

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Gregory, 2008 NSSC 239

Date: 20080731

Docket: CRAD 280602

Registry: Annapolis Royal

Between:

Her Majesty the Queen

Informant

and

Jamie John Gregory

Defendant

Judge:

The Honourable Justice Kevin Coady

Heard:

May 12, 13, 14 2008, in Annapolis Royal, NS

Decision:

July 31, 2008

Counsel:

David Acker, rep the Crown

Lloyd Lombard, rep the Crown

Joel E. Pink, QC, rep Jamie John Gregory

By the Court:

[1] Jamie John Gregory stands charged that on or about the 22nd day of December, 2006 at or near Lawrencetown, in the County of Annapolis, Nova Scotia, did commit second degree murder on the person of Peter Michael Vanderpluijm, contrary to section 235 of the **Criminal Code of Canada**.

[2] On May 12, 2008 Mr. Gregory entered a not guilty plea to this charge.

[3] On that same date an agreed statement of facts was tendered as Exhibit #1.

[4] That document commences with the following preamble:

Pursuant to the provisions of Section 655 of the **Criminal Code**, the Crown is hereby alleging and the Accused, Jamie John Gregory, is hereby admitting the following facts for the purpose of dispensing with proof thereof:

[5] Exhibit #1 consists of 21 admissions.

[6] I will review those of particular relevance to the task I must perform in this proceeding.

1. That Jamie Gregory's video statement to police and transcript will be admitted without necessity for a *voir dire*.

[7] This admission amounts to a confession to killing Peter Vanderpluijm. It also contains the basis for the partial defence of provocation which is capable of reducing this murder to manslaughter.

3. That the witness statements included in a separate binder and summarized in the Trial Summary are admitted for the truth of their contents subject to the witness being called by either party for the purpose of clarification.

[8] These statements are before the court as Exhibit #3.

[9] None of the 28 witnesses were required to give oral evidence, save Frank Longley.

11. That the two VLT machines located furthest from the Legion entry on December 22, 2006, were found to be empty of cash on the morning of December 23, 2006.

12. That \$249.00 was found in one of the pockets of Peter Vanderpluijm.

[10] I have considered all of the admissions and I mention those as they are the most probative to the issue I must decide.

[11] I have also considered all 17 exhibits which include photos, autopsy photos and crime scene diagrams.

[12] Essentially Jamie Gregory is admitting to this homicide but is arguing that it happened as a result of sudden provocation and therefore it is manslaughter, as per section 232 of the **Criminal Code**.

[13] For the most part the oral evidence focused on the issue of provocation.

[14] Where those witnesses were experts their qualifications were admitted by consent and are set forth in Exhibit #10.

[15] The Crown's first witness was Cpl. Baigent, who was a member of the RCMP Identification team on December 23, 2006. He established the crime scene for the court, mostly through photos. He testified as to the location of the body in relation to the video terminals, the fire extinguisher, where the fire extinguisher hung on the wall, the location of a VLT stool and other furniture. The evidence of Cpl. Baigent was not challenged through cross-examination.

[16] The next evidence advanced by the crown was the accused statement to the police which was tendered through video and accompanying transcript.

[17] In the crown's summary for the trial judge it is stated that "the crown does not necessarily agree to all he has to say". That position was apparent during the trial and in final submissions. I will review the parts of that statement that I have found to be probative to the issue I must decide.

[18] Jamie disclosed that he had a problem with drugs in Ontario and that he “got off drugs, got away from the people that I knew”. The trial evidence disclosed that he had used cocaine, and other drugs, starting in his late teens. He was 29 at the time of this offence. Jamie stated, upon arrest, that he was 6'3" tall and weighed about 230 pounds.

[19] Jamie stated that he had 3 to 4 drinks of rum before leaving home on December 22, 2006, and that he had “a fair bit of alcohol” as the night went on. We know from the totality of the evidence that he had a history of over using alcohol since his late teenage years and that such use of alcohol made him aggressive in manner and action.

[20] After a series of initial denials, Jamie Gregory stated as follows:

A. I'll tell you what happened.

Q. OK.

A. (Sobbing) I was playin' the game and he was ah, it was about ten-thirty. I don't even think it was ten-thirty. He told me I gotta go, so I said, well I still got money in here and he had just given me a drink and, I wasn't bein' nasty or nothin'. I said, you know, (sobs). I can't look at you while I do this, OK?

Q. OK.

A. (Sobbing)

Q. Come on man, get it out.

A. He wanted me to go and I told him to fuck off. I said, I'm havin' fun, it's Christmas time. I said, fuck off man, (breathing heavy) and he had already closed out, (oh fuck), he had already closed out the two machines. He said to me, he said, fuck 'em all. I'm goin' to hell (crying).

Q. God'll forgive ya. You made a mistake last night. God'll forgive you for that.

A. I said fuck off to him and he was standin' on my left (sniffs) and he said, "What?", and I said, "Fuck off, man", and he shoved me and, and I fell out of my stool. I got up and I punched him so fuckin' hard (crying) right in the face man, I, I clear him over by the table. (Crying) I, I put my knee onto him and I started fuckin' drivin' him. He was makin' (crying).

Q. You're doin' good. You're doin' good Bud.

A. (Crying, sobbing) He started makin' these fuckin' gurgling noises. I didn't, I knew he was suffering. He, I hurt him bad, I know I did and he was bleedin' and stuff through his, he was bleedin' pretty bad from his mouth and I didn't know what to do man (crying). He was hurtin' so bad (crying), all I could do was help him out, so I (sobs), I took the fire extinguisher (crying, sobbing) and I bashed him over the head with it, oh fuck. And then I, then I didn't know what to do so I, I, oh fuck, I made it look like somebody robbed him. I tried to, I tried to make it look like somebody else was there but (crying), fuck. It's, I couldn't watch him, it was fuckin' hard. All I could, I freaked out and I (sighs), I don't know, I

just fuckin', when he pushed me out of my chair I thought, you son of a bitch and I, I know, I didn't want to fuckin' hit him, I, I know I didn't (crying, sobbing).

