DRAFT : MAY 18, 2009

The McLachlin Court's First Decade: Criminal Justice –Many More Kudos than Brickbats

By
Don Stuart
Faculty of Law
Queen's University*

***Many of the views expressed in this paper first appeared in articles or annotations in the *Criminal Reports, Canadian Criminal Law: A Treatise* (5th ed. 2007) or *Charter Justice in Canadian Criminal Law* (4th ed. 2005). These are published by Carswells/Thomson.**

Introduction: The Court is More Balanced Than Parliament

It is invidious and somewhat presumptuous for one individual to be assessing ten years of jurisprudence of the McLachlin Court in a field where the Court is so active and there is clearly room for difference of opinion. The Court has itself often been deeply divided on key rulings. This is not surprising given the Court's daunting docket and the difficulty of the issues that come before it. I also bear in mind the view of Chief Justice Dickson on a visit to Queen's that academics are very good at criticising but less impressive at constructive suggestions as to how the law should be developed.

Any review of the Court's record in criminal law must be contrasted to the ever insatiable appetite for law and order politics by politicians of all stripes and the consequent unremittingly legislative trend to toughen the criminal law. There are no votes in being soft on crime. Politicians fall over each other to be tough even though crimes rates are falling and criminologists have made it very clear that stiffer and fixed penalties in the United States and elsewhere have had no effect on reducing crime[1]. Parliament has in the past decade produced a torrent of overly complex and unnecessarily pro State amendments to the Criminal Code. Had I been reviewing the legislative record I would have been mostly critical.

In contrast our highest Court has followed a much more balanced approach. What follows is a highly selective review of the Court's major rulings in substantive law, police powers, trial procedure and evidence. Many are the Court's major pronouncements as guardians of the Charter of Rights and Freedoms. However there are also many important non-Charter decisions. My conclusion will be that Canadians should be generally proud of our highest Court's often quite distinctive jurisprudence. Our justices are all serious, hard-working and thoughtful. Some justices , thinking particularly of Chief Justice McLachlin and Justices Binnie and Charron , are especially clear and eloquent in their expression. The Court has helped ensure that we have a criminal justice system that tries to protects procedural and fair trial rights of accused against the

---

1 Tony Doob and Cheryl Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" in Michael Tonry (ed.) (2003) *Crime and Justice Research*, pp.43-195.

tyranny of the majority. Procedural and fair trial rights of those accused of crime tend to be unpopular until the moment you or someone you care about gets charged. It will be suggested that there is room for clarification of some rulings and also that law and order politics have crept into several key rulings of the McLachlin Court especially some rulings respecting the Charter that are cause for concern and ought to be re-considered. I will express strong criticism of the Court's rulings in the following areas:

- The right to discipline children;
- The meaning of detention for section 9 and 10 Charter purposes;
- Limits on police interrogation;
- Denying bail to maintain public confidence; and
- Rape Shield Laws

Part A. Substantive Law

1. Objective Fault for Crimes - Marked Departure but No Individual factors: *Beatty*

In its recent major ruling in *R. v. Beatty*[2] on dangerous driving the Court holds that, in contrast to civil liability for negligence, principles of fundamental justice under section 7 of the Charter require proof of a marked departure from the objective norm. The majority judgment of Justice Charron is written in language which applies to any crime requiring objective fault where there is a risk of imprisonment. A uniquely and welcome Canadian constitutional standard is now firmly in place for Criminal Code crimes based on objective fault. Fault for the criminal sanction can sometimes be justified on the reasonable person standard but the marked departure standard provides a vehicle for restraint. Both Justice Charron for the majority and Chief Justice McLachlin in her concurring opinion expressly call for restraint, a voice so seldom heard in Parliament. Justice Charron also breaks new ground in determining that sometimes it may be necessary to consider the accused's mental state to decide whether the reasonable person would have been aware of the risk.

---

[2] (2008) 54 C. R. (6th) 1 (S.C.C.).

The decision in *Beatty* on the facts seems, however, startlingly lenient. The accused veered off into the wrong lane and killed three persons in the oncoming lane. He had no explanation for his conduct other than that had been working in the sun and may have lost consciousness or fallen asleep. The Court held that a momentary lack of attention was not a marked departure from the objective norm. Given *Beatty* expect defences of momentary inattention to be frequently advanced against dangerous driving charges. In *Beatty* there was no evidence of any other bad driving . However most major vehicle accidents happen in a flash and proof of a pattern of bad driving that day will often be hard to come by with witnesses long gone down the highway. Given the lenient ruling on the facts one can expect that many serious accidents on highways, even those involving fatalities, will now almost always have to be dealt with by charges of careless driving under provincial laws, which usually[3] only require proof of ordinary negligence. The maximum penalties are typically as low as six months.

Beatty should lead to new arguments and welcome change in other contexts. If a marked departure from the objective norm is the minimum Charter standard for criminal offences resulting in imprisonment this should also govern all so-called crimes based on predicate offences. It is regrettable that the Court ever invented the complex analysis of offences based on predicate offences The list of such crimes is, according to the Supreme Court, unlawful act manslaughter (s. 22(5) (a)) [4] , unlawfully causing bodily harm (s. 269) [5 and] aggravated assault (s.268) [6] and, in lower court rulings, assault causing bodily harm (s.267) [7]. These crimes presently require in addition to proof of the fault for the underlying crime only proof of dangerousness in the form of objective foresight of non-trivial bodily harm. There is no marked departure test unless the predicate offence is based on negligence[8]. What of a momentary lapse of attention in a hunting

---

3 In Ontario, however, there has long been a requirement of proof of conduct deserving of punishment: *R. v. Beauchamp* [1953] 16 C.R. 270 (Ont.C.A.), not followed in *R. v. Jacobsen* (1964) 44 C.R. 24 (B.C/C.A.)).

4 *R. v. Creighton* [1993] 3 S.C.R. 3

5 *R. v. DeSousa* [1992] 2 S.C.R. 944.

6 *R. v. Godin* [1994] 2 S.C.R. 484.

7 See, for example, *R. v. Dewey* (1998) 2 C.R. (5th) 232 (Alta.C.A.) and *R. v. Emans* (2000) 35 C.R. 386 (Ont.C.A.).

8 *R. v. Gossett* [1993] 3 S.C.R. 76.

accident where a hunter accidentally shoots his best friend and is charged with unlawful act manslaughter? Consistent with the reasoning in *Beatty* the trier of fact should also not leap from a consequence of death or harm to the conclusion that there was a marked departure from the objective norm deserving of punishment as a crime.

It is disappointing that the Court in *Beatty* would decide that no personal factors short of incapacity can be considered on an objective fault test on the basis that this had been determined in *R. v. Creighton*[9]. *Creighton* was a narrow 5-4 decision. Chief Justice Lamer in dissent argued for inclusion of personal factors the accused could not control (thereby excluding intoxication as a factor). The Lamer type of approach has been favoured by most scholars[10] since the insight of Professor H..L.A. Hart that punishment can sometimes be justified on an objective standard but only where the accused had the capacity and ability to conform to the norm. The Court itself has consistently decided since *Creighton* that the reasonable person standard for defences such as self-defence[11], duress[12] and necessity[13], and long before *Creighton* in the case of provocation as a partial defence to murder[14], should be modified to require that some individual factors be considered. Here the reasonable person is usually considered in the context of the accused's real

---

[9] [1993] 3 S.C.R. 3

[10] See, for example, Eric Colvin and Sanjeev Anand, *Principles of Criminal Liability* (3rd., 2007) (Carswell/Thomson) pp.65-68, 221-222.

[11] *R. v. Lavallee* [1990] 1 S.C.R. 852. ("what the accused reasonably perceived, given her situation and experience" as a battered wife).

[12] *R. v. Hibbert* [1995] 2 S.C.R. 973 ("particular circumstances and human frailties of the accused").

[13] *R. v. Latimer* [2001] 1 S.C.R. 3 ("situation and characteristics of the particular accused" although , surprisingly, not when considering the proportionality requirement) . In *R. v. Ruzic* [2001] 1 S.C.R. 687 the Court thankfully adopts the modified approach to proportionality for duress but does not address the inconsistency with *Latimer*. The distinction is suspect. In *R. v. Kong* (2006) 40 C.R. (6th) 231 (S.C.C.) the Supreme Court, in adopting the concl;usion of thedissentong Justice Wittmann, implicitly rejected the fully articulated view of Fraser C.J.A. in the Alberta Court of Appeal in the Court below that the strict purely objective proportionality test of *Latimer* should also be adopted for self-defence. It is thus clear that it is the *Latimer* ruling that is the anomaly in need of re-consideration.

[14] *R. v. Hill* [1975] 2 S.C.R. 402)("ordinary factors" such as "sex, age or race" but not "idiosyncratic characteristics" such as "exceptionally excitable, pugnacious

situation and experience. In the law of the tort of negligence the Court has had no problem taking personal factors into account. In establishing the tort of negligent investigation in *Hill v. Wentworth Regional Police Services Board* [15]Chief Justice McLachlin writing for the 6-3 majority observes that

> The general rule is that the standard of care in negligence is that of the reasonable person in similar circumstances. In cases of professional negligence, this rule is qualified by an additional principle: the defendant must "live up to the standards possessed by persons of reasonable skill and experience in that calling"[16]

Why then are we not to take into account the abilities, experience and real situation of the driver in assessing objective fault in a dangerous driving case? Are we, for example, to hold a driver of a large transport truck, or a police officer at the wheel of a cruiser, criminally responsible for bad driving only on the standard of the average, reasonable driver? The current approach appears quite unrealistic and will likely continue to be ignored in trial courts with live witnesses. Can a trier of fact really overlook such obvious factors as age and experience?

2. Marked and Substantial Departure for Criminal Negligence (s.216): *J.F*.

For a stunning period of some 20 years since *R. v. Tutton* [17] the Court was equally divided on what to make of the special fault element of "criminal negligence" as defined in s.216 ("shows wanton or reckless disregard for the lives or safety of other persons". This is the fault required for those charged with criminal negligence causing bodily harm (s. 220), criminal negligence causing death(s.221) or manslaughter by criminal negligence (s.222(5)(b)). The McIntyre wing called for a marked departure from the objective norm test. The Wilson cohort asserted an approach of minimal subjective awareness with heavy reliance placed on the concept of wilful blindness. Most provincial courts before and after *Tutton* have applied the marked departure from the objective norm test. Yet some courts have insisted that this is a form of fault higher than that required for dangerous driving [18].

---

or in a state of drunkenness").

15 (2007) 50 C.R. (6TH) 279 (S.C.C.)

16 para. 69

17 [1989] 1 S.C.R. 1392

18 See, for example, *R. v. Palin* (1999) 135 C.C.C. (3d) 119 (Qu.C.A.) and *R. v. J.L* (2006)

In *R. v. J.F.*[19] Justice Fish speaking for the Court[20] resolved the *Tutton* issue in favour of an objective approach but he added a new wrinkle. Criminal negligence offences under s.219 is held to require a marked *and substantial* departure from the objective norm rather than just the marked departure required as a Charter standard for other objective crimes.

