

Chief Justice Dickson's Principles of Criminal Law

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As I reviewed many of Chief Justice Dickson's judgments for the Dickson Legacy, I was struck by the fact that this was a judge who commanded almost universal respect. Such a judge, such a person, is rare, and the thought led me to consider what it was that gave him that quality. One can certainly find it in his judgments, and I would like to examine a few of his judgments in substantive criminal law to disclose the factors that contributed to that distinction.

The first feature of his judgments that is notable is that he was, as a judge, a purist. In criminal law, his best work is contained in what I call "definitive judgments," in which he dared to say what no one before had been willing to either say or deny. He was able to write these definitive judgments because he was able to work out whole pictures, think through principles and their implications and stand by them. While he was clearly a humane judge, he was unwilling to manipulate legal principles in order to arrive at the result he thought best; he abided by the principles as he had developed them even when he was unable to achieve what he desired by that route. In this, he was the paradigmatic Supreme Court judge, with a firm grasp on what we need the Supreme Court for.

Another factor I wish to demonstrate through his judgments is one of respect for and understanding of the system within which he was working. He has been called a civil libertarian by many and there are few who would consider him a conservative. Nevertheless, this respect for the system affected the process by which he expounded his views and led him to put limits on the extent to which he incorporated those views into the law in his judgments.

Thus, he sometimes disappointed people when he would not take "the next step." However, frequently further examination reveals that he would not take that next step because the law would not allow him to. He clearly thought it inappropriate for judges to use all the power they had. It is an approach that smacks of respect and consideration, qualities that sometimes seem to have fallen into disuse if not actual disrepute. However, it must be recognized that those qualities of

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respect and consideration have been the foundation of the legal system as we know it, and have helped to prevent its giving in to excess in any direction.

In defence of this explanation of Chief Justice Dickson's contribution to criminal law jurisprudence, I would like to analyze a number of his judgments in substantive criminal law. In doing so, I will be pointing out that there is a difference in criminal law between policy and principle and that while he was very concerned to give effect to solid and justifiable points of principle, he was equally concerned not to interfere inappropriately with Parliament's right to control policy. That does not mean that he was totally unwilling to take it in hand, but that he was aware as he did so that Parliament had the ultimate power over policy and that, therefore, he should be more cognizant of what they were saying with regard to policy than in areas of principle, which he considered the primary responsibility of the courts.

One of the cases in which he first, but unfortunately rather obliquely, showed his general approach to criminal law was *Smithers v. R.*¹ In this case, the Supreme Court was asked to consider the element of causation in a manslaughter charge. There is no doubt that the facts of the case were difficult. The accused had kicked an opponent, probably causing him to vomit and to breathe the vomit in due to a physical malfunction. In the result, the victim died. The medical evidence was not definitive on the question of what actually caused the physical malfunction. It is important to note that the Supreme Court was not asked to consider the general applicability of the manslaughter offence to this series of events, nor what blameworthiness components should be attached. The sole issue was causation.

Dickson J. wrote the judgment for the Court. There are several noteworthy points in his decision. First, he adopted the factual causation/legal causation analysis that had become prevalent in academic writing on the subject. Second, he acknowledged that a cause must be outside the *de minimis* range to amount to causation for criminal law purposes. However, he rejected two other glosses that have been suggested for causation.

First, he considered foreseeability, a standard that has been suggested as a test for causation. He stated that foreseeability was not an issue, noting that "[i]t is not defence to a manslaughter charge that the fatality was not anticipated or that death ordinarily would not

¹ *Smithers v. R.*, [1978] 1 S.C.R. 506, 34 C.C.C. (2d) 427, 40 C.R.N.S. 79.

result from the unlawful act.”² In thus rejecting the foreseeability test for causation, he was making a statement of principle about analysis in criminal law. He rejected foreseeability in causation because there was no *mens rea* requiring foreseeability of death in manslaughter. In essence, he was finding that the appropriate place for tests of foreseeability in criminal law was in the fault element and not in the act. This approach is a principled one and should not be disregarded. It has become fashionable to require elements of fault in the act, particularly with regard to offences that are absolute liability, as manslaughter arguably is in respect of the consequence of death. In that way, the potentially draconian results of absolute liability can be alleviated. However, it is a fashion that leads to a confusion of principles and therefore it was consistent with Dickson J.’s general approach to reject it. However, there is no doubt that the fault element in manslaughter needs an overhaul and it is unfortunate that Dickson J. never had an opportunity to consider this issue directly.

