

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Baxter*, 2019 NSSC 274

**Date:** 20190905

**Docket:** CRAM No. 470890

**Registry:** Amherst

**Between:**

Her Majesty The Queen

v.

David Alexander Baxter

Defendant

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Jeffrey R. Hunt

**Heard:** September 17 – 20, 2018, March 25, 2019 & July 17, 2019 in Amherst, Nova Scotia

**Oral Decision:** September 5, 2019

**Written Release:** September 12, 2019

**Subject:** Criminal law – attempted murder – *mens rea*

**Issues:** Did the Crown prove the accused had the required *mens rea*?

**Result:** Accused acquitted of attempted murder but guilty of aggravated assault.

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**Charges:** That he on or about the 1<sup>st</sup> day of June, 2017 at or near Amherst, in the County of Cumberland, Province of Nova Scotia,  
**Count #1** Did have in his possession a weapon, to wit: a knife, for the purpose of committing an offence contrary to Section 88(2) of the *Criminal Code*;  
**AND FURTHERMORE**, at the same time and place aforesaid,  
**Count #2** Did wound Katie O’Neil thereby committing an aggravated assault contrary to Section 268(2) of the *Criminal Code*;  
**AND FURTHERMORE**, at the same time and place foresaid,  
**Count #3** Did attempt to murder Todd Smith by stabbing and slashing Todd Smith with a knife contrary to Section 239(1)(b) of the *Criminal Code*.

**Mary Ellen Nurse, Crown Counsel**

**Jim O’Neil, Solicitor for the Defendant**

**By the Court:**

[1] On June 1, 2017, David Baxter inflicted terrible injuries on Todd Smith. These could easily have resulted in his death. As a matter of law, however, this fact alone and the terrible outcome which was possible does not resolve the legal issue of whether David Baxter is guilty of attempted murder or alternatively a most serious aggravated assault.

[2] The Defendant faces additional charges of committing an aggravated assault on Katie O'Neil as well as a weapons offence contrary to s.88(2) of the *Criminal Code*.

**Background**

[3] David Baxter and Katie O'Neil are former spouses. They have three children together and in June 2017 shared custody. There was a child support order requiring maintenance payments from Mr. Baxter who was a correctional officer. Ms. O'Neil had a modest income working seasonally.

[4] The victim, Todd Smith, had been a neighbour of Baxter and O'Neil before their split. After separation, Smith and O'Neil were in a relationship which was ongoing in June 2017. The Defendant's position is that he had no issue with the

relationship. The issue appeared to be that Baxter felt he was unfairly subsidizing the lifestyle of O'Neil and Smith with his child support payments. When his payments went into arrears, the Maintenance Enforcement Program began to garnishee his wages.

[5] This is some of the background to the terrible events of June 1, 2017.

### **Structure of These Reasons**

[6] I intend to set out a summary of the evidence followed by a discussion and application of the applicable law. Although the focus will first be on the attempted murder charge, we will return to the count involving Katie O'Neil as well as the weapons offence.

[7] In setting out my summary of evidence I am not attempting to produce a transcript or recite back everything canvassed by each witness. I will touch on each witness, but my intent will be to focus on central issues of relevance and elements necessary to put the courts factual conclusions in context. I have, however, considered and weighed all the testimony, and each of the exhibits, in reaching my determinations.

[8] Before embarking on this summary of evidence I intend to give a statement of the core legal principles - including the presumption of innocence and proof beyond a reasonable doubt - that underpin this entire proceeding. I do this at this stage of the decision because it helps me keep these principles at the core of the entire decision-making process.

### **Legal Principles**

[9] The fundamental protection in every criminal trial is the presumption of innocence. This is the primary and irreducible foundation of our criminal justice system. It has to be appreciated that this principle is not a slogan to be quoted and then forgotten. It must remain central to the entire analysis to be conducted.

[10] To be presumed innocent until proven guilty by the evidence presented in court is the fundamental right of every person accused of criminal conduct. Running together with this presumption of innocence is the standard of proof against which the Crown evidence must be measured. To secure a conviction in a criminal case the Crown must establish each essential element of the offence to the point of proof beyond a reasonable doubt.

[11] This standard has rightly been called an exacting one. It is a standard far higher than the civil threshold of proof, being a balance of probabilities. The law recognizes various standards of proof depending on the nature of the proceeding. The criminal standard towers above those other lesser standards.

[12] The Nova Scotia Court of Appeal and Supreme Court of Canada have provided clear direction on the issue of what is meant by proof beyond a reasonable doubt. They have instructed as follows:

- A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
- Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
- On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
- In short, if based on the evidence before the Court, you are sure that the accused committed the offence you should convict because this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.
- It has to be remembered that the burden of proof never shifts to the defendant. This is irrespective of whether the defendant himself gives evidence or not.
- In this case the Defendant did testify. This raises particular issues of analysis which the court will address. But whether the defendant testifies or not, at no time does the burden of proof shift to the defendant and the

resolution of the case does not turn on the court picking which version of the evidence it prefers or finds more believable.

[13] On the issue of assessing the evidence of witnesses the Court is aware of the many cases governing the analysis of witness testimony. What we sometimes refer to as the “credibility” of a witness really is comprised of two distinct components of creditworthiness:

1. Honesty of recollection;
2. Reliability of recollection.

[14] Honesty speaks to the sincerity and candour of a witness’s evidence while reliability relates more to such factors as the witness’s individual perception, memory and clarity. Both sides of the equation – honesty and reliability – impact the credit that can be afforded to testimony. A judge may consider all, none or some of a witness’s evidence depending on the findings. A judge may apply different weight to different portions of the evidence which is accepted.

[15] A foundation for reasonable doubt can be found in any witnesses’ testimony. So too, a finding of guilt may be safely grounded on the evidence of a single witness if, of course, it is found sufficiently credible and persuasive to meet the exacting burden of proof. In assessing the credibility of testimony, I am aware

of the factors which have been pointed to by courts as helpful to this process.

On this point I have found *R. v. Farrar*, 2019 NSSC 46 to be instructive.

[16] All these principles must underpin the legal analysis to follow.

## **Evidence**

### **Todd Smith**

[17] The victim of this attack, Todd Smith was the first witness for the Crown.

He described from his perspective the history of his relationship with the Defendant as well as the events of June 1, 2017 as he remembers them. Mr. Smith is a big man but relatively soft spoken. He bears the visible scars of the knife attack he experienced at the hands of David Baxter.

[18] As noted above, prior to their separation, Baxter and O'Neil were neighbours of Todd Smith. After separation, O'Neil lived in a ground level apartment in the home of Smith at 56 West Pleasant Street in the Town of Amherst. They became a couple, but O'Neil maintained her apartment as it was easier with the children.

[19] By June 1, 2017 Smith and O'Neil had been seeing each other for some time. Smith testified that, during his relationship with Katie O'Neil, Baxter



directed comments at him which he took to be threats. These largely consisted of comments to the effect that he hoped to see him alone or in private sometime. While he took these as efforts aimed towards intimidating him, Todd Smith said he never took these seriously. He was not afraid of Baxter and did not believe he would follow through.

