R. *v*. Latimer, [2001] 1 S.C.R. 3, 2001 SCC 1

Robert William Latimer *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada,
the Attorney General for Ontario,
the Canadian Civil Liberties Association,
the Canadian AIDS Society,
the Council of Canadians with Disabilities,
the Saskatchewan Voice of People with Disabilities,
the Canadian Association for Community Living,
People in Equal Participation Inc.,
DAWN Canada: DisAbled Women's Network of Canada,
People First of Canada,
the Catholic Group for Health, Justice and Life,
the Evangelical Fellowship of Canada,
the Christian Medical and Dental Society and
Physicians for Life *Interveners*

Indexed as: R. *v*. Latimer

Neutral citation: 2001 SCC 1.

File No.: 26980.

2000: June 14; 2001: January 18.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Binnie and Arbour JJ.

on appeal from the court of appeal for saskatchewan

Constitutional law -- Charter of Rights -- Cruel and unusual punishment -- Accused convicted of second degree murder after killing his severely disabled daughter -- Criminal Code providing for mandatory minimum sentence of life imprisonment with no chance of parole for 10 years -- Whether imposition of mandatory minimum sentence for second degree murder constitutes "cruel and unusual punishment" in this case, so that accused should receive constitutional exemption from minimum sentence -- Canadian Charter of Rights and Freedoms, s. 12 -- Criminal Code, R.S.C. 1985, c. C-46, ss. 235, 745(c).

Criminal law – Defences – Defence of necessity – Accused convicted of second degree murder after killing his severely disabled daughter -- Trial judge removing defence of necessity from jury after counsel's closing addresses -- Whether jury should have been allowed to consider defence of necessity – Whether timing of trial judge's ruling as to availability of defence rendered accused's trial unfair.

Criminal law -- Trial -- Jury -- Fairness of trial -- Jury nullification -- Accused convicted of second degree murder following death of his severely disabled daughter -- Whether trial unfair because trial judge misled jury into believing it would have some input into appropriate sentence, thereby lessening chance of jury nullification.

The accused was charged with first degree murder following the death of T, his 12-year-old daughter who had a severe form of cerebral palsy. T was quadriplegic and her physical condition rendered her immobile. She was said to have the mental capacity of a four-month-old baby, and could communicate only by means

of facial expressions, laughter and crying. T was completely dependent on others for her care. She suffered five to six seizures daily, and it was thought that she experienced a great deal of pain. She had to be spoon-fed, and her lack of nutrients caused weight loss. There was evidence that T could have been fed with a feeding tube into her stomach, an option that would have improved her nutrition and health, and that might also have allowed for more effective pain medication to be administered, but the accused and his wife rejected this option. After learning that the doctors wished to perform additional surgery, which he perceived as mutilation, the accused decided to take his daughter's life. He carried T to his pickup truck, seated her in the cab, and inserted a hose from the truck's exhaust pipe into the cab. T died from the carbon monoxide. The accused at first maintained that T had simply passed away in her sleep, but later confessed to having taken her life. The accused was found guilty of second degree murder and sentenced to life imprisonment without parole eligibility for 10 years; the Court of Appeal upheld the accused's conviction and sentence, but this Court ordered a new trial.

During the second trial defence counsel asked the trial judge for a ruling, in advance of his closing submissions, on whether the jury could consider the defence of necessity. The trial judge told counsel that he would rule on necessity after the closing submissions, and later ruled that the defence was not available. In the course of its deliberations, the jury sent the trial judge a note inquiring, in part, whether it could offer any input into sentencing. The trial judge told the jury it was not to concern itself with the penalty. He added: "it may be that later on, once you have reached a verdict, you – we will have some discussions about that". After the jury returned with a guilty verdict, the trial judge explained the mandatory minimum sentence of life imprisonment, and asked the jury whether it had any recommendation as to whether the ineligibility for parole should exceed the minimum period of 10

years. Some jury members appeared upset, according to the trial judge, and later sent a note asking him if they could recommend less than the 10-year minimum. The trial judge explained that the *Criminal Code* provided only for a recommendation over the 10-year minimum, but suggested that the jury could make any recommendation it liked. The jury recommended one year before parole eligibility. The trial judge then granted a constitutional exemption from the mandatory minimum sentence, sentencing the accused to one year of imprisonment and one year on probation. The Court of Appeal affirmed the conviction but reversed the sentence, imposing the mandatory minimum sentence of life imprisonment without parole eligibility for 10 years.

Held: The appeals against conviction and sentence should be dismissed.

The defence of necessity is narrow and of limited application in criminal law. The accused must establish the existence of the three elements of the defence. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided. Here, the trial judge was correct to remove the defence from the jury since there was no air of reality to any of the three requirements for necessity. The accused did not himself face any peril, and T's ongoing pain did not constitute an emergency in this case. T's proposed surgery did not pose an imminent threat to her life, nor did her medical condition. It was not reasonable for the accused to form the belief that further surgery amounted to imminent peril, particularly when better pain management was available. Moreover, the accused had at least one reasonable legal alternative to killing his daughter: he could have struggled on, with what was unquestionably a difficult situation, by helping T to live and by minimizing her pain as much as possible or by permitting an institution to do so. Leaving open the question of whether the

proportionality requirement could be met in a homicide situation, the harm inflicted in this case was immeasurably more serious than the pain resulting from T's operation which the accused sought to avoid. Killing a person — in order to relieve the suffering produced by a medically manageable physical or mental condition — is not a proportionate response to the harm represented by the non-life-threatening suffering resulting from that condition.

It is customary and in most instances preferable for the trial judge to rule on the availability of a defence prior to closing addresses to the jury. While the timing of the removal of the defence of necessity from the jury's consideration was later in the trial than usual, it did not render the accused's trial unfair or violate his constitutional rights. The trial judge's decision did not ambush the accused nor should it have caught him unaware.

The trial judge did not prejudice the accused's rights in replying to the question from the jury on whether it could offer input on sentencing. The trial did not become unfair simply because the trial judge undermined the jury's *de facto* power to nullify. In most if not all cases, jury nullification will not be a valid factor in analyzing trial fairness for the accused. Guarding against jury nullification is a desirable and legitimate exercise for a trial judge; in fact a judge is required to take steps to ensure that the jury will apply the law properly.

The mandatory minimum sentence for second degree murder in this case does not amount to cruel and unusual punishment within the meaning of s. 12 of the *Canadian Charter of Rights and Freedom*s. Since in substance the accused concedes the general constitutionality of ss. 235 and 745(*c*) of the *Criminal Code* as these sections are applied in combination, this appeal is restricted to a consideration of the

particularized inquiry and only the individual remedy sought by the accused — a constitutional exemption — is at issue. In applying s. 12, the gravity of the offence, as well as the particular circumstances of the offender and the offence, must be considered. Here, the minimum mandatory sentence is not grossly disproportionate. Murder is the most serious crime known to law. Even if the gravity of second degree murder is reduced in comparison to first degree murder, it is an offence accompanied by an extremely high degree of criminal culpability. In this case the gravest possible consequences resulted from an act of the most serious and morally blameworthy intentionality. In considering the characteristics of the offender and the particular circumstances of the offence, any aggravating circumstances must be weighed against any mitigating circumstances. On the one hand, due consideration must be given to the accused's initial attempts to conceal his actions, his lack of remorse, his position of trust, the significant degree of planning and premeditation, and T's extreme vulnerability. On the other hand, the accused's good character and standing in the community, his tortured anxiety about T's well-being, and his laudable perseverance as a caring and involved parent must be taken into account. Considered together the personal characteristics and particular circumstances of this case do not displace the serious gravity of this offence. Finally, this sentence is consistent with a number of valid penological goals and sentencing principles. Although in this case the sentencing principles of rehabilitation, specific deterrence and protection are not triggered for consideration, the mandatory minimum sentence plays an important role in denouncing murder. Since there is no violation of the accused's s. 12 right, there is no basis for granting a constitutional exemption.

