests in and out of the house and its attached garage throughout the evening.

[3] During the two weeks prior to this party, Ms. Liedtke alleges that Mr. Gignac made inappropriate sexual advances towards her and, in particular, suggested that the two of them have a "threesome" with his wife. She says that she was upset by these advances and decided to speak further with Mr. Gignac about them, and also with Ms. Gignac, if necessary. Ms. Liedtke testified that she had an opportunity to speak with Mr. Gignac about this during the early morning hours of May 2, 2009, but that the conversation was overheard in part by Ms. Gignac. Shortly afterwards, Ms. Liedtke discussed the issue with Ms. Gignac, who became very upset and apparently threatened to overdose on some pills. Ms. Liedtke called 911, and the RCMP ultimately transported Ms. Gignac to the Whitehorse General Hospital to be checked out. Ms. Liedtke then returned to the shop to get another beer, when she alleges she was confronted by an enraged Mr. Gignac, who demanded to know why she had told his wife about the proposed threesome. Ms. Liedtke testified that Mr. Gignac immediately punched her in the left eye, causing her to fall to the floor and also causing her nose to start bleeding. She then said that Mr. Gignac "stomped" on her upper body repeatedly while she begged him to stop and said she was sorry. After Mr. Gignac stopped this attack, Ms. Liedtke alleges that she returned to her home, with the assistance of one of the guests, Mike Symynuk. Once at home, Ms. Liedtke says that she was assisted by

her daughter, Julia, and soon after taken to the hospital. Her injuries included a broken right collarbone and multiple bruises. Ms. Liedtke also alleges psychological injuries.

[4] Mr. Gignac, who has filed a counter-claim as well as a defence, agreed that he had a conversation about a threesome with Ms. Liedtke about two weeks prior to the party, but testified that it was Ms. Liedtke who suggested the idea and not him.

Mr. Gignac said that he did not take the offer seriously and told Ms. Liedtke, apparently half-jokingly, that he was not going to pursue the matter, but that she could talk to Darcie about it if she wanted to. As for the events in the early morning hours of May 2, 2009, Mr. Gignac testified that, at one point, he went to retrieve a beer from the fridge in the attached garage, and discovered Ms. Liedtke having a conversation with Ms. Gignac. Ms. Gignac immediately confronted Mr. Gignac in an angry fashion about the alleged threesome proposal, and then told him to leave the garage, which he did. Although Ms. Liedtke soon after told Mr. Gignac of her concern that Darcie was suicidal, Mr. Gignac testified that he and two of his friends went into the house and satisfied themselves that she was not attempting to overdose. However, Mr. Gignac said that he was not aware that Ms. Gignac was subsequently taken to the hospital by the police until some time after the fact. He alleged that Ms. Liedtke came towards him in an angry fashion about the fact that his wife had been taken to hospital, and was attempting to scratch at him and push him. Mr. Gignac testified that the two exchanged angry unpleasantries and he told Ms. Liedtke to leave. He said that he then turned his back to Ms. Liedtke and heard Mr. Symynuk yell "Paul look out!", at which time he felt a blinding pain on the left side of his head. Mr. Gignac testified that he remembered nothing

further for a period of time. He regained consciousness while sitting in a chair in the shop, when he noticed that he was bleeding from the left side of his head.

[5] Mr. Symynuk testified that he saw Ms. Liedtke strike Mr. Gignac on the head with a piece of wood. He then said the two struggled and fell over a snow machine, landing on the shop floor, with Mr. Gignac on top of Ms. Liedtke, between the snow machine and a car parked parallel to it, about two or three feet away. Mr. Symynuk testified that Ms. Liedtke got up and left the shop on her own and he did not see her again. He did not see Ms. Liedtke's face after the fall and did not recall her suffering any injuries.

[6] A criminal charge of common assault, later upgraded to assault causing bodily harm, was laid against Mr. Gignac. However, a stay of proceedings on that charge was entered on February 10, 2010.

[7] Ms. Liedtke filed her statement of claim for assault and battery on April 26, 2011. On June 21, 2011, Mr. Gignac filed his statement of defence and counterclaim, also alleging an assault and battery. Both counsel agree that there is no limitation issue with respect to the counterclaim. They have also agreed that this phase of the trial will deal solely with the issue of liability.

ISSUE

[8] Obviously, there are competing versions of the facts from each of the parties. The central issue in this trial is the assessment of the credibility and reliability of each party's testimony in the context of all of the evidence, principally including the testimony of Darcie Gignac, Mike Symynuk and another guest by the name of Paul Clements.

EVIDENCE

[9] There is no dispute about the law in this trial. Clearly, each party has the burden of proving whether it is more probable than not that what they allege has occurred. The tort of battery involves the intentional application of force to another person which interferes with that person's bodily security. This is well summarized in *Ellis v. Fallios-Guthierrez*, 2012 ONSC 1670, at para. 50:

"50 Generally speaking, in order to establish the intentional tort of "battery" the plaintiff must prove that the defendant intentionally caused some harmful or offensive contact with the plaintiff. The tort is designed to protect the bodily integrity and security of individuals from deliberate interference by others and seeks to reduce the incidence of violence in our society. Accordingly, when one individual, for example, punches or kicks another, or intentionally engages in any other similar type of direct or indirect invasion of their bodily security, beyond the trivial and incidental contact reasonably expected in the course of crowded ordinary life, they have committed a battery and are civilly liable for any damages the victim suffers in the result. See: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at pp. 246, 303; A.M. Linden and B. Feldthusen, *Canadian Tort Law* (2011, 9th ed.), at pp. 42-46."

[10] Ms. Liedtke's counsel filed a number of cases dealing with the issue of self-defence. However, on Ms. Liedtke's version of the events, Mr. Gignac was an unprovoked aggressor, and no issue of self-defence arises. On Mr. Gignac's version of events, he recalls nothing of the struggle between him and Ms. Liedtke after he was struck on the head by her, and Mr. Symynuk's evidence of what Mr. Gignac did in response, which I will return to later, was extremely limited. Therefore, self-defence only nominally arises as an issue. The question of whether the force applied by Mr. Gignac to Ms. Liedtke after he was struck was reasonable and proportionate was not argued.

Indeed, if Mr. Symynuk's evidence is accepted, then it would appear that Ms. Liedtke's injuries were probably the result of the struggle and subsequent fall over the snow machine, as opposed to any particularly intentional action on Mr. Gignac's part.

1. Ms. Liedtke's Claim

[11] Ms. Liedtke testified that she is presently 45 years old and has three adult daughters ranging in age from 23 to 19. She said that she met the Gignacs in 1991, when Ms. Gignac came to work for her as a hairdresser. In September 2005, Ms. Liedtke purchased the house next door to the Gignacs and became their neighbour. She testified that the two families became very close, often socializing and pursuing outdoor activities together. Indeed, she and Darcie became the best of friends. Ms. Liedtke's 19-year-old daughter, Julia, also became the best friend of the Gignacs' daughter of the same age, Robyn, and described her as being like "a sister".

[12] Ms. Liedtke recounted four incidents within a period of approximately two weeks prior to May 1, 2009, which raised concerns about Mr. Gignac's intentions towards her.

[13] Ms. Liedtke testified that the first incident occurred on or about April 17, 2009. She specifically recalled this date because it was the evening of the birthday party of Marie Benns, a mutual friend of her and Ms. Gignac. Ms. Liedtke said that she was at home asleep on the couch and when she woke up to find Mr. Gignac in the living room, with a beer in his hand. She said the two sat on the couch together and had a conversation which included the disclosures that Mr. Gignac was feeling depressed, that Darcie had recently had surgery, and that she was experiencing hormone issues and was not being affectionate towards him sexually. Ms. Liedtke said that Mr. Gignac asked for a hug, which she agreed to, and that he said he loved her. She responded

that she loved him also, but “like a brother”. Ms. Leidtke said that Mr. Gignac indicated he would like more attention from Darcie. She suggested that he should talk to Ms. Gignac about that. Ms. Leidtke said that Mr. Gignac returned to his home after about two hours.

[14] Ms. Liedtke testified that she thought this visit by Mr. Gignac was “out of character for him”. Accordingly, she mentioned it to her daughter, Julia, the next day, and later to a close friend,Carolynn Van Bibber. Ms. Liedtke said that she received advice from Ms. Van Bibber to try to talk to Mr. Gignac about her concerns and suggest that he in turn talk to Darcie to work things out.

[15] Ms. Liedtke described the second incident as occurring at a Whitehorse business premise called Holm’s Mechanical. She said that she often went there after work for a beer or two because her then-boyfriend worked at a business next door. She said that Mr. Gignac had never been there before in her presence. However, on this particular day, Mr. Gignac attended with a male friend of his, Shane Reed, and Mr. Reed’s daughter. The tenor of Ms. Liedtke’s evidence on the point was that Mr. Gignac’s unusual attendance at Holm’s Mechanical suggested that he might have been “following” her. In any event, she ultimately agreed to give Mr. Gignac a ride home afterwards.

