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A Case for a General Part: Lesson's from Canada's Experience with Stephen's Code since 1892 and Entrenched Charter Standards since 1982

By

Don Stuart
Professor, Faculty of Law
Queen's University
Kingston, Ontario
Canada

Synopsis

Sir James Stephen's Code chose not to incorporate general principles such as those of fault, voluntariness, responsibility for omissions, causation and the defence of necessity. His choice has lead to unnecessary inconsistency and undue complexity in Canadian criminal law. On the other hand the assertion by an activist Supreme Court of Canada of general constitutional standards under our entrenched Charter of Rights and Freedoms, especially those relating to fault, has produced a more just and balanced criminal justice system and a valuable counterbalance to the law and order frenzy of politicians of all stripes.

A draft General Part is appended that reflects Canadian choices and experiences but also relies on Code proposals in the United Kingdom and Australia. Fault principles are asserted for all types of offences. The usual fault standard for regulatory offences is due diligence. For crimes in the Criminal Code subjective reckless is the norm, with responsibility for criminal negligence requiring a marked departure from the norm. Punishment must be proportional to the gravity of the conduct. Negligent conduct is to receive less punishment than intentional or reckless wrongdoing. The standard of reasonableness for fault or defences is based on a modified objective approach which allows for some individualised factors to be considered . The controversial issue of self-intoxication is decided by general fault principles depending on whether the crime requires subjective foresight or criminal negligence. There are no strict proportionality rules for defences such as self-defence, duress and necessity. Above all the General Part is capable of being easily understood by citizens and legal counsel and judges of all levels of experience, and not left to esoteric debates.

Table of Contents Page

1. Introduction

The Irish Criminal Codification project may be unique in that it has Government commitment to proceed. Without that, most codification efforts in other countries , including Canada , have failed. While there are political and historical factors unique to Ireland [1], which will make the road ahead hard, the project appears to have developed a unique structure which bodes well for future success.

Politicians cannot resist the political expediency of pandering to the perceived need to toughen penal responses and resorting to quick fixes such as minimum sentences. . There are no votes in being soft on crime. The only issue is how tough you want to be. In the case of criminal codification, or re-codification as in Canada, the political calculation is likely block may e the fear that this might be perceived as softening the criminal law in some areas. Furthermore criminal law specialists, who are usually the reformists, are not a cohesive nor strong lobby group. Legal practitioners and judges, and especially those who have spent years becoming expert on the law's intricacies, are also often the most resistant to change.

This paper[2] draws lessons from Canada's experience since 1892 with Stephen's Criminal Code

[1] J. Paul McCutcheon and Katie Quinn, "Codifying Criminal Law in Ireland" (1998) 19 *Statute Law Review* 131.

[2] This paper is a revised and updated version of a more detailed earlier paper "A Case for a General Part" published in Stuart, Delisle and Manson (ed.), *Towards a Clear and Just Criminal Law* (1999, Thomson Canada). The earlier paper details the failed efforts by the then Law Reform Commission of Canada and other bodies and reform groups between 1971 and 1998

and also with our Charter of Rights and Freedoms , which was entrenched in 1982. What follows is an attempt to restate the case for codifying a General Part against the backdrop of the current state of Canadian substantive criminal law and Charter standards. I also have the temerity to offer a draft General Part spawned from Canadian law and reform proposals and also codification efforts in the United Kingdom[3] and Australia[4].

2. Stephen's Criminal Code in Canada

Sir James Stephen's Code chose not to incorporate general principles such as those of fault , voluntariness, responsibility for omissions, causation and the defence of necessity. After 115 years of jurisprudence in Canada it is clear that his choice has lead to unnecessary inconsistency and undue complexity. There is, for example, presently no agreement as to the fault element required for such commonly occurring crimes as assault and wilful obstruction. On the issue of responsibility for omissions it is clear that there has to be a legal duty to act but such a duty may be found in the Criminal Code , other federal Acts, provincial statutes or even the common law.

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to re-codify our Criminal Code and add a General Part. See especially L.R.C. Report 30. *Recodifying Criminal Law* (1986), superseded by Report 31, *Recodifying Criminal Law - Revised and Enlarged Edition* (1987). For further documentation and analysis of Canadian substantive law and reform options see my *Canadian Criminal Law: A Treatise* (5th ed., 2007, Thomson) and for the full impact of the Charter see my *Charter Justice in Canadian Criminal Law* (4th ed., 2005, Thomson).

[3]Law Commission, *A Criminal Code for England and Wales. Report No.l77*, (1989)

[4]Criminal Code Act. No.12 of 1995, assented to March 15, 1995 and in effect as of January 1, 1997. This Code stemmed from the impressive work of the Committee for the Review of Commonwealth Criminal Law, *Principles of Criminal Responsibility and Other Matters*, (1990).

The test for intervening cause remains to be determined. Throughout the Canadian Criminal Code special rules remain where Stephen sought to reflect 19th century case law.

In the past thirty years the Criminal Code of Canada has trebled in size with the constant addition of new and often overlapping crimes, stiffer penalties and overly complex procedural changes. Instead of one search warrant procedure we now have several. The legislative process is patchwork and reactive. In the last two years Parliament has been presented with some 50 Government and private members bills, almost all aimed at ad hoc toughening and extending the criminal sanction at a time where criminologists point to declining crime rates..

