COMMENTS
COMMENTAIRES

NON-THERAPEUTIC STERILIZATION—MALPRACTICE, AND THE ISSUES OF "WRONGFUL BIRTH" AND "WRONGFUL LIFE" IN QUEBEC LAW.—Shakespeare may have chosen to describe man as "the paragon of animals",[1] but experience proves that perversity forms a substantial part of human nature. Despite biblical exhortations to be fruitful and multiply,[2] Adam and Eve's modern descendants are more inclined to place a greater emphasis on how *not* to conceive, or at least, how not to conceive inopportunely. This desire for family planning, frustrated to some extent by the uncertainties[3] or the medical risks[4] involved in mechanical or chemical contraceptive methods, has led to a greater public acceptance of vasectomies and bilateral salpingectomies (tubal ligations) as alternate means of limiting family size.[5]

Notwithstanding the fact that in objective terms, these types of surgery involve the destruction of normal functions and are generally

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[1] Hamlet, act II, scene 2.

[2] Genesis 1:28.

[3] According to Dr. Suzanne Parenteau-Carreau in Love and Life (1974), p. 27, the failure rates for various non-surgical contraceptive methods, in terms of unwanted pregnancies per 100 women-years are as follows: Combination pill—0.7; sequential pill—1.4; foams 9.7-29.3; creams and jellies 7.8-40.6; suppositories and foaming tablets 7.7-45; diaphragm with cream or jelly 4-33.6; condom 7-28.3; vaginal douche 21-37.8; I.U.D. 2-3.

[4] For example, oral contraceptives increase the risk of cardiovascular disease and possibly of cancer. They may also cause abnormalities to a male child's reproductive organs if used during or immediately preceding pregnancy: F.D.A. Labeling for Pill Users Takes Effect April 3; Warns Against Smoking by Pill Users at Any Age (1978), 10 Family Planning Perspectives 116. The I.U.D. can cause spontaneous abortion: W. Cates Jr., D.A. Grimes, H.W. Ory, C.W. Tyler Jr.; Publicity and the Public Health (1977), 9 Family Planning Perspectives 138.

[5] In Quebec, there were approximately 6,500 vasectomies performed in 1971 and about 10,000 in 1977: Darrell Sifford, One Man's Vasectomy: The Operation was Simple? The Montreal Gazette, July 10th, 1978, p. 43. As for tubal ligations, 5,122 were performed in 1972 compared to 24,278 in 1974; Zoe Bieler, Operation Found Safe, Effective, Montreal Star, April 5th, 1976, p. C-3.

considered irreversible,[6] jurists have tended to formulate opinions favoring the legality of non-therapeutic sterilization involving capable consenting adults.[7] Until last year in the Province of Quebec, these opinions have remained suppositional because of a dearth of legislation and jurisprudence dealing squarely with the problems surrounding surgical sterilization. At last, the recent decision in *Dame Cataford et al.* v. *Docteur Moreau*,[8] rendered by Chief Justice Deschênes of the Quebec Superior Court, has clarified the issue of the legality of purely contraceptive sterilization and the validity of so-called "wrongful birth" and "wrongful life" claims.[9]

The litigation arose out of the following circumstances: at the time of his marriage, Cataford was an illiterate, twenty-six-year-old francophone whereas his bride was an English-speaking North American Indian who enjoyed little formal education. Within the first eleven years of marriage, the couple had produced ten children. In order to avoid having more offspring, Mrs. Cataford was placed on a regime of birth-control pills, but after a few years, was obliged to discontinue their use due to adverse side-effects. Since the obvious solution was sterilization, their family physician referred the Catafords to the defendant, Dr. Moreau, a surgeon affiliated with the local hospital.

Immediately upon Mrs. Cataford's admission to hospital for a tubal ligation, the authorities of the institution had the couple sign a "sterilization request" form printed in English but with the information concerning the nature of the surgical intervention written in French. In any case, both plaintiffs signed without knowing or understanding the contents of this document. It appears that the request for sterilization form not only mentioned that "there is no possibility to conceive", but also contained a clause

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[6] Surgeons are experimenting with different techniques in order to effect recanalization of the severed *vas deferens* in men or fallopian tubes in women. In men, successful anastomosis is obtained in fifty to ninety percent of all cases: see an unsigned article entitled Voluntary Male Sterilization (1968), 204 J.A.M.A. 821, at p. 822. Because of a suspected immunoreaction to sperm, actual fertility is reestablished in few cases: Eugene Cattolica, Reversibility of Vasectomy (1971), 74 Annals of Internal Medicine 475. In women, the reversal procedure is successful in less than 50% of cases: Parenteau-Carreau, *op. cit.*, footnote 3, p. 40.

[7] Generally described in R.P. Kouri, The Legality of Purely Contraceptive Sterilization (1976), 7 R.D.U.S. 1.

[8] 1st June 1978, District of Terrebonne, no. 66, 320. Not yet reported. No appeal has been made. The author of this comment wishes to express his gratitude to Me Guy Quesnel of Ste-Thérèse and Me Guy Saulnier of St-Eustache who kindly furnished additional background information concerning this case.

[9] These expressions are of American origin and refer to damage claims brought by parents following the birth of a healthy, normal baby in the case of "wrongful birth", and to damages sought by a child as a result of his or her own birth, in the case of "wrongful life".

discharging the surgeon's liability notwithstanding the results of the operation.

The next day, the defendant performed a tubal ligation, as well as an appendectomy and a cholecystectomy on the patient, whose subsequent recovery was uneventful. However, in spite of assurances by Dr. Moreau that there would be no more children, Mrs. Cataford became pregnant within four months of her "sterilization" and gave birth at term to an eleventh child, a healthy boy later named Michel. During a second intervention performed by another surgeon (who eventually served as expert witness for the plaintiffs), it was discovered that spontaneous reanastomosis had occurred in one of the Fallopian tubes.

A law-suit, claiming $25,000.00 damages on the basis of violation of contract, was initiated by the Cataford consorts. In his plea, the defendant invoked several grounds including that he had acted according to standard medical practice, that the plaintiffs had not followed his instructions, that the recanalization was a fortuitous event for which he should not be answerable, and that in any event, the plaintiffs did not suffer any damages.

The case was heard and taken under advisement by Amédée Monet, Justice of the Superior Court, who then decided that the unplanned child, Michel, should be personally represented before the court in order that his own interests be protected. To this effect, a tutor was duly appointed and intervened in the action. After adopting the principal allegations already made by the parents, the tutor concluded that of the $25,000.00 demanded in the Cataford suit, a sum of $20,000.00 should be allocated to him acting on behalf of the minor.[10] Oddly enough, the original plaintiffs did not contest this conclusion even though it had the effect of reducing their own claim to $5,000.00.

In the interim, Mr. Justice Monet was appointed to the Quebec Court of Appeal and under the provisions of article 464 of the Code of Civil Procedure, the Chief Justice personally assumed and adjudicated this case. The court eventually found in favour of the plaintiffs and awarded $2,000.00 to Dame Cataford and $400.00 to her husband. The child's claim was rejected without costs.

Undoubtedly aware of the fact that this action was certainly one of first impression in Quebec and perhaps in Canada,[11] the Chief

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[10] "*Condamner* le défendeur à payer à l'intervenant ès-qualité de tuteur à l'enfant Michel Cataford une somme de $20,000.00 déjà réclamée à même un montant plus considérable par les demandeurs principaux."

[11] The Ontario case of *Doiron* v. *Orr et al.* (1978), 1 All Canada Weekly Series 700, 86 D.L.R. (3d) 718, 20 O.R. (2d) 71 (Garrett J.) involved a female plaintiff who underwent the Aldridge sterilization procedure which is considered reversible.

Justice took particular pains to address himself to several legal issues which were raised by the sterilization, including: (1) the legality of purely contraceptive sterilization, (2) the standard of care involved in this type of surgery, and (3) the heads under which damages could be claimed following an unsuccessful sterilization.

The purpose of this comment is to examine in turn the court's findings with regards to each of these items.

(1) *The Legality of Purely Contraceptive Sterilization.*

Chief Justice Deschênes raised this question on his own initiative, since all the parties to the dispute appeared to presume the legality of the operation. In a situation involving an agreement potentially susceptible of being viewed as illicit or contrary to public order and good morals, this was indeed a most proper preliminary step, since such a finding would have had drastic effects on the claims of the victims. Indeed, according to one view, voluntary participation in an illicit transaction may constitute an absolute bar to reparation.[12] A second, less radical point of view, holds that the

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She later became pregnant and gave birth. Plaintiff sought as damages, an amount necessary to maintain the child up to the age of twenty-one as well as compensation for mental anguish. The action was dismissed because in fact, the surgeon had properly performed the Aldridge procedure and had outlined to the plaintiff the possibility of failure, which she apparently knowingly accepted. The Alberta case of *Cryderman* v. *Ringrose*, [1977] 3 W.W.R. 109, per Stevenson, D.C.J., also dealt with sterilization but by an experimental, non-surgical method. After undergoing, on three different occasions, a procedure which consisted of introducing silver nitrate, a corrosive substance, into the fallopian tubes through the uterus, the plaintiff became pregnant and later underwent an abortion and sterilization by hysterectomy. The victim was awarded damages and on an appeal by the surgeon ([1978] 3 W.W.R. 481), the Appellate Division of the Alberta Supreme Court upheld the original decision. Although this case did not deal with a claim for the wrongful birth of an unplanned child, and is thus not directly pertinent to this comment, McGillivray C.J.A., in his opinion delivered orally, stated the following (at p. 483): "We think that this case is clearly distinguishable from that decided by Lieberman J.A., and referred to in argument where the family had an unwanted child whom they came to love and then they sought damages from a doctor for such things as the cost of looking after the child and toys and things of that sort. Such a claim on the face of it seems ridiculous."

Unfortunately, no reference is given to this case. It would appear however that the decision in question is that of *Colt* v. *Ringrose* rendered in 1976 by Lieberman J.A., and which remains unreported. L.C. Green in his article entitled: Law, Sex and the Population Explosion (1977), 1 Legal Medical Quarterly 82, at p. 87 mentions that the plaintiff's action was dismissed since the risky method utilized was expressly agreed to by the patient. Lieberman J.A., is reported as having added that were he to be in error on this point, the damages awarded would have amounted only to $1.00 since the plaintiff gave birth to a child she loves.

[12] Philippe Le Tourneau, Règle "nemo auditur" in Jurisclasseur Civil, arts 1101-1155 under arts 1131-1133, Paris, Editions Techniques, fasc. 10 bis, p. 16, nos 72 and 74; J. Savatier, Stérilisation chirurgicale de la femme: aspects juridiques, [1964] Cahiers Laënnec 54, at p. 61; Philippe Le Tourneau, La règle "nemo auditur" (1970), pp. 202-203, no. 188.

consent of the victim to an illegal act cannot attenuate the illicit nature of the agreement.[13] Since, according to this second hypothesis, the harm is caused by the joint participation of the patient consenting to, and the surgeon performing the questionable medical act, both would share responsibility for the resultant damages.[14] Since the court reached the conclusion that voluntary sterilization is not *per se* violative of public order and good morals, the controversy just alluded to was avoided and remains unresolved.

In determining the legality of sterilization for purely contraceptive purposes, Chief Justice Deschênes examined first the criminal law. He felt that although a criminal prosecution against a surgeon possibly could be grounded on sections 228 (causing bodily harm with intent) or 224 (assault), a defense based on section 45 would avail, given the circumstances:[15]

> Dans le présent cas, compte tenu de l'âge des parties, du nombre de leurs enfants, de leur situation économique et sociale, il fait peu de doute que "toutes les autres circonstances de l'espèce", pour citer le langage de l'article 45 C. cr., conduiraient à la conclusion que l'intervention a été pratiquée "pour le bien" de la demanderesse.[16]

This statement in itself has great significance in resolving another controversy which has arisen intermittently over the years—whether the notion of "benefit" under section 45 of the Criminal Code should receive a narrow or a more liberal interpretation.[17] It now appears that "benefit" does not deal strictly with the patient's health,[18] but can in fact encompass socio-economic and other considerations. Consequently, surgery may be employed not

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[13] H. et L. Mazeaud, J. Mazeaud, *Traité théorique* et pratique de la responsabilité civile, t. 2 (6e éd., 1970), pp. 601-602, no. 1493; M.T. Meulders-Klein, Considérations juridiques sur la stérilisation chirurgicale, [1967] Annales de la Faculté de Droit de Louvain 3, at pp. 30-31; R. Nerson, Les droits extrapatrimoniaux (1939), pp. 414-416.

[14] See generally R.P. Kouri, *op. cit.*, footnote 7, at pp. 34 *et seq.* For reasons which are described in this article, we prefer the second hypothesis.

[15] "Everyone is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if: (a) the operation is performed with reasonable care and skill and (b) it is reasonable to perform the operation, having regard to the state of health of the person at the time of the operation is performed and to all the circumstances of the case."

[16] At p. 11.

[17] See for example J. Fortin, A. Jodouin, A. Popovici, Sanctions et réparation des atteintes au corps humain en droit québécois (1975), 6 R.D.U.S. 150, at p. 180 and R.P. Kouri, *op. cit.*, footnote 7, pp. 12 *et seq.*

[18] According to C.J. Meredith, Malpractice Liability of Doctors and Hospitals (1956), p. 217: "But a needless operation causing injury to the patient, is obviously not for his 'benefit', and, notwithstanding his consent to undergo it, may be the subject of a criminal charge. Included in this category are operations for the sterilization of a male and female, unless performed for the patient's health, or in virtue of a special statutory provision."

only to protect health, but also to preserve the quality of life in a broader, non-medical sense.

Turning its attention to the legality of non-therapeutic sterilization from a civil law point of view, the court felt that an examination of public policy would be the only appropriate approach since there is no Quebec legislation specifically authorizing this type of intervention. Citing certain examples drawn from jurisprudence dealing with obscenity or books forbidden by the Church, the court noted that the notion of public order is in a constant state of flux. Bearing in mind that enlightened medical opinion,[19] and the *Report of the Royal Commission on the Situation of Women in Canada*[20] are not opposed to voluntary sterilization, that the Quebec government has regulated the procedure by which sterilization should be requested in health institutions,[21] and that the Quebec Health Insurance Board will assume the costs of vasectomies and tubal ligations performed for purposes of family planning,[22] the court stated:

> Dans ces circonstances, la Court n'éprouve pas d'hésitation à conclure que, s'il fut déjà une époque où la stérilisation volontaire pouvait insulter à l'ordre public et aux bonnes moeurs, cette époque—pour le mieux ou pour le pire—est révolue et la loi civile du Québec ne s'oppose pas à la conclusion d'un contrat en semblable matière.[23]

As a result, except for the question of the type of damages sought, the court felt itself entitled to treat this case as an ordinary malpractice action.

