SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Kennedy*, 2024 NSSC 155

Date: 20240402
Docket: CRH No. 518047
Registry: Halifax

Between:

His Majesty the King

v.

Noah Christopher Kennedy

DECISION

Judge:	The Honourable Justice John Bodurtha
Heard:	January 8, 9, 10, 11, and 12, 2024, in Halifax, Nova Scotia
Final Written Submissions:	February 2, 2024
Oral Decision:	April 2, 2024
Written Decision:	May 22, 2024
Counsel:	Emma Woodburn, for the Crown Thomas Singleton, for Noah Kennedy

By the Court (orally):

Overview

[1] You wake up in the middle of the night after a night of drinking with a swollen shut eye. How did this happen? You last remember arguing with your partner and him lunging at you. Your partner tells you a different version of events. He says the injury was an accident. He tried to lift you out of bed, he stumbled, lost his balance and fell on top of you on the bed with his left elbow hitting your left eye and breaking your orbital bone.

[2] This case boils down to credibility. Did the accused cause the injury by an intentional application of force to the eye socket or was it an accident. If intentional, was it an aggravated assault or assault causing bodily harm.

[3] These are the questions the Court must contend with in reviewing the evidence.

Facts

[4] The following are my findings of fact after listening to all the evidence except for the evidence from the complainant, Kaitlyn Thoms ("Thoms") and the accused, Noah Kennedy ("Kennedy"). Thoms and Kennedy have different versions of events as to what happened that night. Thoms claims Kennedy committed an assault against her, while Kennedy indicates that what transpired was an accident. My findings in relation to their evidence is discussed later in this decision.

[5] On August 23, 2020, Thoms went to the Dartmouth General Hospital. She was seen by Dr. Albert Williams. Diagnostic imaging was completed, and the results revealed bleeding behind the eye, and a displaced fracture of the left orbital floor. Dr. Williams testified that this type of injury was the result of a significant amount of force and was normally seen in four situations: a) an altercation, b) a sport injury, c) a car injury, or d) a fall.

[6] Thoms had surgery on August 27, 2020. At that time, they placed a titanium plate in her face to stabilize the fracture site.

[7] Thoms's immediate family members are Tracey Thoms (mother), Philip "Ted" Arnold (father), Jessica (sister) and Drew (brother). She currently lives at home with her mother in Dartmouth, NS. Her father resides in Dartmouth as well with his wife Nicole Arnold. Thoms has step-siblings who live at that residence.

[8] Thoms was in a romantic relationship with Kennedy. Kennedy lived with Thoms at her mother's residence. They were high school friends who started hanging out together then started dating quickly. Things took off after that and not long after they initially started dating, Kennedy began living at Thom's mother's place. They had been dating for a little over a year before the incident.

[9] On August 22, 2020, they went over to Thom's father's place. Kennedy drove them there. They arrived late afternoon/early evening. They did not plan to stay the night, but both were drinking, got intoxicated, and stayed the night.

Nicole Arnold's evidence

[10] When they arrived Nicole and Ted were at the residence. Brooklyn was in her room; other people came and went throughout the night.

[11] There are three bedrooms in the apartment unit. One for Thom's father and Nicole, the other for Desiree, and one for Brooklyn. The unit is large, you enter a large foyer, bathroom to the left and a little hallway to the left with a separate bedroom. At the time, the bedroom on the left belonged to Desiree. To the right after you go through the foyer is Nicole's bedroom. The third bedroom belonged to Brooklyn and is off the dining hall and closest to Nicole's bedroom.

[12] On August 22, 2020, Ted and Nicole were on the deck having alcohol. Thoms was coming over with her current boyfriend to have beverages.

[13] Nicole told them at the beginning of the night that they would be spending the night because they were both having beverages. Desiree planned to spend the night in Halifax at friends. Thoms and Kennedy were to spend the night in her room, the bedroom to the left, the farthest down the hall.

[14] In Desiree's room there was a bed and a wardrobe. When you walk in the door the bed is on the right, wardrobe on the left wall with a good distance in between the two.

[15] Desiree's room is in another section of the apartment. It was summertime and the air conditioning unit was on full blast which makes it difficult to hear things. The air conditioner is a portable standup unit which is located at the window in Nicole's bedroom.

[16] Nicole, Ted, Thoms and Kennedy were all chatting and drinking hard alcohol. Later that night around 10:45 pm, Ted ran out of cigarettes. He went with Kennedy to the store. Nicole went to bed prior to their return. The next morning when she woke up only herself and Ted were home.

[17] Nicole had a quart of rum that night but was still coherent. As soon as her head hit the pillow, she was asleep. She closed her bedroom door that night because Kennedy and Thoms were sleeping over.

Tracy Thoms's evidence

[18] Tracy Thoms is the mother to Drew (age 35), Jessica (age 31), Thoms (age 23), and Cory (age 17). At the time of the incident, she lived in Dartmouth with Thoms, Cory and Thoms's boyfriend, Kennedy.

[19] On August 23, 2020, she woke up and noticed the door to Thoms's room was shut when it was left open the night before. That night when she went to bed Thoms was not home. Tracy woke up around 5 am. The next contact with her daughter was around 6:30-7 am in the morning. Thoms was texting her from her bedroom on Facebook Messenger. Tracy went down to the bedroom and saw her daughter. She screamed, left the room and went to her bedroom where she got dressed, calmed down and decided to take Thoms to the hospital.

[20] She took a closer look at Thoms's injury and saw a swollen face, and a black eye almost swelled shut, and an eyeball that was not moving. Thoms was bruised all over her arms. She was so injured that it was hard to talk and hard to move. Tracy saw Thoms the night before and did not observe any of these injuries.

[21] She drove Thoms to the Dartmouth General Hospital. Her plan on the drive home from the hospital was to call the police but Thoms gave her a police card with an incident number to assure her the police had been called.

[22] Eventually, Tracy called the police. They came to the residence and spoke to Thoms. Tracy indicated that Kennedy has not returned to the home since the incident.

Jessica Thoms's evidence

[23] On August 23, 2020, she woke up to a text message from her mother, and immediately rushed home. She walked into Thoms's room, dropped to her knees and started crying. Thoms had a horrific black eye. She could open it up, but it was red from hemorrhaging.

Governing Principles

Presumption of Innocence and Burden of Proof

[24] Kennedy is presumed innocent of the charge. The Crown bears the burden of proof regarding each specific element of the charge and must prove Kennedy's guilt beyond a reasonable doubt. The standard of proof was summarised in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at paragraph 36:

> 36 Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
>
> the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
>
> the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
>
> a reasonable doubt is not a doubt based upon sympathy or prejudice;
>
> rather, it is based upon reason and common sense;
>
> it is logically connected to the evidence or absence of evidence;
>
> it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
>
> more is required than proof that the accused is probably guilty — a jury which concludes only that the accused is probably guilty must acquit.

[25] In *R. v. Starr*, 2000 SCC 40, Justice Iacobucci, for the majority, said that "an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities" (para. 242).

