

THE PROVINCIAL COURT OF MANITOBA

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|-----------------------|---|--------------------|
| BETWEEN: |) | Mr. S. Sivarouban, |
| |) | for the Crown |
| HER MAJESTY THE QUEEN |) | |
| |) | Mr. J. Rogala, |
| - and - |) | for the Accused |
| |) | |
| PATRICK GAVIN, |) | |
| |) | Judgment delivered |
| Accused. |) | November 3, 2017 |

1 CARLSON, P.J. (Orally)
2 Mr. Patrick Gavin is charged with operating a
3 motor vehicle while disqualified from doing so, in
4 Winnipeg, Manitoba, on October 22nd, 2016, contrary to
5 Section 259(4) of the Criminal Code. Mr. Gavin admits that
6 on that date he was bound, and knew he was bound, by a
7 court order that prohibited him from driving. A copy of
8 that order was entered as an exhibit at trial. That order
9 was issued on December 2nd, 2015 when Mr. Gavin was
10 convicted of driving while disqualified. Jurisdiction and
11 identification were not agreed to, but were established by
12 the evidence.

13 The Crown alleges that on October 22nd, 2016,
14 when Mr. Gavin attended to pick up his young son, Joseph,
15 from the care of his son's mother, Ms. Commeault, he was
16 driving the vehicle in which he arrived and departed.

17 Mr. Gavin's defence is that he was not driving
18 and that he was a passenger in a vehicle being driven by
19 his father, Kevin Gavin.

20 The issue is a very straightforward factual one.

1 Was Mr. Gavin driving a motor vehicle on October 22nd,
2 2016, as alleged? If he was, he's guilty of the offence.
3 If he wasn't, he's not guilty. Since I wasn't there, I
4 don't know if he was driving or not.

5 The court must analyze the evidence, including
6 assessing the credibility of the witnesses, to determine
7 whether the Crown has discharged its onus and persuaded the
8 court beyond a reasonable doubt that Mr. Gavin was driving.

9 The Crown called Emily Commeault, the former
10 domestic partner of the accused. Defence counsel called
11 Mr. Gavin's former family law lawyer, Ms. Shasta Benaim,
12 and the accused's father, Kevin Gavin. As well, Mr.
13 Patrick Gavin testified on his own behalf. In reviewing
14 Ms. Commeault's evidence, Ms. Commeault and Mr. Gavin share
15 a son, Joseph, who's now four years old. Since they
16 separated, they've shared care and control of Joseph in
17 accordance with various family court orders as altered here
18 and there by mediation agreements and sometimes by
19 agreements between the two of them.

20 On October 22nd, 2016, Joseph had been in Ms.
21 Commeault's care, and in accordance with their arrangement,
22 Mr. Gavin was coming to pick Joseph up at Ms. Commeault's
23 apartment in order to take Joseph back into his care.

24 Ms. Commeault and Joseph met Mr. Gavin in the
25 lobby of her apartment block, as they often did. Ms.
26 Commeault testified that Mr. Gavin smelled like whiskey,
27 but she asked him about it, and that he told her it was his
28 cologne. She said she asked him if he'd been drinking, and
29 he said no. Ms. Commeault said she observed Mr. Gavin take
30 Joseph out to his vehicle, which she could see was parked
31 outside, put Joseph in the front passenger side of the
32 vehicle. She said she then saw Mr. Gavin go around to the
33 front driver's side and get in on the driver's side and
34 drive the vehicle away. She says he was driving a white

1 cargo van that would only have had a front seat and room
2 for two people. She said she observed this through the
3 window of her lobby and that his vehicle was parked right
4 outside in front of the window. She was 20-to-30 feet away
5 from the vehicle.

6 She said she believed Mr. Gavin was drinking and
7 driving. Also, it was a term of the court order that Mr.
8 Gavin was not to consume alcohol when Joseph is in his
9 care. Ms. Commeault says she was worried about Joseph's
10 wellbeing, so she called 911 and requested police do a
11 wellness check on Joseph. Ms. Commeault said she did not
12 call police simply because Mr. Gavin was driving. In fact,
13 she said she did not even know he was subject to a court
14 order prohibiting him from driving. She said it was normal
15 for Mr. Gavin to pick Joseph up in his vehicle and drive.
16 He'd been doing it for a couple of months by that time.

