CONSTITUTIONAL LAW—CHARTER OF RIGHTS AND FREEDOMS, SECTION 7 AND STRUCTURAL DUE PROCESS— IN DEFENCE OF WILSON: *Wilson* v. *Medical Services Commission of British Columbia.*

Hart Schwartz*

Introduction

David Lepofsky, writing in the September 1989 issue of this Review,[1] joined a phalanx of leading scholars in decrying the rise of so-called "substantive due process" under the Charter of Rights and Freedoms.[2] Lepofsky argued that the decision in *Wilson* v. *Medical Services Commission of British Columbia*,[3] demonstrated the true demise of parliamentary supremacy. Courts have invaded the realm of policy decision-making, or so it is claimed. Cries of illegitimacy, judges' personal predilection replacing legal principle, and grossly unwarranted judicial intervention are heard. This shibboleth of courts replacing the legislature in determining the policy merits of legislation is both misguided and in error. It simply fails to recognize the Charter as an instrument concerned, not with policy, but with fundamental matters of principle.[4]

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[1] (1989), 68 Can. Bar Rev. 615.

[2] Constitution Act, 1982, Part I. See: A. Petter, The Politics of the Charter (1987), 8 Sup. Ct. L. Rev. 473; R. Romanow, And Justice for Whom? (1986-87), 16 Man. L.J. 102; P. Monahan and A. Petter, Developments in Constitutional Law: The 1985-86 Term (1986), 9 Sup. Ct. L. Rev. 69, at pp. 78-96; M. Mandel, The Charter of Rights and the Legalization of Politics in Canada (1989), pp. 128-183; P. Monahan, Politics and the Constitition: The Charter, Federalism and The Supreme Court of Canada (1987), pp. 82-85.

[3] *Wilson* v. *Medical Services Commission of British Columbia* (1988), 53 D.L.R. (4th) 171, [1989] 2 W.W.R. 1 (B.C.C.A.), leave to appeal to the Supreme Court of Canada refused, November 3, 1988.

[4] R. Dworkin, Taking Rights Seriously (1977), pp. 22-28, 71-80, 90-100; R. Dworkin, A Matter of Principle (1986), p. 72; R. Dworkin, Law's Empire (1986), pp. 221-224, 243-244, 310-312.

Despite the many distinguished scholars who have impugned the type of judicial activity undertaken by the court in *Wilson*,[5] I want to suggest that the *Wilson* judgment is sound, and its reasoning, although spartan, is in substance aligned to the Charter's purpose.

The "Liberty" Interest

In dealing with the "liberty" interest in issue in *Wilson*, Lepofsky attempts to portray the court as raising the incredulous distinction between "the right to work and the right to practice one's profession" or between "pure economic rights" and "economic rights tied to another fundamental right".[6] Both approaches miss the gravamen of the court's thinking which can be discerned from its review of the "regulatory" and "right to work" cases.[7] The court adopts the distinction between those statutes that deal with the ordinary regulation of a profession or industry and those that deal with a complete ban or absolute prohibition on an individual's ability to practise his profession or trade. The court stated:[8]

> We have no doubt that regulation of such matters as standards of admission, mandatory insurance for the protection of the public, and standards of practice and of behaviour will not constitute an infringement of s. 7.

Indeed, the court went out of its way to declare that it was not promoting a *laissez-faire*, or any other, economic approach. It adopted the statement of Seaton J.A. in an earlier case, that section 7 does not embrace a particular economic theory.[9] Instead, the court emphasized repeatedly its concern that the British Columbia legislation stripped a large number of perfectly qualified medical practitioners of their ability to work at all.

What the court had to look at was the impact or effect of the Medical Service Act[10] and the regulations on the applicants.[11] In particular, the structure of the Act and regulations were such that competent doctors having completed their medical training, been licensed to practise medicine in British Columbia, and indeed in some cases having practised medicine for a number of years, were to be barred completely from continuing

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[5] *Supra*, footnote 2. See, in particular, Monahan and Petter, *loc. cit.*, footnote 2, at pp. 87-94.

[6] *Loc. cit.*, footnote 1, at pp. 622-623.

[7] *Supra*, footnote 3, at pp. 189-193 (D.L.R.), 21-25 (W.W.R.).

[8] *Ibid.*, at pp. 190 (D.L.R.), 21 (W.W.R.).

[9] *Ibid.*, at pp. 191 (D.L.R.), 22 (W.W.R.).

[10] R.S.B.C. 1979, c. 255, as amended Medical Service Amendment Act, S.B.C. 1985, c. 39.

[11] The Supreme Court of Canada has reiterated the principle that both the purpose and effect of legislation are relevant in determining its conformity with the Charter. A law with a valid purpose may nonetheless infringe the Charter if its effect or impact interferes with a guaranteed right or freedom. *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321; *Irwin Toy Ltd.* v. *Attorney General of Quebec*, [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577; *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, at p. 1333.

to practise medicine. One appellant had practised in British Columbia for twelve years after which he offered his skills to a third world country. On returning, his British Columbia billing number was deemed inactive. A similar fate befell an appellant who had practised in British Columbia for five years, worked in Nova Scotia for a few more years, and then attempted to return. Another appellant, fresh out of medical school and his internship year, was denied a permanent practitioner billing number.[12] The scheme introduced by the government of British Columbia was one in which an individual could proceed through medical school, undertake a year's internship, even receive a licence to practise medicine in the province, but for all practical purposes never be able to do so. If the province's Medical Services Commission did not distribute a billing number to that person, he or she was out of a job. In short, the structure of the Act and regulations resulted in a complete ban on a good number of otherwise qualified doctors from practising medicine.

In defining "liberty" as a concept "inextricably tied to the concept of human dignity",[13] and in finding that the structure of the legislation constituted government sponsored impairment of an individual's human dignity, the *Wilson* court was clearly addressing a matter of principle. A person who has trained, studied, and developed the skills and expertise to practise a profession or trade, and who may have indeed practised for many years, clearly has her dignity and sense of self-worth impaired when informed by a government agency that she may no longer employ her skills. Whether or not such an impairment is necessary or justified (matters to be considered at a later point in the section 7 test, or at section 1) is not germane to the issue of whether or not a deprivation of "liberty" has ensued. The *Wilson* court, rather than running counter to the prevailing case law, was in fact providing a definition of "liberty" that was fully and wholly consistent with the purposive approach mandated by the Supreme Court of Canada.[14]

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[12] *Supra*, footnote 3, at pp. 179-181 (D.L.R.), 10-11 (W.W.R.). The distinction between a complete ban or absolute prohibition against practising one's profession rather than the mere regulation of a profession was most clearly set out by Matas J.A. in *Re Isabey and Manitoba Health Services Commission* (1986), 28 D.L.R. (4th) 735, [1986] 4 W.W.R. 310 (Man. C.A.).