This new normative distinction between degrees of gross negligence seems likely to confuse and cause head-scratching by lawyers, judges and jurors. Be that as it may, until otherwise advised, there are now three degrees of objective fault requirements

> 1. Due diligence with the onus reversed for regulatory offences (as a matter of common law presumption under *R. v. City of Sault Ste. Marie*[21] or as a Charter standard where there is a risk of imprisonment[22] . This is a standard of simple negligence like that long applied for the tort of negligence;
>
> 2. A marked departure from the objective norm as a Charter standard for crimes with objective fault requirements (*Beatty*) (gross negligence); and
>
> 3. A marked and substantional departure from the objective norm for offences bases on criminal negligence under s.219 *(J.F.)* (apparently worse than gross negligence)

It would have been preferable for the Court in *J.F.* to have stuck with the notion that the fault requirements for the underlying crimes in question in a manslaughter case of criminal negligence and failing to provide necessities of life are essentially the same: a marked departure from the objective norm, and then to have pointed to the higher stigma and especially the higher penalties declared by Parliament for criminal negligence. So jurors could then in future have been advised that criminal negligence is the more serious offence carrying a larger penalty. The standard of fault for criminal negligence under s. 216 should not be different from the Supreme Court's approach to dangerous driving in *Beatty*? The Court should avoid undue subtlety and rest content with the standard of a marked departure from the objective norm? In the case of bad driving there

---

204 C.C.C. (3d) 324 (Ont.C.A.).

[19] 2008 SCC 60.

[20] The issue involved inconsistent verdicts and there was a dissent on the issue of remedy.

[21] [1978] 2 S.C.R, 1299.

[22] *Ref. Re. S.94(2) of the Motor Vehicle Act (B.C.)* [1985] 2 S.C.R. 486

is no need to have two quite overlapping crimes of dangerous driving and one based on criminal negligence causing death or bodily harm. The Court should hold that they involve substantially the same elements such that the rule against multiple convictions should be applied. So too with manslaughter by unlawful act and manslaughter by criminal negligence[23].

Justice Fish in *J.F.* confirms, as did Charron J. earlier for the majority in *Beatty*, that negligence is a form of fault not *actus reus*. That is clarifying and consistent with the definition of forms of fault in modern Criminal Codes, and also with the Charter standard in *Martineau*[24]that intentional conduct must be punished less than negligent conduct[24].

3. Using Criminal Sanction with Restraint: *Labaye, Boulanger* and *Dery*

Chief Justice McLachlin has lead the Supreme Court in asserting a meaningful act requirement in two high profile contexts .

The first was the Court's startling decision in *R. v. Labaye* (2005)[25] that the operator of a Montreal swingers club was not guilty of keeping a common bawdy house for the practice of indecency under section 210 (1) of the Criminal Code. McLachlin C.J. for a 7-2 majority [26]held that in order to establish indecent criminal conduct, the Crown must prove beyond a reasonable doubt that two requirements have been met. The first is that by its nature the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty, (b) predisposing others to anti-social behaviour, or (c)

---

[23] See too L.Wilson, "Too Many Manslaughters", (2007) 52 *Crim.L.Q.* 433.

[24] [1990] 2 S.C.R. 633.

[24] Professor Hamish Stewart , "Beatty: Towards a Coherent Law of Penal Negligence" (2008) 54 C.R. (6th) 45 would, however, prefer the marked departure test to be considered as part of the *actus reus* but concedes that this position is now water under the bridge.

[25] (2005) 34 C.R. (6th) 1 (S.C.C.). See too the companion case of *R. v. Kouri* (2005) 34 C.R. (6th) 86 (S.C.C.) (group sex on a dance floor behind a plastic curtain).

[26] Major, Binnie, Deschamps, Fish, Abella and Charron JJ. concurred. LeBel and Bastarache JJ. dissented.

physically or psychologically harming persons involved in the conduct. The second requirement is that the harm or risk of harm is of a degree that is incompatible with the proper functioning of society. This two-branch test had, the Court held, to be applied objectively and on the basis of evidence. In this way the basic criminal law requirements of fair notice to potential offenders and clear enforcement standards to police would, it was hoped, be satisfied [27].

Clarity is a noble and commendable goal when our courts review the exercise of massive state power against the individual. Whether this deliberate shift from the test of the community standard tolerance [28]to objectively defined harm has, or will, achieve greater clarity or better law is however debatable. The dissenters, Justices LeBel and Bastarache, were clearly not convinced.

Under the community standard of tolerance test the Supreme Court has previously decided that strippers dancing for men while they the men masturbate is not indecent [29]whereas lap dancing in strip clubs is indecent [30]. Presumably these decisions should now be re-litigated under the objective harm criteria. Given the new approach in *Labaye* there is now a strong argument that keeping a common bawdy house charges can no longer be sustained based on acts of prostitution in private. The majority in *Labaye* stress that no-one paid for the group sex. But what about the membership fee?

The emphasis on evidence of objective harms appears, as the dissenters point out , to be at odds with the Court's earlier decision in *R. v. Malmo-Levine* [31]in rejecting Charter challenges against marihuana laws. Justices Gonthier and Binnie there held for the majority that the principle that a criminal sanction could only be validly imposed where there is a reasonable risk of harm could not be elevated to a principle of fundamental justice guaranteed by section 7 the Charter. The majority reasoned, over the sole dissent of Justice Arbour, that there was no societal consensus that

---

[27] Para. 2.
[28] *R. v. Butler* [1992] 1 S.C.R.452, *R. v. Tremblay* [1993] 2 S.C.R. 932 and *R. v. Mara* [1997] 2 S.C.R. 630
[29] *Tremblay*, above note 28.
[30] *Mara*, above note 28.
[31]. [2003] 3 S.C.R. 571.

criminal law should always be based on harm and that the harm principle could not be identified with sufficient precision to yield a manageable standard. Of course the ruling in *Labaye* is not a declaration of a Charter standard. Parliament is therefore free to change it but has not yet moved to do so.

The second restraint decision is that in *R. v. Boulanger* (2003)[32]. The Supreme Court was unanimous in holding that the crime of breach of trust by a public officer in s.122 of Criminal Code required use of public office for a purpose other than public good and also conduct representing serious and marked departure from standards expected of individual in the accused's position of public trust . Neither requirement was met where an official had asked for a full police accident report involving his daughter.

This is an intriguing judgment capable of application in contexts other than the offence of breach of trust by a public official. The most startling aspect of the judgment is the Court's further determination that the accused should have been acquitted because the conduct lacked the level of seriousness required for the offence The Chief Justice invokes in aid her remark for the majority in *Creighton* [33]that the " law does not lightly brand a person as a criminal". That was the basis on which the Court in *Creighton* required crimes based on objective fault requirements to involve a marked departure from the norm. The problem here is that the Court in *Boulanger* had just determined that the breach of trust offence requires subjective *mens rea* . The *Creighton* dictum was not really germane. The *Boulanger* decision nevertheless applies this principle of restraint to the *actus reus* component. It appears to be saying judges can acquit if they decide that the conduct was trivial. This has the look of the doctrine of *de minimis non curat lex* not previously fully endorsed by the Supreme Court [34] . The Chief Justice is certainly and commendably on a roll in leading the Court to interpreting criminal offences with restraint.

---

[32] (2006) C.R. (6th) (S.C.C.).

[33] [1993] 3 S.C.R. 3.

[34] But see Arbour dissenting in Canadian Foundation for Children, below note 39.

In *R. v. Dery* (2006)[35]the Supreme Court decided that there is no offence of attempting to conspire to commit a substantive offence. For the Court Justice Fish indicated that the Crown had proposed an *actus reus* for attempted conspiracy that, if not open-ended, was much broader than the *actus reus* of counselling. There was no conspiracy which requires actual agreement and genuine intent. According to Justice Fish it has never been the goal of the criminal law to catch all crime "in the egg" as the Attorney General for Canada had put it. In this sense, conspiracies are criminalized when hatched. And they can only be hatched by agreement. By its very nature an agreement to commit a crime in concert with with others enhances the risk of its commission. Early intervention through the criminalization of conspiracy was therefore both principled and practical. Likewise the criminalization of attempt was warranted because its purpose is to prevent harm by punishing behaviour that demonstrates a substantial risk of harm. When applied to conspiracy, the justification for criminalizing attempt was lost, since an attempt to conspire amounts, at best, to a risk that a risk will materialize. The criminal law does not, held Fish J., punish bad thoughts that were abandoned before an agreement was reached, or an attempt made, to act upon them.

4. Vagueness, Overbreadth and Arbitrariness: *Clay, Canadian Foundation*

In two high profile cases the Supreme Court of Canada has confirmed that criminal laws can be challenged under section 7 of the Charter as vague, overbroad or arbitrary. However the rejection of these challenges in these cases shows once again that the Supreme Court has set such a high thresholds for such challenges that the doctrines are toothless [36] .

In *R. v. Clay* [37] a 6-3 majority[38] of the highest Court quickly rejected arguments that marihuana laws offended section 7 of the Charter on the ground they are too broad or arbitrary in criminalizing marihuana possession but not the smoking of carcinogenic tobacco. The effects on the accused of enforcement were not grossly disproportionate. Two of the trio of dissenting

---

[36] A rare Supreme Court acceptance of an overbreadth argument occurred in *R. v. Demers* (2004). Criminal Code provisions respecting those found unfit to stand trial were struck down as overbroad as they did not allow an absolute discharge for permanently unfit who did not pose a significant threat to public safety.

[37] [2002] 3 S.C.R. 735

[38] per Gonthier and Binnie JJ. McLachlin C.J., and Iacobucci, Major, Bastarache JJ. concurred

judges, Lebel and Deschamps JJ., were of the view in short separate opinions that the offence of marihuana possession should be struck down because the criminal law in question was an arbitrary and disproportionate response to this social problem.

In the other controversial ruling a slightly differently composed majority of the Court in *Canadian Foundation for Children* (2004)[39] rejected vagueness , overbreadth and equality challenges to section 43 of the Criminal Code (often referred to as the "spanking law") justifying reasonable force by parents and teachers in correction of children. Chief Justice McLachlin, who wrote for the 6-3 majority[40,] did so by radically reading down section 43 so that it now only authorises minor physical correction by parents but not by teachers of children between the ages of 2 and 12.

In her persuasive dissent Arbour J. engaged in a comprehensive review of existing section 43 jurisprudence, emphasising the number of acquittals. She decided that the phrase "reasonable under the circumstances" in section 43 violated children's security of the person interest in section 7 and that the principle was too vague to be in accordance with fundamental justice.

According to the majority "reasonableness" is an objective standard commonly used by the criminal law and a matter of interpretation by judges. In this case regard had to be had to expert evidence before the trial court by way of affidavit, strong social consensus as to what should be permitted and international treaty obligations against corporal punishment of children. The Chief Justice found a solid core of meaning sufficient to establish a zone in which discipline risked criminal sanction. To arrive at this conclusion the majority read in the following limits to the

- Section 43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature;

---

[39] C*anadian Foundation for Children, Youth and the Law et al v. Attorney General of Canada et al* (2004) 16 C.R. (6th) 203 (S.C.C.). See critical comments by Tim Quigley, "Correction of Children: The Supreme Court Divided", (2004) 16 C.R. (6th) 286 and Sanjeev Anand, "Reasonable Chastisement: A Critique of the Supreme Court's Decision in the Spanking Case" (2003) 42 *Alberta. L.Rev.* 871.

[40] Gonthier, Iacobucci, Major, Bastarache and LeBel JJ. concurred.

- It does not apply to corporal punishment of children under two or teenagers as children must be capable of learning from correction;
- Degrading, inhuman or harmful conduct is not protected
- Discipline by the use of objects or blows or slaps to the head is unreasonable;
- Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment;
- Conduct must be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality;
- It is wrong for law enforcement officers or judges to apply their own subjective views of what is "reasonable under the circumstances": the test is objective;
- The question must be considered in context and in light of all the circumstances of the case; and
- The gravity of the precipitating event is not relevant as that would be focusing on punishment not correction.[41]

Although this defence was interpreted by Chief Justice McLachlin for the majority to allow minor corrective force against children between the ages of 2 and 12 this was held not to amount to age

[41] Para. 40, at 229.

discrimination. The dignity of those children had not been offended in the manner contemplated by section 15(1) as interpreted in *Law*[42]. Although children often felt a sense of disempowerment and vulnerability, when balanced against the limited amount of force permitted and the consequences for the family and educational settings if there were prosecutions section 43 was not arbitrarily demeaning nor discriminatory. The power was firmly grounded in the actual needs and circumstances of the children.