[26] Kennedy does not have to prove anything. The Crown must prove each element of the offence beyond a reasonable doubt.

Legislation

[27] Kennedy is charged under section 268(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. The sections read as follows:

> 268(1) Aggravated assault
>
> Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

Elements of the Offence

[28] The essential elements of the offence of aggravated assault that the Crown must prove beyond a reasonable doubt are:

> i. that the accused intentionally applied force to the complainant;
>
> ii. that the complainant did not consent to the force the accused (intentionally) applied;
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> iii. that the accused knew that the complainant did not consent to the force that the accused (intentionally) applied; and
>
> iv. that the force the accused (intentionally) applied wounded, maimed, disfigured or endangered the life of the complainant.

[29] If I am not satisfied that all the essential elements of the offence charged have been proved beyond a reasonable doubt, I must consider whether the essential elements for one of the included offences has been proven. In this case, assault causing bodily harm.

[30] The essential elements for assault causing bodily harm pursuant to section 267(b) of the *Criminal Code* are as follows:

> i. that the accused intentionally applied force to the complainant;
>
> ii. that the complainant did not consent to the force that the accused (intentionally) applied;
>
> iii. that the accused knew that the complainant did not consent to the force that the accused (intentionally) applied; and
>
> iv. that the force the accused (intentionally) applied caused the complainant bodily harm.

The first question to determine is whether Thoms's injuries amount to aggravated assault or assault causing bodily harm?

Section 268(1) of the Criminal Code: Aggravated Assault

[31] The *actus reus* of aggravated assault include: (i) an assault (touching without consent) and (ii) resultant wounding, maiming, disfiguring, or endangering the life of the complainant.

[32] The *mens rea* of aggravated assault is intention, recklessness or wilful blindness to the act. Both aggravated assault and assault causing bodily harm require objective foresight of the risk of bodily harm. Objective foresight of the risk of the kind of injury suffered is not necessary: *R. v. Godin*, [1994] 2 S.C.R. 484, at para. 1.

Injuries

[33] Aggravated assault is distinguished by the consequences, therefore, understanding the extent of Thoms's injury is important. After reviewing the evidence submitted in the medical report (Exhibit 2), the testimony of Dr. Williams, and Thoms, I have summarized her injuries and subsequent medical care as follows:

Expert opinion of Dr. Williams

- His testimony and notes detail a ruptured eye: eye sunk behind socket, displaced fracture of the left orbital bone and bleeding behind the eye that you would not have been able to see.
- Required consultation with plastic surgeon and ophthalmologist.
- Dye in eye – demonstrated a defect behind the eye.
- Patient noted double vision, blurry vision (Exhibit 2, at p. 131).
- After consulting with other doctors in plastic surgery service – determined Thoms needed surgery.
- A titanium plate was placed in the eye and attached to the bone area for stability.
- It was a significant orbital injury if left untreated. The hematoma (blood behind the eye) could increase in size, swell and cause permanent vision loss, likewise, setting of the eyes following a permanent fracture can also lead to vision loss. Any eye injury has a concern for visual loss that can be permanent.

- Medical report documents Thoms has anemia and easily bruises (Exhibit 2, at p. 5).

Thoms's testimony:

- Bruising on upper arms, swollen eye, vomiting and headache (unsure if vomiting was due to alcohol or the injury).
- First treatment – Dartmouth General in the morning where they performed an x-ray on the skull (Exhibit 4, photo 10).
- Attended VG and QE2 on first day – one was to see the surgeon and the next was for scratches on her eye.
- Thoms was home after the first day of treatment.
- Thoms had to wait to have the surgery several days after the incident because of the hemorrhage under her eye.
- Thoms stayed overnight after the surgery and left the following day.
- Follow-up treatment - Thoms had to go for follow-up, and since the surgery has had sinus problems. The doctors believe it was a result of the plate. Thoms had nasal spray prescribed because she often had sinus infections.

[34] In this case, the Crown has not particularized the charge (i.e., wounded, maimed, disfigured, or endangered the life of). Absent any specification, I may find the injuries amount to one or more particulars: *R. v. MacDonald*, 2010 NSSC 280, at para. 31. The particular "endangering the life" is not applicable based on these facts because that refers to putting the person in a situation or condition that could cause the person to die.

"Wounding"

[35] Where injuries have amounted to wounds, courts have relied on factors including the (i) extent of bleeding, (ii) whether the bleeding was internal or external; (iii) permanence, and (iv) what medical treatment was required, if any.

(i) Extent of bleeding

[36] The wound must amount to more than "minor" bodily harm: *R. v. MacNeil*, 2012 NSPC 106, at para. 15 citing *R. v. Hilderman*, 2005 ABQB 106, at para. 14.

(ii) Internal or external bleeding

[37] The law on the extent of bleeding overlaps with whether the bleeding occurred internally, externally, or both. In *MacNeil*, Derrick J. (as she then was) refers to *Vincent* in which a wide interpretation of "wound" was adopted to include the separation of internal tissues at para. 11:

> … the seriousness of an aggravated assault by wounding should not be minimized by an artificially narrow definition of wounding, limited to external bleeding.

[38] *Vincent*, at para. 15 added:

> … An unduly narrow definition of wounding may impose greater criminal responsibility for minor external bleeding but ignore substantial internal damage to tissues caused by an assault.

[39] The Crown provided the case of *R. v. Diszhazy*, 2022 QCCQ 9449, at para. 204 where it stated:

> … Mrs. Diszhazy does not appear to have sustained cuts on her face. However, it could be reasonably inferred from the significant amount of bleeding and the black eye observed on the photograph that Mrs. Diszhazy suffered from some form of internal bleeding. This arguably corresponds to a break in the continuity of the skin.

(iii) Permanency

[40] In 2012, Judge Derrick, as she then was, determined "wounding" required the injury to cause long-lasting effects or have some permanence: *MacNeil*, 2012 NSPC 106, at para. 12; citing *R. v. S.E.L.*, 2012 ABQB 190, at para. 97.

[41] In 2019, the British Columbia Court of Appeal in *R. v. Pootlass*, 2019 BCCA 96, at para 115, dispensed of the permanency and long-lasting effects requirement, finding that an injury will constitute as wounding if there is a "break in the continuity of the whole skin which constitutes a substantial interference with the physical integrity of the well-being of the complainant." In other words, where an injury amounts to substantial interference and lasts long enough to be substantial, the injury will amount to a wound. Applying this approach, the British Columbia Court of Appeal in *Pootlass* concluded that an injury that required twelve stitches close to the face amounted to a wound.

[42] *Pootlass* has become the accepted law in many jurisdictions, other than Nova Scotia: *R. v. Meeks*, 2022 CM 2016, at para 237. Nova Scotia common law decisions post-*Pootlass* suggest that permanency or long-lasting effects is still required. For example, in *R. v. Barron*, 2021 NSSC 14, relying on *MacNeil*, the Nova Scotia Supreme Court reaffirmed the reasoning from *MacNeil* that some degree of "permanence or long-lasting effect of the injuries" was necessary to constitute a wound under section 268(1), as opposed to serious bodily harm (para. 45).

