

IN THE COURT OF SHAKESPEARE

BETWEEN:

GABRIEL PEDERSEN

Applicant

– and –

JEAN DU PARCQ

Respondent

FACTUM OF THE APPELLANT

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Montréal, March 10, 2005

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I. Facts

1. Gabriel, Jean and Chris, “three close friends”,¹ went “on a camping holiday” together for the weekend. The weekend was an opportunity for the three of them to relax, drink, and get away from their usual routines. One afternoon, the three friends were sharing a drink on the beach. Gabriel, already intoxicated, invited his two companions onto his boat. Jean eagerly accepted Gabriel’s invitation. Chris preferred to stay by herself and let her friends go out without her. She remained on the beach, watching the boat.

2. Gabriel and Jean continued to drink on the boat. Gabriel drank quickly and heavily, and became so intoxicated that he lost his excellent sailing abilities as well as his usual *sang froid*. Jean, somewhat less inebriated, decided that she had better take control of the boat. She managed to steer the boat shoreward. Gabriel, however, was insulted at Jean’s lack of confidence in him, and “an argument broke out”. Gabriel got more and more enraged, and finally hit Jean. As a result of this altercation, Jean fell overboard and Gabriel “collapsed insensibly”. He lay unconscious in the bottom of the boat.

3. Jean was drowning and bleeding in the water. There was no help for her from the boat, as its only occupant was incapacitated. She began to “signal frantically” so that someone could see her distress and help her.

4. Chris, who had been witness to this entire scene as both the boat and the drowning Jean were “easily visible from shore”, sat watching her friend drown. Chris chose not to respond in any way. She was afraid of going in the water because of her “fear of sharks.”

¹ All passages in quotations in this statement of facts are particularly relevant quotations taken from the statement of agreed facts.

She tried to no other means of bringing succour to her friend: she did not call for help, nor did she attempt to throw out a rope or some other helpful object to Jean.

5. Two facts contributed to the gravity of Jean's injury. The fall on its own would have resulted in transient injury. However, Jean's prolonged deprivation of oxygen caused severe and permanent brain damage. It was only because "another boat happened by" fortuitously that Jean survived at all.

I. Issues

1. Gabriel owes reparations to Jean, not to the state. He should be held civilly liable. He should not be held criminally liable.
2. Chris also owes reparations to Jean.
3. Chris should be held jointly liable with Gabriel.

II. Arguments

A. Gabriel

1. "Three Close Friends...": Friendship often requires forgiveness.

6. Civil liability is the law of interpersonal relationships – it demands that each one be accountable to her neighbour. Criminal liability is the law of abstract responsibility – the conceptual State metes out its punishment, claiming that the individual owes *it* a debt.

7. In Shakespeare, people often do horrible things to those closest to them: Leontes tries to kill first his best friend, and then his wife. King Lear banishes his most beloved daughter, for refusing to lie to him. Hamlet schemes against many of the people he knows, and kills some of them. In all of these plays, the wrongdoer owes reparations to the individual he has harmed, and not towards some broader collective.

The Winter's Tale 1.1.20-30, 1.2.61-7

Hamlet 5.2.312-13, 325-48

King Lear 1.1.107-118

8. The application of this law to the case before us leads to a clear result: Gabriel

owes a debt to Jean. He must work to gain her forgiveness. He does not, however, owe a duty to anybody other than Jean. He should be held civilly, but not criminally, liable.

9. In *The Winter's Tale*, the committed friendship between the two kings is demonstrated through their alternating roles as host and guest. Gabriel invites Jean and Chris into his boat in the same spirit of hospitality that is privileged in the play. The first act of *The Winter's Tale* shows how love relationships like friendship and marriage can be compromised by rash acts. However, the sanctity of these bonds is recognized by the victims, who are willing to forgive the aggressor. Although Leontes commits a grave error by succumbing to a fear of cuckoldry, his relationships with both Polixenes and Hermione can be recuperated. Forgiveness is bestowed individually, by one person upon another. In having "preserved" herself for the sixteen years of her daughter's upbringing, Hermione shows that she believes that familial bonds are resilient. She shows a willingness to forgive her husband once she finds him sane again, and he has restored her daughter to her.

The Winter's Tale 5.3.121-8

10. Fostering and maintaining personal relationships is of the utmost importance; it warrants divine and human attention. Camillo explains this, when he says: "The heavens continue their loves!" The law of Shakespeare requires that individuals be allowed the opportunity to rebuild their broken relationships. Holding Gabriel criminally liable would preclude Gabriel and Jean from engaging in that process.