Apart from the foregoing, s. 749 of the *Criminal Code* provides for the royal prerogative of mercy, which is a matter for the executive to consider, not the courts.

Cases Cited

Applied: *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39; **distinguished:** *R. v. Underwood*, [1998] 1 S.C.R. 77; **referred to:** *Perka v. The Queen*, [1984] 2 S.C.R. 232; *Southwark London Borough Council v. Williams*, [1971] Ch. 734; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. Loughnan*, [1981] V.R. 443; *R. v. Hibbert*, [1995] 2 S.C.R. 973; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Howe*, [1987] 1 A.C. 417; *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273; *United States v. Holmes*, 26 F. Cas. 360 (1842); *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *McLean v. The King*, [1933] S.C.R. 688; *R. v. Cracknell* (1931), 56 C.C.C. 190; *R. v. Stevenson* (1990), 58 C.C.C. (3d) 464; *R. v. Shipley* (1784), 4 Dougl. 73, 99 E.R. 774; *R. v. Smith*, [1987] 1 S.C.R. 1045; *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Guiller* (1985), 48 C.R. (3d) 226; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Mulvahill and Snelgrove* (1993), 21 B.C.A.C. 296; *R. v. Sarson*, [1996] 2 S.C.R. 223.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 12, 15(1).

Criminal Code, R.S.C. 1985, c. C-46 [am. 1995, c. 22, s. 6], ss. 235, 718, 745(*c*), 745.2, 749.

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APPEAL from a judgment of the Saskatchewan Court of Appeal (1998), 131 C.C.C. (3d) 191, 172 Sask. R. 161, 185 W.A.C. 161, 22 C.R. (5th) 380, [1999] 6 W.W.R. 118, [1998] S.J. No. 731 (QL), dismissing the accused's appeal from his conviction for second degree murder and allowing the Crown's appeal from the decision of Noble J. (1997), 121 C.C.C. (3d) 326, 12 C.R. (5th) 112, [1997] S.J. No. 701 (QL), granting a constitutional exemption from the mandatory minimum sentence and sentencing the accused to one year of imprisonment and one year on probation. Appeals against conviction and sentence dismissed.

Edward L. Greenspan, Q.C., *Mark Brayford, Q.C.*, and *Marie Henein*, for the appellant.

Kenneth W. MacKay, Q.C., and *Graeme G. Mitchell, Q.C.*, for the respondent.

Robert J. Frater and *Bradley Allison*, for the intervener the Attorney General of Canada.

Michael Bernstein, for the intervener the Attorney General for Ontario.

Kent Roach, for the intervener the Canadian Civil Liberties Association.

R. Douglas Elliott and *Patricia A. LeFebour*, for the intervener the Canadian AIDS Society.

Robert G. Richards, Q.C., and *Heather D. Heavin*, for the interveners the Council of Canadians with Disabilities, the Saskatchewan Voice of People with Disabilities, the Canadian Association for Community Living, People in Equal Participation Inc., DAWN Canada: DisAbled Women's Network of Canada and People First of Canada.

William J. Sammon, for the intervener the Catholic Group for Health, Justice and Life.

David M. Brown and *Janet Epp Buckingham*, for the interveners the Evangelical Fellowship of Canada, the Christian Medical and Dental Society and Physicians for Life.

The following is the judgment delivered by

1 THE COURT — This appeal arises from the death of Tracy Latimer, a 12-year-old girl who had a severe form of cerebral palsy. Her father, Robert Latimer, took her life some seven years ago. He was found guilty of second degree murder. This appeal deals with three questions of law arising from his trial. First, did the trial judge mishandle the defence of necessity, resulting in an unfair trial? Second, was the

trial unfair because the trial judge misled the jury into believing it would have some input into the appropriate sentence? Third, does the imposition of the mandatory minimum sentence for second degree murder constitute "cruel and unusual punishment" in this case, so that Mr. Latimer ("the appellant") should receive a constitutional exemption from the minimum sentence?

2 We conclude that the answer to all three questions is no. The defence of necessity is narrow and of limited application in criminal law. In this case, there was no air of reality to that defence. The trial judge was correct to conclude that the jury should not consider necessity. While the timing of the removal of this defence from the jury's consideration was later in the trial than usual, it did not render the appellant's trial unfair or violate his constitutional rights. On the second issue, the trial judge did not prejudice the appellant's rights in replying to a question from the jury on whether it could offer input on sentencing. In answer to the third question, we conclude that the mandatory minimum sentence for second degree murder in this case does not amount to cruel and unusual punishment within the meaning of s. 12 of the *Canadian Charter of Rights and Freedoms*. The test for what amounts to "cruel and unusual punishment" is a demanding one, and the appellant has not succeeded in showing that the sentence in his case is "grossly disproportionate" to the punishment required for the most serious crime known to law, murder.

3 We conclude that Mr. Latimer's conviction and sentence of life in prison with a mandatory minimum of 10 years' imprisonment for second degree murder should be upheld. This means that the appellant will not be eligible for parole consideration for 10 years, unless the executive elects to exercise the power to grant him clemency from this sentence, using the royal prerogative of mercy. The Court's role is to determine the questions of law that arise in this appeal; the matter of

executive clemency remains in the realm of the executive, and it is discussed later in these reasons.

4 The law has a long history of difficult cases. We recognize the questions that arise in Mr. Latimer's case are the sort that have divided Canadians and sparked a national discourse. This judgment will not end that discourse.

5 Mr. Latimer perceived his daughter and family to be in a difficult and trying situation. It is apparent from the evidence in this case that he faced challenges of the sort most Canadians can only imagine. His care of his daughter for many years was admirable. His decision to end his daughter's life was an error in judgment. The taking of another life represents the most serious crime in our criminal law.

I. Facts

6 The appellant, Robert Latimer, farmed in Wilkie, Saskatchewan. His 12-year-old daughter, Tracy, suffered a severe form of cerebral palsy. She was quadriplegic and her physical condition rendered her immobile. She was bedridden for much of the time. Her condition was a permanent one, caused by neurological damage at the time of her birth. Tracy was said to have the mental capacity of a four-month-old baby, and she could communicate only by means of facial expressions, laughter and crying. She was completely dependent on others for her care. Tracy suffered seizures despite the medication she took. It was thought she experienced a great deal of pain, and the pain could not be reduced by medication since the pain medication conflicted with her anti-epileptic medication and her difficulty in swallowing. Tracy experienced five to six seizures daily. She had to be spoon-fed, and her lack of nutrients caused weight loss.