[43] The Ontario Court of Appeal in *R. v. Brown*, 2021 ONCA 678, at para. 23, appeal ref'd at SCC; *Meeks*, at para. 197-200, referenced *Pootlass* before adopting with a slightly different definition from *Watt's Manual of Criminal Jury Instructions*: "to 'wound' means to injure someone in a way that breaks or cuts or pierces or tears the skin or some part of the person's body. It must be more than something trifling, fleeting or minor, such as a scratch." (para. 23). The trial judge in *Brown* found the injury did not amount to long-lasting effects, other than a small scar. In adopting its new definition, the Court of Appeal still upheld the trial judge's finding of aggravated assault. Despite *Brown*, there is a clear trend of recent trial decisions in Ontario still applying *Pootlass*: *R. v. MacKinnon*, 2021 ONSC 4763 and *R. v. William Kirby*, 2021 ONSC 2273.

(iv) Medical treatment

[44] The jurisprudence has indicated that medical treatment is a necessary condition for aggravated assault, but not a sufficient condition. Hospitalization alone does not move the injury on the continuum from assault causing bodily harm to "wounding" under aggravated assault. In *MacNeil*, Judge Derrick commented that, the ultimate focus for a "wound" is that it "must amount to more than "minor" bodily harm." (para. 16).

[45] In this case, I find that the Crown evidence does not rise to the severity required for a "wound" under section 268(1). This finding is consistent with the Nova Scotia jurisprudence which has maintained the requirement of permanency or long-lasting effect of the injuries from *MacNeil*.

"Disfiguring"

[46] Counsel did not provide any authorities nor was I able to find any Nova Scotia cases with commentary on disfigurement. The case law on disfiguring

outside of Nova Scotia focused on two factors: (i) breaking of the skin and (ii) change in appearance:

(i) Breakage of skin

[47] While "wound" requires a breaking of the skin, "disfigurement" does not: *R. v. MacNeil*, 2012 NSPC 106, at para. 11 citing *R. v. Hilderman*, 2005 ABQB 106, at para. 15.

(ii) Appearance

[48] Cases of disfigurement often rely on *Hilderman*, a decision from the Alberta Court of Appeal. Although it was a wounding case, the trial judge dealt in passing with the issue of disfiguring, quoting from Black's Law Dictionary, 4th Edition, that disfigurement should be taken to be: "[t]hat which impairs or injures, beauty, symmetry or appearance of a person or a thing.": *Hilderman*, at para. 17.

[49] The court then went on to conclude, "In Canada, the word has been used to denote 'something more than a temporary marring of a person's appearance, such as a black eye.'": *Hilderman*, at para. 18.

[50] In *R. c. Mouchet*, 2019 QCCQ 1531, which has similar facts to the case before me, a Quebec Court applied the reasoning from the context in the case law of "wound" to a case of disfigurement. Specifically, the Quebec Court found that the impact on the appearance of the complainant's face, causing a broken nose and fracture of the orbital wall, is not diminished by the fact that a surgical procedure was successfully preformed (para. 66). As noted earlier, the Crown had cited *Diszhazy* in its closing for another case which also involves an orbital fracture and surgery, however, extension for an appeal was granted at the end of 2022 on whether the injuries were caused by an accident or from the accused (*Diszhazy*, 2022 QCCQ 9449; *R. c. Diszhazy*, 2022 QCCA 1679).

[51] In this case, it could be reasoned that the fracture to Thoms's left orbital bone, requiring her to have surgery (performed by a plastic surgeon) and that if not for the success of a surgery, Thoms would have appeared disfigured. However, when viewed against the elements of an assault causing bodily harm and the applicable caselaw I am not persuaded that disfigurement is applicable to this case.

"Maiming"

[52] The law on maiming has clarified there is no requirement for the injuries to be permanent: *Meeks,* 2022 CM 2016, at para. 266.

[53] There is no *Criminal Code* definition of "maim." In *MacDonald*, the NSSC relied on the definition in the Oxford Dictionary of "maim", before finding the accused guilty, at para. 30:

> "Maim – disable, wound, cause bodily harm or disfigurement to. Now, deprive of (the use of) a limb etc.; mutilate, cripple; fig. render powerless or essentially incomplete."

[54] Historically, maiming has been found where injuries "deprives a person of the use of any limb or member of the body or renders him or her lame or defective in bodily rigour.": *Meeks,* 2022 CM 2016, at para. 260; *R. v. Shulz,* 1962 CanLII 553 (ABCA).

[55] In 2012, the British Columbia Supreme Court in *R. v. Papalia*, 2012 BCSC 245, was not satisfied that the victim's broken nose could be regarded as "maiming or disfiguring." To "maim" means to inflict an injury that deprives a person of the use of a limb or renders the victim less able to defend themselves. By that definition a broken nose could not be regarded as maiming on those facts (para. 131).

[56] I find that Thoms's injuries do not amount to maiming. Both Thoms's and Kennedy's testimony recount Thoms being able to physically walk out of her father's apartment, get in Kennedy's car and into her home on her own.

[57] In sum, aggravated assault is distinguished from assault causing bodily harm by the consequences. To constitute aggravated assault, the consequence must result in wounding, maiming, disfiguring, or endangering the life of the complaint. Bodily harm is any hurt or injury that interferes with the complainant's health or comfort. It must be more than something that is just brief or fleeting, or minor in nature. It must result from the force that the accused intentionally applied to the complainant. In other words, the accused's (intentional) application of force to the complainant must contribute significantly to the bodily harm the complainant suffered.

[58] After reviewing the caselaw and the facts in this case I find that the offence of assault causing bodily harm is more applicable. I must now determine whether

the Crown has proven beyond a reasonable doubt that Kennedy committed that offence.

[59] As discussed earlier the issue of whether Kennedy caused Thoms's injury by an intentional application of force to the eye socket or was it an accident requires me to consider all the evidence, and in particular the evidence of Thoms and Kennedy. This requires the Court to look at the credibility and reliability of all the witnesses, including Kennedy and Thoms, and apply the principles of *R. v. W.(D).*, [1991] 1 S.C.R. 742; 63 CCC (3d) 397.

Credibility and Reliability

[60] There is a difference between credibility and reliability. In *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.), Doherty J.A. explained the difference at para. 33:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[61] In *R. v. C. (H.)*, 2009 ONCA 56, 244 O.A.C. 288 (Ont. C.A.), Watt J.A. described the difference between credibility and reliability as follows:

> 41 Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
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> i. observe;
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> ii. recall; and
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> iii. recount
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> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R v. Morrissey (R.J.)* (1995), 80 O.A.C. 161, 22 O.R. (3d) 514 (C.A.), at 526 [O.R.].

[62] Having found that these facts do not establish an offence of aggravated assault from the jurisprudence, I must decide if I am satisfied beyond a reasonable doubt that the Crown has proven that Kennedy committed the lesser included offence of assault causing bodily harm.

