

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Donovan, 2012 NSPC 126

Date:20121207

Docket:2367217

Registry: Sydney

Between:

Her Majesty the Queen

v.

Donald Bernard Donovan

Judge: The Honourable Judge Jean M. Whalen

Heard: September 7, 2012 and October 16, 2012
In Sydney, Nova Scotia

Oral Decision: December 7, 2012

Written decision: February 13, 2013

Charge: Section 266(b) Criminal Code of Canada

Counsel: Shane Russell, for the Crown
Nash Brogan, for the Defence

By the Court:

[1] **INTRODUCTION:**

[2] Mr. Donovan was employed as an licensed practical nurse at Braemore Home on August 14, 2011. As a result of a complaint by a fellow employee and an investigation by the police, the defendant was charged with assaulting Paulette Nicholson. The court heard from six witnesses, including Mr. Donovan, but not the complainant as she was unable to testify due to her medical status. [see exhibit # 1]

[3] **ISSUE:**

[4] (1) Did Mr. Donovan assault Paulette Nicholson as alleged by the crown?
If the court does not accept that evidence but accepts the defendant's testimony,
(2) Can Mr. Donovan avail himself of the defence pursuant to s.37(1) C.C.C.
based on the evidence before the court?

[5] **REVIEW OF THE EVIDENCE:**

[6] Mr. Ian Stewart testified he was employed at the Braemore Home on the date of the alleged incident. He had been employed for a month to a month and a half prior to August 14, 2011. He subsequently left Braemore Home in September 2011 and is currently employed in the Bridgewater area as a residential counsellor working with special needs clients.

[7] He was familiar with the complainant, Paulette Nicholson as he had worked on her unit the most since beginning his employment. Mr. Stewart was not clear on Paulette Nicholson's full diagnosis but he did know she was "developmentally challenged, non verbal with no visible signs she could comprehend, and mobility was an issue." She was always in a wheelchair; he never saw her walking around. She used her feet to drag herself along the floor and roll herself around. He never saw her use her hands.

[8] Mr. Stewart testified he knew the defendant to work with him, but didn't know anything about him. He worked with Mr. Donovan two or three times, they never had a conversation, "but there were no issues."

[9] Mr. Stewart stated it was lunch time and he was feeding another resident. Mr. Donovan was feeding Paulette Nicholson. Mr. Stewart was off to the side against the wall [exhibit 3a]. Mr. Donovan and Paulette Nicholson were off to Mr. Stewart's side. [The same distance and line as his position in the witness box in relation to the clerk.] He stated Mr. Donovan "was in my line of view". There was nothing obstructing his view of either individual. He was ten to fifteen feet away.

[10] He doesn't know what "really grabbed his attention", but he looked over at Mr. Donovan and he saw Mr. Donovan's right hand up in the air and it came in contact with Paulette Nicholson's left side of her head. "It was an open hand, it was a slap." He stated he is very clear as to what he saw.

[11] Then he testified Paulette Nicholson "went over in her wheelchair and she shrieked...she fell over to her side". He cannot say the level of force used but "heard a crack and it caused her to go over in her chair". Mr. Stewart did not see what Paulette Nicholson may have done to upset Mr. Donovan, although he stated she does have a tendency to slap her meal onto her lap. They were in the "square" when this is alleged to have happened. He was not sure how many residents were in the "square".

[12] Mr. Stewart testified he did not see P.P. in the square at the time of this alleged assault but, he saw him throughout the day.

[13] After the alleged assault, Mr. Stewart testified Mr. Donovan “took her food and said okay you’re done” and went to the dining room. He did not return with a meal.

[14] When asked if Mr. Donovan could have moved Paulette Nicholson’s face, Mr. Stewart replied “no”. Paulette Nicholson reacted to the slap by screaming and rolling away off towards the exit.

[15] Mr. Stewart consulted with another staff person, Tim Eagan. He told him what happened. Mr. Stewart subsequently got a call from the unit co-ordinator “Tracey” the following day. He told her what happened.

[16] Initially he wasn’t willing to tell, he was somewhat reluctant, but he was “influenced by other staff about horror stories” and he ultimately did tell when contacted by Tracey. He also gave a statement to police. He stated “he wanted to

avoid getting anyone in serious trouble.” He also gave information as part of an internal investigation.

[17] **ON CROSS EXAMINATION:**

[18] Mr. Stewart indicated he had fed Paulette Nicholson before and that she was difficult to feed. The unit he was on is a “locked” unit because the residents are an elopement risk and / or prone to mild violence. Only four of the residents including Paulette Nicholson are fed in “the square”. Mr. Stewart said [on the date in question] only two of them were feeding someone and no one else was present.

[19] Mr. Stewart agreed he made no notes (eg. incident report) and was relying on his memory. M.R., Paulette, T.J. and D. are the residents that require feeding.

[20] Mr. Stewart indicated although Paulette Nicholson is (non-verbal) she could point, for example, to show her shoe was untied. When Paulette Nicholson was in her wheelchair she had a buckle [around her] and a tray.

[21] Normally the wheels are locked when feeding Paulette Nicholson, but it depends, “sometimes people don’t always follow protocol.” Mr. Stewart is sure Paulette Nicholson’s wheelchair was unlocked because she wheeled away using her feet.

