

The *WD* Revolution

L I S A A . S I L V E R *

ABSTRACT

The *W(D)* decision matters. As a paradigm of the core principles of fundamental justice, *W(D)* has empowered the credibility assessment and given it meaning. From its release in 1991, the essence of the decision, invoked by the case initials, reverberated through the appellate and trial courts and changed the legal landscape. From its modest beginnings as an admonishment to beware of the impermissible “credibility contest,” *W(D)* radically transformed the everyday to the infra-ordinary by imbedding the presumption of innocence and the inextricably connected reasonable doubt standard into the decision-making analysis. But the revolutionary path has not been easy as the courts struggle with the tension between the “ideal” and the “real.” Yet, *W(D)* has survived this ordeal to become an essential trial concept. How *W(D)* has made this not-so “magical” transition is discussed in this article as we trace the impact of the decision through statistics, case law, the judicial lens and the personal perspective. At the end of this examination, we will see *W(D)* anew; not as a worn-out overplayed “mantra” but as an invigorating principle representing the plurality of what is at stake in a criminal trial. To apply *W(D)* is to know it. This article attempts that very task.

Keywords: credibility assessment; *W(D)*; principles of fundamental justice; presumption of innocence; reasonable doubt; standard of proof; burden of proof; Supreme Court of Canada; criminal appeals; grounds of appeal; appellate review; empirical analysis of the law; trial judge; jury instructions

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I. EXPLAINING THE REVOLUTION: WHY *W(D)* STILL MATTERS

In the 1991 Supreme Court decision of *R v W(D)*, Justice Cory proposed a simple three-step instruction to the jury on the “question of credibility” as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.¹

Thus, launched the *W(D)* Revolution as an avalanche of cases based on this so-called *W(D)* instruction ensued.² Since then, the decision has been considered an astounding 9,137 times.³ To this day, the principles enshrined in the decision are readily identifiable by mere mention of the case initials.⁴ But, does this iconic status ensure the staying power of the *W(D)* principle, which is synonymous with applying the reasonable doubt standard to the credibility assessment in a criminal trial?

The answer to this question depends on our perception and understanding of the impact of the decision. On one view, the iconic reputation and representation of the case detracts from its potential importance as a legal principle. Iconography begets simplification. With simplification, the case becomes a mere representation of an ideal, resulting in the dilution of the core meaning of the *W(D)* instruction. This flattening out of *W(D)*, instead of being a vehicle for widely disseminating the underlying message, has the potential to weaken those very same principles of fundamental justice it attempts to protect. The other view, advanced in this article, is that *W(D)* is revolutionary. This provocative view recognizes the extraordinary and lasting impact *W(D)* is continuing to have on the criminal justice system. *W(D)* has created a revolutionary paradigm shift

¹ *R v W(D)*, [1991] 1 SCR 742 at 758, 3 CR (4th) 302 [*W(D)* cited to SCR].

² See e.g. *R v JHS*, 2008 SCC 30, [2008] 2 SCR 152 [*JHS*], Binnie J (“has proven to be a fertile source of appellate” at para 8).

³ Westlaw search as of September 11, 2017.

⁴ See e.g. *R v Wruck*, 2017 ABCA 155 [*Wruck*], Watson JA (“the central argument in support of interim judicial release in this case is one which takes on its character from the watershed decision of the Supreme Court over 25 years ago, now compactly called *W(D)*” at para 5).

away from its early conception as a warning to the trier of fact to refrain from making a “choice between two alternatives”⁵ in assessing opposite narratives. This shift has transformed *W(D)* into a robust and sophisticated analytical decision-making tool embedded in our principles of fundamental justice. It is the contention of this article that the *W(D)* principle is key to the integrity of our criminal justice system. *W(D)* must be embraced and celebrated, not derided and discarded.

I set this challenge to discover the true essence of *W(D)* as a multi-dimensional five-part journey in which we interact with the impact of *W(D)* through a variety of interpretive modes from the historic to the juridical. We start with some pre-*W(D)* history in Part II of the article with a nostalgic look back to the roots of *W(D)* to provide both contextual relevance and support for the sustainability and resiliency of the decision. In Part III we construct the *W(D)* Revolution through a structural survey of the decision in an attempt to understand what the case is and what the case is not. Part IV offers what *W(D)* is as seen through the judicial lens. Part V extends this analysis further by offering a numeric glance at the influence of *W(D)* as it is cited and recited through the subsequent case law. Part VI concludes the journey with a look forward and a recognition of the extraordinary impact *W(D)* continues to have on the decision-making process.

II. THE “WINNER” TAKES ALL: ASSESSING CREDIBILITY PRE-*W(D)*

As a criminal defence appellate lawyer practicing in the late eighties to early nineties, the *W(D)* decision was a vindication of what we appellate lawyers already knew; that credibility assessment could potentially strain the metaphorical golden thread of the presumption of innocence. Even before the watershed moment offered by Justice Cory in *W(D)*, we argued appeals based on the forbidden temptation by the trier of fact to enter into a “credibility contest” in assessing credibility. This erroneous approach denied the “legitimate possibility”⁶ that the trier of fact could not choose the ‘winner’ and was thus left in a state of reasonable doubt. By choosing

⁵ *R v Nimchuk* (1976), 33 CCC (2d) 209, [1976] OJ No 1258 (QL) at para 7 (CA) [*Nimchuk* cited to QL].

⁶ See *R v Challice* (1979), 45 CCC (2d) 546, [1979] OJ No 1301 (QL) at para 38 (CA) [*Challice* cited to QL].

sides, the trier effectively reversed the burden of proof, necessitating the accused present the stronger or more persuasive case.

In the days before Justice Cory's sage advice on how to deal with such an issue, we relied on two Ontario Court of Appeal decisions, *R v Challice*⁷ and *R v Nimchuk*,⁸ to make our case. Particularly useful was Justice Martin's decision in *Nimchuk*, which connected general credibility assessment principles to the specific testimonial concern arising from the presentation of two conflicting versions of the events. Justice Martin articulates the issue, reminiscent of *W(D)*, by suggesting three possible assessment alternatives in paragraph 7 involving:

In our view, the trial judge in concluding that in order to acquit the appellant he would have to find that Mrs. Vanka was "framing him", in effect, placed the burden of proof upon the appellant. The trial judge appeared to think that he was confronted with a choice between two alternatives, either accepting the evidence of the accused, and finding that Mrs. Vanka framed him, or accepting the evidence of Mrs. Vanka, which required a conviction. There was, of course, a third alternative, namely, if a reasonable doubt existed, in view of the conflicting testimony, as to exactly where the truth of the matter lay, it would, of course, require an acquittal.⁹

While the error in *Nimchuk* resulted in a new trial, the Court in *Challice*, after carefully reviewing the charge as a whole, found the jury would fully understand "their duty with respect to the burden and standard of proof"¹⁰ despite the trial judge's direction to "decide whose version you are going to accept."¹¹ This consideration of the entire charge in determining the efficacy of this error becomes part of a greater willingness to look at errors contextually. Later, this holistic approach is used as a prophylactic against other grounds of appeal, such as those errors relating to the

⁷ *Ibid.* The Alberta Court of Appeal approved of *Challice* with a brief reference in *R v Larson*, 1983 ABCA 22, and then later a more detailed discussion in *R v Nehring*, 1984 ABCA 60. Similarly, in Quebec, the decision was first approved of in *R c St-Amour*, 1988 CanLII 296 (QC CA).

⁸ *Nimchuk*, *supra* note 5 at para 7. In 2017, there were 114 mentions of the *Nimchuk* decision.

⁹ *Ibid.*

¹⁰ *Challice*, *supra* note 6 at para 44.

¹¹ *Ibid* at para 36.

misapprehension of the evidence, unreasonable verdict, and the more general burden of proof or *Lifchus*¹² errors.

Due to the influence of *Challice*¹³ and *Nimchuk*, cases from the pre-*W(D)* era tended to view the issue as either a “credibility contest”¹⁴ or a “choice between two alternatives.”¹⁵ Better yet, was the use of the phrase “stark choice”¹⁶ or “stark alternatives,”¹⁷ to describe the magnitude and polarity of the error as characterized by Justice Morden in *Challice*.¹⁸ It is therefore disconcerting to read the 1992 British Columbia Court of Appeal decision in *R v CP*¹⁹ suggesting that “in fairness to the learned trial judge, it must be recognized that he delivered this charge before the judgments in *R v (W)D* and *R v H(C)*, and we have no doubt juries will henceforth be instructed that reasonable doubt applies to credibility when it is in issue.”²⁰ This, when the concept of making a “stark choice”²¹ was not new. In fact, this concern can be traced back to 1946 in *R v Nykiforuk*,²² a decision of the Saskatchewan Court of Appeal. Notably, the Court in *Nykiforuk* cites the golden thread decision of *Woolmington v DPP*²³ in discussing the issue.

¹² *R v Lifchus*, [1997] 3 SCR 320, 150 DLR (4th) 733 [*Lifchus* cited to SCR].

¹³ *Challice* has been cited 198 times, with 170 of those cases occurring after the release of *W(D)* in 1991 (Westlaw search as of September 17, 2017).

¹⁴ Westlaw database search, as of September 17, 2017, for the term “credibility contest” found 1313 cases: 1296 of those cases were rendered after the release of *W(D)* on March 28, 1991. Of those post-*W(D)* decisions, 103 reference *Challice*, 22 reference *Nimchuk*, and 15 cite both cases.

¹⁵ Westlaw database search found 36 decisions as of September 17, 2017.

¹⁶ See e.g. *R v CWH* (1991), 3 BCAC 205, 68 CCC (3d) 146; *R v EP*, [2005] NJ No 111 (QL), 2005 CanLII 7874 (NL PC); *R v Turner*, 2017 ONSC 99, 135 WCB (2d) 630; *R v Colson* (2007), 74 WCB (2d) 184, 2007 CanLII 28726 (NL PC).

¹⁷ See e.g. *R v Nehring*, 1984 ABCA 60, [1984] 3 WWR 632; *R v Smith*, 1989 ABCA 187, 7 WCB (2d) 374; *R v VK* (1991), 14 WCB (2d) 251, CanLII 5761 (BCCA).

¹⁸ *Challice*, *supra* note 6 at para 38.

¹⁹ *R v CP* (1992), 74 CCC (3d) 481, 18 BCAC 209.

²⁰ *Ibid* at para 46.

²¹ *Ibid* at para 44.

²² *R v Nykiforuk*, [1946] 3 DLR 609, 86 CCC 151 (SKCA). See also *Kearney v The Queen* (1957), 119 CCC 99 (NB CA); *R v Woods*, [1969] 2 OR 132, 3 CCC 222 (CA).

²³ *Woolmington v DPP* (1935), 25 Cr App R 72.

By the early 1980s, the Supreme Court began to weave the *Challice* narrative into their jurisprudence starting with a brief reference in the 1982 decision of *Brisson v The Queen*.²⁴ The *Challice* caution received even wider treatment in *Nadeau v The Queen*,²⁵ where the Appellant was charged with first-degree murder but convicted by a jury of second-degree murder. According to Justice Lamer, the trial judge erred in his instruction on the standard of proof as he imperatively directed the jury, as excerpted on page 573, to:

[C]hoose the more persuasive, the clearer version the one which provides a better explanation of the facts, which is more consistent with the other facts established in the evidence.

You must keep in mind that, as the accused has the benefit of the doubt on all the evidence, if you come to the conclusion that the two (2) versions are equally consistent with the evidence, are equally valid, you must give - you must accept the version more favourable to the accused. These are the principles on which you must make your choice between the two (2) versions.²⁶

This instruction was squarely within the identifiable error in *W(D)*. Moreover, the accused, according to Justice Lamer, has the “benefits from any reasonable doubt at the outset,”²⁷ while the onus to prove that case continually rests on the prosecutor until the final decision on guilt or innocence. This concept was so basic that *Nadeau* cites no case law in support of allowing the appeal and ordering a new trial. *Nadeau* was cited in *W(D)* and still has traction as a directive case for a trial judge in assessing credibility.²⁸

Nadeau was also cited in two high profile murder appeals later in that decade; *R v Thatcher*²⁹ and *R v Morin*.³⁰ Chief Justice Dickson, in writing for the majority upholding the conviction for first-degree murder in *Thatcher*,

²⁴ *Brisson v The Queen*, [1982] 2 SCR 227, 139 DLR (3d) 685, Laskin CJC (“[t]his is not a case where the jury may have been misled by being directed to determine guilt or innocence on the basis of the credibility of the witnesses on each side: see, for example, *R v Challice* ...” at 232).