[13] *Supra*, footnote 3, at pp. 184 (D.L.R.), 15 (W.W.R.), citing Wilson J. in *R.* v. *Morgentaler, Smoling and Scott*, [1988] 1 S.C.R. 30, at pp. 164-165, (1988), 44 D.L.R. (4th) 385, at p. 485. The United States Supreme Court has held that the right to "liberty" in the due process clause of the American Constitution protects against attempts by the state to proscribe the right to practise one's profession in the private sector of the economy: *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Willner* v. *Committee on Character*, 373 U.S. 96 (1963).

[14] *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, (1984), 11 D.L.R. (4th) 641; *R.* v. *Big M Drug Mart*, *supra*, footnote 11; *R.* v. *Turpin*, *supra*, footnote 11; *Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 205 *et seq.*, (1985), 17 D.L.R. (4th) 422, at pp. 458 *et seq.* Query the extent of the difference, if any, in

Fundamental Justice

Having found a deprivation of liberty, the court then turned to determine whether such a deprivation was in accordance with the principles of fundamental justice. In the *B.C. Motor Vehicle Reference*,[15] Lamer J. stated clearly that the term "fundamental justice" is not synonymous with natural justice and is not limited to ensuring procedural safeguards:

> ... the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system ...
>
> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

The court adopted the notion that "future growth" in the judicial determination of the "principles" of fundamental justice "will be based on historical roots".[16]

The equitable doctrines surrounding detrimental reliance, equitable and promissory estoppel, are clearly a part of our legal tradition. One cannot avoid the fact that an individual's university medical education is almost totally paid for by government money. A person in British Columbia who had completed eight years of heavily subsidized science and medical education, a year of government funded internship, and having applied for and received a licence from the government to practise medicine could legitimately claim reliance on government activity and encouragement. For that person then to be told that she will not be allowed to practise her profession would appear to involve principles akin to estoppel. Equitable estoppel is hardly a new concept and the *Wilson* court's incorporation of this doctrine into section 7's "principles of fundamental justice" is not out of line with the Supreme Court of Canada's test in the *Motor Vehicle Reference*. Indeed, this is an obvious example of "future growth" based

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the deprivation experienced by a woman subjected to "serious state-imposed psychological stress" forced to comply with "certain criteria unrelated to her own priorities and aspirations" and a medical doctor whose own priorities and personal aspirations are destroyed when forced by the government to abandon a medical career: *R.* v. *Morgentaler, Smoling and Scott*, *supra*, footnote 13, per Dickson C.J.C., at pp. 56 (S.C.R.), 401, 402 (D.L.R.). See also: *Reference re Section 94(2) of the B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503, (1985), 24 D.L.R. (4th) 536, at p. 550, where Lamer J. recognizes that one purpose of s. 7 is to preserve "the dignity and worth of the human person". And see *Irwin Toy Ltd.* v. *Attorney General of Quebec*, *supra*, footnote 11, at pp. 1003-1004 (S.C.R.), 632-633 (D.L.R.) where the Supreme Court of Canada leaves open the question of whether Section 7 includes certain "fundamental" economic rights as opposed to ordinary "corporate-commercial economic rights".

[15] *Reference re Section 94(2) of the B.C. Motor Vehicle Act*, *ibid.*, at pp. 512-513 B.C.R.), 557-558 (D.L.R.).

[16] *Ibid.*, at pp. 513 (S.C.R.), 557 (D.L.R.), citing L. Tremblay (1984), 18 U.B.C.L. Rev. 201, at p. 254.

on well-defined "historical roots" grounded in both common law and the law of equitable remedies.[17]

Structural Due Process

This is not to say that under the Charter, the government may never raise expectations, and subsequently dash them because of overriding economic or social concerns. The court in *Wilson* recognized this:[18]

> Regulation of our activities is common place. Society could not survive, and chaos would result if we were all at liberty to do as we saw fit.

However, in keeping with Supreme Court authority, the *Wilson* court added this important qualifier:[19]

> Government may impose an *administrative structure* which limits or even deprives one of liberty to further its perception of the needs of society "unless the use of *such structure* is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice".

The *Wilson* court's focus on the administrative "structure" that deprives a person of her liberty is critical here. The court framed the issue before it as whether the legislation, "both procedurally and in substance, violate[d] the principles of fundamental justice".[20] Procedural review is normally concerned with the procedures or methods that governments use to achieve their objectives. At a minimum, notice of the proposed proceeding must be given and the individual affected must be afforded an opportunity to be heard.[21] Substantive review allows the court to examine the objectives of the legislation itself and to pass muster on its legitimacy. Professor Lawrence Tribe has coined the term "structural due process" to describe a third type of judicial review.[22] Structural due process allows the court

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[17] It is a mistake to think that estoppel is a purely private law remedy. Estoppel has, on many occasions, been applied to enjoin the exercise of a statutory power of decision and even to estop Ministers of the Crown from exercising their authority in circumstances where it would be fundamentally unjust for them to do so. See: P. McDonald, Contradictory Government Action: Estoppel of Statutory Authorities, [1979] Osgoode Hall L.J. 160; *Robertson* v. *Minister of Pensions*, [1949] 1 K.B. 227, at p. 231, [1948] 2 All E.R. 767, at p. 770 (K.B.D.); *Violi* v. *Superintendent of Immigration*, [1965] S.C.R. 232 (1964), 51 D.L.R. (2d) 506; *Re Multi-Malls Inc. and Minister of Transportation* (1976), 73 D.L.R. (3d) 18, at pp. 34-35 (Ont. C.A.).

[18] *Supra*, footnote 3, at pp. 186 (D.L.R.), 17 (W.W.R.).

[19] *Ibid.* (Emphasis added). The words in quotation marks are from *Jones* v. *The Queen*, [1986] 2 S.C.R. 284, at p. 304, (1986), 31 D.L.R. (4th) 569, at p. 548, restated by Dickson C.J.C. in *R.* v. *Morgentaler, Smoling and Scott*, *supra*, footnote 13, at pp. 72-73 (S.C.R.), 414-415 (D.L.R.).

[20] *Supra*, footnote 3, at pp. 182 (D.L.R.), 12 (W.W.R.).