17 On cross-examination, it was suggested to Ms.
18 Commeault that Mr. Gavin's father, Kevin Gavin, had been
19 driving the vehicle. She said no, she saw Patrick Gavin
20 get out of and back into the driver's seat, and she saw him
21 drive the vehicle away from her apartment block.

22 Defence counsel argues that Ms. Commeault's
23 judgment was so clouded by her desire to have more time
24 with Joseph that she was mistaken about the fact Patrick
25 Gavin was driving when he picked Joseph up on October 22nd.
26 To that end Ms. Commeault was asked a lot of questions on
27 cross-examination about the details of the family court
28 orders, the domestic court proceedings, mediation, and text
29 messages back and forth. Some of those orders and text
30 messages were entered as exhibits. None of those, or
31 evidence about the dealings between the two of them
32 regarding Joseph's care and control, is really relevant to
33 whether Patrick Gavin was driving or not, unless any of
34 that evidence supports that Ms. Commeault is not telling

1 the truth about Patrick Gavin driving, or as defence says,
2 supports that Ms. Commeault may be mistaken that he was
3 driving.

4 What happened after the alleged offence of
5 driving was the subject of much questioning on cross-
6 examination of Ms. Commeault. Again, it is not relevant to
7 whether or not Patrick Gavin was driving. It's only
8 relevant if it supports the defence argument that Ms.
9 Commeault was so set on getting more time with Joseph that
10 her observations and possibly her recollection about
11 Patrick Gavin's pickup of Joseph on October 22nd are
12 incorrect.

13 Ms. Commeault testified that after Patrick Gavin
14 picked Joseph up and drove off with him, she called 911.
15 She said that police contacted her to advise that a warrant
16 would be issued for his arrest if he did not turn himself
17 in, and that once arrested, he would be in jail. Ms.
18 Commeault confirmed she believed that if Mr. Gavin were in
19 jail, he would not be able to have Joseph with him.

20 On October 24th, so two days later, Joseph was
21 again in Ms. Commeault's care, and she was, according to
22 court order, to return him to Mr. Gavin. However, she says
23 that since she believed he was then in jail, she did not
24 return Joseph to him as she was required to do by the terms
25 of the court order despite Patrick Gavin's request that she
26 do so, and she sent an email to Patrick Gavin's family law
27 lawyer advising because she understood there was a warrant
28 for his arrest, she should be keeping Joseph with her for
29 the present time. Ms. Commeault admits that she breached
30 the court order by keeping Joseph.

31 Ultimately, Mr. Gavin's father, Kevin Gavin, came
32 to Ms. Commeault's apartment on the evening of October 24th,
33 requesting the return of Joseph on behalf of Patrick Gavin.
34 She said she did not give Joseph to Kevin Gavin because she

1 had some understanding that Mr. Kevin Gavin was not to be
2 alone with Joseph in accordance with some Child and Family
3 Service's guidelines.

4 The next day, October 25th, she received an email
5 from Mr. Gavin's family lawyer, Ms. Benaim, advising if Ms.
6 Commeault did not return Joseph to Mr. Gavin, he would
7 pursue an order of contempt against her.

8 Ultimately, Ms. Commeault did return Joseph that
9 day to Patrick Gavin's stepmother, who came to pick Joseph
10 up. That is Ms. Commeault's evidence and the evidence
11 called by the Crown.

12 At the start of the defence case, counsel advised
13 there was an agreement as to a piece of evidence. That
14 agreement was that Winnipeg Police Services Constable Day
15 attended to Mr. Gavin's residence at 11:30 p.m. on October
16 22nd, that Constable Day has no notes about whether he
17 observed a white cargo van at or near Mr. Gavin's
18 residence, and that Constable Day cannot recall if there
19 was a white cargo van at the residence.

20 Patrick Gavin's family lawyer, Shasta Benaim,
21 testified she confirmed that she had advised Ms. Commeault
22 by email on October 25th that she needed to arrange to
23 return Joseph to Mr. Gavin by the end of the day or
24 proceedings would be commenced against her for contempt.