[63] In analyzing credibility, I refer to *W.(D).*, and consider credibility in this manner: Firstly, if I believe the evidence of Kennedy, I must acquit. Secondly, if I do not believe the evidence of Kennedy, but I am left in reasonable doubt by it, I must acquit. Thirdly, even if I am not left in doubt by the evidence of Kennedy, I must ask myself, whether on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of Kennedy. If I am not convinced, I must acquit.

[64] In *R. v. J.M.M.*, 2012 NSCA 70, at para. 71, Justice Saunders considered the comments of Finlayson, J.A., in *R. v. Gostick*, 1999 CarswellOnt 1952, [1999] O.J. No. 2357, criticizing the trial judge's approach to deciding credibility. He stated:

> …
>
> 15 The proper approach to the burden of proof is to consider all of the evidence together and not to assess individual items of evidence in isolation: see *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.). This is particularly true where the Crown's case depends solely on the unsupported evidence of the complainants and where the principal issue is those witnesses' credibility and reliability. As Rowles J.A. emphasized in *R. v. B. (R.W.)* (1993), 40 W.A.C. 1 (B.C.C.A.), these issues are not to be determined in isolation. She said at p. 9:
>
> > Where, as here, the case for the Crown is wholly dependent upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested *in the light of all of the other evidence presented*. [Underlining for emphasis by Saunders, J.A., italicized for emphasis by Finlayson, J.A., in his reasons]

[65] Justice Saunders addressed the *W.(D.)* factors as follows in *J.M.M.*:

> 72 I recognize that the *W.(D.)* "formula" need not be followed slavishly and that in this, a judge alone trial, a recitation of the three steps suggested by Justice Cory is not required at all. What is critical, however, is that the record demonstrate an appreciation for and a proper application of the criminal standard of proof to the whole of the evidence. As Cromwell, J.A. (as he then was) observed in *R. v. Mah*, 2002 NSCA 99 (N.S.C.A.):
>
> > [42] The **W.D.** principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, **W.D.** describes how the assessment of credibility relates to the issue of reasonable doubt. What

> the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. ... The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.
>
> . . .
>
> [44] In my respectful view, the judge's reasons, read as a whole, make it clear that he did not apply this approach to the evidence. His reasons as a whole are concerned with comparing the Crown and defence positions with a view to ascertaining which was the more probable. Nowhere is the additional required step taken of assessing the whole of the evidence by the reasonable doubt standard. ...
>
> [45] ... The issue at the end of the day is whether guilt has been proved beyond reasonable doubt; the ultimate question is whether the evidence as a whole satisfies that standard. The judge's reasons show that this ultimate question was neither asked nor answered.
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> . . .
>
> [47] The **W.D.** analysis requires consideration of whether all the evidence leaves the judge with a reasonable doubt. Looking at all of these passages in the context of the reasons as a whole, I am persuaded that the judge did not approach the evidence in this way. The decision read as a whole reflects a chain of reasoning from credibility to guilt without recognition that the ultimate issue is not credibility but reasonable doubt.

[66] The Court in *R. v. S. (D.D.)*, 2006 NSCA 34, summarized the principles governing credibility:

> [77] Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

[78] In this regard I find it helpful to repeat the lucid observations of Justice O'Halloran in the oft-cited case of *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.), at 356:

> . . . But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; and *cf. Brethour v. Law Society of B.C.*, [1951] 2 D.L.R. 138 at pp. 141-2.
>
> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and *cf. Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witnesses, 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. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case. (Underlining mine [in *S. (D.D.)*])

While his comments were not expressed in the context of a criminal trial, observations similar to Justice O'Halloran's have often been emphasized in criminal cases, with suitable allowance for the different standard of proof.

[67] More recently, in *Baker v. Aboud*, 2017 NSSC 42, Forgeron J. summarized additional principles governing a credibility assessment:

> [13] Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of *Baker-Warren v. Denault*, 2009 NSSC 59, as approved in *Hurst v. Gill*, 2011 NSCA 100, which guidelines include the following:
>
> • Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. c. Gagnon*, 2006 SCC 17 (S.C.C.), para.20. … "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), para. 49.
>
> • There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, *Novak Estate, Re, supra*.
>
> • Demeanor is not a good indicator of credibility: *R. v. Norman* (1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.
>
> • Questions which should be addressed when assessing credibility include:
>
> a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re, supra*;
>
> b) Did the witness have an interest in the outcome or were they personally connected to either party;
>
> c) Did the witness have a motive to deceive;

> d) Did the witness have the ability to observe the factual matters about which they testified;
>
> e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
>
> f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorny*, 1951, [1952] 2 D.L.R. 354 (B.C.C.A.);
>
> g) Was there an internal consistency and logical flow to the evidence;
>
> h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
>
> i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[68] Finally, *Cameco Corporation v. The Queen*, 2018 TCC 195, is frequently cited by the Nova Scotia Supreme Court for the law on distinguishing reliability and credibility at paragraph 11:

> The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time.[4] In *R. v. Norman*, [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:
>
> > … The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. ...

[69] In reaching my decision I have considered all the evidence against the reasonable doubt standard. Regarding the testimony of the witnesses, I can believe none, part, or all of any of the witnesses' evidence: *Novak Estate, Re*, 2008 NSSC 283, at para. 37. In reviewing their testimony and considering inconsistencies, it is important that I not shift the burden of proof from the Crown, as discussed in *R. v. J.P.*, 2014 NSCA 29:

> [71] With all due respect to the trial judge, the reasoning revealed in these passages is flawed. It is an error in law for the trial judge to say that because he found the appellant's evidence not convincing on one point, it casts doubt on the

credibility of his other evidence. This is not a situation where a trial judge could draw an adverse inference against an accused due to an attempt by an accused to advance a demonstrably false alibi (or similar conduct) from which a consciousness of guilt might be inferred (see for example: *R. v. Hibbert*, [2002] 2 S.C.R. 445 at para. 62; *R. v. O'Connor* (2002), 170 C.C.C. (3d) 365, [2002] O.J. No. 4410 (Ont. C.A.) at para. 23).

[72] Mere disbelief of exculpatory evidence cannot be used to bolster the Crown's case. The rationale is clear: if this were permitted it would diminish the fundamental principle that the burden of proof is on the Crown. O'Connor A.C.J.O., explains:

> [19] The distinction between mere disbelief and a finding of fabrication has regard to the fundamental principle that the onus of proof remains on the Crown throughout a criminal trial and helps ensure that the trier of fact properly applies the burden of proof in cases where statements of an accused are tendered or an accused testifies. The distinction reduces the risk that a trier of fact may blur the need for the Crown to prove the offence charged beyond a reasonable doubt with the failure of the accused to provide a credible defence. The distinction also recognizes the danger that a trier of fact may attach undue weight to the rejection of an accused's explanation and may move too readily from mere disbelief to a finding of guilt. As was pointed out by Gibbs J. in *Steinberg v. Com'r of Taxation (Cwth.)* (1875), 134 C.L.R. 640 at p. 695, cited in *R. v. Tessier* (1997), 113 C.C.C. (3d) 538 at p. 553 (B.C. C.A.): "The fact that a witness [even the accused] is disbelieved does not prove the opposite of what he asserted".
>
> *R. v. O'Connor*, *supra*

[73] I agree with the appellant that the announced analytical path by the trial judge reversed the onus of proof. There is no requirement on an accused to convince the judge by his evidence—all that is needed is for a reasonable doubt to be raised. It is for the Crown's evidence to convince. Furthermore, mere doubt or even non-acceptance of the appellant's evidence on some point cannot be used to cast doubt on the credibility of his other evidence.

