

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R v Lutz*, 2025 NSPC 27

**Date:** 20250929

**Docket:** 8846915

**Registry:** Kentville

**Between:**

His Majesty the King

v.

Daniel Lutz

<b>TRIAL DECISION</b>
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**Judge:** The Honourable Associate Chief Judge Ronda van der Hoek

**Heard:** June 18, 2025, in Kentville, Nova Scotia

**Decision:** September 29, 2025

**Charge:** Section 267(c) of the *Criminal Code*

**Counsel:** Don Urquhart, for the Public Prosecution Service of N.S.  
Michael Curry, for the Defence

**By the Court:**

**Introduction:**

[1] On a warm summer evening in 2024, the defendant, Daniel Lutz, is alleged to have choked his next-door neighbour, John Lowe, when tensions over events that transpired earlier in the day erupted into a physical altercation.

[2] The Crown proceeded summarily, and called three witnesses: 1) the complainant, Mr. Lowe; 2) the complainant's wife, Ms. Diane Bezanson; and 3) the accused's first cousin, Mr. Brad Davis.

[3] The defence admitted identity, date, and jurisdiction.

[4] Defence counsel also took no issue with the Crown tendering three photographs of Mr. Lowe's face and neck, acknowledging that the police took them the day after the alleged incident (Ex. 2).

[5] The parties also filed an *Agreed Statement of Facts* (Ex. 1) acknowledging that when the police took a statement from Ms. Bezanson on July 22, 2024, Mr. Lowe was present in the room.

[6] As I will discuss in more detail below, the testimony of Mr. Lowe and his wife was largely consistent, describing an unprovoked attack by the accused that left both Mr. Lowe and the defendant on the ground. Mr. Lowe and his wife spoke of how the defendant proceeded to choke Mr. Lowe from behind when they were on the ground for at least several minutes.

[7] The testimony of the third Crown witness, Mr. Davis, was quite different. Mr. Davis described Mr. Lowe as the aggressor, testifying that Mr. Lowe approached the defendant and tried to grab him three times before the defendant took him to the ground and ended up on top of Mr. Lowe. Mr. Davis testified that he did not see everything that happened when the men were on the ground but claimed that they never shifted positions. Mr. Davis further testified that Mr. Lowe reached for the defendant on two more occasions after the parties had returned to their feet.

[8] Defence counsel raised self defence, and argued that the Crown was required to prove, beyond a reasonable doubt, that the defence did not apply. The Defence highlighted the discrepancies in the evidence between the Crown's own witnesses. The Defence further argued that the Court should apply the seminal case of *R v WD*, 1991 CanLII 93, [1991] 1 SCR 742 (SCC) [*WD*] when assessing whether the Crown has discharged its burden.

[9] The Crown argued that the totality of the evidence proved beyond a reasonable doubt that the defendant choked Mr. Lowe while he was on the ground and that self defence did not apply to the choking. The Crown noted that the complainant's testimony was largely confirmed by that of his wife. The Crown suggested that Mr. Davis's testimony as to what took place on the ground was not reliable given his stated limitations in what he observed during that part of the altercation.

### *General principles*

[10] This is a criminal trial and Mr. Lutz benefits from the presumption of innocence. The burden of proof for every essential element of the offence rests with the Crown. Mr. Lutz is not compelled to testify and does not bear the burden of establishing his innocence. The Court cannot convict Mr. Lutz of the offence unless the evidence the Court accepts establishes his guilt to the high criminal standard of proof beyond a reasonable doubt. The focus of a criminal trial is whether the Crown has discharged its burden of proving the essential elements of the charge after assessing all of the evidence.

[11] There is no burden on the defendant to prove that he acted in self defence. Rather, if there is an air of reality to that defence grounded in the evidentiary record, the Crown must prove beyond a reasonable doubt that the accused *did not* act in self defence (*R v Cinous*, 2002 SCC 29; *R v Desmond*, 2024 NSSC 60).

[12] The statutory provisions governing self defence are found in s. 34 of the *Criminal Code*, RSC 1985, c C-46 (*Cr. C.*). Section 34(1) states:

A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

[13] The Supreme Court of Canada adopted the following short form terminology to describe these three lines of inquiry in *R v Khill*, 2021 SCC 37 at para 51 (*Khill*):

- the catalyst (s. 34(1)(a));
- the motive (s. 34(1)(b)); and
- the response (s. 34(1)(c)).

