CONTRACTS—THIRD PARTY BENEFICIARY RULE—EXEMPTION CLAUSE—WAS LORD DENNING RIGHT IN MIDLAND SILICONES?—*Scruttons Ltd* v. *Midland Silicones Ltd*,[1] is set in a routine transaction which requires several parties to engage in multiple relationships. The House of Lords jammed into the third party beneficiary rule the controversy which arose when the transaction went awry. In a previous article discussing *Greenwood Shopping Plaza Ltd* v. *Beattie and Pettipas*,[2] a case arising from a similarly complex yet typical transaction, I demonstrated the sterility of this analysis and argued that it was not compelled either by authority or a lack of alternatives. Such controversies are better resolved through the facets of the several relationships that give rise to them, rather than subsumed under a universal abstract rule. I followed the approach taken by Lord Denning in his dissentient speech in *Midland Silicones*.

Lord Denning's substantive conclusions in *Midland Silicones* were (a) the third party beneficiary rule has been extended needlessly and erroneously, (b) vicarious immunity is part of the law and applied in the instant case[3], (c) the third party took the benefit of the exculpa-

[1] [1962] A.C. 446 (H.L.).

[2] [1980] 2 S.C.R. 228, 111 D.L.R. (3d) 257; Arymowicz, *Greenwood Shopping Plaza Ltd.* v. *Beattie and Pettipas*: Life Masquerading as a Contract Case, to be published in (1982), 7 Dal L.J.

[3] Vicarious immunity for Lord Denning is a small part of a comprehensive view of several issues in the law, which, while unrelated, arise in conjunction with each other. Intersecting sets of concentric rings is a good analogy. The epicentre of one of the concentric rings is the regulation of rights among the master, the careless servant and the tort victim. The rings extend to intersect the third party beneficiary rule and the adhesion contract, both worthwhile centres for reform in their own right.

To return to the careless servant, when he injures someone three distinct relationships come into play and each should have its own package of incidents. These relationships are (a) victim-master, (b) victim-servant, (c) master-servant. The incidents of these relationships, according to Lord Denning, should be—

1. The master's liability for his servant's careless act represents liability for the master's own tort. Therefore the victim can hold the master to a higher standard of care than he can hold the employees who did the act.
2. The master can be held liable even if the servant is not liable because (a) the particular servant could not reasonably have done better in those particular circum-

tion clause not by relying on the contract *qua* contract, but as an expression of the plaintiff's consent to being injured or of his voluntary assumption of the risk,[4] and (d) the plaintiff was "estopped"[5] from objecting to the exculpation clause because he implicitly or expressly consented to someone else's agreeing to it on his behalf.

I had always read the speech with a brooding uneasiness. It reads too plausibly to be as wrong as juxtaposition with the majority speeches makes it seem. The style of analysis is classic common law; the references to authority are even accurate. However, the speech is not supported by reference to an authority from a court of last resort, with the possible exception of the embattled, and finally over-

---

stances, (b) the servant has some procedural or substantive immunity from suit, (c) the servant and the victim were joint venturers in the careless act.

3. The master cannot claim a common law indemnity from the servant.
4. The master's sole means (excluding express contract) for recouping payments from the servant is contribution pursuant to statute. Contribution is discretionary and ordinarily will not be permitted.
5. If the victim has exempted the master, he cannot reach through and sue the servant.
6. The definition of course and scope of employment is expansive so as to increase the master's responsibility for his servant.

In order that the servant can claim the immunity created by a contract between his master and the victim, the third party rule must be reformulated or circumvented. In order that the negligently injured victim's claim be equitably determined—that the victim obtain compensation from someone—the strength of the adhesion contract must be weakened to expose the master to liability. Lord Denning is not a friend of either the third party beneficiary rule or the adhesion contract.

The existing scheme effects an enterprise liability indirectly, a result which Lord Denning tried to effect more directly. The existing scheme is based on fictions, the servant is personally at fault and that he will satisfy personally the judgment. The scheme collapses when a court takes the law seriously and (a) permits the master to sue the servant for indemnity, or (b) sympathizes with the impossible position of the servant and finds him not negligent or (c) decides that the servant is not amenable to suit for some other reason. Lord Denning's scheme would have more "singing reason" (". . . a rule with a singing reason is one which wears both a right situation sense and a clear scope criterion on its face . . .", Llewellyn, The Common Law Tradition: Deciding Appeals (1960), p. 183).

I state my opinion of Lord Denning's views with diffidence and hesitancy. Some of the cases from which I derive my opinions are: *Broom* v. *Morgan*, [1953] 1 Q.B. 597 (C.A.); *Jones* v. *Manchester Corporation*, [1952] 2 Q.B. 869; *Alder* v. *Dickson*, [1955] 1 Q.B. 158 (C.A.); *Jones* v. *Stavely Iron and Chemical Co. Ltd*, [1955] 1 Q.B. 474 (C.A.), aff'd., other grounds, [1956] A.C. 627 (H.L.); *Lister* v. *Romford Ice and Cold Storage Co. Ltd*, [1956] 2 Q.B. 180 (C.A.), aff'd., [1957] A.C. 555 (H.L.); *Scruttons Ltd* v. *Midland Silicones Ltd, supra*, footnote 1.

[4] This theory is argued in Furmston, Return to *Dunlop* v. *Selfridge*? (1960), 23 Mod. L. Rev. 373, at p. 386; Battersby, Exemption Clauses and Third Parties (1975), 25 U.of T. L.J. 371; Exemption Clauses and Third Parties: Recent Decisions (1978), 28 U.of T.L.J. 75.

[5] "Estoppel" is my terminology.

whelmed, *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.*[6] I submit that *Grand Trunk Railway of Canada Ltd* v. *Robinson*,[7] in the Privy Council on appeal from the Supreme Court of Canada, is such a persuasive authority. The case has been lost to the law since shortly after it was decided in 1915.[8] It stands without having been rejected by the House of Lords[9] or Privy Council[10] in the relatively recent stevedores' cases.

The purpose of this Comment is to throw *Robinson* back into the fray; to be speculative and provocative, rather than definitive, and over a broad front. To this end, I will begin with a textual analysis of *Robinson*, and then, (a) show that the case has been overlooked inadvertently, (b) argue speculatively that much in Lord Denning's speech by then might have been accepted law had *Robinson* not been lost, and (c), argue in favour of one of the doctrines to which the case might have lead, vicarious immunity.

Robinson: Textual Analysis

The facts are simple. Dr. Parker had purchased a horse for Dr. McCombe in another town and wanted to ship it by rail to Dr. McCombe. The railway company required that a groom accompany the horse. McCombe sent one Robinson to Parker. The way bill contained a clause which provided, first, that the consignee or his nominee would be allowed to travel at a reduced fare to take care of the property, and second, that the company would not be liable for any injury caused to that person. The freight charges were to be paid by the consignee McCombe when the horse arrived. Parker signed the shipping contract without reading it, in Robinson's presence. He was going to mail the way bill to the consignee, but was told to give it to Robinson so that Robinson could show his authority to travel without a ticket. Parker gave the way bill to Robinson and he put it in his pocket without reading it. The railway company carelessly injured Robinson within the exemption clause and based its defence on the

---

[6] [1924] A.C. 522 (H.L.).

[7] [1915] A.C. 740 (P.C.), rev'g. (1913), 47 S.C.R. 622, rev'g. (1912), 27 O.L.R. 290 (C.A.), rev'g. (1912), 26 O.L.R. 437 (H.C.). Only the Supreme Court viewed the case as a third party beneficiary case. This case comes from my colleague Professor Arthur Foote's collection of misleading cases. Professor Foote would spring *Robinson* on his contracts students just as they became comfortable with *Midland Silicones* and had discounted Lord Denning as an anarchist. I thank Professor Foote not only for introducing me to this case, but also for his counsel and for his patience with yet another student.

[8] *Canadian Pacific Railway Co.* v. *Parent*, [1917] A.C. 195 (P.C. (Can.)).

[9] *Supra*, footnote 1.

[10] *New Zealand Shipping Co. Ltd* v. *Satterthwaite and Co. Ltd*, [1975] A.C. 154 (P.C.(N.Z.)).

clause. The Privy Council decided that the clause in the contract between the railway company and Parker vitiated Robinson's action.

The Privy Council's advice was given by Viscount Haldane, who six days later delivered the principal speech in *Dunlop Pneumatic Tire Company Ltd* v. *Selfridge and Company Ltd*,[11] the modern source of the third party beneficiary rule.[12] The judgments conflict in result but both proceed as the articulation of self-evident truths; *Robinson* cites not a single authority. Briefly, Robinson's tort action failed because

---

[11] [1915] A.C. 847 (H.L.).

[12] This following theory comes from a paper, based on American cases, given by Professor Grant Gilmore at the A.A.L.S. Contracts Conference, held at the University of Wisconsin in June 1981.

Perhaps *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70 (P.C. (Can.)); aff'g., [1932] S.C.R. 22; rev'g., [1930] 4 D.L.R. 654 (B.C.C.A.), aff'g., [1930] 2 D.L.R. 562 (B.C.S.C.), established the rule, not *Dunlop Tyre*. *Vandepitte* cited *Dunlop Tyre* simply to tie into precedent, but *Dunlop Tyre* came to be perceived as the authority itself. Thus the views about the law effected in *Vandepitte* became seen as current when *Dunlop Tyre* was decided.

A speculative explanation for this theory goes like this. Sometimes as the law gives, the law ensures that not too much is taken. The seminal case is *Donoghue* v. *Stevenson*, [1932] A.C. 562 (H.L. (Sc)). In those days, eliminating privity as a requisite, particularly according to Lord Atkin's formula, would have been seen as leading to a horrifying flood of litigation. *Vandepitte* ensured that *Donoghue* v. *Stevenson's* uncertain impact was limited to tort. The Privy Council cited precedent for this position, as any competent court would; its precedent was *Dunlop Tyre*.

One of the consequences of this view is concluding that *Dunlop Tyre* and *Robinson* were relatively equal in importance when they were decided in 1915. Another consequence is viewing *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.*, [1924] A.C. 522 (H.L.), rev'g *sub nom. Peterson, Zochonis & Co.* v. *Elder, Dempster & Co.*, [1923] 1 K.B. 420 (C.A.), aff'g (1922), 12 Ll. L. Rep. 69 (K.B.), on the third party liability point not only as not aberrant, but as so ordinary that a judge would not need to explain its doctrinal basis. Indeed the judgments are written in a conclusionary way. *Robinson* may be the link between *Elder, Dempster* and *Dunlop Tyre*; the cases explain each other.

It is noteworthy that there is no reference to *Dunlop Tyre* in *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ltd*, [1919] A.C. 801 (H.L.). Indeed the case does not appear to have been argued as a third party case at all. It is usually given as an example of how far an English court will go in "perverting" the facts in order to create a trust to evade the third party rule if it wishes. Murray on Contracts (1974), p. 563. See also, Swan & Reiter, Developments in Contract Law: 1979-80 Term (1981), 2 S.C.L. Rev. 125, at pp 141-144. I think that the case is noteworthy as an example of a relationship governed by its own equities, and not abstract universal rules. Therefore the court did not trouble to contort itself to find the elements of the trust. This case involves charterparties, a special branch of commercial law. Thus, as Lord Birkenhead stated: ". . . it was decided nearly 70 years ago in the case of *Robertson* v. *Wait* [(1853), 8 Ex. 299, 155 E.R. 1360] that charterers can sue under an agreement of this character as trustees for the broker. I am unable to distinguish between the decision in *Robertson* v. *Wait* and the conclusion which, in my view, should be reached in the present case."

Lord Birkenhead then agreed with *Robertson* v. *Wait* on principle and authority: "It appears to me plain that for convenience, and under long-established practice, the broker in such cases, in effect, nominates the charterer to contract on his behalf,

he consented to the railway company's careless conduct. He manifested his consent by watching McCombe arrange for his travel by a document which he knew contained conditions, physically accepting this document, and travelling under the document.

Before I go through Viscount Haldane's reasoning, I will show that the case is not about a contract made by an agent. Some subsequent cases have misconceived *Robinson* in this way.[13] Viscount Haldane, however, did use agency terminology. After giving the history of the case and its facts, Viscount Haldane set out the general principles which govern cases such as the one at hand. In the course of the exposition, Viscount Haldane stated that the railway company could discharge the burden of proving that the passenger assented to the special provisions by showing that he assented either in person or

---

influenced probably by the circumstance that there is always a contract between charterer and owner in which this stipulation, which is to enure to the benefit of the broker, may very conveniently be inserted. In these cases the broker, on ultimate analysis, appoints the charterers to contract on his behalf. I agree therefore with the conclusion arrived at by all the learned judges in *Robertson* v. *Wait*, that in such cases charterers can sue as trustees on behalf of the broker." (At pp. 806-807.)

There is circumstantial evidence for the initial hypothesis that *Vandepitte* introduced the third party rule in its modern potency. The Supreme Court in *Vandepitte* referred to *Dunlop Tyre* only as an additional authority, rather than as the locus of the law. It is curious that *Vandepitte*, in which only approximately $2,500.00 was in issue, was taken all the way to the Privy Council. The plaintiff succeeded in the British Columbia courts. There must have been some merit to his argument. Notwithstanding, the Privy Council did not call on the defendant (now respondent). If the case was simple, why did the Privy Council go on and on tearing the plaintiff's (now appellant's) case apart for its failure to prove the requisites of contract? Surely citation to *Dunlop Tyre* would have sufficed. Finally, the overlapping membership of the various panels, as evidence of last resort, perhaps supports the theory. See *infra*, footnote 39.

[13] See *e.g.*, *Union Steamships Ltd* v. *Barnes*, [1956] S.C.R. 842, at p. 849. It is clear from the Privy Council's advice, also given by Viscount Haldane, in *Canadian Pacific Railway Co.* v. *Parent, supra*, footnote 8, at pp. 203, 205, also on appeal from the Supreme Court of Canada, that *Robinson* is not a contract by an agent case. This case had the additional fact that the stockman actually signed the pass, which was issued under the carriage contract formed by his fellow employee. The twist was that the stockman was illiterate, spoke French, and "understood but little English". Nevertheless, the railway company was entitled to take his signature as assent.

See also, *Hood* v. *Anchor Line (Henderson Brothers) Ltd*, [1918] A.C. 837, at pp. 843-844 (H.L. (Sc.)) per Viscount Haldane. In *Hood*, the contract was made by an agent. The issue was "whether all that was reasonably necessary to give him (the agent) notice was done" by the carrier so that the standard ticket cases applied. Viscount Haldane, again, stated that this is a question of fact, and that the same question arose in *Robinson* and was also a question of fact, "and that no difficulty after the law arose". This passage does not mean that Viscount Haldane thought that *Robinson* was a contract case. After "all that was reasonably necessary" has been done, knowledge and consent, are inferred from conduct indicative of consent. The passenger cannot approbate and reprobate in contract, tort, agency, or in many other areas of the law. *Hood* has been much cited as a ticket case. And *Cooke* v. *T. Wilson & Co. Ltd* (1916), 85 L.J.K.B. 888, at p. 895 (C.A.) per Neville, L.J., also recognized that *Robinson* is not a contract case.

through the agency of another.[14] He used the terms "principal" and "agent" subsequently. Parker would be the agent, Robinson the principal. It is unlikely that Viscount Haldane intended to characterize all aspects of the transaction with "principal" and "agent".[15] Robinson was little more than an accessory to the horse and was dealt with as if he were part of the bailment. Most likely Viscount Haldane thought of Parker as an agent in a broader sense, that he provided for Robinson and that Robinson permitted Parker to be his representative for certain purposes. The use of words which in different contexts have a technical meaning is understandable. It is difficult to find other labels for the parties; one is not likely to try if the case obviously goes off on another basis. Also, if the facts imply an agency contract, the third party beneficiary rule can always be avoided with a fantasized agency.

There is an indirect argument as well, which shows that *Robinson* is not an agency case. The judgment focuses on Robinson's assent to the conditions on which he was conveyed. It would have been unnecessary to establish Robinson's assent if Parker had been an agent. It is Parker's assent which would be critical to the contract's effectiveness, for he was the contracting party.[16] Robinson's assent would be relevant in an agency context only if the defendant's case were that Robinson had ratified Parker's unauthorized agency. There is no indication that unauthorized agency was part of anyone's theory of the case at any level.

Finally, and conclusively, if Parker had contracted as agent, what consideration flowed from his principal, Robinson? Six days later in *Dunlop Tyre*,[17] the plaintiff, as a principal, foundered on consideration.

Establishing Robinson's assent is critical to the reasoning, but for another purpose. The defendant's case is that Robinson assented to being conveyed on terms, or as Lord Denning says modern cases would put it, consented to conduct which would otherwise be

---

[14] *Supra*, footnote 7, at p. 748 (P.C.).

[15] *See*, *Canadian Pacific Railway Company* v. *Parent*, *supra*, footnote 8, at p. 204, per Viscount Haldane; *Scruttons Ltd* v. *Midland Silicones Ltd*, *supra*, footnote 1, at p. 478, per Lord Reid and at p. 486, per Lord Denning, acknowledging the non-technical use in *Elder, Dempster*; and Lord Denning at p. 490, showing that an owner of bailed goods can authorize a contract without being a principal thereto.

[16] *Hood* v. *Anchor Line (Henderson Bros.) Ltd*, *supra*, footnote 13.

[17] See also, *Scruttons Ltd* v. *Midland Silicones Ltd*, *supra*, footnote 1, at p. 474, per Lord Reid. This problem was overcome in *New Zealand Shipping Co. Ltd* v. *Satterthwaite and Co. Ltd*, *supra*, footnote 10, by finding an accepted unilateral contract between the shipper and the stevedore, made by the carrier as agent. This is no more than finally accepting *volenti* through the medium of a contrived contract. But

tortious.[18] In my paraphrase of one of Lord Denning's alternative reasons, Robinson estopped himself.[19]

Because Robinson is not a contracting party, his case depends on his status as a passenger. The contract, however, determines his rights and the railway company's obligations, notwithstanding the lack of contractual nexus. Had Robinson been on the train with a bare permission, the railway company would owe him general duties of care. If Robinson were a trespasser, the duty of care would be much lower. Because of the contract Robinson is not a trespasser. Lawfully on the train, "it is obvious that the question on which this appeal turns is one as to the terms on which the respondent was accepted by the appellants as a passenger".[20] The contract was a "special contract"—a term of art to common carriers. When the railway company entered relationship with Robinson, it did not assume the obligations of a common carrier and then rely on the document to exclude a portion of these obligations.[21] The special contract displaced the railway com-

---

locked into contract, parties will debate whether its requirements were met and will lose sight of the real issues, which are either (a) did the plaintiff consent or (b) what are the incidents of the relationship. See also, Coote, Pity the Poor Stevedore!, [1981] Cam. L.J. 13; Clarke, Transport—Riding Someone Else's Contract, [1981] Cam. L.J. 17; Rose, Return to Elder, Dempster (1975), 4 Anglo-Amer. L. Rev. 7. Also query, why can Lord Wilberforce say that the carrier's servant would also be exempt? At p. 167.

[18] *Scruttons Ltd* v. *Midland Silicones Ltd, ibid.*, at p. 488. The several reasons in *Robinson* and Lord Denning's speech in *Midland Silicones* overlap. The reasons given express in different forms the idea that no one should be able to claim rights in defiance of his consent contrary; that consent creates an estoppel.

"Estoppel", in the same way as "like cases should be decided alike", may be a fundamental idea in the law. In more recent years, Lord Denning has displaced broad and diverse areas of the law with an estoppel, even when conventional doctrine would have given a remedy. *E.g., Crabb* v. *Arun District Council*, [1976] Ch. 179 (C.A.); *Amalgamated Investment and Property Co. Ltd (In Liquidation)* v. *Texas Commerce International Bank Ltd*, [1981] 3 W.L.R. 565 (C.A.).

Perhaps Lord Denning is not wrong in placing a doctrinal primacy on estoppel. Agreed, the generality of the principle would limit its utility, initially. But perhaps the inquiry would then proceed in a more fruitful direction than it does now, when the various functionally related manifestations of the relevant values (*e.g.*, the law of waiver, estoppel, recission, modification) are evolved independently of each other and without reference to the values from which they arose.

