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## Adding *Zora* to the 1L Crime Syllabus

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**Case Commented On:** *R v Zora*, [2020 SCC 14 \(CanLII\)](#)

It is never too soon to start thinking about the fall semester – in fact, I keep a running list of changes to make to my syllabus throughout the year. But this year, it seems that the newest Supreme Court of Canada decision in *R v Zora*, [2020 SCC 14 \(CanLII\)](#), is going to be added to my syllabus in more places than one. *Zora* is a rare decision in which the Court does much with so little. I do not say this flippantly but seriously. On the surface, the issue of whether the offence of failure to comply with a release order under [section 145\(3\)](#) of the *Criminal Code*, [RSC 1985, c C-46](#), requires objective or subjective *mens rea* seems trite. In fact, any 1L student might be asked to do such an analysis on a law school exam. Yet, *Zora* soars as Justice Sheilah Martin expertly analyzes the issue holistically, humanely and firmly anchored in the *Charter*. In doing so, Justice Martin, on behalf of the entire Court, is weaving together a narrative based on the histories of all those accused who have carried their bail conditions like dead weight, from the moment of arrest and right up to the courtroom doors. In this post, I will share 5 reasons why I am adding *Zora* to my 1L Crime syllabus.

### No. 1 – Pure Humanity

The number one reason to add *Zora* to the must-read list is the pure humanity of the decision. Justice Martin reminds us that bail principles are integral to Chaycen Zora's personal story. But at the same time, Chaycen is mirrored in the many similar failure to comply narratives, scattered throughout the bail system. This means the *Zora* decision is centred on the individual. Bail is an individualized process. The conditions must be tailored to the individual (at paras 22, 25, 47 & 88) and to the particular charges faced by that individual subject to those conditions specifically required to ensure attendance in court, protection of the public, and maintaining confidence in the administration of justice (see [s 515\(10\)](#) and at paras 21 & 25). No two people are alike and therefore no two bail releases are alike (at para 47). Sentencing too is an individualized process, performed at the last stage of a criminal case, and requiring a delicate balancing of principles. Bail, as the first contact an accused person has with the criminal justice system, requires this same dexterous balancing. But, unlike sentencing, bail occurs in the pre-trial stage where other rights and principles come into play, and that makes all the difference.

Chaycen's story starts in September 2015, when he was charged with allegedly being in possession of drugs for the purposes of trafficking. I say "allegedly" because Chaycen, like any accused person, is presumed innocent until found guilty by an independent and impartial court of law. Let's be clear, this charge is not for dealing in drugs. Possession for the purpose of

trafficking is usually laid when a person is in possession of an amount of drugs beyond mere personal possession, and the purpose can be a matter of contention.

After being charged, Chaycen had to wait before his charges were heard in court. An out-of-custody accused person will wait longer for trial than an in-custody accused. Someone in pre-trial custody is “doing time” without the benefit of trial, at a time when they are presumed innocent of doing any crime, and certainly before sentence is imposed. Even though Chaycen was not inside a jail, he was also “doing time” while waiting for trial. Chaycen may not have been sitting in jail but his life and liberty was on hold until, sometime down the road to justice, his trial was heard.

In the meantime, Chaycen was placed on a form of release from custody called a recognizance. A recognizance, according to the now Justice Gary Trotter in *The Law of Bail in Canada* (Scarborough: Carswell, 1999) at 450, is a “foundational document,” recording the acknowledgement by the accused person to follow the conditions and obligations outlined in that document as a basis for his freedom. That freedom comes with a cost. In the case of Chaycen, his recognizance included 12 conditions of his release (at para 8). Most of the conditions were not enumerated in the *Criminal Code* and were imposed because the bail judge considered them “desirable” (see [s 515\(4\)](#) of the *Code*). One such condition placed Chaycen under “house arrest,” which was further enforced through another condition that he “present himself at the door of his residence within five minutes of a peace officer or bail supervisor attending to confirm compliance” (at para 8). Justice Martin has much to say about these many and varied “questionable” non-enumerated conditions (at para 5) and the adverse impact they can have on an accused person’s life, particularly the vulnerable and marginalized (including those who are poor, have addictions or mental illnesses, and /or are Indigenous (see paras 5, 79 & 97)).

