September 13, 2019

W(D) Strikes Again!

By: Lisa Silver

Case Commented On: *R v Ibrahim*, 2019 ONCA 631 (CanLII)

W(D), [1991] 1 SCR 742, is entrenched in our justice system. This seminal Supreme Court of Canada decision provides a tight three-pronged approach to the application of reasonable doubt to the oft divergent evidence from the prosecution and the defence. *W(D)* has been considered, re-considered, and applied over 10,100 times since its release in 1991. It serves as a continual source of discussion and inspiration for scholars like me. Although the principle in and of itself is not overly complex, it is in the application of the principle to complex and unique scenarios that can raise unforeseen or even novel *W(D)* issues. In this post, I will consider *R v Ibrahim*, 2019 ONCA 631, a recent decision from the Ontario Court of Appeal, tackling the thorny issue of applying *W(D)* to objective *mens rea* offences. This will also require a detailed discussion on objective and subjective *mens rea*. The purpose of this robust and far reaching discussion is not to outline the differences between the two forms of liability but to appreciate the similarities. Although objective and subjective *mens rea* have differing aspects and sightlines, they are part of a continuum of awareness, which is key to understanding what makes conduct a crime. Such exploration is necessary to expand our understanding of why - and how - *W(D)* matters. For more background on subjective and objective *mens rea*, read my previous article on "The Subjective/Objective Debate Explained."

As a reminder, the *W(D)* principle involves a suggested approach to credibility assessment where the trier of fact must apply the principles of fundamental justice, presumption of innocence and reasonable doubt to the assessment of the prosecution and defence evidence. The gist of the principle is to ensure that even when the accused's evidence is not believed, the trier does not reverse the burden of proof and take that rejection as proof beyond a reasonable doubt. Rather, the trier must consider the possibility that despite rejecting the accused's evidence, when reviewing the entirety of the evidence they do accept, they may be left in a state of reasonable doubt as to guilt, thus requiring an acquittal. The principle ensures the trier does not fall into the credibility contest trap, where the "winner" means the "loser" is necessarily guilty. In essence, the essence of *W(D)* is keeping the burden and standard of proof at the forefront of the credibility assessment. It is about keeping an open mind and not equating disbelief with proof beyond a reasonable doubt. But this principle does not reside in a vacuum, rather, it is contextualized and framed by the given substantive offence. The standard of proof is about proving the elements of the specific offence. The ultimate question asks whether this accused person committed this offence beyond a reasonable doubt.

Admittedly and unashamedly, I am thoroughly committed to the centrality of the *W(D)* concept in assessing credibility. By saying this, I am actually acknowledging the centrality of the presumption of innocence in our criminal justice system. This concept cannot be better described than it is in *Woolmington v DPP*, [1935] 1 AC 462, the seminal criminal law decision from the English House of Lords. There, Lord Sankey colourfully visualized the presumption of innocence as a shimmering golden thread:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

This famous passage reinforces my contention that the presumption of innocence, together with the onus on the prosecution to prove guilt beyond a reasonable doubt, is the strength of our system without which justice could dissolve, not unlike a spider's web. For more on my thinking around the presumption of innocence and some musings on the web-like metaphor used to describe it, see my blog/podcast entitled "The Golden Thread Metaphor: Section Six And The Other Presumption Of Innocence Episode Nine of the Ideablawg Podcasts on the Criminal Code of Canada."

Admittedly as well, I have written on *W(D)* previously both in journal article format (see *The W(D) Revolution*, (2018) Manitoba Law Journal 307-48) and in blog articles (see *Why Reconsider W(D)?* (February 7, 2019) online: ABlawg). In reconsidering *W(D)*, I commented on Justice Martin's *W(D)* perspective in *R v Ryon*, 2019 ABCA 36 CanLII, and his suggested approach to the application of the principle in determining a case. For a lawyer, *W(D)* discussions, like the one in *Ryon*, are like being allowed to stay up late at your parents' adult party; in the beginning you feel part of a mysterious uncharted world but then realize we are all speaking the same language, just expressing it in different ways.

