

IN THE COURT OF SHAKESPEARE

The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)

Matter No.....3/2005
Hearing Date.....24/3/2005

FACTUM OF THE DEFENDANT/APPLICANT

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PART I – FACTS

1. It began as a beautiful day on the beach. Three close friends – Gabriel Pedersen, Jean du Parcq, and Chris Vidaloca – were vacationing on a secluded maritime reserve. After a couple of beers, Gabriel and Jean decided to go sailing in Gabriel’s small sailing boat, ‘The Bard de la Mer.’ Chris, meanwhile, chose not to join her friends but to lay alone on the shore.
2. The temper of the day soon changed. Out to sea, Gabriel, an experienced sailor, continued to drink heavily. Within a couple of hours, Gabriel had become extremely inebriated and Jean seriously concerned. Jean turned Gabriel’s boat toward shore, whereupon a heated argument broke out, as is wont to happen between very close friends even at the best of times; in the course of the impassioned argument, Gabriel, no longer in his right mind, struck Jean violently. Jean fell overboard, and Gabriel suddenly collapsed insensibly into the bottom of his boat. Jean, who was now bleeding and unable to reach the boat, began to signal frantically to Chris on shore for help.
3. Chris continued to lay unmoving on the shore. From her perspective, Chris, who had stayed ashore because of a purported fear of sharks, could easily perceive Gabriel’s boat (but not Gabriel), Jean’s panicked and fading attempts to avoid drowning to death, and the bloom of blood surrounding Jean. Lying lazily on the shore, Chris did nothing.
4. After a lengthy period of time, another boat by chance happened by and rescued Jean from imminent and certain death. Sadly, the rescue came too late to save Jean from permanent injury – as a result of both her fall in the water and her lengthy deprivation of oxygen, Jean suffered irreparable brain damage and now requires round-the-clock institutional care.
5. On trial for criminal assault brought under a private prosecution, the Court held that, owing to his extreme intoxication, Gabriel was not responsible for his actions. In a parallel action for civil negligence, Gabriel’s maritime insurance company sought to join Chris Vidaloca as a second defendant, but the Court ruled that neither the common law

nor the Civil Code of Québec imposes a duty of rescue in the instant circumstances. The plaintiff succeeded against Gabriel, and damages in the amount of \$2.5 million were awarded.

6. An appeal from each of these judgments was brought to the Court of Shakespeare and by special leave consolidated in a single record. The prosecutor/respondent, Jean du Parcq (by her guardians), seeks a declaration from this Court holding Gabriel responsible for the assault on Jean and a judgment affirming the trial judge's determination of civil liability. The defendant/applicant, Gabriel Pedersen (subsumed by HR&G Insurance Group), seeks a declaration from this Court affirming the trial judge's ruling that Gabriel is not legally responsible for his actions and a judgment holding Chris Vidaloca jointly and severally liable for breaching her duty of care toward Jean.

PART II – ISSUES

7. Do the facts at instant regarding Gabriel's actions constitute an offence against the Laws of Shakespeare?
8. Do the facts at instant regarding Chris's inaction constitute an offence against the Laws of Shakespeare?
9. If the facts regarding Gabriel's actions and Chris's inaction give rise to an offence against the Laws of Shakespeare, does the proper interpretation of those laws demand their strict enforcement?

