

IN THE PROVINCIAL COURT OF NOVA SCOTIA
R. v. Henskee, 2009 NSPC 14

Date: April 7, 2009
Docket: 1746938
1746939
Registry: Halifax

Her Majesty the Queen

v.

Daniel Henskee

Judge: The Honourable Marc C. Chisholm

Heard: September 25, 26, October 6, 23, 2008; February 6, 12, 2009.

Decision: April 7, 2009

Charge: 268 (1); 267(a) Criminal Code

Counsel: Chris Harmes, for the Crown
Matthew Gibbon, for the Defence

[1] Mr. Henskee is charged that he on or about the 2nd day of March 2007 did wound, maim, disfigure and endanger the life of Annette Paris thereby committing an aggravated assault, contrary to section 268(1) of the Criminal Code.

[2] And furthermore at the same time and place aforesaid did, in committing an assault on Annette Paris use or threaten to use a weapon, or imitation thereof, to wit., a hammer, contrary to section 267(a) of the Criminal Code.

[3] I note that the wording of the first charge specifies “and” endanger the life. The Criminal Code provision specifies “or” endanger the life. This point was not addressed by counsel. The law is clear that the offence of aggravated assault may be committed by any one of the prohibited acts. I view the use of the word “and” as an administrative error not binding the Crown to prove all the means by which the offence may be committed. I am satisfied that amending the information to read “or”, even at this stage of the trial, would not create an unfairness as it was not raised by the defense nor did it form part of the defense position at trial. I do so.

Facts Not in Dispute

[4] There is no dispute regarding the time or place of the alleged offences nor the identity of the accused and other persons involved. It is not in dispute that Mr. Henskee struck Ms. Paris with a hammer without her consent. There is no dispute that Ms. Paris sustained injuries as a result of the incident and while not admitted I find that those injuries constitute a wounding of Ms. Paris. There is no agreement on the number of times Mr. Henskee struck Ms. Paris, nor where he was standing at the time any blows were administered.

[5] The defense position at trial was:

1. That the evidence does not permit the court to find beyond a reasonable doubt what transpired between the parties on the date in question; and
2. That any blow(s) administered by Mr. Henskee occurred in circumstances where the defense of persons under s. 34 or 37 applied, and/or the defense of property under section 41 applied

and/or the defense of another person, section 38, applied, raising a reasonable doubt.

[6] The position of the Crown was that the accused used more force than is legally permitted and, therefore, was guilty as charged.

Review of the Evidence and Findings of Fact

[7] Although there was some divergence in the evidence I have no doubt that earlier in the day, in the basement level apartment of 975 Mitchell Street, Halifax, Nova Scotia, there was a dispute between Ms. Paris and Ms. Watkins-Zwicker during which Ms. Paris punched Ms. Watkins-Zwicker in the nose. Some time after that incident Ms. Paris went looking for Ms. Watkins-Zwicker. She went to Mr. Henskee's apartment, situate on the main level of 975 Mitchell Street, Halifax, and kicked in Mr. Henskee's door. She found no one in the apartment and left. About 30 minutes later Ms. Paris returned to Mr. Henskee's apartment, knocked on the door and asked to speak to Ms. Watkins-Zwicker outside. Ms. Watkins-Zwicker was using the phone and so Ms. Paris was told to wait. Ms. Paris pushed into the apartment without being

invited. There was a brief exchange of words between the two women. Then Ms. Paris threw alcohol on Ms. Watkins-Zwicker and threatened to burn her. Ms. Watkins-Zwicker came toward and grabbed Ms. Paris. The two struggled and fell to the ground. They knocked over a metal shelving unit of Mr. Henskee. I find that those events happened.

[8] What happened during the minutes that followed is in dispute.

[9] There were three persons present during those minutes that followed, Mr. Henskee, Ms. Paris and Ms. Watkins-Zwicker. Ms. Watkins-Zwicker and Ms. Paris gave evidence at the trial. Mr. Henskee gave several statements, which were admitted into evidence, regarding his recall of the events of those minutes. Beginning with Mr. Henskee I'll review the statements/evidence of those witnesses in detail.

[10] Mr. Henskee made the following statements concerning the incident on March 7, 2007 to the 911 operator and police dispatch officer:

At p.3

Q. Tell me exactly what happened?

A. It's kind of—I'm partly to blame, I guess, or at least liable. Two women are here. One threw alcohol on the other, was going to set her on fire, and then they started fighting, and they started trashing my place. And I started – and I picked up my hammer and whacked the one in the arm to try to keep her from torching the other one. And then she threatened to get somebody after me. At that point I started hitting her, and, ah, she's kind of bloodied up.

Q. Okay, so you hit her with a hammer, sir?

A. Huh?

Q. You hit her with a hammer?

A. Yeah. I didn't have anything much – they were just – you know.

At p.5:

Q. Okay, so when did this happen, sir?

A. Down my kitchen here.

Q. When did this happen, sir?

A. When? Just – I don't know, say (inaudible) ago.

Q. Okay. All right. And the weapon mentioned was a hammer, sir?

A. Weapon? Well, it was a hammer anyway.

Q. Okay. The hammer. Was there any serious bleeding of her arm or where you struck her?

A. Ah, it's hard to say. She's got some head bleeding.

At p. 6:

Q. Is it the arm and the head that was injured on her?

A. I guess so. It was just a jumble here. I mean, tangling on the floor, and knocking over shelving and, you know, just a horrible mess every which way.