It should be noted that in the Supreme Court’s recent decision in *R. v. Martineau*, Chief Justice Lamer appears to accept the anomaly that is manslaughter when he states: “If Parliament wishes to deter persons from causing bodily harm during certain offences, then it should punish persons for causing the bodily harm. Indeed, the conviction for manslaughter that would result instead of a conviction for murder is punishable by, from a day in jail, to confinement for life.”³ Of course, the point is that manslaughter is not punishing people for causing bodily harm but for causing death. As long as we fail to recognize that and omit even a requirement of objective foreseeability of death in the *mens rea* of manslaughter there will be pressure to include it in causation.

Second, Dickson J. rejected the idea that a “thin skull” could break the chain of causation. Again, the way he rejected it is instructive. He discussed it in conjunction with cases on joint liability. In doing so, he was referring to the fact that in criminal law, liability is all-or-nothing. Two people, who each do something that separately contributes to the death of a third, are each fully responsible for the death. We do not make each one-half responsible. That is because the issue is not compensation in which interests are balanced and damages apportioned, but responsibility to society for acts which do in fact cause harm. In this framework, causation is about who contributed to

² *Ibid.* at 519 of S.C.R.

³ *R. v. Martineau*, [1990] 2 S.C.R. 633, 58 C.C.C. 353 at 361-62.

the result, not about how much they contributed. And, in this framework, it makes no justifiable difference whether the last link in the chain was forged by another person or by a defect in the victim.

Arguably, Dickson J. was right to reject a "thin skull" rule as a special kind of causation problem. It is analogous to other cases where remoteness is a possibility. Similarly, as noted above, his rejection of foreseeability was principled. However, the rejection of these two arguments did not require a finding that causation was automatically established in this case. Dickson J. himself had talked about a requirement of causation beyond the *de minimis* range earlier in the judgment. There, however, because he appeared to be referring to the factual causation test only, he did not give this requirement enough weight to make it applicable in this case. Nevertheless, it is possible to adopt a test that requires a more substantial connection than was required in this case, so that when the necessary consequence appears to result more from a factually disconnected condition or event than from the accused's action, causation would not be found. The accused would still be guilty of lesser offences, of course; but there is no reason, given the purposes of the criminal law, to find him or her responsible for the result of a malfunctioning epiglottis or the actions of a perfectly independent perpetrator.

Dickson J.'s failure in *Smithers* to consider all of the concerns relating to causation in manslaughter is understandable. First, one of the pervasive themes of his judgments was an effort to reduce complexity in the law. Allowing in such arguments as these would undoubtedly increase complexity. Secondly, the framing of the arguments as he received them appeared to be narrow and to rely excessively on torts concepts. He was able to exclude foreseeability because in criminal law we distinguish between the act and the fault element and foreseeability would allow too much of the fault element to be incorporated into the act. At the same time, he accepted the "thin skull" doctrine because, without foreseeability, there seemed to be no basis for excluding it. Thirdly, because there was no argument on the fault element of manslaughter, the judgment did not fully assess the extremes of chance this approach to causation left in the law of such a serious offence. Finally, it was a difficult case because of the inconclusiveness of the medical testimony. Nevertheless, the result was disappointing.

The only other major decision Dickson J. wrote on the general act requirement in criminal law was his dissent in *Moore v. R.*⁴ in 1978.

⁴ *Moore v. R.*, [1979] 1 S.C.R. 195, (1978) 43 C.C.C. (2d) 83.

While his major policy focus in this judgment was on police powers, he also made some significant statements with regard to basic criminal law principles in the area of omissions. In *Moore*, the Court was dealing with whether a person who had been seen committing a provincial offence could be convicted of obstructing a police officer in the execution of his duty for refusing to give his name and address. The problem was that there was no statutory provision requiring such a disclosure in the circumstances of the case. Nevertheless, the majority found that, since the police officer had a duty to find out the name and address, it was obstruction for the accused to refuse to give them. There was no discussion of general criminal law principles in the majority judgment.

