SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Yalcin*, 2018 NSSC 134

Date: 20180529
Docket: Hfx No. 454736
Registry: Halifax

Between:

Her Majesty the Queen

v.

Riza Yalcin

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	October 10, 11, 12, and 13, 2017; February 12 and 13, 2018, in Halifax, Nova Scotia
Oral Decision:	May 29, 2018
Written Reasons:	June 22, 2018
Counsel:	Sarah Kirby, for the Crown Thomas Singleton, for the Defence

By the Court:

Overview

[1] Brandon Davis contracted with the Real Canada Wide Moving company in January 2016, to deliver some of his possessions from Alberta to Nova Scotia. Instead of being delivered within one week as Mr. Davis had expected, the goods did not arrive for two months. An argument over a very late delivery of the goods resulted in a dispute between the driver, Riza Yalcin, the driver's helper, Yousef Kamwal, Mr. Davis, and the man assisting him, Wyatt Forrest. During the dispute Mr. Forrest fell out of the back of the delivery truck while it was moving. He was injured as a result of the fall. The driver, Mr. Yalcin, was eventually charged with dangerous driving causing bodily harm.

[2] The Crown alleges that if Mr. Yalcin is not guilty of dangerous driving causing bodily harm, in the alternative, he is guilty of the included offence of dangerous driving, for driving his delivery truck briefly on a busy highway with the rear door open, his load not secured and having dropped moving blankets on the highway in traffic.

The Facts

[3] The Crown called four witnesses at trial: Brandon Davis, Wyatt Forrest, Constable Marie Poisson, and Corporal John McCarron.

[4] The defence called two witnesses, one of whom was Riza Yalcin and the other being the helper/passenger in Mr. Yalcin's moving van on the date in question, Yousef Kamwal.

[5] On January 15, 2016, while Brandon Davis was living in Alberta, he contracted with Real Canada Wide Moving Services to deliver a small number of personal items to him in Sackville, Nova Scotia. The items included four tires, a television stand, a dresser, and a box spring and mattress. He was originally told the items would be delivered to him within one week. The items were not delivered as promised.

[6] Mr. Davis had been friends with Wyatt Forrest's son, Andrew, since childhood. On March 27, 2016, Mr. Davis was living with the Forrest family. He

was working with Andrew Forrest and Wyatt Forrest at a company that owned a warehouse located at 1390 Lucasville Road.

[7] On March 27, 2016, Mr. Davis received a telephone call from Mr. Kamwal, advising that the delivery van would be arriving within five minutes. Wyatt Forrest was nearby when Mr. Kamwal called, and he agreed to drive Mr. Davis to meet the delivery truck. Because Mr. Davis had been outside playing ball hockey with two of Mr. Forrest's younger children, the two children came along.

[8] On their way to the warehouse, Mr. Forrest and Mr. Davis passed the delivery truck which was lost. They had the truck follow them to the delivery location on Lucasville Road.

[9] Once the group arrived at the warehouse, a dispute occurred regarding delivery. The terms of the contract state that the recipient must pay for the move before the items could be unloaded. Mr. Davis wanted to examine his belongings first, since they had been in transit for two months. Other people's property, in addition to Mr. Davis's, was also being transported in the truck. The back of the truck was opened and Mr. Davis and Mr. Forrest began to unload Mr. Davis's items. They were also taking pictures of his items in order to document damage.

[10] Mr. Yalcin and Mr. Kamwal objected to Mr. Davis and Mr. Forrest removing items prior to full payment being made. Mr. Davis said he believed that he might not have to pay for the move due to the lengthy delay. Words were exchanged.

[11] Mr. Yalcin told Mr. Davis that he was going to call the police. He motioned for Mr. Kamwal to get into the truck. Mr. Kamwal got into the truck. Mr. Kamwal testified that he saw both Mr. Davis and Mr. Forrest outside of the truck as Mr. Yalcin started to drive away. Mr. Yalcin said he also saw both men outside of the truck as he started to drive away. Mr. Forrest said he was in the truck as Mr. Yalcin started to drive away. Mr. Davis said that he did not see the truck as it started to drive away, but he had only seen Mr. Forrest outside of the truck briefly before it started moving.

[12] Mr. Yalcin heard a dolly fall out of the truck as he was driving back up the driveway toward the Lucasville Road. Mr. Forrest fell out of the truck part way up the driveway and was injured.

[13] The main issue on the charge of dangerous driving causing bodily harm is whether Mr. Yalcin was aware that Mr. Forrest was in the back of the truck when he started to drive away. The main issue on the included offence of dangerous driving is whether the test for a conviction for dangerous driving has been met.

The Law

[14] Mr. Yalcin stands charged:

> That he, on or about the 27th day of March, 2016, at, or near Hammonds Plains, in the County of Halifax, in the Province of Nova Scotia, did unlawfully operate a motor vehicle on a road in a manner that was dangerous to the public, and thereby caused bodily harm to Wyatt Jason Forrest, contrary to Section 249(3) of the *Criminal Code*.

[15] Section 249 of the *Criminal Code of Canada* states:

> 249 (1) Every one commits an offence who operates
>
> > (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;
> >
> > ...
>
> Punishment
>
> (2) Every one who commits an offence under subsection (1)
>
> > (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
> >
> > (b) is guilty of an offence punishable on summary conviction.
>
> Dangerous operation causing bodily harm
>
> (3) Every one who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Analysis

[16] The Crown bears the burden of proving the charge beyond a reasonable doubt.