[20] Prior to the attack Smith was personally aware of arguments between O'Neil and Baxter over financial issues. These centered on Baxter's view that he was paying an amount for support which was unreasonable. Baxter believed and complained that Katie O'Neil was voluntarily taking the summer off and living of his payments. Baxter fell into child support arrears. Smith believed that matters came to a flash point when Baxter's wages were garnisheed in the period immediately prior to June 1, 2017. Smith acknowledged he was unsure exactly when this garnishment took place. Baxter complained he didn't have enough left to cover his bills and basic living expenses.

[21] As to the events of June 1, Todd Smith describes returning home after work and visiting his father briefly. He parked his truck and entered his home. After a few minutes he realized he had forgotten his wallet in the vehicle and headed back out to retrieve it. His route in and out of his home was via his back deck and side stairs down to the driveway area. There were many photographs

introduced into evidence and the court had a number of good pictures of the scene.

[22] In the course of heading to his truck he walked out his back door and crossed the deck towards the side stairs. As he did so, Katie O'Neil came up the side stairs onto the deck. He recalls her saying she had just been speaking with David Baxter on the cell phone. As Smith came to the top of the side stairs leading down to the driveway, he saw Baxter walking towards the house, at or near the bottom of the stairs. He had not seen Baxter arrive, park or exit his vehicle which was parked in the driveway.

[23] Smith describes Baxter as being "upset". He says that Baxter asked him where his "...whore of a girlfriend..." was. O'Neil, who was then up on the deck but just out of sight, answered him saying she was there. Baxter with a raised voice asked her to get another job. The context was that O'Neil was then on summer lay-off and did not intend to work till the fall. Baxter's extreme unhappiness with this had been voiced on many occasions previously. The children were in shared parenting, so her income was relevant to the amount he paid. After Baxter loudly repeated his request over the job perhaps a couple times, Smith believes that Baxter turned his attention back to Todd Smith saying that he (Baxter) wanted to see him (Smith) somewhere in private.

[24] At this time, when the men were still on or very near the side stairs, Ava, the 11-year-old daughter of Baxter and O'Neil, came up the driveway towards the residence. Smith believes that Baxter cursed and hollered at her to get home, by which he meant his home. This was his parenting time. It was evident that Ava's arrival at 56 West Pleasant was a surprise. Ava did retreat down the driveway and apparently across the street.

[25] Smith describes Baxter moving from the area at the bottom of the side steps back towards the area near the front driver's side of his vehicle which was parked in the driveway with the driver's door open. Smith testified that, at the time, he believed Baxter was returning to his vehicle with the intention of leaving. Smith continued to move down the side stairs, planning to head to his truck to retrieve the wallet. He says he got as far as the second to last step near the bottom of the stairs.

[26] He does not recall seeing anything in either of Baxter's hands prior to that time. Smith says that Baxter asked him more than once to make O'Neil get a job. After Baxter made this statement a final time, Smith replied saying words to the effect that this had nothing to do with him. At this point Smith recalls Baxter saying, "Well then, I guess, it's just you and me Big Boy."

[27] Events seem to move even more quickly after this point and the accounts of parties and witnesses seem more impacted by the shock of what was unfolding. Smith's recollection is that Baxter moved very swiftly across the space between the front of the Baxter vehicle and the area of the side stairs, where Smith was standing. He remembers David Baxter lunging and grabbing him by the hair. Then and now Todd Smith had long hair which hangs down the back of his neck. Smith was pulled forward off the stairs by the hair. He recalls seeing Baxter with a knife, which he believed came from behind his back. He recalls being stabbed almost immediately. He was taken to his knees. He never really managed to mount a defence of any sort. His recollection of the beginning of the attack includes this description:

Q. Okay. And where did you start to get stabbed?

A. One in the back, and then he stabbed me on the back of the neck. When I landed on my knees, he stabbed me twice in the chest. And then he pulled the knife back out and started stabbing me again in the shoulders. And at that point, Katie was already coming running down the steps and she stood between us.

Q. Okay. Did you ever ... during this, were your hands ever able to punch or ...

A. No, I got stabbed in the hand. In both hands actually.

[28] Smith goes on to describe the attack continuing with injuries to his chest, face and neck. In evidence were numerous medical records and photographs depicting Smith's injuries and wounds. They were terrible. They were

gruesome. And they were inflicted in a sneak attack with a very serious weapon. Todd Smith had at least 24 separate wounds or cuts. He bled profusely. It was a vicious and cowardly attack on a defenceless person. And whether David Baxter is to be found guilty of a most serious aggravated assault or attempted murder no one here questions that the *Criminal Code* mandates very serious punishment for either offence.

[29] The description of the attack given by Todd Smith is chilling. This is particularly so with respect to the face and neck injuries. When it ended, he describes getting up off his knees and getting into Katie O'Neil's apartment which was at the bottom of the side steps and near to the scene of the attack. He and Katie O'Neil went inside and locked the door. He knew he was badly wounded. 911 had already been called. Todd Smith's life was in danger. That is a factual finding on which there is no doubt.

[30] I find that Todd Smith's evidence was compelling. He was clearly attempting to give the best recollection of events that he could. I cannot conclude that he was embellishing his testimony. The trauma of what he experienced obviously had the potential to impact his recall in part.

[31] Understandably his recollection of some of the aftermath is hazy. He spent a significant amount of time in hospital. He required surgery. As I said at the beginning of these reasons, he still carries the scars of this attack. He has sought counselling to help him cope with its ramifications. Unsurprisingly the scars here are psychological as well as physical. This should not be a surprise to anyone with an appreciation of the severity of what he experienced.

**Katie O'Neil**

[32] Katie O'Neil gave evidence for the Crown. The horrible nature of what she witnessed was clear from her testimony. The fact two of her children were witnesses to portions of the attack must have rendered it all the more of a nightmare.

[33] She described the history of her separation and divorce from David Baxter and the subsequent periods of very strained relations between the parties. The Court was presented with text message exchanges between the parties which leave no doubt on this point.

[34] One flash point was the money. David Baxter felt he was paying for the lifestyle of Smith and O'Neil. Ms. O'Neil made clear the money was going to the children. She sought nothing more or less than what the Court Order

required. Collection was in the hands of the Maintenance Enforcement Program.

[35] When directly asked if she was aware of threats made previously by her former husband to Todd Smith, she said that had happened in the past. In 2016 in the course of disputing about child support Baxter had said, according to her, that if he "...couldn't pay his bills then there would be no more Todd around". She said she took that as a threat but didn't call the authorities because she didn't take it seriously. I reviewed all the text exchanges produced in evidence.

[36] O'Neil testified that on June 1, 2017 she heard from Baxter by cell phone around 3:30 PM. He was angry. He said he had been garnisheed and had almost nothing left. He asked for money so he could make his vehicle payment. Given that the subject of finances was a long-term flash point for dispute she told him she did not intend to discuss it again. She wasn't going to go over the same issues again. He made a comment about him maybe taking full custody of the children. She replied the only reason he would try to do that would be so he could stop paying. She ended the call.

[37] She next describes Baxter arriving at the house. This was very quickly after the phone call ended, maybe three minutes. He had obviously been very close

during the phone conversation. David Baxter was still angry. He again went off about her getting a second job. She was off work for the summer as her position with the school board as an educational assistant meant she did not work during the summer. She says she first saw Baxter after he parked in the driveway and came towards the house. She told him to leave. He did not. She subsequently called 911 as he persisted in his comments and would not leave.