7 There was evidence that Tracy could have been fed with a feeding tube into her stomach, an option that would have improved her nutrition and health, and that might also have allowed for more effective pain medication to be administered. The Latimers rejected the feeding-tube option as being intrusive and as representing the first step on a path to preserving Tracy's life artificially.

8 Tracy had a serious disability, but she was not terminally ill. Her doctors anticipated that she would have to undergo repeated surgeries, her breathing difficulties had increased, but her life was not in its final stages.

9 Tracy enjoyed music, bonfires, being with her family and the circus. She liked to play music on a radio, which she could use with a special button. Tracy could apparently recognize family members and she would express joy at seeing them. Tracy also loved being rocked gently by her parents.

10 Tracy underwent numerous surgeries in her short lifetime. In 1990, surgery tried to balance the muscles around her pelvis. In 1992, it was used to reduce the abnormal curvature in her back.

11 Like the majority of totally involved, quadriparetic children with cerebral palsy, Tracy had developed scoliosis, an abnormal curvature and rotation in the back, necessitating surgery to implant metal rods to support her spine. While it was a successful procedure, further problems developed in Tracy's right hip: it became dislocated and caused her considerable pain.

12 Tracy was scheduled to undergo further surgery on November 19, 1993. This was to deal with her dislocated hip and, it was hoped, to lessen her constant pain. The procedure involved removing her upper thigh bone, which would leave her lower leg loose without any connecting bone; it would be held in place only by muscle and tissue. The anticipated recovery period for this surgery was one year.

13 The Latimers were told that this procedure would cause pain, and the doctors involved suggested that further surgery would be required in the future to relieve the pain emanating from various joints in Tracy's body. According to the appellant's wife, Laura Latimer, further surgery was perceived as mutilation. As a result, Robert Latimer formed the view that his daughter's life was not worth living.

14 In the weeks leading up to Tracy's death, the Latimers looked into the option of placing Tracy in a group home in North Battleford. She had lived there between July and October of 1993, just prior to her death, while her mother was pregnant. The Latimers applied to place Tracy in the home in October, but later concluded they were not interested in permanently placing her in that home at that time.

15 On October 12, 1993, after learning that the doctors wished to perform this additional surgery, the appellant decided to take his daughter's life. On Sunday, October 24, 1993, while his wife and Tracy's siblings were at church, Robert Latimer carried Tracy to his pickup truck, seated her in the cab, and inserted a hose from the truck's exhaust pipe into the cab. She died from the carbon monoxide.

16 The police conducted an autopsy and discovered carbon monoxide in her blood. The appellant at first maintained that Tracy simply passed away in her sleep.

He later confessed to having taken her life, and gave a statement to the investigating police and partially re-enacted his actions on videotape. Mr. Latimer also told police that he had considered giving Tracy an overdose of Valium, or "shooting her in the head".

17 Mr. Latimer has been convicted of murder twice in this case. He was initially charged with first degree murder and convicted by a jury of second degree murder. The Court of Appeal for Saskatchewan upheld his conviction and life sentence with no eligibility for parole for 10 years, with Bayda C.J.S. dissenting on the sentence: *R. v. Latimer* (1995), 99 C.C.C. (3d) 481 ("*Latimer (No. 1)*"). The case was then appealed to this Court: [1997] 1 S.C.R. 217. It turned out that the prosecutor had interfered with the jury selection process. The Crown conceded that a new trial could not be avoided. In the second trial, Mr. Latimer was again convicted of second degree murder, and it is from that conviction that this appeal arises.

18 During the second trial, two things occurred that, the appellant submits, resulted in an unfair trial. First, as counsel were about to make closing addresses to the jury, defence counsel asked the trial judge for a ruling on whether the jury could consider the defence of necessity. He wanted this ruling in advance of his closing submissions, since he planned to tailor his address to the judge's ruling. The trial judge, however, refused to make any ruling until after hearing counsel's closing addresses. Defence counsel made submissions, including some on the necessity defence. When counsel had concluded their addresses, the trial judge ruled that the jury was not entitled to consider necessity.

19 Second, some time after beginning their deliberations, the jury sent a number of written questions to the trial judge, one of which was: "Is there any

possible way we can have input to a recommendation for sentencing?" The trial judge told the jury it was not to concern itself with the penalty. He said:

> . . . the penalty in any of these charges is not the concern of the jury. Your concern is, as I said, the guilt or innocence of the accused, you must reach — that's your job, you reach that conclusion, and don't concern yourself with what the penalty might be. We say that because we don't want you to be influenced one way or the other with what that penalty is. So it may be that later on, once you have reached a verdict, you — we will have some discussions about that, but not at this stage of the game. You must just carry on and answer the question that was put to you, okay. [Emphasis added.]

The appellant highlights the underlined passage as misleading the jury.

20 After the jury returned with a guilty verdict, the trial judge explained the mandatory minimum sentence of life imprisonment, and asked the jury whether it had any recommendation as to whether Mr. Latimer's ineligibility for parole should exceed the minimum period of 10 years. Some jury members appeared upset, according to the trial judge, and later sent a note asking him if they could recommend less than the 10-year minimum. The trial judge explained that the *Criminal Code* provided only for a recommendation over the 10-year minimum, but suggested that the jury could make any recommendation it liked. The jury recommended one year before parole eligibility. The trial judge then granted a constitutional exemption from the mandatory minimum sentence, sentencing the appellant to one year of imprisonment and one year on probation, to be spent confined to his farm.

21 The Court of Appeal for Saskatchewan affirmed Mr. Latimer's conviction but reversed the sentence. It imposed the mandatory minimum sentence for second degree murder of life imprisonment without eligibility for parole for 10 years.

II. Legislation

22 *Criminal Code*, R.S.C. 1985, c. C-46

235. (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by this section is a minimum punishment.

745. Subject to section 745.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be

. . .

(*c*) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 745.4. . . .

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

III. Judicial History

23 Mr. Latimer was tried by jury, during the course of which the trial judge made two rulings (besides his handling of the jury's inquiry as to sentence) that are at issue in this appeal. First, as previously outlined, he held that the jury was not entitled to consider the defence of necessity. Second, the trial judge granted a constitutional exemption from the mandatory minimum sentence for second degree murder: (1997), 121 C.C.C. (3d) 326 (Sask. Q.B.). The trial judge concluded that the mandatory sentence amounted to cruel and unusual punishment in this case. He reasoned that the exemption was a valid and appropriate remedy, given the particular circumstances of this offender, his motives, the public reaction to the mandatory sentence in Mr. Latimer's first trial, and his reduced level of criminal culpability.

24 The Court of Appeal for Saskatchewan dismissed the appeal from conviction in a *per curiam* decision: (1998), 131 C.C.C. (3d) 191. The trial judge was correct to remove the defence of necessity from the jury, the Court of Appeal held, and the timing of the trial judge's ruling did not result in an unfair trial. The court reversed the trial judge's remedy of a constitutional exemption, commenting, at p. 216, that "the learned trial judge took too much upon himself in bypassing the judgment of this Court, the direction of Parliament, and the executive power of clemency". The Court of Appeal concluded that Mr. Latimer must serve the mandatory 10-year sentence before parole eligibility.