²⁵ *Nadeau v The Queen*, [1984] 2 SCR 570, 14 DLR (4th) 1 [*Nadeau*].

²⁶ *Ibid* at 573.

²⁷ *Ibid* at 572-573.

²⁸ See e.g. *R v Desrosiers*, 2017 ONCJ 80 at para 210, 137 WCB (2d) 434; *R c St-Pierre*, 2016 QCCQ 4479 at para 63.

²⁹ *R v Thatcher*, [1987] 1 SCR 652, 39 DLR (4th) 275 [*Thatcher* cited to SCR].

³⁰ *R v Morin*, [1988] 2 SCR 345, 44 CCC (3d) 193 [*Morin* cited to SCR].

considered the *Nadeau* error. In the *Thatcher* case, the error was characterized as an improper instruction to the jury to choose between the Crown and defence evidence “thereby reducing the burden of proof.”³¹ The court also considered whether such an error could be “cured” by s. 613(1)(b)(iii) of the Criminal Code³² (now s. 686(1)(b)(iii)) permitting an appellate court to dismiss an appeal where there is no substantial wrong or miscarriage of justice. In *Nadeau*, the court declined to apply the section as the verdict would not necessarily be the same.³³ However, in *Thatcher*, the proviso was applied resulting in the dismissal of the appeal. As in *Challice*, the error in *Thatcher*, when viewed within the context of the charge, essentially disappears.³⁴

The *Morin* decision, as a ground of appeal advanced by the Crown, affords us a different perspective of the issue. Here, the Crown argued the standard of reasonable doubt must be applied to the whole of the evidence, not as a “piecemeal” application to individual pieces of evidence. Although Justice Sopinka generally agreed evidence should be considered as a whole in determining the ultimate guilt or innocence of the accused, exceptions could be found in the duty of the trial judge to give appropriate direction in vital areas, such as credibility assessments. This position is exemplified in the later Supreme Court decision in *R v MacKenzie*³⁵ where the credibility assessment involved a contradiction between the accused’s out of court statement and his evidence at trial.³⁶

³¹ *Thatcher*, *supra* note 29 at 700.

³² *Criminal Code*, RSC 1985, c C-46.

³³ This “test” derives from the common law as articulated in *Makin v Att. Gen. for New South Wales*, [1894] AC 57 at 70 and approved of in Canada as early as *Allen v The King*, 44 SCR 331, 18 CCC 1, Fitzpatrick CJC (considered whether the error was “an irregularity so trivial” to not amount to a substantial wrong or miscarriage of justice at 334). Another early version of the “test” can be found in *Brooks v The King*, [1927] SCR 633 at 636, 1 DLR 268 (“onus was upon the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty”). Subsequent cases such as *R v Bevan*, [1993] 2 SCR 599 at 616–617, 1993 CanLII 101 have refined this “curative provision” to whether “the verdict would necessarily have been the same if such error had not occurred.”

³⁴ *Thatcher*, *supra* note 29 at 701.

³⁵ *R v MacKenzie*, [1993] 1 SCR 212, 18 CR (4th) 133 [*Mackenzie*].

³⁶ *Morin*, *supra* note 30; *Nadeau*, *supra* note 25; *Thatcher*, *supra* note 29; *Challice*, *supra* note 6 are all cited in *MacKenzie*, *ibid*.

The *Morin* position is consistent with the depiction of the trial judge assisting the jury through the “judicial lens” of experience in complex and crucial areas of the evidence. Even at this early stage, what became known as the *W(D)* instruction is viewed as an important part of the discourse between the trial judge, learned in the law, and the jury of peers as finders of the facts. In this way, *W(D)* can be viewed as the bridge between fact and law and as epitomizing the relationship the judge has with the jury during a trial. This relationship, through the charge or instructions to the jury, does not end in the bounded space of the courtroom but remains throughout the jury deliberations.

As an additional wrinkle to our pre-*W(D)* survey is the connection between credibility assessment and other legal principles circumscribed at that time. A good example of this is found in *R v Corbett*³⁷ which considered the admissibility of bad character evidence in the form of a criminal record. This decision created the *Corbett* application in which a *voir dire* is required to determine the admissibility of an accused’s criminal record in circumstances where the accused will testify. It is in the dissent of Justice LaForest where the wider implications of the *Challice* ground can be observed. Justice LaForest outlines several factors in exercising the discretion to exclude, which still inform the *Corbett* application. As part of this discussion, Justice LaForest mentions the problematic situation of when the case “boils down to a credibility contest”³⁸ and the “fair trial” desire to put before the jury the record of all parties in making the credibility assessment.³⁹

Justice LaForest references two lines of authority emanating from American case law. One view, as found in *Gordon v United States*,⁴⁰ suggests the criminal record is highly probative “for exploring all avenues which would shed light on which of the two witnesses was to be believed.”⁴¹ In the other view, exemplified by *United States v Brown*,⁴² the court found the *Gordon* argument fallacious. Where credibility was the core issue, then “admissions of earlier

³⁷ *R v Corbett*, [1988] 1 SCR 670, 41 CCC (3d) 385 [*Corbett* cited to SCR].

³⁸ *Ibid* at para 159.

³⁹ *Ibid* at paras 160–161.

⁴⁰ *Gordon v United States*, 383 F 2d 936 (1967).

⁴¹ *Ibid* at 941.

⁴² *United States v Brown*, 409 F Supp 890 (WDNY 1976).

convictions would be highly prejudicial⁴³ by distracting the jury from the evidence and inviting them to enter into the impermissible inference that as the accused acted wrongly in the past he must be guilty now.⁴⁴ Justice LaForest took a truly Canadian view by favouring a case-by-case contextual approach where credibility instances could not “override the concern for a fair trial.”⁴⁵

There are two items to consider from this dissent. First, there appears to be a disjunct between the caution against entering into a ‘credibility contest’ and the manner in which trial evidence is actually presented. There is a telling gap between the enunciated principle and the trial realities where narratives unfold like every day events. Certainly, in the American decision of *Gordon v United States*, the Court considered credibility as a question of whom to believe. We will explore this dichotomy further in this article but even before *W(D)* swept onto the precedential stage, the courts were struggling with the application of reasonable doubt and the differences between ‘accepting or rejecting’ evidence and ‘choosing’ one type of evidence over another. Second, *Corbett* underlines the important concept of trial fairness, which is engaged by credibility assessments. Trial fairness, as a principle of fundamental justice, permeates *W(D)* and yet is not given due deference in the *W(D)* trope. Both concepts of trial reality and trial fairness will inform the *W(D)* Revolution.

III. CONSTRUCTING THE *W(D)* REVOLUTION

A. Creating *W(D)*: Introduction

Typically, a methodology that employs deconstruction attempts to break down hidden assumptions found in a concept by reducing it to its constituent parts as a method of reinterpretation. But the utilization of this methodology in understanding *W(D)* seems counterintuitive considering the appellate courts shun this approach when the *W(D)* error is raised on appeal. The concept of “cherry-picking”⁴⁶ or parsing a charge or reasons of a trial judge is a stock derisive criticism on appeal. In the courts’ view,

⁴³ *Ibid* at 892.

⁴⁴ *Ibid*.

⁴⁵ *Corbett*, *supra* note 37 at para 161.

⁴⁶ See e.g. *R v Davis*, [1999] 3 SCR 759 at para 103, 139 CCC (3d) 193; *R v NCB*, 2012 ABCA 238 at para 12, [2012] AWLD 4087 [NCB]; *R v Lopez*, 2015 BCCA 294 at para 48, [2015] BCWLD 4885 [Lopez]; *R v Hilton*, 2016 ABCA 397 at para 77, 343 CCC (3d) 304 [Hilton], Paperny JA, dissenting.

breaking down a trial judge's work product results in *reductio ad absurdum*, where the few lines of error are given greater weight than should be apportioned considering the context of the entire case. In law, context is everything.

Yet, up to this point, we have deconstructed *W(D)* without knowing it. We have traced the *W(D)* concept through its pre-history and found the core meaning of the *W(D)* instruction is about choices or rather, about keeping the reasonable doubt mind open to making none. We have also found a golden thread woven in between these choices and that makes all the difference. Credibility assessment, indeed assessing the whole evidential landscape, is imbued with our principles of fundamental justice grounded in the proper application of the presumption of innocence as articulated by the burden on the prosecutor to prove guilt beyond a reasonable doubt. It also engages the gatekeeper function of the trial judge to ensure trial fairness. The pre-*W(D)* case law situates this concept in the testimonial arena where credibility is key. These cases offer a scenario easiest to visualize, the complainant and the accused giving diametrically opposed versions of the events. We can easily see in that vivid picture the ease of committing the *Nimchuk* error; to believe the accused is to find that the complainant "framed" the accused.

However, *Nadeau*, *Thatcher*, and *Morin* decisions tell us a more expansive story which is not limited by sides; those cases are speaking to the very heart of the criminal law through the burden on the Crown to prove the case beyond a reasonable doubt. How *W(D)* weighs into this fray is not a question of deconstruction but of construction as *W(D)* builds on this past case law to create an elegant yet simple framework for the trial judge to use to ensure the evidence is assessed properly and consistently within the core principles of criminal law. But contrary to fiction where we imagine "if we build it, they will come,"⁴⁷ constructing legal principles is fraught with difficulty. We in law do not simply build from pre-vetted plans, we question and probe while we build and often challenge the plan. With this construction material before us, we now turn to what the *W(D)* framework is made of: a mantra, or a reminder; or perhaps here too we are not confined to a choice between two alternatives. It would hardly be an article on *W(D)*

⁴⁷ A reference to *Field of Dreams*, 1989, DVD (Beverly Hills, Cal: Universal Studios Home Entertainment, 2012).

if we did not expose the seminal decision to our scrutiny in answering the question: of what stuff is *W(D)* made?

B. The Building Materials: The Case

To give perspective to this quest, we will first review the backdrop of the case in the broader context of the facts and of the legal landscape of that time. *W(D)* was charged and convicted of sexual offences involving his teenaged niece. It was, as in the previous cases of *Challice* and *Nimchuk*, a trial in which credibility and divergent narratives were at the core of the trial. It was like *Challice*, a jury trial but, as identified by Justice Cory, it was a situation where the trial judge in his original charge correctly directed on the standard of proof relating to credibility assessment but then erred in the recharge to the jury.⁴⁸ The issue was one of quantum and reversible error. In the lower appellate court, the Ontario Court of Appeal was divided and, in the Supreme Court, that divisiveness on the impact or effect of the error would remain. This impact question would become the main thrust of future appeals on the thereafter named *W(D)* error.

But first some socio-legal context. *W(D)* was heard on February 1, 1991 and released weeks later, on March 28, 1991. The panel of five consisted of Justices Sopinka, Gonthier, Cory, McLachlin, and Iacobucci. Justice Sopinka, who dissented in the decision, was the longest sitting justice having been appointed May 24, 1988. Justice Iacobucci was the newcomer having been appointed less than a month previously on January 7, 1991. Historically, the late 1980s to mid-1990s were turbulent times in the Supreme Court: these were heady days of criminal law where the highest court struggled with core elements of criminal offences such as in the subjective/objective *mens rea* debate raging through a series of cases on the fault element of murder, manslaughter, criminal negligence, dangerous driving, and sexual assault.⁴⁹ Connected to this debate was the related issue of offences which purportedly reversed the burden of proof onto the accused.⁵⁰ New amendments to sexual assault laws were also probed and

⁴⁸ *W(D)*, *supra* note 1 at 751.

⁴⁹ See e.g. *R v Vaillancourt*, [1987] 2 SCR 636, 39 CCC (3d) 118; *R v Tutton*, [1989] 1 SCR 1392, 48 CCC (3d) 129; *R v Martineau*, [1990] 2 SCR 633, 58 CCC (3d) 353; *R v Hundal*, [1993] 1 SCR 867, 19 CR (4th) 169; *R v Creighton*, [1993] 3 SCR 3, 105 DLR (4th) 632 [*Creighton*]. Note, the Court did not unanimously agree on the essence of criminal negligence until the decision of *R v Roy*, 2012 SCC 26, [2012] 2 SCR 60.