[14] With respect to the factors for assessing the reasonableness of the defendant's "response", s. 34(2) states:

In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[15] Drawing upon *Khill*, Justice Hoskins in *Desmond* at para. 355 provided the following helpful guidance:

...The catalyst focusses on the accused's state of mind and asks whether the accused subjectively believed on objectively reasonable grounds that force was being used or threatened against them or another person (s.34(1)(a)). The motive asks whether the accused did something for the subjective purpose of defending or protecting themselves or another (s. 34(1)(b)). The response asks whether the conduct of the accused was reasonable in the circumstances (s. 34(1)(c)) by having regard to the non-exhaustive list of factors in s. 34(2).

[16] Given that self defence contains three necessary requirements, the Crown only needs to disprove one of these three elements beyond a reasonable doubt to persuade the Court that the defence does not apply.

[17] When assessing a claim of self defence, it is necessary to consider the full context of an altercation, including how the assessment of such a claim may change as an incident progresses. As stated in *Khill* with respect to “the motive” at para. 61:

An accused's purpose for acting may evolve as an incident progresses or escalates. ...separate defences may rightly apply to distinct offences or phases of an incident (*Cormier*, at para. 67). At the same time, great care is needed to properly articulate the threat or use of force that existed at a particular point in time so that the assessment of the accused's action can be properly aligned to their stated purpose. Clarity of purpose is not meant to categorize the accused's conduct in discrete silos, but instead appreciate the full context of a confrontation, how it evolved and the accused's role, if any, in bringing that evolution about. ...

[Emphasis added.]

[18] There is no requirement for a defendant to testify in order to put self defence in play. The subjective components of the defence may be inferred by way of circumstantial evidence in the absence of a defendant's testimony as to their state of mind (*R v Chan*, 2005 NSCA 61).

[19] The Court is also mindful of *WD*. While the defendant did not testify, there is conflicting evidence on critical issues about this physical altercation arising from the

Crown's own witnesses, specifically Mr. Davis's account of the physical altercation relative to that of the complainant and his wife.

[20] *WD* does not only apply when a defendant testifies. As stated by Justice Saunders, speaking for a unanimous Nova Scotia Court of Appeal in *R v JMM*, 2012 NSCA 70 beginning at para 74:

The question arises whether the approach urged in *W.(D.)* applies to cases where the accused does not take the stand in his own defence. In the present case the appellant did not testify. However, he did call evidence which was in direct opposition to the complainant's account. The Ontario Court of Appeal recently dealt with this issue directly. In *R. v. B.D.*, 2011 ONCA 51, Blair, J.A., writing for the Court, observed:

[114] What I take from a review of all of these authorities is that the principles underlying *W.(D.)* are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if - viewed in the context of all of the evidence - the conflicting evidence leaves them in a state of reasonable doubt as to the accused's guilt: *Chalice*. In that event, they must acquit.[Emphasis added.]

I would, respectfully, adopt Justice Blair's analysis as a proper statement of the law on this point.

[21] It is also important to keep in mind that assessing proof beyond a reasonable doubt in the face of conflicting testimonial accounts through the lens of *WD* requires attention to both the credibility of the witness and the reliability of the evidence. As stated by Paciocco, J.A., in his article "*Doubt about Doubt: Coping with R. v. W.D. and Credibility Assessment*" (2017) 22:31 *Can. Crim. L. Rev.* at p 5, "when references are made in the *W.(D.)* framework to "credibility", they must be

understood as including both the credibility and reliability of the evidence in question”. That is, the *WD* analysis still applies when it is the reliability of those conflicting testimonial accounts, rather than the credibility of the witnesses, that drives the analysis (*R v LT*, 2008 ONCA 763).

[22] Ultimately, the Court may accept some, none, or all of the testimony of any witness (*R v JHS*, 2008 SCC 30 at para 10). The Court must also assess what weight, if any, to give to admissible exhibits.

