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THE CURATIVE PROVISO

1.0 PREFACE

This issue reviews recent cases which have considered the applicability of the curative proviso; in particular, this issue considers whether courts should speculate about the potential impact an error may have had on the jury, in the absence of any indication that the error did in fact affect the jury, and what use, if any, a court should make of implied findings in the curative proviso analysis.

2.0 THE CASES REVIEWED IN THIS ISSUE

(i) ***R. v. Sarrazin*, 2010 CarswellOnt 6646, 2010 ONCA 577 (Ont. C.A.)**

(ii) ***R. v. Townsend*, 2010 CarswellBC 2407, 2010 BCCA 400 (B.C. C.A.)**

(iii) ***R. v. Palarajah*, 2010 CarswellOnt 7210, 2010 ONCA 625 (Ont. C.A.)**

(iv) ***R. v. White*, 2011 CarswellBC 485, 2011 SCC 13 (S.C.C.)**

(v) ***R. v. Pickton*, 2010 CarswellBC 2000, 2010 SCC 32 (S.C.C.)**

2.1 *SARRAZIN*

Facts

Sarrazin and Jean were charged in relation to the shooting of Apaid Noel. Noel was shot twice at close range outside a night club in Ottawa. One of the gunshot wounds caused life-threatening injuries but surgical intervention saved his life; at least temporarily. After spending almost a month in hospital, he was released; five days later he died as a result of a blood clot.

The two appellants were convicted, at a first trial, of second-degree murder (a third man was convicted of manslaughter) but a retrial was ordered by the Court of Appeal: 2005 CarswellOnt 1402 (Ont. C.A.). At the retrial two issues were raised by the defence. Identity was one of the issues; the other issue arose during cross-examination of the Crown pathologist, Dr. Brian Johnston. During cross-examination, although testifying that he was of the opinion that the blood clot arose from the surgical interventions that were required to save the victim from the gunshot wounds, the pathologist admitted, as a possibility, that the victim had died as a result of his ingestion of cocaine just prior to his death; there was no other evidence offered to support this "possibility" [paras 20-21].

Ruling

During the pre-charge conference, the issue of whether or not attempted murder should be left with the jury was raised. The trial judge, noting sections 660-662 of the *Code* and *R. v. Poole*, 1997 CarswellBC 720 (B.C. C.A.), expressed his uncertainty that attempted murder could be left. The Crown argued that it should not be left, and if the jury had a reasonable doubt about the issue of causation they should acquit. The trial judge did not leave causation with the jury [paras 22-25].

The Court of Appeal held this to be an error. In his reasons, Doherty JA chose not to follow *Poole* and held that attempted murder should have been left [para 50]. In his dissenting reasons, Moldaver JA similarly held that attempted murder should have been left. Where Moldaver JA parted ways with the majority (Epstein JA concurring with Doherty JA) was on the issue of the application of the curative proviso.

In his reasons, Doherty JA noted that the curative proviso can be applied where "the evidence against an accused is overwhelming or where it can be safely said that the legal error had no impact on the verdict" [para 68].[2] This case, he held, turned on whether

1 Assistant Crown Attorney, Ottawa. The views and opinions expressed herein are those of the author and do not represent those of the Attorney General or the Crown Attorney's office.

2 In the recent decision of *R. v. Ellard*, 2009 CarswellBC 1514 at para 40 (S.C.C.), the Supreme Court held that the curative proviso would apply where "the error is harmless, or, if serious, is counterbalanced by evidence so overwhelming against the accused that no substantial wrong or miscarriage of justice resulted".

the second part of that test was applicable. Although Doherty JA recognized that implicit in the jury's findings, that the accused were guilty of murder, was a finding of causation against the appellant [para 73], he was not satisfied that this implicit finding could be properly relied upon by the Crown to demonstrate that the legal error had no impact on the verdict. Doherty JA (relying on *R. v. Jackson*, 1993 CarswellOnt 136 (S.C.C.) and distinguishing *R. v. Haughton*, 1994 CarswellOnt 103 (S.C.C.)) held that in the circumstances of this case, the "curative proviso analysis should be undertaken without regard to any findings of fact implicit in the verdict" [para 97].

