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#1 When the allegation is that the jury is not representative, the jury rolls are ordered disclosed.

The Appellants were aboriginals who each claimed on appeal that the jury which convicted them was chosen from jury rolls which were under-representative of First Nations persons. They alleged that the sheriff in each jurisdiction did not make reasonable efforts to prepare representative jury rolls. Prior to arguing their appeal the Appellants sought disclosure from the Crown of the jury roll for jury lists used at their trials. The Court of Appeal found that such records met the *O'Connor* test for likely relevance since they were the very documents which were used to prepare the jury rolls. As the Court explained, the test is only one of likely relevance.

[16] In our view, the applicants have demonstrated that these records are likely relevant. They seek the very lists used to prepare the impugned jury rolls. These records may contain annotations, entries or other information that can be used in testing the statements made by CSD deponents and in better understanding the process used to prepare the jury rolls.

[17] The applicants need not establish the probative value of the records; they must only show that there is a reasonable possibility that the documents are “logically probative” to the issues raised respecting the representativeness of the jury rolls.

R. v. Kokopenace, 2011 CarswellOnt 13270 (Ont. C.A.)

#2 The British Columbia Court of Appeal overturns a Dangerous Driving causing Death Conviction and enters an acquittal.

The Appellant had been driving 10 km/hr over the speed limit and crossed over the right fog line, striking two pedestrians, killing one. At trial there was evidence that the Appellant had not seen the pedestrians or even realized that he struck the individuals. The police accident reconstructionist testified that 85% of the drivers on that road exceed the speed limit. The trial judge found the Appellant's action constituted dangerous driving, in part, because he should have been alert to the possible presence of pedestrians walking along the road. This reasoning was rejected by the Court of Appeal.

57. The trial judge's inquiry into the manner of driving left her to conclude that Mr. De Ciantis was making "unnecessary lane changes which contributed to the accident". The trial judge did not find that the lane changes were executed in a manner which was unsafe or dangerous. She merely found that they were "unnecessary".

58. The trial judge concluded that a reasonable driver should expect pedestrian traffic on the side of the road. However, she failed to consider the circumstances of these pedestrians. They were periodically walking on the road, wearing dark clothing, and when Mr. Black was struck he was either on the fog line or within centimetres of it. While a reasonable driver might expect pedestrians on the side of the road, it is not unreasonable to expect that pedestrians will refrain from travelling on or so dangerously close to the road.

59. A trial judge must consider all of the evidence, and it would have been an error to parse down and analyze each aspect of the driving without looking at the evidence as a whole. However, here, Mr. De Ciantis was speeding, (which was apparently not out of the ordinary for that road at the time the accident happened), and he was changing lanes. The trial judge concluded that he was driving "aggressively", based on his speed and lane changes. There is no other evidence of "aggressive" driving.

Accordingly, the convictions were overturned and acquittals substituted.

R. v. De Ciantis, 2011 CarswellBC 2914 (C.A.)

#3 The Ontario Court of Appeal gives some direction on two different ways of “over-charging”.

The Appellant was convicted of robbery with a firearm, assault with a weapon (pepper spray), administering noxious substance, aggravated assault, and unlawful confinement after the complainant was robbed during the sale of some video game equipment. He won a new trial after the Court of Appeal found that the trial judge erred in her *Vetrovec* charge. The unsavoury witnesses had given both inculpatory and exculpatory evidence against the Appellant, and that portion of the charge did not make a distinction between the two different types of evidence. The Court of Appeal found that the trial judge should have charged the jury that if they believed the exculpatory portion of the witnesses’ evidence, they should acquit. Failure to do so rendered the convictions unsafe. The Court of Appeal also used the case to discuss the complexity of the jury charge, which in their view was unnecessary for two reasons. The first reason was that the Indictment contained duplicative counts (unlawful confinement and robbery, and assault with a weapon and administer noxious substance). The charges on the Indictment created complications for the trial judge. The second source of complication was the trial judge over-charging on legal issues which are not strictly speaking necessary. The Court of Appeal commented on the fact that trial judges have now fallen into the habit of instructing juries in such a manner as to make the trial court immune from appellate scrutiny. As Doherty J.A. put it:

[54] There are two explanations for the confusion and complexity. First, I think the indictment contained counts which, by the end of the trial, were unnecessary to a fair and full adjudication of the merits. There were five counts in the indictment. The trial judge was required to deal with each count and with each element of the offence described in each count. This necessarily made the jury instruction longer, more complicated, repetitive and inherently confusing.

