THE NATURE AND QUALITY OF THE ACT: A RE-EVALUATION

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I. INTRODUCTION: THE PROBLEM

If a choirmaster seduces a young and naive pupil, obtaining her willing submission by representing that the acts will improve her singing voice, [1] there is no doubt that the choirmaster has committed a crime. On the other hand, if a married man goes through a form of marriage with another woman who believes that he was previously single, and they subsequently engage in sexual intercourse, [2] the man, though a bigamist, is not a rapist. But, obvious as these two propositions appear on the surface, they in effect form the brackets of one of the most ticklish problems of logic and semantics confronted by the criminal courts.

The common issue in the above examples is consent. Did the young pupil consent to the choirmaster taking liberties with her, and, did the woman consent to her supposed husband engaging in intercourse with her? In both cases there is the appearance of consent in that neither victim was forcibly overcome, but likewise, in both cases that appearance of consent was obtained by a misrepresentation. If the consent was real, then neither perpetrator is guilty of any sexual offence, but if in fact no consent existed then both are equally guilty. Logically, it would seem that in both cases, either the misrepresentations prevented the reality of consent from forming, or else they had no effect on the actual formation of consent. Thus the cases appear to be indistinguishable. However, it was more than a hundred years ago that the courts realized that, although logically the two situations appear identical, common sense and conscience require that they must be distinguished, [3] and the distinction ultimately settled on was in the type of misrepresentation. [4]

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* Of the Board of Editors.

[1] *See* Rex v. Williams, [1923] 1 K.B. 340 (Ct. of Crim. App. 1922).

[2] *See* California v. Skinner, 33 B.C. 555 (County Ct. 1924).

[3] The first case to do this was The Queen v. Case, 1 Den. 580, 169 Eng. Rep. 381 (Ct. for Crown Cas. Reserved 1850). *See* text accompanying notes 6 to 8 *infra*.

[4] It is not intended to give an account of the historical development of the principle other than a consideration of some of the leading cases for the purpose of establishing the current state of law. Such a historical development could do no more than repeat the excellent judgment of the Australian High Court in Papadimitropoulos v. The Queen, 98 Commw. L.R. 249 (1957). *See infra* discussion following note 18.

The law, then, in Canada is stated by the Criminal Code [5] as follows:

> Section 135. A male person commits rape when he has sexual intercourse with a female person who is not his wife,
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> (a) without her consent, or
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> (b) with her consent if the consent . . .
>
> (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.
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> Section 141. (1) Every one who indecently assaults a female person is guilty of an indictable offence . . . .
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> (2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

Thus the choirmaster is guilty of rape because the fraud he perpetrated concealed the true "nature and quality" of the act of intercourse, but the bigamist is not a rapist because his fraud involved only an inducing collateral fact—marital status. His supposed wife was fully aware of the "nature and quality" of the act of sexual intercourse.

The distinction having been made and the law thus codified, the matter would appear to be settled. However, if the formula is examined more closely one can see that it leaves itself open to unlimited semantics. Just what is the "nature and quality" of any particular act complained of in any particular case? As already mentioned, the two opening examples form merely the brackets of the problem; although the formula is adequate for distinguishing them, it merely creates confusion in more borderline cases.

It is intended here to delineate this confusion and attempt a definition of the words "nature and quality" as used in the Criminal Code based on considerations of public policy as applied to the criminal law. Such a definition, it is felt, will be of assistance in eradicating the semantic malleability which the words themselves possess.

II. Application of the Formula

The origins of the present formula can be traced to an 1850 decision of the Court of Crown Cases Reserved, *The Queen v. Case.* [6] There it was unanimously held that a medical practitioner who had induced a fourteen-year old female patient to submit to intercourse under the pretext that it was medical treatment was guilty of assault. [7] In the course of his judgment,

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[5] Can. Stat. 1953-54 c. 51.

[6] *Supra* note 3.

