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Why Reconsider *W(D)*?

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I have written at great length on the *W(D)* decision, *R v W(D)*, 1991 CanLII 93 (SCC), and the extraordinary impact that case has on our justice system. In my recent article on the issue, aptly entitled *The W(D) Revolution*, (2018) 41:4 Man LJ 307, I posit that the decision reflects a watershed moment in the assessment of credibility in criminal cases. The case decision, outlining the analytical approach to be taken in assessing credibility when there are "two diametrically opposed versions" of events, revolutionized such assessments by providing a template for integrating factual determinations within the burden and standard of proof (see e.g. *R v Avetysan*, 2000 SCC 56 (CanLII) at para 28). The *W(D)* state of mind was one that ensured that the principles of fundamental justice as distilled through the special criminal burden and standard of proof, would remain front and centre in the ultimate determination of guilt or innocence of an accused. This is not to say that the path towards enlightenment has not been strewn with difficulties. To the contrary, to recognize the imperfections of the decision and to experience the twists and turns of *W(D)* as pronounced upon in future SCC decisions, is to appreciate the *W(D)* ethos even more. *W(D)* has needed reinterpretation and reaffirmation throughout the decades since its release, but the question of whether it needed a reconsideration was at issue in the recent decision from the Alberta Court of Appeal in *R v Ryon*, 2019 ABCA 36 (CanLII).

Before we consider whether we reconsider *W(D)* there may be some of you, albeit I am guessing not many, who are unaware of the decision and the principle for which it is named. In *W(D)*, the jury, as the trier of fact, was faced with competing narratives from the complainant and the accused on a sexual assault charge. The accused was convicted. On appeal, the issue was the manner in which the trial judge instructed the jury on the task of assessing the disparate evidence. This concern was not a new one. Previous appellate decisions had warned of the "credibility contest" conundrum in which the trier of fact improperly believes they are obliged to base the verdict on choosing between two stark alternatives of believing the Crown evidence or the defence evidence (see e.g. *Regina v Challice*, 1979 CanLII 2969 (ON CA) at 556). By seeing the decision as binary, the trier was not considering the legitimate alternative – that the trier of fact is unable to resolve the conflicting evidence and is simply left in a state of reasonable doubt. This error effectively shifted the burden of proof, requiring the accused to provide a credible explanation.

Although the issue at the time of *W(D)* was far from unique, the error was common. Something more than appellate review was needed. This "something more" came in the form of Justice Cory, speaking for the majority in *W(D)*, who attempted to break the cycle of error by suggesting

an instruction that would convey the correct approach. An approach that would be simple yet convey the importance of the burden and standard of proof in a criminal prosecution.

Justice Cory, sadly, was wrong. *W(D)* has been referenced in 9701 cases and counting. Notably, it has been referenced in 38 Supreme Court of Canada decisions. Of those 38, two of those decisions are from the past year, one, *R v Calnen*, 2019 SCC 6 (CanLII), as recent as February 1, 2019. In Alberta, *W(D)* has especially resonated with 968 case mentions, almost the same number as British Columbia and twice as many as Saskatchewan. The Alberta Court of Appeal has considered the case a little more than 50 times from 2015 to present. In this context, it is unsurprising that the Alberta Court of Appeal felt it necessary to reconsider *W(D)* in *Ryon*. Indeed, the issue had been raised almost two years earlier in *R v Wruck*, 2017 ABCA 155 (CanLII), an application for judicial interim release pending appeal heard before Justice Watson, who later delivers a concurring judgment in *Ryon.* Presumably, the *Wruck* appeal was not to be after the bail application was dismissed and the reconsideration was left for another day and another case. Although *Ryon* appears to be just that case, as I will explain, the Court had already revisited *W(D)* in 2012.

Before we turn back the *W(D)* clock, we need to take a close look at the most recent decision in *Ryon*. Justice Martin writes for the majority. As mentioned, Justice Watson writes a concurring decision but essentially agrees with the Court's general exasperation with yet another *W(D)* appeal – and a good one at that, as the Court allows the appeal on the basis of the *W(D)* error. Instead of sending the case back for a re-trial with a disappointing shake of their collective appellate heads, Justice Martin digs into the time vortex in an effort to rehabilitate, refresh and generally update the *W(D)* instruction.

There are many reasons why Justice Martin feels the need to intercede. *W(D)* is a staple in the trial judges' decision-making tool kit but it was a framework, a bare bones recommendation that required filling in. It was created with an eye to the factual matrix from which it came involving two competing narratives. It did not account for a more sophisticated evidentiary base arising from a complex factual and legal situation such as a case involving inculpatory and exculpatory evidence from the admission of an accused's confession, or unsavory witnesses overlaying a *Vetrovec* caution (See *Vetrovec*, 1982 CanLII 20 (SCC)) onto the instruction or trials involving multiple charges and included offences. In short, the *W(D)* instruction, when lifted directly from the pages of the decision, lacks context and therefore meaning. Many a trial judge, believing the words spoken by Justice Cory to be adequate, failed to realize the error of leaving the words alone to do the heavy lifting.