[23] In assessing the reliability and credibility of witness testimony the Court considers the general capacity of a witness to make specific observations. The Court also considers their ability to interpret what was perceived. Consideration is also given to whether the witness was able to recall and communicate what they observed, and if that ability was impacted by such things as the passage of time, emotion, impairment by alcohol, or other factors. The Court considers whether their testimony was intrinsically consistent and whether they said different things at different times. Further, the Court considers whether the testimony was plausible, balanced, or affected by a possible interest. The assessment also considers whether the witness was sincere, candid, biased, reticent, or evasive (*R v DDS*, 2006 NSCA 34).

[24] In this case the three photographs (Ex. 2) came before the Court by consent and agreement that they were authentic. Defence counsel suggested it is left to the Court to conclude whether there was visible neck bruising consistent with Mr. Lowe’s testimony.



*Evidence and findings of fact:*

[25] While I have carefully considered the complete evidentiary record, I will now provide a brief summary of the evidence.

[26] Mr. Lowe testified that he is 67 years old. He is a retiree and receives a disability pension.

[27] Mr. Lowe said that he has numerous medical issues. He suffers from scoliosis and arthritis. He also has Chronic Obstructive Pulmonary Disease [COPD], which affects his breathing and “cuts [his] wind very short”. He experiences pain, has difficulty walking, and takes much longer than the average person to complete projects around his property. His hearing is also impaired.

[28] On the afternoon of July 21, 2024, Mr. Lowe testified that he and his wife were making a trellis in their backyard. Their property consists of rural acreage with a meadow behind their house.

[29] While the alleged offence took place in the evening on July 21, 2024, the tensions that led to the physical altercation arose from two events that transpired earlier that afternoon which were the subject of considerable attention by both counsel.

[30] The first precursor event involved geese and a man on a scooter. Mr. Lowe and his wife were working on their trellis when they noticed a male on a scooter chasing a flock of young geese in their back meadow. In Mr. Lowe’s assessment, the geese were “worked up” and the fellow appeared to be “having a good time” chasing the geese around. This upset Mr. Lowe because the young geese were not

yet able to fly, it was 30° Celsius, and some of the geese were maintaining an open wing posture as they tried to cool themselves. This incident, the Defence argued, grounded an anger in Mr. Lowe that would continue for the rest of the day.

[31] Mr. Lowe testified that he presumed the fellow was a “kid lacking in common sense who did not know any better”. Mr. Lowe called him over and was surprised to discover that the trespasser was a 35-year-old man. On cross-examination, Mr. Lowe would not rule out that he had walked toward the man, but he was clear that the two had exchanged words. The trespasser told Mr. Lowe that the geese are “shitting on my lawn”, which led Mr. Lowe to conclude that the man was connected to the neighbouring Lutz property as there were geese on both properties at the time.

[32] When the man told Mr. Lowe he was going to “have another go” at the geese, Mr. Lowe said “I’ll drive you off my property with a two-by-four if I have to”. Mr. Lowe told the Court he did not have a two-by-four in his hand but was alluding to the wood he had been using to make the trellis. The man on the scooter left.

[33] The second precursor event occurred an hour after the first, when Mr. Lowe’s wife told him that their neighbour, Mrs. Lutz, was calling him over. Since Mr. Lowe is hard of hearing, he walked toward Mrs. Lutz who was in her swimming pool, and as he did so, he could see her talking but could not hear what she was saying. He assumed that she intended to apologize for the trespasser’s actions involving the

geese. Instead, she chastised Mr. Lowe for threatening the male on the scooter. Mr. Lowe believed it may have been her half-brother. Mrs. Lutz said, “you did not have to threaten him”. Mr. Lowe says he explained the situation to Mrs. Lutz, commented on the man’s age, and explained his position regarding the harassment of the young geese. He also told her he did not threaten the man. Mr. Lowe left for home concluding that Mrs. Lutz had directed the trespasser to his property “because he did not have sense”.

[34] While these two precursor events were transpiring, the defendant was golfing with the third Crown witness, Mr. Davis. Mr. Davis testified that he and Mr. Lutz are first cousins. He said they get along well, spent the day golfing 18-holes, and estimated that Mr. Lutz had consumed “probably 3 to 4 beer” while they were playing. Mrs. Lutz was their designated driver who picked them up at the golf course at the end of the day.