(2) *The Standard of Care Involved in Surgical Sterilization.*

In his examination of this aspect of the *Cataford* case, the Chief Justice simply placed the burden of proving professional fault on the plaintiffs, without entering into any analysis of the doctrinal and jurisprudential aspects so often encountered in decisions involving professional liability. With the aid of the medical testimony of a very forceful witness for the plaintiffs, the court was able to conclude

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[19] Resolution adopted by the Canadian Medical Association, quoted in the Bird Commission Report (Commission Royale d'enquête sur la situation de la femme au Canada, Rapport, Ottawa, Information Canada, 1970), p. 316, footnote 81; Resolution of the Order of Physicians of the Province of Quebec adopted the 24th of February 1971, quoted in S. Mongeau, La vasectomie: évolution récente (1972), 7 Le médecin du Québec 44, at p. 46; The Canadian Medical Protective Association, Sexual Sterilization for Non-Medical Reasons (1970), 102 C.M.A.J. 211.

[20] *Ibid.*, p. 317, nos 223, 224.

[21] Art. 3.2.3.3 "Toute personne désirant se soumettre à une intervention chirurgicale stérilisante doit en faire la demande par écrit sur une formule prévue à cette fin." (1972), 104 Gazette Officielle du Québec, 10,575 (no. 47, 25/11/1972).

[22] Directive no. 49 issued the 1st of July 1971.

[23] At p. 19.

quite expeditiously that the defendant's surgical technique was deficient since it facilitated, or at least did not hinder the phenomenon of spontaneous recanalization:

> En se contentant de sectionner la trompe droite sans en enlever un segment et sans en enfouir dans le tissu environnant au moins l'une des extrémités, (le défendeur) . . . invitait la nature à réaboucher les extrémités séparées.[24]

Generally speaking, a surgeon who undertakes to perform an intervention whether therapeutic or not, is obliged only to afford his patients ". . . des soins consciencieux, attentifs et conformes aux données acquises de la science".[25] He is held to an obligation of means and not to one of result.[26] Therefore, the surgeon is not the "guarantor" of the treatment; in the absence of negligence or wrongdoing, he will not answer for any untoward result. Since medical science, according to modern standards, admits that there is a failure rate of approximately less than one percent in tubal ligations,[27] it is normal that the patient have the burden not only of proving fault on the part of the physician, but also of not being permitted to rely on presumptions of fact under articles 1238 and 1242 of the Civil Code, in order to discharge this burden.[28]

The plaintiffs, having clearly established malpractice on the part of the defendant-surgeon, the court was able to contemplate the most controversial aspect of this case, that is, the issue of damages recoverable.

(3) *Damages Recoverable Following an Unsuccessful Sterilization.*

Before dealing more particularly with the various heads under

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[24] At p. 22. The court seems to be referring to the so-called "Irving technique" which is practised on puerperal women. The fallopian tubes are ligated about four centimeters from the cornua and then another set of ligatures is placed in the proximal portions of the tubes which are then resected between the two pairs of ligatures. A tunnel is made in the wall of the uterus into which the proximal portion of each tube is drawn by way of a length of suture material and needle. Each tube is then left embedded in the wall of the uterus. This and other operative techniques are described in R.P. Kouri, Certain Legal Aspects of Modern Medicine, unpublished doctoral thesis, McGill Institute of Comparative Law (1975), pp. 212 *et seq.*

[25] Bissonnette J., in *X.* v. *Mellen*, [1975] Q.B. 384, at p. 416.

[26] *Ibid.* See also A. Bernardot, De l'obligation de soigner dans le contrat médical (1977), 37 R. du B. 204, at pp. 205-206 and references therein cited; P.-A. Crépeau, La responsabilité médicale et hospitalière dans la jurisprudence québécoise récente (1960), 20 R. du B. 433, at p. 456.

[27] P.R. Forbes, Voluntary Sterilization of Women as a Right (1968), 18 De Paul L.Rev. 560, at p. 562.

[28] A. Bernardot, Les médecins et les présomptions de faits (1971), 2 R.D.U.S. 78, at p. 81; A. Lessard, Les présomptions de faits et la responsabilité médicale: *Brunelle* v. *Sirois* (1976), 6 R.D.U.S. 417, at p. 423; R. Boucher, D. Gregoire, J. Deslauriers, K.D. Beausoleil, Les présomptions de fait en responsabilité médicale (1976), 17 C. de D. 317.

which damages were sought, Chief Justice Deschênes adopted the basic premise that:

> . . . se limitant à l'aspect juridique de la question, la Cour ne se croit pas justifiée de conclure que la naissance non désirée d'un enfant sain, au surplus dans une famille pauvre comprenant déjà dix enfants vivants, constitue un événement tellement heureux et normal que l'ordre public s'offenserait d'y voir attacher une compensation pécuniaire dans un cas approprié.[29]

In so stating, the court laid to rest any objections in principle to the possibility of claiming damages occasioned by the birth of a normal child. Consequently, the Chief Justice was able to scrutinize first, the action of the child, Michel, seeking damages for his own unplanned birth, before turning to that of the parents.

The first point was disposed of quite rapidly, since the court rejected out of hand, the possibility of a child suing for damages resulting from his own birth:

> La naissance d'un enfant sain ne constitue pas pour cet enfant, un dommage et encore moins un dommage compensable en argent. Il est bien impossible de comparer la situation de l'enfant après sa naissance avec la situation dans laquelle il se serait trouvé s'il n'était pas né. Le seul énoncé du problème montre déjà l'illogisme qui l'habite.
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> D'ailleurs par quelle perversion de l'esprit pourrait-on arriver à qualifier comme un dommage, l'inestimable don de la vie?[30]

Clearly inspired by American jurisprudence involving "wrongful life" claims,[31] this position was also influenced by the fact that subsequent testing established no abnormalities in the young "victim". Needless to say, the obvious implication is that Quebec courts are not likely to leave the beaten track already established by our neighbours to the south in cases of this kind.

In the United States, the "wrongful life" litigation generally arose out of situations in which children were born out of wedlock,[32] or else subject to birth defects.[33] As a rule, the courts have been highly reluctant to break new ground and award damages to these

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[29] At p. 25.

[30] *Ibid.*, at pp. 26-27.

[31] Indeed, the court cited *Zepeda* v. *Zepeda* (1963), 41 Ill. App. 2d. 240, 190 N.E. 2d. 849, cert. denied (1964), 379 U.S. 945 and *Sherlock* v. *Stillwater Clinic et al.* (1977), 260 N.W. 2d. 169 (Minn.). It should be pointed out however, that this latter case dealt with "wrongful birth" as opposed to an action for "wrongful life".

[32] *Zepeda* v. *Zepeda*, *ibid.*; *Williams* v. *State of New York* (1966), 276 N.Y.S. 2d. 885 (C.A.); *Slawek* v. *Stroh et al.* (1974), 215 N.W. 2d. 9 (Wis. S.C.); *Stills* v. *Gratton* (1976), 127 Cal. Rptr. 652 or 55 Cal. App. 3d. 698 (C.A.).

[33] *Gleitman* v. *Cosgrove* (1967), 227 A. 2d. 689 (N.J.S.C.); *Stewart* v. *Long Island College Hospital* (1970), 313 N.Y.S. 2d. 502 (S.C.A.D.), conf. by (1972), 332 N.Y.S. 2d. 640 (N.Y.C.A.); *Demer* v. *St. Michael's Hospital* (1975), 233 N.W. 2d. 372 (Wis. S.C.); *Greenberg* v. *Kliot* (1975), 367 N.Y.S. 2d. 966 (S.C.A.D.),

children, preferring to let the legislative branch determine the public policy considerations applicable.[34]

One notable exception to this almost monolithic consensus occurred on the New York Appellate Division judgment of *Park* v. *Chessin*.[35] In this case, parents who had already produced a child fatally afflicted with polycystic kidney disease, were told by the defendant obstetricians that the disorder was not hereditary and that the chances of subsequent children having this disease were practically nil. Reassured by this advice, the couple had another baby also suffering from the same disease. In allowing the claim of the child for injuries and pain and suffering to stand,[36] the court felt itself empowered to depart from the current line of jurisprudence:

> . . . cases are not decided in a vacuum; rather, decisional law must keep pace with expanding technological, economic and social change. Inherent in the abolition of the statutory ban on abortion . . . is a public policy consideration which gives potential parents the right, within certain statutory and case law limitations, not to have a child. This right extends to instances in which it can be determined with reasonable medical certainty that the child would be born deformed. The breach of this right may also be said to be tortious to the fundamental right of a child to be born as a whole, functional human being.[37]

It is perhaps premature to affirm that *Park* v. *Chessin* is a portent of future judicial attitudes in "wrongful life" claims.

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appeal denied (1975), 375 N.Y.S. 2d. 1026 (C.A.); *Johnson* v. *Yeshiva University* (1976), 384 N.Y.S. 2d. 455, conf. by (1977), 396 N.Y.S. 2d. 647 (C.A.); *Karlsons* v. *Guerinot* (1977), 394 N.Y.S. 2d. 933 (S.C.A.D.); *Howard* v. *Lecher* (1977), 397 N.Y.S. 2d. 363 (C.A.).

[34] The decision of the Court of Appeal of Illinois in the "wrongful life" case of *Zepeda* v. *Zepeda*, *supra*, footnote 31, has served as a leading precedent in claims of this type. In refusing to grant damages to an adulterine bastard who sued his natural father for injury to his person, property and reputation, the court affirmed, per Dempsey P.J.: "Recognition of the plaintiff's claim means creation of a new tort; a cause of action for wrongful life. The legal implications of such a tort are vast, the social impact could be staggering. . . .

What . . . disturb[s] us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation. . . .

We have decided to affirm the dismissal of the complaint. We do this, despite our designation of the wrong committed herein as a tort, because of our belief that lawmaking, while inherent in the judicial process, should not be indulged in where the result could be as sweeping as here. The interest of society is so involved, the action needed to redress the tort could be so far-reaching, that the policy of the State should be declared by the representatives of the people". (At pp. 858-859).

[35] (1977), 400 N.Y.S. 2d. 110.

[36] The child died during the pendency of the suit.

[37] *Supra*, footnote 35, p. 114, per Damiani J.

Nevertheless, when one considers that in the *Cataford* judgment presently under discussion, the unexpected child, Michel, was born in good health and within the confines of wedlock, the rejection of his claim seeking damages for his own birth should be viewed with approval. Were we to be dealing with a child born with defects, following a "sterilization" of one of his parents for the purpose of preventing the transmission of an hereditary disease, it would be preferable that the validity of such a claim be viewed as still open to discussion. In any event, the *Cataford* decision does not preclude this possibility.

Turning next to the claim for damages of the parents, the court readily admitted that all damages directly and immediately attributable to the fault of the defendant could be awarded. Accordingly, the wife was granted an amount of $2,000.00 in order to compensate the loss of enjoyment of life due to an interruption of sexual relations, the inconvenience and anxiety caused by the idea of having an eleventh child, the pain and suffering incidental to giving birth, and finally the pain and suffering as well as the inconvenience occasioned by a subsequent operation necessary to complete the sterilization. As for the husband, since his testimony did not reveal any moral suffering caused by the untimely arrival of another mouth to feed, the court merely granted the sum of $400.00 to compensate him for the temporary deprivation of his wife's *consortium*.

Lastly, the court examined the most controversial question of all—that of "wrongful birth", or whether the parents could validly claim as damages, the costs of nurturing and maintaining the unplanned child from birth until his majority. Unfortunately, Chief Justice Deschênes did not choose to approach this issue head-on:

> La Cour hésite à se convaincre que des parents puissent ainsi monnayer leur enfant vivant et sain. Mais même s'il faut accepter en droit la proposition que les frais d'entretien de cet enfant durant dix-huit ans constituent un dommage dont le défendeur doit assumer le fardeau—*proposition sur laquelle le Cour ne se prononce pas*—il se trouve que, dans le contexte particulier de la présente cause, ce fardeau est plus que compensé par les bénéfices de divers ordres que les demandeurs retireront de la présence de leur fils cadet dans la famille.[38]

After weighing the contradictory opinions put forth by experts called to testify on behalf of the plaintiffs,[39] and of the defendant,[40] the court concluded that the annual cost of raising a child until the age of majority would be approximately $1,000.00.[41] Therefore, a

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[38] At p. 33. Emphasis added.

[39] An actuary set the annual cost of maintaining a child at $1,054.00.

[40] An actuary and an economist testified that the child would cost $5,807.00 over eighteen years but would bring in, in the form of social benefits or allowances $7,557.00, thus creating a net surplus of $1,750.00.

[41] Unfortunately, the author lacks the skills and the background required to

capital sum of $8,500.00 invested at current interest rates would provide this amount on an amortization basis. On the other hand, the Chief Justice noted that the presence of the child would entitle the family to the sum of $7,557.00 in the form of social benefits or allowances. As a result, the difference between the amount necessary to support the child and the benefits which his birth entails would be less than $1,000.00. This difference, in the opinion of the court, would be more than adequately compensated by the moral and financial benefits that the parents would be deriving from their child.[42] Consequently, that part of the parents' claim was rejected.

This aspect of the decision warrants further analysis on two counts, including first of all, the fact that social allowances were taken into account in order to calculate the quantum of damages, and secondly, the notion that any moral benefit resulting from the birth could serve to compensate material loss.

On the first point, it is almost trite to mention that the primary goal of a civil liability action is to afford the victim equitable compensation for the wrongful prejudice suffered.[43] Of course, the evaluation of the damages sustained must be made by taking into consideration, the actual situation of the victim so as to avoid an unjust enrichment on his part. In the case at hand, it would be reasonable to expect that the youngest Cataford would not be treated any differently by his family than were his older brothers and sisters. Except for external or uncontrollable factors such as inflation, illness, death, and so on, the parents would be likely to incur

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contest these figures authoritatively. Speaking, however, as a father whose point of view is admittedly biased, he cannot help but feel somewhat surprised at how little a child is supposed to cost per year. In effect, this amount is equivalent to slightly less than $2.75 per day.

In a study undertaken by Professor T.J. Espenshade, an economist at Florida State University, it was estimated (in 1977) that the costs of rearing a child to age 18 (including food, clothing, housing, transportation, primary and secondary education, and medical care) ranged from $33,124.00 for a farm family to $53,605.00 for an urban family consuming moderately priced food: Parents Everywhere Underestimate Cost of Child-rearing; In U.S. the Cost is $77,000.-$107,000. Including College (1977), 9 Family Planning Perspectives 227.

It is interesting to note that in 1974, the Cataford family received from *all* sources including social benefits, the sum of $8,500.00. The breakdown is as follows: earnings of Mr. Cataford—$5,000.00 (approx.), earnings of Mrs. Cataford—$1,000.00 (approx.) and social benefits—$200.00 per month or $2,400.00.