25 Patrick Gavin testified. He testified that he
26 was to pick up Joseph at 6:00 p.m. on October 22nd. He
27 said that since he was not able to drive due to the driving
28 prohibition, he always has several options for picking up
29 and dropping off Joseph. Sometimes he would take the bus,
30 sometimes he would ask a friend to drive him, and sometimes
31 he would ask a family member to drive him.

32 On October 22nd, he says he called his father,
33 Kevin Gavin, who agreed to take him to pick up Joseph. He
34 says his father picked him up at his home around 6:00 p.m.,

1 and they then headed to Ms. Commeault's residence. He says
2 they attended in a white truck. He advised that his father
3 works for the Manitoba government, and they were in a
4 government white Dodge pick-up truck. He was in the
5 passenger seat and his father, Kevin Gavin, was driving.

6 When they arrived at the apartment building, he
7 sent a text message to Ms. Commeault that he had arrived,
8 and he went into the building and met Ms. Commeault and
9 Joseph in the lobby. He does recall Ms. Commeault asking
10 if he'd been drinking and that he said no, and he says he
11 had not been drinking. He says he and Joseph left, went to
12 the vehicle, he put Joseph in a car seat, and then he got
13 in. He says sometimes he would sit in the front passenger
14 seat when his dad drove, and sometimes he would sit in the
15 back with Joseph. It would depend if his father had work
16 equipment in the vehicle. He believes on October 22nd that
17 he sat in the back with Joseph. He says his father then
18 drove him to his, Patrick Gavin's, home. He took Joseph
19 out of the car seat, and he and Joseph went inside. He
20 said that he had owned a white van for several years that
21 he used for work, but that that van was stolen and not
22 recovered, and he settled with MPI for the value of the van
23 in early 2016, so before this alleged incident. So he says
24 at the time this happened he did not have a white van.
25 Patrick Gavin denied he was driving as alleged on October
26 22nd, 2016.

27 As to the incident on October 24th, Mr. Gavin
28 says that Ms. Commeault had told him she would not be
29 returning Joseph after the visit. He says he got his
30 father to drive him to pick up Joseph, along with his
31 girlfriend. When they got to the apartment, his father and
32 his girlfriend went to Ms. Commeault's suite. The police
33 were called, and he says that he stayed out of sight, and
34 when it was clear Ms. Commeault would not be returning

1 Joseph, he left the building, got on a bus, and went home.

2 Ultimately, after he told his family lawyer of
3 the situation, and based on what he understood to be his
4 family lawyer's communication with Ms. Commeault, Ms.
5 Commeault called him and said she'd return Joseph.
6 Arrangements were made for Kevin Gavin and his wife to pick
7 Joseph up, which they did around 8:00 p.m., and returned
8 Joseph to Patrick Gavin.

9 Mr. Gavin was cross-examined on his criminal
10 record. He has convictions for impaired driving, mischief,
11 resisting a peace officer, two breaches of undertaking, a
12 drive disqualified, and most recently, from February 2017,
13 personation and identity fraud.

14 Kevin Gavin testified. He's the father of
15 Patrick Gavin. He testified that he quite often drove
16 Patrick back and forth to pick up and drop off Joseph at
17 Ms. Commeault's residence. He recalls October 22nd
18 specifically because of the incident that took place two
19 days later on October 24th when he went to Ms. Commeault's
20 to pick Joseph up and Ms. Commeault refused to return
21 Joseph. It is remembering that incident that he says
22 permits him to remember the specifics of the October 22nd
23 pick up of Joseph.

24 He says that on October 22nd Patrick called him
25 around 4:00 p.m., asking if he could take him to pick up
26 Joseph. Kevin Gavin said he would, and he picked Patrick
27 up. He drove Patrick to Ms. Commeault's residence. He
28 says he was driving a government vehicle. It could have
29 been a Dodge Ram four-by-four or it could have been a van.
30 He does say that all the government vehicles he's driven
31 have been white.