IV. Issues

25 The issues divide into an appeal from conviction based on the following first three grounds and an appeal from sentence based on the subsequent grounds, and can be stated as:

1. Should the jury have been entitled to consider the defence of necessity?

2. Did the timing of the trial judge's ruling as to the availability of necessity render the appellant's trial unfair?

3. Did the trial judge render the appellant's trial unfair because of trial procedures that might have lessened the chance of jury nullification?

4. Would the imposition of the mandatory minimum sentence for second degree murder constitute cruel and unusual punishment, contrary to s. 12 of the *Charter*, in this particular case?

5. If the answer to Question 4 is "yes", can that violation be saved under s. 1 as a reasonable limit demonstrably justified in a free and democratic society?

6. If the answer to Question 5 is "no", should a constitutional exemption be granted?

V. Analysis

A. *Appeal Against Conviction*

(1) The Availability of the Defence of Necessity

(a) *The Three Requirements for the Defence of Necessity*

26 We propose to set out the requirements for the defence of necessity first, before applying them to the facts of this appeal. The leading case on the defence of necessity is *Perka v. The Queen*, [1984] 2 S.C.R. 232. Dickson J., later C.J., outlined the rationale for the defence at p. 248:

> It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is . . . .

27 Dickson J. insisted that the defence of necessity be restricted to those rare cases in which true "involuntariness" is present. The defence, he held, must be "strictly controlled and scrupulously limited" (p. 250). It is well established that the defence of necessity must be of limited application. Were the criteria for the defence loosened or approached purely subjectively, some fear, as did Edmund Davies L.J., that necessity would "very easily become simply a mask for anarchy": *Southwark London Borough Council v. Williams*, [1971] Ch. 734 (C.A.), at p. 746.

28 *Perka* outlined three elements that must be present for the defence of necessity. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.

29 To begin, there must be an urgent situation of "clear and imminent peril": *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 678. In short, disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable

or likely; it must be on the verge of transpiring and virtually certain to occur. In *Perka*, Dickson J. expressed the requirement of imminent peril at p. 251: "At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable". The *Perka* case, at p. 251, also offers the rationale for this requirement of immediate peril: "The requirement . . . tests whether it was indeed unavoidable for the actor to act at all". Where the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril

30 The second requirement for necessity is that there must be no reasonable legal alternative to disobeying the law. *Perka* proposed these questions, at pp. 251-52: "Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? *Was there a legal way out?*" (emphasis in original). If there was a reasonable legal alternative to breaking the law, there is no necessity. It may be noted that the requirement involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable, but he must have no reasonable legal alternative. If an alternative to breaking the law exists, the defence of necessity on this aspect fails.

31 The third requirement is that there be proportionality between the harm inflicted and the harm avoided. The harm inflicted must not be disproportionate to the harm the accused sought to avoid. See *Perka*, *per* Dickson J., at p. 252:

> No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself we will not excuse him.

Evaluating proportionality can be difficult. It may be easy to conclude that there is no proportionality in some cases, like the example given in *Perka* of the person who blows up a city to avoid breaking a finger. Where proportionality can quickly be dismissed, it makes sense for a trial judge to do so and rule out the defence of necessity before considering the other requirements for necessity. But most situations fall into a grey area that requires a difficult balancing of harms. In this regard, it should be noted that the requirement is not that one harm (the harm avoided) must always clearly outweigh the other (the harm inflicted). Rather, the two harms must, at a minimum, be of a comparable gravity. That is, the harm avoided must be either comparable to, or clearly greater than, the harm inflicted. As the Supreme Court of Victoria in Australia has put it, the harm inflicted "must not be out of proportion to the peril to be avoided": *R. v. Loughnan*, [1981] V.R. 443, at p. 448.

32 Before applying the three requirements of the necessity defence to the facts of this case, we need to determine what test governs necessity. Is the standard objective or subjective? A subjective test would be met if the person believed he or she was in imminent peril with no reasonable legal alternative to committing the offence. Conversely, an objective test would not assess what the accused believed; it would consider whether in fact the person <u>was</u> in peril with no reasonable legal alternative. A modified objective test falls somewhere between the two. It involves an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person. We conclude that, for two of the three requirements for the necessity defence, the test should be the modified objective test.

33 The first and second requirements — imminent peril and no reasonable legal alternative — must be evaluated on the modified objective standard described above. As expressed in *Perka*, necessity is rooted in an objective standard:

"involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure" (p. 259). We would add that it is appropriate, in evaluating the accused's conduct, to take into account personal characteristics that legitimately affect what may be expected of that person. The approach taken in *R. v. Hibbert*, [1995] 2 S.C.R. 973, is instructive. Speaking for the Court, Lamer C.J. held, at para. 59, that

> it is appropriate to employ an objective standard that takes into account the particular circumstances of the accused, including his or her ability to perceive the existence of alternative courses of action.

While an accused's perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, those perceptions remain relevant only so long as they are reasonable. The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open. There must be a reasonable basis for the accused's beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that <u>he</u> perceived imminent peril without an alternative would only succeed with the defence of necessity if his belief was reasonable given his circumstances and attributes. We leave aside for a case in which it arises the possibility that an honestly held but mistaken belief could ground a "mistake of fact" argument on the separate inquiry into *mens rea*.

34 The third requirement for the defence of necessity, proportionality, must be measured on an objective standard, as it would violate fundamental principles of the criminal law to do otherwise. Evaluating the nature of an act is fundamentally a

determination reflecting society's values as to what is appropriate and what represents a transgression. Some insight into this requirement is provided by G. P. Fletcher, in a passage from *Rethinking Criminal Law* (1978), at p. 804. Fletcher spoke of the comparison between the harm inflicted and the harm avoided, and suggested that there was a threshold at which a person must be expected to suffer the harm rather than break the law. He continued:

> Determining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations. A valuable aid in making that judgment is comparing the competing interests at stake and assessing the degree to which the actor inflicts harm beyond the benefit that accrues from his action.

The evaluation of the seriousness of the harms must be objective. A subjective evaluation of the competing harms would, by definition, look at the matter from the perspective of the accused person who seeks to avoid harm, usually to himself. The proper perspective, however, is an objective one, since evaluating the gravity of the act is a matter of community standards infused with constitutional considerations (such as, in this case, the s. 15(1) equality rights of the disabled). We conclude that the proportionality requirement must be determined on a purely objective standard.

(b) *The Application of the Requirements for Necessity in This Case*

35 The inquiry here is not whether the defence of necessity should in fact excuse Mr. Latimer's actions, but whether the jury should have been left to consider this defence. The correct test on that point is whether there is an air of reality to the defence. In *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 676, Cory J. stated:

> . . . a defence should not be put to the jury if a reasonable jury properly instructed would have been unable to acquit on the basis of the evidence tendered in support of that defence. On the other hand, if a reasonable jury properly instructed could acquit on the basis of the evidence tendered with regard to that defence, then it must be put to the jury. It is for the trial judge to decide whether the evidence is sufficient to warrant putting a defence to a jury as this is a question of law alone.