[16] The third incident which Ms. Liedtke testified about involved her being at home and hearing a knock on her back door. She said that Mr. Gignac arrived with a bottle of wine in hand and that the two once again sat together on the living room couch, and shared the wine. Ms. Liedtke said she asked Mr. Gignac whether he had discussed his marital issues with Darcie and he said he had not. She said that Mr. Gignac then asked

her to shut the curtains in the living room, which she declined to do. Ms. Liedtke said that at one point during the conversation, Mr. Gignac suggested that he, she and Darcie should have a threesome sometime. She said that Mr. Gignac indicated that he and Ms. Gignac had had a threesome with another man before. Ms. Liedtke further testified that Mr. Gignac said that he wanted to eat her pussy, at which point he began opening his pants and “jerking off”. She said she asked Mr. Gignac to leave, and he did. She said she felt “very uncomfortable” about this conversation, and subsequently spoke with one of her daughters about how she wanted an opportunity to talk to Ms. Gignac about it.

[17] The fourth incident described by Ms. Liedtke involved Mr. Gignac’s daughter, Robyn. According to Ms. Liedtke, Robyn was present in Ms. Liedtke’s home when the phone rang and Robyn answered it. According to Ms. Liedtke, Robyn had an odd look on her face, hung up the phone and said that it was her dad and that he thought he was talking to Ms. Liedtke. However, when Robyn was asked to relay what Mr. Gignac had said, she declined.

[18] On Friday, May 1, 2009, Ms. Liedtke finished work, picked up a 15-pack of beer, and went to see her boyfriend at Holm’s Mechanical, where she had a couple of beer. She said that she then returned home about 6:30 or 7:00 PM and noticed Mr. Gignac, Jeff Chamber and Mike Symynuk in Mr. Gignac’s yard standing around drinking beer and chatting. Ms. Liedtke said that one of them asked her if she had any beer and she replied that she did. She said that she went in to her house to briefly check on how her daughters were doing and told them that she was going next door to have a few beers.

[19] Ms. Liedtke said that she then went over to Mr. Gignac's property and, when she discovered that Darcie was in the house, she went in to speak with her. She said that it was a very nice day to be outside and that people were moving back and forth between the yard, the shop, where there was a beer fridge, the house, and the attached garage, where there was another beer fridge. At one point Ms. Liedtke said she went back to her home to get some more beer. At a later point, she said that she also recalled Mr. Chamber and Mr. Clements leaving to get more beer.

[20] Ms. Liedtke testified that, at another time during that night, she was in the shop alone with Mr. Gignac, and asked him if he had talked with Darcie about their marital problems. She said that Ms. Gignac came to the door of the shop while this conversation was going on and stated, "I thought something was going on." She looked quite upset.

[21] Ms. Liedtke said Ms. Gignac then went into the attached garage and she followed her. She said Darcie was asking what the hell Ms. Liedtke had done with Mr. Gignac. Ms. Liedtke said she responded that nothing had happened, but that he had made her uncomfortable and had brought up the topic of the three of them having a threesome. She said Ms. Gignac was upset and replied that this reminded her of an earlier affair Mr. Gignac had with a neighbour when they lived in a different area of the subdivision. Ms. Liedtke testified that Darcie told her to get the hell out of her home, and then entered the house. She explained that she did not leave as requested, because she was concerned about her friend being so upset. She observed Ms. Gignac enter into the bathroom and lock the door. However, Ms. Liedtke was able to enter the

bathroom by another door and noticed pills all over the counter. She assumed Darcie had taken some pills and called 911.

[22] Ms. Liedtke testified she then went back to the shop to inform Mr. Gignac about Darcie being really upset and potentially suicidal. She said she returned to the house to try to calm down Ms. Gignac, but she would have nothing to do with her.

[23] Ms. Liedtke said the police then arrived and she told them she was concerned about Darcie's mental state. She said Darcie was taken to the hospital about 1:00 AM.

[24] Ms. Liedtke testified that she next returned to the attached garage where she found Mr. Symynuk, who appeared overwhelmed by what was happening with Ms. Gignac. She said she had a brief discussion with him, telling him that Mr. Gignac had been sexually inappropriate with her earlier.

[25] Ms. Liedtke said she then returned to the shop to get another beer and to ensure that everyone was okay. She said she did not like how everything was going and that she wanted to fix it. Ms. Liedtke described her state of intoxication at that point as about five out of 10. Immediately upon entering the shop, she claimed that Mr. Gignac demanded, "What the fuck did you tell her?" Ms. Liedtke said she explained to Mr. Gignac that she had talked with Darcie because Darcie had overheard the two of them speaking earlier and that she had been looking for an opportunity to speak with her about it. She said Mr. Gignac again replied, "What in the hell did you tell her?", and immediately punched her in the left eye causing her nose to begin bleeding. Ms. Liedtke acknowledged Mr. Gignac told her to leave the shop, but maintained that she was assaulted before she had a chance to do so. She said she fell to the floor as a result of

the blow to her eye, and that Mr. Gignac started stomping on her repeatedly, while she begged for him to stop, said she was sorry, and tried to protect her head with her arms.

[26] Ms. Liedtke testified that after Mr. Gignac ceased his assault, she ended up in the middle of the backyard on her knees yelling for help. She said Mr. Symynuk helped her get up, and walked her through Mr. Gignac's wire mesh gate and to the end of the common fence line near the street, following which she returned to her house unassisted.

[27] Ms. Liedtke said that she was hysterical when she entered her house and was crying and yelling for her daughter, Julia, to assist. After entering, she slumped down on the floor, with her back against the front door. She suspected that her collarbone was broken. When Julia arrived, Ms. Liedtke yelled that Mr. Gignac had beaten her. She said Julia then called 911, as well as a cousin, who called others in turn, to assist.

[28] Eventually, the police arrived and Ms. Liedtke was taken to hospital in an ambulance. At the hospital, Ms. Liedtke was treated in the emergency room by Dr. Chau. Ms. Liedtke testified she told Dr. Chau that she had been beaten up by Mr. Gignac and that no one helped her until Mr. Symynuk did so. She said she was discharged the following morning and returned home.

[29] Ms. Liedtke testified that she suffered the following physical injuries from Mr. Gignac:

- a) a broken right collarbone (shattered in several places);
- b) a surface bruise above the broken collarbone;
- c) a blackened left eye and reddening to the sclera of the eyeball;
- d) a bleeding nose;

- e) several bruises to her forearms and upper arms;
- f) a bruise on her left hand;
- g) a bruise on the inside of her left leg: and
- h) a lump on the back of her head.

[30] Ms. Liedtke also claims she has suffered psychological injuries, including:

- a) feeling very isolated and withdrawn;
- b) feeling paranoid;
- c) feeling a distrust of people in general;
- d) feeling very self-conscious;
- e) having a hard time relaxing and enjoying things (e.g. this past Christmas holiday); and
- f) depression and crying.

[31] Ms. Liedtke said she received referrals to Many Rivers Counselling and Alcohol and Drug Services for counselling, but only gave evidence about attending a one-month treatment program with the latter agency. She described herself as a recovering alcoholic, but presented no further evidence or details in that regard.

[32] Ms. Liedtke denied assaulting Mr. Gignac.

2. Mr. Gignac's Counterclaim

[33] Mr. Gignac is presently 50 years old and has been married to Darcie Gignac for almost 27 years. The couple's only child is their daughter, Robyn. Mr. Gignac has a grade 12 education and has been employed for the last 19 years as a truck driver with a propane delivery company in Whitehorse.

[34] Paul and Darcie Gignac moved to the Yukon in 1991. Ms. Gignac almost immediately obtained work with Ms. Liedtke and the two subsequently became very good friends. Mr. Gignac echoed Ms. Liedtke's testimony about their two families spending a lot of time together and becoming very close. He said Ms. Liedtke was a "good friend" until the incident in May 2009.

[35] Mr. Gignac recalled two incidents where he visited with Ms. Liedtke in the two-week period prior to the party on May 1, 2009. He said the first visit came about while he was working in his backyard. Mr. Gignac said Ms. Liedtke came up to their common fence and asked him if he could give her a couple of beers. He said, "Sure", and grabbed two beers from the fridge in the shop and handed them to Ms. Liedtke. He said they talked briefly and that she invited him to join her at her house for a couple of beers. Mr. Gignac said that he agreed and went over there. However, Mr. Gignac testified Ms. Liedtke entered her home by her back door, while he went down to the street in front of their houses, came around their common fence, and entered through the front door. He said they chatted generally about their children and other everyday matters and that, after he finished his two beers, he went home without any incident.

[36] Mr. Gignac testified that the second visit began much the same way as the first, with him working in the backyard and being approached by Ms. Liedtke over their common fence requesting a couple of beers. He said he replied that he did not have any beer, but did have some wine. Mr. Gignac said Ms. Liedtke requested a bottle, which he agreed to supply after finishing the work he was involved with. He said he then obtained a bottle of wine and went to Ms. Liedtke's front door where he knocked to gain entry. Mr. Gignac said he gave her the bottle of wine and Ms. Liedtke then invited him in

to join her for a glass. He said they had some general conversation, as before, but at one point, Ms. Liedtke suggested that he talk to Darcie about the three of them having a threesome. Mr. Gignac said Ms. Liedtke was “giggly” when she said that, and appeared to have had a few drinks beforehand. He said that he laughed off the proposal and did not take it seriously, responding “No, I don’t think so, if you want to ask her, you do it yourself.” Mr. Gignac said that he finished his wine and left without any further incident.