The Winter's Tale 1.1.30

11. Once Hermione and Polixenes forgive Leontes, he is whole again. He pays the personal debts he owes. He owes no other; he has no abstract responsibility to any concept, either the Oracle in *The Winter's Tale* or to any state, such as the one that seeks to exact justice from Gabriel.

2. “On a Camping Holiday”: The Festive Outdoor Setting Creates Special Obligations between Gabriel, Chris and Jean.

12. The camping holiday situates the three friends in a pastoral scene, where they have agreed to retreat into nature and therefore into a greater commitment to one another. There are only three of them in a nature reserve, so their duty to protect one another and think of each other's needs is greater. As on the stormy heath of *King Lear*, the sublime in nature often makes us recognize our close connections with others. Lear demonstrates a new-found ability to put others first.

King Lear 3.4.23-36

13. Furthermore, on a camping holiday, as in the sheep-shearing holiday of *The Winter's Tale*, community is celebrated through participation in communal activities (Autolycus' balladry, for example), and carousal (as in the Old Shepherd's advice to Perdita, the Mistress of the Feast). Perdita is instructed in the tradition of quenching her thirst with repeated toasts to her guests.

The Winter's Tale 4.3.1-21, 4.4.55-70

14. Under Shakespearean law, a retreat into nature, such as a camping trip, is a time that is specially suited to changing behaviour. It requires that everyone present should have a good time, even to excess. When Gabriel started drinking that afternoon, he did so without worrying about the consequences, in the same manner as Perdita was instructed to. He gave himself over to the festive nature of the weekend. Especially after

he took on the role of host, when he invited his two friends onto his boat, he had a responsibility to be festive. He drank too much. But drinking too much was what the occasion required. Therefore, Gabriel's drunkenness is not in itself blameworthy.

3. "An Argument Broke Out...": Mistakes Made in Altered States are less Blameworthy.

15. It has now been established that Gabriel was both extremely and felicitously drunk. His drunkenness caused him to in some sense become a different person, as drunkenness often does. Drunkenness acted on his brain as a sort of madness.

16. Shakespearean characters are vulnerable to various kinds of madness. Madness is often directly responsible for their most violent and harmful actions. The plays that guide our jurisprudence provide instruction on how we should respond to mistakes born of mental instability.

17. Lear's banishment of Cordelia and Kent is due to his mental illness. His compromised state of mind is made evident by his language. He is devoted to his own rage. Leontes' madness is likewise proven through his frantic, repetitive words, and it is this madness that leads to his homicidal impulses. It can be argued that some of Hamlet's other crimes are committed sanely, but it is definitely in passionate and confused rage that he kills Polonius.

King Lear 1.1.11-27, *The Winter's Tale* 1.2.281-95

18. These men's crimes of madness are forgivable. They receive special treatment because of their mental disorders. Hermione expresses the need to think differently of different men's crimes. A man who has previously proven himself good must be given the benefit of the doubt, and we must consider the possibility that he has simply made a rash mistake.

Leontes:She's an adulteress!

Hermione: Should a villain say so,

The most replenished villain in the world,

He were as much more villain—you, my lord,

Do but mistake.

The Winter's Tale 2.1.78-81

19. The rule that governs these plays is that people may do terrible things, but when they are not in their right minds, they cannot be held fully accountable. It would, in fact, be unjust to hold Lear accountable for his madness; or Hamlet for his. Human empathy dictates that the audience will forgive these mistakes. What governs the plays must also govern our client's fate: Gabriel was not in his right mind when he hit his friend. His actions cannot be judged in the same light as if they had been committed by a rational actor. He must be absolved of the criminal responsibility he would otherwise bear.

4. “Collapsed Insensibly...”: The Disappearance of Gabriel's Agency

20. When a character disappears, either physically or mentally, from the narrative, a deputy or advocate for that character must emerge. These secondary characters are expected to speak for the sane and good-thinking aspects of those who have departed from their usual performative roles. It is incumbent upon surrounding family and friends to pick up the burden of one who has gone mad, and fill the void left by the departure of that rational actor.