[42] Chief Justice Deschênes suggested that because, in the past, the court granted damages to parents for the loss of a foetus, (see *Dame Langlois et al.* v. *Meunier*, [1973] C.S. 301), it follows that a child must represent some moral value or benefit to his family.

[43] J.-L. Baudouin, La responsabilité civile délictuelle (1973), p. 88, no. 112.

expenses similar in nature to those assumed in raising the other ten children. As a result, Chief Justice Deschênes was inclined to conclude that these projected disbursements would be almost completely defrayed by allowances paid by the state. In his opinion, to allow the victims to accumulate these benefits along with additional damages would place the plaintiffs in a more advantageous position than they were prior to the negligent act of the physician.[44]

Was the court justified in taking into account social benefits in establishing damages? Although the subject remains somewhat controversial,[45] it would appear that in principle, a victim may accumulate indemnities in cases where the debtor of the benefits, (the state in the present discussion), is not subrogated in the rights of the plaintiff and thus has no recourse against the responsible party.[46] In addition, unlike Workmen's Compensation[47] and similar benefits, payments made as a result of the birth of a child do not serve to indemnify the recipient[48] for the simple reason that the purpose of an indemnity is to repair or compensate a loss rather than to ensure a minimal standard of living.

Following the untimely arrival of young Michel, the Cataford family was qualified to receive an increase in family allowances.[49] However, it should be noted that the laws governing family allowances do not in fact provide for subrogation. Consequently, in determining the amount to be awarded in order to raise the child, it seems that the court should not have considered these social benefits

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[44] It must be pointed out that there *are* reported Quebec cases in which sums paid by the state have been taken into account in establishing awards. In *Niro* v. *Niro*, [1950] S.C. 151 and *Lachance* v. *Lachance*, [1962] S.C. 614, the Superior Court had deducted from alimentary allowances owed by children to their parents, the amount of old-age pensions received by the latter. Yet, one should not lose sight of the fact that one of the essential conditions of a claim for alimentary support is that the person claiming must be in need: art. 169 C.c. See also A. Derek Gutherie, Alimentary Obligations (1965), 25 R. du B. 524, at p. 538. Thus, sums received from public bodies by alimentary creditors are properly taken into consideration in establishing need. This is not the case when contemplating claims by a parent who will have to support a child born because of the wrongful act of another since here, the claim is one for damages and not for support, and the question of need is not pertinent in fixing the quantum.

[45] H. et L. Mazeaud, A. Tunc, Traité théorique et pratique de la responsabilité civile, vol. 1 (6th ed., 1965), p. 291, nos. 232 *et seq*.

[46] G. Courtieu in Juris-classeur responsabilité civile, vol. 1, Paris, Editions Techniques, fasc. III-H-1, no. 5, p. 3.

[47] Workmen's Compensation Act, S.R.Q., 1964, c. 159, as am.

[48] P. Le Tourneau, La responsabilité civile, vol. 1 (1972), p. 277, no. 718.

[49] Family Allowances Act, 1973, S.C., 1973-74, c. 44, s. 3; Quebec Family Allowances Plan, S.Q., 1973, c. 36, s. 3. These are the only benefits to which the judgment refers since the Catafords were not on welfare: see letter to this writer dated the 14th of August 1978 and written by Me Guy Saulnier, attorney for the plaintiffs.

paid by the provincial and federal governments.[50] Moreover, the duty of parents with regard to their children is much broader than this mere dollars and cents discussion tends to indicate. As A. Derek Gutherie pointed out:[51]

> The alimentary obligation of parents to maintain their children who are in want should not be confused with their separate and distinct obligation to feed, shelter and educate them physically, intellectually and morally. This latter obligation begins with the birth of the child and does not cease until the child is ready to make his own way in life; it is satisfied in kind under the family roof and not in cash.

Since allowances paid by the state are certainly not intended to remunerate parents for performing their duty, perhaps one may assume that the time, effort and anxiety expended in providing a decent upbringing for their children are more properly compensated by the moral benefits which accrue to the family following the birth of each child?

The notion of moral benefit is not unfamiliar to American jurisprudence. Indeed, this very issue has been discussed in several suits seeking damages in order to offset the costs of raising an unplanned child. In some "wrongful birth" decisions for example, the courts have been reluctant to recognize claims of this type, either because the hazards incidental to childbirth (in a case of therapeutic sterilization) were not suffered,[52] or else because damages could not be awarded for reasons of public policy.[53] It has also been ruled on occasion that recovery could not be granted for the expenses of raising a child because they were too speculative or uncertain.[54] Going so far as to invoke the precept that plaintiffs have a duty to mitigate damages, some defence attorneys have even suggested that the failure of parents to abort the foetus or to place the child for adoption would bar recovery.[55] Happily, this cynical view has been firmly rejected by the courts.[56]

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[50] Would it be inappropriate to point out that when a child is killed, the courts do not take into consideration in fixing damages the reduction in family allowances?

[51] *Op. cit.*, footnote 44, at p. 539.

[52] *Christensen* v. *Thornby* (1934), 255 N.W. 620 (Minn. S.C.).

[53] *Shaheen* v. *Knight* (1957), 11 Pa. Dist. & Co. R. 2d. 45 (Penn.); *Clegg* v. *Chase* (1977), 391 N.Y.S. 2d. 966 (S.C.); *Coleman* v. *Garrison* (1975), 349 A. 2d. 8 (Del. S.C.); *Rieck* v. *The Medical Protective Company of Fort Wayne, Indiana* (1974), 219 N.W. 2d. 242 (Wis. S.C.).

[54] *Coleman* v. *Garrison*, *ibid.*, at p. 12. See however, *Troppi* v. *Scarf* (1971), 187 N.W. 2d. 511, at pp. 520, 521 (Mich. C.A.); *Betancourt* v. *Gaylor* (1975), 344 A. 2d. 336, at p. 340 (N.J.S.C.).

[55] See for example the dissenting opinion of Cardamone, J., in *Ziemba* v. *Sternberg* (1974), 357 N.Y.S. 2d. 265 (S.C.A.D.).

[56] *Ziemba* v. *Stenberg*, *ibid.*, especially at p. 269. See also *Troppi* v. *Scarf*, *supra*, footnote 54, at pp. 519, 520; *Martineau* v. *Nelson* (1976), 247 N.W. 2d. 409

Nevertheless, as a general rule, it appears safe to state that the public policy of most of the American jurisdictions admits the possibility of recovery for "wrongful birth".[57] This does not imply that in reality, damages have indeed been awarded in every case since, under the so-called "benefit rule",[58] the ultimate outcome would have had to depend upon the weighing of the advantages conferred by the birth as opposed to the expense and inconvenience resulting therefrom.[59]

In many judgments, the courts have held as a matter of law that the birth of a child constituted an overriding benefit which would more than adequately reward the parents for their trouble. The following statement in *Terrell* v. *Garcia*[60] typifies this attitude:

> . . . a strong case can be made that, at least in an urban society, the rearing of a child would not be a profitable undertaking if considered from the economics

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(Minn. S.C.), holding that the failure of the husband to undergo a vasectomy following the unsuccessful sterilization of his wife was not equivalent to contributory fault; *Sherlock* v. *Stillwater Clinic*, *supra*, footnote 31, at p. 176.

[57] *Custodio* v. *Bauer* (1967), 59 Cal. Rptr. 463, at pp. 476-477 (C.A.); *Jackson* v. *Anderson* (1970), 230 So. 2d. 503 (Fla. D.C.A.); *Bowman* v. *Davis* (1976), 356 N.E. 2d. 496 (Ohio S.C.). In this latter decision it is stated (at p. 499): "It is the opinion of this court that the cause of action pursued successfully by the Bowmans at the trial and appellate levels is not barred by notions of public policy. The choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations), a constitutional guarantee .... For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute an impermissible infringement of a fundamental right". In *Jacobs* v. *Thiemer* (1975), 519 S.W. 2d. 846 (Tex. S.C.), the court held that public policy was not opposed to recovery of the expenses necessary to care for a child born defective as a result of an undiagnosed case of rubella. In the State of New York, *Cox* v. *Stretton* (1974), 352 N.Y.S. 2d. 834 (S.C., Special Term) has reversed the jurisprudence of *Stewart* v. *Long Island College Hospital* (1970), 313 N.Y.S. 2d. 502 (S.C.A.D.) confirmed by (1972), 332 N.Y.S. 2d. 640 (C.A.) which held that parents could not sue for damages resulting from the birth of a defective baby whose mother had had rubella. The parents complained that the hospital failed to perform a therapeutic abortion. At that time, public policy declared the proposed abortion illegal. Since then, the *Roe* v. *Wade* ((1973), 93 S. Ct. 705) and *Doe* v. *Bolton* ((1973), 93 S. Ct. 755) decisions have changed the abortion laws. The courts have also refused to admit actions brought by the siblings for having to share with the unplanned child, the care, comfort, finances and society of their parents: *Aronoff* v. *Snider* (1974), 292 So. 2d. 418 (Fla. D.C.A.); *Cox* v. *Stretton* (1974), 352 N.Y.S. 2d. 834, at pp. 840, 841 (S.C., Special Term).

[58] According to the Restatement on Torts (1939), p. 616, no. 920: "Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable".

[59] *Troppi* v. *Scarf*, *supra*, footnote 54, at p. 518; *Anonymous* v. *Hospital* (1976), 366 A. 2d. 204, at p. 206 (N.J.S.C.).

[60] (1973), 496 S.W. 2d. 124 (Tex. C.A.).

> alone. Nevertheless . . . the satisfaction, joy and companionship which normal parents have in rearing a child make such economic loss worthwhile. Who can place a price tag on a child's smile or the parental pride in a child's achievement? Even if we consider only the economic point of view, a child is some security for the parents' old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child.[61]

The opposing point of view however, appears to be more widely accepted. While admitting that the "benefit rule" must be taken into consideration in evaluating damages, its proponents feel that the extent of the benefit must be examined only as a question of fact in each case. As Rogosheske, J. expressed it in the *Sherlock* v. *Stillwater Clinic*[62] decision:

> Ethical and religious considerations aside, it must be recognized that such costs are a direct financial injury to the parents, no different in immediate effect than the medical expenses resulting from the wrongful conception and birth of the child. Although public sentiment may recognize that to the vast majority of parents, the long-term and enduring benefits of parenthood outweigh the economic costs of rearing a healthy child, it would seem myopic to declare today that those benefits exceed the costs as a matter of law.[63]

In light of these alternatives, it becomes a relatively simple matter to categorize the judgment in *Cataford*. Notwithstanding Chief Justice Deschênes' very emphatic assertion that he wished to avoid a statement of principle regarding the costs of raising the unplanned child, the mere fact that a value of $1,000.00 was placed on the moral and financial benefits that the parents would derive from the presence of said child in the home implies an inclination towards considering moral benefit as an element of appreciation of, rather than a bar to, damages. In a society which accepts family planning and perhaps even encourages it, this is probably the more rational solution. It acknowledges that if a wrongful act deprives the parents of their freedom of choice in matters of procreation, the responsible party cannot seek sanctuary behind the inflexible notion

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[61] *Ibid.*, per Barrow C.J., at p. 128. This decision was followed by the U.S. Dist. Court (Texas) in the case of *LaPointe* v. *Shirley* (1976), 409 F. Supp. 118. See also *Hays* v. *Hall* (1972), 477 S.W. 2d. 402 (Court of Civil Appeals of Texas), (reversed and remanded by the Supreme Court of Texas (1973), 488 S.W. 2d. 412, on a question of limitations); *Rieck* v. *Medical Protective Company of Fort Wayne, Indiana, supra*, footnote 53, at pp. 244-245; *Coleman* v. *Garrison*, *supra*, footnote 53. In *Ball* v. *Mudge* (1964), 391 P. 2d. 201, the Supreme Court of the State of Washington confirmed a jury's decision that no damages were suffered as a result of the birth of a normal child.

[62] *Supra*, footnote 31.

[63] *Ibid.*, at p. 175. See also *Troppi* v. *Scarf*, *supra*, footnote 54, at pp. 518, 519; *Betancourt* v. *Gaylor*, *supra*, footnote 54, at p. 340; *Stills* v. *Gratton* (1976), 127 Cal. Rptr. 652, at p. 658 (C.A.); as well as the dissenting opinion of Cadena J., in *Terrell* v. *Garcia*, *supra*, footnote 60, especially at p. 131.

of "overriding benefit". On the other hand, this attitude allows the courts to admit another reality—that under many circumstances, the birth of a child is an occurrence not totally devoid of advantage to the parents.

It must be acknowledged that in practice, the evaluation of the moral benefits resulting from a birth can be far from simple. Personal circumstances including marital status, the number of existing children, the health, age, careers of the parents, the family's general financial picture, not to mention the aleatory nature of life itself—all these elements constitute problematical aspects which would have to be taken into consideration.

Nevertheless, a starting-point for the evaluation of benefit is suggested in *Cataford*. The Chief Justice based his opinion that a child confers a moral benefit to the parents, on the *Dame Langlois et al.* v. *Meunier* decision,[64] which granted damages to parents for the loss of their foetal offspring. Thus, subject to the particular circumstances of each fact-situation, an equitable rule of thumb would be to quantify the moral benefit in terms of an amount comparable to that which the parents would have received had the claim been one for damages caused by the loss of the foetus, rather than for "wrongful birth". Certainly there must be some equivalence involved, since to hold otherwise would be tantamount to an admission that the prejudice resulting from the death of a conceived child is greater than the moral benefit that would be conferred by its birth!

The *Cataford* judgment is a good illustration of what can occur when a novel situation (for Quebec), is placed before a dynamic jurist willing to explore the issues in depth.

From this single decision, several salient features emerge. To begin with, the legality of purely contraceptive sterilization from both a criminal and a civil law point of view is no longer in doubt. Secondly, a suit by a healthy, normal child for its so-called "wrongful life", that is for damages supposedly suffered by the child because of his or her own birth, will not be viewed with favour. On the other hand the question as to whether such damages will inure to the benefit of a child born defective is still unsettled. Thirdly, in granting a portion of the damages sought by the parents, the court acknowledges that "wrongful birth" claims are not contrary to public order. Finally, in fixing the quantum of damages, the court appears inclined to view as relevant, but not in law overriding, the benefits conferred by the birth of a normal child. In addition, the

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[64] *Supra*, footnote 42.

value of social allowances paid by the state will be taken into consideration in assessing any loss.

In 1962, Albert Mayrand asked the disquieting question, "Que vaut la vie?",[65] referring to the value of a life unlawfully cut short. *Cataford* attempts to answer this question, but from the very different perspective of a life wrongfully created. It may safely be predicted that surgeons will make mistakes, the courts will adjudicate and the debate will continue. . . .