In his dissenting reasons, Moldaver JA would have applied the curative proviso. In doing so, he cited five factors that persuaded him that the curative proviso could properly apply; the two most notable of which were that the jury was not faced with a stark choice of murder or acquittal (manslaughter was left with the jury) and the charge on causation was exemplary [paras 135-136]. After reviewing these two factors in detail, Moldaver JA concluded that the fact that a properly-instructed jury found the Crown had proven causation, the failure to leave attempted murder was harmless [para 170].

Comment

All members of the court appear to accept that there are cases where a trial judge's failure to leave an included offence with the jury would result in an error to which the curative proviso should not apply. The majority held that this was such a case. In dissent, Moldaver JA held that the failure to leave attempted murder, in the circumstances of this case, could not have possibly impacted on the jury's verdict and, accordingly, that the curative proviso should have applied. This approach seems more consistent with the principles that govern the applicability of the curative proviso.

First, an integral part of our jury system is the presumption that juries understand and are able to apply and act upon legal instructions provided to them: see *R. v. Corbett*, 1988 CarswellBC 252 (S.C.C.). Second, there was no issue with the charge on causation; Moldaver JA found it was "exemplary". Third, there was nothing on the record to suggest the jury had any difficulty understanding or attempting to apply the law to the evidence; there were no jury questions on the issue of causation.[3] Fourth, on the facts of this case, the evidence that supported a reasonable doubt in relation to causation was dubious. This evidence arose from the cross-examination of Dr. Johnston, who testified that it was "possible", but not probable, that recent cocaine ingestion could have caused the clot. This evidence was hardly impressive and it is not difficult to imagine the jury had little difficulty rejecting it as raising a reasonable doubt. It is indeed implied in the verdict that the jury did, in fact, reject it.

Given the absence of any evidence to suggest the jury had difficulty, the presumption that juries understand and are able to apply and act upon the legal instructions provided should prevail. This seems especially so where the charge (on causation) was unchallenged and the evidence which could have lead to a verdict of attempted murder was tenuous. In such circumstances, the suggestion by Doherty JA – that the absence of attempted murder as a possible verdict may have subconsciously influenced the jury [para 94] – should, with respect, be rejected.

3 There were two questions from the jury during the five days of deliberation; both of which related to identity.

There was, on the available evidence, an implied finding that the jury rejected the cocaine causation theory. There was no reason to ignore this implied finding in the circumstances of this case.

2.2 *TOWNSEND*

Facts

Townsend had given the victim a ride in his car. While in the car, the victim, according to the appellant, made an unwanted sexual advance toward him. This greatly angered the appellant and he pulled out a "small baseball bat" and began beating the victim. The appellant then evicted the victim from a car, throwing him into a ditch. The victim was alive when the appellant left him.

The appellant was charged with second-degree murder and was tried by a judge and jury. During the charge the judge left with the jury a copy of certain sections of the *Code* including section 229; a portion of paragraph (c) of that section ("he knows or ought to know is likely to cause death") was, of course, struck down as unconstitutional: see *R. v. Martineau*, 1990 CarswellAlta 143 (S.C.C.).

The appellant was convicted and appealed. On appeal the appellant argued that this was a serious error that left with the jury the possibility that it could convict him if satisfied that his intention to kill was objectively – not subjectively – demonstrated [para 9]. The Crown agreed it was an error but argued that the curative proviso should apply as it was a minor error and it could not have had an impact on the verdict.

Ruling

Chiasson JA authored the decision for a unanimous court. In considering whether the curative proviso should be applied, Chiasson JA, after citing, *inter alia*, *R. v. Van*, 2009 CarswellOnt 2897 (S.C.C.), held that "there must be some indication that the error could have affected the verdict" [para 17]. In reviewing the case and the issue, Chiasson JA held that the jury could not possibly have been mislead as this was a case, based on the evidence and the charge, based on section 229(a) of the *Code*.