21. To fail in one's role as a deputy is an error that is less forgivable than the initial abdication of responsibility. When Lear exiles Cordelia as a representative of his own sanity and love, he departs from his own good sense. Kent steps in to advocate for the

King he has always known and respected, even though it is risky to do so. After his own exile, Kent adopts a disguise that will allow him to administer good sense to his king. Kent is fulfilling the role that he knows he must. He shows loyalty and endurance by “shak[ing] the superflux” of insight and compassion to his king.

King Lear 1.1.146-54, 1.4.1-7

22. In *Measure for Measure*, the Duke’s retreat from his position clearly necessitates the emergence of a deputy, and he appoints one. Tragedy threatens to ensue when Angelo fails to represent the good parts of Vincentio’s character as a ruler. Because of his error in judgement, Isabella is forced to step in, “assay[ing] the power” she has. In her plea to Angelo, she has not only to advocate for her brother, but also to argue for a specific approach to rule.

Measure for Measure 1.4.50-71, 76, 2.2.57-80

23. In *Hamlet*, friendship is shown to be a bond that sometimes requires its beneficiaries to perform difficult tasks. Hamlet asks Horatio to “Absent [himself] from felicity awhile,” and to “draw [his] breath in pain” for Hamlet’s sake. Horatio shows himself to be a true friend when he takes on the burden of telling Hamlet’s tragic story.

Hamlet 5.2.300-301, 344

24. Sometimes people fail, and those around them must not only forgive their failure, but also help them get through it. It is part of communal responsibility, which again, should have been particularly present to Gabriel, Chris and Jean on that weekend. Gabriel collapsed immediately after striking Jean. Therefore, he was unable to do anything to repair the grievous harm he had caused. There was only one person left who had any

power to save her friend's life, and salvage the peaceful weekend holiday. This brings us to Chris's responsibility.

B. Chris

1. "Signal Frantically": Chris had the Responsibility to Answer a Call for Help.

25. In Shakespeare, characters who have been endangered by the rash acts of those in power, as Jean was by Gabriel, often signal for rescue. If a character urgently cries out for help, then those around her must answer the call. Failing to respond causes tragedies.

26. In *Measure for Measure*, Lucio signals to Isabella on behalf of her imprisoned brother. She, in turn, adopts her role as his advocate in good faith. Later, Isabella needs to be represented in a much different way. Isabella falls to her knees at Mariana's desperate request, "take my part." Mariana answers Isabella's desperate plea and acts on her behalf.

Measure for Measure 1.4.85-9, 4.1.68, 5.1.431, 438-55

27. The words and actions of her father, brother and lover compromise Ophelia's welfare. She is in desperate circumstances. Her plea for medicinal treatment for the "rotten" state of Denmark is a frantic signal. She is in imminent danger. Soon after she distributes her fennel, columbines and rue, she is destined for a watery death. The tragedy of Ophelia's story is that no one answers her call for help in time. Gertrude responds too late by strewing "sweets for the sweet" over Ophelia's grave.

Hamlet 4.5.176-85, 5.1.233

28. Chris chose to make herself an actor in a tragedy, rather than a comedy, by callously ignoring Jean's call for help. Jean signalled, and Chris sat idly by. Isabella attempts to save Claudio's life. She finds the cost too great to herself, and falters. Chris

did not even make any initial attempt, did not stick her big toe in the water. She did not see whether there was anybody nearby who might be a more courageous swimmer than herself. Chris, like Gertrude, made no response at all, watching while her friend suffered irreparable brain damage.

2. “Easily visible from shore...”: Chris’s Privileged Perspective

29. Some people have greater power than others, and it is particularly incumbent upon those with special resources to use them for the good of all. In *Measure for Measure*, the Duke Vincentio, is the only character with complete information. He spies on everyone, finding out all of their secrets. It is because of his unique perspective that he is the only one who has the power to save the day. Vincentio acts slowly, which causes unnecessary harm, but he does orchestrate a happy resolution before it is too late. Paulina has a privileged perspective because of her special connection to the Oracle, and also because of her own common sense. She is the only one with the power to redress the wrongs Leontes has committed, and she puts all her energy into making right his mistakes.

Measure for Measure 4.2.153-61, 4.5.1-10, 5.1.528-42

The Winter’s Tale 5.1.34-49, 94-7

30. Of the three people present, Chris was the only one with any resources to alter the course of events. Gabriel and Jean were both incapacitated. Chris, however, was in full command of her physical and mental health, and had a view of the tragic scene as it unfolded, which gave her all the necessary information to realize that her friend required her help. Chris was passive, as Gertrude was in the face of Ophelia’s death. If Vincentio had been governed by the same character as Chris, *Measure for Measure* would have

been transformed into a tragedy. Chris's actions are morally reprehensible, because she knew that she was the only person who could stop a bad situation from continuing, and she did nothing.