⁵⁰ See e.g. *R v Whyte*, [1988] 2 SCR 3, 5 DLR (4th) 481; *R v Penno*, [1990] 2 SCR 865, 59

discussed in a number of cases and with these amendments were evidential questions of proof, reliability, and credibility, most notably of children.⁵¹ Intoxication and the *pro forma* categories of general and specific intent were dissected and debated.⁵² Although on divergent issues, these cases engaged themes resonating through *W(D)*, such as the presumption of innocence, burden of proof, trial fairness, and the desire to protect the integrity of the criminal justice system from miscarriages of justice. Against the background of these momentous decisions is a divergent court with many split decisions, dissents, and multiple majorities; in short, a fractious court. Notably, Justice Cory was a strong voice in many of these ground-breaking criminal law cases. Justice Sopinka too was instrumental, both as speaking for the Court or as part of the dissenting opinion.⁵³

Justice Cory, for the majority in *W(D)*, begins the analysis by generously excerpting⁵⁴ the charge to the jury; both the error free main charge and the erroneous recharge. By setting out the charge in this fashion, the reader of the decision experiences the charge first-hand and can gauge the effect of it. The trial judge, in the re-charge error, advises the jury that “at the end of the day the core issue to be determined by yourselves is whether you believe the complainant or whether you believe the accused.”⁵⁵ Justice Cory first identifies this error in the language of precedent, lending continuity to his admonishment by referencing the *Chalice* and *Morin* decisions.⁵⁶ Then comes the solution, as Justice Cory, in the oft-quoted passage excerpted at the beginning of this article, speaks to the model trial judge by offering a recommended instruction. But before the three-step solution there is a prologue sentence, not as oft-quoted,⁵⁷ and a brief paragraph following in

CCC (3d) 344; *R v Downey*, [1992] 2 SCR 10, 90 DLR (4th) 449.

⁵¹ See e.g. *R v Hess*; *R v Nguyen*, [1990] 2 SCR 906, 79 CR (3d) 332; *R v M(WH)*, [1992] 1 SCR 984, 98 Nfld & PEIR 359; *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, 66 CCC (3d) 321 [*Seaboyer*]; *R v L(DO)*, [1993] 4 SCR 419, 25 CR (4th) 285 [*L(DO)* cited to SCR].

⁵² See e.g. *R v Bernard*, [1988] 2 SCR 833, 45 CCC(3d) 1; *R v Daviault*, [1994] 3 SCR 63, 93 CCC (3d) 21.

⁵³ See e.g. *R v DeSousa*, [1992] 2 SCR 944, 76 CCC (3d) 124; *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1; *Creighton*, *supra* note 49, Sopinka J, dissenting.

⁵⁴ The excerpt is over three-and-a-half pages.

⁵⁵ *W(D)*, *supra* note 1 at 757.

⁵⁶ *Ibid.*

⁵⁷ Quoted in 360 decisions referencing *W(D)*. The prologue is found at page 757 and

which Justice Cory qualifies the proposed instruction as a suggestive “ideal.” This “appropriate instruction”⁵⁸ is in the form of a recommendation consisting of a simple generic formula not contextually connected to the facts.

Later in the judgment, Justice Cory gives a list of factors supportive of the majority’s position that no substantial wrong or miscarriage of justice resulted from the re-charge error. Many of those factors are connected to the charge when “read as a whole,”⁵⁹ which would not have left the “jury (...) in doubt as to the burden resting on the Crown.”⁶⁰ He referenced the short time lapse between the main charge and recharge and the urging of the trial judge to apply the correct standard of proof. Justice Cory also emphasized, by quoting the colourful passage of Justice Addy in *R v Lane and Ross*,⁶¹ that jurors are not “morons, completely devoid of intelligence”⁶² but are “conscientious” and “anxious to perform their duties” and would not “be forgetful of instructions.”⁶³ True, but with that intelligence they would also realize that the instructions were contradictory and possibly confusing.

Justice Sopinka’s dissent adds a different perspective. His dissent also opens by providing continuity with the past by labelling the issue through the *Chalice* metaphor of an unacceptable tug of war “presented as a contest between the credibility of the complainant and that of the accused.”⁶⁴ Justice Sopinka carefully summarizes the facts; presenting them vividly but in a manner which feeds into unacceptable myths and stereotypes.⁶⁵ He depicts the complainant as a 16-year-old “dropout” living from place to place, who did not “complain of these incidents immediately after despite numerous

states, “[i]deally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines.”

⁵⁸ *W(D)*, *supra* note 1 at 757.

⁵⁹ *W(D)*, *supra* note 1 at 761.

⁶⁰ *Ibid* at 758.

⁶¹ *R v Lane and Ross*, [1970] 1 OR 681, 1 CCC 196 (Sup Ct J), Addy J (dismissing the severance application of two co-accused at 8).

⁶² *W(D)*, *supra* note 1 at 761.

⁶³ *Ibid*.

⁶⁴ *Ibid* at 745.

⁶⁵ *Ibid* at 746.

opportunities to do so.”⁶⁶ Furthermore, she remained in the company of the accused after the event. The accused is described as a “poor witness, uneducated and illiterate.”⁶⁷ This recitation of the facts is a stark reminder that this was a watershed moment for the Supreme Court in their approach to child witnesses and sexual offences. This is the time when the language of “myths and stereotypes”⁶⁸ became part of the court’s lexicon and reasoning. Only a few months before *W(D)*, the Court was recognizing the influence of the genderized trope in *R v Lavallee*.⁶⁹

Justice Sopinka takes issue with the standard charge on credibility in which the accused “is in exactly the same position as any other witness as to credibility.”⁷⁰ Such a “bald statement,”⁷¹ in the opinion of Justice Sopinka may lead a jury, without further “elaboration” to fail to appreciate that the assessment of the accused’s evidence must be done through the consideration of the whole of the evidence while applying the burden of proof beyond a reasonable doubt.⁷² In Justice Sopinka’s view, credibility was “fundamental” to the final determination of the case and the concept of the burden of proof “the most fundamental rule of the game.”⁷³ A misdirection in the instructions could not be salvaged by a proper charge elsewhere in the instructions. The jury required proper instructions not contradictory ones. To find the jury would understand the task required was “pure speculation”⁷⁴ requiring a new trial.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Although, “myths and stereotypes” as a phrase was first used by the Supreme Court by L’Heureux-Dubé J, dissenting in Seaboyer, *supra* note 51, the phrase was referenced a year earlier in the majority decision of Wilson J in *R v Lavallee*, [1990] 1 SCR 852, 55 CCC (3d) 97 [*Lavallee*] (quoting from *State v Kelly*, 478 A 2d 364 (1984)). See also *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 40 DLR (4th) 193, Dickson CJC (quoting from the report entitled “Canadian National Action Programs – Women” under the heading “Traditional beliefs by managers and women in the many negative myths and stereotypes of working women” at 1119).

⁶⁹ *Lavallee*, *supra* note 68.

⁷⁰ *W(D)*, *supra* note 1 at 747.

⁷¹ *Ibid* at 747.

⁷² *Ibid* at 748.

⁷³ *Ibid* at 750.

⁷⁴ *Ibid.*

It is worthwhile to step back from these two opinions to consider the language used and the emphasis given to certain concepts. For Justice Sopinka, as he posited in the majority decision of *Morin*, the burden of proof was “one of the most fundamental rules of the game”⁷⁵ and credibility in *W(D)* was the “fundamental issue.”⁷⁶ Even the trial judge, in the passage of the instructions where the error was made, recognized that determining credibility “is very fundamental to this trial and that is the very heart in effect is who you are going to believe.”⁷⁷ On the other hand, Justice Cory found credibility was merely “important”⁷⁸ and he gave no special descriptor to the burden of proof. His emphasis was on the “correct and fair”⁷⁹ or “fair and error free”⁸⁰ main charge and the charge “read as a whole.”⁸¹

For Justice Cory, fairness is a reasoned balance between perfection and reversible error. Reasonableness becomes the touchstone, but such a long view may not sit well with the admonishment to only find the accused guilty beyond a reasonable doubt. The criminal standard is not about balance but about tipping the scales of justice. In *FH v McDougall*,⁸² the Supreme Court understood this when they found *W(D)* was unique to the criminal justice system where credibility was “fundamental”⁸³ as opposed to the civil system where the standard of proof was merely an offset. Trial fairness encompasses many concepts, some of which do require a balanced view and approach, such as in charging the jury on the positions of the defence and prosecution. However, there is one fundamental concept which defies balance and compromise; that is in the fundamental precepts of presumption of innocence and with it the burden on the prosecution to prove guilt beyond a reasonable doubt. This special dimension, attributable only to criminal law, encapsulates complex concepts requiring the deft hand of the trial judge to unravel and reveal in an accessible ‘human’ manner devoid of legalistic language and incomprehensible terminology. As the Alberta Court

⁷⁵ *Morin*, *supra* note 30 at 375.

⁷⁶ *W(D)*, *supra* note 1 at 750.

⁷⁷ *Ibid* at 749.

⁷⁸ *W(D)*, *supra* note 1 at 757.

⁷⁹ *Ibid* at 751, 760, 761. Cory J used this phrase three times to describe the charge.

⁸⁰ *W(D)*, *supra* note 1 at 753.

⁸¹ *Ibid* at 753, 758, 761. Cory J used this phrase three times in his reasons.

⁸² *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41 [*McDougall*].

⁸³ *Ibid* at 41-42.

of Appeal suggests in *R v Barton*,⁸⁴ instructions to the jury must be user friendly and understandable, taking meaning and solidity from the trial narrative. Of note, in *Barton* a *W(D)* argument was raised.

Reading this “as a whole”⁸⁵ it is a wonder that the *W(D)* decision reached the ‘cult status’ it did. I suggest it is partially language which caused the initial error but also what brings this case into one of the most used and easily identified decision. A decision readily recognized by its two initials. Justice Cory, as already mentioned, called his three-step model instruction an “ideal”⁸⁶ but also a “formula”⁸⁷ which if used would avoid the “oft-repeated”⁸⁸ error on appeal. The lure of a formulaic solution to an ‘oft-repeated’ error, part self-serving and part altruistic, is simple to understand but as we will discuss in the next section, even when the Supreme Court disapproved of the formulaic stance *W(D)* encouraged, the case continued to be the ‘star attraction’ and the *cause celebre* of case law.

C. The Nuts and Bolts: There is No Magic in That!

In fact, the courts do not like formulaic instructions that suggest insulation from error. There is no such reality where a stock repetition of an approved instruction results in an error free charge. There is no such magic here. Soon after its release, *W(D)* becomes imperative, reaching the “must do” pinnacle. The Supreme Court quickly resiles from this heightened state to the ‘nice to do’ position. It was in 1994 when Justice Cory in *R v S(WD)*⁸⁹ made the ‘obvious’ even more so when he stated “[o]bviously, it is not necessary to recite this formula word for word as some magic incantation. However, it is important that the essence of these instructions be given.”⁹⁰ Instead of formula, instead of ideal, we have “essence.”⁹¹ If an instruction, in the essentials, instructs the jury on the proper approach to credibility assessment, then no error is committed.

⁸⁴ *R v Barton*, 2017 ABCA 216 at paras 155–163 [*Barton*].

⁸⁵ *W(D)*, *supra* note 1 at 753.

⁸⁶ *Ibid* at 757.

⁸⁷ *Ibid* at 758.

⁸⁸ *Ibid*.

⁸⁹ *R v S(WD)*, [1994] 3 SCR 521, 119 DLR (4th) 464.

⁹⁰ *Ibid* at 533.

⁹¹ *Ibid*.

