IN THE PROVINCIAL COURT OF NOVA SCOTIA
(Cite as: R. v. Nickerson, 2002 NSPC 004)

HER MAJESTY THE QUEEN

vs.

CRAIG NICKERSON

DECISION

Decision: **Delivered orally March 1st, 2002**

Judge: **The Honourable C. H. F. Williams, JPC**

Counsel: **Mr. R. Woodburn, Crown Attorney**
Mr. G. Allen, Defence Attorney

Introduction

Six persons including the accused, Craig Nickerson, shared an upstairs apartment at 6319 Pepperill Street in the Halifax Regional Municipality. The complainant, Brent Andrews, is the boyfriend of another tenant Marilyn Veinot. Occasionally, and usually when they had been drinking, the male tenants would get together in the basement to indulge in wrestling and horseplay. They called these occasions "the fight club." The female tenants considered "the fight club" as a strange bonding ritual something that the men did to rid themselves of their frustrations.

Findings of Fact

After hearing the evidence and on my assessment of the witnesses as they testified, I find that on January 6, 2001, the tenants invited some guests, including the complainant, for a sociable and convivial evening together. The complainant was a regular visitor to the apartment and had heard about the fight club from Veinot. In any event, as the evening progressed and all present were in various stages of intoxication, the accused invited the complainant to go to the basement to participate in the fight club. The complainant willingly accepted the invitation.

On arrival in the basement, the complainant took off his shirt and squared off with the accused as

if to wrestle. However, instead of a wrestling hold, he advanced and struck the accused in the face. Surprised and stunned, the accused put his arms around the complainant to prevent him from striking again, and, as a result, they stumbled to the floor. In a brief struggle that followed, the accused ended on top of the complainant and commanded the situation. However, after calming an agitated complainant and after receiving assurances of no further belligerency, he got up and allowed the complainant to stand. The complainant hurt his knee during this contact.

Angrily, the complainant left the basement and went upstairs with Veinot into her bedroom from where he was shouting threats and swearing at the accused. Concomitantly, Veinot was persuading him to leave the apartment and he was arguing loudly with her. Nonetheless, the accused, ostensibly to protect Veinot, opened her closed bedroom door, entered and angrily confronted the complainant. Veinot, who had not requested assistance from anyone, stood between them and implored them not to fight. Some persons present also came to the bedroom. Nevertheless, in spite of her efforts, the complainant swung at the accused and struck him in the face. In the sudden commotion that followed, someone pushed Veinot aside. Again, the accused put his arms around the complainant and in the confined space of the bedroom their momentum caused them to crash into a glass window that broke. They also stumbled into a dresser and then ended on the floor with the accused on top of the complainant.

While on the floor they struggled and exchanged blows. However, at some stage of their contact, the complainant sustained a nasal fracture for which he sought and received medical attention. The following day, after receiving an allegation of misconduct, the police arrested and charged the accused with assault causing bodily harm to the complainant. The accused does not deny that the complainant was hurt but argues self defence.

Issue

Is self defence applicable in the circumstances of this case?

Applicable Legislation

Here, the applicable sections of the **Criminal Code,** are:

> 34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
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> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
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> (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

> (a) he uses the force
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> > (i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and
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> > (ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;
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> (b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and
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> (c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

265. (1) A person commits an assault when

> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

Analysis

The accused submitted that he is entitled to rely on **Criminal Code** sections 34 and 35. He

submitted that the complainant did not know how or when during their contact, if at all, he sustained his injuries. Furthermore, the complainant was the aggressor. Essentially, the accused's submission was that he was scared and only responded to blows delivered by the complainant without the intention to hurt the complainant. On the other hand, the Crown submitted that, from the beginning, the accused was the aggressor. From this perspective, there was no dispute that the complainant sustained his injury in the bedroom, where on the complainant's testimony, the accused struck him in the face.

