NOTES

De Minimis

Justice, though occasionally deaf, is, as *Durand's* case[1] may show, rarely wholly blind. In an age of confrontation, the judiciary, like the executive and legislative branches, may not unfairly be expected to do its duty without flinching — even when faced with the *monokini*. In this task, Her Majesty's justices in Quebec, drawing upon their dual English and French legal heritages, may be best able to achieve the requisite synthesis.[1a]

On the afternoon of July 7, 1964, it appears that one Demoiselle Durand, twenty-one years of age, had, not without the instigation of the director of the "Hawaii Beach" at Cannes or the influence of the modest sum of thirty-five francs by him proferred, publicly engaged in a game of ping-pong — with a difference: the young lady was, in the words of the Court (let us be pedantic), 'vêtue d'un simple cache-sexe, dit "monokini", les seins restant entièrement nus', attracting, not surprisingly, some fifty passers-by before a police officer put an end to the proceedings. The Court of Appeal of Aix-en-Provence had held [2] that the facts disclosed no offence,[3] since the lady's most privy parts were covered by a sufficiently opaque "monokini", and she had struck no posture and done no act that was lascivious or obscene, and since the sight of the human body naked, commonplace nowadays for purposes of 'sport, health or aesthetics', could not outrage normal sensibilities, unless accompanied with a view of more privy parts or lascivious or obscene postures or acts.[4]

Moral sensibilities were more delicate in the chillier climes of Paris, where the less sunny view of the *Cour de Cassation*[5] was that

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[1] *Milanini* et *Claudine Durand* v. *Min. publ.*, Cass., ch. crim., 22 déc. 1965, D.1966.144, Gaz. Pal. 1966.1.167 and note, J.C.P. 1966.2.14509; rev'g Aix, 5e ch. corr., 20 janv. 1965, D.1965.417 and note, Gaz. Pal. 1965.1.208 and note, J.C.P. 1965.2.14143 bis; rev'g Trib. corr. Grasse, 23 sept. 1964, Gaz. Pal. 1965.1.95 and note, J.C.P. 1965.2.13974, note A. Rieg.

[1a] *R.* v. *Brisebois*, (1967), 14 McGill L.J. 109 (C.S.).

[2] D.1965.417, Gaz. Pal. 1965.1.208, J.C.P. 1965.2.14143 bis.

[3] Despite this intervening judgment of the Court of Appeal overruling its holding in *Durand's* case, the *Tribunal correctionnel de Grasse* some months later unflinchingly condemned the antics of one Dlle. Claudine Bau as it had those of Dlle. Claudine Durand: *Bau* v. *Min. publ.*, Trib. corr. Grasse, 29 mai 1965, J.C.P. 1965.2.14323 and note.

[4] These words of the Court of Appeal appear to have been taken almost *verbatim* from the judgment of the *Cour de Riom*, in *Association des familles nombreuses* v. *Ménagerie Pezon*, 16 nov. 1937, D.H. 1938.109.

the facts in themselves amounted without more to an "exhibition provocante de nature à offenser la pudeur publique et à blesser le sentiment moral de ceux qui ont pu être les témoins", in violation of Art. 330 of the Penal Code,[6] though, as no penalty was inflicted, days in Cannes turned out to be more carefree than knights in Covent Garden;[7] Lord Brougham's preference for the former was wiser than he knew.

Scholars considering the likely impact of this decision upon the common law should bear in mind that there may be a certain point of accord between that system and the civil law: if in the former system, the lower court is best able to *find* the facts, in the latter it is also *mieux capable de les apprécier*. If, however, it is to be assumed that the judicial perspective is more accurate (if paradoxically less broad) from above, we must expect here, too, application of the well-known if rather confining maxim: *genitalia specientibus non derobant*.

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[5] D.1966.144, Gaz. Pal. 1966.1.167 and note, J.C.P. 1966.2.14509.

[6] Art. 330:

Toute personne qui aura commis un outrage public à la pudeur sera punie d'un emprisonnement de trois mois à deux ans, et une amende de 500 F. à 4,500 F.

Lorsque l'outrage public à la pudeur consistera en un acte contre nature avec un individu du même sexe, la peine sera un emprisonnement de six mois à trois ans et une amende de 1,000 F. à 15,000 F.

[7] *Le Roy* v. *Sr. Charles Sidney*, (1663), 1 Sid. 168, 82 E.R. 1036 (*sub. nom. Le Roy* v. *Sr. Charles Sidley*). The text of the case, as reported by Siderfine, reads in part as follows:

> Sr. Ch. S. fuit indict al common ley pur several misdemeanors encounter le peace del Roy & que fueront al grand scandal de Christianity, et le cause fuit quia il monstre son nude corps in un balcony in Covent Garden al grand multitude de people & la fist tiel choses & parle tiel parolls &c. (monstrant ascun particulars de son misbehavior) & cel indictment fuit overtment lie a luy en Court & fuit dit a luy per les justices que coment la ne fuit a cel temps ascun Star-Chamber uncore ils voil fair luy de scaver que cest Court est custos morum de touts les subjects le Roy, et est ore haut temps de punnier tiels profane actions fait encounter tout modesty queux sont cy frequent sicome nient solement Christianity.

The case was discussed briefly by Blackstone (*sub. nom. Sir Charles Sedley's* case) at Bk. IV, p. 65, n. 12 and also reported by Keble (*sub. nom. Sir Charles Sydlyes* case) at 1 Keb. 620, 83 E.R. 1146, the text of that report being as follows:

> He was fined 2000 mark, committed without bail for a week, and bound to his good behavior for a year, on his confession of information against him, for shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Covent Garden, contrà pacem, and to the scandal of the Government.

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