Stephen's original choices have also been resistant to change. Self-defence is likely one of the most commonly raised defences. Since 1892 Canadian courts have struggled with excessively convoluted Criminal Code sections 34, 35 and 37 based on Sir lames Stephen's questionable assumptions that it is wise to distinguish in advance between fatal and non-fatal self-defence cases and to have a tougher rule for an initial aggressor. Threats to third parties, even close family members, are only indirectly included in s. 37, a provision respecting the prevention of harm. Our courts have struggled with little success to simplify matters for themselves and juries. Given the complexity of the law, directions on self-defence are often appealed and not infrequently result in new trials. For some 25 years writers and Commissions have called for simplification of the law of self-defence. In 1995 former Chief Justice Lamer commented for the

majority *R. v. Mclntosh*[5] that:

> ss. 34 and 35 of the Criminal Code are highly technical, excessively detailed provisions deserving of much criticism. These provisions overlap and are internally inconsistent in certain respects. Moreover, their relationship to s. 37 ... is unclear. It is to be expected that trial judges may encounter difficulties in explaining the provisions to a jury, and that jurors may find them confusing. The case at bar demonstrates this. During counsel's objections to his charge on ss. 34 and 35, the trial judge commented, "Well, it seems to me these sections of the Criminal Code are unbelievably confusing." I agree with this observation[6].

There has been some desultory Government consultation in recent years but no simplifying amendments have been tabled .

3. Canadian Charter of Rights and Freedoms

The good news is that the assertion by an activist Supreme Court of Canada of general constitutional standards under our Charter of Rights and Freedoms has produced a more consistent, balanced and just criminal justice system and a valuable counterbalance to the law and order frenzy of politicians . Under section 7

> Everyone has the right to life, liberty and the security of the person and not to be deprived thereof except in accordance with principles of fundamental justice.

In its expansive interpretation of s. 7 the Supreme Court has put in place several powerful constitutional minimum standards of fault, quite unique to Canada:

- In the case of any type of offence where there is a possibility of imprisonment, even if only in default of payment of a fine, there must at least be the possibility of a due diligence defence[7].

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[5] (1995) 36 C.R. (5th) 171 (S.C.C.)

[6] At 180.

[7] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.),* [1985] 2 S.C.R. 486; *Pontes,*

- In the case of true crimes there are few offences, such as murder, attempt murder, war crimes and crimes against humanity [8] which because of special stigma and punishment constitutionally require proof of foresight of risk.

- Punishment must be proportionate to the gravity of the conduct and negligent conduct must be punished less severely than intentional conduct[9].

- Where the fault standard for a crime is based on objective negligence there must have been a marked departure from the norm[10].

There are also other important general Charter standards declared which have impacted on substantive law such as those relating to vagueness, overbreadth or arbitrariness , and physical voluntariness. The Supreme Court's recognition of the somewhat nebulous standard of "moral involuntariness" for defences led the Supreme Court in *Ruzic* in 2001 [11] to strike down a significant part of the very narrow defence of duress in section 17 of our Criminal Code. Stephen was not enamoured with the defence of duress and so restricted it by requiring that the threats be of immediate death or grievous bodily harm by someone present. In Supreme Court found these limits to be contrary to principles of fundamental justice in denying such an excuse where the accused was in a compelling situation of agonising choice. It left for another day the constitutionality of the large number of crimes listed for which the defence of duress is not available. Although it has been clear for over a century that Stephen's view of

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[1995] 3 S.C.R. 44. , *Creighton,* [1993] 3 S.C.R. 3

[8] *Martineau*, [1990] 2 S.C.R. 633; *Logan* [1990] 1 S.C.R., 731, *Finta*, [1994] 1 S.C.R. 701.

[9] *Martineau*, *Creighton*, above note 7.

[10] *Creighton*, above note 7, and *Beatty* (2008) 54 (6th) 1 (S.C.C.)

[11] [2001] 1 S.C.R. 687.

duress has been out of step with comparable laws in other jurisdictions it has taken the power of Court asserting an entrenched Charter for the law to be reformed.

4. Why Have a General Part?

A General Part is urgently needed in Canada for several reasons:

- Basic substantive principles, such as those respecting fault, voluntariness and omissions and the defences of duress and necessity, are missing from the Criminal Code which is the document most accessible to Canadians;
- Although our courts, and the Supreme Court in particular, have tried hard to provide guidance, there is now considerable inconsistency and undue complexity in the law;
- Our adversary system, which requires cases to be fairly put to impartial judges or juries, and the presumption of innocence, cannot work with legitimacy where there is confusion as to the applicable tests on even basic matters such as the fault requirement or which self-defence rule applies;
- The law must be capable of being easily understood by counsel and judges of all levels of experience and not left to esoteric debates;
- As a matter of efficiency and cost it makes little sense for so many appeals and retrials simply because the law is unclear.

A well-drafted General Part will not miraculously clear up all these deficiencies. It too would require interpretation and Charter review. But it should surely go a long way to addressing them.