Q. Okay. Well the ambulance is...

A. And, as I say, the one threw alcohol on the other one and was going to set her on fire in my kitchen.

At p. 13:

Q. ...you were trying to break it up or...

A. Well, no, I'll – the one that was – I was trying to hit the one on the arm – the elbow to keep her from choking or whatever the other one. They were both down on the floor and, as I say, knocked over some shelving and broke a little glass and stuff here. But apparent – I – I assume that the one really was going to set the other on fire, because the one – or that one kicked in the door about an hour and a half ago, but I wasn't here at the time. I was up...

Q. Ah.

A. ..close by enough to see who it was or, you know...

Q. Right.

A. ...wearing the same outfit anyway.

At p. 14:

Q. All right. Well, same as the ambulance, the police are on their way there, and they shouldn't be too much longer getting down there.

A. Yeah. Just a fear being arrested here if it's critical.

Q. Well, yeah. We'll see how – what they have to say there when it...

A. Yeah.

Q. ...when it all plays out, okay? It's just a bad situation.

A. Yeah. I was trying to basically stop the one from attacking the other but...

Q. Yeah.

A. But then the other one threatened to get people after me, presumably to kill me or beat me severely or something. That's when I kept after her.

[11] As to his relationship with the two women involved, he said, at p. 1:

Q. Okay. These were all just friends of yours, right? There was no relationship between anybody?

A. Not – acquaintances, not even friends really.

Q. Okay.

A. They use my telephone.

At p. 12:

Q. And what about you Mr. Henskee, are you okay?

A. Oh, yeah.

Q. Other than just being shaken up there?

A. Well, I've been under great stress myself anyway the past week or so.

[12] At p. 15, he mentioned he had to get his place ready for a fire inspection.

To The Police

Cst. Ross Webb

[13] Cst. Webb testified that Mr. Henskee was very cooperative and talkative. He advised the police that the battle started inside and moved out to the patio area. Mr. Henskee said that he hit her just inside the door and outside. He wasn't sure the number of times he hit her.

[14] On cross he said that Mr. Henskee had said that he continued to hit her as she went outside. He acknowledged that was not an exact quote but the gist of what was said.

Cst. Sullivan

[15] Cst. Sullivan described Mr. Henskee as very calm. He told Cst. Sullivan where it happened and pointed out the alcohol. He said that the women were fighting. That he tried to hit Ms. Paris' elbow. He said that he didn't remember what happened then.

[16] After arrest, rights and caution were provided Mr. Henskee said that the hammer he hit her with was outside on the deck. He said that he hit her when she threatened his life. Cst. Sullivan acknowledged that Mr. Henskee may have made other statements that weren't noted by him.

At the police station

[17] Mr. Henskee refused the opportunity to speak with counsel and indicated that he wanted to talk about what happened.

[18] Mr. Henskee indicated that he felt that he was right to do what he did.

[19] He was given paper to write his own statement which he did. It states:

Annette appeared at the door and said that she wanted to talk to Sharilyn on the deck or landing that is outside the door to my apartment. Sharilyn said that she was busy at the moment, either stating or implying that Annette would have to wait until Sharilyn had finished with the telephone. Almost immediately, Annette came in and threatened to "burn" Sharilyn produced a bottle that I thought might contain acid and sloshed some liquid out of the bottle onto Sharilyn. Because Sharilyn did not react as if she had been splashed with muriatic acid, which is the most harmful acid which is commonly available to the general public, I realized that the liquid was probably alcohol, and that the threat was to burn Sharilyn literally, or at least burn her hair and some of her skin. At the time I thought that there was also a good chance that the building might be set on fire as well, but now I have come to the conclusion that if the liquid was actually 70% propanol rather than 99% propanol. I would probably have been able to use water to dilute alcohol burning on the floor before the building could be set afire, although I would not want to have to actually try to deal with an alcohol fire in such circumstances. As it happened, Sharilyn did not simply stand still and wait for Annette to ignite the alcohol, and the two women were soon fighting. Some steel shelving got knocked over, and it appeared that the situation would get worse rather than better. I had a carpenter's claw hammer on the floor for de-nailing pieces of wood as I was trying to get the place clean and tidy for an impending by-law and possible safety inspection. I picked up the hammer and tried to hit one of Annette's elbows with the hammer to discourage her from continuing to assault Sharilyn. That proved to be difficult, but I was eventually able to hit Annette hard enough to get her attention. The two women got up and Annette stood in the doorway and issued a threat not to call

for police involvement but rather to call some people to come after me on a private basis. I will leave it to others to say exactly what happened immediately after that.

[20] He mentioned that some time earlier in the day Annette had kicked in the door to his apartment.

[21] He also indicated that Sharilyn told him that, earlier in the day, Annette had hit her in the nose.

[22] After writing out his own statement Mr. Henskee spoke to the police. A transcript of his statement is in evidence marked exhibit #15. Key portions of the transcript are:

Q. Did she stop wrestling, fighting with Sharilyn?

A. Eventually, but may have had to hit her a second time before she finally got the message, you know, started to leave so ...

Q. Where do you think the second blow would have hit her?

A. I cannot say exactly but I wouldn't be ... I can't rule out the possibility of hitting her in the head at that point. I just don't know so.