3. "Fear of Sharks...": Chris's fear cannot answer for her callous inaction when her friend was drowning.

31. On a superficial reading, *The Winter's Tale* may seem to contain a dark message of murderous animals. However, the bear does not have homicidal impulses towards Antigonus. Antigonus is eaten by a bear because he must be repaid for his actions. The bear is punishment for his cowardice. He is not brave enough to disobey the king, and instead does something that he knows is terribly wrong. That is why he gets eaten by the bear. He sacrifices Perdita for the sake of his own selfish desire to avoid the wrath of the king. Similarly, Chris sacrificed Jean for the sake of her own safety. In Shakespearean logic, animals don't hurt people who are in the midst of performing good deeds. Because of this, Chris had more to fear from sharks by staying on shore, than she would have if she had braved her fear in order to help Jean.

The Winter's Tale 3.3.26-35, 50-57.1

32. We know that good people have nothing to fear from animals because of the virtuous Old Shepherd's lack of any fear of bears. The Shepherd, when he hears of the mauling, immediately declares his wish to have been present, so he could have intervened. The Shepherd is a vehicle for redemption within *The Winter's Tale*. He is unafraid of a bear, even though it is unrealistic for the audience to think he could have been of much help to Antigonus. The Shepherd is so selfless that he wants to help even if success is only a slight possibility.

The Winter's Tale 3.3.103-4

33. In the words of Manderson J., concurring in *Ben Britten*, “We look to *The Winter’s Tale* for guidance on the meaning of ethics.... [The play is] about the nature of our jurisprudence itself.” The Shepherd is an example of right ethics, and he is unafraid. Antigonus is an example of bad ethics, and he has reason to fear the bears. Therefore, the moral lesson of *The Winter’s Tale* is, do not let fear of animals stop you from doing what is right (but maybe let it make you think twice about doing wrong).

Attorney General of Canada v Pete Pears, Ben Britten & Ors. [2004] 2 C. of Sh. 1; Manderson J concurring.

34. Chris was frightened. Whether or not her fear was reasonable, it was subjectively hers. Fear is not contemptible in itself, but it is not an excuse for avoiding one’s responsibilities, especially those of friendship.

4. “Saw the drowning woman...”: To see a drowning woman is to help her.

35. In Shakespeare, no one ever sees a drowning woman. One can either a) save a drowning woman, or b) find a dead woman. The audience knows that the second-hand report of Ophelia’s death, as related by Gertrude, is a fiction. Its double narrative frame only emphasizes its fictionality. Were it a true account, it would be the story of a man standing idly by while a young woman goes to an unnecessary death. He would have seen Ophelia flailing helplessly, and signalling for help. Thus, the very manner of the narrative’s relation attests to its own falsehood.

Hamlet 4.7.138-59

36. The audience learns from the grave-diggers’ discussion that Ophelia’s death is obviously a suicide. Yet the story Gertrude has just told gives the event a very different character. Gertrude has an interest in changing some of the events surrounding Ophelia’s

death, because it is too dishonourable for a young woman of her social class to have committed suicide. The audience sees, even before the confirmation of the grave-diggers, that Gertrude's story lacks verisimilitude.

37. The grave-diggers know that a play-by-play account of a drowning is paradoxical. They have a pseudolegal debate about the hush-up of Ophelia's unlawful death, in which their very language demonstrates the implausibility of the account presented by Gertrude.

Hamlet 5.1.1-28

38. Another reason why the report of Ophelia's death is easily recognizable as fiction, is that it is a story, told by Gertrude, of a story, told her by the witness, of an event that happened in a fiction, the play. This is in stark contrast to the events under examination in this case. Chris's witnessing of the death was no fiction, she admitted to it, in the agreed statement of facts. Her actions were a paradox and a perversion of normal human responses. The grave-diggers would react to this story with incredulity, as Chris's response was so inhumanly unfeeling as to be unbelievable.

5. "Another boat happened by...": Coincidence can transform tragedy into comedy without redeeming the initial wrongdoer.

