

Notes for Commentary on the Paper by Professor Richard Bauman

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I propose to test the Hart and Dworkin analyses by using them to analyse a current Canadian appellate decision.

I turn for my test to the recent case of *Cuerrier*,¹ a British Columbia case. *Cuerrier* had apparently consensual sex with a woman without telling her that he was HIV positive. She testified at trial that she had not asked him for any assurance on this point, but that "had she known" she would have withheld consent. So far, she is not HIV positive. He was charged with aggravated assault, but the Supreme Court of Canada made it clear that the law about the defence of consent was the same for both assault and sexual assault.

The previous case law clearly limited the fraud exception to the defence of consent to cases of fraud about the nature of the act, or the identity of the party. In an 1888 case, the courts decided that a lying assurance to a sexual partner that the seducer did not suffer from gonorrhoea did not invalidate consent. I think that decision shocks the conscience of most Canadians today, and is open to the charge of sexism. I say that because, except perhaps in the case of consensual Presidential sex, it is usually the man who seeks consent to sex and the woman who is asked to consent, and no view of the matter from the woman's perspective would seriously suggest that a lie about the existence of venereal or other sexually transmitted disease did not go to the heart of meaningful consent. The rule I think, was intended to prevent a "john" from charging a prostitute who had assured him she had no venereal diseases.

All the judges in *Cuerrier*² agreed that the old law was a bad law. Where they disagreed was over what should be the scope of any new rule, and whether they or Parliament should write that new rule.

A four-judge majority of judges of the Supreme Court led by Cory J., and including the three most junior judges on the Court (Major, Bastarache and Binnie JJ.), held that the accused could not invoke the defence of consent because he had obtained that consent by fraud. They adopted a broad definition of fraud for this purpose, including fraud by silence. But they then limited the scope of the new rule to cases where the fraud

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1. *R. v. Cuerrier*, [1998] 2 S.C.R. 371.
2. *R. v. Cuerrier*, *supra* note 1.

created a risk of serious harm to the victim. Madam Justice L'Heureux-Dubé, dissenting in part, said that the defence of consent should not be available in *any* case where deceit by words or silence vitiated consent in fact. McLachlin J. (Gonthier J. concurring) would have overruled the older cases to say it was fraud for a person to induce consent by lying, when asked by his sexual partner, about that person's sexually transmissible diseases. She refused, however, to go further, saying the majority had tread on the function of Parliament. But she would not agree with Madam Justice L'Heureux-Dubé because she agreed with the majority that the new rule would create some difficulties with the administration of justice, and some limitations would be required.

The problem of course is that a broader rule about fraudulent consent raises the troubling prospect that juries will be asked to rule on dishonesty in lovers' quarrels. The seduction process, by which I mean the efforts on the part of man or woman to secure consent to sex from a hesitant partner, may often be viewed afterwards by one party or the other as less than honest. A variant of the issue arises in *Ewanchuk*.³ In that case, the complainant (a job applicant) said that she had several times said no during the "seduction process" by her potential employer, but he had persisted. The accused admitted this, but said that when he persisted she yielded. Both agreed that, at a certain point, she had said no and he had stopped.

Notice also that the new rule applies to deceit by silence. The complainant in *Cuerrier*⁴ never asked for any advance assurance about sexually transmittable diseases. (I was not aware that the civil law of fraud had gone so far as to say that one person in a commercial setting has a duty, despite an absence of any inquiry or any pre-existing legal duty to speak, to inform another of an important fact. Does this mean it is fraud for the used car salesman to fail to tell me, even when I do not ask, that the same car can be purchased down the street for less?)