Q. Was there any blood at this point on the second hit?

A. I don't think so, but then again I know there was ...I saw one blood spot on the floor over where I hang my jacket, which is quite a distance. And apparently there's a couple little blood spots on the wall so ...

Q. Right.

A. ...it's quite possibly I just don't know so.

Q. How did you get the blood on your hands do you think?

A. It's quite likely Annette's blood. But I'm not going into exactly how for this purpose of this statement and interview.

Q. The second blow you believe you could have struck her in the head, you're not sure?

A. That's pretty accurate, yeah.

Q. What happens to Annette at that point?

A. She went to the door eventually, I'm not again ...separated from Sharilyn and went to the door and then she threatened, as I mentioned here to get some people to come after me.

Q. Okay. Did she come back in?

A. No. I don't think so, no.

Q. Did you go out?

A. Yes.

Q. And what happened when you got out there?

A. Well, I'm not talking ... as I said, I'll leave that to other people

to give their version of it and then if I have to give my version I will.

Q. Do you recall striking Annette with a hammer outside of your apartment?

A. Well, I won't answer that one right now.

Q. Do you think you could have seriously hurt her?

A. It's hard to say. I have certainly been under a lot of stress and I could have blacked out and, you know. Done worse to her than I would have done, you know, in a normal situation but ...

At p. 44:

A. Yeah, well, I don't know if I should say it or not but you could say that it turned into a conflict between me and Annette over whether she was going to have people come and do serious damage to me or not.

Q. We're talking at the door when she was on her way out after being struck a couple of times. She said ... you believe, you can't recall exactly though, if I'm remembering what you said in your statement, and you told me that she was going to send people back?

A. Pretty much, yeah. And you can image the kind of people they would be so.

Q. Has she ever had anybody show up at your door before?

A. We've never had any problems. We've got along pretty well. It's not ...(inaudible-talkover).

Q. So she's never sent people after you before?

A. No, if she had I probably wouldn't ... I might not be alive to

be talking here. I don't know what connections she has but I know that there's a lot going on lately and I'd like to be able to sleep with my door unlocked so.

Q. Most of us would.

Q. Daniel, did you feel threatened when she was outside threatening you?

A. Well, obviously.

At p. 47:

A. I had it in my hand when I left the apartment and the fellow asked me to put it down so...

At p. 50:

A. No, I was just pretty confused that's ... I probably remember maybe 50 percent to 75 percent of what happened so there's a lot of blank spots.

At p. 51:

Q. Did you feel that if she stayed there she was going to get someone to come and harm you?

A. I don't quite ... it sounds like ...

Q. So she stayed right there on that deck hollering or shouting?

A. No, she would have to make some telephone calls and, you know, nothing would have happened possibly even tonight but at some point, you know, somebody would be likely to show up and, you know, do some serious damage to me.

Q. Why not call the police and report that though?

A. No witnesses, for one thing, except maybe Sharilyn so.

At p. 53:

Q. And you neutralized her from continuing with words, she never physically attacked you?

A. I think that's true that she never physically attacked me. She was never intending to do it herself, it was always somebody else was always suppose to do it so.

At p. 54:

Q. Okay. And just to clarify, she was threatening you outside on the deck?

A. She was outside on the deck and I was still inside at the time the threat was actually uttered.

Q. Okay. You didn't have to go outside though did you? Was there a reason to go outside?

A. Well, that's a good question.

Q. What drew you outside?

A. Well, to follow her actually. I guess that would be, you know, the answer to the question.

Q. For what purpose to follow her though? What ... if you wanted her out, you got what you wanted she left, right, after the first two hits. Why not shut the door, lock it up, call us?

A. Again I had nothing really to call in about, you know, calling in for somebody threatening and first of all the threats are never specific. It's just, you know, something will happen or somebody will come and get you or so forth so.

At p. 56:

Q. ... on with the tapes rolling, with us being in the room with you, you choose to disclose about your stress level?

A. Pretty high and I've been worried about having a fourth nervous break down actually.

At p. 58:

A. Unfortunately, of right now, I've cut way back, I have a bad short term memory especially and I ... though concentrating if I ... I can't read a newspaper. ... Anyway I've been almost back to normal lately.

[23] Of particular relevance is Mr. Henskee's statements regarding what took place outside his apartment between he and Ms. Paris and his recall of those events.

[24] In his statement to the police dispatch officer he said that he started hitting Ms. Paris with the hammer after she threatened to get someone after him. Later he said that after the threat by Ms. Paris, "That's when I kept after her."

[25] When speaking to the police at the scene he is reported to have said that he hit Ms. Paris while she was inside and outside of his apartment.

[26] In his own handwritten statement he indicated that after the two women stopped fighting and got up that Ms. Paris stood in the doorway of his apartment and threatened to bring someone back to get after him. He said he would leave to others to indicate what happened thereafter.

[27] When questioned by the police he repeatedly indicated that he didn't want to say what happened after Ms. Paris uttered her threat.

[28] He said that he didn't recall telling the officers that he hit Ms. Paris when she was outside of his apartment.

[29] He indicated that he had been under a lot of stress and could have blacked out. That his stress level was very high.

[30] At p. 50 he indicated that he was pretty confused. That he only remembered 50% to 75% of what happened. That there were a lot of blank spots.

