

CANADA / JUDGMENT

R. v. Pootlass

2019 BCCA 96

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 96 R. v. Pootlass

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Pootlass,

2019 BCCA 96

Date: 20190318

Docket: CA44845

Between:

Regina

Appellant

And

Kevin Crosby George Pootlass

Respondent

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Savage

The Honourable Mr. Justice Butler

On appeal from: An order of the Provincial Court of British Columbia, dated September 26, 2017 (R. v. Pootlass, Vancouver Docket 243603).

Counsel for the Appellant:

M. Scott

Counsel for the Respondent:

D.N. Fai

Place and Date of Hearing:

Vancouver, British Columbia

November 2, 2018

Place and Date of Judgment:

Vancouver, British Columbia

March 18, 2019

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Mr. Justice Savage

The Honourable Mr. Justice Butler

Summary:

The accused hit the complainant repeatedly on the head, resulting in a cut on his forehead that required stitches and a cut on top of his head that required staples. The accused was charged with aggravated assault. The trial judge acquitted the accused of aggravated assault on the ground that the complainant's injuries did not qualify as a "wound" as that word is used in the aggravated assault provision in the Criminal Code. Instead, he convicted him of the lesser included offence of assault causing bodily harm. The Crown appeals the acquittal. Held: Appeal allowed, conviction for aggravated assault substituted. The word "wound" had an established meaning at common law in the U.K. It was any break in the continuity of the "whole skin", which meant a break that went deeper than the epidermis and pierced the dermis. When the word was adopted into Canadian law in the late 19th century, the established legal meaning was adopted as well. It retained that meaning until 1983, when assaults were reorganized into a three-tier system. That reorganization necessarily implied a change in the definition. The definition of "wound" is now a break in the continuity of the whole skin that also constitutes serious bodily harm. Here, the trial judge applied the wrong legal standard. If he had applied the correct standard, his factual findings would have led to the conclusion that the victim's injuries were wounds.

Reasons for Judgment of the Honourable Madam Justice Bennett:

Introduction

- [1] The issue in this appeal is when an injury rises to the level of a "wound", as that word is used in s. 268(1) of the Criminal Code, which defines the offence of aggravated assault.

- [2] On August 20, 2016, Kevin Pootlass hit Robert Kenoras on his head, causing a cut on his forehead that required five or six stitches and another cut on top of his head that required five or six staples. The trial judge found Mr. Pootlass not guilty of aggravated assault, but guilty of the included offence of assault causing bodily harm, because he found that Mr. Kenoras's injuries did not constitute wounds. The issues in this Crown appeal are the correct definition of "wound", whether a wound requires permanent damage or long-lasting dysfunction, and whether Mr. Pootlass should be convicted of aggravated assault.
- [3] In my view, the definition of "wound" contemplated by the aggravated assault provision is a break in the continuity of both the epidermal and dermal layers of the skin that constitutes serious bodily harm. The injury to Mr. Kenoras was clearly a wound within that definition. I would therefore allow the appeal, set aside the conviction for assault causing bodily harm, and substitute a conviction for aggravated assault. I would not impose any additional sentence.

Background and reasons of the trial judge

- [4] In August 2016, Mr. Pootlass, his girlfriend, and Mr. Kenoras all lived on the second floor of the Brandiz Hotel in Vancouver.
- [5] On August 20, Mr. Kenoras had met a few friends for drinks at the bar in the nearby Empress Hotel. As he walked home from the Empress, he ran into Mr. Pootlass's girlfriend, who asked him to walk her home. He did so. When they arrived on the second floor of the Brandiz, they encountered Mr. Pootlass, who was leaving the shared bathroom on that floor. Mr. Pootlass seemed upset.
- [6] Mr. Kenoras went down the hall to his room, where he had something to eat, watched some television, and went to bed. After some time had passed, he heard his door open. When he saw that it was Mr. Pootlass, Mr. Kenoras thought he had come to ask for a cigarette. Instead, Mr. Pootlass began punching him in the head and continued to do so for at least 30 to 40 seconds.
- [7] Mr. Kenoras was fairly sure that Mr. Pootlass had something in his hand, as he could feel something cutting into him. The trial judge ultimately did not resolve the question of whether Mr. Pootlass had attacked Mr. Kenoras with a weapon.
- [8] After the attack, Mr. Kenoras was found in the lobby by a Brandiz Hotel employee, who saw that Mr. Kenoras was bleeding. An ambulance was called. Mr. Kenoras had two cuts, one on his forehead and one on the back of his head. One of the cuts required five or six stitches, and the other required five or six staples. On the day of the trial, Mr. Kenoras had a light scar and a mild loss of feeling on his forehead, where the scar was.

- [9] Mr. Pootlass was charged with aggravated assault, contrary to s. 268 of the Code. The trial judge was satisfied beyond a reasonable doubt that Mr. Pootlass had assaulted Mr. Kenoras, knowing that bodily harm was likely to result from the force that he had applied. I add, parenthetically, that the trial judge applied a generous test for the mens rea, which operated to the benefit of Mr. Pootlass. He required (and found) subjective foresight of bodily harm, when only objective foresight is required: *R. v. Godin*, [1994] 2 S.C.R. 484.
- [10] He identified the remaining issue as whether Mr. Kenoras's injuries amounted to a wound. In applying the definition of "wound", he said that "a wound contemplates a tissue injury that results in permanent damage or long-standing dysfunction, including injuries that result in serious internal or external bleeding or other serious internal tissue damage." He concluded the injuries did not fall within that definition, acquitted Mr. Pootlass of aggravated assault, and convicted him of the lesser included offence of assault causing bodily harm instead.

Discussion

Positions of the parties

- [11] The Crown submits that the trial judge erred in law in finding that a wound required "permanent damage or long-standing dysfunction". The Crown submits that the word "wound" has for more than 200 years required no more than a breaking of the skin that bleeds and amounts to more than minor bodily harm.
- [12] Mr. Pootlass submits that whether or not Mr. Kenoras was wounded is either a question of fact or a question of mixed fact and law. He submits that the trial judge did not actually define "wound" in the way the Crown says he does, but instead simply adverted to whether the injury was sufficiently serious to be an aggravated assault. Mr. Pootlass submits that since the Crown can only appeal questions of law, this Court cannot interfere with the trial judge's determination.