[21] And further;

A. I didn't want any of this to happen. I just couldn't see him suffer, like just layin' there. He just fuckin' lay there.

Q. How many times did you hit him with the fire extinguisher?

A. I think it was three times.

Q. Where did you hit him?

A. In the head. I did, I just, I didn't know what to do.

Q. After you hit him with the fire extinguisher, can you tell me what you did then, and I know, I just want you to take your time and think about it?

A. I wiped it down, I washed my hands.

Q. Where did you wash your hands?

A. In the sink in the washroom.

Q. OK.

A. OK, you probably know that though but.

Q. Well, it's important to hear it from you.

A. I'm guilty (crying) I don't expect you to understand.

[22] And further;

Q. Ah, OK so you, you hit him with the fire extinguisher then you wiped the fire extinguisher down and then you went to the bathroom and washed your hands? What did you do then?

A. I gathered the paper towel, well after, he was making this gurgling sound, afterwards, I was pretty sure he was dead. Like I, but he kept makin' this gurgling type noise and I thought if I just put paper towel over him maybe that'll help to stop.

[23] The crown called Frank Longley to give oral evidence.

[24] He was at the legion from 7:00pm until 10:15pm on December 22, 2006. He testified that when Jamie Gregory arrived at the legion the only people present were him and Peter Vanderpluijm. Frank Longley stated that Jamie Gregory was talking to Peter Vanderpluijm and him and that conversation was on a first name basis. He testified that Jamie Gregory had 4/5 drinks before Frank Longley left at approximately 10:15pm and he understood they were double rums. He testified

that Jamie Gregory spilt one drink. He cleaned it up satisfying Peter Vanderpluijm by saying “I cleaned up my mess”. He stated that during the evening Jamie Gregory would go outside for a smoke and that “sometimes Peter would go out with him”. He described Jamie Gregory while at the legion as “happy go lucky, having a good time, not rowdy and never became aggressive”.

[25] Frank Longley stated he was often at the legion when it was closing time and could testify about Peter Vanderpluijm’s routine. He stated that Peter Vanderpluijm would come out from the bar with two 4 litre ice cream buckets and that he would move the stools away from the machines and then empty the VLT money into the buckets.

[26] Frank Longley was able to identify the buckets and the VLT keys through the photos. They were both located on the floor near the machines. Frank Longley, through photos, pointed out a pen on the stool. He stated that Peter Vanderpluijm would “mark up slips from in the machines” when closing down the machines.

He also pointed out, through photos, that the covers on the two machines not being played by Jamie Gregory had been pulled down and those machines were closed. He stated that “Jamie was playing the machine closest to the door”.

[27] He also pointed out in photos that the bar doors were half closed and that when he left the legion at 10:15pm Peter Vanderpluijm and Jamie Gregory remained and that there was “no tension” between them.

[28] Frank Longley stated that he had been at the legion at closing time “a lot” and that Peter Vanderpluijm would shut down the machines before closing time. It was common for Peter Vanderpluijm to go over to the machines and tell the players to finish up. Peter Vanderpluijm would tell patrons they had to leave but “never saw Peter get aggressive during this closing process”. On cross-examination Frank Longley acknowledged that “over prior months Peter Vanderpluijm would become upset and ignorant when people would not leave when he wanted”. On re-direct Frank Longley said that he could be ignorant to some customers and could speak quite sharply and loudly but no vulgarity was ever spoken.

[29] In his statement dated December 24, 2006 Frank Longley spoke of the closing routine in the following language:

Cpl. B. RICHARDSON: What's the normal closing time for Friday night over there?

F. LONGLEY: Well Friday night usually if there's not many people around, which ... most times there's only one or two in there on Friday night and usually he'll close the machines down at ten-thirty and then if you have a drink well he'll let you drink that and then he usually closes down then, probably gets out of there by eleven.

[30] And further:

Cpl. B. RICHARDSON: Anything about Peter or anything that we should be aware of?

F. LONGLEY: Peter ah, he ah like if ah, when he got closing times sometimes he would get just a little ignorant when he, when he come to ah getting you to leave, ah myself he wouldn't because ah ... we've been always been good friends and when he gets ready to shut the machines down, don't make any difference to me he shut 'em down. I'll just leave the machine, ... but if you hold back well he'll say something to you, ah sometimes a little sarcastic but not real bad but ah somebody that was ah like this fellow I would say, I wouldn't he wasn't passing out drunk but he had quite a lot to drink, sometimes that annoys people that way, they might not take it the way I would.

[31] Dr. Matthew Bowes, the medical examiner, was the next crown witness. He performed the autopsy and he described the injuries apparent on the body. It was his opinion that the cause of death arose from injuries above the shoulder. He testified that the cause of death was “blunt head trauma - homicide”.

[32] While Dr. Bowes’ report spoke of “multiple blunt injuries of the neck, consistent with strangulation”, he clarified that he can generate no evidence of asphyxia and that this was not a case of smothering and that the “tissue” evidence in Jamie Gregory’s statement would not change his opinion.

[33] I find as a fact that Peter Vanderpluijm did not die by asphyxia.

[34] Dr. Bowes testified that the amount of blood on the floor suggested a ruptured carotid artery. He stated that the blood escaped the body through the left ear. He stated that a carotid rupture will result in certain death and that such an injury can be caused by a blow to the head.