[21] See: *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, (1978), 88 D.L.R. (3d) 671; *Duke* v. *The Queen*, [1972] S.C.R. 917, (1972), 28 D.L.R. (3d) 129.

[22] L. Tribe, Structural Due Process (1975), 10 Harvard Civil Rights—Civil Liberties L. Rev. 269; L. Tribe, American Constitutional Law (2d ed., 1988), pp. 1673-1687.

to examine the "structures through which government policies are both formed and applied, and formed in the very process of being applied".[23]

The British Columbia legislation was structurally unsound principally because its actual effect was to protect an established class of doctors. Although the legislation claimed to have as its goal the cutting of medical costs for the province, in fact, its design or structure revealed a more telling objective: the solidifying of a virtual monopoly on the government's medical purse by a cadre of established practitioners.

Those doctors who already had a billing number in the province at the time of the enactment of the new law, the "ins", had the right to unrestricted billing of the province's health insurance plan and were not subject to any geographic restriction on their practice. However, a physician who did not have a billing number, an "out", had first to obtain hospital privileges before even being allowed to apply to the Medical Services Commission for a billing number. The "out" had first to attempt to make application to a committee of a local hospital made up of members of the medical staff and the hospital board. Needless to say, the "established" medical community could easily protect its monopoly by controlling the granting of hospital privileges and, accordingly, the ability of an "out" to obtain a billing number to practise. Indeed, the provincial medical manpower committee was made up, overwhelmingly, of members of the established medical professional groups.[24] The *Wilson* court found on the evidence:[25]

> There is no means by which an applicant can ascertain whether a hospital in any area has or is prepared to demonstrate a need for the applicant's services. The persons, who are in a position to do so, may be the competitors of the applicant, and there is no means by which the applicant has an opportunity to contradict the opinions which may be expressed by those competitors.

Under this structure, an applicant could not determine in what areas of

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[23] Tribe, Structural Due Process, *ibid.*, at p. 269. For some American examples of the application of the structural due process, see: *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976); *Califano* v. *Goldfarb*, 97 S. Ct. 1021 (1977).

[24] *Supra*, footnote 3, at pp. 179 (D.L.R.), 9-10 (W.W.R.). The facts appear to reveal that the local hospital committees were made up of representatives of those doctors already enjoying hospital privileges. Indeed, the superintending Provincial Medical Manpower Committee consisted almost exclusively of members from the leading doctors' organizations and the entrenched medical establishment.

[25] *Supra*, footnote 2, at pp. 196 (D.L.R.), 28 (W.W.R.). In a number of "structural due process" cases, the United States Supreme Court has struck down similar delegations of rulemaking authority to professional associations. See, in particular: *Gibson* v. *Berry Hill*, 411 U.S. 564 (1973), where the Alabama Board of Optometry was made up entirely of established optometrists who felt threatened by a group of competing optometrists entering a limited market; *Florida Avocado Growers* v. *Paul*, 373 U.S. 132 (1963), where regulations that had in fact been drafted by a self-interested group of Florida avocado growers and handlers, rather than by lawmakers or officers with a nation-wide constituency, were struck down. See also the seminal case of *Schecter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

the province a practitioner number might be available, if his application was being considered by a local hospital committee or on what evidence it was being considered.[26] An "out", moving to a region of the province where there is a short supply of doctors in order to have a better chance of obtaining a billing number, could have his chance dashed by an "in" jumping the queue in that region, being able to "erase a demonstrated need for an applicant's services".[27] The *Wilson* court found:[28]

> There is evidence before us not only for the potential for abuse of the system, but of actual abuse.

The structure of the British Columbia legislation granted tremendous power and decision-making authority to the medical establishment. The administrative structure allowed local hospital committees, made up of such members of the medical establishment, to both form and apply policies, and to form policies as they are being applied.[29] This structure, the court found:[30]

> ... is based on the application of vague and uncertain criteria, which combined with areas of uncontrolled discretion, leaves substantial scope for arbitrary conduct.

It is noted that similar problems with the structure of therapeutic abortion committees led the Supreme Court of Canada to strike down the Criminal Code provisions establishing those committees in *R.* v. *Morgentaler, Smoling and Scott*.[31] Using the principles of structural due process, the *Wilson* court was able to strike down, not the individual policies formed by these committees, but the whole legislative structure that created and allowed these unprincipled bodies to operate in the first place.

David Lepofsky describes the situation of the enormous number of existing and established doctors, the "ins", as persons "grandfathered" under the new legislation. These doctors were not subjected to the geographic and billing restrictions prescribed by the Medical Service Act[32] purportedly on the grounds that they had set up their practices in British Columbia in reliance upon the unrestricted system that was then in place. But "grandfathering" is normally used to deal with a small number of individuals who would otherwise be seriously harmed by changes in legislation.[33] The

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[26] *Supra*, footnote 3, at pp. 196 (D.L.R.), 28 (W.W.R.).

[27] *Ibid.*

[28] *Ibid.*

[29] *Supra*, footnotes 22 and 23.

[30] *Supra*, footnote 3, at pp. 196 (D.L.R.), 28 (W.W.R.).

[31] *Supra*, footnote 13.

[32] *Supra*, footnote 10.

[33] In *The Queen* v. *Beauregard*, [1986] 2 S.C.R. 56, (1986), 30 D.L.R. (4th) 481, the statutory scheme did not empower those individuals who had been "grandfathered" with the authority to determine which of the non-grandfathered individuals would be subjected to the statutory benefits or burdens created by the new legislation. As well, in *Beattie* v. *Ontario (Minister of Health)* (1988), 29 O.A.C. 98, the Ontario Court of Appeal dealt

"grandfathering" provided under the Medical Service Act, rather than softening the blow of new harsh measures for a few, instead granted a tremendous advantage to a large, powerful and entrenched group—to the detriment of a relatively powerless and disparate collection of young doctors. In protecting such a minority, from what the *Wilson* court found was potentially serious abuse from the majority, the court's striking down of this administrative structure does indeed accord with the Charter's purpose as an instrument designed to protect human rights and dignity.[34]

The *Wilson* court closely examined an existing administrative structure and found it lacking. It did not do so by concocting a radical or misconceived formula for section 7 of the Charter. Rather, the court relied upon the underlying and well entrenched legal principles that have formed the equitable doctrines of estoppel, the common law principles of fairness in administrative hearings and the hardly new ability of a superior court to superintend the conduct, proceedings and even the structure, of inferior tribunals. The *Wilson* decision, far from being an aberrant, unwarranted ruling, ought to be respected for its proper application of Charter principles and purposes.