The Evidence of Ms. Watkins-Zwicker

[31] Ms. Watkins-Zwicker stated that she was doing cocaine that day, but, not too much. She said that she did some shortly before this incident. She said that Ms. Paris was drunk and stoned. She stated that she was at Mr. Henskee's apartment for more than an hour before Ms. Paris arrived. She said that she was using the telephone when Ms. Paris burst into the apartment. Ms. Paris didn't knock or call to her from outside the door. After Ms. Paris burst into the apartment there was no talking, just Ms. Paris throwing alcohol on her and threatening to burn her. She said that Ms. Paris had a lighter in her hand and was trying to light the alcohol. She jumped Ms. Paris to get the lighter from her.

[32] She said Dan (Mr. Henskee) broke us up. Demonstrating a downward action with her arm she said Dan came down with a fist or something "to get our attention" and said "Stop" or "Break it Up". She didn't see anything in Dan's hand. Later she said she didn't recall anything in his hand.

[33] She said that they stopped fighting and got up. As I understood her evidence, at one point, she said that, then she went to the livingroom and from there she couldn't see the entrance door area. Yet, later in her evidence, she

said that Annette went outside but then tried to come back inside and there was a scuffle at the door with her and Dan and Ms. Paris. Those versions appeared inconsistent. She said that she heard Ms. Paris threaten to burn the place down. She apparently didn't hear or see Mr. Henskee strike Ms. Paris in the doorway or outside the door.

[34] She said that when she came out of the livingroom Dan was gone. Annette was laying on the veranda outside the door "not looking too good". Annette's wig was off. She was mumbling. Ms. Watkins-Zwicker said she didn't notice any injuries and couldn't say if she saw blood. She left. She thought that it was still daylight when she left.

[35] She couldn't recall the colour of the lighter Ms. Paris had. She guessed orange.

[36] She said that she didn't hear Mr. Henskee mention \$20 dollars.

[37] Ms. Watkins-Zwicker's evidence was internally inconsistent, inconsistent with objectively proven facts, and inconsistent with admissions made by Mr.

Henskee. I don't believe that she saw a lighter in Ms. Paris' hand. Mr. Henskee said that he couldn't say that he saw a lighter. If Ms. Paris had a lighter in her hand and was trying to ignite the alcohol Mr. Henskee would surely have seen it at some point. And where was the lighter during and after the wrestling match? Was it no longer a threat?

[38] I believe that Ms. Watkins-Zwicker saw a hammer in Mr. Henskee's hand, as he admitted he held a hammer. In my view when Ms. Watkins-Zwicker said that she didn't see anything in Mr. Henskee's hand or didn't recall, she was intentionally misleading the court.

[39] She said she didn't see and didn't know if Ms. Paris had been struck while inside the apartment. Given the blood of Ms. Paris on the kitchen counter and other places in the apartment I find it hard to accept her evidence on that point.

[40] After the wrestling stopped I'm not certain if Ms. Watkins-Zwicker left the kitchen area or not as I viewed her evidence on that point as being internally inconsistent. I'm not at all convinced that Ms. Watkins-Zwicker was truthful in

claiming she wasn't present and didn't see what happened between Mr. Henskee and Ms. Paris near the exit door and outside.

Evidence of Annette Paris

[41] Ms. Paris testified that on the day in question she smoked, maybe a \$20 piece of crack cocaine. She said that at the time of the alleged assault she was very coherent.

[42] During the afternoon she had been in the basement apartment at 975 Mitchell Street with a number of other persons, all of whom were doing crack. At around 2:30 - 3:00 pm she got into an argument with another person present, Sharilyn Watkins-Zwicker, and punched her in the nose. Ms. Watkins-Zwicker left, but returned about an hour later. Ms. Watkins-Zwicker stepped over Ms. Paris' legs, taunting and laughing at her. Then Ms. Watkins-Zwicker left the apartment again. Ms. Paris said she was angry and stewed about it for about an hour. Then she went to the apartment on the next level (Mr. Henskee's), where she believed Watkins-Zwicker to have gone. She kicked in the door. No one was there.

[43] About 30 minutes later she went back to the second level apartment to confront Ms.Watkins-Zwicker and someone opened the door for her. Ms.Watkins-Zwicker was on the telephone. She had words with Ms.Watkins-Zwicker. She said to Ms.Watkins-Zwicker, "so you want to be smart". Ms.Watkins-Zwicker made a gesture in reply. Ms. Paris threw rubbing alcohol on Ms.Watkins-Zwicker (later she said "in her face") and threatened to burn her. Ms. Paris initially testified that she didn't have a lighter. Later she stated that she couldn't recall if she had a lighter. She said she was trying to intimidate Ms.Watkins-Zwicker and didn't intend to light her on fire. She said that after making the threat she stepped back and got hit in the head by Mr. Henskee. She said that someone was holding her. She remembers turning and seeing Mr. Henskee with a hammer in his hand and swinging it down at her while saying "and she owes me \$20. dollars". She testified that was the only thing that Mr. Henskee said during the incident.

[44] In retelling the story Ms. Paris indicated that after she threw the alcohol on Ms. Watkins-Zwicker and stepped back that Ms.Watkins-Zwicker grabbed her, or they grabbed each other, and Ms.Watkins-Zwicker fell on top of her. She said that she was trying to get up when she was hit on the head by Mr.

Henskee. Later in her evidence she said that she had stood up before she was hit on the head.

[45] Ms. Paris testified that she wanted to get out of there because she was on probation and didn't want to be caught fighting.