32 He says they arrived in front of Ms. Commeault's
33 apartment block. There's a large parking lot in front of
34 the block, and he says he parked close, close to the door,

1 right beside the handicap spot. He says Patrick texted Ms.
2 Commeault, and then waited for her to come down to the
3 lobby with Joseph. He says Patrick Gavin then got out and
4 went in to get Joseph. He says Patrick Gavin put Joseph in
5 the backseat of the truck, and would sit with Joseph in the
6 back or sit with him in the front. Where Patrick Gavin sat
7 would depend on how much equipment he had in the vehicle on
8 a given day. Kevin Gavin says he was driving the vehicle,
9 not Patrick. He drove Patrick and Joseph to Patrick's
10 residence and dropped them off. He went through the
11 October 24th incident saying he and Patrick's girlfriend
12 went with Patrick to pick up Joseph, that Ms. Commeault
13 would not return Joseph, so he, Kevin Gavin, called the
14 police. He confirmed that Patrick Gavin left the apartment
15 block. He agreed he got upset, and the police asked him,
16 Kevin Gavin, to leave. The next day he drove his wife to
17 pick up Joseph from Ms. Commeault's residence.

18 On cross-examination, Crown counsel asked
19 questions purporting to go to Kevin Gavin's credibility.
20 It was established that in 2014 he gave a statement to
21 police about an incident involving another son, Andrew
22 Gavin, committing some mischief. After the statement had
23 been given, he spoke to a Crown attorney and seemed to
24 change his position. When asked about it, Mr. Gavin said
25 in quote, I quote:

26

27 "That statement was not sworn on the Bible, it's
28 completely different than today. He responded to a question
29 from Crown counsel. I wasn't lying either time, I was
30 trying to fix a problem."

31

32 So that, essentially, is the, the relevant
33 evidence.

34 In terms of the law, since both the complainant

1 and the accused testified, the former saying she saw
2 Patrick Gavin driving and the latter saying he wasn't
3 driving, the court needs to review the evidence in the
4 context of the case of R. v. W.(D.).

5 Ultimately, if the court believes Mr. Gavin, I
6 must acquit him. If I do not necessarily believe him, but
7 his evidence leaves me with reasonable doubt as to his
8 guilt, then I must acquit him. If I do not have reasonable
9 doubt at that stage, I must then consider all the evidence
10 I do accept and decide if that evidence leaves me with
11 reasonable doubt as to his guilt. If it does, I must
12 acquit. If not, I must convict.

13 It's important for me to say that using the
14 three-step approach set out in the W.(D.) case does not
15 mean I'm deciding whether I prefer the evidence of the
16 complainant over the evidence of Mr. Gavin and his father
17 or vice versa. I do not simply choose which of them I
18 think is telling the truth. The structure of the W.(D.)
19 approach protects the presumption of innocence and
20 recognizes that the onus is on the Crown to prove the
21 offence beyond a reasonable doubt.

22 When applying the first two branches and
23 assessing the defence evidence, I must do so in the context
24 of all of the evidence.

25 Turning to Patrick Gavin's evidence. Clearly, as
26 Crown counsel points out, he does have a related criminal
27 record that includes a recent offence of dishonesty, and he
28 has driven while disqualified before. He did evade police
29 from October 22nd to 24th, when he knew police were looking
30 for him. Neither of those things, nor both of them
31 together, means he is not necessarily telling the truth
32 about not driving on October 22nd. Patrick Gavin gave his
33 evidence in a straightforward way and a careful review of
34 his evidence makes it clear that his evidence really was

1 not shaken on cross-examination. Mr. Gavin did not appear
2 hostile toward Ms. Commeault either at trial or even at the
3 time of the incident as reflected in text messages between
4 them. He just seemed very frustrated with her. Patrick
5 Gavin did not claim to have a specific recollection of
6 certain details about the incident, which was about a year
7 ago, and he was very candid in admitting that he couldn't
8 remember certain details. For example, he said he thought
9 they were in his father's white pickup government truck,
10 but that sometimes his father had other government
11 vehicles, he couldn't remember which one it was. He
12 doesn't recall exactly where they parked; he couldn't
13 remember if Ms. Commeault and Joseph were already in the
14 lobby when he got there, or if he got to the lobby first;
15 and he can't recall if he sat in the front seat or if he
16 sat in the back with Joseph.

17 The fact that Mr. Gavin was willing to admit that
18 he couldn't recall certain specific details about a
19 particular pick up given the many pickups that he's made of
20 Joseph, in my view enhances his credibility to a certain
21 degree.