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CONTRACT—PUNITIVE DAMAGES—AGGRAVATED DAMAGES—DAMAGES FOR MENTAL DISTRESS IN CONTRACT: *Vorvis* v. *Insurance Corporation of British Columbia.*

Bruce Feldthusen*

Introduction

The Supreme Court of Canada's decision in *Vorvis* v. *Insurance Corporation of British Columbia*[1] dealt specifically with damages for non-pecuniary loss in wrongful dismissal. More generally, it considered

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with regulations which would have severely restricted the number of foreign medical school graduates eligible for a medical licence. The statutory scheme only "grandfathered" those few graduates already interning in Ontario but did not include those who merely intended to intern in Ontario in the future.

[34] *R.* v. *Edwards Books and Art Limited* , [1986] 2 S.C.R. 713, at p. 779, (1986), 35 D.L.R. (4th) 1, at p. 49, where Dickson C.J.C. states that in interpreting and applying the Charter, the courts must have regard for vulnerable minorities. To the same effect, see the discussion, in a different context, by Wilson J. in *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 152-153, (1989), 56 D.L.R. (4th) 1, at p. 33.

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damages for mental distress, aggravated damages, and punitive damages for breach of contract. In passing, it also clarified the law governing awards of aggravated and punitive damages in tort.

At trial, the plaintiff was found to have been wrongfully dismissed and was awarded damages in lieu of notice. On appeal, the award was increased to take into account extra compensation for overtime to which the plaintiff would have been entitled during the notice period. A claim for lost pension rights which would not have vested during the notice period was rejected at both levels, and again at the Supreme Court. Both lower courts rejected the claim for punitive damages, which encompassed claims for mental distress, aggravated damages and punitive damages. Again this was affirmed by the majority in the Supreme Court.

The majority[2] held that damages for mental distress may be awarded in contract, except in an action for wrongful dismissal. It also held that neither aggravated damages, nor punitive damages may be awarded in any action in contract unless the conduct said to justify the award was independently actionable. The minority[3] would have allowed damages for mental distress in wrongful dismissal, but held that such damages were too remote in this case. The minority would have awarded punitive damages in this case, although the award it endorsed contains a large element of aggravated damages.

Punitive and Aggravated Damages in Tort

Vorvis is the Supreme Court's first major consideration of punitive damages generally subsequent to the House of Lords' decision in *Rookes* v. *Barnard*.[4] There it was held that punitive damages were only available in two categories of common law cases: "oppressive, arbitrary, or unconstitutional" behaviour of public servants; and "whenever it is necessary to teach a wrongdoer that tort does not pay".[5] The Supreme Court rejected these restrictions, and thus confirmed the view which has emerged over the years in lower Canadian courts. In Canada, punitive damages may be awarded in any action in tort where conduct which contributes to the plaintiff's loss is "deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature".[6] Significantly, by approving

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[1] [1989] 1 S.C.R. 1085, (1989), 58 D.L.R. (4th) 193.

[2] McIntyre J. (Beetz and Lamer JJ. concurring). Estey and Le Dain JJ. heard the case, but did not take part in the judgment.

[3] Wilson J. (L'Heureux-Dubé J. concurring).

[4] [1964] A.C. 1129, [1964] 1 All E.R. 367 (H.L.).

[5] *Ibid.*, at pp. 1226 (A.C.), 410 (All E.R.).

[6] *Supra*, footnote 1, at pp. 1108 (S.C.R.), 208 (D.L.R.).

Robitaille v. *Vancouver Hockey Club Ltd.*,[7] the court clarified that punitive damages may be awarded in negligence.

The court confirmed that the distinction between aggravated and punitive damages adopted in *Rookes* was part of the law of Canada. The purpose of aggravated damages is to compensate for injury to proper pride and dignity. The purpose of punitive damages is to punish the tortfeasor for "exceptional"[8] conduct. This is a critical distinction in England. Outside of the two categories noted above, a plaintiff may only recover extra damages, called aggravated damages, as compensation for injury to pride and dignity caused by exceptional conduct. In Canada, where exceptional conduct will justify a punitive award whether or not there is injury to pride and dignity, it is less critical. At best, the distinction encourages the court to isolate damages for compensation from damages for punishment. This could be done more effectively by allowing damages for injury to pride and dignity as an ordinary item of compensatory damages without proof of exceptional conduct, subject to a remoteness test. Otherwise, blended awards of punitive damages which contain a large element of aggravated damages for "humiliation"[9] will persist.

Perhaps the most important part of the judgment is the court's confirmation that the punitive award must pertain to conduct "which caused the injury complained of by the plaintiff".[10] This emphasizes that the purpose of punitive damage is punishment, not deterrence, a point underscored by the court's use of the term "punitive" in preference to "exemplary" damages. In particular, this suggests that punitive damage awards should be quantified in proportion to the defendant's past conduct as it affected the particular plaintiff. It should not take into account that similar conduct may have injured or exposed

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[7] (1981), 124 D.L.R. (3d) 228, [1981] 3 W.W.R. 481 (B.C.C.A.).

[8] I shall use the term "exceptional" as an abbreviation for these and similar adjectives used in the cases to describe conduct deserving of punishment. It is generally agreed that the defendant's conduct must be advertently tortious in addition to being exceptional.

[9] The minority judgment in *Vorvis* is a good example. *Supra*, footnote 1, at pp. 1130-1131 (S.C.R.), 224 (D.L.R.). See also *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, [1989] 4 W.W.R. 39, where the court approves as punitive damages, without comment, two awards which appear to be awards of aggravated damages. Note the difficulty when the defendant has liability insurance cover for compensatory liability only, or cover which excludes punitive, but not aggravated, damage liability.

