Marine Cargo Claims

Alastair Bissett-Johnson

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Reviews


In marine matters, Canada is not a maritime but a coastal power. She is also a nation dependent for a livelihood on foreign trade. Translated into terms of admiralty law, Canada's principal interests in ships is not in their ownership but in the cargoes they carry. Accordingly *Marine Cargo Claims* is a particularly apt title under which Professor Tetley has written a unique Canadian text.

His work is also unusual in several useful ways. First, in being directed to the general practitioner, accustomed or not to admiralty affairs but always short of time, it is deliberately organised to facilitate the conduct or defence of a cargo claim. This style will be especially attractive to lawyers who are only occasionally faced with an admiralty problem, but whose number must greatly increase in direct proportion to the ever rising volume of inter-modal and through transport brought about by the container revolution.

Secondly, although *Marine Cargo Claims* is a Canadian text, it is unusual in drawing very heavily on a very wide range of comparative sources. Their inclusion is not of academic interest only but of much practical use in a field of private law that governs transnational transactions in overseas trade. The subject matter demands harmonization of national development and is succumbing increasingly to international regulation. Professor Tetley has rightly perceived that on both grounds the Canadian law of carriage of goods by sea requires uniformity of national interpretation and, to his credit, the Canadian lawyer is provided with the necessary authorities and analysis by his work.

The plan of this second edition of the book follows its original form. As the author explains, (p. vii), it is based on the burden of proof that is faced in succession first by a cargo claimant, then by a shipowning defendant and in rebuttal by the claimant again. It is concerned exclusively with the distribution of that burden for the carriage of goods under ocean bills of lading. Charterparties are not discussed except to the extent a bill of lading is also present or incorporates their terms. Accordingly the work is essentially a practical study of the application of the Hague Rules and Visby Amendments.
From the table of contents this plan and scope is abundantly clear. Part I, chapters 1-5, by way of introduction to the rest of the book, discusses the application of the internationally agreed Rules and the order of proof they demand. Part II, chapters 6-11, concerns "What the Cargo Claimant Must Prove", Part III, chapters 12-21, discusses "What the Carrier Must Prove", and Part IV, chapters 22-25, treats "Counter Proof by the Claimant." Part V, chapters 26-40, picks up "Related Arguments Available to Both Partners" (should that not read "Parties"?)! It contains treatment of some elements of a typical carriage contract that are currently of most pressing concern because of their uncertainty. Examples are limitation of responsibility for the cargo before loading and after discharge, limitation of liability per package, Himalaya clauses and the like.

It is a pity there is no mention of the new Hamburg Rules. They were not settled by international convention until shortly after publication of this book, and no doubt may be several years delayed in coming into force. However their likely contents were already well-known, including to Professor Tetley who has elsewhere contributed forcefully and effectively in their formulation, and their impact will probably be felt well before the next edition of his work. The scope of the book would now plainly have to include the Hamburg Rules. At least footnote reference to their then likely existence and variance with particular Hague and Visby Rules would have been a valuable inclusion in a reference work of this character, particularly in the hands of those readers who, as general practitioners, will rely upon it because they are not used to admiralty litigation. They would then minimally be alerted to another critical source of law or argument (!) beyond the otherwise excellently detailed discussion and thorough documentation Professor Tetley has provided.

The depth and range of the book's comparative analysis is apparent throughout. It exhibits an extraordinary facility with Canadian, British, American, French and other European cases and jurisprudence. The whole study is backed up by a series of appendices that handily collect together the international Rules and the relevant national legislation of the United States, the United Kingdom, France and Canada. There is an additionally helpful set of "Summaries of National Laws" from some thirty countries particularly engaged in overseas trade and international carriage. The work ends with a copy of the Beaufort Wind Scale, a so-called
"Glossary" of admiralty terms that might have been better described as a list of author's abbreviations, and a detailed index.

Thirteen years has been too long a delay between the first and second editions of this important book. If the termination of Professor Tetley's energetic political life has provided the opportunity for this up-to-date revision of his vigorous exposition of *Marine Cargo Claims*, whatever the Quebec public may have lost the Canadian maritime community has much gained.