[22] Mr. Stewart has had limited exposure to Paulette Nicholson when she gets upset but agreed with Mr. Brogan that she has tried to kick / trip him once while he was walking past her, and he also agreed it’s not unusual for her to strike out at people.

[23] Mr. Stewart testified the incident occurred at dinner time because he recalls carrots on Myles’ plate, “no one has carrots for breakfast”.

[24] Mr. Stewart told Mr. Brogan he is “sure Mr. Donovan struck Paulette Nicholson with his right hand”. He stated he heard “like an impact smack, it sounded hard” Mr. Donovan “couldn’t have hit the tray. I could see Mr. Donovan from my peripheral vision”.

[25] Mr. Stewart says he “didn’t hear a sound, he just happened to look over”.

He estimates the incident may have taken a couple of minutes, including when the defendant walked away with the meal. He said he stopped feeding his resident and looked until the defendant walked away.

[26] He is sure he saw Paulette Nicholson move to the right (which would be towards the exit), scream and roll away. Mr. Stewart admitted he was concerned but didn’t check Paulette Nicholson or get anyone. There was no one else present to report to so he waited until his lunch break to talk to Mr. Eagan. He spoke to Tracey the next day and gave a statement to police a few days later.

[27] Darlene Chaisson, Director of Organizational Development, was qualified as an expert (by consent) in non-violent crisis intervention, education and training of nursing staff, continuing care assistants and licensed practical nurses relating to non-violent crisis intervention, who is able to give opinion evidence regarding proper procedures and techniques used when dealing with residents or patients [see exhibit #4].

[28] In training Ms. Chaisson's role is to give people information on (1) how to recognize agitation (2) strategies to reduce same (3) how to protect yourself and (4) show patient respect.

[29] Ms. Chaisson is not familiar with Paulette Nicholson. Ms. Chaisson was sent a letter by crown counsel [see exhibit #5] setting out a scenario and requesting the answer to three questions:

The scenario for which an opinion is requested involves an in-patient who is non-verbal, suffers from severe cognitive impairment and has a long history of obsessive compulsive behaviour. This patient, due to her disability, requires the assistance of staff to complete various activities of daily living such as eating.

The employee, while assisting the patient, starts to feed her while she is seated in a wheelchair. The patient becomes upset when another patient comes into the room. Upset with the other patient, she begins screaming and kicking her feet in his direction. As she does this, the employee, in an effort to distract her, slaps the feeding tray. The employee further "grabs" or takes her face with his right hand and turns her towards him. The employee then tells her "eat your breakfast".

It would be extremely helpful if you could address the following questions based on the fact scenario outlined above:

1. At any point, is it an acceptable practice for this employee to slap the patient's tray and physically take her face with his hand and turn her towards him.

2. What would be the proper techniques and procedures for an employee when faced with a scenario such as the one described above?
3. Would this employee have ever been taught that such a face grab procedure is acceptable?

Answers to Scenario Questions from the letter dated April 30, 2012:

- 1) No, it is not an acceptable practice.
- 2) Response to described scenario:
 - Provide personal space for the person.
 - Use the CPI supportive stance with the person. Staff must also keep their hands in plain view, at their sides if possible and keep their movements to a minimum.
 - Cue other team members to direct the other person out of the area, then stand by in case the employee needs further assistance.
 - Allow acting out person to vent, then give simple, clear direction to help them calm down.
 - When the person is in tension reduction (settled or calm). Give direction to the person to continue the activity at hand (in this case eating).
- 3) I'm unaware of whether he was taught a face grab procedure is acceptable.

[30] **TO QUESTION # 1 MS. CHAISSON TESTIFIED:**

[31] “No, it would probably increase agitation.” Ms. Chaisson then set out the proper technique. It does not include slapping a tray...that, she stated “is not acceptable under any circumstance”. She also testified “grabbing the face” is not acceptable because it could cause increased agitation. There are other options available such as asking for assistance, calling a code, taking a supportive stance or removing the person.

[32] On cross examination Ms. Chaisson testified that using physical intervention is a last resort. “You should try every alternative [as outlined earlier] as it is all part of a non-violent intervention.”

[33] Constable Forgeron testified he has been a police officer for twenty-one years and he was assigned to this case on September 8th. It was reported August 18th, four days after alleged incident.

[34] He stated the complainant is a resident of Braemore Home. There is no statement from Paulette Nicholson because the complainant suffered brain damage as a child and is “severally mentally challenged”. Mr. Donovan gave a statement

on September 22, 2011 (thirty-nine days after the alleged offence). Mr. Donovan gave a statement without counsel present. He was very co-operative.

[35] The officer testified the defendant did not use the word “redirect”, [however see page 6 of the defendant’s statement]. Constable Forgeron also stated he had a statement from Ian Stewart when he was questioning the defendant and in his statement he denied slapping Paulette Nicholson as described by Mr. Stewart.

[36] Mr. Donald Vaders testified he has been employed at Braemore Home since 1976. He has known and worked with the defendant for ten years. He was working on the date in question and outlined his duties that day which included feeding residents.

[37] When working with new employees he usually asks them to feed residents that require assistance. On this date he testified Ian Stewart was feeding a resident (D.H.M.) in the “square”. There are four residents at most in the “square”, each with a staff person.

[38] Mr. Vaders marked where residents and staff were located in the square [exhibit 3b] on the date in question. He was able to recall the breakfast menu being porridge, eggs and toast.