The question is whether there is sufficient evidence that, if believed, would allow a reasonable jury — properly charged and acting judicially — to conclude that the defence applied and acquit the accused

36 For the necessity defence, the trial judge must be satisfied that there is evidence sufficient to give an air of reality to each of the three requirements. If the trial judge concludes that there is no air of reality to any one of the three requirements, the defence of necessity should not be left to the jury.

37 In this case, there was no air of reality to the three requirements of necessity.

38 The first requirement is imminent peril. It is not met in this case. The appellant does not suggest he himself faced any peril; instead he identifies a peril to his daughter, stemming from her upcoming surgery which he perceived as a form of mutilation. Acute suffering can constitute imminent peril, but in this case there was nothing to her medical condition that placed Tracy in a dangerous situation where death was an alternative. Tracy was thought to be in pain before the surgery, and that pain was expected to continue, or increase, following the surgery. But that ongoing pain did not constitute an emergency in this case. To borrow the language of Edmund Davies L.J. in *Southwark London Borough Council, supra*, at p. 746, we are dealing not with an emergency but with “an obstinate and long-standing state of affairs”.

Tracy's proposed surgery did not pose an imminent threat to her life, nor did her medical condition. In fact, Tracy's health might have improved had the Latimers not rejected the option of relying on a feeding tube. Tracy's situation was not an emergency. The appellant can be reasonably expected to have understood that reality. There was no evidence of a legitimate psychological condition that rendered him unable to perceive that there was no imminent peril. The appellant argued that, for him, further surgery did amount to imminent peril. It was not reasonable for the appellant to form this belief, particularly when better pain management was available.

39 The second requirement for the necessity defence is that the accused had no reasonable legal alternative to breaking the law. In this case, there is no air of reality to the proposition that the appellant had no reasonable legal alternative to killing his daughter. He had at least one reasonable legal alternative: he could have struggled on, with what was unquestionably a difficult situation, by helping Tracy to live and by minimizing her pain as much as possible. The appellant might have done so by using a feeding tube to improve her health and allow her to take more effective pain medication, or he might have relied on the group home that Tracy stayed at just before her death. The appellant may well have thought the prospect of struggling on unbearably sad and demanding. It was a human response that this alternative was unappealing. But it was a reasonable legal alternative that the law requires a person to pursue before he can claim the defence of necessity. The appellant was aware of this alternative but rejected it.

40 The third requirement for the necessity defence is proportionality; it requires the trial judge to consider, as a question of law rather than fact, whether the harm avoided was proportionate to the harm inflicted. It is difficult, at the conceptual

level, to imagine a circumstance in which the proportionality requirement could be met for a homicide. We leave open, if and until it arises, the question of whether the proportionality requirement could be met in a homicide situation. In England, the defence of necessity is probably not available for homicide: *R. v. Howe*, [1987] 1 A.C. 417 (H.L.), at pp. 453 and 429; J. Smith, *Smith & Hogan: Criminal Law* (9th ed. 1999), at pp. 249-51. The famous case of *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273, involving cannibalism on the high seas, is often cited as establishing the unavailability of the defence of necessity for homicide, although the case is not conclusive: see R. Card, *Card Cross and Jones: Criminal Law* (12th ed. 1992), at p. 532; *Smith & Hogan: Criminal Law*, *supra*, at pp. 249 and 251. The Law Reform Commission of Canada has suggested the defence should not be available for a person who intentionally kills or seriously harms another person: *Report on Recodifying Criminal Law* (1987), at p. 36. American jurisdictions are divided on this question, with a number of them denying the necessity defence for murder: P. H. Robinson, *Criminal Law Defenses* (1984), vol. 2, at pp. 63-65; see also *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383). The American *Model Penal Code* proposes that the defence of necessity would be available for homicide: American Law Institute, *Model Penal Code and Commentaries* (1985), Part I, vol. 2, at § 3.02, pp. 14-15; see also W. R. LaFave and A. W. Scott, Jr., *Substantive Criminal Law* (1986), vol. 1, at p. 634.

41 Assuming for the sake of analysis only that necessity could provide a defence to homicide, there would have to be a harm that was seriously comparable in gravity to death (the harm inflicted). In this case, there was no risk of such harm. The "harm avoided" in the appellant's situation was, compared to death, completely disproportionate. The harm inflicted in this case was ending a life; that harm was immeasurably more serious than the pain resulting from Tracy's operation which Mr.

Latimer sought to avoid. Killing a person — in order to relieve the suffering produced by a medically manageable physical or mental condition — is not a proportionate response to the harm represented by the non-life-threatening suffering resulting from that condition.

42 We conclude that there was no air of reality to any of the three requirements for necessity. As noted earlier, if the trial judge concludes that even one of the requirements had no air of reality, the defence should not be left to the jury. Here, the trial judge was correct to remove the defence from the jury. In considering the defence of necessity, we must remain aware of the need to respect the life, dignity and equality of all the individuals affected by the act in question. The fact that the victim in this case was disabled rather than able-bodied does not affect our conclusion that the three requirements for the defence of necessity had no air of reality here.

(2) The Removal of the Defence of Necessity After Counsel's Final Addresses

43 Given that the trial judge was correct in removing this defence from the jury, there remains the argument that the timing of the trial judge's ruling on necessity rendered the trial unfair.

44 After the evidence was led and immediately prior to counsel addressing the jury, defence counsel requested a ruling on the availability of the defence of necessity. He had prepared two versions of his address to the jury. One raised necessity; the other did not. The trial judge's ruling would determine which version he would use. The trial judge, however, indicated that he had not decided whether the defence of necessity was available. He requested counsel to proceed with their closing

submissions, telling them that he would rule on necessity after those submissions. He later ruled that the defence of necessity was not available.

45 The appellant argues that this approach violated his right to a fair trial, as guaranteed by s. 7 of the *Charter*. He states that he did not know the case he had to meet. He asks, what if he had made submissions on necessity that were later withdrawn by the trial judge, or abstained from making such submissions only to discover that the jury was entitled to consider the defence? The result in either case, he submits, is unfair.

46 In most cases, the trial judge will be able to rule on the availability of a defence before counsel begin their closing addresses. But that does not mean that the trial is unfair where the trial judge delays his ruling. In the circumstances of this case, we conclude that the fairness of the trial was not affected.

47 The "case to meet" principle is a component of the accused's constitutional right to make full answer and defence. It means that an accused has the right to know the case he must meet before answering the Crown's case: *R. v. Underwood*, [1998] 1 S.C.R. 77, at para. 6; *R. v. Rose*, [1998] 3 S.C.R. 262, *per* Cory, Iacobucci and Bastarache JJ., at para. 102. The rationale behind this principle is that the accused, before embarking on his defence, should be able to assume that the Crown has called all the evidence it will rely on to establish guilt. Both *Underwood* and *Rose* affirm this principle, but do not require all rulings by the trial judge to take place prior to counsel addressing the jury. *Underwood* and *Rose* deal with the accused person's right to respond to the Crown, not a right to reply to the trial judge. (In *Underwood*, the issue arose in the context of a judge's ruling, but the concern was that the Crown would lead additional evidence — in that case, the accused's criminal record.) As such, there is

no broad right to have all rulings on the availability of defences take place prior to closing submissions. The right to respond to the Crown's case is not equivalent to a right to respond to the trial judge's rulings.

