

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Garnier*, 2022 NSPC 50

Date: 20221017

Docket: Dartmouth No. 8495837 - 8495842

Registry: Dartmouth

Between:

His Majesty the King

v.

John Alexander Garnier

LIBRARY HEADING

Judge: The Honourable Chief Judge Pamela S. Williams

Heard: August 29, 2022 in Dartmouth, Nova Scotia
September 12, 2022 in Dartmouth, Nova Scotia

Oral Decision: October 17, 2022

Written Decision: December 5, 2022

Subject: Assault with a Weapon, to wit: a car, property damage,
dangerous driving and breach of probation

Summary: Charges flow from a driving encounter between strangers
where Ian Hape is struck by a vehicle operated by John
Garnier. Before and after the incident there are allegations
of dangerous driving.

Issues: (1) Did Mr. Garnier intentionally or recklessly assault Mr.
Hape with his car?
(2) Did Mr. Garnier utter a threat to Mr. Hape to cause
death or bodily harm?

(3) Did Mr. Garnier operate his car in a manner that, having regard to all the circumstances, was dangerous to the public?

Result:

The events in the vacant lot unfolded quickly and quite unexpectedly. Although not convinced by Mr. Garnier's evidence, his explanation of what happened may be accurate in that he panicked, and to avoid Mr. Hape's threatening approach, he mistakenly struck Mr. Hape.

While being followed by Mr. Garnier, Mr. Hape said he saw Mr. Garnier in his rear-view mirror making a thumb across the throat gesture which he interprets as a death threat. No words are spoken. It is possible, as per Mr. Garnier, he was simply gesturing with his thumb to get Mr. Hape to pull over so he could pass. No threat was uttered or otherwise made out.

Considering the context and the full circumstances, including speeding, and attempting to pass Mr. Hape on a double solid yellow line and driving more than 30 kilometers over the posted limit for 5 kilometers to avoid Mr. Hape's pursuit, was dangerous to the public.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.
QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.***

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Garnier*, 2022 NSPC 50

Date: 20221017

Docket: 8495837 - 8495842

Registry: Dartmouth

Between:

His Majesty the King

v.

John Alexander Garnier

Judge:	The Honourable Chief Judge Pamela S. Williams
Heard:	August 29, 2022, in Dartmouth, Nova Scotia September 12, 2022, in Dartmouth, Nova Scotia
Decision	October 17, 2022
Charge:	Section 239 of the Criminal Code of Canada Section 267(a) of the Criminal Code of Canada Section 264.1(1)(a) of the Criminal Code of Canada Section 430(4) of the Criminal Code of Canada Section 320.13(1) of the Criminal Code of Canada Section 733.1(1)(a) of the Criminal Code of Canada
Counsel:	Cheryl Schurman, for the Provincial Crown Drew Rogers, for the Defence

By the Court:

Background

[1] Charges flow from a driving encounter between strangers, John Garnier, and Ian Hape. Some might describe it as ‘road rage’. Mr. Garnier is charged with attempted murder, assault with a weapon (his car), uttering a threat to cause death or bodily harm, wilful damage of sunglasses, dangerous driving, and breach of probation by failing to keep the peace and be of good behaviour.

[2] Following Mr. Hape’s testimony the Crown advises they are no longer prosecuting the attempt murder charge. That charge is dismissed. Counsel agrees that the verdict on the mischief and breach of probation charges flow from findings on the charges of assault with a weapon and dangerous driving.

Central Issues at Trial

- 1 Did Mr. Garnier intentionally or recklessly assault Mr. Hape with his car?
- 2 Did Mr. Garnier *utter* a threat to Mr. Hape to cause death or bodily harm?
- 3 Did Mr. Garnier operate his car in a manner that, having regard to all the circumstances, was dangerous to the public?

Position of the Parties

The Crown

[3] The Crown argues Mr. Garnier is the aggressor. He attempts to pass Mr. Hape, several times, along a solid yellow lined two-lane highway, east of Dartmouth. Mr. Garnier makes a 'thumb to throat' gesture that Mr. Hape takes as a threat. Mr. Garnier then follows Mr. Hape into a vacant lot and intentionally (or in the alternative) recklessly strikes Mr. Hape with his car. In so doing, he damages Mr. Hape's expensive sunglasses as they fly off his face when he falls. The Crown further contends Mr. Garnier's driving, both before and after the incident in the vacant lot is dangerous, which is also a breach of the peace, of his valid Probation Order.