[55] I do not fault the Crown for placing the five charges in the indictment, or proceeding through the trial with those charges. In my view, however, the Crown should have taken a hard look at the need to instruct the jury on all counts and require that it return verdicts on all counts. Counts two and three related to the use of pepper spray against Mr. Al-Ali. One of the two, either one, was redundant. I see no disadvantage to the Crown had it asked for a verdict on only one of those two counts and relieved the trial judge of her obligation to address the second.

[56] I also see no need from the Crown’s perspective for a verdict on the unlawful confinement charge. There was no chance that a reasonable jury would convict of unlawful confinement if it did not convict on the robbery charge. If the jury convicted of robbery, an additional conviction for unlawful confinement, while virtually inevitable, would add nothing to the case. A conviction on the unlawful confinement count was

not necessary to accurately reflect the nature and extent of the appellant's criminal culpability, or to permit the imposition of an appropriate penalty. Apart from adding another line to the appellant's criminal record, I see no purpose served by the unlawful confinement charge.

[57] I emphasize that I am not suggesting that a trial judge can unilaterally decide to take counts in an indictment away from a jury as a means of facilitating the jury's deliberations. Subject to the judge's power to order severance, and assuming there is an evidentiary basis for the allegation in each count in the indictment, it is up to the Crown to decide whether a charge in the indictment should go to the jury for a verdict.

[58] Crown counsel in the exercise of his or her responsibility to further the due administration of justice should consider whether multiple count indictments can be trimmed before the case goes to the jury without compromising the case the Crown seeks to have determined by the jury. The possibility of not requiring verdicts on all counts in a multiple count indictment should be canvassed with counsel as part of the pre-charge conference. It is self-evident that the fewer the charges a jury must consider, the less likely it is that confusion will intrude upon the jury's deliberation, or that the trial judge will fall into legal error. Jury confusion can lead to a hung jury and legal error can necessitate a new trial. Neither result serves the Crown's interest in the due administration of justice. A properly trimmed indictment serves everyone's interests in the criminal process.

[59] The second source of unnecessary complexity in the jury instruction flows from what this court has described as "over-charging": see *R. v. Pintar* 1996 CanLII 712 (ON CA), (1996), 30 O.R. (3d) 483 (C.A.), at p. 493. In *Pintar*, the appellant complained that the self-defence instruction was so complex as to be incomprehensible. Moldaver J.A. said:

Unquestionably, trial judges do encounter difficulties in explaining the self-defence provisions to juries for the reasons expressed by the Chief Justice. In my opinion, these difficulties are compounded by the standards which appellate courts have imposed, or are perceived to have imposed, when assessing the adequacy of self-defence instructions. Trial judges are often heard to say that 90 per cent of their legal instruction on self-defence is for the Court of Appeal and 10 per cent for the jury. Expressed somewhat differently, fear of under-charging has led to over-charging.

Ironically, many trial judges have taken to leaving multiple self-defence provisions with the jury as a means of defending themselves against appellate assault. This phenomenon, which I describe as "over-charging", has itself come under attack....

[60] My former colleague's comments were directed at the law of self-defence, a notoriously complicated area of the criminal law. His comments, however, have more general application. Like him, I think that fear of appellate reversal is one of the causes of "over-charging". Trial judges perceive, correctly I think, that legally accurate instructions that are superfluous will seldom lead to reversal, while a failure to instruct on an issue that may have been on the periphery of the trial, but has become central on the appeal, will lead to reversal and a new trial. Instructions on anything and everything that have any possible relevance are seen as the best defence against the hindsight inherent in appellate review.

Accordingly, a new trial was ordered.

R. v. Rowe, 2011 CarswellOnt 13378 (Ont. C.A.)

#4 New 11(b) case from Ontario Superior Court imposes new obligations on defence counsel.

The Respondent had appeared for trial on a refuse breath sample case at the College Park courthouse in Toronto. On March 3, 2010, a trial date was set for January 28, 2011. On the trial date the charge was stayed by the Court because the delay from March 3 to January 28 contributed to a systemic delay of nearly 11 months. The Summary Conviction Appeal Court disagreed with the trial judge's calculation of that period, and found that trial counsel was not available from March 3, 2010 until April 23, 2010. Therefore, the period in which defence counsel was not available could not contribute to the overall systemic delay – which the Appeal Court then calculated to be only 9 months. Mr. Justice Code described the idea that counsel are perpetually available as a “fiction”.