48 In the absence of a constitutional right, we must still consider whether the procedure employed by a trial judge led to an unfair trial.

49 The Court of Appeal concluded, at p. 205, that "it might have been better" to rule on the availability of the necessity defence prior to counsel addressing the jury. The decision should not have been a difficult one, since not one of the three requirements for necessity had an air of reality to it.

50 Nonetheless, while the trial judge's approach was imperfect, the benchmark for measuring trial fairness is not perfection. The critical question is whether the trial judge's approach rendered the appellant's trial unfair. The inquiry is necessarily specific to the facts of the case under consideration; the determination of whether the timing of a particular ruling rendered a trial unfair must be made on a case-by-case basis.

51 We are of the view that, on the facts of this case, the timing of the removal of the necessity defence did not render the appellant's trial unfair. The appellant relies on *Underwood* to argue that he was denied the ability to make an informed tactical decision. In *Underwood*, the trial judge deferred a ruling on the admissibility of an accused person's criminal record until after he had begun testifying. The accused had to decide whether to testify without knowing if his criminal record would be admissible. He was forced into an untenable position, in which he had to gamble on a decision without any ability to mitigate the damage if he lost his gamble.

52 The situation in this appeal differs from *Underwood* in two ways. First, the nature of the interest is not comparable: Underwood had to make an uninformed decision that would see him irrevocably surrender his *Charter* right not to be compelled to testify, while the appellant faced only a tactical decision as to how to present an unlikely defence. The second difference between the cases lies in the fact that in *Underwood*, the accused could not anticipate or mitigate a surprise ruling, whereas in this case the appellant could, and did, anticipate and mitigate the withdrawal of the defence of necessity. In fact, Mr. Latimer's trial counsel explained to the jury in his closing remarks that the trial judge could rule that certain issues — including the defence of necessity — had to be withdrawn from the jury's consideration.

53 It was hardly a surprise that the trial judge eventually removed the defence of necessity. The decision did not ambush the appellant, nor should it have caught him unaware. The trial judge in the first *Latimer* case had removed the defence, and the Court of Appeal in *Latimer (No. 1)*, *supra*, at pp. 512 and 520, unanimously agreed. The ruling was obvious: there was no air of reality to even one of the three requirements for necessity. In discussing his decision to delay ruling on necessity until after closing addresses, the tenor of the trial judge's comments makes it apparent that he is highly sceptical that the defence was available. We are of the view that the surprise here, if any, was minimal, and we fail to see the prejudice. While it is customary and in most instances preferable for the trial judge to rule on the availability of a defence prior to closing addresses to the jury, it cannot be said that the failure to do so here resulted in an unfair trial.

54 The appellant also argues that the manner in which the trial judge removed the defence of necessity was unfair. We disagree. If anything, the trial judge's treatment of the defence of necessity gave it greater credibility than deserved on the facts. While the trial judge did explain to the jury that the defence of necessity was unavailable, he appeared reluctant to remove the defence. He explained how "the law" defines necessity, and he was clear that he had no choice; his ruling was required by "the courts" as "a matter of law". The trial judge's explanation as to why the defence of necessity was not available did not portray the appellant in an unsympathetic manner, and in fact the trial judge did not even touch on the requirement of proportionality in removing the defence. Consequently, in the circumstances of this case, it cannot be concluded that the trial judge seriously undermined the appellant's closing submissions.

55 We similarly reject the appellant's submission that the trial judge "took sides" or became "an advocate for the Crown", as there is no support in the record for this suggestion. The trial judge explicitly said that he agreed with the Crown's argument as to the unavailability of the necessity defence, but that fact alone does not transform him into an ally of the Crown and it does not constitute bias, particularly when the Crown's position was correct and no other choice was open to the trial judge.

56 The assessment of trial fairness is specific to the facts of the particular case. In another case, a trial judge's removal of a defence — after closing addresses to the jury had been made relying on that defence — might render the trial unfair, but that is not the case here.

(3) Jury Nullification

57 The term "jury nullification" refers to that rare situation where a jury knowingly chooses not to apply the law and acquits a defendant regardless of the strength of the evidence against him. Jury nullification is an unusual concept within the criminal law, since it effectively acknowledges that it may occur that the jury elects in the rarest of cases not to apply the law. The explanation seems to be that on some occasions, oppression will result either from a harsh law or from a harsh application of a law.

58 This Court has referred to the jury's power to nullify as "the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law" and it has characterized the jury nullification power as a "safety valve" for exceptional cases: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 ("*Morgentaler* (1988)"), at pp. 78-79. At the same time, however, Dickson C.J. warned that "recognizing this reality [that a jury may nullify] is a far cry from suggesting that counsel may encourage a jury to ignore a law they do not support or to tell a jury that it has a right to do so" (emphasis in original).

59 The appellant effectively makes two arguments, one specific and one general. His specific argument is that the trial judge interfered with the jury's ability to nullify by implying that the jury could offer input on sentencing. His general argument is that an accused person must have some right to a jury that is more likely to nullify. We will consider each argument in turn.

60 The appellant submits that his trial was unfair because of what he characterizes as the trial judge's misleading answer to the jury's inquiry as to whether it could offer input on sentencing. In the course of its deliberations, the jury sent the trial judge a note inquiring, in part, whether it could offer any input into sentencing.

The trial judge was clear in reply that the jury was not to concern itself with the matter of penalty, but should focus solely on the question of guilt. The trial judge added, "it may be that later on, once you have reached a verdict, you — we will have some discussions about that [penalty]".

61 The appellant argues that the trial judge ought to have clarified his "misleading" suggestion that the jury could influence the penalty by explicitly telling the jury of the mandatory minimum sentence of life without parole for 10 years.

62 While the practice varies in other jurisdictions, the rule in Canada is that guilt is for the jury to determine, while sentencing is left to the trial judge. That long-standing approach is sensible as a trial judge will obviously have more knowledge on both the acceptable range of sentences for the particular offence and the principles of sentencing. The jury's role is to determine on the facts whether the evidence establishes guilt. There is no reason to depart from the general rule.

63 It may seem odd that the jury, without knowing the penalty, could be blind to the consequences of its conclusions, but that fact is both appropriate and desirable when one takes into account the risk that the jury could be influenced — whether towards acquitting or convicting — on the basis of the sentence. That logic applies with the same force when the prescribed penalty is a statutory minimum. The fact that a convicted person will be subject to a pre-designated minimum sentence should not influence the jury's consideration of the question of guilt. The appellant suggests that the jury was less likely to nullify because it was not explicitly told of the mandatory minimum sentence. The question of whether the jury would have been more likely to acquit if informed of the mandatory minimum sentence — however interesting its

speculation may be — cannot be the basis for a requirement that the jury be informed of the penalty consequent on conviction.

64 The argument advanced by the appellant is that the trial judge should have ruled on the availability of the necessity defence at the usual time in the trial, that is, before counsel's jury addresses. In addition, the appellant submits, the trial judge ought to have explicitly told the jury it had no ability to determine sentence. If that had occurred, the jury would have had more time to dwell on what the appellant argues are the most ameliorating circumstances of the appellant's actions; this, coupled with the mandatory life sentence, might have led to jury nullification. At a minimum, it is argued, the jury would have had more time to think about it. That argument fails.

