

The Top Five 2006

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



***R. v. Labaye*, [2005] 3 S.C.R. 728**

<http://scc.lexum.org/en/2005/2005scc80/2005scc80.html>

Operating a common bawdy house is found not to constitute criminal indecency in this circumstance, but the court creates a new test for determining what constitutes criminal indecency.

Mr. Labaye operated a member's-only club where people could meet each other to participate in group sex. All members were consenting adults who were well aware of the activities of the club. All prospective members were interviewed prior to membership fees being accepted. Group sex was permitted only on the third floor "apartment" which was locked with a numeric keypad and marked "privéé". Members of the club were supplied with the appropriate numeric code and permitted access to the apartment.

At the trial level, the accused was charged and convicted with keeping a common bawdy-house for the practice of acts of indecency under s. 210(1) of the *Criminal Code*. The trial judge found that the accused's "apartment" fell within the meaning of "public place", as defined in s. 197(1) of the *Criminal Code*. The trial judge found that social harm took place as a result of the sexual exchanges occurring in the presence of other members of the club. The trial judge concluded that the conduct at issue was indecent under the *Criminal Code* because it was degrading and dehumanizing, was calculated to induce anti-social behaviour in its disregard for moral values, and raised the risk of sexually transmitted diseases. The Court of Appeal upheld the findings of the trial judge and the issue was appealed to the Supreme Court of Canada.

The Supreme Court of Canada focused its decision on the issue of whether the concept of 'indecency' is a moral determination or an issue of harm. The majority favoured an objective harm-based test that could be used to define 'indecency' in criminal law, rejecting the traditional subjective standard of community morality and tolerance. In other words, the Court adopted a test for proving indecent criminal conduct which required the Crown to prove beyond a reasonable doubt that two requirements have been met.

First, that the conduct causes harm that is contrary to society's norms by:

- (a) confronting members of the public with conduct that significantly interferes with the public's autonomy and liberty,

- (b) predisposing others to anti-social behaviour, or
- (c) physically or psychologically harming the person(s) involved in the conduct.

Secondly, the Crown must prove that the harm caused is incompatible with the proper functioning of society.

The accused was acquitted by a 7-2 majority ruling. The Court articulated that a harm-based analysis of conduct alleged to be indecent, rather than judicial interpretation of community standards of tolerance, must be used in these cases to meet the goal of protecting members of society, without prioritizing a particular view of morality.

The dissenting judgment disagreed with the creation of a harm-based test as the determinative factor in establishing the minimum level of tolerance for indecency. The dissenting judgment argued that a harm-based test does not allow for the contextual factors of the case to be considered. The Dissent pointed out that in cases where no concrete harm can be proven, such as pornography or bestiality, the harm-based test would not be sufficient. Simply because harm is not inflicted should not necessarily make an activity legal, as it still may offend the public's standard of tolerance. Moreover, the dissenting voices in the Court argued that the public and commercial aspects of the sexual practices in this case make them indecent even if there was no harm. The dissent maintained that questions of 'indecency' should be regulated according to community standards, rather than harm, or the standards of the individuals involved. The adoption of a harm-based test is a significant shift in the purpose of the criminalization of indecency that eliminates the government's ability to regulate conduct that offends the majority of the public.

Discussion Issues:

- Should 'indecency' in the criminal law be measured by the severity of harm or by public morality?
- Is the criminal law part of regulating/enforcing community morality?
- Should the criminal law extend beyond protecting against harm to promote a particular social conscience or regulation?
- How should society determine the standards of community tolerance or morality?
- Is there a consensus of opinion on what makes an act indecent?
- What is the judge's role in deciding questions of morality or tolerance?
- What role should the personal experiences of the judge, or the personal morals of the judge, police and lawyers play when deciding how to deal with conduct such as consensual, safe group sex?
- How does this case reflect a shift in the role of the court when deciding question on indecency? (refer to Little Sisters case on community standards)
- What authority or factors would you rely on to support your decision on a question of indecency?