Chief Justice Dickson and Criminal Law: Principled Common Sense

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I. INTRODUCTION

"HE WAS A GREAT JUDGE", so ends Professor Stuart's paper and I would like to begin on that note. What makes a "great judge"? And for our purposes what makes a "great judge" of criminal law?

Chief Justice Dickson leaves a long legacy of landmark decisions that have initiated unprecedented reform and change in the criminal law. However change standing alone is not the mark of greatness. To my mind, great judges must have the vision to be ahead of their time in making law and, at the same time, the wisdom to apply the law in tune with their time. In other words, reform must be reasonable and practical. Theory must mesh with common sense.

Benjamin Cardozo, the eminent American jurist, stated:

> 'Law must be stable, and yet it cannot stand still.' The mystery of change and motion still vexes the minds of men . . . I can only warn you that those who heed the one without honoring the other, will be worshipping false gods and leading their followers astray. The victory is not for the partisans of inflexible logic nor yet for the levelers of all rule and all precedent, but the victory is for those who shall know how to fuse these two tendencies together in adaptation to an end as yet imperfectly discerned.[1]

Nowhere is the need for cautious change more important than in criminal law. Criminal law represents a precarious balance between an individual's liberty interests and the public's legitimate desire for protection. A slight skewing in favour of one interest over the other disrupts the equilibrium and either subjects the individual to untoward state intrusion or exposes the public to unacceptable risk.

Glanville Williams opened his book, *Textbook of Criminal Law*, with the following statement by Herbert Wechsler from his *The Challenge of a Model Penal Code*:

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[1] Benjamin Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1924) at 143.

Whatever views one holds about the penal law, no one will question its importance to society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. Nowhere in the entire legal field is more at stake for the community or for the individual.[2]

Chief Justice Dickson's greatest contribution in the area of criminal law is that he managed to move the law without disrupting the fragile balance between individual and state. He succeeded in elevating this balance to a higher plateau. His judgments were both principled and practical. Legal theory was combined with common sense. I propose, therefore, to examine Chief Justice Dickson, not as a reformer of criminal law, but as the restrained judge of reason — a principled pragmatist.

Three cases illustrate this point well:

1) *Moore* v. *R.* — in which Justice Dickson found that there was no "duty" on the part of an "offending" cyclist to identify himself to the police;[3]
2) *Pappajohn* v. *R.* — in which Justice Dickson applied the principle of "subjective fault" to the defence of mistake of fact in a rape case, to hold that an accused need only have an *honest* belief in consent and that that belief need not be *reasonably* held;[4] and
3) *R.* v. *Bernard* — in which Chief Justice Dickson argued for the abolition of the "defence of intoxication."[5]

All three were controversial cases. In all three Justice Dickson presented well reasoned and principled decisions. In all three there were strong countervailing public policy arguments in answer to Justice Dickson's position. And in all three he has been criticized for placing principle over a policy based on common sense.[6] I would like to show how in each of these decisions principle accommodated practicality.

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[2] Glanville Williams, *Textbook of Criminal Law*, 2d ed.(London: Stevens, 1983) at 3.

[3] (1978), 5 C.R. (3d) 289 (S.C.C.).

[4] (1980), 14 C.R. (3d) 243 (S.C.C.).

[5] (1988), 67 C.R. (3d) 113 (S.C.C.).

[6] For a critique of *Pappajohn* see: T. Pickard, "Culpable Mistakes and Rape: Harsh Words on Pappajohn" (1980) 30 U.T.L.J. 415.

II. *MOORE* v. *R.*

THIS WAS THE CASE OF AN OBNOXIOUS AND OBSTINATE CYCLIST. Moore went through a red light. He was observed by a police officer, who gave chase. The officer requested Moore to stop. Moore replied with a "lewd rebuff".[7] Once stopped, he refused to identify himself. Moore was charged with wilful obstruction of a peace officer in the execution of his duty. Of note, he was not charged with the original traffic infraction.

The majority in the Supreme Court upheld Moore's conviction for obstruction. Mr. Justice Spence found that the police officer was acting within the execution of his duties to stop a wrongdoer and identify the wrongdoer. In turn Moore was under a "reciprocal" duty to identify himself and his failure to do so amounted to obstruction. The decision was based on policy. Providing one's name and address was seen as a minimal inconvenience for the citizen, but a major inconvenience for the police.