[35] On the drive back from the golf course to the Lutz house, Mr. Davis recalled a conversation between Mr. and Mrs. Lutz about issues “involving a neighbour, threats to a son, and discussions with the wife that were not very nice”. Mr. Davis observed Mr. Lutz become quiet and assumed that Mr. Lutz was angry.

[36] When they arrived at the Lutz residence Mr. Lutz headed over to talk to Mr. Lowe. Mr. Davis decided it was best to go along “so things would go smooth, in case something bad happened, turned south”.

[37] Mr. Davis testified that Mr. Lutz went to the edge of the property line and called out two or three times to Mr. Lowe, “Johnny, come here, I want to talk to you!”. Mr. Lowe and his wife soon joined the group at the edge of their property.

[38] On cross-examination, Mr. Davis testified that he did not recall Mr. Lutz using hand motions such as fist clenching or waving.

[39] By way of contrast, Mr. Lowe testified that he saw Mr. Lutz was at the property line yelling, flexing his arms and fists, and pacing back-and-forth. This was several hours after his conversation with Mrs. Lutz. Mr. Lowe made his way to the property line where he heard Mr. Lutz saying, “I’m mad, I’m mad”. He could not recall saying anything himself, adding that Mr. Lutz would not have heard him in any event because Mr. Lutz was doing all the talking. He recalled Mr. Lutz saying things such as, “You [were] over bothering my wife!”, and “She did not call you over, she was calling insults”. The later comment suggests that Mr. Lowe was engaging in communication with Mr. Lutz, even if he does not recall doing so. It also demonstrates that Mr. Lutz was responding to Mr. Lowe’s account of the

conversation he had with Mrs. Lutz at the pool. It is reasonable to conclude Mr. Lowe was defending and/or explaining his actions.

[40] Mr. Davis characterized the communication between the two men as “a discussion aimed at finding out what had happened earlier that day”. Mr. Davis said that “voices were raised”, and “it was clear there were issues there”. Mr. Davis recalled Mr. Lutz standing on higher ground. He testified that Mr. Lowe came forward, attempting to put hands on Mr. Lutz. He said that Mr. Lowe brought his hands up in an effort to grab hold of Mr. Lutz. Mr. Davis also recalls Mr. Lutz knocking Mr. Lowe’s hands away three times amid loud conversation “about geese, a son, and a wife”. In Mr. Davis’s assessment, things were getting hotter, and the men’s voices were rising.

[41] Mr. Lowe, by way of contrast, described how the 200-pound Mr. Lutz charged toward him with outstretched arms and bowled him over. He testified that Mr. Lutz drove his ribs in with an elbow. Mr. Lowe said, “I did not do a lot of anything”, except grab him, Mr. Lutz, by the neck before hitting the ground. Mr. Lowe also testified that he could smell alcohol on Mr. Lutz’s breath and testified “it was not hard to tell” that he was intoxicated and “pretty worked up”.

[42] Mr. Davis testified that after Mr. Lowe had attempted to grab Mr. Lutz three times, there was a scuffle and both men were then grabbing at each other. He said

that Mr. Lutz “ending up on the ground on top of” Mr. Lowe. He explained, “from what I remember both had hands on the other. Lowe trying to pull Lutz off the hill, [that was] starting to work, then what I saw was a shoulder toss by Mr. Lutz to Mr. Lowe”. Mr. Davis described Mr. Lutz as having “brought the other person around over his shoulder”. Mr. Davis said that Mr. Lutz “made sure Lowe landed on the bottom”.

[43] When they were on the ground, Mr. Davis said, “I could not see the whole thing, but enough to see holding and scuffling but saw no fists thrown and attempts to free themselves from each other”.

[44] Mr. Davis testified that while Mr. Lutz was on top of Mr. Lowe, he watched from approximately 8 to 10 feet away, with no plans to intervene. While the men were on the ground he did not see where their hands were located. He said when Mr. Lowe was on the ground that Mr. Lutz was on top, that Mr. Lowe did not change positions, and ‘where they started was where they ended up’.

[45] Mr. Davis recalled Mr. Lowe’s wife beside the men yelling “the same as me- ‘let him up, let him up!’”. She was also saying ‘you want me to call the cops?’ over and over again, antagonizing to bring those two to a clash faster”.