[37] Mr. Gignac acknowledged seeing Ms. Liedtke at Holms’ Mechanical on one occasion. He explained that earlier in the day he had been speaking with a co-worker, Luc Gauvin, about some mechanical snowmobile issues, and that Luc told him that he was going over to Holm’s Mechanical later. Mr. Gignac further explained that, after he returned home, he decided to catch a ride to Holm’s Mechanical with a neighbour, Shane Reed, and his four-year-old daughter, who were heading over there. He said that he wanted to continue his discussion with Luc about the mechanical issues. Mr. Gignac said he did not know that Ms. Liedtke was there at that time. He explained that, shortly after he arrived, his friend, Shane, and his daughter left, leaving him to find another ride home. Initially he asked his co-worker, Luc, but decided to take an earlier opportunity to return home by going with Ms. Liedtke.

[38] Mr. Gignac testified that on May 1, 2009, he returned home after work and began enjoying what was a beautiful spring day. He put on his shorts and rubber “Crocs” style shoes and had a beer on his deck while waiting for his wife to return home. In the meantime, Mr. Gignac said he invited a number of friends, including Paul Clements, Shane Reed, Mike Symynuk, Jeff Chamber and Blair Carlsberg. He said the general plan was to play darts and shuffleboard in the shop and to have a few beers.

[39] Mr. Gignac testified that his wife arrived home about 5:30 PM, and that she was followed by Shane Reed and his daughter, Blair Carlsberg, Mike Symynuk and Jeff Chamber. He explained that he had 2 15-packs of beer in his fridge in the attached garage. The group began socializing on the deck and in the backyard. Mr. Gignac said that Paul Clements was the last guest to arrive.

[40] At one point, Mr. Gignac said he noticed Ms. Liedtke driving into her driveway. He said she had a bag of beer with her and asked to join their group. Mr. Gignac said he and Darcie invited Ms. Liedtke over, and that she already appeared intoxicated, exhibiting a giggly laugh and wobbly movements.

[41] Mr. Gignac testified that, as it was starting to get dark, Darcie suggested that the group move into the shop, which they all did, and that some of them played darts, listened to music and played shuffleboard. At that point, Mr. Gignac said his state of intoxication was about three to four out of 10.

[42] Mr. Gignac said the first significant interaction he had with Ms. Liedtke that night was after he noticed Darcie leaving the shop for a reason unknown to him. He then saw Ms. Liedtke leave the shop shortly afterwards. At some point after that, Mr. Gignac said he went to get another beer from the fridge in the attached garage. He said he saw Darcie and Ms. Liedtke in the garage arguing and Darcie immediately challenged him by saying, "What is this about you and Tina wanting a threesome?" Mr. Gignac said he responded, "Excuse me?", and that Darcie challenged him again, saying, "Yes, Tina said you came to her and asked her for a threesome." Mr. Gignac said he responded, "No, that did not happen that way. She wanted me to come to you to talk about having a threesome." Mr. Gignac said Darcie then asked, "Well, what about you snuggling her

breasts?”, to which he replied, “I gave her a hug when I left, that was all.” Mr. Gignac then stated that Darcie said, “I do not want to talk to you right now, just leave”, and that he returned to the shop. He said he was upset at that point and wanted to explain the situation further to Darcie, but that he intended to do so later.

[43] When Mr. Gignac returned to the shop, he said that Paul Clements, Mike Symynuk and Jeff Chamber were present. Mr. Gignac said Ms. Leidtke came into the shop yelling that Darcie had just taken some pills. Mr. Gignac said that he replied, “You are lying, I know my wife, Darcie did not take any pills.” However, when Ms. Leidtke insisted that Ms. Gignac had done so, Mr. Gignac testified that all four of the men decided to go into the house to confirm what had happened. He said Ms. Gignac was in the bathroom, but initially would not let anybody in. Mr. Gignac said Darcie eventually allowed Mr. Symynuk and Mr. Chamber into the bathroom and when they returned a few minutes later, they reported that, although there were pills all over the floor, Darcie had not taken any. Mr. Gignac then said that all four men returned to the shop to discuss what he described as a “ridiculous situation”.

[44] Mr. Gignac next testified that Ms. Leidtke once again returned to the shop in a very angry state, yelling, screaming and swearing at him, while advancing towards him, saying, “I told you Darcie would take some pills. The ambulance took her away.” Mr. Gignac said that he replied, “You lied about the pills before. You are lying again. Darcie would not take those pills.” He said Ms. Leidtke continued advancing towards him, trying to scratch at him and hit him with her hands.

[45] Mr. Gignac testified that Mr. Clements and Mr. Chamber left the shop at this point, announcing that they were going back into the house to check on Ms. Gignac a second time to make sure she was okay.

[46] Mr. Gignac said he continued to deal with Ms. Leidtke advancing towards him. He told her "Get the fuck out of here. I do not want you here anymore, you are not welcome. You lied before about pills and you are lying now. You lied about the conversation [about the threesome]. Get away from me you psycho bitch." He said that at one point he was backing up between the car and the snow machine and was blocking Ms. Leidtke's advances by pushing her hands and arms away. Mr. Gignac testified he repeatedly told Ms. Leidtke, "Get the fuck out of here. We do not want you here no more. You are just a psycho bitch. I am done with you. I don't want nothing to do with you."

[47] Then, as Mr. Gignac backed up towards the "man door" of the shop, he said he pivoted around, with Ms. Leidtke mirroring his movement, such that she ended up with her back to the man door. At that point, Mr. Gignac said he turned to face the back of the shop where Mr. Symynuk was positioned and started to walk towards him. Mr. Gignac then testified that Mr. Symynuk yelled, "Paul look out", and that as he turned to his left towards Ms. Leidtke, he felt a sharp blinding pain on the upper left side of his head. He said he does not remember anything after that until he was sitting in the brown armchair in the shop, being attended to by Mr. Clements, Mr. Symynuk and Mr. Chamber. He said that Mr. Clements was holding a rag to his head to stop the bleeding and that either Mr. Clements or Mr. Symynuk informed him that Ms. Leidtke had just hit him over the head with a piece of wood. By that time, Mr. Gignac said

Ms. Leidtke was no longer in the shop. Mr. Gignac said he was in a state of shock, and that he was feeling very cold and was shaking and confused.

[48] Mr. Gignac then said that, with the assistance of Mr. Clements, he walked to the house to have a hot shower. About 15 minutes later, he said that he returned to the shop, where the four men discussed the situation, and Mr. Clements took three photographs of the injuries to Mr. Gignac's head. Shortly after, two female police officers arrived to inquire about what had happened between Mr. Gignac and Ms. Leidtke. By then, Mr. Gignac said there were several people in Ms. Leidtke's driveway acting aggressively towards him. He thought he recognized the voice of one of her daughters. Mr. Gignac said he was taken by one of the police officers to the Whitehorse RCMP detachment, where he spent the night in custody for allegedly assaulting Ms. Leidtke. He said his head was pounding and he continued to feel shaky and dizzy, but was reluctant to go to sleep, so he remained standing the whole time. Mr. Gignac said he asked the jail guard for medical assistance two or three times that night, but none was provided.

[49] Mr. Gignac was released from custody at 1:09 PM on May 2, 2009, and was picked up by his wife, who immediately noticed his head injuries and, after driving him home for a shower, suggested that she drive him to the hospital for medical attention.

[50] At the Whitehorse General Hospital, Mr. Gignac was noted to have two lacerations in his scalp area. He received four stitches to close one wound and two stitches to close the other. He said he was also provided with a prescription for painkillers and an information sheet for the care and treatment of a concussion.

[51] Mr. Gignac's daughter, Robyn, took photographs of his head injuries before and after he received medical treatment at the hospital.

[52] Later that evening, Mr. Gignac said he and Darcie were questioning why he had been charged with assault and not Ms. Leidtke. He said he telephoned the Whitehorse RCMP detachment and that one of investigating officers, Constable Spicer, informed him that she had not observed any evidence to suggest Mr. Gignac had been assaulted, but that he was invited to come down to the detachment and provide a statement.

[53] The following Monday, Mr. and Ms. Gignac decided to retain a lawyer and were ultimately referred to Mr. E.J. Horembala. Mr. Gignac testified that, as soon as Mr. Horembala was retained, he went with the Gignacs to their shop to inspect the scene and advised them to bag certain items, such as the bloody shop towels and the piece of wood, and also to take photographs of the scene. Mr. Gignac said he had not moved anything around in the shop between being released from custody and taking the photographs.

[54] Mr. Gignac testified that his level of intoxication at the time of the incident with Ms. Leidtke was about six or seven out of 10.