Legislative framework

- [13] "Wound" is not defined in the Code. Subsection 268(1) simply provides:

268 (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

[Emphasis added.]

- [14] The French version uses the conjugated verb "blesse" to mean "wounds":

268 (1) Commet des voies de fait graves quiconque blesse, mutilé ou défigure le plaignant ou met sa vie en danger.

[Emphasis added.]

Question of law

- [15] The Crown can only appeal an acquittal on a question of law alone: Code, s. 676(1)(a). Mr. Pootlass submits that this Crown appeal actually raises a question of fact or mixed fact and law, as it concerns the trial judge's determination of whether a particular injury is a wound.
- [16] Whether the trial judge applied the legal standard that the Crown says he did or whether he instead considered whether the injury was sufficiently serious to be a wound, as Mr. Pootlass submits, resolving the issue requires interpretation of the statute, which raises a question of law alone: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 50. Therefore, in my view, the Crown may appeal Mr. Pootlass's acquittal to this Court and the trial judge's decision is reviewable for its correctness: *R. v. Shepherd*, 2009 SCC 35 at para. 20.

Analytical framework

- [17] Determining the definition of the word "wound" in s. 268 of the Code is a question of statutory interpretation. Here, this Court is asked to interpret a word that has been defined at common law for hundreds of years, but is not defined in the Code. The framework for analyzing whether the definition of a term in the Code, adopted from the common law, persists through time was set out by Justice Cromwell, writing for the majority, in *R. v. D.L.W.*, 2016 SCC 22. In that case, Cromwell J. found that the term "bestiality" required the Crown to prove penetration of an animal. His finding was based on the definition of that word at common law, which he found to have been unchanged for hundreds of years.
- [18] Applying the D.L.W. framework (as set out at para. 13), the questions are whether the word "wound" had a well-understood legal meaning at common law and, if so, whether Parliament intended to depart from that meaning when it used the word without further definition.
- [19] Quoting Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at §17.1, Cromwell J. said at para. 14, "The common law 'forms an important and complex part of the context in which legislation is enacted and operates and in which it must be interpreted' Nowhere in our law is this observation more apt than in relation to our Code."
- [20] Parliament is presumed to know the accepted legal meanings of the terms that it uses and to intend those accepted meanings: *D.L.W.* at paras. 18, 20. The meaning of a statute is generally fixed at the time of its enactment: *Perka v. The Queen*, [1984] 2 S.C.R. 232 at 264-65.
- [21] In *D.L.W.* at paras. 18, 20, Cromwell J. explained that any departure from that legal meaning must be clear, effected either by express language or by necessary implication from the statute. A related principle is stability of the law. As Cromwell J. said, at para. 21, "Absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law." To support this principle, he also pointed to the Interpretation Act, R.S.C. 1985, c. I-21, ss. 45(2), (3), which provide that the mere enactment or repeal of legislation

does not imply a change in the law.

- [22] When Parliament chooses not to include an express definition of a word with an accepted definition, it is a strong indication that it does not wish to change the definition of that word. For that reason, in the absence of an express direction, the high standard of necessary implication must be met for a court to infer that Parliament has altered the accepted legal definition of a word.
- [23] This standard applies in multiple contexts in which strong presumptions exist and has been described in various ways. In *Province of Bombay v. Municipal Corporation of the City of Bombay*, [1947] A.C. 58 at 61, 63 (P.C.), Lord du Parc explained that if divergence from the presumption is "manifest from the very terms of the statute", including when the purpose of the legislation would be "wholly frustrated" by adherence to the presumption, then it is necessarily implied.
- [24] Recently, in *Moore v. Sweet*, 2018 SCC 52 at para. 70, Justice Côté wrote that Parliament must express its intention to depart from prevailing law with "irresistible clearness", citing cases including *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298 at 1315-16. In *Gendron* at 1316, 1319, Justice L'Heureux-Dubé found that Parliament had ousted a common law duty by necessary implication because the common law duty was not "necessary or appropriate" where a new statutory duty applied. In doing so, L'Heureux-Dubé J. considered the statutory provision "in its proper context" (at 1317), considering the overall effect of ousting the common law duty.
- [25] Parliament necessarily implies divergence from an accepted legal meaning when it clearly follows from the provisions of the statute, construed in their context, that another meaning must have been contemplated.
- [26] In the criminal law context, it is only for Parliament, not the courts, to criminalize conduct or extend the scope of criminal liability: D.L.W. at para. 66.

Legislative history: did "wound" have a clear legal meaning?

- [27] The word "wound" has continuously appeared in Canadian criminal statutes since the first federal criminal statute was enacted in 1869. Prior to the creation of aggravated assault as a criminal offence (in its current form) in 1983, wounding, wounding with the intent to cause grievous bodily harm (often referred to as "wounding with intent"), wounding with the intent to commit murder, and wounding a magistrate preserving a wreck were themselves offences.
- [28] Those offences were originally codified in 1869, in *An Act respecting Offences against the Person*, S.C. 1869, c. 20, ss. 10, 17, 19, 38. With some alterations, they remained in the Code until 1955, when simple wounding was repealed, wounding with intent was significantly altered, and both attempted murder and assaulting an officer were amended such that they did not include the word "wound". In 1983, the new assault provisions came into force. Although the wounding offences themselves were no longer in effect, the word remained in

use in the interim.

- [29] The 1869 provisions had incorporated, with no significant change, three provisions of the United Kingdom's Offences against the Person Act 1861, 24 & 25 Vict., c. 100, ss. 11, 18, 20, 37 [1861 Act], containing the word "wound". As such, it is useful to trace the origin of those provisions and the meaning given to the word "wound" in the U.K.