Dickson J., in dissent, used his characteristic style to consider the question in detail. He started by setting out the legal parameters to the issue:

Any duty to identify oneself must be found in either common law or statute, quite apart from the duties of the police. A person is not guilty of the offence of obstructing a police officer merely by doing nothing, unless there is legal duty to act. Omission to act in a particular way will give rise to criminal liability only where a duty to act arises at common law or is imposed by statute.⁵

He then applied this rule to the facts, showing that as there was no duty for the accused to give his name and address under either statute or by common law, and no basis for arguing that a reciprocal duty to answer the question was created by the police officer's duty to ask it, no obstruction charge could be founded on the failure to give his name and address. Dickson J.'s approach differed from that of the majority in that he started from the general criminal law requirement for an act and recognized the distinction between an act of obstructing and the result of being obstructed. By using his typical disciplined and principled style of analysis, he saw in the case a different problem and therefore a different solution. Interestingly, it has been his dissent in this case rather than the majority judgment that has garnered the most approval, both from academics and from other judges. Arguably, that is not only because it limited police powers but also because it recognized and put in place the basic principles involved.

The difference between *Smithers* and *Moore* is instructive. Where there had previously been a thorough discussion of an area of law without its being synthesized, Dickson J. brought to bear a wonderful

⁵ *Ibid.* at 205 of S.C.R.

capacity to bring it all together. His dissent in *Moore*, therefore, was clear and truly helpful in the development of the act analysis. But in areas that had not been well-analyzed in the past, often due to a paucity of cases, his approach suffered from that lack of material and theory and appeared somewhat formulaic and empty. *Smithers* was a good example of this problem. The act has traditionally been ignored in criminal law and raised for analysis only when *mens rea* fails. Thus, its analysis has been sporadic and unprincipled and it is arguable that Dickson J.'s judgments have been similarly sporadic in this area and have therefore not helped resolve this problem as much as they might have.

Dickson's approach to "fault" in criminal offences has been much more successful. It can be seen in the cases of *Leary v. R.*,⁶ *Pappajohn v. R.*,⁷ and *R. v. City of Sault Ste. Marie*.⁸ The basic principle, as he stated in *Leary*, is that the attribution of fault in criminal law is based on the *will* of the offender: the accused must have chosen to do what is wrongful, at least in the sense of foreseeing the risk that it might occur and continuing nonetheless. In this way, and only in this way, can society limit the application of its harshest instrument to those who are indeed responsible in a personal sense for harming society; for most who have thought about it, this is the essential justification of punishment. While it is admitted now that there are some situations in which society might want to impose duties on people to take care (i.e. impose a negligence standard), it is also generally admitted that there are problems with applying such a standard in the area of criminal offences. One problem is that the factors that make an offence an appropriate one for a negligence test have not been identified or accepted, although limited attempts have been made.⁹ Another is that there are risks of overinclusiveness in such an approach, and that to avoid such overinclusiveness requires a sophisticated instrument. These problems form the basis for the argument that, if a negligence standard of some sort is to be allowed for crimes, it is better done by Parliament, which can adjust penalties or adopt highly structured approaches to different offences. Such

⁶ *Leary v. R.*, [1978] 1 S.C.R. 29, (1977) 33 C.C.C. (2d) 473.

⁷ *Pappajohn v. R.*, [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481.

⁸ *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353.

⁹ See particularly T. Pickard, "Culpable Mistakes and Rape: Relating Mens Rea to the Crime" (1980) 30 U.T.L.J. 75.

differentiation is difficult for a court which looks at one offence and one situation at a time.

Given this type of analysis, it is understandable that Dickson J. took the purist approach to *mens rea*. In *Leary*, a 1977 decision, he stated that the subjective test of blameworthiness was the standard for criminal offences and that it, like all elements of the offence, had to be proven beyond reasonable doubt by the Crown. Therefore, it was an anomaly to take that element away just because an accused had had too much to drink before committing the offence. He pointed out that the traditional distinction between specific intent and general intent in drunkenness cases had no real basis and was not theoretically supportable. Moreover, it unduly complicated the law. And he refused to accede to that unprincipled approach on the basis of a policy that it would be wrong to create a gaping hole in criminal law by allowing mistakes based on drunkenness to negate *mens rea*, especially when there was no evidence that the hole created would in fact become a gaping one. He reasserted the same view in *R. v. Bernard*¹⁰ with even more force. In addition to mentioning the changes the *Charter* had wrought and the possibilities of reanalyzing drunkenness in light of it, he also pointed out the unnecessary complexity and uncertainty that the rule brought into the analysis of criminal cases. These are all considerations of principle in legal analysis and are to be welcomed. The end result was a theoretically pure and unassailable discussion that has failed to win the day only for reasons of policy. But Dickson J. had shown his colours.

