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1. Criminal Negligence Piggy-Backed on Failure to Provide the Necessaries: S.C.C.

In [R. v. J.F.](#), 2008 SCC 60 the court considered appeals with respect to the inconsistent verdicts entered by the jury, who acquitted the accused on a charge of manslaughter by failing to provide the necessities of life and convicted on a charge of manslaughter by criminal negligence. The court found that:

...where criminal negligence is "piggy-backed" onto an alleged failure to provide the necessities of life - as it was explicitly in *Tutton* and, in effect, here as well - the analysis may be expected to proceed in two stages. The jury would then consider whether the accused had a duty to protect the child - that is, to provide the necessities of life - and whether the accused failed in that duty. If so, the jury would be entitled to find that the accused committed an offence under s. 215(2)(a)(ii). The jury would then be required to decide whether the accused, in failing to provide the necessities of life, showed a wanton or reckless disregard for the life or safety of the child. If so, the jury would be bound to find the accused guilty of criminal negligence. If not, the jury could still find the accused guilty of failure to provide the necessities of life, but not of criminal negligence.

The Crown's appeal was dismissed, the accused's appeal was allowed and the conviction quashed without being sent back for trial.

2. No More *Duncan* Instructions: S.C.C.

The Supreme Court's companion decisions in [R. v. Illes](#), 2008 SCC 57 and [R. v. Rojas](#), 2008 SCC 56 deal with question of use of *Duncan* instructions by the trial judge. The issue before the court, as set out in *Rojas*, was whether:

...when faced with statements by an accused containing both inculpatory and exculpatory elements, a trial judge may, or should, instruct the jury that the incriminating parts are likely to be true "otherwise why say them?", whereas excuses for one's behaviour do not necessarily carry the same weight. This "mixed statement" instruction originates from the decision of the English Court of Appeal in *R. v. Duncan* (1981), 73 Cr. App. R. 359, and, for this reason, it is often referred to as "the *Duncan* instruction". As I will explain, I conclude that it is dangerous to instruct the jury in a manner which suggests that inculpatory statements should be given more weight than exculpatory statements and, consequently, that it is best to avoid

instructing the jury in this manner.

The effect of a mixed statement instruction of the kind found in Duncan, however, may vary considerably from case to case, depending on the precise content of the instruction and its context. Whether the instruction constitutes reversible error is a matter to be determined on a case-by-case basis, having regard to the charge as a whole and the evidence at trial.

The decisions of the court are analyzed and compared in some detail in the article [No More Duncan Instruction in Canada - So Why Say It?](#) by Regina Lee, posted on [The Court](#) on October 30, 2008.

3. Response to Jury Questions: C.A.

The issue before the court in [R. v. Layton](#), 2008 MBCA 118 (CanLII) was whether the trial judge erred in giving instruction to the jury on the issue of reasonable doubt. The trial judge here, on receiving a question from the jury as to the meaning of the concepts of absolute certainty and balance of probabilities in the context of the charge given on reasonable doubt, repeated the instructions already provided to the jury. The court allowed the appeal, having found that:

...the jury identified that it required assistance with respect to the fundamental principle of reasonable doubt. Using the words of Cory J. in *S. (W.D.)*, "[t]he jury has said in effect, on this issue there is confusion, please help us" (at p. 530). Because that help was not provided, I am of the view that there is a reasonable likelihood that the jury was under a misapprehension about the meaning of reasonable doubt.

4. Provincial Court Notice: Entering a Plea

By [Notice dated October 28, 2008](#), the Provincial Court issued a reminder to lawyers that when matters are set for plea, counsel are to appear ready to enter a plea.

5. Know Your Client!

The new [Rules on client identification and verification](#) come into effect in Manitoba on December 31, 2008. These Rules can be reviewed on [The Law Society website](#) and will be the subject of two upcoming professional development programs:

- [Brandon](#): Monday, November 17, 2008, 12-1:30 at the Victoria Inn
- [Winnipeg](#): Monday, November 24, 2008, 12-1:30 at the Law Society

To obtain more information and to register, click on the link above for the location you are interested in.

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