However, it seems to me, on the evidence that I accept, the evening's confrontation between the accused and the complainant was one continuing episodic event. It started with the struggle in the basement and ended with the struggle in Veinot's bedroom. In my view, initially, both parties voluntarily agreed to participate in a physical contest. Therefore, both parties reasonably would have appreciated the risks involved while participating in the fight club antics. Further, it is reasonable to conclude that they also consented explicitly or by implication to some form of bodily contact and the risk of injury that would occur within any existing customary norms or rules of the fight club. In the basement, however, the complainant's conduct took the accused by surprise but the event ended unsatisfactorily for the complainant. It was also unresolved from the accused's point of view as the complainant apparently did not play by the assumed rules. Thus, in my view, on the evidence, it is reasonable to conclude that they both had bruised egos and were immaturely seeking an opportunity to resolve their differences through physical force.

Because of my factual findings, the accused cannot rely on the **Criminal Code** s.35, for his defence. This section only affords self defence in cases of aggression. Firstly, for this section to apply, the accused would have had to commence the assault on the complainant without justification and without the intention to cause him grievous bodily harm. Secondly, the accused must have tried to stop the fight, if at all possible, by quitting or retreating before it became necessary for him to protect himself from serious injury. Thirdly, before the fight reached the stage where he felt threatened with serious bodily harm, he himself must not have tried to inflict serious bodily harm on the complainant. Here, the accused has not admitted nor did I find that he was the aggressor. Although the accused might have invited the assault, he did not strike the initial blow with the intention of hurting the complainant and without any justification. In fact, he did not strike the initial blow. In addition, I found that there was no evidence to support the proposition that without justification the accused provoked an attack upon himself by the complainant. Furthermore, in my view, the accused did not shy away from confronting the complainant nor did he take any reasonable steps to avoid such hostile contacts.

However, by virtue of the **Criminal Code** s.34(1) a person is justified in using force to repel an ***unprovoked unlawful assault.*** Thus, the initial question is: Was the application of force to the person of the accused by the complainant unprovoked and unlawful? Further, the accused must not have intended to cause grievous bodily harm to the complainant and he must have used no more force than, in the circumstances, was necessary to protect himself. Accordingly, to establish the factual underpinning of his defence under s.34(1), I must also consider his conduct, as I have found. Essentially, I must ask myself whether the accused had an honest belief, in all the circumstances, that he was being unlawfully assaulted without having provoked the assault.

The **Criminal Code**, s. 36 states that, "provocation ***includes***, for the purposes of sections 34 and 35, provocation by blows, words or gestures." [Emphasis added.] "Bodily harm" in s.2 " means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature." "Grievous bodily harm" is not defined. However, ***R.v. Bottrell*** (1981), 60 C.C.C.(2d) 211 (B.C.C.A), for the purposes of s.25(3), at p.217 defines the term "grievous bodily harm" as "causing a hurt or pain."

Consequently, in assessing his conduct to determine the applicability of s.34 (1), I considered, along with my other impressions of the witnesses as they testified, the following:

(a) the accused invited the complainant into the basement to wrestle where they had an unsatisfactory and unresolved contact;

(b) on his own testimony, the accused met the complainant in the hallway upstairs where the complainant, still upset, stuck him in the face despite Veinot's efforts to prevent them from fighting;

(c) the accused heard the complainant and Veinot arguing in Veinot's room and the complainant angrily shouting threats at him from Veinot's room but with the door closed;

(d) without any invitation or reasonable justification, the accused entered Veinot's room to confront the complainant;

(e) the complainant suffered a nasal fracture during the melee.

On the evidence that I accept, I find, by reasonable inference, that the accused, by his considered conduct, intended to invite an assault upon himself by the complainant. I find that given his observed emotional state of the complainant and the complainant's hostile attitude toward him, the accused's persistence in accosting the complainant, in the circumstances, was provocative and intentional, or wilfully blind or foolhardy. He knew that the complainant was dissatisfied with the outcome of the physical contact in the basement. Further, he was aware that the complainant was making threats to even the score. Therefore, concluding that he was wilfully blind or foolhardy was difficult. Accordingly, on the evidence, I do find, by reasonable inference, that the accused was still prepared to challenge the complainant. I therefore conclude that a reasonable person, in his position and in those circumstances, reasonably would have perceived that his overall conduct would be provocative to the complainant.