Hugh M. Kindred  
Faculty of Law  
Dalhousie University

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and


> If it were done when 'tis done, then 'twere well  
> It were done quickly. If the assassination  
> Could trammel up the consequence, and catch  
> With his surcease, success; that but this blow  
> Might be the be-all and the end-all here,  
> But here, upon this bank and shoal of time,  
> We'd jump the life to come. But in these cases  
> We still have judgment here; that we but teach  
> Bloody instructions, which being taught return  
> To plague th' inventor. This even-handed justice  
> Commends th' ingredients of our poisoned chalice  
> To our own lips.

*Shakespeare, Macbeth*

It is false to assume that the "[b]loody instructions" taught in Canada's prisons affect only the inmates of these institutions. The tolerance of injustice and brutality anywhere in society weakens the human fabric of that society. It is in this sense that society's "[b]loody instructions" do return to "plague the inventor." Canada needs to rethink the role of the prison system in promoting "even-handed justice".
If the average person were asked why prisons exist, he or she would likely respond that they keep the specific criminal off the streets and may deter crime generally. A few honest souls might boldly contend that criminals are put in prisons because they deserve to be there. On this latter point, it is interesting to note that there has been a renaissance of the retribution theory of punishment. However, the simple truth is that the general public has thought very little about prisons. The real rationale for prisons may be that they allow society, like the proverbial ostrich, to hide from the nasty reality of both crime and its consequences.

Cruel and Unusual and Barred From Prison attempt to bridge the gap between public perceptions of prisons and penal reality. Neither book provides a philosophical foundation for prisons. Gérard McNeil and Sharon Vance seem to accept that society has a right to punish its wayward members within "moral" limits. Claire Culhane, since she regards the law as a means of class oppression, is less likely to embrace a general right to punish. Culhane argues:

Society is based upon an unequal distribution of power and opportunity, disguising its discrimination against the poor and the powerless. It uses prisons as an instrument to create a criminal milieu that the ruling class can control. The existence of a just system of criminal justice in an unjust society remains a contradiction of terms. No society can call itself civilized as long as one section has the power to brutalize another section. Eventually this brutality infects the whole of society and turns back upon itself. An example is the high rate of marital breakdown among guards. (p. 205)

Neither book directly addresses in even a superficial fashion the basic issue of whether there is a right to punish at all, even if it is done with humanity. Leo Tolstoy expressed the dilemma well:

2. P. E. Slater, The Pursuit of Loneliness (Boston: Beacon Press, 1970) at p. 15 describes this approach as the "Toilet Assumption". He states:

Our ideas about institutionalizing the aged, psychotic, retarded, and infirm are based on a pattern of thought that we might call the Toilet Assumption — the notion that un-wanted matter, unwanted difficulties, unwanted complexities and obstacles will disappear if they are removed from our immediate field of vision. We do not connect the trash we throw from the car window with the trash in our streets, and we assume that replacing old buildings with new expensive ones will alleviate poverty in the slums. We throw the aged and psychotic into institutional holes where they cannot be seen. Our approach to social problems is to decrease their visibility: out of sight, out of mind . . .
He asked a very simple question: "Why, and by what right, do some people lock up, torment, exile, flog, and kill others, while they are themselves just like those they torment, flog and kill?" And in an answer he got deliberations as to whether or not signs of criminality could be detected by measuring the skull; what part heredity played in crime; whether immorality could be inherited; and what madness is, what degeneration is, and what temperament is; how climate, food, ignorance, imitativeness, hypnotism, or passion affect crime; what society is, what its duties are — and so on . . . , but there was no answer on the chief point: "By what right do some people punish others?" 3

A pragmatic response to this question is that society will continue to punish. Hence there would appear to be little practical value in considering whether or not there is a right to punish. However, the examination of abstract principles may be a useful guide to setting the acceptable limits of punishment. The value of abstract principles is well articulated in the following excerpt:

Our national reluctance to discuss abstract principles did comparatively little harm when there was a certain intuitive unanimity about sound fundamentals; in such circumstances a healthy moral instinct yields better results than an inadequate abstract theory. A man who knows that chicken is wholesome, as Aristotle remarks, is more likely to restore you to health than the man who knows that light meat is easily digested but does not know what kinds of meat are light. At present, however, when instinctive unanimity has disappeared, it becomes imperative to reflect upon abstract principles if we are not to submit to the casual influence of gusts of emotion. You can muddle through only with the aid of sound instincts; without them you make the muddle but you do not get through. 4

Culhane implicitly considers why society punishes by accepting the view of Jessica Mitford that all prisoners are political prisoners and that prisons should be abolished. 5 It is not clear whether Culhane feels that other forms of punishment are justified or not.