[55] Mr. Gignac acknowledged a criminal record for a break and enter and theft and an assault. The break and enter conviction occurred when Mr. Gignac was about 16 years of age. He explained that he and his brother stole some pies, cooked them and ate them. He received probation for that offence. The assault occurred in early 1991 and involved a party where Ms. Gignac was present. Mr. Gignac felt that one of the men at the party was becoming too friendly with his wife and he asked him to stop. Eventually, other people got involved and there was an altercation outside. Mr. Gignac

ended up punching someone, although he could not be sure if it was the man he originally had a problem with. He pled guilty and received a \$500 fine for that offence.

3. The Other Evidence

a) *Julia Leidtke-Thompson*

[56] Ms. Leidtke-Thompson, whom I will refer to as Julia, is the 19-year-old daughter of Ms. Leidtke. She recalled three occasions during the few weeks prior to the incident that involved the topic of Mr. Gignac. On one occasion, her mother told her that Mr. Gignac had let himself into the house and that she woke up in the living room with him standing there. Her mother provided no further details. On the second occasion, her mother told her Mr. Gignac had been “a little over friendly” and made comments that made her feel uncomfortable. The third occasion was the telephone call answered by Mr. Gignac’s daughter, Robyn. Julia’s evidence about that call reflected that of her mother.

[57] Julia was at home in Ms. Leidtke’s house on May 1 and 2, 2009, because she was not feeling well. Julia saw Ms. Leidtke briefly after she returned home from work on May 1st at about 6:00 PM and said she did not appear to be intoxicated. At about 2:00 AM on May 2nd, Julia said she heard her name being called from inside the house and then a thump sound. She went to the front entrance way and saw her mother on the landing with her back to the front door in hysterics, saying she was in pain and that Mr. Gignac had beaten her, without providing any further particulars. Julia said her mother had a swollen black eye and blood on her face. She said she also observed what “seemed to be a foot mark of dirt on the front of her sweater”. Julia acknowledged that her mother was intoxicated at the time. She telephoned a cousin for assistance,

and then the police. Julia also telephoned her two older sisters for assistance. She later took photographs of her mother's injuries.

b) *Carolynn Van Bibber*

[58] Ms. Van Bibber is 45 years old and has been a friend of Ms. Leidtke for most of her life. She testified that in April 2009, Ms. Leidtke telephoned her at least three times indicating that Mr. Gignac made "sexual advances" towards her and she did not know what to do. Ms. Van Bibber did not recall any other details of those conversations, other than to say that she advised Ms. Leidtke to talk to Mr. Gignac and tell him to stop, and, if that did not work, then she should talk to his wife. She said she believes that Ms. Leidtke followed that advice, because she later told Ms. Van Bibber that she did so.

c) *Constable MacQuarrie*

[59] Constable MacQuarrie was one of the two police officers who attended Mr. Gignac's residence on two occasions in the late evening and early-morning hours of May 1 and 2, 2009. She first attended in response to what she understood was a potential suicide based on the call from Ms. Leidtke regarding Darcie Gignac possibly overdosing on some pills. Constable MacQuarrie described both Ms. Gignac and Ms. Leidtke as "intoxicated" at the time of the call. She said Ms. Gignac reluctantly agreed to accompany the police to Whitehorse General Hospital. Constable MacQuarrie said Ms. Leidtke told her she had told Ms. Gignac that she had been having an affair with Mr. Gignac for the previous three months.

[60] Constable MacQuarrie said she was the RCMP watch commander that night and described the night as being "crazy busy".

[61] Constable MacQuarrie attended the Gignac residence a second time in response to what she understood to be a domestic disturbance. On arrival, she spoke with Ms. Leidtke in the back of an ambulance in order to find out what happened. Constable MacQuarrie testified that, at first Ms. Leidtke said she did not know, but then she said she thought she was beaten up by Mr. Gignac and possibly three others. When Cst. MacQuarrie interviewed Mr. Gignac, she said he did not appear to know what was going on around him. Constable MacQuarrie also said Mr. Gignac appeared to be “really, really intoxicated”. On cross-examination, she agreed that Mr. Gignac was extremely cooperative, but was “totally out of it”, which could have been due to a head injury. She noticed two short, thin red scratches on Mr. Gignac’s forehead which she described as vertical, but noticed no other injuries. However, she did not examine his scalp and only spent one or two minutes with him at his property, before transporting him to the detachment. She was not involved with Mr. Gignac during the booking-in process at the detachment.

[62] Constable MacQuarrie said she spoke with Jeff Chamber, Mike Symynuk, and Paul Clements and noted that all three were extremely intoxicated and not particularly forthcoming with information. She said Mr. Chamber and Mr. Clements told her they had gone into the house looking for Ms. Gignac, and when they came back to the shop they saw Mr. Gignac bleeding from the head and Ms. Leidtke was no longer present. Constable MacQuarrie said Mr. Symynuk told her that he did not see what had happened at all, but that “it was a love triangle”. She said that he pointed out a piece of wood in the garage which he thought was used to hit Mr. Gignac on the head. Constable MacQuarrie described the piece of wood as being approximately 4 or 5

inches long, about the thickness of a 2 x 4, with nails protruding. However, she said she noticed no blood or hair on the wood, suggesting that this discounted what Mr. Symynuk was telling her.

[63] Constable MacQuarrie described Ms. Leidtke as being more intoxicated during her second attendance at the Gignac residence than she was during the first attendance. Indeed, she described her variously as being “very, very intoxicated” and “smashed”.

d) Mike Symynuk

[64] Mr. Symynuk is 49 years of age and has known Mr. Gignac for over 17 years. He said they had been “good friends” prior to the incident, but since then he has hardly seen him. Mr. Symynuk said he was sober when he arrived at the party at about 5:00 PM, but by the end his level of intoxication was about eight out of 10. He described Mr. Gignac’s photographs of the shop as accurately depicting the state of affairs as it was on May 2nd.

[65] At one point, Mr. Symynuk said he went into the attached garage and saw Darcie Gignac and Ms. Leidtke inside. He described Ms. Gignac as “crying” and said that “maybe” Ms. Leidtke was crying also. He said he turned and left the attached garage.

[66] At a later point in time, Mr. Symynuk said that he and Mr. Gignac were in the shop. Mr. Symynuk said he was standing at the back of the shop by the brown armchair. He said he observed Ms. Leidtke enter the shop and Mr. Gignac turned and repeatedly told her to “get the fuck out”. He could not recall if Ms. Leidtke was saying anything. Mr. Symynuk said Mr. Gignac went to usher Ms. Leidtke towards the door of the shop, and when Ms. Leidtke reached the door, Mr. Gignac turned around and

started walking back towards him. He then said he observed Ms. Leidtke pick up a block of wood and come at Mr. Gignac from behind. Mr. Symynuk said that he shouted, "Paul look out", and that as Mr. Gignac was starting to turn around to face Ms. Leidtke, she struck him in the head with the piece of wood. He said Mr. Gignac immediately put his arms up in self-defence. Mr. Symynuk said Mr. Gignac's back was then towards him, which obstructed his view of Ms. Leidtke. However, he observed the two of them fall over the snow machine, landing on the floor in the space between the snow machine and the car, with Mr. Gignac landing on top of Ms. Leidtke. Mr. Symynuk said he heard moaning from Mr. Gignac and crying from Ms. Leidtke as Mr. Gignac struggled to get off of Ms. Leidtke, and the two of them got back on their feet. He did not see Ms. Leidtke's face after the fall and did not recall noticing any injuries to her. He said she got up and left on her own and described her gait as a "mid-run".

[67] Mr. Symynuk said his memory "gets spotty from there", but he does recall that he talked with Mr. Gignac and Mr. Clements outside of the shop, that he told Mr. Clements about what he had just seen, that Mr. Gignac was "covered from head to toe with blood", and that he advised Mr. Gignac "to clean himself up".

[68] After the police arrived, Mr. Symynuk heard Mr. Clements trying to explain to the police what had happened, based on what Mr. Symynuk had told him. However, when the police appeared to give no credence to Mr. Clements' story, Mr. Symynuk chose not to cooperate further. Accordingly, he told the police that he did not see anything but a love triangle. However at that point, he did not know Mr. Gignac was about to be arrested.

[69] Mr. Symynuk said he did not hear anything about pills during that night.

[70] Mr. Symynuk also denied helping Ms. Leidtke to the end of the driveway as she described.

e) Paul Clements

[71] Mr. Clements is 44 years old and has known Mr. Gignac for approximately 16 years. He said he arrived at the Gignac residence about 9:00 or 9:30 PM on May 1, 2009, bringing with him two or three cans of beer. At about 11 PM, Mr. Clements determined he would need more beer, so he left the Gignac residence and went to the Casa Loma Hotel to buy some. He said when he returned to the Gignac residence, Darcie Gignac, who had been in the shop when he left, was no longer there. He said he detected a change of atmosphere at the party and tension in the air. He went to the attached garage and saw Ms. Gignac sitting on the inside step crying in Ms. Leidtke's presence. He decided to return to the shop.

[72] Later, Mr. Clements observed Ms. Leidtke enter the shop saying that Darcie was very upset and was going to kill herself by taking medications. He said that he, Mr. Gignac and Jeff Chamber all went into the house to see if Ms. Gignac was okay. Mr. Clements said they saw Ms. Gignac in the bathroom and determined that she was not taking any medications, so the three men returned to the shop.