[7] Earlier cases had held that fraud would vitiate consent in a charge of assault, but not in a charge of rape: Regina v. Saunders, 8 Car. & P. 265, 173 Eng. Rep. 488 (Stafford Assizes 1838). Regina v. Williams, 8 Car. & P. 286, 173 Eng. Rep. 497 (Monmouth Assizes 1838). Hence the accused had been charged only with assault. However, Baron Alderson suggested that had the accused been charged with rape, he could have been found guilty of that offence also.

Mr. Chief Justice Wilde stated: "She consented to one thing, he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will." [8] These words were quoted with approval by Mr. Justice Mellar in *The Queen v. Flattery*, [9] a case involving an almost identical fact situation. These two cases, along with *Rex v. Williams*, [10] the choirmaster case, established the proposition that where fraud as to the "nature and quality" of the act exists, the defence of consent is not available to an accused charged with rape or indecent assault. As earlier indicated, that is the rule in the Canadian Criminal Code. [11]

It is clear in these three cases that the victim did not appreciate the "nature and quality" of the act under any reasonable meaning of these words. In each of them the victim was a young, [12] naive girl who was duped as to the actual implications of what she was doing. She was completely ignorant as to what was happening to her.

Would this proposition still hold true if the victim understood the physical and social implications of her submission, but nevertheless was led to believe it would effect a medical cure or some other advantage? Such a fact situation arose in *Rex v. Harms*, [13] where a "quack" doctor induced the complainant to submit to sexual intercourse by telling her it would effect a cure of her complaint. The complainant, a twenty-year old waitress, knew that she was submitting to an act of sexual intercourse, but the Saskatchewan Court of Appeal nevertheless held that the accused was guilty of rape. Mr. Justice Mackenzie, speaking for the court, said: "[T]he question of the complainant's knowledge of the nature and quality of the prisoner's act is not necessarily to be determined by a mere consideration of her understanding of the intimate incidents preceding it, or by its usually natural consequences, but by the *purpose* which rendered her submissive to it and by the effect she was moved by the prisoner to believe would result therefrom." [14] In summing up the precedents cited, including *Flattery* and *Williams*, he said: "It seems to me that the principle they [the precedents] are seeking to enunciate is rather that a man shall be deemed guilty of rape if he has succeeded by fraud no less than by force in overcoming her permanent will to virtue." [15]

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[8] *Supra* note 3, at 582, 169 Eng. Rep. at 382.

[9] 2 Q.B.D. 410, at 413 (Ct. for Crown Cas. Reserved 1877).

[10] *Supra* note 1.

[11] *Supra* text accompanying note 5.

[12] The ages of the victims in these cases were: fourteen (*Case*), sixteen (*Williams*) and nineteen (*Flattery*).

[13] [1944] 1 W.W.R. 12, [1944] 2 D.L.R. 61 (Sask. 1943).

[14] *Id.* at 16, [1944] 2 D.L.R. at 65. [emphasis added]

[15] *Id.* at 20, [1944] 2 D.L.R. at 68.

This appears to say that the formula applies where the fraud concerns the existence of certain consequences which would make the act unobjectionable to the complainant if true. What, then, if this is turned around so that the complainant would refuse her consent if she knew certain consequences were to follow and the accused's fraud concerns the absence of those consequences, *i.e.*, he represents that the objectionable consequences will not follow, when he knows, in fact, that they will? Will the formula apply, for example, where the complainant would resist were she aware that she would contract venereal disease and the accused fraudulently represents that he is free from infectious disease?

