

Chief Justice Dickson and Criminal Law: Cheers, Brickbats, and Regrets

*Don Stuart**

I. INTRODUCTION

IT IS A PRIVILEGE to be able to assess, so soon after his retirement, the immense contributions of the Chief Justice to the evolution of Canadian criminal law these past 20 years.

The first Dickson judgment I encountered was that of the Manitoba Court of Appeal in *Heffer*.¹ The issue was whether a young hitchhiker was guilty of the crime of vagrancy by simply sitting on the steps of a public building. A section of the *Criminal Code*, later repealed,² criminalized anyone found wandering abroad without any apparent means of support and not being able to justify his presence. Mr. Justice Dickson considered that it was important to understand this prohibition in the context of the social history of vagrancy legislation in England which had been directed against vagrants in the sense of persons "having the common characteristic of preying upon the public." The language of the section which was "vague and, in some respects, archaic," had to be applied to the "mores of today." In holding that the offence was not applicable to "peregrinating youth," Mr. Justice Dickson sent me scurrying to a dictionary and also demonstrated that he was a forward-looking judge, determined not to have important social issues determined by the barren exercise of case distinguishing:

The sociological phenomenon of peregrinating youth is of relatively recent origin in Canada but not in Europe where it has long since been the custom of many young people of little means to roam from place to place, aided in some countries by the provision of youth hostels where bed and breakfast can be had at little cost.

* Faculty of Law, Queen's University.

¹ *R. v. Heffer*, [1969] 71 W.W.R. 615 (Man. C.A.).

² S.C. 1953-54, c. 51, s. 164(1)(a), repealed by S.C. 1972, c. 13, s. 12(1).

It cannot be the intent of sec. 164(1)(a) to stigmatize as criminal every young person who travels across the country without employment and with little money in his pocket.³

In his first few years on the Supreme Court, Mr. Justice Dickson was a relatively passive member of the LSD connection (Laskin, Spence and Dickson). In the criminal context these three justices formed the civil libertarian wing of the court, a wing which was constantly outvoted by the majority. In 1978 the Chief Justice flowered with his leading judgment on causation for the full Court in *Smithers*⁴ and his landmark judgment on fault for another unanimous Court in *Sault Ste. Marie*.⁵ There followed over the next twelve years a flow of judgments in the criminal law area, from which it is very difficult to select particular examples.

I would like to start by applauding six distinctive and major contributions.

II. CONSPICUOUSLY CLEAR AND WELL-JUSTIFIED JUDGMENTS

EVEN IF YOU DID NOT AGREE WITH THE CHIEF JUSTICE, at least you knew exactly where the law had been left and why.

Consider, for example, the much-quoted Dickson attack on penal liability without fault in *Sault Ste. Marie*. For the Court he decided to assert some form of fault even for so-called public welfare offences. The major arguments in favour of absolute liability were seen to be that it was more likely to exact a higher standard of care from those who knew that even mistakes and accidents would incur liability and that, therefore, such offences would promote administrative efficiency. The courts would be unnecessarily burdened if fault had to be assessed, especially considering the number of public welfare offences; and because such offences usually carried light penalties and less stigma, individuals found liable would not be seriously prejudiced. However Dickson J. found "greater force" in the opposing arguments. Absolute liability violated "fundamental principles of penal liability." He continued:

It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute

³ *Supra*, note 1 at 621.

⁴ *R. v. Smithers* (1978), 40 C.R.N.S. 79 (S.C.C.).

⁵ *R. v. Sault Ste. Marie* (1978), 3 C.R. (3d) 30 (S.C.C.).

liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked.⁶

The Chief Justice concluded that there was indeed "opprobrium" attached to a public welfare conviction and that the administrative argument was likewise of "little force." Serious crimes also involve the public interest and their *mens rea* had still to be proven. While penalties for health and safety offences were often minor, many others carried heavy fines and the possibility of imprisonment.

Consider too the bold and controversial Dickson holding for the majority in *Pappajohn*⁷ that general fault principles are equally applicable to the crime of rape such that an honest belief in consent will excuse, with the reasonableness of that belief being merely relevant to the issue of credibility. Again, there can be no doubt about the meaning and reasons for this position. It is clearly pointed out that a requirement that the belief be both honest *and reasonable* would improperly impose a civil standard of negligence in criminal cases. Dickson J. also addresses the "legitimate and real" concern that the honest belief defence would too easily allow the acquittal of persons accused of rape. His conclusion is that, as a practical matter, the accused's statement that he was mistaken will not likely be believed unless the jury finds the mistake was reasonable. The Dickson view in *Pappajohn* has been strongly criticised by some.⁸ However it is still this writer's view that, although gross objective negligence should sometimes suffice for crimes causing serious harm as in the case of rape, this was, as the Chief Justice asserted, an inappropriate occasion for the courts to take the initiative.⁹

A final example of clear exposition is to be found in His Lordship's rejection in *Whyte*¹⁰ of the view that the presumption of innocence only applies to proof of elements of offences and not to defences:

⁶ *Supra*, note 5 at 363-64.

⁷ *Pappajohn v. R.* (1980), 14 C.R. (3d) 243 (S.C.C.).