PART III – ARGUMENT

1. THE PRINCIPLE OF CONSCIENTIOUS RESPONSE-ABILITY DEFINES THE STANDARD OF CONDUCT REQUIRED BY THE LAWS OF SHAKESPEARE

1.1 Conscientious response-ability is a duty of care owed to oneself and others

10. The duty to act response-ably toward oneself and toward others is canonical normative principle underlying the Laws of Shakespeare. This foundational obligation to reflect and, ultimately and most importantly, to act in accordance with one's capacity is the Shakespearean norm that makes morality, law and community life possible. The narrative arc of *Hamlet* expresses this specifically as Hamlet struggles with ideas of morality and normative behaviour, and upon their effect on his decision to act, as well as the implications of inaction. Even Hamlet's contemplation of suicide, "To be or not to be?" privileges action "to take arms against a sea of troubles" over inaction "to suffer the slings and arrows of outrageous fortune." At this point, Hamlet recognizes his own flawed behaviour – that "the native hue of resolution is sicklied o'er with the pale cast of thought." The principle of conscientious action, however, is fulfilled at the play's conclusion: Hamlet, finally able to act conscientiously and to enact his responsibility to avenge his father's death, must face death to do so. It is only at this point, when he is ready to die in order to fulfill his conscientious response-ability, that Hamlet becomes a truly living, participating, adult member of society. His explanation to Horatio lies at the very core of the Laws of Shakespeare: "If it be now, 'tis not to come. If it be not to come, it will be now. If it be not now, yet it will come. The readiness is all." We will die, then, and lose the ability to act. Our responsibility in life is, therefore, to reflect and then to act conscientiously. The failure to do so constitutes a failure to participate fully in our communities and in our own lives. The Laws of Shakespeare must be founded on this core, canonical commitment, for the principle of conscientious and response-able action does not simply render actions of a particular value: it is the principle that defines our duties to others and ourselves and, in so doing, makes us human. Indeed, Shakespeare's

tragedies as a whole, according to Manderson J. of this Court, “address the *obligations* that define our relationship to others and ourselves.”

Hamlet III i 58-92, V ii 158-160.

Desmond Manderson, *Proximity and the soul of the law* (forthcoming, 2005; excerpted in W. Adams, D. Jutras & S. Van Praagh, eds., *PRV3-200: Advanced Common Law Obligations – Cases Volume II*, Montreal: McGill University Faculty of Law).

Attorney General of Canada v. Pete Pears, Ben Britten & Others, [20004] 2 C. of Sh.1; (2004) 49 McGill L.J. 482 at para. 7 [*Pears and Britten*].

11. *King Lear* affirms the canonical import of the principle of conscientious responsibility in the Laws of Shakespeare. This principle requires an individual to stand up and be counted, at times at great risk to oneself. However much Cordelia may have suffered by her banishment, and however much she desired an individual life of her own, she nevertheless returns from France to save her father and in so doing does the very thing she vowed she would not do: she risks her marriage and her life because of her sisters’ intolerable treatment of Lear. Edgar, Kent, and the Fool manifest in *King Lear* the same courage in the face of a seemingly indifferent universe. Contrast their courageous conduct with that of Edmund, Goneril, and Regan, who embody in *King Lear* the antithetical principle of “anarchic opportunism” and are consequently struck down by their own hands for their heartless self-sufficiency.

King Lear IV iv.

David Bevington, “Tragedy in Shakespeare’s career” in Claire McEachern, ed., *Cambridge Companion to Shakespearean Tragedy* (Cambridge, UK: Cambridge University Press, 2002) at 64-65.

1.2 Conscientious response-ability is defined by the need and vulnerability of the other person measured against the capacity of the individual to reflect rationally and respond response-ably

12. *Hamlet* stands for the proposition that an individual’s accountability to the principle of conscientious response-ability (to oneself and to others) is measured by the individual’s capacity to reflect rationally and respond accordingly. Hamlet recognizes his

capacity for conscientious response-ability has been flawed – “I am very sorry, good Horatio/That to Laertes I forgot myself” and explains to Laertes that this capacity has been denied him through his madness and grief, explaining “If Hamlet from himself be ta’en away,/And when he’s not himself does wrong Laertes/Then Hamlet does it not, Hamlet denies it.”

Hamlet V ii 171-173.