[46] Mr. Davis testified, “I went to talk to her and said, ‘I’m here for him, you are here for him, let’s stay quiet’. It was not like they are fighting”. Mr. Davis also

testified, “we” tried to talk to Mr. Lutz, to get him to let Mr. Lowe up, and they both came to their feet.

[47] On cross-examination, Mr. Davis denied that Mr. Lutz was intoxicated and confirmed the two men were initially standing at the property line. He also testified on cross-examination that after the men were back on their feet again, Mr. Lowe reached once again for Mr. Lutz, and that Mr. Lutz knocked his hand away. He added for the first time on cross-examination that he heard Mr. Lowe call Mr. Lutz a name “a dirty bastard” – at that point. He also expressed the opinion that “Mr. Lutz was still trying to defend himself” and that that Mr. Lowe was “trying to grab a hold of him again”. Finally, Mr. Davis testified that when Mr. Lowe came to his feet, he was injured and there was blood coming from an eye and lip. He saw no injury to Mr. Lutz.

[48] Mr. Lowe testified that when he was knocked to the ground and had Mr. Lutz in a headlock, that Mr. Lutz was on top, trying to bust free, and using his hand to try to gouge at Mr. Lowe’s face and eyes. Mr. Lowe testified that Mr. Lutz got a hand inside of Mr. Lowe’s mouth and tried to “rip my face off“. Mr. Lowe has false teeth and says it felt as though Mr. Lutz was using all the force he could apply. Mr. Lowe let Mr. Lutz loose from the headlock when he heard what he believed to be Mr.

Lutz's son offer to get involved. There is some support for a conclusion that the fight was consensual up to this point.

[49] Mr. Lowe testified that upon releasing Mr. Lutz from the headlock, Mr. Lutz "instantly got off, slid around and grabbed my neck from behind", choking him to the point of unconsciousness. Mr. Lowe believes Mr. Lutz's hand was around his neck for approximately three minutes while he blacked in and out of consciousness. Fearing for his wife's safety, Mr. Lowe wanted to tell her to leave but was unable to talk. Mr. Lowe testified that he 'wasn't totally out' but was "going in and out of consciousness two or three times" during the choking he worried whether Mr. Lutz "had sense enough to let go if I went unconscious". On re-direct, Mr. Lowe said that 'what he did to me was a chokehold'.

[50] Mr. Lowe said that it all came to an end when Mr. Lutz let him go. He testified that Mr. Lutz's son then said, "that's what you get for bothering my mom". Mr. Lowe estimated the entire incident lasted "maybe five minutes".

[51] Mr. Lowe testified the choking left him with a crushed voice box and, due to Mr. Lutz taking him to the ground, ribs that "were stoved in". He said his voice box was sore for quite a few weeks and the pain in his ribs was ongoing.

[52] Ms. Bezanson testified that she recalls the situation that day very well and described her husband as having been "viciously attacked" by their neighbour. Her



testimony largely accorded with that of Mr. Lowe with respect to the precursor events involving the geese and Mrs. Lutz hollering for her husband.

[53] Ms. Bezanson recalled ‘Danny’ Lutz coming onto their property “hollering and shooting off his mouth”, accusing her husband of threatening his wife. While she cannot recall the exact words that were spoken, she remembered that Mr. Lutz and Mr. Lowe were three feet apart, and Mr. Lutz jumped at Mr. Lowe and put him on the ground. She says, “it was just a shock to me to see Johnny attacked”, and once on the ground she saw Mr. Lutz choke her husband with an arm around his neck and a hand on his face. She remembered her husband “was almost out because his eyes started to close, and he was making very little movement”. She believes the whole thing lasted between five and ten minutes. She specifically remembers Danny kneeling behind her husband choking him while he was lying on the ground. She recalls Danny’s son “was going to step in” to help and saying she was “calling the cops”. She also recalls Mr. Lutz acting as though he did not hear her.

[54] Ms. Bezanson recalled the men getting up from the ground, standing for a couple minutes, and she and her husband leaving to go into the house. She saw that her husband had a mark on his forehead, blood running down his chin, and blood on his t-shirt. She washed his face and took off his bloody shirt.

[55] Ms. Bezanson recalled as many as five people being present during the fight, and one guy who was there as an overseer to make sure things did not get out of hand. She did not explain why she reached that conclusion and did not name Mr. Davis.