ROBERT P. KOURI*

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CONTRACTS—DOCTRINE OF FUNDAMENTAL BREACH—EFFECT OF DISCLAIMER CLAUSES—THE BEGINNING OF THE END?—As every first year law student knows, for more than twenty-five years the doctrine of fundamental breach (or breach of a fundamental term as some prefer to call it) has been the main foil of Anglo-Canadian courts against attempts by defaulting parties to immunize themselves, partially or completely, against liability that would otherwise attach to them for breach of a contractual obligation. Although initially grounded in the commendable objective to protect a weaker party against the excesses of standard form disclaimer clauses, the doctrine rapidly grew out of control and has been applied indiscriminately by the courts without regard to its underlying purpose, the character of the parties, the subject matter of the contract, and the economic impact of disallowing disclaimer clauses altogether where a substantial breach of contract has occurred.[1]

Things have become so bad that conscientious draftsmen have despaired of being able to persuade a court that a disclaimer clause means what it purports to mean and is intended to operate precisely in those situations where the courts keep insisting the "parties" (read the aggrieved party) could not have intended it to apply. To those lawyers and their puzzled clients Griffiths J.'s judgment in *Green Ltd* v. *Cade Bros Farms*[2] will come like the first glimmer of dawn after a long and particularly painful night. This is not to suggest that the doctrine of fundamental breach has reached its quietus or that it has no legitimate function. As will be seen, the English judgment was based on provisions in the amended British

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[65] (1962), 22 R. du B. 1.

* Robert P. Kouri, of the Faculté de Droit, Université de Sherbrooke, Québec.

[1] *Cf. Woollatt Fuel and Lumber (London) Ltd* v. *Matthews Group Ltd* (1978), 83 D.L.R. (3d) 137, per Killeen Co. Ct J. at pp. 146-147: "It [the doctrine of fundamental breach] has become the darling of many textbook writers and commentators and has bewitched or bedevilled not a few judges."

[2] [1978] 1 Lloyd's L. Rep. 602.

Sale of Goods Act[3] that have no precise counterpart in the common law provinces in Canada. But even allowing for this difference, it seems reasonable to expect that in the long run the judgment will demote the importance of the doctrine on both sides of the Atlantic and encourage in its place a measured evaluation of disclaimer clauses in terms of their reasonableness having regard to all the surrounding circumstances. Such a change in emphasis will benefit all contracting parties and should be warmly welcomed.

The facts in *Green Ltd* v. *Cade Bros Farms* were fairly straight-forward. The plaintiffs were seed potato merchants. The defendants were brothers carrying on a substantial farming business in partnership. Prior to the event in question the parties had dealt with each other for a period of five or six years. The transaction that triggered the present lawsuit was an order for twenty tons of uncertified King Edward potatoes that the plaintiffs delivered to the defendants in January 1974. Because of a latent virus the potatoes turned out to be unmerchantable but the source of the unmerchantability was not finally diagnosed until October 1974. As a result the defendants claimed to have suffered a total loss of profit on the crop planted with the seed potatoes of £5,822. The purchase price of the seed potatoes was £28 per ton, or £560 altogether. It will be seen therefore that the defendants' claim amounted to just over ten times the price due to the plaintiffs. The plaintiffs sued for the price and credit charges owing on this as well as earlier consignments; the defendants counterclaimed for the amount of their loss as set out above.

The plaintiffs did not deny the unmerchantability of the potatoes but they relied on two defences based on exculpatory provisions in the contract of sale. The first was that the defendants had failed to give notice of their claim within three days of receipt of the potatoes. The second was that the contract limited the liability of the plaintiffs to the price of the potatoes. Both these defences were based on clause 5 of the conditions of sale, which read in part as follows:[4]

> If the Purchaser considers he has grounds for rejection of the Seed notwithstanding that the goods have passed in transit from the point of loading, he shall, if requested by the Seller, clear the goods and take all necessary measures to mitigate damage or loss without prejudice to the claim of either party. Time being the essence of this Contract, however, notification of rejection, claim or complaint must be made to the Seller, giving a statement of the grounds for such rejection, claim or complaint within three days (within ten

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[3] Sale of Goods Act 1893, 56 & 57 Vict., c. 71. See s. 55(4) and (5), added by the Supply of Goods (Implied Terms) Act 1973, c. 55. The text of these provisions is reproduced below. They have now been repealed by the Unfair Contract Terms Act 1977, c. 50, Sched. 4, and replaced by the comparable provisions in s. 6 and Sched. II. of the latter Act.

[4] *Supra*, footnote 2, at p. 607.

> days in the case of rejection, claim or complaint specifically in respect of Skinspot, Gangrene or Dry Rot) after the arrival of the Seed at its destination. The place of rejection is the place of delivery in all cases. Notwithstanding the foregoing it shall not be competent to the Purchaser to reject, claim or complain for any reason unless the Seed Potatoes shall have been properly stored during the period after their arrival at their destination. The Seller shall replace any Seed properly rejected by the Purchaser unless otherwise agreed. It is specifically provided and agreed that compensation and damages payable under any claim or claims arising out of this contract under whatsoever pretext shall not under any circumstances amount in aggregate to more than the contract price of the potatoes forming the subject of the claim or claims.

The plaintiffs also relied on clause 3(a) of the conditions which was to the following effect:[5]

> Seed potatoes sometimes develop diseases after delivery. It being impossible to ascertain the presence of such diseases by the exercise of reasonable skill and judgment the Seller cannot accept any responsibility should any disease develop after delivery other than as provided under clause 5.

The evidence was that these conditions were based upon a standard form of conditions produced by the National Association of Seed Potatoes Merchants that had been in use for over twenty years and had evolved over a much longer period as the result both of trade practice and discussions between the Association and the National Farmers Union. Nevertheless, the defendants argued that the conditions relied upon should not, as a matter of construction, be applied to the facts of the present case or, in the alternative, that it would not be fair or reasonable to allow the plaintiff to rely on clause 5 having regard to the provisions of section 55(4) and (5) of the Sale of Goods Act as amended by section 4 of the Supply of Goods (Implied Terms) Act 1973. Griffiths J. disallowed the plaintiffs' first defence (that is, the three day complaint period) but upheld the second (that is, the limitation of liability).

Section 55 of the Sale of Goods Act.

The amendments to section 55 of the Sale of Goods Act were inspired by the recommendations of the English and Scottish Law Commissions published in 1969,[6] and the relevant parts thereof provided as follows before their subsequent repeal and substantial re-enactment in the Unfair Contract Terms Act 1977:

> 55(4). In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 13, 14 or 15 of this Act shall be void in the case of a consumer sale and shall, in any other case, not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term.
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> (5). In determining for the purposes of subsection (4) above whether or not

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[5] *Ibid.*, at p. 608.

[6] Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act 1893, Law Com. No. 24, Scot. Law Com. No. 12.

reliance on any such term would be fair or reasonable regard shall be had to all the circumstances of the case and in particular to the following matters

(a) the strength of the bargaining positions of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply;

(b) whether the buyer received an inducement to agree to the term or in accepting it had an opportunity of buying the goods or suitable alternatives without it from any source of supply;

(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) where the term exempts from all or any of the provisions of section 13, 14 or 15 of this Act if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed, or adapted to the special order of the buyer.

Sections 13, 14 and 15 of the British Sale of Goods Act deal respectively with the implied conditions of description (section 13), merchantability and fitness (section 14) and the implied conditions in a sale by sample (section 15). Section 55(9) of the Sale of Goods Act extends the meaning of a term excluding the provisions of any section of the Act to include a provision limiting or excluding liability for breach of such an implied term.

Griffiths J. held[7] that it was unreasonable for the plaintiffs to rely on the first part of clause 5 because the defendants could not be expected to complain within three days of delivery of a latent defect of whose presence they did not become aware until much later. The result is justifiable though the reasoning is difficult to reconcile with the court's treatment of the plaintiffs' second defence. We shall return to this difficulty later. It would have been better, in my view, if the court had found, as a matter of construction, that this part of clause 5 was not intended to apply to latent defects, particularly in view of the evidence that the perishable nature of potatoes made it important to give prompt notice of a complaint. This rationale could hardly apply to latent defects.

The importance of Griffiths J.'s judgment resides in his treatment of the balance of clause 5. It fell into two parts:

(a) *The argument of unreasonableness*. In the learned judge's view, it was not unreasonable to allow the plaintiff to rely on clause 5 and he listed seven factors in the seller's favour.[8] These were that no moral blame attached to either party; that neither of them knew or could be expected to know that the potatoes were infected; that the

[7] *Supra*, footnote 2, at pp. 607-608.

[8] *Ibid.*, at p. 608.

risk was one that the defendants could largely have avoided by buying certified seed, but that they chose not to do so; that the contract in clear language placed the risk of loss on the defendants insofar as it exceeded the contract price; that the contract had been in use for many years with the approval of the negotiating bodies acting on behalf of both seed potato merchants and farmers; and, finally, that the parties were of equal bargaining strengths and the buyer received no inducement to accept the restrictive terms of clause 5.

It will be observed that all these factors were responsive to the criteria of unconscionability listed in section 55 of the British Act. Their cumulative impact was of course very powerful and shows the superiority of a reasoned analysis of the ingredients of unconscionability to the crude approach of the traditional fundamental breach doctrine. So far as one can tell from the judgment, the defendants did not challenge the judge's findings of fact. It also appears that the question of insurability against the loss that occurred was not raised and that it was not contended that one party was in a better position to insure against it than the other.

(b) *The argument based on fundamental breach.* From a Canadian point of view, this aspect of Griffiths J.'s judgment is as important as his disposition of the defence based on section 55. As is well known, prior to the decision of the House of Lords in *Suisse Atlantique*[9] there was a line of authority, beginning with Denning L.J.'s judgment in *Karsales (Harrow) Ltd* v. *Wallis*,[10] which held that no disclaimer clause, however sweeping in its terms, could relieve a contracting party from discharging his fundamental obligations. The House of Lords rejected the existence of such a substantive principle of law and held that the meaning of a disclaimer clause depends on its true construction. That and nothing more. Subsequent courts, including numerous Canadian decisions,[11] paid lip service to the House of Lords' constructional rule but, with surprising ease, almost unfailingly managed to find that the parties could not have intended the clause to apply to a fundamental breach. *Suisse Atlantique* changed the form of the judicial reaction to disclaimer clauses but not its substance.

Refreshingly, Griffiths J. genuinely attempted to construe, and not misconstrue, clause 5 and therefore experienced no difficulty in finding that it applied to the facts that occurred. To quote him:[12] "In

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[9] [1967] 1 A.C. 361.

[10] [1956] 1 W.L.R. 936.

[11] See *e.g.*, *Canso Chemicals Ltd* v. *Canadian Westinghouse Ltd* (1975), 54 D.L.R. (3d) 517 (N.S.C.A.); *R.G. McLean Ltd* v. *Can. Vickers Ltd*, [1971] 1 O.R. 207, 15 D.L.R. (3d) 15; *Western Tractor* v. *Dyck* (1970), 7 D.L.R. (3d) 535 (Sask. C.A.); *Lightburn* v. *Belmont Sales Ltd* (1969), 6 D.L.R. (3d) 692 (B.C.).

[12] *Supra*, footnote 2, at p. 609.

this case both parties to the contract must have realized that there was a chance that the potato merchants would be guilty of this very breach, namely that they would innocently sell infected potatoes. That which they must have anticipated might happen, has happened; why then should the Court say that a term in the contract that limits liability in such readily foreseeable circumstances is to be of no effect? In my view the limitation of liability in cl. 5 is clearly intended to cover the circumstances of the present case, and the plaintiffs are entitled to rely upon it."

In approaching the constructional task Griffiths J. purported to apply Sir John Pennycuick's summary in *Wathe* v. *Austin*[13] of the effect of the recent case law. It may be questioned whether he did so in fact since, contrary to the established bias against disclaimer clauses, he brought few preconceptions to bear on the interpretation of clause 5. He was able to free himself from so much judicial freight because, as he himself explained with admirable candour,[14]

> . . . it appears to me that now Parliament has given the Judge a discretion to declare such a clause unenforceable if he thinks that it is not fair and reasonable, there will in the future be little need to resort to the doctrine of the fundamental breach in this type of action, and that the Court should not strain to give an artificially restrictive meaning to an exclustion clause when it has the other remedy close at hand to do justice between the parties.

One does not need prophetic insights to predict the rapid decline of the fundamental breach doctrine if subsequent courts follow Griffiths J.'s approach.

Some Difficulties.

This is not to suggest that his judgment is free of difficulty. Two such difficulties warrant special mention. The first is the suitability of Griffiths J.'s approach in a case where the court is not explicitly authorized to apply a test of fairness. Since the passage of the Unfair Contract Terms Act 1977[15] such occasions will be much less frequent in the United Kingdom since section 3 of the Act now extends the court's policing powers, *inter alia*, to any contract involving written standard terms of business that purport to exclude or restrict any liability for breach of contract that would otherwise attach to the party relying on them. However, the question remains very pertinent in Canada. This issue is discussed below.

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[13] [1976] 1 Lloyd's Law Rep. 14, at p. 25: "The current of authority has now set, . . . in favour of the view that where a contract is affirmed after fundamental breach an exemption clause is treated as inapplicable to liability resulting from that breach, not upon a substantive principle of law, but upon construction, the clause being construed in the absence of some plain indication of a different intention, as by implication inapplicable to such liability."

[14] *Supra*, footnote 2, at p. 609.

[15] *Supra*, footnote 3.

The second difficulty is that Griffiths J. reached conflicting results in interpreting the two parts of clause 5. Since he found that there was no overreaching by the plaintiff and that the conditions of sale were the product of consultation between the two trade associations, it may well be asked how one part of clause 5 could be stigmatized as unreasonable and not the other part? The learned judge did not himself advert to the apparent inconsistency. My preferred solution would be the constructional one, that is, that the part of the clause requiring notification of claims within three days should not, in the absence of clear language to the contrary, be deemed to apply to latent defects. An alternative possibility would be to argue that section 55(5) does not limit the court, in its assessment of the fairness of an exculpatory clause, to the criteria listed in clauses (a) to (e). In the present case therefore the court was free to find this part of clause 5 unreasonable even though it appeared to have won the approval of the parties' own trade associations. So far as one can tell, no evidence was offered at the trial to explain why they should have wished clause 5 to apply to latent defects and it seems inconceivable that the National Farmers Union would have assented to such a construction had they thought about it.

