

**MackJCR 146****Mack's Jury Charge Review**

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## 146 — Nodrick MBCA Jury Charge

***Nodrick MBCA Jury Charge***

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**1.0 — PREFACE**

This review will discuss the appended jury charge delivered in *Nodrick*; specifically, this review considers the trial judge's instruction to the jury on causation and the *actus reus*. This case and the charge were considered by the Manitoba Court of Appeal: *R. v. Nodrick*, 2012 CarswellMan 319 (Man. C.A.).

***Impugned Charge Topics***<sup>4</sup>

- (i) Causation (Charge at page 18).

***Other Charge Topics***<sup>5</sup>

- (i) Opinion of Trial Judge (Charge at pages 3 and 6).
- (ii) Unanimity (Charge at page 5 and 7).
- (iii) Jury Questions (Charge at page 6, 30).
- (iv) Reasonable Doubt (Charge at page 7).
- (v) Assessing credibility (Charge at page 9).
- (vi) Exhibits (Charge at page 11).
- (vii) Circumstantial Evidence (Charge at page 12).
- (viii) Expert Evidence (Charge at page 13).
- (ix) Admissions (Charge at page 14).
- (x) Statements of the Accused (Charge at page 15).
- (xi) Other Discreditable Conduct (Charge at page 17).
- (xii) Murder (Charge at page 17).
- (xiii) Manslaughter (Charge at page 24).

(xiv) Jury Notes (Charge at page 26).

(xv) Essential Element and Date (Charge at page 32).

## 2.0 — THE FACTS

In June 2003, the accused befriended the frail, diabetic, 65-year-old male victim. Using the victim's motor vehicle, the accused drove the victim to a field in the outskirts of the city. The accused forced the victim to remove his clothes and left the victim in his underwear. The accused then drove to an ATM at a nearby gas station where he then attempted to withdraw funds from the victim's bank account. The accused returned to the victim and told him that if he wanted his clothes and shoes, he would have to give him the PIN. The victim complied. The accused then threw the victim his shoes and drove off. The victim having been left on the field, wandered aimlessly. Within a few days he died of hypothermia following exposure to the elements.

Over the course of the following days, the accused was detained by police and was questioned about the victim's whereabouts. He initially lied to the police about the whereabouts of the victim but then, a week later, admitted to his actions. He further directed the police to the location where he had left the victim. The victim was found dead at that location.

At trial, the issue was whether the actions of the accused caused the death of the victim. Prior to reviewing the evidence relating to the cause of death, the trial judge charged the jury with respect to the standard of causation. The trial judge indicated that for the accused's act to legally have caused the victim's death, the accused's actions had to have been a significant contributing cause. In reviewing the evidence with the jury, the trial judge mentioned the accused's lies to the police but only presented them in the context of post-offence conduct, not as part of the *actus reus*/unlawful action that contributed to the victim's death.

At trial the accused was acquitted of second-degree murder.

## 3.0 — THE REVIEW

### *Complaint*

The Crown sought to appeal the acquittal on two grounds. The complaints with regards to the jury charge, both interrelated to the issue of causation, were:

- *First*, that the trial judge's charge on causation was incomplete in the sense that the trial judge failed to state that the accused's conduct could contribute significantly to the victim's death without being the sole or main cause of death.
- *Second*, that the trial judge in her charge to the jury circumscribed the *actus reus* of the offence. It was the Crown's position that it was an error in law not to have included the accused's lies to the police in the part of the jury charge that dealt with the *actus reus*. The trial judge only presented the lies in the context of post-offence conduct.

The Crown has no right of appeal from an acquittal except on a ground that involves a question of law alone (see s. 676(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46). However, even when it is accepted that the question raised is one of law and that an error in law was committed, the Crown must still overcome the "nexus hurdle" for the jury acquittal to be overturned: there must be a link between the error in law and the acquittal (*Nodrick MBCA* at paragraph 7).

### *Charge*

#### **a) — Causation**

The trial judge's charge to the jury on the law of causation was as follows:

"For an act to cause someone's death, it must be a significant contributing cause, one that is beyond something that is trifling or minor in nature. To answer this question you must consider all the evidence. Do not limit your

consideration only to the opinions of the experts about what caused [the victim]’s death. Use your good common sense” (*Nodrick MBCA* at paragraph 10; Charge at page 18).

Further as it relates to the law of causation and the particular consideration of objective or reasonable foreseeability, which was *not* a ground of appeal but was considered by the Court of Appeal, the trial judge instructed the jury as follows:

“The unlawful act must also be one that any reasonable person in the circumstances would think would likely put another person at risk of some harm or injury that is more than brief or minor in nature” (*Nodrick MBCA* at paragraph 20; Charge at page 20).

“To decide this question, you should consider all the circumstances of [the accused]’s conduct. Take into account not only the nature of the act alleged, but also anything said at or about the same time.