[56] On cross-examination, Ms. Bezanson acknowledged her statement to the police that she gave in the presence of her husband. She said if they walked towards Mr. Lutz, it was because Mr. Lowe could not hear him. She also reiterated that Mr. Lutz was behind her husband with his arm around his neck and that she also recalled Mr. Lowe's mouth being pulled when Mr. Lutz was behind her husband. The latter point differed from the testimony of her husband, although he said he was in and out of consciousness when he was being choked, which affords an opportunity for her to see something that he did not register.

*Assessing the testimony of the witnesses*

[57] Mr. Davis was an interested witness, a first cousin of the accused who spent the day golfing with him prior to the alleged incident. His testimony was at times imprecise, but an important part included not seeing where Mr. Lutz was holding Mr. Lowe, "because of the angle". He agreed the two men were in close proximity, "it looked like scruff of [the] neck, but I did not have a clear view of it", and he did not see a shift by Mr. Lutz to a location behind Mr. Lowe. Tellingly he testified to

the following as to the location of hands, “the only part I saw was hands by [the] collar, *but what happened when they hit the ground I cannot say because I did not see it*”.

[58] Ultimately, I do not find Mr. Davis to be a reliable historian of what occurred when the parties were on the ground. He has acknowledged the limitations in his evidence with respect to what transpired there. I find that Mr. Davis did not see the relevant part of the action. I do accept his evidence that Mr. Lutz was upset, that he initiated a confrontation with Mr. Lowe, that the men were yelling, and Mr. Lutz took Mr. Lowe to the ground.

#### *The photographs*

[59] Mr. Lowe testified that he contacted his lawyer the next day and was advised to get physical evidence of what had occurred, so he went to outpatients where a doctor photographed his face. While he does not recall a police officer taking the photographs, as per the agreement of counsel, he says she may have but testified the background in the photographs does not look like his house, where presumably he spoke to police. He also clarified on cross-examination that it was the lawyer’s receptionist who told him to get proof. I do not find it unusual that a reference to a direction from a lawyer would include the office staff.

[60] Mr. Lowe reviewed the photographs and pointed out bruising. He also noted swelling on his cheek and around his eyes which he attributed to Mr. Lutz's fingers "when he was trying to rake my eyes". The second photograph, Mr. Lowe said, demonstrates the swelling inside his mouth caused by Mr. Lutz's fingers pulling inside his mouth. The third photograph showed swelling on his cheek, *bruising on his neck*, and a puffiness around his eye.

[61] Mr. Lowe estimated that Mr. Lutz outweighed him by a fair bit, at least 50 pounds, was physically fit, had no disabilities of which he was aware, and is likely 55 years old. He says before that day there had never been problems between the two men, certainly nothing like this had ever happened, and he does not get close, nor pay much attention to his neighbours.

[62] On cross-examination Mr. Lowe confirmed that he did not review his statement to the police before testifying, and when challenged on details contained in the statement, he prefaced his answers with "maybe, don't know word for word what I said in the statement". He maintained that everything he said was true to the best of his ability to remember.

[63] Defence counsel's challenges included collateral issues such as whether Mr. Lowe went part way toward the trespasser who was chasing the geese in the meadow, and whether he left that portion out when speaking with police. Mr. Lowe testified,

“I started to head down across the meadow”, adding “I answered the questions that I was asked”.

[64] Counsel challenged whether Mr. Lowe was angry about the situation involving the geese. Mr. Lowe testified that he did not know if he was angry at the beginning when he thought the fellow was a child, but agreed he “laid it on pretty thick, but was not yelling”. I find it is of little consequence whether Mr. Lowe was upset about the incursion on his property and the harassment of migratory birds. He was well within his rights to be angry. Whether that anger carried on many hours later and somehow undermines his credibility or the reliability of his account of the choking, is presumably the issue.

[65] Challenged as to whether he threatened the trespasser, Mr. Lowe maintained he did not, adding nor did he threaten Mrs. Lutz at her pool.

[66] Counsel challenged Mr. Lowe’s testimony about Mr. Lutz pacing at the property line, and whether he failed to mention that point in his police statement. Mr. Lowe said, “maybe so”.

[67] Challenged as to whether he could engage in physical labour, Mr. Lowe explained that while he did such things as paint his barn and build a trellis, it takes him significantly longer than other people to achieve such tasks.