In dissent Justices Binnie and Deschamps found that section 43 violated equality protections under section 15. Binnie J. was of the view that the violation could be saved under section 1 for parents and those standing in the place of parents but not for teachers. Deschamps J. found that the violation could not be demonstrably justified in either case. She was also concerned with vagueness.

There are significant problems with the majority's interpretation of section 43. Why should parents have a right to assault, within the majority's parameters, children between the ages of 2 and 12, giving parents a defence not available to any other accused charged with assault. Clinicians working with highly disturbed and potentially dangerous children have, for example, no such special protection. The age limit of 2-12 amounts, as does any age-based line, to arbitrary demarcation especially for children close to those ages. It is arbitrary to decide that a minor slap to the head is criminal but a minor slap to the bottom is not. The majority's criteria are full of uncertainty. What is a parent, a social worker, a prosecutor or a judge to make of tests such as "capable of correction". Fundamentally problematic is that, unlike normal defences to assault such as self-defence, the Court allows no consideration of proportionality given that the gravity of the precipitating event is stated to be irrelevant. It doesn't matter whether the child spat or burnt down the barn. The assaulter also cannot be acting out of frustration or anger. So we are left with justifying coolly premeditated minor physical correction without reference to context. Trial judges will surely have difficulty in not considering the precipitating event. Explaining all this to the

[42] *Law v .Canada* [1999] 1 S.C.R. 497.

public is daunting. It is surely dangerous to advise parents and those standing in their place that they can lightly hit young children with impunity?[43]

The Supreme Court is certainly in disarray in protecting Charter Rights for children. In *Canadian Foundation* the Court holds that the well known "best interests of the child" principle is not a principle of fundamental justice under s.7. Yet very recently in *R. v. D.B.*[44], respecting sentencing of young offenders as adults , Justice Abella held for a 5-4 majority (that included Chief Justice McLachlin) that section 7 guarantees a

> principle of a presumption of diminished moral capacity in young persons... fundamental to our notions of how a legal system ought to operate[45]

The majority constitutionalized a presumption of lower sentences for young offenders.
This new Charter standard could be utilised to mount a new Charter challenge to section 43. The strongest Charter challenge is that of age discrimination, especially now that the Court has backed away from the stringent *Law* test for section 15 in *R. v. Kapp*[46]

Parliament should repeal s.43 and catch Canada up to the worldwide trend to abolish the right to physically discipline children?[47] Canada is in breach of our obligations under the Convention on the Rights of the Child[48] .Section 43 is an embarrassment to Canada in the United Nations and to our reputation as human rights leaders. By 2008 26 countries including almost all those in Europe

---

[43] Early indications are that the tougher criteria read in by the majority are not always being faithfully applied so judicial subjectivity and acquittals are still a major problem. See for example *R. v. Kaur* (2004) 27 C.R. (6th) 224 (mother lightly tapped cheek of 12 year old daughter because of her silent treatment), criticised by Drew Mitchell, Child Assault and Children's Rights after Foundation for Children.", ((2005) 27 C.R. (6th) 230,), *R. v. Plummer*, Ont.C.J., June 6, 2006 (use of belt to correct causing no pain) and *R. v. Swan*, Ont.S.C. March 13, 2008 (throwing teenage daughter into truck to rescue her from a party and her boyfriend).

[44] May 16, 2008.

[45] Para. 68.

[46] (2008) 58 C.R. (6th) 1 (S.C.C.).

[47] Corinne Robertshaw, Co-ordinator of the Repeal 43 Committee has long campaigned for this result, supported by groups who work with children across the country: see www.repeal43.org.

[48] As pointed out by Arbour J. at paras. 186-188, at 265-266.

and New Zealand have enacted laws prohibiting corporal punishment of children. If Canada followed this trend defences available to parents, caregivers and teachers would be those available to anyone charged with assault, include the defences of self-defence, duress and necessity, and the emerging doctrine of *de minimis non curat lex* . The power of physical restraint would be limited to that presently authorised in section 27, which allows physical force where reasonably necessary to prevent crime or harm to others and which involves an assessment of what the child actually did. I suspect that Parliament will not touch this controversial issue. All the more pity that the Supreme Court missed its privileged opportunity under the Charter.

5. Presumption of Strict Liability for Regulatory Offences and Stays for Officially Induced Error of Law : *City of Levis v. Tetreault*

According to LeBel J. for a unanimous court of seven justices in *City of Levis v. Tetreault* [49] the provincial offences in question did not place the burden of proving mens rea on the prosecution and included no expression of the legislature's intent to create an absolute liability offence. There was common law presumption under *Sault Ste Marie* that they should be characterised as strict rather than absolute thereby affording the accused the chance of proving a due diligence defence. Absolute liability offences still exist, but they have, confirmed LeBel J., become an exception requiring clear proof of legislative intent. In deciding between strict and absolute liability. LeBel J. expressly rejected the inquiry added by Cory J. in *R. v. Pontes* (1995)[50] of asking whether the legislature intended to make a due diligence defence available. According to Justice LeBel this made the approach harder to apply and it was better to return to the clear framework of *Sault Ste Marie*[51]. This is an important clarification and also emphasises that the Supreme Court's presumption of strict liability for regulatory offences is alive and well.

LeBel J. for the Court of seven justices also accepted the Lamer view[52] that this defence should be recognised as a limited but necessary exception to the rule that ignorance of the law cannot excuse

[49] [2006] 1 S.C.R. 420.
[50] [1995] 3 S.C.R. 44.
[51] para. 19.
[52] Lamer C.J. was the only justice to address this issue in *R. v. Jorgenson* [1995] 4 S.C.R. 55.

the commission of an offence for both regulatory and true crimes and even where the offence is one of absolute or strict liability[53]. It operated as an excuse similar to entrapment :

> The wrongfulness of the act is established. However, because of the circumstances leading up to the act , the person who committed it is not held liable for the act in criminal law. The accused is thus entitled to a stay.

The Supreme Court's full acceptance of the defence of officially induced error's of law to any offence is welcome as a just exception to the rigid rule that ignorance of the law is no excuse. The criteria laid out bring welcome clarity. However there remain lingering doubts[54] as to whether the full Court was wise to accept the Lamer remedy regime of a stay rather than full defence . A full defence had been the choice of remedy of all courts below and is that in the United states where the defence developed. The analogy drawn to entrapment is not convincing. Isn't an act in reasonable reliance on erroneous official advice lacking in culpability and entitled to an acquittal like other substantive defences?

6. Physical Involuntariness (Daviault, Stone, Ruzic)

The constitutional requirement of voluntariness was established in *R. v. Daviault* [55]to allow for a defence of extreme intoxication akin to automatism and insanity for so-called general intent crimes. This Charter standard of voluntariness presently appears to apply, contrary to well established common law, even where there was negligence in getting into that state. That should be a matter for re-consideration if and when the Supreme Court gets to hear a Charter challenge to Parliament's attempt in section 33.1 of the Criminal Code to remove the *Daviault* defence from crimes of general intent involving bodily integrity, including sexual assault. Section 33.1 is presently considered to be unconstitutional in the Ontario Superior Court[56.]

---

[53] Paras. 222-224, at 231.

[54] Christine Boyle and Sam de Groot, "The Responsible Citizen in the City of Levis: Due Diligence and Officially Induced Error of Law". (2006) 36 C.R. (6th) 249 see the Court as having otherwise attempted to reinforce the principle that ignorance of law is no excuse despite its "relatively weak policy rationales" and also having an onerous view of civic obligation to know the law. (at 254).

[55] [1994] 3 S.C.R. 63

[56] *R. v. Jenson* [2000] O.J. No. 4870 (Ont.S.C.), with the Charter matter unfortunately

A most disappointing decision of the Supreme Court occurred in *R. v. Stone*[57] where Justice Bastarache for a 5-4 majority reversed the full onus of proof for automatism. The majority simply asserts a new common law presumption of involuntariness . In dissent Justice Binnie points out that no Crown counsel had argued for this reversal of the presumption of innocence. Justice Lebel in *R. v. Ruzic*[58] later made it clear (*obiter*) that there is no reverse onus in normal physical involuntariness cases, such as a motorist sliding on black ice, and that *R. v. Stone* only applies to that subset of voluntariness cases arising from dissociated states .

The majority in *Stone* also assert a presumption that automatism cases are normally to be treated as cases of no criminal responsibility on account of mental disorder. The harshness of that ruling which makes automatism acquittals now highly unlikely is softened by the revised Criminal Code regime for disposition hearings following findings of no criminal responsibility on account of mental disorder and especially by Chief Justice McLachlin's ruling in *Winko v. Forensic Psychiatric Instituite* [59] that the least restrictive alternative must be considered.

7. Moral Involuntariness As Charter Standard for Defences: *Ruzic*

Canada has had one of the most restrictive defences of duress since 1892. It took the power of the Charter and the important judgment of LeBel J. in *R. v. Ruzic*[60] to widen section 7 by striking down the requirements in section 17 that the threats be immediate and by someone present. The Court declared a new Charter standard for defences for those acting in a situation of "moral involuntariness" . That test taken from George Fletcher's writings is confusing especially as morality is not in issue when dealing with an excuse and the accused cannot really be said to have been acting without exercising choice. Nevertheless it is salutary that the Supreme Court has

---

ducked on the further appeal: (2005) 27 C.R. (6th) 240 (Ont.C.A.). Concerns as to the fairness of the law where both parties were very drunk were expressed by Duncan J. in *R. v. Cedano* (2005) 27 C.R. C.R. (6th) 251 (Ont.C.J.).

[57] [1999] 2 S.C.R. 290

[58] [2001] 1 S.C.R. 687 See too *R. v. Swaby* (20012) 44 C.R. (5th) 1 (Ont.C.A.) and *R. v. Luedecke* (2009) 61 C.R. (6th) 139 (sexsomnia to result in NCRMD finding).

[59] [1999] 2 S.C.R. 625.

erected a Charter standard to strike down laws which deny the accused a defence in a situation of truly agonising choice. The standard ought to be applied in other cases , for example to extend the section 37 defence of preventing force being applied to one under one's protection to a defence of preventing force against any third party.

Section 17 still denies a duress defence to a long list of offences. When the Court gets to consider such a Charter challenge to such limits may well be advised to turn to the Charter standard that the law cannot be arbitrary, as suggested by Justice Laskin in the Ontario Court of Appeal in *Ruzic.*

8. Significant Contributing Cause Test: *Nette*

In *R. v. Nette* (2001) [61]the Supreme Court unanimously decided for the first time that the *Smithers* test of "a contributing cause outside the *de minimis* range" applies not only to manslaughter but also to second degree murder. Arbour J., writing for a 5-4 majority[62,] further sought to clarify the *Smithers* approach. Her preference was to avoid Latin and to phrase the test positively as a test of "a significant contributing cause", which is seen to be the same standard as that in *Smithers*. However she gave trial judges discretion as to terminology in explaining the standard. Justice L'Heureux-Dube for the minority [63]objected that the language of a significant contributing cause would raise the standard and saw no reason for doing so. In *Nette* there is no mention of Charter standards for causation. The Charter issues were not argued and thus remain open in the highest court.

A 5-4 majority normally determines the legal issue. Here the majority preference is for "a significant contributing cause". However in *Nette* Justice Arbour's ruling that the causation terminology is to be left to the trial judge to decide sets the scene for considerable confusion. This

---

[60] [2001] 1 S.C.R. 687.