[39] Mr. Vaders testified he has known Paulette Nicholson for 23 years and fed her numerous times. He is familiar with her behaviour. He recalls having a conversation with the defendant over Paulette Nicholson not eating her breakfast. He stated Mr. Donovan told him “she’s not gonna eat it” so he gave him a “resource” yogurt and a drink and he went back out to the square. Mr. Donovan told him that she liked it.

[40] Mr. P.P., another resident, poured his porridge over his shirt so Mr. Vaders escorted him out of the dining room into the square as they were walking towards Paulette Nicholson. He testified he hollered at John Murphy to let P.P. into the change room (aka bathroom). He then turned around and went back to the dining room. He did not see any interaction between P.P. and Paulette Nicholson.

[41] Mr. Vaders testified that Paulette Nicholson has been struck by residents. She is able to point to where she was hit and will scream to let you know. If

someone walks by Paulette Nicholson and “it’s a threat or someone she knows” she will “get excited, bounce and she can raise her hand to say hi”.

[42] Mr. Vaders explained how he deals with residents who may act out when you are feeding them. He testified that you “feed with sensitivity”, you make sure their head is up and you have eye contact. If they are known to be aggressive you sit off to their side.

[43] When dealing with Paulette Nicholson it may be necessary to tap her tray, getting her to focus. She may go back in her chair and smile. “Then sometimes you must let her run her course” if you can’t get eye contact. Sometimes you stand up over her face and try and get her to focus or use your hand(s) to get her head up.

[44] On cross examination Mr. Vaders recalled the dinner menu as well. It consisted of roast beef, potatoes and carrots. He testified he remembered this day “even though a good day and nothing out of ordinary” because the defendant called him on August 18th and told him he was terminated and he wanted to know who was working.

[45] He stated Mr. Donovan called “to refresh my memory” and they did talk about the “incident”. He talked to the defendant because he said he was shocked. He did not know about the internal investigation. “Initially all he knew was something with him and Ian. Then he eventually saw [something] in the paper.”

[46] Mr. Vaders testified he was contacted by the police in mid September but the officer only wanted to talk about emails because both (meaning the defendant and Ian Stewart) said he wasn’t in the square.

[47] Mr. Vaders says he has a good rapport with Paulette Nicholson and taps to get her focus. “Not loud enough to get worker to jump because that was not appropriate”. He has never grabbed her face, but has touched her chin lightly.

[48] He also testified he has never smacked the table or grabbed Paulette Nicholson’s face to focus. He stated he did see the defendant try to feed Paulette Nicholson her oatmeal, but there was nothing out of the ordinary to worry about. (He was escorting clients in and out of the dining room) He did not see Mr. Donovan feed Paulette Nicholson the second items, but did see him come in with empty dishes and said Paulette Nicholson “loves this stuff”.

[49] Mr. Vaders does not know if Paulette Nicholson was strapped in because he couldn't see the harness due to her clothes. He testified Mr. Donovan never told him that day that Paulette Nicholson was violent and tried to attack P.P. He stated when they talked (he thinks) in October, Mr. Donovan told him after he had sent P.P. out to the square that Paulette Nicholson was acting up because P.P. was coming by. Mr. Vaders said Mr. Donovan told him he gave a statement to the police that he tapped Paulette Nicholson's [tray] and turned her chin. He said P.P. had his head down and was worried Paulette Nicholson was going to trip P.P.

[50] Mr. Vaders testified he was five to six feet away from P.P. and Paulette Nicholson when he started to go back to the dining room. He was ten feet from the dining room door. He did not hear Paulette Nicholson screaming or getting upset. He has no idea if Paulette Nicholson was trying to attack P.P.

[51] Mr. Donovan attended the Cape Breton Regional Police Service, central division, on September 22, 2011 and gave a cautioned statement to Constable Forgeron [exhibit # 2]. This was entered by consent of crown and defence counsel.

[52] When asked by the police officer “what’s your side of the story?”, Mr.

Donovan told Constable Forgeron the following:

[53] Beginning at page 3:

A. ...when I went home I sat down and I thought about what exactly happened from the minute I got there that day til the time I left and I wrote it all down and ah, the, then I understood ah, where it might of been misinterpreted what, why this gentleman accused me of doing what I did.

Um, I was ah, in the process of feeding ah, one of the clients. Her name is Paulette Nicholson. Um, she has severe OCD; ah, ob. Obsessive Compulsive Disorder. Um, as long as she’s no being distracted she’s great to, to deal with and to handle. Unfortunately, as I was starting to feed her, another client; we have four clients that are fed out in what we call the unit square because they’re in wheelchairs and whi, and one of them is blind. So, the rest of the clients eat in the dining room.

So, I feed Paulette out on the unit square. So, I’m just in the process of starting to feed her when ah, one of the clients ah, was, who has, who was misbehaving in the dining room, was sent out. Ah, he had poured his bowl of oatmeal over his head and down his shirt and pants and everything and he looked a mess and anyway, he, he was coming out and when Paulette saw him ah, she started to scream and point at him and ah, she wouldn’t stop screaming.

She just, cause, like I say, things are ou, out of the norm upset her and this was out of the norm and so she, he was heading towards her. She was getting more upset. Um, as, as the closer

he got the more she screamed and then she started to, to attempt to, to kick him and start trying to reach out and hit him.