[17] In *R. v. Beatty*, [2008] 1 S.C.R. 49, Charron J., for the majority, explained the legal requirements for a finding of guilt on a charge of dangerous driving, and stated:

> (a) The *Actus Reus*
>
> The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".
>
> (b) The *Mens Rea*
>
> The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

[18] In this case, the Crown must also prove the additional element of bodily harm beyond a reasonable doubt. Bodily harm was essentially conceded by Mr. Yalcin at trial. There is no doubt that Mr. Davis suffered harm that was more than trivial or trifling when he fell out of the back of the moving van.

[19] There is no question that Mr. Yalcin knew that the load in the moving van was partially unsecured and that the rear door was open when he drove away from the warehouse. A critical issue in this trial is whether or not Mr. Yalcin was aware, or should have been aware, that Mr. Forrest was in the back of the van when he drove away. On this issue, Mr. Davis testified:

> **MS. KIRBY**: Mr. Davis, where was Wyatt Forrest at the time the truck started moving?
>
> ...
>
> **THE WITNESS**: When I looked back, when he was moving, he was, Wyatt Forrest was in the truck.
>
> **Q**: Where in the truck? Oh, sorry.

A. In the back of the truck.

Q. Did the driver or the helper say anything to you that they were going to drive away?

A. No.

Q. How close were you to Mr. Forrest when he was in the back of the truck shortly before it left?

A. I was on the ground, I would say five to 10 feet away from him.

Q. Did you hear the driver or helper say anything to Mr. Forrest that the truck was going to drive away?

A. No, I did not.

Q. Did the driver or the helper say anything to you that Mr. Forrest should get out of the back of the truck?

A. No.

Q. Did you hear the driver or the helper say to Mr. Forrest that he should get out of the back of the truck?

A. No.

Q. When Mr. Forrest was in the back of the truck was he visible to people outside of the truck?

A. Yes, if you were standing behind the truck, right behind, you would see Mr. Forrest.

Q. What if you were in the cab of the truck, could you see? Were there ... was there any way to see from the cab of the truck into the back of the truck?

A. To the best of my knowledge, no.

Q. And during the exchange, during the time when the driver and/or the helper were talking to you about payment and you were saying I just want to look at the stuff first, did Mr. Forrest participate in that conversation?

A. Yes, he was there.

Q. You say he was there. Do you recall whether he actually spoke up at all or was he simply there, do you recall?

A. I don't recall exactly what was said but he did speak.

Q. And when the truck started moving was the door to the back of the truck open or closed?

A. Open.

Q. When the truck started moving and you, what did you observe regarding Mr. Forrest in the back of the truck?

A. When I looked, it looked like, to me, he was trying to grab onto something, to hang on from falling out.

…

Q: So what were you able to see as the truck left where it had been parked?

A. It started driving away and that Mr. Forrest was in the back trying to grab onto something.

Q. Were you able to see it the whole time?

A. No.

Q. Why not?

A. Because where I was and after the truck got around the corner of that white truck, it wasn't visible to me, and so by the time I got around ... up and around to the white truck, I see Wyatt was on the ground at that time.

Q. Do you know how long that driveway is?

A. No.

Q. Do you know where, approximately, on the driveway Mr. Forrest fell out of the truck?

A. Between about halfway to three-quarters of the way up the driveway.

Q. And what did you do when you saw him there? Oh, sorry.

A. I went to see if he was okay and then he told me to call 911.

Q. Where were the children at this time?

A. The children came running up with me.

Q. What did you see when you got to Mr. Forrest?

A. He was laying on the ground and he was just saying he was in pain and he couldn't move.

…

MR. SINGLETON: Okay. I'm going to suggest to you, Mr. Davis, that both Mr. Forrest and the helper were on the ground behind the truck after Mr. Yalcin left the truck.

THE WITNESS: I just told you I don't know where they were.

Q. Okay. And you told me yesterday that you don't recall seeing Mr. Yalcin ... or, sorry, Mr. Forrest approaching the helper with his fists clenched before the helper left and went up to the front of the truck.

A. No.

Q. After the helper left and went toward the front of the truck, Mr. Forrest was on the ground and not in the back of the truck.

A. I did not say that. I told you, to the best of my knowledge, the only time I saw Mr. Forrest on the ground was when he helped me take the TV stand down.

Q. But you told me a minute ago ...

THE COURT: Mr. Singleton, you have to wait for the translation.

MR. SINGLETON: Sorry. You told me a minute or two ago that you're not sure where Mr. Yalcin and the helper were.

A. When did I say that?

Q. Moments ago.

A. When did I say I didn't know where Mr. Yalcin was?

Q. Or, sorry, Mr. Forrest and the helper.

THE COURT: Would you try that question again, Mr. Singleton?

Q: You told us a little while ago, you didn't know where Mr. Forrest and the helper were after Mr. Yalcin had gotten out of the truck, saying he was going to call the police.

A. No, I don't know exactly where they were.

Q. Okay. After the helper left and went up and got in the truck, and after the truck had started moving, didn't Mr. Forrest jump in the back of the truck to try to retrieve your other two tires?

A. No. When I turned around and it was moving, Mr. Forrest was in the truck.

Q. When you turned around, Mr. Forrest was in the truck.

A. Yes.

Q. You turned around from where?

A. From looking at the tire.

Q. Pardon?

A. From looking at the tire.

Q. And what side of the truck were you looking at?

A. The back. I was in behind the truck.

Q. But what side? Were you looking at the driver side of the truck or the passenger side of the truck?

A. I was closer on to the driver side of the truck.

Q. Okay. So the truck had already started moving when you turned around?

A. Yes, from what I can remember.

Q. So you don't know if Mr. Forrest was in the truck when it started moving or if he got in after it started moving, do you?

A. I already told you, to the best of my knowledge, the only time that I saw Mr. Forrest off the truck was when he helped me move the TV stand.