Chiasson JA concluded:

> There is nothing in the record of this case to suggest that there was a reasonable possibility that, but for the error, the verdict would have been different. I do not think it was reasonably possible that the jury was misled in this case merely by receiving an unedited copy of a section of the *Criminal Code* which was not relevant to the case as it was presented and argued and to which no one made reference [para 42].

Comment

As Chiasson JA noted in *Townsend*, all errors must be considered in context. Taking into account the four factors outlined above, Chiasson JA recognized the presumption that juries will follow instructions provided; that the charge was legally sound; that there were no jury questions; and that on the facts of the case, it was apparent that the jury would not have inappropriately relied on section 229(c) of the *Code* [paras 40-41].

It is interesting to note that in *Townsend*, the appellant had advanced the argument that he did not intend to kill the victim when he struck him. Given that this was his position, one might think that the jury, improperly having access to section 229(c), could have been influenced. In other words, they could have subconsciously, or actually – by reading section 229(c) – been

influenced to conclude that whether or not the appellant intended to kill the victim, objectively he ought to have known that his actions could have caused death.

Chiasson JA, however, declined to engage in this type of speculation and noted that in the absence of any indication that the jury did not apply the law as instructed by the trial judge, the curative proviso could properly be applied.

This approach is consistent with the principles underlying the application of the curative proviso and should be favoured. The presumption that juries will understand and apply instructions provided should not be displaced by speculation about the potential impact of an error absent evidence to demonstrate that the jury was influenced by the error.

2.3 *PALARAJAH*

Facts

Janakan Sivalingam was set upon by a group of young men and savagely beaten with baseball bats, an axe and a machete. The appellant was alleged to be amongst the group that attacked the victim. The Crown offered two theories. First, that the appellant and his friends intended to kill another man, Pay, and believed that the victim was Pay and, therefore, should be convicted of first-degree murder. In the alternative, the Crown advanced the theory that the appellant and his friends realized Pay was not present and decided, spontaneously, to attack the victim and should be found guilty of second-degree murder.

Palarajah testified and admitted to being present. He testified, however, that he did not participate in the beating and attempted to act as a peacemaker.

Palarajah was convicted of second-degree murder. On appeal he argued, *inter alia*, that the trial judge erred in the instruction on the defence of abandonment; in particular, the trial judge failed to "instruct the jury that the timely communication of an intention to withdraw should be considered in the context of what was 'practical and reasonable' in the circumstances" [para. 26].

Ruling

In a unanimous ruling, the Court of Appeal held that while the trial judge may have erred by failing to include this element of the charge on abandonment, that the trial judge's instruction on the defence was "overly favourable" to the appellant [para 30]. The court further noted that even if there had been an error, it would have had "no difficulty" in applying the curative proviso [para 26].

Comment

In *Palarajah*, unlike the majority's ruling in *Sarrazin*, the court accepted the findings implicit in the jury's verdict: "[b]y its verdict, it is apparent that the jury rejected Palarajah's evidence that he assumed the role of peacemaker and tried to stop the attack on the deceased" [para 27]. Given this apparent rejection, the court held, it would have "no difficulty" applying the proviso.

Yet, the error alleged in *Palarajah* was potentially a significant one. The alleged error arose from the trial judge's failure to advise the jury that the timeliness of the efforts to withdraw must be considered in the context of what was "practical and reasonable". The accused's position was that given the speed with which the attack was carried out, this aspect of the charge was significant.