So I was trying to distract her from doing that. So, what did, sh, I was si. I sit perpendicular; like she, she is in a wheelchair and she has a tray on it so I'm, I'm here and she's facing that way. So I'm feeding her this way. He's coming out directly in her sight of view. Now, between her and the next person's who's being fed, there's only a space mabe this big and that's where he's trying to get through and I know that she's gonna attack him if she gets by; if he gets to close. So, she's screaming at him. She's pointing at him and she's attempting to kick with her left leg at him.

So, what I tried to do was, I tried to distract her. So, I slapped on her, her tray that she has. We don't, we, we, we don't leave anything on her tray because she'll throw it at people and stuff. So, I've, I have her food her but there's nothing on her tray. So, I'm feeding her and then I, I slap the tray be, to get, try and get her to refocus at me. That didn't work so I slapped the tray and I reached across and I grabbed her like this and I, and I just turned, I, I said her name. I said, Paulette and I turned her face towards me and I said, eat your breakfast and while I did that, he walked by and went to, to the washroom door and started banging on the door tryna get changed but we don't do personal care while we're feeding. But, that worked. It got her like, took her focus off of him. So, he managed to get by as long as I had her faced towards me.

So, as soon as he went by, I let her go and I continued to feed her. Um, the, she wasn't happy with the meal she got that morning anyways cause she's very particular. Um, so I remember when I first, when I first got the meal I said to one of the guys who was in the dining room, his name is Don Vaders. I said, Don I don't know if she's gonna eat this I said. It's pretty sloppy ah, watered down oatmeal. I said, she usually

likes something that's thick, puree type a thing. I said, I'll get her to try with it.

So I'd only had like two mouthfuls into her when this other client came out of the dining room. So, when I went to restart to try and feed her, she took one bite. She spit it out on her, on her table. At that point, I got up and I went in, into the dining room. I got a face cloth. I told Mr. Vaders that I was right. She wasn't gonna eat it plus she was agitated. So, I went out and I cleaned off her table and I brought her out some yogurt, a coupla things of yogurt, an apple sauce and a cup a tea. That's how I finished the day with her for the morning.

But, that's the only time through the whole day that I, other than when I did her personal care including like her shower or treatments. A, that's the only time that I actually physically touched her without um, like changing, changing her diaper or something like that when I hadda take her to the bathroom or something and like I say, all I did was reach across. I ban, I slapped on her ta, on her, on her tray. I reached across, grabbed her face like that and turned it towards me, told, said her name and said, eat your breakfast and I, like I said, that gave me enough time to, to let the client go by without being hit and at this time; the gentleman across from me, when I hit the table he jumped and ca, he, he was only new there. He was only there two weeks, This new, new, a, staff member.

Q. What's his name?

A. I think his name is a, Ian Stewart, if I'm not mistaken but when I slapped her table he jumped and turned and at that time, when he turned, I had her face in my hand turning it. So, that was the only thing I could think of was that maybe he misinterpreted me grabbing her face like slapping the table, grabbing her face; that he thought I slapped her because that, that's the only thing that makes any sense throughout the whole day that, cause she

had a wonderful dinner. She had a wonderful supper. She had a great day.

Later at page 5:

...Like I say, I was, I sat down and I wrote everything that happened from the minute I got there til, til the end um; that was the only incident that happened that day and a, that was the only incident where he was with me. There was two other clients and, and two other staff members in the square at that time ah, were feeding other clients. Um, I don't know if they were questioned or not but like I said.

Q. Who's the other staff members?

A. I, Danny Martell was one of them and John Murphy was another. They were feeding two other clients in wheelchairs.

Q. Ahem. So, so they were there during this incident?

A. Yeah, yeah. So, like I say, and I, and I didn't, considered anything other than me trying protect this other client from getting, you know, slapped or kicked or (inaudible), she was a, she was upset and like I say she's a, like I said, that's, that's basically what happened. You know, she was just, she was screaming and screaming and screaming at him and a, I was trying to get her attention away from him; get her to refocus on me and I figured if I could do that he'd be able to slip by and, and he wouldn't get his ah, and like I say, that's the only thing that I, that I actually did. That's the only time that I actually touched her other than giving her, her, her treatments and her shower that morning before breakfast and um, like I say, it was a great day and I, I, was ta, I was totally baffled by this whole situation and I...

Later at page 6:

A. ...You know, she, if she saw a, sock on the floor, she's the type of person that would go right to that sock and she would point to that sock and she would scream and scream and scream til some staff member picked up that sock and removed it and put it where it was supposed to be. That's how, the type of individual she is so um, that was the only way I thought I could redirect her was, like I say, I, I slapped on her de, a, her, her tray that was on her a, wheelchair and at the same time I slapped and I grabbed her face and I turned it towards me cause she, like I say, she was pointing, she was pointed towards him and I thought, well this is, might be the only way I could redirect her was maybe to get her to refocus on me and if she did that he could get by and that's exactly, that as the only incident of the day and it was such a little incident that I, I didn't even write it up as an incident because it's such a common thing for Paulette to holler and scream when she sees something that she doesn't; we'd be doing paperwork all day so that's.

Later at page 7:

A. No I did not. I slapped her tray. I gr, took her face and, and focussed it on me.

Q. Ahem.

A. That's all and I said, Paulette, eat your breakfast. That's all I did.

Later at page 8:

Q. ... He said, he said that she was distracted and you slapped her in the side a the head and, and then, and then, then you took her tray of food and, and, and left, went in the, went into the kitchen or, or left the area there.