⁸ See, e.g., T. Pickard, "Culpable Mistakes and Rape: Harsh Words on Pappajohn" (1980) 30 U.T.L.J. 415 and C. Boyle, *Sexual Assault* (Toronto: Carswell, 1984) at 78-88.

⁹ See D. Stuart, *Canadian Criminal Law: A Treatise*, 2d ed. (Toronto: Carswell, 1987) at 253-59.

¹⁰ *R. v. Whyte* (1988), 64 C.R. (3d) 123 (S.C.C.).

The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.

The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused. The trial of an accused in a criminal matter cannot be divided neatly into stages, with the onus of proof on the accused at an intermediate stage and the ultimate onus on the Crown.¹¹

III. GENERAL REQUIREMENT OF FAULT

THE CHIEF JUSTICE'S JUDGMENT in *Sault Ste. Marie* is clearly one of his most important legacies to the criminal law. He insisted on a fault requirement even in the case of public welfare offences. In the absence of an express *mens rea* requirement such offences were to be interpreted as *prima facie* "strict" rather than absolute. For strict liability offences, there was to be a fault requirement but not of the subjective *mens rea* type. Relying in part, as he so often did, on the views of Professor Glanville Williams and Sir Owen Dixon of the Australian High Court, the "half-way house" compromise was asserted. Fault in public welfare offences was to be determined on the objective standard of simple negligence and the accused should be acquitted if he could prove on a balance of probabilities that reasonable care had been taken. At this time of parliamentary supremacy the Court had to recognize that the legislatures could on occasion insist on absolute liability. However, the Court went out of its way to make such liability exceptional. Where possible, negligence was to be asserted as the yardstick for public welfare offences.

In the years of criminal litigation since *Sault Ste. Marie*, it has become clear that the Chief Justice was indeed successful in halting the previous overwhelming trend towards absolute liability for public welfare offences. In the vast majority of such offences, the unmistakable pattern has been one of reclassification to offences of strict liability allowing the due care defence. There is only a small minority of reported cases, conspicuously those involving speeding, where courts have still opted for absolute liability.

¹¹ *Ibid.* at 135-36.

The judgment in *Sault Ste. Marie* has become all the more significant as it was heavily relied upon by the present Chief Justice Lamer in the *Motor Vehicle Reference*.¹² That landmark decision established a constitutional requirement of fault for any type of penal responsibility threatening the interest protected by s.7 of the *Charter*.¹³ *Sault Ste. Marie* was authority for the proposition that "there is a generally held revulsion against punishment of the morally innocent" and the basis of the conclusion that absolute liability violated fundamental principles of penal liability and violated s.7 of the *Charter* to the extent that it had the potential for depriving an accused of life, liberty or security of the person by means, whether substantive or procedural, which constituted a denial of fundamental principles of justice.

Since this constitutional fault requirement was asserted in the context of a motor vehicle offence, it was a logical corollary that the Court would be even more demanding in the case of murder, the most serious of offences. In *Vaillancourt*¹⁴ the Court declared that the constructive murder rule in what was then s.213(d) of the *Criminal Code* was contrary to the *Charter* and of no force or effect. Under subsection (d) of that section, the only culpability requirement was that of minimal intent to use or have a weapon which in some way caused the death of the person.

There can be no doubt now that for all types of offences which threaten an interest protected by s.7 of the *Charter*, there is a minimum constitutional requirement of simple negligence. It is not yet clear how far the courts will extend their definitions of a threat to a liberty interest or to security of the person. In the case of true crimes, the extent to which the courts will insist upon the subjective awareness approach is uncertain. What is clear is that courts are using the *Charter* to insist upon a fault requirement irrespective of legislative intent. Fault requirements are not recipes for lawlessness but merely insist, as did Chief Justice Dickson in *Sault Ste. Marie*, that punishment must be based on some measure of responsibility.

¹² *Reference Re Section 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c.288* (1985), 48 C.R. (3d) 289 (S.C.C.).

¹³ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹⁴ *R. v. Vaillancourt* (1987), 60 C.R. (3d) 289 (S.C.C.). See further applications in *R. v. Martineau* (1990), 79 C.R. (3d) 129 (S.C.C.) and *R. v. Logan* (1990), 79 C.R. (3d) 169 (S.C.C.). See Stuart, "Further Progress on the Constitutional Requirement of Fault, But Stigma is Not Enough" 79 C.R. (3d) 247. Compare R.C. Way, "Constitutionalising Subjectivism, Another View" 79 C.R. (3d) 260.

IV. SHOWING RESPECT FOR THE TRIAL PROCESS

MORE THAN ANY OTHER SUPREME COURT JUDGE in his generation, the Chief Justice often struggled not to fetter the discretion of trial judges and to defer to the common sense of juries. This is particularly evident in a series of important judgments in the law of evidence.¹⁵

In *Vetrovec*¹⁶ the issue was the common law rule that the jury had to be warned in all cases that it was dangerous to rely on the uncorroborated evidence of an accomplice. For the Supreme Court, Chief Justice Dickson decried the complexity and technicality of such corroboration rules and held that all that was necessary was that, in an appropriate case, a judge could give an appropriate warning if he or she wished. The need for a warning should not be based on any particular witness stereotype; the trial judge should exercise discretion based on the particular witness and circumstances before the Court.