[19] *Supra*, footnote 7, at p. 748 (P.C.). See also, *Buckpitt* v. *Oates*, [1968] 1 All E.R. 1145, which held that an infant's agreement was not a contract (*Balfour* v. *Balfour*, [1919] 2 K.B. 571), but was the basis for a *volenti* defence.

[20] The following cases are based on special contracts: *Consolidated Plate Glass (Western) Ltd* v. *Manitoba Cartage & Storage Ltd* (1959), 20 D.L.R. (2d) 779 (Man. C.A.); *Alderslade* v. *Hendon Laundry, Ltd*, [1945] 1 All E.R. 244 (C.A.); *Thomson National Transport (Melbourne) Pty. Ltd* v. *May & Baker (Australia) Pty. Ltd* (1966), 115 C.L.R. 353 (Aust. H.C.); *Union Steamships Ltd* v. *Barnes*, [1956] S.C.R. 842, 5 D.L.R. (2d) 535.

[21] *Supra*, footnote 7, at p. 748 (P.C.).

pany's common law obligations. Its obligations and Robinson's rights flowed from the contract itself. Thus:[22]

> In a case to which these principles apply, it cannot be accurate to speak, as did the learned judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined.

The task is to tie Robinson to the contract. Parker, had he accompanied the horse, would have restricted his own rights by signing or by receiving the contract despite his lack of actual knowledge of the contents of the document. Robinson is not a party to the contract. Since Robinson's action is based on the passenger-carrier relationship alone, it must be in tort. His rights are reduced or to state the matter better, are redefined if he "assents to the terms of the contract", for *volenti non fit injuria*. He assented in two ways. First he availed himself of the defendant's services knowing that they were procured under contract, having watched the contract being formed and knowing that such contracts can contain conditions. Second, he cannot dispute his knowledge of the exemption clause and his consent because he actually received the document, knowing that it was a contractual document. It may be a bit much to find *volenti* to personal injury through ticket cases doctrine,[23] but this is another matter. In

---

[22] *Scruttons Ltd* v. *Midland Silicones Ltd. supra,* footnote 1, at p. 489, per Lord Denning, distinguishing *Cosgrove* v. *Horsfall* (1945), 175 L.T. 334, 62 T.L.R. 140 (C.A.), and citing his own judgment in *Alder* v. *Dickson, supra,* footnote 3, at p. 188.

Viscount Haldane thought that the railway's duty to reduce delay when serving the public overrode the duty to inform the public of the impunity with which it could injure a passenger: *Canadian Pacific Railway Co.* v. *Parent, supra,* footnote 8, at p. 205 (P.C.). The exculpation clause was ambiguous to boot, (1915), 51 S.C.R. 234, at p. 255, per Idington, J., not that this would have made much difference to Parent, who was illiterate, spoke French and very little English.Where such duties do not exist, the *Parent* result need not ensue. There is a strong strain of estoppel and actual rather than a fictious presumed consent in the 19th century ticket cases. This aspect of the decisions, unfortunately, has come to be rejected. See generally: *McCutcheon* v. *David McBrayne Ltd*, [1964] 1 All E.R. 430, at p. 435 (H.L.); but see *Hood* v. *Anchor Line (Henderson Bros.), supra*, footnote 13, per Viscount Haldane and *Le Strange* v. *F. Graucob Ltd*, [1934] 2 K.B. 394, at p. 403 (C.A.), per Scrutton L.J.

[23] *Surpa,* footnote 7, at p. 749 (P.C.). Compare with the last paragraph to Lord Denning's estoppel argument in *Midland Silicones, ibid.*, at p. 491: ". . . It seems to me that when the owner of goods allows the person in possession of them to make a contract in regard to them, then he cannot go back on the terms of the contract, if they are such as he expressly or impliedly authorized, that is to say, consented to be made, even though he was no party to the contract and could not sue or be sued upon it. It is just the same as if he stood by and watched it being made. And his successor in title is in no better position."

Viscount Haldane's words:[24]

> If Dr. Parker had been acting for himself, there can be no doubt that he would have been bound by the terms of the document he received from the agent and by his signature expressly told the company that he understood. Can the respondent be in a better position? On the evidence, can he say that the company's agent was not led by him to believe that Dr. Parker, by whose side he stood while the contract was being made, was making it with his assent? "I was standing right there," he says in his cross-examination, "alongside Dr. Parker."
>
> "Q. What did Dr. Parker say after he had signed the contract?—A. He folded the contract up and said he would send that to Dr. McCombe by mail, and 'it will be there before you will be there,' and he says, 'No, you must give it to this man, he must carry it with him, and it shows that he is travelling with this car.' They just handed it to me and I put it in my pocket."
>
> Under such circumstances the true inference is that the respondent accepted the document knowing that it contained the contract obtained by Dr. Parker for his journey, and in accepting it accepted all the terms which were set out on the face of the document, and which he would have seen had he taken the trouble to look at what was handed to him. It does not appear possible to say, in this case, that he was misled in any way, or that the agent need have done more than he did when he handed over a document which set out the terms offered for acceptance with great distinctness, in the form which the Railway Board had directed.

Furthermore, as Viscount had said previously[25],

> If he has approbated that contract by travelling under it, he cannot afterwards reprobate it by claiming a right inconsistent with it.

Robinson: Was It Lost?

I stated that *Robinson* was lost. It is true that lost cases often have not been lost but rather have been ignored or reinterpreted to conform the law to changing views.[26] But *Robinson's* disappearance from what are now called third party cases must be accidental, at least in part. Had *Robinson* been known, surely defendant's counsel would have cited it in many succeeding cases.[27] Lord Denning is "so attached to the strict doctrine of precedent"[28] that at times he cites as authority cases which are contradictory; surely he would have cited *Robinson*. Cognizance of *Robinson* would have affected at least the form of expression of some of the judgments. The House of Lords in *Midland Silicones* might not have justified its decision through protestations of allegiance to *stare decisis* had it appreciated that *Dunlop*

---

[24] *Ibid.*, at p. 748 (P.C.).

[25] *Midland Silicones Ltd, supra*, footnote 1, p. 446, per Reid L.J.

[26] The closest cases on the facts are *Fosbrooke-Hobbes* v. *Airwork Ltd*, [1937] 1 All E.R. 108 and *Cockerton* v. *Naviera Aznar, S.A.*, [1960] 2 L1 L.R. 450. The guest of the passenger who purchased the tickets was held bound by the exculpatory conditions. See also, *Pyrene Co., Ltd* v. *Scindia Steam Navigation Co., Ltd*, [1954] 2 Q.B. 402. The vendor and still owner of goods was bound by a carriage contract made by the purchaser-shipper when the goods were damaged while being loaded aboard ship. This case was accepted as another exceptional instance in *Midland Silicones*, *ibid.*, at p. 471, per Viscount Simonds.

[27] *Midland Silicones Ltd* v. *Scruttons Ltd, supra*, footnote 1, at p. 487.

[28] *Supra*, footnote 12.

Tyre was only a portion of Viscount Haldane's legal framework, and might not have rejected *Elder, Dempster Co.* v. *Paterson, Zochonis and Co.* so easily.[29]

Cosgrove v. *Horsfall*,[30] with its similar facts, language echoing *Robinson*, and contrary result, proves past doubt that *Robinson* was lost. Cosgrove was injured while he was a gratuitous passenger on a tram. The pass pursuant to which he was riding purported to vitiate the liability of the tram company and its employees. The defendant was the tram driver. Compare the approbation-reprobation passage from *Robinson* to the Court of Appeal's judgment, given by Du Parcq L.J., with seeming irritation:[31]

> The plaintiff in this case has suffered injury and damage by reason of the negligence of the defendant Horsfall. Why, then, should he not recover damages against that defendant? The only answer is that the plaintiff is bound by contract, or, alternatively, by a condition attached to a licence, not to hold the defendant liable. The Judge held that this defence could not avail the defendant Horsfall, since he was not a party to the contract and did not grant the licence or impose the condition. At first sight this decision seems to be plainly right, and to be founded on an elementary principle of our law. It has, however, been criticized on diverse grounds and with much ingenuity. In my opinion the attack on it wholly failed.
>
> It was said that, in making the contract, or imposing the condition, the London Passenger Transport Board were acting as agents for Horsfall, so that the could take advantage of the condition and rely on it. There was no evidence before the Judge on which he could have found that the board acted as agents for Horsfall, and, of course, he did not so find. It was not even proved that Horsfall was in the employment of the board when the pass, on which the condition is endorsed, was issued to the plaintiff. If I assume that Horsfall was then in the board's employment it remains true that there is no evidence from which agency ought to be inferred. I agree with the Judge that Horsfall "was not a party to and has no right by virtue of the licence or contract."
>
> It was further argued for Horsfall that the plaintiff was bound to produce and rely on his pass in order to show that he was lawfully in the omnibus when he was injured, and that, having once produced it and relied on it, he must be held bound by all its terms, so that he could not ask the Court to hold any servant of the board liable in respect of his injury or damage. Thus, it was said, Horsfall must escape. We heard much of "blowing hot and cold" and of "approbating and reprobating," and it would seem that the latter expression is not yet as out-moded as in 1940 Lord Atkin supposed it would become: see *United Australia, Limited* v. *Barclays Bank, Limited* (57 The Times L.R. 13, at p. 21; [1941] A.C. 1, at p. 32). In the end it appeared (if I rightly understood the argument) that the submission was founded on the equitable doctrine of election. In my opinion Horsfall cannot rely on any such doctrine here. In order to show that the driver of the omnibus was under a duty to the plaintiff to take reasonable care for his safety, all that the plaintiff had to prove was that at the time of the accident he was lawfully in the omnibus. It may be that it was necessary to produce the pass in order to show that he was in the omnibus with the consent of the board, and no doubt, its production reveals the fact that after the accident had happened the plaintiff broke one of the

---

[29] *Supra*, footnote 22.

[30] (1945), 175 L.T. 334, 62 T.L.R. 140 (C.A.).

[31] *Ibid.*

> conditions by which, as between the board and himself, he was bound. But this cannot retrospectively make him a trespasser, or invalidate his claim to have been a passenger with the consent of the board. There is, in my opinion, nothing in the point.

One would have to write a social history to explain why *Robinson* has disappeared. It is past the scope of this comment even to describe in detail the footsteps in the sand, the trail of decided cases which mark the path away from the case. What follows is only a sketch and conjecture.

Robinson became misclassified as a ticket case, if one can judge from the way that it has been used subsequently.[32] The case which came to stand for the possibility of alternative approaches to third party beneficiary is *Elder, Dempster Co.* The fate of the ideas in *Robinson* is tied to the fate of *Elder, Dempster*. This is an admiralty case with complex facts and relationships. Basically, the claim was against the owner of a chartered ship for damage to the cargo. The contract for carriage exempted the ship owner and the charterer, but the owner was not a party to the contract. The speeches are written as if all understand the underlying law and therefore it need not be expressed. Consequently any ratio is difficult to ascertain and the result is amenable to several ratios, including that the owner was vicariously immune.[33] For whatever reasons, the issues raised in *Elder, Dempster* were rarely raised in subsequent litigation and the case was rarely cited. On the whole, the few admiralty cases that dealt with *Elder, Dempster* had difficulty understanding the case and were hostile towards it. As *Elder, Dempster*, with its doctrinal diversity was passing out of favour, the modern orthodoxy was being established in cases such as *Vandepitte* v. *Preferred Accident Insurance Corporation of New York,*[34] an insurance case which involved a contract and a third party, but raised issues with a different flavour. The fact pattern in *Robinson* and *Elder, Dempster* reappeared in *Cosgrove*. *Volenti* was argued, but neither case was cited. *Cosgrove* evidences complete acceptance of the orthodox approach. The court in *Alder* v. *Dickson*[35] was referred to *Elder, Dempster* but decided this case as an application of *Cosgrove*. The House of Lords in

---

[32] *Grand Trunk Railway Company of Canada* v. *Robinson, supra,* footnote 7; *Gray-Campbell Ltd* v. *Flynn* (1922), 18 Alta L.R. 547 (Alta C.A.); *Ludditt* v. *Ginger Coote Airways Ltd,* [1942] S.C.R. 406, aff'd. [1947] A.C. 233 (P.C. (Can.)); *Johnston & Co.* v. *Inter-City Forwarders,* [1946] O.W.N. 798 (C.A.); *Belbin* v. *S.M.T. (Eastern) Ltd,* [1948] 1 D.L.R. 414 (N.B.S.C.); *C.P.R.* v. *A.G. Sask.,* (1950), 1 W.W.R. (N.S.) 193; *Union Steamships Ltd* v. *Barnes, supra,* footnote 20.

[33] In *Mersey Shipping and Transport Co. Ltd* v. *Rea Ltd* (1925), 21 Ll. L.R. 375, at p. 378 (C.A.), Scrutton L.J., interpreted the speeches in the House of Lords as agreeing with his own judgment in *Elder, Dempster,* [1923] 1 K.B., 420, at p. 441 (C.A.).

[34] *Supra,* footnote 12.

[35] *Supra,* footnote 3.

Midland Silicones gave *Elder, Dempster* the narrowest interpretation and reiterated *Dunlop Tyre*, stating that it occupied the field with the exception of agency and trust.

Lord Denning's attempts in the 1950's to reformulate the master-servant-victim relationships come in the midst of this recitation.[36] Vicarious immunity is an integral part of his programme, but by the time *Midland Silicones* came to the House of Lords, many other parts had been emphatically and conclusively rejected. In *Midland Silicones*, Lord Denning gave, in passing, vicarious immunity as a reason for decision, citing *Elder, Dempster*. Vicarious immunity surely was a lost cause in that court. *Volenti* must have seemed to be a side-wind.

Robinson: Speculations

I am of course leery of predicating a great deal on a claim that one case has been lost, particularly when only some of the reasons for the loss can be technical. Also, I would like to think that the course of the common law does not depend on any one controversy's being adjudicated; that the parties did not have a chance of changing the course of the common law by settling *Robinson* on the boat to England. But occurrences small at the time can have profound and extensive effects. What if the burglars of the Democratic Party offices in Watergate had taped the lock on the door vertically rather than horizontally? If only for the sake of the exercise, I will speculate about the effect *Robinson* might have had on the law.

Robinson had the potential for two kinds of effects. First, it could have changed the outcome of specific cases and changed specific rules of law. Second, *Robinson*, by establishing that "third party beneficiary" cases are amenable to diverse approaches, would have been a force leading the jurisprudence in this area away from formalism and towards pragmatism based on fact patterns and relationships.

The two consequences are synergetic, but the second is more important. Viewing law as relational equities promotes doctrinal development even in unrelated fields. Because the individual decisions share a common approach, they reinforce and legitimate each other. The synergy results in part from the view of the judicial role which is associated with one's understanding of the nature of legal rules. Someone who sees law as the expression of relational equities is more likely to believe that evolving law alongside evolving relationships is an inherent part of the judicial role. Similarly, perceiving law as a closed and self-contained system of rules is also a source of law. The resulting decisions in unrelated fields also encourage and legiti-

---

[36] *Ibid.*

mate each other's non-purposiveness. This conception of law also has a related theory of the judicial role.

The line of cases which I have described, beginning with *Robinson* and ending with *Midland Silicones,* covers three areas in which the law is generally recognized as unsatisfactory. These areas are (a) agency, (namely the relationships among victim, master and servant), (b) the third party beneficiary rule and (c) the adhesion contract replete with exculpation clauses. I believe that Lord Denning recognized that these areas could not evolve separately and worked towards a comprehensive solution. It is difficult however, for a common law judge to achieve comprehensive integration and reformulation. The issues come up singly, at random and are fought on bad ground of someone else's choosing. Even in the best case a judge is limited in how much conventional doctrine he can abandon at one time; in a bad case conventional doctrine seems welcome and necessary. Judges also need time and cases to evolve their ideas, but their previous judgments stay and develop their own vitality. Then there is the problem of convincing brethren to a comprehensive view in any one case. On the whole, Lord Denning has failed to have his views accepted in any of the three fields. But the fight had been substantially lost before *Midland Silicones*. Courts in other cases had seen the areas as discrete, or followed orthodox doctrine for short-term gain, or adhered faithfully to obsolete precedent. And although the areas developed separately into dead ends, the individual decisions reinforced each other. Thus the mood and a great deal of the law in *Midland Silicones* was set in *Lister* v. *Romford Ice and Cold Storage Co. Ltd*,[37] which froze development of the agency area.

What can one conjecture on the assumption that *Robinson* had been known throughout?

Cosgrove was potentially a pivotal case, probably one of several. Subsequent cases treat it as an authority and use it in an *a fortiori* argument. It is a good place to start. In both *Cosgrove* and *Robinson*, a passenger who had obtained carriage pursuant to an agreement sued a person with whom he had no contractual relationship but the agreement purportedly protected. The facts are so similar that it would have been difficult to resist the reasoning or the outcome in *Robinson*.[38]

---

[37] *Ibid.*

[38] It is irrelevant whether the third party is burdened or benefitted; whether the third party is prevented from asserting a cause of action or sues for a benefit. The theory that effects the contract provision is equally applicable. Thus Lord Denning in *Midland Silicones* exonerated the stevedore both on (a) the shipping contract, to which it was not a party, (if it had been within its scope), and (b) on the stevedoring contract, to which the owner of the goods was not a party. Accidents of the particular facts account for the differences in the explanations of the result; the explanations are only different expressions of the idea of consent.

Dunlop Tyre would not have been so formidable an authority because, with *Robinson*, *Elder*, *Dempster* would have made much more sense and would have been seen as reconcilable. *Robinson* may be the unexpressed link between the two cases.[39] Perhaps *Elder*, *Dempster*

Nor should *Robinson* be distinguished as a case in which the person benefitting from the burden affecting the third party imposed the burden while providing the service which caused the injury. Du Parcq L.J., in *Cosgrove*, called this kind of a case a license case. First, there is nothing said in *Robinson* about licenses. The judgment emphasizes consent. Second, perhaps the reason that the licensee cannot sue the licensor is because he consented to the limitation of his rights. Secret limitations on the license are ineffective: *Parker* v. *Eastern Railway Co.* (1877), 2 C.P.D. 416; *Ashdown* v. *Samuel Williams and Co.*, [1957] 1 Q.B. 409, at p. 425 (C.A.). Therefore the licensee's obligation to abide by his license is a manifestation of a broader idea, and not the idea itself. Third, if one cannot look a gift horse in the mouth, why does this quite sensible proposition not extend to the employee as well?

Lord Simon in *New Zealand Shipping Co. Ltd* v. *Satterthwaite and Co. Ltd*, *supra*, footnote 10, at p. 182, rejected the stevedore's consent (as opposed to *volenti*) argument because it was based on cases which dealt with licenses coupled with a disclaimer of liability and "it is obvious that any person making a gift can limit its extent". I do not think that Lord Simon's distinction of license from consent or *volenti* is valid in this context. The donor of a license must disclose the gift's limitations, if only because the donee must accept the gift. The requirement of acceptance gets us back to the heart of the matter, knowledge of the limitation and assent thereto. Furthermore, in my opinion, the principal purpose of distinguishing between consent and *volenti* is to enable one to argue, in another guise, the knowledge and assent idea if one form has already been rejected or has become unreasonably encrusted.

Arguing *volenti* in *Cosgrove* does raise two weightier problems. They are surmountable. One problem is that the consent has to be directed to the employee who caused the injury, not only to the employer company which profferred the document. There is no reason in logic why the employee, as well as the employer, cannot rely on ticket cases doctrine. One might well find the result achieved offensive. The result, however, would be in keeping with cases of the highest authority which saddle persons with stipulations contained in a document when they realistically had no opportunity to apprise themselves of the stipulation or any power to reject that stipulations. *E.g. Grand Trunk Railway Company Ltd* v. *Robinson*, *supra*, footnote 7; *Canadian Pacific Railway* v. *Parent*, *supra*, footnote 8; *Union Steamships Ltd* v. *Barnes*, *supra*, footnote 13.