[35] On cross-examination Dr. Bowes acknowledged that he did not see the crime scene photo's when preparing his report. He was not then aware of the volume of blood on the floor of the legion. On the basis of that evidence he opined that there were two potentially fatal injuries, head trauma and a ruptured carotid artery. He stated that he could not say which came first.

[36] It was Dr. Bowes' opinion that these potential causes of death could be the result of the actions described by Jamie Gregory in his cautioned statement. The significance of this evidence relates to the operative cause of death, whether it was blunt head trauma caused by the fire extinguisher or a ruptured carotid artery caused by punches using ones fist.

[37] The crown's next witness was Dr. Robert MacCaulay, a neuropathologist. He had been asked to do an examination of the victim's brain which had been removed at autopsy. He observed a significant recent contusion on the left parietal lobe and stated that the trauma occurred shortly before death. It was his opinion that head trauma injuries often do not kill right away and that Peter Vanderpluijm could have survived and lived a productive life if he had had timely medical attention. It was his further opinion that if a ruptured carotid artery was the

operative cause of death “death would be virtually inevitable”. He further stated that his examination did not discount death by carotid rupture.

[38] The next crown witness was Lyle Scott Jory, a blood stain expert with the RCMP. He attended the scene early and took many photos and measurements. He prepared a report dated October 10, 2007 which must be viewed with his conclusions and also with reference to his terminology and the science itself. The following blood stain evidence was advanced by Mr. Jory.

AREA 1: Between body and carpet.

- Transfer - wiping and swiping.
- left by person with stains on them already.

AREA 2: Between legs and near feet.

- (1) passive drops - person bleeding while above this location.
- (2) wiped passive drops - person/object moved through passive stains before drying.
- (3) swiping transfers - person/object making contact with area while stained with blood-wet.

(4) projected (under chair) cast off bleeding person by application of force.

AREA 3: Passive drops on carpet - from person bleeding while above the carpet.

AREA 4: On carpet - left of area 3.

(1) various transfer swipes and wipes.

(2) also transfer soak bloodstains.

- soaking from person on or near floor.
- footwear/object moved through soaks caused swipes and wipes.

AREA 5: Left of soaking stains.

- Projected stains overlapping.
- Many altered by wiping.
- Application of more than one measure of force to blood source while located on or near the floor.
- Also could be by aspiration.

AREA 6: Right of victim's head - transfer swipes and projected bloodstains on top of transfers.

- swipes caused by object wet with blood projected by more than 1 application of force to a source on or close to the floor after the transfers.

AREA 7: Wall near fire extinguisher - swiping transfer on the wall.

- person stained with blood made contact with wall below bracket while moving.

AREA 8: Fire extinguisher - numerous.

(1) transfer and transfer swipes caused by item coming in contact with person stained with blood.

(2) projected stains - evidence of hair

- caused by item coming in contact with bloodstained area of hair.

VICTIM: (1) transfer stains on face and t-shirt from laying in accumulations of blood.

(2) projected stains - upper area - blood source affected by a measure of force.

FLOOR TO BATHROOM:

Footwear transfers caused by wet blood on shoes.

BATHROOM: Diluted blood and paper towel in toilet.

ACCUSED'S SHOE)

NAUTICA SHIRT)

DRESS SHIRT)

JACKET)

All with drops of victims blood projected and transferred.

[39] Mr. Jory stated that the following conclusions apply:

Peter Vanderpluijm bled while on or near the floor at the end of the carpet runner at Area 4, and again while on the floor at Area 6 as found.

The exposed blood of Peter Vanderpluijm was affected by at least two measures of force while located on or near the floor at both areas 5 and 6. The exposed blood of Peter Vanderpluijm was affected by a measure of force while also located at area 5a.

The fire extinguisher located at the scene made contact with the blood stained head of Peter Vanderpluijm with an associated measure of force.

[40] I find the blood stain evidence to be consistent with the assaults described by Jamie Gregory in his statement to police. The use of the fire extinguisher is clearly established. The effect of the first punch, and subsequent punching, is confirmed. I conclude that this evidence adds much to the veracity of Jamie Gregory's statement to the police.

[41] The first witness for the defence was Donald Ross Gregory, the father of the accused. He established Jamie Gregory's psychiatric and substance abuse history. He testified that as early as 18/19 years he experienced blow ups, rage attacks and mood swings. He described these events as akin to a Dr. Jekyll and Hyde situation. He stated that Jamie's psychiatrists prescribed "Effexor XR" in February, 2004 and that the dosage was 300mg daily.

[42] The essence of Donald Gregory's research was that at the time of this offence Jamie Gregory was off his medication and had been since December 11, 2006. He stated that from June 27, 2006 until December 11, 2006 he was using his mother's "Effexor" in the amount of 150mgs daily.

[43] Donald Gregory testified to the amount of “hard liquor” Jamie consumed before going out on December 22, 2006. It was his observation that the more liquor consumed by Jamie Gregory, the more he became agitated. On cross-examination Donald Gregory testified that before going out on December 22, 2006, Jamie seemed to be in a good mood and things were going fine.

[44] The second defence witness was Dr. Stephen Hucker, a forensic psychiatrist. Dr. Hucker’s report has been filed with this court and marked Exhibit #15. It was Dr. Hucker’s opinion that at the time of the attack Mr. Gregory “lost it” and that provocation was in play. It was his evidence that in situations such as these “the trigger can be trivial” and that provocation may be different for different persons.

[45] In his report Dr. Hucker canvassed all witness statements including that of Jamie Gregory. At page 4 of the report he commented on the interview with the police and the words of Jamie Gregory.

The police officer asks him what caused him to “go off”, suggesting it was when the victim pushed him out of his chair and he agreed. He said: “I just lost it. I just stood up and I drove him right in the face and I hurt him. Like, as I hit him,

he goes, “stop, stop” and then it just ... I had like a blackout ... kind of felt like it was ... I just lost it. I just started punching.”