[73] Mr. Clements said Ms. Leidtke once again came out to the shop to say that Darcie had disappeared. In response, Mr. Clements went back to the house and made an unsuccessful search for Ms. Gignac.

[74] Returning again to the shop, Mr. Clements observed Mr. Gignac trying to get Ms. Leidtke out of the shop, asking her to leave. Mr. Clements said he solicited the

assistance of Mr. Chamber to return to the house to look for Ms. Gignac, once again unsuccessfully.

[75] When Mr. Clements returned to the shop the second time, he observed Mr. Gignac bleeding from the head. He said he grabbed a rag to control the bleeding. Mr. Clements said he then encouraged Mr. Gignac to take a shower and change his clothes. He said he stood outside the bathroom while Mr. Gignac had a shower and was able to make a cell phone call to Darcie. He said that Ms. Gignac informed him that she was okay.

[76] Mr. Clements then said that he and Mr. Gignac returned to the shop where Mr. Chamber and Mr. Symynuk were still present. He said he cleaned up the blood on the floor between the snow machine and the automobile, as well as a trail of blood leading from the brown armchair to the shop door. He said he took photographs of Mr. Gignac's head wounds. He said the men continued to talk about the incident over a few more beers until the police arrived. Mr. Clements said it was Mr. Gignac who told him he had been struck by Ms. Leidtke with the piece of wood as he was trying to get her to leave the shop. He said Mr. Symynuk did not say much at that time. He described Mr. Gignac as being "still in shock", "shaking" and "almost teary".

[77] Mr. Clements explained that he tried to tell one of the police officers about Ms. Leidtke striking Mr. Gignac on the head with the piece of wood on the floor of the shop. He said that the police officer picked up the piece of wood, examined it quickly, and said "I don't think so."

[78] Mr. Clements identified the piece of wood in evidence as the one that he saw on the shop floor and the same one that was examined by the police officer.

[79] Mr. Clements testified that Mr. Gignac's photographs of the layout of the shop were an accurate representation of how it looked on May 2, 2009.

[80] Mr. Clements described his level of intoxication as approximately four out of 10.

f) Darcie Gignac

[81] Darcie Gignac is presently 47 years old and is employed as an employment standards officer with the Yukon Government. She agreed with Ms. Leidtke's description of how the two of them became close friends. In May 2009, Ms. Gignac said that Ms. Leidtke was coming over to her house "a lot", which was sometimes an issue for Mr. Gignac. She said that he did not like Ms. Leidtke's visits as much as she did, especially if she and Mr. Gignac had other plans.

[82] On the weekend of April 17 and 18, 2009, Ms. Gignac attended the birthday party of Marie Bennis.

[83] On May 1, 2009, Ms. Gignac testified she arrived home about 5:30 PM, after previously stopping to pick up a 15-pack of beer for herself. She then learned from Mr. Gignac that he had invited some guests over for the evening, which was not uncommon.

[84] At one point during the evening, after the guests had arrived, Ms. Gignac said she learned that Ms. Leidtke was upset because she had not been invited to Marie Bennis' birthday party, and repeatedly brought up the subject until Ms. Gignac said she did not want to discuss it anymore.

[85] Later, Ms. Gignac said she went into the house to go to the bathroom and came out into the attached garage where she found Ms. Leidtke, who said she wanted to talk about something. Initially, Ms. Gignac said she thought that Ms. Leidtke wanted to raise

the topic of Ms. Benns' birthday party again, but then realized that Ms. Leidtke wanted to discuss an incident with Mr. Gignac at her house which had occurred when Ms. Gignac was at the birthday party. Ms. Gignac testified that Ms. Leidtke told her that she and Mr. Gignac were having a couple of beers when Mr. Gignac told her he wanted her to ask Ms. Gignac about having a threesome. When Ms. Gignac indicated she could not believe what she was hearing, Ms. Leidtke repeated "Paul wants us to have a threesome" and said he also "cuddled my tits" when he was over there. Ms. Gignac said Mr. Gignac then arrived in the attached garage to get some more beer and she confronted him with what Ms. Leidtke had just told her. She said Mr. Gignac told her that it was Ms. Leidtke's idea to have the threesome and that he did not cuddle her tits, but only gave her a hug when he left her house. Ms. Gignac said she then told Mr. Gignac to leave, which he did. She said she turned to Ms. Leidtke and asked her to explain herself, and Ms. Leidtke laughed nervously saying something like, "It does not matter who brought it up, it's the same thing". Ms. Gignac replied, "That is not at all what you just told me" and "You have been at my house almost every day for two weeks and you never told me about this?" Ms. Gignac also testified that Ms. Leidtke told her she and Mr. Gignac had been having an affair for three months, but that they only "talked about it".

[86] Ms. Gignac said she ran into the house, grabbed a bottle of pills from the pantry, and attempted to lock herself in the bathroom. She said she told Ms. Leidtke to get the fuck out of the house and that she did not want to talk to her any more.

[87] Later, Ms. Gignac said she allowed Mr. Symynuk and Mr. Chamber into the bathroom to make sure she was okay. She said she told the two men what Ms. Leidtke just told her and that Ms. Leidtke kept changing her story.

[88] When Ms. Gignac came out of the bathroom, she saw that Ms. Leidtke was still present and told her that she did not want her in the house. Ms. Leidtke informed Ms. Gignac that she had just phoned the police. The police arrived shortly afterwards and persuaded Ms. Gignac to go to the Whitehorse General Hospital to be checked out.

[89] While at the hospital, Ms. Gignac testified that she received a telephone call from Mr. Clements informing her that Mr. Gignac was OK and having a shower, to which she replied that she was not interested.

[90] Ms. Gignac said that she was released from hospital and took a taxi home and went to bed.

[91] Ms. Gignac also testified that, after lunch on May 2nd, she agreed to pick Mr. Gignac up from the police detachment. She said he was shaking uncontrollably and she could see what she described as “ooze” on the side of his head. He reported to her that Ms. Leidtke had hit him on the head, but that he had been charged with assault. He said he wanted to go home and shower.

[92] Eventually, Ms. Gignac said she took Mr. Gignac to the hospital where his wounds were stitched and he was treated for concussion.

[93] Ms. Gignac denied striking Mr. Gignac in the head at any time. She also denied Ms. Leidtke’s version of events and testified that she did not hear Ms. Liedtke and Mr. Gignac having an intimate conversation alone in the shop. She also denied Ms. Leidtke’s testimony that Ms. Gignac said the news of the threesome reminded her

of Mr. Gignac's previous affair in the early 2000's. Ms. Gignac said that the only reference to an "affair" came from Ms. Leidtke.

[94] Ms. Gignac acknowledged an incident earlier in her marriage, where she and Mr. Gignac were having an argument, Mr. Gignac went into the bathroom, and Ms. Gignac used a kitchen cleaver to try and get through the door to continue the argument.

g. The Medical Evidence

[95] The emergency room physician, Dr. Chau, opined that Ms. Leidtke's injuries were consistent with an assault. However, he conceded on cross-examination that his assessment was based on the history provided by Ms. Leidtke, which was that she had been assaulted. Dr. Chau further conceded that the injuries he saw were also consistent with causes other than an assault, such as falling over and striking an object, or falling to the floor with force.

[96] Ms. Leidtke's long-time family physician, Dr. Macdonald, also opined that Ms. Leidtke's physical injuries were "consistent with trauma which does include assault". However, Dr. Macdonald similarly acknowledged that she relied heavily on the history provided to her by Ms. Leidtke about being assaulted. On cross-examination, Dr. Macdonald further conceded that although it might be "challenging" to attribute all of Ms. Leidtke's injuries to fall over an object, such an opinion "could be" expressed.

[97] As noted, Mr. Gignac attended the Whitehorse General Hospital on May 2nd. While he did not call any doctor at trial, an emergency room report was entered into evidence confirming his testimony that he received sutures for two lacerations to his head. He also tendered the photographs taken by his daughter, Robyn, of his head

injuries before and after the medical treatment, with the latter photos showing the stitches.

ANALYSIS

1. Ms. Leidtke's Claim

[98] The plaintiff's counsel referred to the often-cited case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), for the principle that where the evidence is in conflict, a trial judge must look for the extent to which a witness's story harmonizes with the preponderance of the evidence (para. 11):

“11 The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions....”

[99] In this case, counsel argued that Ms. Leidtke's evidence is in harmony with the rest of the evidence, whereas Mr. Gignac's evidence is not. However, that argument ignores the significant amount of evidence from Mr. Gignac and his witnesses, which I will return to shortly, that suggests he received two wounds to his head during the early morning hours of May 2, 2009. Ms. Leidtke's version of the facts fails to account for that evidence and therefore remains in disharmony with it. When I challenged counsel on this point, she responded that Mr. Gignac did not suffer his injuries that night. In order to accept that submission, I would have to disbelieve the evidence of four witnesses: Mr. Gignac, Mr. Symynuk, Mr. Clements and Darcie Gignac, as well as Mr. Gignac's

emergency room report. For reasons which follow, I have concluded that I am unable to do so.