[10] *Supra*, footnote 1, at pp. 1106 (S.C.R.), 206 (D.L.R.). To the same effect, see *Rookes*, *supra*, footnote 4, at pp. 1227 (A.C.), 411 (All E.R.). The court did not address directly whether the conduct must be aimed specifically at the plaintiff as held in *Kaytor* v. *Lion's Driving Range Ltd.* (1962), 35 D.L.R. (2d) 426 (B.C.S.C.). See, *contra*, *Vlchek* v. *Koshel* (1988), 30 B.C.L.R. (2d) 97 (B.C.S.C.), affd. (1988), 32 B.C.L.R. (2d) xxxi (B.C.C.A.).

to injury other persons.[11] Nor should the award be greater than just punishment for the defendant, even if a larger amount is necessary to deter effectively others who may choose to act similarly in the future.[12]

In my opinion, it is the absence of a similar limiting condition which accounts for the fact that punitive awards are so much larger in the United States than they are in Canada.[13] Enormous awards are not necessarily unjust to the defendant if they accurately reflect harm done, or accurately estimate the increase necessary to discount the defendant's expectations that sanctions are unlikely. What is problematic is that the award go to a single plaintiff. This encourages racing to file suit, maintenance and champerty, and windfall benefits which bear no relation to the wrong done to the plaintiff. Deterrence and punishment for all wrongdoing are legitimate goals, but punitive damage awards are not always the best way to achieve them. This aspect of the decision in *Vorvis* is to be commended, and if followed should spare Canada the problems experienced in the United States.

Damages for Mental Distress in Contract

The terms "damages for mental distress" and "aggravated damages" are often used interchangeably by the courts to refer to two quite different items of non-pecuniary loss in contract. *Vorvis* is an example. The majority blends discussion of both under the heading "aggravated damages"; the minority under the heading "damages for mental suffering". Nevertheless, it is implicit in both judgments that the judges recognize the difference.

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[11] For example, if a case for punitive damages were made out against a product manufacturer, it might be that the same defect had injured others. However, the plaintiff may not recover a sum thought sufficient to punish the defendant for all those wrongs, only for the wrong done to himself or herself. As in criminal matters proper, these other wrongs should be the subject of separate actions. Procedural reforms would be desirable to enable actions based on similar conduct to be joined and the damages shared fairly amongst the full class of plaintiffs.

[12] For example, in theory compensatory damages plus punitive damages assessed to reflect the past conduct may provide the ideal measure to deter others from acting similarly in the future. However, if prospective wrongdoers expect to be sued successfully on only one of ten occasions, damages would have to be increased tenfold to constitute an effective deterrent. This poses two difficulties in the common law of torts. The defendant can complain of being punished greatly out of proportion to the wrong actually committed, and of being used as a vehicle to affect the conduct of others. The judge or jury who attempt to assess the penalty will seldom have any idea how great an increase is necessary to achieve deterrence.

[13] Research in the United States indicates that punitive awards in excess of $1 million, although by no means typical, are far from uncommon. See Peterson *et al.*, Punitive Damages: Empirical Findings, Rand, The Institute for Civil Justice (1987). In contrast, the only Canadian award even approaching $1 million was the approximately $5 million punitive award given in *Claiborne Industries Ltd.* v. *National*

Damages for mental distress refer to non-pecuniary loss in the nature of mental suffering caused by the *breach* of contract *per se.* Vacation or entertainment contracts are particularly good examples of when mental distress may be caused by simple breach. The very subject of the bargain is non-pecuniary enjoyment. The case for compensation in no way depends on the oppressive manner in which the defendant behaves. Aggravated damages, as in tort, compensate injury to pride and dignity caused by the exceptional *conduct* of the breaching party. Such damages do not necessarily, or even usually, flow from the breach itself.

The full court endorsed damages for mental distress subject to the remoteness rules of contract. This is sound. To do otherwise would frustrate the purpose of the contract, undercompensate plaintiffs, and encourage inefficient breaches.[14] It is the majority's refusal to extend this rule to wrongful dismissal which is problematic.

The key to *Vorvis* is that the court upheld the old common law position that employment contracts could be terminated by due notice. Therefore, damages were those and only those which arose from the failure to give such notice. As such, it is a judgment about the substance of wrongful dismissal law from which the remedial conclusion naturally flows.

It is worth noting, however, that there are trends in modern labour law rejecting this conception of the employment relationship.[15] These reflect the many non-economic aspects of the employment relationship including the psychic well-being, prestige and social status which come from employment. In effect, the decision in *Vorvis* denies legal recognition to the social and economic realities of modern employment.[16] This entails that an employee may endure a great deal of

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Bank of Canada (1989), 59 D.L.R. (4th) 533, 69 O.R. (2d) 65 (C.A.). The court based the amount on its finding that the defendant had profited from the wrong by that amount. If that were true, the award would be a large, but otherwise unexceptional, application of basic principles of restitution.

[14] The theory of efficient breach is discussed *infra,* footnote 18 and accompanying text. Even if one accepts that theory, it is predicated on the defendant paying full compensation.

[15] See D. Venour, Punitive Damages in Contract (1988), 1 Can. J.L. & Jur. 87, at pp. 97-98. A different conception of the employment relationship entails a broader scope for extra damages. In *Cormier* v. *Hostess Food Products Ltd.* (1984), 52 N.B.R. (2d) 288, at p. 293 (N.B.Q.B.), the court awarded aggravated damages "where the method of termination is reminiscent of nineteenth century England at the start of the industrial revolution, and where the scenario would be proper subject matter for a tale by Charles Dickens". In *Tippett* v. *International Typographical Union Local 226* (1976), 71 D.L.R. (3d) 146, at p. 149, [1976] 4 W.W.R. 460, at p. 465 (B.C.S.C.), the court said union membership is "in a sense a social contract".

[16] The majority recognizes this in collective agreement settings, but does not consider whether a broader conception of the employment contract might be needed

unwarranted abuse on the job before claiming constructive dismissal, because damages will never provide adequate compensation. The court's further refusal to endorse aggravated and punitive damages for breach of contract allows the employer to abuse this advantage by engaging in risk-free conduct designed to circumvent its legal obligation to compensate for dismissal.

Punitive Damages in Contract

As noted in the minority judgment, although the position was somewhat uncertain, a trend to allow punitive damages in contract seems to have been emerging in Canada. This the minority endorsed and held that punitive damages should be awarded in contract, as in tort, to punish "high-handed, vindictive, or otherwise shocking and reprehensible conduct".[17] This is problematic, because the case for punitive damages in tort differs from the case in contract.

It is sometimes alleged that the exceptional conduct standard is too uncertain a basis for just punishment. This is an objection which has considerably more force in contract than in tort. Punitive damages in tort require both advertent tortious conduct, and exceptional conduct. Advertent tortious conduct is a sufficient moral justification for punishment. An advertent tortfeasor cannot justly complain that punishment is undeserved. The further legal requirement that the conduct be exceptional has many practical justifications, but in retributive theory it should only be relevant to quantum. There may be uncertainty about whether the conduct will qualify as exceptional. In tort, this amounts to a rather weak complaint about uncertainty as to when the actor will be spared deserved punishment.