The Defense

[4] Mr. Garnier says he tries to pass Mr. Hape who is driving 40 kilometers (km) per hour in a 70 km zone but is prevented from doing so as Mr. Hape speeds up and then brakes. According to Mr. Garnier, Mr. Hape is the aggressor. He gestures with his thumb to get Mr. Hape to pull over so he can pass.

[5] He follows Mr. Hape into the parking lot to get the license plate number to report Mr. Hape's 'reckless driving' to the authorities.

[6] He says he attempts to avoid Mr. Hape who is enraged, on foot and coming at his vehicle, with a long object. Mr. Hape steps in front of Mr. Garnier's vehicle

and is struck as Mr. Garnier tries to avoid him. It is an accident. He neither intends to strike Mr. Hape nor is he reckless in his actions.

[7] As for the damaged sunglasses, that too is an accident. Mr. Garnier does however admit that, in hindsight, he regrets having pursued Mr. Hape and that his driving might be ‘reckless in a sense’.

Legal Principles

Innocent Until Proven Guilty

[8] All accused persons are innocent until proven guilty.

Burden and Standard of Proof

[9] The Crown has the burden to prove all essential elements of the offence beyond a reasonable doubt. This however does not require proof to an absolute certainty or beyond any doubt.

[10] A reasonable doubt is based on reason and common sense that is derived from the evidence, or absence of evidence *R. v. Lifchus* [1997] 3 SCR 320 para 39.

Credibility, Reliability and Demeanor

Credibility

[11] **R. v. WD** [1991] 1 SCR 742 is instructive on assessing credibility:

If I believe the evidence of the accused, I must acquit. If I do not believe the accused but I am left with a reasonable doubt that her version of events could be true, I must acquit. If I am not left with a reasonable doubt that her version could be true, I must then consider whether, on the remainder of the evidence before me, I am convinced of the guilt of the accused, beyond a reasonable doubt.

[12] Credibility has to do with a witness's truthfulness. However, I am mindful that a credible witness may give unreliable evidence. They may be truthful in testifying, but may, however, be honestly mistaken.

Reliability

[13] Reliability has to do with the accuracy of a witness's testimony. It involves the witness' ability to accurately observe, recall and recount events in issue.

[14] One of the best ways to assess credibility and reliability is to carefully and repeatedly test the evidence to see how it compares on central points: **R. v. D.D.S.** 2006 NSCA 34 at para. 77.

[15] The Court must reflect on the effect of inconsistencies considering all the evidence presented. Minor inconsistencies may not unduly diminish the credibility of a witness whereas a series of inconsistencies may be significant and cause the Court to have reasonable doubt about the reliability of the witness's evidence: **R. v. B. (R.W.)** (1993), 40 W.A.C. 1 at pp. 9-10.

[16] The Court is entitled to believe all, some, or none of a witness' testimony. I am entitled to accept parts of a witness' evidence and reject other parts. Similarly, I can afford different weight to different parts of the evidence that I have accepted.

Demeanor

[17] A witness' demeanour can be considered but I am mindful of the cautious approach to be taken. There are a multitude of variables that can explain or contribute to a witness' demeanour while testifying.

[18] As noted in *D.D.S. at para. 77*, demeanour can be considered by a trier of fact when testing the evidence but standing alone, it cannot be determinative.

Issue # 1: Did Mr. Garnier intentionally or recklessly assault Mr. Hape with his car?

Facts

[19] After turning left onto the Lawrencetown Road, Mr. Garnier speeds up and attempts to pass Mr. Hape on a double yellow solid line. Mr. Hape is traveling well below the 70 km speed limit. Mr. Hape "holds his lane" and prevents Mr. Garnier from passing.

[20] There is an oncoming car, so Mr. Garnier pulls in behind Mr. Hape's Jeep. A short time later Mr. Hape enters a vacant lot to confront Mr. Mr. Garnier, who

also pulls in. Mr. Hape has a very recognizable Jeep that his wife and son sometimes drive so he is not going to risk a threat to his wife or son. In his words, he goes into “Papa Bear mode”. He is both protective and angry.

