White Paper Proposals on Subjective and Objective Standards of Fault and Defences, Mistake of Fact and Transferred Intent

by

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My paper entitled "Subjective and Objective Standards for Fault and Defences", completed on February 25, 1994, for the National Judicial Institute, provides a detailed and documented analysis of current Canadian law. Here the focus will be on identifying deficiencies and reform needs and the extent to which the White Paper proposals respond.

Before proceeding to my assigned topics, I would like to offer advice to the Minister as to his responsibility in the difficult process of achieving a new General Part.

A. The Challenge for the Minister of Justice

The challenge will be to resist the temptation to garner political popularity through law and order expediency. The Minister should truly act on the vision of the Horner Committee[1] that

> threats to the safety and security of Canadians will not be abated by hiring more police officers and building more prisons.

The criminal justice system is a blunt instrument that is essential but not a panacea. There has been more than ample research on a General Part since the creation of the Law Reform Commission in 1972. The C.B.A. has produced a significant report and draft Code[2].

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[1] Twelfth Report of the Standing Committee on Justice and the Solicitor General, Crime Prevention in Canada: Toward a National Strategy (February, 1993) p. 2.

[2] C.B.A. Task Force, Principles of Criminal Liability (1992).

A Parliamentary Subcommittee[3] held hearings and accepted the need. It is time to act in the interests of just punishment and fair trials. The Supreme Court has been the major vehicle for change in this area for some 20 years and it has now passed the mantle to Parliament. It is time to re-examine the controlling 1892 vision of Sir James Stephen. There will be few if any votes in passing a General Part. Even the practicing bar and the judiciary, many of whom may be too wedded to the old system, may resist change. There is, however, considerable room for improvement in the important substantive principles upon which accused are tried and, in some cases, gaoled. They are often far too complex, sometimes contradictory, sometimes unfair and are not well enough understood even by lawyers. It is time for a Minister of Justice to act in the interests of better justice for all accused. A Minister of Justice should not simply be responding to calls by various interests groups to make a particular aspect of the criminal law more punitive.

Although the completion of the White Paper on a General Part is welcome, my overall reaction is similar to that of the C.B.A.'s in January, 1994[4] : these proposals are not sufficiently clear, rational or comprehensive to proceed to the stage of a Bill. The White Paper has many hallmarks of being work prepared in too

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[3] First Principles: Recodifying the General Part of Criminal Code of Canada, February, 1993.

[4] Submission to the Minister of Justice on the Proposals to Amend the Criminal Code (General Principles), January, 1994.

much haste and being too expedient. However opposition of the C.B.A. and inevitable criticism by law teachers should not give the Minister cold feet. Like the C.B.A. I **suggest a small Task Force with a specific and time-defined mandate of producing a draft Bill, to be tabled in Parliament.** Unlike the C.B.A. I naturally (!) suggest that the membership included legal scholars, who have an important and independent perspective. **Above all the Minister should declare a new General Part as a high personal priority.** Without this the process will be doomed and lost in the shuffle of such politically popular and expedient measures as toughening up the Young Offenders Act and keeping dangerous offenders in prison.

B. Fault

1. Charter Standards

Although there is no satisfactory distinction between "regulatory" offences and true crimes, that distinction is vital when it comes to constitutional standards of fault declared by the Supreme Court in interpreting "principles of fundamental justice" under s. 7 of the Canadian Charter of Rights and Freedoms.

As a practical matter it would appear that all provincial offences and federal offences not in the Criminal Code and not incorporating Criminal Code standards (as do the Narcotic Control and Food and Drugs Acts) can be safely classified as regulatory. For such regulatory offences, where the liberty interest is threatened the minimum constitutional standard is that of a defence

of due diligence with the onus of proof reversed. Especially if the Supreme Court were to hold that the possibility of imprisonment in default of payment of a fine threatens the liberty interest, and thus engages section 7 protection, absolute liability would become extremely rare.

Since Creighton (1993)[5] the following are the constitutional standards for Criminal Code offences:

(a) Subjective awareness for a few crimes to reflect stigma and proportional punishment (The list is presently murder, attempt murder, accessory liability for an offence constitutionally requiring a subjective test, and, obiter, theft).

(b) Intentional conduct must be punished more than negligence (This principle will be formally satisfied where there is no minimum penalty).

(c) Objective crimes require a marked departure; crimes based on predicate offences merely reasonable foresight of harm (In both cases no allowance is to be made for individual factors short of incapacity).