[46] She said it wasn't even really a fight - that she and Ms. Watkins-Zwicker were just grabbing each other. Ms. Paris said that after she got up from wrestling with Ms. Watkins-Zwicker she got hit on the head from behind. She turned to see Mr. Henskee with the hammer in his hand. He swung and hit her again on the head. She tried to get out. She said that Ms. Watkins-Zwicker held the door shut so she couldn't get out. She was just about out the door when being hit. She recalled Mr. Henskee hitting her twice. She couldn't recall how many times she was hit on the head. She said that she had 10-11 dents to her head, mostly to the back of her head. She recalls screaming, "help, help, help". She said her left arm was broken and her finger on her left hand split open. She said she has flashes of memory from that point onward.

[47] Ms. Paris admitted that she was charged and pled guilty to punching Ms.

Watkins-Zwicker in the nose and throwing alcohol in her face.

[48] Ms. Paris testified that the lighter found at the scene did not belong to her. She said that her lighter was white and she told the police so. In fact her statement to the police indicated that she didn't recall the color of her lighter.

[49] She denied threatening Mr. Henskee.

[50] In assessing the evidence of Ms. Paris I am conscious of the fact that she was under the influence of cocaine at the time and suffered a significant trauma to the head. She admitted to assaulting Ms. Watkins-Zwicker by punching her in the nose and by throwing alcohol on her and threatening to burn her. She pled guilty to those offences.

[51] She stated that she intended to scare Ms. Watkins-Zwicker and not to burn her. I'm not certain whether in her impaired and upset state she would have lit the alcohol which she threw on Ms. Watkins-Zwicker. I am certain that she intended to cause Ms. Watkins-Zwicker to take her threat seriously, which she did.

[52] Although she denied uttering a threat to Mr. Henskee I find that she may have done so.

[53] That was the evidence/statements of the three persons who were present when the incident occurred. Let me now turn to the remaining evidence which is of assistance to the court in determining the facts.

[54] Russell Heon attended the scene shortly after the incident occurred. His evidence was as follows:

Evidence of Russell Heon

[55] Mr. Heon stated that just before dusk he heard someone hollering "Help Me" from the veranda above his apartment , ie. outside Mr. Henskee's apartment.

[56] He went to investigate. He found Annette Paris laying face down on the veranda. Blood was coming from the back of Annette's skull. Dan (Mr. Henskee) was standing just outside his apartment door - facing out. He was

about 6-7 feet from Annette. He said he didn't see Dan holding anything. Later he said he didn't recall what Mr. Henskee had in his hands.

[57] His evidence on that point was not credible. Mr. Henskee admitted to having a hammer in his hand at that time and putting it down when he was asked to do so. I have no doubt that Mr. Henskee held the hammer as he stated. I have no doubt that Mr. Heon saw Mr. Henskee holding the hammer.

[58] I believe that Mr. Heon was reluctant to give evidence harmful to Mr. Henskee.

[59] Mr. Heon said he might've asked Dan what happened. He didn't recall if he got a response.

[60] He carried Annette downstairs to his apartment and tended to her injuries until the EHS arrived.

[61] I believe that Mr. Heon's evidence was truthful in describing his actions.

Evidence of Injuries to Ms. Paris

[62] In relation to Ms. Paris' injuries the Court heard from Dr. McNeely and by consent received into evidence Exhibit #4, Hospital Discharge Summary for Annette Paris and Exhibit#16, a Forensic Laboratory Services Report in relation to blood found at the scene.

Evidence of Dr. McNeely

[63] Dr. McNeely was accepted by the Court as an expert witness qualified to give opinion evidence on the nature of the wounds sustained by Ms. Paris. He is on the Medical Register for Nova Scotia as a Neurosurgeon.

[64] He testified that he observed at least six (6) injuries to Ms. Paris' head - two above her right ear and at least four at the back of her head. Two of the blows to the head had caused a skull fracture, one with no displacement and the second with a 1 to 2 mm displacement - which was described as minimal. The head wounds did not require surgery. He noted a compound fracture of the middle finger of her left hand. He also noted a superficial laceration over her left

tibia (leg).

[65] Dr. McNeely indicated that these injuries likely caused impaired consciousness. They were not trivial and she required hospitalization. He was not asked his opinion on the degree of force necessary to cause such injuries.

[66] I accept the Doctor's evidence and find that there were at least seven blows administered by Mr. Henskee. There were at least six blows to Ms. Paris' head and one to her left hand, which most likely was occasioned by her trying to block the blows to her head. I find that the injury to the hand and the injuries to the head which broke the skin to constitute a wounding of Ms. Paris.

Exhibit #4 - the Hospital Discharge Summary

[67] The Discharge Summary states:

She had multiple scalp lacerations over the occiput, two lacerations over the right temporal bone, one of which included an arterial bleeder.

There was a puncture laceration over the right tibia.

It was noted that Ms. Paris was combative and noted to be in withdrawal from cocaine. There was a strong smell of gasoline from Ms. Paris.

Exhibit #16 the Forensic Laboratory Services Report

[68] The Lab report confirms that blood of Female #1, whom I am convinced is Ms. Paris, was found on:

The swab from the kitchen wall (area marked 11);

The swab of the entry door (area marked 16);

The swab of the arm of the hammer (marked as area AA);

The swab of the landing/deck area (marked as area 7);

The swab of the handle of the hammer (marked as AB);

The grey sweater of Mr. Henskee;

The swab of the left hand of Mr. Henskee.