Q. When you saw Mr. Yalcin leave and go up on the driver side of the truck, that's where you had focused your attention, wasn't it?

A. Yes, I saw Mr. Yalcin go up.

Q. Yeah. And you were no longer paying attention to where the helper and Mr. Forrest were.

A. No. I can't look everywhere at the same time.

Q. Now, Mr. Davis, you testified yesterday that the truck continued forward and then turned down a corner and you couldn't see things. Right?

A. Yes. Once the truck had got past the other white truck that was sitting there, I could not see around the corner.

[Emphasis added]

[20] Therefore, Mr. Davis did not see whether Mr. Forrest was on the back of the truck when it started moving. On this same issue, Mr. Forrest testified:

MS. KIRBY: Mr. Forrest, before lunch we were talking about ... you told the Court that Mr. Yalcin said to Mr. Davis, Payment must be made before anything further comes off the truck. I asked you how Mr. Yalcin was talking. How was Mr. Davis talking when he was discussing this with Mr. Yalcin?

A. He was talking back in not a raised voice but a firm voice.

Q. And where was the helper at this time?

A. I don't know.

Q. Where was Brandon at this point?

A. Standing on the ... at the back of the truck with Mr. Yalcin.

Q. On the ground or on the truck?

A. On the ground.

Q. When you said, I'm just taking some photos, how did you say that?

A. I turned and said, I'm just taking photos.

Q. And who were you speaking to when you said that?

A. Mr. Yalcin.

Q. Were you looking at him when you said it?

A. Yes.

Q. And did you get a reply?

A. Him and Brandon conversed at that point.

Q. Did you hear Mr. Yalcin say anything else?

A. No. I just ... I heard a yell.

Q. Did you hear Mr. Yalcin or the helper say anything about calling the police?

A. No.

Q. You said Brandon and Yalcin continued to talk. Did you stand and listen to them talk or did you ... do you stand and listen to them discuss?

A. No.

Q. What did you do?

A. I was just looking over the furniture. It happened very quickly. And I was looking over the furniture and then there was a yell.

Q. Who yelled?

A. I don't know.

Q. Was it Brandon?

A. No. It was either the driver ... it was the driver or the passenger, Mr. Yalcin or the passenger.

Q. So you hear a yell. Are you able to tell us what that yell was?

A. No. It was a different language.

Q. And then what happens?

A. And then the truck starts taking off.

Q. Did the truck motor start, idle and then leave or did the truck start and leave right away?

A. I just felt the truck moving. I didn't hear the engine running at all.

Q. How much time passed between you saying, I'm just taking photos, and the truck leaving?

A. Seconds.

Q. Did the driver or the helper say anything to you regarding ... that they were going to drive away?

A. No.

Q. Did the driver or the helper say anything to the effect that you should get out of the back of the truck?

A. No.

Q. Sorry. Did you have any warning that the truck was going to leave?

A. No.

Q. Where were you when the truck started to leave?

A. On the back of the truck.

Q. When you say "on the back of the truck", do you mean on the back step, do you mean inside the back of the truck or do you mean something else?

A. Inside the back of the truck.

Q. Were you outside the truck when it started to leave and jumped back in?

A. No.

Q. You testified that you and Brandon removed two tires or wheels and you understood from Brandon that there were four in total. Am I right about that?

A. Yes.

Q. At any time, did you see the last two wheels on the truck?

A. No.

Q. Had you been told where the last two wheels were on the truck?

A. No.

Q. Did you know where those two wheels were?

A. I don't recall the other two wheels.

Q. Did you and Brandon have a plan to remove his belongings from the truck without paying for them?

A. No.

Q. So you're in the back of the truck. The truck is moving. Where does the truck go, initially?

A. It sped out the driveway and down the road.

Q. Can you tell the Court whether it had to turn or not to go on the driveway?

A. Yes. It had to turn right.

Q. What, if anything, happened to you when that delivery truck turned right?

A. I fell over.

Q. What happened next? You've fallen over inside the truck. What happens next?

A. The truck sped out the driveway and I fell off.

Q. Can you tell the Court how far up the driveway you were when you fell off?

A. About 150 feet.

Q. What happened inside the truck before you fell off?

A. I tried to grab ahold of something. There's nothing to hold onto.

Q. Was it only you that came out of the truck or did something else come out?

A. Yeah. A cart fell out of the truck and blankets.

Q. How did you hit the ground?

A. I hit on my right side.

Q. And what happened next?

A. I just laid there and my kids came over and were crying and laying on top of me.

Q. Did you lose consciousness?

A. No, I don't believe. I just ... I was ... I think I was in shock.

Q. Do you know how fast or can you estimate how fast the truck was going?

A. Maybe 20 - 30 kilometers.

….

MR. SINGLETON: You wanted to help Brandon get his goods off the truck so that he would not have to pay for them.

A: When Brandon came back from Calgary I believe he had a very large sum of money saved from working out there. I have no reason to help Brandon in ... in making a couple bucks off not paying for a bill that belonged to him, if it had a bill.

Q. Again, Mr. Forrest, when Mr. Yalcin tells you when you're in the back of the truck that you can't move any more items off the truck, why, at that point, do you stay in the back of his truck?

A. While Brandon sorted out what he had to sort out with Mr. Yalcin, all I did was take pictures.

Q. I'm going to submit to you, Mr. Forrest, that Brandon was not having any conversation with Mr. Yalcin, that it was only you?

A. No, that's not true.

Q. After the helper ran away from you when you came toward him with clenched fists, you stayed outside the truck?

A. I didn't go after anybody with clenched fists whatsoever. That did not happen.

Q. You stayed outside the truck?

A. That did not happen.

Q. When the truck started moving away, you jumped back in the truck to try to get Brandon's tires, his last two tires off?