Of course, all of the above becomes more complicated when applied to cases where the "sides" are not so clearly wrought and where the elements of the offence require a nuanced approach. The objective standard of liability is a much-debated area of criminal law, straining the traditional formulation of crime as subjectively based. The trier of fact, instead of determining what was in the mind of the accused when the offence was committed, must determine what the reasonable person would have known or ought to have known in the circumstances. In objective *mens rea* cases, the narrative of the accused provides context of the circumstances of the case to assist the court in situating the reasonable person into the factual matrix. Even if the accused denies intending to do what is alleged to have been done, and even if the trier accepts this evidence as true, in an objective *mens rea* offence, such as manslaughter, it is of no consequence if there is an objective foreseeability of bodily harm arising from the conduct of the accused. It is this scenario which the court in *Ibrahim* attempts to explain how *W(D)* matters.

The above explanation seems to be the answer to the *Ibrahim* situation; *W(D)* simply does not apply to objective *mens rea* cases. However, intention can matter in the objective *mens rea* world. When the Supreme Court of Canada, in *R v Beatty*, [2008] 1 SCR 49, finally, finally, clarified the objective *mens rea* test for criminal offences, Justice Charron, speaking on behalf of the majority, also clarified the role of intention in the objective matrix. Intention may not be the standard to assess the accused's fault, but it is a circumstance, a piece of evidence, which, together with the whole of the evidence in a case must be considered. Picture an accused person, charged with criminal negligence causing death, an objective *mens rea* offence, on the basis the accused purposely used their car as a "weapon," causing fatal injury to a person walking along the sidewalk. If this intention is proven, the objective *mens rea* is met; those actions would be objectively dangerous and a marked and substantial departure from the conduct of a reasonable person. In fact (and in law!), subjective *mens rea*, an intention to kill, would also be fulfilled. Deliberate action would be evidence of the objective offence. Although Justice Charron in *Beatty* (para 47) and Justice Doherty in *Willock* (2006 CanLII 20679 (ON CA) at para 32) use slightly different examples, the principle remains the same; intention as subjective *mens rea* if proven would also provide proof of the lower standard of objective *mens rea*.

This argument can also be understood by looking deeply into the structure of *mens rea*. Justice Sopinka, in *R v Anderson*, [1990] 1 SCR 265, a Supreme Court of Canada decision straddling the division created by Justice Lamer's desire to personalize the objective standard and permit consideration of the accused's personal characteristics in determining objective *mens rea*, neatly explained the similarities between objective and subjective *mens rea*. Both forms of fault are determining the "foreseeability of consequences" (*Anderson* at 270) and the connection between conduct - the physical *actus reus* component of crime - and foresight – the mental or *mens rea* element. The connection is a "criminal" one rather than the less substantial "civil" relationship. The greater the risk of harm created by the conduct, as explained by Justice Sopinka in *Anderson*, the "easier it is to conclude that a reasonably prudent person would have foreseen the consequences," as required for the criminal form of negligence (*Anderson* at 270). It is "equally" easier to conclude that the accused "must have" foreseen the consequences (*Anderson* at 270). Taking this further, when the consequences are "the natural result of the conduct creating the risk" (*Anderson* at 270), the foreseeability – consequences relationship is, as in the highest level of subjective intention, a certainty. It is important to note that consequences do not necessarily create the liability. In other words, a fatality resulting from a car accident does not mean the accused is guilty of dangerous driving. A horrific outcome does not create objective dangerousness.