U.K. offences

- [30] In the U.K., a "wound" was a break in the continuity of the whole skin. Generally speaking, this would be evidenced by bleeding, but bleeding was not a necessary condition for a wound.
- [31] In the development of the word "wound" in the U.K., the courts used basic knowledge about human skin in their decisions. The outermost layer is called the epidermis, also called the "cuticle" in some older case law. Beneath the epidermis is the dermis, also called the "true skin" in some decisions, and a cut in the "whole skin" was a cut in both of those layers.
- [32] In 1803, the U.K. Parliament enacted An act for the further prevention of malicious shooting, and attempting to discharge loaded fire-arms, stabbing, cutting, wounding, poisoning 43 Geo. 3, c. 58 (emphasis added to title) [Lord Ellenborough's Act]. Lord Ellenborough's Act included the following prohibition:

That if any person or persons wilfully, maliciously, and unlawfully stab or cut any of his Majesty's subjects, with intent in so doing, or by means thereof, to murder, or rob, or to maim, disfigure or disable such his Majesty's subject or subjects, or with intent to do some other grievous bodily harm to such his Majesty's subject or subjects, or with intent to obstruct, resist, or prevent the lawful apprehension and detainer of the person or persons so stabbing or cutting, or the lawful apprehension and detainer of any of his, her, or their accomplices for any offences for which he, she, or they may respectively be liable by law to be apprehended, imprisoned, or detained shall be and are hereby declared to be felons, and shall suffer death as in cases of felony without benefit of clergy

[Emphasis added.]

- [33] In 1828, An Act for consolidating and amending the Statutes in England relative to Offences against the Person (1828), 9 Geo. 4, c. 31 [1828 Act], repealed that offence and re-enacted it, adding the word "wound":

XII. That if any Person shall unlawfully and maliciously stab, cut, or wound any Person, with Intent, in any of the Cases aforesaid, to maim, disfigure, or disable such Person, or to do some other grievous bodily Harm to such Person, or with Intent to resist or prevent the lawful Apprehension or Detainer of the Party so offending, or of any of his Accomplices, for any Offence for which he or they may respectively be liable by Law to be apprehended or detained, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall suffer Death as a Felon

[Emphasis added.]

- [34] In his *Treatise on Crimes and Misdemeanours*, 5th ed., vol. 1 (London: Stevens & Sons, 1877) at 920 [Russell on Crime], William Oldnall Russell explained that the word "wound" was added to the statute "to obviate the difficulties" that stemmed from "construction of the words 'cut or stab...". According to Lord Chief Justice John Jervis, writing extrajudicially in *Archbold's Pleading and Evidence in Criminal Cases*, 19th ed. (London: Henry Sweet, 1878) at 722, this was for two reasons. First, because "cut or stab" had been narrowly interpreted to include incisions but no lacerations or contusions. Second, because evidence of a "cut" would not prove an indictment that referred to a "stab" and vice versa. "Wound" was thought to be a broader term that did not lead to these difficulties of narrow construction.
- [35] Even so, in *R. v. Wood* (1830), 168 E.R. 1271, 1 Mood. 278, decided under the 1828 Act, the majority found that broken and fractured bones did not constitute a wound, as the continuity of the skin had not been broken. The trial judge had originally decided that the introduction of the word "wound" was intended to "destroy" the distinction between incisions and contusions. It followed, he held, that no breaking of the skin was necessary. The case was reserved and the trial judge was overturned by a sitting of the whole court, the majority holding that no matter the kind of injury, the skin must still be broken in order for the injury to constitute a wound.
- [36] Decided under the 1837 successor to the 1828 Act, in *Shea v. The Queen* (1848), 3 Cox C.C. 141 at 157 (Q.B.), Justice Perrin explained that the word "wound" did indeed encompass injuries beyond incisions. However, Justice Crampton confirmed that, in any case, the skin must have been broken (at 155).
- [37] Under the 1828 Act, Baron Parke found in *R. v. Beckett* (1836), 174 E.R. 181, 1 M. & Rob. 526 at 527 (Ct. Com. Pl.), that "[a] scratch is not a wound there must, at least, be a division of the external surface of the body".
- [38] In 1837, the U.K. Parliament passed An act to amend the Laws relating to Offences against the Person (1837), 7 Will. 4 & 1 Vict. c. 85 [1837 Act], which repealed the above-quoted portion of the 1828 Act and replaced it with:

II. And be it enacted, That whosoever shall stab, cut, or wound any Person or shall by any Means whatsoever cause to any Person any bodily Injury dangerous to Life, with Intent in any of the Cases aforesaid to commit Murder, shall be guilty of Felony

IV. And be it enacted, That whosoever unlawfully and maliciously shall stab, cut, or wound any Person, with Intent in any of the Cases aforesaid to maim, disfigure, or disable such Person, or to do some other grievous bodily Harm to such Person, or with Intent to resist or prevent the lawful Apprehension or Detainer of any Person, shall be guilty of Felony

[Emphasis added.]

- [39] In a tort case, *Moriarty v. Brooks* (1834), 172 E.R. 1419, 6 Car. & P. 684 at 686 (U.K. Ex. Ct.), Lord Chief Baron Lyndhurst wrote, "The definition of a wound in criminal cases is an injury to the person, by which the skin is broken. If the skin is broken, and there was a bleeding, that is a wound."
- [40] However, in *R. v. M'Loughlin* (1838), 173 E.R. 651, 8 Car. & P. 635 (K.B.), the victim's doctor testified that although his skin was injured and he bled, the blood issued in "a different way" than if his skin had been cut beyond the epidermis and into the dermis. Justice Coleridge decided under the 1837 Act that only a break in "the whole skin" could qualify as a wound. In doing so, Coleridge J. implicitly disagreed with Lord Lyndhurst C.B.'s finding in *Moriarty* that "a bleeding" is an element of a wound. The accused was instead found guilty of assault.
- [41] The weight of authority suggested that bleeding was not sufficient to prove a wound. Also under the 1837 Act, in *R. v. Smith* (1837), 173 E.R. 448, 8 Car. & P. 173 (K.B.), Justice Park, after consulting with Lord Chief Justice Denman, found that a break in the skin in the victim's mouth constituted a wound. He held that "if the skin is broken, whether there be an effusion of blood or not", the injury is a wound even if it is internal.
- [42] In 1861, the U.K. Parliament passed a collection of statutes, often referred to as the Criminal Law Consolidation Acts 1861, which consolidated previously disparate criminal law statutes into seven Acts, organizing the offences into categories. One of those Acts was the 1861 Act, which included the word "wound" in a number of places, removing references to "stab" and "cut":

Attempts to murder.

11. Whosoever shall by any Means wound or cause any grievous bodily Harm to any person, with Intent to commit Murder, shall be guilty of Felony

Acts causing or tending to cause Danger to Life or bodily Harm.