A. That's wrong.

Q. You're saying that you didn't do that?

A. No, I didn't.

Q. You got out of the truck to threaten the helper and then after the truck was leaving, you jumped back in trying to grab the two tires, right?

A. No, that's wrong.

[21] Mr. Forrest testified that he was in the back of the truck when it started to drive away.

[22] Yousef Kamwal testified about this issue and stated:

Q. When the older man came towards you, what did you do?

A. I just threw my hands up. He said something, What are you going to do? He said some- ... I don't know, he said something, I can't say exactly the word. What are you going to do about it or something like that. I just threw my hands up and left.

Q. Where did you go?

A. I went around to the driver's side of the truck.

Q. Why did you go to the driver's side of the truck?

A. Oh, because I knew Mr. Yalcin went that way so I ... I followed him that way and I just didn't want to get in a confrontation. He was right in front of me. I didn't want to go this way, maybe he'd get aggravated if I go this way, he was in front of me. That was the best way just to get out of the whole situation, just to go around towards that side instead of this side, in my opinion.

Q. What, if anything, happened when you went up to the front driver's side of the truck where Mr. Yalcin was?

A. He waved at me to come to ... to come sit down. He just waved at me like this.

Q. And what did you do?

A. I went and sat in the passenger side of the truck.

Q. And what happened then?

A. Mr. Yalcin asked me where were the ... where the guy was. He said where's ... where's the guy?

Q. When you say the guy, who are we talking about?

A. The older gentleman. He said it in half broken English and half Turkish. I can basically understand what he's talking about.

Q. And what, if anything, did you say?

A. I looked around and said, He's right there. I looked and he was right ... I looked out the passenger side window and I could see him right there in the passenger side window and he looked ...

Q. You say you could see him ... sorry. Were you looking out through the passenger side window, into the rearview mirror, or did you have your head out ... out the window looking back?

A. No. No, I just looked out the window, I didn't have my head sticking out. The windows were closed.

Q. And when you say he was right there you're ... can you describe where he was?

A. Yeah, I can actually, I can. At the back of the truck on the right side towards the end.

Q. And when you say on the right side you're referring to the passenger side?

A. Yes, I am.

Q. Okay. What happened then?

A. Mr. Yalcin turned on the truck and said, Let's go.

Q. And did the truck start moving?

A. Yes, it did.

Q. And how fast was the truck moving?

A. Not fast. First he had to put it in park. It's a U-Haul truck, they don't move that fast. I would say ten, 20 to start with and then I remember just slowly picking up speed as we were going up the hill.

Q. When you say ten or 20, are you talking about kilometers per hour?

A. Yeah.

Q. Was the truck an automatic or a standard?

A. It was automatic. (You have it?) right on the side of the steering wheel.

Q. Do you know if the back door of the truck was open or closed?

A. It was open. I wasn't going to close it. It was open. When I left there it was open.

[23] Riza Yalcin testified that when he started to drive away, Mr. Forrest was not in the back of the truck:

Q. Where were you when he was with his fists clenched and angry?

A. I was ... I was at the left side of the truck at the back on the ground at the moment.

Q. And where was he? And I'm talking about the older guy who you said was angry.

A. He was ... he was on the truck and he was trying to pass the tires out.

Q. You said that he had his fists clenched. Where was he at that point?

A. He was on the truck at the back toward the left side of the truck.

Q. And when you said you were going to call the police did anything happen?

A. He started to shout and yell at me, but I couldn't understand what he was saying. I went toward the front of the truck.

Q. So you told us you got in the truck and you locked the doors and put up the windows and that you motioned to Yousef to get in the truck.

A. Yes.

Q. Did Yousef get in the truck?

A. Yes, he got in the truck.

Q. And he got in the truck on what side?

A. From the left ... the right side.

Q. The passenger side?

A. Yes.

Q. After Yousef got in the truck what happened?

A. I told Yousef, What's going on? And he said, He is very angry, let's go. And I started to go.

Q. Before you started to go what did you do?

A. Before starting to go I looked into the left and the right side and I asked Yousef where the older guy is, and Yousef told me that is on the right side at the back of the truck and then I started to go.

Q. Now you said you looked. You looked back on the left side of the truck, and what did you see when you looked back?

A. There was the younger guy with two kids there.

Q. And the younger guy with two kids was where in relation to the back of your truck?

A. 15 to 20 feet.

Q. Away from ...

A. Away from the truck.

Q. ... the back of the truck?

A. Yes.

Q. Now could you see in the mirror on the passenger side of the truck?

A. Yes.

Q. And what, if anything, did you see in looking in the passenger side mirror before you started moving?

A. The older guy was there and I asked Yousef to look, and he confirmed.

Q. And what did Yousef tell you?

A. He said that he's on the right at the back.

Q. So when you started moving how fast were you going?

A. Ten to 20.

Q. Before you started moving did you close the back door of the truck?

A. No.

…

Q. You told us that when you start ... before you started moving that Yousef had told you that Mr. Forrest was outside the truck and he could see him in looking back in the mirror.

A. Yes.

Q. After you started moving did you see Mr. Forrest at all?

A. He was on the right side on the ground.

…

Q. Riza, I asked you questions earlier about where Mr. Forrest, the older gentleman, was when you started the truck and started moving.

Were you confident that it was safe to start driving the truck when you did?

A. Yes.

I looked into the mirrors, the left side and the right side, and controlled everything before I take off and then I started to take off.

Q. Would you have started the truck moving if you had thought that anybody was in the back of the truck?

A. No.

[24] Mr. Yalcin was not challenged on cross-examination as to whether he was aware, or should have been aware, that anyone was in the back of the truck when he started to drive away from the warehouse.