[61] (2001) 48 C.R. (5th) 197 (S.C.C.). See Sanjeev Anand, "Determining Causal Standards for First Degree Murder in the Wake of Nette: When Does the Substantial Cause Test Apply?", (2002) 46 *Crim.L.Q.* 282.

[62] Iacobucci, Major, Binnie and LeBel, JJ. concurred.

[63] McLachlin C.J., Gonthier and Bastarache JJ. concurred.

would appear to allow trial judges to instruct on the majority formulation of "a significant contributing cause" OR the minority *Smithers* test of a not insignificant contributing cause.

Justice L'Heureux-Dube was compelling in suggesting that the test of a significant cause *is* a higher standard than the *Smithers* test. However she was not persuasive in seeing no reason to change the *Smithers* test which had "stood the test of time". A unanimous Supreme Court decision is hard to get reconsidered. There has been substantial criticism of the approach which the Court has chosen to ignore. The *Smithers* test throws the net far too wide in cases of multiple causation, independent cause and even thin skull cases.

The Court should unambiguously decide [64] that a meaningful test of causation in criminal law requires that there be at least proof of a significant cause. Regrettably the decision in *Nette,* where causation was not a viable issue, has muddied rather than clarified. It will not be the last word on causation.

Part B. Procedure

1. Police Powers to Stop, Search and Question : *Mann, Clayton* and *Kang-Brown*

I recently published a lengthy paper on these controversial topics [65]. I will not repeat the detailed case analyses here but will stick to major themes and more recent developments..

The Chief Justice Dickson was at pains in *Hunter v. Southam* [66] to declare that the Courts were the 'the guardians of the Constitution' and that the Charter

> is intended to constrain governmental action inconsistent with those rights; it is not itself an authorisation for governmental action[67].

---

[64] As has Doherty J.A. in *R. v. Talbot* (2007) 44 C.R. (6th) 176 (Ont.C.A.).

[65] "Charter Standards for Investigative Powers: Have the Courts Got the Balance Right?" (2008) 40 *Supreme Court L.Rev*. 3-53.

[66] [1984] 2S.C.R. 145.

[67] At 110-111.

Collins confirmed that an illegal search was necessarily a violation of section 8 . Yet various majorities of the Supreme Court have, ever since the majority *Dedman* decision[68] that RIDE stop programs could be authorised by the courts without enabling legislation, done an end run around that vision by using the so-called ancillary powers doctrine to create a number of carefully limited new police powers such as those of entry to investigate a 911 call[70], strip searches[71],investigative detention[72] and roadblocks stops.

When Justice Abella turned to ancillary powers doctrine to authorise roadblock stops for a 6-3 majority of the Supreme Court in *Clayton and Farmer* [73] she adopted the following statement of Justice Doherty in the Court below:

> Where the prosecution relies on the ancillary power doctrine to justify police conduct that interferes with individual liberties, a two-pronged case specific inquiry must be made. First, the prosecution must demonstrate that the police were acting in the exercise of a lawful duty when they engaged in the conduct in issue. Second, and in addition to showing that the police were acting in the course of their duty, the prosecution must demonstrate that the impugned conduct amounted to a justifiable use of police powers associated with that duty.

The key issue is almost always that of the second test of justifiability which , according to *Dedman* is that of "reasonably necessary" given the liberty interest involved.

Many writers[74] argue that the problem with the ancillary powers doctrine is that it is a fact-specific *ex post facto* inquiry that is vague and speculative and contrary to the rule of law. It should be left to Parliament to allow for full democratic processes to come up with

> clear, prospective and comprehensive rules that will serve to confine and structure the exercise of police discretion[75]

---

[68] [1985] 2 S.C.R. 2. Dickson C.J. registered a strong dissent, expressing concerns about the rule of law and the supremacy of Parliament.

[70] *R. v. Godoy*[1999] 1 S.C.R. 311.

[71] *R. v. Golden* [2001] 3 S.C.R. 679.

[72] *R. v. Mann* [2004] 3 S.C.R. 59.

[73] (2007) 47 C.R. (6th) 219 (S.C.C.).

[74] See, for example, Stephen Coughlan , "Common Law Police Powers and the Rule of Law", Annotation to *Clayton*, (2007) C.R. (6th) and James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention after Mann" (2007) 52 *Crim. L.Q.* 299.

[75] Stribopoulos, *ibid.*, p. 326.

Both citizens and the police officer need to know what State powers are in advance. Yes, but what of Parliament's inaction on the many clarifying police powers recommendations of the Law Reform Commission of Canada in the 80's? And what of Parliament's record of the past 15 years of almost always favouring arguments of law and order expediency and listening to like-minded lobby groups – in this context those of police and prosecutors ? There is now a significant body of case law since the Charter to suggest that our independent judges in applying the ancillary powers doctrine do a much better job than Parliament in balancing minority rights of accused against the interests of law enforcement and public safety . This reality has caused me to change flags on this issue.

In its rulings on police powers to use dog sniffers in *R. v. Kang-Brown* [76] and *R. v. A.M.*[77], the Supreme Court of Canada, after reserving for 11 months, was deeply divided with four sets of reasons delivered in each case. In the result, a 6-3 majority holds that the police use of a sniffer dog in *Kang-Brown* to find drugs in the bag of someone getting off a bus and in *A.M.* in a knapsack after a search of an entire school violated section 8 and should be excluded.

In terms of establishing Charter standards for future cases the decisions in *Kang -Brown* and *A.M.* are unclear. All justices agree that a dog sniff is a search for section 8 purposes. A further ratio may be distilled by compiling a box score of the views of each justice on the law and on the facts.

On the law four justices -- Justice LeBel (Fish, Abella and Charron JJ. concurring) --hold that there is no common law power to use sniffer dogs on buses and in schools and that any departure from the *Hunter v. Southam* [78] reasonable and probable and warrant standards should be left to Parliament with subsequent Charter review by courts. Four justices --Justice Binnie (McLachlin C.J. ,Deschamps and Rothstein JJ.A. concurring) --resort to the ancillary powers doctrine to hold that the police have a common law power to conduct a warrantless search using sniffer dogs on the basis of individualised reasonable suspicion . They also hold that this standard complies with

[76] 2008 SCC 18.
[77] 2008 SCC
[78] [1984] 2 S.C.R. 145

section 8 although it was less than the *Hunter* standard. Bastarache J. agrees but, expressly *obiter*, is of the view that a generalised reasonable suspicion standard will sometimes be sufficient.

On the facts Justices Deschamps and Rothstein, and Justice Bastarache separately, dissented in both cases and found no violations.

It would appear that five justices are already on record as favouring a reasonable suspicion standard for the use of dog sniffers on buses and in schools but there is regrettably no clear agreement as to what the test means. Since the LeBel cohort was concerned about departing from the reasonable and probable test it is clear that , with the retirement of Justice Bastarache, eight justices favour a Charter standard of at least individualised reasonable suspicion.

The Binnie test of individualised reasonable suspicion to limit the use of police sniffer dogs in routine criminal investigations is a well justified and pragmatically sound solution to making such a police power Charter compliant. Parliament has not bothered to attempt any regulation before. I also agree with Justice Binnie that it seems far too late for the Court to now reject the use of the ancillary powers doctrine. The horse is well out of the barn

The difference between reasonable and probable grounds and reasonable suspicion may be exaggerated and involve some dancing on a pin. The important and key aspect of the focus of all but one of the justices on an individualised standard is that police cannot just rely on police hunches and spidey senses which may mask arbitrariness and discriminatory behaviour, as long ago pointed out by Doherty J.A. on *R. v. Simpson*[79].

The detailed determination by Justice Binnie that there was no reasonable suspicion on the facts in *Kang-Brown* is much more persuasive than the Deschamps view that suspicion was reasonably based on such cues as stares and rubbernecking. The Jetway programme is a R.C.M.P. adaptation of the Operation Pipeline programme in the United States to use such profiling techniques in

[79] (1993) 20 C.R. (4th) 1 (Ont.C.A.).

traffic stops to detect those carrying drugs. In Canada it has sometimes been justified as part of the law enforcement effort to find terrorists carrying explosives on buses, trains and airports, but it has clearly emerged as mostly a tool to go after young persons carrying illegal drugs. The U.S. programme was and is controversial because it is avowedly based on profiling techniques which encourage reliance on unreliable social cues (as in *Kang-Brown*) and in practice such invidious factors as race[80] . Here *Kang Brown* was identified as East Indian. The police officer's assurance that racial profiling was not involved was meekly accepted.

2. Reasonable Expectation of Privacy (s.8): *Tessling, Patrick*

Reasonable expectation of privacy is of course the triggering device for section 8 protection. Without such expectation section 8 cannot be considered at all. I have been critical of earlier decisions of the Supreme Court in *R. v. Edwards* [81,] where the court unduly favoured those with property interests, and *R. v. Tessling* [82.] In *Tessling* Justice Binnie decided that there was no reasonable expectation of privacy against rudimentary F.L.I.R. imaging of the outside of houses as this did not go to the biographical core or lifestyle and was simple information. The Court distanced Canada from the decision of Justice Scalia for the United States Supreme Court in *Kyllo* v. *U.S.* (2000)[83] that F.L.I.R. imaging of the outside of houses is unconstitutional. Our highest Court does expressly enter two caveats:

1. F.L.I.R. information alone is insufficient ground to obtain a search warrant, and
2. If, as the Court expects, F.L.I.R. technology gets better[84] the constitutional issue will have to be re-considered.

Judging from a recent Canadian Forces' video which shows FLIR technology swooping down to highlight details of an individual's conduct otherwise completely out of human sight *Tessling* already looks to be obsolete. In any event Justice Binnie in his recent judgments in *Kang-Brown*

---

[80] See especially David Tanovich, *The Colour of Justice. Policing Race in Canada* (Irwin Law, 2006) pp.91-95 and "A Powerful Blow Against Police Use of Drug Courier Profiles" (2008) 55 C.R. (6th) 379.

[81] [1996] 1 S.C.R. 128.

[82] [2004] 3 S.C.R. 432.

[83] 533 U.S. 27 (2000)

[84] http://www.gs.flir.com/videos/Land_TV3000.wmv.

and *R. v. Patrick*[85] has fortunately significantly de-emphasised his approach in *Tessling*. The vitality of section 8 has been restored.

In *Patrick* Justice Binnie for a 6-1 majority reaches a carefully reasoned and justified compromise on the issue of police searches of garbage. There is no reasonable expectation of privacy and therefore no section 8 protection in garbage placed for collection. There are careful caveats. Section 8 still protects against searches of garbage where the public has no access to it or where the garbage disposer shows an intent to limit access, for example by locking up the garbage. These limits are likely to be relied on in the future by defence counsel attempting to distinguish the reach of *Patrick.*

The Court makes it express that nothing in *Patrick* is to be read as affecting the section 8 protection as it has previously put in place for perimeter searches [86]and "knock on" searches [87]. This is important as some lower courts have appeared reluctant to apply the full rigour of such rulings.

The Supreme Court implicitly returns to the approach of Justice La Forest in *R. v. Wong* [88]who required the question of whether there was a reasonable expectation of privacy to be asked in a neutral way. In *Patrick* the majority of the Alberta Court of Appeal is rebuked for simply asserting that drug dealers can have no reasonable expectation of privacy. The proper question was whether householders putting out garbage for collection have a reasonable expectation of privacy in the contents of those bags.