A. No, I came back out and finished feeding her.

Q. Yeah.

A. That doesn't ma, no; I absolutely would not slap her. I would not slap any client in the head. It serves no purpose except to get her angrier and more upset for the rest of the day.

...

A. That, I, I'm just telling you, I absolutely did not slap her. I would not slap anybody and if I saw somebody do the same thing, the, I wo, would have handled that right there and then. I wouldn't have waited four or five days. I would have been concerned for the client's well being.

Q. Ahem.

A. That didn't make sense to me cause if I had seen anybody do that to any client, get, get abused; I would confront that person right there and then and then I would bring it to somebody who, a unit coordinator or the RN in charge and we would deal with that situation right there.

Later at page 9:

A. No I did not.

Q. Okay.

A. I did not slap her in the side a the head.

Q. Hmm.

A. I slapped her tray and reached over and I grabbed her by the, her chin and fa, faced her towards me.

Q. Well, he's saying that you raised your hand and slapped her on the side a the head and caused her to slump over. Donne, that's

A. No way. No, absolutely, that would, doesn't even make sense.

...

Q. Would you take a polygraph on that?

Later at page 10:

A. Yes.

Q. You'd take a polygraph?

A. Sure I would.

Q. And how would you do on the polygraph?

A. I don't know. I've never taken one before.

Q. You di, but how would you do? I mean, I mean if, if, if it came down to the polygraph technician asked you if, if you slapped her in the head on that day, how would you do on that?

A. I, I'm sure I would pass. All I did was grab her face. I slapped her tray, grabbed her face, that's it. I never slapped her. I never raised my hand above her head, a, above my head and slapped her in the face; absolutely not, ever, not a chance.

Q. Well um, based on Ian Ste, Ian Stewart's account of this incident, there's no other, no other witnesses came forward. There was nobody else that saw this but Ian Stewart. No one else saw this. There was no other witnesses over there that came forward. You said there was a, who were the staff members you said?

...

- A. I'm very positive it was, they were the two. I'm not absolutely sure. It was like, we all, there's always four clients that have to be fed on the unit square and that particular day I, that's who I thought was there was Danny Martell and John Murphy and Ian Stewart.
- Q. Ahem, ahem.
- A. And Ian Stewart was directly across from me.
- Q. Yeah. How far away was Ian Stewart from you?
- A. Ah, no, gosh not even from here to the door, not, not, not even that far, maybe.
- Q. So that's.
- A. A very short distance actually.
- Q. So, so like this?
- A. Right, yeah I would say that yeah.
- Q. Yeah and you'd say he was in clear sight of
- A. Well actually Ian, Ian Stewart was on the side.
- Q. He said he, he said he was in clear sight of where, of where you were, where you were feeding her and had no mistake in his mind that you slapped her with your open hand in the side of the head. You slapped her in the
- A. Ian Stewart wasn't facing me because Ian Stewart's client that he was feeding was facing me so he was facing his client feeding the client. It wasn't until I slapped the desk that he

turned to look. When I slapped her tray he turned to look and I grabbed her face and turned it.

Later at page 12:

Q. And verified they were working that day but they weren't necessarily in that, in, in, in that area when this incident took place.

A. Well I wasn't sure if that was them or not. Like I say, it was a, like every other day like

Q. Yeah.

A. I, I just, I thought that's who I saw that day.

...

A. Okay and I'm, I'm denying it. You, you said to me you wanted to hear my side a the story.

Q. Yeah I heard your side of the story.

A. But what you wanted to hear was a confession for something I didn't do.

Q. No. I, I wanna hear, I wanna hear the truth and I want the truth.

A. Okay and I'll give you the truth and that was the truth. What I said was the truth.

A. I, I just, I thought that's who I saw that day.

Later at page 20:

Q. No you didn't. Saw Donnie Donovan raise his hand above his head and smacked her on the left side of her head and with the

impact she went over to the right. Donnie stormed off and said, okay, that's it, you're done. He stor, you stormed off and said, that's it, you're done and half her meal was still left on her plate.

- A. I had her meal in my hand when I said it, that's it you're done, meaning, I meant she was done with this. I had to find something else. That's how she tells me she's not gonna eat okay. She spits it out if she doesn't want anymore a this and when I first got it, I told one of the, one of the staff members, I don't know if she's gonna eat this. She only had two bites into her when this client came out. After I tr, after he was gone and I tried to give her another bite, she spit it out. I said, okay, you're , you're done with this. I went to get a cloth. I wiped it up. I came back out with three, three other foods for her and a drink after that. All I did was go in and get a cloth to wipe off her tables so that she didn't smear it all over the place. That's exactly what I did. I went in and got her a coupla, a coupla yogurts; a, a thing of apple sauce and when she was done with that, I went in and got her a cup a tea. I brought her out a cup a tea.

[54] Besides the statement given to Constable Forgeron Mr. Donovan testified at trial (after Mr. Vaders) that he was employed at Braemore Home for eleven years as a licensed practical nurse. His duties included attending to personal hygiene, medical treatment and feeding of clients among other things. He knows Paulette Nicholson and for the last three years has worked with her as he is full time on her unit.