1.3 Those who ultimately act and show mercy are forgiven

13. The canonical importance of action in the Laws of Shakespeare is manifested by the forgiveness and mercy granted to those who, notwithstanding their difficulty in doing so, ultimately act. Hamlet and Laertes, for example, exchange forgiveness, and Hamlet dies at peace. Both the repentant Lear and Gloucester are forgiven by their wronged children. Othello begs and receives forgiveness from his wronged friend, Cassio. As importantly, these characters are granted mercy by the audience. The audience has seen Othello kill his wife, but recognizes that he did indeed “love not wisely, but too well” and takes into account his honesty, his desire for Lodovico “to speak of me as I am”: it is Iago for whom they desire punishment. Contrast these characters with the unforgiving Timon who, not unlike the equally unforgiving Shylock, dies alone, making “his everlasting mansion/Upon the beached verge of salt flood,/Who once a day with his embossed froth,/The turbulent surge shall cover.”

Hamlet V ii 163-198.

King Lear IV vii.

Othello V ii 351, 353.

Timon of Athens, V ii 100-103.

Merchant of Venice IV i.

2. THE PRINCIPLE OF CONSCIENTIOUS RESPONSE-ABILITY EXCULPATES GABRIEL’S ACTIONS

2.1 Gabriel was incapable of acting response-ably toward Jean

14. Hamlet excuses his violent actions toward Laertes as a product of his madness and grief, explaining that: “If Hamlet from himself be ta’en away/And when he’s not himself does wrong Laertes/Then Hamlet does it not”

Hamlet Vii 171-3.

15. Lear is represented as culpable only for those actions committed *before* his madness. Indeed his madness renders him pathetic, “A poor, infirm, weak and despised old man,” despite it being a consequence of his own actions.

King Lear (conflated text) III ii 19.

16. Madness and drunkenness are comparable examples of involuntary incapacity to reflect rationally and thus to act responsibly – the Laws of Shakespeare recognize mental incapacity as extenuating of responsibility. Because he involuntarily became inebriated, and because Gabriel was enveloped in passionate rage due to the volatile mix of his inebriation and his intense argument with his close friend Jean, he was incapable of acting response-ably toward her.

2.2 Response-able action must be judged in context

17. Moral and legal responsibility cannot be judged independently of the ongoing relationship between the two friends: to represent the relationship synchronically is to skew the Court’s perception. Hamlet’s abuse of Ophelia (verbal abuse in the text, but frequently physical abuse in performance) leads Claudius, as witness, to doubt Hamlet’s love. It is only the privileged diachronic representation of the relationship offered to the audience that allows full understanding of Hamlet’s apparent violence as emanating from a complex and impassioned human relationship. The incident between Jean and Gabriel is influenced – even produced – by the close nature of their relationship as friends. Accordingly, Gabriel, under these circumstances, was incapable of acting response-ably toward Jean.

Hamlet III i 91 – 140.

18. Close relationships between men and women, moreover, are consistently represented by Shakespeare as problematic and, frequently, as combative. That men and women have roles of different types is described most specifically in Katherine’s speech in *The Taming of The Shrew* – it is a masculine duty to perform “painful labour both by

sea and land,” while Katherine is “ashamed that women are so simple/ To offer war where they should kneel for peace.” While the Laws of Shakespeare do not refute the equality of men and women, they nonetheless allot them specific roles. Jean’s attempt to wrest control of the boat from Gabriel should therefore be recognized as unjustly provocative, rendering Gabriel incapable of acting response-ably toward her.

The Taming of The Shrew V ii 153, 165-66.

2.3 Jean exacerbated Gabriel’s incapacity to act response-ably

19. Jean’s agreement to Gabriel’s suggestion of sailing after they had commenced drinking placed the already incapacitated – if not yet fully inebriated – Gabriel in direct danger. Simultaneously, Jean’s acceptance of the suggestion to go sailing was, not unlike Antigonus’s ultimately fatal acceptance of Leontes’s orders in *The Winter’s Tale*, a failure on her part to fulfill her duty of responsibility to herself. This is not to say that her action in boarding the boat was a conscious acceptance of risk. It was rather a failure to reflect and thus to exercise her own *conscientious capacity of response-able action*.

The Winter’s Tale III iii.