A number of other aspects of the judgment in *Green Ltd* v. *Cade Bros Farms* deserve to be noted. Clause 5 did not deprive the defendants of all remedy; it merely confined a damage claim to the amount of the price of the goods. Would it have made any difference if *all* damage claims had been disallowed by the clause? Would the court have been as ready to apply a natural interpretation to clause 5 if the virus had spread from the potatoes to the defendants' cattle (if they had any) or the cattle of sub-buyers to whom (let us assume) the defendant had resold some of the potatoes? Again, the relevance, availability, and cost of insurance to either or both parties against the risk of virus infection or other biological diseases is not discussed although it was surely a very appropriate factor to be considered by the court in assessing the reasonableness of the allocation of risk.

Canadian Impact.

In assessing the possible impact of Griffiths J.'s decision in the Canadian context a distinction must be drawn between three types of disclaimer clause:

(a) disclaimer clauses that are expressly avoided by legislation;

(b) disclaimer clauses that are regulated but not avoided by legislation; and

(c) disclaimer clauses that are neither avoided nor regulated by legislation.

Provisions of the first type are to be found in the Ontario Consumer

Protection Act[16] and the legislation of several other provinces[17] nullifying disclaimer clauses that purport to exclude the statutory implied warranties and conditions in consumer sales. *Cade Bros Farms* will be largely, but not completely, inapplicable in such cases. It will retain a marginal relevance because the statutory provisions are not always broad enough to catch all forms of exculpatory clause.[18]

Provisions of the second type are exemplified by the unfair trade practices legislation that now obtains in Ontario, Alberta and British Columbia.[19] Two points need to be emphasized. The first is that the legislation is not confined, or even particularly directed to, the regulation of disclaimer clauses but encompasses unconscionable acts or practices generally by a supplier in relation to a consumer transaction (British Columbia)[20] or an unconscionable "consumer representation" made in respect of a particular transaction (Ontario).[21] It seems reasonably clear however that the provisions are broad enough to authorize the policing of disclaimer clauses.[22] The second point is that the criteria of unconscionability in the provincial Acts differ substantially from those appearing in the (now repealed) provisions in section 55 of the British Sale of Goods Act, a difference that is due to the much broader reach of the provincial Acts and their concentration on consumer transactions. Nevertheless, it is to he hoped that Griffiths J.'s general approach will also find a congenial home in interpreting the status of the doctrine of fundamental breach in this particular setting. That is to say, if the disclaimer clause in question does not offend the test of unfairness in the legislation the court should be slow to invoke the doctrine of fundamental breach to do indirectly what it has held it cannot justify doing directly.

As noted, the trade practices legislation is also confined to consumer transactions and will not affect disclaimer clauses of the third type, that is, those used in non-consumer transactions and

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[16] R.S.O., 1970, c. 82, as am., s. 44a.

[17] *E.g.*, B.C., Saskatchewan, Manitoba, and Nova Scotia.

[18] In the case of Ontario the difficulty arises because s. 44a of the Consumer Protection Act, *supra*, footnote 16, only avoids attempted exclusion of the implied warranties and conditions and does not deal with contractual restrictions of the remedies otherwise available for breach of the implied terms.

[19] See S.O., 1974, c. 131; S.A., 1975, c. 33; S.B.C., 1974, c. 96, as am.

[20] *Ibid.*, s. 3(1).

[21] *Ibid.*, s. 2(b). "Consumer representation" is defined in s. 1(c).

[22] In considering whether or not the "consumer representation" is unconscionable the Ontario Act, s. 2(b)(vi) empowers the court to consider, *inter alia*, whether "the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable". S. 3(2)(e) of the B.C. Act is substantially to the same effect.

therefore not subject to specific statutory control. The critical question is whether *Cade Bros Farms* will affect future judicial reaction in this type of case. The courts would appear to have three principal alternatives. The first is to ignore Griffiths J.'s decision as irrelevant where a disclaimer clause is not regulated by legislation. The doctrine of fundamental breach would therefore continue to be applied as before. In my view, this would be an unimaginative approach. It suggests that the doctrine will be applied differentially depending on whether or not the legislature has supplied the courts with more explicit policing tools.

The second alternative would be to follow what might be construed as Griffiths J.'s lead in construing the disclaimer clause naturally even though it may lead to unfair results. This solution would also not be satisfactory. It would be a case of throwing out the baby with the bath water. The initial impulse that prompted the development of the doctrine of fundamental breach was very sound insofar as it was designed to prevent overreaching of a weaker party by a stronger party. The impulse became distorted when subsequent courts confused cause and effect and treated the doctrine, albeit covertly, as expressing a conclusive rule of public policy regardless of the circumstances of the particular case. What is needed therefore is a return to a regime of natural construction coupled with an explicit test of unfairness tailored to meet the facts of particular cases. This is the third alternative that is open to the courts.

Its superiority to the existing doctrine of fundamental breach can be demonstrated in the context of two well-known decisions. In *Canso Chemicals Ltd* v. *Canadian Westinghouse Ltd*,[23] Westinghouse supplied some defective electrical equipment to the plaintiff. The defects were rectified in due course but not before the plaintiffs incurred substantial losses which they sought to recover from the defendants. The contract expressly excluded liability for consequential damages and limited the defendant's obligation to repair or replacement of any defective parts. A majority of the Nova Scotia Court of Appeal held, in the face of a strong dissent by MacKeigan C.J.N.S., that the defendant had committed a fundamental breach of its contractual obligations and that the disclaimer clause did not apply in such a case. Leaving aside the acceptability of the court's constructional technique and its interpretation of the meaning of fundamental breach, the conclusion is difficult to justify on its merits. The disclaimer clause was written in very clear language and appeared to be directed precisely to the facts that occurred. There was nothing inherently objectionable about the defendant wishing to avoid the risk of being held responsible for consequential damages.

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[23] *Supra*, footnote 11.

There was no imposition on the plaintiff. The parties were bargaining from positions of strength and both presumably had the benefit of legal advice. As Chief Justice MacKeigan observed in the course of his dissent,[24] quoting in part from *Suisse Atlantique*,[25] "this is not the typical case of conditions in fine print on the back of a ticket or bill of lading where '. . . the customer has no time to read them, and if he did read them he would probably not understand them . . . '. It is rather a case 'where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason' ". Unfortunately this critical distinction was overlooked in the majority judgment.

The second case is *Lightburn* v. *Belmont Sales Ltd.*[26] The plaintiff purchased a new Cortina motor vehicle from the defendants. The vehicle broke down repeatedly and was returned to the defendants no less than seventeen times without the defendants being able to determine the cause of the trouble. Not surprisingly the plaintiff rescinded the contract and sued for the return of his payments. The defendants relied on an exculpatory clause which excluded the statutory warranties and conditions in the British Columbia Sale of Goods Act and restricted the defendants' liability to replacing or otherwise making good any defective parts. Ruttan J. of the British Columbia Supreme Court found that the defendants had committed a fundamental breach of the contract of sale and that, as a matter of construction, the disclaimer clause did not apply to the present facts.[27]

The decision was plainly just but not necessarily for the reasons given by the learned judge. It was just because it would have been unfair to bind the plaintiff to a disclaimer clause that was unilaterally imposed on him by an overwhelmingly stronger party and that, if read literally, denied him the right to reject a vehicle that suffered from incurable defects. The hardship would have been no less if the disclaimer had appeared in red ink, in bold type, and in still more explicit language. It will be seen therefore that the basic issue in both this case and in *Canso* was not so much one of determining the meaning of the disclaimer clause (although of course it is not an irrelevant question) as in deciding whether it would be fair to uphold it. In *Canso* there was no overreaching and no sufficient reason why the defence should be disallowed. In *Belmont* literal application of the disclaimer clause would have led to an intolerable result and the court rightly saw its obligation to protect the weaker party.

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[24] *Ibid.*, at p. 523.

[25] *Supra*, footnote 9, at p. 406 per Lord Reid.

[26] *Supra*, footnote 11.

[27] Since *Lightburn* the B.C. Sale of Goods Act has been amended to avoid the use of disclaimer clauses in consumer sales. See S.B.C., 1971, c. 52.

Although it seems to me then that the third alternative that I have suggested is open to the courts is preferable to continued reliance on the fundamental breach doctrine as the principal judicial response to disclaimer clauses, some lawyers are likely to reject it on the ground that it involves a usurpation of power that the legislature has so far not seen fit to confer on the courts. It is to be hoped that this excessive cautiousness will not prevail. There is no need to retrace the history of the doctrine of unconscionability since this task has been ably performed by others.[28] Suffice it to say that the doctrine has long judicial roots and is an integral part of any civilized legal system that imposes conditions on the availability of the coercive power of the state for the enforcement of bargains. During the second half of the nineteenth century the doctrine suffered a temporary eclipse but it began to regain respectability when it was seen that the assumptions of nineteenth century classical contract law did not accord with the realities of modern market place conditions. The doctrine of fundamental breach is one form of reaction to the excesses of standard form contracts but more explicit reactions to unilaterally imposed terms are to be found in the seminal judgment of the New Jersey Supreme Court in *Henningsen* v. *Bloomfield Motors*[29] and in such recent Anglo-Canadian judgments as *Clifford Davis Ltd* v. *W.E.A. Records*,[30] *Instone* v. *A. Schroeder Music Pub. Co. Ltd*,[31] and *Tilden Rent-A-Car* v. *Clendenning*.[32] In the United States of America the explicit approach found its vindication in the celebrated section 2-302 of the Uniform Commercial Code and subsidiary provisions in article 2. It is not therefore a case of the courts and the legislature moving in opposite directions but of the one reinforcing the other; and to read negative inferences from the restricted scope of the provincial trade practices and consumer protection legislation is, in my view, to misconstrue the legislative intent.

Apart from the aforegoing reasons there are two others why a rule of natural construction coupled with an explicit policing power should be welcomed by lawyers and courts alike. The first is that it is a more flexible approach. It enables the courts to distinguish between consumer and non-consumer transactions and between contracts in which standard form conditions are being relied upon and those in which the terms were settled as the result of individual bargaining. The other reason is that the *Cade Bros Farms* approach encourages the courts to consider the economic rationales of

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[28] See *e.g.*, Waddams, (1976), 39 Mod. L. Rev. 369.

[29] (1960), 161 A. 2d 69.

[30] [1975] 1 W.L.R. 61.

[31] [1974] 1 W.L.R. 1308.

[32] (1978), 83 D.L.R. (3d) 400 (Ont. C.A.).

disclaimer clauses as well as other relevant factors. This is a vital exercise that the courts have so far studiously avoided. For too long we have looked upon the damage rules in *Hadley* v. *Baxendale*[33] as enshrining an immutable natural law. The regularity with which modern sales contracts restrict or exclude the normal measure of damage rule surely indicates that they do not accord with the typical seller's perception of the proper way to allocate risks of loss arising from the supply of defective goods. Judicial modification of the rule in *Hadley* v. *Baxendale* is not likely to occur in the foreseeable future but, even without it, a supplier is surely entitled to more sympathetic understanding than he has received up to now of the economic forces that prompt him to seek protection against a rule that he regards as imposing an unreasonable burden on *his* interests.

Some commentators, including not a few judges,[34] have based their opposition to a judicial doctrine of unconscionability on the grounds that the courts are not equipped to decide questions of public policy in the contract area or at least not in this branch of contract law. They think it is a job for the legislature. While not wishing to minimize the difficulties, I believe both limbs of the argument are mistaken. The courts are no worse—even if no better—equipped to decide the fairness of disclaimer clauses than they are to decide many other difficult questions involving a discretionary element that are put before them every day. It does not appear that the American courts have experienced undue difficulties in exercising their powers to police disclaimer clauses under article 2 of the Code and, if Griffiths J.'s judgment in the present case is any guide, there is no reason to believe that the English courts will find themselves unequal to the task delegated to them under the Unfair Contract Terms Act.[35]

If it is a mistake to ascribe oracular powers to the courts, it is equally a mistake to ascribe them to the legislatures. With comparatively few exceptions, our federal and provincial parliaments have shown little disposition to regulate the minutiae of the many different types of contract that obtain in the market place and even if they had the will they could not begin to afford the time. Very wisely therefore they have relegated the task to the courts or, in some cases, to old or new administrative agencies, as is demonstrated by such legislation as the Unfair Contract Terms Act in the United Kingdom, the unfair trade practices legislation in Canada, and section 2-302 of the Uniform Commercial Code in the United States. No doubt a greater degree of individualization and expertise could be

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[33] (1854), 9 Ex. 341.

[34] See, for example, Lord Reid's judgment in *Suisse Atlantique*, *supra*, footnote 9, and the judgment of Lacourcière J.A. in *Clendenning*, *supra*, footnote 32.

[35] *Supra*, footnote 3.

obtained by the use of more administrative agencies, or by giving the existing ones more resources, but few would seriously suggest that there are ever likely to be enough of them wholly to replace the need for a judicial role. As recent events have made all too plain there is growing resistance to overregulation of the economy. Rather the pressure is to reduce the number and powers of existing regulatory agencies. This suggests an enlarged, not a reduced role, for the courts in policing the fairness of disclaimer clauses and the question will be not whether the courts should be doing it but whether they should be doing it implicitly or explicitly. And this, after all, is what *Green Ltd* v. *Cade Bros Farms* is all about.

JACOB S. ZIEGEL*

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CARRIAGE OF GOODS—NEGLIGENCE—BAILMENT—EXCLUSION OF LIABILITY—WHEN IS A CARRIER NOT A CARRIER?—The decision of the Appeal Division of the Nova Scotia Supreme Court in *McKinnon* v. *Acadian Lines Ltd*[1] raises a number of interesting issues and provokes a significant comparison with a more recent decision of the Australian High Court.[2] Two trunks of personal effects were despatched by the respondent, Miss McKinnon, from Kenora, Ontario to Halifax, Nova Scotia. The principal carrier (with whom the contract of carriage was made) delegated the final stage of the journey to the appellants, who were common carriers. The trunks were taken to the appellants' terminal in Halifax and (in accordance with Miss McKinnon's earlier instructions) were held to await collection by her appointee. After some two to three weeks, however, the appellants complied with a request by another customer (one Harnish) to deliver the trunks to him. Harnish misappropriated them and Miss McKinnon sued Acadian Lines for their loss.

Acadian appeared to admit liability[3] but contended that their damages were limited to the amount specified in section 96 of the Regulations made pursuant to the (Nova Scotia) Motor Carriers Act, 1967,[4] or to the amount specified in the principal carriers' receipt (the "bus-bill"). Cooper J.A., dismissed these contentions on the following grounds. First, he conceded that the appellants were no longer, at the time of misdelivery, subject to the strict liability of a

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* Jacob S. Ziegel, of the Faculty of Law, University of Toronto.

[1] (1978), 81 D.L.R. (3d) 480.

[2] *Port Jackson Stevedoring Pty Ltd* v. *Salmond & Spraggon (Australia) Pty Ltd* (1978), 18 A.L.R. 333.