Presumption of Innocence and Reasonable Doubt

[25] Section 11(d) of the *Canadian Charter of Rights and Freedoms* states:

> Any person charged with an offence has the right
>
> …
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[26] The Crown must prove each essential element of its case beyond a reasonable doubt. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, [1997] S.C.J. No. 77, Cory J., speaking for the majority of the Supreme Court of Canada, reiterated the significance of this burden:

> 27 First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titanic and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

[27] While discussing reasonable doubt in the context of jury instructions, Cory J.'s comments are equally applicable to a judge sitting alone. Cory J. summarized the majority position on the reasonable doubt standard in *Lifchus*:

> [36] Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
>
> · the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
>
> · the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
>
> · a reasonable doubt is not a doubt based upon sympathy or prejudice;

- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[28] It is therefore not for a trier of fact to simply choose which version of the events they believe. The trier of fact must consider all of the evidence. In discussing reasonable doubt, Iacobucci J., writing for the majority of the Supreme Court of Canada in *R. v. Starr*, 2000 SCC 40, [2000] S.C.J. No. 40, stated:

> 242 In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between these two standards. The additional instructions to the jury set out in *Lifchus* as to the meaning and appropriate manner of determining the existence of a reasonable doubt serve to define the space between absolute certainty and proof beyond a reasonable doubt. In this regard, I am in agreement with Twaddle J.A. in the court below, when he said, at p. 177:
>
> > If standards of proof were marked on a measure, proof "beyond reasonable doubt" would lie much closer to "absolute certainty" than to "a balance of probabilities". Just as a judge has a duty to instruct the jury that absolute certainty is not required, he or she has a duty, in my view, to instruct the jury that the criminal standard is more than a probability. The words he or she uses to convey this idea are of no significance, but the idea itself must be conveyed....

[29] If a judge in deciding any criminal matter determines only, "I think he is probably guilty" and then registers a conviction, that decision will be wrong in law. Probability is never enough in a criminal matter. This is a criminal matter and the Crown must prove the guilt of Mr. Yalcin beyond a reasonable doubt – a standard which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

[30] In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, the British Columbia Court of Appeal stated, at p. 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth the story of a witness in such a case must be its harmony with the preponderance of the probabilities which are practical and informed person would readily recognize as reasonable in that place and in those conditions.

[31] Of significance in this case is the decision of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, [1991] S.C.J. No. 26, where Cory J. provides a clear and mandatory reasoning path for a trier of fact when assessing credibility:

> 27 In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.
>
> 28 Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
>
> If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[32] The Supreme Court of Canada discussed the issue of assessing credibility in the context of reasonable doubt in *R. v. Dinardo*, [2008] 1 S.C.R. 788, [2008] S.C.J. No. 24, where Charron J. spoke for the unanimous Court:

23 The majority rightly stated that there is nothing sacrosanct about the formula set out in *W. (D.)*. Indeed, as Chamberland J.A. himself acknowledged in his dissenting reasons, the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W. (D.)*; it will depend on the context (para. 112). What matters is that the substance of the *W. (D.)* instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt...

***W. (D.)* Analysis**

[33] In applying the test in *W.(D).* to the charge of dangerous driving causing bodily harm, I do not believe the evidence of Mr. Yalcin outright regarding the location of Mr. Forrest when he started to drive away from the warehouse. However, this is not simply a question of whether I believe Mr. Yalcin or Mr. Forrest.

[34] Considering the second branch of *W.(D.),* I am left with a reasonable doubt by the testimony of Mr. Yalcin. He says he saw Mr. Forrest was outside of the truck when he started to drive away. This testimony is supported by the testimony of Mr. Kamwal. Mr. Davis did not see Mr. Forrest at the critical time the truck started to drive away. The constellation of evidence leaves me with a reasonable doubt on this issue.

[35] In the alternative, even if the evidence of Mr. Yalcin does not result in a reasonable doubt, on the basis of the evidence which I do accept, I am not convinced beyond a reasonable doubt by that evidence of the guilt of the accused. While Mr. Forrest was adamant that he was in the back of the truck when it started moving, Mr. Kamwal and Mr. Yalcin both say that he was clearly outside of the truck at that time.

[36] The overall credibility of Mr. Davis and Mr. Forrest was impacted by the following conflicts:

- Mr. Davis initially testified that he and Mr. Forrest were both taking photographs of the items in the back of the truck;
- Mr. Davis then admitted that he was mistaken and adopted his testimony from the preliminary inquiry, where he stated that he was the only one taking such photographs;
- Mr. Forrest testified that he was taking photographs of the items on the back of the truck;
- Mr. Yalcin stated that he told Mr. Davis and Mr. Forrest that he was calling the police;
- Mr. Davis said that he heard Mr. Yalcin say he was going to call the police;
- Mr. Forrest, who was within earshot of both Mr. Yalcin and Mr. Davis, said he did not hear Mr. Yalcin say he was calling the police;

- Mr. Forrest said he had no interest or discussions with Mr. Yalcin or Mr. Kamwal regarding payment by Mr. Davis;
- Mr. Yalcin and Mr. Kamwal said Mr. Forrest did engage in such discussions; and
- Most significant are the differences between the testimony of Mr. Yalcin and Mr. Kamwal regarding the location of Mr. Forrest when Mr. Yalcin started to drive and the testimony of Mr. Forrest. Mr. Davis' testimony in this regard was not clear.

[37] Mr. Yalcin is not guilty of the charge of dangerous driving causing bodily harm as it relates to driving up the driveway and Mr. Forrest falling out of the back of the moving van.