The fundamental objection to applying *Robinson* in *Cosgrove* is that its situation sense differs because in *Cosgrove* the defendant is the employee, rather than the employer. Thus, the only way that a deserving plaintiff can get a remedy is by suing the employee. Preventing the employee from sheltering under the employer's exculpation clauses preserves this remedy. This indirect effect is perhaps the principal benefit of the third party beneficiary rule. However, if the controversy is viewed without the encrustation of doctrines striving indirectly for a fair result, it is difficult to justify imposing liability on the employee while permitting the employer to be immune. In any event, given the tone of the judgments in *Robinson* and *Parent* and the priorities, which they establish, I think that the Privy Council would have found that the victim consented to the employee as well, at least in railway cases, if the issue had arisen.

[39] The overlap in membership of the panels gives some minimal weight to the argument. *Robinson:* Viscount Haldane, Lord Dunedin, Lord Parmour, Sir George Farwell, Sir Arthur Channell. *Dunlop:* Viscount Haldane, Lord Parmour, Lord Sumner, Lord Atkinson, Lord Parke. *Elder, Dempster:* Lord Dunedin, Lord Sumner, Viscount Cave, Viscount Finlay, Lord Carson.

would not have been distinguished in *Midland Silicones* as an inexplicable case with peculiar facts in a peculiar branch of commercial law.[40] An *Elder, Dempster* with more vitality in turn would have reinforced *Robinson*, and *vice versa*. It would have been more difficult to dismiss vicarious immunity out of hand in *Midland Silicones*.

The cases unrolled differently. For whatever reason, *Elder, Dempster* was not argued in *Cosgrove*. It was argued in *Alder* v. *Dickson*, but this case had bad facts which cried out for a remedy.[41] A remedy was readily available through orthodox doctrine. After all of the defendants' arguments fell to the third party beneficiary rule, *Alder* v. *Dickson* was decided as an application of *Cosgrove*. On the facts of the particular case there was no incentive to follow Lord Denning's broad reformulation.

The year after *Alder* v. *Dickson*, the House of Lords reversed Lord Denning in *Staveley & Company Chemical Ltd* v. *Jones*,[42], and rejected one of Lord Denning's related ideas, the master's tort theory. This case set the stage for making the collection of agency rules complete, integrated and misdirected in *Lister* v. *Romford Ice*. If the House of Lords in *Lister* v. *Romford Ice* had seen the law as more complex and fluid, perhaps it would have accepted one of the employee's arguments, all of which were cogent.

The Court of Appeal in *Cosgrove* and *Alder* v. *Dickson* classified the facts as raising not a tort problem, nor a master-servant problem, but a third party beneficiary problem. *Lister* confirmed this view by stultifying agency with outmoded notions of contract, even

---

The differences in membership between these panels and the panel in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York, supra,* footnote 12 is noteworthy. The panel consisted of Lord Tomlin, Lord Thankerton, Lord MacMillan, Lord Wright, and Sir George Lowndes.

In *Donoghue* v. *Stevenson, supra,* footnote 12, the majority consisted of Lord Atkin, Lord Thankerton and Lord MacMillan; Lord Buckmaster and Lord Tomlin dissented.

The panel in *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Limited, supra,* footnote 12, consisted of Viscount Finlay, Lord Atkinson, Lord Birkenhead and Lord Wrenbury.

[40] Lord Reid said that the decision was "anomalous", "unexplained", and binding in "circumstances which are not reasonably distinguishable from those which give rise to the decision. The circumstances in the present case are clearly distinguishable in several respects". However, Lord Reid did not indicate the doctrinally relevant circumstances. *Supra,* footnote 1, at p. 479, (H.L.).

[41] The plaintiff was an elderly lady who bought a first class ticket for a holiday cruise on the liner Himalaya. She was thrown from the ship's gangplank; the gangplank was negligently secured and swung away from the wharf. She suffered grave injuries and sued the ship owner and certain of the ship's officers. The exculpatory clause which was very wide and encompassed the ship owner, did not even mention the officers as it's beneficiaries.

[42] [1956] A.C. 627 (H.L.).

though a contract is neither a necessary nor sufficient condition of an agency relationship. *Midland Silicones* is immediately based on *Cosgrove* and *Alder* v. *Dickson*. Thus the majority of the Law Lords in *Midland Silicones* saw a third party beneficiary problem, and Lord Denning came into the case from every other direction.

Lord Denning's lone dissent in *Midland Silicones* seems bizarre in comparison to the other speeches. But *Robinson*, in finding *volenti* to physical injury through ticket cases doctrine goes even further than Lord Denning would go in *Midland Silicones*.[43] At the very least, citation of *Robinson* would have made Lord Denning's tort analyses and "estoppel" more persuasive. *Robinson* would have provided a link between *Dunlop Tyre* and *Elder, Dempster* and made *Elder, Dempster* more acceptable. The House of Lords could not so easily have declined to extract some rule from *Elder, Dempster* which would restrict the third party rule, if not vicarious immunity. With *Cosgrove* and *Alder* v. *Dickson* more contentious, it would not have been so easy to apply the third party rule so mechanically in *Midland Silicones*.

If the House of Lords in *Midland Silicones* had known *Robinson* and accepted at least the *volenti* theory, it could have shown the third party beneficiary rule had the same claim for allegiance as the Statute of Frauds. Perhaps the House of Lords would not have found the third party rule to be so inexorable that consumer cases raising issues of agency and contract governed commercial persons. Perhaps it would not have felt so bound by *Dunlop Tyre* or perpetuated a static view of *stare decisis* and would have confined the third party rule to a defensible ambit.

But *Robinson* had been cited nowhere, Lord Denning kept on being reversed or ignored, the cases kept accumulating and the law became "principled" and orderly. And perhaps the law was not ready for a task as large as rejecting the fiction that the offeree had assented to a standard form contract and articulating in substitution new doctrine to govern the transaction. In any event the House of Lords in *Midland Silicones* distinguished *Elder, Dempster* into oblivion and forced much of everyday life into the third party beneficiary rule.

Robinson: Vicarious Immunity

Robinson could have prevented the range of ideas relevant to the law from being so narrow. It would have bolstered *Elder, Dempster*. For these reasons, *Robinson* could have contributed to the third party's

[43] [1955] 1 Q.B. 158, at p. 184.

invulnerability to suit being accepted separately from the rest of Lord Denning's agency package.

Assuming that *Robinson* would govern cases such as *Alder* v. *Dickson* (if the employees had been within the exculpation clause), the question remains, what is the appropriate basis for the employees' lack of responsibility? The modern explanation of *Robinson* is *volenti*, but vicarious immunity is closer to the heart of the matter and is more likely to raise the right questions. Also, *volenti* can easily become as over-broad as the third party beneficiary rule;[44] persons should be responsible for the consequences of their negligent action in most cases. If the problem were analyzed in the context of master-servant rather than *volenti*, perhaps rules could be devised which would relieve the employees of responsibility selectively and in express conformity with prevailing views of morality and efficacy. Such a course would be preferable to explaining and regulating the employees' lack of responsibility through doctrine, which is premised on freedom of choice but manifests itself in ticket cases which incorporate by reference one-sided conditions in transactions in which the offeree has no choice of any sort nor any ability to negotiate.[45]

One wonders why vicarious immunity for negligence is not part of the common law. One would think, on first impulse, that vicarious immunity is the natural converse of vicarious liability, particularly if the employer is a corporation. On reflection, vicarious immunity is defensible on moral and economic grounds.[46] Vicarious immunity is well established as a defence to a trespass[47] and defamation action[48] and it follows the pattern set elsewhere in the law. Thus in *Jones* v. *Staveley Iron and Chemical Co. Ltd*,[49] the House of Lords held that the master owed no greater duty on account of the servant's act than the servant; the master could not be liable when the servant was not culpable. It is also the converse of the "organic theory" of corporate liability. Symmetry should have appealed to courts which were suffi-

---

[44] *Canadian Pacific Railway* v. *Parent, supra,* footnote 8.

[45] See *Union Steamships Ltd* v. *Barnes, supra,* footnote 20.

[46] The corporate employee's personal liability for his actions can be supported if the corporation has been under-capitalized, particularly if the employee is a shareholder in the corporation. However, rejecting vicarious liability is a crude and incomplete way of resolving the under-capitalization problem.

The employee's personal liability is also desirable if the employer can continue to exculpate his liability pursuant to a standard form adhesion contract. The employer generally stands behind the employee or insures the employee's liability. See *e.g.*, *Alder* v. *Dickson, supra,* footnote 3; *Gore* v. *Van der Lann (Liverpool Corporation intervening),* [1967] 2 Q.B. 31 (C.A.).

[47] *Ewer* v. *Jones* (1846), 9 Q.B. 623.

[48] Gatley on Libel and Slander (6th ed., 1967), p. 215.

[49] *Supra,* footnote 3.

ciently concerned with conceptual tidiness to distinguish or overrule *Elder, Dempster*. As for the authority of *Dunlop Tyre* negating vicarious immunity, the law is not so rigid and undifferentiated that it is forced to jam a suit against an employee of a corporation which negotiates for his exculpation into the same pigeonhole as a price maintenance case. To say, as Lord Keith did in *Midland Silicones*, that vicarious immunity cannot be law because it "does not appear to me to proceed on any known principle in English law"[50] is not an answer. It is not profitable to pursue the distinction between principle and rule, if only because the form of expression of much of the common law results not from principle but from medieval ideas of the jurisdiction of courts. In any event, until the eighteenth century, the master and not the servant was liable if the servant committed a tort in pursuit of the "particular command" of his master and the master's immunity left the injured party without a remedy.[51] An entire body of law does not develop either instantly or in unison with other areas. As Lord Denning showed in *Midland Silicones*, one must not look at history through modern and myopic eyes and become fascinated with yesterday's expedient solution.

Conclusion

Our contract rules bound the passenger in *Alder* v. *Dickson* to the ship owner by a shockingly harsh, unknown and unnegotiable term, but enabled the consignee of the goods in *Midland Silicones* to defy a term which was fair, negotiated, and agreed upon. Furthermore, the rules run counter to the probable incidence of insurance coverage.[52]

Karl Llewellyn denounced formalistic jurisprudence which leads to such perverse results, quoting from a scholar who seems to have been his match in enthusiasm and romanticism:[53]

> I doubt if the matter has ever been better put than by that amazing legal historian and commercial lawyer, Levin Goldschmidt: "Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its approprite, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very

---

[50] *Supra*, footnote 1, at pp. 480-481.

[51] Wigmore, Responsibility for Tortious Acts: Its History (1894), 7 Harv. L. Rev. 315, 383, 441; *Earl Danby's Case* (1678-85), 11 How. St. Tr. 599.

[52] The result in *Pyrene Co. Ltd* v. *Scindia Steam Navigation Co. Ltd*, [1954] 2 Q.B. 402 can be criticized, despite one's approval of Lord Denning's position in *Midland Silicones*, if the purchaser's insurance policy was not likely to have covered the vendor's interest.

[53] Llewellyn, *op. cit.*, footnote 3, p. 122, quoting from: Preface to Kritik des Entwurfs eines Handelsgestezbuchs, Krit. Zeitschr. f.d. ges Rechtswissenschaft, Vol. 4, No. 4.

> circumstances of life. The highest task of law-giving consists in uncovering and implementing this imminent law.

I do not urge lawyers to convert from the privity religion to the *volenti* religion. I do not even maintain that *Robinson* was rightly decided on its facts. I argue that if one is to adhere to a false god, one should have a selection. Then it can become part of the theology to shelve gods that are not currently helpful and establish new ones. With a large enough selection one might strike it lucky as did certain Indian tribes when they placed fish next to the corn seeds to satisfy the corn god. In any event, there are less rational bases for obligations and rights than consent.

C.M. ARYMOWICZ*

* * *

INDUSTRIAL PROPERTY—THE ARRIVAL OF PURPOSIVE CONSTRUCTION IN PATENT LAW.—It has long been settled in the patent laws of the British Commonwealth that the first task of the court in a patent action is to decide upon the correct construction (interpretation) of the patent specification. Having done that, the court then turns its attention to the issues of validity and infringement.[1] How the court construes the patent may therefore be critical.

In the recent case of *Catnic* v. *Hill*,[2] the House of Lords, speaking through Lord Diplock, has held that it is necessary to give to a patent what their Lordships call a "purposive" construction. That is to say, the claims should be construed in such a way as to give effect to the purpose of the draftsman, at least where his purpose would be obvious to a person who is skilled in the art to which the alleged invention relates. In the *Catnic* case, the issue was whether the patent claim in suit, which referred to a structural member "extending vertically", covered the defendants' construction in which the corresponding member was inclined at 6° or 8° from the vertical. The problem of the patentee in getting around his choice of the word "vertically" was increased by the fact that his claim referred to another member as being "inclined" (in the embodiment illustrated in the patent the "inclined" member was about 13° off vertical), so that the defendants were able to argue that the word "vertically" in

---

* C.M. Arymowicz, of Dalhousie Law School, Halifax, N.S.

[1] See *e.g.*, *American Cyanamid* v. *Berk*, [1976] R.P.C. 231, at p. 234, per Whitford J.

[2] [1981] F.S.R. 60 (H.L.).

the claim must mean truly vertical having regard to the specific reference in the claim to another of the members as being "inclined".

In the United Kingdom, and in countries which take their lead from British jurisprudence, it has been the traditional approach in patent cases to construe the patent and then, turning to the alleged infringement, to ascertain whether there is "textual infringement" of one or more claims, that is, whether the language of a claim, as construed, literally fits the alleged infringement in all respects. If the alleged infringement does not fit the text of the claim, there may still be an infringement if the "pith and marrow" (or "essential features") of what is claimed are taken. In the *Catnic* case their Lordships stated that both "textual infringement" and infringement of "pith and marrow" are a single cause of action, and that construction of the specification is determinative. On the issue of construction, the House of Lords said:[3]

> A patent specification should be given a purposive construction rather than a purely literal one derived from applying to it the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge. The question in each case is: whether persons with practical knowledge and experience of the kind of work in which the invention was intended to be used, would understand that strict compliance with a particular descriptive word or phrase appearing in the claim was intended by the patentee to be an essential requirement of the invention so that any variant would fall outside the monopoly claimed, even though it could have no material effect upon the way the invention worked.

They said that the court should inquire whether the specification would make it obvious to the skilled reader that some departure from verticality would make no material difference. Thus, the approach seems to be to ask what a skilled reader would consider that the patentee was attempting to protect. On this approach, their Lordships found that the patent was infringed.

Some of the recent history of purposive construction is outlined by the Master of the Rolls, Lord Denning, in his book *The Discipline of Law*.[4] Lord Denning has throughout his career waged battles on several fronts against what he considers to be outmoded judicial concepts, but his views have not always found favour in the House of Lords. In his book he refers in his Introduction to the "strict constructionists" who go by the letter of the document, and to the "intention seekers" who go by the intent of the makers of it, and in his chapter on the interpretation of statutes (Part One, Chapter 2) he outlines the recent history of the resistance, led by Lord Chancellor Simonds, to looking behind the words of a statute to the intention of Parliament in enacting it. But that resistance has now crumbled, and Lord Denning notes that it was Lord Diplock (the author of the

---

[3] *Ibid.*, at pp. 65-66.

[4] (1979).

opinion in the *Catnic* patent case) who, in *Kammins* v. *Zenith*,[5] drew the distinction between the "literal approach" and the "purposive approach". In his book Lord Denning argues that the latter approach is much to be desired because, with the United Kingdom now a member of the European Community, it brings the English method of interpretation into line with that adopted by the European courts.

Lord Denning may now claim victory in his battle on the construction of statutes because in *Fothergill* v. *Monarch Airlines*[6] purposive construction triumphed. The *Fothergill* case was concerned with the interpretation of section 26 of the Carriage by Air Act 1961 which had, as Schedule 1 thereto, the Warsaw Convention as amended by the Hague Conference of 1955. The House of Lords agreed with Lord Denning in the court below that it is legitimate, where there is an ambiguity, or where a literal interpretation leads to a result that is manifestly absurd or unreasonable, to have recourse, with appropriate caution, to certain publicly available aids to interpretation. In the case of purely domestic legislation, resort may be had to reports of official committees or commissions (but not to *Hansard*); in the case of legislation designed to acheive uniformity of national laws, the door has been opened to reference to legislative history (les travaux préparatoires), international case law (la jurisprudence), and commentaries of learned authors (la doctrine). Lord Diplock referred expressly to the unhappy legacy of the judicial attitude evinced by words of Lord Simonds in an earlier case[7] where the court declined to give effect to the apparent purpose of a statute because that would have meant departing from its literal wording. Purposive construction goes beyond determining what was the mischief to be remedied, and looks to what the draftsman intended to accomplish.

Their Lordships in the *Fothergill* case were aided by the adherence of the United Kingdom to the Vienna Convention on the Law of Treaties[7a] which, though too recent to be applicable to the Carriage by Air Act in issue in *Fothergill*, nonetheless was read as consistent with their Lordships' reasoning.

But returning to the *Catnic* patent case, it is not possible to contend that purposive construction of patents was ushered into United Kingdom patent law as a result of any treaty obligation or any need for harmonization with the relatively flexible Continental approach to questions of infringement. The *Catnic* patent was dated December 29th, 1969. The United Kingdom joined the European Community on January 1st, 1973. It was not until June 1st, 1978 that

[5] [1971] A.C. 850, at p. 881.

[6] [1980] 2 All. E.R. 696 (H.L.).

[7] *Inland Revenue* v. *Ayrshire*, [1946] 1 All. E.R. 637, at p. 641 (H.L.).

[7a] Misc. 19 (1979); Cmnd 4818.

United Kingdom patent legislation was amended for greater conformity with Continental law. The *Catnic* infringement actions were begun in 1975, and it is settled that the construction to be given to the patent could not alter after its 1969 date.[8] In *Catnic* their Lordships made no suggestion that there has been any change in United Kingdom law on the question of construction, and they cited only well known prior English cases. That being so, there seems to be nothing to prevent the courts of other Commonwealth countries to start talking of purposive construction of patents, and to consider whether it makes any difference to their traditional attitudes. They may, and this would surprise no one, conclude that purposive construction has always been with us and that little or nothing has changed. A decision of the Supreme Court of Canada a few years ago, *Burton Parsons* v. *Hewlett-Packard*,[9] could easily be characterized as exemplifying purposive construction. The case was concerned with an issue of validity rather than infringement, but the Supreme Court emphasized the importance, in construing the specification, of reading it with the knowledge and expectations of a skilled reader. The Canadian Patent Act[10] focuses on the purpose of the inventor and applicant. Subsection (1) of section 36 provides that the applicant shall in his specification correctly and fully describe the invention and its operation or use "as contemplated by the inventor" and subsection (2) requires the specification to end with a claim or claims stating distinctly and in explicit terms the things or combinations "that the applicant regards as new and in which he claims an exclusive property or privilege". To speak of purposive construction may be merely to reiterate what Knight Bruce L.J. said as long ago as 1853 in *Key* v. *Key*:[11]

> In common with all men, I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint the intention with which the instrument, read as a whole, persuades and convinces him that it was formed. A man so convinced is authorized and bound to construe the writing accordingly.

Indeed we can go back to St. Paul:[12]

> . . . for the letter killeth but the spirit giveth life.

But these thoughts, however virtuous and uplifting, are not of great assistance to a lawyer who is trying to advise his client whether he can safely ignore a patent because of some departure from the wording of its claims.

---

[8] *Deere* v. *Harrison*, [1965] R.P.C. 461, at p. 477, per Lord Reid.

[9] [1976] 1 S.C.R. 555.

[10] R.S.C., 1970, c. P-4.

[11] 4 DeG. M. & G. 73, at pp. 84-85.

[12] Second epistle to the Corinthians, ch. 3, verse 6.

Looking behind the patent specification

An interesting question raised by the *Catnic* decision is whether, in reaching a purposive construction, Commonwealth judges may now be persuaded to do as their United States brethren have long done, and look behind the patent specification to other publicly available possible aids to construction, and more particularly to the file of the application for the patent and perhaps to other published writings attributable to the patentee.[13] In the United States, ancillary documents are usually used against the patentee, not to help him. But the House of Lords has endorsed purposive construction, which is not necessarily to be equated with benevolent construction.

The United States approach has the merit that it limits the patentee's room for manoeuver from a position that he had previously taken. That position, at least insofar as it was taken in Patent Office proceedings, is readily ascertainable from the Patent Office files.[14] There has been opposition in other jurisdictions to looking at these files to ascertain something that it is the function of the issued specification to say.[15]

No one in the *Catnic* case said that we may now probe behind the patent specification to ascertain its meaning; the point was not in issue. The suggestion that this may now be possible stems only from the new reference, in a patent case, to purposive construction which, as we have seen, has its antecedents in the construction of statutes and represents a new willingness to ascertain how statutory language came about in order to construe it according to its intended purpose.