Therefore, on balance, it is reasonable to conclude that the assault by the complainant was anticipated by the accused. In my view, he anticipated the complainant's predictable reaction by indulging in strategic sporadic verbal confrontations. When the facts and the true situation are examined, it seems to me that this was his stratagem as part of the ongoing and unresolved squabble. Thus, his subjective belief that the action of the complainant presented to him an imminent danger of grievous bodily harm and that his counter action was necessary to protect himself, objectively,

given his own conduct, in my view, was not reasonable. He was struck twice in the face by the complainant without the opportunity to really even the score. It is therefore reasonable to infer, from the evidence that I accept, that the accused was probing for an opportunity to strike back. Consequently, in my opinion, the incidents of the assault, in these circumstances, would not have occurred without the accused "having provoked" them by his conduct. See, for example, ***R.v. Nelson***, (1992) 71 C.C.C. (3d) 449 (Ont. C.A.). As a result, it is my opinion, on the analysis that I have made, the accused cannot avail himself to the protection of s.34(1).

I have found that the accused provoked the assault upon himself. Therefore, he may, at first blush, avail himself to the protection of s.34(2). However, as was put by Lamer C.J., in ***R. v. Petel*** [1994] 1 S.C.R.3, [1994] S.C.J. No.1., at paras. 19-20:

> 19 It can be seen from the wording of s. 34(2) of the Code that there are three constituent elements of self-defence, when as here the victim has died: (1) the existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm; and (3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary.
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> 20 In all three cases the jury must seek to determine how the accused perceived the relevant facts and whether that perception was reasonable. Accordingly, this is an objective determination. With respect to the last two elements, this approach results from the language used in the Code and was confirmed by this Court in Reilly v. The Queen, [1984] 2 S.C.R. 396, at p. 404:
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> > The subsection can only afford protection to the accused if he apprehended death or grievous bodily harm from the assault he was repelling and if he believed he could not preserve himself from death or grievous bodily harm otherwise than by the force he used. Nonetheless, his apprehension must be a reasonable one and his belief must be based upon reasonable and probable grounds. The subsection requires that the jury consider, and be guided by, what they decide on the evidence was the accused's appreciation of the situation and his belief as to the reaction it required, as long as there exists an objectively verifiable basis for his perception.

Thus, the law requires me to ask myself not whether "the accused was unlawfully assaulted" but rather whether "the accused reasonably believed, in the circumstances, that he was being unlawfully assaulted." It is his state of mind that is relevant. Therefore, here, did he have a reasonable apprehension of any danger posed by the complainant? And, if so, did he have a reasonable belief that he could not extricate himself otherwise than by injuring the complainant? On the evidence, however, I find that there was no "objectively verifiable basis" for the accused's submission, in argument, that he had a reasonable apprehension that the complainant would cause him "grievous bodily harm." Nothing in his testimony, supported his submission, in argument, that he was afraid of the complainant because of some continuing violent act on the part of the complainant towards

him.

On the contrary, the evidence suggests and I find that the accused took every available opportunity to be within the complainant's space, so to speak, even though he knew that the complainant quite clearly had animosity toward him. In my view, he had the opportunity to leave the complainant alone in that it was not necessary for him to enter Veinot's bedroom and there to approach the complainant and to become involved in a heated argument. He was uninvited and unwelcomed. Therefore, his submission that he entered the room out of concerns for Veinot's safety, on the evidence and in my view, lacked an air of reality and has no merit. When eventually they did embrace angrily and engaged in fighting, the accused's explanation, in the end and in hindsight, was that he did not intend to hurt the complainant. His explanation was not that he believed on reasonable grounds that he had to fight the complainant as it was not possible to preserve himself from harm otherwise and except by hurting the complainant.

Generally, it is a reasonable inference that a man intends the natural consequences of his act. Here, the accused averred that he intended to fight but not to cause injury to his opponent. However, the natural risk involved in fighting is injury either to one's self or your opponent or both to self and opponent. On the evidence and on my impression of the accused as he testified, I think that because he was also injured in the fracas he now baulks at the notion that he should be held criminally responsible for the complainant's injuries in what started off as a consensual physical contact. Consequently, he claims self defence. However, on the analysis that I have made, in my opinion, he cannot avail himself to the protection of s.34(2). In short, the facts, as I have found, do not support the defence of self defence and the evidence does not lend an air of reality to the submitted factual underpinnings for me to apply the provisions of the **Criminal Code** , sections 34 and 35 for the benefit of the accused.