18. Whosoever shall unlawfully and maliciously by any Means whatsoever wound or cause any grievous bodily Harm to any Person with Intent to maim, disfigure, or disable any Person, or to do some other grievous bodily Harm to any Person, or with Intent to resist or prevent the lawful Apprehension or Detainer of any Person, shall be guilty of Felony
20. Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily Harm upon any other Person, either with or without any Weapon or Instrument, shall be guilty of a Misdemeanor
37. Whosoever shall assault and strike or wound any Magistrate, Officer, or other person whatsoever lawfully authorized, in or on account of the Exercise of his Duty in or concerning the Preservation of any Vessel in Distress, or of any Vessel, Goods, or Effects wrecked, stranded, or cast on shore, or lying under Water, shall be guilty of a Misdemeanor

[Emphasis added.]

- [43] The words "stab" and "cut" were removed, it seems, because the word "wound" is a more general term that includes every "stab" or "cut": Russell on Crime at 920.
- [44] The 1861 Act, with some modifications, remains in force in the U.K. today.
- [45] In *JJC (A Minor) v. Eisenhower*, [1984] Q.B. 331 at 341, decided under the 1861 Act, Lord Justice Goff referred to the definition of "wound" as resting on "a continuous stream of authority" that a wound is a breaking of the continuity of the whole skin. He declined to extend that definition to internal ruptures.
- [46] The definition of wounding in England in the 19th century is therefore clear: it was any break in the continuity of the whole skin. Although there is some disagreement in the case law, it predominantly does not include the requirement that a wound bleed. It did not need to amount to grievous bodily harm, nor was there any requirement that the injury have any permanence. Furthermore, it did not include internal bleeding, but did include breaking of skin on the inside of the body, as long as it was continuous with the external skin. This remains the law in England today. Commentators stress that there is no requirement of bodily harm of any sort. Even the most trivial break in the whole skin qualifies as a wound: A.P. Simester & G.R. Sullivan, *Criminal Law: Theory and Doctrine*, 3rd ed. (Oxford: Hart Publishing, 2007) at 402; Dennis J. Baker, *Textbook of Criminal Law*, 4th ed. (London: Sweet & Maxwell, 2015) at §12-028.

Canada

- [47] In Canada, as in the U.K., the early history of the word "wound" shows that it required no more than a breaking of the whole skin. When the word "wound" was adopted into Canadian law, it was the clear intent of Parliament to simply adopt the definition that was used in the U.K. at the time.
- [48] In 1869, An Act respecting Offences against the Person adopted all four offences from the U.K.'s 1861 Act, listed above, with no relevant modifications. They read:

Attempts to murder.

10. Whosoever by any means whatsoever, wounds or causes any grievous bodily harm to any person, with intent to commit murder, is guilty of felony

Acts causing or tending to cause danger to life or bodily harm.

17. Whosoever unlawfully and maliciously, by any means whatsoever, wounds or causes any grievous bodily harm to any person with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with the intent to resist or prevent the lawful apprehension or detainer of any person, is guilty of felony

19. Whosoever unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, is guilty of a misdemeanor
38. Whosoever assaults and strikes or wounds any magistrate, officer or other person whatsoever, lawfully authorized in or on account of the exercise of his duty, in or concerning the preservation of any vessel in distress, or of any vessel, goods or effects wrecked, stranded, or cast on shore, or lying under water, is guilty of a misdemeanour

[Emphasis added.]

[49] It is not necessary to reproduce the French versions of these offences here, but it is significant to note that in every instance, Parliament used the verb "blesse" to mean "wounds": *Offenses contre la Personne*, S.C. 1869, c. 20, ss. 10, 17, 19, 38.

[50] The wholesale adoption of the U.K. offences is a signal that Parliament intended to adopt the same definition for the term that was used in the U.K. This is much like the bestiality provision in D.L.W. (at para. 38).

[51] That signal is confirmed by contemporary commentary. Justice Henri Elzéar Taschereau (then of the Superior Court of Québec), writing extrajudicially in *The Criminal Law Consolidation and Amendment Acts of 1869*, 32-33 Vict. for the Dominion of Canada, 1st ed. (Montréal: Lovell Printing and Publishing Company, 1874) at 230, interprets "wound" in much the same terms as the U.K. case law, citing Archbold and the U.K. cases for those interpretations:

The word "wound" includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gunshot wounds.--Archbold, 664.

But to constitute a wound, within the meaning of this Statute [An Act respecting Offences against the Person], the continuity of the skin must be broken--R. vs. Wood, 1 Mood. 278.

The whole skin, not the mere cuticle or upper skin, must be divided.--Archbold, 665.

But a division of the internal skin, within the cheek or lip, is sufficient to constitute a wound within the Statute.--Archbold, 665.

[52] Justice Taschereau (then of the Supreme Court of Canada, but not yet chief justice) reproduces the same explanation of a wound without change in the next two editions of his book: *The Criminal Statute Law of the Dominion of Canada*, 2nd ed. (Toronto: Carswell & Co., 1888) at 150; *The Criminal Code of the Dominion of Canada*, 3rd ed. (Toronto: Carswell Co. Ltd., 1893) at 212.

[53] In the first edition of James Crankshaw's *Criminal Code of Canada* (Montreal: Whiteford & Theoret, 1894) at 162-63, he gives the same definition:

To constitute a wound the continuity of the skin must be broken; In other words, the outer covering of the body, (that is, the whole skin, not the mere cuticle, or upper skin), must be divided. A division of the internal skin--for instance, within the cheek or lip,--is sufficient to constitute a wound.

The word "wound" includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gunshot wounds; and, in short, any and every kind of wound, no matter how or by what produced. If the skin be broken, the nature of the instrument by which it was effected is immaterial.

[Italics in original; footnotes omitted.]