In contrast, advertent breach of contract is not absolutely proscribed conduct which justifies punishment. Rather, it entails only an obligation to compensate for breach of bargain. This is clearly the majority's view.[18] Indeed, there is a body of theory which supports deliberate breach on efficiency grounds as socially useful activity. If punitive damages were awarded in contract as in tort, exceptional conduct alone would be the moral justification for punishment. There is much to be said for the view that exceptional conduct alone is too uncertain a standard on practical and moral grounds to justify punishment. *Vorvis* illustrates this. One of the reasons why the majority would not award punitive damages was that it did not see the conduct as meeting the exceptional conduct standard. The minority clearly

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especially for unorganized labour. The minority judgment seems more sensitive to this in the abstract, but this is put into question by its refusal to recognize mental distress damages in the case.

[17] *Supra*, footnote 1, at pp. 1129 (S.C.R.), 223 (D.L.R.).

[18] *Ibid.*, at pp. 1107-1109 (S.C.R.), 207-209 (D.L.R.).

believed it did. It is a legitimate concern that actors cannot tell in advance whether their conduct is deserving of punishment.

If the minority's view is unduly wide, the majority's view is unduly restrictive. The majority restricts damages in contract to those which flow directly from the breach, a view which effectively precludes recovery of either punitive or aggravated damages which depend on the mode of breach. It follows from this that complaints about the mode of or motive for breach must be independently actionable to support the claim for extra damages in the majority's view. But the same objection could be made to extra damages in tort. They flow from the mode and motive, not directly from the tort, and from conduct which is not generally independently actionable. It is inherent in the concept of punitive damages that they respond not to direct damage, but to exceptional conduct associated with such damage.

What the minority notes and majority seems to ignore is that in a power-imbalanced contractual relationship it is possible to commit unique wrongs which could not be actionable in any other context and which may be deserving of civil punishment.[19] In *Vorvis*, the conduct which in the opinion of the minority justified punitive damages reduces largely to an attempt by the employer to induce the employee to resign and forego the claim to damages in lieu of notice.[20] In this case, the employer ended up in no worse position than it would have been in had it given legal notice. In other cases, the employer may succeed in having the employee resign without compensation. There is nothing efficient or socially useful about conduct of this sort, and much deserving of sanction.

In principle the law ought to recognize a claim for punitive damages which takes the unique abuse of contractual power situation into account. The issue is not so much whether, but how, such a rule might be phrased. The simple exceptional conduct test endorsed by the minority seems too uncertain and perhaps too broad. This is borne out by the unsatisfactory attempt by the California courts to develop a doctrine of bad faith breach of contract.[21] A narrower and more concrete approach would allow punitive damages whenever a defendant abuses its contractual power to breach a known obligation to pay money. This could be restricted further to power-imbalanced contractual relationships. Or, the law could isolate at least two types of case where abuse of contractual power was probable—wrongful

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[19] *Ibid.*, at pp. 1130 (S.C.R.), 224 (D.L.R.).

[20] *Ibid.*, at pp. 1131 (S.C.R.), 224-225 (D.L.R.).

[21] For a strong and prosaic rejection of the general case for punitive damages for bad faith dealing in commercial contracts, and a review of the relevant cases, see *Oki America Inc.* v. *Microtech Int'l Inc.*, 872 F. 2d 312, at pp. 314-317 (9th Cir., 1989), per Kozinski J.

dismissal and cases where insurers fail to honour first party claims by their own insureds. When such defendants refuse to honour a known obligation to pay money or compensation, the argument of efficient breach is completely inapplicable. This would capture all the successful actions for punitive damages for breach of contract to date, and probably the overwhelming majority of deserving cases. It would address the concerns of the minority in *Vorvis*, without introducing a general entitlement based on exceptional conduct. Some deserving cases might be excluded by such a rule. This seems preferable to excluding all of them, as does the majority judgment, or possibly including too many undeserving claims, as does the minority rule.

Aggravated Damages in Contract

As long as aggravated damages are triggered by the same conduct which triggers punitive damages, the case for aggravated damages when the mode of breach causes injury to pride and dignity should be the same as the case for punitive damages. Few contractual settings outside employment and insurance claims entail the power to affect pride and dignity in a manner which is not independently tortious. It would seem to matter little whether aggravated and punitive damages were quantified under separate heads, or whether punitive damages were quantified taking into account both injury to pride and dignity, and the need to punish, as did the minority in *Vorvis*.

Conclusion

In *Vorvis*, the Supreme Court has precluded the possibility of obtaining aggravated and punitive damages in contract, and also the possiblity of obtaining damages for mental distress in wrongful dismissal. Taken together, this increases the possibility of abuse of contractual power in situations where the possibility already exists. Punitive damages in particular could serve a useful role in deterring and punishing what is after all totally unjustified conduct.

The minority's view that punitive damages should be available in contract as in tort is theoretically suspect and practically uncertain. However, it is possible to address the conduct which concerned the minority by allowing punitive damages in wrongful dismissal and bad faith insurer cases when the defendant breaches a known obligation to pay money. This addresses a unique concern with the unwarranted abuse of contractual power, an abuse made more likely by the majority's refusal to recognize damages for mental distress in wrongful dismissal.

Ideally, legislative reform along these lines is needed. Otherwise, I would predict that the courts which have shown justified sympathy to claims of this nature will create a new common law tort of abuse

of contractual power, and circumvent the requirement of an independently actionable wrong established in *Vorvis*.

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Criminal Law—Criminal Negligence and Recklessness—Criminal Law Reform: *The Queen* v. *Tutton; Waite* v. *The Queen.*

Peter MacKinnon*

There is no shortage of testimonials by Canadian writers to the confused state of the law of criminal negligence.[1] The difficulty lies in the fact that criminal negligence and the related concept of recklessness are central to unresolved and often complicated arguments about theories of culpability and the appropriate threshold of criminal liability. The decisions of the Supreme Court of Canada in *The Queen* v. *Tutton*[2] and *Waite* v. *The Queen*[3] illustrate how persistent are the issues raised by these arguments, and remind us that they are far from being settled.

Historically, the debate has focused on the mental element requirement of criminal negligence. The subjectivist argument holds that as a "true"[4] and indeed serious crime, subjective fault is required for a conviction. The objectivist reply is that criminal negligence differs only in degree from civil negligence, that it is simply a bigger departure from the standard of care expected of the reasonable person than that required for civil liability. Even where there is agreement, on one side or the other, on this fundamental matter, there remain questions about how subjective the subjective fault is or can be, or about the extent to which the objective approach is ameliorated by considerations peculiar to particular accused persons. Satisfactory definitions and an adequate analytical framework have been elusive goals in this area of the law.