The Queen v. Clarence [16] concerned a charge of assault against a husband who had infected his wife with venereal disease by intentionally concealing from her his condition. It was argued on behalf of the Crown that the wife's consent was to intercourse with a sound man and that which she submitted to was intercourse with a diseased man, which is an essentially different thing, and therefore the husband's concealment of his condition constituted a fraud as to the nature and quality of the act. Mr. Justice Wills held that such an argument qualifies the essential nature of the act to such a degree that it includes collateral facts. The essential nature of the act was intercourse and not intercourse with a healthy man. Only fraud as to the essential nature of the act will vitiate consent—not fraud as to collateral facts, or "effects." This proposition is supported by *Rex v. Arnold*, [17] in which the Ontario Court of Appeal held that the trial judge's direction that, for the complainant's consent to be a valid defence, the consent must have been obtained without inducements, was clearly wrong since mere inducements, even if false, will not vitiate consent. But surely the false promise of a resulting medical cure as in the *Harms* case is every bit as much an inducement as a false assurance of good health, *i.e.*, that no injury to one's health will result. It would not appear to affect the basic essential nature of the act. It is merely fraud as to a collateral fact and should properly be dealt with on the same footing as concealed disease or a feigned marriage.

In the well-known Australian High Court decision of *Papadimitropoulos v. The Queen* [18] the accused had represented to an immigrant girl who spoke no English that an application for a marriage certificate by them was a valid marriage. After living with her for one week, he deserted her. The accused was convicted of rape at his trial and an immediate appeal was dismissed. On appeal to the High Court his conviction was quashed. In allowing the appeal, the court said : "[T]he key to such a case as the present lies in remembering that it is the penetration of the woman's body without her

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[16] 22 Q.B.D. 23 (Ct. for Crown Cas. Reserved 1888).

[17] [1947] Ont. 147, [1947] 2 D L.R. 438.

[18] 98 Commw. L.R. 249 (1957).

consent to such penetration that makes the felony. The capital felony was not directed to fraudulent conduct inducing her consent. Frauds of that kind must be punished under other heads of the criminal law or not at all : they are not rape." [19]

To summarize the foregoing cases, then, we could tentatively conclude that the words "nature and quality of the act" in our formula refer to the purely physical aspects and implications of the act. If the complainant knows this and submits, it does not matter what lies the seducer has used to procure the submission. The only exception to this is *Harms*, [20] and that case is either wrong or else it so totally confuses the issue that we can no longer say what the words in our formula mean. [21]

There remains to be considered, however, the most recent Canadian decision on fraudulently obtained consent, *Regina v. Maurantonio*, [22] in which the Ontario Court of Appeal upheld the conviction of a "quack" doctor posing as a properly qualified physician on six counts of indecent assault arising out of intimate examinations of female patients during the course of his masquerade. As we have already seen, [23] section 141 of the Criminal Code dealing with indecent assault uses the same words as section 135 (rape) in disallowing fraudulently obtained consent as a defence. Thus the court was faced with the issue we have been discussing.

According to Crown counsel, the acts complained of would have been unobjectionable had the accused possessed the proper medical qualifications. [24] Thus this lack of qualifications must have been the sole basis for his conviction. Mr. Justice Hartt (for the majority) held that the complainants consented, not simply to the acts of physical touching, but to certain medical treatments including whatever physical contact was necessary thereto. The nature of the acts consented to, he held, were therefore bona fide medical treatments and whether or not such were received by the complainants depends upon the accused's intent. This, of course, was a question of fact to be determined by the jury, and the jury having found that the complainants did not receive bona fide medical treatments, Hartt concluded that the acts complained of were different in nature and quality from those to which the com-

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[19] *Id.* at 261.

[20] *Supra* note 13.

[21] An editorial note accompanying the report of *Harms* in the *Dominion Law Reports* says : In the present case the complainant appreciated the nature of the act but submitted because she thought it was a necessary part of a medical treatment. Is there not in such circumstances a real consent? It should be noted also that *Cr. Code*, s. 298 requires that the false and fraudulent representation be as to the nature *and* quality of the act and leaves no room for any distinction between appreciating the physical nature of the act but failing to appreciate the character of the act in a moral sense. [1944] 2 D.L.R. at 62.

[22] [1968] 1 Ont. 145, 65 D.L.R.2d 674 (1967).

[23] *Supra* text following note 5.