[38] Katie O'Neil's evidence largely tracks that of Todd Smith. She describes being able to hear conversation between Smith and Baxter. They were both then in the area of the side steps as described by Smith. She agrees that Baxter was asking Smith to make O'Neil get another job. The exchange with crown counsel was as follows:

**Q.** And what could you hear being said?

**A.** I heard him saying, tell her to get another job. He said something about, I want to see you alone later, and Todd said, Well, I'm right here.

[39] She remained on the phone. She saw Baxter move back down the side stairs towards his vehicle. She too assumed he might have been leaving. She believed he knew that 911 had already been called. Their daughter Ava came up the driveway to the side stairs and asked for her mother. She says she lost sight of Baxter for a few seconds as he moved down the stairs and away



towards his vehicle. She was still on the phone. She turned away very briefly. Then very quickly the events spiralled at the bottom of the stairs. She describes believing for a few seconds that it was merely a fight. This was because she did not see the knife. She ran in a panic down the stairs, screaming and throwing the phone at Baxter. She jumped in attempting to stop him. He did not stop. She describes Baxter maintaining a hold on Todd Smith and inflicting the wounds described earlier.

[40] This was happening very quickly. She continued to scream. At some point she cried that she didn't want the money. He could keep the money. The couple's daughter Ainsley was in the ground floor apartment. She came out screaming at her father to stop. This as much as anything appeared to break through to him. He moved away from Todd Smith who picked himself up and struggled towards and into her nearby apartment.

[41] Ms. O'Neil was injured. She suffered a cut requiring 14 stitches. She describes it this way:

Q. Did you get injured as a result of getting in the middle of that?

A. Yes, I did.

Q. And what happened to you?

A. I got my thumb cut.

Q. And did you have to have surgery for that?

- A. No.
- Q. Does it affect you today?
- A. Ahh, a little bit. It's numb.
- Q. It's numb?
- A. Yes.
- Q. Which part of your hand is that?
- A. It's all in here.
- Q. So how is it that you received that injury?
- A. I'm assuming just from jumping in. I don't recall getting it. I didn't feel it when it happened.”

[42] The cross examination of Katie O’Neil included a focus on what she may have said in two conversations in the presence of Alissa Stiles, Nicole Crowe, Laura Arnold and/or Kim Kaiser to the effect that David Baxter had in the course of these events retrieved the knife used in the attack from his vehicle. I have carefully assessed this portion of her evidence. There is also some police evidence relative to this issue. A number of witnesses were called on this point. I will return to this issue later in these reasons.

**Ainsley Baxter**

[43] The Crown called the now 16-year-old daughter of David Baxter and Katie O’Neil. She was 14 at the time. On June 1, 2017 she was in the ground floor apartment at 56 West Pleasant Street when these events unfolded. She had arrived there after school at approximately 3:15 PM. She describes being in her

room on her computer with headphones on when she heard screaming. It took her a few seconds to register that it was her mother.

[44] She opened the door to her room and had a view out the apartment window to the outside. In evidence were photographs showing the configuration of the apartment. She testified that she saw her father holding Todd Smith by the hair and wielding a knife. He stabbed Smith. She said she saw two or three such motions in the area of the chest. She ran to the door of the apartment screaming. She believes she said “Dad, what are doing?” and “Stop”. She believes she would have repeated this a number of times. She says he did stop. The trauma of witnessing this scene was evident from her evidence.

[45] When her father stepped away from Smith, she says he and her mother scrambled through the door and into the apartment. She called 911 in a panic and asked for help, telling them what had happened.

[46] Ainsley Baxter was asked about her personal knowledge of the dispute between her parents. She said that the day before the attack her father had shown her his pay stub and discussed the garnishment. He was upset. She says she knew her father did not like Todd Smith but that she herself had never heard him threaten Smith.

[47] She was also questioned about her familiarity with the knife. She said she believed it was one they took camping.

**Ava Baxter**

[48] The younger daughter of the couple testified. Ava was 11 at the time of trial. The contents of a prior video statement were put to her. She adopted it with some caveats around not remembering a couple of elements. This was obviously very traumatic for her. I have made myself familiar with her evidence. It simply compounds the tragedy of this matter that such a vulnerable child was exposed to these events.

[49] In her child like way Ava believed she was witnessing a fist fight between the men. She didn't see a knife.

**Christopher Mizuik**

[50] The EHS technician who first responded to the scene was called as a witness. His evidence was not particularly controversial, but I will touch on it to highlight the absolutely horrible wounds inflicted on Todd Smith. He described the multiple wounds including the exposure of the jugular vein and injuries that ranged, he said, from the head and neck down the chest and torso,

left arm and inner leg. It was a frenzy of slashing and wounding. Much was concentrated on the left side.

[51] The witness said he was shocked that Smith did not appear to be in shock. He was upset but talkative. Mr. Mizuik said that despite Smith's terrible injuries he appeared more concerned about the hand injury suffered by Katie O'Neil.

[52] I have assessed his testimony in conjunction with the medical records admitted into evidence.

**Constable Jade Pratt**

[53] Cst. Pratt is an officer with the Amherst Police Department. On June 1, 2017 she was one of the first officers on the scene at 56 West Pleasant Street.

[54] She provided testimony on the event immediately following the stabbing and the arrival of the police. Police arrived just prior to EHS. She had direct dealings with Baxter, Smith and Katie O'Neil. She described these in some detail.

[55] The parties were most interested in Cst. Pratt's discussions at the scene with Katie O'Neil. These were detailed in an occurrence report made by Cst. Pratt.

In it the Officer quotes O'Neil as saying that David Baxter returned to his vehicle to retrieve the knife. The Officer was directed, and cross examined on this.

[56] I have assessed the evidence of Cst. Pratt as well as all the additional evidence on the issue of what Katie O'Neil said or did not say at the scene on the issue of the knife.

**Deputy Chief (Acting) Tim Hunter**

[57] Deputy Chief Hunter testified for the Crown. He detailed his dealings with David Baxter and the course of the investigation in general.

[58] Also, in evidence by consent were medical records, the contents of which have been reviewed and considered by the Court. They demonstrate in stark terms the grave injuries to Todd Smith and the perilous situation he was in.

**Defence Witnesses**

[59] The defence in this case called five witnesses, the last witness being the defendant himself. Three of the other witnesses largely spoke to the issue of what Katie O'Neil said regarding the retrieval of the knife from the vehicle. Laura Arnold, the partner of the accused, addressed this issue as well as others.

**Alissa Stiles**

[60] Alissa Stiles was the first witness called by the Defence. She indicated that she is the cousin of David Baxter's current partner, Laura Arnold. Her testimony related her account of a conversation she witnessed at the home shared by Laura Arnold and David Baxter on Victoria Street in Amherst later on the evening of the attack. She had gone to the house to assist by offering to take Laura Arnold's son for the evening. She was there as part of a group of women including Laura Arnold, Nicole Crowe and Kim Kaiser when Katie O'Neil arrived to pick up Ava who was at the O'Neil residence.

[61] Alissa Stiles testified she heard the conversation which was taking place largely between Katie O'Neil and Laura Arnold. She recalls Laura Arnold saying to O'Neil that she still didn't understand where David Baxter had got the knife. She testified that O'Neil replied, "I told you, he got it from the car".

[62] In cross examination the witness's recollection and motivation was challenged. Her family relationship with Katie O'Neil and the other women present was explored.