According to [the accused] in his final interviews with the homicide detectives, he left [the victim] in the field not far from a farmhouse, golf course and the highway. The sun was still up as it was the evening of a hot June day. [The victim] had suffered some blunt trauma including a cut on his head that would have required stitches, but none of the abrasions contributed to his death. However, he was also a frail person, suffering from diabetes who was left in the field in his underwear. He had no medication with him. His glasses were found nearby and his shoes but he was not wearing them. Would a reasonable person believe that this would likely put a person like [the victim] at the risk of some harm or injury that is more than brief or minor in nature?

[The accused] told police that [the victim] was alive when he left him, that he threw his shoes out to him and thought he would walk out of the area. If you are not satisfied beyond a reasonable doubt that [the accused] unlawfully caused the death of [the victim], you will find him not guilty. Your deliberations would be over. If you are satisfied beyond a reasonable doubt that [the accused] unlawfully caused the death of [the victim], you must go on to the next question” (*Nodrick MBCA* at paragraph 21; Charge at page 20).

#### **b) — Circumscribing the *Actus Reus***

The trial judge’s charge to the jury as it related to the accused’s lies to the police regarding the whereabouts of the victim was as follows:

“The Crown led extensive evidence of lies by [the accused] to various police officers over the course of several days about the whereabouts of [the victim]. If you are at this stage in your deliberations, you will already have found that [the accused] caused [the victim]’s death and that he did so unlawfully. I instruct you that the evidence of his ongoing lies to police does not help you decide whether [the accused] had the state of intention necessary for murder rather than manslaughter. His lies are equally consistent with consciousness of having unintentionally caused [the victim]’s death as intentionally” (*Nodrick MBCA* at paragraph 35; Charge at page 24).

### ***Ruling***

#### **a) — Causation**

The Court of Appeal held that there can be “no doubt” that the trial judge’s charge on causation would have been more complete had the following words, taken from the Canadian Judicial Council Model Jury Instruction, been added after the trial judge’s charge on causation: “A person’s conduct may contribute significantly to another person’s death even though that conduct is not the sole or main cause of death” (*Nodrick MBCA* at paragraph 14).

The Court of Appeal held that assuming that such an omission resulted in a legal error, that such an omission did not amount to enough of a nexus to overturn the jury acquittal as per s. 676(1)(a) of the *Criminal Code*. While the acquittal may have been affected by the assumed error, there was not a “reasonable degree of certainty,” that the error on causation affected the verdict (*Nodrick MBCA* at paragraph 16). It was much more likely that the jury was not convinced beyond a reasonable doubt on the objective or reasonable foreseeability component of causing death unlawfully (*Nodrick MBCA* at paragraph 20). Based

on the judge's jury charge, the jury acquitted the accused not because it had a doubt that the accused's actions were a significant contributing cause of death, but rather because it had a doubt on the question of whether any reasonable person in the circumstances of the accused would think that leaving this victim in the way that he was left on a warm, sunny day, near a farmhouse and golf course, would likely put him at risk of some harm or injury that was more than brief or minor in nature (*Nodrick MBCA* at paragraph 22).

Further, the court held that the Crown's failure to object to such a charge at trial, when the Crown had three different occasions to do so, weighs heavily against the Crown's position that the trial judge omitted key aspects of causation in his charge. The failure to object can be indicative that the alleged omissions are not serious enough to have materially affected the acquittal (*Nodrick MBCA* at paragraphs 27-29).

#### **b) — Circumscribing the *Actus Reus***

The Court of Appeal gave no effect to this ground appeal. The court held that appellate courts are to review jury instructions on a "standard of adequacy, not perfection, using a functional approach that takes into account the nature of evidence before the trial court, the live issues that are raised, the positions of the parties on those issues, and the addresses of counsel" (*Nodrick MBCA* at paragraph 32).

The Court of Appeal held that the accused's lies could be viewed either as part of the unlawful act which contributed to the victim's death (the *actus reus*) or as post-offence conduct evidence (*Nodrick MBCA* at paragraph 33). The court concluded that, based on the conduct and objections of the Crown during the trial, the Crown did not ask the trial judge to modify the charge to include the lies as part of the *actus reus* of the offence. The Crown submitted case law to the trial judge that the lies formed part of post-offence conduct, which necessarily meant that they could not be viewed as part of the *actus reus* (*Nodrick MBCA* at paragraph 39).

#### Footnotes

- 1 Assistant Crown Attorney in Ottawa; the views and opinions expressed herein are those of the author and do not represent those of the Attorney General or the Crown Attorney's Office. See also Mack's Criminal Law.
- 2 Assistant Crown Attorney; the views and opinions expressed herein are those of the author and do not represent those of the Attorney General or the Crown Attorney's Office.
- 3 Law Student, University of Ottawa, Faculty of Law. The views and opinions expressed herein are those of the author.
- 4 These are the case specific topics that were subject to appellate review. The page numbers referenced reflect the page numbering in the PDF and not the page numbering in the document.
- 5 These are other case specific topics that are contained in the jury charge but were not subject to appellate review. The page numbers referenced reflect the page numbering in the PDF and not the page numbering in the document.