34. Finally there is no place for fictions when seeking to prove *Charter* violations. It is rarely true that counsel is immediately available for trial, when setting a date. Whenever counsel take on a new case they complete various preliminary steps during the intake period. Once they have taken these steps and are ready to set a date for trial, they need to set aside sufficient time in their calendars to prepare the new case for trial and to then conduct the trial. If the case is lengthy and complex, or if counsel are very busy, it may be some considerable period of time before counsel are ready for trial. To use a simple hypothetical, if counsel has no time in his/her calendar to prepare a new case for trial and to then try it until ten months in the future, and the earliest date that the Court has available for the trial is twelve months in the future, then systemic congestion in the Court is the cause of only two months of delay. The other ten months is delay that the accused needs, for entirely beneficial reasons, in order to allow his/her counsel of choice to prepare the case for trial and to accommodate it in an otherwise busy calendar. It is good and necessary delay that would have occurred in any event, even if the Court had earlier available dates. It is a fiction to characterize this kind of useful delay as unwarranted or unreasonable or prejudicial.

In the result, the stay was overturned and a new trial ordered.

R. v. Lahiry, 2011 CarswellOnt 12516 (S.C.J.)

#5 The Supreme Court rules on availability of insanity defence arising from self-induced intoxication.

The Appellant had brutally assaulted two persons after having ingested drugs. There was no suggestion that he had a prior disease of mind. During the assault the Appellant had appeared as if he was in a religious delirium. He was convicted at trial of aggravated assault, and assault. On appeal he claimed that his state of mind entitled him to a verdict of not criminally responsible, notwithstanding his self-induced intoxication. The Quebec Court of Appeal dismissed this argument. In the Supreme Court of Canada, the Appellant argued that when the intoxication is self-induced but produces a disease of mind the insanity provisions of s. 16 apply, and not the self-induced intoxication provisions of s. 33.1. This argument was rejected. The Court held that a person suffering from no other mental health problems cannot be temporarily insane merely by self-intoxication. Such persons do not fit within the rationale of the Not Criminal Responsible provisions of the *Criminal Code* because the disease is not part of their psychological make-up. As Lebel J. explained for the Court:

82. In the instant case, the psychotic symptoms experienced by the appellant began to diminish shortly after he took the "*poire bleue*" pill and continued to do so until they disappeared completely on October 28, 2005. The Court of Appeal held that the disappearance of the symptoms showed that the symptoms of toxic psychosis coincided with the duration of the appellant's intoxication. Thibault J.A. could thus say that [TRANSLATION] "[t]he appellant suffered from no [disease of the mind] before committing the crimes, and once the effects of the drug consumption had passed, he was entirely sane" (para. 77). I see no valid reason to depart from this conclusion.

83. As for the second factor from [Stone](#), there is no evidence indicating that the mental condition of the accused is inherently dangerous in any way. Provided that the appellant abstains from such drugs in the future, which he is capable of doing voluntarily, it would seem that his mental condition poses no threat to public safety. Although I will not adopt a definitive position on this question, I might have concluded otherwise if the appellant had a dependency on drugs that affected his ability to stop using them voluntarily. The likelihood of recurring danger might then be greater.

84. Finally, after considering all the circumstances of this case, I am satisfied that there is no valid reason to initiate the special procedure provided for in Part XX.1 of the *Criminal Code*. An accused whose mental condition at the material time can be attributed exclusively to a state of temporary self-induced intoxication and who poses no threat to others is not suffering from a mental disorder for the purposes of s. 16 *Cr. C*. The scheme of Part XX.1 applies only if the accused actually suffered from a disease of the mind at the material time. It is not intended to apply to accused persons whose temporary madness was induced artificially by a state of intoxication.