[24] *Supra* note 22 at 146, 65 D.L.R.2d at 675.

plainants gave their consent. But, since the only evidence the jury could have relied upon in arriving at this conclusion was the accused's lack of qualifications, this is in effect saying that concealed lack of qualifications is a sufficient fraud to vitiate consent. Although Hartt says that such is not the case—that it is the fraud as to the nature of the act which vitiates the consent [25]—since he bases the nature of the act on the jury's finding which was in turn based on the question of qualifications, the above conclusion is inescapable.

Thus, the fraud which the majority held vitiated the consent concerned an obviously collateral fact or inducing cause, and not the "nature and quality" of the acts as those words were explained in *Papadimitropoulos*. Mr. Justice Laskin, in his dissent, noted this fact and pointed out the paradox in the following words :

> [I]t was incumbent on the Crown to prove deceit by the accused as to the "nature and quality" of the very acts charged against him; whether or not they constituted medical treatment in the abstract would be merely a refined way of challenging professional qualification, and to raise this in the context of s. 141(2) would, in my opinion, be begging the question to be decided. The Crown failed completely to show any deceit in this respect. [26]

Nevertheless, it appears that the majority of the Court of Appeal in this case has expanded once more the seemingly well-established interpretation of the words "nature and quality of the act." Consequently, this case, coupled with *Harms*—both decisions of the highest provincial courts—, indicates that the law in Canada may possibly be that any fraud will vitiate consent, or at least that the Canadian law is equivocal.

III. Conclusion : A Suggested Solution

The law being thus in need of clarification, it would be appropriate to dwell briefly on the form such clarification ought to take.

The interest the law is seeking to protect here is, of course, the right of the individual to bodily integrity. But this right can be violated by varying degrees of anti-social behaviour ranging, in terms of seriousness of the crime, from common assault to murder. In between lie the crimes of indecent assault and rape. Section 230 of the Criminal Code in defining the offence of assault uses the following words : "A person commits an assault when, without the consent of another person or with consent *where it is obtained by fraud*, (*a*) he applies force intentionally to the person of the other . . . ." [27] Thus, for the offence of assault *any* fraud will vitiate the consent. But according to sections 135 and 141, only fraud as to the nature and quality of the act vitiates consent in the offences there defined. It must therefore have been

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[25] *Id.* at 153, 65 D.L.R.2d at 682.

[26] *Id.* at 150, 65 D.L.R.2d at 679.

[27] Crim. Code § 230. [Emphasis added].

intended that the defence of consent should be more readily available in the case of these latter crimes than in the case of assault. But if the rationale of *Harms* and *Maurantonio* were to be followed, there would, in effect, be no difference in the grounds for refusing the defence.

The reason behind the two different approaches to fraud would seem to lie in the nature of the activity involved. In one case it is almost invariably of a violent and offensive nature. The possibility of a person knowingly consenting to an assault—the application of force to his person—is extremely remote. Consent, therefore, would rarely be a defence to a charge of assault. However, the activity involved in the crimes of rape and indecent assault is generally normal sexual activity—activity which could well be engaged in willingly by both parties. The only time it is criminal is when it is engaged in without the woman's consent. But, because in certain circumstances the woman might readily give her consent, the law must be very careful to ensure that no consent was given before a crime is established. It must ensure the protection of women only from unwanted sexual advances and should not pretend to protect them from themselves, with one exception, namely, that of the young and naive. It is impossible to suppose that a mature, sophisticated woman could not comprehend the physical nature of any act which might be the *actus reus* of a charge of rape or indecent assault, yet it is conceivable that a very gullible and naive girl could be duped. It is not sufficient, however, that the law assume that at an arbitrarily designated age, all girls reach that level of sophistication which would enable them to fend for themselves in these matters. [28] These considerations would appear to form the basis for the "nature and quality" formula and should therefore form the basis for decisions on the issue of consent.