Justice Dickson replied with a principled dissent. "A person is not guilty of the offence of obstructing a police officer merely by doing nothing, unless there is a legal duty to act." Where was Moore's duty to identify himself? All agreed that there was no statutory duty on Moore to identify himself. The common law also provided for no such duty and Justice Dickson was not prepared to expand the common law to create the duty.

Did this mean that "lewd cyclists" go free? No. Justice Dickson observed that law enforcement would not grind to a halt. Reasonable alternatives were available, other than using the full force of a criminal conviction for obstruction. In the circumstances the police had the power to arrest the cyclist. Alternatively the provincial government could simply amend its law to cover this gap. Justice Dickson's dissent

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[7] Mr. Justice Carrothers of the British Columbia Court of Appeal described the verbal exchange between officer and cyclist as follows:

"The constable and Moore proceeded side by side on their respective cycles, with Moore sometimes taking elusive action by riding his bicycle on the sidewalk, with the constable repeatedly requesting Moore to "pull over and stop" and Moore lewdly rebuffing each such request with an obscene demand to leave him alone as he was in a hurry. I attach no importance to the particular salacious vulgarity used by Moore in rejecting the policeman's request to stop as it has been used by the unimaginative so excessively and indiscriminately as to have lost its literal quality, but there is no doubt that it constituted flat refusals on the part of Moore to stop as requested by the policeman." (1977), 36 C.C.C. (2d) 481 at 489 (B.C.C.A.).

epitomizes a principled analysis of the law and a balanced application of that law. Here there was no need to sacrifice long held principle for expediency.

III. *PAPPAJOHN* v. *R.*

IN *PAPPAJOHN* JUSTICE DICKSON APPLIED the principle of *subjective fault* to the crime of rape. He found that rape was a full *mens rea* offence and that a mistaken belief in consent went to negate that *mens rea*. Of concern was what was going on in the mind of the accused: subjective awareness. The test was not that of the reasonable man, objective awareness. Therefore, a mistake by the accused only need be *honestly held* and did not need to be based on *reasonable grounds*.

Was this decision blind allegiance to subjective principle and devoid of practical sense? Was not the Court providing a defence for the unreasonable rapist? Mr. Justice Lambert in the court below preferred policy over logic:

> Why should a woman who is sexually violated by such a man have to defend herself by screams or blows in order to indicate her lack of consent, or have to consent through fear, for a charge of rape to be sustained? Surely a firm oral protest, sufficient to deny any reasonable grounds for belief in consent, should be a sufficient foundation in these circumstances for a charge of rape.[8]

Justice Dickson appreciated the concern, but countered with this reasoned response:

> There is justifiable concern over the position of the woman who alleges that she has been subjected to a non-consensual sexual act; fear is expressed that subjective orthodoxy should not enable her alleged assailant to escape accountability by advancing some cock-and-bull story . . . First, cases in which mistake can be advanced in answer to a charge of rape must be few in number. People do not normally commit rape *per incuriam*. An evidential case must exist to support the plea. Second, if the other circumstances lend credence to belief on the part of the accused that she was consenting, it may be that it is unjust to convict. I do not think it will do to say that in those circumstances she in fact consented. In fact, she did not, and it would be open to a jury to so find. Third, it is unfair to the jury and to the accused to speak in terms of two beliefs, one entertained by the accused, the other by a reasonable man, and to ask the jury to ignore an actual belief in favour of an attributed belief. The mind with which the jury is concerned is that of the accused. By importing a standard external to the accused, there is created an incompatible mix of subjective and objective factors. . .[9]

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[8] As quoted at *supra*, note 4 at 266.

[9] *Supra*, note 4 at 266.

Dickson had faith in the jury's ability to see through an accused's "cock-and-bull story":

> The ongoing debate in the courts and learned journals as to whether mistake must be reasonable is conceptually important in the orderly development of the criminal law, but, in my view, practically unimportant, because the accused's statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable.[10]

The jury, for Justice Dickson, was the reasonable bulwark against an unreasonable application of the principle of subjective *mens rea*.