[74] I recognize that in the next paragraph (¶112) the judge used language that attempted to track the first two steps recommended in a *W.D.* instruction: that the judge did not believe the appellant and was not left with a reasonable doubt by his evidence "in terms of his credibility". The problem is his explanation for the finding that the appellant was not credible.

[75] As highlighted in the excerpt above (¶112) the trial judge found no fault in how the appellant testified, describing him as having a smooth and even delivery, but reasoned his evidence was "not persuasive" and "therefore not credible". No elaboration was given by the trial judge. Again, with respect, this logic is legally flawed.

> [76] Simply because he did not view the appellant's evidence as persuasive does not equate to a dismissal of it as not being "credible". This smacks of a credibility contest between the Crown's witnesses and the appellant. This was not the only instance the trial judge used language that reflected an incorrect application of the burden of proof.

[70] The following is my analysis regarding the credibility and reliability of Kennedy and Thoms, and the inconsistencies contained in their testimony. My analysis is informed, in particular, by *R. v. C.E.G.*, 2021 NSSC 305, *Baker v. Aboud*, 2017 NSSC 42, *R. v. W.(D.)*, [1991] 1 S.C.R. 742; 63 CCC (3d) 397, *R. v. Preston*, 2021 NSSC 212, and *R. v. Preston*, 2022 NSCA 66.

Application of *W.(D.)*

[71] The three questions in *W.(D.)* must be considered because Kennedy elected to testify (paras. 27-28).

[72] The first question asks - can Kennedy be believed: *R. v. C.E.G.*, 2021 NSSC 305 at para. 20 citing *R. v. D.W.S.*, 2007 NSCA 16.

[73] *W.(D.)* prohibits a trier of fact from treating the standard of proof as a simple credibility contest between Kennedy and Thoms: *D.W.S.*, 2007 NSCA 16, at para 15. The purpose of the first question is not to "isolate Kennedy's testimony for assessment, but to ensure that Kennedy's credibility is assessed, instead of marginalizing it as a lockstep effect of believing Crown witnesses.": *D.W.S.*, at para. 16 citing *R. v. Lake*, 2005 NSCA 162 at para. 22.

[74] To the second question, even if Kennedy's evidence (in whole or in part) is not believed, one must consider if it nonetheless gives rise to a reasonable doubt. The Supreme Court of Canada in *R. v. Morin* rejected the piecemeal analysis of individual segments of evidence for reasonable doubt: *R. v. C.E.G.*, 2023 NSCA 1 at paras. 67-68 citing *R. v. Morin*, [1988] 2 SCR 345 at para. 28.

[75] And finally, if the trier does not believe Kennedy and is not left in doubt based on that evidence, one must still address and resolve the most critical question – does the remaining evidence lead to a finding of guilt beyond a reasonable doubt?

[76] The trier of fact can believe some, none or all of any witness's testimony, including that of Kennedy. The reasoning process is not complete with the

rejection of Kennedy's testimony because Kennedy is not required to prove anything. The burden remains on the Crown throughout.

Circumstantial Evidence

[77] Since all the evidence must be considered in assessing Kennedy's credibility, the Crown provided the following guidance on how to apply the circumstantial evidence in this case:

- *R. v. Calnen*, 2019 SCC 6 at paragraph 112:

  > [112] In order to draw inferences, the decision maker relies on logic, common sense, and experience. As with all circumstantial evidence, a range of inferences may be drawn from after-the-fact conduct evidence. The inferences that may be drawn "must be reasonable according to the measuring stick of human experience" and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence: *R. v. Smith*, 2016 ONCA 25, 333 C.C.C. (3d) 534, at para. 77. That there may be a range of potential inferences does not render the after-the-fact conduct null: see *R. v. Allen*, 2009 ABCA 341, 324 D.L.R. (4th) 580, at para. 68. In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. "It is for the trier of fact to choose among reasonable inferences available from the evidence of after-the-fact conduct": *Smith*, at para. 78.

- *R. v. Barton*, 2019 SCC 33 speaks to the proposition that after-the-fact conduct evidence is circumstantial at para. 238:

  > [238] After-the-fact conduct refers to anything said or done by an accused after the commission of the alleged offence. It is a form of circumstantial evidence and its use is highly specific to the factual matrix and context of each case. It can be probative of whether the accused was conscious of having committed an offence and of particular significance in assessing credibility.

- *R. v. Roberts*, 2020 NSCA 20, at paragraph 25, for the principle that when circumstantial evidence is evaluated, logic and common sense is to be relied upon and any conclusions drawn must be reasonable:

  > [25] If reasonable inferences other than guilt can be drawn from circumstantial evidence the Crown has not met the standard of proof beyond a reasonable doubt. Reasonable doubt can be logically based on the evidence or lack of evidence, must be reasonable given that evidence

or lack thereof, and assessed logically in light of human experience and common sense (*Villaroman*, ¶35-38).

- *R. v. G.P.W.*, 2021 NSSC 28, at paragraph 75, citing *R. v. Lola* from the Saskatchewan Court of Appeal which provides more overarching principles of circumstantial evidence:

> [75] In *R. v. Lola*, 2020 SKCA 103, the Court of Appeal discussed drawing up inferences as it relates to circumstantial evidence as follows:
>
> > [25] In *R. v. Villaroman*, 2016 SCC 33, [2016] 1 SCR 1000 [*Villaroman*], the Supreme Court of Canada clarified the law of circumstantial evidence and reiterated a number of key points about circumstantial evidence and how that type of evidence must be assessed. These points have been conveniently summarised in *Learning* as follows:
> >
> > > [24] Importantly, the Court in *R. v. Villaroman* had earlier commented on the reasoning process in cases of circumstantial evidence, noting:
> > >
> > > (a) "The inferences that may be drawn from [an] observation must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense" (at para 30).
> > >
> > > (b) "In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts" (at para 35).
> > >
> > > (c) "The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt" (at para 35).
> > >
> > > (d) "[A] reasonable doubt, or theory alternative to guilt, is not rendered 'speculative' by the mere fact that it arises from a lack of evidence. As stated by this Court in [*R v Lifchus*, 1997 CanLII 319 (SCC), [1997] 3 SCR 320], a reasonable doubt 'is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence': para. 30 (emphasis added [in *Learning*]). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the

> absence of evidence, assessed logically, and in light of human experience and common sense" (at para 36).
>
> (e) "When assessing circumstantial evidence, the trier of fact should consider 'other plausible theor[ies]' and 'other reasonable possibilities' which are inconsistent with guilt" (at para 37).
>
> (f) "[T]he Crown thus may need to negative these reasonable possibilities, but certainly does not need to 'negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused'. … '[O]ther plausible theories' or 'other reasonable possibilities' must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation" (at para 37; emphasis in original).