With this in mind, a precise definition of the words "nature" and "quality" as used in the Criminal Code would be helpful. It is suggested that a misrepresentation as to the "nature" of the act refers to the actual physical aspects of the act, *i.e.*, a representation that the act is something which it is not, such as the accused's representation in *Flattery* that the act of intercourse was a surgical procedure. It would follow, then, that a misrepresentation as to the "quality" of the act refers to the implications involved in the act. This would, of course, include most of the collateral facts such as sterility, freedom from venereal disease and marital status of the woman.

The Criminal Code makes it incumbent upon the Crown to show a fraud going to both the nature and the quality of the act in order for the apparent consent to be vitiated. A fraud as to the quality alone will not suffice. However, under the suggested definitions of the terms, a fraud as

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[28] Although § 138 of the Criminal Code makes it an offence to engage in sexual intercourse with a girl under the age of fourteen and, in certain circumstances, with a girl under sixteen, if the proper fraud is present, a person guilty of either of these offences would also be guilty of rape under § 135.

to the nature of the act would seem automatically to include a fraud as to the quality of the act. If the victim is prevented by the accused from understanding the physical aspects of the act, she will also be ignorant of its implications. Thus, again, we would be forced to the conclusion that what the courts must determine is whether or not the fraud involves the purely physical aspects of the act—whether or not the act, unqualified by collateral facts, is what it was represented to be. If the complainant was so gullible and naive as not to comprehend the physical aspects and, consequently, the implications of the act she submitted to, then she has not consented to it, but otherwise she has.

A solution such as this has been suggested in another recent Canadian decision : *Bolduc v. The Queen.* [29] In that case, the majority of the Supreme Court of Canada allowed the appeal of a physician and his lay friend from a conviction for indecent assault. The physician had obtained the consent of the female complainant to the presence of his friend during an intimate physical examination by representing him to be a medical intern. In giving the majority judgment, Mr. Justice Hall said : "Bolduc [the physician] did exactly what the complainant understood he would do . . . . There was no fraud on his part as to what he was supposed to do and in what he actually did . . . . The fraud that was practised on her was not as to the nature and quality of what was to be done but as to Bird's identity as a medical intern." [30] In other words, although there was fraud as to the conditions under which the examination was carried out, the activity which was complained of was exactly that which it was purported to be and therefore there was no fraud as to the nature and quality of the act. The critical object of consent was thus stated to be the actual physical activity itself and nothing else. However, the suggestion was not subsequently followed in *Maurantonio.* Perhaps the reason it was not followed is that, because of the existing state of confusion, Mr. Justice Hall's point was not made clearly enough to settle the matter. Or perhaps the reason lies in his choosing to distinguish *Harms* rather than disapprove of it. No matter what the reason, the confusion has not been settled and a clear, definitive statement from the Supreme Court is required.

It can be argued that in many of the cases considered here, the accused's actions were distinctly anti-social and the law should discourage and protect against such actions. The fact is that it does. In virtually all the cases

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[29] [1967] Sup. Ct. 677, 63 D.L.R.2d 82.

[30] *Id.* at 679-80, 63 D.L.R.2d at 83.

where the prisoners were acquitted—and in *Harms* and *Maurantonio*, had they been acquitted there—they would still have been liable to a charge of assault under the definition in section 230, since any fraud vitiates apparent consent under that section. Furthermore, the victim would now appear to have a tort remedy. [31]

But, regardless of how these men should be punished or make compensation for their actions, one thing is clear : society cannot, in good conscience, brand them as rapists.

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[31] *See* Halushka v. University of Saskatchewan, 52 W.W.R. (n.s.) 608, 53 D.L.R.2d 436 (Sask. 1965), which held, for there to be a true consent on the part of a paid volunteer to medical experiments the volunteer must submit with a full knowledge of all possible consequences. *Contra*, Hegarty v. Shine, 14 Cox Crim. Cas. 145 (Irish C.A. 1878). *But see* Note, 1 OTTAWA L. REV. 236 (1966).