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Analysing Legal Causation: SCC

In [*R. v. Maybin*](#), 2012 SCC 24, the Supreme Court considers when an intervening act by another person severs the causal connection between the accused's act and the victim's death, thereby absolving the accused of legal responsibility for manslaughter. In this case, the victim died in a bar brawl after being punched unconscious by the accused brothers and then struck in the back of the head by a bouncer. Since there was no conclusive evidence as to the cause of death all three accused were acquitted at trial. The Supreme Court upheld the majority decision of the B.C. Court of Appeal, however, that it was open to the trial judge to conclude that the appellant brothers caused the death. A new trial was ordered. On the analytical approach to assessing legal causation the court concluded at para. 60:

Courts have used a number of analytical approaches to determine when an intervening act absolves the accused of legal responsibility for manslaughter. These approaches grapple with the issue of the moral connection between the accused's acts and the death; they acknowledge that an intervening act that is reasonably foreseeable to the accused may well not break the chain of causation, and that an independent and intentional act by a third party may in some cases make it unfair to hold the accused responsible. In my view, these approaches may be useful tools depending upon the factual context. However, the analysis must focus on first principles and recognize that these tools do not alter the standard of

causation or substitute new tests. The dangerous and unlawful acts of the accused must be a significant contributing cause of the victim's death.

[*Maybe We Have Clarity in Causation: R v Maybin*](#), posted May 23, 2012 on The Court, examines the implications of the case.

SCC Divided on Court of Appeal Review Powers

A divided court restored the indecent assault conviction in [*R. v. R.P.*](#), 2012 SCC 22, a case where the complainant alleged she had been assaulted by her sister's husband 30 years previously when she was only 13. The majority found that "(a) court of appeal that reviews a trial court's assessments of credibility in order to determine...whether the verdict is reasonable cannot interfere with those assessments unless it is established that they 'cannot be supported on any reasonable view of the evidence...'" In this case, said the court, the verdict was reasonable and intervention could not be justified. The minority disagreed, finding that a trial judge who draws inferences or makes findings of fact that are contrary to the evidence, invites appellate intervention, and that the appeal judge "was not only entitled but indeed bound" to "re-examine the entire evidentiary record at trial...."

On this issue see also [*R. v. G.J.B.*](#), 2012 MBCA 43, a recent Manitoba case, in which the Court of Appeal directed a new trial on a sexual assault charge because the trial judge misapprehended the accused's evidence, resulting in a miscarriage of justice. On the subject of the scope of appellate review the judge said:

I am well aware that reasons for judgment should be read as a whole and that an appellate court should refrain from nit-picking through the reasons in order to find errors of little consequence in the totality of the reasons. In this instance, I have done a detailed review of the reasons dealing specifically with the credibility findings of the judge with respect to the accused because those findings are not incidental to his *W.(D.)* analysis, but are a crucial part thereof.

Bizarre Sexual Assault Evidence Admissible: SCC

Verdicts "rank extremely high on the reliability scale and that is how they should be viewed when deciding whether they can be admitted for their truth" said the court in [*R. v. Jesse*](#), 2012 SCC 21, an appeal of a sexual assault conviction in which the appellant challenged the introduction of similar fact evidence of a prior conviction to prove identity. The court found the trial judge made no error in receiving the 1995 conviction on the similar fact *voir dire* for the limited purpose of linking the appellant to the sexual assault. The evidence was both highly reliable and the best evidence available to refute the appellant's contention that he was not the assailant in either assault. The court also found that, while nothing automatically forecloses an accused from challenging a prior conviction at the *voir dire* stage, the trial judge's right to control the proceedings will mean such challenges are rare.

No Need to Announce Transition to Sobriety Investigation: MBQB

In [R. v. Weik](#), 2012 MBQB 138, an unsuccessful appeal of a drive over .08 conviction, the court examines the evolving jurisprudence on how s.10(a) of the *Charter* is to be applied to situations of roadside stops and screenings, as well as the framework set out in *Grant* for analysing whether evidence should be excluded under s.24(2) of the *Charter*. Among other things the court finds that the s.10(a) requirement that an accused be advised of the reason for a detention will be satisfied by the general inquiries made of a motorist at a legitimate roadside screening and that the police are not obliged to warn the motorist that the initial detention is transitioning into an impaired driving investigation.