- [54] In 1908, W.J. Tremear confirms in his *The Criminal Code and the Law of Criminal Evidence in Canada*, 2nd ed. (Toronto: Canada Law Book, 1908) at 211, "To constitute a wound the continuity of the skin must be broken There must be a division not merely of the cuticle or upper skin, but of the whole skin".
- [55] The same definition is found in Leonard J. Ryan's 1964 update of the text, Tremear's *Annotated Criminal Code*, 6th ed. (Toronto: Carswell Company Limited, 1964) at 345.
- [56] The term "wound" has been in continuous use in Canadian criminal statutes from An Act respecting Offences against the Person in 1869 until the present day.
- [57] When the first Criminal Code was enacted in 1892 (55-56 Vict., c. 29), it included the four 1869 offences (renumbered to ss. 232(b), 241, 242, 243), as well as many others that used the word "wound": treason (ss. 65(a), (b)), piracy offences (ss. 127(a), 129), injuring pigeons (s. 333), robbery (s. 398(a)), mischief to cattle (s. 499(B)(b)), attempting to injure cattle (s. 500(a)), injuring other animals (s. 501), and threatening to injure cattle (s. 502).
- [58] In every case, the French versions of these offences use the verb "blesser", the appropriate conjugated form of that verb, or the gerund "en blessant" to mean "to wound", "wounds", or "wounding", respectively: *Code Criminel*, 1892, 55-56 Vict., c. 29, ss. 65, 127(a), 129, 232(b), 241, 242, 243, 333, 398(a), 499(B)(b), 500(a), 501, 502.
- [59] In 1906 and 1927, all of the above offences remained in the Code when it was renumbered as part of each of those years' revised statutes (R.S. 1906, c. 146; R.S. 1927, c. 36).
- [60] In 1955, the Code underwent an extensive revision, and the proliferation of the term "wound" ended. Some offences continued to use the word, but many were either repealed (e.g. injuring pigeons), or rewritten and streamlined, the word "wound" removed in the process. One typical example of the latter is attempted murder (*Criminal Code*, S.C. 1953-54, c. 51 (in force April 1, 1955)):

210 Every one who attempts by any means to commit murder is guilty of an indictable offence and is liable to imprisonment for life.

[61] Even so, the word has never fully disappeared from the Code. Section 17 of 1869's An Act respecting Offences against the Person, wounding with intent, has been steadily modified into discharging a firearm with intent. Still, it contains the word "wound" in the present Code:

244 (1) Every person commits an offence who discharges a firearm at a person with intent to wound, maim or disfigure, to endanger the life of or to prevent the arrest or detention of any person -- whether or not that person is the one at whom the firearm is discharged.

[Emphasis added.]

[62] To this point, there is no discernable intent to diverge from the classic definition of the term "wound". The term was introduced into Canadian law in 1869 as part of four offences that almost exactly duplicate the wording of offences found in the U.K.'s 1861 Act. Commentary on the term beginning at the time of enactment and stretching forward decades uniformly defines it in the same way as cases and commentary in the U.K. The French version of the offences consistently describes wounding using the word "blesser" or another word with the same root.

[63] I note that some decisions have interpreted the word "wound" to require that the injury bleed, often replacing the requirement that the injury include a break in the whole skin: Vallance v. R., [1961] HCA 42 at para. 7; R. v. Hoare, 2015 ONCJ 283 at para. 74; R. v. Hilderman, 2005 ABQB 106 at para. 9.

[64] Other decisions, which conform more closely to the origins and history of the term, instead say that bleeding is valuable (and in some cases decisive) evidence that a break in the skin went at least as far as the dermis: R. v. Waters, [1979] 1 N.Z.L.R. 375 at 378 (C.A.); Devine v. R. (1982), Tas. R. 155 at 168-69 (S.C.).

[65] In my view, the latter is the correct statement of the law. Prior to the incorporation of the word "wound" into Canadian law, it had a widely understood meaning that did not include bleeding. Although Lord Lyndhurst C.B.'s statement of the law in Moriarty has gained traction in recent years, the weight of the jurisprudence and commentary in England rejected it in favour of the "break in the whole skin" articulation. The relevant interpretive principles appropriately constrain courts from altering the definition of words with accepted meanings. As Cromwell J. wrote in D.L.W. at para. 48, one way to frame the question is as what a lawyer who was asked for the definition of "wound" in 1869--the time that it was first enacted--would say. In my view, they would say that a wound was a break in the continuity of the whole skin, meaning a break in the skin that goes at least as deep as the dermis.

[66] It is important to note that this definition, which still survives in the U.K., did not require that bodily harm flow from the wound. Even a prick in the finger into the dermis would, by that definition, be a wound.

Assault and aggravated assault before 1983

[67] The word "assault" was initially used in multiple places in 1869's An Act respecting Offences against the Person without definition, including in s. 47, which included prohibitions against assault occasioning bodily harm and common assault:

47. Whosoever is convicted upon an indictment, of any assault occasioning actual bodily harm, shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour ; and whosoever is convicted upon an indictment for a common assault, shall be liable to be imprisoned in any gaol of place of confinement, other than a Penitentiary, for any term not exceeding one year, with or without hard labour.

[Emphasis added.]

[68] When the first Code was enacted in 1892, it included a statutory definition of assault. That definition has changed little since then. It read:

258. An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person of another, if the person making the threat has, or causes the other to believe, upon reasonable grounds, that he has, present ability to effect his purpose, and in either case, without the consent of the other or with such consent, if it is obtained by fraud.

[69] An offence called "aggravated assault" was also codified in the 1892 Code:

263. Every one is guilty of an indictable offence and liable to two years' imprisonment who--

(a.) assaults any person with intent to commit any indictable offence; or

(b.) assaults any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer; or

(c.) assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person, for any offence; or

(d.) assaults any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure, or with intent to rescue any goods taken under such process, distress or seizure;

(e.) on any day whereon any poll for any election, parliamentary or municipal, is being proceeded with, within the distance of two miles from the place where such poll is taken or held, assaults or beats any person.

[70] In 1906, the offence was renumbered to s. 296, but remained identical to the original offence. In Tremear's Criminal Code, 5th ed. (The Carswell Company, Limited: Toronto, 1944) at 335, an annotation explains that the term "aggravated assault":

is commonly used for the assaults specified in ss. 295 [assault occasioning actual bodily harm] and 296. In every case, an assault, as defined in s. 290, must be established, together with certain additional circumstances of aggravation.