In *Pappajohn*, he refused to go along with the policies that might impel us to treat rape differently from other offences. He found that they did not take adequate account of the way in which subjective *mens rea* was normally assessed (i.e. by considering the facts of the case and how they would reasonably be interpreted), that it would be unjust to convict if it is believable that an accused might have misinterpreted the victim's wishes, and that to require objective reasonableness would be inconsistent and confusing. It has been argued that he did not examine the basis of traditional *mens rea* analysis thoroughly enough and that he did not take into account the special features of rape.¹¹

However, whatever criticisms might be levelled at the particular choices he made here, the significance of this decision should not be

¹⁰ *R. v. Bernard*, [1988] 2 S.C.R. 833, 45 C.C.C. (3d) 1.

¹¹ T. Pickard, "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*" (1980) 30 U.T.L.J. 415.

overlooked. Firstly, the decision demonstrates one of the truly admirable qualities of Dickson J.'s judgeship, his principled approach. He was never willing to bend with the winds of favour simply because they *were* the winds of favour. He had previously satisfied himself in *Leary* and *Sault Ste. Marie* that there was good reason for requiring subjective awareness in true criminal offences; he was not going to discard that view lightly. Moreover, he was careful in *Pappajohn* to point out that sexual relations between men and women were normally neither wrong nor criminal; it was the lack of consent that made them criminal. Therefore, awareness of the lack of consent or the risk of it was crucial. Therefore, consent was fundamental to the offence and it was there that the basic fault principles of criminal law were most needed. As a result, he was not willing to allow those fundamental principles to be affected by issues that might better be dealt with by other kinds of responses. Just because a tinkering with *mens rea* might produce better results for women did not mean that it was the only or the best way of producing those results. His perspective was that such tinkering was justifiable only if it was based on principle: i.e. a reason that it was fair to punish someone who had made a real and honest mistake about consent. That he felt he had not been given. (I should note here that some of that analysis has now been done. While the *mens rea* analysis in *Pappajohn* might not come out any differently now, it seems to me that Dickson J. might approach it differently and take into account things such as concerns about the way in which an undifferentiated application of the *mens rea* principle can skew the criminal law. Timing is everything, especially at the Supreme Court.)

The judgment in *Pappajohn* demonstrates another hallmark of Dickson J.'s judgments: his care to discuss how the application of his approach would work in real cases. Obviously he was concerned about the way in which his judgment might be viewed by women, and he was right to be concerned. But he was probably more concerned that it not be misinterpreted by men, including male lawyers and judges, and that it not be viewed as a *carte blanche* to ignore a woman's response. He took great care to discuss the kinds of arguments that would not work even under his subjective approach.

These fault element judgments, then, show a consistent and principled approach to an issue that has traditionally been within the judicial sphere and which has clearly not been taken over by Parliament. The judgments demonstrate an ability to synthesize the long experience of the criminal law and to accept the consequences of the pure or principled approach. They adopt a concept of criminal law that

prefers simplicity to complexity and uprightness on the part of the state to expediency. They are the output of a judge who is willing to take full responsibility for his views.

That then brings us to *Sault Ste. Marie*. This case was arguably Dickson J.'s greatest, the case that has won him universal renown and that has found favour with theorists and practitioners alike. It is a case which has not been whittled down but which has easily stood the test of time. *Sault Ste. Marie* introduced into Canadian criminal law the concept of the defence of due diligence for public welfare offences. In it, Dickson J. analyzed the reasons for using absolute liability for quasi-criminal offences and found that the reasons were not principled but rather oriented to expediency. He also found that they were not supportable in fact and were based on assumptions about the nature of such offences that were no longer true. Through analysis of cases both in Canada and elsewhere, he found that there was considerable support for a "half-way house" between traditional *mens rea* and absolute liability, imposing *prima facie* guilt on an accused for committing an act but allowing him or her a defence of due diligence (or non-negligence), to be proven by the accused on the balance, on probabilities. It is of interest that Dickson J. specifically considered the question of whether this was an appropriate innovation to be made by the courts. He found that it was, because absolute liability had also been established by the courts. It might be added here that even the traditional concept of *mens rea* is of course a common law doctrine and that neither *mens rea* nor absolute liability have ever been consistently or generally dealt with by a legislature in Canada. Therefore, it was proper for a court to establish general and even new rules in these areas.