In *Graat*,¹⁷ the Chief Justice noted how the law of evidence had become a complex list of exclusions and exceptions to the exclusions and insisted on a return to a less technical law. A police officer was entitled to express a lay opinion based on personal observation as to the accused's state of intoxication. The common law rule that an opinion should not be offered on the very fact in issue had become a "fetish." The trial judge should exercise a discretion and admit an opinion when its probative worth was not outweighed by other policy considerations.

In his leading judgment in *Corbett*,¹⁸ Chief Justice Dickson held that the long-standing rule in s.12 of the *Canada Evidence Act*,¹⁹ under which the Crown may cross-examine an accused on prior convictions as they relate to credibility, did not violate the accused's right to a fair trial. Section 12 did not deprive the accused of a fair trial in the sense that the introduction of such evidence would divert the jury from the task of deciding the case on the basis of admissible

¹⁵ This attitude also determined his judgments in other areas. Thus in *R. v. Hill* (1985), 51 C.R. (3d) 97 (S.C.C.) the Chief Justice holds that the ordinary person for the purpose of the objective test of provocation to reduce murder to manslaughter is to be considered of the same age and sex of the accused. However a direction to the jury was held to be useful but not mandatory as this could be left to their "collective good sense."

¹⁶ *R. v. Vetrovec*, [1982] 1 S.C.R. 811.

¹⁷ *R. v. Graat* (1982), 31 C.R. (3d) 289 (S.C.C.).

¹⁸ *R. v. Corbett* (1988), 64 C.R. (3d) 1 (S.C.C.).

¹⁹ R.S.C. 1985, c. C-5.

evidence legally relevant to the proof of the charge faced by the accused. There was perhaps a risk that, if told the accused had a criminal record, the jury would make more than it should of that fact. But concealing the prior criminal record of an accused who testified would deprive the jury of information relevant to credibility and create a much more serious risk that the jury would be presented with a misleading picture. It was preferable to trust the good sense of the jury. The jury should be given all the information but also be provided with a clear direction regarding the extent of its probative value. In "unusual circumstances where a mechanical application of s.12 would undermine the right to a fair trial," a trial judge had discretion to exclude evidence of prior convictions of tenuous probative value in assessing credibility.²⁰

Turning now to the *Charter*, Chief Justice Dickson has made at least three monumental contributions which affect the criminal law and its process.

V. PURPOSIVE APPROACH TO THE *CHARTER*

PRIOR TO THE DECISION of the Supreme Court of Canada in *Hunter v. Southam* (1984)²¹ there were competing schools of thought amongst the judiciary as to the proper approach to *Charter* interpretation. Some courts had accepted the validity in this context of Viscount Sankey's statement that the Canadian constitution was "a living tree capable of growth and expansion" and that constitutional interpretation had to proceed by "larger and liberal interpretation" rather than "narrow and technical construction."²² On the other hand, there had been powerful voices calling for restraint, as for example in Mr. Justice Zuber's oft-quoted remark in the Ontario Court of Appeal that "the *Charter* does not intend a transformation of our legal system or

²⁰ At a first degree murder trial the accused's previous criminal record had been admitted including a previous conviction of murder. La Forest J. would have excluded the murder conviction. The majority through Dickson C.J. held that the discretion should not be exercised, given that the accused had deliberately attacked the credibility of Crown witnesses, largely on the basis of their prior records. See comment by R.J. Delisle in (1988) 67 Can. Bar Rev. 706 at 709-10.

²¹ (1984) 41 C.R. (3d) 97 (S.C.C.).

²² *Edwards v. A.G. Canada*, [1930] A.C. 124 at 136-37 (P.C.). The interpretation in *Edwards* was that "person" in the *British North America Act* includes women for the purpose of membership in the Canadian Senate.

the paralysis of law enforcement.”²³ In *Hunter*, Chief Justice Dickson enrolled all Canadian judges in the broader school.

For a unanimous Court Mr. Justice Dickson asserted a “purposive” approach to the *Charter*, which has been consistently asserted ever since.²⁴

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a bill or a charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must therefore be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts “not to read the provisions of the Constitution like a last will and testament lest it become one.”

The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence . . .

[A] broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects, is also consonant with the classical principles of American constitutional construction . . .

The Canadian *Charter* of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.²⁵

A skeptic might suggest that an attempt to identify a distinctive approach to *Charter* interpretation is mere rhetoric. Is the task of interpreting a written *Charter* really different from that of interpreting a statute? Are not statutes also “purposive documents”? Although it is difficult to generalize about approaches to statutory interpretation, surely the best judicial approach would do more than concentrate on ordinary grammatical meaning and would instead find an interpretation that best achieves the objective of the section. However the functional role for judges outlined in *Hunter* makes the purposive

²³ *R. v. Altseimer* (1982), 29 C.R. (3d) 276 at 282 (Ont. C.A.).

