Why Starr Should Not Be Suspended: Reasonable Doubts and Fair Trials

For all the publicity and controversy, the Supreme Court’s recent decision in *R. v. Starr* is hardly shocking. It is really only an affirmation of the court’s 1997 decision in *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1, to require trial judges to explain the meaning of reasonable doubt to juries. The trial judge in *Starr* did not have the benefit of *Lifchus*. He told the jury that reasonable doubt was not an imaginary, frivolous or speculative doubt and it did not require absolute certainty. He failed, however, to explain that it required more than the probability or likelihood of guilt. He also made a dangerous analogy to the everyday ordinary sense of the term. With the possible exception of advising judges to indicate that proof beyond a reasonable doubt is much closer to absolute certainty than probability, there is little new law in *Starr*. A *Lifchus* direction should be consistent with *Starr*.

The court agreed that the trial judge was in error, but divided 5:4 over whether a new trial was required. The minority concluded that the trial judge’s explanation that it is rarely possible to prove anything to an absolute certainty so the burden is only proof beyond a reasonable doubt adequately conveyed the idea that reasonable doubt required more than the probability or likelihood of punishment. In contrast, the majority was concerned that the judge had stressed that reasonable doubt was not certainty, but had not stressed that it was far more than probability.

The Attorney General of Ontario asked that the decision in *Starr* be suspended so that it does not apply to accused whose appeals are still in the system. The motion was subsequently and, it will be suggested, wisely abandoned.

The first thing to note about the motion is that the cases most at risk will be trials held before September 18, 1997, the day the Supreme Court decided *Lifchus*. In these cases, appellate counsel will simply add *Starr* to a ground of appeal that already included *Lifchus*. Indeed, the Attorney General’s objective of preserving convictions in some notorious cases may require the suspension of *Lifchus* in addition to *Starr*.
The second point is that neither Lifchus nor Starr suggests that all cases that do not follow their recommended formula should be automatically overturned. As in Starr, appellate courts must closely examine the particular charge and reasonable judges will disagree about the effect of errors. Consistent with stare decisis, a charge identical to the one given by the trial judge in Starr should require a new trial, but one that does an even slightly better job of explaining reasonable doubt could be held not to require a new trial. A suspension or transition period would be a blunt instrument applied to all cases still in the system, whereas our appeal courts are quite capable of looking at each case on its particular facts.

The final point is that a suspension of a judgment, while not without precedent, is extraordinary when an accused's rights are at stake. The court entertained the idea of transition periods in some of its s. 11(b) cases before deciding that “a moratorium on Charter rights” was not appropriate: R. v. Morin (1992), 71 C.C.C. (3d) 1 at p. 21. The court gave the police a 30-day transition period to implement Brydges duty counsel warnings, 21 days to implement Bartle 1-800 duty counsel warnings, and a seven-month transition period in the wake of Feeney. In the latter case, however, police could still have complied with the Charter because the court read in Feeney warrants to the existing warrant structure. The United States Supreme Court similarly used prospective rulings in a few cases that imposed new constitutional rules on the police. The court’s more frequent use of delayed declarations of invalidity should not be confused with its rare use of prospective rulings. Delayed declarations provide the legislature with an opportunity to pre-empt the court’s blunt remedy, but they do not sanction the infringement of the rights during the period of delay, as prospective or non-retroactive rulings do. In both R. v. Swain (1991), 63 C.C.C. (3d) 481 and R. v. Bain (1992), 69 C.C.C. (3d) 481, the court gave unconstitutional criminal laws six months of temporary validity, but indicated that courts should intervene in individual cases during that period should the unconstitutional powers of the state be abused and the accused's rights be denied. Similarly in the Provincial Judges Reference (1997), 121 C.C.C. (3d) 474 at para. 8, the court suspended a declaration, but indicated that “a demonstration of positive and substantial injustice in the circumstances of an individual case” could justify judicial intervention during the period of the delay. If delayed declarations are not to become a moratorium on Charter rights, individuals such as those still in the system with Lifchus and Starr arguments should be able to seek redress in the courts on the facts of their particular cases.

The delayed declaration of invalidity cases do not support the suspension requested in Starr because the court took care to ensure that accused could vindicate their rights in individual cases. The prospective rulings cases should be distinguished because they were short and related to new procedural obligations placed on the police, not judges. Judges should not require transitional periods in ensuring that the accused has a fair trial.

The general rule that accused who have not exhausted their appeals can take the benefit of changes in the judicial interpretation of laws should apply. The potential injustice of the “still in the system” rule to those out of the system does not justify injustice to those in the system. The temptation to issue a wholesale transition period and suspend Starr should be resisted. Errors in informing juries about the reasonable doubt principle go to the very heart of a fair trial and run the unacceptable risk of wrongful convictions. We should allow appeal courts to do their job in individual cases of deciding whether the errors of trial judges, errors that in most cases would already have been challenged on the basis of Lifchus, require a new trial.

K.R.