One question that is not much discussed, however, is why he did not require *mens rea* here. Was it only because nobody would have accepted it, because even moving to strict liability was considered dangerous by some? Or was there a difference between the types of offences? Dickson J. himself spoke of the need for society to maintain high standards, but surely we would also like high standards where we are dealing with offences involving violence or serious interference with others. I can suggest two significant distinctions that may justify the difference in approach. First, there is the difference in stigma and the concomitant difference in penalty. While penalties for some of these offences have risen dramatically as pointed out in *Sault Ste. Marie*, they are nonetheless still not on a par with truly criminal offences. Second, there does appear to be a difference based on the whole idea of regulation - that in entering into these areas, people are

put on notice that they will have to use their best efforts to conform to certain standards. There is a sense of prior warning, available because these are not everyday activities but chosen fields of endeavour and singled out for regulation on that account. Therefore, it is fair to require people to take all precautions that a reasonable person would take since this is, figuratively speaking, the entrance fee.

These distinctions are at best only rough ones. The lines between some stigma and real stigma, and effective penalty and severe penalty are not capable of being precisely drawn. Similarly, it is arguable that in certain criminal offences at least (e.g. in rape¹²), the accused is also put on notice and that therefore, the distinction between regulation and true crimes does not make much sense. It may be that both lower stigma/penalty and being on notice are necessary before an offence can be considered appropriate for a negligence standard. If that is the case, until Parliament sees fit to enact hierarchies of offences (i.e. specific distinctions between the same act committed by negligence and by *mens rea*, as has been suggested by the Law Reform Commission of Canada¹³ and as may arguably be the case now in murder/manslaughter), negligence will simply not be acceptable for true criminal offences that have only one definition and one maximum penalty.

At any rate, despite the difficulty in rationalizing it, Dickson J.'s approach appears to reflect a division that rings true for many people. Moreover, while the line between strict liability and *mens rea* offences now appears fuzzy, nobody would suggest that a move back to absolute liability would be acceptable. *Sault Ste. Marie* accomplished a significant, lasting and welcome shift in fault analysis.

The final topic of criminal law that I am going to use to demonstrate Dickson J.'s contribution is that of the defences. Defences raise particular problems because of the interaction between the *Criminal Code*¹⁴ and the common law. It is in this arena that the distinction between principle and policy has been most apparent.

¹² Pickard, *supra*, note 9.

¹³ Law Reform Commission of Canada, Report 31, *Recodifying Criminal Law* (Ottawa: L.R.C., 1987) at 56-57 (in homicide), 62 (assault by harming), and 67 (endangering).

¹⁴ R.S.C. 1985, C. c-46.

In the cases of *Brisson v. R.*¹⁵ and *R. v. Faid*,¹⁶ Dickson J. rejected the developing concept of allowing excessive use of force in self-defence to reduce murder to manslaughter. He based his arguments on (1) the lack of principle for such a defence, (2) the fact that it did not fit well within a codified system where the full defence was recognized but no such half-way house could be found in the legislation, and (3) the fact that it would complicate jury charges and lead to compromise verdicts. These factors are familiar ones within Dickson's process of analysis. He found there was a lack of principle even though in *Brisson* he discussed two possible justifications for the defence. The second was that this was a form of criminal negligence which he understandably did not discuss, given the current confused state of the law of criminal negligence in Canada.¹⁷ The first was that this defence operates like provocation in that it does not negate intent but acknowledges that, when force is permissible, using it improperly is less morally culpable than is force used under other circumstances. His response was that while provocation is recognized by the *Code* in s.232, this is not. In other words, even if this approach were justifiable, it is clearly a policy issue and, as such, one that should be introduced by Parliament. One may well ask why excessive force in self-defence is policy when, for instance, strict liability is principle. After all, this has to do with the recognition of subjective mistakes and thus is analogous to certain aspects of the *mens rea* principle. The problem, however, is that this mistake is in relation to a defence that operates despite the finding that the accused committed all of the principal elements of the offence. Therefore, by its nature it relates to the fundamental policy issue of when society will excuse behaviour that it has already found to meet its criminal requirements. This then is an area that is overlain with policy even though, of course, the fair application of the defence could well be characterized as an issue of principle.

