

I would like to thank Christine Boyle for her permission to reproduce this document.

**François Lareau
22 August 2011**

Memo to Don Stuart

From Christine Boyle

Re: codification of the general part.

23rd, September, 1992.

Thanks for your letter and draft brief of 8th, September. I have read it carefully and thought about whether it was close enough, or could be made close enough, to my views for me to support it. I don't really think that we are far apart in our views but there are things in the draft, some of which appear to me to be fundamental to it, which make it unlikely that we could express our opinions jointly.

1. I don't really "strongly support the move to codification of the general principles". Its not that I actually object but I think it is likely that such codification will be based more on lawyers' interests in accessibility and order, and on the principles of consistency dictated by the internal needs of the system, rather than on a fundamental reexamination of the underlying values which should inform the principles. As well I think it is more likely that codification will entrench judge-made ideas that don't particularly reflect the deverse interests of women than that it will challenge those ideas. For instance, I don't anticipate that necessity will be codified as to cover such chronic "emergencies" as hunger and homelessness.

2. I don't really agree that the C.B.A.'s report is impressive and therefore I would not express support for it. I would rather say that it should not be relied on as being accurate, which strikes a rather different tone, you will agree! For instance, subjective fault, as you point out, has not been a principle of the common law for very long. (I find it hard to believe that this misrepresentation is not deliberate, and this feeling of course affects my reading of the whole report.) It is, as you point out, an overstatement to say that it is a principle of fundamental justice. To say that it is a fundamental distinction between civil and criminal liability is more aspirational than accurate. There is confusion on p.26 about causation, since the authors do not appear to know that mens rea would already apply to thin skull cases. They appear to think that the causation question is answered yes then a conviction automatically follows, irrespective of mens rea. On p. 41, "intent" is not a term that is well understood by lawyers, and the meaning given (want) would appear to me to illustrate that. I wouldn't say, on p. 43, that wilful blindness is an exception to the subjectivity principle and the words used on p.42 (has become aware) suggest confusion on the part of the authors. Recklessness is hardly a new concept in Canadian criminal law. The report does not even consistently stick to its own subjectivity principle, e.g. re automatism.

3. There are things I am not sure I agree with in your draft, not so much because I am confident in my views but because enough is not said. For instance, what are the implications of putting all duties in the Code? The C.B.A. report does not help with this. I am concerned about the implications with respect to crimes committed by business people and corporations, e.g. with respect to health and safety standards. My sense is that it would be an impossible task to take all the statutory standards and repeat them in the Code. If this is not done, and Westray, for instance, refrained from obeying other statutory standards with foresight of death or injury, then there would be no criminal liability. I can see there is lots of room for debate about the pros and cons of use of criminal law here, although a major concern of mine would be that principles not be tilted in such a way as to facilitate a selection of accused from disadvantaged groups, (e.g. poor people rather than corporations) but surely this is the kind of debate that should take place re codification. I see no sign of that in the C.B.A. report. This is the kind of thing I am afraid of when debate takes place at this level. We distance ourselves from the questions of who benefits, who loses. If workers in dangerous industries are to pay a price for the approach to omissions then I think that we should be making such choices consciously. If the C.B.A. thinks that women should pay a price in tolerance of negligent sexual assault then this should be part of the debate. One might still reach the same conclusion about the values which are most important, but at least there is acknowledgement that no principle is cost-free and the people who are expected to pay the price are not made invisible, as they are in the report, to my astonishment given the profusion of feminist analyses, for example.

One of my graduate students, Jessie Horner, is working on a brief based on her thesis about the nature of discourse on criminal issues. I think she has a lot of really interesting things to say. I can send you a copy of that if you would be interested. I would like to get myself organised to send in something myself, which, as you can see, is likely to have a somewhat different emphasis to what you are thinking of saying.

Thanks for including me in this. Best wishes.