[100] The plaintiff's counsel argued that Ms. Leidtke's evidence that she was confronted by Mr. Gignac in the shop upon entering is corroborated by the evidence of Mr. Clements and Mr. Symynuk, because both described Mr. Gignac as ushering Ms. Leidtke towards the shop door. Mr. Gignac, on the other hand, testified that Ms. Leidtke was advancing towards him at that point, attempting to scratch at him, push him and hit him, and that he was backing up and attempting to deflect her arms and hands. I acknowledge that there is an apparent inconsistency between Mr. Gignac's version of what took place during the initial confrontation between him and Ms. Leidtke and the version described by Ms. Leidtke, Mr. Symynuk and Mr. Clements. Therefore, I can accept that submission of plaintiff's counsel as far as it goes, however, as I just noted, it still ignores the evidence of Mr. Symynuk that Ms. Leidtke struck Mr. Gignac on the head with a piece of wood while his back was turned. It is therefore difficult to reconcile how counsel expects me to accept only that part of Mr. Symynuk's evidence, which she submits is corroborative, without accepting the balance of his evidence, which clearly contradicts Ms. Leidtke's evidence. The same can be said for Mr. Clements' photographs and observations of the wounds to Mr. Gignac's head, which he observed shortly after he had witnessed Mr. Gignac attempting to remove Ms. Leidtke from the shop. Once again, it is difficult to reconcile only that part of Mr. Clements' evidence which is potentially corroborative of the plaintiff's evidence, while ignoring the balance of his testimony, which clearly contradicts counsel's theory that Mr. Gignac's injuries were not sustained that night.

[101] The plaintiff's counsel repeatedly emphasized that Mr. Gignac immediately "followed" Ms. Leidtke out of the shop when she left to go into the attached garage to talk to Ms. Gignac about Mr. Gignac's sexual advances. According to Ms. Leidtke, this was right after Ms. Gignac overheard the private intimate conversation between her and Mr. Gignac in the shop. Unfortunately, counsel failed to clarify why this point was of such significance. If true, perhaps it was to indicate that Mr. Gignac had a "guilty mind" and wanted to prevent Ms. Leidtke from spilling the beans to Ms. Gignac. However, when Mr. Gignac was cross-examined on this point, he was very clear in stating that he did not immediately follow Ms. Liedtke. Rather, he said he finished the beer he was drinking and only left for the attached garage when he needed another beer.

[102] The plaintiff's counsel also submitted that, when Mr. Gignac was booked into cells at the RCMP detachment he was not wearing a shirt and there were no signs of any bruising on his body, which one would have expected to see if he and Ms. Leidtke fell over the front of the snow machine as described by Mr. Symynuk. While I accept this as an arguable submission, it is also conceivable that, if Mr. Gignac fell on top of Ms. Leidtke as Mr. Symynuk described, that could explain the absence of bruising on his body.

[103] The plaintiff's counsel further submitted that Ms. Leidtke's version of event is corroborated by the two medical doctors. However, each of the doctors also indicated that they were relying heavily upon the history of assault told to them by Ms. Leidtke in reaching their opinions on how the injuries were sustained. Further, they each allowed that Ms. Leidtke's injuries may not only have been the result of an assault, but could be attributed to other trauma, such as falling over an object and onto the floor. It is also

clear that the truth of what the plaintiff reported to her doctors must be established by the plaintiff's own evidence: *W.R.B. v. Plint*, 2001 BCSC 997, at para. 350.

[104] I also observed that Dr. Chau noted in his emergency room notes that Ms. Leidtke reported that she had been “ganged up” on and beaten. This was reflected in his subsequent written opinion where he said “The patient states that the injuries were sustained by an assault from a number of people who were present at the party...” Constable MacQuarrie also testified that Ms. Leidtke told her she thought she was beaten up by Mr. Gignac “and possibly three others”. This is clearly internally inconsistent with Ms. Leidtke’s testimony that the only person who assaulted her was Mr. Gignac.

[105] The plaintiff’s counsel also argued that Ms. Leidtke’s evidence was corroborated by her daughter, Julia. I agree that Julia’s evidence is potentially corroborative of Ms. Leidtke’s evidence about the two visits from Mr. Gignac prior to May 1, 2009. However, regarding the phone call involving Mr. Gignac’s daughter, Robyn, there is no evidence about what she heard during that call, as Julia said Robyn declined to provide particulars. Further, Robyn was not called as a witness in this trial. Julia’s evidence that her mother arrived home saying that she had been ‘beaten’ by Mr. Gignac is also generally corroborative, but given Ms. Leidtke’s inconsistent statements about the nature of the assault to Constable MacQuarrie and Dr. Chau, this evidence is not particularly probative.

[106] Ultimately, the only non-hearsay evidence that Ms. Leidtke was assaulted by Mr. Gignac was from Ms. Leidtke herself.

2. The Challenges to Mr. Gignac's Credibility and Reliability

[107] The plaintiff's counsel argued that Mr. Gignac's previous conviction for an assault supports the proposition that he was probably the aggressor in the confrontation with Ms. Leidtke, relying on *R. v. Grandin*, 2001 BCCA 340, at para. 51. However, with respect, that submission ignores the Court of Appeal's conclusion, at para. 54 of *Grandin*, that the single nine-year-old conviction for assault had little probative value since it was "one act of violence that occurred almost a decade ago." In the case at bar, the singular act of violence on Mr. Gignac's criminal record involved an assault on a male person, which was apparently minor given the modest fine imposed, and was over 20 years ago. Therefore, I conclude that this is too remote in time to have any real value in determining who the likely aggressor was on May 2, 2009.

[108] The plaintiff's counsel also argued that Mr. Gignac's version of the events must be viewed skeptically because of two pieces of evidence indicating his dishonesty. The first is his criminal conviction for a break and enter and theft. It is commonly accepted that a conviction for theft does involve an element of dishonesty. However, in the case at bar, the conviction is even more remote in time than the assault, occurring some 34 years ago, when Mr. Gignac was a teenager. The second piece of evidence relied upon by counsel is the admission by Mr. Gignac that he had an affair during his marriage to Darcie Gignac, which she says is inherently dishonest. While I can accept that submission, it must also be remembered that this affair apparently occurred in the early 1990's, again over 20 years ago. Therefore, this evidence has little if any probative force. In short, I give no merit to counsel's submission regarding Mr. Gignac's dishonesty.

[109] The plaintiff's counsel also argued that Mr. Gignac's version of the events was not put to Ms. Leidtke in cross-examination. This raises the issue of the so-called rule in *Browne v. Dunn*. The purpose of the rule, which is more commonly employed in criminal cases, is to ensure that a witness is given an opportunity to state his or her position about the contradictory evidence of a later witness, by requiring counsel cross-examining the first witness to bring that person's attention to the nature of the contradictory evidence. The rule was well summarized in *R. v. Verney*, (1993), 87 C.C.C. (3d) 363 (Ont. C.A.), at para. 28:

“...*Browne v. Dunn* is a rule of fairness that prevents the "ambush" of a witness by not giving him an opportunity to state his position with respect to later evidence which contradicts him on an essential matter. It is not, however, an absolute rule and counsel must not feel obliged to slog through a witness's evidence-in-chief putting him on notice of every detail that the defence does not accept...” (my emphasis)

Further, as was noted in *Stewart v. Canadian Broadcasting Corporation* (1997), 150 D.L.R. (4th) 24 (Ont. C.J. (Gen. Div.)), at para. 377, civil actions generally result in much greater disclosure of the factual issues than takes place in a criminal prosecution. In the case at bar, Mr. Gignac's theory of the case is clearly set-out in his counterclaim.

Furthermore, both parties have been examined for discovery. Therefore, I fail to see how Ms. Leidtke is in any way prejudiced from the fact that Mr. Gignac's counsel did not specifically cross-examine her on each of the allegations made by him and his witnesses regarding her assault upon him. Therefore, I give no merit to this submission.

[110] The plaintiff's counsel also submitted that Darcie Gignac's evidence should be discounted “because of course she would take Mr. Gignac's side”, as his wife. However, counsel pointed to no particular piece of evidence as an example of this alleged bias.

Further, I found Ms. Gignac to be very much a “no-nonsense” witness, who was clearly not afraid to confront her husband on the issue of the alleged threesome and prior affair with Ms. Leidtke. I also found Ms. Gignac’s evidence to be largely harmonious with that of the other witnesses. Indeed, much of her evidence about what was discussed between her and Ms. Leidtke in the attached garage was corroborated by Ms. Leidtke herself.

[111] The plaintiff’s counsel also made a number of other submissions why I should disbelieve Mr. Gignac and his witnesses.

[112] First, counsel argued that Mr. Gignac failed to prove that his scalp injuries were caused by the piece of wood in evidence. In particular, counsel argued that expert evidence was required from Mr. Gignac in order to prove causation in that regard. While such evidence would have been helpful, I disagree that it is essential. I find that a reasonable inference can be drawn from the testimony of Mr. Symynuk that Mr. Gignac’s injuries were caused by the piece of wood in evidence. Although Mr. Symynuk himself could not certainly identify the piece of wood in evidence as the one he saw that evening, the evidence of Mr. Clements was that Mr. Symynuk had pointed out the item to him. Accordingly, Mr. Clements was able to identify the piece of wood in evidence as the same one which he understood was used by Ms. Leidtke, and also as the item which was briefly examined by one of the police officers.