Included offence

[38] In the alternative, the Crown argues that a conviction of dangerous driving should be entered against Mr. Yalcin, as an included offence, relating to his driving on the Lucasville Road after he exited the driveway of 1390 Lucasville Road. The Crown says that driving on a busy roadway, with an unsecured load, and the back door wide open, dropping the moving blankets onto the highway, was dangerous.

[39] Mr. Yalcin argues that because the Crown did not raise the possibility of an included offence at the pre-trial conference, they are precluded from raising it at the conclusion of the evidence.

[40] Section 662(1) of the *Criminal Code* states:

> 662 (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted
>
> > (a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
> >
> > (b) of an attempt to commit an offence so included.

[41] In *The Queen v. George,* [1960] S.C.R. 871, the Supreme Court of Canada, in considering s. 569(1) of the *Criminal* Code (a previous incarnation of s. 662), found that the trial judge is not relieved of his or her duty to consider any included offence contained in the principal charge merely because Crown counsel omitted to

raise the issue in his or her argument to the judge or address to the jury, Fauteux J. said, at 875:

> In the circumstances of this case, it was the duty of the trial judge to consider common assault. For when, as in the present case, the commission of the offence charged, as described in the enactment creating it or as charged, includes the commission of another offence, the charge is divisible, and the accused may be convicted of the offence so included, if proved, notwithstanding that the whole offence that is charged is not proved. The law and the jurisprudence in this respect are clear. …
>
> …
>
> In a like situation, the offence included is part of the case which the accused has to meet under the law. The mere omission of counsel for the Crown to have raised the issue cannot *per se* and without more relieve the trial Judge from the cardinal duty imposed upon him under the section. This is not a civil but a criminal case. The words "may convict", appearing in the opening phrase thereof, give an authority which must be exercised when, as in this case, the circumstances described in the section are present. …

[42] Therefore, the duty to consider included offences rests with the court, independent of whether the Crown raises the argument at or before trial. As a result, the issue of whether the Crown is precluded from "seeking a conviction" - as raised by defence counsel - is immaterial. The more pertinent issue is whether the court is precluded from considering a conviction because of the requirement of fair notice to the accused or for some other reason.

[43] In *R. v. R. (G.)*, 2005 SCC 45, [2005] S.C.J. No. 45, Binnie J., for the majority of the Supreme Court of Canada notes that formal notice to the accused of potential legal jeopardy is of equal importance to the requirement that the court consider whether the accused is guilty of any included offences:

> 11 An important function of an indictment is to put the accused on formal notice of his or her potential legal jeopardy. It is equally important, of course, that if the Crown can establish some but not all of the facts described in the indictment or set out in the statutory definition of the offence, and such partial proof satisfies the constituent elements of a lesser and included offence, that the result be not an acquittal but a conviction on the included offence.

[44] The Supreme Court of Canada further states that the strictness of the test for the inclusion of one offence in another - that the offence is "necessarily included" - is linked to the requirement of the accused's right to fair notice of legal jeopardy.

In *R. v. R. (G.)*, Binnie J. quotes *R. v. Manuel*, (1960), 128 C.C.C. 383, where the B.C. Court of Appeal said, at p. 385:

> Further, to be an included offence the inclusion must form such an apparent and essential constituent of the offence charged that the accused in reading the offence charged will be fairly informed in every instance that he will have to meet not only the offence charged but also the specific offences to be included. Such apparent inclusion must appear from "the enactment creating" the offence or "from the offence as charged in the count"; either of those two may be considered under [s. 662(1)] but not the opening by counsel or the evidence.

[45] According to the majority in *R. v. R.(G).*, the included offences described by section 662 of the *Criminal Code* fall into three categories:

> 29. …
>
> (a) offences included by statute, e.g. those offences specified in s. 662(2) to (6), and attempts provided for in s. 660;
>
> (b) offences included in the enactment creating the offence charged, e.g. common assault in a charge of sexual assault;
>
> (c) offences which become included by the addition of apt words of description to the principal charge.

[46] Justice Binnie went on to address how the requirement of fair notice is met for each of these categories of included offences:

> 30 In terms of the need for fair notice, "included" offences in the first category can be ascertained from the *Criminal Code* itself: see, e.g., *R. v. Wilmot* (1940), [1941] S.C.R. 53 (S.C.C.). Cases in the second category also meet the test of fair notice because "an indictment charging an offence also charges all offences which as a matter of law are necessarily committed in the commission of the principal offence as described in the enactment creating it" (*Harmer*, at p. 19; emphasis added). ...
>
> 31 With respect to the second category, it may be said that "[i]f the whole offence charged can be committed without committing another offence, that other offence is not included" (P. J. Gloin, "Included Offences" (1961-62), 4 Crim. L.Q. 160, at p. 160; emphasis added). This proposition was endorsed by the Manitoba Court of Appeal in *R. v. Carey* (1972), 10 C.C.C. (2d) 330 (Man. C.A.), at p. 334, per Freedman C.J.M.; by the Ontario Court of Appeal in *Simpson*, at p. 139, per Martin J.A., and by the Quebec Court of Appeal in *Colburne*, at p. 243, to which Proulx J.A. added:

> [TRANSLATION] For my part, I would add that an offence would be included where the essential elements of this offence are part of the offence charged. [Emphasis in original.]
>
> Clearly the offence of incest can be committed without committing sexual assault or sexual interference.
>
> 32 It is the third category of cases that is more likely to cause difficulty. What is required are words of description in the count itself of facts which put an accused on notice that, if proven, such facts taken together with the elements of the charge, disclose the commission of an "included" offence: *Allard*. For example, in *Tousignant v. R.* (1960), 130 C.C.C. 285 (Que. C.A.), the indictment charged the accused with attempting to murder the victim *"by hitting him on the head with a blunt instrument"* (p. 291; emphasis added). The italicized words were not essential to the charge of an attempt to murder, but their inclusion in any event permitted conviction on the lesser and (thereby) included offence of causing bodily harm with intent to wound, or assault: see Simpson, at p. 139. Similarly in *R. v. Kay*, [1958] O.J. No. 467 (Ont. C.A.), the indictment charged manslaughter "by a blow or blows". The addition of these words of description to the indictment disclosed the allegation of an assault, and a conviction of the accused of the included offence of assault causing bodily harm was upheld on appellate review.