Even after *W(D)*, Justice Cory continued to offer ‘suggested’ direction to the jury in areas such as the preferred exhortation to the deadlocked jury in *R v G(RM)*⁹² or on the proper charge tied to *W(D)* on reasonable doubt as in *Lifchus*.⁹³ In *G(RM)*, Justice Cory cautions trial judges that his “helpful” “suggestion” not be “slavishly” adhered to “as a magic incantation.”⁹⁴ In *Lifchus*, the suggested charge on reasonable doubt again cautions that the instruction “is not a magic incantation to be repeated word for word”⁹⁵ but a “suggested form that would not be faulted if it were used.”⁹⁶ Even if the form itself is not used, Justice Cory continues to explain that “any form of instruction that complied with the applicable principles and avoided the pitfalls referred to would be satisfactory.”⁹⁷ Although not a formula, it is a recipe to be followed allowing, of course, for personal taste. Notably, at paragraph 40 of *Lifchus*, Justice Cory clarifies the difference between error and error free as the “reasonable likelihood”⁹⁸ a jury would misunderstand. As an illustration, he references *W(D)* as the example of where “the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply.”⁹⁹

D. The Framework: What *W(D)* is

And yet, *W(D)* continued to be called a “test” albeit not an “academic” one.¹⁰⁰ In fact, *W(D)* is described in many ways by the Supreme Court:

⁹² *R v G(RM)*, [1996] 3 SCR 362, 110 CCC (3d) 26 [*G(RM)* cited to SCR]. Even before the release of *W(D)*, *supra* note 1, Cory J in *R v Askov*, [1990] 2 SCR 1199 at 1228-1229, 75 OR (2d) 673, warned against “magical incantations.”

⁹³ *Lifchus*, *supra* note 12.

⁹⁴ *G(RM)*, *supra* note 92 at 386.

⁹⁵ *Lifchus*, *supra* note 12 at para 40.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ See e.g. *L(DO)*, *supra* note 51 at 469-470, L’Heureux-Dubé J.

“directions”¹⁰¹; “principle(s)”¹⁰²; “instruction”¹⁰³; “questions”¹⁰⁴; “message”¹⁰⁵; “charge”¹⁰⁶; “procedure”¹⁰⁷; “step(s)”¹⁰⁸; “approach”¹⁰⁹; “formula”¹¹⁰; “caution”¹¹¹; “analysis”¹¹²; “analytical framework”¹¹³; “factors”,¹¹⁴ and finally in *R v Wilcox*,¹¹⁵ an “analytical process.”¹¹⁶ But what can we glean from this other than uncertainty as to what exactly the purpose and placement of *W(D)* should be? It tells us that *W(D)* has become much more than the sum of its parts and that this ideal formula, this list of questions to be asked by the trier, is a message, which embodies the legal principles encapsulated in the presumption of innocence as guaranteed under the *Charter* and as reflected in our fundamental values. It is a signature of our justice system that we do not approach the evidence as an everyday experience but, as emphasized in *R v Starr*,¹¹⁷ a special occasion requiring, nay challenging us, to look at people, stories, and events in a different way: in a way that protects the individual and the integrity of the administration of justice. It is the last *W(D)* descriptor, “analytical process,”¹¹⁸ suggests this change of function of *W(D)*. Finally, the material and the ideal meet where the act of decision making, and all that it entails, coincides with legal principles and societal expectations.

¹⁰¹ See e.g. *R v Haroun*, [1997] 1 SCR 593 at 597, 115 CCC (3d) 261, Sopinka J, dissenting.

¹⁰² See e.g. *R v Sheppard*, 2002 SCC 26 at para 65, [2002] 1 SCR 869.

¹⁰³ See e.g. *R v Van*, 2009 SCC 22 at para 23, [2009] 1 SCR 716, LeBel J [Van].

¹⁰⁴ *JHS*, *supra* note 2 at para 10.

¹⁰⁵ *Ibid* at para 13.

¹⁰⁶ *McDougall*, *supra* note 82 at para 83, Rothstein J.

¹⁰⁷ See e.g. *R v Avetyan*, 2000 SCC 56 at para 28, [2000] 2 SCR 745 [Avetyan].

¹⁰⁸ See e.g. *McDougall*, *supra* note 82 at para 83.

¹⁰⁹ *R v Boucher*, 2005 SCC 72 at para 29, [2005] 3 SCR 499 [Boucher].

¹¹⁰ See e.g. *R v Dinardo*, 2008 SCC 24 at paras 18, 23, [2008] 1 SCR 788 [Dinardo].

¹¹¹ *R v Daley*, 2007 SCC 53 at para 106, [2007] 3 SCR 523.

¹¹² *R v Laboucan*, 2010 SCC 12 at para 7, [2010] 1 SCR 397.

¹¹³ *R v CLY*, 2008 SCC 2 at paras 24, 31, [2008] 1 SCR 5 [CLY SCC].

¹¹⁴ *R v JAA*, 2011 SCC 17 at para 67, [2011] 1 SCR 628 [JAA].

¹¹⁵ *R v Wilcox*, 2014 SCC 75, [2014] 3 SCR 616 [Wilcox], Karakatsanis J.

¹¹⁶ *Ibid* at para 1.

¹¹⁷ *R v Starr*, 2000 SCC 40, [2000] 2 SCR 144.

¹¹⁸ *Wilcox*, *supra* note 115 at para 1.

E. The Framework: What *W(D)* isn't

Still, the Supreme Court after *W(D)* made it perfectly clear what *W(D)* is not. It is not a “magic incantation,”¹¹⁹ although nothing in law is for that matter. As early as 1993, in *R v Evans*,¹²⁰ Justice Cory, the progenitor of *W(D)*, is speaking to the legal community at page 640 when he reminds us that:

At the outset, it's worth repeating that a jury charge should not be microscopically examined and parsed. There is no such thing as a perfect jury charge. Rather, the directions to the jury must be looked at as a whole to determine if there has been any error. See, for example, *R. v. W. (D.)*.¹²¹

In the next paragraph, Justice Cory reiterates his view that the charge, when read as a whole, is “eminently fair.”¹²² Later, in the *Avetysan* decision, Justice Major reminds trial judges they “need not mimic” the *W(D)* ideal as “the language used to obtain the result” is within their “wide discretion.”¹²³ He further agrees with Justice Cory's assessment in *Evans* that perfection is not what a trial judge strives for but “adequacy.”¹²⁴ Indeed, an adequately informed jury and a form of instruction that is “in substantial compliance with the existing law is the sum total of what the appellate court expects from the trial judge.”¹²⁵ Even so, the court in *Avetysan* allowed the appeal as there were multiple errors in the charge on reasonable doubt resulting in a departure from “established principles.”¹²⁶ Justice Deschamps in *R v Boucher* is even more candid on the non-status of *W(D)* as a miracle prescription, reminding us “the approach set out in *W.(D.)* is not a sacrosanct formula that serves as a straitjacket for trial courts.”¹²⁷

¹¹⁹ This phrase is from the American decision *Time Inc v Hill*, 87 S Ct 534 (1967), Fortras J (“[b]ut a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters” at 557–58).

¹²⁰ *R v Evans*, [1993] 2 SCR 629, 82 CCC (3d) 338.

¹²¹ *Ibid* at 640.

¹²² *Ibid*.

¹²³ *Avetysan*, *supra* note 107 at paras 1, 3.

¹²⁴ *Ibid* at paras 1, 8, 9, 12. Indeed, Major J characterizes the charge as “adequate” on five occasions in the decision.

¹²⁵ *Ibid* at para 2.

¹²⁶ *Ibid* at para 3.

¹²⁷ *Boucher*, *supra* note 109 at para 29.

The use of ‘sacrosanct’ and ‘straitjacket’ signify a growing frustration with the *W(D)* decision and the growing appeals grounded in the error. A frustration that culminates in a series of five cases released in 2008 from the Supreme Court,¹²⁸ attempting to explain and temper the impact of the *W(D)* instruction. Justice Binnie in *JHS* best exemplifies the effort by the Court to resolve *W(D)* as the “normal” and not the sensation it seemed to become when he clarified at paragraph 9 that the “so-called” instruction “simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts.”¹²⁹ Despite the critical treatment it received in 2008, the *W(D)* ground of appeal did not abate. In 2009, Justice LeBel in the *Van* decision urged the “wording from *W. (D.)* must not be followed to the letter.”¹³⁰

Similar treatment of the oft-quoted *W(D)* paragraphs can be mined from lower court decisions.¹³¹

For instance, the appellant in the British Columbia Court of Appeal decision of *R v Terry*¹³² urged the Court to find the *W(D)* instruction as a directive. The Court readily rejected this position as such “special”¹³³ instruction was not needed. This case is a reminder that much of the court’s response to *W(D)* was indeed framed by the appellate counsel who attempted to crystallize *W(D)* as an imperative. However, as reminded by the ‘magical incantation’ caution, perhaps counsel was not suggesting presence but absence: not that the *W(D)* words were to be intoned ‘just so,’ but that without these ‘words to the effect’ the spirit of the ideal would render the trial unfair.

I cannot leave the *Terry* decision without underlining the faulty characterization of *W(D)* as a “special” instruction. Although I earlier criticized the Supreme Court for normalizing the status of *W(D)*, I also find fault with the idea that *W(D)* is singular and applies only in specific

¹²⁸ See *CLY SCC*, *supra* note 113; *Dinardo*, *supra* note 110; *JHS*, *supra* note 2; *R v REM*, 2008 SCC 53, [2008] 3 SCR 3 [REM]; *McDougall*, *supra* note 82.

¹²⁹ *JHS*, *supra* note 2 at para 9.

¹³⁰ *Van*, *supra* note 103 at para 20.

¹³¹ See e.g. *R v Yeung*, 2017 ONCA 190, 137 WCB (2d) 111 (the court describes *W(D)* as a “mantra” at para 7); *R v Murray*, 2017 ONCA 393, [2015] OJ No 2529 (QL) [Murray], Watt JA (describes *W(D)* as a “command” at para 77).

¹³² *R v Terry* (1994), 91 CCC (3d) 209, [1994] BCWLD 1665 at paras 42, 43 (BCCA).

¹³³ *Ibid* at paras 43-45.

circumstances. True, *W(D)* is about the intersection of credibility and reasonable doubt but I would suggest that virtually every case before the courts would have that general aspect. We live in the adversarial system in which narrative is everything. Perhaps that is the trouble with *W(D)* and why it continues to pervade case law, albeit in a more seamlessly organic manner. The reality is that in a trial, *W(D)* is everywhere.

The Alberta Court of Appeal also weighed in on *W(D)* while dispensing advice to appellate counsel and other appellate courts. For instance, the court in *R v Tran* remarked that “it is not appropriate to read a trial judge’s reasons preciously in a spirit of *post-facto* fault finding”¹³⁴ and “equally, an appeal court is not to ‘cherry pick’ through reasons in a process of isolating words and phrases from their contexts.”¹³⁵ This reference to “cherry-picking”¹³⁶ lends an immediate connection to Justice Cory’s approach in *W(D)* where context is everything and errors can be tolerated depending on the overall fairness of the instruction when ‘read as a whole.’

Finally, *W(D)* is not sacrosanct. In *R v NCB*,¹³⁷ the court roundly dismisses the appellant’s argument on the burden of proof issue by commenting on the “difficulty” of such ground as contrary to the “mass of authority” that “does not characterize incompleteness of reasons, or a departure from the catechism in *R v W(D)*...as being demonstrative of error by themselves.”¹³⁸ The metaphoric rise of *W(D)* is found by the Courts to be misguided.

F. The “Finishing Touches”: What *W(D)* may be

We have seen thus far that *W(D)* did not create a novel instruction but clarified an already recognized interplay between assessing the credibility of testimonial evidence and the fundamental principles of the burden of proof. Rather, it provided an “ideal formula” that when utilized by the trial judge, could avoid, what became known as, the *W(D)* error. But it was an ideal with a difference; it was not a “magic incantation,” which if not intoned or “mimicked” by the trial judge in a charge resulted in a reversible

¹³⁴ *R v Tran*, 2008 ABCA 209 at para 36, 58 CR (6th) 246.

¹³⁵ *Ibid.*

¹³⁶ See e.g. *Lopez and Hilton*, *supra* note 46.

¹³⁷ *NCB*, *supra* note 46 at para 12.

¹³⁸ *Ibid.*

error. Nor was it a “straitjacket” that incentivized parsing and cherry-picking specific words and phrases of a jury charge to conjure up a persuasive ground of appeal. On the contrary, it is the spirit of *W(D)* which matters.