2.4 Because Gabriel was incapable of acting response-ably toward Jean, he is deserving of the Court’s mercy

20. The Court of Shakespeare’s judgment in *Re Attorney General for Canada; ex parte Heinrich* accepted that the arguments based on Portia’s speech in *The Merchant of Venice* showed that “mercy is essentially positioned as a consequence of justice and not a substitute for it” Mercy was not appropriate for Heinrich: his failure to disclose or show remorse for his crimes precluded the notion of merciful justice. Mercy for Gabriel, by contrast, is an entirely appropriate application of justice: Gabriel has at no point attempted to deny the facts of this case, nor has he tried to portray the events in a light more flattering to himself. He cannot be judged as one who has chosen to act without responsibility, for it has been clearly shown that he did not have such a choice – he was

incapable of making it. Hence the consequence of justice in this case should, according to precedent, be mercy.

Re Attorney General for Canada; ex parte Heinrich, [2003] C. of Sh. 1 at per Manderson J. [*Heinrich's Case*].
The Merchant of Venice IV i 179–212.

21. Isabella's plea for mercy for Angelo in *Measure for Measure* is rooted in the idea that "Thoughts are no subjects/ Intentions but merely thoughts," and thus that one cannot be denied mercy when the crime that is being punished exists in thought only. This is despite her belief at this point that Angelo has enacted his intentions, and throws into sharp relief the facts of the instant case: Gabriel intends no crime at all, and while the consequences of his actions are tragic, he cannot own those actions when the *conscientious capacity for response-able action* has been denied him by his involuntary incapacity. If both Angelo and Claudio are granted mercy after the breaking law in a cognizant and intentional manner, then Gabriel's right to mercy is unequivocal.

Measure for Measure, V i 445-46.

3. THE PRINCIPLE OF CONSCIENTIOUS RESPONSE-ABILITY INculpATES CHRIS'S INACTION

3.1 Chris was capable of acting response-ably toward herself and her close friends but breached this duty

22. Chris's duty to act is at the heart of the principle of *conscientious capacity*. She is aware of the need for aid, and of her ability to provide it, and her failure to do so is therefore not passivity, but a conscious decision to neither offer help directly nor to seek help elsewhere. Chris's inaction directly contravenes the Laws of Shakespeare as expressed by the entire narrative arc of *Hamlet*: that while consideration of correct behaviour is necessary, it is only through action that we participate in society and thus in life. If "All the world's a stage," then Chris has decided to remain in the audience.

Hamlet
As You Like It II vii 138.

23. To view Chris as an uninvolved bystander is to erroneously view the situation synchronically: Chris's duty of care to both Jean and Gabriel arises from a close

relationship that extends beyond the isolated moment of danger and is founded upon an existing and ongoing understanding of mutual support. The value of friendship in Shakespeare is amply demonstrated in *The Winter's Tale*, where Shakespeare privileges the wisdom of Paulina's loyalty (to Hermione as her friend) over that of Antigonus (to Leontes as his king).

24. Chris's inaction has no basis in conscientious reasoning. While Isabella also chooses in *Measure for Measure* not to save a life, her decision is an active one of conscientious responsibility: it is based in her belief that the life of the immortal soul is of greater importance than that of the mortal body. Thus Isabella actively chooses to allow her brother the possibility of salvation, while Chris chooses to negate her presence at the scene, even her very existence as human and social being.

Measure for Measure III i 84–91.

3.2 Chris was not rendered incapable of acting response-ably toward Jean and Gabriel because of her fear of sharks

25. Chris's potential actions were not limited to those that required entering the water herself. Her failure to go or call for help elsewhere cannot be explicated in any way by her fear of sharks. Chris failed not only to act, however, but to reflect rationally – given the palpable bloom of blood surrounding Jean in the water over a lengthy period of time attended by an absence of sharks who, it is well known, are attracted by blood, Chris's inaction cannot even be explained, much less justified, in terms of fear.