[3] *Supra*, footnote 1, at p. 484.

[4] R.S.N.S., 1967, c. 190.

common carrier in relation to the trunks. In so holding, he adopted statements in the judgment of Cockburn C.J., in *Chapman* v. *Great Western Railway Co.*[5] to the effect that a common carrier is relieved of his traditional responsibility once the goods have arrived at his terminal in the place of destination and a reasonable period for collection by the consignee has elapsed. From that time onwards, he holds the goods as a mere bailee[6] and is answerable only for breach of the bailee's duty of reasonable care. In the present case, Miss McKinnon had arrived in Halifax some three weeks before the trunks, and had delayed for some two to three weeks after their arrival before they were misdelivered to Harnish. They had accordingly lain in Acadian's baggage room "for quite an extended period"[7] and Acadian were no longer insurers of them when they were stolen.

Nevertheless, the appellants had clearly been negligent and were thus answerable unless the relevant provisions in the bus-bill or the statutory regulations exempted them.[8] The court discerned three reasons why such protection should be denied. First, it held that both the bus-bill and the regulations were limited in their effect to obligations incurred during the period of carriage and ceased to apply once the character of the appellants had changed from that of common carriers to that of ordinary bailees. It is difficult to comment upon the validity of this conclusion as an exercise in construction, since the statutory regulations were not examined in detail and are not cited in the report, but the words of the bus-bill—"Liability limited to $50 unless greater value declared and excess charge paid"—while clearly suggesting a less than comprehensive exemption, do not readily lend themselves to the limitation imposed by the court. The decision is, however, remarkably similar on this point to that of the Australian High Court in *Port Jackson Stevedoring Pty Ltd* v. *Salmond & Spraggon (Australia) Pty Ltd.*[9] In that case, stevedores, who had negligently misdelivered goods to an unauthorised collector, sought to avoid liability in an action by the consignees by relying upon protective

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[5] (1880), 5 Q.B.D. 278, at pp.281-282. The period will not begin to run (if the consignee cannot be expected to know the approximate date of arrival) until the carrier has notified him to that effect: *ibid.*

[6] In most cases, at least, he will be a bailee for reward: see *Heugh* v. *L.N.W. Ry Co.* (1870), L.R.J. Ex. 51, at p. 56.

[7] *Supra*, footnote 1, at p. 484.

[8] Cooper J.A., assumed without deciding that the regulations were *intra vires* and that they might apply to a contract for interprovincial transport not made in Nova Scotia: *ibid*, at p. 482. *Cf.* on the latter point *Allan H. Panozza Ltd* v. *Allied Interstate (Qld) Pty Ltd*, [1976] 2 N.S.W.L.R. 192.

[9] *Supra*, footnote 2.

clauses within the bill of lading. The majority[10] held that, irrespective of whether these provisions were capable of applying in principle to the liability of an ostensible stranger to the bill, the language of the clauses clearly limited them to occasions upon which the stevedores were discharging, as delegates of the carriers, an obligation originally undertaken by the carriers themselves. The carrier's responsibility had determined upon delivery of the goods over the ship's rail while the stevedores' responsibility was a subsequent, independent responsibility as non-contractual bailees. Therefore, the clauses were incompetent to protect them.

Whereas, however, an equation between the two decisions is superficially attractive, two discordant elements must be noted. In the Australian case, Barwick C.J., delivered a strong dissent, arguing that upon a realistic and intelligent construction the clauses conveyed a blanket protection. Moreover, the Australian court examined the relevant clauses in detail and the majority indicated the specific terminology which supported their conclusion. No such exactitude emerges from the Canadian authority, either upon this point or upon two secondary grounds for refusing to uphold the limitation of damages.

The second ground of refusal centred upon that perennial problem, the exclusion of liability for negligence. The court dealt with this question in less than half a page,[11] citing *Halsbury*[12] and *Rutter* v. *Palmer*[13] and evidently concluding that the clauses were neither wide nor clear enough to protect the appellants from the consequences of the breach of their duty of care. No observation was made upon the exact terminology which may suffice to achieve such protection, nor upon the efficacy of the formulae "whatsoever" or "howsoever caused" which had, until recently, been considered adequate under English law to exclude liability for negligence.[14] Moreover, no mention was made of the statement by Scrutton L.J., in the decision cited, that where the sole ground of liability for which the bailee might be answerable is negligence, appropriately-worded clauses might "more readily" operate to protect him.[15] This is surprising because Cooper J.A., had already observed that the appellants' liability lay solely in negligence;[16] an observation which

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[10] Jacobs, Mason and Stephen JJ.

[11] *Supra*, footnote 1, at p. 484.

[12] Laws of England (4th ed. 1974), Vol. 5, para. 400.

[13] [1922] 2 K.B. 87.

[14] *E.g. Gillespie Bros Ltd* v. *Roy Bowles Transport Ltd*, [1973] Q.B. 400; but *cf.* now *Smith* v. *South Wales Switchgear Ltd*, [1978] 1 All E.R. 18 (H.L.Sc.).

[15] *Rutter* v. *Palmer*, *supra*, footnote 13, at p. 92.

[16] *Supra*, footnote 1, at p. 482, citing *Morris* v. *C.W. Martin & Sons Ltd*, [1966] 1 Q.B. 716 and *Scott Maritimes Pulp Ltd* v. *B.F. Goodrich Canada Ltd* (1977), 72 D.L.R. (3d) 680 (N.S.S.C.A.D.).

itself is questionable if liability for misdelivery by an orthodox (as opposed to an involuntary) bailee is normally independent of the failure to exercise reasonable care.[17]

Finally, the court held the clauses inapplicable on the ground that the appellants' unauthorised delivery to Harnish constituted a fundamental breach.[18] Again, this conclusion was reached without examination of the relevant wording and appears to involve the application of a substantive doctrine of fundamental breach; a doctrine which can perhaps be said, albeit perilously, to survive in Canada.[19] Although in this respect both facts and conclusion are markedly similar to those in *Alexander* v. *Railway Executive*,[20] it must surely be unsatisfactory to declare an exclusion clause inoperative without at least some examination of what it purports to do. More recent authority than *Alexander's* case has (both in England and Australia) displayed a more interpretative and analytic approach to cases of misdelivery.[21] In *Port Jackson Stevedoring Pty Ltd* v. *Salmond & Spraggon (Australia) Pty Ltd*[22] the respondents' goods were stolen in similar circumstances by a thief who had been allowed to remove them without presentation of the necessary shipping documents. The New South Wales Court of Appeal[23] refused to hold the protective clauses in the bill of lading inapplicable by virtue of the appellant bailees' fundamental breach because the clauses were, upon their proper construction, capable of applying to such a breach. Glass J., cited Australian authority[24] and dicta of the House of Lords in *Suisse Atlantique*[25] and concluded that:[26]

> There is therefore no rule of law which stipulates that a party in fundamental

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[17] *Cf.* the separate bases of liability set down by counsel in *Gillespie Bros Ltd* v. *Roy Bowles Transport Ltd, supra*, footnote 14.

[18] *Supra*, footnote 1, at pp. 484-485.

[19] Its survival was left open by the Ontario Court of Appeal in *Heffron* v. *Imperial Parking Co. Ltd* (1974), 46 D.L.R. (3d) 642, although a statement by Estey J.A., at p. 651 was evidently taken (if so, it is submitted wrongly) as authority for the doctrine by Lord Denning M.R. in *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd*, [1978] 1 Q.B. 69.

[20] [1951] 2 K.B. 882.

[21] *Cf. Hollins* v. *J. Davy Ltd*, [1963] 1 Q.B. 844; *Sydney City Council* v. *West* (1965), 114 C.L.R. 481; *Metrotex Pty Ltd* v. *Freight Investments Pty Ltd*, [1969] V.R. 9.

[22] *Supra*, footnote 2.

[23] [1977] 1 Lloyd's Rep. 445.

[24] *Thomas National Transport (Melbourne) Pty Ltd* v. *May & Baker Australia Pty Ltd* (1966), 115 C.L.R. 353; *H. & E. Van der Sterren* v. *Cibernetic (Holdings) Pty Ltd* (1970), 44 A.L.J.R. 157.

[25] [1967] 1 A.C. 361.

[26] *Supra*, footnote 23, at pp. 450-451. See also Hutley J., at pp. 452-453.

> breach forfeits the protection of all exception clauses. The protection will only be lost if the fundamental breach is of such a character if the application to it of a given exception clause would defeat the whole purpose of the contract. I am not persuaded that the contractual substratum of the contract of sea carriage would be destroyed if liability for the wrongful delivery of goods to a person who had no documents were to become unenforceable after the lapse of 12 months.

On appeal to the High Court of Australia, Barwick C.J., agreed that the proper approach was to adopt a careful construction of the provisions in question to ascertain whether they encompassed misdelivery. He held that, upon such construction, the appellants were exonerated.[27] No dissent was expressed upon this point by the other members of the court. It is submitted that, although it will often be found that contractual exclusions do not extend to misdelivery, it is only after careful construction that their inefficacy in the face of such a breach can be legitimately declared.

It is here (with a further conclusion on damages and a finding that a clause requiring the specific declaration of value of certain goods did not affect the appellant)[28] that the decision of the Nova Scotian court appears to end. It is therefore an authority more remarkable for the nature of the questions it raises than for the conclusions it reaches or for the route by which it reaches them. Indeed, it may be ventured that it is hardly authority for anything other than the question of damages and the identification of a carrier's transition from insurer to mere bailee. One further tantalising question concerns the availability of the contractual clause (contained in the "bus-bill") in favour of the respondents. Although the facts are not clear from the report, it seems that the respondents were sub-bailees from the principal carriers who had secured Miss McKinnon's agreement to the clause. Does the decision therefore represent an instance of the special principle of a sub-bailee's protection enounced by Lord Denning M.R., in *Morris* v. *C.W. Martin & Sons Ltd*,[29] rejected (unconvincingly) by Nettlefold J., in *Philip Morris (Australia) Pty Ltd* v. *Transport Commission*[30] and apparently overlooked by counsel in *Port Jackson*?[31] It may be that, because Miss McKinnon was expected to

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[27] *Supra*, footnote 2, at pp. 347-348.

[28] *Supra*, footnote 1, at pp. 485-487.

[29] [1966] 1 Q.B. 716, at pp. 729-730: *Gillespie Bros Ltd* v. *Roy Bowles Transport Ltd*, [1973] Q.B. 400, at p. 412; Palmer, *Bailment* (1979), pp. 1000 *et seq*. *Cf*. *Johnson Matthey & Co. Ltd* v. *Constantine Terminals Ltd*, [1976] 2 Lloyd's Rep. 215.

[30] [1975] Tas. S.R. 128.

[31] *Supra*, footnote 2. Likewise, *The Suleyman Stalskiy*, [1976] 2 Lloyd's Rep. 609.

pay the respondents upon delivery, there was a distinct contractual immunity impliedly incorporating the clause in the bus-bill.[32] Again, however, the decision is inscrutable on this point.

N. E. PALMER*

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CRIMINAL LAW—HOMICIDE—CONSTRUCTIVE MURDER—CANADIAN CRIMINAL CODE—SECTION 212(c)—HISTORICAL ORIGINS OF "UNLAWFUL OBJECT".—In Canada, the prosecution is fortunate in murder cases because it does not have to specify the particular provision of the Criminal Code[1] under which it hopes to prove the guilt of the accused. All that is required in the formal charge is a reference to that nebulous section 205, a vague, declaratory legislative provision which defines nothing in particular, describes no specific ingredients of any offence and prescribes no penalties. In summary, section 205 tells us that homicide is culpable or not culpable; culpable homicide is murder, manslaughter or infanticide.

In most murder cases, the Crown, and the trial judge in due course, had relied on section 212(a) and (b) and, until quite recently, section 212(c) was ignored. This situation has changed and that last sub-section has become quite important, particularly in cases heard by the Ontario Court of Appeal.

Sections 212 and 213 of the Criminal Code provide detailed descriptions of murder. The latter section gives a very broad definition of what used to be called felony-murder (although our Code has never used the distinction between felony and misdemeanour). Murder in section 213 is defined as a death caused while committing or attempting to commit one of a catalogue of crimes most of which are violent in nature (or at least potentially violent).

Section 212(a) defines classic, subjective murder which is committed by persons who cause death when they mean to cause death or mean to cause bodily harm that they know is likely to cause death and are reckless whether death ensues or not.

Section 212(b) adds nothing new except that it introduces the concept of transferred intent.

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[32] *Cf. H. M. Humphrey Ltd* v. *Baxter Hoare & Co. Ltd* (1933), 149 L.T. 603; *Britain & Overseas Trading (Bristles) Ltd* v. *Brook's Wharf & Bull Wharf Ltd*, [1967] 2 Lloyd's Rep. 51, at p. 60.

*N. E. Palmer, of the Faculty of Law, University of Manchester, United Kingdom.

[1] R.S.C., 1970, C-34, as am.

Finally, section 212(c), in which we are most interested, provides:

> Where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

This description of murder has two ingredients which we do not find in the other sub-sections of 212. The definition of *mens rea* is broader because there is mention of "ought to know" and there is the phrase "notwithstanding he desires to effect his object . . .". Secondly, the sub-section includes the phrase "for an unlawful object".

This last phrase is not defined in the Code. We find similar expressions in two other sections which have a direct or indirect connection with homicide. Section 21(2) describes participation of persons in criminal enterprises and has always been important in murder;[2] the sub-section describes liability for two or more persons "who form an intention in common to carry out an unlawful purpose . . .". This provision has been very important in murders which fall under section 213 but has not caused any relevant discussion in relation to 212(c). Section 205 has already been mentioned. In sub-section (5) of 205, culpable homicide is defined to include death caused "by means of an unlawful act". Unfortunately, there is no further explanation in the Code. Given the existence of sections 205(5), 212(c) and 217 (which provides that "culpable homicide that is not murder . . . is manslaughter") we could surmise that culpable homicide by "unlawful act" (or "object"?) could be either murder or manslaughter.

Before we seek any legislative scheme for a progression of homicide offences in the Code, we should trace the genesis of section 212(c) the wording of which has remained unchanged since 1892.

The conventional wisdom of the history of 1892 Code is that it was based on the English Draft Code which was written by James Fitzjames Stephen. This is essentially true although two Canadians, George Wheelock Burbidge and Robert Sedgewick, made a significant and original contribution to the Canadian Code.

Stephen published his *Digest of the Criminal Law*[3] in 1877 and then used that work as the basis for the English Draft Code of 1879.

The *Digest* does not include anything like our section 212(c). The closest is found in the article 223 on murder where malice

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[2] *E.g.*, *Regina* v. *Trinneer*, [1970] S.C.R. 638.