39. Grave errors have grave consequences. But strangers can arrive to mend situations. Genre is determined by how much coincidence can do to mitigate and reverse the harm done. In tragedies, coincidences exacerbate the bad actions of central characters. In comedies, the coincidences have a redemptive power. Each genre has a type of coincidence appropriate to it. The fact that this situation did not end in the worst kind of tragedy does not absolve Chris from her responsibility towards Jean. This finding would be undesirable for all parties, as it would necessitate finding that the passing boat also absolved Gabriel from his mistake.

40. Coincidences abound. In *Measure for Measure*, it is coincidental, as far as Isabella can see, that Angelo is indebted to Mariana in the only way that can provide a resolution for the play. Mariana, as a character who is introduced after all the major threats have been posed, has the ability to fix the seemingly unfixable problem Isabella faces. She is a passing boat, come in with the purpose of mitigating the damage Angelo and the Duke have caused.

Measure for Measure 3.1.241-61, 4.1.64-8.

41. In *The Winter's Tale*, the Old Shepherd is the boat that passes by and saves Perdita, and by extension Leontes and Hermione. He is a foil to Antigonous's abandonment. A cynic might argue that the shepherd and his son are excited by the bag of gold, and by the opportunity to become "gentlemen born," but the shepherd makes it clear in these speeches that he sees the baby as a blessing on her own. The shore in *The Winter's Tale* is a nexus of abandonment and adoption. The shore of Jean, Gabriel and Chris's camping trip was a nexus of abandonment and abdication of social responsibility.

The Winter's Tale, 3.3.74, 3.3.103, 3.3.123

6. "Lengthy deprivation of oxygen": Shakespearean law decrees that every act is meaningful.

42. The saving of lives is a human business in Shakespeare. So is killing. In *Hamlet*, for example, although poison is a weapon, it is administered by human agents, and it is human agency that makes it fatal. Shakespearean drama is a realm in which every event has a meaning in relation to the protection or endangering of human life. To omit to do something is an act in itself. A play, like a fact pattern, allows for the presentation of certain facts, while leaving us with the responsibility to create meaning. Chris Vidaloca's choice to remain on shore must therefore be read as an act, and not simply as the absence

of action. Because we know about her refusal to act, we must infer some significance in that very negligence. It is not solely a consequence of Gabriel's initial act, without any meaning of its own. The meaning of Gabriel's act has already been assigned, and if no further meaning could be found for Jean's deprivation of oxygen, then it would be a superfluous event. In the logic of Shakespearean drama, no event is superfluous.

43. In Shakespeare, people keep one another alive, administering the essential human emotions that are just as vital as oxygen. Chris should have this function in her friend Jean's life. Furthermore, in Shakespeare's drama there is such a thing as an antidote. Our client's act was rash and poisonous. But there is always an antidote, a way of undoing the effects of a poison. Here the antidote was administered by a stranger.

44. There are no omissions that are not also acts. Everything happens for a reason. Everybody is responsible for how they are perceived every time they are on stage.

45. In drama, not only does every action mean something, but each action should be read as giving meaning to each other action. So what does Gabriel's action say about Chris, or vice versa? In some ways, they are identical: they each contributed to Jean's harm. But in some ways they are also opposite: Gabriel, in a passionate and drunken fit, committed a terrible act. Jean, seemingly dispassionately and rationally, failed to act, and there are terrible consequences of that failure. Those consequences are not just terrible from the point of view of Jean's injury, but for Chris as a person, too. They confirm her cold-heartedness, so that it's an inescapable fact that she will have to live with, and that will likely weaken her bonds with others. Remember that Paulina cools towards Antigonus because of his weakness. He is not wronging her, but his cowardice makes Paulina contemptuous. As readers of Shakespearean drama and fact patterns, we must be

willing to be moved by what we read, to open ourselves up to the fruitful work of the imagination, and to see this imaginative work as one of the fundamental principles of community. We read these stories with a hope that they will prevent us from committing the “crime[s] against innocence” that lead to tragedy.

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

III. Orders Sought

46. The applicant therefore respectfully requests that this honourable Court find Gabriel Pedersen not legally responsible for his actions, and find Gabriel Pedersen and Chris Vidaloca jointly and severally liable for breaching a duty of care to the plaintiff.

Myra E. Wright

Attorney for the applicant

Sylvia Rich

Attorney for the applicant

Montréal, March 10, 2005

IV. List of Authorities

Attorney General of Canada v Pete Pears, Ben Britten & Ors. [2004] 2 C. of Sh. 1

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

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