5. Drafting the General Part

I attach in appendix A an updated and revised version of the General Part I first drafted for a Canadian criminal law reform conference in 1995[12], and which has been gathering dust ever since. I will here confine myself to trying to justify the fault provisions and those setting out general principles for defences, including the lightening rod issue of self-induced intoxication. These reflect Canadian choices which may be distinctively different and worth considering.

A. Fault

In the case of Criminal Code offences, even though many Charter issues have now been resolved, the trial judge must decide whether the fault requirement is objective or subjective in respect of all or some elements. The Supreme Court has most recently returned to a common law presumption of subjective *mens rea*[13] but there has been vacillation[14]. If the answer is subjective fault there remains the cloudy issue of whether the *mens rea* requirement is one of intent, knowledge, recklessness and/or wilful blindness and what those terms mean. In contrast to modern United States Codes in Canada after more than 115 years many *mens rea* requirements are still in dispute. The meaning of criminal negligence, which s. 219 of our Criminal Code defines as "wanton or reckless" disregard for lives or safety, has been left in the air for almost 20 years since the Supreme Court divided equally between a test of a a marked departure from the

[12] The proceedings were published : see above note 2.

[13] *Lucas*, [1998] I S.C.R.439.

[14] See L' Heureux-Dube J. (obiter) speaking for four of seven justices in *Hinchey*. [1996] 3 S.C.R. 1128 , See too the divided opinions in *Kerr* [2004] 2 S.C.R. 371

objective norm and one of minimal subjective awareness.[15]

Minimum Fault for Criminal Code offences: Recklessness

> **9. Unless the law creating the offence specifies to the contrary, criminal responsibility under the Criminal Code requires proof of fault in the form of intent, recklessness, or criminal negligence.**
>
> **10. Unless the law creating the offence specifies to the contrary, recklessness is the fault element required in relation to each element of the offence.**

Sections 9 and 10 aim to give guidance to courts interpreting fault requirements for Criminal Code offences. Since imprisonment is a possibility for any Criminal Code offence the only issue given our Charter standards is the definition of the fault requirement. Section 9 limits the normal choices to intent, recklessness, or criminal negligence. Section 10 codifies the common law presumption that fault is norma1ly to be in the form of subjective recklessness.

Most judges, writers, and modern Codes recognize the need for some measure of criminal responsibility for failing to measure up to an objective, reasonable standard. However there is a need for caution. The subjective awareness approach is the fairest basis for state punishment since full allowance is made for individual differences and all the circumstances. In Canada most Criminal Code offences require, or are being interpreted to require, proof of subjective awareness of risk and there is no convincing evidence that this has proved a vehicle for lawlessness. High conviction rates suggest that triers of fact are not duped by bogus defences. Given that much conduct resulting in criminal charges is quite deliberate the subjective awareness of risk approach only makes a difference in borderline cases where it operates as a

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

vehicle for restraint and just results.

Section 10 further specifies that the fault requirement be recklessness in the absence of legislative provision to the contrary. In the case of the standard of subjective awareness of risk, given conflicting jurisprudence from the Supreme Court[16], it can no longer be confidently stated that when courts adopt a *mens rea* approach they normally include intent and recklessness..
As long as there is a proper requirement of subjective awareness of risk, an extension to recklessness is justified for most crimes. Given the state of the present law where few crimes are restricted to intent [17], it seems preferable to follow the approach adopted by both the U.K. Law Commission and the Australian Criminal Code and declare recklessness to be the required minimum.

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[16] In *Docherty* [1989] 2 S.C.R. 941 the Supreme Court relied on contextual reasoning to confine the offence of wilful disobedience of a probation order to intent. Parliament later removed the express reference to "wilful" which might well mean that the offence can now be committed by recklessness. *Chartrand.* [1994] 2 S.C.R. 864. 31 however determines the crimes which express a requirement of "with intent" must be limited to intent (defined as conscious purpose or foresight of a certainty) and not extended to recklessness.

[17] Liability for murder, attempts, conspiracy and aiding and abetting are Canadian examples.

Definitions Intention, Recklessness and Criminal Negligence

> **Intention**
> **11. A person acts "intentionally" with respect to**
> **(1) a circumstance where he hopes or knows that it exists or will exist;**
> **(2) a consequence when his purpose is to cause it, or he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other consequence.**
>
> **Recklessness**
> **12. A person acts "recklessly" with respect to**
> **(1) a circumstance when he is aware of a risk that it exists or will exist;**
> **(2) a consequence when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.**

Sections 11 and 12 adopt definitions of intent and recklessness drafted by the U.K. Law Commission. The U.K. Commission's definitions have the advantage of distinguishing between fault respecting circumstances and consequences. The U.K. definition of intent here adopted in s. 11 includes under intention as to result awareness that it will occur in the ordinary course of events. The U.K. Commission changed to this formulation in 1993[18] as a clearer expression than the usual direction to juries that intention could be inferred from foresight of a virtual certainty.

The U.K. Law Commission also has a definition of "knowledge" in its Draft Code as follows:

> For the purposes of this Act. .. a person acts - "knowingly" with respect to a circumstance not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist;

Section 11 gets by without relying on concepts of "knowledge" or "wilful blindness." Both concepts are satisfactorily included within the awareness of risk test for recklessness. There is no

[18]U.K. Commission Report, *Legislating the Criminal Code: Offences against the Person*

need to define knowledge separately from recklessness. Recklessness assumes knowledge. One who is aware of a possible risk but deliberately refrains from inquiries and is wilfully blind, as Glanville Williams put it, is also subjectively reckless as to the risk. Knowledge, recklessness, and wilful blindness are all embraced by a concept of actual awareness of risk.