- [71] The offence as named was removed in the 1955 amendments, but continued in a similar form as "assault with intent" and "other assaults" pursuant to s. 232.
- [72] In Martin's Criminal Code, 1st ed. (Toronto: Cartwright & Sons, Ltd., 1955) at 432, J.C. Martin, Q.C., lists "common assault" separately and categorizes all other assaults as "aggravated assault", including attempted murder, attempted rape, causing bodily harm, kidnapping, and so on. In doing so, he essentially categorizes aggravated assault as any offence with an assaultive nature combined with an aggravating feature.
- [73] Immediately prior to the amendments made in 1983, assaults were generally aggravated by specific intent requirements or aggravating circumstances rather than the nature of the injury that resulted. As points of comparison, common assault was punishable on summary conviction (R.S. 1970, c. C-34, s. 245(1) [1970 Code], as amended by S.C. 1972, c. 13, s. 21) and assault causing bodily harm was a hybrid offence punishable by five years' imprisonment if the Crown proceeded by indictment (1970 Code, s. 245(2), as amended by S.C. 1972, c. 13, s. 22, and S.C. 1974-75-76, c. 93, s. 22).
- [74] Causing bodily harm with intent (a successor to wounding with intent) had a maximum sentence of 14 years in the 1970 Code:

Causing bodily harm with intent

228 Every one who, with intent

- (a) to wound, maim or disfigure any person,
- (b) to endanger the life of any person, or
- (c) to prevent the arrest or detention of any person,

discharges a firearm, air gun or air pistol at or causes bodily harm in any way to any person, whether or not that person is the one mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and is liable to imprisonment for fourteen years.

- [75] The offence attracted a significantly steeper penalty than assault causing bodily harm because of the requirement that the accused have had a blameworthy specific intent. The post-amble of the section allowed the offence to be made out either by use of a gun or by resultant bodily harm. In cases involving the use of a gun, this circumstance was also an aggravating factor.

[76] Assault with intent and the provisions listed under "other assaults" were successors of the original aggravated assault provision. Assault with intent had a maximum sentence of five years and other assaults were, like assault causing bodily harm, hybrid offences punishable by five years' imprisonment when the Crown proceeded by indictment (1970 Code, as amended by S.C. 1972, c. 13, s. 22):

Assault with intent

246 (1) Every one who assaults a person with intent to commit an indictable offence is guilty of an indictable offence and is liable to imprisonment for five years.

Other assaults

- (2) Every one who
- (a) assaults a public officer or peace officer engaged in the execution of his duty, or a person acting in aid of such an officer;
 - (b) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or
 - (c) assaults a person
 - (i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or
 - (ii) with intent to rescue anything taken under a lawful process, distress or seizure,
- is guilty of
- (d) an indictable offence and is liable to imprisonment for five years, or
 - (e) an offence punishable on summary conviction.

[77] Assault with intent had the same maximum penalty as assault causing bodily harm. Again, a specific intent requirement made the offence at least as serious as assault causing bodily harm without any requirement that injury result. The "other assaults" either import heightened intent requirements or circumstances that increased the seriousness of what would otherwise be a common assault.

[78] Prior to 1983, then, the assault offences were not vertically integrated. They were not organized in increasing seriousness. The drafting of the provisions does not disclose any real attempt to relate each offence to the others. Different offences were written in different ways for the purpose of capturing different offending behaviour. Heightened specific intent requirements played a significant role in differentiating between those categories of behaviour.

[79] As noted below, aggravated assault took on a different meaning with the 1983 amendments. As I will explain, the amendments did organize assaults in increasing seriousness. The manner in which they did so discloses a clear intent on the part of Parliament to alter the definition of the word "wound" from its common law roots.

Was there a clear intent to change the meaning, either expressly or by necessary implication?

1983 amendments: three tiers of assault

[80] In 1983, s. 268(1) was added to the Code by An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125, s. 19 (in force January 4, 1983) [1983 amendments]. This Act created the current three-tier scheme that categorizes assaults as assault simpliciter, assault causing bodily harm, and aggravated assault.

[81] Given that the statutory scheme for assaults has not significantly changed since 1983, I reproduce the three tiers of assault as they currently read:

Assault

265 (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Application

- (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Assault

266 Every one who commits an assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction.

Assault with a weapon or causing bodily harm

267 (1) Every one who, in committing an assault,

- (a) carries, uses or threatens to use a weapon or an imitation thereof, or

(b) causes bodily harm to the complainant,

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Aggravated assault

268 (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

Punishment

(2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[82] Bodily harm is defined in s. 2 of the Code as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature".

[83] Aggravated assault was amended in 1997 by An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation), S.C. 1997, c. 16, s. 5, to deem the act of female genital mutilation to be a wounding. This amendment does not assist in determining the meaning of the word.

[84] As I will explain, it is clear that Parliament's organization of assaults into three categories signaled an intent to alter the definition of "wound" from its common law roots. The more challenging question is just how much it changed the definition. In my view, a wound is a break in the skin that goes beyond the epidermis and that rises to the standard of "serious bodily harm".

[85] The Crown submits that a wound must result in more than minor bodily harm. As noted above, this was not a requirement when the word "wound" was first adopted into Canadian criminal law; bodily harm was not an element of wounding. The Crown's position makes sense, however, because when Parliament created the three categories of assault in 1983, it signaled that they were of increasing seriousness. Aggravated assault is a more serious offence than assault causing bodily harm. It would be contrary to Parliament's clear intent if wounding, as a mode of aggravated assault, could be committed without, at the very least, the infliction of bodily harm.

[86] Courts quickly recognized that the lesser versions of assault should generally be considered included offences for the greater versions. In *R. c. Lucas* (1987), 34 C.C.C. (3d) 28 at 32-33 (Que. C.A.), Justice L'Heureux-Dubé (then of the Québec Court of Appeal) explained that any injury that constitutes a wound, maim, or disfigurement must amount to more than bodily harm. As L'Heureux-Dubé J.A. put it, "toute blessure au sens de [art. 268] est un lésion corporelle selon [art. 267] mais non l'inverse"--all wounds are bodily harm, but the inverse

does not hold.

[87] Other appellate courts have also concluded that assault causing bodily harm is an included offence in a charge of aggravated assault by wounding: *R. v. Soluk*, 2001 BCCA 519 at paras. 11-20; *R. v. Wong* (2006), 209 C.C.C. (3d) 520 at para. 11 (Ont. C.A.).

[88] David Watt, Q.C. (as he then was), in his book, *The New Offences Against the Person: The Provisions of Bill C-127* (Toronto: Butterworths, 1984) at 68, agrees:

"bodily harm" would seem to be an integral part of the external circumstances of the "wounds, maims, disfigures" basis of liability in [s. 268]. Stated shortly, it is necessary to cause bodily harm in order to wound, maim or disfigure [the victim].