[63] I appreciate that because of her relationship with the defendant's partner, care needs to be taken in weighing and evaluating her testimony. I will say at

this stage that Ms. Stiles appeared to be give every indication of offering credible testimony. I will evaluate her evidence in the context of the other witnesses to see how it accords with common sense and the testimony of others.

**Nicole Crowe**

[64] Nicole Crowe is the sister of Laura Arnold. She testified that she too was present during the evening of June 1<sup>st</sup> at Laura Arnold's home.

[65] Katie O'Neil arrived at the house. O'Neil had a friend with her whose name Crowe did not know. Crowe says she did not speak herself to O'Neil, but all the women stood as a group while O'Neil and Arnold had a brief conversation.

[66] Crowe recalls Arnold asking, "Katie, where did David get the knife?" and O'Neil replying, "I already told you, he got it from the car".

[67] Ms. Crowe was cross examined about her relationship with Laura Arnold, whether her recollection of the conversation had been impacted by conversation with her sister, and how she had come to be asked to give evidence about this issue.

[68] Her evidence was consistent with that of Laura Stiles as well as that of the next witness.



**Kim Kaiser**

[69] Kim Kaiser gave evidence. She is the mother of Laura Arnold. She received a call on June 1<sup>st</sup> in which she learned there had been a stabbing incident. She went first to the home of her daughter and David Baxter and from there to 56 West Pleasant Street - the site of the stabbing. She arrived after the police were there and securing the scene. After being told by the police to stay back, she stood back, near the driveway, with her daughter Laura who was present as well.

[70] She describes seeing and speaking to Ainsley Baxter and then Katie O'Neil. All were obviously and understandably upset. Kim Kaiser testified as to the conversation. She testified in part as follows:

- Q. So, tell me about that again. What happened about the knife?
- A. When Laura's talking with Katie, Katie had come up to her a said, told you he's crazy. And Laura's like, Oh my God, I just ... I don't understand. You know, where'd he get the knife from. And she said, He went back to the car and got it.

Later she was asked about this issue again. The exchange was as follows:

- Q. Okay. And how did the conversation start with Katie?
- A. She just come up. Laura's hugging Ainsley because Ainsley was crying. And then Katie come up and she said, I told you he was crazy. And Laura's like, Oh my God, you're hurt, and so she wanted ... you know, that's why she was holding her hand. And then she said, I just don't get it. Where did he get the knife from? And then Katie had said that, but I was hugging Ainsley.

- Q. What did Katie say?  
A. Ahh, about that he went back to the car.  
Q. He went back to the car.  
A. Yeah.  
Q. Did she say which door he went back to?  
A. No, no.  
Q. Did she just say, He went back to the car?  
A. Yes.

[71] Kim Kaiser also testified that she herself had been in the Baxter car previously, driving with her daughter, and in the course of straightening up the passenger seat floor area of the very messy vehicle she had picked up two knives from off the floor and had placed them in the storage area running along the bottom of the passenger side door. This was, she believed maybe a week or two prior to June 1<sup>st</sup>. On the same occasion she says she was shown a baton which was in the storage area on the driver's side door.

[72] In cross examination Kim Kaiser was challenged on the consistency of her recollection and as to the motivation for her testimony. Given her relationship to the partner of the Defendant this is absolutely appropriate. Her evidence does warrant additional care because of that relationship. However, it is also accurate to say that, like many cases which come before the courts, witnesses are often related or have other relationships with the parties or other witnesses.

**Laura Arnold**

[73] Laura Arnold was the next witness. On June 1, 2017 she and David Baxter had been a couple for some time and had been living together for approximately three years. They considered themselves common law partners.

[74] She was questioned about her knowledge of the history of the dispute between Baxter and his former wife over child support. She testified as to what she was aware of. David Baxter was coming under more and more financial pressure. She acknowledged that their household was coming to the point of financial crisis. She spoke of the animosity and friction that existed. She knew Baxter was extremely upset and becoming more so. This was being driven by his feeling that the situation was unfair. She believed it was beginning to affect him physically.

[75] Laura Arnold testified as to her knowledge of the horrible events of June 1<sup>st</sup>. She received a call at work from Baxter which he placed almost immediately after walking away from Todd Smith and as he waited in the garage at 56 West Pleasant Street for the police to arrive. It was obviously a surreal situation. Her shock and horror at what David Baxter was telling her was evident.

[76] She rushed to the scene at 56 West Pleasant Street. The police were already there. Her mother arrived there as well. They waited where the police were holding them back. Ainsley came down the driveway and they comforted her. Laura Arnold had called Ainsley to tell her she was coming. Katie O'Neil soon came down as well. She was cut on the hand. They spoke. Laura Arnold relates the conversation much as her mother had detailed. It certainly was a scene where these women were in what we might call a state of shock.

[77] Laura Arnold was asked as well about the events of the evening of June 1<sup>st</sup>. She testified about the gathering of people and her further conversation with O'Neil at 40 West Victoria Street. She was adamant in her recollection of the conversation in which O'Neil spoke of Baxter returning to the vehicle to retrieve the knife. She was vigorously cross examined on this point including having it put to her that her police statement did not appear to relate this information she was said to have received from O'Neil. I have carefully reviewed all these exchanges.

[78] Arnold was familiar with the knife. She testified that she believed it had been in the vehicle. She believed it had been used by Baxter to make sticks for roasting over a campfire when she and David had taken the kids to a beach bonfire the summer prior.

[79] Laura Arnold was thoroughly cross examined and I have assessed her direct and cross examination. Weighing the evidence of someone intimately connected with one of the parties can be difficult. A person's love or sympathy could possibly play a role in their recollection or account.

[80] For the most part, I found her testimony to be credible. She was obviously sympathetic to her partner and I tend to discount her evidence where she may have downplayed David Baxter's level of upset and frustration.

[81] I have also considered the evidence pertaining to the conversations between Katie O'Neil and others pertaining to Baxter's retrieval of the weapon from the vehicle.

[82] I will return to that issue in the analysis shortly.

### **David Baxter**

[83] The Defendant gave evidence on his own behalf. He was the final witness of the trial. He acknowledged stabbing Todd Smith. The issue was, and is, has the Crown proven he intended to kill Todd Smith, or did he perhaps want to inflict grievous injury and pain on Smith, and he did not care if he lived or died?

[84] If it's the former – he is guilty of attempted murder. If the latter – the mental element of attempted murder would not be satisfied, and he would be guilty of a most serious aggravated assault.

[85] Of course, David Baxter's evidence was quite extensive, and he was cross examined at length. The core areas of questioning included the history of his relationship with O'Neil and Smith, the financial and child support issues, the lead up to and the events of June 1<sup>st</sup> and aftermath.

[86] David Baxter is a big man. In June 2017 he was 6'2'' and 190 lbs. As a correctional officer he had some specialized training in physical combat. This became a point of some focus in the trial.

[87] He related the history of conflict with his former spouse. His self perception was that he worked very hard and he could not get ahead because of the unfairness of the system and the fact his former wife would not make enough money. Although the couple had shared parenting time of the children, because of his much larger income, he paid child support. He saw the O'Neil/Smith household as doing very well financially while he could not make his basic payments and had to ask others for financial help.