What of benevolent construction? Historically, there has been qualified judicial reference to benevolent construction of patent

---

[13] Deller's Walker on Patents (2nd ed., 1965), ss 228, 233-234, 244. However the U.S. courts speak less of "construction" and more of "file wrapper estoppel" (an "estoppel" which does not require reliance by the defendant) or sometimes of "admissions".

[14] In the U.K., the Patent Office file has not previously been as freely accessible as it has in the United States and Canada (see 18 C.P.R. (2d), at p. 275, note 231), but now see the Patents Act 1977, c. 37, s. 118 and rules 92-95 made pursuant thereto. The traditional U.K. approach to construction would exclude reference to Patent Office files: *Poseidon* v. *Cerusa*, [1975] F.S.R. 122, per Whitford J.: file of corresponding Swedish application.

[15] In Canada, Thorson P. took a decisive stand against it in *Lovell* v. *Beatty* (1964), 14 C.P.R. 18, at p. 41, but there has not been complete consensus: Hayhurst, Annual Survey of Canadian Industrial Property Law (1979), 11 Ottawa L. Rev. 391, at pp. 440-441. If ancillary documents may not be used to construe the patent specification, a judge may be prepared to look at them to confirm his interpretation reached independently of them, as in *Noranda* v. *Minerals*, [1950] S.C.R. 36, at p. 52, per Rand J. and at p. 58, per Kellock J., and as perhaps was also done in *B.V.D.* v. *Canadian Celanese*, [1937] S.C.R. 221, at p. 233, per Davis J. Statements in such documents may be admissible as admissions against interest: *cf. Foseco* v. *Bimac* (1981), 51 C.P.R. (2d) 51, at p. 55, per Walsh J.

specifications,[16] but the courts have generally shied away from expressions (if not attitudes) of benevolence. As stated by Lord Esher:[17]

> You are not to construe it with a leaning in favour of the patentee. You are not to construe it with any leaning against him. You are trying to find out what is the true interpretation of it . . . .

In seeking the true interpretation the courts have long been urged to approach patent specifications with "a mind willing to understand".[18] That is probably all that purposive construction demands.

Looking at the patent specification

Assuming that ancillary documents need not be considered by the court in seeking a purposive construction, there remains the vital question whether purposive construction signifies any change in analysis in patent cases. Before the House of Lords decision in the *Catnic* case, English judges had struggled with the concept that has been variously labelled "pith and marrow", or "substance", or "essential features", or the "doctrine of equivalents". According to this concept or doctrine, where a patent claim recites more than one element or feature, the question is whether, on a proper construction of the claim read in the light of the patentee's description and drawings, any feature (or features) of the claim may be regarded as inessential. Where a feature is inessential, infringement is not avoided by leaving it out or by replacing it with an equivalent. This is what was discussed in *Catnic* by the Court of Appeal,[19] which expended no little effort in reviewing prior decisions, but in the result was reversed by the House of Lords.[20] Prior to the House of Lords decision, the following guidelines may be said to have emerged from the Court of Appeal's *Catnic* decision and from earlier cases:

(1) What is essential is a question of construction.[21]

---

[16] *Hinks* v. *Safety Lighting* (1876), L.R. 4 Ch. D. 607, at p. 612, per Jessel M.R.

[17] *Leadbeater* v. *Kitchin* (1890), 7 R.P.C. 235, at p. 224. See also *B.T.-H.* v. *Corona* (1922), 39 R.P.C. 49, at p. 89, per Lord Shaw. In Canada, Thorson P. adhered consistently and openly to "a judicial anxiety to support a really useful invention": *Scragg* v. *Leesona*, [1964] Ex. C.R. 649, at pp. 701-702.

[18] *Lister* v. *Norton Brothers* (1886), 3 R.P.C. 199, at p. 203, per Chitty J.; *Baldwin* v. *Western Electric*, [1934] S.C.R. 94, at p. 106, per Rinfret J.

[19] [1979] F.S.R. 619, at p. 630. Lord Denning, though the senior judge in the Court of Appeal, and of course very interested in purposive construction of statutes, did not participate in the *Catnic* case. It has not been his habit to sit in patent cases.

[20] In the Court of Appeal, Sir David Cairns had dissented, but the House of Lords saw no discernable difference of opinion in the Court of Appeal as to the applicable law, the difference in the Court of Appeal being as to the applicability of the law to the facts of the instant case: *supra*, footnote 2, at p. 65.

[21] *Catnic* in the Court of Appeal, *supra*, footnote 19, at p. 641, line 6. At p. 633, line 10, Buckley L.J. suggests as a preliminary point that a feature that is in fact essential

(2) The specification is construed with the knowledge of a person skilled in the art,[22] and in consequence a feature will be essential if such a person, reading the specification as a whole, would regard the feature as essential to the working of the invention.

(3) A feature will also be essential if the inventor has in the specification shown his belief that it is essential;[23] inclusion of the feature in the broadest claim suggests that it probably is so regarded.[24]

(4) Subject to the foregoing, a recited feature is inessential if a skilled reader would realize that a literal reading was not intended,[25] as in a case where he would conclude that the feature was specified through inept draftmanship.[26]

It is of some interest, however, that Waller L.J. in the *Catnic* case wandered a bit off the traditional course by suggesting[27] that in determining whether a feature is essential it is necessary to know how the defendant came to make his variation: was there a genuine reason, other than to avoid falling within the language of the claim? This suggests that what is essential is not entirely a question of construction, but the suggestion is contrary to the weight of authority in the United Kingdom. What the notional skilled reader would construe to be essential is to be judged as if the defendant had not been born.[28] Perhaps Waller L.J. would also be willing to look at how the patentee came to put the feature into his claim, though to do this would also be contrary to the weight of authority, at least before purposive construction came on the scene.

What does the *Catnic* decision of the House of Lords do to this past learning? In a passage alluded to earlier in this Comment, Lord Diplock said:[29]

---

to the working of the claimed invention must be an essential feature of the claim. This is true, but it begs the question of what is the claimed invention. Of course, the court may be able to avoid a concluded opinion on what is the correct construction, purposive or otherwise, by holding that a feature not used by the defendant would have to be in the claim if the claim were to survive an attack on its validity.

[22] *Ibid.*, at pp. 632, 641.

[23] *Ibid.*, at pp. 631-633.

[24] *Ibid.*, at pp. 632-633.

[25] *Ibid.*, at p. 632. As will be noted below, the House of Lords has elaborated upon this by saying that one must consider whether it would have been obvious to the skilled reader, at the appropriate date for construction, that there were any variants that would have no material effect upon the way the invention works.

[26] *Ibid.*, at pp. 633, 640.

[27] *Ibid.*, at pp. 636-638. Buckley L.J. disagreed at pp. 630-632.

[28] *Nobel's* v. *Anderson* (1894), 11 R.P.C. 519, at p. 523, per Lord Esher M.R.

[29] *Supra*, footnote 2, at p. 65.

> My Lords, in their closely reasoned written cases in this House and in the oral argument, both parties to this appeal have tended to treat "textual infringement" and infringement of the "pith and marrow" of an invention as if they were separate causes of action, the existence of the former to be determined as a matter of construction only and of the latter upon some broader principle of colourable evasion. There is, in my view, no such dichotomy; there is but a single cause of action and to treat it otherwise, particularly in cases like that which is the subject of the instant appeal, is liable to lead to confusion.[30]

His Lordship then went on to explain that the single cause of action turns on construction of the specification rather than some broader principle:

> The expression "no textual infringement" has been borrowed from the speeches in this House in the hay-rake case, *Van Der Lely* v. *Bamfords*,[31] where it was used by several of their Lordships as a convenient way of saying that the word "hindmost" as descriptive of rake wheels to be dismounted could not as a matter of linguistics mean "foremost"; but this did not exhaust the question of construction of the specification that was determinative . . . .

Then Lord Diplock continued by explaining that what was left open, after "textual infringement" had been considered, was whether the patentee had made hindmost wheels an "essential feature" of the claimed monopoly, and that it is only features that the patentee claims to be essential that constitute the so-called "pith and marrow" of the claim. This is a matter for purposive construction.[32]

This reflects no change in the law. Nor did their Lordships suggest that it did. There is nothing in the decision to inhibit the sort of inquiry that has heretofore been made as to what is essential, provided it is remembered that what is of the essence is a question of construction. The *Catnic* decision does, however, emphasize the difference in the views of the House of Lords and those of Thorson P. in *McPhar* v. *Sharpe*,[33] which is virtually the only Canadian case where a judge has attempted to analyze the "pith and marrow" concept. As has been suggested elsewhere,[34] Thorson P., with respect, confused the preliminary question of construction with the factual issue of infringement, as the briefs in the *Catnic* case appear also to have done.

In the *Catnic* case the House of Lords elaborated a little on how the question of construction is to be approached.[35] One must construe the specification at the correct date, which they said is the date of publication.[36] What is to be asked is whether it would then have been

---

[30] A remarkably similar statement was made by Lord Blackburn over 100 years ago in *Dudgeon* v. *Thomson* (1877), 3 A.C. 34, at p. 53.

[31] [1963] R.P.C. 61.

[32] See the extract quoted in footnote 3, *supra*.

[33] [1956-1960] Ex. C.R. 467.

[34] Hayhurst, McPhar v. Sharpe: A Post Mortem (1967), 21 Bull. P.T.I.C. 66.

[35] *Supra*, footnote 2, at p. 66.

[36] It is suggested that there is a great deal to be said for construing the specification at the date it was first filed in a Patent Office, rather than at some later date when the state

obvious to the skilled (or "informed") reader that there were any variants that would have no material effect upon the way the invention worked.[37] If at that date there were no such obvious variants, the correct construction would be that no variants were intended to be covered. They concluded that it would have been obvious to the skilled reader of the *Catnic* specification that the patentee did not intend to make exact verticality an essential feature of what was claimed.

On the issue of infringement their Lordships have indicated that if the claim is construed as leaving room for variation, the variant may only be one which has no material effect upon the way the invention works. Previous cases have referred to "equivalents" rather than "variants",[38] but the earlier cases do not appear to have been disturbed. There is no discussion in the *Catnic* case of whether the allegedly infringing variant or equivalent must be one that would have been obvious at the date the specification is construed; prior cases have rightly held that it need not have been.[39]

In sum, though purposive construction is a new expression in patent cases, there seems to be little that flows from it unless, as has been indicated, it opens the door to a consideration of ancillary documents as aids to construction. On the whole, it is suggested that patent cases can be fairly dealt with without adding the further complication of ferreting out such documents and becoming embroiled in a contestation as to what if anything they signify.

There has been surprisingly little reference in Canadian decisions to the correct approach to be taken in a patent case where the defendant has departed from the language of the claims. No Canadian judge since Thorson P. has attempted to state or even to reiterate what he considers the applicable principles to be. What is essential seems to have been treated as a question of fact, as Thorson P. said it was in *McPhair* v. *Sharpe*,[40] though it has clearly emerged in England (correctly, it is submitted) that it should be treated as one of construc-

---

of knowledge may have changed: Hayhurst, Lord Esher, and Some Fundamentals of Patent Law (1981), 9 Bull. P.T.I.C. 493, at p. 520. In the *Catnic* case nothing turned on what was the appropriate date.

[37] One might infer from the decision that it would be useful when drafting a patent specification to include a statement that the patentee intends to include all such variants within the scope of his claims, though this should go without saying. *Cf.* Hayhurst, Disclosure Drafting (1971), 28 Bull, P.T.I.C. 64, at p. 81.

[38] Equivalents function in substantially the same way to achieve the same result: *Lovell* v. *Beatty, supra,* footnote 15, at p. 76, per Thorson P.; *R.C.A.* v. *Gaumont* (1936), 53 R.P.C. 167, at p. 191, per Lord Wright M.R.

[39] *Hosiers* v. *Penmans*, [1925] Ex. C.R. 93, at p. 99, per Maclean J.; Blanco-White, Patents for Inventions (4th ed., 1974), p. 63.

[40] *Supra,* footnote 33, at p. 537.

tion. To take a recent example in the Federal Court of Canada, relating to a simple mechanical device, in *Baxter* v. *Cutter*[41] claim 2 of the patent called for a combination of elements, one of which was a "cannula". What was illustrated in the drawings as a cannula was a hollow cylindrical element.[42] Having heard expert testimony on the meaning of the word "cannula" the learned judge felt able to construe the word as not being limited to a hollow body. He seems to have accepted expert evidence as to what the word was intended to mean in the patent.[43] The conventional view has been that expert testimony, though admissible as to the meaning of technical terms, should stop short of saying what the patent means.[44] Two of the other claims of the patent, claims 1 and 4, called for a "hollow cannula". If the essentiality or nonessentiality of "hollow" were a matter of construction, there would be a problem in concluding that "hollow" was a nonessential feature of claims 1 and 4 because claim 1, by contrast, specified any cannula.[45] The learned judge considered the "hollow" feature to be nonessential[46] and found that claims 1 and 4 were infringed by use of a solid, vaned spike that provided external passages around it but no passage through it. It seems that he approached the issue of essentiality as one of fact, not of construction, and on an issue of fact he would be clearly entitled to listen to and weigh the opinions of experts.[47] Had the issue been treated as one of construction, the conventional rule has been that expert evidence on this

[41] (1981), 52 C.P.R. (2d) 163, per Gibson J. The decision was rendered so soon after the House of Lords decision in the *Catnic* case that the latter would not have been available to the learned judge. It is understood that an appeal is now pending to the Federal Court of Appeal. This comment does not purport to discuss all the issues in the case nor to suggest what the result might or should be on any line of reasoning.

[42] The patent drawings, and the claims in suit, are not reproduced in the reasons for judgment but are of public record.

[43] *Supra*, footnote 41, at p. 170.

[44] *Joseph Crosfield* v. *Techno-Chemical* (1913), 30 R.P.C. 297, at pp. 309-311, per Neville J.; *British Celenese* v. *Courtaulds* (1935), 52 R.P.C. 171, at p. 196, per Lord Tomlin; *Northern Electric* v. *Photo Sound*, [1936] S.C.R. 649, at p. 676, per Duff C.J.; *Western Electric* v. *Baldwin*, [1934] S.C.R. 570, at pp. 572-573, 592-593, per Duff C.J. In *Chatenay* v. *Brazilian*, [1891] 1 Q.B. 79 (C.A.), Lindley L.J. said at p. 85: "The expression 'construction', as applied to a document, at all events as used by English lawyers, includes two things: first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law."

[45] *Cf. Submarine Signal* v. *Henry Hughes* (1972), 49 R.P.C. 149, at p. 174, per Lawrence, L.J.; *Noranda* v. *Minerals*, *supra*, footnote 15, at pp. 51-52, per Rand J.; *Jamb Sets* v. *Carlton* [1964] Ex. C.R. 377, at p. 385, per Cattanach J. The problem admits of but one solution where the feature provides the only distinction over another claim.

[46] *Supra*, footnote 41, at p. 171.

[47] As he did: *ibid.*, at pp. 165, 168. Like Waller, L.J. in the *Catnic* case, he also seemed to be interested in how the defendant came to make its device: *ibid.*, at p. 167.

"ultimate issue" is inadmissible.[48] We must await further developments to see how far the Canadian courts are prepared to go in entertaining evidence on such issues. And whether the Canadian courts will in future cases treat the issue of essentiality as one of construction separate from the factual issues of equivalency and infringement must also await elucidation. It is submitted that the court cannot decide the question of essentiality as one of fact where the Patent Act requires that the invention be correctly and fully described, and distinctly and explicitly claimed, in the patent specification.[49] To deal with the question, as in England, as one of (purposive) construction makes it easier, if only somewhat easier, to deal with these difficult cases and to advise clients.

WILLIAM L. HAYHURST, Q.C.*

* * *

BROADCASTING POLICY—REGULATORY FRAMEWORKS AND JUDICIAL RESPONSIVENESS.—Industries characterized by rapid technological change present a special challenge to the state in regard to the problem of establishing effective regulatory frameworks and mechanisms. The political and judicial challenge is to maintain a relevant and appropriate responsiveness capacity to the constantly emerging issues. Unless the legislation instituting the regulatory scheme is sufficiently flexible to permit a particular administrative agency to adapt to and control new technologies, and unless the courts are sufficiently mindful of the purpose behind the scheme, both the agency and the industry may flounder on the shores of indecision and uncertainty. A recent case in the Provincial Court of Newfoundland, *The Canadian Radio-television and Telecommunications Commission* v. *Shellbird Cable Limited*,[1] is particularly illustrative of the dilemmas facing the

[48] However, at least some judges in patent cases are now entertaining expert evidence on "ultimate" issues: Hayhurst, *op. cit.*, footnote 15 at p. 441; *American Cyanamid* v. *Ethicon*, [1979] R.P.C. 215, at pp. 251-255, per Graham J. In the writer's opinion this signals an undesirable shift towards more advocacy from the witness box, and if permitted at all it should be confined to rare cases of great technical difficulty, perhaps ones where the judge would otherwise need the aid of a scientific adviser. See also Blanco White et al., Encyclopedia of United Kingdom and European Patent Law (1977), ss 3-311 and 10-119. The use in the Federal Court of affidavits of experts, filed in advance of the trial, tends to put what is proferred out of the control of the court.

[49] Patent Act, *supra,* footnote 10, s. 36.

* William L. Hayhurst, Q.C., of the Ontario Bar, Lecturer in Industrial Property in the Faculty of Law, University of Toronto.

[1] Unreported, Oct. 29th, 1981 (Currently under appeal).

administrative and judicial processes in the area of television broadcasting in Canada.

However, before discussing the *Shellbird* case, it is important to note briefly the three main features of the context within which the case arises. First, the regulation of all broadcasting in Canada is governed principally by three statutes of the federal Parliament: The Broadcasting Act,[2] The Radio Act,[3] and The Canadian Radio-television and Telecommunications Commission Act.[4] The most important piece of legislation insofar as we are concerned here is The Broadcasting Act. Under this Act the Canadian Radio-television and Telecommunications Commission (CRTC) is empowered to ". . . regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 . . .".[5] This policy is essentially one of ensuring the establishment and operation of a Canadian-owned system which will ". . . safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada . . .".[6]

While the goal of Canadian ownership of the industry was effectively accomplished within a very short period of time, there has been a marked failure to establish predominately Canadian-produced programming on Canadian television. Recent figures quoted by the Minister of Communications, Francis Fox, reveal that eighty-one percent of the viewing public is watching American shows,[7] and even the CRTC has acknowledged that the regulations on Canadian content quotas have proved to be a "dismal flop".[8] The reasons for this failure are not pertinent to the issues at hand; suffice it to say that the current broadcasting environment is one clouded by a notable inability to ensure the maintenance of a uniquely and effectively Canadian character in television programming.

The second factor is the judicial recognition of the right of the federal government to control broadcasting in Canada. The matter (at least as it pertains to systems involving off-air, non-closed-circuit broadcasting systems) was decided by the Supreme Court of Canada in *Captial Cities Communications Inc. et al.* v. *Canadian Radio-*

---

[2] R.S.C., 1970, c. B-11, as varied by the Canadian Radio-television and Telecommunications Act, S.C., 1974-75-76, c. 49.

[3] *Ibid.*

[4] R.S.C., 1970, c. R-1 as varied by the Maritime Code Act, S.C., 1977-78, c. 41, not yet proclaimed in force, and the Canadian Radio-television and Telecommunications Act, *ibid.*

[5] *Ibid.*, s. 15. See also s. 3.

[6] *Ibid.*, s. 3(b).

[7] Toronto Sunday Star, Nov. 29th, 1981, at p. A1.

[8] *Ibid.*, at p. A15.

Television Commission[9] where Laskin C.J., writing for the majority, stated:[10]

> I am therefore in no doubt that federal legislative authority extends to the regulation of the reception of television signals emanating from a source outside of Canada and to the regulation of the transmission of such signals within Canada.