The majority, led by Cory J., sought to head off these concerns by limiting the new rule to cases where the fraud resulted in a serious risk of harm. The dissenters also emphasized the wide scope of the proposed new rule, saying :

*[...] Not only are the proposed extensions of the law sweeping, they are unprecedented. Moreover, the theoretical difficulties with both proposals are matched by the practical problems they would introduce.*⁵

Again, one problem is obvious. The Cory exception applies both to fraud by silence and express fraud. Thus, a woman who specifically asks and receives a prior assurance about something very important to her, let us say for example that a job will be got in return, faces the prospect that he will be acquitted if the lie did not cause her serious harm because she found a better job the next day. I would have thought that the serious

3. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, (1998) 57 Alta L.R. (3d) 235, 13 C.R. (5th) 324, 6 W.W.R. 8, 22 A.R. 81, 168 W.A.C. 81 (C.A.).

4. *R. v. Cuerrier*, *supra* note 1.

5. *R. v. Cuerrier*, *supra* note 1 at 376.

harm is that she nevertheless was the victim of an assault. But the new rule now requires something more than that for criminality.

In any event, the dissenters added the words Professor Hart would expect :

Parliament is better equipped than the courts to foresee the complex ramifications of such sweeping change and make the necessary value choices.

What would Professors Hart and Dworkin say about this decision?

If Hart is right, the Court should have approached the case on the basis that they should, as Professor Bauman explains, "resist the temptation to shape their presentation of the law by reference to moral or political values" and resist also the temptation to engage in any extension or alteration of the law unless no rule applies. He would permit new judge-made law only when there seems to be no rule of any sort to govern the new case, and then would approve only a modest and necessary extension of the old rule.

But what happened here? As I say, an old rule of law did apply. And the majority changed it. This is not merely an example of score-keeper's discretion. Professor Hart would be shocked.

Even the dissenters would not escape his wrath. They wanted to make a less grand change in the law, but they nevertheless wanted to change it. McLachlin J. said :

*It is the proper role of the courts to update the common law from time to time to bring it into harmony with the changing needs and mores of society [...]*⁶

They went on to say that they would have convicted in this case had the accused been asked and offered a lying assurance that he had no sexually transmissible diseases. Professor Hart did not think that it was the role of the Courts to change the law to meet the needs or the values of changing society. He would say that this is a usurpation of the role of Parliament, and an improper exercise of judicial power.

I confess that the case is not quite as simple as I put it. The Criminal Code had contained a codification of the fraud exception to the defence of consent. It was a restatement of the rule that consent is only negated by fraud about the nature of the act or the identity of the assailant. Recently, Parliament amended the Code to drop those words, and refer to fraud without any definition. One could view this case, as a result, as merely one about the interpretation of that amended term. The majority decided that the removal of the defining words should be taken as an acceptance of a new, unstated, definition. This offers an air of respectability, but it was scorned by the dissent as a hollow argument. The majority drew attention to s. 45(2) of the *Interpretation Act*,⁷ which provides that an

6. *R. v. Cuerrier*, *supra* note 1 at 406.

7. R.S.C. 1985, c. I-21.

amending enactment shall "not" be deemed to involve a declaration of a change in the existing law.

In any event as we all know, the Supreme Court does not normally worry about finding a statutory hand-hold when it decides to change the law. Time and time again it, and other appellate Courts, have, during the past 25 years, changed old legal rules not because they failed to apply to a new situation but because the courts decided they "did not apply adequately or fairly to old situations."

If Professor Hart thought he was offering merely a description of what judges do, his description does not fit modern Canada. If he intended to say what we ought to do, then I guess by his lights we have been very naughty fellows.

But have we? Why is it that legitimacy must come only from fidelity to the past? That, of course, is all the rule of precedence is about. Why can judges not also have some regard to the future, and overcome mistakes of the past, as the entire Court did in this case? I think most Canadian judges will be most reluctant to enforce old rules that will have unjust or impractical results. Few Canadian appeal judges today accept Hart's analysis. Many would agree with McLachlin J. in this case that they should change bad rules, and some would agree with Cory J. in his effort to write the exceptions to the new rule himself. But few would be comfortable with the "pure" Dworkinian view as expressed by L'Heureux-Dubé, J. in this case. Canadians for the most part being careful people, most judges I suspect would hesitate to throw an issue wide open. Most consider it to be prudent to draw back to a workable rule. Some would draw back entirely, and leave the matter to Parliament, as did the British Columbia Court of Appeal in this case, and the minority in Ottawa. But others would and often do attempt to go as far as prudence dictates, and would at least try to do something like what the majority did.