[46] At page 11 of the report he comments on his discussion of events with Jamie Gregory some considerable time after the event,

Frank, the older man, left around 10:15pm and he continued to use the machines as he seemed to be making more money. About 15 minutes later, Pete came out and said something to the effect of, “cash up ... you’re leaving.” Jamie remembers saying to him that they don’t close until 11pm and it was Christmas and to just leave him to finish. However, Pete said “too bad, you’re leaving ... and I said, “too bad, I’m not” or something to that effect.” Jamie said that he was “kinda laughing” as he said this. He said he was just sitting there getting ready for the next game and, “next thing I know, he pushes me ... shoves me ... I fell off my stool”. He said both he and the stool went over. He said “on the way down, I hit my arm, trying to catch myself ... when I got up, I could feel the rage that took over ... I don’t know if I can explain it ... pins & needles ... feel it through your face ... engulfed me ... I got up and punched him ... let him have it ... I watched him fall back ... then I knelt down and remember, with both hands banging away at him ... after calming down, I have little visions of things ... I was able to calm down ... get a grip what happened ... like a blackout ... I guess I lost control ... I can’t remember picking up a fire extinguisher ... like a dream ... whacked him ... can’t recall the actual incident ... now I can see things ... I dream about it.” When confronted with the vagueness of the recollection, he insisted that he cannot actually remember grabbing the fire extinguisher but he can remember trying to put it back on the wall. He said that his current understanding of the continuity of events is because he has managed to re-construct the scene retrospectively. He has no doubt that he actually killed Pete. He said that he began panicking - “I didn’t know that to do ... call my Dad ... I fucked up ... all I could think to do was wipe it down ... I didn’t hide it ... I left it there ... left it on the floor where he was.” He thinks that the actual part that he cannot specifically remember could only have been a few seconds.

[47] Dr. Hucker reviewed Jamie Gregory’s medical history and he discussed his substance abuse issues with his parents.

[48] Jamie Gregory's mother's comments appear at page 16 of Dr. Hucker's report:

Mrs. Gregory again talked of his "rage attacks" and of one occasion when she declined to give him a cigarette and he "went off the deep end". The other things that seem to be associated with these rages are his depression, lack of medication and alcohol use. They explained that he would smash things and "be in your face" but he would not physically attack the person. Rather, he would punch a hole in the wall. He would be over his attack quickly and would express regret. Typically, he hurts only himself and asks for forgiveness.

[49] Dr. Hucker's overall opinion appears at page 34 of his report, an opinion which he repeated in court:

In your letter to me you indicated that based on your own review of the relevant case law, an examination of a mix of subjective and objective factors is required when determining if a wrongful act or insult constitutes provocation. The objective aspect of the test is whether the wrongful act or insult is of such a nature as to be sufficient to deprive an ordinary person of self control. Even in this aspect of the test, there appears to be some element of subjectivity as the ordinary person may include some of the general characteristics of the accused such as sex, race or age. The subjective aspect of the test is that the accused did act on the provocation and did so before there was time for his passions to cool. In the second part of the test, the background, temperament, idiosyncrasies or drunkenness of the accused may be considered. The requirement of suddenness must apply to both provocation and the accused's reaction to it.

From Mr. Jamie Gregory's description of the events of the evening of December 22nd 2006 it appears to me likely that this defense could apply in this case. He reports that the victim told him he was closing up his bar and when Mr. Gregory showed reluctance to finish, pushed him off his chair.

His propensity for impulsive rage attacks (based on his combination of mental disorders noted above) following minimal provocation, compounded by the disinhibiting effect of large amounts of alcohol, would have rendered him even more likely than the average male of his age to respond with excessive violence to an incident such as he described.

Although Mr. Gregory gave a slightly different version of the alleged offense to the police officer to that which he gave me (that he did not, for example, remember striking the victim with a fire extinguisher or his apparent reason for doing so) all this would have occurred in the context of his state of extreme rage when his “passions” would not have had time to cool.”

[50] Clearly Dr. Hucker is a very accomplished forensic psychiatrist. It was obvious that he was well versed in the principles associated with the partial defence of provocation. I specifically noted that he used the word “could” in his opinion. I have concluded that Dr. Hucker’s evidence was primarily focused on subjective factors such as the propensity for rage attacks and the disinhibiting effect of alcohol. There appeared to be a blending of objective and subjective factors and I suspect that mix led to the use of the word “could”.

[51] The final defence witness was Dr. Peter Mullen, pharmacologist/toxicologist/pharmacokinetics specialist. It was his opinion that Jamie Gregory was a type 2 alcoholic. He testified that type 2 alcoholics have characteristics which include early onset, impulsivity, risk taking, aggressiveness and a lack of

serotonin in the brain. He testified that serotonin affects mood and aggression. It was his evidence that increasing serotonin by the use of “Effexor XR” will overcome depression and reduce aggression. He testified that abruptly stopping Effexor can increase anxiety and aggression.

FINDINGS OF FACT:

[52] Obviously the facts inside the legion on December 22, 2006 are more significant to the issue at hand than the facts outside the legion. However, I believe it is important to establish facts for the entirety of this tragic day.

[53] Peter Vanderpluijm was the bartender at the Lawrencetown Legion on December 22, 2006, which was a Friday. He went there at 6:40 pm which was the usual time he arrived on Fridays. He had worked at that legion as a bartender for over 12 years. He was 59 years old.