²⁴ See, for example, *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and *R. v. Brydges* (1990), 74 C.R. (3d) 129 (S.C.C.).

²⁵ *Hunter*, *supra*, note 21 at 110-11.

approach indeed distinctive. Vincent Del Buono²⁶ sees the implications as follows:

When a *Charter* issue is raised now with respect to the existence of a statutory power or right or its exercise, the courts will no longer understand their role to be to ask what is the intent of the legislation; that is the language of Parliamentary supremacy and statutory interpretation. Rather, the courts will now talk in terms of reconciling the competing interests of government and the individual when considering government intrusions on *Charter* rights and freedoms: very much the language of public policy-making in its widest sense.²⁷

The best illustration of what is meant by a purposive approach is to be found in the decision in *Hunter* itself. A combiner investigator had conducted a search of the offices of a newspaper acting under authority of the appropriate federal act. The issue was whether this offended the right under s.8 to be "secure against unreasonable search and seizure." Rather than focusing on the meaning of the word "reasonable," the Court first explored what interest the section protected. It was found to protect people as well as property and, at the very least, to confer a right to privacy. This, the Court held, could only be adequately protected by asserting a minimum standard of prior authorization by one capable of acting judicially and based on objective grounds established upon oath. The search in question had therefore been unconstitutional even though it had been pursuant to a warrant.

In contrast, less than two weeks before *Hunter* had been handed down, the British Columbia Court of Appeal in *Hamill*²⁸ decided that the anomalous power of writs of assistance then provided for in the *Narcotic Control Act*, authorizing warrantless searches of dwelling houses, did *not* offend s.8 of the *Charter*. The absence of a warrant was of no constitutional significance. The proper approach was to analyze the words appearing in s.8 and not to rely on a judge's subjective view as to what the law should be. Section 8 said nothing about the procedures required to prevent unreasonable searches. That remained a matter for Parliament. The Court was not concerned with the interests that s.8 sought to protect. The focus was on efficacy of law enforcement. The Court saw dangers in involving the Court in an

²⁶ V. del Buono, "The Implications of the Supreme Court's Purposive Interpretation of the *Charter*" (1986) 48 C.R. (3d) 121.

²⁷ *Supra*, note 26 at 123-124.

²⁸ *R. v. Hamill* (1984), 41 C.R. (3d) 123 (B.C.C.A.).

inquiry it was not well equipped to make and introducing into criminal trials matters entirely unrelated to the question of guilt.²⁹

Chief Justice Dickson's purposive philosophy in *Hunter* has led to the Supreme Court's consistent examination of old issues through fresh lenses. In the context of search and seizure, the fears of the British Columbia Court of Appeal now seem misplaced. What has happened is that *Charter* decisions have been a long-needed catalyst to the reform of our existing hotch-potch of unprincipled laws relating to search and seizure. Successful *Charter* challenges led to the statutory abolition of writs of assistance.³⁰ The Supreme Court has declared that electronic surveillance based only on the consent of one of the parties who is an agent of the state is unconstitutional³¹ and has begun to scrutinize the common law's automatic right to search a person upon arrest.³² Principled standards for the issuance of a warrant and for reasonable belief set out in Justice Dickson's far-ranging but succinct judgment in *Hunter* provide the best chance to force the legislature to enact a proper principled scheme along the lines first set forth by the Law Reform Commission of Canada.³³

VI. THE BLUEPRINT FOR SECTION 1 OF THE CHARTER

PERHAPS ONE OF THE CHIEF JUSTICE'S most lasting legacies will be the approach for justifying limitations on *Charter* rights as reasonable and demonstrably justified in a free and democratic society as provided in s.1. This he declared for a majority of the Supreme Court of Canada in *Oakes*.³⁴ The onus of justification rested upon the parties seeking to uphold the limitation. Although the standard of proof was the civil standard of proof on a preponderance of probability, the test had to be applied rigorously such that there would have to be "a very high degree of probability." Furthermore, the Court asserted two central

²⁹ *Supra*, note 28 at 139-141.

³⁰ *R. v. Noble* (1984), 42 C.R. (3d) 209 (Ont. C.A.).

³¹ *R. v. Duarte* (1990), 74 C.R. (3d) 281 (S.C.C.).

³² *Cloutier v. Langlois* (1990), 74 C.R. (3d) 316 (S.C.C.) and *R. v. Greffe* (1990), 75 C.R. (3d) 257 (S.C.C.). Compare S.A. Cohen, "Search Incident to Arrest: How Broad an Exception to the Warrant Requirement?" (1988) 63 C.R. (3d) 182 and "Search Incident to Arrest" (1990) 32 *Crim. L.Q.* 366.

³³ *Working Paper 30: Police Powers — Search and Seizure in Criminal Law Enforcement* (Ottawa: L.R.C., 1983); *Report 24: Search and Seizure* (Ottawa: L.R.C., 1984).

³⁴ *R. v. Oakes* (1986), 50 C.R. (3d) 1 (S.C.C.).

criteria. The objective of the limit had to be of sufficient importance to warrant overriding a constitutionally protected right or freedom and also had to satisfy a form of proportionality which had three components:

1. That the measures be carefully designed to achieve the objective;
2. That they impair as little as possible; and
3. That there be a proportionality between the effects of the measure and the objective.