The major problem with the concept of "wilful blindness" is that it is unstable in that it may easily become the vehicle for relying on the objective standard.[19] The Australian Code also avoids wilful blindness, its drafters noting that knowledge and recklessness fairly cover the field[20]. Given the breadth of the concepts of subjective recklessness and the existence in Canada of crimes of objective criminal negligence it is time to jettison the unruly metaphor of wilful blindness.

The U.K. definition of recklessness is a version of the Glanville Williams' double-barrelled concept requiring actual foresight of a risk and objectively unreasonable behaviour in assuming that risk. Why not adopt a simpler definition? The double-barrelled approach to recklessness has the real danger that it might confuse and obscure the key distinction between a test of subjective awareness and the objective approach of negligence. As the late Professor Jacques Fortin once

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and General Principles (1993) Law Com. 218, s. 1

[19] See, for example. *Sansregret*, [1985] 1 S.C.R. 570 and Wilson J. in *Tutton* [1989], 1 S.C.R. 1392.

[20]See too the New Zealand *Report of the Crimes Consultative Committee*, (1991) at p. 14, who describe wilful blindness as an evidentiary matter and not appropriate for a substantive Code.

suggested in Canada, the notion of justifiability could be left out of the definition of fault and considered as a question of justification or excuse. There is much to be said for the simple definition of the majority of the L.R.C[21] that recklessness is where the accused is conscious that a consequence will probably result or that circumstance probably obtain. A similar approach is favoured by Justice McLachlin. in *Théroux* (1983[22])

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

On the other hand it seems odd to characterize those who foresee risks as necessarily reckless. Glanville Williams pointed to the surgeon who takes risks which are justified.. The U.K. test also has the advantage of not making everything turn on whether the risk was foreseen as possible, probable, or likely. The degree of risk will be weighed by the trier of fact in determining whether, given the foreseen risk and the degree of risk undertaken, it was reasonable to take it and hence not reckless. These formulations link the tests of foresight to the circumstances or any prohibited consequences. This was accepted by the Supreme Court in *Creighton*[23] as the ideal although not a constitutional requirement. A fault test that does not relate to the context has little meaning.

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[21] *Recodifying,* p. 24.

[22] [1993] 2 S.C.R. 5.

[23] Above note 7.

Criminal Negligence
13. A person is "criminally negligent" where a reasonable person in the accused's situation would have been aware of the risk and the failure to avoid it constituted a marked and substantial departure from the standard of care a reasonable person would have exercised in the circumstances.

In the context of upholding the constitutionality of the crime of unlawful act manslaughter in *Creighton*[24] the Supreme Court clearly leaves considerable scope for Parliament to create and/or maintain objective standards. Although responsibility on the objective standard is sometimes called for, as in the case of sexual assault and other offences causing or risking serious harm, wholesale resort to a reasonableness standard would vastly expand the net of criminal responsibility. No such need has been demonstrated. The requirement of proof of awareness of the risk is an important vehicle for restraint.

In *Creighton* and recently in *Beatty*[25] , respecting the crime of dangerous driving, the Supreme Court has recognized the need for restraint in holding that objective crimes require proof of a marked departure from the norm on the basis that " we do not lightly brand someone a criminal". This is reflected in s. 13. This normative test clearly satisfies the need to use the criminal sanction with restraint. It also does away with the phrase "wanton or reckless" disregard which has proved such a source of confusion and uncertainty. "Criminally" is retained to distinguish ordinary, civil negligence which might be sufficient fault for regulatory offences There is also a requirement of reasonable foresight of risk to relate the objective fault to context.

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[24] Ibid.

[25] (2008) 54 (C.R. 96th) 1 (S.C.C.).

The Australian Code is commendably blunt on the issue of a marked departure, declaring that:

> A person is negligent with respect to a physical element if his or her conduct involves
> (a) such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances; and
> (b) such a high risk that the physical element exists or will exist: that the conduct merits criminal punishment for the offence[26].

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 (namely, according to the Supreme Court, unlawful act manslaughter (s. 22(5)(a))[27], unlawfully causing bodily harm (s. 269)[28], aggravated assault (s.268)[29] and, in lower court rulings, assault causing bodily harm (s.267)[30]. 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[31]. Any new Criminal Code should avoid the unprincipled and unnecessary category of offences based on so-called predicate offences. Such constructive liability has not found favour in modern and proposed new Criminal Codes in the United States.

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[26] Above note 4, s. 5.5.

[27] *Creighton*, above note 7.

[28] *DeSousa* [1992] 2 S.C.R. 944.

[29] *Godin* [1994] 2 S.C.R. 484.

[30] See, for example, *Dewey* (1998) 21.R. 95th) 232 (Alta.C.A.) and *Emans* (2000) 35 C.R. 386 (Ont.C.A.).

[31] *Gossett* [1993] 3 S.C.R. 76.

the United Kingdom, Australia, and New Zealand.