Given this argument, it might seem telling that the court was, nonetheless, willing to accept the implicit finding in the verdict that the jury rejected the accused's evidence. As one might wonder: would the jury necessarily have rejected it if they had been properly instructed that the timing must be considered in light of what is "practical and reasonable"? Nonetheless, this does seem to be an appropriate case for the application of the curative proviso; it is, however, at odds with the approach of the majority in *Sarrazin*. How could the court accept the implicit finding in *Palarajah* (that the jury rejected the accused's evidence) in the face of the fact that the error went to the very heart of the accused's position (the practical and reasonable realities that impacted on his efforts to abandon his involvement) yet reject the implicit finding in *Sarrazin* (that the jury found that causation had been made out) due to the potential subconscious impact that the absence of a lessor offence could have had?

2.4 *WHITE*

Facts

Around 3:30 a.m. on December 3, 2005, Lee Matasi was with a group of friends heading home from a night out in Gastown. En route he encountered Dennis Robert White, the appellant, who accosted him and struck him in the head with a gun. The men began to struggle. During the struggle Matasi was shot in the heart. He was killed instantly. Immediately after the shooting the appellant fled; he was apprehended some time later.

The appellant was charged with second-degree murder in relation to the killing of Matasi. Throughout the trial, identity and intent were at issue. As part of its case, the Crown lead evidence about the actions of the appellant immediately after the shooting. Ultimately, identity was effectively conceded and the only issue was whether the appellant had the requisite intent for murder [para 2]. The appellant was convicted and appealed.

On appeal the appellant argued that the trial judge erred in his instruction to the jury in relation to post-offence conduct. The appellant was concerned about a comment in the Crown's closing wherein the Crown noted for the jury that the appellant immediately ran from the scene and that there was "no hesitation here, no shock, no uncertainty…just immediate flight" [para 4]. This, the appellant argued improperly, invited the jury to consider flight as post-offence conduct consistent with guilt for second-degree murder, citing, *inter alia*, *R. v. Arcangioli*, 1994 CarswellOnt 1151 (S.C.C.) [para 6]. A majority of the Court of Appeal dismissed the appeal and the matter was appealed to the Supreme Court.

Ruling

Three separate judgements were rendered by the Supreme Court on the appeal.[4] Relevant to the present discussion is Rothstein J's ruling and his consideration of the applicability of the curative proviso. With respect to the adequacy of the charge and caution to the jury on the use that could be made of the post-offence conduct, Rothstein J held that the evidence of the appellant's "lack of hesitation" was relevant to the issue of "his level of culpability" [para 86]. Rothstein J reviewed the charge in that light

4 Rothstein J delivered a decision, concurred in by LeBel, Abella and Cromwell JJ; Charron J delivered a decision, concurred in by Deschamps J; and Binnie J delivered a decision concurred in by McLachlin CJ and Fish J.

and concluded that the instruction was "adequate and did not constitute an error of law" [paras 81 and 88].

Although he found no error, Rothstein J went on to consider whether the curative proviso should have applied if there had been an error [89-102]. Noting the two circumstances in which the curative proviso could be applied, Rothstein J held that this was a case where the error was minor and could not possibly have affected the outcome:

> It would have been ideal for the trial judge, when instructing the jury on the matter of intent, to refer expressly and exclusively to Mr. White's lack of hesitation or shock, as opposed to his 'conduct in fleeing the scene'. Although, as I explained above, *I believe that any ambiguity would immediately have been resolved by the context in which the statement was made*...and...such error is a minor one [para 95] [emphasis added].

It is particularly interesting to note that in coming to that conclusion – that the error was a minor one – Rothstein J concluded that based on the entire record of proceedings, the Crown's approach to the case and the trial judge's ruling that the evidence of post-offence conduct would have been "of minor importance" [para 102] and that the jury could not possibly have been "induced to consider the flight per se as a relevant circumstance" in determining intent [para 96].

Comment

In *White* the Court again relied upon implied findings in the curative proviso analysis; although the implied findings were not strictly speaking those which arose from the verdict. In *White* both Rothstein and Binnie J – although coming to different conclusions – relied on what they perceived to be the implied findings that would have been reached by the jury from the evidence.