[88] He related his history of increasing anxiety and level of stress. He tied this to his financial problems and his sense that the support situation was unfair and unjust. In evidence were text messages and communications in which David Baxter expressed his anger in profane and angry terms. I have reviewed everything that has been pointed to as possible threats.

[89] Baxter was asked about his carriage of weapons. He acknowledged having a baton or asp in his vehicle. He related a memory of showing the asp, which normally sat in the driver's side door storage area, to Michael Mazerolle who laid it either on the passenger side floor or passenger door side storage. He also acknowledged there was a knife or knives in the car. While he said the asp was for self defence reasons, the knife was for utilitarian purposes such as camping or beach cook outs. There was extensive questioning as to his recollection, or lack thereof, as to the location of the knife on the day in question.

[90] David Baxter testified as to his recollection of the events of June 1st. He was to pick Ava up after cheer practice following school. When he saw Ava, she asked if she could walk home with her friend which he allowed her to do. He was also aware that he was supposed to be home to meet a friend of Laura Arnold who was dropping off some reclaimed wood that he was using as part of a wood working project to make additional money. Shortly after he spoke to

Ava, he reassured Arnold by text that he should be home to meet the friend in about 15 minutes.

[91] David Baxter also testified that he knew he wanted to speak with Katie O'Neil about the fall out from a Facebook posting Laura Arnold had made in which she vented about how unfair the support situation was and generally about other issues which were being taken as an attack on Katie O'Neil. One of the children had seen the posting and this had set off a general upset.

[92] He called O'Neil on her cell. It did not go well. When she hung up on him, he was at a point in the drive where he could have continued towards his home or make the turn to her home. He made the fateful decision to turn towards West Pleasant Street and all that unfolded there.

[93] He testified that on arrival he parked in the driveway and got out of his vehicle. He could see Todd Smith was near the top of his side steps up near his back deck. He testified he wanted to speak with Katie O'Neil to reason with her. To him this appeared to mean once again railing about her getting another job and that if she didn't, the people really being hurt were the children. He directed some angry words to O'Neil about her laying poolside all summer while he worked hard and couldn't make ends meet. When he didn't get the



response he wanted from O'Neil he directed his attention to Todd Smith. He asked Smith to make O'Neil get another job. Smith said this didn't involve him. Smith said he worked hard and everything he had - he had earned. Baxter said that Smith repeated this a number of times. As the adults continued to go back and forth, Ava Baxter ran up near the side steps. Her arrival was a surprise to David Baxter. He denies cursing at his daughter but acknowledges making clear to her that he wanted her to go.

[94] The Defendant's account of what happened next is as follows:

- A. So, the next step is I'm going to leave. I turn to leave. So now I'm facing down the steps. Katie's still on the deck, and Todd is still at the top landing, on the landing. He taps me on the shoulder because he's now just almost eye level with me, points me on the shoulder and says as I turn around and he's in ... he's in my face. He's right here going, Let me tell you something, bud. I can take you any time, no problem. And as he says, No problem, he's shaking his hands back and forth. No problem.
- Q. When you say he's shaking his hands back and forth, what do you mean by that? Can you describe that?
- A. Let me tell you something, bud. I can take you any time, no problem. [With raised voice.]
- Q. Okay. So then has anybody moved at that point?
- A. Nobody's moved at that point except for me because I'm turning towards him as he's talking down to my face ...
- Q. Okay.
- A. ... over my shoulder here.
- Q. So, then what happens?
- A. I turn. May I demonstrate?
- Q. Yeah, go ahead.

- A. I turn and I push him back like this.
- Q. So, for the record, you're standing in the witness box. You're turning to the right, and you're putting your right arm up ahead of you with your left arm behind.
- A. Yeah.
- Q. And what are you describing when you do that?
- A. I'm pushing a person that's in my personal space out and away from me.
- ....
- Q. Okay. So, what's the next thing that happens?
- A. The next thing that happens is I start walking backwards down the stairs away from ...
- Q. Why were you going backwards?
- A. Away from Todd O'Neil (sic). Why? Because I'm walking backwards away from a threat that's coming down the stairs towards me. Because it didn't ... the verbal altercation between him and I didn't stop with just that push.

[95] David Baxter continued his account with a description of the verbal back and forth with O'Neil and Smith. He says he went to the passenger side of his vehicle and opened the door. He claims this was because he was trying to get Ava to come so he could drive her home and get her out of this situation. Ava had not obeyed his order to leave. She was still hanging around in the area at the end of the lane or across the street.

[96] David Baxter's account of what happens next can be difficult to follow:

- A. ...In the meantime, Katie's yelling from the top of the stairs going, you're not going anywhere. I got the cops coming. You're not going anywhere. I said, don't worry, I'll be right back, I'm just taking her home.

But at the same time, I've got Ava blabbering on about, no, well, actually we were going to go to the store first because we've got money, blah-blah-blah-blah-blah, as she's going on about money and coming and walking across the street towards me, and me saying, Don't worry, I'll be right back, I get, You're not coming back here. You've never coming back here. So that was Katie.

And at that point, Todd said something to the effect of, Yeah, that's right. You're never coming back here. I look to my right, and all I see is Todd flying down the stairs coming towards me. As I'm looking to my right as he's coming down the stairs towards me, I'm looking to my left as my daughter is coming towards me.

I'm now sandwiched if I want to show you on this exhibit, I'm sandwiched between my passenger door and the side of the apartment. Everything inside of me is screaming, oh my God, he's coming to get you. He's got you from behind. You're good as done.

I then with my ... my ... my laboured breathing, everything's just firing. Everything's screaming in my head about, holy shit, you're done, you're done. He's coming to get you. He's got you from behind. You're trapped.

I screamed something to the effect of ... my last recollection is screaming something to the effect of Ava ... Ava, just go home, just go home. I don't care, go to the store and get right home. Just get right home. [With raised voice.]

And all of a sudden I have, like, tunnel vision. I have these ... these ... these flashes in white, and ... and... and that is my last recollection of what happened at this time.

Q. What is your next recollection?

A. My next recollection of the situation was hearing, not seeing but hearing my daughter going, Dad, Dad, and me going, Yeah. And they're going, what are you doing? What are you doing? And it's black. And all I'm thinking is I don't know. Am I sleeping? I don't know what I'm doing. I don't know where I am. I thought I'd fallen asleep somewhere.

So, I said ... Dad, Dad, what are you doing? So, all of a sudden, I ... I ... I see white, like hazy white. I look up, and all I see is ... is Ainsley. And I'm like, Ainsley? I was disoriented. I'm like, Ainsley?

And then I looked back and she's not there. And then I look over and I see Katie and she's yelling at me going, we don't want your money. Just get out of here. Just get out of here. Just leave. Yelling at me. And I'm like, What?

I look down and I got red arms from here down. I'm holding onto a knife in my hand, and I'm like, What the hell? I then look in front of me. All of a sudden, I hear a grunt and I see Todd pop up. Like he went from being

on one knee to next he's right in front of me. In my head, all that's screaming is, Oh my God, Todd.”

[97] As can be seen from that lengthy excerpt, David Baxter is claiming he has no direct memory of the attack itself. His account put him at the side of his vehicle door where the weapon was said to be, and then, according to his account he ceases to have a memory. The Crown strongly argues that this is simply convenient avoidance. Baxter referred in evidence to what he experienced as a panic attack. He claims to have no memory of taking the knife or undertaking the attack. He does not, however, dispute that he did so.