[113] The nature of Mr. Gignac’s injuries suggest that a further reasonable inference can be made that, when Ms. Leidtke struck Mr. Gignac, she did not make contact with a sharp edge of the piece of wood. Rather, it appears more likely that she struck him with its broadside, in a glancing fashion. Further, I find that the two nail heads protruding

from the weapon are approximately the same distance apart as the lacerations to Mr. Gignac's scalp. It is therefore likely, in my view, that these lacerations were caused by a glancing blow in which the nail heads made contact with Mr. Gignac's scalp.

[114] Second, the plaintiff's counsel argued that there was no blood on the brown armchair shown in the photographs. Since this is the same chair which Mr. Clements says Mr. Gignac was sitting in while he was bleeding from the scalp after being attacked by Ms. Leidtke, counsel says this is inconsistent with Mr. Gignac's evidence that he sustained a head wound that evening. However, the evidence does not actually establish one way or the other whether there was any blood on the brown armchair. All we know is that a close-up photograph of the armchair was not taken by Mr. Gignac. And, as I understood his evidence, his explanation for not doing so is that, following the advice of his lawyer, he was attempting to photograph the relative position and layout of the items and vehicles in the shop. Further, it is unclear from the evidence of Mr. Clements when he began to apply rags or towels to stop the bleeding from Mr. Gignac's scalp. If he did so before or shortly after Mr. Gignac seated himself in the armchair, then that would explain the absence of blood on the chair. However, I am quick to repeat that there is simply no evidence whether there was or was not blood on the armchair. Therefore, I can give little weight to this submission.

[115] Third, the plaintiff's counsel made a related submission focusing on the fact that Mr. Gignac did not preserve the clothing he was wearing on the night of the incident. Rather, he took a shower right afterwards, and Mr. Clements cleaned up the blood on the floor of the shop before the police arrived. I agree that, with the 20/20 vision of hindsight, it might indeed have been helpful and probative if Mr. Gignac had bagged up

his bloody clothing, if photos had been taken of Mr. Gignac before he showered, and if Mr. Clements had not cleaned up the blood trails, in order that photographs could later be taken of them. However, the tenor of the submissions by the plaintiff's counsel in this regard was to suggest either: (1) that there was some type of intentional cover-up by Mr. Gignac and his friends; or (2) that the absence of this evidence suggests that Mr. Gignac was not bleeding as profusely, or indeed at all, as Mr. Symynuk and Mr. Clements testified.

[116] I will return to my assessment of the credibility and reliability of Mr. Gignac and his witnesses shortly, but for now it is sufficient to recognize that there is no evidence that Mr. Gignac, nor any of his friends present after the alleged attack by Ms. Leidtke, had any reason to believe that the police would become involved. Once again, the plaintiff's counsel implicitly suggested that the fact that no one called the police in response to the attack either indicates that there was no such attack or that Mr. Gignac was attempting to cover up his assault on Ms. Leidtke. However, it is important to remember the context of this conflict. Prior to that evening, Mr. Gignac considered himself to be good friends with Ms. Leidtke. Further, the two families were very close, with Ms. Gignac and Ms. Leidtke being best friends, and their respective daughters as close as sisters. As a result, it is understandable that there was some amount of discussion between Mr. Gignac and his friends after the alleged attack upon him, because everyone was trying to understand the situation and come to grips with it. Furthermore, there is a good deal of evidence to support the inference that Mr. Gignac was in a state of shock and was not thinking clearly. Lastly, there is the evidence that Mr. Gignac and his friends were all intoxicated to some degree, which can be expected

to have played a role in the extent to which any one of them exercised good judgment. It is therefore not surprising that, in those circumstances, no one's first response was to call the police and consider the shop as a potential crime scene.

[117] As well, given the medical records, it cannot reasonably be maintained that Mr. Gignac did not sustain his injuries around the time frame of the alleged assault by Ms. Leidtke.

3. Mr. Gignac's Counterclaim

[118] Generally speaking, I found Mr. Gignac to be a careful and straightforward witness. Although he was intoxicated (he blew 166 mg percent upon being booked into the RCMP cells), subjectively he described his level of intoxication at the time of the alleged assault by Ms. Leidtke as approximately six or seven out of 10, which was more than that reported by Mr. Clements, but less than that reported by Mr. Symynuk.

Mr. Gignac also had few problems remembering the sequence of events on May 1 and 2, 2009, prior to the alleged assault. Thus, while his intoxication must be borne in mind when assessing his evidence, I did not find Mr. Gignac to be an unreliable witness.

[119] Frankly, I share the concerns of the plaintiff's counsel about the fact that Mr. Gignac failed to bag and preserve the clothing he was wearing at the time of the alleged assault, despite it apparently being covered with blood. Based on my comments above, I can understand why that was not immediately done after his shower and before the police arrived at his residence the second time. However, I find it curious that this topic was not addressed by Mr. or Ms. Gignac on or after the evening of May 2nd, by which time they had apparently begun thinking of retaining a lawyer and responding to

the criminal charge. There is simply no evidence one way or the other about what happened with the clothing.

[120] On the other hand, any concerns that I have about the absence of the bloody clothing are largely offset by the fact that Mr. Gignac has produced Mr. Symynuk as an independent eyewitness to the alleged assault. Clearly, Mr. Symynuk is the most important witness for Mr. Gignac, as he is the only witness to the alleged attack by Ms. Leidtke and the subsequent physical struggle between her and Mr. Gignac.

[121] Mr. Symynuk acknowledged that the extent of his intoxication by the end of the evening was about eight out of 10 and that his memory got “spotty” after witnessing the alleged attack by Ms. Leidtke. Clearly, that is a concern relating to his reliability.

[122] Mr. Symynuk also said that he did not hear anything about pills during the night. The matter of Darcie Gignac potentially overdosing on pills was testified to by Ms. Leidtke, Constable MacQuarrie, Mr. Gignac and Paul Clements. It was therefore a central event during the evening, and the fact that Mr. Symynuk has no memory of it also goes to his reliability.

[123] On the other hand, there is conflicting evidence about whether Mr. Symynuk was ever involved with Ms. Gignac in the house. Mr. Gignac testified that when Ms. Leidtke came out to warn the men that Darcie had possibly taken some pills, he, Mr. Clements, Mr. Chamber and Mr. Symynuk all went into the house to check on her. Further, Ms. Gignac also testified that when the men came into the house to check on her, she heard “Mike’s voice” and she allowed Mr. Symynuk and Mr. Chamber into the bathroom to speak with her. However, Mr. Clements, who was the least intoxicated of all of the witnesses, clearly testified that when he went into the house initially to check on

Ms. Gignac, he was only in the company of Mr. Gignac and Mr. Chamber. Further, Mr. Clements said that, after initially determining that Ms. Gignac was okay in the bathroom, he returned back into the house twice more to search for Ms. Gignac, and on the last occasion he was again in the company of Mr. Clements. At no time did Mr. Clements suggest that Mr. Symynuk was involved in any of the forays in the house to check on Ms. Gignac. To the extent that Mr. Clements' evidence varies from that of Mr. and Ms. Gignac, I prefer that of Mr. Clements. Therefore, I find as a fact that Mr. Symynuk did not go into the house to deal with Ms. Gignac and the pills, which helps to explain why Mr. Symynuk claims that he heard nothing about pills that night.

[124] Further, there is nothing to suggest that Mr. Symynuk was anything but an independent and unbiased witness. Although he was a long-time friend of Mr. Gignac prior to the events of May 1 and 2, 2009, since then he said that he has hardly seen him, which suggests that the friendship has fallen off.

[125] In addition, as I touched on above, Mr. Symynuk's description of Mr. Gignac "ushering" Ms. Leidtke out of the shop just before he was allegedly struck is partially corroborated by the evidence of Mr. Clements.

[126] Mr. Symynuk's unwillingness to be forthright with the police after their arrival about what he had witnessed is arguably a reason to be concerned about his credibility. However, it is more understandable when one takes into account that Mr. Symynuk overheard Mr. Clements recounting to the police what he understood had happened and pointing out the piece of wood which had allegedly been used as a weapon. According to Mr. Symynuk, the police gave "no credence" to Mr. Clements' story, which

led him to not want to be cooperative. Also, Mr. Symynuk had no idea at the time that Mr. Gignac was in danger of being arrested.

[127] Lastly, Mr. Symynuk's description about Mr. Gignac and Ms. Leidtke falling over the front of the snow machine and onto the floor in between the snow machine and the car, with Mr. Gignac on top Ms. Leidtke, is capable of explaining the nature and extent of Ms. Leidtke's injuries. That is particularly so when Ms. Leidtke herself acknowledged that she is especially susceptible to bruising easily, to the extent that she has discussed this with her family doctor.