85. In this context, I conclude that the appellant was not suffering from a "mental disorder" for the purposes of s. 16 *Cr. C.* at the time he committed the assault. He has failed to rebut the presumption that his toxic psychosis was a "self-induced stat[e] caused by alcohol or drugs" in accordance with the definition in [Cooper](#). A malfunctioning of the mind that results *exclusively* from self-induced intoxication cannot be considered a disease of the mind in the legal sense, since it is not a product of the individual's inherent psychological makeup. This is true even though medical science may tend to consider such conditions to be diseases of the mind. In circumstances like those of the case at bar, toxic psychosis seems to be nothing more than a symptom, albeit an extreme one, of the accused person's state of self-induced intoxication. Such a state cannot justify exempting an accused from criminal responsibility under s. 16 *Cr. C.*

Accordingly, the appeal was dismissed.

R. v. Bouchard-Lebrun, 2011 CarswellQue 12785, 2011 CarswellQue 12786 (S.C.C.)

#6 When the trial judge reverses himself during the trial, the Court must put the Crown and Defence on notice of the issue and invite further argument.

The Respondent was charged with impaired driving by drug. The Crown called two police witnesses who were both initially qualified in the science of impaired driving by drugs. After hearing the evidence, the trial judge acquitted on the basis that the drug expert witnesses should not have been allowed to testify because of the unreliability of drug recognition expert evidence. This acquittal was overturned ultimately by the New Brunswick Court of Appeal who found that the procedure of reversing earlier trial rulings had to be made with proper notice.

13. In the case at bar, the trial judge initially accepted the testimony of the police officers. In permitting them to testify as expert witnesses, he implicitly accepted the scientific underpinnings of their testimony. He later reconsidered their testimony and concluded it was inadmissible due to the unreliability of the science, without calling for further submissions. Although the judge is not *functus* until the final disposition of the case, where he or she reconsiders a previous ruling, the parties should be put on notice that the matter is being reconsidered and invited to make further submissions.

Accordingly, a new trial was ordered.

R. v. Steeves, 2011 CarswellNB 524 (C.A.)

#7 A Refuse Breath Sample case is dismissed where there is no evidence about subjective grounds to make the breath demand.

The Appellant was stopped in her car by one officer Cst. Lange, who asked that she exit the car. Another officer Cst. Kaiser then arrived and administered an ASD test. She failed the test, and then the first officer Cst. Lange read her a breath demand under s. 254(3). Although Cst. Lange testified that he knew that the Appellant had failed the ASD test, he never testified that such a failure furnished him with subjective grounds under s. 254(3). On appeal, this proved fatal to the conviction for refusing a breath sample. According to Justice Melnick:

7. For the most part, the Provincial Court judge was correct with respect to his recitation of the evidence. However, I have carefully reviewed the transcript of the evidence of Cst. Lange. Nowhere in his evidence does he give the opinion that the results of the ASD test constituted reasonable and probable grounds for his belief that Ms. Harrison had committed an offence contrary to s. 253 of the *Code*. Therefore, the Provincial Court judge was in error when he found as a fact that Cst. Lange had provided the court with evidence of one of the essential elements of the charge, namely his subjective opinion of the accused having committed such an offence as a basis for the demand he made upon her.

8. This case is thus on all fours with the authority provided by defence counsel, Mr. Ewan: *R. v. Nott*, [\[2000\] O.J. No. 437](#).

9. The Crown cites [R. v. Spetch, 2011 BCPC 0298](#) [*Spetch*] and *R. v. Stark*, [2006 BCSC 1134](#) [*Stark*] for the proposition that courts should not be overly formalistic in their analyses of whether a police officer has given evidence of a subjective belief. In *Spetch*, the officer testified that he formed an opinion that the accused had committed an offence under s. 253 of the *Criminal Code*, but did not specifically testify that he had formed a subjective belief. In *Stark*, the officer testified that "due to everything [he] observed, including the fail reading on the approved screening device, [he] formed the opinion that ... [the defendant's] driving ability was affected by the consumption of alcohol" (*Stark* at para. 29). In *Stark*, the court considered whether the officer's switching between the past and present tense when describing the ASD test, left a reasonable doubt as to whether he appreciated the implications of the defendant's test results, and also considered whether the officer's opinion that the accused was "affected" by alcohol was equivalent to an opinion that the accused was impaired. In each case, the court found that the officer had articulated the necessary subjective belief at trial and convicted the defendant of impaired driving.