[54] I accept the evidence of Rosie Vanderpluijm that on Fridays her husband was usually home from the legion by 10:30pm. I accept that Peter Vanderpluijm was stressed out by the job in 2006 and was looking forward to retirement. I

accept Annette Dunbrell's evidence that he would get jittery when people got out of control at the legion. Annette Drumbrell stated that there were occasions when Peter Vanderpluijm closed the legion early and patrons would complain to her as president of the legion.

[55] Peter Vanderpluijm was a man of 59 years and frail build and weighed 110 lbs. Jamie Gregory was 29 years old on December 22, 2007 and weighed 230 lbs.

[56] Jamie Gregory had been raised in Ontario and moved to Annapolis County in mid 2006 when his parents relocated to Nova Scotia. He was living with his parents on December 22, 2006. He became associated with the Lawrencetown Legion as a result of joining a dart league. He attended at this legion on a number of occasions, usually to play darts.

[57] I find that on those occasions Peter Vanderpluijm was the bartender and also on those occasions Jamie Gregory did not present any problems to the legion or Peter Vanderpluijm. They were on a first name basis which is not uncommon in a small rural community.

[58] I find as a fact that Jamie Gregory suffered a history of alcohol and drug abuse in Ontario and that it had been a problem since his late teens. I also find as a fact that Jamie Gregory experienced mental health difficulties when he lived in Ontario. These difficulties were manifested by anger, blow-ups, rage attacks and mood swings. These symptoms resulted in damage to property but not in assaults on family members or others. I find that by late 2003 he was suffering from depression and that by early 2004 was placed on “Effexor XR”, 300 mg daily. I find that from 2003 to 2006 he continued to be subject to instability, mood swings and outbursts of rage. This resulted in numerous hospital admissions and referrals to various professionals including psychiatrists.

[59] I accept and find as fact that Jamie Gregory was inconsistent in taking his medications over that period of time. I find as a fact that elimination, or reduction of the Effexor, resulted in increased agitation, expressions of rage and mood swings. I further find as a fact that when Jamie Gregory consumed hard liquor, he had a tendency to become more aggressive.

[60] I am satisfied that on December 22, 2006, and in the preceding years, Jamie Gregory was an alcoholic. I am satisfied that he recognized this condition and, at

times, avoided the consumption of hard liquor. I am satisfied that Jamie Gregory knew that his prescription medication were less effective when used with hard liquor.

[61] There are many “issues” associated with Donald Gregory’s evidence relating to Jamie Gregory’s use of his medication in the months leading up to December 22, 2006. I accept that this evidence is the best that Donald Gregory could establish from the documentation available to him. However, it was created after the fact, not contemporaneously. The prescribing and intake of medication is a private function and there is an element of hearsay involved. I am satisfied however, from all of the evidence, that on December 22, 2006 Jamie Gregory was, at a minimum, taking less Effexor XR than he was prescribed and more likely not taking his medication at all. There are a number of facts which I accept that support this conclusion.

- Historically Jamie Gregory had an aversion to the amount or the taking of his Effexor.
- He was not involved with a psychiatrist after moving to Nova Scotia on June 30, 2006.
- The last prescription he picked up was in Ontario in late June, 2006.

- He did not collect a prescription at his families local pharmacy.
- There was a substantial cost associated with the Effexor prescription.

[62] On December 22, 2006 Jamie Gregory consumed alcohol at home before going out. The amount is uncertain but most likely between 2 and 4 drinks of an undetermined volume. I find as a fact that he left home at approximately 6:00pm and that he was in a good mood.

[63] He was dropped off at the Capitol Lounge in Middleton by his parents who were on their way to a Michelin Christmas party. He told them he was going to a Christmas party with some friends. He arrived at the Capitol Lounge at 6:30pm. He consumed more alcohol there, at least one single and two double rum and cokes. I find that he was there for no more than 45 minutes. Jamie Gregory played a bit of pool and played the VLT's and chatted with Kathleen Murray. I find that Jamie Gregory then got a ride with a patron to the Lawrencetown Legion.

[64] Jamie Gregory entered the legion. The only individuals there were Peter Vandepuijm and Frank Longley, a completely sober man who was there merely to play the VLT machines. I find as a fact that he was at the legion for approximately

2 1/2 hours. I accept Frank Longley's evidence that during that time Jamie Gregory had four or five rum and cokes, one of which he accidentally spilt. I conclude that they were doubles, as that had been his pattern to that point in the evening. I accept that Jamie Gregory continued to be in a good mood and was "pretty calm". I find that Jamie Gregory was playing the VLT closest to the door throughout his time at the legion.

[65] Frank Longley was playing the VLT next to him until he went home at about 10:20pm leaving Jamie Gregory and Peter Vandepluijm alone in the legion. I will return to the inside legion facts after I complete the evening events.

[66] Jamie Gregory obtained a ride back to the Capital Lounge with Messrs Curtis and Veinot, two local individuals. He was dropped off across the street at the Save-Easy store. He then walked over to the Capitol Lounge sometime around 11:00pm. He removed his Nautica shirt during that walk.

[67] Jamie Gregory inquired of Mr. Curtis and Mr. Veinot as to where he could get some "blow", referring to cocaine. These two gentlemen made two observations: one, his right hand was bloody and two, he was drunk. They

described him as being “hammered”. I find as a fact that when he arrived at the Capitol Lounge the second time he was highly intoxicated, but not to the point of incapacitation. I find that when he entered the lounge he had a “balled up shirt in his hand”. I find that he went into the bathroom and disposed of the shirt in the garbage bin. I find that he stayed until closing time at 1:30am, December 23, 2006.

[68] While at the Capitol Lounge Jamie Gregory continued to consume alcohol, danced with a Ms. Caldwell and was buying drinks for anyone in the bar. He had substantial cash on him. After 1:30am he went home with Mr. Woodworth and Ms. Caldwell where they all continued to party and consume alcohol.