There can be no doubt that this approach was designed to preclude s.1 becoming an easy avenue to the dilution of *Charter* protections.

Subsequently, in *Edwards Books*³⁵ Chief Justice Dickson restated his *Oakes* test in words now frequently quoted:

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern." Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed and rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights. The court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the court has been careful to avoid rigid and inflexible standards.³⁶

VII. THE REJECTION OF THE CAUSAL CONNECTION TEST FOR EXCLUDING EVIDENCE UNDER SECTION 24(2) OF THE *CHARTER*

CHARTER RIGHTS HAVE BEEN TAKEN VERY SERIOUSLY in criminal law and have had a great impact. A major impetus has been the possibility that the trial judge may exclude evidence under s.24(2) because it was obtained in violation of the *Charter* and thus its admission would bring the administration of justice into disrepute.

³⁵ *Edwards Books & Art Ltd. v. R.* (1986), 55 C.R. (3d) 193 (S.C.C.).

³⁶ *Ibid.* at 234. Chouinard and Le Dain JJ. concurred.

There were conflicting dicta in *Therens*³⁷ as to whether the evidence could only be excluded under s.24(2) if the evidence would not have been obtained but for the *Charter* violation. By one view, if the violation did not cause the discovery of the evidence, the evidence could not be excluded. In *Strachan*,³⁸ Chief Justice Dickson rejected such a requirement in these forceful words:

In my view, all of the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the *Charter* violation occurred and the evidence was obtained. Accordingly, the first inquiry under s. 24(2) would be to determine whether a *Charter* violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the *Charter* and the discovery of the evidence figures prominently in this assessment, particularly where the *Charter* violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence, though obtained following the breach of a *Charter* right, will be too remote from the violation to be "obtained in a manner" that infringed the *Charter*. In my view, these situations should be dealt with on a case-by-case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote.³⁹

One of the proponents of the causal connection test, the present Chief Justice Lamer, magnanimously acknowledged that the force of this reasoning had made him change his mind and agree.⁴⁰

On June 20, 1990, Mr. Justice Lamer stated, at an Ottawa dinner to honour the retiring Chief Justice, that there was "no field of law that he did not visit and significantly improve." Under the heading of "brickbats," I suggest that there are three major areas in which Chief Justice Dickson did *not* significantly improve criminal law.

VIII. TOO RIGID AND HARSH ON MURDER AND MANSLAUGHTER

MURDERERS DO NOT AND SHOULD NOT ENGENDER SYMPATHY. On the other hand, the homicide laws found in the *Criminal Code* are, even notwithstanding *Vaillancourt*, still the toughest in the British Commonwealth. One might have expected Chief Justice Dickson to subject our laws of murder and manslaughter to rigorous and

³⁷ *R. v. Therens* (1985), 45 C.R. (3d) 97 (S.C.C.).

³⁸ *R. v. Strachan* (1988), 67 C.R. (3d) 87 (S.C.C.).

³⁹ *Ibid.* at 107-08.

⁴⁰ *Ibid.* at 109.

principled review. However, his judgments in this area have been content with literal interpretations that have extended rather than restricted the scope of criminal responsibility for various types of killings.

In *Smithers*,⁴¹ for the full Supreme Court, he confirmed a conviction of manslaughter of an accused who, following a violent midget hockey game, had attacked one of the participants as he left the arena and delivered a "hard, fast kick" to the boy's stomach. The victim had collapsed, gasped for air and died within minutes. The cause of death was asphyxiation by aspirating vomit. The vomit had entered the victim's lungs because the epiglottis had for some unknown reason malfunctioned. The Court rejected the view of the dissenting judge in the Court below that the trial judge had not made it sufficiently clear that the kick must have caused the vomiting, there being some evidence that this might have been spontaneous as a result of fear.

In the course of the *Smithers* judgment, the Court makes important general rulings on causation. It was held that the accused's act need merely be "a contributing cause . . . outside the *de minimis* range" and that the civil law "thin skull" rule that "you take your victim as you find her" as regards individual susceptibilities and frailties applied equally in criminal law. Here it was immaterial whether the death had been partly caused by a malfunctioning epiglottis to which the accused may not have contributed. Both these rulings surely create far too wide a net of responsibility. The Alberta Court of Appeal⁴² has indeed recently suggested that the contributing cause test may be too tenuous a link to criminal liability such that principles of fundamental justice under s.7 may demand reconsideration. The "thin skull" rule should not apply in criminal law. Surely there are fundamental policy differences between punishing an offender for unexpected consequences and demanding that a tortfeasor fully compensate a particularly vulnerable victim? The unqualified invocation of the rule in *Smithers* ignores the inquiry into fault which on principle must be directly related to the consequences. Even under the present much reduced standard of fault required for the crime of manslaughter, the separate inquiry into fault should always be made.

Given that there is a mandatory penalty of life imprisonment for first or second degree murder, one might have expected Chief Justice Dickson to be generous towards possible avenues to a verdict of

⁴¹ *R. v. Smithers* (1977), 34 C.C.C. (2d) 427 (S.C.C.).