In her own book review of Cruel and Unusual, Culhane attacks McNeil and Vance for taking too narrow a view of the criminal justice system and for failing to recognize that prisons are a

microcosm of the larger society.\textsuperscript{6} It appears that the authors of \textit{Cruel and Unusual} implicitly reject Culhane's political analysis and view the prison system as an aberration in a generally humane society. However, McNeil and Vance fail to explore the basis for punishment within a humane social structure.

Both \textit{Cruel and Unusual} and \textit{Barred From Prison} recognize that the definition of crime is not a self-evident process. McNeil and Vance devote a full chapter to the need for decriminalizing the non-medical use of drugs. In some respects, this "crusade" of the authors detracts from the essential message of \textit{Cruel and Unusual}. Having stated that the criminal sanction should only be used as a last resort and that too many laws result in over-crowded prisons, an examination of the administration of the drug laws is unnecessary in the context of an exposé of prisons.

Culhane leaves no doubt that criminal conduct is defined by and for the established order.

The first essential is to recognize the class nature of the prison system, in which 95\% of prisoners are and will continue to come from the socially and economically deprived class — victims of a threatened, frightened and crisis-ridden capitalist economy — and to that extent they are political prisoners. Some prisoners realize the political nature of their imprisonment. We ought to be equally aware of the relevance of prisons to the total economic system, and how they are set up to maintain a so-called criminal population which the Third Level class has the power to abuse and control. As an ex-prisoner put it, "It's not a crime to be hungry, but it is a crime to steal. . . sometimes you don't have much choice." (p. 209)

Culhane also addresses the problem of crime causation, albeit from an ideological stance. She views criminals as victims of a corrupt and oppressive system. McNeil and Vance do not directly address the problem of crimenogenesis but do view some criminals as victims of the system.

"The Narcotic Control Act provides law enforcement officials with a weapon to suppress an undersirable subculture," Toronto sociologist Shirley J. Cook concluded in a 1969 article in \textit{The Canadian Review of Sociology and Anthropology}. The subculture in the first twenty-five years of the century had been the Chinese. In the 1060's, it had become the hippies. (p. 158)

\textsuperscript{6} Claire Culhane, "Prisons in Canada — A Basic Pillar of Society" (1979), 13 Our Generation (No. 2) 51, at 51-3; Ms. Culhane also asserts that prisons are a microcosm of society in \textit{Barred From Prison}, at 206.
In their concern for the drug offender, who is often a member of the middle class, the authors of Cruel and Unusual may have revealed an unconscious bias. More obvious victims of the criminal justice system were generally ignored not only in Cruel and Unusual but also in the MacGuigan Report, upon which the book is based. This was a point emphasized by Culhane.

Scapegoatism, and particularly its racist element, flourishes in our society, and nowhere more visibly than within our detention centres. Yet a Parliamentary Subcommittee, which sat for months listening to a stream of bitterness from Native Indian prisoners, allotted one half of one Recommendation to the Native issue:

**Recommendation 61:** At least one separate institution should be provided for youthful offenders on a selective basis. There should be at least one wilderness camp for Native peoples and other residents accustomed to life in remote areas.

A deliberate and contemptuous indifference towards Native prisoners may not have been intended. Nevertheless, this Recommendation does reflect a remarkable capacity to accept, without protest, the disaster of a race of people other than one's own. (p. 208)

A blindness to the racist aspects of the prison structure is a significant flaw in Cruel and Unusual. In her review of the book Culhane highlights the kind of facts that McNeil and Vance chose to ignore.