Drawing on all of this, the Court said (at para 38) that the "basic question" in such cases is "whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty".

Text Messages

[78] Text messages between Thoms and Kennedy were tendered by the defence and adopted by Thoms on cross-examination as Exhibits 7-9. As admissions, the texts are an exception to the hearsay rule and not subject to a principled analysis: *R. v. Preston*, 2021 NSSC 212, at paras. 31-33 ("*Preston 1*"); *R. v. Preston*, 2022 NSCA 66, at para. 39 ("*Preston 2*"). On the record, the parties agreed that no propensity evidence could be drawn from the contents of the messages.

[79] I analyzed and applied the texts in the following way: where the texts are consistent with the witnesses' testimony, they are not to be used to suggest the trial testimony is more likely to be true because of what was said in the text messages: *Preston 2*, at para. 39. Repetition does not enhance credibility: *Preston 2*, at para. 41. Where the texts are inconsistent with the witnesses' testimony, they do not have the same probative value as a prior inconsistent statement made to a person in authority or under oath, but they still have some probative value in relation to assessing the credibility and reliability of Thoms and Kennedy: *R. v. Fardy*, 2023 NSSC 252, at para. 345; *Preston 2*, *supra*, at para. 50 citing *R. v. Langan*, 2020 SCC 33, at para. 97.

The evidence in reference to W.(D.)

[80] First, if you believe the evidence of the accused, obviously you must acquit.

[81] Kennedy testified his actions were accidental. All the evidence must be considered to determine whether the Crown has proven the elements of the offence beyond a reasonable doubt. I first analyze Kennedy's testimony and its inconsistencies on its own.

Kennedy's Testimony

[82] Kennedy stated he knew Thoms for a few years before they started living together at Thoms's mother's place soon after dating.

[83] On August 22, 2020, Kennedy testified he drove himself and Thoms to her father's apartment around 6:00-6:30 pm with a bottle of whiskey. They did not plan to spend the night. Kennedy recounted drinking on a patio. On cross-examination, he admitted that he got into an argument with Nicole Arnold upon arrival. Eventually, most people at the apartment went to bed except Kennedy and Thoms's father, Philip Arnold. Kennedy testified that he and Philip Arnold went to the gas station nearby. When they left Kennedy said he saw Thoms sleeping on a couch. Kennedy estimated they returned around 11:00-11:30 pm. Philip Arnold and Kennedy stayed up and talked for about thirty minutes. Philip Arnold then went to bed and Kennedy went to get Thoms, who had moved from the couch to a bedroom where she was sleeping.

[84] When he went into the bedroom, Thoms was in bed. When asked if she were asleep, Kennedy testified she was "in and out but definitely awake" and that he could see her eyes were open. Kennedy asked Thoms if she wanted to leave, and she said "yes".

[85] On direct examination, Kennedy testified he first tried to pick Thoms up by her back, but he could not do so. Next, he tried to lift her up by her arms. When he tried to pick her up by the arms, he was standing over her, she grabbed onto him and then pulled him down. Kennedy claims he lost his balance and fell and that is when his left elbow hit her left eye accidentally.

[86] The mechanics of the incident became less clear on cross-examination. During which, Kennedy added he was only an arm reach away from Thoms, attempting to pull her up with her upper arms. He added he was standing, and he is

about six feet tall, and she was on a low bed. Thoms then pulled him down by grabbing on to his shoulder, his body initially landed across her on the bed and then Kennedy popped back up.

[87] Kennedy denied the Crown's suggestion that he must have pulled his elbow back to swing, causing such force. When asked about texts between himself and Thoms's sister, Jessica Arnold, Kennedy added Thoms was initially moving around, "flailing" her arms, trying multiple times to have her grab on to his shoulders but she was too drunk (Exhibit 11, at p. 2). He admitted he could have caused the bruising on her arms.

[88] Next, Thoms screamed. She laid there for 30-seconds. On cross-examination, Kennedy said Thoms was groaning but there was "no communication or anything" during the thirty seconds. For those thirty seconds, he was just standing there. Thoms does not respond or say anything for thirty seconds and during that time Kennedy did not ask if she needed medical help. He then asked if she wanted to get up and go and if she was alright. After this pause, Thoms got up on her own. Kennedy and Thoms exited the apartment. They did not see or talk to anyone. After leaving the apartment, they got in the vehicle, which was parked behind Thoms's father's place.

[89] Kennedy drove ten minutes back to Thoms's mother's place and upon arrival, Thoms asked for Kennedy's house key and went inside without Kennedy. Kennedy slept in his vehicle outside the residence that night. On cross-examination, Kennedy said he did not recall any conversation between him and Thoms on the drive back to her mother's. He also had no recollection of discussing why Thoms wanted the house key back. He did not text any of Thoms's family members about the injury she had just sustained. He testified that he did not recall knowing how bad it was. He said it was dark inside the car.

[90] The next morning, on August 23, 2020, Kennedy said he woke up around 5:00-6:00 am. He was hungover and drove home to his parents' residence. He did not text Thoms or her family about the injury or find out if he was welcomed back in Thoms's mother's home, where he had been living for over a year. Instead, he drove back to his parents' place.

[91] Kennedy did not reach out to Thoms until around noon on August 23, 2020. He said he does not recall specifics but remembers they "picked away at what may had happened that night" and that it was not a long phone call. On cross-examination, he explained by "picked away" he explained to her what had

happened before. There was no other contact between Kennedy and Thoms that day.

[92] Around 1:00 pm, Jessica Arnold contacted Kennedy over text. The texts include an exchange where Kennedy volunteers he did not punch Thoms (Exhibit 11). He also explained to Thoms's sister they were both "loaded", in reference to how much alcohol was consumed. On cross-examination, when asked how he knew people were thinking it was a punch, he said he guessed because it looked like she had a black eye.

[93] Kennedy still did not return to the Thoms's residence, nor did he ask Thoms why she asked for the house key back when discussing the incident.

[94] Kennedy's response to the expert witness testimony regarding the significant amount of force required to cause the damage to Thoms was, "I am a big guy."

[95] Kennedy referenced a past domestic assault charge from May 2020, where on direct examination he explained he grabbed Thoms's wrists and gave them a "little shook." As a result, he went to Domestic Violence Court and received an absolute discharge. On cross-examination, Kennedy agreed due to the red marks and bruising he caused, it was probably more than a little shake and that he had applied some force.

[96] On August 25, 2020, Kennedy appeared in Dartmouth Provincial Court to have conditions varied on the past assault charge (Exhibit 6). It appears that Thoms spoke to a Crown Attorney to allow Kennedy to have contact with her, a condition he appears to have been breaching all along. Kennedy stated he does not recall speaking to Thoms about varying the conditions for the provincial court matter in the days between this incident and his court appearance. Kennedy suggests Thoms spoke to the Crown Attorney on her own and that he did not recall any discussion with Thoms between August 22nd and 25th about this court appearance. On cross-examination Kennedy was directed by the Crown to a text sent on August 24, 2020, where Kennedy stated he needs clothes for court the following day (Exhibit 7). Again, I only reference this for determining credibility and not for propensity.