This admonishment to take note of content over form is perfectly modelled by Moldaver JA, as he then was, in his majority decision of *R v Pintar*.¹³⁹ In this decision, he muses on the “functional approach”¹⁴⁰ to jury instructions in the context of self-defence, again raising the specter of “magical incantations” in his discussion on what instructions are and are not.¹⁴¹ As suggested by Justice Moldaver,¹⁴² the “functional approach” necessitates the form of the instruction be accountable to the content. This requires a contextual reading of the charge as a unique expression of the specific issue raised in any given case.¹⁴³ No two charges, in other words, should be the same and yet the underlying fundamentals remain the same. Justice Moldaver cautions that the functional approach was neither “novel” nor “radical” but a labelling or calling out of what trial judges did on a regular basis through the giving of instructions to the jury.

The trial judge, as portrayed by Justice Doherty in *R v Haughton*,¹⁴⁴ is like a tailor creating a bespoke suit from material ready at hand. There should be neither too little nor too much material and the embellishment should be as needed not extemporaneous or shoddy workmanship. Eloquent and elegant are the words that come to mind. In this way, its

¹³⁹ *R v Pintar* (1996), 110 CCC (3d) 402 (Ont CA) [*Pintar*].

¹⁴⁰ *Ibid* at paras 34–41.

¹⁴¹ *Ibid* at para 38.

¹⁴² Moldaver J, as a member of the Supreme Court, often offers advice to trial judges and counsel on the appropriate approach to jury instructions and trial strategy. See e.g. *R v Hart*, 2014 SCC 52, [2014] 2 SCR 544; *R v Rodgeron*, 2015 SCC 38 at paras 44–54, [2015] 2 SCR 760.

¹⁴³ See also *Avetyan*, *supra* note 107, Major J (“[t]rial judges’ charges to juries vary. No particular magical incantation is required” and that charging a jury is a matter of “wide discretion” at para 1).

¹⁴⁴ *R v Haughton* (1992), 11 OR (3d) 621 (CA), *aff’d* [1994] 3 SCR 516, Doherty JA (“[a] trial judge’s instructions to the jury must be custom-made for the particular case. Those directions must equip the jury with the law necessary to render its verdict. The scope of the trial judge’s legal instructions will depend in large measure on the nature of the evidence adduced and the issues legitimately raised by that evidence. A trial judge should not engage in a far-ranging esoteric discourse on potential applications of legal principles which bear no realistic relationship to the issues raised by the evidence” at 625).

purpose, according to Justice Moldaver in *Pintar*, is “to relieve against some of the confusion and complexity,”¹⁴⁵ and, if done properly, such instructions enable:

trial judges to be somewhat more selective and proactive in the formulation of their instruction. It is designed to encourage trial judges to pinpoint the real basis upon which the claim to self-defence rests and communicate that defence to the jury in as clear and comprehensible a fashion as possible.¹⁴⁶

This is in harmony with the recent *Barton*¹⁴⁷ decision, a plea for clarity in jury instructions requiring an integration of the specific facts of each case with the relevant law. This advice, I suggest, is equally applicable to the *W(D)* scenario.

It is the plasticity of *W(D)*, therefore, not its immutability, that has defined the oft-quoted passage. *W(D)* symbolizes a fundamental value yet also provides a platform for further development of the law. It is this organic quality of a legal principle, which defines its staying power and development into iconic status. In the next part, we will follow the blossoming of the *W(D)* instruction from a simple three-step formula to a complex and robust ‘analytical process’ connecting and enhancing vital trial concepts. This can be traced through the burgeoning grounds of appeal which rely upon or brush against the *W(D)* mantra and lends decided richness to appellate decisions. Simultaneously, this transformative ability of *W(D)* redefines the historical meaning of the decision as case law renames the principles inherent in the case. The old school ‘credibility contest’ or ‘choice between two alternatives’ becomes more sophisticated. The emphasis shifts from the interplay between two opposing sides to the heart of the fundamentalism of the instruction – the burden of proof.

IV. THE MAKING OF THE *W(D)* REVOLUTION

To construct this conceptual transition, *W(D)* effectively made the past part of the present by leaning into the “stark alternative” error and providing a framework onto which the principle could rest. This framework imagined the *W(D)* principle as a chameleon, which took on the shape of the case before it in the context of the principles of fundamental justice.

¹⁴⁵ *Pintar*, *supra* note 139 at 40.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Barton*, *supra* note 84.

This continuity permitted an enlargement of *W(D)*, not a diminishment. This is accomplished by two treatments. First, the *W(D)* principle is imagined through a sophisticated judicial lens that emphasizes the heart of the principle, the burden of proof. Second, *W(D)* became a discussion piece woven through more than one ground of appeal, touching upon differing areas of law with the common bond or golden thread of the burden of proof. As a result, this prodigious principle has become a richer and more robust part of our criminal justice nomenclature. In this way, I suggest *W(D)* is alive and well and reminding trial judges and counsel alike across Canada to take heed of our fundamental values.

A. The *W(D)* Revolution as Imagined Through the Judicial Lens

The first strand in this shift is the sophistication of the principle as seen through the judicial lens. The best example comes to us from the Ontario courts where the *W(D)* notion has gone through an inspirational makeover. Instead of describing the principle as a ‘credibility contest’ or ‘stark choice between two alternatives,’ the issue is one of “uneven scrutiny”¹⁴⁸ of the evidence or “different standards of scrutiny”¹⁴⁹ or “unbalanced scrutiny”¹⁵⁰ or “misallocation”¹⁵¹ of the burden of proof. In this modern approach to *W(D)*, “balance” and “scrutiny” are the key tropes. Thus, the evidence is no longer signified by which side the evidence emanates, the accused or the prosecutor. Rather, the whole of the evidence requires a calm, reasoned, judge-like examination. Although this examination is connected to the “standard” or “burden” of proof in the criminal sense, the use of the balancing metaphors suggests a balanced standard more akin to the civil balance of probabilities. By employing this language, the courts shift the

¹⁴⁸ See e.g. *R v Stromberg*, 2015 ONCA 121 at paras 2, 4, [2015] OJ No 831 (QL) (this approach is taken in many decisions, notably in Ontario); *R v LRS*, 2016 ABCA 307 at para 29, 134 WCB (2d) 529 [LRS]; *Gauthier c R*, 2017 QCCA 4 at para 71 [Gauthier].

¹⁴⁹ See e.g. *R v CAM*, 2017 MBCA 70 at paras 4, 32–39, 354 CCC (3d) 100 [CAM] (this approach is taken in many decisions, notably in Manitoba); *R v B(D)*, 2002 CanLII 41611 at para 2 (Ont CA); *Lopez*, *supra* note 46 at para 47; *R v Smith*, 2008 SKCA 61 at paras 39, 54, 80 WCB (2d) 602; *R v MTL*, 2016 YKCA 11 at para 2, 132 WCB (2d) 99.

¹⁵⁰ See e.g. *R v Adams*, 2016 ONCA 413 at para 30, 130 WCB (2d) 525 (this phrase is used mostly in Ontario); *Lopez*, *supra* note 46.

¹⁵¹ *R v Davis*, 2013 ABCA 15 at paras 85–86, 275 CRR (2d) 266; *R v MJB*, 2015 ABCA 146 at para 34, 395 DLR (4th) 197.

W(D) concern from the singular assessment of credibility required in a criminal case, which protects the accused through the presumption of innocence, to an equal, not necessarily equitable review. However, this shift is in many ways consistent with Justice Cory's caveat in *W(D)* that the magnitude of the error must be seen in the light of the whole of the evidence.

Other cases describe the *W(D)* error in a quantitative manner. Thus, the trial judge errs by employing a "higher standard" of scrutiny in the credibility assessment of the accused, resulting in the reversal of the burden of proof.¹⁵² This characterization better reflects the concern with the application of the proper standard and burden of proof. Yet, it is a characterization which moves away from the *W(D)* instruction as it views the credibility assessment in silos, partitioning the complainant's evidence from the accused's evidence as separate entities. It may also have the unwelcome effect of blurring the lines between how we make everyday assessments of data. In the everyday, we regularly make innate choices between what we accept and do not accept. In the unique space of a criminal case, the decision-maker must consciously turn their mind to employing a special or different standard than the everyday. This specialness surrounding the criminal burden of proof is best viewed as the "infra-ordinary,"¹⁵³ a standard that embodies what is at risk in a criminal trial.

Even with this change of approach and language, the courts still view the *W(D)* ground as a challenging one.¹⁵⁴ Justice Doherty at paragraph 59 of *R v Howe*,¹⁵⁵ recognizes the profusion of such grounds and the difficulty in successfully advancing it. In Justice Doherty's view:

¹⁵² *R v Howe*, [2005] OJ No 39 (QL) at para 58, 192 CCC (3d) 480 (CA) [*Howe* cited to QL]. See also *R v Aksidan*, 2004 BCSC 1318 at paras 23–29.

¹⁵³ See Georges Perec, *Species of Spaces and Other Pieces* (London, UK: Penguin, 1997) at 208–211 [edited and translated by John Sturrock]. The word "infra-ordinary" was coined by the French writer, Georges Perec. It describes an "everyday" that is not "ordinary or extraordinary, neither banal nor exotic" but requires us to appreciate what we continually miss in the margins between significant and insignificant. The "infra-ordinary" leads to a different perspective that requires us to view seemingly ordinary matters in a heightened way.

¹⁵⁴ See *R v Andrade*, 2015 ONCA 499 at para 39, 326 CCC (3d) 507 (quoting Doherty JA in *Howe*, *supra* note 152); *R v Aird*, 2013 ONCA 447 at para 39, 107 WCB (2d) 735.

¹⁵⁵ *Howe*, *supra* note 152 at para 59.

It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.¹⁵⁶

Here, Justice Doherty is attempting to confront the curative proviso by explaining it is not the presence of the error but the magnitude of such error that matters on appeal. In reading this, one is reminded of the outcome of *W(D)* in which the trial judge clearly erred in his instructions in the recharge yet the court found no substantial error. Justice Doherty in *Howe* also highlights the presence of deference, which is a key component of maintaining the integrity of the justice system. The application of deference by the appellate courts to issues of fact-finding and to credibility assessment, establishes the parameters of appellate intervention, which work in conjunction with the curative proviso. This deference is also connected to the visual side of the judicial lens, the observations made by the trial judge at the time of trial, as opposed to the written and oral advocacy that typically drives the appellate courts.¹⁵⁷ In this context, the concept of the common place maxim of “seeing is believing” is nurtured and rewarded over the written expression of the law.

This mixed messaging confirms the *W(D)* ground is “difficult.” What is apparent is that the “difficulty” of this ground of appeal lies in the inextricable mingling of the character or principled purpose of the *W(D)* instruction and the narrative landscape of a trial. The interplay of fact and law is so near seamless that the difficulty lies in picking them apart, not “cherry-picking” as the derisive side of this argument can be viewed, but as revealing the parts which make up the whole. The inability to do this adequately, I suggest, may be a direct result of the synergy of what we now label as the *W(D)* principle. The concepts underlying *W(D)* are deep within our criminal justice system and are “difficult” concepts to articulate and appreciate and yet are necessary to articulate and appreciate. Credibility

¹⁵⁶ *Ibid.*

¹⁵⁷ See *Savard c R*, 2016 QCCA 380, aff'd 2017 SCC 21, Dutil JA (“[i]t is often difficult to describe why one believes or does not believe a witness. This conclusion is based on many elements that a trial judge can see in the front line” at para 40 [translated by author]).

assessments in light of the formidable duty to apply the rule of law in the context of those fundamental principles is difficult. But difficult does not mean we turn away from that duty. It means we must be ever cognizant of that duty as we go about applying reason and common sense.

To better understand this shift and how it is viewed through the judicial lens, we will look at two recent exemplar cases from two different provincial appellate jurisdictions: the Alberta Court of Appeal decision in *R v Cunningham*¹⁵⁸ and the Manitoba Court of Appeal decision in *R v CAM*.¹⁵⁹ To best appreciate the impact of these decisions, we will examine these cases through the optics of case law. The *CAM* case will present us with a thoroughly modern approach, which is illuminated by the line of Ontario cases scrutinizing *W(D)* in light of the burden and standard of proof. But first we will view the *Cunningham* decision through the Supreme Court's quest to decant the essence of *W(D)* and free the principle from the formula.