For his part, Rothstein J would have applied the curative proviso. In undertaking the curative proviso analysis he began by reviewing the other evidence that was available for the jury to consider on the issue of intent [para 101]. Given the "case as a whole", Rothstein J held that the post-offence conduct "was of minor importance" and would not have influenced the jury [para 102]. He concluded, therefore, if there was an error it was minor and inconsequential. Whether or not one agrees with the analysis, what is clear is that this conclusion was based on Rothstein J's perception of the evidence and the implied findings that would have been made thereon by the jury.

Binnie J, on the other hand, dissenting on this point, would not have applied the curative proviso. In his view, the Crown's case was not overwhelming and portions of the relevant evidence were conflicting [para 197]. As a result of the problems he perceived in the evidence, Binnie J concluded that "[i]n these elusive circumstances, post-offence conduct of reaction time and demeanour took on considerable importance, which is why, no doubt, the Crown laid emphasis on it in its closing argument" [para 197]. Accordingly, he held, the error was not minor and the curative proviso should apply. This conclusion, whether or not one might agree, is similarly based on Binnie J's perception of the evidence and his conclusion that implicit in the verdict is the jury's reliance on the post-offence conduct.

White offers helpful insight into the issue of how implied findings may be instructive in the curative proviso analysis. Indeed, both Rothstein and Binnie J rely on implied findings to come to their respective conclusions. Such reliance seems appropriate and reasonable. Indeed, as Rothstein J noted, it is fundamental to our jury system that we assume and must accept that juries make reasonable findings:

> Our jury system is predicated on the conviction that jurors are intelligent and reasonable fact-finders. *It is contrary to this fundamental premise to assume that properly instructed jurors will weigh the evidence unreasonably or draw irrational and speculative conclusions from relevant evidence* [emphasis added]. I agree with the view expressed by Dickson C.J., in *R. v. Corbett*, 1988 CarswellBC 756, 1988 CarswellBC 252 (S.C.C.), that it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system [para 56].

In *Sarrazin,* Doherty JA refused to consider the implied findings arising from the verdict. Instead, he chose to speculate that the jury may have subconsciously been influenced by the failure to leave attempted murder with the jury. As *White* demonstrates, implied findings are not only an appropriate consideration, they may be central to the curative proviso analysis.

2.5 *PICKTON*

Facts

In 2001, police became interested in Robert Pickton as a result of an investigation into the disappearance of numerous women (all of whom were drug-dependent sex-trade workers from the downtown Vancouver area). Ultimately, the police investigation led to an extensive search of the appellant's property, his arrest and the laying of 27 counts of first-degree murder. Prior to trial, the trial judge quashed one count and severed 20 others.

The Crown's case against the appellant was multi-faceted and included confessions and admissions by the appellant during his interview with the police and to an undercover officer, another confession to a civilian witness, and an eye-witness who testified at trial that she saw Pickton disembowelling a woman in his slaughterhouse.

The Crown's theory throughout the trial was that Pickton was the sole perpetrator. The defence's strategy throughout the trial was to undermine that theory and suggest that others may have actually killed the victims on Pickton's property.

Two portions of the charge to the jury and the trial judge's answer to a jury question became the subject of appellate litigation. One aspect of the charge related to the trial judge's "other suspect instruction". That instruction related to the possible involvement of others in the killings, but, as the trial judge noted, this would not impact on the appellant's liability so long as he "actively participated in the killing" [para 23]. The second aspect of the charge, referred to as the "actual shooter instruction" was one that was agreed upon by the Crown and defence and included an instruction that "...if you have a reasonable doubt about whether or not he shot her, you must return a verdict of not guilty" [para 25].

The question, which was the subject of the appeals, came several days into deliberations: "when considering element 3 [the identity of the killer] on one of more counts, are we able to say 'yes', if we infer that the accused acted indirectly?" [para 28]. The trial judge answered: if you find that Mr. Pickton shot [the victim] or *was*

otherwise an active participant in her killing, you should find that the Crown has proven this element [emphasis added] [para 28].