There is no doubt, in my mind that the complainant suffered bodily harm. According to Dr. Thomas Currie, the attending emergency physician, the complainant's history was injuries to the face that on examination and diagnosis revealed a nasal fracture without any obvious evidence of bony deformity. There was significant swelling to the bridge of the nose that needed icing for several days to improve the swelling but would be painful for several months. The injury, however, needed no surgical intervention. The doctor opined that the probable cause of the injury was "blunt trauma." Further, it would have required "a significant amount of force to break a bone." The critical questions however are: How did it happen? When did it occur? Here, because of the manner in which the parties conducted themselves causation has become the essential factor to establish culpability. Consequently, the questions that I must answer are: Was the facial trauma the result of other probable causes? or, Was it the result of force applied intentionally and directly by the accused to the person of the complainant?

Here, the injury complained of apparently occurred in the bedroom as the evidence points to the fact that apart from his leg, the complainant was free of any other injuries before the accused entered the bedroom. However, eyewitnesses' accounts of what happened in the bedroom are conflicting. The complainant testified that the accused struck him first when he was standing and that he offered no response to the accused. He testified that, "nothing happened on the floor." This version is supported

by Veinot. However, another Crown witness, Terri Grant, testified that the complainant threw the initial punch striking the accused in the face. The accused did not hit the complainant when he was standing. They clinched and stumbled into the window and the wardrobe. At that point she and Veinot were pushed out of the bedroom but she could hear "crashing" noises through the open door.

Chris Hache, another Crown witness, testified that the complainant threw the first punch and that "they grabbed each other" and with the momentum they fell into the window and then to the floor with the accused on top. While on the floor, they were both throwing blows at each other. the accused was throwing blows to the complainant's body "from the stomach up." The complainant's blows were aimed at the accused's face. The accused testified that the complainant struck the first blow. He grabbed the complainant and their momentum took them towards a glass window breaking it, then into a closet and then onto the floor with him on top. On the floor the complainant was punching up at him and he was punching back. He is not sure whether he struck the complainant in the nose. However, the complainant has asserted that he did not receive the injury to his nose when he was on the floor.

Consequently, as I assessed the witnesses as they testified and my impressions of their testimonies in light of the total evidence, I have no doubt and find that the complainant threw the first blow that struck the accused in the face. I do not find that the accused first threw a punch that struck the complainant in the face while the complainant was standing. Receiving the blow to his face the accused advanced and they grabbed each other. In addition, I find that their momentum caused them to stumble into a glass window breaking it. Still holding each other they then stumbled into a dresser and finally fell together to the floor with the accused on top.

In ***Smithers v. The Queen*** (1977), 34 C.C.C.(2d)] 427 (S.C.C.) Affirming 24 C.C.C. (2d) 344, the Supreme Court of Canada affirmed that causation is a question of fact to be decided by the jury beyond a reasonable doubt. But, it is a question of law as to whether there is any evidence to put the issue to the jury in the first place. Here, in my view, the Crown did not undertake to show any casual relationship between the blows of the accused, on my findings of fact, and the broken nose sustained by the complainant. There was no well grounded opinion as to the cause. The doctor's opinion was that it was occasioned by a blunt trauma. There was, however, no opinion as to what the blunt trauma would have been consistent with as a causative factor.

Here, in my opinion, there are too many variables and probabilities. There was the fall into the glass window; the fall into the dresser and the fall to the floor. Rather than speculate, I think that the evidence was not only contradictory but also disturbing. Further, on the total evidence, I think that the direct factual cause of the injury was also unclear. The Crown has the burden of showing factual causation beyond a reasonable doubt. In short, it must prove beyond a reasonable doubt, that the blows delivered by the accused to the complainant when they were on the floor were the actual cause or were contributing factors "outside the de minimis range." Absent the bodily harm this, in my view, was a consensual fight.

Conclusion

Consequently, on the analysis that I have made, I find that there is insufficient evidence for me to conclude, beyond a reasonable doubt, that the accused caused bodily harm to the complainant. This does not mean that the complainant did not suffer bodily harm. It means, in my opinion, on the evidence before me and on the analysis that I have made, that the Crown has not proved beyond a reasonable doubt the elements of the offence as charged. I find the accused, Craig Nickerson, not guilty, as charged, and will enter an acquittal on the record.