He then went on to give exclusive control (subject to certain caveats which will be noted below) over all television broadcasting, including cable television programming, within Canada to the federal government. He subsequently confirmed this view in *The Public Service Board et al.* v. *Dionne et al. and the Attorney General for Canada*[11] where, again writing for the majority, he said:[12]

> . . . exclusive legislative authority in relation to the regulation of cablevision stations and their programming, at least where such programming involved the interception of television signals and their transmission to cablevision subscribers, rested in the Parliament of Canada.

The final point is that telecommunications technology has undergone great advances in the last decade. While a great deal of media attention has been focused on the development of interactive information services such as Telidon, progress in the field of broadcasting satellite technology has also been formidable. This is particularly true in the case of the direct broadcast satellite (DBS) and the earth stations or dishes (TVRO's) which receive its signals. Satellites are becoming more powerful with each succeeding generation of models, and as the power output increases so does the possibility of using smaller, less expensive dishes to pick up their signals. In the past, satellites required receivers up to several metres in diameter, whereas with the new breed of satellites, dishes of approximately one metre in diameter are feasible. It is predicted that prices for such dishes will fall dramatically from the several thousands of dollars they now cost to an estimated cost of two hundred dollars within a few years.[13]

Moreover, programmes on satellite signals are available now: at least twenty-five American stations currently use satellites for their broadcasts,

> . . . including nine pay-TV [stations] . . . offering first-run movies, Las Vegas nightclub acts and entertainment specials; a network called Nickelodeon providing 16 hours a day of children's programs; three 24-hour-a-day channels offering

---

[9] (1977), 81 D.L.R. (3d) 609, 36 C.P.R. (2d) 1, [1978] 2 S.C.R. 141, 18 N.R. 181.

[10] *Ibid.*, at p. 162 (S.C.R.).

[11] (1977), 83 D.L.R. (3d) 178, 38 C.P.R. (2d) 1 (*Sub nom, Régie des Service Public* v. *Dionne*), [1978] 2 S.C.R. 191, 18 N.R. 27.

[12] *Ibid.*, at p. 196 (S.C.R.).

[13] Report of the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, Telecommunications and Canada (1979), p. 53.

> religious and family shows; four independent "superstations" that broadcast, among other things, some 500 baseball games per season.[14]

These signals are for the most part picked up by authorized commercial receiving stations in the United States which rebroadcast them to home subscribers for a fee. However, if an unauthorized company or individual in Canada or the United States wants to receive the signal, the dish need only be pointed at the satellite. As yet the use of scrambling devices by the broadcasters is not economically necessary because the pirating of signals has not become a real threat to their operations.

The *Shellbird* case serves as a convenient Canadian exemplar of the difficulties which arise within the context of the three above factors. Shellbird Cable Limited is a small cable television company in Corner Brook, Newfoundland, which operates under a licence granted by the CRTC. The licence authorized *Shellbird* to carry the signals of several stations, including those of the CBC, CTV, NBC, and ABC. Shellbird's licence, by its own admission, did not permit the reception and distribution of the American Public Broadcasting System (PBS) signal which was broadcast via an American satellite. However, in early June, 1981, Shellbird was using a receiving dish to capture the PBS signal which it transmitted through its cable network to its subscribers (at no extra cost). The company was charged with a breach of section 5 of the Cable Television Regulations which states:[15]

> A licence shall not use or permit the use of its undertaking or any channel of its undertaking except as required or authorized by its licence or these Regulations.

The question which Seabright P.C.J. addressed was:[16]

> Is the delivery of the PBS signal to the subscribers of Shellbird Cable Limited broadcasting as defined by the Broadcast [*sic*] Act?

The defence argued that if a satellite signal was not within the definition of broadcasting, the CRTC had no power to control that signal. The argument was based on the definition of broadcasting in section 2 of the Broadcasting Act:

> "broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public . . . .

And furthermore, "radiocommunication" is defined as:

> . . . any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies . . . propagated in space *without artificial guide*.[17]

---

[14] L. Dotto, Earth Stations: Dishing Up a Revolution (1980), VII In Search 3, at p. 10.

[15] S.O.R. Cons./78, Vol. 4, p. 2529.

[16] *Supra*, footnote 1, at p. 2.

[17] *Supra*, footnote 4, s. 2, italics added.

There were three methods by which the PBS signal could be brought into Canada: by microwave (which did not reach beyond Nova Scotia), by antenna (which was possible only in the regions near American stations along the border), and by TVRO from satellite broadcasts. It was the third way which Shellbird was using (by necessity), and which the defence was arguing was not within the ambit of the broadcasting definition.

The question, then, was whether the satellite signal constituted a "broadcast", thus establishing the CRTC's authority in the matter. To be a broadcast meant that the signal had to be a radiocommunication, and to be a radiocommunication, the court stated, the signal had to meet six criteria. It had to be a:

(a) Transmission, emission or reception of
(b) signs, signals, writing, images, sounds or intelligence
(c) by means of electromagnetic waves
(d) of frequences
(e) propagated in space
(f) without artificial guide.[18]

According to Seabright P.C.J., all these criteria had not been fulfilled insofar as ". . . the artificial guide is contained in the TVRO or earth satellite [*sic*]".[19] Because the signal was not broadcasting as defined by the Act, and because there was no explicit authority in the Act to control the use and reception of satellite signals *per se*, then the CRTC had no authority to regulate this signal.

One futher argument which was put forward by the prosecution was based on section 3(j) of the Act which states that:

> . . . the regulation and supervision of the Canadian broadcasting system should be flexible and readily adaptable to scientific and technical advances . . . .

As the court pointed out, however, the extent of the CRTC's powers is to be found in the Act, and unless satellite signals are subject to the CRTC's control, the issue of flexibility and adaptability does not arise.

Nevertheless, several points about the case suggest that the court was misguided not only in its conclusions, but also in its approach to the issues involved. The first difficulty is that there is no discussion of the meaning of "without artificial guide" which is the basis of the decision. Traditionally, the phrase was assumed to mean "over wire", with the actual cable being the artificial guide. If indeed the court's interpretation that the TVRO constitutes an artificial guide for the signal is correct, then it is difficult to understand why microwave receivers or even conventional antennae would not be classified in the

[18] *Supra*, footnote 1, at p. 5.
[19] *Ibid.*

same way for their position in the transmitting-receiving network is analogous to that of the TVRO. If, on the other hand, the court meant to say that the satellite is the artificial guide,[20] then the same type of argument can be made. This argument would be that:

> [j]ust about every broadcast transmitting antenna . . . guides its signal. If it didn't that signal would fire off equally in all directions. . . . A lot of it would be wasted up in the sky, where there's no audience.[21]

Yet Parliament clearly intended the Act to cover such transmissions, and the courts have implicitly accepted such signals as within the ambit of the broadcasting definition. It is very difficult to conceive of any logical distinction which might be made between "regular" transmissions and satellite transmissions, and between "regular" receptions and TVRO receptions.

Even assuming that the satellite or the TVRO is an artificial guide, it can still be argued that the CRTC controls the station's programming in a case such as this. The support for such an argument can be found in the reasoning behind the *Capital Cities* and *Dionne* cases. The thrust of these two cases is that once the CRTC assumes control over a "broadcasting undertaking"[22] (which *Shellbird* admittedly was), then it assumes control over all its programming, not just those parts of its programming which are delivered off-air from sources outside the country or the individual province in which the receiver-distribution system is situated:

> Programme content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise.[23]

And the *Shellbird* case, as with the two constitutional decisions, is:

> . . . not a case where the cable distribution enterprises limit their operations to programmes locally produced by them for transmission over their lines to their local subscribers.[24]

---

[20] A case similar to *Shellbird* which was decided on the basis that a satellite constituted an artificial guide is *R.* v. *Lougheed Village Holdings Ltd* (Unreported), May 8th, 1981 (Prov. Ct B.C.), in which Romilly P.C.J. said at p. 4: ". . . there would seem to be an irresistible inference that the electromagnetic waves were propagated in space with artificial guide, that is the satellite." Consequently, Lougheed was acquitted of charges laid under the Radio Act and the Broadcasting Act because the company was not involved in "radiocommunication", an essential element in all the charges which were laid. The case can be distinguished from *Shellbird* only to the extent that Lougheed operated an apartment complex and was neither a cable television company nor a licencee of the CRTC.

[21] J. Miller, *Shellbird* v. *CRTC*, [1981] Broadcaster (Dec.) 8, at p. 10.

[22] *Supra*, footnote 4. S. 2 states: ". . . broadcasting undertaking includes a broadcasting transmitting undertaking, a broadcasting receiving undertaking and a network operation . . . ."

[23] *Supra*, footnote 10.

[24] *Supra*, footnote 11, at p. 197.

To allow the regulation of *some* but not *all* programming, it is argued, would destroy the prospect of any effective regulation whatsoever. The contention that because not all the broadcasting in *Capital Cities* and *Dionne* was of a transprovincial character, and that consequently the intraprovincial broadcasts at least should not be subject to federal control, was rejected by Laskin C.J. in *Dionne*:[25]

> I do not think that any argument based on relative percentages of original programming and of programmes received from broadcasting stations can be of any more avail here than it was in *Re Tank Truck Transport Ltd.*

The results in *Dionne* and *Capital Cities* might have been different if all the programming were locally produced. Similarly, the argument in *Shellbird* might be different if all the programming were received via satellites (assuming again that the court's artificial guide argument is a valid one).

Furthermore, if the decision in *Shellbird* stands, the purposes behind the Broadcasting Act would be thwarted. If the CRTC is to regulate the broadcasting industry with a view to establishing a national broadcasting system which, again, would ". . . safeguard, enrich and strengthen the culture, political, social and economic fabric of Canada . . .",[26] then the existence of uncontrolled pockets of programming would present a serious threat to a system which has yet to fulfill its goals. Once a company like Shellbird Cable Limited becomes a broadcasting undertaking, control over its programming (at the very least as to the number and mix of channels to be carried) must be total to be effective. To ignore the purpose of the Act entails the risk of decisions like *Shellbird* which threaten the whole system, particularly in light of developing satellite technologies. This is the real complaint about *Shellbird*; it fails to come to grips with the realities of Canadian broadcasting. The problems in the industry cannot be addressed effectively through simplistic, narrow interpretations of isolated phrases like "artificial guide" without examining fully the history and context of broadcasting and its regulation in the country.

Finally, on policy grounds, satellite broadcasting must be subject to federal regulatory control. Three types of reasons can be put forward for such control: cultural, regulatory, and developmental.[27] The cultural challenge from the United States is not now being met, and with the influx of many more American channels in competition with Canadian shows, ". . . the opportunity to provide new sources

---

[25] *Ibid.*, at p. 198.

[26] *Supra*, footnote 4, s. 3(b).

[27] Report of the Committee on Extension of Services to Northern and Remote Communities, The 1980s: A Decade of Diversity (1980), p. 18.

of Canadian programming would be lost''.[28] As regards regulatory needs:

> . . . regulation is feasible only when the regulatory body has complete control over all the instruments of broadcasting. The CRTC would have no control at all over the nature and content of the US programming carried by satellites [if such signals were allowed].[29]

And, lastly, there is the developmental concern: ''. . . the widespread reception and delivery of US satellite services would inhibit or delay the carriage of Canadian services on Canadian satellites . . . .''[30] Assuming that the broadcasting policy as expressed in the Act remains valid, and assuming that a truly Canadian broadcasting system is still a worthwhile goal, then satellite broadcasts must be amenable to federal regulation.

One additional point needs to be made about the *Shellbird* case. At the heart of the case and of Shellbird's actions lies a double standard which is found all too often in the regulation of broadcasting in Canada. The fact is that while television watchers in most major urban centres in the country have access to literally dozens of Canadian and American stations (including PBS) those in remote regions usually have a limited range of alternative viewing. At the time of the charge, Shellbird was providing only five channels to its subscribers. The distribution of the PBS signal was an attempt to widen the choice of programmes at relatively little expense. However, the goal of greater selection in programming should not be achieved by misguided judicial reasoning; this can only serve to render the Broadcasting Act impotent. Rather, the solution is to ensure equality of access to all types of programming across the country through fair and effective regulation.

R. P. SAUNDERS*

* * *

CRIMINAL LAW — STATUTORY INTERPRETATION — USE OF PARLIAMENTARY DEBATES — COMPARISON OF ROLES OF JUDGE AND HISTORIAN — HOMICIDE — PROVENANCE OF THE CODE SECTIONS ON HOMICIDE — CODIFICATION OF GENERAL PRINCIPLES OF THE COMMON LAW.—Vasil had been living with a woman (G) and her two children by a previous union. On the night of the crime, he had left a party without G because he was very upset with her. After driving the babysitter home, he went

[28] *Ibid.*

[29] *Ibid.*, at pp. 18-19.

[30] *Ibid.*, at p. 19.

* R.P. Saunders, of the Department of Law, Carleton University, Ottawa, Ontario.

to the basement and opened a can of barbecue fluid. He poured this fluid over the contents of a freezer and a refrigerator so that the food would be spoiled. He also decided to show his displeasure with G by throwing lighted matches on the living-room rug. He denied pouring barbecue fluid on the rug but expert evidence suggested that he had done so. A fire destroyed the house causing the death of G's two children. The trial judge instructed the jury on section 212(c) and, inferentially, section 205. Vasil was convicted of murder. The Court of Appeal of Ontario had ordered a new trial because the trial judge had erred in his direction to the jury on the partial defence of intoxication.[1] A unanimous Supreme Court of Canada[2] dismissed a Crown appeal from that decision. In strict terms, the *ratio decidendi* of *Vasil* relates to the intoxication defence but the case's greatest significance is its discussion of section 212(c) of the Canadian Criminal Code[3] which provides:

> Culpable homicide is murder . . .
>
> (c) 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.

Vasil is only the third time in its history that the Supreme Court has examined section 212(c).[4] The judgment was written by Mr. Justice Lamer, the court's newest judge and a former member of the Law Reform Commission of Canada. His Lordship's judgment is welcomed as making some sense of section 212(c). While we might applaud the result, his method of arriving there is less an occasion for celebration. The writing style is convoluted and his choice of authorities is eccentric. The *Vasil* decision may be a cryptogram but it does make some very important observations on the law of murder. In the process of doing so, Lamer J. also makes a contribution to the burgeoning case law on statutory interpretation, a topic sadly neglected by our legal writers and law schools.

Statutory Interpretation — The Use of Parliamentary Debates

In keeping with his law reform background, Lamer J. is mildly reformist in deciding that, in interpreting the Code, he should look at the 1892 parliamentary debates on the Criminal Code Bill although he warns us that it is not "usually advisable" to refer to *Hansard*.[5] The courts are increasingly ignoring or implicitly distinguishing the *Read-*

---

[1] (1980), 37 C.C.C. (2d) 199 (Ont. C.A.).

[2] (1981), 58 C.C.C. (2d) 97 (S.C.C.).

[3] R.S.C., 1970, c. C-34.

[4] *Graves* v. *The King* (1913), 47 S.C.R. 568 (S.C.C.); *R* v. *Hughes et al.*, [1942] S.C.R. 517 (S.C.C.).

[5] *Supra*, footnote 2, at p. 110.

er's Digest[6] decision and taking a peep at *Hansard*. The Supreme Court of Canada might rationalise its reference to the Minister's remarks in the House of Commons as a special case because the Criminal Code is a basic document rather like a constitution statute. Lamer J. does not spell out for us the "unusual" circumstances when judges would be allowed to pierce the legislative veil and look at the "true" intentions of the policy-makers. Perhaps if Lamer J. had provided us with some policy he might have said that we could examine the remarks of the Government sponsor of a Bill only and we certainly should not go ferreting about among the more irrelevant remarks of an opposition back-bencher who had some untutored views on the Great Measure.

The rule against the use of *Hansard* has always seemed a trifle hypocritical because the courts often do indirectly what they profess is legally impossible by a direct route. Before I am accused of a terminal case of naïveté, let me hastily add that I am fully aware that the courts (and indeed much of human society) operate on that basis.[7] On the question of statutory interpretation, the judicial hypocrisy was a little more obvious than usual because the courts have frequently resorted to the rather inexact methods afforded by the classic rules of statutory interpretation such as the Mischief Rule when they have asked themselves: "What mischief or defect in the common law did this Act hope to eradicate?" Instead of looking at the Debates, the judges have made guesses, admittedly educated ones, in the hope of divining the true intention of Parliament. Similar arguments could be made for the use of the Golden Rule and all those other canons of interpretation which are not really much better than rather obvious props for judicial decision-making. Late in the twentieth century, when all of us have embraced at least some of the ideas of Karl Llewellyn[8] and the other Legal Realists, I am always surprised by the shock experienced by new law students if it is suggested to them that judges sometimes have a gut-feeling as to the decision they wish to make and then seek out an *ex post facto* rationalisation in the cases or, in this context, the legislative intent of the measure under discussion. This realistic and pragmatic quality of the judicial mind has become so much of the thinking layperson's attitude toward the law that we find a cartoon in *The New Yorker* where a judge, in replying to counsel's objection to the reception of evidence, says "yes, it is hearsay but it is great hearsay".

Lamer J.'s hesitant reference to *Hansard* is understandable. On the one hand, some argue that the legislature's role is discrete and the

[6] *Attorney General (Canada)* v. *Reader's Digest Association*, [1961] S.C.R. 775 (S.C.C.).

[7] Willis, Statute Interpretation in a Nutshell (1938), 38 Can. Bar Rev. 1.

[8] Twining, Karl Llewellyn and the Realist Tradition (1975).

courts have no right to overrule or mess with legislation; judges merely interpret the law and should not look behind the words of the statute. In support of this view, the argument proceeds that the meaning of the words of a statute should be treated as self-evident. Courts should not take notice of legislators' attempts to explain or distort the intent of the drafter who has worked under the specific instructions of the Cabinet or a particular Minister. On the other hand, those who want judges to read *Hansard* say that legislative drafting is an inexact science and the words of an Act can be ambiguous and can be made even more so by the meddling and amendments which are inflicted on the Bill when discussed on the floor of the House. Of course wholesale use of *Hansard* can lead to the absurd situation where courts are so intent on discovering the legislators' intent by looking at their debates, that the judges only look at the actual words of the Act as a last resort in statutory interpretation![9]

One suspects that the Canadian courts, which have, until now, been rather conservative in statutory interpretation, will expand the "unusual" occasions for reading *Hansard*. Lamer J. decided to examine the 1892 Parliamentary Debates when Sir John Thompson, the Minister of Justice, discussed section 174 (now section 212) of the Criminal Code Bill. Lamer J. sought confirmation that that section had been taken directly from the English Draft Code of 1879; he also referred to the *Report* of the Commissioners which had been published to explain the Draft Code (and was quoted by Thompson). His Lordship could be commended for his historical scholarship but I would suggest that it did not go far enough.

The judicial process is essentially an historical one. The trial judge uses evidence to draw inferences. His method is the same as that of the historian although usually the judge's standard of proof is higher or more selective than that of the writer of history.[10] For instance, the historian Fawn Brodie satisfied herself as to Jefferson's paternity of his slave Sally Hemming's children by methods which would never satisfy a judge who was asked to award support to the Hemmings offspring.[11] The historian could be satisfied with much less but then he or she is not making a decision which would condemn some person to penal servitude or which would impose severe financial burdens on the unsuccessful party. Courts no longer take a very literal-minded and slavish adherence to case-precedent; instead, the courts examine the facts of the present case, with the creative use of precedent, some reference to the social milieu of the present litigation

[9] See Dickerson, The Interpretation and Application of Statutes (1975) and Corry, The Use of Legislative History in the Interpretation of Statutes (1954), 32 Can. Bar Rev. 689.

[10] *E.g.*, Lerner (ed.), Evidence and Inference (1958), particularly pp. 19-72.

[11] Brodie, Thomas Jefferson (1973).

and the peculiar circumstances of the parties, and in the process, the judges are writing or re-writing the history of the law. If the courts are resorting to the social or economic data of something like a Brandeis brief, the historical analogy becomes even more obvious.[12]

In recent years, the appellate courts have become more conscious of the need to examine historically some of the background of statutes and case law. In *Beaver* v. *R.*[13] Fauteux J. neglected to do so when he failed to recognise that in the nineteenth century the accused could not give evidence. In contrast, we find Lord Diplock in *Hyam* v. *D.P.P.*[14] arguing against a stringent rule of constructive or objective *mens rea* in homicide because he pointed out that objective *mens rea* only made sense if the accused could not give evidence. Before 1898, the only way to find guilt was by implying it from the facts presented by the prosecution and the surrounding circumstances. The Ontario Court of Appeal in *R.* v. *Tennant and Naccarato*[15] made the same point. In *Vasil*, we are interested in the historical origins of sections 205 and 212(c).