The Tuttons happened upon this scene in 1981. In the belief that their diabetic child had been cured by an act of God, and despite medical warnings to the contrary, the Tuttons stopped giving him insulin and he died as a result. The parents were charged with manslaughter by criminal negligence through an omission of their duty to provide necessities of life

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I am indebted to my friend Michael Finley for a vigorous discussion of *The Queen* v. *Tutton*.

[1] See A. Stalker, 'Can George Fletcher Help Solve the Problem of Criminal Negligence?' (1982), 7 Queen's L.J. 274.

[2] *R.* v. *Tutton*, [1989] 1 S.C.R. 1392.

[3] *R.* v. *Waite*, [1989] 1 S.C.R. 1436.

[4] One of the categories of offences recognized in *R.* v. *Sault Ste. Marie*, [1978] 2 S.C.R. 1299, (1978), 40 C.C.C. (2d) 353.

to the child.[5] The prosecutor thus was obliged to prove this omission and that their neglect showed "wanton or reckless disregard"[6] on the part of the Tuttons for their son's life or safety.

They were found guilty at trial but their convictions were overturned by the Ontario Court of Appeal[7] on the basis that the indictment as drawn had led the trial judge into reversible error in his instructions to the jury on burdens of proof. The alleged omission would be made out where necessaries have been withheld "without lawful excuse".[8] The statute imposes a burden on the accused to prove lawful excuse on the balance of probability. The concern of the Ontario Court of Appeal was that the jury may have concluded from the judge's instructions that the burden of proving lawful excuse rested upon the Tuttons not only with respect to the underlying offence of failing to provide necessaries, but with respect to the manslaughter charge as well.

This alone could have ended the matter because all six judges who participated in the judgment of the Supreme Court agreed with the Ontario Court of Appeal on the point. Both courts, however, also addressed themselves to the Tuttons' defence that they had lacked the mental element required for criminal negligence and therefore, on the indictment, for liability for manslaughter. Their claim had been that Christ had revealed Himself to them and announced that their son was cured. Accordingly, they believed that insulin injections could be discontinued. Even when subsequently their son became sick, they were unaware that he was seriously ill on account of the withdrawal of insulin. In other words they had an honest though mistaken belief which meant that the fault requirement for criminal negligence was not present.

The Supreme Court members who took part in the judgment were evenly split on the subjective-objective controversy. McIntyre J. reasoned that criminal negligence is not a traditional or ordinary *mens rea* offence and concluded that an objective test is required in all cases.[9] "What is punished", he observed, "is not the state of mind but the consequences of mindless action",[10] and a conviction is justified where there had been a "marked and significant" departure from the standard of conduct expected of the reasonable person.[11] L'Heureux-Dubé J. agreed, as did Lamer J.,

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[5] R.S.C. 1985, c. C-46, s. 215(2).

[6] *Ibid.*, s. 219(1).

[7] (1985), 18 C.C.C. (3d) 328 (Ont. C.A.).

[8] Criminal Code, *supra*, footnote 5, s. 215(2).

[9] The Court of Appeal had accepted the objective test as being generally applicable, but had concluded that a subjective test would be required in cases where the charges were based on acts of omission as distinct from those of commission.

[10] *Supra*, footnote 2, at p. 1430.

[11] *Ibid.*, at p. 1431.

with the proviso that the objective test required "generous allowance"[12] for factors such as an accused's youth, mental development and education.

Wilson and La Forest JJ., along with the Chief Justice, supported the subjectivist position. Writing for the three, Wilson J. stated that liability for criminal negligence requires "more than gross negligence in the objective sense. It requires some degree of awareness or advertence to the threat to the lives or safety of others or alternatively a wilful blindness to that threat which is culpable in light of the gravity of the risk that is prohibited".[13]

The debate on these two approaches does not emphasize controversy about who would or would not be convicted of criminal negligence depending upon which test is applied. Subjectivists are anxious to point out that both tests would usually lead to the same result in particular cases,[14] while objectivists at least do not claim that subjectivism opens the door to easy acquittals. The argument is about the nature of criminal fault and the classification of offences. In *R.* v. *Sault Ste. Marie*[15] the Supreme Court of Canada acknowledged the existence of three types of offences—*mens rea* (intention, knowledge, recklessness), strict liability and absolute liability—and asserted that crimes were in the first category. Negligence was explicitly excluded as being insufficient to fulfil the fault requirement, a position that has been strengthened by reaffirmation of the principle of *mens rea* in cases decided under section 7 of the Charter.[16] At first blush it seemed that the subjectivist position had prevailed and that there was little room for further debate.

But the debate does continue. In *Sault Ste. Marie* the exclusion of negligence from the fault requirement for crimes was presumptive, not conclusive, and the Charter cases do not deny that the definition of the fault requirement continues to depend, as it must, on the nature of the crime under consideration. The objectivist reply has always depended heavily on the wording of the criminal negligence section in support of the argument that we are dealing here with negligence that has been made criminal and not a *mens rea* offence of the kind contemplated in *Sault Ste. Marie.* The section provides:

> 219.(1) Everyone is criminally negligent who
> (a) in doing anything, or
> (b) in omitting to do anything that it is his duty to do,
> shows wanton or reckless disregard for the lives or safety of other persons.

Briefly, objectivists emphasize this as a complete and self-contained section aimed at negligent conduct of a particularly serious kind. Their

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[12] *Ibid.*, at p. 1434, citing D. Stuart, Canadian Criminal Law (2nd ed., 1987), p. 194.

[13] *Ibid.*, at p. 1407.

[14] *Ibid.*, at p. 1410, per Wilson J., citing E. Colvin, Recklessness and Criminal Negligence (1982), 32 U.T.L.J. 345, at p. 356.

[15] *Supra*, footnote 4.