IV. *R.* v. *BERNARD*

IN *BERNARD*, CHIEF JUSTICE DICKSON repeated his call for the abolition of the "defence" of intoxication.[11] Intoxication was a factor to be taken into account in assessing whether the accused had the requisite mental element for the crime charged. It was not to be treated as a "defence" for certain offences. His is a logical argument based on the principle of subjective fault.

The contrary position is based on policy and not logic. Lord Simon of Glaisdale in the pivotal English case of *D.P.P.* v. *Majewski* made no apology for preferring policy over logic:

> It is all right to say "Let justice be done though the heavens fall." But you ask us to say, "Let logic be done even though public order be threatened," which is something very different.[12]

Will the "heavens fall" should the "defence" of intoxication be dropped in favour of applying drunkenness to the *mens rea* of the particular crime? Chief Justice Dickson thought not:

> An unrestrained application of basic mens rea doctrine would not, in my opinion, open a gaping hole in the criminal law inimical to social protection. There are several reasons for this. To the extent that intoxication merely lowers inhibitions, removes self-restraint or induces unusual self-confidence or aggressiveness, it would be no avail to an accused, as such effects do not relate to the mens rea requirement for volitional and intentional or reckless conduct. Similarly, intoxication would be of no avail to an accused who got drunk in order to gain the courage to commit a crime, or to aid in his defence. Thirdly, one can trust in the good sense of the jury and that of our trial judges to weigh all the

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[10] *Supra*, note 4 at 267.

[11] He had argued this same point in *Leary* v. *R.* (1977), 37 C.R.N.S. 60 (S.C.C.).

[12] [1976] 2 All E.R. 142 at 167-68.

evidence in a fair and responsible manner, and they are unlikely to acquit too readily those who have committed offences while intoxicated.[13]

He noted the experience in Australia and New Zealand, where specific intent has been abandoned. In these countries the "heavens have not fallen." Australian and New Zealand juries seem slow to embrace claims of extreme intoxication. Chief Justice Dickson was confident that Canadian juries would apply that same "sober" wisdom.

The jury for Justice Dickson is the fount of reason. The common sense of the ordinary Canadian citizen mitigates against any inflexible application of a principle of law. His trust in the jury has led to an unshackling of the rules of evidence. Complexity and technicality has been replaced by clarity and simplicity.[14]

This has also meant that the criminal law must respect the common sense of juries. Principles of law, laudable in theory, but confusing to apply in practice are to be avoided. It was for this reason that Justice Dickson rejected a "half-way house" defence of manslaughter where excessive force is used in self-defence. He wrote that such a defence 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."[15]

Of interest is that the Australian experiment in such a "half-way house defence" supports his view. It was in the Australian courts that the "half-way house" defence was first recognized.[16] However there were problems in applying the defence. One Australian judge lamented, "not even a jury of professors, acquainted with the subject and given the most lucid verbal exposition of the law, could have retained the necessary concepts."[17] In 1987 the Australian High Court ended the experiment by abandoning the defence.[18] Confusion was the motivating factor.

At times judges and academics alike tend to have too much faith in the law and not enough faith in their fellow citizens to apply the law.

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[13] *Supra*, note 5 at 125.

[14] See D. Stuart, "Chief Justice Dickson and Criminal Law: Cheers, Brickbats, and Regrets," *supra*, 288 at 293.

[15] *R.* v. *Faid* (1983), 33 C.R. (3d) 1 at 8 (S.C.C.).

[16] See: *R.* v. *MacKay*, [1957] V.R. 560 (S.C.); *R.* v. *Howe* (1958), 100 C.L.R. 448 (H.C.A.); and *Viro* v. *The Queen* (1978), 141 C.L.R. 88 (H.C.A.).

[17] David Lanham, "Death of a Qualified Defence?" (1988), 104 L.Q. Rev. 239 at 240.

[18] *Zecevic* v. *D.P.P.* (1987), 61 A.L.J.R. 375 (H.C.A.).

Though Chief Justice Dickson ruled from on high from the rarified air of Ottawa, he never forgot his good prairie common sense. He molded principle and practicality to change and at once to maintain the integrity of the criminal justice system — that is what great judges do.