The Criminal Law Quarterly

Volume 50, Number 4

September 2005

Editorial

Jobidon Revisited in Paice

The Supreme Court’s decision in *R. v. Jobidon*, [1991] 2 S.C.R. 714, 66 C.C.C. (3d) 454, 7 C.R. (4th) 233 that consent to a fist fight would be nullified in cases in which the accused intentionally caused serious hurt or non-trivial bodily harm was rightly controversial. The majority’s decision relied heavily on the English common law and was at odds with the clear language of s. 265(1) of the *Criminal Code*, which limits assault to the intentional application of force “without the consent of another person”.

*Jobidon* had the effect of converting some consensual fist fights into assaults and some unintended and unanticipated deaths from such fights into manslaughters. This may be good social policy, but as the late Justice Sopinka argued in a forceful dissent, Parliament was in a better position both to make and to implement policy decisions that would expand the criminal sanction.

The Supreme Court’s recent decision in *R. v. Paice*, [2005] 1 S.C.R. 339, 251 D.L.R. (4th) 193, 195 C.C.C. (3d) 97 places some limits on *Jobidon*. It clarifies what is required to nullify consent and what consensual fights will result in assault and manslaughter convictions. At the same time, however, the decision unfortunately fails to really reconsider *Jobidon*. It is not clear whether this failure stems from continued commitment by the court to the policy of *Jobidon* or from a failure to argue that the case should be reversed.

The facts of *Paice* were remarkably similar to those of *Jobidon*. This is not surprising given the frequent combination of alcohol and male aggression. Indeed, the similarity of the facts underlines the importance and the potential reach of the court’s ruling in *Jobidon*.

In *Paice*, as in *Jobidon*, a celebration at a bar resulted in an altercation, a decision by the parties to take it outside and the resultant tragic death of one of the parties. The accused Paice and the deceased, Baulk, agreed to fight in the parking lot of a bar. Baulk pushed Paice who then struck Baulk in the face with his elbow causing Baulk to fall and hit his head. He then punched the fallen Baulk three more times. Baulk subsequently died.

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Paise seemed to argue for the reversal of Jobidon by claiming that Baulk's consent to the fight meant that he was not guilty of assault as the unlawful act in the manslaughter charge. The Supreme Court reaffirmed Jobidon, but subject to the important caveat that the English common law rule that consent was nullified if bodily harm was intended or caused cannot "strictly apply, since the definition of assault in s. 265 is explicitly restricted to intentional application of force. Any test in our law which incorporated the English perspective would of necessity have to confine itself to bodily harm intended and caused." [Emphasis in original.]
(Paise at para. 11, quoting Jobidon at p. 760.)

Charron J. for the majority stated that if the broader English rule was used: the result would be to criminalize numerous activities that were never intended by Parliament to come within the ambit of the assault provisions and would go beyond the policy considerations identified in Jobidon. For example, if causation alone sufficed, a person who agreed to engage in a playful wrestling match with another could end up being criminally responsible if, even by accident, he caused serious bodily harm to the other during the course of play... Conversely, the intention to cause serious bodily harm alone cannot serve to negate the other person's consent to the application of force if, in fact, no bodily harm is caused. The activity, a consensual application of force that causes no serious bodily harm, would fall within the scope of the consent and not in any way fall within the Code definition of assault. Yet, it would be criminalized by judicial fiat. In my view, this would constitute an unwarranted extension of the principle in Jobidon.

(Paise, at para. 12.)

Paise clearly limits Jobidon to situations where non-trivial bodily harm is both intended and caused. Although this limits Jobidon, it also duplicates its tendency to overlook the precise language of the Criminal Code. The result is that the court now seems to have converted the reference in s. 265(1)(a) of the Criminal Code to the intentional application of force into the different concept of the intentional infliction of non-trivial bodily harm. As with the primary ruling in Jobidon, this may be good policy, but it is policy that does not square with the language that Parliament has used in the Criminal Code.

Although the court may have been wise not to extend Jobidon to the non-intentional infliction of bodily harm, the rationale for such a restriction cannot lie in the language of s. 265(1)(a) of the Criminal Code, but rather on limits on the court's policy rationale for nullifying consent in the first place. Given this, it is disappointing that the court did not reconsider the policy rationale for Jobidon in its entirety.

Justice Fish in a separate concurring opinion disassociated himself from the above interpretation of Jobidon for reasons that may relate to concerns about the actual language of the Criminal Code. He stressed that the intentional application of force requirement in s. 265(1)(a) applies to all forms of assault including s. 267(b), which defines assault causing bodily harm as the intentional application of force that "causes bodily harm to the complainant". He also adverted to jurisprudence that has concluded that such bodily harm does not have to be either intended or foreseeable to the accused. (Paise, at para. 26).

Justice Fish seems to be concerned that the majority's requirement that bodily harm be both intended and caused for Jobidon to apply will sit uneasily with the language of the Criminal Code. This is a valid concern because the majority's decision adds an intent requirement that is specific to the Jobidon issue of vitiated consent to consensual fights and is not required when assault laws are applied in other contexts. It perhaps should not be surprising that a decision that finessed clear language of the Criminal Code should inspire more finessing in order to limit its ambit. The shortcomings of parents unfortunately often appear in their children.

What is not clear from either judgment in Paise is whether the court has an appetite to really reconsider Jobidon. Justice Charron for the majority is clearly concerned about extending assault "by judicial fiat" so far as to apply to unintentional causing of bodily harm or to cases where the accused has not actually caused bodily harm. If the extension of the crime of assault "by judicial fiat" is wrong in such circumstances, it is not clear why it's extension in cases of consensual fist fights that intentionally cause bodily harm is right.

Justice Fish seems to suggest that consent should be nullified if the accused either intends or causes bodily harm. This would expand Jobidon to cases where bodily harm is inflicted accidentally, as well as not at all. At the same time, however, he also states that he did not want to be taken as agreeing with the broad English common law rule and that the court was not required or invited in Paise to reconsider the importation of the common law rule in Jobidon (Paise, at para. 29). This hints that he at least might be prepared to reconsider Jobidon in future cases.

In the end, the court has clarified that Jobidon will only apply when bodily harm is both intended and caused in consensual fist fights, but it has failed to reconsider the problematic decision to expand the law of assault through common law concepts that are at odds with the language of the Code. Although some aspects of Jobidon have now been clarified, the case and now its progeny still do not fit the way that Parliament has, rightly or wrongly, defined assault in our Criminal Code.

K.R.