

R v. Starr
[2000] 2 SCR 144 (SCC)

[The following is the portion of this case from Justice Iacobucci's reasons that deals with the explanation of how reasonable doubt should be described in the charge to the jury.]

B. Adequacy of the Instruction to the Jury on Reasonable Doubt

(1) The Decisions in Lifchus and Bisson

[230] In its decisions in *Lifchus*, supra, and *R v. Bisson*, [1998] 1 SCR 306, this Court has recently addressed the appropriate manner of instructing a jury on the nature of the criminal standard of proof. Cory J, writing for the full Court in *Lifchus*, held that it is essential for jurors to be instructed that the term "beyond a reasonable doubt" has a special meaning in a criminal trial. He explained that an appropriate jury instruction on reasonable doubt is a fundamental component of a fair trial, because a jury might otherwise convict the innocent by finding guilt on the basis of mere probability, rather than on the basis of proof to a near certainty as is required in criminal proceedings. In his words, at para. 14:

No matter how exemplary the directions to the jury may be in every other respect if they are wanting in this aspect the trial must be lacking in fairness. It is true the term has come echoing down the centuries in words of deceptive simplicity. Yet jurors must appreciate their meaning and significance. They must be aware that the standard of proof is higher than the standard applied in civil actions of proof based upon a balance of probabilities yet less than proof to an absolute certainty. [Emphasis added.]

[231] In *Lifchus*, Cory J held that there are certain essential elements that should be included in any effective jury charge on reasonable doubt, as well as several instructions that would generally lessen or impair the effectiveness of such a charge. Cory J summarized the essential elements in the following terms, at para. 36:

It should be explained that:

- **the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;**
- **the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;**
- **a reasonable doubt is not a doubt based upon sympathy or prejudice;**
- **rather, it is based upon reason and common sense;**
- **it is logically connected to the evidence or absence of evidence;**
- **it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and**
- **more is required than proof that the accused is probably guilty—a jury which concludes only that the accused is probably guilty must acquit.** [Emphasis in original.]

[232] Cory J also summarized, at para. 37, **certain references to the required standard of proof that should be avoided:**

- **describing the term "reasonable doubt" as an ordinary expression which has no special meaning in the criminal law context;**
- **inviting jurors to apply to the task before them the same standard of proof that they apply to important, or even the most important, decisions in their own lives;**
- **equating proof "beyond a reasonable doubt" to proof "to a moral certainty";**
- **qualifying the word "doubt" with adjectives other than "reasonable," such as "serious," "substantial," or "haunting," which may mislead the jury; and**
- **instructing jurors that they may convict if they are "sure" that the accused is guilty, before providing them with a proper definition as to the meaning of the words "beyond a reasonable doubt."**

[233] Cory J stressed that the precise wording of any given jury charge on reasonable doubt will not necessarily be determinative of its effectiveness at transmitting the meaning of the term, and so at securing the fairness of the accused's trial. A charge must be examined in its entirety to determine whether the essential elements of a fair and accurate instruction on reasonable doubt are present and have been properly explained. The question in every case in which a trial judge's instructions on reasonable doubt are impugned is whether there is a reasonable likelihood that the jury was under a misapprehension as to the correct standard of proof to apply. If the charge, when read as a whole, could not have placed the jury under a misapprehension as to the correct standard of proof, then the jury verdict should not be disturbed: *R v. W. (D.)*, [1991] 1 SCR 742, at p. 758. However, in Cory J's words in *Lifchus*, at para. 41: "if the charge as a whole gives rise to the reasonable likelihood that the jury misapprehended the standard of proof, then as a general rule the verdict will have to be set aside and a new trial directed."

[234] In both *Lifchus*, supra, and *Bisson*, supra, this Court held that the reasonable doubt instruction provided to the jury in the particular cases created a reasonable likelihood of a misapprehension of the standard of proof. In *Lifchus*, the trial judge instructed the jury on reasonable doubt by referring to the ordinary everyday meaning of the phrase.

[235] In finding that the trial judge's instruction constituted an error in law justifying a new trial, Cory J explained that the instruction contained two central flaws. First, it did not provide a *definition* of "reasonable doubt." Second, it described the words "reasonable doubt" as "ordinary, every day words" with no specific meaning in the context of a criminal trial. Cory J found that these errors were not cured when the jury charge was viewed as a whole, even though the charge was, in all other respects, "a model of clarity and conciseness" (para. 44).

[236] The trial judge in *Bisson*, supra, explained to the jury that proof to an absolute certainty was not required, and that a reasonable doubt was something more than simply a frivolous, capricious, or imaginary doubt. He then drew an analogy between the standard of proof beyond a reasonable doubt and the standard of proof used in everyday activities such as checking the oil in one's car, emphasizing at some length that there was no distinction

between the two standards. Writing for the Court, Cory J explained that a trial judge should avoid providing examples from daily life of what may constitute a reasonable doubt, for two key reasons. First, everyday examples are problematic because, almost invariably, they involve the application of a standard of probability rather than one of proof beyond a reasonable doubt. Second, examples tend to be applied subjectively, depending upon the degree of care taken by different jurors prior to making everyday decisions, whereas the reasonable doubt standard is a single, objective, and exacting standard of proof.

[237] Before turning to examine the charge to the jury in the present appeal, I would like to emphasize that in *Lifchus* and *Bisson*, we set out to improve the existing standard for instructions on reasonable doubt. This was not intended to suggest that a new trial is warranted for all previous convictions obtained following jury charges that were not in strict compliance with every aspect of *Lifchus* and *Bisson*. To the contrary, as Cory J made clear in *Lifchus*, supra, at para. 40, there is no "magic incantation." A court reviewing a pre-*Lifchus* jury charge must examine it to make sure that it was in substantial compliance with the principles set out in that case.

(2) *Inadequacy of the Reasonable Doubt Charge in This Case*

[238] It should be pointed out that the trial judge in the present appeal, like the trial judge in *Bisson*, supra, gave his charge to the jury without the benefit of the decision of this Court in *Lifchus*. However, I agree with Twaddle JA that the reasonable doubt instruction given in this case falls prey to many of the same difficulties outlined in *Lifchus*, and likely misled the jury as to the content of the criminal standard of proof. For ease of reference, I will set out again the relevant portion of the charge in this case:

It is rarely possible to prove anything with absolute certainty and so the burden of proof on the Crown is only to prove the guilt of the accused beyond reasonable doubt. What, then, is proof beyond a reasonable doubt? ...