Sections 205, 212 and 213 of the Criminal Code and their Origins — The Search for Malice Aforethought

In the last decade, section 212(c) has received a great deal of attention. Why? Is it because the prosecution thinks it is easier to obtain convictions under that provision? Is the prosecution trying to convert factual manslaughters into legal murders? Why is section 213 so infrequently used, particularly when one examines the facts of some of the section 212(c) cases and realises that the prosecution could have sought a conviction under section 213? We seem determined to broaden the categories of murder. Society finds it necessary — perhaps on some denunciatory theory — to label Vasil as a murderer rather than merely find him guilty of manslaughter or arson.

Before we examine section 212, it is necessary to examine the enigmatic section 205 which was given undue attention by Lamer J. Section 205 is a grab-bag of definitions which has little cohesion and absolutely no pretence to comprehensiveness. It defines homicide, tells us that homicide can be culpable or non-culpable, and that culpable homicide is murder, manslaughter or infanticide. Sub-section 6 tells us that causing death by perjurious evidence is not homicide. Sub-section 5 is the one of greatest interest and it is an inexplicable mixture of manslaughter (and, perhaps, murder):

---

[12] Rosen, Judicial Interpretation and Extra-Legal Facts (1972).

[13] [1957] S.C.R. 531 (S.C.C.).

[14] *Regina* v. *Hyam*, [1975] A.C. 55 (H.L.).

[15] *R.* v. *Tennant and Naccarato* (1975), 23 C.C.C. (2d) 80 (Ont. C.A.).

A person commits culpable homicide when he causes the death of a human being

(a) by means of an unlawful act,

(b) by criminal negligence,

(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death, or

(d) by wilfully frightening that human being, in the case of a child or sick person.

Lamer J. rather grandiosely described this sub-section as containing "within its four corners . . . all possible forms"[16] of culpable homicide which, in definitional terms, is about as useful as telling us that the alphabet contains all of Shakespeare's plays. Section 205(5) is useless, or at least, a mess. In future we would hope that courts will ignore its provisions and instead find the definition of murder and its constituent elements of *actus reus* and *mens rea* in section 212 or section 213. Using section 205 to define murder makes only a little more sense than looking at section 214 which, I submit, contains no definition of the crime. Section 205 appears to be a drafting error which we inherit not only from the English Draft Code but also from Stephen's *Digest*.[17]

As stated earlier, Lamer J. showed some creativity in seeking the meaning of the relevant Code sections in their antecedents but the search was only skin-deep. When it came to differentiating murder from manslaughter, he relied upon the ingredient of malice aforethought despite the fact that the drafters of the Code consciously discarded that mischievous term. Furthermore, the learned judge cited as authorities on the topic of malice, the *first* editions of Halsbury[18] and Kenny[19] which do not exactly contain the essence of modern scholarship on the criminal law and offer even less on the history of the subject. Canada has had a Code for ninety years and yet its judges have consistently treated the law of crime as if it were common law. The drafters of the Code are partly to blame because they failed to include general principles in their formulation. Furthermore the common law offered very little definition of the *mens rea* of murder until some nineteenth century codifiers attempted to extricate the law of murder from the unhelpful case-law and a morass of statutes.

In 1869, the new Dominion, following the lead of England eight years earlier, passed Acts consolidating the criminal law.[20] The aim

[16] *Supra*, footnote 2, at p. 107.

[17] 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 (1879); Stephen, A Digest of the Criminal Law (Crimes and Punishments) (1877).

[18] Halsbury, Laws of England (1st ed., 1907-1917).

[19] Kenny, Outlines of Criminal Law (1st ed., 1902).

[20] 32 & 33 Vict., cc. 18-28 (Can.).

was to make the law more intelligible and more accessible but the nearest we approach a definition of murder is the negative definition in section 7 which described "excusable homicide" as occurring where a person "kills another by misfortune, or in his own defence, or in any other manner without felony". This should not surprise us because the law of murder is essentially judge-made or jury-made. The statutory literature on murder, from the thirteenth century to the middle of the nineteenth century, did not define the crime but only described the circumstances under which the benefit of clergy did *not* apply. So we find statutes from Edward I to Edward VI which exclude killings from a general pardon. The common ingredient in all these was "malice prepensed".[21] If the killer showed a clear (prior) intention to kill, had waited in ambush or poisoned the victim, then the court, and the jury, would have no difficulty. The books of authority such as Staundforde[22] in the seventeenth century, usually assumed that everybody knew the meaning of malice prepense as embracing all those killings which were not excusable or justifiable. In the same century, the proliferation of weapons and increase in violence prompted the passage of the Statute of Stabbing[23] which provided that: "Every person . . . which . . . shall stab or thrust any person or persons that hath not then any weapon drawn, or that hath not then first stricken the party, which shall so stab or thrust so as the person so stabbed or thrust shall thereof die . . . although it cannot be proved that the same was done of malice aforethought . . . shall be excluded from the benefit of clergy, and suffer death as in case of wilful murder." This statute was too widely drawn and within sixty years, the courts were ignoring it by saying that the Statute was only a declaration of the common law but they offered no refinement of the phrase "malice aforethought".

The problem which we know as felony-murder was not easily solved. The judges had no statute to help them and the authorities were quite unscientific in trying to formulate rules. For instance, Lambard had said that "if a thief do kill a man whom he never saw before and whom he intended to rob only, it is murder in the judgment of the law, which implyeth a former malicious disposition in him rather to kill the man than not to have his money from him".[24] Stephen, who did not like the automatic felony-murder rule, commented that the rule of Lambard was quite satisfactory if the thief intended to kill but was not as satisfactory if the killing was unintentional but was only the "improbable effect of minor violence". He also said: "The law can hardly be justified in 'presupposing' that a

[21] See Stephen, A History of The Criminal Law of England (1883), vol. III, p. 44.

[22] Staundforde, Pleas of the Crown (1607), p. 19A.

[23] 1604, 2 James I, c. 8.

[24] Lambard, Eirenarcha (1610), p. 224.

thief 'carrieth that malicious mind that he will achieve his purpose though it be with the death of him against whom it is directed', from the fact that he trips a man up in order to rob him and happens to kill him.''[25]

Coke has always been given exaggerated respect as a legal authority. In truth, his formulation of murder is messy. He defined malice as a killing done *sedato animo* (which suggested premeditation). At another place he described implied malice as a killing ''without any provocation'' (which does not suggest any preconceived scheme). He seemed to confuse motive and intention. Coke's most celebrated instance of murder was: ''So if one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off without any evil intent in him, this is *per infortunium,* for it was not unlawful to shoot at the wild fowl; but if he had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder, for the act was unlawful.''[26] Stephen was quite justified in finding this doctrine ''astonishing'' and unsupported by precedent.

In treatises on the criminal law and its history, there is a remarkable lack of any history of the substantive law and how the rules of the criminal law developed. Instead, writers take ''criminal law'' to mean the history of punishment and penal methods. Why? The common law defined crime and was unchangeable but merely evolving. At least this was true of homicide; every one, judges and juries, were taken to know the difference between murder and an accidental or justifiable killing. The law relating to theft had been thought to be similarly immutable but socio-economic factors gave the law some stimulus for reform.[27] While methods of dishonesty might change, the same was not true of homicide—a corpse was a corpse. Another factor was the criminal trial, as we know it, which is less than a century old. Accused persons did not generally have a right to counsel until 1836 (and universal legal aid is much more recent). Until 1898 in England and 1896 in Canada (which was *after* the passage of the Criminal Code), the accused was not allowed to give evidence on oath at his own trial.[28] This state of affairs meant that the verdict of guilt was, for centuries, arrived at without the help of defence counsel and without the explanations which the accused could make to explain his actions as innocent or at least ambiguous. Before then, the trials were very short and the reports were limited to a recital of the indictment

[25] *Op. cit.,* footnote 21, p. 51.

[26] Co. Inst. III, 50.

[27] See Hall, Theft, Law and Society (2nd ed., 1952), and Fletcher, Rethinking Criminal Law (1978).

[28] The best short discussion of this is found in Lewis, A Draft Code of Criminal Law and Procedure (1879), pp. xxxiv *et seq.*

and the few remarks which the judge made to the jury. Appeals in criminal cases did not become routine until this century; it is hardly surprising that the jurisprudence of criminal law was so poverty-stricken.

Even a speculative thinker such as Francis Bacon limited his remarks on the criminal law to the statement that: "All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular act." At another place, he spoke of killing "with malice" and gave no further explanation but concentrated on the punishments and forfeitures which would apply to various kinds of homicide.[29] One gains the impression that liability was a given; it was only a matter of proving it by the confession of the accused. Another cultured lawyer, Lord Kames, wrote a history of the criminal law in which he urged lawyers to avoid the "little arts of chicane" and instead to pry into "the secret recesses of the human heart" and seek the "abstract reason of all laws". Did he unlock the mysteries of *mens rea*? No. Instead, he developed the judicial hunch theory of crime: "we feel that he is guilty; and we also feel that he ought to be punished for his guilt."[30] Instead of talking about *mens rea*, he discussed revenge. In examining homicide, he was more interested in the relative heinousness of the *modus operandi* than in laying down firm legal rules.

We find a more legalistic approach in the works of Chief Justice Hale who defined murder as a killing with malice aforethought. He defined express malice as "a deliberate intention of doing some corporal harm to the person of another". The deliberation "must arise from external circumstances discovering that inward intention, as lying in wait, menacings antecedent, former grudges. . .".[31] This definition echoed the medieval notion of secret homicides being so heinous that they were not pardonable by benefit of clergy. Hale also defined murder as being committed with implied malice — a killing without provocation, the death of an officer of justice in the execution of his duty and, finally, in the following circumstances: If A came to rob B in his house, or upon the highway, or otherwise without any precedent intention of killing him, yet A kills B. This last case does not sound like a death caused by some weird or unforeseen event but a direct killing in the heat of the moment.

Hawkins, another treatise writer, thought that the criminal law was just and adapted to the human good. Malice was a "formed design of doing mischief" which showed the "heart to be pervertly

---

[29] The Maxims of the Law, Regula XV in Montagu (ed.), The Works of Francis Bacon (1844), pp. 238, 247.

[30] Kames, Historical Law Tracts (2nd ed., 1761), p. xi.

[31] Hale, The History of the Pleas of the Crown (1736), pp. 425, 451.

wicked''. Murder could be committed indirectly by ''wilfully and deliberately doing a thing which apparently endangers another's life''.[32] Malice was implied in ''the execution of an unlawful action, principally intended for some other purpose''. This is close to section 212(c), although in another passage in his rather confusing presentation, Hawkins referred to the unlawful action as being an intention to commit another felony.

So far, these legal authorities, which have continued to be quoted until this century, offer no rational system of general principles. At the end of the eighteenth century, under the influence of Beccaria and Montesquieu, critical voices were heard. Sollom Emlyn, an editor of Hale and of the *State Trials,* differed from Hawkins and disapproved of a punishment system which did not differentiate cases where the guilt was ''manifest and apparent'' from those where the liability of the accused was more ambiguous. He also complained of the ''multiplicity and voluminousness'' of the law and the resulting ''clashings and inconsistencies'' and yet a blind veneration for English law made reform impossible.[33]

The next fifty years were preoccupied with campaigns against harsh punishments which did not apportion the sentence to the guilt. There was no ''distribution of justice'', in Eden's view, and a crime should be punished according to ''its abstract nature and turpitude''.[34] He considered it wrong for the lawgiver ''to assume the divine attribute of animadverting on the fact, only according to the internal malice of the intention''.[35] Eden was a penal reformer rather than a theoretician of the criminal law but the contrast between the rational man of the Enlightenment and the narrowly legal view is seen in a dialogue between a commonsensical English gentleman (who suggested that everyone knew murder when he saw it) and a lawyer (who tells us very little but delivered a short sermon on the fairness of criminal procedure). The gentleman defined an act of homicide as ''either murder, or it is not so'', and added: ''The intention of the killer is the criterion; and the malignity of that intention is in the nature of a single controverted fact, subjected to enquiry, and capable of strict proof.'' The lawyer replied: ''Every crime hath its proper degree of enormity, variable as the mind of the criminal; but you misapply the property of the crime to the act on which the crime is founded. That act, in itself, and abstractly considered, is a simple consequence of the attributes of matter; unfortunate indeed and piti-

---

[32] Hawkins, A Treatise of the Pleas of the Crown (1716), pp. 78, 80.

[33] Emlyn, preface to State Trials (2nd ed., 1809), reprinted in Cobbett's Complete Collection of State Trials (1809), vol. 1, pp. xi, xxxiii.

[34] Eden, Principles of Penal Law (3rd ed., 1772), p. 8.

[35] *Ibid.*, p. 12.

able, but neither culpable nor punishable, until it be proved to have cooperated with a mischievous intent. When that proof is given, then, and not before, it becomes criminal, under the appellation of murder."[36]

Eden was interested in proportionate punishment and this should have led to classification of offences but his attempt to make categories of homicide was not very successful. He did warn against placing much reliance on Coke's fowl-arrow example because "every circumstance weigheth something in the scale of justice". He referred to the infinite variety of constructive crime and deplored its existence as contrary to "political liberty": "that external, unconnected circumstances should regulate the nature and enormity of crimes, that the intention should be transferred to the accident which results from it, are positions, which, in their present extent, have ever seemed to me most preposterous and innatural".[37] The intent of the accused should only be collected from the actual circumstances. Eden offered his own formulation for constructive crime: "If an action unlawful in itself be done deliberately, and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter."[38] He had the very *avant-garde* notion that crimes should be classed according to the "actual mischief done to society" partly because "the internal malignity of mankind is not within the cognizance of human tribunals".[39]

Although he did not make great advances in the definition of *mens rea,* Eden was an important influence. He was not only a penal reformer but also advocated the repeal of obsolete laws and suggested that an independent commission should draft declaratory Acts "comprehending all the descriptions and degrees of each crime, with their proportionate punishments".[40]

So far, the history of the criminal law has been portrayed as the history of punishment with little thought given to general principles and the extent of knowledge about the *mens rea* of murder being limited to the phrase *malice prepense.* The pre-occupation with punishment may not be very useful in the search for criminal law

---

[36] *Ibid.*, pp. 205-206.

[37] *Ibid.*, p. 227

[38] *Ibid.*, p. 228.

[39] *Ibid.*, p. 229.

[40] *Ibid.*, p. 329. Blackstone had the same idea in his Commentaries, vol. IV, ch. 1. Also see Dagge, Considerations on Criminal Law (1722).

principles, but the reformers and legislators had a proper sense of priority because the first urgent task was to curtail the number of crimes which carried a mandatory death sentence. Eden, for instance, influenced by Beccaria,[41] argued that "when the laws are good, those, who deserve punishment, rarely escape the arm of Justice". Unfortunately, the laws were so out of line with popular sentiment that judicial discretion and the royal prerogative of mercy had to be used extravagantly to see something like justice done.

Madan and Paley were the important conservative voices who opposed Eden's views. Madan devoted no attention to the principles of the criminal law. He was not interested in proportionality of punishment. If law prescribed hanging, the only one way to prevent crime was strict enforcement of the death penalty. He criticised the use of judicial discretion which led to leniency but he was in favour of executive clemency so long as it was strictly limited to convictions arising from perverse jury verdicts, legal doubts arising from "vague wording of a statute or a doubtful construction" or cases where "the offence, though within the letter of the law, is not within its apparent meaning and intent". These instances would be rare because, in Madan's view, the law was certain. Paley was primarily interested in punishment and his criteria for severity had very little relation to the definition of the crime but he was prepared to see definitional information built into the system *after* the guilt-determination stage. These factors included "the facility with which [the crime] can be committed, the difficulty of its detection and the danger it presents to the community". This convinced him that it was better to have many capital offences which could occasionally be subject to commutation and mercy rather than a very few where capital punishment would invariably be inflicted.

The Movement for Reform

Romilly is best remembered for his campaign to reduce the number of capital offences. He struggled for more than twenty years to reform the criminal law but did not live to see the wholesale changes to the scheme of punishments which were guided through Parliament by Macintosh and Peel. Romilly had an instinct for the reform of the substantive law but saw the barbarity of criminal punishments as a first priority. He admired Beccaria's treatise but he questioned the Italian's preoccupation "that crimes are to be measured by the injury they do to the State, without regard to the malignity of the will".[42] In an 1810 Parliamentary speech, he called for "a vigilant

[41] On Beccaria, Madan and many other penal theorists, see Heath, Eighteenth Century Penal Theory (1963).

[42] Peter (ed.), The Speeches of Sir Samuel Romilly (1820), p. xxix.

and enlightened Police, rational rules of Evidence, clear and unambiguous Laws, and punishments proportioned to the Offender's guilt",[43] and he felt that the laws would be more certain if "embodied in formal Statutes". He shared with Beccaria a distrust of judicial discretion and, on this point, differed widely from his influential protagonist, Paley, who argued that capital punishment should apply to many crimes and the judges could decide the small proportion of criminals who should be hanged, depending on the "general character or the peculiar aggravations" of their crimes. In his reply, Romilly struck a blow for legal certainty and the Rule of Law:

> The general character of a crime cannot be considered as one of those circumstances which it is impossible to enumerate or define beforehand, or even which cannot be ascertained with that exactness which is requisite in legal description; and yet it is upon the supposed existence of circumstances easy to be noted after the crime has been committed, but impossible to be beforehand defined, that the writer's defence of this system is principally founded.[44]

The tenor of these remarks suggests that Romilly would have welcomed reform of the substantive law but such was not attempted for another seventy years. Even after the Peel Acts were passed, a model indictment shows how the law of murder remained uninformative. The accused was alleged to have "feloniously, wilfully and of his malice aforethought did kill and murder, against the peace of our said lord the King, his crown and dignity".[45]

Everyone interested in the reform of substantive criminal law was influenced by Jeremy Bentham who abhorred the common law and advocated codification. He wanted the law clearly defined. He castigated legal fictions including constructive crime. He wanted the subjective circumstances taken into account in the determination of guilt.[46] The first codes of criminal law in the English language were drafted by Edward Livingston in Louisiana and Thomas Babington Macaulay in India. Both were cultured men for whom law was not a total preoccupation. They were both strongly influenced by Beccaria, Eden, Bentham and the British Parliamentary Committees which sought to investigate and reform the criminal law at the beginning of the nineteenth century. Both Codes were highly prized for their brilliance and originality but criticised for being too literary and impractical. They were considered good because they minimised

---

[43] *Ibid.*, pp. 127-128.

[44] *Ibid.*, pp. 156-157. He said in the same speech: "Unless our Criminal Code is avowedly to be founded, in its different parts, upon the most inconsistent and discordant principles, we ought either to abolish capital punishments in the instances which have been pointed out, or to appoint them in a great many cases in which they do not now exist."

[45] A Barrister, An Alphabetical Arrangement of Mr. Peel's Acts (1830), p. 149.