Reasonableness Standard

> **14. For the purposes of s. 13 and the application of any reasonableness standard under this Criminal Code the trier of fact must take into account the person's awareness, if any, of the circumstances and also factors the person could not have controlled or managed such as race, gender, age and experience, where relevant, but not self-induced intoxication.**

Section 14 would reverse the further ruling of the bare 5-4 majority of the Supreme Court in *Creighton,* and recently repeated in *Beatty,* that an objective fault standard in criminal law cannot take into account individual factors short of incapacity. The majority's express exclusion from consideration of possibly relevant factors such as age, inexperience, poverty, and extremely narrow view of incapacity is far too insensitive and unrealistic and has been largely avoided by trial judges and , no doubt, jurors. Chief Justice Lamer in dissent in *Crieighton* argued for inclusion of personal factors the accused could not control (thereby excluding intoxication as a factor). This is the type of modified objective approach favoured by most scholars[32] since the insight of Professor H.L A. Hart that punishment could sometimes be justified on an objective standard but only where the accused has the capacity and ability to conform to the norm.

The Supreme Court itself has consistently decided since *Creighton* that in the context of defences such as self-defence[33], duress[34] and necessity[35], and long before *Creighton* in the case of

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

[33] *Lavallee* [1990] 1 S.C.R. 852. ("what the accused reasonably perceived,

provocation as a partial defence to murder[36], the objective approach should be modified to require that individual factors be considered so that the reasonable person is considered in the context of the accused's real situation. In the law of the tort of negligence the Court has no problem taking into account personal factors. In establishing the tort of negligent investigation in *Hill v. Wentworth Regional Police Services Board* [37]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"[38]

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?

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given her situation and experience" as a battered wife).

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

[35] *Latimer* [2001] 1 SA.C.R. 3 ("situation and characteristics of the particular accused" although , surprisingly, not when considering the proportionality requirement) .

[36] *Hill* [1975] 2 S.C.R. 402)("ordinary factors" such as "sex, age or race" but not "idiosyncratic characteristics" such as "exceptionally excitable, pugnacious or in a state of drunkenness").

[37] (2007) 50 C.R. (6^{TH}) 279 (S.C.C.)

[38] para. 69

Mistake of Fact

> **15. (1) Where the fault requirement is intent or recklessness, to excuse a mistaken belief need not be reasonable although reasonableness is relevant to determining whether the belief existed.**
> **(2) Where the fault requirement is criminal negligence, to excuse a mistaken belief must be reasonable.**
> **(3) Where the accused has a mistaken belief within the meaning of subsections (1) or (2), he or she may nevertheless be convicted of an included or attempted offence where the belief constitutes the requisite fault for that offence.**

There is really no need for a separate defence of mistake of fact since such a defence merely amounts to a denial that the requisite fault requirement has been proved[39]. Section 15 was seen to be necessary to make it clear that a mistake need not be reasonable in cases of *mens rea* crimes but has to be reasonable where the charge involves criminal negligence.

Section 15(3) is aimed against the common law doctrine of transferred intent. The majority position in *Kundeus*[40] that fault can be transferred from one crime to another is too severe. On this view if the accused mistakenly believes she is committing an offence but she is in fact committing the actus reus of another offence she is guilty of the first offence despite lack of proof of the required act. Section 15(3) adopts the minority position of Chief Justice Laskin in *Kundeus* that the accused should, in the interests of justice and fair labelling, be convicted on the facts as she believed them to be. This could result in conviction for an included offence which might well be an attempt to commit the offence intended.

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[39] *Pappajohn* [1980] 2 S.C.R. 120.

[40] [1976] 2 S.C,R, 272,

Fault for Offences under Other Acts of Parliament

> **16. (1) Unless Parliament expressly requires intent, recklessness or criminal negligence as a fault requirement or expressly imposes absolute liability, negligence is required for penal liability.**
> **(2) A person acts "negligently" where he or she departs from the standard of care expected of a reasonable prudent person in the circumstances.**
> **(3) Before imprisonment can be imposed, intent, recklessness or criminal negligence must be proved.**
> **(4) Where the Crown has proved the conduct specified in the offence for which the fault requirement is negligence, the accused is presumed to have acted negligently in the absence of evidence to the contrary.**

The due diligence defence fashioned by Chief Justice Dickson in the *City of Sault Ste. Marie*[41] for regulatory offences was an important rejection of absolute liability for any type of offence however minor, including speeding and seatbelt laws. The Court recognised arguments of administrative efficiency favoured liability without fault. But the Court found no empirical evidence that such liability would deter others. Punishing where reasonable care has been taken was unjust and would lead to cynicism and disrespect of the law.

The *City of Sault Ste. Marie* approach to regulatory offences is a workable compromise in two senses: the test is merely that of ordinary negligence and the accused must prove due care on a balance of probabilities. The distinction between crimes and regulatory offences is however murky and contentious[42]. In practice in Canada it largely reflects a difference between offences

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[41][1978] 2 S.C.R. 1299.