The police regularly attended Chaycen’s home for a house arrest compliance check and Chaycen dutifully presented himself at the door of his home as required. However, twice, over a long weekend, the police attended and Chaycen did not present himself at the door. Chaycen was a drug user and was doing methadone treatments. These treatments made him tired and he did not hear the officers at his door. For this, he was charged with four counts of failure to comply with his release conditions pursuant to section 145(3) of the *Criminal Code* (breach sections have since been amended as discussed at para 18); two charges of failure to comply with the house arrest and two charges for failing to attend at the door as required. At trial, Chaycen was acquitted of failure to comply with the house arrest condition due to a lack of evidence, but convicted of two counts of failure to comply with the condition that he present himself at the door when required.

Zora’s story confirms why bail conditions must be customized to each person’s personal story. Bail conditions should “attenuate risks that would otherwise prevent the accused’s release without that condition” (at para 85) and not become a “personal source of criminal liability” (at para 6). This potential liability, Justice Martin suggests, may have “profound implications” on an individual’s life (at para 54). A person convicted of failure to comply faces up to two years imprisonment and a criminal record “with the associated stigma and difficulties this can bring in respect of employment, housing, and family responsibilities” (at para 54).

One of Chaycen’s bail conditions specifically can serve as an example of how precarious life on bail can be where the conditions are not crafted with care and thought to the person’s ability to comply. Chaycen was required to “obey all rules and regulations” of his home (at para 8). We do not know what those house rules would be in Chaycen’s situation, but we can imagine that there may be trivial rules, wholly unconnected with the drug offences and bail objectives, such as keeping his room neat and tidy. Should Chaycen fail to comply with this rule, he could face a criminal charge. Justice Martin considers this an improper delegation of the judicial officer’s authority. To ground a criminal charge on the basis of amorphous rules stretches the boundaries of criminal law too far. This is just one example of many such bail conditions that set people up for failure in a system that has little room for second chances.

Another example referenced in *Zora* offers a further glimpse into the potential oppressive effects of bail conditions (at paras 87 & 96). In *R v Omeasoo*, [2013 ABPC 328 \(CanLII\)](#), Jennifer Omeasoo called the police to protect her from domestic abuse, but instead was charged with failure to comply with her bail as she was in breach of the non-enumerated condition requiring her to refrain from the consumption of alcohol. Not only did the bail condition set her up for failure as a person struggling with an addiction, but it also punished her for relying on the authorities for help. Bail conditions, imposed without individualization, can adversely impact vulnerable people like Jennifer and those racialized groups who are continually overrepresented in the justice system (*Zora* at paras 26 & 79).

## **No. 2 – Restraint and Review**

Justice Martin gives those of us involved in the criminal justice system another reason to read *Zora*, and that is the easily referenced credo that must guide all actions in the pre-trial phase: restraint and review (at para 6). The principle of restraint and the need for continual review throughout the pre-trial phase is the foundation of the bail system. Restraint requires judges and lawyers to start with liberty and then fine-tune release dependent on bail principles. The goal of minimal state interference in the accused person’s life pending trial and the use of review throughout the process ensures that non-criminal responses are the first step when the minimal requirements are not enough.

Review must be meaningful. Everyone involved in bail must “carefully scrutinize” (at para 6) release conditions. There are many points of entry into the statutory regime that allow for judicial review of bail release. For instance, should the accused reoffend while on bail, the Crown can apply for a revocation of that bail (see ss [521](#) & [523](#)). An accused who wishes to dispense of a condition can apply for a bail variation (see [s.520](#)). For instance, bail variations have recently responded to the material change of circumstances triggered by COVID-19 (see a discussion in *R v Ledesma*, [2020 ABCA 194 \(CanLII\)](#)). Review acknowledges that bail court is “an expediated process” which “is often based on limited information” (*Zora* at para 59). It also acts as the “risk management” system of the administration of justice (at para 65) and is an immediate means to “curtail the statutorily identified risks posed by the particular person” (at para 25). Criminal charges for failure to comply with bail conditions, due to their punitive nature, should be used as “means of last resort” (at para 69).