[46] *E.g.*, Codification Proposal in Bowring (ed.), The Works of Jeremy Bentham (1962), vol. IV, p. 535.

ambiguity and discarded obsolete law but lawyers disapproved because they were too novel. Livingston's Code did not become law in Louisiana but served as a model for the criminal law of other parts of the United States. Macaulay's Code had to wait more than twenty years for acceptance and it too would probably have failed if it had had to seek a majority vote from a constituent assembly. Both were harshly critical of English criminal law. Livingston railed against the "disgusting tautology of the English statutes".[47] He was no kinder to the common law: "the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies . . . with a patience that would be astonishing, even if their written laws had sanctioned the butchery."[48] In its place would be a Code which would "no longer be a piece of fretwork exhibiting the passions of its several authors, their fears, their caprices, or the carelessness and inattention with which legislators in all ages and in every country have, at times, endangered the lives, the liberties, and fortunes of the people, by inconsistent provisions, cruel or disproportioned punishments, and a legislation, weak and wavering, because guided by no principle, or by one that was continually changing, and therefore could seldom be right".[49] Instead, Livingston's Code was "addressing the people in the language of reason, and inviting them to obey the laws, by showing that they are framed on the great principle of utility"![50] Instead, penal laws should be in plain language "clearly and unequivocally expressed, that they may neither be misunderstood nor perverted, they should be so concise so as to be remembered with ease, and all technical phrases or words they contain, should be clearly defined".[51] Livingston did not include a General Part which described the underlying principles of the criminal law. Once again, it seems that *mens rea* was not considered important at the beginning of the nineteenth century, partly because the intent of the accused was only indirectly examined because the accused could not give evidence on oath. In the context of homicide however, did Livingston live up to his promise of plain language and a lack of ambiguity? He defined "negligent homicide in the performance of unlawful acts" and the punishment depended upon the risk taken and means used but also upon the quality of the unlawful act—the more serious the offence, the higher the punishment. The *mens rea* definition of this offence was:

---

[47] The Complete Works of Edward Livingston on Criminal Jurisprudence (1968), vol. I, p. 47.

[48] *Ibid.*, p. 13.

[49] *Ibid.*, p. 11.

[50] *Ibid.*, p. 175.

[51] *Ibid.*, p. 84.

> . . .the homicide must have been done in the attempt to offer the injury or commit the offences . . . that is to say, must have been the consequence of some act done for the purpose of offering or committing such other injury or offence. If the act which caused the death had no connexion with the injury intended to be offered or committed, it does not come within the definition.[52]

Livingston admitted that, after all had been done to give "precise limits to the definitions of crimes", there was much to be left to the "discernment of the judge" because so much depended upon the "ever-varying . . . and the inscrutable workings of the perpetrator's mind".[53] Nevertheless, he hoped that every word in the new Code would be carefully weighed and "the most clear and explicit" meaning would be given to it with a minimum reference to external material.

Livingston limited murder to intentional killing (and the definition must be read in the light of the description of negligent homicide already given):

> Murder is homicide, inflicted with a premeditated design, unaccompanied by any of the circumstances, which, according to the previous provision of this chapter, do not justify, excuse or bring it within some one of the descriptions of homicide hereinbefore defined.[54]

Macaulay shared many of Livingston's sentiments. He asked: "How long may a penal code at once too sanguinary and too lenient, half written in blood like Draco's, and half undefined and loose, as the common law of a tribe of savages, be the curse and disgrace of the country?"[55] He thought the most striking feature of his Code was "the manner in which the mental circumstances involved in a criminal act are carefully distinguished and made use of".[56]

Stephen described the Indian Penal Code as "the criminal law of England freed from all technicalities and superfluities"[57] and that it was "practically impossible to misunderstand"[58] it, but he felt that the weakest part of the work was the section on homicide. The general principles of the Code did not contain full definitions of *mens rea* except for a definition of "voluntarily": "a person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended

---

[52] *Ibid.*, p. 308.

[53] *Ibid.*, p. 306.

[54] *Ibid.*, vol. II, p. 147. In his commentary on the Code, Livingston said: "What is *malice aforethought*? Is there any malice that is aforethought? What is *express malice*? When shall it be *implied*? Thus we find that there is scarcely a word in the description of a crime so important to be known, that will not raise at least a doubt in the mind of a man of common understanding." *Ibid.*, vol. I, p. 305. (Emphasis in original.)

[55] Quoted by Clive, Macaulay: The Making of the Historian (1975), p. 436.

[56] Quoted, *ibid.*, p. 457.

[57] Stephen, A History of the Criminal Law of England (1883), p. 300.

[58] *Ibid.*, p. 303.

to cause it, or by means which at the time of employing these means he knew or had reason to believe to be likely to cause it''.[59]

Murder was defined as including acts done:

1. With the intention to cause death.
2. With the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused.
3. With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.
4. If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, and commits such act without any excuse for incurring the risk of causing death or such injury.[60]

Stephen suggested that murder could more economically be defined as ''whoever voluntarily causes the death of any person is guilty of murder'' but he did not follow his own advice either in his Digest or in the English Draft Code (or inferentially in the Canadian Code).[61]

On the other hand, one of the most perceptive commentators considered that Macaulay had taken the greatest pains over the section on voluntary culpable homicide and said that ''it remains a monument'' to the Benthamite form of analysis (*e.g.*, the distinction between intention and motive).[62] The wording of those sections was not

---

[59] Whitley Stokes, The Anglo-Indian Codes (1887), Act xiv of 1860, s. 39.

[60] *Ibid.*, s. 300. The Code also contained, in s. 299, a general definition of culpable homicide: ''Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death. . ..''

[61] *Op. cit.*, footnote 57, p. 314. Stephen also said of the General Explanations Part of the Indian Penal Code: ''The idea by which the whole Code is pervaded . . . is that every one who had anything to do with the administration of the Code will do his utmost to misunderstand it and evade its provisions; this object the authors of the Code have done their utmost to defeat by anticipating all imaginable excuses for refusing to accept the real meaning of its provisions and providing against them beforehand. *Ibid.*, at p. 305.

In terms of the style of Code drafting, he also said: ''Human language is not so constructed that it is possible to prevent people from misunderstanding it if they are determined to do so, and over-definition for that purpose is like the attempt to rid a house of dust by mere sweeping. You make more dust than you remove. If too fine a point is put upon language you suggest a still greater refinement in quibbling.'' *Ibid.*, at p. 306.

[62] Eric Stokes, The English Utilitarians and India (1959), p. 232. In an 1835 Minute for the Council of India, Macaulay had said: ''I would resist the very beginning of an evil which has tainted the legislation of every great society. I am firmly convinced that the style of laws is of scarcely less importance than their substance . . .. Why it has been so much the fashion in various parts of the world to darken by gibberish, by tautology, by circumlocution, that meaning which ought to be transparent as words can make it. . . .'' Quoted, *ibid.*, p. 159.

Ross, a judge and a fellow Commission with Macaulay quoted Bentham on the nature of Codes: ''. . . aptitude for notoriety in respect of its contents, conciseness and clearness in respect of its language, compactness in respect of its form, completeness in

vague in the sense of style but they appear strange because they contain so few words which a lawyer would recognise as denoting *mens rea*. Yet in his explanatory notes on the Code, Macaulay, who had so little sympathy with common law, found it difficult to avoid the conventional language of the English lawyer. For instance, in explaining his disapproval of constructive homicide, he said: ". . . to punish a man whose negligence has produced some evil which he never contemplated, as if he had produced the same evil knowingly and with deliberate malice, is a course which, . . . no jurist has ever recommended in theory, and which we are confident that no society would tolerate in practice."[63] He hoped that the Code would be self-sufficient but had to admit that in distinguishing between acts which were almost certain to cause death and acts which caused death "only under very extraordinary circumstances", the legislature could not frame a law but had to trust to the courts' consideration of the evidence. Very strong evidence of liability was needed where the possibility of death seemed remote.[64] Macaulay wanted to be rational but when it came to marginal cases, he hoped he could rely on the courts' common sense and fairness. In homicide cases, where the initial act was in itself innocent, he thought it "barbarous and absurd" to punish a person for "bad consequences, which no human wisdom could have foreseen".[65] He specifically refuted Blackstone's assertion that it was murder to administer abortifacients to a woman so that she died. Instead, Macaulay hoped that the following would be adopted in the application of his Penal Code (although we might well ask what Code provisions would lead us to his conclusions):

> If A kills Z by administering abortives to her, with the knowledge that these abortives are likely to cause her death, he is guilty of voluntary culpable homicide, which will be voluntary culpable homicide by consent, if Z agreed to run the risk, and murder if Z did not so agree. If A causes miscarriage to Z, not intending to cause Z's death, nor thinking it likely that he shall cause Z's death, but so rashly or negligently as to cause her death, A is guilty of culpable homicide not voluntary, and will be liable to the punishment provided for the causing of miscarriage, increased by imprisonment for a term not exceeding two years. Lastly, if A took such precautions that there was no reasonable probability that Z's death would be caused, and if the medicine were rendered deadly by some accident which no

---

respect of its contents; intrinsic usefulness in respect of its character, and justifiedness *i.e.* manifested usefulness in respect of the body of instruction by which in the form of principles and reasons it ought to be illustrated. A code is almost the only blessing—perhaps it is the only blessing—which absolute governments are better filled to confer on a nation than popular governments." Quoted, *ibid.*, pp. 218-219.

[63] Macaulay, Speeches (1872), p. 558.

[64] *Ibid.*, p. 657. In further explanation, Macaulay said: "It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who do it as likely to cause death." *Ibid.*

[65] *Ibid.*, p. 669.

> human sagacity could have foreseen, or by some preculiarity in Z's constitution such as there was no ground whatever to expect, A will be liable to no punishment whatever on account of her death, but will of course be liable to the punishment provided for causing miscarriage.[66]

In further explanation, Macaulay remarked that to punish "as a murderer every man who, while committing a heinous offence, causes death by pure misadventure is a course which evidently adds nothing to the security of human life. . . . The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way".[67]

The Canadian Criminal Code was drafted by Robert Sedgewick, Deputy Minister of Justice and George Burbidge of the Exchequer Court but the great lobbyist for codification was James Gowan and his correspondence often mentioned the English Draft Code and Stephen, referred to Livingston but never mentioned Macaulay.[68] He did not like Livingston's effort and perhaps put Macaulay's draft in the same category as too "literary". Gowan was also in touch with another codifier, R.S. Wright, who is best remembered nowadays as an English High Court judge and an author of a book on conspiracy. He prepared a code for the Colonial Office in 1874 which was somewhat revised by Stephen.[69] This code was enacted in Jamaica but never became law because it did not receive Colonial Office approval. When Stephen was asked by the Colonial Office to revise the 1874 Code of Wright, he objected to general definitions relating to the mental element of crime. Wright, in reply, argued that a "code without general definitions of general elements would miss the greatest advantage of codification".[70] It is very difficult to understand why Stephen omitted general principles. Gowan was fully aware of this obvious deficiency in the 1892 Canadian Criminal Code. One gathers that they were omitted because the Government was in a hurry to pass a Code and thought that an imperfect code was better than none. Would Wright's draft have been an improvement? He made an attempt at General Principles as shown in the definition of "intent":

---

[66] *Ibid.*, pp. 668-669.

[67] *Ibid.*, pp. 670-671.

[68] See Parker, The Origins of the Canadian Criminal Code, in Flaherty (ed.), Essays in the History of Canadian Law (1981), pp. 249 *et seq.* Also see a selection of Gowan's letters in (1981), 2 Now and Then 17.

[69] See Friedland, R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law, [1981] Oxford J. of Leg. Stud. 307.

[70] Quoted, *ibid.*, at p. 315.

> If a person do an act for the purpose of thereby causing or contributing to cause an event, he intends to cause that event within the meaning of this Code although either in fact or in his belief, or both in fact and also in his belief, the act is unlikely to cause or to contribute to cause the event.[71]

This provision had a double-edged quality. On the one hand it seemed to be subjective because it referred to "his belief" although one should not place too much store in this because very little thought was given in the nineteenth century, not even by jurists of the calibre of Wright, to the subjective-objective dichotomy. On the other hand, this sub-section seemed to negate forseeability based on the knowledge or intent of the accused.[72] One could almost say that this sub-section was a codification of the so-called presumption that a man intends the natural and probable consequences of his acts, or perhaps that was the meaning of the next sub-section:

> If a person do an act voluntarily, believing that it will probably cause or contribute to cause an event, he intends to cause that event within the meaning of this Code although he does not do the act for the purpose of causing or contributing to cause the event.[73]

Then the following seemed to corroborate the recognition of the presumption of intention, and yet, at the start, qualified the whole situation by reference to the actor using "reasonable caution and observation":

> If a person do an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event.[74]

The homicide sections were very disappointing. Manslaughter was defined as "whoever causes the death of another person by any unlawful harm".[75] If the harm were negligently caused, then it was

---

[71] Jamaica Law 36 of 1879, s. 10(i). Also notice the problematic s. 40(1): "A person shall not be punished for any act which by reason of ignorance or mistake of fact in good faith he believes to be lawful." There was also s. 40(ii) which referred to ignorance of law.

[72] Wright, following Macaulay's example, clothed his Code with illustrations. Illustration to s. 10(i) was: "A discharges a gun for the purpose of shooting B, and actually hits him. It is immaterial that B was at such a distance or in such a situation that the shot would most probably miss B."

[73] *Ibid.*, s. 10(ii). The illustration given was: "A, for the purpose of causing the miscarriage of B, administers to her a medicine which he knows to be dangerous to life. It is immaterial that he earnestly desires to avoid causing B's death and uses every precaution to avoid causing it."

[74] *Ibid.*, s. 10 (iii). The illustration given was: "A discharges a gun among a crowd of persons and one of them is shot. A must be presumed to have intended to cause harm unless he can show that he had such ground for believing that harm would not be caused that his act was merely negligent."

[75] *Ibid.*, s. 121.

only the lesser crime of manslaughter by negligence. Murder was defined as "whoever intentionally causes the death of another person by any unlawful harm".[76] No illustrations were given to assist us in construing these sections.

The English criminal law was still awaiting codification when Wright prepared his code in 1874. In forty years of effort by Romilly, Mackintosh, Peel and Brougham, nothing had been achieved but the appointment of many Commissions and Parliamentary Committees to consolidate, digest and codify the law. Starting in 1833, there were Commissions which had various mandates ranging from weeding out legal bric-a-brac all the way to codification schemes.[77] The Benthamites (such as Austin[78] and Amos[79]) wanted root-and-branch codification while others wanted merely consolidation with minimal changes to the existing law. The lawyers in the House did not want change and, between 1833 and 1861, defeated the work of fourteen Commission reports, and the codification and consolidation schemes of three Lord Chancellors. A Royal Commission was established in 1834 and in the next seven years made six reports which commented on the law and prepared a digest of the criminal law. The legal philosopher Austin served on the first two and the law academic Amos served on the first four. Unfortunately these six reports, amounting to more than 700 pages, received little attention. A few pieces of patchwork legislation were passed but an overall consolidation or codification was not achieved. They found the law inaccessible, inaccurate and unwieldy. Because the law was scattered through ancient books of authority and untrustworthy law reports, the Commissioners dis-

[76] *Ibid.*, s. 120. Lewis' Draft Code is even less known than Wright's version. S. 412 provided that "the jury shall, in determining whether or not such intent existed on the part of the person charged with such offence, take into consideration whether, when the act to which such intent is relevant was done or omitted, such accused person was in fact incapable, from any cause whatsoever, of forming such intent, and shall find accordingly". Lewis' Code does not include a full range of General Principles. The murder provisions describe the crime of murder as occurring when a person "intentionally commits any unlawful act from which the death of any person results having, at the time such act was committed, the express intention, formed deliberately. . . , unlawfully to cause death either of the person whose death is caused, or of any other person whatsoever". (S. 506.) Lewis said that he wanted to limit murder to killing in cold blood and to exclude constructive murder but he gave a very wide interpretation to "unlawful Act" but one presumes that that phrase should be severely narrowed by phrases such as "intentionally" and "deliberately". *Op. cit.*, footnote 28.

[77] A good summary of the work of the various Commissions is found in Greaves, The Criminal Law Consolidation and Amendment Acts (1862), pp. vii *et seq.* Also see Cornish, Crime and Law in Nineteenth Century Britain (1978).

[78] Austin, The Province of Jurisprudence Determined (1832).

[79] Andrew Amos, Ruins of Time Exemplified, in Sir Matthew Hale's History of the Pleas of the Crown (1856). He is not to be confused with Sheldon Amos, An English Code: Its Difficulties and the Modes of Overcoming Them (1873).

covered very few principles of law and few "precise rules fitted for general application".[80] They did not agree with the defenders of the common law who admired its flexibility and adaptability; the Commissioners thought these qualities might be appropriate for private law but this was its greatest weakness for the criminal law which was thus made "inaccessible and unintelligible in its rules and boundaries". They also deplored constructive crime:

> Impediments to the formation of a uniform and consistent system of criminal statute law sometimes result from the retention of *doctrines founded upon ancient notions*, which are totally incongruous with the general principles of our jurisprudence. An instance occurs in the law of homicide, according to which a felonious purpose, though it be unwholly unconnected with any design to occasion death, is made, in conjunction with an accidental killing, to constitute the crime of wilful murder.[81]

They criticised the "scarcity of distinctions defining the gradations of guilt" so that crimes "bearing little moral resemblance to each other, are, by sweeping definitions, frequently classed together without discrimination as to penal consequences".[82] They wanted certainty in drafting and flexibility in degrees of liability. The report did not avoid the use of malice aforethought in defining murder and described "express malice" as where death resulted from a "deliberate intention to kill or do great bodily harm".[83] Implied malice was questioned but recognised:

> 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.[84]

This provision would have limited application because a lesser offence of involuntary homicide was also defined:

> Involuntary homicide which is not by misadventure, includes all cases where, without any intention to kill or do great bodily harm, or wilfully to endanger life, death occurs in any of the following instances:
>
> Where death results from any act of unlawful omission done or omitted with intent to hurt the person of another, whether mischief light on the person intended, or on any other person;

---

[80] First Report from His Majesty's Commissioners on Criminal Law (1834), p. 3.

[81] Fourth Report of Her Majesty's Commissioners on Criminal Law (1839), p. xxi.

[82] *Op. cit.*, footnote 80, p. 4.

[83] *Op. cit.*, footnote 81, p. xxxiii, art. 14. Art. 12 had defined "voluntary": "The killing of another is voluntary whensoever death results from any act or unlawful omission done or omitted with intent to kill or do great bodily harm to any other person, or whensoever anyone wilfully endangers the life of another by any act or unlawful omission likely to kill, and which does kill any other person." Malice aforethought had been defined, by art. 11, as any killing which was voluntary and not justified, excused or extenuated.

[84] *Ibid.*, p. xi, art. 53.

> Where death results from any wrong wilfully occasioned to the person of another;
>
> Where death results from any unlawful act or unlawful omission, attended with risk of hurt to the person of another;[85]

The Commissioners used the word "malice" almost apologetically. They did not approve Foster's definition of malice as the "ordinary symptoms of a wicked, depraved and malignant spirit" or "plain indications of a heart regardless of social duty and totally bent upon mischief".[86] They felt that this definition was more an assessment of murder based on facts (or the circumstances of the case) rather than law. The doctrine of implied malace was "very abstruse and technical" so that "a criminal intention, wholly unconnected with any personal injury, in connexion with a purely accidental killing, is in some instances made to constitute the distinction between the higher and lower species of culpable homicide, and in others, to bring an accidental killing within the scope of manslaughter".[87] Instead, they wished to limit implied malice to cases where the accused exposed "life to manifest peril"[88] and there was "consciousness on the part of the offender that such peril would ensue". There was some confusion in their minds as to whether it was a question of legal definition or factual assessment:

> These elements are obviously matters of fact, to be decided as facts; they are beyond the reach of definition, and when probability of loss of life from doing the act, the knowledge of that probability on the part of the offender, and his criminal intention to occasion the risk have been determined in fact, the principle of law applies.[89]

But they also said:

> The limits of the crime would naturally be extended in this as in other cases, by a constructive extension of its rules, and thus constructive or implied malice, or

---

[85] *Ibid.*, p. xi, art. 67.

[86] *Ibid.*, p. xxiii.

[87] *Ibid.*, p. xxii.

[88] *Ibid.*, p. xxiii. The Commissioners decided to retain the term "malice aforethought". They seemed a little ambivalent about legislative language. They said that it was "manifestly improper" to use technical language in "declaring to all classes of society the rules which they are bound to obey". They added ". . .the employment of terms which have an ordinary and well-understood signification in a technical or constructive sense, differing from their popular meaning, is far more objectionable than the use of terms of act to which no popular meaning is attached; in the latter case, the law may be a dead letter to all those who cannot understand its meaning; in the former, the law will probably be misunderstood". *Ibid.*, pp. xii-xiii. Later, they declared that "elegance of diction" was sometimes sacrificed in their drafting of "abstract propositions and rules" in favour of "plain and even homely language". *Ibid.*, p. xiii. As stated earlier, the draft of 1839 retained malice aforethought and explained that it had been retained without "any sacrifice in point of perspicuity" and pointed out, in what seems a contradiction that "actual premediation, or forethought, is the leading characteristic of murder in most of the modern systems of criminal law". *Ibid.*, p. xxiii.