[42] In *Wholesale Travel Group Inc*. [1991] 3 S.C.R. 154 Cory J. expressed the view that there was a sound basis for distinguishing between regulatory and criminal offences but conceded that "like all theories, its application is difficult". In dissent Lamer C.J. preferred to make a distinction based on penalty.

found in the Criminal Code (or the Controlled Drugs and Substances Act) and those thousands of offences declared in other federal legislation and provincial statutes. It is a useful and pragmatic distinction based on stigma and penalty rather than any defensible notion of intrinsic difference. In this context it works only because of the reality of our constitutional division of authority. This is the Canadian equivalent of the distinction drawn in the United States between felonies and misdemeanours.

The reversal of the onus at common law and its later justification under the Charter by a 5-4 majority of the Supreme Court[43] is suspect. The Supreme Court has since made it clear [44] that a reverse onus cannot be upheld as a demonstrably justified violation of the presumption of innocence unless the court decides that an evidentiary burden would not be sufficient. There is much to be said for the approach of the Ontario Law Reform Commission[45], here reflected in s.16. This establishes a presumption of the normal fault requirement of negligence. The burden of adducing evidence adequately responds to arguments of law enforcement efficiency. On the other hand this alternative has the advantage that, in a borderline case, the accused will not be convicted simply because the persuasive burden has not been discharged. "Probably guilty" is not enough to justify state punishment. Given the difficulty of validly distinguishing "regulatory" offences, there is also much to be said for a marked departure limit wherever imprisonment is a

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[43] *Wholesale Travel Group Inc* ., above note 42.

[44] *Laba.* [1994J 3 S.C.R. 965. .

[45]Ontario Law Commission, *Report on the Basis of Liability for Provincial Offences* (1990), pp. 57-58. This writer was the principal consultant. The Report's approach was adopted by Chief Justice Lamer for four justices in dissent in *Wholesale Travel Group Inc*..

possibility, as recommended for provincial offences by the former Ontario Law Reform Commission.

B. General Principles for Defences

Common Law Defences

17. Any defence, justification or excuse shall be available unless it is contrary to an express provision of the Criminal Code.

This preserves the flexibility of s. 8(3) of the present Criminal Code, which expressly allows courts to recognize new common law defences, as they have done, for example, in the cases of necessity and entrapment. This would be independent of any defence required as a constitutional requirement under principles of fundamental justice guaranteed by s. 7 of the Charter of Rights and Freedoms. Side by side common law and statutory defences, as presently is the case with duress, is however unduly complex and confusing and should be avoided. Under the proposed s.17 once a defence, justification, or excuse has been codified, the words used would govern unless there is a successful constitutional challenge.

Self-induced Intoxication

22. Self-induced intoxication is not a ground of incapacity nor may it be considered in any determination of reasonableness under this Act.

Section 22 reflects current law. There is no automatic legal exemption for one who chose to get drunk. It is also clear that where the determination of legal liability is based on considering the objective standard of the reasonable person, whether this be for determining whether the accused was negligent or for the purposes of a reasonableness inquiry for a defence, the inquiry is to

proceed on the assumption that the accused was sober. For the sake of clarity sections .14 (considered earlier) and 22 make this express.

The most acute controversy arises respecting the relevance of self-induced intoxication to the determination of the fault requirements of intent and recklessness. In its highly contentious ruling in *Daviault*[46] a 6-3 majority of the Supreme Court maintained the common law rule that voluntary intoxication is a defence to "specific" intent crimes such as murder but not to "general" intent crimes such as assaults, sexual assaults, and manslaughter. The court chose not to accept views of successive Chief Justices Laskin, Dickson and Lamer, and most academic writers, that the general/specific intent distinction is logically untenable and produces arbitrariness and injustice. However the majority in *Daviault* also decided that the Charter principles of fundamental justice also require the defence of voluntary intoxication to "general intent" crimes where, in rare cases, the accused can prove extreme intoxication akin to automatism on a balance of probabilities. The ruling was reached by the majority's assertion of a constitutional requirement of fault but obiter reliance was also placed on the voluntariness requirement.

Parliament reacted with speed and vigour to *Daviault* . Section.33.1 of the Criminal Code attempts to reverse it. The essence of this complex provision is to exclude self-induced intoxication from any consideration in the case of general intent crimes of violence against the person while still allowing drunkenness to be considered in the case of the few crimes restricted to specific intent, such as murder. Parliament’ s rejection of the *Daviault* defence flouted the

[46] [1994] 3 S.C.R. 63.

Supreme Court's declaration of Charter standards of fault and voluntariness without resort to the constitution's notwithstanding clause. Whether the Supreme Court will change its previous constitutional ruling remains to be seen .

In my view we should proceed by asserting general principles which distinguish between subjective and objective fault standards. Automatic rules of criminal responsibility for those voluntarily intoxicated should be limited to offences which specifically target drunkenness Such as impaired driving or those offences based on negligence such as manslaughter. Where the fault is intent or recklessness (awareness of risk), subject to a greater penalty, the trier of fact should be satisfied by consideration of all the circumstances, including intoxication, that the accused was aware of the risk. The experience of countries such as Australia and New Zealand when courts allowed intoxication to be considered in all *mens rea* inquiries was that triers of fact are very seldom duped by bogus defences and almost always convict by properly drawing reasonable inferences from the circumstances that the intoxicated accused knew of the risks. In nine months of Canadian experience with the *Daviault* defence was much exaggerated by politicians but there were only 11 reported defences attempted of which only three survived Crown appeals[47].