[68] Defence counsel suggested to Mr. Lowe that his holding of Mr. Lutz in a chokehold demonstrated considerable strength on his part. Mr. Lowe clarified it was not a chokehold but a headlock that did not interfere with Mr. Lutz's ability to breathe. Mr. Lowe emphasized that he was on his back and was not the aggressor. When pressed on that point, Mr. Lowe testified "I don't think so", adding "this had nothing to do with Mr. Lutz". Having the benefit of listening to Mr. Lowe testify and noting the inflection and tone of his words, I conclude his meaning was not to wonder if he was the aggressor, but to reflect that 'no, he was not'. The words 'this had nothing to do with Mr. Lutz's, referenced the two precursor events involving the geese and the conversation with Mrs. Lutz.

[69] Mr. Lowe was cross-examined about how he actually got Mr. Lutz into a headlock, and he explained how he "kind of sidled up, grabbed him in the headlock...", and "by that I mean I stepped to the side when he charged at me and put my arm around his head".

[70] Mr. Lowe also clarified on cross-examination that the lawyer's receptionist told him he needed physical evidence and that was why he went to the doctor, adding he was not looking for any of this and was minding his own business on his own property.

*Assessment of the photographs*

[71] Defence counsel did not challenge the admissibility of the photographs, the date taken, nor that police took them. Although Mr. Lowe believes a doctor took them, I find nothing turns on this, as they were admitted by way of consent. In closing submissions, defence counsel did challenge whether Mr. Lowe pointed out neck bruising evident in the three photographs during his testimony. I find, based on my careful notes and listening to the record, that he did. I find the injury on Mr. Lowe's neck is clear in the photographs. It is a bruise on the left-hand side of his neck and covers a fairly wide area.

[72] I find the bruising, evident in the photographs of Mr. Lowe's neck, was caused by Mr. Lutz choking Mr. Lowe. I make this finding based on the testimony of both Mr. Lowe and Ms. Bezanson. Even based on the testimony of Mr. Davis, who acknowledged that did not see everything that happened on the ground, there is little reason to doubt the cause of the bruising. It simply does not make sense that it was caused when Mr. Lutz was on top of Mr. Lowe and in a headlock.

*Position of the parties*

[73] The Crown says this case is about what happened when Mr. Lowe was on his back on the ground, and not what led to that moment. Mr. Lutz choked Mr. Lowe from behind resulting in a neck injury and an intermittent loss of consciousness. The Crown argued that the Court should accept the evidence of Mr. Lowe and his wife,

as well as that of Mr. Davis, while acknowledging the limitations of his observations of when Mr. Lowe was on the ground. While Mr. Davis was not in a position to see choking, both Mr. Lowe and his wife testified that choking occurred, and the bruising on Mr. Lowe's neck, as demonstrated in the admitted photographs, supports their testimony. Mr. Lowe, it is argued was both reliable and credible.

[74] The Crown argues when Mr. Lutz choked Mr. Lowe the action was not taken in self defence. He notes the significant age discrepancy, size discrepancy, that Mr. Lutz came to Mr. Lowe's property to start a fight, he tackled Mr. Lowe to the ground, he was on top of Mr. Lowe, and his stance at the property line confirms intended aggression. There was no need for Mr. Lutz to put his hands around Mr. Lowe's neck once he was freed from the headlock. There was no evidence at all of any imminent risk to Mr. Lutz at the time he rolled off Mr. Lowe and put his hands around Mr. Lowe's throat. It cannot be ignored that Mr. Lowe presents as an older, frail man, with scoliosis and various ailments. There is no history between these two, there were no weapons involved, and Mr. Lowe's wife was so shocked by the incident that she wanted to call the police. While it is possible, based on Mr. Davis' evidence, to conclude this matter started as a consensual fight between the two men, the choking part occurred after Mr. Lowe released Mr. Lutz and he had rolled away.



Positioning himself to choke Mr. Lowe, who was on his back on the ground and not presenting a threat, is not defence of self. There was nothing to defend against.