[69] Jamie Gregory was arrested the next morning and gave his statement to the police.

INSIDE LEGION FACTS - PROVOCATION:

[70] The crown have entered into evidence the statement of Jamie Gregory. This was done to assist the crown in satisfying its onus. In that statement lies the

foundation for the partial defence of provocation. Like any other evidence, it is only fact if I accept it as a fact.

[71] Essentially Jamie Gregory's statement was to the effect that Peter Vanderpluijm requested him to leave the legion before he had gambled away the credit he had remaining in the VLT. Jamie Gregory told him to "fuck off" because it was not yet closing time and he wanted to stay. Peter Vanderpluijm shoved him and he fell off the stool and onto the floor and that he "got up and punched him so hard" that he drove him across the floor. It was a punch in the face. He then went over to where Peter Vanderpluijm lay and beat him about the head while he placed his knee on his chest. Peter Vanderpluijm was making "gurgling noises" and as a result he got the fire extinguisher off the wall and hit him over the head three times. He then placed paper towel over his face in hopes it would stop the gurgling sounds. He then took steps to make the scene look like a robbery. He took two bottles of liquor, smashed the till and took the money from the till.

[72] I find as fact that the events I've just described which came from Jamie Gregory's statement actually happened. Peter Vanderpluijm did push Jamie Gregory off the stool after he refused to leave the VLT and the premises. Jamie

Gregory effected three levels of assault - the punch, the hitting about the head with his fists and the three hits with the fire extinguisher.

[73] There are many undisputed pieces of evidence that support this factual finding:

- Annette Dumbrell, President of the legion, testified that there were occasions when the legion closed early and patrons complained of such.

- Peter Vanderpluijm was the only bartender.

- Frank Longley was a close friend of Peter Vanderpluijm and a regular patron of the legion and a sober man.

- Mr. Longley stated that when it “got to closing times sometimes he would get just a little ignorant when he come to getting you to leave”, and he stated “but if you hold back well he’ll say something to you, ah, sometimes a little sarcastic but not real bad”.

- I do accept that there was no evidence of Mr. Vanderpluijm ever hitting anyone at the legion on prior occasions.

- The photos of the scene satisfy me that the two VLT's furthest from the side door had been closed out and their screens pulled down prior to the assault on Peter Vanderpluijm.

- The photos of the bar indicated that the large bar doors were partially closed which was part of the closing procedure.

- There was a stool in the general vicinity of the VLT that Jamie Gregory was playing.

- It is well established that there was no animosity between Peter Vanderpluijm and Jamie Gregory on any occasion prior to December 22, 2006.

- It is also well established that there was no animosity between the two up to the point when Frank Longley left the legion at 10:15pm.

- Frank Longley testified that while all three were at the legion, they were engaged in normal conversation. He testified that Peter Vanderpluijm and Jamie Gregory addressed each other by their first names.

- When Jamie Gregory spilled his drink, he cleaned it up much to the satisfaction of Peter Vanderpluijm.

- Frank Longley testified that Jamie Gregory would go out for a smoke every once and a while and sometimes Peter Vanderpluijm would go out with him.

- Frank Longley stated that Jamie Gregory was happy go lucky and he was having a good time. He was not rowdy and never became aggressive while Frank Longley was at the legion.

- The buckets Peter Vanderpluijm used to close out the machines were on the floor by the VLT's.

- The keys used to close out the VLT's were found on the floor near the two buckets.

- There was a pen on a stool by the machines which the evidence discloses was a necessary tool for closing down the machines. Frank Longley testified that Peter Vanderpluijm would “mark up the slips from in the machine”.

- Frank Longley left at 10:15pm and he stated that Peter Vanderpluijm was in the bar and Jamie Gregory was playing the machine closest to the door.

- Frank Longley testified to being at the legion during closing time on many occasions and that “Peter would go over and tell them to finish up”.

- I found nothing in the blood stain evidence that challenges these findings of fact.

[74] These are the facts upon which I will rely in assessing provocation.

POST OFFENCE CONDUCT:

[75] At this juncture I offer a comment regarding post offence conduct. That conduct includes creating an impression of a robbery at the legion and going to the

Capitol Lounge after the death of Peter Vanderpluijm. Jamie Gregory sought out drugs and continued to drink heavily. He bought alcohol for just about everyone and appeared to be having a good time. He danced with Ms. Caldwell and slept with her after they all went on to party at Mr. Woodworth's residence. The next morning he reported to his mother that he had been out partying all night and was having breakfast and had a great time with friends. This behaviour will appear cold and callous to the observer. However, it has nothing to do with the issue in the trial, that is whether the partial defence of provocation applies to the death of Peter Vanderpluijm.

CAUSE OF DEATH:

[76] There were three assaults committed on Peter Vanderpluijm. One was the punch that followed being pushed off the chair. The second was a series of

punches while he was down on the floor. The third was the three strikes to the head with the fire extinguisher.

[77] I will state again as a fact that this was not an asphyxiation. Dr. Bowes' evidence satisfies me of that fact. I am satisfied that the only smothering activity advanced by the crown is the placing of the paper towel over the mouth and that has been discounted completely.

[78] I find as a fact that the cause of death was the rupture of the carotid artery and that the rupture was the result of the initial blow by Jamie Gregory. I will review the evidence that I relied on to come to this conclusion.

[79] In his statement Jamie Gregory said that "I got up and I punched him so fuckin' hard right in the face man, I, I clear him over by the table". I also relied on the fact that Jamie Gregory was 6'3" tall and weighed 230 pounds at the time while Peter Vanderpluijm was 110 pounds and well under 6 feet tall. Jamie Gregory was 29 years old and fit while Peter Vanderpluijm was 59 years old and frail.