Analysis and Conclusions

What has the evidence proven beyond any reasonable doubt?

[69] While the charges relate to one incident, counsel have raised different

arguments/defenses in relation to the initial use of force by Mr. Henskee and any subsequent use of force. For that reason I will refer to Mr. Henskee's initial use of force as the first phase of the incident and the use of force following Ms. Paris' threat as the second phase.

First Phase

[70] The evidence is clear that when Ms. Paris and Ms. Watkins-Zwicker were wrestling in his apartment, Mr. Henskee picked up a hammer and struck Ms. Paris with it. I find that he applied force to Ms. Paris without her consent, by using a weapon, to wit., a hammer, which caused a wounding of Ms. Paris.

[71] The defense have raised the following defenses.

Section 37

37(1) Every one is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

Section 41

41(1) Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation.

27. Every is justified in using as much force as is reasonably necessary

(a) to prevent the commission of an offence

(i) for which, if it were committed, the person who committed it might be arrested without warrant; and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).

What force was applied and for what purpose?

[72] Mr. Henskee said that he didn't speak before intervening. However, he did say that he didn't recall all of the incident. Ms. Watkins-Zwicker stated that Mr. Henskee told the two women to, "Stop" or, "Break it up". While I didn't believe Ms. Watkins-Zwicker, I find that Mr. Henskee may have attempted to intervene verbally before resulting to the use of physical force.

[73] In terms of the use of physical force, Mr. Henskee may have tried to hit Ms. Paris' elbow as he stated. He said doing so proved difficult. There was no note of any bruise or other injury to Ms. Paris' elbow. I therefore, conclude that there was no significant contact made by Mr. Henskee to Ms. Paris' elbow, but he may have tried to do so.

[74] Ms. Paris' blood was found at various places in Mr. Henskee's apartment. The only reasonable explanation for the blood of Ms. Paris inside Mr. Henskee's apartment is that at least one blow was administered while she was inside the apartment that caused a breakage of the skin. That blow could have been to her hand or her head. Mr. Henskee admitted that he may have hit her on the head while she was inside his apartment. He didn't say if he was trying to hit her head.

[75] Mr. Henskee did not acknowledge hitting Ms. Paris more than once during this phase. He said that he eventually hit her hard enough to get her to stop. Ms. Watkins-Zwicker described one downward motion by Mr. Henskee. There may have been only one blow with the hammer administered by Mr. Henskee during this phase.

[76] As previously stated Mr. Henskee may have first attempted to hit Ms. Paris on the elbow. If he did so, it would suggest a belief on his part that he could intervene in that manner, without the risk of causing any injury or any significant injury. The degree of risk did not change as the two women wrestled. In those circumstances, in my view, an escalation to an intentional blow to the head with the hammer, would constitute an unreasonable use of force. However, it has not been proven beyond a reasonable doubt that Mr. Henskee intentionally struck Ms. Paris on the head during this phase of the incident.

[77] In summary, giving the benefit of any doubt to Mr. Henskee:

Mr. Henskee may have first tried to verbally intervene;

When intervening using the hammer Mr. Henskee may have tried to hit Ms. Paris on the elbow;

If Mr. Henskee struck Ms. Paris' head with the hammer, he may not

have intended to strike her on the head;

Mr. Henskee may have struck Ms. Paris only one significant blow during this phase of the incident;

While the injury to Ms. Paris during this phase caused her to bleed, the injury was not proven to have been more serious than a breakage of the skin.

What was Mr. Henskee's purpose?

[78] I believe that Mr. Henskee's main purpose in intervening was to stop the two women from continuing to fight and possibly causing more disruption of his property, as had occurred with the knocking over of his steel shelving unit. While he stated that he was concerned that Ms. Watkins-Zwicker may be set on fire and indirectly his apartment set on fire I don't believe that he thought about that at the time. This matter occurred very quickly, before allowing much time for thought. In my view Mr. Henskee tended to rationalize his actions upon later reflection. I note that the perception of Ms. Watkins-Zwicker was that Mr. Henskee was attempting to break up the fight between the two women. Having said that, Mr. Henskee struck only Ms. Paris, which tends to suggest that he saw her as the aggressor.

[79] While I believe that Mr. Henskee's main concern was the immediate disruption of his apartment, I find that, at least in part, he may have intervened out of concern that Ms. Paris' may set Ms. Watkins-Zwicker on fire and thereby cause fire damage to his personal property and residence.

Application of the Law to Phase One Facts As Found By The Court

Section 37

[80] Section 37 allows the use of force to defend one's self or some one under your protection. The term "any one under his protection" is not defined. Mr. Henskee referred to Ms. Watkins-Zwicker and Ms. Paris as acquaintances, persons who occasionally came to his apartment to use his phone. He was under no legal duty toward either of them. They were not family members or persons residing with him. In my view Ms. Watkins-Zwicker, on who's behalf Mr. Henskee may have intervened, was not a person under his protection and, consequently s.37 does not apply.

[81] The Crown conceded that Ms. Paris was a trespasser. I find that Mr.

Henskee's action may have, at least in part, been to remove her from the premises and to prevent a further assault upon Ms. Watkins-Zwicker by Ms. Paris.