[75] Defence counsel argues Mr. Lowe is not a reliable witness based on inconsistencies in his testimony as compared to his police statement. He says Mr. Lowe was angry and aggressive with the trespasser, Mrs. Lutz at the pool, and Mr. Lutz at the property line. He says Mr. Lutz was not pacing at the property line, instead he was standing there while Mr. Lowe was trying to grab him and repelling those efforts. While Mr. Lowe says he was 15 to 20 feet away from Mr. Lutz, the other witnesses place the two men as close as three feet apart before the touching occurred.

[76] The Court should be concerned about the evidence of Ms. Bezanson who testified about a chokehold from behind occurring at the same time Mr. Lutz's hand was in her husband's mouth. That is so because Mr. Lowe testified Mr. Lutz's hand was in his mouth while Mr. Lutz was on top of him on the ground and before the choking occurred.

[77] Defence counsel also argues there is a difference between a chokehold and headlock, and Mr. Lowe's testimony about physical frailty should be discounted because Mr. Lutz, a larger man, could not break free from that chokehold. He also asks the Court to note that Mr. Davis did not testify in accord with the others about

a shift off of Mr. Lowe to a behind position when the choke to Mr. Lowe allegedly occurred.

*Conclusions and findings of fact*

[78] The Court finds Mr. Lowe was a credible witness. He testified in a fairly clear manner and the minor discrepancies noted by defence counsel did little to affect that conclusion. Mr. Lowe did not review his statement before testifying, indeed there was no evidence he reviewed it all. The discrepancies were minor and of little consequence. The Court is not concerned about whether Mr. Lowe was angry about the geese, or whether he was hot when talking to Mrs. Lutz about that topic. Mr. Lowe was not responsible for the actions of the trespasser or Mrs. Lutz calling him over. He did not initiate any of the contacts that day, including with Mr. Lutz. None of those issues impacted his credibility with respect to being rendered unconscious time and again by choking.

[79] Mr. Lowe was also fairly reliable. He estimated how long he was unconscious, an unusual task for such a witness, but added it was not for long each time it occurred. His testimony about letting Mr. Lutz go just before the choke was plausible and supported by his concern that the son would get involved, also testified to by Ms. Bezanson and not disputed by Mr. Davis who testified about the crowd and the yelling directed at Mr. Lutz to let Mr. Lowe up.

[80] Mr. Davis was concerned about Mr. Lutz's intended interaction with Mr. Lowe, to the extent that he accompanied him to the property line. While I find Mr. Davis was an interested witness as a first cousin of the accused, he nonetheless provided some important context evidence. He was aware that Mrs. Lutz had passed relevant information to her husband, that Mr. Lutz was angry, and so chose to accompany Mr. Lutz when he went directly to the Lowe property after leaving the car. Mr. Davis was concerned about what would happen, and his concern was well placed. He knows Mr. Lutz, his relative, and had benefit of the lead up to the confrontation. That said, his was the only evidence of Mr. Lowe grabbing at Mr. Lutz on several occasions, followed by mutual grabbing prior to their time on the ground. I am not convinced that occurred, rather I find there was a sudden grab by and take down by Mr. Lutz to the ground.

[81] Even if I am wrong that Mr. Lowe tried to grab Mr. Lutz on several occasions followed by mutual grabbing, I find Mr. Lowe ended up on his back on the ground as a result of Mr. Lutz's actions, confirmed by Mr. Davis. Once on the ground, and upon being released from a headlock, there was no justification for Mr. Lutz to choke Mr. Lowe. He was free and could have gotten up and left. He had the opportunity but chose a different course of action. Mr. Lowe represented no threat to Mr. Lutz as he lay on his back on the ground, it is quite reasonable to conclude he was already

bleeding from both his eye and mouth. Instead, Mr. Lutz choked him to the point of unconsciousness, not once, but a few times while Ms. Bezanson shouted about calling the police. There could be no question of self-defence in these circumstances having regard to the unreasonableness of his actions. The choking was in addition to, what could not be ruled out as, a consensual fight.

[82] The Crown has established the elements of the offence of choking beyond a reasonable doubt. In committing an assault, Mr. Lutz choked Mr. Lowe, and that interfered with his breathing such that he was rendered unconscious at least three times. The evidence of Mr. Davis does not leave me with a reasonable doubt, and the Crown has satisfied me beyond a reasonable doubt that self defence did not apply to Mr. Lutz's actions.

[83] Judgment accordingly.

van der Hoek ACJ PC