[3] A Digest of the Criminal Law (Crimes and Punishments) (1877).

aforethought is defined to include "(c) an intent to commit any felony whatever".[4] At that time, felony included many crimes which were not very serious and even more that could not be called inherently violent. In other words, Stephen was adhering to a strict interpretation of the felony-murder rule. The illustrations which accompany article 223 mostly describe clear acts of violence such as arson, explosives and serious assault. There are two questionable examples; Coke's old chestnut about "shooting at a domestic fowl, intending to steal it, and accidentally killing B"[5] and "A, a thief, pursued by B, a policeman, who wishes to arrest A, trips up B, who is accidentally killed".[6] The second illustration is a clear statement of a "crime control" policy because a policeman was killed. This situation is covered by section 213 and does not concern us in an examination of section 212(c).

The first example has been thoroughly discounted by many commentators, including Mr. Justice Stephen who explained the fowl case to the jury in *Serné*:[7]

> . . . he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law . . . the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed . . . instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder.

Some other illustrations furnished by Stephen describe deaths caused by unlawful acts which include assault (without intending to kill or do grievous bodily harm), failing to cover a mine shaft, and throwing stones down a coal mine. The authorities cited by Stephen suggest that such killings would only be manslaughter.

Stephen has often been imagined as a Draconian retributivist. This is partly due to his attitudes toward malice and revenge. He supported a conviction of murder (and a mandatory death penalty) for those who killed while committing felonies of violence. He believed that such persons showed a clear disposition for "evil" and should be punished accordingly. In lesser cases, where there was merely implied malice, he was quite prepared to see a verdict of manslaughter. Such an amelioration did not originate with Stephen. Forty years before the English Draft Code, the Criminal Law Commissioners, in effect a parliamentary committee, complained in

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[4] *Ibid.*, p. 144.

[5] *Ibid.*, p. 146.

[6] *Ibid.*, p. 147.

[7] *Regina* v. *Serné and Another* (1887), 16 Cox C.C. 311, at p. 313 (Central Crim. Ct).

1839 that implied malice was "loosely defined or rather is not defined at all".[8] The Commissioners had great difficulty in coming to a definition, observing that the borderline between murder and something less would depend on the facts. They were attracted by Foster's formulation of *mens mala*—"the heart regardless of social duty" which they further described as a:

> . . . figurative expression used to denote the criminal apathy or indifference with which an act is wilfully done which puts human life in peril. Whether such a peril be wilfully occasioned is a question not of law but of fact, depending on a consideration of the nature of the act done, the circumstances under which it is done, the probability that the act done, under those circumstances would be fatal to life, and the consciousness on the part of the offender that such peril would ensue.[9]

A little later, the *Report* condensed this statement of "malice" to "the mere question whether the offender, being conscious of the risk, wilfully exposed life to danger".[10]

In turn, article 10 of a Digest drafted by the Commission simply defined murder as a killing "of malice aforethought".[11]

"Malice aforethought" in murder is defined in later articles as "voluntary" killing which in turn is described as a death resulting from "any act or unlawful omission done or omitted with intent to kill or do great bodily harm to any other person, or whensoever any one wilfully endangers the life of another by any act or unlawful omission likely to kill . . .".[12]

The Commissioners preserved the felony-murder rule but with some circumscription:

> The killing is also of malice aforethought whensoever one in committing or attempting to commit any felony with force or violence to the person or dwelling-house of any other, or in burning or attempting to burn such dwelling-house or in committing or attempting to commit any felony from which danger may ensue to the life of any other person, shall happen to kill any other person.[13]

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[8] Fourth Report of Her Majesty's Commissioners on Criminal Law (London, 1839), reprinted in the Irish University Press Series of British Parliamentary Papers; Reports from The Royal Commission on the Criminal Law with Appendices and Index, 1834-1841 (Shannon, 1971), pp. xxii and 254. (The references represent the internal pagination of the individual reports and the overall pagination of the reprint.)

[9] *Ibid.*

[10] *Ibid.*, pp. xxv and 257.

[11] *Ibid.*, pp. xxxiii and 265.

[12] *Ibid.*

[13] Art. 53, at pp. xl and 272. Taschereau in his treatise on Canadian criminal law defined "malice aforethought": ". . . it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, a heart regardless of social duty, and deliberately bent upon mischief. And in general any formed design of doing mischief may be called malice." Taschereau, The Criminal Law Consolidation and Amendment Acts (1874), p. 165.

This definition limited felony-murder to life-endangering acts. Article 67 of the *Report*, in defining manslaughter, accentuated the Commission's desire to limit murder because the lesser form of homicide is described as death resulting "from any unlawful act or unlawful omission, attended with risk of hurt to the person of another".[14]

These recommendations never reached the statute book. The English Draft Code[15] was similarly ignored. The 1879 attempt to codify the criminal law included a sub-section similar to section 212(c) of the Canadian Criminal Code with one important difference. The proviso at the end of section 212(c) of the Canadian law states "notwithstanding that he desires to effect his object without causing death or bodily harm to any human being" while the Draft Code ends with the words "though he may have desired that his object should be effected without hurting anyone".[16] There seems a difference in quality here so long as we assume "bodily harm" is a stronger phrase than "hurting anyone".

The wording of the Draft Code is surprising in light of the earlier Criminal Law Commissioners' *Report* and the formulation in Stephen's *Digest*. The *Report* of the Criminal Code Commissioners, who included Stephen, is no more enlightening. Indeed the remarks found there are positively confusing and show a disturbing disparity between the spirit of the *Report* and the letter of the Draft.

The Commissioners wisely decided to abandon "malice aforethought" because it was misleading. In particular, the *Report* commented that "the inaccuracy of the definition is still more apparent when we find it laid down that a person may be guilty of murder who had no intention to kill or injure the deceased or any other person, but only to commit some other felony, and the injury to the individual was a pure accident. This conclusion was arrived at by means of the doctrine of constructive or implied malice. In this case as in the case of other legal fictions it is difficult to say how far the doctrine extended".[17]

In the process of rejecting malice aforethought, the Commissioners noted that the term included the bare intent "to commit any felony". They admitted that this might be thought too broad but they cited, in support, Foster who recited Coke's famous fowl example. They obviously had not studied Foster as carefully as their 1839

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[14] *Op. cit.*, footnote 8, pp. xlii and 274.

[15] Report of The Royal Commission Appointed to Consider The Law Relating to Indictable Offences: With An Appendix Containing A Draft Code embodying the Suggestions of the Commissioners (London, 1879).

[16] *Ibid.*, s. 174(d).

[17] *Ibid.*, p. 24.

predecessors. They redeemed themselves in the actual Draft by limiting "felony-murder" in section 175 to cases where the accused meant to inflict "grievous bodily injury for the purpose of facilitating the commission" of a limited range of offences almost the same as those now found in section 213 of the Canadian Criminal Code.

There is no explicit explanation of what was to become section 212(c) of our Code although there is a suggestion in these remarks of the Commissioners:

> For practical purposes we can make no distinction between a man who shoots another through the head expressly meaning to kill him . . . and a man who, intending *for some object of his own*, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, *hoping indeed that death may not be caused*, but determined to effect his purpose whether it is so caused or not.[18]

The 1839 *Report* had not envisaged anything as wide as this but the Commissioners at that time were living in a period of comparative calm. The years between 1839 and 1879 had seen the 1848 convulsions in Europe, the most active years of the Chartists, the effects of trade unionism, the fears of anarchism and the activities of the Fenians. These events, and the political climate they created, provoked a response epitomised in the worship of force and might be seen in Carlyle's writings.[19]

The Fenian "menace" may not have been the most serious threat but the reported cases might suggest otherwise. In the decade preceding the 1879 Code, there had been at least two cases with Fenian overtones. The 1867 case of *Regina* v. *Allen and Others*[20] would probably now fall under section 213 of our Code although there was some question about the legality of the warrants on which the alleged murderers of a policeman had been held. This may explain the partiality for the "unlawful object" (falling short of a felony of violence) provision although this seems specious because the defendant's behaviour was clearly recklessly murderous under what is now section 212(a) of our Code. Perhaps it is not coincidental that one of the judges on the *Allen* case was Blackburn J. who presided over the 1879 Commission.

The second Fenian case was closer to the railway explosion example given in the 1879 *Report* of the Commissioners. In *Regina* v. *Desmond and Others*,[21] the six accused were charged with murder of a prisoner who had been killed when the conspirators had blown a

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[18] *Ibid.*, italics added.

[19] Houghton, The Victorian Frame of Mind, 1830-1870 (1959), Ch. 9.

[20] (1867), 17 L.T.N.S. 222 (Lancaster Special Commission).

[21] (1868), 11 Cox C.C. 146 (Central Crim. Ct).

hole in the wall of the Clerkenwell House of Detention to liberate a colleague named Burke. One of the conspirators, Barrett, was convicted of murder and once again one of the judges Cockburn C.J., was to have a decisive role in the fate of the English Draft Code. Cockburn C.J. had relied upon the fowl example to convict Barrett and was reported as saying:

> If a person seeking to commit a felony should *in the prosecution of that purpose* cause, although it might be unintentionally, the death of another, that, by the law of England, was murder.[22]

Once again, Barrett could have been convicted under section 212(a) of the Canadian Criminal Code or its English Draft Code equivalent. The extension found in section 212(c) was quite unnecessary.

Canada had also had its Fenian scares and perhaps this explained the inclusion of the "unlawful object" provision. In addition, the Macdonald Government was somewhat preoccupied with railways at the time of the passage of the 1892 Code and this may have added to the attraction of section 174(d) of the English Draft Code.[23]

As stated earlier, George Wheelock Burbidge was one of the drafters of the 1892 Canadian Code. He was a Judge of the Exchequer Court at the time but had previously been Deputy Minister of Justice. In 1890, he had published *A Digest of the Criminal Law of Canada*,[24] which was expressly modelled on Stephen's *Digest*. The description of murder in Burbidge's work is an exact copy of Stephen's, including the latter's illuminating appendices.[25] Therefore the definition of murder in Burbidge

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[22] The Times newspaper, April 28th, 1868, cited by Stephen, *op. cit.*, footnote 3, pp. 160-161, note 4, emphasis added. The Clerkenwell explosion case was cited with approval by Stephen J. in *Serné*, *supra*, footnote 7, at p. 314.

[23] This provision (s. 174(d) or 212(c)) does not appear in the Criminal Code (Judiciable Offences) Bill of 1878, Bill No. 178 introduced on May 14th, 1878.

If we look at Bill No. 170 introduced on May 12th, 1879, we find that s. 174 is identical to s. 174 of the Draft Code examined by the Commissioners.

Similarly, it is also found unaltered in Bill 2 called Criminal Code Bill dated February 6th, 1880.

[24] A Digest of the Criminal Law of Canada (Crimes and Punishments): Founded by Permission on Sir James Fitzjames Stephen's Digest of the Criminal Law (1890).

[25] Stephen, *op. cit.*, footnote 3, p. 360 said: "Foster to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence, by confining it to cases in which the unintentional violence is offered in the commission of a felony. This rule has in modern times had a singular and unexpected effect. When Coke and Hale wrote, the infliction of hardly any bodily injury short of a maim was a felony. Cutting with intent to disfigure was made felony by the Coventry Act; shooting was made felony by what was called the Black Act; and by later statutes it has been provided that the intentional infliction of grievous bodily harm in any way whatever shall be felony (see Article 236(a)). The result is that Foster's rule as to the

includes "an intent to commit any felony whatever"[26] but no mention of an "unlawful object" provision although it does find its way into Sir John Thompson's Code of 1892.

When Crankshaw published his first commentaries on the Code in 1894,[27] there are no cases which relate to what is now section 212(c).[28] The illustrations which could possibly relate to unlawful acts or objects are all applicable to section 213[29] (and the felonies of robbery, arson or choking) or section 212(a)(ii).

In the 1902 edition, Crankshaw does offer more enlightenment but the discussion is found in the manslaughter section.[30] He discussed *Regina* v. *Salmon*[31] and *Regina* v. *Archer*[32] and about the latter case, he said:

> The last case approaches very closely to the idea of murder, as defined in section 227(d) which makes it murder if the offender, *for any unlawful object*, does an act which he knows or ought to know . . . etc. A distinction, however, may be drawn from the fact that in [*Archer*] the object of the accused—that of obtaining possession of the gun which was his own property—was not an unlawful object, although the means used, attempting to regain possession of it by force, were unlawful.[33]

The writer creates some confusion because he seems to suggest that homicide under section 227(d) may be manslaughter. In a general description of the difference between manslaughter and murder, Crankshaw said:

> . . . if, by an unlawful act . . . one causes the death of another, *meaning* to cause death, it will be murder. If, however, in doing the unlawful act . . . one kills another, *not meaning* to kill any one, it will, in general, be manslaughter only. It may, however, even then—notwithstanding the absence of intention to kill—be murder, under some circumstances; as, where the offender's intention is to cause some bodily injury which he knows to be likely to cause death; and he is reckless whether death ensues or not. And so, if a person, without intending to hurt anyone, proceed, for some unlawful object—say with the object of robbing a bank—to do an act (such as the blowing open, by explosives, of a safe or vault), whereby the watchman, who happens to be in an adjoining office, is killed, the question would arise whether the act of blowing

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intent to do grievous, as distinguished from minor, bodily harm being essential to malice aforethought now rests on statutory authority, for no one can intentionally inflict on another grievous bodily harm without committing a felony, and to cause death by a felonious act is murder." Burbidge, *op. cit.*, *ibid.*, p. 518, reproduced this passage.

[26] *Ibid.*, p. 217.

[27] Crankshaw, The Criminal Code of Canada (1894).

[28] Then s. 227(d) of the 1892 Code.

[29] Then s. 228 of the 1892 Code.

[30] Then s. 230 of the 1892 Code.

[31] (1880), 6 Q.B.D. 79 (Ct of Crown Cases Reserved).

[32] (1857), 1 F. & F. 351, 175 E.R. 750 (Norfolk Circuit Ct).

[33] *Op. cit.*, footnote 27, p. 247, italics in original.

open the safe or vault was an act which the accused knew or ought to have known to be likely to cause death.[34]

Most of the cases cited by Crankshaw fall under the present section 213.[35] In the section on manslaughter, he did give one example which could come within section 212(c). He described the case of a workman, on the top of a house under construction, throwing stones or other materials which kill a person below. This seems a reasonably clear case in the "unlawful object" category but Crankshaw said it could be murder, manslaughter or misadventure "according to whether there is an entire absence of care, or according to the degree of the precautions taken and of the necessity of any such precautions. If the workman threw the stones etc. without giving any previous warning to persons passing beneath, and at a time when it was likely for a person to be passing, it would be murder".[36]

In the third edition of 1910, Crankshaw is at last able to cite one Canadian case to illustrate section 212(c). This case, *The King* v. *Chisholm*[37] is inappropriate because it is a clear case of manslaughter (resulting in a suspended sentence). The English cases cited, including *Serné* (which resulted in an acquittal), are equally uninstructive because they are all illustrations of manslaughter or less.