What grade would Professor Dworkin give the Supreme Court?

He would have no qualms about the Court making a change in the law so long as the new rule is consistent with principles accepted in the past, or relies on some deeper principle that past cases perhaps failed to respect. Indeed, Dworkin's judge is supposed to identify the great underlying moral principles that for the most part support and justify legal rules, and restate rules to be consistent with them. But, as Professor Bauman says, Dworkin tends to distinguish these great principles from policy goals, where the law-maker seeks to achieve some goal for the benefit of the community as a whole and not for individuals. He says judges have no special talent in that area, and should leave that sort of thing to the legislatures.

Madam Justice L'Heureux-Dubé made a pure Dworkinian analysis. She extracted a principle from earlier cases and the use of the word "fraud" in this context. She said the idea of consent as a defence to crime requires that it be "a true reflection of a person's autonomous will."⁸ The earlier cases about venereal diseases were not consistent with that principle. To give effect to this underlying principle, the law, she argued, should consistently affirm that a person who would escape criminal responsibility on the basis of

8. *R. v. Cuerrier*, *supra* note 1 at 387.

the consent of another had a "duty to inform the other" of all facts likely to bear on a rational decision to consent. Only in that event would consent be a true reflection of autonomous will.

This principled approach also led her to say that the only additional requirement for a conviction would be to establish a causal tie between the failure of the accused and the actual consent.

Dworkin would be proud. A Gold Star to Madam Justice L'Heureux-Dubé!

But no other judge concurred.

The majority put Madam Justice L'Heureux-Dubé into dissent by placing the "risk of harm" qualifier on the new rule. They drew back from her unconditional rule because they worried about the appropriateness of the criminal process for other, less frightful, examples of consent induced by fraud. Their concern was of course exacerbated by their unqualified acceptance of the idea of fraud by silence. Cory J. for the majority mentioned expectations of advancement in the workplace as an example. He might also have mentioned expectations of marriage, or of conception, or of non-conception. In any event, he limited the new rule to cases of serious harm. All other cases of non-consent, by his definition, he rejected because, and I quote :

It would trivialize the criminal process by leading to a proliferation of petty prosecutions instituted without judicial guidelines or directions.⁹

Dworkin would vigorously protest, I think. These are not principled reasons, they are policy reasons. Dworkin would say the majority should have left it to Parliament to select the exceptions and limitations that policy demanded.

Similar constraints of policy also motivated the other dissenters, as I have already noted. They refused to agree with either Madam Justice L'Heureux-Dubé or the majority. McLauchlin J. was inclined to agree with the majority that there would be a need for some practical limits to the new rule on policy grounds. Unlike the majority, she did not assume the power to set those limits. She was content to leave the matter for Parliament to act except in the blatant case of a lying assurance to a questioning sexual partner about the possibility of sexually transmitted disease.

Dworkin would award her a brass medal, I think. He would be afraid that she has undermined the principle. He would say that the proper role of the Court was to challenge Parliament to act by adopting the rule. Her approach drew the sting from any challenge because now Parliament need not act at all. Time will tell if she was too prudent.

But the majority went further again. They not only rejected the Dworkinian principle for legitimacy, which he called integrity or fidelity to established principles, but also offered clear policy ground for their change in the law. This was in response to the

9. *R. v. Cuerrier*, *supra* note 1 at p. 433.

argument by intervenors that public health measures were a more effective means to curb abuse by those afflicted by HIV. In response Cory J. said :

*Where public health endeavours fail to provide adequate protection to individuals like the complainants, the criminal law can be effective. It provides a needed measure of protection in the form of deterrence and reflects society's abhorrence of the self-centered recklessness and the callous insensitivity of the actions of the respondent and those who have acted in a similar manner.*¹⁰

With respect, both Dworkin and Hart would, I think, agree that he thus raises and deals with ineluctably policy questions with which judges have no special claim to expertise. Moreover, he seems to justify the new rule in part on his moral assessment of the accused in this case, with which no doubt most everybody agrees but respecting which both Hart and Dworkin would express considerable difficulty because it implicitly claims that judges can limit the defences to crimes whenever they think the criminal is a bad person, and claim with comfort that most Canadians agree.