65 An accused is entitled to a fair trial, including the presumption of innocence, the duty of the Crown to prove guilt beyond a reasonable doubt, and the ability to make full answer and defence. The accused is not entitled to a trial that increases the possibility of jury nullification. If the trial of the accused has not been unfair and no miscarriage of justice has occurred, the accused cannot succeed on an argument that due to some departure from the norm by the trial judge, his chances of jury nullification are lessened. This point is treated in further detail below.

66 The appellant argues that the jury was misled into believing it could make a recommendation on sentence. The trial judge might have confined himself to telling the jury not to concern itself with the penalty. But his vague suggestion ("it may be that later on . . . we will have some discussions about that") cannot be taken to have seriously misled the jury into believing that it would determine the sentence. In fact, the jury could and did offer its input on sentence by virtue of s. 745.2 of the *Criminal Code*, which requires a trial judge to ask the jury if it wishes to recommend more than

the 10-year minimum before parole eligibility for second degree murder. It seems likely that the trial judge had this provision in mind when he suggested the jury could "have some discussions" about the sentence. Read in the context of the trial judge's repeated insistence that the jury focus on the issue of guilt, not penalty, it is clear that his comment about discussing the sentence later on did not render the trial unfair.

67 We also reject the argument that the trial judge could have corrected any "misleading" suggestion by informing the jury of the mandatory minimum sentence; to do so might have been an error. (See *McLean v. The King*, [1933] S.C.R. 688, at p. 693; *R. v. Cracknell* (1931), 56 C.C.C. 190 (Ont. C.A.), at pp. 192 and 194; *R. v. Stevenson* (1990), 58 C.C.C. (3d) 464 (Ont. C.A.), at p. 482.) The trial judge's slightly awkward but short response to the jury's inquiry did not prejudice the appellant.

68 The appellant's second argument is a broad one, that the accused person has some right to jury nullification. How could there be any such "right"? As a matter of logic and principle, the law cannot encourage jury nullification. When it occurs, it may be appropriate to acknowledge that occurrence. But, to echo the words of *Morgentaler* (1988), saying that jury nullification may occur is distant from deliberately allowing the defence to argue it before a jury or letting a judge raise the possibility of nullification in his or her instructions to the jury.

69 The appellant concedes as much, but advances some right, on the part of the accused person, to a jury whose power to nullify is not undermined. He suggests the right to a fair trial under s. 7 of the *Charter* encompasses this entitlement. The appellant submits that there is a jury power to nullify, and it would be unconstitutional to undermine that power.

70 We reject that proposition. The appellant cannot legitimately rely on a broad right to jury nullification. In this case, the trial did not become unfair simply because the trial judge undermined the jury's *de facto* power to nullify. In most if not all cases, jury nullification will not be a valid factor in analyzing trial fairness for the accused. Guarding against jury nullification is a desirable and legitimate exercise for a trial judge; in fact a judge is required to take steps to ensure that the jury will apply the law properly. See *R. v. Shipley* (1784), 4 Dougl. 73, 99 E.R. 774 (K.B.), at p. 824, cited with approval by Dickson C.J. in *Morgentaler* (1988), at p. 78. Steps taken by a trial judge to guard against jury nullification should not, on that basis alone, prejudice the accused person.

71 We conclude that the appellant's conviction must be upheld.

B. *Appeal Against Sentence*

72 The appellant also seeks a constitutional exemption from the mandatory minimum sentence for second degree murder on the basis that such a sentence amounts to cruel and unusual punishment in the circumstances of this case. This aspect of Mr. Latimer's appeal centres on the following constitutional questions stated by Lamer C.J. on September 22, 1999:

> 1. Was the learned trial Justice correct in finding that in this specific case, the mandatory minimum sentence prescribed by ss. 235 and 745(*c*) of the *Criminal Code* would be cruel and unusual punishment in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If the answer to Question 1 is "yes", can ss. 235 and 745(*c*) of the *Criminal Code* be justified in this case by s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> 3. If the answer to Question 2 is "no", did the learned trial Justice err in granting a constitutional exemption rather than declaring the sections inoperative?

(1) Review of Relevant Principles

73 This Court first interpreted s. 12 of the *Charter* in *R. v. Smith*, [1987] 1 S.C.R. 1045, where Lamer J. (as he then was) adopted the standard articulated by Laskin C.J. in *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680, as the starting point for the s. 12 scrutiny. Specifically, Lamer J. stated at p. 1072:

> The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is, to use the words of Laskin C.J. in *Miller and Cockriell*, *supra*, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.

74 Lamer J. went on to set out the nature and elements of the s. 12 gross disproportionality analysis as follows:

> In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.

This test was subsequently affirmed and applied in *R. v. Lyons*, [1987] 2 S.C.R. 309, *R. v. Luxton*, [1990] 2 S.C.R. 711, *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, *R. v. Goltz*, [1991] 3 S.C.R. 485, and most recently in *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39.

75 In *Goltz*, *supra*, at p. 500, and *Morrisey*, *supra*, at paras. 27-28, Gonthier J. clarified that, beyond the *Smith* factors outlined above, a full contextual understanding of the sentencing provision also requires a consideration of the actual effect of the punishment on the individual, the penological goals and sentencing principles upon which the sentence is fashioned, the existence of valid alternatives to the punishment imposed, and a comparison of punishments imposed for other crimes in the same jurisdiction. However, not all of these matters will be relevant to the analysis and none of these standing alone will be decisive to a determination of gross disproportionality.

76 While the test is one that attributes a great deal of weight to individual circumstances, it should also be stressed that in weighing the s. 12 considerations the court must also consider and defer to the valid legislative objectives underlying the criminal law responsibilities of Parliament (*Goltz*, *supra*, at p. 503). In this regard, Cory J., for the Court in *Steele v. Mountain Institution*, *supra*, at p. 1417, stated:

> It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*. [Emphasis added.]

77 In emphasizing the deferential standard for the s. 12 review, this Court has repeatedly adopted the following passage from *R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.), at p. 238, *per* Borins Dist. Ct. J. (cited at *Smith*, *supra*, at p. 1070; *Luxton*, *supra*, at p. 725; *Goltz*, *supra*, at p. 502):

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining

> proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.

78 Finally, before moving on to the application of these principles to this appeal, we note that there are two aspects to the s. 12 analysis (*Goltz, supra*, at p. 505). Specifically, the first aspect of the s. 12 analysis centres on the individual circumstances as set out above and is commonly known as the "particularized inquiry". If the particularized inquiry reveals that a challenged provision imposes a sentence that is grossly disproportionate in those particular circumstances, then a *prima facie* violation of s. 12 is established and will be examined for justifiability under s. 1 of the *Charter*. If, however, the particular facts of the case do not give rise to such a finding "there may remain . . . a *Charter* challenge or constitutional question as to the validity of a statutory provision on grounds of gross disproportionality as evidenced in reasonable hypothetical circumstances" (*Goltz, supra*, at pp. 505-6 (emphasis in original)).