⁴² *R. v. D.L.F.* (1989), 73 C.R. (3d) 391 at 399 (Alta. C.A.).

manslaughter — still a serious offence but for which the penalty need not be life imprisonment. Instead the Chief Justice in a series of judgments interpreted the only *Criminal Code* partial defence to murder — that of provocation — most restrictively.⁴³ Furthermore, he led the Court in *Faid*⁴⁴ in squelching an acceptance by provincial courts of appeal in every province but Manitoba of a common law partial defence to murder whereby one killing in the name of self-defence but exceeding the limits on the amount of force which the law allowed could nevertheless be convicted only of manslaughter. For the unanimous Court, Mr. Justice Dickson reasoned as follows:

The position . . . that there is a “half-way house” outside s. 34 of the Code is, in my view, inapplicable to the Canadian codified system of criminal law, it lacks any recognizable basis in principle, would require prolix and complicated jury charges and would encourage juries to reach compromise verdicts to the prejudice of either the accused or the Crown. Where a killing has resulted from the excessive use of force in self-defence the accused loses the justification provided under s. 34. There is no partial justification open under the section.⁴⁵

Given the Chief Justice’s rigidity, there is much to be said for the position of the Ontario Court of Appeal which has doggedly asserted what has become known as the “rolled up” charge:⁴⁶ a trial judge can direct the jury that, if the evidence falls short of provocation or intoxication, they may nevertheless consider its “cumulative” effect on the intent required to be proved for murder. It must be quite clear to all the various judges who have participated in this development that in such cases intent is in fact *not* the issue. Rather, the jury is given the discretion to decide whether there were extenuating circumstances in the murder for which a verdict of manslaughter would be satisfactory.

In 1976, Parliament, as a political compromise on the occasion of the formal abolition of the death penalty, drew a distinction between first and second degree murder. Although both first and second degree murders still carry a mandatory sentence of life imprisonment, one convicted of first degree murder normally cannot be considered for

⁴³ See especially *R. v. Faid* (1983), 33 C.R. (3d) 1 (S.C.C.). We have seen that in *Hill*, *supra*, note 15, His Lordship did acknowledge that some individual factors could be taken into account even though the test was objective.

⁴⁴ *Faid*, *ibid.*

⁴⁵ *Ibid.* at 8.

⁴⁶ See, e.g., *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.) at 15-16, *R. v. Nealy* (1986), 54 C.R. (3d) 158 (Ont. C.A.) and *R. v. Bob* (1990), 78 C.R.(3d) 102 (Ont. C.A.).

release under parole until 25 years have elapsed, whereas a second degree murderer's parole eligibility date may be set at the discretion of the trial judge at anywhere between 10 and 25 years.⁴⁷

According to Chief Justice Dickson for the Supreme Court in *Farrant*,⁴⁸ *mens rea* is an irrelevant consideration to the classification of first degree murder under s.214:

Section 214 does not create a distinct and independent substantive offence of first degree constructive murder pursuant to forcible confinement. The section is subservient to ss. 212 and 213; it classifies for sentencing purposes the offences in ss. 212 and 213 as either first or second degree murder . . . The distinction between first and second degree murder in s. 214 is not based upon intent; it is based upon (1) the presence of planning and deliberation (s. 212(2)); (2) the identity of the victim (s. 214(4)); or (3) the nature of the offence being committed at the time of the murder (s. 214(5)).⁴⁹

Farrant asserts a strict and severe approach to first degree murder. It is most curious that the Chief Justice who has struggled so hard to assert a subjective *mens rea* requirement as the fault requirement for serious offences has chosen to ignore it as a principle for deciding whether a particular murder falls within a category carrying an extra 15 years in jail. A literal approach to the interpretation of hurriedly drafted provisions seems misplaced. Surely, the fundamental requirement of fault is applicable and should not be pigeon-holed. Recently the Ontario Court of Appeal in *Collins*⁵⁰ reversed itself in holding that under s.7 of the *Charter* the first degree murder category for the killing of a police officer has to be interpreted to require that the accused knew or took the risk that the victim was a police officer.

IX. THE DEFENCE OF NECESSITY IS TOO NARROW

WHEN THE CHIEF JUSTICE RECOGNIZED the common law defence of necessity in *Perka*,⁵¹ it was on the basis that necessity was an excuse calling for compassion for action that was morally involuntary. Had the defence been classified as a justification, it would have implied a vindication of the act. However, the Chief Justice asserted three most restrictive conditions:

⁴⁷ R.S.C. 1985, c.C-46, ss. 231, 742-745.

⁴⁸ *R. v. Farrant* (1983), 32 C.R. (3d) 289 (S.C.C.).

⁴⁹ *Ibid.* at 301.

⁵⁰ *R. v. Collins* (1989), 69 C.R. (3d) 235 at 264-65 (Ont. C.A.).

⁵¹ *R. v. Perka* (1984), 42 C.R. (3d) 113 (S.C.C.).