[21] From this point forward the version of events differs considerably.

[22] According to Mr. Hape, he exits his Jeep and is 6-8 feet away when Mr. Garnier enters the parking lot, does a ‘180’ and drives toward Mr. Hape. He says he is struck as he moves to his left, flips over Mr. Garnier’s car, and falls to the ground, damaging his \$300 titanium sunglasses. The incident occurs within seconds of entering the lot.

[23] Mr. Garnier says he pulls off in behind Mr. Hape’s Jeep to get his license plate, to report Mr. Hape’s reckless driving to the police. Mr. Hape exits his vehicle, opens his back door, reaches for a long object, and raises it above his head as he approaches Mr. Garnier’s car. He looks angry and appears to be getting ready to attack.

[24] Mr. Garnier is fearful; he swerves to the left and then to the right to avoid Mr. Hape and the object he believes Mr. Hape throws. Mr. Garnier estimates he is going under 20 km per hour when Mr. Hape contacts the passenger side of Mr. Garnier’s car. Mr. Garnier does not intend to hit Mr. Hape but is simply trying to

avoid a collision. Mr. Garnier says he is in shock and does not tell the 911 operator he has struck Mr. Hape.

Law

[25] Assault includes the intentional application of force without consent.

[26] The mental element of assault, ‘intentionally’, is defined in s. 265(1)(a) of the *Code and* includes recklessness, that is, ‘not done by accident or through honest mistake’: *R. v. Dawydiuk, 2010 BCCA 162 and The Queen v. George [1960] S.C.R. 871.*

[27] Recklessness is defined as rashness, heedlessness, or wanton conduct. The state of mind accompanying the act either pays no regard to its probable or possible injurious consequences, or foreseeing such consequences, persists despite such knowledge. Conduct must demonstrate indifference to consequences under circumstances involving peril to the life or safety of others, although no harm is intended: **West’s Encyclopedia of American Law, edition 2.**

Analysis

[28] These two gentlemen have very differing perspectives on what happens in the vacant lot, and why. Interestingly, each testifies to the other being a threat to

their safety. Neither is an objective, impartial or independent witness. No one else witnesses the event.

[29] For reasons I will elaborate on below, the photos, video and expert evidence do not provide much assistance in determining what happens in that lot.

Mr. Hape

[30] Mr. Hape is a 51-year-old veteran having served 25 years with the Canadian Armed Forces (the last 15 years of which were with the military police). He was diagnosed with Post Traumatic Stress Disorder in 2014. He clearly perceives Mr. Garnier as a threat to the safety of himself and his family due to Mr. Garnier's manner of driving and the threatening 'thumb to throat' gesture.

[31] Mr. Hape goes into 'protective mode' and wants to confront Mr. Garnier to ensure that neither he, nor his family, are targeted by Mr. Garnier in the future.

Mr. Hape admits to a 911 operator shortly after the incident, "I'm fucking raging" and admits he said he wanted to run Mr. Garnier off the road. Mr. Hape alleges Mr. Garnier tries to run him over with his car and is injured when struck.

[32] Mr. Hape has since filed a civil lawsuit against Mr. Garnier seeking damages in excess of \$150,000. Mr. Hape is visibly agitated while testifying.

Mr. Garnier

[33] Mr. Garnier, a 28-year-old industrial painter, wants to report Mr. Hape's reckless driving to police but needs to get the license plate number. He says Mr. Hape prevents him from passing in the face of an oncoming vehicle and then brake checks, speeds up and slows down causing Mr. Garnier real concern.

[34] Mr. Garnier says he makes a gesture with his thumb for Mr. Hape to "get the F off the road" and let him pass. Mr. Garnier follows Mr. Hape into the vacant lot to get the plate number so he can lodge a complaint with police but is fearful and in shock when Mr. Hape approaches his vehicle in a threatening manner holding an object above his head.

[35] He veers to avoid the object being thrown by Mr. Hape and Mr. Hape then steps in front of his moving vehicle. Mr. Hape does not come over the windshield; rather, he rolls off the passenger side of the vehicle.