There is no constitutional requirement of foresight of a prohibited consequence although this is the ideal. There can be exceptions such as manslaughter by unlawful act, where the test is reasonable foresight of harm rather than death.

Although the Supreme Court has effectively prevented Parliament from resting any penal responsibility on absolute liability it has clearly settled on constitutional standards of

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[5] (1993) 23 C.R. (4th) 189 (S.C.C.).

fault which allow considerable latitude for Parliament to create new and tougher forms of penal responsibility. Hopefully a Minister of Justice with vision and balance will resist such a temptation.

2. Four Basic Deficiencies of the Current Law on Fault

Parliament needs to enact a General Part that responds to the following basic deficiencies:

(a) The due diligence compromise for regulatory offences sets the standard too low;

(b) Current objective standards for Criminal Code offences need to be further restricted.

(c) Definitions of various fault requirements need to be clarified and inserted into the Criminal Code; and

(d) Guidelines should be provided as to which fault standard is to be applied.

It will become clear that the White Paper proposals only partly respond to the second and third deficiencies.

(a).The due diligence compromise for regulatory offences sets the standard too low

The due diligence defence fashioned by Chief Justice Dickson in the City of Sault Ste. Marie (1978)[6] is a compromise in two senses: the test is merely that of ordinary negligence and the accused must prove due care on a balance of probabilities. The Supreme Court in Wholesale Travel Group Inc.(1991)[7]held that this was all that could be constitutionally required for regulatory offences. However the upholding of the reverse onus by a bare majority of the Court despite the presumption of innocence in s. 11(d), which applies to all offences, rests in part on resort under the section 1 enquiry to a mere assertion that the law would otherwise be ineffective. The authority of this ruling should be considered suspect since the Supreme Court later abandoned the effectiveness minimum intrusion test[8] to revert back to the test of whether the violation restricts as little as reasonably possible[9].

This should lead to the option of an evidentiary presumption of negligence favoured by the minority of the Supreme Court, the Ontario Court of Appeal and the Ontario Law Reform

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[6] (1978) 3 C.R. (3d) 30 (S.C.C.).

[7] (1991) 8 C.R. (4th) 145 (S.C.C.).

[8] Chaulk (1990) 2 C.R. (4th) 1 (S.C.C.).

[9] Ramsden v. City of Peterborough (1993) 23 C.R. (4th) 391 (S.C.C.).

Commission [10]. The burden of adducing evidence adequately responds to arguments of law enforcement efficacy. On the other hand this alternative has the advantage that, in a borderline case, the accused will not be convicted simply because the persuasive burden has not been discharged. "Probably guilty" is not enough to justify state punishment. Given the difficulty of validly distinguishing "regulatory" offences, there is also much to be said for a gross departure limit wherever imprisonment is a possibility, as recommended for provincial offences by the Ontario Commission.

Recommendation 1. Rather than assuming that the due diligence defence is an adequate compromise for regulatory offences the Criminal Code should contain a provision expressly governing federal offences not in the Criminal Code and not incorporating it by reference. The provisions proposed by the Ontario Law Reform Commission for provincial offences are commendably clear and wise in resting on a normal requirement of negligence with an evidentiary burden on the accused and a limit of a marked departure for imprisonment:

> 79a.(1) Unless an aware state of mind is stated expressly to be an element of an offence, negligence shall be the standard of liability for all offences.
>
> (2) Before imprisonment can be imposed for an offence, an aware state of mind or a marked and substantial departure from the standard of care expected of a reasonably prudent person in the circumstances must be alleged and proved.

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[10] Report on the Basis of Liability for Provincial Offences (1990). This writer was the principal consultant.

> 79b.(1) Every element of an offence must be proved by the prosecutor beyond a reasonable doubt.
>
> (2) Where the prosecutor proves the act or omission specified in an offence for which the standard of liability is negligence, the defendant is presumed to have acted negligently in the absence of evidence to the contrary.
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> (3) Evidence to the contrary under subsection (2) means evidence of conduct capable of amounting to reasonable care.
>
> (4) Where evidence to the contrary has been adduced in accordance with subsection (3), the prosecutor must prove beyond a reasonable doubt that the defendant was negligent.