[89] *Ibid.*, p. xxiv.

> malice in law, became a test of murder; but as the question how far and to what cases the offence should be extended by construction was of course a question of law, implied malice as the supposed test of the extended crime was also a question of law; or in other words it was a question of law how far the offence should be extended under the pretext of implied malice.[90]

This seeming inconsistency is only skin-deep. The two statements quoted above indicate a sophistication in legal exposition which is all too rare. The Commission was quite correct in thinking that the fact-finder must obviously decide upon the facts of a case but must only do so within a legal framework, that is "wilfully exposing life to danger".[91] If we wanted to convict an accused of murder, even if we are obliged to use the doctrine of implied malice, (and of course we are often required to do so because murderers do not usually kill on close-circuit television or make explicit confessions), we must piece together, from all the circumstances, the degree of culpability—whether it is murder or manslaughter. This was shown in articles 12 and 67 which defined murder and manslaughter respectively. The first section talked about "intent to kill or do great bodily harm" and "wilfully endangering the life of another" or "any act or unlawful omission likely to kill" while article 67 specifically ruled out the intention to "kill or do great bodily harm" and "wilfully" and replaced it with "intent to" or "risk of" *hurt* to the person of another. This distinction, as set out in articles 12 and 67, was meant to limit the former to life-risking situations. In addition, article 12 contained words which suggested a subjective *mens rea* with the use of "with intent" and "wilfully", while in article 67 phrases such as "without any intention to kill or do great bodily harm or wilfully to endanger life" were found.

The 1839 Report did not favour Coke's fowl-arrow example because there was no good reason why the trespass to a man's fowl should be "enhanced beyond its intrinsic moment". Or to express it on a broader theoretical basis:

> If the predicaments of fact, which constitute crimes, are framed too largely, and if the same penal consequences are applied generally to an extensive class of criminal actions, a wide range of discretion in the application becomes necessary in order to avoid injustice in particular cases; and thus judicial discretion, the exercise of which within defined limits is not only salutary, but necessary, is too largely substituted for legal certainty.[92]

Alas, these good ideas came to naught. The forces of obstruction made codification impossible. The Criminal Law Consolidation and

---

[90] *Ibid.*, p. xxviii.

[91] Art. 17 had provided that it was murder "whether the offender, wilfully putting life in peril, intend mischief to the deceased or any other person in particular, or wilfully do an act, or be guilty of an unlawful omission likely to occasion death, without intending the mischief to light on any person in particular". *Ibid.*, p. xxxiv.

[92] *Ibid.*, p. xxviii.

Amendment Acts of 1861 were a consolation prize, an act of frustration by governments which had been able to achieve nothing. Their author was Charles Greaves[93] but he was not happy with this half-measure which suffered further damage by untutored amendments in the House. In the future he wanted established a Board, composed of the ablest lawyers, which would be a combination of a legislative drafting committee and law reform commission. In this way, some general principles might be drafted. Greaves was in correspondence with Gowan and Henry Elzéar Taschereau.[94] His views on codification of the general principles of law did not come to fruition in Canada but the 1861 consolidation was adopted in the 1869 Canadian enactment.[95] Neither of these sets of Acts contained a definition of murder although the 1861 English Act on offences against the person provided that an indictment for murder should set forth, *inter alia*, that "the defendant did feloniously, wilfully and of his malice aforethought kill . . .".

Both the Canadian and English provisions were remarkably silent on the subject of murder but were positively prolix on attempted murder and in typical Victorian fashion, gave every conceivable instance of an attempt to murder—by poison, by explosives, setting fire to ships, drowning, suffocating, strangling, shooting or by any other means. Two sections from the Canadian consolidation, one originally passed in 1877 and the other in 1869, will give the general impression:

> Section 8:
>
> Every one who, with intent to commit murder, administers or causes to be administered, or to be taken by any person, any poison or other destructive thing, or by any means whatsoever, wounds or causes any grievous bodily harm to any person, is guilty of felony, and liable to imprisonment for life.[96]
>
> Section 11:
>
> Every one who, with intent to commit murder, attempts to administer to, or attempts to cause to be administered to, or to be taken by any person, any poison or other destructive thing, or shoots at any person, or, by drawing a trigger or in any other manner attempts to discharge any kind of loaded arms at any person, or attempts to drown, suffocate or strangle any person, whether any bodily injury is effected or not, is guilty of felony, and is liable to imprisonment for life.[97]

---

[93] *Op. cit.*, footnote 77.

[94] (1981), 2 Now and Then 28.

[95] Taschereau, The Criminal Law Consolidation and Amendment Acts of 1869, 32-33 Vict., for the Dominion of Canada (1874).

[96] 1877, 40 Vict., c. 28, s. 1 (Can.) originally 1861, 24 and 25 Vict., c. 100, s. 11 (Eng.).

[97] 1869, 32 and 33 Vict., c. 20, s. 13 (Can.) originally 1861, 24 and 25 Vict., c. 100, s. 14 (Eng.).

These sections, which are repetitive and contradictory, justified Greaves' dissatisfaction with careless and thoughtless consolidation. One poisoning was a crime where grievous bodily harm was actually caused and in the other, a conviction could be obtained "whether any bodily injury is effected or not". The penalty was the same in both instances.

Taschereau prepared an annotated version of the Canadian consolidation. This scissors-and-paste volume could hardly be called scholarly. The whole section on murder consisted of quotes from *Russell on Crime* and the Criminal Law Commissioners' *Reports*. One can almost forgive Lamer J. for making 18th century statements about "malice" in murder when we find that Taschereau approvingly quoted Russell defining malice aforethought as not 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 social mischief".[98] In further explanation, again borrowed from Russell, Taschereau even had resort to Coke describing express malice as proceeding from a "sedate deliberate mind and formed design".[99] This could be discerned from "external circumstances" such as lying-in-wait and former grudges. Implied malice on the other hand was characterised as non-sedate—killing another upon the sudden without any provocation. The law presumed malice because the attack could not have arisen but from "an abandoned heart". Perhaps the most telling statement (which shows the state of the criminal trial and the lack of protection of the accused in the mid-19th century) was Taschereau's comment that as a general rule "all homicides are presumed to be malicious and of course amounting to murder until the contrary appears from circumstances of alleviation, excuse or justification".[100] Malice did not mean hatred or envy and only meant voluntary behaviour so that the accused "need not have contemplated the injury beforehand and need not have intended at any time to take life".[101] In a rambling essay, Taschereau quoted from treatises and cases which were inconsistent and lacking any underlying thesis and arrived at the conclusion that malice aforethought "may be practically defined as not actual malice or actual aforethought, or any other particular actual state of the mind, but any such combination of wrongful deed and mental culpability as judicial usage has determined to be sufficient to render that murder which else would be only

---

[98] Quoted in *op. cit.*, footnote 95, Vol. I, p. 165.

[99] *Ibid.*

[100] *Ibid.*, p. 166.

[101] *Ibid.*, p. 175.

manslaughter''.[102] This is reminiscent of the judge who said he could not define obscenity but he knew it when he saw it. The need for codification of general principles is obvious in Taschereau's statement that: ''If an action, unlawful in itself, be done deliberately, and with the intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder.''[103] In support, he cited abortion and arson cases. In some instances, the killing was accidental but it was still murder because the original act was *malum in se*. Similarly, the killing of a police officer was deemed murder because it was an ''outrage wilfully committed in defiance of the justice of the Kingdom''.[104] Manslaughter was different because malice was neither express or implied and the act was ''imputed to the infirmity of human nature''.[105] In retrospect it is difficult to believe that Taschereau criticised the 1892 Canadian Code because it was not a total code which, presumably, would include general principles. Taschereau's lack of systematic thought is even more incredible when we remember that he had been brought up in a civil law tradition.

Is it any wonder that Stephen, fresh from the codification which he had practised as Law Member of the Council of India where he did not experience the obstruction of the common law lawyers, decided that the criminal law would only be rationalised by the private enterprise of the individual drafter.[106] Stephen lacked Macaulay's flair and his drafting was sometimes sloppy. His Code had massive gaps, particularly in relation to general principles. Macaulay was a stylist but Stephen was only a technician. Although they both admired Bentham as the prophet of codification, Stephen was pessimistic and misanthropic while Macaulay was an unabashed Whig who took delight in advocating reform and saw the common law (and its practitioners) as impediments to reform. Despite his call for scientific law-making, Stephen retained an admiration for the common law. Yet, Stephen was not a Philistine, and produced books on criminal law which could be called scholarly and were often supported by historical research. For instance, in an examination of malice, he referred to a statute of Henry VIII[107] which made murder with malice aforethought a non-clergyable offence and pointed out that, with the

---

[102] *Ibid.*, p. 177.

[103] *Ibid.*, p. 178.

[104] *Ibid.*, p. 185.

[105] *Ibid.*, p. 193.

[106] Stephen, Improvement of the Law by Private Enterprise (1877), 2 Nineteenth Century 198.

[107] 1531, 23 Hen. VIII, c. 13.

aim of strengthening royal authority over law and order, the Tudor courts extended malice aforethought to implied malice.

In many ways, Stephen's first book on the criminal law, *General View of the Criminal Law*, was his best.[108] His examination of the definitional elements of the criminal law are the most intelligent one can encounter in the nineteenth century. For instance, he avoided all that nonsense about *actus reus* and *mens rea* and defined an action as a "combination of certain external motions with certain internal sensations"[109] and that the sensations which "accompany every action and distinguish it from a mere occurrence are intention and will".[110] Yet, Stephen soon ran into difficulties because he would have liked the elements of every crime to be "so worded as to denote by the mere literal sense of the words every action intended to be punished, and no other", but unfortunately, morality was a necessary ingredient in the administration of criminal justice because of its "general correspondence with the moral sentiments of the nation".[111] Therefore he was driven back to the position that it was practically impossible to give a more precise definition to "malice" than "wickedness". At this stage of his career, Stephen was not interested in drafting laws on murder. He felt that the degree of wickedness would depend upon the moral disapprobation which the accused's acts created. The degree of disapproval "would vary as the act was, or was not wrong, as it was or was not accompanied by negligence, as it was or was not likely to cause death".[112] The judgment of society was a task for "judicial legislation" and in the past it had been "discharged with skill and discretion".[113] The law threw "upon any persons who commit acts of a particular class the burden of proving that they were not done under the circumstances contemplated by the legislature, but at the same time to permit them to give evidence to that effect".[114] This is a remarkable statement on two bases. First, it shows that the presumption of innocence and the prosecutorial burden of proof are inventions of (or were resurrected in) the twentieth century. Perhaps *Woolmington* v. *D.P.P.*[115] was not stating the very obvious after all. Secondly, Stephen was arguing for a revolutionary change in the law: that the accused should be allowed to tell his version of the charge as a sworn witness on the stand.[116] If

[108] Stephen, A General View of the Criminal Law of England (1863).

[109] *Ibid.*, p. 75.

[110] *Ibid.*, p. 76.

[111] *Ibid.*, p. 82.

[112] *Ibid.*, p. 115.

[113] *Ibid.*, p. 116.

[114] *Ibid.*, p. 83.

[115] *Woolmington* v. *D.P.P.*, [1935] A.C. 462 (H.L.).

[116] Stephen, Prisoners as Witnesses (1886), 20 Nineteenth Century 453.

these factors are remembered in examining section 212(c) of the Canadian Code (which was enacted before the two reforms mentioned) then a strong argument can be made for interpreting that sub-section in a subjective manner. Stephen, in the *General View* and in the Draft Code was prepared to live with objectivity and constructive crime and yet he must be also remembered as the author of the excellent judgments in *Serné*[117] and *Tolson*[118] which are classic statements of subjectivity in *mens rea*.

Stephen published his *Digest* in 1877[119] and looked upon it as a preliminary draft of a code. At that time, he was also involved in the drafting of a Homicide Bill[120] which was based on the Indian Penal Code. The Bill was introduced in 1872 and 1874. The wording was not identical but very similar to Macaulay's. The 1872 version defined murder as a death caused:

1. With the intention of causing the death of the person killed.
2. With the intention of causing deadly injury to the person killed.
3. With the intention of causing to the person killed an injury, which the person killing knew to be deadly with respect to him.[121]

In the 1874 version, these definitions were broadened and compacted into:

1. With the intention of causing the death of or grievous bodily harm to the preson killed or any other person ascertained or unascertained.[122]

The earlier version had a final clause:[123]

4. When the act by which death is caused is, to the knowledge of the person who does it, so imminently dangerous, that it must, in all probability, cause death or deadly injury to some person, ascertained or unascertained, and when it is done without any excuse for running the risk of causing such death or grievous bodily harm.[124]

This provision did not make very great changes although it broadened liability by replacing "imminently dangerous" with "grievous bodily harm". The new version, however, added a proviso which made the law of murder more rigorous:

---

[117] *R.* v. *Serné* (1887), 16 Cox C.C. 311 (Central Crim. Ct).

[118] (1889), 23 Q.B.D. 168 (Central Crim. Ct).

[119] *Op. cit.*, footnote 17.

[120] The 1872 Homicide Bill and 1874 Homicide Law Amendment Bill were printed and copies were found in the Public Record Office of London, England. References to the Bills and the Home Office communications mentioned below are to be found in the P.R.O. file H045-9361-33015-HP00421.

[121] Clause 15 of 1872 Bill.

[122] Clause 26 of 1874 Bill.

[123] *Supra*, footnote 121.

[124] *Supra*, footnote 122.

> Every person shall be presumed to intend and to know the natural and ordinary consequences of his acts, nor shall this presumption be rebutted only because it appears or is proved that at the time when the act was done the person who did it did not attend to or think of its nature or probable consequences, or that he hoped that those consequences would not follow. . . .[125]

The only other section of the 1874 Bill which need concern us is the one relating to manslaughter and it is a very sensible one. It simply says that if some one intends to do bodily harm or has knowledge that his act will probably cause bodily harm it is only manslaughter if he did not know or foresee that in "all probability" it would cause death or grievous bodily harm.

Neither of these Bills became law. The House of Commons never liked codification but dismissed this particular measure because it preferred to wait for a full codification rather than pass piecemeal legislation. The reaction to the 1874 Bill was very diverse. William Tallack of the Howard Association applauded it because it would stop the hanging of those who were simply convicted on a legal fiction, namely, constructive murder. Some of the High Court judges (whose opinions were sought by the Home Office) were in favour. Lord Coleridge thought it a "most desirable measure".[126] Bramwell J. thought it "very desirable" to have the law "defined in modern, intelligible language, free from the confusion and mischief arising from the use of the word 'malice'".[127] Pollock J., on the other hand, did not approve because it would "disturb a course of law which I believe to be so thoroughly settled for all practical purposes as the subject will in its nature admit of".[128] Amphlett J. agreed and thought it a mistake to describe the law of murder "in the rigid form of an Act of Parliament"[129] and would only cause confusion and difficulty in an area of law where the judges already did substantial justice.

Stephen's talents—shown in his *Digest* and the Homicide Bills—were recognized and he became a member of the group responsible for drafting the English Draft Code from which the Canadian Criminal Code is adapted. Certainly, our present item of interest, section 212 was taken directly from the English Draft Code, which was completed in 1879.[130]

The English Draft Code had a provision somewhat similar to our present section 205 which described culpable homicide:

> Homicide is either culpable or not culpable. Homicide is culpable when it consists in the killing of any person either by an unlawful act or a culpable omission to

---

[125] *Ibid.*

[126] *Supra*, footnote 120, letter dated July 14th, 1874.

[127] *Ibid.*, letter dated May 3rd, 1874.

[128] *Ibid.*, letter dated May 1st, 1874.

[129] *Ibid.*, letter dated May 4th, 1874.

[130] *Op. cit.*, footnote 17.

> perform or observe any legal duty, or by both combined, or by causing a person by threats or fear or violence or by deception to do an act which causes that person's death, or by wilfully frightening a child or sick person.[131]

The section then went on to state that culpable homicide could be either murder or manslaughter and all the rest were not culpable. This section is not one of Stephen's better efforts. He may have been attached to it and decided to use it because it was in his *Digest*.

Finding a justification for section 212(c) is difficult, particularly when section 213 describes felony murder and almost all the situations where the commission of a crime could lead to life-threatening situations. It is equally difficult to understand why Stephen should have adopted the language of section 212(c) when there were much better models in other attempts at codification we have already examined and also in his own writing.[132] On another occasion, it has been argued that there are very few fact-situations which could be imagined as falling under section 212(c). In any case, the wording of that sub-section is, on its face, remarkably constructive. The only explanation can be that Stephen was expressing his beloved moral sentiment of society exemplified in the words "ought to know" and "whether or not. . .".

Lamer J. has tried to make sense of the sub-section and his judgment must be applauded for the overall policy it propounds. The decision would have been even better if he had not suggested that section 205 has any intelligibility or overall purpose. Similarly, as has been more than adequately demonstrated, we can only wish that he had avoided any resort to malice and all its evil works.

In summary, the following points can be made about sections 205 and 212(c) of the Code. It would be a distortion to say that they are all found in *Vasil* although that decision is one of the most important cases on homicide in recent years. One only wishes that it were not so difficult to decipher. The case inspires the following arguments and observations:

1. Lamer J. was misguided in placing any reliance on section 205. It says nothing of importance. Why should it be referred to at all? Why is it that it only arises in relation to section 212(c)?
2. The "unlawful act" in section 205 should only be applied to manslaughter.
3. Section 212(c) should be scrapped. All the cases which should be murder could find liability in section 212(a) or section 213. The only justification for section 212(c) seems to

---

[131] *Ibid.*, s. 167.

[132] Parker, Comment (1979), 57 Can. Bar Rev. 122.

be that the courts want to apply an objective standard and thereby keep the subjectivity of section 212(a) pure. Anyone who should be convicted of murder in circumstances such as *Vasil* would be caught, if at all, under the recklessness ingredient of section 212(a).

4. Lamer J. rightly explodes the nonsense about "unlawful act" and "unlawful object" needing to be present and separate. At least, one hopes this is what he said. He said at one point that it was wrong for the trial judge to tell a jury that "in order to comply with the requirement of an unlawful act so that the homicide be culpable under section 205(5)(a), there must be under section 212(c) an unlawful act causing death and a further unlawful object".[133] Yet he also laid down as good law that "when . . . the dangerous act is unlawful, the jury must be told, as the trial Judge did, that there must be the prosecution of a further unlawful object clearly distinct from the immediate object of the dangerous (unlawful) act".[134] This confusion is created by the unfortunate reference to section 205(5)(a). If that were ignored and we simply said that anyone who, for an unlawful object, does anything which was inherently dangerous, that is life threatening, then the accused may be convicted of murder even though he hoped it would not cause death. The courts have got themselves into illogical situations by straining to find further unlawful objects. This has had the effect of creating, or threatening to create, misdemeanour-murders. As we have seen, enlightened opinion has been against such constructive murders for 150 years.

6. If we have to retain section 212(c), Lamer J. is correct in saying that the unlawful object must be an indictable (that is serious) offence with *mens rea* although it is difficult to think of inherently dangerous crimes resulting in death which are not adequately covered by section 213. Abortion is a possibility but Macaulay has shown that the only death which should result in a murder conviction would be one arising from recklessness which is already covered by section 212(a).

7. What is Lamer J.'s test for *mens rea* under section 212(c)? Subjective or objective? It seems to be objective and he relies on Martin J.A. in *R.* v. *Tennant and Naccarato*[135] where that judge seems to be saying that he does not want the same test for both section 212(a) and section 212(c) and he talks about

---

[133] *Supra*, footnote 2, at p. 107.

[134] *Ibid.*, at p. 121.

[135] *R.* v. *Tennant and Naccarato*, *supra*, footnote 15.

foresight. Lamer J. does not want to expand constructive murder and he seems to prefer the objective test of the reasonable man but only a mildly objective test, meaning the reasonable man placed in the circumstances of the accused. Yet this is difficult to reconcile with Lamer J.'s remarks on the intoxication defence. The reasonable man is presumably sober but Lamer J. says that drunkenness is "relevant in the determination of the knowledge which the accused had of those circumstances".[136]

GRAHAM PARKER*

---

[136] *Supra*, footnote 2, at p. 121.

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