A focus on restraint and review requires vigilance of all members of the justice system – lawyers and judges, police, and bail supervisors alike. It provides a reasonable alternative to the piling on of failure to comply charges and serves to break the “vicious cycle” (at paras 5 & 57) of re-offending and incarceration. It brings about the desired result without further stigmatizing the accused person through criminal charges. It ends the revolving door syndrome, symbolized in the ‘catch and release’ attitude of the justice system (at para 57).

Although Justice Martin gives us the phrase “restraint and review” to capture, in an abbreviated form, the essence of the bail system, these principles are now firmly imbedded into the statutory bail sections in the *Criminal Code* (see e.g. [s 493.1](#)). Even so, it is essential to the sustainability of the bail system that *Zora* emphasizes these twin principles.

### **No. 3 – The Charter Rules!**

This leads me to the third reason why *Zora* will be on my criminal law syllabus – because the *Charter* rules! The Court brings *Charter* rights and values into sharp focus in *Zora*. The decision is about reasonable bail, which is protected under [section 11\(e\) of the Charter](#) (the right “not to be denied reasonable bail without just cause”). But section 11(e), like so many *Charter* rights, does not stand alone. It is animated by the presumption of innocence, which is a *Charter* right under section 11(d), but also a principle of fundamental justice under section 7 of the *Charter*. The presumption of innocence is the golden thread that runs throughout the criminal justice system and it must not be set aside, misplaced, or hidden. *Zora* revels in the presumption of innocence, referencing this core value 20 times throughout the decision.

But that’s not all; the presumption of innocence is inextricably tied to liberty interests. The freedom to go about our daily lives and to make decisions on how we will conduct our lives is a core *Charter* right and value. Bail, innocence, and liberty all come together in *Zora*. Reasonable bail requires reasonable conditions. Reasonable conditions must be carefully imposed in light of the presumption of innocence. Bail conditions are neither punishment nor treatment (at para 85). They can restrict otherwise legitimate activities we freely engage in such as travel, enjoying a drink with friends, or simply speaking on the phone (at para 2). One’s self-autonomy is constantly challenged through bail conditions that impinge upon liberty interests.

In reading *Zora*, we see how the *Charter* can apply on the micro-level. It suggests a *Charter* in action as *Charter* rights and values merge together in all phases of the Court’s decision. For example, the *Oakes* test (*R v Oakes*, [1986 CanLII 46 \(SCC\)](#), [1986] 1 SCR 103) for determining whether violation of a *Charter* right is saved under section 1, is applied in *Zora* as a set of organic principles, bringing home the need for clearly articulated bail conditions that stay within the objectives of the bail regime as found under the *Criminal Code* and as interpreted by case law. Bail conditions violate liberty and there must be built-in justifications for interfering in this right to truly create a bail system that is fair, just, and unbiased. Thus, the liberty interest can only be protected if bail conditions are minimally intrusive, logically connected, and proportional to the three objectives of conditional release: to ensure the accused attends for trial, to protect the public and safety, and to promote confidence in the administration of justice (at paras 70, 81-89 & 90).

Moreover, all of these bail release values are held together by the principle of restraint, with all of its constitutional dimensions (at para 26). The criminal justice system is founded on this principle of restraint because without it, we will no longer be a free and democratic society. Rather, if we imposed punishment before conviction, if we imposed conditions unconnected to the charges facing the accused person, we would be empowering a system based on arbitrariness, vagueness and promoting grossly disproportionate legal rules. A justice system that permits this cannot call itself a justice system at all.