The appellant was convicted of six counts of second-degree murder.

Ruling

Low JA, on behalf of the majority, dismissed the appeal. On appeal to the Supreme Court, Charron J, on behalf of the majority, found no error in law and dismissed the appeal.

Charron J noted, *inter alia*, that the "actual shooter instruction" should never have been suggested or given to the jury [para 26]; to the extent there was an error, it enured to the benefit of the appellant. In conclusion, Charron J held that neither the answer to the jury nor the charge itself constituted legal error [paras 30 and 32].

LeBel J wrote a separate, but concurring in the result, decision. LeBel J found that the trial judge erred in his charge. In particular, he held that the "words 'or was otherwise an active participant' did not convey the adequate causal requirement…the instructions should have made it clear that the jury could only convict Mr. Pickton of the killings if they were satisfied beyond a reasonable doubt, having considered all the evidence, that he *either* personally shot the victims *or* aided and abetted another person in the killings" [para 80].

Turning to the curative proviso, LeBel J held that the Crown presented "compelling, overwhelming evidence of the participation" of the appellant in the killings [para 86]; it was clear that Pickton was either a principal or an aider or abettor. Accordingly, LeBel J held, there was no miscarriage of justice arising from the error and the curative proviso should apply [para 87].

Comment

Unlike the cases discussed thus far, the curative proviso was applied in *Pickton* on the basis that the case was overwhelming; even if the error was serious, the verdict would have inevitably been the same.

Undoubtedly, the curative proviso should have been applied in *Pickton*. The case was multi-faceted and highly compelling. The verdict would undoubtedly have been the same if the jury were properly instructed (assuming, as LeBel J held, they were not).

What is more interesting about the application of the curative proviso in *Pickton*, however – and more relevant to the current discussion – is the rationale underlying its application in such circumstances. The proviso is applied on the basis that the jury, *if* properly instructed, would have applied that law to the evidence before it and returned the same verdict. Thus, the court is relying on the same presumption discussed above: that juries are presumed to follow and apply the law as instructed.

If the presumption is applied in this context, it should equally apply in a situation where, although the case is not overwhelming, the charge is not attacked and there is no indication that the jury did not apply the law as instructed. The error in such circumstances should be seen not to have impacted on the verdict.

3.0 EPILOGUE

A fundamental aspect of our jury system is the presumption that jurors understand and will follow the legal instructions provided to them by the trial judge; it is also presumed that they are intelligent and reasonable fact-finders. These presumptions should not be displaced lightly. In the context of the curative proviso these presumptions are a relevant, indeed a significant, consideration.

Where the relevant aspect of the charge is found to be sound, and there is no indication that the jury had difficulty with the application of the law to the evidence tendered, the presumption that the jury understood and will apply the law should not be displaced and the proviso should be applied. Speculation that the jury may be subconsciously influenced by an error, such as the failure to charge on an included offence (as in *Sarrazin*) or the provision of an erroneous section of the *Code* (as in *Townsend*) is, with respect, unnecessary and contrary to the foundation of our jury system.[5]

Where there are, on the available evidence (as in *White*) or flowing from the verdict (as in *Sarrazin* and *Palarajah*), implied findings, the presumption that the jury is an intelligent and reasonable fact-finder should not be displaced and the implied finding should be considered in the curative proviso analysis. It is neither necessary nor logical to ignore implied findings in determining whether the impugned error was significant.

While the Crown bears the onus to establish that the proviso should apply, unfounded speculation about the subconscious impact an error may have on the jury should not be a bar to the Crown satisfying that onus. So too a court should not ignore relevant evidence flowing from implied findings.

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5 This presumption is similarly seen in the context of the application of the curative proviso where the case is overwhelming. In *Pickton* (the dissent), the curative proviso was applied on the basis that if the jury had been properly instructed, the outcome would inevitably have been the same (a conviction). In other words, the presumption is applied: the jury would have properly applied the law and come to a just verdict.

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