Understanding this relationship, in which subjective and objective *mens rea* are part of a unifying continuum, permits understanding of why *W(D)*, may apply equally to objective and subjective *mens rea* offences. Justice Trotter in *Ibrahim*, looks at the flip side of this 'subjective intention as objective intention' relationship by considering the effect the accused's evidence, if accepted, would have on the issue of objective *mens rea*. The reasonable person, in the objective assessment, does not reside in a vacuum. Here, the reasonable person must be similarly situated as the accused. This does not mean the personal characteristics of the accused are considered as Justice Lamer recommended in a series of cases on the meaning of the objective standard in criminal offences. The *Beatty* decision permanently shut down that minority position. A similarly situated accused does not share personal characteristics with the accused but shares place or context. As I explain this to my 1L class, objective *mens rea* in criminal law is contextualized not personalized.

Context is important, particularly in determining the availability of, what authorities like *Hundal*, [1993] 1 SCR 867 and *Beatty* calls, an exculpatory defence. Like strict liability for regulatory offences, objective *mens rea* for criminal offences is "modified" to permit defences of mistake of fact and due diligence or due care. The premise behind these defences is again about what the reasonable person would have done in the circumstances. As Justice Charron explained in *Beatty*, objective *mens rea* is founded on the presumption that reasonable people "in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity" (at para 37). Conversely, if the reasonable person "in the position of the accused would not have been aware of the risk or, alternatively, would not have been able to avoid creating the danger" (at para 37) then the logic behind that presumption falls. Notice, we are situating the reasonable person in the place of the accused. Similarly, the defence of mistake of fact defence in the objective arena is based on reasonable belief, which requires objectively verifying the accused person's subjective perception. In other words, the mistake in the facts, which resulted in the accused committing the offence, must be an honest and reasonable one, requiring a mix of subjective and objective factors (See *R v Tutton and Tutton*, [1989] 1 SCR 1392, McIntyre J at 1432 to 1433). The accused's place in the circumstances of the offence is an important ingredient in both the essential elements of the offence and in the consideration of the exculpatory defences.

It becomes evident then that the defence evidence, particularly the accused's evidence on the circumstances of the offence is relevant and may result in an acquittal, whether it is accepted or not. Equally, the evidence may not result in an acquittal, whether it is accepted or not. The point of the exercise, indeed the point of *W(D)*, is to remind the trier of fact that the accused's evidence must be considered in the final assessment of guilt or innocence. It is troubling that case authority, until *Ibrahim*, suggests courts did not apply the principles arising from *W(D)*. This is the reason why not only does *W(D)* matter but *Ibrahim* matters as well.

Justice Trotter, like Justice Cory before him, gives the trial courts a modified *W(D)* approach for objective *mens rea*. It simply reminds the trier what we have already identified and discussed in the previous paragraph and throughout this article that the accused's perceptions are relevant and must be considered in the final determination of the case. At paragraphs 62 to 64 of *Ibrahim*, Justice Trotter outlines the preferred approach and then urges trial judges, at paragraph 65, to take heed of these instructions in the context of the unique facts and issues arising in their own specific cases. This tailoring of *W(D)* recognizes that *W(D)* is a state of mind, a decision-making approach, not an incantation or formulae. *W(D)*, in many ways, is a concession to our humanity. It articulates in principle-based language the concept we all know but rarely admit; that judges are people too. We have independent and impartial triers of fact precisely for this reason; to make use of their humanity to discern, discriminate and digest facts and law. We want and need our decision makers to apply their logic and common sense together with legal principles in assessing the evidence. By relaxing our hold on the stock jury instruction, we permit judges to personalize their instructions and tailor them to the case at hand. No two judges are alike and equally, no two cases are either. These two truisms must be recognized and reflected in the instructions to the jury. So too decision-making cannot be the same exercise for everyone. The only requirement is that the decision be made on the basis of the evidence and in accordance with legal principles. In the end, no

incantation or formulae can work the magic of a properly instructed trier of fact. And we have *W(D)* to thank for that.

This post may be cited as: Lisa Silver, "W(D) Strikes Again!" (September 13, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/09/Blog_LS_Ibrahim.pdf