Exhibits and Expert

[36] Both men refer to several photos of the vacant lot. Each indicate where their vehicle is in relation to the other and the path each takes once in the lot.

[37] Mr. Hape also presents video footage and photos showing what he says are the tire marks of each vehicle, supporting his evidence that Mr. Garnier drives by him, does 'a 180' and swerves left to strike Mr. Hape.

[38] The footage and photos are taken 1.5 to 2 hours after the event. Tire tracks are evident but there is no independent or expert evidence to confirm or deny the tire tracks belong to these vehicles. Even if they do, the photos show tire tracks veering to the left, which both acknowledge.

[39] The photos do not explain the circumstances giving rise to the tire marks. The footage and photos are of little assistance in determining the credibility and reliability of the testimony given by the two men.

[40] Photos and examination of Mr. Garnier's vehicle confirm there is damage to the front passenger side door and bonnet, and to the bumper skirt. Digit and palm impressions are also detected but Sergeant Martin McKenna, a forensic identification specialist, qualified as an expert to provide opinion evidence about the identification, examination, and composition of friction ridge impressions, is not able to say when the damage occurred or to whom the digit and palm impressions belong.

[41] According to the Forensic Identification Occurrence Report, authored by Sergeant McKenna and dated March 1, 2021, Mr. Garnier's vehicle was seized February 25, 2021, the day after the encounter between the two men.

[42] Given the short intervening timespan, I am satisfied beyond a reasonable doubt the “area of disturbance” is made by Mr. Hape’s two palms with “slides possibly being made by the digits”.

[43] There is also a second area of disturbance on the passenger side front door of the vehicle near the handle, but it is less clear to me whether that can be attributed to Mr. Hape. Anyone opening the passenger side door could have left that impression.

[44] Neither the report nor the expert can speak to whether Mr. Hape is struck intentionally, recklessly or by accident.

Credibility and Reliability

[45] Credibility and reliability are live issues. The event in the vacant lot occurs in the heat of the moment and lasts mere seconds. Neither man, in my view, has exercised good judgment from the moment they turn on to Lawrencetown Road. Each consider the other the aggressor, and neither backs down.

[46] Given the volatility of the situation and heightened emotions, recollection of the events may not be entirely accurate. As well, I am mindful there is a pending lawsuit by Mr. Hape against Mr. Garnier.

[47] Each may well have a motive to fabricate or exaggerate the circumstances giving rise to the charges.

Assessing Mr. Garnier's Evidence

[48] Mr. Garnier presents to police (through an agreed statement of facts), to a third-party witness (Mr. Purcell), and to the Court as calm, not angry or agitated. His demeanor does not change throughout his testimony.

[49] He appears to answer all questions put to him and he makes several admissions. He confirms he does not tell the 911 operator he strikes Mr. Hape, adding in hindsight, he wasn't sure he had struck him and that he was in shock, not having expected such a threatening encounter in the vacant lot.

[50] He calls 911 though because he thinks Mr. Hape is driving recklessly and tries to harm him in the lot. Mr. Garnier also says, looking back, there are "many things I regret that I should not have done. My driving was reckless in a sense", trying to get by him (Mr. Hape).

[51] The Crown challenges Mr. Garnier that he could have gotten Mr. Hape's license plate number as he is driving behind the Jeep and does not need to follow him into the lot. Mr. Garnier says he is so focused on staying a reasonable space

behind Mr. Hape (given Mr. Hape's speeding and brake checking) that he is not able to get the plate number.

[52] I am not convinced Mr. Garnier's evidence is true or is the full version of events. However, his explanation of what happens in the lot may have some truth to it; perhaps he panics and, in an attempt, to avoid Mr. Hape's threatening approach, strikes him. The event unfolds quickly and quite unexpectedly.

Assessing Mr. Hape's Evidence

[53] I also have concerns about the veracity of Mr. Hape's evidence as to what occurs in the vacant lot. Mr. Hape downplays his role in the encounter; he downplays his manner of driving and his emotional state, and his demeanor while testifying is concerning.