[80] I accept Dr. Bowes' evidence that the cause of death was located in the head area. Dr. Bowes identifies two possible causes of death. One is "blunt head trauma" that would be the result of the blows to the head by either the fire extinguisher or the fists while on the floor, or both. The second possible cause of death is the ruptured carotid artery as stated by Dr. Bowes. He felt this was the most likely cause because of the amount of blood on the floor which exited through the victim's left ear. Dr. Bowes testified that this rupture can be caused by any blow to the head and that the blunt trauma injury would not result in that degree of external blood loss. Dr. Bowes also testified that with a ruptured carotid artery death is certain.

[81] Dr. MacCaulay testified that when the carotid artery is ruptured "death would be virtually inevitable". Dr. MacCaulay also testified that Peter Vanderpluijm could have survived and lived a productive life notwithstanding the head trauma injuries, especially if he had had medical attention.

[82] I accept that Peter Vanderpluijm was still alive, but fatally injured, when he received the blunt trauma injuries. However, it was that first punch that sealed his fate. This factual determination limits the application of provocation to the initial

punch to the face of Peter Vanderpluijm. The evidence of the secondary punches, and the use of the fire extinguisher, does not indicate a contribution to the death.

[83] It may very well be that the strikes by the fire extinguisher would have caused death but I cannot be sure and I am satisfied that the initial punch was the cause of death.

THE ISSUE OF ONUS:

[84] Jamie Gregory bears no legal burden on the excuse of provocation once the issue of provocation is in play which it clearly is in this trial. The statement of Jamie Gregory, and the supporting evidence, gives it an air of reality. The crown has the burden of satisfying the trier of fact beyond a reasonable doubt that this murder was not provoked. In a jury trial the judge must expressly tell the jury that they must find the accused not guilty of murder, but guilty of manslaughter, if they find or have a reasonable doubt that the accused was provoked when he murdered the victim.

THE LAW OF PROVOCATION:

[85] Section 232 of the **Criminal Code** states:

232.(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section, the questions

(a) whether a particular wrongful act or insult amounted to provocation, and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

[86] Voluntary manslaughter is mitigated murder. In such situations the accused kills in circumstances that amount to murder, but the presence of s. 232 reduces the crime to the less serious manslaughter. Voluntary manslaughter occurs in one instance only and that is where the killing is done under provocation. In other

words, voluntary manslaughter is provoked murder. In this case the crown and defence agree that the death was murder. The defence argues that there is a reasonable doubt about provocation.

[87] In *R. v. Hill*, [1986] 1 S.C.R. 313 establishes that subsections 1 and 2 produce three sequential questions:

1. Would an ordinary person be deprived of self control by the act or insult, in this case the knocking of Jamie Gregory off the stool?
2. Did Jamie Gregory in fact act in response to the provoking act?
3. Was Jamie Gregory's response, the striking with his fist, sudden and before there was time for his passion to cool.

[88] In *Hill, supra* the court set the way in which these questions are to be approached:

In the answering of these successive questions, the first, or "ordinary person", test is clearly determined by objective standards. The second, de facto, test, as to the loss of self-control by the accused, is determined, like any other question of fact as revealed by the evidence, from the surrounding facts. The third test, as to whether the response was sudden and before passions cooled, is again a question of fact.

[89] I have already determined that Peter Vanderpluijm knocked Jamie Gregory off the stool when he refused to leave the VLT. I am satisfied that this act amounts to a “wrongful act or insult” as envisaged by s. 232 of the **Criminal Code**, and, as such, that threshold is met. In *R. v. Thibert* (1996), 104 C.C.C. (3d) 1 (S.C.C.) Cory J stated that these words bear their normal, natural everyday meaning as follows:

“An act, or the action of attacking or assailing; an open and sudden attack or assault without formal preparations; injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity.”

[90] While historic case law did not attribute personal characteristics to the ordinary person objective test, that has softened somewhat in more recent jurisprudence. The principle of the ordinary person stands at the threshold of the excuse of provocation. It sets a standard against which to determine whether a wrongful act or insult qualifies as provocation sufficient to reduce murder to manslaughter.

[91] In *R. v. Thibert, supra*, Cory J re-affirmed the need to assign certain of the accused’s characteristics to the ordinary person test:

In my view, so long as the provocation section remains in the **Criminal Code** in its present form, certain characteristics will have to be assigned to the “ordinary person” in assessing the objective element. The “ordinary person” must be of the same age, and sex, and share with the accused such other factors as would give the act or insult in question a special significance and have experienced the same series of acts or insults as those experienced by the accused.

In summary then, the wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person, of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control.

[92] And Cory J stated further:

In Canada, the courts have also sought to attain a proper balance in the interpretation of the provocation section. It has been properly recognized that the objective element of the test exists to ensure that the criminal law encourages reasonable and responsible behaviour. A consideration of the defence of provocation must always bear this principle in mind. On the other hand, if the test is to be applied sensibly and with sensitivity, then the ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors as would give the act or insult in question a special significance. In other words, all the relevant background circumstances should be considered. In the context of other cases it may properly be found that other factors should be considered. It is how such an “ordinary” person with those characteristics would react to the situation which confronted the accused that should be used as the basis for considering the objective element.

The problem was considered by this Court in *R.v. Hill*, [1986] 1 S.C.R. 313. There a 16 year old male fought off the homosexual advances of an older man who was his “Big Brother”. The narrow “ordinary person” test was rejected and a more contextual one adopted. Dickson C.J.C., writing for the majority of the

Court, held that the age and sex of the accused are important considerations in the objective branch of the test. At p. 331, he noted that “particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation”. Although it was not necessary in the circumstances of that case to go beyond a consideration of the age and sex of the accused, Dickson C.J.C. did state that the jury should “assess what an ordinary person would have done if subjected to the same circumstances as the accused” (p. 332). Thus, although characteristics such as a propensity to drunken rages or short tempered violence cannot be taken into account, other characteristics may properly be considered without in any way demeaning or subverting the aim of the objective test to encourage responsible behaviour. So too, it is proper for the jury to consider the background of the relationship between the deceased and the accused, including earlier insults which culminated in the final provocative actions or words. For a jury to take this into account would not adversely affect the objective aspect of the test.