[82] Section 41 limits the amount of force permitted to "no more force than is necessary". Section 27 limits the amount of force which may lawfully be employed to "only as much force as is reasonably necessary". I note that section 27 adds the term "reasonably".

How if at all does the additional of "reasonably" affect the test?

[83] The case law relating to s.41 speaks to the subjective perception of the accused but finds that the force used must be reasonable in the circumstances. (See *R. v. Born With A Tooth* (1992), 76 C.C.C. (3d) 169 (Ab.C.A.); and *R. v. George* (200), 145 C.C.C. (3d) 405 (Ont.C.A.), leave to appeal to S.C.C. refused.) Cases dealing with s. 27 have held that the use of the word "reasonably" establishes an objective standard.

[84] I accept that Mr. Henskee may have believed that the force that he used

was no more than was (reasonably) necessary. On the facts as I have found them in relation to this first phase of the incident I am left with a doubt as to whether the force used was reasonable in those circumstances.

Phase Two of The Incident

[85] Both Ms. Watkins-Zwicker and Mr. Henskee related that Mr. Henskee's intervention was successful and the two women separated and got up. Ms. Watkins-Zwicker said she went to the bedroom and Ms. Paris to the exit door. Ms. Watkins-Zwicker said she heard Ms. Paris uttering words of threat from the door area - to burn the place. Mr. Henskee indicated more than once that Ms. Paris uttered a threat to get somebody to come and get him. He said he viewed that as a threat to burn his place down or seriously harm or kill him at some future time.

[86] Ms. Paris' recall of events after the first or second blows is patchy at best. She stated that she did not threaten Mr. Henskee. Given her state of impairment by cocaine and the fact that she had been struck in the head with a hammer she may not recall uttering a threat against Mr. Henskee. I find that

it is likely that she did so.

[87] Mr. Henskee admitted that he took the threat seriously and after the threat:

Initially he said "At that point I started hitting her."

Later he said, "That's when I kept after her."

[88] According to the police he said he hit her when she was just inside the door and continued to hit her after she went outside. I find that statement consistent with his earlier utterance and I am convinced that a statement to that effect was made by Mr. Henskee to the police.

[89] In his own written statement he indicated that Annette was standing in his doorway when she uttered the threat and he would leave to others to say what happened after that. He maintained that position when interviewed by the police and said he didn't recall having earlier said that he followed her out of the apartment continuing to hit her.

[90] Ms. Watkins-Zwicker claims not to have been present nor seen or heard

what happened during this time. She last saw Ms. Paris in the door area of the apartment. Afterwards she discovered Ms. Paris on the deck outside the apartment.

[91] Ms. Paris has no recall other than visualizing Mr. Henskee standing over her and hitting her repeatedly on the head with the hammer. At one point stating, "And she still owes me \$20.00"

[92] I have no doubt that in response to Ms. Paris' threat, that Mr. Henskee struck Ms. Paris on the head with a hammer. He followed her out of his apartment as she tried to leave, hitting her several times on the head with the hammer until she went down on the deck. I have no doubt that the blows administered by Mr. Henskee during this second phase caused a wounding of Ms. Paris.

[93] I am not certain why Mr. Henskee stopping hitting Ms. Paris. According to Mr. Heon, Mr. Henskee was 6-7 feet from Ms. Paris when he arrived in response to her calls for help. I am not certain how Ms. Paris' clothing became wet with gasoline.

Why did Mr. Henskee use physical force against Ms. Paris?

[94] I have found that Mr. Henskee may have acted in response to a threat made against him by Ms. Paris.

[95] Mr. Henskee indicated that he has a history of mental illness with three prior nervous breakdowns. He said that he was feeling very stressed prior to this incident and fearful of a fourth nervous breakdown. He said that more recently he was doing better. He said that he only recalled about 50 to 75% of what occurred - although, at times, he admits to events that later he said he didn't recall, which raises a question of the veracity of his claim of lack of recall. This evidence of emotional fragility doesn't provide any guidance to the Court on whether Mr. Henskee would/did perceive the threat in a manner different than the usual person would perceive it.

[96] There was no history of animosity between Mr. Henskee and Ms. Paris nor any history of physical violence between them.

[97] When speaking with the police at the police station Mr. Henskee

acknowledged that Ms. Paris never struck him and that her threat was not of any immediate or imminent harm to he or his property. He said that he believed that she meant that at some future time someone may do damage to his home or seriously injure or kill him. He said that he didn't think calling the police to make a complaint of the threat was a viable option because he had no witnesses and "These threats are never specific". He said he didn't know if Ms. Paris knew people. Which I took to mean "people" that may be capable of doing as he said she'd threatened to do.

[98] In this case there was no expert witness called to provide any insight into Mr. Henskee thinking/perception at the relevant time.

[99] I am not convinced that Mr. Henskee contemplated any other options before using force against Ms. Paris. He acted quickly in response to her statement. He may well have perceived her as a threat. I believe his discussion with the police about why he didn't just call the police is another example of his after the fact rationalization of his quick decision at the time.

[100] In relation to this second phase of the incident the defense relied upon

s.41, s.29, s.37 and s.34. I have earlier discussed s.41, s.29 and s.37.

Section 34 states:

34(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Application of the Law to the Facts of Phase Two

[101] Although I have referred to two phases of the incident I am conscious of the fact that the events began unexpectedly and happened quickly. The time between the end of what I've called the first phase and the start of the second

phase was brief, likely less than a minute. Mr. Henskee appears to be an intelligent man who, unfortunately, is emotionally fragile. Undoubtedly he became upset having had two women in his apartment, both acquaintances, one of whom who threw alcohol on the other and threatened to burn her. His actions throughout the incident must be seen in this context.