[97] When asked about the texts between Kennedy and Jessica Thoms as well as Kennedy and Thoms, Kennedy explained he had downloaded and subsequently deleted them in September 2022. When the Crown on cross-examination asked about his ability to recover any other possible correspondence between himself and

Thoms at this time, Kennedy told the court he no longer has a phone, he does not remember his iCloud password, he has had several email accounts in the time since to which he remembers no passwords, and he no longer has a Facebook account.

[98] When comparing Kennedy's testimony to the evidence I find the following inconsistencies:

- Thoms went from being unable to get out of bed and asking for his assistance before being injured to being able to walk out on her own after the injury.

- The morning after the incident, Kennedy did not reach out to Thoms's family to determine if she was okay or if he could return to Thoms's mother's where he had been living for over a year. This behaviour is inconsistent with that of a reasonable person, who claims he was close to the family and had just committed an accident.

- It is unclear how Kennedy knew when texting Jessica Arnold on August 23, 2020, that the injury had led to a black eye. When the Crown suggested to Kennedy that he saw her face but did not get medical help immediately following the incident, he admitted he saw her face but did not "recall" how bad it was. When asked whether he saw the injury in the car, he explained it was dark, suggesting he did not. It seems unlikely that Kennedy did not know the extent of her injury. On direct examination, Kennedy testified he could see Thoms's eyes open when he initially walked into the room. If the room was light enough to see her eyes, it was likely light enough to see her injury after it occurred.

- Kennedy insists it was his left elbow that hit her left eye, but the mechanics of the accident as Kennedy explained it make this difficult to understand. It could have been possible that after he fell across her onto the bed, his elbow hit her eye as he stood back up, but Kennedy claimed it was on the way down he hit her. The parties were close together, within arms reach. Kennedy was at the side of the bed; his right elbow was closest to Thoms's right eye as he tried to pull her up. He lost his balance and as he fell his left elbow hits the other side of Thoms's face, her left eye, and no other part of her face. The amount of force required to cause the injury makes the explanation that this was an accident

unlikely. In addition, Kennedy suffered no injury to his elbow, not even a bruise. Also, the expert opinion evidence of Dr. Williams described this as a localized injury which makes this explanation of Kennedy's unlikely.

- Two days after the incident, on August 24, 2020, Kennedy texts Thoms, pleads he is getting the "help" he needs and going to counselling (Exhibit 7). Kennedy testified this was in reference to the programming he was in from the past domestic assault charge. However, Kennedy and Thoms had previously reconciled since the May 2020 incident. If the current incident was an accident, it seems unnecessary to make this reference to the consequences of a past domestic assault charge to convince Thoms to get back together after she already accepted him back following the May 2020 incident.

- Kennedy claimed he drank the night of the incident but was sober enough to drive, however, in texts with Jessica Arnold, he wrote Thoms and himself were both "loaded."

- On direct examination, Kennedy understated the nature of his past domestic assault charge, later agreeing on cross-examination that it was probably more than a little shake and required force to cause the bruising that had occurred.

- If May 2020 is the only other incident between Kennedy and Thoms, why is it that when Thoms is saying to Kennedy "I've lied all the other times" Kennedy does not ask Thoms what she is talking about because Kennedy testified there was only one other time.

[99] Other Credibility Concerns – from the *Baker v. Aboud* factors:

- Kennedy admitted he had not been following his court order.

[100] Reliability Concerns:

- Kennedy testified he does not recall some sequences of events:

  He did not recall asking why Thoms wanted the key back.

  He did not recall knowing how bad the injury was.

He did not recall phone calls he had with Thoms in days past the incident.

- Kennedy admitted in addition to texting, he and Thoms also communicated over Snapchat and Facebook messenger, suggesting the text record may not illustrate the extent of their recorded communications.

[101] In reviewing Kennedy's testimony, I do not believe the evidence he presented. Secondly, I do not believe the evidence of Kennedy and I am not left with a reasonable doubt. I must now ask myself whether on the basis of the evidence that I do accept, am I convinced beyond a reasonable doubt by that evidence of the guilt of the accused. In answering this question, I will start with the evidence of Thoms.

Thoms's Testimony

[102] Thoms testified by the time of the incident, her and Kennedy had been in a relationship for over a year. He was her first "real boyfriend."

[103] On August 22, 2020, her father invited her over for drinks to celebrate his birthday. Kennedy drove her over around supper time. They did not plan to stay the night. Upon arrival, Kennedy was agitated and was being snarky with her father. They drank hard liquor.

[104] Later in the evening, Thoms said she was very drunk and needed to go to bed. She recalled Kennedy was drunk as well but not as drunk as she was. At some point, she went to sleep in a bedroom. The apartment had three bedrooms, the bedroom she slept in was beside another bedroom. The room she was in had a bed against a wall and across from the side of the bed, a wardrobe with a mirror. On cross-examination, Thoms admitted she did not recall if she fell asleep on the couch first or went to the bedroom.

[105] She fell asleep and when she woke up, Kennedy was "cranky", seemingly because it appeared they were spending the night there. They argued and he called her a "whore." Thoms inferred this was because she took her pants off to go to bed. During the argument she was still in the bed, sitting up on the wall side of the bed with a wall behind her back. Kennedy was standing beside the side edge of the bed, a few feet away. He had tight fists with both hands at shoulder height.

[106] The argument eventually escalated, and Thoms testified he lunged at her. The next thing she recalled was waking up, then sitting up in the bed, and seeing

her eye swollen shut in the mirror of the wardrobe across the room. Kennedy was still there. Thoms started yelling for her father and Kennedy told her to stop. No one came. Kennedy did not provide any explanation of what happened to her eye.

[107] Kennedy and Thoms got up and left her father's apartment. Kennedy drove her home to her mother's place and asked him to return the house key to her. She did not recall talking in the car or discussing the state of their relationship. She testified by asking for her house key back it was implied he was not welcome at her mother's residence anymore. She said she got home around 4:00 am. When she arrived home, no one was awake. She took a bath and took photos of the injury for her manager to prove the injury and explain why she would not be working the next day. Her eye was protruding, the eyelid was swollen, and she would have to force it open to see. There was a constant throb in her eye.

[108] She went to her bedroom and when she heard her mother get up for the morning, she messaged her from her bedroom on Facebook. Eventually her mother came into her room and screamed when she saw Thoms's eye. Thoms does not recall any contact with Kennedy on August 23, 2020.

[109] At the hospital on August 23, 2020, Thoms said she showed the police a police card from a previous incident to prove she had called the police. The medical report also documents "police called" on an intake form (Exhibit 2, at p. 16).

[110] During cross-examination, Thoms was asked about a text message she sent Kennedy dated August 24, 2020, in which she wrote, "and I know this time it was an accident", in reference to the injury of her eye (Exhibit 7, at p. 12).