26. The normative principle of *conscientious capacity to act response-ably* as derived from the Laws of Shakespeare specifically precludes fear as a morally (or legally) viable excuse for forbearance. Hamlet remarks that “conscience does make cowards of us all.” Hamlet achieves his ultimate redemption only when he understands that in order to be truly alive, one must accept the inevitability of death. At the very heart of the Shakespearean canon is Hamlet's insight “If it be not now, yet it will come. The readiness is all.” It is this principle – the ultimate necessity of action – that lies at the very foundation of the Laws of Shakespeare and that strikes to the heart of Chris's inaction:

her fear does not prevent her from acting. Rather, Chris's inaction must be the result of her unwillingness to accept the responsibilities of rational reflection and response-able conduct that make up what it means to be fully alive as a social being. It is Chris's selfish, anarchic atomism that prevents her from recognizing her responsibility to, and ultimate dependence on, the other that explains her immoral and illegal inaction on the beach. As Manderson J. remarks in *Pears and Britten*, "If *Heinrich's* case told us something about how identity gives birth to responsibilities, *Pears and Britten* tells us something about how responsibility gives birth to identity." Obligation and being, which is instantiated and reproduced through actions, are one.

Hamlet III i 85, V ii 160.

King Lear

Pears and Britten, supra, at para. 46 [emphasis in original].

3.3 Because Chris failed to act in accord with her capacity for response-able action, she is undeserving of the Court's mercy

27. The Court of Shakespeare views mercy as a "consequence of justice": Chris's choice not to help her companions and to allow both their lives to remain at risk does not allow the Court any opportunity to grant her mercy; indeed, it is submitted that Chris's unwillingness to show any mercy toward her close friends independently compels the Court to withhold mercy on this very ground. Her ability to respond is unquestionable, and there is no valid reason that mercy should be granted in light of her choice to absent herself from participation in the events of the day in question.

Heinrich's Case, supra, at 31.

Merchant of Venice IV i.

4. THE PRINCIPLE OF CONSCIENTIOUS RESPONSE-ABILITY IS AT ONCE MORAL AND LEGAL

4.1 Our response-ability toward others is a duty, not a choice

28. As Manderson J. of this Court ruled in *Pears and Britten*, "Our responsibility for others, which proceeds from friendship and faces, is not an exchange and is never guaranteed." Consequently, we must each rely on others to act toward us in good faith, as Jean and Gabriel relied, erroneously it turns out, on their mutual friend Chris. But rely we

must, for our response-ability to ourselves and to others is founded upon the ineluctable indebtedness each of us owes to the Other as found in the inescapably – be one on land or at sea – institutional patterns of conduct recognized by the Laws of Shakespeare.

Pears and Britten, supra, at paras. 34, 39 per Manderson J.

29. Following Yachin’s reasons in *Pears and Britten*, this duty is based on “Shakespeare’s ideal of the dignity of *communities* and on the relative autonomy of ... ‘normative orders,’ which derive their legitimacy from the communities from which they emerge.” Our duty of *conscientious response-ability* toward others, therefore, is at once moral and legal. It is not *beyond* the law, but rather *before* it – it is among the fundamental norms that make law, and thus community life, possible. Accordingly, this duty demands legal recognition and enforcement by the Court of Shakespeare.

Pears and Britten, supra, at para. 55 per Yachnin J [emphasis in original].
Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” (1958) 71 Harv. L. Rev. 630 at 645.

4.2 It is a duty, not to be followed blindly, but to be exercised conscientiously

30. Granting the importance of obedience as a fundamental normative principle underlying the Laws of Shakespeare, the practice of obedience should nonetheless be thoughtful. The legal duty of *conscientious response-ability* toward others, therefore, is not submitted to this Court as the kind of law given arbitrarily by the Duke, applied automatically by Angelo, and accepted absent reflection by Claudio. Nor does this principle recommend, much less command, the thoughtless obedience of Antigonus in *The Winter’s Tale*. Rather, as the submitted description of the duty suggests, it is one of action based on reflection in accordance with one’s capacity to both reflect and act; reflective action is the duty; capacity to reflect and act is the measure of accountability to that duty (and thus to oneself and others).

Troilus and Cressida I iii 99-101.
Measure for Measure
The Winter’s Tale III iii.
Paul Yachnin, “Shakespeare and the Idea of Obedience: Gonzalo in *The Tempest*” (1991) 24(2) Mosaic 1.