#### **No. 4 – Re-bottling the Ink on Fault**

Academically and judicially speaking, “more ink has been spilled” on the fault element than any other criminal law concept (see *R v ADH*, [2013 SCC 28 \(CanLII\)](#) at para 94). It is a tricky concept, requiring the trier of fact to construct the mindset of an individual out of what at times seems like thin air in an effort to determine what they were thinking at the time of their actions. This form of liability, called subjective *mens rea*, is presumed to be required for crimes to ensure that only those who are morally blameworthy are subject to criminal sanctions. The other form of criminal liability, objective *mens rea*, lies outside of the inner thoughts of the accused and is based on the reasonable person. In determining objective *mens rea*, the trier of fact compares the accused’s actions to the expected actions of the reasonable person. Should the accused depart from the standard of the reasonable person to a criminal degree, objective *mens rea* is established. Objective *mens rea* can capture the morally innocent or those accused who did not subjectively intend to commit the offence (at para 33). It is a harsh standard, which does not account for human frailties. Subjective *mens rea* is personalized, while objective *mens rea* is merely contextualized to place the reasonable person in the factual circumstances of the accused. Justice Martin does a masterful job of describing subjective and objective *mens rea* in *Zora* (at paras 29-31). In doing so, she demystifies and clarifies these core criminal law concepts.

In *Zora*, the Court was called upon to determine whether the offence of failure to comply required objective or subjective *mens rea*. To do so, Justice Martin applied the presumption that Parliament intends to create crimes with subjective *mens rea* (at para 32). This presumption is only displaced by clear intention by Parliament to do otherwise. It is a matter of statutory interpretation to determine whether there is such a contrary intention by looking at the words used in the section, the context of the section, and the objectives of the offence.

The Crown argued the bail offence in *Zora* required objective *mens rea*, which would capture inadvertent or criminally negligent conduct. The argument was based on the words used to describe the offence as a “failure” in a duty, which would require an objective form of liability. This approach was soundly rejected by Justice Martin. In her view, failure to comply is not a duty-based offence as described in the *ADH* decision. The word ‘fail’ should be read in simple terms, as an omission or failure to act, and merely indicating the *actus reus* requirement of the offence. Moreover, the duty, as suggested by the Crown, is even less defined. The word ‘duty’ does not even appear in the section. The concept of the accused person having a ‘duty’ to comply is written in general terms, not in specifics like those found in the true duty-based offences such as failing to provide the necessities of life under section 215(2) (at paras 35 to 49).



Section 145(3) does not provide any hint of a standard of conduct, which typically suggests an objective *mens rea* offence. There is no standard from which the accused person's conduct can be measured. Bail conditions are "intended to be particularized standards of behaviour" (at para 25), not uniform standards of care. With no discernable criminal standard, should the offence require an objective standard of liability, there would be a "risk that the objective fault standard slips into absolute liability," requiring no fault element at all (at para 47).

But Justice Martin's analysis does not stop there. In her view, the offence is firmly rooted in the subjective *mens rea* realm because it "reaches back" (at para 5) to the animating principles of the bail system. The substance of the offence is the individualized process of bail contextualized by the principles of restraint and review (at para 82). The failure to comply offence creates a "direct link" (at para 19) and an "inexorable connection" (at para 73) between bail conditions and the breach of those conditions as a criminal offence. Only subjective *mens rea* will fulfill all of the principles entrenched in the bail system.

As a law professor who revels in the objective/subjective, Justice Martin's passages on *mens rea* are magical to me. They are not mystical reasons but clear-eyed and grounded in criminal law principles that are fully engaged in the purpose of the offence. It is a classic analysis but with the modernity we have come to expect from the Supreme Court of Canada. Justice Martin in *Zora* has finally put the stopper in the ink bottle, and with her clarification of objective *mens rea* in the *Chung* decision, the ink can now dry (see *R v Chung*, [2020 SCC 8 \(CanLII\)](#) and my previous blog post on the issue [here](#)).