The White Paper proposals do not address these concerns and indeed, if enacted in their present form, would considerably muddy the waters. Section 12.6 defines "criminal negligence" as a marked departure from the objective norm and section 12.7 lumps together, without reference to differing onus, "negligence","due diligence" and "careless" under a definition of showing "a departure from the standard of reasonable care". Given Creighton it must be made clear that all forms of objective negligence under the Criminal Code require a marked departure. There must be a separate provision to set out the minimum fault standards for non-Code federal offences along the lines proposed by the Ontario Law Reform Commission.

(b).Current objective standards for Criminal Code offences need to be further restricted.

In the case of Criminal Code offences Creighton clearly leaves considerable scope for Parliament to create and/or maintain objective standards. Contrary to the position of the Canadian Bar Association most judges, writers and modern Codes recognize the

need for some measure of criminal responsibility for failing to measure up to an objective, reasonable standard. However there is a need for caution. The subjective awareness approach is the fairest basis for state punishment since full allowance is made for individual differences and all the circumstances. Despite Creighton most Criminal Code offences still require proof of subjective awareness of risk and there is no convincing evidence that this has proved a vehicle for lawlessness. High conviction rates suggest that triers of fact are not duped by bogus defences. Given that much conduct resulting in criminal charges is quite deliberate the subjective awareness of risk approach only makes a difference in borderline cases where it operates as a vehicle for restraint and just results. Although responsibility on the objective standard is sometimes called for, as in the case of sexual assault and other offences causing or risking serious harm, wholesale resort to a reasonableness standard would vastly expand the net of criminal responsibility. No such need has been demonstrated.

In Creighton even the majority recognized the need for restraint in holding that objective crimes normally require proof of a marked departure from the norm. This is a normative test which clearly satisfies the need to use the criminal sanction with restraint.

The White Paper proposals define various forms of fault but do not guide courts as to which is to be adopted in any particular case.

Recommendation 2. There should be a Criminal Code provision that requires subjective awareness in the normal case and a marked departure where the Criminal Code offence is expressly based on an objective standard.

This could be accomplished by a provision such as:

> The standard of fault for crimes is an awareness of risk except that where Parliament expressly requires an objective standard criminal negligence in the form of a marked departure is required.

The Supreme Court in Creighton is unanimous in recognizing the need to keep subjective and objective fault separate and that deliberate conduct must be punished more than negligent behaviour. This seems more a matter for re-codification of specific offences and for sentencing. It was recently Parliament's approach in creating a separate offence of arson by criminal negligence with a reduced penalty, but not when it later decided that the wide category of sexual assault should include one who did not take reasonable steps to ascertain whether the victim was consenting.

Unfortunately the majority in Creighton did not favour restraint in its further ruling that there is a category of offences based on what were called predicate offences, such as unlawful act manslaughter, where the test is objective foresight of harm without the marked limit. A brief on a new General Part is not the place to address this strange move to justify constructive liability which has not found favour in modern and proposed new Criminal Codes in the United States, the United Kingdom, Australia

and New Zealand.

However it is appropriate to call for Parliament to repudiate the further ruling of the bare majority of the Supreme Court in Creighton that an objective standard in criminal law cannot take into account individual factors short of incapacity. The majority rejected the individualized approach to the objective standard so well developed by Chief Justice Lamer for the four dissenting justices. The majority exclusion from consideration of factors such as age, inexperience, poverty and cultural factors is far too insensitive and is likely to be sidestepped by trial judges and juries. The Supreme Court itself has already[11] avoided it in its determination that individual factors such as the experience of abuse can be taken into account in assessing the reasonable belief test for self-defence.

Here the White Paper is responsive in its definition of criminal negligence in s. 12.6. Subsection (3) reads:

> For the purposes of this section, in determining whether a person shows a marked and substantial departure from the standard of reasonable care, the court shall take into account the person's awareness, if any, of the circumstances, whether or not the circumstances are specified in the description of the offence.

This may well sufficiently allow for the inclusion of personal factors which place the reasonable person test in context. It might be advisable to make it clear, along the lines of the approach of Chief Justice Lamer, that individual factors must be those that the accused could not control or manage in the

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[11] Petel (1994) C.R. (4th) (S.C.C.).

circumstances and do not include intoxication.

Recommendation 3. The grave potential for injustice in the Creighton exclusion of all individual factors when applying objective standards needs a quick intervention by Parliament irrespective of any effort to proceed with a new General Part. A definition is needed along the lines suggested by 12.6 of the White Paper and Chief Justice Lamer.