Another response to the provocation analogy, but one that Dickson J. did not make, would be that even provocation has elements of reasonableness attached; why then would one require a purely subjective approach to the partial defence of excessive self-defence? In fact, as we shall see below in the discussion of *Perka v. R.*,¹⁸ Dickson

¹⁵ *Brisson v. R.*, [1982] 2 S.C.R. 227, 69 C.C.C. (2d) 97.

¹⁶ *R. v. Faid*, [1985] 1 S.C.R. 265, (1983) 2 C.C.C. (3d) 513.

¹⁷ See *R. v. Tutton and Tutton*, [1989] 1 S.C.R. 1392, 48 C.C.C. (3d) 129.

¹⁸ *Perka v. R.* (1984), 14 C.C.C. (3d) 385 (S.C.C.).

J. appeared to accept the concept that in the area of defences, other than insanity, the application of objective standards may be appropriate.

Ultimately, though, Dickson J. rejected this defence because there was in the *Code* already a complicated series of defences regarding protection of the person and protection of property and in these he found a Parliamentary intent to exclude this particular defence. It is very hard to quarrel with this approach. If one accepts the supremacy of Parliament at all, then it does appear that the desire was there to limit self-defence to reasonable conduct and, in the absence of reasonable conduct, to analyze the actions of the accused within the parameters of the traditional elements of murder and manslaughter. It may well be that such a defence would be helpful but that of course is not the question; the question Dickson legitimately asked himself was whether he could find it in the law. This is not the area of *mens rea*, which is only sporadically mentioned in the *Code*. This is the defence of self-defence, which is quite fully set out in the *Code*. It is both appropriate and, on principle, necessary for Supreme Court judges to recognize the difference and to engage in a genuine exercise in statutory interpretation. Such an approach is not just literal interpretation, but a legitimate recognition that a legislature wants to set limits and has the right to set limits. It can only do so by enunciation of complete and precise rules. Sections 34 and 35 of the *Code* advert specifically to situations where death has been caused. They read like a code in their coverage. Dickson gave proper consideration to the full intent of Parliament.

Despite the fact that with regard to excessive self-defence, Dickson J. relied mostly upon statutory interpretation, his views on the appropriateness of judicial intervention in areas of policy and on the use of negligence in defences appeared again in *Perka*. In this 1985 case, Dickson J. gave the majority judgment in which the Supreme Court of Canada recognized the defence of necessity in Canada. The notion of necessity that was approved in *Perka* was that based on excuse and the absence of choice. A number of criticisms have been made of Dickson J.'s analysis in the case.¹⁹ However, the case is a further reflection of the Dickson approach to criminal law. There was clearly here a reluctance to recognize necessity at all. One might wonder why a judge who was humane in so many ways would struggle with this point. He was obviously very concerned that to allow a broad

¹⁹ D. Galloway, "Necessity as a Justification: A Critique of *Perka*" (1986) 10:1 Dalhousie L.J. 158.

view of necessity would, as he put it, "invite the courts to second-guess the Legislature and to assess the relative merits of social policies underlying criminal prohibitions. Neither is a role which fits well with the judicial function."²⁰ He was, however, more comfortable in allowing a defence where the actor's "normal human instincts, whether of self-preservation or altruism, overwhelmingly impel disobedience."²¹ Again we see that he considered the function of assessing human response and responsibility as more appropriate for the judiciary than balancing the policies that we want to protect. Galloway states that "Dickson J.'s point is that it is politically inappropriate for a court to make an evaluation of the purposes imbedded in legislation with a view to balancing these against moral concerns which do not have legislative recognition." He then goes on: "What Dickson J. fails to recognize is that the practice of interpretation *demand*s that judges engage in just such activity *whenever* they are confronted with a legal text."²² Of course Dickson J. recognized that interpretation was an exercise in evaluating purpose and effect in light of social conditions and human reality. His decisions in *R. v. Heffer*²³ and *Towne Cinema Theatres Ltd. v. R.*²⁴ clearly show that. However, he was concerned that in areas where interests must be balanced, as in deciding which of two courses of action is best managed by society, Parliament for all its defects is in a better or, at least, more appropriate position to decide than judges. Therefore, he was willing to recognize that the basis for necessity derived from principles analogous to those of voluntariness and fault but not those derived from alternative assessments of the proper course of action. It is important to recognize that many of the same cases will be covered no matter which of the two tests is applied. The test is used not so much to limit the application of the defence as to justify the judicial incursion into this area which had not previously been formally recognized by either Court or Parliament, despite the fact that it had been much discussed up to the year 1985.