[98] He was questioned about his training as a correctional officer and other martial arts experience. At one point the suggestion of the defence was that perhaps David Baxter had some level of training or conditioning that led him to act out in some automatic, autonomic or non-voluntary fashion. In the end this argument was not forcefully advanced by his counsel and to be clear, I reject it completely. His actions were voluntary. The issue was, and is, his intent to kill – and the Crown’s ability to prove this beyond a reasonable doubt.

[99] I wish as well to dispose of any question of self defence. The submissions of the Defendant contained some reference to a possible self defence theory. Simply put there is no air of reality to such a suggestion. There is no resort to

the s. 34 factors. If in an alternative analysis I was required to assess the s. 34 (2) elements (a) through (h) I would have found no credibility at all to any suggestion that the actions of the Defendant were reasonable within the s. 34 (2) analysis.

[100] Stepping back and examining the Defendant's evidence as a whole, while I do not accept that he has as little recall as he claims, I have to balance this against the fact that there is no burden on him. His evidence, taken as a whole, is certainly a denial of his having an intent to kill.

[101] I intend to move to a consideration of the law of attempted murder and consideration of our facts in light of that law.

### **Attempted Murder - Applicable Law**

[102] The core charge before this court is one of attempted murder. The relevant provision of the *Criminal Code*, is as follows:

239(1) Every person who attempts by any means to commit murder is guilty of an indictable offence and liable...

(b) in any other case, to imprisonment for life.

[103] While this charge does not appear complex on its face, Canadian case law on the offence of attempted murder makes it clear that proving the required mental element of the offence can be highly difficult. For instance, in **R. v. Villagran**, [2007] O.J. No. 818 (Ont. S.C.J.) the Court summed up the point this way:

43 The charge of attempted murder is very difficult to prove. The *mens rea* for attempted murder is the specific intent to kill, notwithstanding that if the victim actually died and the accused were charged with murder, certain mental elements other than an intent to kill could lead to a conviction for murder. In the case of attempted murder, while a mental state falling short of a specific intent to kill may lead to a conviction for other offences, it cannot support a conviction for attempted murder: See **R. v. Ancio**.

[104] It has been said in a number of judgments that it can be harder for the Crown to prove attempted murder than it is to prove actual murder.

[105] The Ontario Court of Appeal recently addressed the required mental element for attempted murder. In **R. v. Boone**, 2019 ONCA 652, the court said the following:

57...the *mens rea* required for attempted murder is not satisfied by recklessness as to the consequence. A person who anticipates that his acts may, or probably will, lead to the victim's death is not guilty of attempted murder unless killing the victim was his purpose...

[106] The Supreme Court of Canada in **R. v. Ancio**, [1984] 1 S.C.R. 225 gave the following instructions with respect to the offence of attempted murder:

The complete offence of murder involves a killing. The intention to commit the complete offence of murder must therefore include an intention to kill. I find it impossible to conclude that a person may intend to commit the unintentional killings described in s.212 and 213 of the *Code*. I am then of the view that the *mens rea* for an attempted murder cannot be less than the specific intent to kill. [pg. 248]

[107] In *R. v. Odulate*, [2001] O.J. No. 4029 (Ont. S.C.J.) the Court discussed the intent required for a conviction under s. 239:

98 The intent required for attempted murder is a very high level of intent, higher than the degree of intent required for actual murder.

99 Although the wound was life threatening because of the danger of septic death and the proximity to the aorta, it takes more than a life-threatening wound to establish attempted murder. To paraphrase what was said in *R. v. Rajanayagam*, [2001] O.J. No. 393:

It is not enough, for attempted murder, that the stabber intends to cause bodily harm that he knows is likely to cause death and is reckless whether death ensues or not. Attempted murder now requires a specific intent to kill: *R. v. Ancio* (1984), 10 C.C.C. (3d) 385 (S.C.C.); *R. v. Logan* (1990), 58 C.C.C. (3d) 391 (S.C.C.).

[108] In *R. v. Amador*, [2001] O.J. No. 4672 (Ont. SCJ) the Court observed:

The mere fact that A stabs and wounds V with life threatening results is not, alone, any evidence of intent to kill.

For attempted murder there must be some additional evidence from which the trier of fact may infer that the stabber intended something more than the actual consequence of the wound.

Some stab wounds, by themselves alone, provide such evidence. Other stab wounds do not. It is impossible to draw a bright line between the two. It is entirely a question of degree having regard to all the circumstances including the nature of the wound, the vital nature of the area wounded, the nature of the combat, the evidence or lack of evidence of premeditation or spontaneity or threat or plan, the presence or absence of evidence of defensive motivation, the persistence with which the stabbing is repeated or not, whether or not intent to kill has been established.

[109] Finally, it may be helpful to include this portion of *R. v. Wielgosz*, 2018 ONCJ 666 in which the accused was charged with attempted murder among other offences. This case includes a discussion of how a court must assess issues of different possible inferences from the facts which are available to the Court. Some of this analysis is as follows:

47 In order to prove an attempt murder charge, the Crown must establish beyond a reasonable doubt that Mr. Wielgosz had a specific intent to kill Ms. Vala. It is not sufficient for an attempted murder charge for the Crown to prove only that Mr. Wielgosz intended to cause bodily harm to Ms. Vala that he knew was likely to cause death and was reckless as to whether death ensued or not: *R. v. Ancio* (1984), 10 C.C.C. (3d) 385 (S.C.C.) at pages 402-04.

48 In this case, there is no direct evidence of a specific intent to kill Ms. Vala. Accordingly, the finding of a specific intent to kill must be drawn, if it can be, from the circumstantial evidence. When dealing with a circumstantial evidence case, the trier of fact must be satisfied that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty. The evidence must be considered as a whole and the existence of any rational non-guilty inference is sufficient to raise a reasonable doubt: *R. v. Roks* (2011), 274 C.C.C. (3d) 1 (Ont. C.A.) at para 142 citing *R. v. Griffin* [2009] 2 S.C.R. 42 (S.C.C.) at para 33; see also *R. v. Amere*, [2014] O.J. No. 5225 (Ont. S.C.J.) (per Hill J.) at para. 108 also citing *R. v. Griffin supra*.

[110] To this extent the Court is restating some of the principles already expressed.

The decision goes on:

63 I have considered all the evidence in this case including the factors which I have outlined above. In my view, one rational and available inference on the evidence is that Mr. Wielgosz intended to kill Ms. Vala. However, the question is this: is another rational and available inference that Mr. Wielgosz did not specifically intend to kill Ms. Vala but that in the words of s. 229 (a)(i) of the *Code*, that he meant to "cause her bodily harm that he knew was likely to



cause [her] death and [was] reckless whether death [ensued] or not?" In my view, the answer to that question is yes. Still another rational inference is that he intended to cause her harm and did not care whether or not she died regardless of whether he knew his actions were likely to cause her death.

....