Manner of Driving

[54] Mr. Hape denies he contributes, in any way, to the events as they unfold. In describing Mr. Garnier's attempt to pass he provides an implausible explanation as to why he holds his lane in the face of oncoming traffic.

[55] He says he cannot pull off the road to the right as it is too narrow. He cannot put on the brakes as he has new tires and is not sure what they will do. He would have us believe he is simply driving defensively. I disagree.

Evidence of Driving

[56] The Court hears evidence Mr. Hape chases Mr. Garnier, forcing a vehicle off the road and traveling at excessive rates of speed along Lawrencetown Road.

Brandon Purcell, on his way home, is driving the 70 km speed limit when he sees two vehicles in his rear-view mirror that then “fly by” him at a fast speed. He pulls over.

[57] The red Corolla (Mr. Garnier’s vehicle) is ahead, and the Jeep (Mr. Hape’s vehicle) follows within a car length, as they go around a blind crest with a slight bend. Mr. Purcell goes to the shoulder to let them pass. He estimates both vehicles are travelling 100 km per hour with the Jeep chasing the Corolla.

[58] Mr. Purcell thinks they are either racing or there is some sort of an emergency. As they pass, the Corolla gives Mr. Purcell “a wider angle (approx. 3 feet) to get by” and the Jeep gives about half that. Mr. Purcell offers that he rarely sees motor vehicles travel that speed on Lawrencetown Road.

[59] Mr. Hape is quick to say that Mr. Garnier is “running cars off the road” but denies doing so himself. He also justifies his speeding by saying “I had to catch up to him; if not, he’d get away”. Later in his evidence he says he doesn’t remember forcing a motor vehicle off the road in pursuit of Mr. Garnier.

[60] He also neglects to say how fast he is travelling, admitting only that he is going faster than the speed limit.

[61] I accept Mr. Purcell's evidence in its entirety. It is measured, clear and impartial.

[62] Mr. Purcell is an independent third-party witness, even though he acknowledges knowing Mr. Garnier. Mr. Purcell says after the incident he discovers the Corolla is driven by 'John' who is an old family friend. Mr. Purcell's brother and Mr. Garnier had been friends, but Mr. Purcell has not seen Mr. Garnier in five years. There is no reason to believe Mr. Purcell is trying to protect Mr. Garnier or sway his evidence in his favor.

[63] Given inconsistencies on key pieces of driving evidence, I have concerns about the reliability and credibility of Mr. Hape's evidence of what happens in the vacant lot.

Enraged State

[64] Mr. Hape admits to being upset after Mr. Garnier tries to pass him and sees the throat gesture by Mr. Garnier as a threat. He says he has a very recognizable vehicle and does not want to risk a threat to his wife or son, so he wants to verbally confront Mr. Garnier.

[65] Although I do not accept Mr. Garnier's evidence in its entirety, it may well be that Mr. Hape is the aggressor in the lot and Mr. Garnier attempts to avoid a confrontation by veering left, but in so doing strikes Mr. Hape who steps into his path. If so, Mr. Garnier's actions are neither intentional nor reckless.

[66] Each version of events is plausible, and I am not able to say which is accurate. As a result, I have a reasonable doubt and find Mr. Garnier not guilty of assault with a weapon and wilful damage.

Issue # 2: Did Mr. Garnier *utter* a threat to Mr. Hape to cause death or bodily harm?

Facts

[67] While being followed by Mr. Garnier along Lawrencetown Road, Mr. Hape sees Mr. Garnier in his rear-view mirror making a thumb across the throat gesture which he interprets as a death threat. Mr. Garnier says he is simply gesturing with his thumb to get Mr. Hape to pull over so he can pass.

Law

[68] Mr. Garnier is charged with *uttering* a threat to cause death or bodily harm to Mr. Hape.

[69] The verb 'to utter' has been defined as saying something or making a sound with one's voice; giving an audible expression, speaking or pronouncing:

<https://dictionary.cambridge.org>; www.dictionary.com;
www.macmillandictionary.com.

Analysis

[70] Mr. Garnier clearly makes a gesture but does not say anything. An essential element of the offence is an utterance. There is no utterance. Regardless, I am not satisfied beyond a reasonable doubt the gesture is intended as a threat. Mr. Hape glances in his rear-view mirror momentarily and perceives a threat. It is possible, given all the circumstances, that Mr. Garnier is simply trying to get Mr. Hape to pull over so he can pass.