[102] As I've indicated I have no doubt that Mr. Henskee repeatedly struck Ms. Paris in the head with a hammer as she was leaving his apartment. She may have threatened to have people get him before she turned to leave.

In those circumstances, is Mr. Henskee legally entitled to use force against Ms. Paris and, if so, what degree of force is he permitted to employ?

[103] I find that at the time that Mr. Henskee used force against Ms. Paris was not assaulting or attempting to assault Mr. Henskee nor was there any immediate danger of assault or damage to Mr. Henskee's property.

[104] In *R v Lavalee*, [1990] 1 S.C.R. 852, the Supreme Court of Canada noted that although s.34 does not specify that the accused must apprehend an immediate danger before acting in self-defense, there is an assumption that it

is inherently unreasonable to apprehend death or grievous bodily harm unless and until the physical assault is actually in progress at which point the victim can reasonably gauge the requisite amount of force needed to repel the attack and act accordingly.

[105] In ***Lavalee*** expert evidence was presented on the Battered Wife Syndrome to establish that in the case of a battered women, although there is no immediate assault in process, she may perceive that the only way to prevent her death or grievous bodily harm at the hands of her abuser is to kill him at that time. The test applied in ***Lavalee*** was:

Did the accused believe on reasonable grounds that it was not otherwise possible to preserve himself from death or grievous bodily harm?

[106] This test requires a subjective believe based on objectively reasonable grounds.

What was Mr. Henskee's belief? Did he believe that he had to kill or cause grievous harm to Ms. Paris to prevent future death or grievous harm to himself?

[107] What was Mr. Henskee's intention when he struck Ms. Paris repeatedly on her head.? Did he intend to kill Ms. Paris? Surely killing her would be the only means of eliminating the risk of her having persons attack him or his property in the future. If Mr. Henskee believed that such was necessary why didn't he kill Ms. Paris? Did he stop because he thought he'd killed her? Did he reconsider and change his mind? Was he interrupted by Mr. Heon? I note that Ms. Paris smelled of gasoline. Was she doused with gasoline with intent to burn her to death? The evidence doesn't provide answers to these questions.

[108] I am convinced that Mr. Henskee may have perceived Ms. Paris as a threat. The threat being that if she left she may convince someone else, possibly someone unknown to Mr. Henskee, to cause grievous harm or death to him or serious damage to his property. I believe he acted immediately, without consideration of alternatives, to the threat which he believed she represented if she left. I am persuaded that Mr. Henskee may have believed that it was not otherwise possible to preserve himself from death or grievous bodily harm and that the force he used to stop her from leaving was reasonable and no more force than was necessary.

[109] In my view, if Mr. Henskee held that belief, his belief was not based on reasonable grounds. Further, I find that the force he used was far more than (reasonably) necessary to prevent a possible future assault.

[110] There was no history of violence between these parties. There was no violence towards Mr. Henskee by Ms. Paris on the day of this incident. While Mr. Henskee saw Ms. Paris douse Ms. Watkins-Zwicker with alcohol and threaten to burn her, she didn't do so. The threat of possible future violence wasn't to be committed by Ms. Paris but by someone else at her request. Mr. Henskee's use of force was not against a possible future assailant but the person who may ask another person to assault Mr. Henskee. In these circumstances, for Mr. Henskee to believe he had no other option but to stop her from leaving by using whatever force necessary, was unreasonable. Of that I have no doubt.

[111] In my view, whether Mr. Henskee struck Ms. Paris with the intention of killing her or to cause harm so that she couldn't leave to possibly further her threat while high on cocaine doesn't affect the outcome of this case. By striking her on the head repeatedly with a hammer I am certain he realized he was

going to cause grievous harm or death to Ms. Paris.

[112] Mr. Henskee's claim of lack of recall does not of itself or on the totality of the evidence raise any doubt regarding his intentions.

[113] No reasonable doubt has been raised in relation to the self-defense arguments raised.

[114] No doubt has been raised in relation to the defense of property. Ms. Paris was not struck to prevent her from trespassing on Mr. Henskee's property. I find that s.41 does not permit action in anticipation of a possible future trespass. Even if it did the fear was not of a future trespass by Ms. Paris, but possibly of her agent. I do not believe that s.41 permits the use of force in those circumstances. If it does I find that it has been proven beyond a reasonable doubt that the force used was more than necessary.

[115] I am of the view that the force used by Mr. Henskee against Ms. Paris to prevent a possible future offence by another individual is not permitted under s.27, and even if it were I am convinced beyond a reasonable doubt that the

force used was more than reasonably necessary.

[116] In my view, if Ms. Paris uttered a threat as Mr. Henskee stated she did, Mr. Henskee was not legally permitted to apply any force against Ms. Paris to prevent her from leaving to possibly pursue a future assault on him by someone engaged to do so by Ms. Paris. If I am incorrect on that view of the law, I find that it has been proven beyond a reasonable doubt that the force used was more than (reasonably) necessary in the circumstances.

[117] I find Mr. Henskee guilty of aggravated assault as alleged.

[118] I find Mr. Henskee guilty of the second count of assault with a weapon.

J.