The Alberta Court of Appeal's candid treatment of *W(D)* in *Cunningham* reduces the *W(D)* concept to the original conundrum of "who to believe" but with a distinctly "intellectualized" twist. In doing so, the Alberta Court of Appeal relies on *R v Vuradin*,¹⁶⁰ authored by Justice Karakatsanis, who filters the *W(D)* question through the judicial lens of the burden of proof. In this way, the Court deconstructs the *W(D)* "three-step" analysis by detaching the purpose of *W(D)* from the "formula." According to Karakatsanis J, the essence of *W(D)*, as emulated in the burden of proof, transcends the ritual vocalization of *W(D)*. Therefore, the trier of fact's approach to the credibility analysis pursuant to *W(D)*, in terms of which evidence the trier turns to first in that assessment, does not matter.¹⁶¹ In other words, it is the principle that counts not the stratified hierarchy as suggested by Justice Cory's modest, yet attractive, *W(D)* instruction.¹⁶²

Although this attitude suggests a fresh perspective, in fact it was a position taken a decade earlier in two Manitoba Court of Appeal

¹⁵⁸ *R v Cunningham*, 2014 ABCA 329, [2014] AWLD 4331 [*Cunningham*].

¹⁵⁹ *CAM*, *supra* note 149.

¹⁶⁰ *R v Vuradin*, 2013 SCC 38, [2013] 2 SCR 639 [*Vuradin*].

¹⁶¹ *Ibid* at para 21.

¹⁶² See e.g. see *R c Moynan*, 2013 QCCQ 9808 at para 13; *R v JW*, 2014 ONCA 322 at para 24, 316 OAC 395; *JNC v R*, 2013 NBCA 59 at para 9, 109 WCB (2d) 665; *R v Majedi*, 2013 BCCA 351 at para 18, 341 BCAC 146; *R v Menow*, 2013 MBCA 72 at para 25, 300 CCC (3d) 415 (this position has been approved and applied throughout Canada).

decisions¹⁶³ and reflects, in some sense, the minority view of the Supreme Court in the series of cases on *W(D)* rendered in 2008. In *CLY*,¹⁶⁴ the Supreme Court reversed the lower court's majority decision, quashing the conviction and ordering a new trial. Even though the result was unanimous, the reasons show a split in the court regarding the effect of the *W(D)* error. Justice Fish, who wrote the powerfully indignant minority decision,¹⁶⁵ resumed the lower court's discussion on substance over form. His opinion, pointedly at odds with the majority opinion judgment, finds a clear *W(D)* error. *CLY* is an excellent example of how the courts then viewed the *W(D)* error in virtually diametrically opposed perspectives.

The majority decision of Justice Abella,¹⁶⁶ agrees there is an error in the "highly problematic"¹⁶⁷ approach the trial judge took in assessing credibility but no error in the burden of proof. Here, Justice Abella distills Justice Fish's arguments to rigid approval of the *W(D)* "catechism" as she reiterates Justice Cory's *W(D)* comments as a "helpful map, not the only route."¹⁶⁸ Although Justice Fish does view the lack of adherence to the *W(D)* process as a fatal error, it is not because the trial judge deviated from the approved route but because the "pathway" chosen revealed an untenable error in assessing the evidence, resulting in the reversal of the burden of proof.

For Justice Fish, this could have been avoided by keeping the *W(D)* instructions in mind, not as a one-dimensional representation of credibility assessment possibilities, but as the multi-dimensional "analytical framework"¹⁶⁹ supporting the fundamental principles paramount in the task of assessing and weighing the evidence. In closing, Justice Fish gives us words to ponder as he candidly and wisely explains, in paragraph 33, that "[i]n short, judges may know the law, yet err in its application; they may know the facts, yet make findings of credibility unsupported by the record. What matters in either instance is the substance and not the form

¹⁶³ *R v CJL*, 2004 MBCA 126 at paras 62–64, 197 CCC (3d) 407; *R v CLY*, 2006 MBCA 124 at paras 8–9, 213 CCC (3d) 503.

¹⁶⁴ *CLY* SCC, *supra* note 113.

¹⁶⁵ Concurring with Fish J's dissent are Binnie and Deschamps JJ. The decision was rendered by a seven-member panel and was split 4 to 3.

¹⁶⁶ Abella J's majority decision is concurred in by three further Justices.

¹⁶⁷ *CLY* SCC, *supra* note 113 at para 5.

¹⁶⁸ *Ibid* at paras 8, 11.

¹⁶⁹ *Ibid* at para 31.

of the decision.”¹⁷⁰ Despite the minority status of Justice Fish’s comments, courts have subsequently approved of his comments.¹⁷¹

After *CLY* was released at the end of January 2008, *R v Dinardo*,¹⁷² which was argued only days before the release of *CLY*, followed on May 9, 2008. The unanimous decision, authored by Justice Charron described *W(D)* in a formulistic manner despite the caution at paragraph 23 that “what matters is that the substance of the *W. (D.)* instruction be respected.”¹⁷³ The court does, in the same paragraph, reiterate the purpose of *W(D)* as requiring the trial judge to “direct” his or her “mind” to the ultimate standard of proof. However, in the selfsame paragraph, Justice Charron dismisses the ground, preferring to characterize the “substantive concerns” as a sufficiency of reasons issue. To characterize a burden of proof argument as such does require a preference for form over content.

The *JHS*¹⁷⁴ and *REM*¹⁷⁵ decisions considered *W(D)* more substantively. *JHS* was argued at the same time as *Dinardo* but released three weeks later under the authorship of Justice Binnie on behalf of the seven-member panel. The exasperated tone of the decision is palpable when Justice Binnie, in paragraph 8, references the 3,743 reported decisions citing *W(D)* while commenting on the case as a “fertile source of appellate review.”¹⁷⁶ Keep in mind that the numeric count at that time covered cases over a period of 17 years. Since that decision, there have been almost 6000 more citations in nearly half the time. Fertile source, indeed.

In Justice Binnie’s view, *W(D)* is a teachable moment for the jury and a mere “unpacking” of the concept of credibility assessment in the context of the reasonable doubt principle. For Justice Binnie, the difficulty in applying the exact *W(D)* instruction was in its oversimplification when more complex evidence is before the trier such as exculpatory and inculpatory evidence from the accused. This concern is captured by Binnie J when he suggests *W(D)* has attained a status of immutability “never claimed for” by the

¹⁷⁰ *W(D)*, *supra* note 1 at para 33.

¹⁷¹ See e.g. *R v VY*, 2010 ONCA 544 at paras 9-15, 334 DLR (4th) 33.

¹⁷² *Dinardo*, *supra* note 110.

¹⁷³ *CLY* SCC, *supra* note 90 at para 23.

¹⁷⁴ *JHS*, *supra* note 2.

¹⁷⁵ *REM*, *supra* note 128.

¹⁷⁶ *JHS*, *supra* note 2 at para 8.

author. According to Justice Binnie, it is the “message” not the package that matters. In *JHS*, the trial judge “got across the point”¹⁷⁷ of *W(D)* and thereby delivered the message.¹⁷⁸ But delivering a message and expounding the meaning of the message are two different things. Delivering *W(D)* does not unpack the concepts in a meaningful way for proper application.

A different panel of seven members heard *REM* in May of 2008 with the unanimous decision rendered by Chief Justice McLachlin. The issue was one of sufficiency of reasons. *W(D)* in this context is peripheral yet connected. The Court is again emphasizing substance over the rote recitation of the *W(D)* “rule.” In the same way, reasons are sufficient if the content “seize[s] the substance” of the “critical issue” of “a reasonable doubt in the context of credibility assessment.”¹⁷⁹ In the final *W(D)* decision in 2008, Justice Rothstein, again for a seven-member court in *McDougall*,¹⁸⁰ considered the inapplicability of the decision in a civil action. In saying this, Justice Rothstein found *W(D)* to be a “guidepost to the meaning of reasonable doubt”¹⁸¹ and “developed as an aid”¹⁸² in arriving at the ultimate decision where there were conflicting testimonial accounts.

Months later, in the 2009 *Van* decision, Justice LeBel approached *W(D)* purposively as an instruction “to ensure that the jury know how to apply the burden of proof to the issue of credibility.”¹⁸³ However, Justice LeBel reverted to Justice Cory’s reasoning by suggesting an error in the charge was not fatal if the trial judge “clearly conveyed”¹⁸⁴ the proper burden and standard. The deficiency could thus be “compensated” for at another point in the charge.¹⁸⁵ Similarly, in the 2010 *Laboucan* decision, Justice Charron, on behalf of the full court at paragraph 19, found the reasons demonstrated the trial judge “faithfully” followed the applicable *W(D)* principles.¹⁸⁶ This

¹⁷⁷ *Ibid* at para 16.

¹⁷⁸ *Ibid* at paras 9, 10, 13, 16.

¹⁷⁹ *REM*, *supra* note 128 at para 46.

¹⁸⁰ *McDougall*, *supra* note 82.

¹⁸¹ *Ibid* at para 84.

¹⁸² *Ibid* at para 85.

¹⁸³ *Van*, *supra* note 103 at para 23.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid*.

¹⁸⁶ *W(D)*, *supra* note 112 at para 19.

case was followed shortly by *R v Szczerbaniwicz*,¹⁸⁷ in which Justice Abella for the majority reiterated the now familiar *W(D)* mantra emphasizing that the substance of *W(D)* “must be respected, not its literal tripartite incantation.”

As a result of the Supreme Court’s emphasis on substance over the form, the Court became increasingly focused on *W(D)* as a container for burden of proof and reasonable doubt instructions. The 2013 *Vuradin* decision exemplifies this nuanced approach.¹⁸⁸ Justice Karakatsanis, writing for the Court, clearly characterizes the *W(D)* concern as a misapplication of the burden of proof. Reminiscent of Justice Sopinka in the dissent of *W(D)*, she cites those principles as “paramount” and “central” in a criminal trial. In paragraph 26, Justice Karakatsanis also embraces Justice Fish’s disquiet with content over form when she notes that “although a trial judge is not required to outline the *W(D)* steps, the trial judge here referred to *W(D)* and the dangers that it addresses”¹⁸⁹ (emphasis added). In this brief passage, the *W(D)* Revolution is complete as the formulaic is jettisoned in favour of a purposive approach to credibility assessment. Thus, the true meaning of *W(D)* is revealed as an integral and continuing aspect of the criminal trial; from the overarching gate keeper duty of trial fairness to the minutiae of the final analysis of the evidence. *W(D)* is finally accepted as the analytical place-keeper to ensure the special burden of proof and our principles of fundamental justice stay firmly in mind throughout the criminal trial.¹⁹⁰

In this long but necessary segue through the Supreme Court’s judicial lens of *W(D)* as a catalyst of change, we return to a discussion on how this view of *W(D)* as articulated by the Supreme Court has impacted recent provincial appellate decisions. As will be argued in the numeric portion of this article, the Alberta Court of Appeal stands as a unique voice in *W(D)* history. Alberta regularly reviews grounds of appeal based on *W(D)* and

¹⁸⁷ *R v Szczerbaniwicz*, 2010 SCC 15 at para 14, [2010] 1 SCR 455.

¹⁸⁸ *Vuradin*, *supra* note 160 at para 21. This approach, as discussed in this paper, occurred over time but can also be seen in *R v Lee*, 2010 SCC 52 at para 7, [2010] 3 SCR 99, where the court dismisses the *W(D)* ground as the trial judge did not err in applying the “reasonable doubt standard.”

¹⁸⁹ *Ibid* at para 26.

¹⁹⁰ This is reminiscent of Rothstein J, dissenting, in *JAA*, *supra* note 114 at para 66, where, in dismissing the ground based on *W(D)*, he does so on the basis that the trial judge “kept his eye firmly on the proper standard and burden of proof.”

produces dissents on the issue. Unsurprisingly then, the Alberta court in *Cunningham* turned to *Vuradin* to illuminate the *W(D)* concern.

