

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

Cite as: R. v. MacNeil, 2012 NSPC 106

Date: December 3, 2012

Docket: 2356881

Registry: Halifax

**BETWEEN:**

**Her Majesty The Queen**

**v.**

**Ashton Thomas MacNeil**

**TRIAL DECISION CONCERNING THE CHARGE OF AGGRAVATED  
ASSAULT ON JONATHAN CLARKE**

**JUDGE:** The Honourable Anne S. Derrick

**HEARD:** November 6, 7, 8 and 9, 2012

**DECISION:** December 3, 2012

**CHARGES:** section 268(1), of the *Criminal Code*

**COUNSEL:** Christine Driscoll, for the Crown

**DEFENCE:** Luke Merrimen, for Ashton MacNeil

By the Court:

### *Introduction*

[1] On November 6 – 9, 2012 I heard Ashton MacNeil’s trial on charges of aggravated assault against Brett Myketsyn and Jonathan Clarke. In my decision of November 20 (*R. v. MacNeil, 2012 NSPC 105*) I found Mr. MacNeil guilty of the aggravated assault of Mr. Myketsyn. I indicated I was satisfied beyond a reasonable doubt that Mr. MacNeil had unlawfully assaulted Mr. Clarke but I asked Crown and Defence to provide me with some law on the issue of whether the injuries inflicted by the assault constituted “wounding” as contemplated by section 268(1) of the *Criminal Code*. This decision deals with that issue and addresses this question: in relation to the unlawful assault of Jonathan Clarke by Mr. MacNeil on August 26, 2011, is Mr. MacNeil guilty of aggravated assault as charged or the included offence of assault causing bodily harm?

[2] The aggravated assault charge against Mr. MacNeil for the assault on Mr. Clarke was not particularized. It contemplates that Mr. MacNeil can be found guilty of aggravated assault if Mr. Clarke’s injuries endangered his life or disfigured, maimed, or wounded him.

[3] I found in my decision of November 20 that Mr. Clarke’s life had not been endangered by Mr. MacNeil’s assault. (*R. v. MacNeil, 2012 NSPC 105, paragraph 104*) The Crown has conceded that Mr. Clarke’s injuries do not constitute disfigurement or maiming. What remains is whether Mr. Clarke’s injuries constituted “wounding” as contemplated by the use of that term in the context of the offence of aggravated assault.

### *Jonathan Clarke’s Injuries*

[4] The evidence of Mr. Clarke’s injuries is relevant to my determination of the “wounding” question. These reasons will be more coherent if I repeat this evidence, which I detailed in my November 20 decision at paragraphs 98 - 100.

[5] A CT scan indicated that Mr. Clarke did not have any bleeding in his brain from a major artery. Very small amounts of blood that had not pooled, were detected in several parts of his brain. There were areas of patchy, small bleeds throughout the brain and some blood in the ventricles. Dr. Henneberry (who treated Mr. Clarke in the ER) testified that Mr. Clarke’s brain showed signs of

having been shaken, rattled, or bruised. These injuries were consistent with what was described about the events that had occurred downtown. A neurosurgery consult was arranged but it was determined that no neurosurgical intervention was required.

[6] Jonathan Clarke had fractured bones in his face. His right cheek bone and his eye bone had breaks in them. They did not require treatment and were left to heal on their own. He had a cut by the corner of his right eye and bruising around that eye. (Exhibit 1, Photographs 27 – 30) He was in hospital for three days. He now has a small but obvious scar by his right eye that corresponds to the injury shown in the photographs taken by police.

#### *The Case Law on Wounding*

[7] Crown and Defence each provided me with a case: the Crown forwarded *R. v. Vincent*, [2011] O.J. No. 143 (S.C.J.) and I received *R. v. S.E.L.*, [2012] A.J. No. 366 (Q.B.) from Mr. Merrimen who also wrote a short brief.

[8] It is Mr. Merrimen's submission that section 268 of the *Criminal Code* "contemplates injuries more severe and long-lasting than those suffered by Mr. Clarke." He goes on to state:

The cut by the corner of Mr. Clarke's right eye was minor in nature. The cut did not require stitches. There was no significant breaking of the skin in this case.

With respect to Mr. Clarke's internal injuries, this is not a case where there was a severing of an artery. This is not a case involving extensive bleeding throughout the brain. There is no evidence of permanent damage to any internal tissues. Mr. Clarke's injuries did not require neurosurgical intervention.

[9] Mr. Merrimen's description of Mr. Clarke's injuries is accurate. The Defence position is that, having been found guilty of inflicting these injuries, Mr. MacNeil is guilty of assault causing bodily harm, not aggravated assault.

[10] Many cases, including *Vincent*, refer back to the Alberta Court of Appeal decision in *R. v. Littlelent*, [1985] A.J. No. 256 which upheld a conviction for

aggravated assault based on “wounding” where the victim, a correctional officer, had been assaulted by a prisoner and suffered a broken rib and fractured jaw, and a perforated ear drum that bled and was surgically repaired. He experienced constant ringing in his ear as a result of the assault. The court referred to him having sustained “substantial trauma” to the area around his ear. (*Littlelent*, paragraphs 2 – 4)

[11] Other cases since *Littlelent* have described the type of injury that constitutes “wounding.” A wound has been described as “a cut or breaking of the skin which bleeds, which is more than transient or trifling, and which will leave a scar if not surgically altered.” (*R. v. Hilderman*, [2005] A.J. No. 243 (Q.B.), paragraph 15) An internal injury can constitute “wounding.” (*R. v. Vincent*, paragraph 13) In *Vincent* it was held that “the seriousness of an aggravated assault by wounding should not be minimized by an artificially narrow definition of wounding, limited to external bleeding.” (paragraph 15)

[12] In *S.E.L.*, the court held that “An appropriate modern definition of “wounding” is tissue injury that results in permanent damage or dysfunction”, which on the facts in *S.E.L.* would have required “sustained loss of vision or impairment to [S.E.L.’s daughter’s] brain.” The court in *S.E.L.* held that aggravated assault by way of “wounding” required that the injuries have a “lasting effect” on the victim. In noting the requirement for “permanent damage or dysfunction”, the court referenced the *Vincent* decision.