(c).Definitions of various forms of fault need to be clarified and inserted into the Criminal Code

The key distinction in fault requirements is between actual awareness and assumption of risk and failure to measure up to the standard of a reasonable person. Now that it is clear that objective standards are sometimes appropriate and constitutional it is time that negligence definitions be clearly expressed in a General Part in the manner already addressed in (b) above.

Notwithstanding the acceptance of objective standards in Creighton most Criminal Code offences currently require, and hopefully will in the future, proof of awareness and assumption of risk. There is a need for general definitions especially since our Criminal Code has never had a coherent approach, sometimes invoking such words as "intentionally" or "knowingly" or, occasionally, "recklessly", and sometimes not referring to any mens rea words.

The White Paper at 12.3-12.5 proposes definitions of knowledge, intention and recklessness for offences and separate

definitions for those concepts as they relate to elements. This structure and the definitions themselves seem unnecessarily complex when compared to other Code initiatives in Canada and abroad. It is high time for definitions comprehensible to jurors as well as legal experts.

The White Paper keeps repeating the cumbersome caveat

> Except as otherwise provided by this Act or any other Act of Parliament, where the description of an offence specifies or the law otherwise provides...

Surely the only necessary caveat in grafting a General Part to the present Code would be something like

> Except where otherwise provided by Parliament or a constitutional minimum standard...

Such an approach would allow for special fault requirements tailored to suit the particular context of a special offence such as sexual assault, where Parliament recently created a special approach to fault. In the case of most crimes the general fault definitions would work satisfactorily and consistently.

In general there is much to be said for the C.B.A.'s mens rea definitions of intent, knowledge and recklessness. They are simpler and have a greater chance of being comprehensible. The C.B.A. wisely do not resort to the unstable concept of wilful blindness and simply insist that knowledge includes somebody who is virtually certain. The White Paper formulation in 12.3(b) includes someone

> aware that it is probable that the circumstance exists and to avoid steps to confirm whether that circumstance exists

This appears to be a sloppy version of the U.K. Law Commission's

definition in their Draft Criminal Code[12] that knowledge includes awareness of a circumstances and

> also when he avoids taking steps that might confirm his belief that it exists or will exist.

The U.K. formula seems much more likely to guard against improper resort to an objective test of taking steps when the accused ought to have confirmed whether a circumstance existed.

The White Paper's definition of recklessness in 12.5 involves awareness of a serious risk which is defined as a substantial risk or one that it was highly unreasonable to take. This is a refined version of the Glanville Williams's double-barrelled concept requiring actual foresight of a risk and objectively unreasonable behaviour in assuming that risk.

Why not adopt a simpler definition? The double-barrelled approach to recklessness has the real danger that it might confuse and obscure the key distinction between a test of subjective awareness and the objective approach of negligence. As the late Professor Jacques Fortin suggested, the notion of justifiability could be left out of the definition of fault and considered as a question of justification or excuse. There is much to be said for the simple definition of the majority of the L.R.C. that recklessness is a conscious assumption of a probable risk or that of McLachlin J. in Theroux (1993)[13]

> Recklessness presupposes knowledge of the likelihood of the prohibited consequence.

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[12] Law Com. No. 177, vol. 2, s. 18.

[13] (1993) 19 C.R. (4th) 194 (S.C.C.).

Commendably these formulations and those of the White Paper link the tests of foresight to the circumstances or any prohibited consequences. This was accepted in Creighton as the ideal although not a constitutional requirement. A fault test that does not relate to the context is not a real one.

Recommendation 4. There should be a clear and workable definition of subjective fault based on the notion of awareness or assumption of a likely risk of a circumstances existing or of a consequence resulting.

As McLachlin J. points out there is no need to define knowledge separately from recklessness. Recklessness assumes knowledge. The unstable concept of wilful blindness should be jettisoned. One who is aware of a possible risk but deliberately refrains from inquiries is subjectively reckless as to the risk.

(d) Guidelines must be provided as to which fault requirement is to be applied

We have already considered the necessity for guidelines concerning fault for regulatory offences and, in the case of crimes, favouring subjective awareness of risk and also reflecting the necessity under Creighton for usually requiring a marked departure limit to any objective standard for Criminal Code offences.