Cunningham was rendered “by the court,” which consisted of Justices Picard, Watson and the then Justice Brown, who was later elevated to the Supreme Court. Again, the angst of the court in reviewing, yet again, a *W(D)* issue is evident. In paragraph 14, the court comments on how submissions “essentially rehearse” general arguments on credibility assessment and reasonable doubt. Then, the Court, in paragraph 16, reveals a singular truth concerning *W(D)* when it states:

Ultimately a trial judge or jury *does* have to make intellectually valid choices amongst competing evidence. The concern of the law is whether in its reasoning process the trial judge or jury loses sight of the presumption of innocence and the Crown’s burden of proof: *Vuradin*; *R v Prokofiew*, ... *R v S(JH)*... *W(D)* is not a straightjacket for trial courts, or, for that matter, for appeal courts, as noted by Duval-Hesler CJQ in *R(J)* where she trenchantly observed ‘courts of appeal throughout Canada, and certainly this Court of Appeal, are beset by appeals on the basis of *W.(D.)*’.¹⁹¹

The Court references Justice Duval-Hesler’s decision in *RJ* to distinguish between *W(D)* concerns invoking “lay juries” and reasons as given by a trial judge. In the Court’s view, trial judges are presumed to know the law and deserve deference in their factual findings. This presumption limits appellate intervention to consider whether the lower court’s decision was “reasonable.”¹⁹²

Two issues arising from this position require our attention. First, is the underlying warning that *W(D)* not become a “straightjacket” for appellate courts. This view fits nicely with the courts’ protective stance relating to the traditional role of the trial judge as the ultimate arbiter of the facts whose decision-making abilities, as seen through the judicial lens, are to be upheld if reasonably held. The further concept of the “presumption” the judge knows the law, must be tempered by the comments we discussed earlier made by Justice Fish in *CLY* that “judges may know the law”¹⁹³ [emphasis added].

Second, is the comment on the realities of decision-making, which implies a trier of fact “*does* have to make intellectually valid choices amongst

¹⁹¹ *Cunningham*, *supra* note 158 at para 16.

¹⁹² *Ibid* at paras 17–18.

¹⁹³ *Ibid* at para 33.

competing evidence.”¹⁹⁴ That phrase ‘intellectually valid choices’ must be viewed in the context of the pre-*W(D)* decisions where the error was described as a ‘stark choice between two alternatives.’ Here the court is not admonishing the trier for making choices if they are ‘intellectually’ validated by the application of the reasonable doubt principle. This sentiment has been taken up by other provincial courts¹⁹⁵ and within Alberta’s trial courts as well. In three Alberta Queens Bench decisions¹⁹⁶ Justice Renke leans on this approach. For instance, in *R v JAB* at paragraph 107, he acquits the accused as he has “no intellectually valid reason for rejecting the Accused’s evidence.”¹⁹⁷ He refers to similar wording at para 173 of the *Page* decision.¹⁹⁸

In the Manitoba *CAM* decision,¹⁹⁹ written by Mainella JA, the issue is based on the modern “Ontario” approach to the *W(D)* error involving an “uneven scrutiny of the evidence.”²⁰⁰ The court approaches the issue in two different ways. The first, is reminiscent of *Cunningham* as Justice Mainella acknowledges the trial judge may properly believe “the evidence of a Crown witness over that of a witness for the defence” without committing an error in applying the burden of proof. The second, invokes the familiar contextual approach. The court explicitly finds that the trial judge “reviewed the evidence in accordance with the approach discussed in *R v W(D)*.”²⁰¹

It must be noted that the *CAM* case, like so many of the cases referencing *W(D)*, involve sexual offences and/or domestic assaults for the obvious reason that so often such offences involve diametrically opposing versions of events with little to no independent evidence, outside of the complainant and accused. Again, like many *W(D)* appeals, the appellant is

¹⁹⁴ *Ibid* at para 16.

¹⁹⁵ See *R v Clouter*, 2015 CanLII 1809 at para 36 (NL PC); *R c Arvisais-Moisan*, 2016 QCCQ 9656 at para 53 [*Arvisais-Moisan*]; *LSJPA – 1716*, 2017 QCCQ 8467 at para 134 [*LSJPA – 1716*].

¹⁹⁶ *R v JAB*, 2016 ABQB 362 at para 107, 133 WCB (2d) 188 (acquittal entered) [*JAB*]; *R v Johnson*, 2016 ABQB 633 at para 171, [2016] AJ No 1183 (QL) (acquittal entered); *R v Page*, 2017 ABQB 33 at para 173, [2017] AWLD 1112 (acquittal entered on some counts) [*Page*].

¹⁹⁷ *JAB*, *supra* note 196 at para 107.

¹⁹⁸ *Page*, *supra* note 196.

¹⁹⁹ *CAM*, *supra* note 149 at paras 22, 32–38.

²⁰⁰ See *Sromberg, LRS, and Gauthier*, *supra* note 148.

²⁰¹ *CAM*, *supra* note 149 at para 22.

the accused and the grounds of appeal focus on the cluster of errors arising from factual determinations such as misapprehension of the evidence and the weight of the evidence, unreasonable verdict and the reversal of the burden of proof. *W(D)*, in this instance, is raised by the court as confirmation the trial judge approached the assessment in the appropriate manner. The court, in dealing with the burden of proof issue, does not rely on *W(D)* specifically but on the case law which works in tandem with the principle. Related to this approach is the previously discussed appellate standard of reasonableness as an aspect of deference to the trial judge's finding of fact with the admonishment the appellate court must not substitute their opinion for the original fact finder.

The position in *CAM* does not seem novel, yet the court adds a twist by citing the 1947 Supreme Court decision in *White v The King*²⁰² to support the contention that "issues of credibility are not determined by a 'set of rules' that 'have the force of law'."²⁰³ This expression is singular considering *W(D)*'s pedigree as a legal principle requiring the trier of fact to apply the standard of proof to the credibility determination. These comments must be viewed in the proper context: the court was confronted with appellate arguments, both written and oral, interlaced with myths and stereotypes. In *CAM*, the court needed to be exhaustive in their response.²⁰⁴

CAM is a case demonstrating a court's desire to diffuse an impermissible basis for an appeal that was obscured by *W(D)*. In other words, the court found the appellant's argument to be a thinly veiled attempt to rely upon erroneous beliefs of how a woman should act and react by wrapping it in a *W(D)*-like package. *W(D)* is indeed a powerful and fundamentally important concept but must be approached in a manner consistent with the prime objectives of the principle, which is to ensure a just and fair trial consistent with our principles of fundamental justice. The passages in *CAM* on the issue are written for everyone in the justice system and should be read by all, notably the caution in paragraphs 51 and 52 of the judgment where the court states that:

²⁰² *White v The King*, [1947] SCR 268, 89 CCC 148.

²⁰³ *Ibid* at 272. Of interest, counsel for the appellant in this case was G Arthur Martin, the author of the *Nimchuk* decision and a member of the *Challice* panel. See *Nimchuk*, *supra* note 5; *Challice*, *supra* note 6.

²⁰⁴ *CAM*, *supra* note 149 at paras 45–53.

Trial judges have a heavy responsibility to ensure that counsel do not introduce the spectre of such forbidden reasoning into a trial. If that occurs in a jury trial, it should be answered by a timely and appropriate instruction to the jury (see *R v Barton*, 2017 ABCA 216 (CanLII) at paras 1, 159-61). In judge-alone trials, judges must not succumb to drinking from such a poisoned chalice in their assessment of credibility. The accused's submission that the complainant's credibility as to her version of events was undermined because it did not conform to some "idealized standard of conduct" (*R v CMG*, 2016 ABQB 368 (CanLII) at para 60) is unsound. I reject it unequivocally. Credibility determinations must be based on the totality of the evidence, not untested assumptions of a victim's likely behaviour based on myths and stereotypes.²⁰⁵

This frank statement calibrates the *W(D)* decision to focus on an assessment of the evidence free of bias and misconceptions but tied to the paramount consideration of the standard of reasonable doubt. This is best articulated by Judge Sylvain Meunier in *Arvisais-Moisan* that, "[t]hus, *DW(D)* is a model of analysis which is certainly not sacrosanct but which guarantees the safeguarding of the principle of reasonable doubt and reaffirms the need to prove beyond a reasonable doubt of guilt of an accused" [translated by author].²⁰⁶

B. Complexity and Enhancement

The second strand to consider in the *W(D)* revolutionary shift is the way the principle has become bound up with other grounds of appeal resulting in a richer and more complex principle than originally imagined. *W(D)* is now a discussion piece woven through more than one ground of appeal, touching upon differing areas of law with the common bond or golden thread of the burden of proof. Reference to some of these connected grounds have already been made earlier in this article, such as the grounds relating to reasonable doubt in unreasonable verdict cases. Other areas offer a more specific connection to *W(D)* as potential errors in assessing the credibility of evidence, which clash with other evidentiary principles such as, the rule in *Browne v Dunn*,²⁰⁷ the admission and use of "Mr. Big"

²⁰⁵ CAM, *supra* note 149 at paras 51, 52.

²⁰⁶ *Arvisais-Moisan*, *supra* note 195 at para 53; *LSIPA – 1716*, *supra* note 195 at para 134.

²⁰⁷ *R v Martin*, 2017 ONCA 322 at paras 14, 22, 348 CCC (3d) 384 (appeal allowed due to the error).

statements,²⁰⁸ collateral fact rule,²⁰⁹ *Vetrovec* warning²¹⁰ and intent in a first-degree murder trial.²¹¹ This connectivity is most significantly seen in the line of cases where the *W(D)* instruction is required, whether the accused testifies or not.²¹² Thus, the “principles underlying” *W(D)*, as envisioned by Blair JA in *BD*, have “a broader sweep.”²¹³

The darker side of this broader dissemination of *W(D)* is the use of the decision as a shield in response to related errors of unreasonable verdict or misapprehension of the evidence. Often, the appellate court, in dismissing such an appeal, will emphasize the *W(D)* instruction as proof of the trial judge’s appropriate principled approach to the case. Such a broad application of *W(D)* reduces the content over form approach to an absurdity as *W(D)* becomes what the court fears: a magical charm.²¹⁴

V. FINALLY, THE *W(D)* REVOLUTION BY THE NUMBERS

In order to truly observe the impact of the *W(D)* revolution, we will turn finally to *W(D)* by the numbers. An empirical analysis provides a platform for contemplation of the enormity of the issue and presents a unique narrative of why the issue deserves such contemplation. But first a caution; the numeric story is open to interpretation and subject to a deeper statistical analysis, which positions the numbers in a broader context. As referenced at the beginning of this article, there are over 9000 mentions of *R v W(D)* in case law.²¹⁵ Undoubtedly, the obvious reason for this explosion of

²⁰⁸ *R v Kelly*, 2017 ONCA 621, 387 CRR (2d) 93.

²⁰⁹ *R v SB*, 2017 SCC 16, [2017] 1 SCR 248.

²¹⁰ *Murray*, *supra* note 131, Watt JA (a *Vetrovec* caution given in relation to the accused’s testimony “or witnesses who testify on his behalf...impermissibly transfers a burden of proof to an accused and is contrary to the commands of *R. v. W. (D.)*” at paras 123, 125).

²¹¹ *R v Zvolensky*, 2017 ONCA 273 at paras 102, 113, 352 CCC (3d) 217.

²¹² See e.g. *R v BD*, 2011 ONCA 51 at paras 105, 144, 266 CCC (3d) 197 [BD]; *R v Kirlaw*, 2017 ONCA 171 at para 32, [2017] OJ No 1184 (QL); *R v JMM*, 2012 NSCA 70, [2012] NSJ No 364 (QL).

²¹³ *BD*, *supra* note 212.

²¹⁴ See e.g. *R v RA*, 2017 ONCA 714, 355 CCC (3d) 400, Huscroft JA, *contra* Trotter JA, dissenting.

²¹⁵ As of September 12, 2017, using the Westlaw database, I found 9,173 case considerations of *W(D)* over 26 years. In contrast, *Vetrovec v The Queen*, [1982] 1 SCR

citations is the self-fulfilling popularity of Justice Cory's *W(D)* "model" instruction. Instantly, the three-step charge to the jury became an indispensable trial judge created "note to self" which if utilized promised, in the words of Justice Cory at page 758, that "the oft repeated error ... would be avoided."²¹⁶ Conceived in that light, it would be more surprising not to see *W(D)* repeated and cited in so many decisions.