[13] Permanent damage was also a feature of the injuries in *R. v. Kogon*, [2008] O.J. No. 3921. In that case, the injuries were frontal and right temporal cerebral contusions, permanent hearing loss, and ongoing problems with vertigo. The Ontario Superior Court of Justice found these injuries satisfied the definition of “wound” as it is used in section 268(1) of the *Criminal Code*. (*Kogon*, paragraph 5)

[14] And in *R. v. MacDonald*, [2010] N.S.J. No. 405 (S.C.), no issue was taken with the characterization of an assault as aggravated assault that left the victim with a jaw broken in two places, requiring surgery and the use of plates and screws. The victim could not chew for a month and half and was left with permanent nerve damage. (*MacDonald*, paragraph 13)

[15] Plainly, wounding must amount to more than “minor” bodily harm. (*Hilderman, paragraph 14*) “Bodily harm” assault is an intermediate level of assault, with simple assault being the least serious form of assault and aggravated assault being the most serious. As noted in *Vincent, paragraph 14*: “Parliament intended to reflect the increasing gravity in the definition and penalty for each kind of assault.”

### *Bodily Harm or Wounding?*

[16] Bodily harm itself lies along a continuum: there will be bodily harm that falls at the lower end and bodily harm that is more significant. To illustrate my point with examples, one-punch assaults charged as assault causing bodily harm have included such injuries as a black eye, bruised and swollen face, cut on the nose, and a bruised shoulder (*R. v. Sandoval, [1995] A.J. No. 1013 (P.C.)*) and, more significant injuries that led to unconsciousness and hospitalization (*R. v. Bennett, [2006] A.J. No. 540 (P.C.), paragraphs 2 and 27*) As I mentioned earlier, for injuries to amount to “wounding”, they must amount to more than “minor” bodily harm.

[17] Mr. Clarke’s injuries cannot be characterized as “minor” even though he recovered successfully and without surgery or stitches. He has a small scar near his eye. He had some bruising of his brain. He suffered broken facial bones.

[18] So, was Mr. Clarke subjected to an assault that inflicted serious bodily harm or was he “wounded”? I have struggled with this issue because Mr. Clarke’s injuries can be fitted inside the descriptions of wounding that include tissue breakage and internal bleeding. However, as the examples indicate, it is hard to discern a clear, bright line that distinguishes what tissue breakage and internal bleeding is “wounding” and what tissue breakage and internal bleeding is bodily harm.

[19] An assault is characterized as an aggravated assault when it involves injuries at the upper end of the injury spectrum, injuries that either endanger life, or disfigure, or maim, or wound. Surely then, wounding has to be bodily harm that sits at that end of the severity scale where disfigurement and maiming also belong.

[20] For the law to be coherent, there must be something that distinguishes wounding from serious bodily harm where the nature of the injuries alone do not make the distinction clear. In such cases, the distinguishing characteristic has to be the permanence or long-lasting effect of the injuries. In this respect I find the *S.E.L.* decision to be the most helpful to my analysis. The trial evidence indicated that Mr. Clarke's injuries healed after about 2 – 4 months. He is taking no medications and receiving no ongoing treatment. There are no physical changes to his face other than the scar by his eye. He testified that although he is once again playing competitive hockey, he is not playing it at the same level as before. But I do not know if that is related to his injuries directly or to his level of conditioning after a hiatus from playing, or some other reason.

[21] In *Vincent*, the victim suffered injuries more akin to Mr. Myketsyn's injuries than Mr. Clarke's. The Alberta Court of Queen's Bench noted the following about the injuries that had been inflicted:

...a fracture of a bone in the skull severed the meningeal artery, causing bleeding between the skull and the dura. The damage was evident to [the neurosurgeon] when he opened the skull during surgery. The pressure on the brain exerted by bleeding and resulting hematomas caused serious injury to Mr. Syposz's brain. I find the severing of the artery and the damage to the internal tissues constitutes wounding as defined by the Criminal Code. (*paragraph 17*)

[22] In *Vincent*, Mr. Syposz's medical condition at the time of trial, some 18 months after the assault, prevented him from being able to testify. (*Vincent, paragraph 18*)

[23] Wounding is an element of the offence of aggravated assault with which Mr. MacNeil is charged. The Crown must prove all the elements of the offence beyond a reasonable doubt. When I look at the injuries sustained by Mr. Myketsyn, and by Mr. Syposz in the *Vincent* case, the *Kogon* and *MacDonald* examples, and what the Alberta Court of Queen's Bench has had to say in the *S.E.L.* case, I find I am left with a doubt about whether Mr. Clarke's injuries constitute "wounding" as contemplated by section 268(1) of the *Criminal Code*. It is a doubt that must be

resolved in Mr. MacNeil's favour. I therefore find him not guilty of aggravated assault and guilty of the included offence of assault causing bodily harm.

[24] Nothing I have said should be seen as suggesting that Mr. Clarke's injuries were not serious. They were. He suffered a concussion, a cut near his eye, a brain injury, and broken facial bones. It is more a matter of good fortune than anything else that Mr. Clarke's injuries were not as severe as Mr. Myketsyn's. That being said, it is not uncommon for one-punch assaults to have tragic outcomes. Good fortune alone can be credited for that not being the result in this case.