The majority's did not accept the more generous compromise of Abella J. that there is a reduced reasonable expectation of privacy in garbage placed out for collection and that there should be a reduced section 8 standard of reasonable suspicion. The majority approach leaves no Charter protection against random searches by police of garbage set out for collection. Since the Charter

[85] April 8, 2009
[86] *R. v. Kokesch* [1990] 3 S.C.R. 3.
[87] *R. v Evans* [1996] 1 S.C.R. 8

does not apply in this context presumably the police could use sniffer dogs for such searches (in marked contrast to the Court's reasonable suspicion standard for police dog sniffers in buses and schools) **.**

3. Detention (ss.9 and 10): *Mann, Thomson, Hawkins*

Iacobucci J. remarked *obiter* for the majority in *R. v. Mann* [89] that police cannot be said to "detain" within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview and that constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

This test of degree is too uncertain and also misses civil liberty concerns about general stop powers. It has caused marked inconsistency in lower court rulings[90]. The Supreme Court in *Mann* could not have intended that the careful limits they were placing on investigative detention based on individualized suspicion could be completely bypassed by the current police practice in Toronto, as in *R. v. Grant*[91], of approaching persons on the street, especially young persons and/or persons of colour, getting their names, doing a C.P.I.C. search and then launching into aggressive questioning aimed at incrimination.

The Court should confirm that Ontario Court of Appeal's ruling in *Grant* that the *Therens/Thomson* concept of psychological detention applies to both vehicle and pedestrian stops where there is a reasonable belief that there is no choice but to comply with a police request. Courts should not play down the coercive realities of all exchanges with police.

The problem with a sole focus on physical or psychological detention is, however, that this leaves one who naively thinks he or she is free to go without *Charter* protection. The test also

---

[88] (1990) 1 C,R, (4th) 1 (S.C.C.)

[89] Para. 19

[90] See Stuart, "The Ontario Court of Appeal Blinks and Flutters: Less Exclusion and Inconsistency in Stop Cases", (2007) 49 C.R. (6th) 282 and Ken Lockhart, "The Urgent Need for the Supreme Court to Reconsider the Meaning of Detention for Charter Purposes", (2008) 58 C.R. (6th) 222.

encourages police to avoid section 9 and 10 rights by delaying arrest, and resorting to such strategies as telling the detainee he or she is free to leave when in fact they are not and are suspected of criminal activity. These concerns would be addressed by an *alternative* test that detention also occurs where police have a suspicion which has reached the point that they are attempting to obtain incriminating evidence. This was the compromise test carefully articulated by a majority of the Newfoundland Court of Appeal in *R. v. Hawkins*[92]. On the appeal as of right to the Supreme Court this approach was implicitly rejected in the briefest of reasons[93] consisting of a one sentence assertion that the accused was detained. It should be fully reconsidered.

4. Police Interrogation: *Oickle, Singh*

The principle of self-incrimination once described by Chief Justice Lamer for the Supreme Court as the "organising principle" of criminal law capable of growth[94] was later reduced by Justice Arbour to a principle of "limited application"[95]. The Court understandably came to realise that it could not be that the State can never compel an accused to incriminate himself or herself as is the case with breathalyser and D.N.A. warrant laws.

However the Court's current jurisprudence allowing ever more leeway for police interrogation is deeply disturbing. The section 7 pre-trial right to silence was recognised by Justice McLachlin with very strong justificatory language in *R. v. Hebert*[96]. There was a need in the Charter era to move beyond the old common law's focus on reliability to allow judicial control of police interrogation, abuses and tricks. The detainee had a fundamental right to choose whether to speak to police. However the Court in *Hebert* was concerned about the implications of this new right for the use of undercover agents. So the majority imposed pragmatic limits:

> The accused need not be advised of the right;
> it applies only on detention;

---

[91] (2006) 38 C.R. (6th) 58 (Ont.C.A.)- on reserve in the Supreme Court since April 24, 2008.
[92] (1992) 14 C.R. (4th) 286 (Nfld. C.A.) at paras. 26-32
[93] [1993] 2 S.C.R. 157
[94] *R. v P.(M.B.)* [1994] 1 S.C.R. 555.
[95] *R. v. S.(A..B.)* [2003] 2 S.C.R. 678.
[96] [1990] 2 S.C.R. 151

prohibits active elicitation "functionally equivalent to interrogation" [97],
does not apply to non state agents; and
allows for questioning after counsel has been consulted.

In *R. v. Oickle* [98] Justice Iacobucci for the Court voiced heartfelt concerns about the emerging evidence that coerced confessions were a major factor in wrongful convictions . Yet the revised common law voluntary confession rule he stated for the 8-1 majority[99] is only that a statement to a person in authority is inadmissible if it is the product of a threat or inducement, not of an operating mind, where oppressive conditions have resulted in involuntariness and if the police conduct would shock the conscience of the community. I have elsewhere argued that the majority ruling in *Oickle* , especially that on the facts, reads like a manual for coercive interrogations[100].The disturbing reality is that our Supreme Court has now clearly given the police huge authority to use tricks and inducements in interrogation. *Oickle* and the majority's later ruling in *R. v. Spencer* [101] will encourage police questioning to exploit emotions about possible prosecution against partners. *Oickle* says police may use polygraphs and lie about their accuracy and offer spiritual and other inducements. The Ontario Court of Appeal in *R.v. Osmar* [102] found nothing in the Charter or *Oickle* to prevent police from pretending to be members of organised crime (the Mr. Big strategy) in their undercover investigations to obtain confessions.

Furthermore in its especially disappointing ruling in *Singh* [103], a 5-4 [104] majority of the Supreme Court did not follow *Herbert* , or respected justices Doherty in the Ontario Court of Appeal[105] or Proulx in the Quebec Court of Appeal[106] .They held that the section 7 pre-trial right to silence is subsumed by the voluntary confession rule. A confession can now be admitted if it is voluntary

---

[97] *R. v. Broyles* [1991] 3 S.C.R. 595.
[98] [2000] 2 S.C.R. 3.
[99] Justice Arbour was the sole dissenter.
[100] See *Charter Justice in Canadian Ciminal Law* (4th ed., 2005), pp. 134-142.
[101] (2007) 44 C.R. (6th) 199 (S.C.C.)
[102] (2007) 44 C.R. (6th) 276 (Ont.C.A.)
[103] [1990] 2 S.C.R. 151.
[104] Per Charron J. (McLachlin C.J., Bastarache, Deschamps, Rothstein JJ. concurring). Justice Fish wrote a stinging dissent, with Binnie, LeBel and Abella JJ. concurring.
[105] *R. v. Roy* (2004) 15 C.R. (6th) 282 (Ont.C.A.).

even if the interrogation goes on for hours over the accused's protests that he or she does not wish to talk. Singh asserted his right to silence eighteen times. In this context the right no longer exists.

The problem is that even *Oickle* is not just about voluntariness. Under *Oickle* there is a freestanding discretion to exclude confessions obtained by tricks that shock the community. Why wasn't such a sustained effort by the police to override an assertion of the right to silence shocking? Justice Abella held for the Supreme Court in *R. v. Turcotte*[107] that adverse inferences should not be drawn against someone who is silent at the pre-trial stage as it would be a "snare and delusion" to advise about the right to silence and then to turn around and use silence as a sign of guilt. Why isn't it a snare and delusion to say a suspect has the right to si1ence but allow police to ignore its exercise? *Singh* has suddenly reduced this to the very little section 7 right to one that an undercover agent cannot elicit statements from a detainee by the functional equivalent of an interrogation. Certainly in *Singh* there is no mention of any section 7 right to be advised of the right to silence where police are not undercover. Whether the accused receive advice from the police or a lawyer (if there was one) is just a factor to be considered on the voluntariness inquiry.

The community shock test is a very high hurdle for accused and does not apply to the s.24(2) remedy of exclusion for Charter breaches. In the United Kingdom judges under s.76(2) of the Evidence Act of 1984 have a discretion to exclude a confession where police interrogation methods are considered oppressive and not just where they shock the community. Under s.76(5) oppression "includes torture, inhuman or degrading treatment or the use or threatened use of violence (whether or not amounting to torture" .

---

[106] *R. v. Otis* (2000) 37 C.R. (5th) 320 (Qu.C.A.).
[107] (2006) 31 C.R. (6th) 197 (S C.C.)

Trial judges in Canada who have relied on *Oickle* to exclude confessions on the basis that oppression has resulted in involuntariness have often felt it necessary to buttress their rulings by also finding a section 7 breach[107]. The resort to section 7 analysis is clearly no longer available given *Singh.*

Regulation of police interrogation is one area where Parliament may have achieved a better balance than the courts. Under section 269.1 of the Criminal Code torture is an indictable offence punishable to a maximum of fourteen years. Torture is widely defined in s. 269.1(2) as

> any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.

Further, under subsection 4, a statement obtained by torture is inadmissible in any proceedings over which Parliament has jurisdiction. This may be a vehicle for further judicial checks on police interrogation. It is also of note that the newest member of the Court, Justice Tom Cromwell, wrote in his lengthy opinion for the Nova Scotia Court of Appeal in *Oickle* that the confession had been obtained by oppressive methods and ought to be excluded.

5. Charter Remedy of Exclusion of Evidence (s.24(2)): Grant ?

[107] See, for example, *R. v. Hammerstrom* (2006) 43 C.R. (6th) 346 (B.C.S.C.)(police tricking the accused by claiming they had the crime videotaped on a store surveillance tape), and *R. v. N.* (2005)28 C.R. 6th) 149 (Ont.S.C.) (five hour polygraph, hostile interrogation and shocking number of tricks). Prior to *Oickle* , Fradsham J. in *R. v. S. (M.J.)* (2000) 32 C.R. (5th) 378 (Alta.P.C.) excluded a confession in part because the videotape revealed Calgary police were using the oppressive atmosphere and psychological brainwashing Reid method pioneered in the United States, which should not, he held, be accepted in Canada.

The appeal against the decision of the Ontario Court of Appeal in R. v. Grant [108] not to exclude evidence of a gun found following an arbitrary detention on the basis that there are degrees of trial unfairness, the evidence was reliable and the officers were acting in good faith had at the due date of this paper been on reserve since April 24, 2008. Given the importance of the s,24(2) remedy of exclusion this will be a bellweather ruling on the vitality of Charter standards the Court has been at pains to put in place for policing. I argued in Grant before the Supreme Court as intervenor for the Canadian Civil Liberties Association. Our position was that it was indeed time to abandon the unsatisfactory distinction between conscripted and non-conscripted evidence and the obtuse doctrine of discoverability but that it was crucial to declare that the seriousness of the breach was the key factor rather than the seriousness of the offence. We further suggested that good faith of the police should only be considered a mitigating factor where the police have shown reasonable diligence in attempting to comply with the Charter. Courts of Appeal and trial courts are currently in disarray as to whether Grant should be followed. Many decisions are adjouned pending the Supreme Court's decision.

6. Bail to Maintain Public Confidence : *Hall*

In *R. v Hall* (2002)[109] the Supreme Court were unanimous in ruling that the opening phrases "on any other just cause being shown and, without limiting the generality of the foregoing" in

[108] (2006) 38 C.R. (6th) 58 (Ont.C.A.).

[109] (2002) 4 C.R. (6th) 197 (S.C.C.). My full review and analysis of *Hall* was first

s.515(10)(c) of the Criminal Code were too general to survive Charter challenge and had to be struck down. The division in the Court came with the further 5-4 ruling that subsection 515(10)(c) is constitutional to the extent that it allows bail to be denied not because the accused is a flight or public safety risk but to "maintain confidence in the administration of justice".

For reasons powerfully expressed by Iacobucci J. in dissent[110] this is a deeply disappointing ruling. *Hall* effectively overrules the earlier *Morales* rulings that detaining in the public interest is too vague and that s.11(e) requires grounds of detention to be limited to assessment of flight risk and public safety. The surprise is that the majority judgment was written by Chief Justice McLachlin[111] ,who had joined the majority in *Morales* and had also authored a strong dissent in *R. v. Pearson*[112] on the basis that the reverse onus for narcotic traffickers in question was too broad.