[47] Even though subsection 662(1) of the *Criminal Code* uses permissive language, that is a judge "may" convict, the old section, s.569(1), also used the same permissive language, and the majority in *George*¸ at 875, found that s. 569(1) imposed a "cardinal duty" upon the trial judge to consider included offences.

[48] In *R. v. H. (E.,)*, 2008 NLTD 164, 2008 CarswellNfld 296, the Court was not precluded by the pretrial conference report's conclusion on included offences from convicting on two counts of the included offence of indecent assault. After the end of trial but before a decision was rendered, the Court found that conviction on an included offence might be possible, but noticed that the pretrial conference reports of counsel on both sides indicated that there were no included offences for the charge of rape. The Court then asked for submissions from counsel as to whether indecent assault was an included offence. Counsel, in their submissions, agreed that it was. Once indecent assault was deemed an included offence, it does not appear that the Court considered the effect on the fairness to the accused of the decision to convict thereunder:

> 110 Following the reserve of my decision on October 3rd, 2008 and in the course of preparing my reasons, I noticed that the pre-trial conference report had indicated that counsel agreed that there were no included charges. However, Ewaschuk, *Criminal Pleadings and Practice in Canada* (2nd ed.) Vol. 2 at p. 16-160 relying upon *R. v. Muma* (1910), 17 C.C.C. 285 (Ont. C.A.) and *R. v.*

> *Quinton*, [1947] S.C.R. 234 (S.C.C.) suggests that common assault and indecent assault (but not bodily harm) are included offences to the charge of rape. I did, therefore, through the Registry, arrange for counsel and the accused to reappear before me on October 20, 2008 at 9:00 a.m. at which time I alerted them to this issue and sought their submissions.
>
> 111 Counsel made their submissions at 2:30 p.m. on the same day and both confirmed that common assault and indecent assault were included charges.

[49] It is clear from the wording of the *Criminal Code* that the offence of dangerous operation of a motor vehicle under subsection 249(1) is "necessarily included" in the offence of dangerous operation of a motor vehicle causing bodily harm under subsection 249(3). It falls into the second category of included offences described by the Supreme Court of Canada in *R. v. R. (G.)*: offences included in the enactment creating the offence charged, e.g. common assault in a charge of sexual assault.

[50] According to the Supreme Court of Canada, cases in the second category meet the test of fair notice because "an indictment charging an offence also charges all offences which as a matter of law are necessarily committed in the commission of the principal offence as described in the enactment creating it" (*Harmer*, at p. 19; emphasis added). The requirement of fair notice is met not by virtue of the Crown's accurate completion of a pretrial conference report, but because, as a matter of law, the included offence is necessarily committed in the commission of the principal offence as described in the enactment creating it.

[51] As a result, I do not agree with Mr. Yalcin that in the circumstances of this case that it is unfair for the Court to consider a conviction for a lesser included offence because the Crown had not expressly mentioned that possibility during the pre-trial conference.

[52] Beyond the requirement of fair notice, the duty to consider lesser included offences rests with the Court for offences that, as charged, include the commission of another offence. As a result, the Crown's incorrect completion of the pretrial conference report does not carry the day.

[53] However, in this case the charge in the indictment focused on Mr. Yalcin's driving up the driveway at 1390 Lucasville Road, when Mr. Forrest fell out of the back of the moving truck. The Crown now urges a conviction for Mr. Yalcin's driving on the Lucasville Road, after Mr. Forrest had fallen out of the truck.

[54] While I must consider any included offences, I do not believe that the alleged dangerous driving on the Lucasville Road is an included offence to the charge of dangerous driving causing bodily harm in these circumstances.

[55] While Mr. Yalcin's driving on Lucasville Road after Mr. Forrest fell out of the moving truck was mentioned during the course of the trial, his driving up the driveway at 1390 Lucasville Road was the focal point of the trial. Referring to the indictment, it is the time period of Mr. Yalcin's driving up the driveway when Mr. Forrest fell out of the truck that is of significance.

[56] In *R. v. Devison*, 2016 NSPC 43, [2016] N.S.J. No. 274, Ross Prov. Ct. J. had to consider whether an accused, charged with impaired driving causing bodily harm in one location, could be convicted of the included offence of impaired driving in another location. Judge Ross stated:

> 79 Is the driving at Port Bevis continuous with the conduct at South Haven? While part of one transaction, in a sense, I don't think it would be proper to convict the accused with an included offence (s.253(a) or (b)) based upon the driving in Port Bevis. The place of offence is described in the Information as being South Haven. The allegations concern the accused's driving, and the accused's state in the seconds prior to her striking Ms. Buffett. It would be unfair to regard the driving from South Haven to Port Bevis as one parcel containing all the charges. The case was predicated and defended on the driving at the time of the collision, and should be decided that way.
>
> 80 In conclusion on this point, I am not convinced beyond a reasonable doubt that the accused struck the complainant subsequent to 11:57.