The other well-known commentator was Tremeear whose second edition[38] appeared in 1908. In explanation of section 212(c), he cited two English cases, *Regina* v. *Jones*[39] which was another clear case of manslaughter and *Regina* v. *Weston*[40] which has some factual resemblance to *Regina* v. *Tennant and Naccarato*.[41]

The jury in *Weston* returned a finding that the "gun was levelled at the deceased unnecessarily under the circumstances, but without any intention of discharging it, and that it went off accidentally",[42] which Cockburn C.J. construed to be a verdict of manslaughter.

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[34] *Ibid.*, p. 244, italics in original.

[35] Then 3. 228 of the 1892 Code.

[36] *Op. cit.*, footnote 27, p. 245. The only authorities cited are Foster, Coke and Hale.

[37] (1908), 14 C.C.C. 15 (Halifax Co. Ct).

[38] The Criminal Code and the Law of Criminal Evidence in Canada (2nd ed., 1908).

[39] (1874), 12 Cox C.C. 628 (Oxford Circuit).

[40] (1879), 14 Cox C.C. 346 (Crown Court).

[41] (1976), 23 C.C.C. (2d) 80 (Ont. C.A.).

[42] *Supra*, footnote 40, at p. 352. An editor of this case had added, *ibid.*: "It must not be supposed that the Lord Chief Justice intended to lay down anything contrary to the law laid down in many cases—that even a blow in self-defence will not excuse or even reduce to manslaughter the instant recourse to deadly murderous

A Canadian case[43] had finally been decided which specifically raised the question of "unlawful object" homicide, although it was hardly necessary because the facts fell squarely under the protection of section 213 (or even 212(a)). The facts had Fenian overtones although its resemblance to *Regina* v. *Allen* was merely fortuitous. The accused was being returned to jail in a cab after a trial for burglary. Some unknown persons threw revolvers into the cab and in the consequent struggle, a police officer was killed. The trial judge Falconbridge C.J.K.B. instructed the jury about the law of participation (under what is now section 21(2)) and said that it was clearly murder where the accused acted "with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force . . ."[44]. The trial judge referred to no particular section of the Code but the five man Ontario Court of Appeal made it tolerably clear that the accused's murder conviction should be affirmed because he was a party to the transaction and was attempting to escape from lawful custody which was an offence mentioned in the felony-murder provision of what is now section 213.[45]

Tremeear's[46] comment at this juncture was:

> If a man does an illegal act although its immediate purpose may not be to take life, yet if it be such that life is necessarily endangered by it and the doer knows or believes that life is likely to be sacrificed by it, it is murder.

After a decade, there was no Canadian decision which had used section 212(c). *Rex* v. *Elnick, Clements and Burdie*[47] was another case in this genre. The judgment of the full bench of the Manitoba Court of Appeal is a very scholarly one but it was, in effect, superfluous because the trial judge had insisted upon instructing the jury on both sections 212 and 213 although only the latter was necessary as it was a clear case of murder in furtherance of an armed robbery. In addition to explaining those two sections, the trial judge had also told the jury that if the "accused did not intend to fire the gun at all, his offence would be manslaughter because, if a man,

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violence causing death. . . . This was intended to be conveyed . . . with the present case, that if the prisoner intentionally fired the gun not from such alarm as suggested, but on account of ill-will, then the act was murder. The jury in their verdict [of manslaughter] negatived the state of alarm suggested, but also negatived intention, and found that the gun went off by accident."

[43] *The King* v. *Rice* (1902), 5 C.C.C. 509 (Ont. C.A.).

[44] *Ibid.*, at p. 512.

[45] *Ibid.*, at p. 517, per Osler J.A., who commented that constructive murder was "a phrase which has no legal meaning".

[46] *Op. cit.*, footnote 38, pp. 200-201. This is taken from Cockburn C.J. in *Barrett*, *supra*, footnote 22.

[47] (1920), 33 C.C.C. 174 (Man. C.A.).

while doing an unlawful act, kills another, although he did not intend to do him any hurt, it is manslaughter''.[48]

This case is complicated by the fact that the Court of Appeal decided that the substantive common law still applied in Manitoba. Consequently, the court examined, and implicitly approved, the fowl case, doubted the liberality of Stephen J.'s direction in *Serné*, cited Cockburn C.J. in *Barrett*, but finally decided that these authorities were unnecessary because the act being committed by Elnick and his confederates, which resulted in the victim's death, was ''an act of violence done in the course or pursuance of a felony involving violence''.[49] This decision was made very soon after the House of Lords decision in *D.P.P.* v. *Beard*[50] and the Manitoba court decided that the trial judge in *Elnick* had misdirected the jury because ''Elnick was engaged in the commission of a crime of violence and his intention to discharge the revolver cannot be regarded separately from his avowed intention to commit robbery''.[51]

Once again, we see that precise direction of the jury in terms of section 213 would have obviated the difficulties and have shown the very limited use of section 212(c). Indeed, until the rash of recent decisions on this latter section, the only situation in which section 212(c) appears to be needed is the case of abortion. The Manitoba Court of Appeal had serious doubts about the ''extraordinary view'' expressed in two English cases[52] of abortion followed by the death of the woman where it was laid down that a jury may find a verdict of manslaughter ''if the death was so remote a contingency that no reasonable man would have taken it into his consideration''.[53] A Quebec court examined this problem in the 1948 case of *Molleur* v. *The King*.[54]

The appellant doctor, convicted of murder, in *Molleur* had claimed, quite rightly, that section 259(d), that is the present section 212(c) was the only description of murder in the Code which could apply to his case of a death arising out of an illegal abortion. He argued that section 259(d) only applied to an ''illegal act involving personal violence'' and that it was ''not enough to know that the unlawful act [*sic*] is generally dangerous, but it is necessary to know that it is dangerous in a particular case''.[55] E.M. McDougall J.

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[48] *Ibid.*, at p. 177.

[49] *Ibid.*, at p. 187.

[50] [1920] A.C. 479 (H.L.).

[51] *Supra*, footnote 47, at pp. 188-189.

[52] *Regina* v. *Whitmarsh* (1898), 62 J.P. 711; *Rex* v. *Lumley* (1912), 22 Cox C.C. 635 (Central Crim. Ct).

[53] *Rex* v. *Elnick*, *supra*, footnote 47, at p. 186.

[54] (1948), 93 C.C.C. 36 (Que. K.B., App. Side).

[55] *Ibid.*, at pp. 43-44.

declined to answer this issue because he was content to reduce the crime to manslaughter on his interpretation of "likely" in the sub-section. He adopted the words of Anglin J. in the enigmatic case of *Graves* that it would only be murder if the death "was, under the circumstances, such a natural or probable consequence of their conduct that the defendants should have anticipated it".[56] The doctor would have to know or should have known of the danger when he undertook the operation and as this was not proved, it was only manslaughter.

Three Australian states[57] have adopted various forms of the English Draft Code, including something very like section 212(c). That country's highest court[58] has examined section 302(2) of the Queensland Criminal Code which provides that it is murder "if death is caused by means of an act done in the prosecution of an unlawful purpose which act is of such a nature as to be likely to endanger human life . . .". Dixon J. decided that this sub-section had no application in a case where the accused had assaulted the deceased in such a way that death had resulted. The judge criticised the jury direction because it was "founded on the view that the assault on the deceased woman constituted at once the unlawful purpose and the dangerous act".[59] In any case, if this view is incorrect, Dixon J. considered the direction wrong because the trial judge "gave a direction that if the prisoner unlawfully assaulted the deceased woman, in such a way as to be likely to endanger her life and her death resulted, it amounted to murder. This we regard as a serious misdirection because of the absence of any reference to intent".[60]

Admittedly the Queensland provision is not identical to the Canadian Code section 212(c) but we should note that the "unlawful purpose" is given a justly limited meaning. In addition, Dixon J. is telling us that the equivalent of section 212(c) must not be treated as constructive murder, or worse, a form of misdemeanour-murder.

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[56] *Graves* v. *The King* (1913), 47 S.C.R. 568, at p. 584.

[57] Queensland, Criminal Code Act 1899, 63 Vict., No. 9, s. 302(2): "If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life . . . it is material that the offender did not intend to hurt any person." Western Australia, Criminal Code, Reprinted Act 1956, is identical to the above provision.

Tasmania, Criminal Code Act 1924, s. 157(c) provides that it is murder "if the offender for any unlawful object does an act that he knows to be likely to cause death and thereby kills any person though he may have desired that his object should be effected without hurting anyone".

[58] *Hughes* v. *The King*, [1950-1951] Qd S.R. 237 (Aust. High Ct).

[59] *Ibid.*, at p. 243.

[60] *Ibid.*

The Australian courts have strengthened this impression in two subsequent decisions.[61]

In the last five years, Canadian courts have reviewed a number of cases under section 212(c). *Regina* v. *Tennant and Naccarato*[62] led off the brigade in a thoughtful judgment of the Ontario Court of Appeal. The court rejects the argument made in *Hughes* (and many other cases) that an assault cannot be the "unlawful object" for the purposes of section 212(c). The learned judges seem to think that any other interpretation would defeat the purposes of the sub-section. At first, they appear to be applying a more stringent test under section 212(c) and yet they immediately follow it with this obscure passage:

> We are, nonetheless, of the view that s.212(c) ought not to be given an interpretation which permits foreseeability under s.212(c) to be substituted for the intent required under s.212(a)(i) and (ii) in cases where personal injury is not inflicted for a *further* unlawful object. To hold otherwise would largely nullify the provisions of the section with respect to the necessity for proof of the requisite intent to kill or to inflict bodily harm which the offender knows is likely to cause death in order to constitute murder (apart from the limited class of case falling within a more stringent definition of murder). Accordingly, s.212(c) is not applicable where death is caused by an assault which is not shown to have been committed for the purpose of achieving some other unlawful object. It is, however, applicable where death is caused by a separate act which the accused ought to have anticipated was likely to result in death, and which was committed to achieve some further unlawful object; that unlawful object may be an assault.[63]

The judges' "unlawful object" argument seems no stronger here but if we ignore that particular problem, is the court saying anything more than the *mens rea* needed in section 212(a) must also be proved for a charge of murder based on section 212(c)? Perhaps the "unlawful object" issue has obscured the problem. We might have all been more convinced if that phrase had been qualified by such explicit words as "inherently violent". This argument could certainly be made as Naccarato was wielding a gun. Then again, if we are dealing with accused persons wielding loaded guns, which are by definition dangerous, then we could argue, once again, that section 212(c) is unnecessary and guilt should be obtained under section 212(a). Is this implied in this passage from the judgment?:

> The jury should then have been told that if they had a reasonable doubt that the gun was discharged accidentally and if they were not satisfied beyond a reasonable doubt that the appellant Naccarato procured and used the gun for an unlawful object and knew or ought to have known that his use of the gun in the circumstances was likely to cause death, they must acquit him of murder. But they must then consider whether or not he was guilty of manslaughter. When

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[61] *Rex* v. *Brown and Brian*, [1949] Vict. L.R. 179 (Vict. Full Ct); *Regina* v. *Gould and Barnes*, [1960] Qd R. 283 (Qd Ct of Crim. App.).

[62] *Supra*, footnote 41.

[63] *Ibid.*, at p. 94.

> death is accidentally caused by the commission of an unlawful act which any reasonable person would inevitably realize must subject another person to, at least, the risk of some harm resulting therefrom, albeit not serious harm, that is manslaughter.[64]

The same court has further examined this problem in *Regina* v. *De Wolfe*.[65] A conviction of murder was quashed and a new trial ordered. Zuber J.A. makes it quite clear, by a circuitous route, that there will be no more interpretations of "unlawful object" which are as broad as the one in *Tennant and Nacaratto*. He viewed that decision and *Graves*[66] as "high-water marks of the construction and application of [212(c)] and should not be construed as points of departure".[67] The Ontario Court of Appeal was bound by the Supreme Court of Canada decision in *Graves* and managed to distinguish *Tennant and Nacaratto* on the rather doubtful basis that the accused in that case entered into a conspiracy before the killing. Zuber J.A. criticised the application of the "unlawful object" criterion because it would subject the accused's "mental processes to an unrealistic dissection".[68]

Unfortunately, Zuber J.A. did not help us very much in our search for *mens rea* necessary for section 212(c). The Court of Appeal hesitated to pursue this issue because of the new trial but Zuber J.A. did imply that the sub-section is not meant to create constructive murder. His Lordship said:[69]

> . . . it does not appear that in this case the possession, pointing or using a firearm . . . can be the unlawful *object* contemplated by s.212(c). . . .
>
> The jury was told, in effect, that if De Wolfe was engaged in the commission of an unlawful act which he knew or ought to have known was likely to cause death, and thereby caused death, he could be guilty of murder pursuant to s.212(c). . . . This is not the law, and this instruction was a serious misdirection.

We shall have to wait for further enlightenment because this "serious misdirection" is very similar to the passage from *Tennant and Naccarato* quoted earlier although the latter judges do talk about

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[64] *Ibid.*, at p. 96.

[65] (1977), 31 C.C.C. (2d) 23 (Ont. C.A.).

[66] *Supra*, footnote 56.

[67] *Supra*, footnote 65, at p. 29.

[68] *Ibid.*, at p. 30.

[69] *Ibid.*, at p. 26. Emphasis in original.

De Wolfe was followed in *Regina* v. *Ritchie* (1976), 31 C.C.C. (2d) 208 (Ont. C.A.). On the question of unlawful object, see *Regina* v. *Messarobba*, [1974] 8 W.W.R. 191 (Alta Sup. Ct, App. Div.); *Regina* v. *Quaranta* (1975), 24 C.C.C. (2d) 109 (Ont. C.A.); *Regina* v. *Desmoulin* (1976), 30 C.C.C. (2d) 517 (Ont. C.A.). The earlier cases of *Regina* v. *Blackmore* (1967), 1 C.R.N.S. 286 (N.S. Sup. Ct), and *Downey* v. *The Queen*, [1971] N.Z.L.R. 97 (N.Z.C.A.) were not approved in *Regina* v. *Tennant and Nacaratto*.

onus, place emphasis on acquittal rather than guilt and refer to the use of the gun "in the circumstances".

We must seriously question the need for section 212(c) in murders where the accused's behaviour is inherently or potentially dangerous. Such cases should attract liability under the mental element of recklessness found in section 212(a). Sub-section (c) should not be used to stretch manslaughter into murder.

GRAHAM PARKER*

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* Graham Parker, of Osgoode Hall Law School, York University, Toronto.