[47] Martha Drassinower and Don Stuart, "Nine Months of Judicial Application of the Daviault Defence" (1995).39 CR. (4th) 280.

No Strict Proportionality Rules

An argument against strictly proportionality requirements can be found in the writings of George Fletcher[48], which have influenced the Supreme Court[49]. He considers it crucial to draw a distinction between a justification which is doing something morally right and an excuse which holds the accused not accountable for a wrong act as a matter of compassion. The distinction between justification and excuse has proved most difficult to draw and its utility is doubtful, especially once a new Code of defences is in place. Nevertheless, the central thrust of Fletcher's writings remain powerful. He suggests that the common law tendency is to view defences mainly as justification which tends to lead to moralistic right/wrong judgments such as the *Dudley and Stephens*[50] pronouncement that necessity can never justify a homicide. Instead, Professor Fletcher argues defences should be looked at more as excuses. As a matter of excusing accused in situations of agonizing choice, there should be generous allowance for individual circumstances and rigid balancing-of-harms tests avoided.

In the case of the Canadian law of self-defence is presently reversible error of law to require proportionality for s. 34(2) where death occurs in the name of self-defence and courts have often emphasized that no strict proportionality is to be insisted upon when interpreting the reasonable

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[48] Rethinking Criminal Law, (1978) c. 10.

[49] *Perka* [1984] 2 S.C.R. 232. The Court accepted a defence of necessity for the first time as long as it was accepted to be an excuse rather than a justification.

[50] (1884) 14 Q.B.D. 273.

necessary requirement for s.34(1). In this context Canadian courts have long favoured showing generosity to people who are trapped in agonizing situations requiring unlawful force to be repelled in which the degree of force cannot be nicely weighed.[51]A strict proportionality requirement would drastically curtail the considerable efforts made by the Supreme Court to show special sensitivity to those in abusive relationships who defend themselves[52].

There should be no arbitrary and rigid rules that homicide can never be excused because of necessity[53] or duress or in reasonable defence of property.

Modified Objective Approach

Under section 14 of this proposed General Part, any reasonableness standard in the Criminal Code must consider factors beyond the accused's ability to manage or control where relevant, but not self-induced intoxication. The specification of individual factors to be taken into account on the objective inquiry would govern and preserve the current individualised approached to objective standards for defences.

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[51] The leading judgment is now that of Wittman J.A. dissenting in the Albertta Court of Appeal in *Kong* (2005) 40 C.R. (6th) 225. The majority judgment by Justice Fraser , Chief Justice of Alberta, would have changed the law to a test of strict proportionality. However on further appeal the Supreme Court of Canada (2006) 40 C.R. (6th) 221) , in a brief judgmet, agreed with Wittman J.A.

[52] *Lavallee,* above note 33.

[53] The rigidity of *Dudley and Stephens* , above note 50, has been weakened by the the Court of Appeal's decision in the *Conjoined Twins* case [2004] 4 All E.R. 961 (C.A.)

Appendix. Draft General Part

Preamble

Whereas the Criminal Code of Canada has not, since it was first enacted in 1892, comprehensively declared basic principles under which persons can be justly held criminally responsible,

Whereas Criminal Law should be clear and accessible to all, Whereas the declaration of such principles by the courts has become unduly complex and sometimes inconsistent, and

Whereas the Criminal Code should reflect minimum constitutional standards declared by the courts to be mandated in interpreting the Canadian Charter of Rights and Freedoms, Parliament hereby enacts a new Part 1 of the Criminal Code entitled Principles of Criminal Responsibility.

Principle of Legality
1. No one can be found guilty of conduct that is not an offence under this Act or another Act of Parliament.
Principles of Interpretation

2. In the absence of clear legislative intent to the contrary, the principles in the General Part are to be applied in the interpretation of any offence in the Criminal Code or other Act of Parliament.

3. Where a provision of the Criminal Code is reasonably capable of two interpretations, the interpretation which is more favourable to the accused must be adopted.

Criminal Responsibility
4. Except where otherwise specifically provided, no one is criminally responsible for an offence unless that person engages in the prohibited conduct with the requisite fault and in the absence of a lawful justification, excuse or other defence.

Prohibited Conduct
5. Prohibited conduct consists of an act committed or omission occurring in specified circumstances and sometimes with specified consequences.

Omissions
6. No one is criminally responsible for an omission unless
(1) there is a legal duty declared by the offence definition in the Criminal Code or other Act of the Parliament of Canada, or
(2) that person created danger to life or safety of others and rectification was reasonably within that person's control.

Involuntary Conduct
7. (1) No one is criminally responsible for involuntary conduct.
(2) Conduct is involuntary if it was beyond that person's ability to control.
(3) This section does not apply to conduct resulting from rage, mental disorder, or where the accused getting into the involuntary state satisfied the fault requirement for the offence charged.

Causation
8. (1) A person causes a consequence when that person's acts or omissions significantly contribute to that consequence.
(2) A person may significantly contribute to a consequence even though that person's acts or omissions are not the sole or main cause of the consequence.
(3) No one causes a consequence if an independent, intervening cause so overwhelms that person's acts or omissions as to render those acts or omissions as merely part of the history or setting for another independent, intervening cause to take effect.