[57] In *R. v. Taylor*, (1991) 105 NSR (2d) 305 (S.C.A.D.) the court discussed included offences and determined that although common assault is an included offence of assault causing bodily harm, on the facts of that case, common assault was not properly included because of the lack of causal connection.

[58] Keeping in mind the decision of *Taylor*, while dangerous driving is certainly an included offence within the charge of dangerous driving causing bodily harm, I am not convinced that the actions of Mr. Yalcin while driving on the Lucasville Road are included within the facts Mr. Yalcin was facing at trial. There must be a causal connection between the offence alleged and the proposed included offence. While both events were close in time and involved the driving of Mr. Yalcin, the dangerous driving on the Lucasville Road was not a necessary step in the dangerous driving causing bodily harm to Mr. Forrest. The driving on the Lucasville Road occurred after the events on the driveway, when Mr. Forrest had

already fallen out of the truck. It was not clearly part of the same transaction as the driving up the driveway when Mr. Forrest was in the back of the truck.

[59] While there was some examination by the parties about what happened on the Lucasville Road after Mr. Forrest had fallen out of the back of the truck, the focus of the evidence during the trial was of the activity that occurred in the driveway, not on the highway. It would be unfair to convict Mr. Yalcin of a criminal offence for behaviour that was not clearly identified as the focus of the trial. If the Crown wanted to have Mr. Yalcin tried for dangerous driving on the Lucasville Road, in this particular case, they should have charged him with that offence separately, in addition to the charge of dangerous driving causing bodily harm relating to the events on the driveway.

Necessity

[60] Since I have found Mr. Yalcin not guilty of the charge on the indictment, and have also determined that it would be unfair to consider as an included offence Mr. Yalcin's subsequent driving on the Lucasville Road, that ends the matter. However, Mr. Yalcin raised the defence of necessity in an effort to excuse his driving up the driveway and onto the Lucasville Road, with an unsecured load and the rear door of his truck left wide open. The Supreme Court of Canada considered the necessity defence in *R. v. Perka*, [1984] 2 S.C.R. 232. The elements were later summarized by the court in *R. v. Latimer*, 2001 SCC 1, 2001 CarswellSask 4, at paras. 26-31:

> 26 We propose to set out the requirements for the defence of necessity first, before applying them to the facts of this appeal. The leading case on the defence of necessity is *Perka v. R.*, [1984] 2 S.C.R. 232 (S.C.C.). Dickson J., later C.J., outlined the rationale for the defence at p. 248:
>
> > It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is. ...
>
> 27 Dickson J. insisted that the defence of necessity be restricted to those rare cases in which true "involuntariness" is present. The defence, he held, must be "strictly controlled and scrupulously limited" (p. 250). It is well-established that the defence of necessity must be of limited application. Were the criteria for the defence loosened or approached purely subjectively, some fear, as did Edmund

Davies L.J., that necessity would "very easily become simply a mask for anarchy": *Southwark London Borough Council v. Williams*, [1971] Ch. 734 (Eng. C.A.), at p. 746.

28 *Perka* outlined three elements that must be present for the defence of necessity. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.

29 To begin, there must be an urgent situation of "clear and imminent peril": *R. v. Morgentaler* (No. 5) (1975), [1976] 1 S.C.R. 616 (S.C.C.), at p. 678. In short, disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur. In *Perka*, Dickson J. expressed the requirement of imminent peril at p. 251: "At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable". The *Perka* case, at p. 251, also offers the rationale for this requirement of immediate peril: "The requirement ... tests whether it was indeed unavoidable for the actor to act at all". Where the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril.

30 The second requirement for necessity is that there must be no reasonable legal alternative to disobeying the law. *Perka* proposed these questions, at pp. 251-52: "Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? *Was there a legal way out?*" (emphasis in original). If there was a reasonable legal alternative to breaking the law, there is no necessity. It may be noted that the requirement involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable, but he must have no reasonable legal alternative. If an alternative to breaking the law exists, the defence of necessity on this aspect fails.

31 The third requirement is that there be proportionality between the harm inflicted and the harm avoided. The harm inflicted must not be disproportionate to the harm the accused sought to avoid. See *Perka*, per Dickson J., at p. 252:

> No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself we will not excuse him.

Evaluating proportionality can be difficult. It may be easy to conclude that there is no proportionality in some cases, like the example given in *Perka* of the person who blows up a city to avoid breaking a finger. Where proportionality can quickly be dismissed, it makes sense for a trial judge to do so and rule out the defence of

> necessity before considering the other requirements for necessity. But most situations fall into a grey area that requires a difficult balancing of harms. In this regard, it should be noted that the requirement is not that one harm (the harm avoided) must always clearly outweigh the other (the harm inflicted). Rather, the two harms must, at a minimum, be of a comparable gravity. That is, the harm avoided must be either comparable to, or clearly greater than, the harm inflicted. As the Supreme Court of Victoria in Australia has put it, the harm inflicted "must not be out of proportion to the peril to be avoided": *R. v. Loughnan*, [1981] V.R. 443 (Australia Vic. Sup. Ct.), at p. 448.

[61] Neither Mr. Yalcin, nor Mr. Kamwal, was in actual imminent danger or peril during this event. They were merely having a dispute with an unhappy customer.

[62] There were two very simple, reasonable alternatives to the course of action Mr. Yalcin took, if they really were in danger. They could have merely locked themselves in the truck and called the police. They also could have just allowed Mr. Davis and Mr. Forrest to unload the items in question and then have dealt with any dispute either by way of a civil action or by later attempting to involve the police. Driving a truck with an unsecured load and an open back door was ill-advised and completely unnecessary.

[63] Accordingly, I am satisfied that the defence of necessity would not have raised a reasonable doubt in these circumstances.

Arnold, J.