Thus, in *Perka*, Dickson J. was concerned as always about the proper relationship between the courts and the legislature. In addition, he showed that he was also willing to accept some require-

²⁰ *Perka*, *supra*, note 18 at 248.

²¹ *Ibid.*

²² Galloway, *supra*, note 19 at 171.

²³ *R. v. Heffer*, [1970] 4 C.C.C. 104 (Man. C.A.)

²⁴ *Towne Cinema Theatres Ltd. v. R.*, [1985] 1 S.C.R. 494, 18 C.C.C. (3d) 193.

ments of reasonableness in the defences. This was consistent with his approach to the other defences. In self-defence (*Brisson* and *Faid*), he rejected the proposition that unreasonable self-defence leading to death could on that account alone reduce murder to manslaughter; in provocation (*R. v. Hill*²⁵ and *Faid*), he approved of the ordinary person standard to determine whether the alleged incitements amounted to provocation (albeit applying it in a pluralistic fashion); and in necessity, he limited the application of the defence to cases where the harm avoided would be greater than the harm caused or risked, a proportionality standard that smacks of reasonableness. Given the earlier discussion of the conditions in which negligence seems appropriate, the penalties involved in these situations seem much too high to apply negligence standards. However, it must be recognized that these are all cases where the accused knows that he or she is committing the criminal act; otherwise the defences would be irrelevant. Thus they are stronger than the strict liability cases where the accused was simply in a position to know that he or she must take care generally. Here, they are aware that they are doing a serious wrong. Since the specific wrong in the situation is clearer to them, the requirement to take reasonable care can apply even though the penalty is severe; since the second part of the two-pronged test is stronger, it can overcome the lack of the first part.

Moreover, the approach to defences can legitimately be distinguished from the approach to the required elements of criminal offences, even in clearcut cases like sexual assault involving intercourse. In the case of required elements, arguments regarding *mens rea* arise precisely because the accused did *not* realize that his or her situation had moved from the norm. These accused do know that. The basic principle is that an accused who knows he or she is doing something that would be against the law except for the unusual circumstances in which the action is occurring is alerted to the importance of those circumstances and therefore is under an obligation to take at least as much care about those circumstances as the ordinary person would. If he or she does not take such care, then the law is left with the original intent, which was to do the act which breaks the law. As a second step analysis, negligence applies somewhat differently here than in the determination of the basic elements of the offence, where there is no underlying original intent to fall back on.

²⁵ *R. v. Hill*, [1986] 1 S.C.R. 313, 25 C.C.C. (3d) 322.

One argument that could be raised about this approach is that these defences arise because of the actual inability of people to act differently and therefore they should peculiarly recognize the individual's own assessment of the situation. However, even the reasonableness test in these circumstances is going to recognize the extreme circumstances within which the accused was acting and apply the standards with that in mind. Fine distinctions are clearly not required. Dickson J.'s view was that that is an appropriate response to the exigencies of the circumstances. To go further and accept the accused's own assessment of what is possible would not encourage efforts to comply with the law.

My point in reviewing these cases is not that, on analysis, Dickson's judgments are capable of total support. It is that there is a consistent and principled approach to criminal law to be found in these judgments. While substantively the approach may not always be pleasing, it is based on a well-developed view of the appropriate relationship between the judiciary and the legislature, and on a vision of the role of criminal law in society that is justifiable even when it has not been fully defended. Dickson J. tried to the extent possible to keep the concepts with which he was dealing focussed and not to be diverted by the pressures of the instant case. If, in the course of doing that, he occasionally disappointed us, he also left us with an example of a judge who respected his institution to the utmost. In the long run, I believe that is the rarer and more influential legacy.