Minimum Fault for Criminal Code offences
9. Unless the law creating the offence specifies to the contrary, criminal responsibility under the Criminal Code requires proof of'fault in the form of intent, recklessness or criminal negligence.

10. Unless the law creating the offence specifies to the contrary, recklessness is the fault element required in relation to each element of the offence.

Intention
11. A person acts "intentionally" with respect to
(1) a circumstance where he hopes or knows that it exists or will exist;
(2) a consequence when his purpose is to cause it, or he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other consequence.

Recklessness
12. A person acts "recklessly" with respect to
(1) a circumstance when he is aware of a risk that it exists or will exist;
(2) a consequence when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.

Criminal Negligence
13. A person is "criminally negligent" where a reasonable person in the accused's situation would have been aware of the risk and the failure to avoid it constituted a marked and substantial departure from the standard of care a reasonable person would have exercised in the circumstances.

Reasonableness Standard
14. For the purposes of s. 13 and the application of any reasonableness standard under this Criminal Code the trier of fact must take into account the person's awareness, if any, of the circumstances and also factors the person could not have controlled or managed such as race, gender, age and experience, where relevant, but not self•induced intoxication.

Mistake of Fact
15. (1) Where the fault requirement is intent or recklessness, to excuse a mistaken belief need not be reasonable although reasonableness is relevant to determining whether the belief existed.
(2) Where the fault requirement is criminal negligence, to excuse a mistaken belief must be reasonable.
(3) Where the accused has a mistaken belief within the meaning of subsections (1) or (2), he or she may nevertheless be convicted of an included or attempted offence where the belief constitutes the requisite fault for that offence.

Fault for Offences under Other Acts of Parliament
16. (1) Unless Parliament expressly requires intent, recklessness or criminal negligence as a fault requirement or expressly imposes absolute liability, negligence is required for penal liability.
(2) A person acts "negligently" where he or she departs from the standard of care expected of a reasonable prudent person in the circumstances.
(3) Before imprisonment can be imposed, intent, recklessness or criminal negligence must be proved.
(4) Where the Crown has proved the conduct specified in the offence for which the fault requirement is negligence, the accused is presumed to have acted negligently in the absence of evidence to the contrary.

Common Law Defences
17. No defence, justification or excuse shall be unavailable unless contrary to an express provision of the Criminal Code.

Mistake or Ignorance of Law
18. Ignorance or mistake of law is not an excuse.
19. No one is criminally responsible for a mistake or ignorance of law reasonably resulting from
(1) the law not being properly made known to those likely to be affected, or

(2) reliance on a judicial decision or official advice.

Age Incapacity
20. No person is criminally responsible for conduct committed while under the age of 12 years.

Mental Disorder Incapacity
21. (1) No person is criminally responsible for conduct while suffering from mental disorder that rendered the person incapable of appreciating the nature and quality of the conduct or of knowing that it was morally wrong.
(2) For the purpose of subsection (1), every person is presumed not to suffer from a mental disorder, in the absence of evidence to the contrary.

Self-induced Intoxication
22. Self-induced intoxication is not a ground of incapacity nor may it be considered in any determination of reasonableness under this Act.

Defence of Person
23. A person is not criminally responsible for using force against another person if he or she
(1) reasonably believes that force is necessary for self-protection or the protection of a third party from unlawful force or the threat thereof; and
(2) the degree of force used is reasonable.

Defence of Property
24. A person is not criminally responsible for using force against another person if he or she
(1) reasonably believes that force is necessary to protect property (whether belonging to that person or another) from unlawful appropriation, destruction or damage, or to prevent or terminate a trespass to that person's property; and
(2) the degree of force is reasonable.

Duress
25. A person is not criminally responsible for conduct under threat
(1) that person reasonably believes
(a) that a threat has been made to cause death or serious personal harm to that person or another if the conduct is not performed;
(b) that the threat will be carried out if that person does not act or before that person or that other can gain official protection; and
(c) that there is no other way of preventing the threat being carried out;
(2) the threat is one which in all the circumstances that person cannot reasonably be expected to resist; and
(3) the person has not recklessly exposed that person or another to the risk of threat.

Necessity
26. A person is not criminally responsible for conduct under necessity if
(1) that person reasonably believes that it is immediately necessary to avoid serious personal harm to that person or another or serious harm to property;
(2) in all the circumstances that person cannot reasonably be expected to do otherwise; and
(3) the person has not recklessly and without reasonable excuse exposed himself or herself to the danger.

Accessories
27. Everyone is an accessory to an offence and liable to the same penalty as a perpetrator who
(1) does or omits to do anything with intent to procure, assist or encourage another to commit an offence;
(2) with the fault required for that offence; and
(3) that other person commits the offence, whether or not that person can be convicted of it.

Corporations
28. (1) Corporations may be held criminally responsible for any offence if, on consideration of that corporation's organizational structure and culture, the corporation can be justly held to have acted . with the fault specified for the particular offence, whether this be intention, recklessness, or criminal negligence.
(2) For the purposes of the determination under subsection (1), consideration is to be given to acts of authorization or delegation, corporate goals and practices, past practices, any past offences and the existence and sufficiency of compliance programmes.