1. There must be "circumstances of imminent risk where the action was taken to avoid a direct and immediate peril,"⁵²
2. The act must be "inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law,"⁵³ and
3. The "harm inflicted" must be less than the harm sought to be avoided."⁵⁴

The mechanical balancing-of-harms test in the third requirement in particular seems much more appropriate to a justification than an excuse. Professor Donald Galloway⁵⁵ also points out that the requirement is contradictory. How can conduct be both the lesser of two evils and also the only realistic option? And how can compliance with the law be both unavoidable and a less preferable option? Above all, the criteria in *Perka* appear far too restrictive to deal with the possibility of compassionate defences of necessity particularly in cases of less serious crimes where the defence might be more acceptable. A fairly generous residual defence of necessity can perform a valid function in a variety of contexts, as in cases of medical treatment where the patient is incapable of consent, escape from dangerous and threatening custody, defences against a charge of killing a charging animal, and desperate attempts to avoid serious threats to property. Here too we should trust the good sense of judges and juries.

X. INCONSISTENCY IN APPLYING THE OAKES PROPORTIONALITY TEST FOR SECTION 1

THE SUPREME COURT in *Edwards Books*⁵⁶ considered whether a Sunday observance law⁵⁷ was unconstitutional because of a violation of freedom of religion as guaranteed by s.2(a) of the *Charter*. The

⁵² *Ibid.* at 139.

⁵³ *Ibid.*

⁵⁴ *Ibid.* at 133.

⁵⁵ Donald Galloway, "Necessity as a Justification: A Critique of *Perka*" (1986) 10 *Dalhousie L.J.* 158.

⁵⁶ *Supra*, note 35.

⁵⁷ *Retail Business Holidays Act*, R.S.O. 1980, c. 453.

judgment of the Chief Justice is notable for holding that the *Oakes* test will vary depending on the context. Furthermore, in applying the test, the Chief Justice saw the question as whether the act abridged the freedom of religion as "little as is *reasonably possible*."⁵⁸ The test was whether there was "some *reasonable* alternative scheme which would allow the province to achieve its objective with fewer detrimental effects on religious freedom."⁵⁹

Concern has been justifiably expressed that *Edwards Books* has watered down *Oakes*.⁶⁰ One can perhaps understand the need to dilute the *Oakes* test in the context of *Edwards Books*, given the various competing interests there at stake. Furthermore, given the variety of provincial statutes in question, any mechanical application of the "impairment as little as possible" test would have meant that only the least restrictive scheme could have survived. However, in the case of criminal law, there is invariably only one federal statute to interpret and one common law tradition. The *Charter's* protection of individual rights against the power of the state is preeminently well-suited to the criminal law, and should be rigorously safeguarded, as the Court in *Oakes* originally set out to do.

There are signs that the Supreme Court, including Chief Justice Dickson, have become distressingly inconsistent in their adherence to the *Oakes* test even in the criminal context. Although lip service is still paid to the "impair as little as possible" test, the Court is in fact often far less demanding. This is particularly true in recent rulings relating to impaired driving that have justified a reverse onus clause,⁶¹ a denial of the right to counsel in the case of a demand for a roadside sample of breath of the right to counsel⁶² and, finally, random vehicle stop powers in the absolute discretion of the police.⁶³ Chief Justice Dickson did later concur with a dissent in the context of a random roving stop.⁶⁴ However, he was in the majority in the

⁵⁸ *Supra*, note 35 at 237 (emphasis added).

⁵⁹ *Ibid.* The need for flexibility is even more evident in the separate judgment of La Forest J. (at 259).

⁶⁰ See G.D. Creighton, "Edwards Books and Section 1: Cutting Down *Oakes*?" (1987) 55 C.R. (3d) 269. Compare Hon. R.P. Kerans, "The Future of Section 1 of the *Charter*" (1989) 23 U.B.C. L. Rev. 567.

⁶¹ *Whyte*, *supra*, note 10.

⁶² *R. v. Thomsen* (1988), 63 C.R. (3d) 1 (S.C.C.).

⁶³ *R. v. Hufsky* (1988), 63 C.R. (3d) 14 (S.C.C.).

⁶⁴ *R. v. Ladoucer* (1990), 77 C.R. (3d) 110 (S.C.C.).

Prostitution Reference.⁶⁵ In that case Madame Justice Wilson in dissent reasoned, surely persuasively, that the criminal offence prohibiting all public attempts to communicate for prostitution because in some circumstances and in some areas this might give rise to a nuisance, cannot be considered carefully tailored to the objective. The impact of the *Charter* will be considerably weakened if the Supreme Court continues to be too quick to side-step the safeguards the Chief Justice originally set out in *Oakes*.

Those are the brickbats. There is also cause for considerable regret that important views of the Chief Justice could not persuade the majority.