[111] Thoms also agreed she referred to the injury as an "accident" to her mother. On redirect examination, Thoms explained she lied to her mother because she thought they (herself and Kennedy) may still get back together.

[112] On cross-examination, Thoms agreed she must have spoken to a Crown Attorney to have conditions changed which would allow contact with Kennedy after his court appearance on August 25, 2020.

[113] On September 3, 2020, her mother had the police come to the house. Thoms had previously told her mother she had contacted the police. She used a police card from a previous incident as proof she had spoken to them. When the police arrived that day, she met with them in the privacy of her bedroom. She told the

police she did not want to press charges. On cross-examination, Thoms agreed she told the police she had no memory of the incident and if Kennedy had assaulted her, she would have told the police because she had called them before on a previous matter. On redirect examination, Thoms explained she lied to the police because she was scared for herself and scared for Kennedy. When asked about texts where she stated she had "lied all the other times", Thoms explained she had covered for Kennedy in the past and was trying to convince him this time wouldn't be any different (Exhibit 7).

[114] Thoms testified she and Kennedy initially broke up after the injury, but she started to talk to him again after he told her he was sorry for what he had done, and he was going through therapy.

[115] In April 2021, Thoms sent Kennedy a photo and texted she had banged herself up in an unrelated matter. On cross-examination, Thoms explained that was an accident and denied ever hurting herself on purpose (Exhibit 9). Eventually, she stopped speaking to Kennedy altogether.

[116] Several months after the incident, Thoms was a witness to a separate incident and was asked to provide the police a statement. In that visit, she spoke to Officer Rhodenzier and gave a statement on August 15, 2021, regarding the incident in the case before me.

Inconsistencies within Thoms's testimony:

- She gave her consent to the Crown Attorney to vary Kennedy's condition to allow him to contact Thoms, which is possibly inconsistent with her submission that she was scared. She also continued to text him in the days following.
- Thoms claims she was crying out for her father, but no one came, despite being in the same apartment. Nicole Arnold testified the air conditioner was on and that she and Philip Arnold had a lot to drink, which could have blocked out the noise.

Other Credibility Concerns – from *Baker v. Aboud* factors:

- Thoms admits to lying to the police.
- Defence suggests Thoms is lying for attention-seeking purposes or retribution against Kennedy, referencing a TikTok screenshot in Exhibit

10 – this is relevant to the factors cited in *Baker v. Aboud* specifically (1) having an interest in the outcome or being personally connected to the party and (2) having a motive to deceive.

Reliability Concerns:

- Thoms admits on the night of the accident, she drank so much she had to go to bed.
- Thoms admits some things she does not remember including the content of the phone call on August 24, 2020, with Kennedy.

Comparing the Testimony of the Accused and the Complainant:

[117] I emphasize that these tables are not being used in a "credibility contest," between the accused and the complainant but to compare the evidence from Thoms's testimony with Kennedy's testimony in reaching a conclusion to the third question in *W.(D.)* that on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt that Kennedy is guilty.

Thoms	Kennedy
Does not remember bringing anything to her fathers but says they drank hard liquor there.	He drove himself and Thoms there with a bottle of whisky.
Thoms claims she arrived at her mothers around 4:00 am. She took a photo in the bathroom to send her boss but there is no time stamp.	Kennedy's timeline suggests they would have arrived back to Thoms's residence around 1:00 am.
Thoms claims she was yelling for her father after she woke up.	Kennedy said she screamed and then there was no communication between them for 30 seconds, but she was groaning.
Thoms claims Kennedy called her a "whore" when he came into the room, and they argued.	Kennedy said he said, "let's go".
Thoms says she was asleep when Kennedy came into the room.	Kennedy said she was awake.
Thoms claims when Kennedy entered, she sat up and her head was leaning against the wall behind her.	Kennedy testified when he fell and his elbow hit her, he fell across her and did not hit the wall.

Comparing Other Relevant Evidence

Kennedy's Testimony	Other Evidence
Kennedy testified he did not recall knowing the extent of the injury.	Exhibit 4 are pictures of Thoms immediately following the incident, which she testified she sent to her boss as proof of an injury and her inability to go into work. Obvious swelling and bruising are noted in photograph 8.
Kennedy testified he was standing above Thoms within arms-reach of her when he fell. He did not pull his elbow back.	Dr. Williams testified a significant application of force would have been required to cause the injury. He saw this type of injury before and noted the literature comments this type of common injury pattern is related to physical altercations, sports injuries, falls in older people, or vehicle collisions. The commonality between these activities is that the impact is localized.
Kennedy testified that he did not speak to Thoms about the August 25, 2020, court appearance. This suggests she just knew to call into court.	Texts from Exhibit 7 on page 2 indicate he references to Thoms items he needs for court.
Kennedy testified he tried to pick her up by her upper arms.	Thoms's bruising includes marks on the inside of her arm upper and wrists, which is consistent with the action of picking her up but is not consistent with the innocent manner suggested by Kennedy (Exhibit 4).
Kennedy stated he did not know the extent of the injuries to her eye and did not know she was in the hospital for a few days, until August 26th or 27th.	Texts demonstrate a pattern of Kennedy asking Thoms about her location, sometimes requiring proof she was not with anyone (Exhibit 7). It seems unlikely he did not know she was at the hospital based on this behaviour.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by the evidence of the guilt of the accused.

[118] I find Thoms to be a credible witness. She testified in a straightforward manner. Thoms was honest about things such as her level of intoxication, lying to her mother, and the police, and how this was her first relationship, and it was a controlling relationship. Her willingness to admit to things not in her favour adds to her credibility. Thoms was not truthful about the incident and provided a reason - she still loved Kennedy and believed he would change. I accept this explanation.

[119] This case involved alcohol which tends to result in gaps to memory which puts a witness' reliability into question. Thoms admits to being intoxicated and not recalling certain events. Those inconsistencies do not affect the fact that Thoms's core memories, were not shaken on cross. In addition, her family members and Kennedy corroborated those core memories.

[120] Kennedy corroborated core memories of Thoms such as everyone was drinking, he drove them to Philip Arnold's apartment, they arrived around suppertime, they did not plan to spend the night, Thoms went to bed before him in Desiree's room, Kennedy drove them back to Thoms's mother's residence, Thoms got into the car and out of the car on her own, and Kennedy gave the house key back. Kennedy also corroborated the controlling relationship, the length of the relationship, how they did almost everything together and how there were rules in this relationship, such as Thoms had to tell him when she was going to and from work. This provided further support of the reliability of Thoms's evidence.

[121] After reviewing all the evidence, including the inconsistencies, Thoms's version of the core facts, and the circumstantial evidence, I find based on the evidence I do accept leads me to conclude, the Crown has proven beyond a reasonable doubt that the accused, Kennedy, on August 23, 2020, committed an assault causing bodily harm against Thoms. I find the accused guilty of an assault causing bodily harm, contrary to section 267(b) of the *Criminal Code*.

Bodurtha, J.