[89] This interpretation is clearly a change from the original definition.

[90] Considering the historical use of the term "aggravated assault", it would appear that the third tier means more aggravated than the second tier. In other words, the third-tier assault requires something more than the second-tier assault.

[91] It thus became clear that some additional element in aggravated assault was necessary, if assault causing bodily harm was to be a lesser but included offence. Three different possible requirements have been proposed in the case law to date: (1) that the injury result in damage that persists through time, (2) that the injury be more than merely trifling, fleeting or minor, and (3) that the injury constitute more than "minor bodily harm".

[92] Some decisions, primarily in Alberta, have imposed the requirement that a wound result in permanent or long-lasting damage: *R. v. Hilderman*, 2005 ABQB 106 at para. 15; *R. v. S.E.L.*, 2012 ABQB 190 at paras. 96-97; *R. v. MacNeil*, 2012 NSPC 106 at paras. 19-20; *R. v. Reid*, 2013 ABPC 228 at paras. 22-26. The Crown submits that this is the standard the trial judge applied to Mr. Kenoras's injuries.

[93] Some Ontario decisions have imposed a requirement that the injury be more than merely trifling, fleeting or minor: *Wong* at para. 13 (quoting the trial judge's jury charge); *R. v. Cummings*, 2015 ONSC 2416 at para. 58; *R. v. Khalili-Arabi*, 2013 ONSC 5566 at para. 144; *R. v. Hoare*, 2015 ONCJ 283 at para. 74. This simply requires that the injury qualify as bodily harm, which would mean that assault causing bodily harm becomes aggravated assault if the complainant's skin is broken.

[94] Finally, some decisions in British Columbia have instead said that a wound requires more than minor bodily harm: *R. v. Papalia*, 2012 BCSC 245 at para. 131; *R. v. Martin*, 2012 BCSC 2086 at paras. 57-61. I interpret this to mean that it requires that the injury rise above the least serious category of injuries that would qualify as bodily harm.

- [95] It is worth reiterating the standard that must be met to infer that Parliament has deviated from the accepted definition of a legal term. The provision, construed in its context, must disclose with irresistible clearness that Parliament intended to alter the definition: *Moore v. Sweet* at para. 70; *Gendron* at 1315-16. Any deviation from that original definition must satisfy this test: *D.L.W.* at para. 18.
- [96] A requirement that the injury persist through time, standing alone, does not satisfy this standard. An important purpose of classifying the three tiers of assault by seriousness was to ensure that they were organized in a coherent way. The tier below aggravated assault is assault causing bodily harm. Bodily harm is defined in terms of both the significance of the injury and its persistence through time--bodily harm can be either trifling or transient as long as it is not both: *R. v. J.A.*, 2010 ONCA 226 at paras. 101-07, rev'd on other grounds 2011 SCC 28.
- [97] Given that aggravated assault by wounding is clearly intended to be a more serious offence than assault causing bodily harm, both by the penalty that is in place and the fact that the latter is a lesser included offence of the former, the definition of wounding must include a more serious consequence.
- [98] The trial judge, if he followed the Alberta cases cited above, opted for a definition that required that the injury persist more significantly through time, but without reference to the significance of the injury. This ignores the dual nature of our definition of bodily harm and leads to counterintuitive results. An insignificant injury that leaves a small but permanent scar should rarely qualify as aggravated assault. Conversely, a significant interference with the complainant's well-being may not be permanent or long lasting, but it should be open to the trier of fact to determine that it was the consequence of an aggravated assault. A definition of "wound" that requires that the injury be permanent or long-lasting--with no further definition--should not be adopted.
- [99] Nor should "wound" be defined as any injury that meets or even marginally exceeds the boundary for "bodily harm" as long as it bleeds, as the Crown suggests. Parliament has clearly signaled that each kind of assault is more serious than the last. This is an important purpose of Parliament's reorganization of criminal assaults, recognized by courts since that reorganization took place, which would be frustrated if "wound" were defined as a low standard. The amendments necessarily imply that wounds be meaningfully elevated from the standard of bodily harm.
- [100] The 1983 amendments to the Code updated and modernized the law of sexual offences. A primary purpose of the amendments was to recognize that sexual offences are primarily acts of violence: *D.L.W.* at para. 107. In doing so, the amendments created three tiers of assault, which run parallel to three corresponding tiers of sexual assault.

- [101] In 1978, the Law Reform Commission of Canada had recommended that sexual offences be classified as either "sexual interference" or "sexual aggression" based on whether the offence was committed with or without violence or threats of violence: Report on Sexual Offences (Nov. 1978) at 15. The 1983 amendments were at least partially based on the recommendations in that report: House of Commons Debates, 32nd Parl., 1st Sess, Vol. X (7 July 1981) at 11300 (Hon. Ron Irwin).
- [102] But Parliament instead opted to define assaults based on their consequences rather than how they were committed and to create three tiers of assaults rather than two. For each successive tier of assault, the accused is liable to be imprisoned for a significantly longer period of time.
- [103] As I have explained, prior to the 1983 amendments, assaults were not organized hierarchically, with each successive tier including the one below it. Nor were assaults categorized primarily based on their consequences. In the past, assaults were made more serious by virtue of objective circumstances (such as the victim's being engaged in duties as a peace officer) or by specific intent requirements.
- [104] The three-tier scheme replaced both categories of aggravating factors with aggravating consequences. The current scheme does not refer to circumstances that increase the seriousness of assaults. Nor, significantly, do assault causing bodily harm or aggravated assault have specific intent requirements. The mens rea required for aggravated assault is objective foresight of bodily harm: *Godin* at 485. The actual consequence (in this case wounding) need not be intended or subjectively foreseen: *R. v. DeSousa*, [1992] 2 S.C.R. 944 at 965-66. As Justice Sopinka explained in *DeSousa*, at 967, "The implicit rationale of [consequences aggravating liability] is that it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused."
- [105] Given that aggravated assault is primarily distinguished from less serious assaults by virtue of its consequences, it is important to ensure that those consequences are sufficiently more severe than mere bodily harm.
- [106] In *R. v. McCraw*, [1991] 3 S.C.R. 72, a case interpreting the offence of uttering threats, Justice Cory recognized that there is a significant gap between "bodily harm" and the kind of harm that results from an aggravated assault. In defining the phrase "serious bodily harm", he had this to say at 80-81:

"serious bodily harm" does not require proof of the same degree of harm required for aggravated assault described in s. 268 of the Code; that is to say the wounding, disfiguring or endangering of the life of the complainant. Yet it requires greater harm than the mere "bodily harm" described in s. 267; that is hurt or injury that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

[Emphasis added.]