79 As is reflected in the constitutional questions before the Court, this appeal is restricted to a consideration of the particularized inquiry. In substance, the appellant concedes the general constitutionality of ss. 235 and 745(*c*) as these sections are applied in combination. Mr. Latimer's challenge to their overall constitutionality was put forward in the alternative but was not pressed forcefully since no substantive argument on point was offered. Furthermore, no reasonable hypothetical situation was presented for the Court's consideration. In short, the appellant's arguments wholly centred on the effect of the sentence in this specific case on this specific offender.

Consequently, only the individual remedy sought by the appellant, namely a constitutional exemption, is at issue.

(2) Application of Section 12 Principles

80 The first factor to consider is the gravity of the offence. Recently, Gonthier J., in *Morrisey*, *supra*, provided important guidance for the proper assessment of the gravity of an offence for the purposes of a s. 12 analysis. Specifically, Gonthier J. noted, at para. 35, that an assessment of the gravity of the offence requires an understanding of (i) the character of the offender's actions, and (ii) the consequences of those actions.

81 Certainly, in this case one cannot escape the conclusion that Mr. Latimer's actions resulted in the most serious of all possible consequences, namely, the death of the victim, Tracy Latimer.

82 In considering the character of Mr. Latimer's actions, we are directed to an assessment of the criminal fault requirement or *mens rea* element of the offence rather than the offender's motive or general state of mind (*Morrisey*, *supra*, at para. 36). We attach a greater degree of criminal responsibility or moral blameworthiness to conduct where the accused knowingly broke the law (*Morrisey*, *supra*, at para. 36; *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645). In this case, the *mens rea* requirement for second degree murder is subjective foresight of death: the most serious level of moral blameworthiness (*Luxton*, *supra*, at p. 724).

83 Parliament has classified murder offences into first and second degree based on its perception of relative levels of moral blameworthiness. Parliament has

also provided for differential treatment between them in sentencing, but only in respect of parole eligibility. As noted by Lamer C.J. in *Luxton*, *supra*, at pp. 720-21:

> I must also reiterate that what we are speaking of here is a classification scheme for the purposes of sentencing. The distinction between first and second degree murder only comes into play when it has first been proven beyond a reasonable doubt that the offender is guilty of murder, that is, that he or she had subjective foresight of death: *R. v. Martineau*, handed down this day. There is no doubt that a sentencing scheme must exhibit a proportionality to the seriousness of the offence, or to put it another way, there must be a gradation of punishments according to the malignity of the offences. [Emphasis added.]

84 However, even if the gravity of second degree murder is reduced in comparison to first degree murder, it cannot be denied that second degree murder is an offence accompanied by an extremely high degree of criminal culpability. In this case, therefore, the gravest possible consequences resulted from an act of the most serious and morally blameworthy intentionality. It is against this reality that we must weigh the other contextual factors, including and especially the particular circumstances of the offender and the offence.

85 Turning to the characteristics of the offender and the particular circumstances of the offence we must consider the existence of any aggravating and mitigating circumstances (*Morrisey*, *supra*, at para. 38; *Goltz*, *supra*, at pp. 512-13). Specifically, any aggravating circumstances must be weighed against any mitigating circumstances. In this regard, it is possible that prior to gauging the sentence's appropriateness in light of an appreciation of the particular circumstances weighed against the gravity of the offence, the mitigating and aggravating circumstances might well cancel out their ultimate impact (*Morrisey*, *supra*, at para. 40). Indeed, this is what occurs in this case. On the one hand, we must give due consideration to Mr.

Latimer's initial attempts to conceal his actions, his lack of remorse, his position of trust, the significant degree of planning and premeditation, and Tracy's extreme vulnerability. On the other hand, we are mindful of Mr. Latimer's good character and standing in the community, his tortured anxiety about Tracy's well-being, and his laudable perseverance as a caring and involved parent. Considered together we cannot find that the personal characteristics and particular circumstances of this case displace the serious gravity of this offence.

86 Finally, this sentence is consistent with a number of valid penological goals and sentencing principles. Although we would agree that in this case the sentencing principles of rehabilitation, specific deterrence and protection are not triggered for consideration, we are mindful of the important role that the mandatory minimum sentence plays in denouncing murder. Denunciation of unlawful conduct is one of the objectives of sentencing recognized in s. 718 of the *Criminal Code*. As noted by the Court in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81:

> The objective of denunciation mandates that a sentence should communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. [Emphasis in original.]

Furthermore, denunciation becomes much more important in the consideration of sentencing in cases where there is a "high degree of planning and premeditation, and where the offence and its consequences are highly publicized, [so that] like-minded individuals may well be deterred by severe sentences": *R. v. Mulvahill and Snelgrove* (1993), 21 B.C.A.C. 296, at p. 300. This is particularly so where the victim is a vulnerable person with respect to age, disability, or other similar factors.

87 In summary, the minimum mandatory sentence is not grossly disproportionate in this case. We cannot find that any aspect of the particular circumstances of the case or the offender diminishes the degree of criminal responsibility borne by Mr. Latimer. In addition, although not free of debate, the sentence is not out of step with valid penological goals or sentencing principles. The legislative classification and treatment of this offender meets the requisite standard of proportionality (*Lyons*, *supra*, at p. 339). Where there is no violation of Mr. Latimer's s. 12 right there is no basis for granting a constitutional exemption.

88 Having said all this, we wish to point out that this appeal raises a number of issues that are worthy of emphasis. The sentencing provisions for second degree murder include both ss. 235 and 745(*c*). Applied in combination these provisions result in a sentence that is hybrid in that it provides for both a mandatory life sentence and a minimum term of incarceration. The choice is Parliament's on the use of minimum sentences, though considerable difference of opinion continues on the wisdom of employing minimum sentences from a criminal law policy or penological point of view.

89 It is also worth referring again to the royal prerogative of mercy that is found in s. 749 of the *Criminal Code*, which provides "[n]othing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy". As was pointed out by Sopinka J. in *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 51, albeit in a different context:

> Where the courts are unable to provide an appropriate remedy in cases that the executive sees as unjust imprisonment, the executive is permitted to dispense "mercy", and order the release of the offender. The royal prerogative of mercy is the only potential remedy for persons who have

exhausted their rights of appeal and are unable to show that their sentence fails to accord with the *Charter*.

90 But the prerogative is a matter for the executive, not the courts. The executive will undoubtedly, if it chooses to consider the matter, examine all of the underlying circumstances surrounding the tragedy of Tracy Latimer that took place on October 24, 1993, some seven years ago. Since that time Mr. Latimer has undergone two trials and two appeals to the Court of Appeal for Saskatchewan and this Court, with attendant publicity and consequential agony for him and his family.

VI. Disposition

91 Mr. Latimer's appeals against conviction and sentence are dismissed. The answers to the constitutional questions are as follows:

1. Was the learned trial Justice correct in finding that in this specific case, the mandatory minimum sentence prescribed by ss. 235 and 745(*c*) of the *Criminal Code* would be cruel and unusual punishment in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*?

   No.

2. If the answer to Question 1 is "yes", can ss. 235 and 745(*c*) of the *Criminal Code* be justified in this case by s. 1 of the *Canadian Charter of Rights and Freedoms*?

   It is not necessary to answer this question.

3. If the answer to Question 2 is "no", did the learned trial Justice err in granting a constitutional exemption rather than declaring the sections inoperative?

It is not necessary to answer this question.

Appeals against conviction and sentence dismissed.

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