[55] Mr. Donovan reviewed exhibit # 1 and agreed Paulette Nicholson is non-verbal, mentally challenged and has limited mobility, ie: movement on the left side of her body. He stated she is aware of what she likes and doesn't like, stating "she screams if you did something she didn't appreciate or if she didn't like".

[56] Mr. Donovan placed the four clients and four staff in the square on August 14, 2011 as seen in exhibit # 3c. He testified Mr. Stewart had his back to him (feeding D. M.) and Paulette Nicholson was perpendicular to Mr. Donovan with her tray in front of him. He was next to a big chair.

[57] Mr. Donovan testified he moved to a different location at dinner because of what happened at breakfast with Paulette Nicholson and P.P. He stated he moved over six feet and back four feet, but fed the same person. When he feeds Paulette Nicholson he first decides where he'll feed her then locks her brakes, "otherwise she'll walk all over the room".

[58] He described the "square" as generally quiet but when other residents are finished in the dining room they are sent out into square and it can get "kinda noisy". He testified there are always four staff for the four clients in the square

(Paulette Nicholson, M.R., D.H.M., and T.J.), because of safety issues, eg. they could choke.

[59] Mr. Donovan was emphatic that he never leaves Paulette Nicholson's wheelchair unlocked when he feeds her.

[60] On August 14, 2011 Mr. Donovan testified that the food served for breakfast that day was "milky and watered down". He was not sure Paulette Nicholson would eat it but he decided to try it and see what happened. He recalls Don Vaders there and "specifically said to Don he gave her two mouthfuls (but she wouldn't eat any more)."

[61] P.P. had poured porridge on himself and when Paulette Nicholson saw him it made her upset, because this was out of the ordinary. She began to lash out with her left arm and left leg. He stated "I slapped on her tray, called her name, touched her chin with two fingers and turned her to me and said eat your breakfast".

[62] Paulette Nicholson wouldn't so I said "you're done". I went and got yogurt and juice. Then Mr. Donovan gave her tea in her left hand. "She finished the tea, he took the cup, undid her brakes and she wheeled away." She was not upset.

[63] Mr. Donovan testified that for dinner he moved to another spot. His back was to everyone, Paulette Nicholson was moved out of the corridor area. "There were no problems, it was her favourite meal."

[64] Mr. Donovan was on vacation when he was called and advised he had been accused of assaulting Paulette Nicholson. He was suspended for two days. He tried to recall the events of that day. He was subsequently arrested on October 22, 2011. He gave a statement to the police [exhibit # 2], referred to earlier.

[65] He called Mr. Vaders and asked him if he remembered anything that happened. He stated the only thing Don Vaders remembered was "the P.P. incident". [Don Vaders doesn't see anything between P.P. and Paulette Nicholson.] But that is not unusual. Someone will be "acting up" on a regular basis and when that happens it's a very noisy unit.

[66] Mr. Donovan testified if Paulette Nicholson had made contact with P.P. he would have been required to do an incident report and report to the R.N. but because there was no contact, “such a normal incident”, which took “four to five seconds” he did not report.

[67] Mr. Donovan stated he made eye contact with Ian Stewart the second time he slapped the tray because Ian Stewart jumped. Mr. Ian Stewart was five to six feet away, the other group was further away. He did not get Paulette Nicholson’s attention so he slapped the tray for the second time - louder and Ian Stewart turned and looked.

[68] Mr. Donovan testified he thought P.P. would have been assaulted by Paulette Nicholson. He did not have time to step back, he had “no other option”. Mr. Donovan stated there were no marks or redness on Paulette Nicholson. [There is no evidence Paulette Nicholson was examined by a doctor regarding this complaint]. He described the level of force used as “normal”. Mr. Donovan said it was not a “code white” situation.

[69] Mr. Donovan testified about using the word “grabbed” in his police statement. He describes it at trial as a matter of “semantics”. He was upset, nervous because he was talking to the police. He didn’t use the right language, “If he was talking to staff I would have said re-direct”. He stated he was never told he was not allowed to use the procedure. Mr. Donovan testified he has seen others use it.

[70] Paulette Nicholson had no food on her tray. He testified she will “smuck it off if she gets upset”. She had juice in her left hand.

[71] Mr. Donovan stated there was no incident at dinner. The [alleged incident] didn’t happen at dinner. Paulette Nicholson had her favourite meal. He doesn’t remember anyone raising their voice. It was uneventful.

[72] Mr. Donovan states Mr. Ian Stewart was not ten to fifteen feet away, it was not possible because of where he placed Ian Stewart and Don Vaders. He testified there was six feet between Dave Martell’s chair and where he was seated. Mr. Ian Stewart was not there for supper because he was off at 4:00 p.m., “apparently”. There is no doubt in the defendant’s mind that Ian Stewart did not feed M.R..

[73] On this date, this was Mr. Donovan's second shift with Ian Stewart. As Mr. Ian Stewart was a "new person" he kept an eye on him. Mr. Donovan moved at dinner, but Mr. Ian Stewart was feeding D.H.M. in the same spot.

[74] When dealing with Paulette Nicholson Mr. Donovan said in the past he has (1) gently nudged her face, (2) touched her nose and clowned around. These were "terms of endearment".