- [107] Justice Cory defined "serious bodily harm", for the purpose of s. 264.1(1)(a), the uttering threats provision, as "any hurt or injury, whether physical or psychological, that interferes in a substantial way with the integrity, health or well-being of the complainant" (McCraw at para. 81).
- [108] Although the word "serious" was removed from the uttering threats provision by s. 16 of the Criminal Law Amendment Act, 1994, S.C. 1994, c. 44, Cory J.'s definition has since been employed in other contexts. In *R. v. Mabior*, 2012 SCC 47 at para. 82, Chief Justice McLachlin applied it to the question of when HIV nondisclosure can rise to the level of fraud vitiating consent to sexual activity. In *R. v. C.D.*, 2005 SCC 78 at paras. 20, 66, 85, Justice Bastarache applied the definition to a provision in the Youth Criminal Justice Act, S.C. 2002, c. 1.
- [109] It is a definition that can potentially encompass relatively transient harm as long as it is sufficiently serious to be a substantial interference, as well as relatively trifling harm that lasts long enough to be substantial. In short, it is an appropriate elevation of the bodily harm standard.
- [110] Although McCraw suggests that a wound would require greater than serious bodily harm, Mabior suggests that serious bodily harm itself would suffice. Chief Justice McLachlin explained:
- [2] Because HIV poses a risk of serious bodily harm, the operative offence is one of aggravated sexual assault...
- [111] In my view, the serious bodily harm standard is workable and comprehensible. It provides a principled way to distinguish between an assault causing bodily harm and the more serious offence of aggravated assault by wounding. By contrast, instructing the trier of fact that an injury qualify as "greater" than serious bodily harm does not provide them with a standard that can be easily applied. Nor does McCraw actually articulate the standard that should be applied to aggravated assaults.
- [112] Finally, the standard in Mabior is more closely related to what that case actually decides. In both cases, the statements were technically obiter dicta. But not all obiter is created equal: *R. v. Henry*, 2005 SCC 76 at para. 57. In Mabior, the statement related to why the accused was convicted of the appropriate offence. By contrast, in McCraw, the statement was intended to aid in locating the definition of "serious bodily harm", which is what was actually at issue.
- [113] To briefly conclude, a wound, as the word is used in s. 268(1) of the Code, is a break in the continuity of the whole skin that constitutes serious bodily harm. Serious bodily harm is any hurt or injury that interferes in a substantial way with the integrity, health or well-being of the complainant. This is a finding of fact, upon the application of the proper legal test.

Disposition

- [114] On a Crown appeal from an acquittal, it must show (1) that an error of law was made, and (2) that there is a reasonable degree of certainty that but for the error, the result would not necessarily have been the same: *R. v. Nuttall*, 2018 BCCA 479 at para. 498.
- [115] The first requirement is met. The Crown submits that the trial judge defined "wound" as requiring "permanent damage or long-standing dysfunction". Mr. Pootlass submits that the trial judge simply determined that Mr. Kenoras's injury was not serious enough to qualify as aggravated assault. In either case, the trial judge erred in law by failing to apply the correct definition of "wound", which is a break in the continuity of the whole skin that constitutes a substantial interference with the physical integrity or well-being of the complainant.
- [116] The second requirement is also met. Absent the trial judge's error, he could certainly have found that Mr. Kenoras's injuries were wounds. It is clear from the trial judge's findings of fact that Mr. Kenoras's injuries were breaks in the continuity of his skin. They bled. This is evidenced by the Brandiz Hotel employee's testimony, which the trial judge accepted, that Mr. Kenoras was bleeding. It is also clear that his injury rose to the level of serious bodily harm. A cut that requires five stitches or staples is a substantial interference with someone's physical integrity. The trial judge's mistaken reliance on a requirement that the injury be permanent or long lasting is the only thing that prevented him from convicting Mr. Pootlass of aggravated assault.
- [117] The Crown asks this Court to exercise its discretion under s. 686(4) of the Code to substitute a conviction for aggravated assault. This discretion is only to be exercised where it is clear that "the trial judge's findings of fact, viewed in light of the applicable law, supported a conviction beyond a reasonable doubt": *R. v. Katigbak*, 2011 SCC 48 at para. 50.
- [118] I agree that this Court can substitute a guilty verdict in these circumstances. Under s. 686(4) (b)(ii), a court of appeal can substitute a guilty verdict on an appeal from an acquittal where the accused would have been found guilty if it were not for the error of law. This also allows the court to substitute a guilty verdict for a greater offence in place of a guilty verdict for a lesser included offence: *R. v. Magoon*, 2016 ABCA 412, *aff'd* 2018 SCC 14. The Crown submits that this Court should substitute a guilty verdict for aggravated assault.
- [119] The trial judge did not conclude that either of Mr. Kenoras's injuries was a break in the continuity of his skin that extended to the dermis, an essential element of aggravated assault by wounding. Regardless, this is a factual finding that would easily have been inferred from the fact that Mr. Kenoras was bleeding and required staples and stitches to close the breaks in his skin. Indeed, a failure to draw that inference from the uncontested evidence of the extent of Mr. Kenoras's injuries would have constituted a palpable and overriding error. Here, Mr. Kenoras's bleeding is decisive evidence of a break in the continuity of his whole skin: *Waters*; *Devine*.
- [120] This is an appropriate case in which to substitute a conviction for aggravated assault.

[121] In the course of the hearing, the Crown advised this Court that Mr. Pootlass had already served the custodial part of the sentence imposed for the assault causing bodily harm conviction and that it is not seeking a further custodial sentence. Given the position the Crown has taken, the proper course is to allow the appeal, substitute a conviction for aggravated assault, and pass no further sentence.

Conclusion

[122] For the reasons above, I would allow the appeal and substitute a conviction for aggravated assault.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Savage"

I AGREE:

"The Honourable Mr. Justice Butler"

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