Although Justice Martin fills in the framework to account for these variant situations at paragraphs 29 to 32 of *Ryon*, it is the common-sense admonishment underlying his decision that truly encapsulates the essence of *W(D)*. At paragraph 38, for instance, he advises us to "step back and consider the message intended to be delivered." Later, at paragraph 48, Justice Martin reiterates the need for the instruction to be "contextual and responsive to the evidence." Finally, after recommending a more inclusive instruction, Justice Martin at paragraphs 53 and 54 cautions that

> Like *W(D)*, the foregoing is not intended to be an incantation that must be included in every trial where there is conflicting evidence to be resolved. Ultimately, the wording used is not critical so long as the trier is given sufficient information to understand the correct burden and standard of proof to apply ... However, reciting and relying solely on the wording of *W(D)*, without elaboration, will not usually be sufficient in a jury trial. That portion of the charge must be responsive to the evidence and explained in such a manner that the jury is able to understand the message intended to be conveyed.

These are sentiments that apply to every situation in which the accused's exculpatory evidence is pitted against the prosecution's case. In the end, it is the trier of fact alone, equipped with the special criminal standard, who must use and apply their common sense, as nurtured by lived experience, to the set of facts before them. However, in the case where there is potential for a credibility contest, the concept of reasonable doubt as it applies to that evidence must be brought home to the trier of fact. As Justice Sopinka said in *R v Morin*, 1988 CanLII 8 (SCC) at 360, rendered before his dissent in *W(D)*, "The law is clear that the members of the jury can arrive at their verdict by different routes and need not rely on the same facts. Indeed, the jurors need not agree on any single fact except the ultimate conclusion." This freedom to fact-find is essential to our criminal justice system and through the judicious use of judicial instructions on how to get to that ultimate conclusion, we are ensuring that the verdict arrived at will be a fair and just one.

Although Justice Martin is right to bemoan the overuse of *W(D)* as a panacea for credibility assessments, he does seem to get too far into the weeds by over-instructing the trier of fact with all the potentialities of a *W(D)* situation. His comments on the sequence of the instruction, including which evidence must be considered first, may create a less flexible framework and run contrary to Justice Sopinka's fact-finding vision as articulated in *Morin*. Granted, providing clarity on the type of evidence to be considered, exculpatory rather than inculpatory, is helpful, but to get into parsing evidence into types may cause more problems than it's worth. For instance, the concern raised with applying *W(D)* to neutral evidence may result in arguments by counsel over what is neutral evidence and what is not. At some point we must trust the jury to come to a true verdict by allowing them to draw inferences from the evidence on the basis of their findings of fact.

Nevertheless, Justice Martin's penultimate statement on what information should be imparted to the jury at paragraph 51 is helpful and does fill in the skeleton-like structure of the *W(D)* instruction. Of course, Justice Martin had ample opportunity to consider this as he expounded similar suggestions in his 2012 decision, *R v Gray*, 2012 ABCA 51 (CanLII). As an aside, that decision received quite a bit of traction with the Honourable Judge Gorman of the Newfoundland and Labrador Provincial Court who quoted the *Gray* decision in 13 cases between 2012 and 2014. I too will quote from Justice Martin in *Gray* at paragraph 45 in which he explains that "In other words, the instruction is a contextual, evidence-sensitive, one that requires a trial judge to carefully mould it to the evidence and not just recite it in isolation with the hope that the jury will understand or figure it out." Truer words have never been spoken—or, rather, they have been spoken but not listened to—but perhaps this time these words will have the impact they deserve.

I conclude this post with some final thoughts on conflicting narratives and criminal trials. The situation of competing narratives is not in and of itself unusual. A trial is a time anomaly. The trial itself is conducted in the present four corners of the courtroom, yet it is concerned with past

events that lie outside of those courtroom walls. In many ways a trial borders on science fiction as it leaps through the time-space continuum.

The trier of fact, who is in the present space, must turn the present tense into the past through the consideration of days gone by. In short, a trial is stuck in the past and the trier of fact needs tools to translate the past events into a language of the present. This is particularly important as at the time those past events were occurring, not everyone involved could see the future significance of those events. The narrative was not captured in pristine form at the time. A further "past meets present without future thought" problem is that often those events did not involve direct observers. The people living those events did not rush out and bring in a witness for future use. Indeed, these events are by their very nature done in private. Nor did these events necessarily produce animate items for future use at trial.

The *W(D)* trial is a description of the past from the perspective of the complainant and the accused person. The trier must assess that information through a kaleidoscope of time, which collapses those past events into present time. But that is not all—those events are also filtered through legal rules and principles. This changes the texture of those narratives and gives them a different, special meaning. It is the application of those legal principles that frames the past so it may be used in the present time of a trial. This is the true message of *W(D)*, which serves as a memorial itself by commending to a trier of fact a possible, but not the only, way to review evidence in coming to the ultimate decision of guilt or innocence.

Does *W(D)* need a reconsideration? There is not much wrong but much right about re-energizing legal principles and ensuring they are understandable, meaningful and relevant for those who must apply them. An update and a re-working can enhance the administration of justice. However, in that new look, we must retain the essence of that original statement and its *raison d'etre*. In the case of *W(D)*, any reformulation must emphasize the linkages that must be made between credibility assessment and reasonable doubt. Without this crucial connection, a reconsideration is not doing *W(D)* justice. Justice must not only be seen to be done, it must also be done. The *Ryon* decision, in its aspect and essence, will go a long way of doing just that.

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