[16] *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636, and *Reference re S. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486.

opponents' rejoinder is that the section is ambiguous;[17] that it is not self-contained; and that it stipulates the act or conduct requirement only, with the mental element to be read in or "implied in accordance with general principles".[18]

Perhaps the most serious resistance to the objectivist case arises from the concern that the existing classification and organization of criminal offences is crude, to say the least, and that a contextual approach is nearly always needed in the interpretative process. And here, two considerations are important—recent judicial support for a requirement of subjective fault for serious crimes and a potential life imprisonment penalty that places offences of criminal negligence within this category. Apart from murder, for which the penalty of life imprisonment is mandatory, no offender is vulnerable to a higher maximum penalty than one found to have been criminally negligent in causing death. The fact that the life sentence is never imposed for the offence and that the range of sentences is on the lower end of the spectrum is beside the point. The statute provides for the potential and thereby places criminal negligence causing death close to the top of the hierarchy of serious crimes.

What does all this mean for the Tuttons? The debate outlined here indicates the framework for evaluating their plea that they honestly believed that their child was cured and no longer needed insulin. On the objective standard, the question is whether or not that belief was a reasonable one. On the subjective approach, the enquiry focuses on whether or not there was the required awareness of or advertence to the risk to their son's life on the part of the Tuttons. To ask the question is not, however, to provide the answer. On the objective approach indicating that the belief must be reasonable, we have to ask, reasonable to whom? Does Lamer J.'s reference to a requirement of generous allowance for factors such as an accused's youth, mental development and education extend also to his or her religious beliefs? On the subjective approach we are obliged to reflect on just what it means to be aware of or to have adverted to a risk. Is one aware of a risk if one knows that one's fellow citizens would regard as dangerous that which one believes to be safe?

It is on this terrain that the distinction between subjectivism and objectivism becomes less distinct. Lamer J. would "introduce subjective elements into objective standards"[19] and in Canada it is accepted that this can be done to some extent. However, if we were, as Lamer J. would be, "generous" in doing so, ultimately a subjective standard would be substituted for the objective one. If a belief born of religious conviction will excuse, why not a belief born of excessive self-confidence, or of mere ignorance?

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[17] *Supra*, footnote 2, at p. 1403, per Wilson J.

[18] E. Colvin, Principles of Criminal Law (1986), p. 120, cited by Wilson J., *supra*, footnote 2, at p. 1407.

[19] The language is that of Wilson J., *supra*, footnote 2, at p. 1419.

Likewise, objective elements can be introduced into subjective standards, with telling effect, if the awareness of risk requirement is interpreted to refer to the subjective awareness of an objectively defined risk. It would then not matter what the actor believed as long as he would have known that by relevant community standards, his behaviour entailed a risk to the life or safety of another. The Tuttons had been educated about diabetes and warned by doctors on a previous occasion on which they had withdrawn insulin; and so their belief in divine cure would not excuse. Nor would Coyne's belief that he was shooting at a deer when in fact he wounded children playing in the woods.[20] Nor would Rogers' belief in the efficacy of the diet he had prescribed as medical treatment for a patient who died of malnutrition as a result.[21]

It is bad driving cases that provide the more typical context for the struggle between objectivism and subjectivism. In *Waite* v. *The Queen*[22] the Supreme Court of Canada rendered its decision in such a case on the same day as it delivered judgment in *Tutton*. After consuming alcohol in a quantity sufficient to result in a blood alcohol reading above the legal limit, Waite drove behind a hayride in which tractors pulled wagons containing bales of hay, with most of the forty or more participants riding on the wagons, but with some walking or running on the road beside or among them. Waite passed the hayride, turned around, drove on the wrong side of the road toward it and, drawing closer, swerved into the right lane, striking and killing or injuring some of the participants who had been walking alongside the wagons.

Waite was charged with criminal negligence causing death and convicted of the included offence of dangerous driving after the trial judge instructed the jury on the "moral difference" between the two.[23] With dangerous driving, he explained, "[y]ou look objectively at the manner of driving", whereas with criminal negligence, "you also have to look at the subjective element", namely, "whether there is a deliberate and wilful assumption of the risk involved in driving in the manner in which he was driving".[24]

The Court of Appeal ordered a new trial on the basis that this was misdirection, and the Supreme Court upheld that decision. McIntyre, L'Heureux-Dubé and Lamer JJ. cited the reasons they gave in *Tutton*. Wilson J., writing for herself, the Chief Justice and La Forest J., did as well, though she reaffirmed her view of the nature of the subjective fault element in criminal negligence:[25]

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[20] *R.* v. *Coyne* (1958), 31 C.R. 335 (N.B.C.A.).

[21] *R.* v. *Rogers*, [1968] 4 C.C.C. 278 (B.C.C.A.).

[22] *Supra*, footnote 3.

[23] Quoted by McIntyre J., *ibid.*, at p. 1442.

[24] *Ibid.*

[25] *Ibid.*, at p. 1438.

> Although I believe there is a subjective element to criminal negligence, the judge in this case placed much too high an onus on the Crown to prove elements of deliberation and wilfulness.... I am of the view that the mental element in criminal negligence is the minimal intent of awareness of the prohibited risk or wilful blindness to the risk.

What, then, is the gist of Waite's fault? Is it his mindless action with its appalling consequences? Or does it depend on our judgment that he was aware of the risk he was taking? If it is the latter, does Waite's testimony that he had not expected to find any of the hayride party on the road, and was unaware of their presence there until the accident, mean that he lacked the required awareness?

Bad driving cases such as this present the challenge to the subjective position with some force. If more than mindless action is required for liability, subjective awareness of an objectively defined risk—awareness that people generally would see the danger of this manner of driving—should suffice. And it is easy to conclude that all drivers, if they thought about it, would be so aware.

Conclusion

Perhaps mindless action is all that should be required for liability for criminal negligence. For this to be acceptable, however, the law should be changed to recognize that mindless action should not be punishable by sentences up to life imprisonment. It is difficult to imagine that the offence of criminal negligence would have attracted the anguished debate that it has, if the Code had provided for a maximum penalty of two years in jail.

For the present, the Supreme Court decisions in *Tutton* and *Waite* will perpetuate what has become a rather tiresome debate. We are really no further ahead in our attempt to specify a fault requirement for criminal negligence than we were years ago. Judges and juries will continue to be perplexed by the "moral difference" between this and other crimes such as dangerous driving.

These cases provide another illustration of the need for fundamental criminal law reform in this country. The Law Reform Commission offers a redefinition of the fault element[26] that would go a long way toward solving the problems in this area of law, though we must reserve final judgment until we know the Commission's proposed scheme for penalties. We also have to hope that the momentum for criminal law reform has not been lost, and that the Commission's work in this area will be seriously addressed by legislators in the years ahead.

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[26] Law Reform Commission of Canada, Report 31: Recodifying Criminal Law (1987), pp. 21-25, 56-57.