But there is another side to the numbers, which is the appellate dimension. The Supreme Court alone has referenced the decision 36 times²¹⁷ with 5²¹⁸ of those cases, as earlier discussed, released in 2008. There are 1718 decisions referencing *W(D)* from appellate courts across Canada.²¹⁹ The Court of Appeal for Ontario has rendered the most decisions with 497 case citations, which is 28.9% of the total appellate cases. Thus far, in 2017, there are 71 provincial appellate level cases.²²⁰ Except for five Crown appeals, these appeals are defence initiated.²²¹ Of the 71, only one appeal, from the New Brunswick Court of Appeal in *DAM v R*, was allowed based on the *W(D)* error.²²² The Quebec Court of Appeal in *GU c R*, allowed the appeal for reasons other than the *W(D)* issue but commented on the flawed credibility assessment.²²³ There are 2 dissenting judgments on the issue; one decision from Ontario, *R v Black*,²²⁴ for which a notice of appeal to the

811, 136 DLR (3d) 89 [*Vetrovec*], which created the "Vetrovec warning," has been considered 972 times since 1981, and *Kienapple v R*, [1975] 1 SCR 729, 44 DLR (3d) 351 [*Kienapple*], which launched the "Kienapple principle," has 2,851 case mentions since 1975. Finally, there are 2,015 case considerations for the 1986 *Charter* decision in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

²¹⁶ *W(D)*, *supra* note 1 at 758.

²¹⁷ CanLII search as of September 15, 2017.

²¹⁸ *CLY SCC*, *supra* note 113; *Dinardo*, *supra* note 110; *JHS*, *supra* note 2; *McDougall*, *supra* note 82; *REM*, *supra* note 128.

²¹⁹ Westlaw search as of September 12, 2017.

²²⁰ Derived from combined searches done on both Westlaw and CanLII databases.

²²¹ See *R v ARD*, 2017 ABCA 237, 353 CCC (3d) 1 [ARD]; *R v Spencer*, 2017 SKCA 54, 354 CCC (3d) 525; *R c Sénécal*, 2017 QCCA 954; *R v Thompson*, 2017 SKCA 33, [2017] SJ No 182 (QL); *R c Alie*, 2017 QCCA 18. All decisions are from Crown appeals.

²²² *DAM v R*, 2017 NBCA 9, 352 CCC (3d) 471.

²²³ *GU c R*, 2017 QCCA 1207 at paras 39-41, 46.

²²⁴ *R v Black*, 2017 ONCA 599, 140 WCB (2d) 637, Pardu JA, dissenting directly on the issue.

Supreme Court has been filed²²⁵ and one decision from Alberta, *R v ARD*, a dissent in a Crown appeal against acquittal.²²⁶

Although very few dissents are rendered on the *W(D)* issue, this does not mean appellate justices are *ad idem* on the approach to and the significance of *W(D)*. Case in point, is the Alberta Court of Appeal's treatment of the issue. In the last five years,²²⁷ the Alberta Court of Appeal has the second largest number of appellate decisions referencing *W(D)* with 101 cases in contrast to Quebec with 71 decisions and British Columbia with 77 cases. The only other province with more decisions is Ontario, rendering 146 decisions. Clearly, the Alberta Court of Appeal has been engaged with the *W(D)* ground on a regular basis.

The Alberta Court of Appeal rendered one of the two dissents on the issue in 2017. However, there are two further cases from 2017 with related dissents by Justice Berger.²²⁸ A review of 2016, reinforces the Alberta appellate divide on the issue. In 2016, there were 14 decisions raising *W(D)*, including two bail pending appeal matters. Of those 14 decisions, two of the cases have dissenting opinions on the *W(D)* issue: *Hilton*,²²⁹ where the majority allowed an appeal based on a *W(D)* error and *R v Threefingers*,²³⁰ where the majority dismissed the appeal.

These numbers tell us that *W(D)* is often raised but rarely successful. This is consistent with similar judicial conclusions, such as Justice Binnie's comment in *JHS*²³¹ that *W(D)* is a "fertile source of appellate review."²³² Further support for the numbers are found in Justice Doherty's remarks in

²²⁵ See 2017 CarswellOnt 14024 (filed on July 21, 2017). Black's case was successfully argued. See 2018 SCC 10.

²²⁶ *ARD*, *supra* note 221, Slatter JA, dissenting.

²²⁷ Westlaw search from January 1, 2012 to September 16, 2017.

²²⁸ In *R v AGW*, 2017 ABCA 247, [2017] AJ No 808 (QL), Berger JA, dissenting on issues involving misapprehension of the evidence and failure to appropriately apply the standard of proof. Similarly, in *R v Gulliver*, 2017 ABCA 223, [2017] AWLD 5193, Berger JA, dissenting on the sufficiency of the reasons to articulate the credibility assessment process.

²²⁹ *Hilton*, *supra* note 46.

²³⁰ *R v Threefingers*, 2016 ABCA 225, 340 CCC (3d) 301.

²³¹ *JHS*, *supra* note 2.

²³² *Ibid* at para 8.

*Howe*²³³ on the difficulties of appellate success on burden of proof issues. It is hardly surprising that the numbers also confirm the almost exclusive use of the case by the defence on appeal. *W(D)* involves the fundamental trial task, credibility assessment, which is inextricably linked to the most fundamental trial concept, the burden of proof.

Despite these predictable results, the numbers should still give us pause. Does this mean *W(D)* is an overused and underperforming ground of appeal that makes something out of nothing? Or is it such a complicated legal construct that trial judges regularly engage the ground and provide a foundation for potential appellate correction?

In fact, the reality may have shades of both positions: *W(D)* is overused because it is such an easy error for a trial judge to make. As discussed earlier in this article, in our everyday lives we encounter narratives like those found on the daily court docket. We are constantly required to assess information from loved ones, friends, and even from those unknown to us. We may base our assessments on several complex factors but in the end, we make a choice as to which narrative we will accept, the kind of choice which can lead to a *W(D)* error. There is a difference: in the everyday when we accept one version of events over another, we are not in the arena of justice where special protections and considerations are advanced through the principles of fundamental justice. True, trial judges are legal specialists and are required to view the legal world through the “judicial lens,” however such a lens is not engaged automatically and must be intentionally looked through as part of the “infra-ordinary.” *W(D)* is such a prolific ground of appeal for that reason as it requires judges to think contrary to the everyday and to assess the evidence through the reasonable doubt lens. This heightened situation requires delicacy of thought, involving the intricate confluence of both fact and law. *W(D)* is an easy ground of appeal to raise but it is a concept difficult to master in both thought and effect.

W(D) is, in many ways, a personal ground of appeal. It suggests the trial judge not only erred in legal principle but also failed in the judicial sense. Such an error implies a lack of awareness of the most basic concept of criminal law; that of reasonable doubt. A *W(D)* ground extends beyond the case itself and strikes at the very heart of the criminal justice system by calling into question the integrity of the judicially imposed result. It is a ground premised on a system which has been compromised. Such an error

²³³ *Howe*, *supra* note 152.

has the potential to result in a miscarriage of justice through the missteps of the trial judge alone. Conversely, such an error cannot be lightly indulged. The ground engages the full arsenal of appellate court jurisdictional authority such as deference to the trier of fact, the presumption a trial judge knows the law, the reasonableness of the ultimate outcome, the due consideration of the full context of the case, and the recognition that justice need be fairly dispensed but not perfectly so. It is no wonder then that *W(D)*, as a ground of appeal, is often used yet is rarely successful.

This brief segue into a mere slice of the numeric backdrop does reveal the complexities surrounding the issue, which support the revolutionary and almost incendiary aspect of *W(D)*. On one issue, these provincial appellate numbers do make clear, that *W(D)* as a ground of appeal laden with the burden of usage and judicial effrontery, will continue to engage appellate courts struggling to comprehend its meaning and place in our justice system. In the end, no matter how the numbers are viewed, the numeric significance of *W(D)* is remarkable for a decision rendered by a five-panel court.²³⁴

VI. CONCLUSION

The survey of the *W(D)* Revolution is now complete. The oft-quoted three-step test created by Justice Cory as a guide for trial judge's in assessing credibility has evolved into an immutable reminder of the fundamental principles of criminal law. This evolution is a marker of modernity as credibility assessment has morphed into a sophisticated, complex, and challenging part of the function of the trial judge in a criminal case. This change in tone and complexion of *W(D)* did not arise easily nor has it been fully embraced. Rather, it has occurred out of the changing role of the trial judge as a gatekeeper and guardian of the core principles underlying our justice system.

The *W(D)* incantation, although not a "magical" one, serves as a mighty reminder of what is at stake in a criminal trial; the presumption of innocence, the burden of proof on the Crown, the standard of proof beyond

²³⁴ Five-member panels have meaning in the appellate arena. In the case of a provincial appellate decision, where three-member panels are the norm, a five-member panel is precedential, as such a panel is needed to re-consider precedent setting decisions from their court or to tackle particularly precedent-setting issues. Conversely, a five-member panel at the Supreme Court may suggest the issue is not of precedential concern.

a reasonable doubt, trial fairness and the scrupulous avoidance of miscarriages of justice. *W(D)* and the oft-quoted “test” is now bound up in these fundamental principles of justice creating a synergy of fact and principle. Its influence cannot and should not be underestimated. In an era where there are calls for re-consideration of the *W(D)* decision,²³⁵ it behooves us to recognize what *W(D)* is and is not.

An exemplary tale will serve as a caution of the dangers of indifference – the re-characterization of the presumption of subjective *mens rea* for crimes. The presumption was firmly in the forefront of pre-*Charter* decisions such as *Beaver v The Queen*²³⁶ and *R v Sault Ste Marie*.²³⁷ After the advent of the *Charter*, the presumption became marginalized by the s. 7 fault element analysis. This secondary position was further advanced in *R v ADH*²³⁸ as the presumption became a mere tool of statutory construction.²³⁹ This marginalization will not happen to the *W(D)* principle. *W(D)* has not disappeared or become redundant but is subsumed in the fundamental tenets of our justice system. In this integration, *W(D)* signals to the trier of fact that we are in the presence of the principles of fundamental justice, which must be applied with rigour. Our challenge is to ensure that the substance or essence of *W(D)*, which reminds each of us in the justice system to keep an open and larger view of the evidence, does not evolve further beyond recognition.

Yet, the case continues to exist uneasily within the rule of law. On one hand, it articulates a core concept vital to the fair and just administration of justice. On the other, it is considered an over-used behemoth that provokes strong reaction from the appellate courts. It is at once protected and rejected by the courts. It is an ideal but not a perfect one. As reiterated by Justice Cory in *Evans*, released two years after *W(D)*, “a jury charge should not be microscopically examined and parsed. There is no such thing as a

²³⁵ See *Wruck*, *supra* note 4, Watson JA (the Crown’s position is the “application of the *W(D)* formula should perhaps be reconsidered in light of subsequent case law that deals with how appellate courts analyze reasons for judgment given by trial judges. See e.g. *R v Vuradin*” at para 8).

²³⁶ *Beaver v The Queen*, [1957] SCR 531, 118 CCC 129.

²³⁷ *R v Sault Ste Marie*, [1978] 2 SCR 1299, 40 CCC (2d) 353.

²³⁸ *R v ADH*, 2013 SCC 28 at para 25, [2013] 2 SCR 269, Cromwell J.

²³⁹ See Sarah-Jane Nussbaum, “Diminishing Protection of Subjective Fault: A Case Comment on *R. v. ADH*” (2014) 77 Sask L Rev at 279.

perfect jury charge.”²⁴⁰ Yet, the desire to “parse” and “examine” is tempting on an issue which lies so close to the heart of the criminal justice system. Miscarriages of justice are real and sadly frequent enough in our justice system that to refrain from “microscopic examination” seems contrary to our responsibilities to our clients and to the law. It is difficult to reconcile the end goal of a fair and just decision with an admonishment by the courts to not take *W(D)* to the nth degree. *W(D)* is not merely a mental construct or a state of mind of the decision-maker whose boundaries are defined by legal principles. Rather, *W(D)* transcends the ordinary as a symbol or a gesture encapsulating all that is our criminal justice system.

What of the premise of this article that *W(D)* has somehow transcended the banal and revolutionized in three steps the way triers of fact approach and assess evidence? I would suggest the revolution is there in every one of those 9000 cases citing *W(D)* and in every trial lawyer who stands up to remind the trier of fact that *W(D)*, as the embodiment of the presumption of innocence and the principle of reasonable doubt, is a key component of our criminal justice system. In the end, it is not the presence of *W(D)* for which we must be ever vigilant, but the absence of justice should we not take *W(D)* seriously.

²⁴⁰ *Evans, supra* note 120.