In the case of the standard of subjective awareness of

risk, given conflicting jurisprudence from the Supreme Court[14], it can no longer be confidently stated that when courts adopt a mens rea approach they normally include intent and recklessness. However as long as there is a proper requirement of subjective awareness of risk an extension to recklessness is justified for most crimes. Both the L.R.C. and C.B.A. have a scheme that intent is the usual mens rea requirement and any extension to knowledge or recklessness has to be specified. Given the state of the present law where few crimes are restricted to intent it seems preferable to follow the approach adopted by both the U.K. Law Commission and the Australian Model Criminal Code. The latter[15] would include a provision that

> Unless the law creating the offence specifies to the contrary, recklessness is the minimum fault element required in relation to each physical element of an offence in order for the offence to be committed.

Recommendation 5. Recklessness should be declared the minimum fault requirement for crimes not expressly limited to intent and not expressly based on objective standards.

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[14] Theroux conflicts with Docherty (1989) 72 C.R. (3d) 1 (S.C.C.).

[15] Criminal Law Officers Committee, Final Report, General Principles of Criminal Responsibility (1992), s. 203.5.

C. Defences

1. Mistake of Fact

The controlling authority is still Pappajohn (1980)[16]. A mistake of fact is not properly characterized as a defence but is rather a denial of proof of the fault requirement for the offence charged. It follows that, in the absence of legislative intent to the contrary, in the case of an offence requiring awareness of risk the mistake need merely be honestly held. Reasonableness merely goes to the issue of credibility. In the case of a negligence offence the mistake must be both honest and reasonable. Under the Creighton requirement of a marked departure presumably even an unreasonable mistake might excuse if it did not constitute a marked departure.

There is no logical need for a mistake provision to reflect these general principles. The White Paper does not contain one. There may be a case for a clarifying provision given that courts frequently err in applying an honest and reasonable test for subjective awareness offences. Also it is, surprisingly, sometimes not appreciated by courts[17] or Parliament[18] that if the accused actually believed in situation A he cannot have been subjectively

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[16] (1980) 14 C.R. (3d) 243 (S.C.C.).

[17] See, for example, Sansregret (1985) 45 C.R. (3d) 193 (S.C.C.).

[18] See s. 273.2 of the Criminal Code respecting the mistaken belief defence for sexual assault.

reckless or wilfully blind respecting situation B.

Recommendation 6. There should be a provision that a mistake of fact need merely be honest in the case of awareness of risk crimes but must also be reasonable in the case of negligence offences.

2. Transferred Intent

The present common law of transferred intent declared by the majority in Kundeus (1976)[19] is severe. If the accused mistakenly believes she is committing an offence but she is in fact committing the actus reus of another offence she is guilty of the first offence despite lack of proof of the required act.

There is much to be said for the minority position of Chief Justice Laskin in Kundeus that the accused should in the interests of justice and fair labelling be convicted on the facts as she believed them to be. This would result in conviction for an included offence which might be an attempt to commit the crime she intended. The C.B.A. proposes such a solution but does not specifically mention the possibility of an attempt conviction.

Recommendation 7. There should be a provision that where an accused has a mistaken belief she can be convicted on the facts as she believed them to be of an included offence, which might be an attempt to commit the offence intended.

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[19] (1976) 32 C.R.N.S. 129 (S.C.C.).

3. Justifications and Excuses

Since Perka(1984)[20] the Supreme Court has distinguished between justification and excuse. A justification is doing something morally right whereas an excuse holds the accused not accountable for a wrong act as a matter of compassion. This distinction has proved most difficult to draw and has most uncertain implications. It is said to point to the need to characterize as many defences as possible as excuses so as to make generous allowance for individual circumstances and to avoid rigid balancing-of-harms tests. This need can be addressed directly in deciding on the scope of any new common law defence or at the time of drafting a new Code. It would appear that several of the justifications or excuses appearing in the White Paper are too rigid. Consider, for example the rule in 37 (1) (c) requiring self-defence to be "proportionate to the harm". This is quite contrary to the traditional view of our courts that it is unjust to judge with nicety, after the event in the cool light of day, the exact degree of force needed to repel the unlawful force.

The White Paper is generous in allowing most of the defences to operate on the accused's subjective perception. On present law the defences usually require reasonableness both as to the perception and the reaction. The L.R.C. proposed[21] the novel

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[20] (1984) 42 C.R. (3d) 113 (S.C.C.).

[21] Report No.31, Recodifying Criminal Law (1987) pp.41-42.

solution that the reasonableness of the accused's reaction should be judged on actual perception in the case of awareness of risk offences but on a reasonable perception in the case of negligence offences. The L.R.C. approach appears logically consistent but is intricate. The White Paper approach is that of proposed Codes in the United Kingdom and Australia.