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### Court Must Find Real Error to Order New Trial: SCC

A divided (5-4) Supreme Court [overturned](#) the Manitoba Court of Appeal decision in [R. v. Sinclair \(T.\)](#), 2009 MBCA 71, restoring the manslaughter conviction of one of three co-accused who beat up the victim and left him on the road where he was later run over by a passing driver. The majority of the Supreme Court disagreed with the Court of Appeal decision that the trial judge had misapprehended the evidence concerning Sinclair's involvement:

In my opinion, for an appellate court to decide to order a new trial on the basis of a miscarriage of justice resulting from a misapprehension of the evidence, more is needed than an "apparent" mistake (e.g., an error that the trial judge may have committed) in the reasons. A court of appeal should not, in applying the *Lohrer* test, order a new trial unless the trial judge has made a real error; its decision cannot be speculative. The plain language or the thrust of the reasons must disclose an actual mistake. When such errors are in fact committed, appellate courts have no difficulty in explaining why they caused the trial judge's reasoning process to be fatally flawed and where they may be found in the reasons. In such situations, the errors are readily obvious. (para. 53)

No Evidence of Game Playing in Funding Decision Reversal:  
MBCA

The court dismissed the accused's motion to fix an hourly rate for counsel fees in [R. v. Roussin \(B.\)](#), 2011 MBCA 67, a case in which Legal Aid Manitoba reversed its initial decision to deny funding after the court appointed counsel under s.684(1) of the *Code*. The court found that

the language of s. 684(2) must mean that notwithstanding an earlier refusal, the provincial legal aid authority has a fresh opportunity to consider the granting of legal aid following the court's decision to grant an order under s. 684(1). It is only if legal aid is then denied that the obligation falls upon the Attorney General to provide the necessary funding...(para.36)

### Disproportionately Severe Sentence Reduced by One Day: MBCA

Inadvertent failure to take into account the accused's immigration status and the potential immigration consequences resulted in the imposition of an unfit sentence according to the Court of Appeal in [R. v. Arganda \(J.R.\)](#), 2011 MBCA 54. The court reduced the two year sentence already served by the accused by one day in order to avoid the "unintended, unjust and unfair consequence" of depriving him of the opportunity to appeal the deportation order against him.

### Crown Not Obligated to Prove Actual Rate of Speed: MBCA

The actual rate of speed of the vehicle is not an element of the offence of speeding under s. 95(1) of *The Highway Traffic Act* and need not be proved by the Crown according to the court in [R. v. Brown](#), 2011 MBCA 63. The court rejected the accused's argument that his conviction should be overturned because the justice of the peace failed to assess credibility or give reasons for the finding he made concerning the speed at which the accused was driving. The accused admitted to speeding, but not at the higher rate alleged by the police officer and accepted by the JP which would necessarily result in the loss of his licence.

### Four Year Sentence Upheld for Sexual Interference: MBCA

In [R. v. R. \(G.W.\)](#), 2011 MBCA 62, an unsuccessful appeal of a 4 year sentence on a sexual interference charge involving 9 year old victim, the court makes an *obiter* comment concerning the sentencing judge's characterization of the accused's conduct as an abuse of his position of authority. The court commented that, while the judge was entitled of his own accord to raise the issue as an aggravating factor contributing to the severity of the sentence, counsel for the accused should have been given notice and an opportunity to address the issue.

### Recent Q.B. Decisions

[R. v. Steele](#), 2011 MBQB 181 - the court dismissed the Crown's application under s. 752.1 of the *Code* for remand for assessment of an accused convicted of a 39 second drug store robbery. The court found that the circumstances of the robbery (in which no weapon was seen and no injuries were sustained) did not constitute a serious personal injury offence:

The implied threat of violence is not sufficient to constitute the use or attempted use of violence against another person in these circumstances. This was a robbery committed without the use or attempted use of violence. (para. 31)

[R. v. Junkin](#), 2011 MBQB 170 - the court stayed impaired driving charges because the accused's right to be tried within a reasonable time was violated by an inadequately explained 20 month delay in delivery of a ruling on a *voir dire*.

## Court Notice

The Court of Queen's Bench issued a [Notice re Books of Authority](#) on June 30, 2011 requiring all such books to be indexed, bound, and with the authorities separated by numbered tabs.

## Criminal Justice Publications

These recent publications contain useful information for criminal law practitioners:

- [Pleading Fairly](#) - this University of Calgary Faculty of Law blog article reviews the effect of *R. v. Nixon*, 2011 SCC 34 in the context of proposed omnibus changes to the criminal law, concluding that it will further enhance the power of Crown prosecutors to exact concessions from accused.
- [Evidentiary Issues in Domestic Violence Trials](#) - this BC CLE Practice Points article explores the significant judicially imposed changes to the criminal law to deal with domestic violence cases.
- [SCC judge's retirement leaves gaping hole in criminal law](#) - this *Lawyers Weekly* article takes a look at the legacy of recently retired Supreme Court of Canada Justice Louise Charron.

## Criminal Law Expert Evidence Series

The Law Society of Manitoba and the Criminal Law section of the Manitoba Bar Association have developed a [series](#) of three programs on expert evidence for criminal lawyers:

- DNA Evidence - a DNA expert from the RCMP will discuss how DNA is handled in their lab and what DNA profiles look like. The program will be held October 20, 2011 from 5:00 to 7:00 p.m.
- Fingerprint Evidence - a forensic identification specialist will review the history of fingerprint identification and the national and international fingerprint databases at this November 30, 2011 program which takes place from 12:00 noon to 2:00 p.m.
- Arson Evidence - learn about the methodology of fire investigation from the perspective of a Winnipeg Police Service arson expert at this January 12, 2012 evening program.

All programs take place at the Law Society of Manitoba classroom. Save money by [registering](#) for more than one program.

## Fall CPD Programs: LSM

Be sure to register soon for these upcoming continuing professional development programs offered by the Law Society:

- [Preparation for Big Cases](#) - Mr. Justice Jeffrey Oliphant and Richard Wolson, Q.C. will draw on their experiences with the Mulroney-Shreiber Inquiry to take a close look at the issues specific to preparing for big cases. [Register](#) now for this unique program which will be held September 16, 2011, from 12:00 noon to 2:00 p.m. in the Law Society classroom.
- [Advanced Cross-examination Techniques](#) - all who litigate will benefit from the techniques taught in this full day program by internationally acclaimed presenters Larry Pozner and Roger Dodd. The program will be held October 24, 2011 at the Radisson Hotel. [Register](#) by September 15, 2011 to take advantage of the early bird rate.
- [How to Work With New Immigrants](#) - this course will help legal professionals who work with new immigrants to become more aware of cultural differences and to learn intercultural communication strategies. It takes place October 14, 2011, from 1:00 to 4:00 p.m. at the Law Society classroom.

## The Ninth Annual Crown Defence Conference

The Ninth Annual Crown Defence conference will take place September 22 and

23, 2011 at the Winnipeg Convention Centre. Guest speakers include Justice Marc Rosenberg and journalist Christie Blatchford. For further details contact Heather Reay at 985-8189.

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