[75] He reiterated Paulette Nicholson didn't respond on the first tap (slapped table). The closer P.P. got, she got more angry; he hollered louder but Paulette Nicholson is hearing impaired so he slapped harder and he had to "redirect" Paulette Nicholson to prevent an assault. "She stayed in one position in the chair".

[76] On cross examination Mr. Donovan was directed to his statement he gave to the police. He testified the word "grab" is just "semantics" for police. He would describe it now as a re-direction even though he used the word "grab" or grabbed at least ten times.

[77] He testified that when P.P. left the dining room Mr. Don Vaders was behind him, but there was hardly any distance between Paulette Nicholson (to defendant's left) and P.P. (to defendant's right), M.R. was six to seven feet away from where he was seated. Mr. Donovan stated Mr. Don Vaders did not walk into the square with P.P. [This contradicts what Mr. Vaders said.]

[78] Mr. Donovan stated Paulette Nicholson lashed out with her left foot and arm which means she is telling P.P. to get away and his reaction was to try and re-direct Paulette Nicholson. Once Paulette Nicholson put her arm out, the defendant said "there was only three and one-half to four feet between Ian Stewart / client".

[79] It was defendant's opinion there was a good chance Paulette Nicholson could have assaulted P.P. because he wasn't paying attention. She was in a three point strap, wheelchair with wheels locked but she could still move her leg and arm. He testified he didn't have time to stand up and unlock the brake, he had a hot bowl of porridge in one hand so he slapped the table twice and redirected Paulette Nicholson.

[80] He stated no one else would have jumped at a “slap to table” because others are used to noise. Then defendant stated “it wasn’t that loud, no one else heard it”. Mr. Donovan testified there was no force because “not even a mark on her, gently re-directed Paulette Nicholson”.

[81] Mr. Donovan testified he asked Paulette Nicholson “eat your breakfast please” although he acknowledged that is not in his statement to police. He stated he had a conversation with Don Vaders in October after arrested by the police. It was at this time he told Don Vaders about P.P. and Paulette Nicholson.

[82] Mr. Donovan disagreed with crown counsel when he suggested Paulette Nicholson was defenceless. Mr. Donovan said “no, Paulette Nicholson can be violent and she is a risk because she is able to move around the unit on her own”. On this date he didn’t know for sure if she would assault P.P., but he stated “he couldn’t take the chance, he felt he’d be negligent if he didn’t take action”.

[83] Mr. Donovan says he has slapped Paulette Nicholson’s table before to get her attention, but has never slapped and alarmed a worker before. He also stated he has never slapped and grabbed before because he never had a reason to as he was always standing in front or beside her.

[84] He testified he made a poor decision [that day] but never assaulted Paulette Nicholson. He denies he was frustrated with Paulette Nicholson. He said it took him about 15 seconds or so to get out of his position to get a cloth to clean the tray.

[85] He stated Paulette Nicholson “stopped kicking as soon as I redirected her...Paulette eat your breakfast”, “then he snuck by”. He agreed with crown “yes she was instantly calm”.

[86] **MR. LORNE NORMAN:**

[87] Mr. Lorne Norman testified he has been a residential counsellor since August, 1989. He reviewed various protocols with Ian Stewart, namely: risk assessment, incident reports and abuse policies.

[88] He testified nothing was charted on date in question by either the defendant or Ian Stewart.

[89] He has fed Paulette Nicholson in the past and has used his hands to re-direct Paulette Nicholson . He “wraps on her tray” and “put two fingers under her chin and moves her to look at you”.

[90] **THE LAW:**

1. Credibility of Witnesses

[91] *R. v. Jaura*, p. 4, para. 12 and 13, states:

The assessment of credibility is not a science. However, proper credibility assessment is closely related to the burden of proof. For this reason an accused is to be given the benefit of reasonable doubt in credibility assessment. Credibility must not be assessed in a way that has the effect of ignoring, diluting, or worse, reversing the burden of proof. What must be avoided is an either or approach where the trier of fact chooses between competing versions, particularly on the basis of mere preference of one over the other. In assessing the credibility of any witness, including the accused, the existence of evidence that contradicts the witness is obviously relevant, but so are other factors such as demeanor, contradictions within the witnesses evidence itself, potential bias and criminal record.

No witness is entitled to an assessment of his or her credibility in isolation from the rest of the evidence. Rather, his or her evidence must be considered in the context of the evidence as a whole.

[92] I am also mindful of *R.v.W.D.* which states at para. 27:

In the case here credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The

trial judge should instruct the jury that they need not firmly believe or disbelieve any witnesses or set of witnesses specifically. The trial judge is required to instruct the jury, one, if you believe evidence of the accused you must acquit; two, if you don't believe the evidence of the accused but have been left in a reasonable doubt by it, you must acquit; and third, if you are not left in doubt by the evidence of the accused, you must still ask whether on the whole of the evidence you accept that you are satisfied beyond a reasonable doubt of the guilt of the accused.

[93] s. 265(1)(a) defines assault. A person commits an assault when (a) without the consent of another person, he applies force intentionally to that person, directly or indirectly.

[94] s. 37 (1) - Defence of a 3rd party - Prevent Assault

“Everyone 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) - Extent of Justification - 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.

ie., The responsive force...must be proportionate to the assault which engages it.

R. v Grandon (2001) 154 CCC (3d) 408 (BCCA) 44 C.R. (5th) 53 states: s. 37 applies even if defendant (among other things)

(ii) acts in defence of others. Defendant's honest but mistaken belief that s/he or another person under his/her protection, is being assaulted justifies the use of force under s. 37 provided the belief is based on reasonable grounds.