According to the majority the portion of s.515(10)(c) which permits denial of bail where necessary to maintain confidence in the administration of justice, having regard to four specified factors, was neither unduly vague nor overbroad. The Chief Justice saw the provision as representing a separate and distinct basis for bail denial not covered by the other two categories of flight risk and public safety in subsections (a) and (c). It was neither superfluous nor unjustified. It served a very real need to permit a bail judge to detain an accused pending trial for the purpose of maintaining the public's confidence if the circumstances of the case so warrant. Without public confidence, the bail system and the justice system generally stood compromised. Denial of bail "to maintain confidence in the administration of justice" having regard to the factors set out in s. 515(10)(c) complied with s. 11(e)'s requirement of no denial of bail without just cause. According to

---

published in the Criminal Reports and in Stuart, "Zigzags on Rights of Accused: Brittle Majorities Manipulate Weasel Words of Dialogue, Deference and Charter Values" (2003) 20 *Supreme Court Law Review* 267 at 281-288.

[110] Major, Arbour and LeBel JJ. concurred

[111] L'Heureux-Dube, Gonthier, Bastarache and Binnie JJ. concurred

[112] [1992] 3 S.C.R. 665

McLachlin C.J. this was an "excellent example"[113] of the courts' constitutional dialogue with Parliament.

The dissent is conspicuously blunt. For Justice Iacobucci [114] liberty is at the heart of a free and democratic society and our justice system must minimize unwarranted denials of that liberty. In the criminal law context, this freedom is seen to be embodied generally in the right to be presumed innocent until proven guilty and specifically the right under s. 11(e) of the Charter not to be denied reasonable bail without just cause". It was impossible to justify the sweeping discretion to abrogate liberty that section 515(10)(c) afforded and it should be struck down in its entirety. In the view of the dissenting justices fear that a bail judge will be unable to protect the public without s. 515(10) (c) was without reasonable foundation. There was no evidence that the bail system was lacking in any way before the introduction of the provision in 1997, five years after the "public interest" ground for denying bail had been struck down as unconstitutionally vague. The Crown could not raise even a convincing hypothetical scenario that would require pre-trial detention where there were no flight risk or public safety concerns addressed by s.515(10)(a) or (b). Whether the phrase "maintain confidence in the administration of justice" had been given a workable standard by courts and/or Parliament in other contexts, in the context of s. 515(10)(c) it was impermissibly vague[115] because of the failure to establish plausible and valid ground for denying bail that would serve the proper administration of the bail system and were not already covered under the more specific grounds in s. 515(10)(a) and (b). Section 515(10)(c) was ripe for misuse and allows irrational public fears to be elevated above an accused's Charter rights. According to Justice Iacobucci J. the majority had transformed "dialogue with Parliament" into "abdication"[116].

---

113 para. 43.

114. paras . 59-129

115 The minority relied heavily on the analysis of the leading text by Justice Gary Trotter, *The Law of Bail in Canada* . The majority ignored it.

116. para. 137.

In my view the minority had it exactly right. The decision shows how the dialogue metaphor is strained and likely to be used to erode rights of accused. The amendment inserted into a crimunal omnibus amendment bill resulted in no Parliamentary debate on the floor or in committee. Some debate.

A proper reading of the majority *Hall* ruling is that the tertiary ground should be used sparingly given the following considerations:

> 1. McLachlin C.J. remarks that that there are "relatively rare cases where it can be properly invoked" (citing Hall J.A. of the B.C.C.A.) (para, 27) and that "the circumstances in which recourse to this ground for bail denial may not arise frequently"[117].
>
> 2. McLachlin C.J. accepts that the reasonable person making the assessment of the need to maintain public confidence must be properly informed about the philosophy of the legislative provisions, Charter values and the actual circumstances of the case[118]
>
> 3. *Hall* was an especially brutal offence with evidence that the community were fearful about this particular case.

Based on the above there is now substantial jurisprudence in lower courts and courts of appeal for using the tertiary provision sparingly[119]. However the new Chief Justice of Ontario, Justice Winkler, asserted in *R. v. S.B.*[120] that there is nothing in the judgment in *Hall* to suggest that s.515(10(c) is to be used exceptionally or that in murder cases the power is to be reserved for the most heinous cases.

Ascertaining the true reality of the use of the tertiary ground since *Hall* would require expensive empirical research given that so many bail decisions are made by provincial judges and justices of

---

117 para. 31.

118 para. 41."Charter values" are certainly weasel words here in that the majority of the Supreme Court is showing such little respect for its previous standards.

119 See case authorities collected in my critical annotation to *R. v. S.B.*, below note 120.

the peace and not recorded in available data bases. An early survey[121]examined 64 higher level decisions turning on the tertiary ground. It found that it was used to deny bail in 35 cases. This suggested that the ground was not being used sparingly. The trend was, however, already different in murder cases.

A surprising and disappointing feature of the majority judgment in *Hall* is the failure of the majority to consider the issue of context. Often the Supreme Court has an expansive view of context and is guided by a variety of secondary sources. Here the majority puts on blinkers.

Bail decisions in high profile cases such as guns and drug cases in Toronto are now sometimes made on the unruly basis that a bail judge thinks that the offence is serious and that a law and order community would get upset by a release. The issue ought to be re-considered in the Supreme Court given this reality and findings of systemic racism in the bail process[122]. For similar reasons the Supreme Court ought also to consider the constitutionality of reverse onus clauses which are proliferating and threatening to completely undermine the 1972 Bail Reform Act . This major initiative sought to restrict pre-trial custody by placing the onus on the Crown to show cause for detention. Parliament has chosen to ignore evidence of appalling conditions in detention gaols. Justice Reinhardt of the Ontario Court of Justice recently found [123]that conditions in the Don Jail in Toronto fell short of the United Nations Minimum Rules for Treatment of prisoners

7. Disclosure and Production: *McNeil*

---

120 (2007) 49 C.R. (6th) 397.

121 Don Stuart and Joanna Harris, "Is the Public Confidence Ground to Deny Bail Used Sparingly?", (2004) 21 C.R. (6th) 232

122 *The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (1985) found that the black detention rate for drug trafficking/importing charges was 27 times higher than the rate for white persons.

123 *R. v. Prince* (2006) 41 C.R. (6th) 389 (Ont.C.J.).

In *R. v. McNeil*[124] ,Justice Charron speaking for a unanimous Court, provided a clear and comprehensive review both of the current *Stinchcombe* disclosure regime and of the procedures and principles for production of third party records. In either case this important judgment should now be the first point of call.

Justice Charron clarifies in a balanced way the issue of access to police disciplinary records, which has led to protracted and conflicting litigation in lower courts. Records relating to findings of serious misconduct by police offences must be disclosed if "related to the investigation or if they could reasonably impact on the case against the accused". If not the *O'Connor* procedure is to be applied.

At a time when politicians are talking about somehow putting limits on disclosure especially in mega trials it is pleasing to see the Suporeme Court standing frm and indeed expanding the constitutional obligation to disclose

As for the procedures for the production of third party records the Supreme Court in *McNeil* also makes it crystal clear that there are two quite distinct procedures – Parliament's scheme respecting records of sexual assault complainants upheld in *Mills* and the *O'Connnor* common law regime for all other records. Details of both procedures are carefully clarified.

8. Trial by Jury: *Cinous, Fontaine, Krieger*:

This issue of whether weak defences should be withdrawn from juries has divided the Supreme Court. In *R. v. Cinous* (2002)[125] McLachlin C.J. and Bastarache J,, writing for a 6-3 majority[126] rejected the argument of Arbour J. in dissent[127] . Her view was that the air of reality test

[124] (2009) C.R. (6th) (S.C.C.).

[125] (2002) 49 C.R. (5th) 209 (S.C.C.).

[126] L'Heureux-Dube, Gonthier, and LeBel JJ. concurred, as did Binnie J. in a short concurring opinion.

[127] Iacobucci and Major JJ. concurred.

developed in the context of the mistaken belief defence in sexual assault cases had departed from the common law "no evidence" test for withdrawal from the jury in favour of one of sufficiency of evidence which had usurped the fact-finding function of juries. According to the minority the "no evidence" test should be adopted for defences such as self-defence, especially where there were no special technical or policy considerations, no alternative defences and where it was the accused's only defence.

The majority in *Cinous* firmly decided that the same test of air of reality should be applied to all defences. The test for whether there is an evidential foundation warranting that a defence be put to a jury was whether there is evidence upon which a properly instructed jury, acting reasonably, could acquit if it believed the evidence to be true. A trial judge must consider the totality of the evidence, and assumes the evidence relied upon by the accused to be true. The majority spoke of the "positive duty" to keep from the jury lacking an evidentiary foundation. However the trial judge

> does not make determinations about the credibility of witnesses , weigh the evidence, make findings of fact, or draw determinate factual inferences...Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the judge should ultimately decide the issue[128].

The message from the majority in *Cinous* in deciding that a defence of self-defence should not be put in a murder case where an accused testified he shot because he was in fear of being assassinated by a fellow gang member was that weak defences should not be left to a jury. The short concurring opinion of Binnie J. (Gonthier J. concurring) is particularly blunt and dismissive:

> A Criminal code that permitted preemptive killings within a criminal organization on the bare assertion by the killer that no course of action was reasonably available to him while standing outside a motor vehicle other than to put a shot in the back of the head of another member sitting inside the parked vehicle at a well-lit and populated gas station is a criminal code that would fail in its most basic purpose of promoting public

[128] Para 54.

> order.... [The] only way the defence could succeed was if the jury climbed into the skin of the [accused] and accepted as reasonable a sociopathic view of appropriate dispute resolution [129]

This seems to deny the contextual aspect of the individualised objective approach which requires the court to let the jury consider whether, given the situation and experience of the accused, his fear was reasonable The majority ruling of no air of reality was contrary to that of the trial judge , three justices of the Quebec Court of Appeal and the three dissenters in the Supreme Court. It seemed to treat the accused's testimony as "second class" evidence, as Arbour J. put it, and to show a lack of trust in the jury system.

Subsequently the Supreme Court appears to have lowered the *Cinous* bar in several decisions [130] that defences should have been left where the evidence appeared weak. In the automatism case of *R. v. Fontaine*[131] Justice Fish relies on *dicta* from Justice Arbour's dissenting opinion in *Cinous* to order a new trial to consider the defence. Justice Fish's respect for the autonomy of the jury system is also evident in his judgment for the Court in *R. v. Krieger* [132]that a trial judge cannot direct a jury to convict.

In *Gunning* [133]Justice Charron held that the "air of reality" test had no application to the issue of proof of essential ingredients of an offence[134]. Absent a plea of guilt or admission of fact such essentials were, under the presumption of innocence , necessarily at play and had to be left to the jury. This would appear to make the extensive jurisprudence respecting tough air of reality tests for mistaken belief in consent defences to charges of assault and sexual assault anomalous.

---

[129] Paras, 128, 130.
[130] See, for example, *R. v. Fontaine* (2004) 18 C.R. (6th) 203 (S.C.C.)(automatism), *R. v. Gunning* [2005] 1 S.C.R. 627 (defence of property).
[131] Above note 130.
[132] [2006] 2 S.C.R. 501.
[133] Above note 130.