In sum, I think Dworkin, like Hart, would give the majority a failing grade.

Here are a few more thoughts :

1. For what it is worth, my view is that judges should offer deep analysis and pursue and identify the great principles described by Dworkin as part of the social fabric, even though we thus become as much anthropologists as lawyers. This means judges should sometimes change the law.

But if judges are to change the law, then they must give careful consideration to rules about when it is fair to do so. They perhaps should overrule only prospectively, and, in any event, refuse to apply the changed rule in a case where the person who would suffer under the new rule had a settled expectation how the law applied. What if, for example, *Cuerrier*¹¹ had sought legal advice about his duty to disclose and been told, quite correctly, that the law did not require him to offer this information? Indeed, it may be he had such an understanding, quite reasonably. And yet, there he is in a penitentiary. Should not the Court have inquired into those circumstances?

2. Arguably, judges should limit these adventures in new rules by a sense of what is "doable in the practical judicial setting." We are I think as good as anybody and better than most at assessing whether a rule will work in practice in day-to-day application in court. One of the many duties of a judge is to "make the system work." This idea, which some say gives rise to policy-like arguments about the prudence of a proposed rule, has its limits. A judge has no special expertise to say whether a rule would be effective in

10. *R. v. Cuerrier*, *supra* note 1 at p. 437.

11. *R. v. Cuerrier*, *supra* note 1.

terms of social result or administrative expedience.¹² But perhaps the courts should work out some new rules about the areas where they can make a claim to expertise.

3. The irony here is that a more careful doctrinal analysis arguably would support the majority decision, or something very like it, and probably in a way that would meet the approval of both Hart and Dworkin.

The two main points in issue, recall, were "fraud by silence," and the "risk-of-harm" limit on the "fraud vitiates consent" rule.

As to the first, the law always has been that silence is fraud "if there is a duty to speak." In this case, the public-health law in British Columbia imposes a duty on *Cuerrier* not to transmit his disease. That being so, he was under a statutory duty not to have unprotected sex, and his partner was entitled to assume he obeyed the law. Under those circumstances, he arguably had a duty to speak when he was in fact in breach of the law, and his failure was fraud. (Curiously, an argument about judicial policy may have discouraged the Supreme Court from adopting this approach, because it would mean the criminal law could vary from province to province.)

As to the second, it already is the law in Canada that consent is not a defence to any assault (barring anomalous and embarrassing example of public sports) "if the form or circumstance of the assault raises a serious risk of serious injury." That extension of the law developed, recall, as a reaction to duels and consensual knife-fights. That rule reflects the principled analysis, probably acceptable both to Hart and Dworkin, that the *prime* purpose of assault law is to discourage members of the public from conduct that may give rise to injury.

4. Even if one does accept fully either the Hartian or the Dworkinian analysis, Professor Bauman is right that there must surely be some limit on what kinds of law-making are appropriate for courts in Canada. While judges sometimes defer to Parliament, as did McLauchlin J. here, there is in our law very little discussion about when one should do so. After reading decisions like *Cuerrier*, I must confess I have absolutely no idea what many judges on that Court think are those limits.
5. In the short term, *Cuerrier* was a popular decision because, in the public eye, a bad guy got his just deserts. In the long run, however, decisions like this could undermine support for an independent judiciary.

12. One problem about Dworkinian analysis in the Canadian context is that *Canadian Charter of Rights and Freedoms*, s. 1, Part I of the *Constitutional Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 seems to command a judge to weigh social policy against the protected right. That complicates the application of his ideas. And this is why I chose a non-Charter case for consideration.