[128] With respect to Mr. Clements, I find that his evidence is corroborated generally by the photographs he took of Mr. Gignac's scalp injuries immediately after Mr. Gignac had a taken a shower and returned to the shop. In one of the photographs, it is obvious from various items on the shelving in the background, when compared with Mr. Gignac's photographs of the shop, that Mr. Clements photographed Mr. Gignac in the shop and likely around the relevant time period. Further, the fact that Mr. Gignac appears to have wet hair in Mr. Clements' photos is consistent with the evidence of both Mr. Gignac and Mr. Clements that the former had a shower before the photographs were taken. Finally, it appears that the wounds to Mr. Gignac's scalp in Mr. Clements' photos are relatively fresh and open. That is in contrast to the photographs of Mr. Gignac's head taken by his daughter Robyn in the early afternoon on May 2, 2009, by which time the wounds have an appearance of being scabbed over. All of this evidence as a whole tends to make untenable the theory of the plaintiff's counsel that the injuries were not suffered by Mr. Gignac the in the early morning hours of May 2, 2009.

4. The Challenges to Ms. Leidtke's Credibility and Reliability

[129] I will lastly turn to a number of points specifically relating to Ms. Leidtke's credibility and reliability.

[130] Firstly, in relation to her certainty about her testimony, Ms. Leidtke was cross-examined about the following evidence at her examination for discovery, which she acknowledged was the truth:

- "Q Do you acknowledge that you hit Mr. Gignac with a piece of wood in the early hours of May 2nd-?
- A No.
- Q --2009?
- A No.
- Q You deny that absolutely?
- A Yes.
- Q And do you have a certain knowledge that you did not do that, or do you have no recollection of doing that?
- A I have no recollection.
- Q So, you have no recollection of hitting Mr. Gignac on the back of the head?
- A Correct.
- Q You have no recollection of hitting Mr. Gignac from behind?
- A Correct." (my emphasis)

Obviously, there is an important distinction between a witness who testifies that they have actual knowledge that something did not occur and a witness who claims to have "no recollection" of whether something occurred or not. In the latter case, the witness has no memory and therefore cannot say one way or another whether something occurred. In my view, this is potentially fatal to Ms. Leidtke's claim. Further, her counsel made no effort to rehabilitate Ms. Leidtke on the point by re-examination.

[131] Secondly, it is perhaps not surprising that, at her examination for discovery, Ms. Leidtke claimed to have no recollection of hitting Mr. Gignac, since she was extremely intoxicated at the time. Constable MacQuarrie referred to her as being “very very intoxicated” and “smashed” during the second attendance by the RCMP at the Gignac residence. Further, even at 4:10 AM, when Dr. Chau examined Ms. Leidtke in the emergency room at Whitehorse General Hospital, he still observed her to be “intoxicated”. This evidence clearly impacts the reliability of Ms. Leidtke’s testimony.

[132] Thirdly, I find it surprising that when Ms. Leidtke finally claimed to have had an opportunity to confront Ms. Gignac with what Mr. Gignac had said to her earlier about the threesome, she failed to disclose two significant aspects of the threesome conversation which presumably contributed to her overall level of discomfort, i.e. Mr. Gignac saying that he wanted to eat her pussy, and then opening his pants and starting to jerk off. Common sense would suggest that, if Ms. Leidtke was indeed upset by this alleged conduct, then she would have raised it with Ms. Gignac together with the topic of the threesome.

[133] Fourthly, Ms. Leidtke’s evidence was significantly inconsistent with that of Mr. Symynuk in two respects. First, Ms. Leidtke claimed to have had a conversation with Mr. Symynuk in the attached garage during which she told him that Mr. Gignac had been sexually inappropriate with her earlier. Mr. Symynuk gave no such evidence, and the plaintiff’s counsel failed to cross-examine him on the point. Second, Ms. Leidtke’s evidence that Mr. Symynuk helped her to get up when she was on her knees in the driveway and walked her to the end of the common fence line, so that she could return home, was specifically denied by Mr. Symynuk.

[134] Fifthly, according to both Ms. Gignac and Constable MacQuarrie, Ms. Leidtke spoke to each of them about having “an affair” with Mr. Gignac for the previous three months. Further, according to Ms. Gignac, when Ms. Leidtke relayed this information, she then attempted to clarify by saying that she and Mr. Gignac “only talked about it”, presumably referring to the affair. This evidence is internally inconsistent, contradictory and confusing for at least a couple of reasons. First, Ms. Leidtke made no reference to such an affair in her testimony. Second, Ms. Leidtke clearly tried to convey through her trial testimony that she was uncomfortable with Mr. Gignac's previous sexual advances and that this was the reason she spoke to both Mr. Gignac and Ms. Gignac about those advances on the evening in question. However, that is inconsistent with the suggestion that she was having a consensual affair with Mr. Gignac for the previous three months.

[135] Sixthly, Ms. Leidtke gave inconsistent evidence about informing her friend, Carolynn Van Bibber, about what had happened with Mr. Gignac after their first visit prior to the incident. She testified in the trial that she talked with Ms. Van Bibber about the first visit “at least once before the second visit”. However, at her examination for discovery, she testified that she told Carolynn Van Bibber about the prior incidents with Mr. Gignac “After the second time he came over.” While that on its own may not seem a significant inconsistency, Ms. Leidtke’s trial testimony on this point was inconsistent in a further respect. In cross-examination, she conceded that she did not find the first visit traumatic and did not consider it to be a harassing conversation. Consequently, one would not expect her to have had any particular reason for discussing it with Ms. Van Bibber, as she testified to just a few minutes earlier.

[136] Lastly, Ms. Leidtke made an inconsistent statement to the RCMP on May 7, 2009. She testified about that as follows:

“Q I’m showing you a copy of the statement. Is that your statement that you gave to Constable Spicer on May 7, 2009?

A Yes, it is.

Q Turn to the second page. That’s your signature?

A Yes.

Q And in that statement you said as follows [as read in]:

Q What happened last Friday night in your own words?

A After Darcy [phonetic] left the house I went to talk to Paul, which ended up in a yelling match. I remember him asking why I didn’t come to him or talk to him first. I told him I tried to. It was obvious Darcy was thinking something was up or wasn’t right. I was talking with Darcy about -- she wanted to know if there was something I needed to talk about. She was afraid because a long time ago Paul was having an affair with someone across the street. She wanted to know why I did not come to her sooner.

Q What did you tell Darcy?

A That I was uncomfortable with Paul’s suggestive talk. He was telling me things he should be -- he should have been talking with her about.

Q After you spoke with Darcy about this and she left the house, what happened?

A I went out to talk with Paul. We got in a face-to-face heated discussion. I don’t know how the physical altercation happened. I can’t remember if there was even a witness. I only - I can only remember then seeing my daughter and niece downstairs when I was hurt.

Q Do you recall who injured you?

A No.

- Q What's the last thing you recall?
A Us yelling at each other, me and Paul.
Q Where were you and Paul?
A In the garage, I think, the back garage.
Q Was anyone in the room?
A I don't know. I'm assuming no one 'cause they would have done something to stop it.
Q What were you and Paul yelling about?
A He was yelling at me because I had talked to Darcy. I just wanted to tell them because I wanted it to stop. He was upset I didn't tell him. They are my best friends.
Q Would you like charges?
A I really don't think it's going to do anything for me or them. They have enough problems. We have been great friends. I believe he did it but I think he just snapped. This has never happened before.
Q Is there anything else, anything I've missed?
A Just wish this had never happened.

So that was your statement --

- A Yes, it is.
Q -- that you gave to the RCMP officer?
A Yes, it is.
Q Five days after the alleged incident?
A Yes.

...

- Q So, Ms. Leidtke, with respect to this statement, the officer asked you those questions and you gave those answers, right?
A That is correct.
Q And you told the truth to the police officer?
A No, I did not.
Q You lied to the police officer?
A I was protecting Paul and Darcy at this point, when my head had cleared. I had previously told the police that Paul had beat me. I had this illusion that our friendship could continue and that they would come

over and offer me an apology and offer some help to me.

Q So my question to you is did you lie to the police officer?

A What I said is factual but I did not say everything.

Q Did you lie to the police officer, yes or no?

A Yes, I did.” (my emphasis)

CONCLUSION

[137] In summary, I find that Ms. Leidtke has not proven her claim on a balance of probabilities. Furthermore, Ms. Leidtke has not been able to explain in any rational or coherent manner how Mr. Gignac suffered his head injuries.

[138] On the other hand, I find that Mr. Gignac’s evidence and that of Mr. Symynuk are broadly consistent with and mutually corroborative of the evidence of the various other witnesses, although there were admittedly variances in the details and specifics in some respects: see *R. v. Thomas*, 2012 ONSC 6653, at paras. 11-17. Furthermore, Mr. Symynuk’s evidence is capable of explaining how Ms. Leidtke suffered her injuries.

[139] Therefore, I dismiss Ms. Leidtke’s statement of claim and allow Mr. Gignac’s counterclaim by finding that Ms. Leidtke committed an assault and battery upon him.

[140] Counsel have agreed to address damages in the next phase of this trial.

Gower J.