Part C. Evidence

1. Assessing Reasonable Doubt: *W.D. and J.H.S.*

In *R. v. J.H.S.*[135] the Supreme Court makes it clear that the much quoted *W.D.*[136] formula for explaining reasonable doubt does not have to be followed. In *R v. W.D.* Justice Cory suggested the following three step approach could be followed for instructions as to credibility:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

In *J.H.S.* Justice Binnie , without identifying the many critics (or supporters) of the *W.D.* questions, pithily and powerfully acknowledges their weaknesses as follows:

> ... As to the first question, the jury may believe inculpatory elements of the statements of an accused but reject the exculpatory explanation. ... The principle that a jury may believe some, none, or all of the testimony of any witness, including that of an accused, suggests to some critics that the first W. (D.) question is something of an oversimplification.
>
> As to the second question, some jurors may wonder how, if they believe none of the evidence of the accused, such rejected evidence may nevertheless of itself raise a reasonable doubt. Of course, some elements of the evidence of an accused may raise a reasonable doubt, even though the bulk of it is rejected. Equally, the jury may simply conclude that they do not know whether to believe the accused's testimony or not. In either circumstance the accused is entitled to an acquittal.
>
> The third question, again, is taken by some critics as failing to contemplate a jury's acceptance of inculpatory bits of the evidence of an accused but not the exculpatory elements. In light of these possible sources of difficulty, Wood J.A. in H. (C.W.) suggested an additional instruction:

---

[134] paras 30-31.
[135] 2008 SCC 30
[136] [1991] 1 S.C.R. 742

> I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit". [p. 155][137]

Given these weakness it is unfortunate that the Supreme Court did not expressly and clearly abandon the *W.D.* approach as it has just done in civil cases in the context of sexual assault[138]. *W.D.* has been responsible for many, many prolix appeals and orders of new trials. The main problem is that the second question is potentially confusing and/or too generous to accused[139]. Justice Binnie might have mentioned the following remark of McLachlin J., dissenting in *R. v. S.(W.D.)*[140]

> Certainly if the jury rejected (as opposed to being merely undecided about) *all* of the evidence of the accused , it is difficult to see how that very evidence, having been rejected, could raise a reasonable doubt.

Trials judges are at least now free to reject the complexity of *W.D.* as long as they make sure that the jury is warned of the Crown's burden of proof, that it is not just a choice between competing versions and that they may believe some, none or all of any witness, including the accused. These principles, of course, apply equally to judge alone trials. In *R. v. Dinardo*[141] the Court also warns that sufficient reasons must be provided to justify findings of credibility.

2. Similar Fact Evidence Exceptionally Admissible as Specific Propensity: *Handy*

Justice Binnie lead the Court in *R. v. Handy* [142] to re-examine the similar fact evidence rule. In a comprehensive judgment he decided that such evidence is presumptively inadmissible but that exceptionally it can be admitted to show specific but not general propensity. No longer is it necessarily to artificially manufacture a purpose distinct from propensity.

---

[137] paras. 10-12.
[138] *F.H. v. McDougall* (2008) 61 C.R. (6th) 1 (S.C.C.) per Rothstein J.
[139] See especially the late Jack Gibson, "*R. v. W.D.* Revisited: Is Step Two a Misdirection?" (2003) 11 C.R. (6th) 323.
[140] [1994] 3 S.C.R. 521
[141] (2008) 57 C.R. (6th) 48 (S.C.C.).
[142] [2002] 2 S.C.R. 908.

Notwithstanding the careful attention to criteria Justice Binnie was at such pains to set out it is uncertain whether *Handy* has really made the law clearer or easier to apply and whether similar fact evidence is more or less likely to be admitted.

The unanimous ruling in *R. v. Trochyn*[143] holding that the similar fact evidence had been wrongly admitted confirms that the Supreme Court intends that it be admitted only in exceptional cases. In *Trochyn* the purpose was to show identity. It is intriguing that the majority reached its ruling on the "improbability of coincidence" test of *R. v. Arp* [144] without mentioning the *Arp* catchword of "strikingly similar". The Court in *R. v. C.R.B.* [145]and *Handy* had previously warned against the use of catchwords to solve this difficult weighing exercise. The Court did, however, return to the language of "striking similarity" in *R. v. Perrier* [146]in fashioning a special and complex test for the admissibility of similar fact evidence to show identity in gang cases.

3. Hearsay Principles of Necessity and Reliability: *Khelawon, Mapara*

The judgment of Justice Charron in *R. v. Khelawon*[147] on the hearsay rule is a *tour de force.* She provides a detailed and instructive review of the current law of hearsay and in particular of the Court's principled approach which requires proof of necessity and reliability before hearsay evidence can be admitted. She takes us all back to first principles in rehearsing how hearsay should be identified and why judges should be mindful about admitting presumptively inadmissible hearsay. In identifying a "functional" approach she emphasises the need for flexibility in the approach to the factor of reliability. She finds this largely reflected in the Supreme Court's jurisprudence, which she fully reviews.

[143] (2007) 43 C.R. (6th) 217 (S.C.C.).
[144] [1998] 3 S.C.R. 339
[145] [1990] 1 S.C.R. 717
[146] [2004] SCC 56
[147] (2006) 42 C.R. (6th) 1 (S.C.C.).

The most important change in the law is that the Court in *Khelawon* expressly reversed *R. v. Starr*[148] to the extent that it divided factors into categories relevant to threshold and those relevant to ultimate reliability and forbad consideration of evidence extrinsic to the making of the statement. As the Court recognises without providing citations, most judges and commentators have found no wisdom in those quick and restrictive *obita*. Laurie Lacelle [149] long ago pointed out that not allowing consideration of extrinsic evidence such as medical evidence of bruises would have a detrimental and undesirable effect on the prosecution of domestic assault cases where, for example, the complainant's out of court statement speaks of assault causing bruises but she has now recanted. Of course the existence of corroborating physical evidence will not necessarily be determinative on the issue of sufficient reliability. So too the Court stresses in its ruling on the facts that just because there are striking similarities in other statements there is to be no "rigid pigeon hole" admission. The catchword is case-by-case flexibility looking to all the facts. For those concerned by the length of pre-trial voir dires it is noteworthy that in *Khelawon* itself it was agreed that the *voir dire* on the statements would determine the result at trial.

In passing the Court in *Khelawon* confirms the ruling in *R. v. Mapara* [150]on the relationship between traditional exceptions and the principled approach. The majority ruling in *Starr* promised that there would be a thorough review of each existing exception to see whether the principled requirements of necessity and reliability were met. Here the Court again accepts the *Mapara* ruling that traditional exceptions are presumptively valid. The bottom line of *Mapara* is that the co-conspirators' exception set out in the *Carter* [151] rules remain unaffected by *Starr*.

In *Mapara* the minority's difference of opinion with the majority turns out to be limited to the majority's view that the trial judge should only intervene to assess necessity and reliability in

---

[148] [2000] 2 S.C.R. 144

[149] "The Role of Corroborating Evidence in Assessing the Relaibility of Heasrsay Statements for Substantive Purposes", (1999) 19 C.R. (5th) 376

[150] [2005] 1 S.C.R. 358

[151] [1982] 1 S.C.R. 938.

highly exceptional cases. According to the minority this set the bar too high. An inquiry should rather occur when the circumstances in which the evidence was obtained or given raise real and serious concerns as to reliability or necessity. In such cases the trial judge should be required to scrutinize the evidence to ensure that it meets the criteria of the principled approach. However even the minority judges emphasize that a *voir dire* to assess the hearsay evidence will remain the exception[152].

When the majority in *Starr* called for existing hearsay exceptions to be reviewed according to the requirements of necessity and reliability many writers, as the minority acknowledge, suggested that the complex and inherently circular co-conspirator's exception was a prime candidate for review and reform. The major problem is that it seems more consistent with *Starr* to have the issues of threshold liability and necessity determined by a trial judge at a *voir dire* before the jury hears the evidence[153].

The trumping consideration for the majority is the need to ensure that conspiracy trials are "effective" and not unduly complicated by hearsay *voir dires*. That seems at odds with the concern of the majority in *Starr* to ensure that necessity and reliability criteria are taken seriously before the admission of any hearsay. Chief Justice McLachlin was a dissenter in *Starr* and appears

---

[152] In *R. v. Simpson* (2007) 53 C.R. (6th) 1 (Ont.C.A.) a new trial was ordered because the trial judge erred in admitting co-conspirator hearsay where necessity was not met because the declarant was available to testify and reliability was not met because of the manner of recording the statements. Lisa Dufraimont, Annotation in C.R.'s suggests this ruling is more in keeping with the minority view in *Mapara*.

[153] See especially the detailed analysis of David Layton, "R. v. Pilarinos: Evaluating the Co-conspirators or Joint Venture Exception to the hearsay Rule", (2002) 2 C.R. (6th) 293. Layton points out that the co-conspirator exception has been applied in many contexts other than conspiracy and is best named the joint venture exception. He addresses concerns about rationale, reliability and necessity , the issue of corroboration inherent in the rule, the lack of a voir dire and the reality of the doctrine's dangerous reliance on conditional relevancy. See too Marvin Bloos and Michael Plaxton, "A Co-conspirators' Exception to the Standing Rule Keeping Out Hearsay in Gang Trials" (2003) 47 *Crim.L.Q.* 286.

to have found a new majority much more accepting of the *status quo* of existing categories of exception to the hearsay rule, including this one sometimes known as "the prosecutor's darling"

With the Court's acceptance of the wide co-conspirator's exception in *Mapara* there seems little likelihood that existing exceptions will be re-configured. The only change so far is the reliability requirement of not under "circumstances of suspicion " the majority in *Starr* itself imposed on the present intent exception. [154]

On the other hand where an exception is narrow and/or technical the principled approach is available as an avenue to admission in an appropriate case. For example Justice Hill in *R. v.West* [155] avoided the rigours of statutory business records requirements by going straight to the principled approach to admit a forensic report from an expert who was now deceased.

Lower courts [156]have differed as to whether admissions of parties should also be subject to the necessity and reliability determination. In passing Charron J. in *Khelawon* makes an enigmatic comment that seems to suggest that such an inquiry should not occur:

> Some of the traditional exceptions stand on a different footing, such as admissions from parties (confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way[157].

4. Judicial Notice: *Spence*

R. v. Spence [158]is now the controlling authority on judicial notice. Justice Binnie is clearly at pains to establish principles upon which all issues of judicial notice are to be based. On the one hand the Court is cautious. The closer any issue is to the dispositive issue the less scope there is for judicial

---

[154] See similarly Romilly J. in *R. v. Larsen* (2001) 42 C.R. (5th) 49 (B.C.S.C.)(hospital records).
[155] (2001) 45 C.R. (5th) 307 (Ont.S.C.)
[156] See, for example, *R. v. Terrico* (2005) 199 C.C.C. (3d) 126 (B.C.C.A.)
[157] par. 63

notice. If the matter relates to adjudicative issues the strict Morgan criteria of notorious or indisputable govern. When it comes to social or legislative facts the Court opens the door a little wider. However a judge must still ask whether the alleged fact would be accepted by a properly informed reasonable person as not subject to reasonable dispute. This latter test is new.

In the course of reiterating that the Morgan approach is the "gold standard" Binnie J. criticizes the Thayer view that courts should take judicial notice of what "everyone knows". He sees at least three difficulties.

> Firstly what "everybody knows" may be wrong.... Secondly, there is the problem of trial fairness. Where do these facts come from and how are the parties going to address them? How can parties who are prejudiced by the taking of judicial notice rebut what "everybody" knows unless a plausible source is put to them for their comment and potential disagreement? A third problem is that judges occasionally contradict each other about some "fact" that "everybody" knows, even on the same court in the same case[159]

Binnie J. also notes that for the majority of the Court in *R. v. Malmo-Levine*[160] he expressed a preference for social science evidence to be presented through an expert witness who could be cross-examined as to the value and weight to be given to such studies and reports.