10. The present case is not the same situation that was before the courts in *Spetch* and *Stark*. Cst. Lange never testified that he held an opinion or a subjective belief either that Ms. Harrison's driving was affected or impaired by alcohol, or that Ms. Harrison had

committed an offence under s. 253 of the *Criminal Code*. To find that Cst. Lange's reading of the demand card and testimony about objective indicia of intoxication permits me to infer a subjective belief on his part that Ms. Harrison's driving was impaired, would go well beyond the holdings in *Spetch* and *Stark* and would render meaningless the requirement that an officer's belief have both a subjective and an objective component: *R. v. Shepherd*, [2009 SCC 35](#) at para. 17.

Accordingly, the appeal against conviction was allowed and an acquittal entered.

R. v. Harrison, 2011 CarswellBC 3061 (C.A.)

#8 If the Intoxilyzer is operated improperly and the error gives rise to an Over 80 reading, does the accused still have to prove he was under 80? An Alberta Court of Appeal judge says no.

The Respondent was acquitted of Over 80 after the trial judge accepted that his breath readings were skewed because of his elevated body temperature which arose from his fever at the time of arrest. The majority of the Alberta Court of Appeal reversed the acquittal on the basis that the trial evidence did not tend to show that accused's BAC was under 80. Ronald Berger J.A. agreed with the result, but disagreed with the requirement that the accused prove that his BAC was under 80. Berger J.A. put it this way:

29. Consider the following: Suppose that the reading in a given prosecution was 130mg percent. Suppose also that the Crown conceded that the approved instrument malfunctioned. Can the Crown rely on the reading to bring home a conviction? I suggest that in such circumstances there is a reasonable doubt as to whether the reading is correct even if the accused proffers no evidence that the reading *would not in fact* have exceeded 80mg.

30. It follows, in my view, that once a reasonable doubt has been raised by the accused regarding the accuracy of the breathalyzer machine, the reading obtained no longer proves an essential constituent element of the crime which is the sole burden of the Crown. While it is true that the recent amendments to the *Criminal Code* limit the permissible challenges to the accuracy of the Intoxilyzer, and while it is equally true that s. 258(1)(c) requires, on its face, evidence tending to show all three factors listed in the enactment, I am respectfully of the view that where the first two have been made out, as my colleague concedes, the effect of the third statutory requirement reverses the burden of proof. It does so, in my opinion, because the mandatory presumption, *in those circumstances*, requires the accused to raise a reasonable doubt of a fact that has not been proved by the Crown. *Prima facie*, that constitutes a limit on the presumption of innocence protected by s. 11(d) of the *Charter* and needs to be justified under s. 1.

R. v. Kasim, 2011 CarswellAlta 1966 (C.A.)

#9 False Roadside Utterances prior to arrest may not be used to impeach the accused's credibility on a *Charter* Application.

The accused was stopped by a police officer and then told the officer that he had not had anything to drink that day. That was a lie. The accused alleged a breach under s. 10(b) insofar as he wished to speak with private counsel, and the police officer did not carry out that request. At trial the accused testified to that effect but the officer testified that the accused only asked to speak with duty counsel. Credibility was therefore central to the *Charter* Application. In dismissing the *Charter* Application, the trial judge referred four times to the roadside lie about alcohol consumption. He found the accused not believable. On appeal, the issue was whether the trial judge was permitted to use the roadside utterance for credibility purposes. The Summary Conviction Appeal Court found that he couldn't because those utterances may only be used by the officer to find grounds for making a breath demand or arrest. As Ratushny J. put it:

11. The Crown has submitted there is a difference in the present case as the roadside statement is only being used at trial in the context of deciding a *Charter* motion and not in determining the ultimate issue of guilt. In my view there is no difference and the fundamental principles affecting trial fairness must continue to apply regardless of whether the roadside evidence is being used at trial to assess credibility for the purposes of determining a *Charter* application or to assess guilt.

12. Neither does it make any difference, I agree with defence counsel, that the appellant admitted at trial that he had lied to the officer at the roadside. The appellant's roadside evidence is inadmissible for the purposes of assessing credibility or determining guilt at trial, regardless of what the appellant had said about it in his testimony. This is again because of the operation of the underlying fundamental principle of trial fairness allowing statutorily approved investigatory procedures that violate s. 10(b) *Charter* rights limited admissibility at trial confined to investigatory purposes only.

Accordingly, the conviction was quashed and a new trial ordered.

R. v. Brown, 2011 CarswellOnt 13056 (S.C.)