[71] Accordingly, I find Mr. Garnier not guilty of uttering a threat to cause death or bodily harm to Mr. Hape.

Issue # 3: Did Mr. Garnier operate his car in a manner that, having regard to all the circumstances, was dangerous to the public?

[72] There are three distinct patterns of driving to consider: Mr. Garnier's driving prior to the vacant lot incident, the incident in the lot and his driving after leaving the lot.

Background Facts

[73] The driving encounter occurs on a Wednesday, midday east bound on the Lawrencetown Road, a 200 series 2 lane highway. Traffic is light. Visibility is

good. It is clear and sunny. The road is in good condition. Portions of the road are straight but there are some turns and hills. There are few passing zones. There are residences and businesses spread out along the highway.

Law

[74] I must consider the nature of the driving and standard of care exercised while driving. The driving must be in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition, and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be present.

[75] The mental element consists of the degree of care exercised by the accused and whether there is a *marked* departure from the standard of care that a reasonable person would observe in the accused's circumstances: *R. v. Beatty [2008] 1 S.C.R. 49*.

[76] The care exhibited by Mr. Garnier is assessed against the standard of care expected of a reasonably prudent driver in the circumstances. The offence will only be made out if the care exhibited by Mr. Garnier constitutes a marked departure from that norm.

[77] While the distinction between a mere departure from the standard of care, which justifies civil liability, and a *marked* departure justifying criminal punishment is a matter of degree, the lack of care must be serious enough to merit punishment: *R. v. Roy, 2012 SCC 26 (para. 1)*.

Analysis

Driving Prior to the Lot Incident

[78] There is no question Mr. Garnier decides to pass Mr. Hape's Jeep, on a double solid yellow line, soon after turning onto the Lawrencetown Road because the Jeep is travelling well below the posted limit of 70 km per hour. Mr. Hape speeds up, preventing Mr. Garnier from passing as they approach a turn.

[79] There is an oncoming vehicle, which forces Mr. Garnier to retreat into his lane behind the Jeep. Mr. Garnier suggests Mr. Hape speeds up, brake checks Mr. Garnier and then slows down before entering the lot.

[80] If this were the extent of the driving evidence, I would not be satisfied it is sufficiently dangerous to warrant criminal liability. However, that is not the end of the matter.

Parking Lot Encounter

[81] For the reasons outlined above, I am not satisfied that Mr. Garnier intends to strike Mr. Hape. Nor am I able to conclude that his actions are reckless. His rate of speed, as he tries to avoid Mr. Hape is estimated to be 20-30 km per hour. It is possible he veers left to avoid Mr. Hape and or an object thrown by Mr. Hape.

Driving Following the Lot Incident

[82] After he veers left, Mr. Garnier leaves the lot. Mr. Hape gets up in pursuit. Both vehicles are going well in excess of the 70 km limit for up to 5 kilometres. Mr. Garnier passes two vehicles to put distance between he and Mr. Hape but Mr. Hape passes the vehicles to keep pace with Mr. Garnier.

[83] Mr. Garnier wants to get away as fast as possible as he is in a state of shock after what happens in the lot. I accept that Mr. Hape is 'on his bumper' the whole time. Mr. Purcell, who is going 70 km at the time, must pull over to let them pass. He estimates they are going approximately 100 km per hour.

[84] Considering the context and the full circumstances, the driving, on the part of both Mr. Garnier and Mr. Hape is a marked departure from the standard of care that any reasonable person would expect in the circumstances. The rate of speed over the course of several kilometers, together with passing on a double yellow solid lined 200 series highway in the middle of the day where it is reasonably

expected there would be some traffic, is clearly dangerous and there is no excuse for it. Although Mr. Garnier is the only person charged, Mr. Hape's driving is also dangerous.

Conclusion

[85] For the foregoing reasons I find Mr. Garnier guilty of dangerous driving. The dangerous driving also constitutes a breach of the peace condition in his valid Probation Order.

Chief Judge Pamela S. Williams, JPC