4.3 The duty is to be judged contextually on a case-by-case basis

31. Nor is it submitted that this duty ought to be formulated and applied by this Court as a kind of codal, statutory injunction admitting only of strict interpretation. Rather, it is submitted that the Court of Shakespeare ought to determine the applicability and scope of the duty by way of contextual analysis on a case-by-case basis. It is submitted that, in the instant case, the relevant contextual variables include (a) the close nexus of friendship as a social institution governing the relations between Gabriel, Jean, and Chris; (b) Gabriel's involuntary incapacity to act response-ably toward Jean; (c) the explosive and brutal *actions* that may at times issue from the close but yet fragile bonds of friendship when it is tested; (d) Jean's contributorily negligent exacerbation of Gabriel's incapacity; (e) Chris's capacity for rational conscientious response-able action; and (f) Chris's inexcusable inaction and lack of mercy toward her close friends. In other cases that come before this Court, however, different variables may emerge as determinative. At a level of abstraction lower than that of a codal provision intended to cover the universe of all possible predicaments that may arise in private relations, the principle of *conscientious response-ability* derived from the Laws of Shakespeare, it is submitted, is one that may serve the Court well in the future in defining the nature and scope of our obligation to act response-ably toward ourselves and others.

5. THE PRINCIPLE OF CONSCIENTIOUS RESPONSE-ABILITY MUST BE ENFORCED

5.1 Legal recognition and enforcement of the duty of conscientious response-ability is consistent with the Court of Shakespeare's jurisprudence

32. If the Laws of Shakespeare are to be respected and taken seriously as contributing to the ongoing evolution of western legal culture, then the fundamental legal principles undergirding individual and social responsibility recognized by Shakespeare ought to be applied in the twenty-first century so as to secure justice for the innocent and the culpable alike – the maxim of *conscientious response-ability* has as much purchase as a criterion

of at once moral and legal judgment in the Law of Shakespeare as it has for us today. The Court of Shakespeare's adoption of the "living tree" interpretive analogy supports this claim.

Heinrich Case, supra, at 31 per Manderson J.

Pears and Britten, supra, at para. 10 per Manderson J.

McCulloch v. Maryland, 4 Wheaton 316 (1819) (United States Supreme Court)

PART IV – ORDER SOUGHT

33. The defendant/applicants request respectfully that the Court of Shakespeare, McGill Appellate Moot Court Division, issue a declaration ruling Gabriel Pederson not legally responsible for his actions and holding Chris Vidaloca jointly and severally liable for breaching her duty of care toward Jean du Parcq.

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Montréal, 10 March 2005

PART V – AUTHORITIES

Codex, Institutes, Digest

As You Like It
Hamlet
King Lear
Measure for Measure
Othello
The Merchant of Venice
The Taming of the Shrew
The Tempest
The Winter's Tale
Timon of Athens
Troilus and Cressida

Jurisprudence

Re Attorney General for Canada; ex parte Heinrich, [2003] 1 C. of Sh. 1.

Attorney General of Canada v. Pete Pears, Ben Britten & Others, [2004] 2 C. of Sh. 1;
 (2004) 49 McGill L.J. 482.

Doctrine

Bevington, David. “Tragedy in Shakespeare’s career” in Claire McEachern, ed., *The Cambridge Companion to Shakespearean Tragedy* (Cambridge, UK: Cambridge University Press, 2002), 50-68.

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Manderson, Desmond. *Proximity and the soul of the law*. Forthcoming, 2005; excerpted in W. Adams, D. Jutras & S. Van Praagh, eds., *PRV3-200: Advanced Common Law Obligations – Cases Volume II* (Montreal: McGill University Faculty of Law) 105-114.

Yachnin, Paul. “Shakespeare and the Idea of Obedience: Gonzalo in *The Tempest*” (1991) 24(2) Mosaic 1.

Foreign Jurisprudence

McCulloch v. Maryland, 4 Wheaton 316 (1819) (United States Supreme Court).