Legislative Changes

Several sections of [The Police Services Act](#), S.M.2009, c.32 (ss. 1 to 5, 13 to 55, 78, 79 and 81 to 89, 91(1)(a) to (d) and (g) to (j), 91(2), 92 to 103 and 105 to 110) have been proclaimed and will come into force June 1, 2012. The act replaces *The Provincial Police Act*, and governs policing in Manitoba.

[Bill 11](#), *The Criminal Property Forfeiture Amendment Act*, introduced April 25, 2012, proposes changes to the forfeiture process for uncontested seizures and adds protections for victims of crime as described in this [news release](#).

The Manitoba government has introduced several bills amending *The Highway Traffic Act* in the last month: [Bill 3](#), (concerning speed limits in school zones, introduced April 19, 2012); [Bill 5](#), (regarding changes to inter-city bus regulation, introduced April 20, 2012); [Bill 8](#) (concerning car seat and seatbelt use, introduced April 30, 2012); [Bill 22](#), (extending the ignition-interlock program, introduced May 7, 2012); [Bill 32](#), (concerning authority over cycling traffic on highways, introduced May 16, 2012); and [Bill 37](#), (requiring cyclists under 18 to wear helmets, introduced May 23, 2012).

This [news release](#) explains the proposed changes to the ignition interlock program in more detail.

FASD Service Increase

The Manitoba government [announced](#) a province-wide expansion of fetal alcohol spectrum disorder services on May 11, 2012. New funding will be available for projects that address prevention, diagnosis and intervention, including the expansion of the Youth Justice Program.

Recommended Reading

Criminal lawyers may be interested in the following publications:

- The May 2012 edition of [*Voir Dire*](#), the CBA Criminal Justice section newsletter, contains articles on [judicial discretion in sentencing](#) in tragic cases (dealing with the MBCA decision in [R. v. Henderson](#) and written by Christopher Mainella); [social media and the courts](#); and the pros and cons of [Bill C-26](#).
- [Awaiting legal clarity over HIV non-disclosure](#) - this *Lawyers Weekly* article discusses the two cases on failure to disclose HIV-positive status recently heard by the Supreme Court: [R.v. Mabior](#) (C.L.), 2010 MBCA 93 and [R. v. D.C.](#), 2010 QCCA 2289.
- [Making Sense of the New Criminal Omnibus Bill](#) - this post from The Stream summarizes which sections of the [Justice for Victims of Terrorism Act](#) (the omnibus crime legislation also known as the *Safe Streets and Communities Act*) are in force and which are pending or transitional.
- [Surveillance under the spotlight](#) - law professor Benjamin Goold, the author of this *Lawyers Weekly* article, applauds the SCC decision in *R. v. Tse* curtailing police wiretap powers, but warns that the lack of guidance by the court as to what constitutes reasonable diligence is problematic.

CBA/MBA Programs

The Criminal Law section of the MBA is hosting two programs in June:

- [Welcome to the Practice of Law](#) - this seminar, designed for articling students who will appear in Provincial Court on criminal matters, will be held June 12, 2012, from 4:00 to 6:30 p.m. in room 413 of the Law Courts building;
- [Top 5 Criminal Cases for 2011-2012](#) - join Constitutional Law counsel Nathaniel Carnegie as he reviews the most important SCC and MBCA cases from the last year. The program takes place June 15, 2012, from noon to 1:30 p.m. at the Law Society classroom.

RSVP to the MBA for either program.

Crown Defence Conference

The 10th annual [Crown Defence Conference](#) will take place September 20 and 21, 2012 at the Winnipeg Convention Centre. Distinguished speakers include Justice Cromwell of the Supreme Court of Canada, Judge Casey Hill, Commissioner Wally Oppal, Q.C. and Professor Stewart, U of T, Faculty of Law. Topics to be covered include Garofoli applications, computer forensics, hearsay evidence, polygraphs, and media in the courtroom. For further details see the conference [program](#) and [agenda](#).

National Criminal Law Program

[Evidence, Ethics and the Administration of Justice](#), the Federation of Law Societies' 39th annual National Criminal Law Program, will take place July 9-13, 2012 in Victoria, B.C. The program is currently sold out, but there is a waiting list. Among the broad list of topics to be covered: privilege, cross-examination, hearsay evidence, expert opinion, and ethical issues. The Hon. Justice Richard Saull will present at panels on Foundation Principles and Cross-Examination and Prior Statements. Check the [brochure and registration form](#) for further information.

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