64 I recognize that the attack on Ms. Vala was vicious, unprovoked, premeditated and that Mr. Wielgosz had an *animus* towards her. I am very sympathetic to the serious injuries and trauma suffered by two entirely innocent people namely Ms. Vala and Mr. Kraus. I recognize and empathize with the fact that they have had their lives turned upside down by the pointless acts of violence inflicted on them by Mr. Wielgosz. However, my sympathy for the victims can't cloud my view of the objective facts. As I have already stated, the only rational and reasonable inference from the circumstantial evidence is not that Mr. Wielgosz had a specific intention to kill Ms. Vala. That is one available inference and perhaps the most probable inference. However, on my view of the evidence, other rational inferences are available namely that he intended to cause her bodily harm that he knew was likely to cause her death or that he simply intended to cause her bodily harm whether or not he knew it was likely to cause her death. The existence of these other potential rational inferences mean that Mr. Wielgosz is not guilty of the attempted murder of Ms. Vala but he is guilty of the aggravated assault of her.

### **Position of Crown and Defence**

[111] In his submissions defence counsel effectively argued these exact same points. If there are other rationally available inferences, then this would be fatal to the Crown's obligation to prove specific intent to the required standard.

[112] The Crown responds that when all the circumstances are taken into account including the nature of the wounds, the areas targeted, the construct of the attack and the evidence of animus – they have met their burden in this case.

[113] Case law has made clear that while intention can not be taken or assumed merely from the fact of grave injury which could have resulted in death - this is not to say that the nature, placement and character of the wounds are irrelevant. The targeting of vital organs has been found to be relevant. The prolonged nature of an attack has been considered a factor.

[114] On the issue of past threats or intimidation – I have reviewed these from the evidence. Any threat is serious. There is absolutely no question there was animus on the part of Baxter against O’Neil and Smith. In this case the past instances that are pointed to as threats are not as explicit or connected in time as the direct and contemporaneous threats seen in other attempted murder cases such as *R. v. Foster*, 2018 ONSC 6699. I have already made reference to the “It’s just you and me Big Boy” comment which did come close in time to the attack.

[115] The case law also makes clear we can consider the area or areas targeted by the attacker. The wound sites here were numerous and in highly vulnerable areas. The Crown says the targeting had to be deliberate and aimed to intentionally kill. The Defendant seeks to raise a doubt and would argue the wounds could be consistent with a frenzied attack. It is difficult to accept that there was not at least some degree of targeting. The Court must caution itself

however not to falsely substitute the life-threatening results for the intention to kill.

[116] The issue of a defendant's pre-planning is often canvassed in case law assessing attempted murder charges. In this case on balance there appears to be a dearth of evidence of pre-planning. The evidence suggests the knife had been in the vehicle for some time as opposed, for instance, to having been retrieved from the home and placed in the car that day.

[117] The attack has more hallmarks of a terrible spontaneous event as opposed to one with any real degree of pre-planning. To be clear – this in and of itself does not eliminate the possibility of intent. But much like the prior factor (areas targeted) it is one factor which is to be weighed with the others.

[118] What can be said of the length of the attack? Previous cases have provided commentary to the effect that the pressing of an attack can be a relevant factor. This is a difficult element to analyze. Not a lot of reliable information came out about timing of the attack itself. Understandably witnesses perceived it differently and almost in slow motion. The attack here was relatively quick but there was an element of persistence. Baxter did not immediately stop when Katie O'Neil threw herself between the men. It appeared to be his daughters

cries that broke through to him. So, while it may have been quick it encompassed a tremendous amount of deadly action in a short period of time.

[119] I wish to briefly address the issue of what Katie O'Neil may have told Constable Pratt and later other witnesses including Arnold, Stiles, Crowe and Kaiser about the retrieval of the knife.

[120] First – to be clear, the outcome of this matter does not turn on this issue. Whether he had the knife on him when he first exited the vehicle or retrieved it later is a factor to be weighed along with others we have examined.

[121] Second – my inclination is to have some sympathy for O'Neil. She had been through a horrible ordeal. This must have been one of, if not the most, traumatic days of her life. It would not be surprising if her memory were not impacted by these events. Given all this I have concerns about the reliability of her recollections on this point - the retrieval issue and her discussions with others. I prefer the evidence of the others on this point. Again, I repeat, this is but one factor to weigh with all the others.

[122] David Baxter has denied that he had the knife on him when he first exited the vehicle at 56 West Pleasant. I conclude as a finding of fact that this is accurate. He returned to the vehicle as this event spiraled and retrieved this

deadly weapon. Once again, I repeat, this is but one of the factors that goes into the overall weighing process.

### **“W.D.” Factors**

[123] The Defendant in this case testified in his own defence. This means the Court will analyze his evidence under what has come to be known as the “W.D.” analysis. In *R. v. N.M.*, 2019 NSCA 4 the Nova Scotia Court of Appeal recently endorsed the restatement of this test as follows [para 67]:

First, if you believe the evidence of the accused, obviously you must acquit.

Secondly, if you do not know whether to believe the accused or a competing witness, you must acquit.

Thirdly, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.

Fourthly, even if you are not left in doubt by the evidence of the accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the accused.

[124] The Court must never lose sight of the fact that the accused is to be regarded as innocent until proven guilty on a criminal standard. It is well established that while the Crown always has the burden of proving the essential elements of the offence(s) to a criminal standard, it is not required to prove

every single piece of the evidence beyond a reasonable doubt. See: Nova Scotia Court of Appeal in *R. v. J.E.W.*, 2013 NSCA 19.

[125] The Defence has urged in oral and written argument that the Court ought to accept the evidence of Baxter and in doing so resolve this matter on the first step in the WD analysis. I do not conclude this is the case. I will explain why.

[126] I have issues with elements of the evidence of the Accused. His claim of a “black out” does raise real issues of whether it is all too convenient. Is it an avoidance technique to allow him to avoid facing the full truth of what he did and what he is capable of? Is it a means of not facing what he did with his own children in the area?

[127] Baxter demonstrated self serving rationalizations. I do not accept that he went to 56 West Pleasant Street to “reason” with Katie O’Neil. He was angry and he knew that in going there he was going to extend the confrontation which began with O’Neil on the phone.

[128] He had been hung up on by O’Neil. He was determined to be heard, whether she liked it or not. I reject his account that he was going to borrow money and so was intending to be on his best behavior. He was perhaps going

to rhetorically ask for money as part of his argument with O'Neil. But he knew the exchange was going to be heated.

[129] I have assessed all the evidence through the lens of *R. v. W.D.*

[130] I find that this matter cannot be resolved on the first element of the test. I do not find that I accept the account of the accused such that this would be possible. Additionally, there are relevant portions of time where the accused says he has issues of recollection. We do have his account of his state of mind, and thus insight into intention, right up to the critical moment and this has been assessed.

[131] Neither do I find that the case can be resolved, in my mind, by an application of the second and third elements of the restated (see: *R. v. N.M.*, supra) test.

[132] The second leg of the analysis says that if the court does not know whether to believe the accused or a competing witness, the court is led to acquit. One can imagine many cases which may be resolved on such an analysis. This case is not one of these.

[133] The third portion of the test directs that even if the Court does not accept the testimony of the accused, but is left in a reasonable doubt by it, the court must acquit. In this case we have the complexity that the accused denies a memory

of portions of the events. The court must look to all the evidence. For this reason, I have resolved the matter with the application of the fourth element of the test.

[134] The core issue before the Court is that of intention and whether the Crown has carried its burden of proving that there is only one rationally available inference on the facts, keeping in mind that the burden of proof never shifts to the accused. Judge Derrick, as she then was, had a matter with different facts but similar issues of intention and available inferences. In *R. v. Blagdon*, 2013 NSPC 61 the accused was charged with attempted murder with a firearm, in this case a handgun.