As I will discuss in my next reason for putting *Zora* on my course syllabus, Justice Martin does not just explicate the legal principles, she provides guidance and direction on how to use these principles in court. In paragraphs 108 to 122 for instance, Justice Martin gives explicit direction on the two components of the subjective *mens rea* required for failure to comply. Notably, Justice Martin touches upon an unexplored dimension of recklessness, which is when the accused is aware of the risk their behaviour will bring about the undesired consequence but proceeds despite that risk (at para 117). Typically, there is no determination of what kind of risk is needed to fulfill that subjective fault element. But in *Zora*, because bail conditions "can operate to criminalize otherwise lawful day-to-day behaviour," the accused must be aware that their "continued conduct creates a substantial and unjustified risk" of failure to comply with conditions (at para 118).

Without this form of recklessness requiring the accused to be aware of a "substantial and unjustified risk," the failure to comply offence could capture conduct we would not deem morally blameworthy. Returning to Chaycen's particular failure to comply offence, Justice Martin offers an example of an accused who may have missed the knock while taking the "minimal and justified" risk of taking a shower (at para 119). In those circumstances, the subjective *mens rea* would not be fulfilled when applying the special form of recklessness. This differentiation between the general form of recklessness and a higher form, fills the gap between recklessness and the higher level of subjective *mens rea* involving certainty that one's conduct will produce the undesirable result and intending it to occur. Although Justice Martin's comments are specific to this offence (at paras 118-119, but see also *R v Hamilton*, [2005 SCC 47 \(CanLII\)](#) where Justice Morris Fish applies it to counselling offences at paras 26-33), in my

view, Justice Martin has moved the needle in the spectrum of criminal fault elements. In this way, *Zora* may have profound and lasting effects on the fault element of a crime.

## **No. 5 – Practically Speaking**

Above all *Zora* is a practical decision. It provides guidance to lawyers and judges who, on a daily basis, work within the bail system. Justice Martin reminds lawyers and judges alike of their duty to fulfill the principles of restraint, to collaborate in fulfilling the objectives of the bail system, and to breathe life into the presumption of innocence through an approach to release from custody that minimally interferes in a person's liberty. The bail judge is reminded of their gatekeeper role in the broadest sense: to protect the accused from untoward prejudice, to promote pre-trial fairness, to fulfill the ethos of restraint and to provide the judicial scrutiny needed to ensure the proper workings of the bail system.

To that end, Justice Martin provides a check list for all lawyers and judges conducting bail hearings (at para 89). It is a check list straight out of *R v Antic*, [2017 SCC 27 \(CanLII\)](#) and it meaningfully reinvigorates that decision. We look to our highest court to pronounce on legal principles but we also look to it for direction and guidance. *Zora* educates, instructs, and shares practice-ready details. The bail court need not sift through this decision to find the principles. The principles are written in a digestible and understandable manner for the purpose of effecting immediate change. Reading the decision, we no longer see the Supreme Court ensconced in Ottawa, wrapped in the robes of office, but sitting in courtroom 305 or 306 in Calgary, watching the Crown call the bail list.

Finally, *Zora* calls it as it sees it. Yet again, the Court is calling out the systemically imbedded cultural attitudes within the criminal justice system that perpetuate “risk aversion” practices and promote consensual “excessive” bail conditions (at paras 77-78). Justice Martin's call to action comes in describing bail as a “dynamic, ongoing assessment, a joint enterprise among all parties to craft the most reasonable and least onerous set of conditions, even as circumstances evolve” (at para 92). This is the Court's attempt to dislodge the “culture of complacency” found throughout the justice system (see also *R v Jordan*, [2016 SCC 27 \(CanLII\)](#) at paras 4, 40-41, 104 & 135). It is a reminder that the adversarial system can, in the appropriate circumstances, benefit from collaborative decision-making.

## **Bonus Reason**

*Zora* is an example of the modern approach to legal writing. This would be reason alone to include *Zora* on any law school reading list. Justice Martin writes as we all should: clearly, plainly, and persuasively. My favourite line, found at paragraph 88, encapsulates the tone of the entire decision when she says, “Bail conditions may be easy to list, but hard to live.”

In the *Zora* decision, the Supreme Court of Canada did much more than determine the fault element for section 145(3). The Court laid down very explicit guidelines in conditions of release on bail. In doing so, they gave back Chaycen Zora, and others like him, their liberty, their dignity, and their humanity.

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