22 As to the vehicle itself, Ms. Commeault describes
23 a white cargo van which she says Mr. Gavin often arrived in
24 to pick up Joseph. Mr. Gavin says he used to have exactly
25 that kind of vehicle, but no longer had it at the time of
26 the alleged incident.

27 Both Patrick Gavin and Kevin Gavin said they were
28 in a white government van of some type. The officer who
29 attended Patrick Gavin's home five hours after the alleged
30 incident, just before midnight, doesn't recall a white van
31 being there.

32 Overall, what can be said about the van is just
33 that the evidence does not establish that Patrick Gavin had
34 a white cargo van at the time of the alleged incident.

1 The evidence of Kevin Gavin is a bit of a two-
2 edged sword. Certainly, it purports to confirm that he was
3 the driver on October 22nd, and not Patrick Gavin. The
4 court does have some concerns about the seriousness with
5 which he may regard the giving of evidence based on his
6 comments elicited by the Crown on cross-examination, not
7 about the substance of his statement or conversation with
8 other Crown counsel about the incident involving his son,
9 Andrew, but his comments about how the giving of evidence
10 sworn on the Bible is different than giving a statement to
11 the police, suggesting that perhaps one might not be
12 required to tell the whole truth in the latter situation,
13 and his evidence about trying to change his version of
14 things so the Crown would drop the charges against his
15 other son.

16 When challenged on that statement and discussions
17 with Crown counsel, Kevin Gavin became quite upset.
18 However, I do note that Kevin Gavin's accounts of the
19 October 24th incident and the delivery of Joseph to his
20 wife on October 25th do line up with the accounts given
21 both by Ms. Commeault and by Patrick Gavin to the extent
22 that Patrick Gavin was present. His account of the pickup
23 of Joseph on October 22nd itself, leaving out the issue of
24 who was driving, also accords in some detail with the
25 accounts of both Ms. Commeault and Patrick Gavin in terms
26 of pulling up, parking in the parking lot near the door,
27 that Patrick Gavin texted Ms. Commeault to advise he'd
28 arrived, and then waited for her to come to the lobby.
29 These details do give credence to the prospect that Kevin
30 Gavin was there.

31 As to Ms. Commeault's evidence, when she called
32 police she didn't know that Mr. Gavin was subject to a
33 driving prohibition. She called because she was worried
34 about him driving while intoxicated. Ms. Commeault was

1 somewhat argumentative on cross-examination. She was non-
2 responsive to a number of questions, and she certainly
3 added commentary to answers to reinforce her view that she
4 was justified in some of her actions. Although that is
5 true, the fact she called police right after the fact to
6 advise of her concern that Mr. Gavin may be driving while
7 intoxicated tells me that she honestly believed Mr. Gavin
8 was indeed driving at that time. She didn't know about the
9 prohibition, and she didn't just call police to assert he
10 was operating a motor vehicle. So I do not believe that
11 Ms. Commeault was lying, nor do I believe that she called
12 police frivolously to get Mr. Gavin in trouble.

13 Defence counsel, in fact, doesn't allege she was
14 lying or argue that she was lying. He says that her
15 judgment was, with respect to Mr. Gavin, clouded and she
16 may have been mistaken that he was driving.

17 Based on all of the evidence, I agree that that
18 may, indeed, have been the case.

19 In applying the W.(D.) analysis on the first
20 branch, I cannot simply believe Patrick Gavin's evidence
21 given Ms. Commeault's evidence that he was driving. When I
22 get to the second branch of W.(D.), I do have to find that
23 I am left with reasonable doubt that Patrick Gavin was
24 driving. He may have been, but that's not the standard I
25 have to apply.

26 Given that his evidence wasn't really shaken on
27 cross-examination and the fact that there was some
28 corroboration by his father, whose evidence did line up
29 with his, and even with Ms. Commeault's evidence on other
30 details, I do have to have a reasonable doubt as to Patrick
31 Gavin's guilt. Accordingly, I'm not satisfied beyond a
32 reasonable doubt that Patrick Gavin was operating a motor
33 vehicle on October 22nd, 2016, and I must acquit him.

34