These views appear to diverge considerably from those of Justice L'Heureux-Dube who championed the need for a wide approach to judicial notice to bring social context into the courtroom [161.] Justice L'Heureux-Dube saw no distinction between the role of trial or appeal

---

[158] [2005] 3 S.C.R. 458.
[159] par. 63
[160] [2003] 3 S.C.R. 571
[161] *Moge v. Moge* [1992] 3 S.C.R. 813 (taking judicial notice of the disproportionate economic impact of divorce on women), *Willick v. Willick* [1994] 3 S.C.R. 670 (social science research on child support) and *R. v. S.(R.D.)* [1997] 3 S.C.R. 484 (black judge taking into account racial context in assessing credibility respecting the arrest of a black youth in Halifax). See too her articles "Re-examining the Doctrine of Judicial Notice in the Family Law Context", (1994) 26 *Ottawa L.Rev.* 551 and "Making Equality Work in Family Law", (1997) 14 *Can. J.Fam. Law* 103.

judges, did not stress the distinction between adjudicative and other facts and indicated that it was not necessary to alert counsel as to when judicial notice may be taken. She also wrote that family law matters require an especially generous approach to judicial notice.

Justice Binnie's view is much more respectful of the adversary process and the role of lawyers. It will be interesting to see whether the Supreme Court extends its new approach to judicial notice to contexts other than criminal matters and whether it will be able to satisfactorily distinguish between adjudicative facts, where there is to be a strict standard for judicial notice, and social and legal facts where there is now a slightly relaxed standard.

In the meantime trial judges in particular would be well advised to alert counsel as to matters seen to be subject to judicial notice. Alerting counsel requires a delicate balance which must avoid taking on the role of a research director [162].

5. Expert Evidence: *Mohan, JJ-L* and *Trochyn*

In a series of decisions the majority of the Supreme Court has adopted an ever more cautious approach to the admission of expert testimony. Trial judges are expected to exercise a gatekeeper role and to insist on criteria of necessity and reliability before admitting the evidence of experts[163]. The Court is here commendably protective of fair trial rights and the danger that the mystic infallibility of experts will overwhelm the fact-finding process. It is also concerned about time-wasting and that it is unfair that Crown typically have more resources to hire experts[164].

---

[162] See Doherty J.A. in *R. v. Hamilton* (2004) 186 C.C.C. (3d) 129 (Ont.C.A.).

[163] See especially *R. v. Mohan* [1994] 2 S.C.R. 9, *R. v. J.J-L* [2002] 2 S.C.R. 600 , *R. v. D.D.* [2000] 2 S.C.R. 275 and *R. v. Trochyn* (2007) 43 C.R. (6th) 217 (S.C.C.).

[164] David Paciocco, "Unplugging Juke Box Testimony in an Adversarial System; Strategies for changing the Tune on Partial Expects", to be published in (2009) Queen's L.J. suggests that the Mohan tests do not address the issue of bias directly enough. He calls for codes of conduct to recognise experts owe a special duty to courts of impartial advice and for exclusion after a voir dire if an opposing party can provide a realistic foundation that the testimony may be biased

The scepticism in mostly addressed at soft science but recent wrongful convictions squarely blamed on faulty forensic pathology[165] will no doubt now attract the same caution.

In *R. v. Trochyn* [166] Justice Deschamps made it clear that the criteria of necessity and reliability are to be applied whether the expertise reflects new science or old. She decided that evidence revived by hypnosis was too unreliable to be admitted. The minority are concerned about the lack of evidentiary foundation. This characterisation is debatable given that hypnosis experts did testify at trial and were subject to cross-examination and the court was considering a wealth of secondary sources. The dissenters say the majority should not have done their own research and judicial notice should never be taken of experts. In the Court's controlling decision on judicial notice in *Spence* the unanimous Court did there recognise that the strict Morgan test of notorious or indisputable can be relaxed where the court is dealing with social or legislative facts. However Binnie J. added that even in such cases there should be a requirement that reasonably informed people would not reasonably dispute. It does seem that the overwhelming opinion of researchers discussed in *Trochyn* was that memory revived by hypnosis is much less reliable than previously thought. It would be odd if the court had, as Deschamps J. put it, been "frozen"with old knowledge. It certainly seems within the court's role to decide whether the evidence should be received with caution or, as the majority decided, be excluded altogether.

There is some double speak in the Court's approach where it indicates that unreliable devices such as polygraph tests and hypnosis can be used for other purposes such as police investigations. If those tests are too unreliable for a court of law why should the court be condoning such devices in police investigation and interrogation where there are no lawyers present?

6. Privilege Against Self-Incrimination (s.13): *Henry*

[165] Goudge Commission Inquiry.
[166] (2007) 43 C.R. (6th) 217 (S.C.C.)

In *R. v. Henry* [167]Justice Binnie speaking for the Supreme Court introduced a fundamental, sensible and well justified new distinction that section 13 of the Charter only protects against the use of prior compelled testimony and not against the use of testimony previously volunteered. This resulted in the reversal of *R. v. Mannion*[168] and, in the non-compelled situations, no Charter protection for accused. Like the majority judges in the B.C. Court of Appeal, the Supreme Court could not see why section 13 should protect an accused from cross-examination where he chose to testify one way at his first trial and then differently on the re-trial.

Some had thought that the Court might have been prepared to reverse the *R. v. Dubois*[169] ruling that where a new trial is ordered the new trial does not constitute "other proceedings" such as to trigger section 13 protection. The Court did not accept this view. The accused had a right not to be compelled to testify at the second trial and, in such cases, section 13 protected against indirect compulsion through the Crown introducing the accused's testimony from the first trial.

When it comes to situations where the accused was earlier compelled to testify when he was not the accused the Supreme Court now gives the accused greater section 13 protection. Such earlier testimony cannot be used to incriminate nor to attack credibility. The courts will now be spared the task of trying to draw a distinction that the Supreme Court now says has been, in this context, too difficult to draw.

The further pronouncement in *Henry* that not all *obiter dicta* of the Supreme Court are binding is expressly intended to foster creativity by lower courts. However the Court does still insists [170] that *some obiter dicta* "obviously intended to give guidance should be accepted as authoritative". In contrast *obiter* that are "commentary, examples or exposition that are intended to be helpful and may be found to be persuasive" are not binding. This may well be a difficult distinction to make! It seems clear that lower courts have been given the green light to try.

---

[167] [2005] 3 S.C.R. 609.
[168] [1986] 2 S.C.R. 272.
[169] (1990) 64 C.R. (3d) 216 (S.C.C.)
[170] para.57.

7. Rape Shield Law: *Darrach*

The key issue is whether prior sexual history is ever properly admitted under s.276(1) and (2) of the Criminal Code on the issue of consent. Our rape shield protection is of course built around the twin myth hypotheses established by Justice McLachlin in *R. v. Seaboyer* [171] and now found in s.276(1) of the Criminal Code that prior sexual history cannot be used to show the complainant was more likely to have consented or less worthy of belief . Unlike any country in the Western world, this protection applies, ever since a further assertion by McLachlin J. in Seaboyer, equally to prior sexual history with the accused.

The Supreme Court in *R. v. Darrach* [172] upheld the statutory regime as constitutional but it left ambiguities such that the law is not clear. The Court found that the rules in section 276(1) are not blanket exclusions and may lead to admission under the criteria of s. 276(2). Can that lead to admission on the issue of consent? Consent is often the central issue in sexual assault trials especially since the Supreme Court in *R. v. Ewanchuk* [173] so drastically narrowed the defence of mistaken belief in consent. The problem is that *Darrach* is not at all clear, indicating at one point that such evidence would never be admissible on the issue of consent as it is not relevant and at another that such evidence is rarely admissible to show consent.

If we assume or know that a sexual assault was committed there can of course be no question of the relevance of prior sexual conduct either to the issue of consent or mistaken belief. But trial judges cannot make such an assumption. Relevance is a low threshold test of whether the evidence would make the matter to be proved more likely. Nor can a trial judge simply assert the *Ewanchuk* proposition that there is no implied consent in sexual assault given that Major J. in *Ewanchuk* also said that consent can be inferred from words and conduct.

---

[171] [1991] 2 S.C.R. 577
[172] [1991] 2 S.C.R. 577
[173] [1999] 1 S.C.R. 330

There is a consistent line of authority especially in the Ontario Superior Court (reviewed in *R. v. Strickland* [174]and see earlier *R. v. Temertzoglou*[175]) to admit prior evidence of sexual conduct with the accused to show "context". In *Strickland* Justice Heeney is forthright in seeing prior sexual history as relevant to proof of consent on the basis that it is more probable that someone would consent to sexual activity with one whom there has been prior consensual sexual behaviour. But he hastens to say that such evidence while probative is certainly not conclusive and may not meet the "significant probative value" test set out in section 276(2) The solution he holds is to admit it as "part of the context".

Admitting evidence is "part of the context" seems very like the "part of the narrative" ruse sometimes resorted to bypass unwelcome evidentiary rules[176]. The real problem is that the twin myth hypotheses are too rigid. Professor David Paciocco[177] suggests judges read them down to forbid only general stereotypical inferences and to allow inferences specific to the case . This was the approach taken by Fuerst J. in *Temertzoglou.* This solution is rather like that adopted in the Supreme Court in *R. v. Handy*[178] for similar fact evidence: pattern evidence of the accused can exceptionally be admitted as evidence of specific rather than general propensity. The Paciocco analysis found favour in lower courts but was not squarely addressed by the Supreme Court in *Darrach*. The Supreme Court further speaks of Parliament having clarified that the sexual nature of the previous activity can never be referred to. This seems bizarre. It is only the sexual nature of the prior relationship evidence that could give it any probative force.

In *R.* v. *A.(no.2)* [179] the House of Lords somehow read *Darrach* as not applying rape shield principles equally to prior sexual history with the accused. The Law Lords unanimously declared that new U.K. rape shield laws offended fair trial rights in the European Convention for the

---

[174] (2007) 45 C.R. (6th) 183 (Ont.S.C.)
[175] (2002) 11 C.R. (6th) 179 (Ont.S.C.)
[176] See Christopher Nowlin, "A Wolf in Sheep's Clothing": (2006) 51 *Crim.L.Q.* 238, 271.
[177] "The New Rape Shield Provisions in Section 276 Should Survive Charter Challenge" (1993) 21 C.R. (4th) 223.
[178] [2002] 2 S..C.R. 908

Protection of Human Rights and Fundamental Freedoms in applying with equal force to prior sexual history with the accused. Lord Steyn, for example reasoned as follows:

> As a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. It is a species of prospectant evidence which may throw light on the complainant's state of mind. It cannot, of course, prove that she consented on the occasion in question. Relevancy and sufficiency are different things...It is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not usually blot out all memories. What one has engaged on in the past may influence what choice one makes on a future occasion. Accordingly, a prior relationship between a complainant and an accused is sometimes relevant to what decision was made on the particular occasion.

Rape shield law protection in the United States presently do not extend to prior sexual history with the accused. Following the Kobe Bryant rape trial acquittal Dean Michelle Anderson has called for restrictions on such evidence[180] . But she accepts it as a given that

> prior negotiations between the complainant and the defendant regarding the specific acts at issue or customs and practices about those acts should be admissible. Those negotiations, customs, and practices between the parties reveal their legitimate expectations on the incident in question[181].

Until the Supreme Court speaks more clearly on this issue my sympathy is with trial judges attempting to ensure that sexual assault trials are fair to both the accused and the accuser.

---

179 [2001] 2 W.L.R. 1546 (H.L.)

180 "Time to Reform Rape Shields Laws. Kobe Bryant Case Highlights Holes in the Armour" (2004) *Criminal Justice* 14.

181 At p. 19.