R. v. Mulder (1978) 40 CCC (2d) 1 (Ont.C.A.) states:
The use of the force permitted by this section is "proportionate force" and must not be more than is necessary to prevent an assault".

[95] **ANALYSIS:**

[96] Mr. Donovan's evidence falls into two categories. One, denial - it is difficult to elaborate on a denial. There is nothing inherently untruthful or contradictory in Mr. Donovan's denial. His evidence on it's own suggests nothing inherently believable or unbelievable. The defendant's evidence must be contrasted with the evidence of all of the witnesses and his statement to the police to be given its context. It is impossible to give full consideration to the denial without considering it and testing it in light of the details of the allegation.

[97] And the second category is that the evidence is intended to undermine the credibility of the allegations: (a) Mr. Stewart is mistaken; (b) Mr. Stewart was a new employee, and (c) Mr. Stewart did not follow protocol and report it immediately.

[98] There is no oral evidence to be considered from Paulette Nicholson because she cannot communicate verbally and is severely mentally challenged. The court must rely on the observations of the witnesses called to testify.

[99] The evidence of Mr. Ian Stewart, Mr. Vaders and Mr. Norman was a straight forward narrative. I find they did not embellish, when they weren't sure they said so, particularly Mr. Stewart and Mr. Vaders. Mr. Stewart had no animosity towards the defendant, no "axe to grind" so to speak.

[100] Neither Mr. Vaders, Mr. Norman, nor Ms. Chaisson saw the alleged incident. From the evidence heard it does not appear that an incident report was filed by anyone, including Mr. Ian Stewart, Tracey LeBlanc (unit co-ordinator) or Mr. Donovan.

[101] There is no evidence that Paulette Nicholson was examined by a doctor once the complaint was known, nor that photo's were taken of Paulette Nicholson or "the square" where this incident was alleged to have happened.

[102] The key question to be answered is whether or not Mr. Ian Stewart was mistaken as to what he saw:

1) Mr. Stewart describes seeing the defendant's right hand up in the air and the defendant using his right open hand to strike the side of Paulette Nicholson's head. A completely different movement from the defendant's description in his statement of using his right hand to "grab" Paulette Nicholson's chin to get her to focus on him. At trial he said he took her chin with two fingers and turned Paulette Nicholson towards him.

2) Mr. Stewart then heard Paulette Nicholson scream. Witnesses testified that Paulette Nicholson screams when you do something she doesn't appreciate; or for example, to get you to pick up a sock that is on the floor because it is out of the ordinary or as Mr. Vaders testified Paulette Nicholson has been hit in the past by other residents and will scream to let "you know". There is no evidence she screams when you move her chin to re-direct her.

3) Mr. Stewart then saw Paulette Nicholson slump over to her right in her chair. There is no evidence from others to suggest that Paulette Nicholson does this on other occasions when in the square in her chair or that that is how she sits

or is positioned in her chair routinely. Mr. Donovan says Paulette Nicholson stayed in one position in the chair. That it was her left arm and leg that were swinging at P.P.

4) Mr. Stewart then saw Paulette Nicholson try to wheel toward the exit. Mr. Donovan said when he feeds Paulette Nicholson he always locks the wheels. No one else testified when feeding Paulette Nicholson they must lock her wheels “otherwise” she would be all over the place. Mr. Stewart did state normally her wheels are locked, but sometimes people don’t always follow protocol.

5) Mr. Stewart was in close proximity to Mr. Donovan. Approximately 10 - 15 feet away. Mr. Donovan said he moved down further at dinner which put him next to the exit, which is consistent with Mr. Stewart’s markings on exhibit #3a. There is no evidence that Mr. Stewart’s view was obstructed by anything or anyone. He did not see P.P. in the area.

6) There was no one else in the area which is consistent with Mr. Stewart’s testimony and his exhibit #3a. In Mr. Donovan’s statement the police officer confirms to the defendant the names he called:

Q. ...they were working that day but they weren't necessarily in that area when the incident took place.

A. Well I wasn't sure if that was them or not...

7) Mr. Stewart did not glance over and see a hand and then look away. He watched long enough to see a series of events or movements by both Mr. Donovan and Paulette Nicholson.

[103] Given all of the above, I do not think Mr. Stewart was mistaken. Paulette Nicholson may have been upset at breakfast, but I find on the evidence that this incident most likely took place at dinner because of the defendant's recollection of dinner menu, consistent with Mr. Stewart's recollection of carrots, and the markings on exhibit # 3a which put Mr. Stewart in close proximity to Mr. Donovan.

[104] The crown suggested Mr. Donovan was frustrated with Paulette Nicholson that day. Mr. Stewart is not sure what drew his attention to Mr. Donovan and Paulette Nicholson, but whatever motivated the defendant to assault Paulette

Nicholson may never be known. Motivation is not an element of an offence and need not be proved by the crown.

[105] Based on all the evidence I have heard and seen and considering *R v. W.D.* I am satisfied beyond a reasonable doubt and find Mr. Donovan guilty of the assault on Paulette Nicholson.

Dated at Sydney, Nova Scotia this 13th day of February, A.D. 2013.

Jean M. Whalen, J.P.C.