XI. THE DOCTRINE OF SPECIFIC INTENT STILL DETERMINES WHETHER THERE IS A DEFENCE OF VOLUNTARY INTOXICATION

VOLUNTARY INTOXICATION IS ONLY A DEFENCE to crimes of "specific intent." The Dickson dissenting attack on that sorely troubled concept in *Leary*,⁶⁶ and repeated with even greater force in *Bernard*,⁶⁷ makes a most powerful and original contribution to a well-worn debate. Experience in both Australia and New Zealand has shown that public order is not threatened and few accused will be acquitted if intoxication is simply treated as a factor to be considered under the fault inquiry set for each offence. Commentators seem agreed⁶⁸ that the attempted compromise by Madame Justice Wilson to the effect that voluntary intoxication can be a defence to a general intent crime where there is intoxication to the point of automatism is half-hearted and not responsive to the Chief Justice's concerns.

XII. THERE IS NO GENERAL VOLUNTARINESS REQUIREMENT

DISSENTING IN *RABEY*⁶⁹, the Chief Justice would have rejected Mr. Justice Martin's pragmatic external factor requirement for the defence of sane automatism in favour of a general requirement that the Crown

⁶⁵ *Reference Re Criminal Code, Ss. 193 & 195, 1(1)(c)* (1990), 77 C.R. (3d) 1 (S.C.C.).

⁶⁶ *R. v. Leary* (1978), 37 C.R.N.S. 60 (S.C.C.).

⁶⁷ *R. v. Bernard* (1988), 67 C.R. (3d) 113 (S.C.C.).

⁶⁸ See T. Quigley & A. Manson, "*Bernard* on Intoxication: Principle, Policy and Points in Between" (1989) 67 C.R. (3d) 168.

⁶⁹ *R. v. Rabey* (1980), 15 C.R. (3d) 225 (S.C.C.).

prove that the act was voluntary. This would have been a welcome development⁷⁰ provided that involuntariness was, as long ago suggested by Professor Hart,⁷¹ considered to be a defect much more basic than a mere lack of awareness of circumstances or consequences, involving a substantial inability to control action. If the application of a general principle of voluntariness results in an acquittal of someone thought to be dangerous, there should nonetheless be no jurisdiction in the criminal justice system to compulsorily order treatment, whether this be in confinement or otherwise. This should be left to the law of civil commitment. The only restriction should be to cover situations where there was negligence in getting into the state of involuntariness and the offence charged is one that can be committed by negligence.

XIII. THE RECOGNITION OF NEW POLICE POWERS HAS NOT BEEN LEFT TO LEGISLATURES

IN A SERIES OF DISSENTING OPINIONS, the Chief Justice sought to establish the sound principle that it was not advisable for the Courts to be establishing police powers in the absence of legislative authorization or at least a very clear common law power. He would have held that a failure to provide a name and address following a provincial offence violation could not be the basis for conviction of a *Criminal Code* offence of obstructing a police officer,⁷² that an authorization to wiretap did not authorize entry into a house to install the bug⁷³ and that a provincial stop program to detect impaired drivers was illegal in the absence of statutory authorization.⁷⁴ In the latter context how could anybody have rejected the following plea:

It has always been a fundamental tenet of the rule of law in this country that the police, in carrying out their general duties as law enforcement officers of the state, have limited powers and are entitled to interfere with the liberty or property of the citizen only to the extent authorized by law.

⁷⁰ See further Stuart, *supra*, note 9 at 83-102.

⁷¹ "Acts of Will and Responsibility" in *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) c. 4.

⁷² *R. v. Moore* (1979), 5 C.R. (3d) 289 (S.C.C.).

⁷³ *R. v. Lyons* (1984), 43 C.R. (3d) 97 (S.C.C.).

⁷⁴ *R. v. Dedman* (1985), 46 C.R. (3d) 193 (S.C.C.).

A police officer is not empowered to execute his or her duty by unlawful means. The public interest in law enforcement cannot be allowed to override the fundamental principle that all public officials, including the police, are subject to the rule of law. To find that arbitrary police action is justified simply because it is directed at the fulfilment of police duties would be to sanction a dangerous exception to the supremacy of law. It is the function of the legislature, not the courts, to authorize arbitrary police action that would otherwise be unlawful as a violation of rights traditionally protected at common law.⁷⁵

XIV. CONCLUSION

THIS HAS BEEN A MOST SELECTIVE REVIEW of Chief Justice Dickson's immense contributions to criminal law. His presence on the bench will be sorely missed. Judges, lawyers and academics will find it difficult to ignore his insights.

When I arrived in Canada in 1970, the federal government of the day was expressing a strong commitment to a fundamental review of the criminal justice system. In 1971⁷⁶ the Law Reform Commission of Canada was set up with that mandate. It has produced numerous well researched and justified suggestions for reform. However for some twenty years a succession of Ministers of Justice have preferred the expediency of law and order rhetoric in, apparently, responding to particular pressure groups. The Commission has had little success in its attempts to make the criminal justice system more comprehensible and fair. Both before and after the *Charter* this type of reform has only been achieved by an activist Supreme Court. Canada has been fortunate indeed that the Court's leader was a person of broad vision and keen insight, who always had in mind a clearer and better picture. Chief Justice Dickson was a great judge and a wonderful scholar of the criminal law.

⁷⁵ *Ibid.*, at 200-01, 204-05.

⁷⁶ *Law Reform Commission Act*, R.S.C. 1970 (1st Supp.) c. 23, proclaimed July 1971.