[135] The accused had shot at the victim a number of times using a handgun.

These were not warning shots. The issue was not whether he was attempting to strike the victim. He was. The issue for the court was whether there was only one reasonable inference with respect to intent:

[52] Mr. Woodburn made a compelling submission. While it is tempting to accept it, I find it is equally reasonable to infer from all the evidence that Clayton wanted to hit Johnson but had not formed the specific intent to kill him. He was certainly engaged in highly dangerous, aggressively anti-social behaviour, chasing Johnson and taking shots at him as he ran away. While Clayton could have hit him and I think it is reasonable to infer that he would have been gratified if he had, I cannot rule out that he may have wanted to do no more than wound, maim, or disfigure Johnson, or endanger Johnson's life. He may have been satisfied to wing Johnson or bring him down with one of the shots, but I am unable to find that the only



reasonable inference is that he was trying to murder Johnson as he pulled the trigger on the revolver.

[136] This analysis tracks as well that of the court in *R. v. Wielgosz*, surpa, that we examined earlier.

[137] In the context of our present case my analysis has reached the same conclusion as the courts in those other cases. That Mr. Baxter wanted Todd Smith dead is absolutely one of the reasonable inferences, perhaps even the most likely inference. But I am not satisfied, to the requisite standard, that it is the only reasonable inference available on the facts. It is also a reasonable inference that he didn't care if he lived or died. While at the end of the day such a horrible realization may be relevant to a sentencing hearing, it also plays its role on the reasonable doubt analysis.

[138] I believe that a desire to damage Katie O'Neil's world, a misguided intention to make her hurt like he was hurting or to show that he wasn't as powerless as he felt may have been driving him that day. I cannot rule out that he hoped to do serious harm to Todd Smith, and vicariously to O'Neil, and did not care if he lived or died.

[139] Accordingly, in accordance with section 662 of the *Criminal Code* I find David Baxter guilty of the included offence of aggravated assault of Todd Smith contrary to section 268. This is a very serious offence under our *Criminal Code* having a maximum potential sentence of 14 years in custody.

### **Aggravated Assault - Katie O'Neil**

[140] Section 268 of the *Criminal Code* sets out the offence of aggravated assault:

- (1) Everyone commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
- 2) Everyone who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[141] The mental element of the offence is described by Binnie J., for the Court, in **R. v. Williams**, 2003 SCC 41, [2003] 2 S.C.R. 134. This case has been applied in many Nova Scotia judgments on this issue.

[142] Justice Chipman recently applied the *Williams* case in **R. v. H**, 2016 NSSC 195:

123 The *mens rea* for aggravated assault is objective foresight of bodily harm and does not require proof of intent to maim, wound or disfigure (see **R. v. Godin**, [1994] 2 S.C.R. 484 (S.C.C.) at p. 485). *Godin* was relied upon in *Williams* where the Supreme Court confirmed the *mens rea* for aggravated assault is the *mens rea* for assault plus objective foresight of the risk of bodily

harm. Endangerment of the complainant's life is part of the *actus reus* (see *Williams* at paras. 53 and 60).

[143] In *R. v. MacNeil*, 2012 NSPC 106 Judge Derrick, then of the Provincial Court gave a highly cogent explanation of what “wounding” means in the context of an aggravated assault charge. I adopt her analysis in its entirety. In part, she explained:

19 An assault is characterized as an aggravated assault when it involves injuries at the upper end of the injury spectrum, injuries that either endanger life, or disfigure, or maim, or wound. Surely then, wounding has to be bodily harm that sits at that end of the severity scale where disfigurement and maiming also belong.

20 For the law to be coherent, there must be something that distinguishes wounding from serious bodily harm where the nature of the injuries alone do not make the distinction clear. In such cases, the distinguishing characteristic has to be the permanence or long-lasting effect of the injuries. In this respect I find the *L. (S.E.)* decision to be the most helpful to my analysis. The trial evidence indicated that Mr. Clarke's injuries healed after about 2 - 4 months. He is taking no medications and receiving no ongoing treatment. There are no physical changes to his face other than the scar by his eye. He testified that although he is once again playing competitive hockey, he is not playing it at the same level as before.

....

23 Wounding is an element of the offence of aggravated assault with which Mr. MacNeil is charged. The Crown must prove all the elements of the offence beyond a reasonable doubt. When I look at the injuries sustained by Mr. Myketsyn, and by Mr. Syposz in the *Vincent* case, the *Kogon* and *MacDonald* examples, and what the Alberta Court of Queen's Bench has had to say in the *L. (S.E.)* case, I find I am left with a doubt about whether Mr. Clarke's injuries constitute "wounding" as contemplated by section 268(1) of the *Criminal Code*. It is a doubt that must be resolved in Mr. MacNeil's favour. I therefore find him not guilty of aggravated assault and guilty of the included offence of assault causing bodily harm.

24 Nothing I have said should be seen as suggesting that Mr. Clarke's injuries were not serious. They were. He suffered a concussion, a cut near his eye, a brain injury, and broken facial bones. It is more a matter of good fortune than anything else that Mr. Clarke's injuries were not as severe as Mr. Myketsyn's. That being said, it is not uncommon for one-punch assaults to have tragic outcomes. Good fortune alone can be credited for that not being the result in this case.

*Accused found guilty of included offence of assault causing bodily harm.*

[144] I have previously analysed the evidence with respect to Katie O'Neil. She was injured by a cut on the hand and required medical attention. She required stitches and some follow up care in that regard.

[145] I am satisfied that the Crown has carried its burden of proof sufficient to obtain a conviction of Assault Causing Bodily Harm with respect to the offence against O'Neil. Accordingly, the Defendant is found guilty pursuant to section 662 of the **Code** of an offence contrary to section 267 of the *Criminal Code*.

### **Weapons Offence**

[146] Mr. Baxter is charged with one count of having a weapon dangerous to the public peace contrary to section 88(1) of the *Criminal Code*.

[147] Proof of a weapons dangerous charge requires proof beyond a reasonable doubt that the defendant possessed a weapon and that he did so for a purpose that was dangerous to the public peace. The purpose for which the person had

possession of the weapon must be determined at the instant of time that precedes its use: see Henein, *Martin's Criminal Code* 2018. P. 200.

[148] This count was, for understandable reasons, not the subject of much attention or submission at the trial. It would appear that Mr. Baxter is charged with this offence for his possession of the knife for the instant prior to his assault on the victim.

[149] Mr. Baxter does not challenge that he took control of the knife and committed the act he did. The issue throughout has been the specific intent question. I have rejected any suggestion of a self defence argument, it having no air of reality. On the facts as I have found them, Mr. Baxter is guilty of the weapons charge as concerns his possession of the knife immediately prior to the assault on Todd Smith.

### **Conclusion and Disposition**

[150] Accordingly, with respect to the Indictment before the Court the defendant is found **guilty of Count #1** contrary to s. 88 of the *Criminal Code of Canada*; On **Count #2 a finding of guilty** of an offence contrary to s. 267 of the *Criminal Code of Canada*; on **Count #3 guilty** of an offence contrary to section 268 of the *Criminal Code of Canada*.

J.

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