[93] The subjective element of provocation must also be satisfied if this defence is to succeed. This element requires proof that Jamie Gregory acted upon the act or insult on the sudden and before there was time for his passion to cool. There is no element of the ordinary person in this test. The subjective test involves an assessment of what actually took place in Jamie Gregory’s mind when he threw that first punch. It is an assessment of his reaction to the provocation, the immediacy of the retaliation and the dominating influence of the underlying wrongful act or insult. Individual factors of every description are all relevant in applying the subjective test.

[94] A trier of fact only reaches the subjective test if satisfied that the objective test has been met. If the trier of fact is satisfied beyond a reasonable doubt that an

ordinary person would not have lost self control as a result of the wrongful act or insult, the excuse or partial defence of provocation fails without consideration of the subjective test.

THE OBJECTIVE TEST:

[95] I have accepted as a fact that Peter Vanderpluijm pushed Jamie Gregory off the stool in front of the VLT machine. I have set forth in this ruling the immediate circumstances surrounding this act. Obviously I have concluded that the evidence in this trial gives provocation an “air of reality”. *R. v. Cinous*, [2002] 2 S.C.R. 3. These conclusions allow me to move on to the analysis of whether this act was sufficient to deprive an ordinary person of the power of self control, the objective test.

[96] At this point I offer the comment (I want to say, at this point,) that I do not accept the crown’s submission that if the push occurred, it was done in the context of Peter Vanderpluijm’s employment and thus caught by s. 232(3). There is

nothing in the facts that can legitimize the push. Jamie Gregory was entitled to stay until closing time and to continue playing the VLT.

[97] The development of the objective test has already been canvassed in this ruling.

[98] The purpose of the ordinary person test is to set a standard that everyone is expected to observe. The standard reflects the degree of self-control and restraint that we expect from all members of our society.

[99] *R. v. Thibert, supra*, states that the ordinary person would be someone of the same sex and age as the accused, who shares with him those other characteristics that would give the wrongful act or insult special significance in the circumstances.

Laycraft, J.A. stated in *R. v. Daniels* (1983), 7 C.C.C. (3d) 542 (N.W.T.C.A.) at page 554:

“The purpose of the objective test prescribed by s.215 is to consider the actions of the accused in a specific case against the standard of the ordinary person. Hypothetically, the ordinary person is subjected to the same external pressures of insult by acts or words as was the accused. Only if those pressures would cause an ordinary person to lose self-control does the next question arise whether the accused did, in fact, lost self-control. In my view, the objective test lacks validity

if the reaction of the hypothetical ordinary person is not tested against all of the events which put pressure on the accused.”

[100] That case establishes that the ordinary person has a normal temperament and level of self control and is not a person who is exceptionally excitable, pugnacious or in a state of drunkenness. In Jamie Gregory’s case, at the objective stage, I cannot consider the effect of alcohol, the issue of Effexor XR, the medical history or the social history. These are factors for consideration at the “subjective” stage of the provocation analysis.

[101] I cannot find any “other factors that would give the act or insult in question special significance”. There is no sexual or racial factor as between Jamie Gregory and Peter Vanderpluijm. *R. v. Hill, supra; R. v. Camplin*, [1978] A.C. 705; *Bedder v. D.P.P.*, [1954] 1 W.L.R. 1119. I find no factors that would be akin to Lord Diplock’s comments in the *Beddar* case:

“To taunt a person because of his race, his physical infirmities, or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however, equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not”.

[102] Or that would be caught by Lord Morris of Borthy-Y-Gest words in the same case:

If the accused is of particular colour or particular ethnic origin and things are said which to him are grossly insulting it would be utterly unreal if the jury had to consider whether the words would have provoked a man of a different colour or ethnic origin – or to consider how such a man would have acted or reacted.

[103] I have kept the words of Dickson, J in the *Hill* case in mind while I searched the evidence for appropriate objective factors:

It is important to note that in some instances certain characteristics will be irrelevant. For example, the race of a person will be irrelevant if the provocation involves an insult regarding a physical disability. Similarly, the sex of an accused will be irrelevant if the provocation relates to a racial insult. Thus the central criterion is the relevance of the particular feature to the provocation in question. With this in mind, I think it is fair to conclude that age will be a relevant consideration when we are dealing with a young accused person. For a jury to assess what an ordinary person would have done if subjected to the same circumstances as the accused, the young age of an accused will be an important contextual consideration.

[104] I find that there were no “special significance” factors that arose from the relationship between Jamie Gregory and Peter Vanderpluijm. They were not close but they did have a history. The events of the tragic night are unremarkable to the

point of assault. There is no evidence of prior conflict. If there had been such a history of conflict, *Thibert, supra* would permit me to consider it at the objective stage.

[105] There was nothing said by Peter Vanderpluijm that could be described as an affront to a personal characteristic or an insult to his dignity.

[106] I am unable to conclude that the punch thrown by Jamie Gregory meets the objective standard of the ordinary man. I accept that Jamie Gregory lost self-control as a result of a fit of anger. His response to the sudden insult was not proportional and did not comply with the standard of self-control and restraint that is expected from all members of our society. It follows that I am satisfied beyond a reasonable doubt that the crown has discounted provocation. There will be a conviction on second degree murder.

J.