To a Native prisoner, racism means that registered Status and Non-status Natives comprise approximately 8% of Canada's population, but occupy 40-60% (depending on the province) of its jails and prisons. What is not as well known is that "in 1976, 54% of all Native inmates were held in maximum security as against 31% of non-Natives." Racism also means that Catholic priests, Protestant ministers, and Jewish rabbis are permitted into prisons, but not Shamans for Native Indians.8

It would be unfair to suggest that McNeil and Vance are unaware of the unequal application of the law. They recognize in Cruel and Unusual that the criminal sanction is not applied with equal force in all parts of Canada.

... But the system will do anything to keep you out of jail in the Atlantic Region. If you do go to jail, it is because you have

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8. *Supra*, note 6, at 54
committed something that even you would have to admit is a crime. Perhaps that is why Dorchester is the quietest of penitentiaries. The seething sense of injustice rampant in some of the others does not exist there. But west of the Ottawa, it is a different country, a land-mine of law.

... The criminal justice system is characterized by barely limited discretionary power. The result is justice in one place, law in another. (p. 126)

Nevertheless, even in this acknowledgement of regional discrimination in administering the criminal law, there is a blindness to racial problems. It has become almost automatic to place Blacks who enter Dorechester in the protective custody unit, ostensibly for their own protection. These Blacks may well feel a sense of injustice because of the added restrictions placed upon inmates of these units.

Culhane makes a more perceptive analysis of the role of the protective custody unit (P.C.U.) as a prison within a prison. She quotes the following excerpt from an ex-prisoner's letter:

L.R. is in PCU against his own will. When he was admitted he asked to be put into population but after being told he would be killed (Administration told him this) he consented to go into PCU — not fully realizing the implications behind being put into that environment. Since he's been put there, he repeatedly asked to be put back into population, but to no avail. You might ask, why this sudden interest — especially when I tell you I didn't know this fellow from Adam. The answer is he is not an isolated case.

There are a lot of youngsters, who upon entry, are virtually scared into PCU by the Administration. They've never done time in a pen before and when confronted by these solemn-looking people and told they will be raped, killed, etc. they check in, out of fear — not realizing that once in there they are branded by the population a "dead man" — inside and outside those walls... (p. 193)

The authors of both books agree that sex offenders and informants must be protected from the general prison population. The brutal truth of this fact was dramatized by the torture and murder of sex offenders during the Kinston Penitentiary riots in 1971. However, Cruel and Unusual also provides a useful illustration of a more positive correctional approach to sex offenders in its full chapter discussion of Oak Ridge Division at Penetanguishene, Ontario.
The contrast between the handling of sex offenders in traditional penal institutions and at Oak Ridge is vividly presented by McNeil and Vance. They highlight this contrast in the following quote from a sex offender cited in Cruel and Unusual.

"...As a parolee from Oak Ridge put it to Arnold Bruner: “When you go to the penitentiary, the best thing that can happen is that you’ll come out the way you went in. Here at Oak Ridge, it’s the worst thing that can happen.” (p. 145)

Cruel and Unusual presents a more convincing and focused picture of the injustices of life behind bars than Barred From Prison. The picture developed by McNeil and Vance is more focused because of the succinct and readable style of their book. In contrast, Culhane’s “Personal Account” is often anecdotal and relies too heavily on prison diaries, letters and personal remembrances. Cruel and Unusual is more convincing than Barred From Prison because Culhane has abandoned any pretense of objectivity and openly sides with the prisoners.

The portrayal of prison guards provides a good example of the different perspectives taken in the two books. Culhane has very few kind words for prison guards and even fewer for their union, the Public Service Alliance of Canada. She pins much of the blame for the 1976 hostage incidents in the British Columbia Penitentiary on them. By contrast, the prisoners in Barred From Prison emerge as essentially good people driven to violence by the hopelessness of their situation.

McNeil and Vance are in at least partial agreement with Culhane’s view of the prison guards. In chapter three of Cruel and Unusual the authors describe the “overtime racket” perpetrated by the Public Service Alliance of Canada allowing “guards to drive Cadillacs” (p. 30). The authors also indicate that union and guard activities precipitated the 1976 disturbances in Millhaven. There the agreement with Culhane ends.

The opening chapter of Cruel and Unusual presents a sympathetic picture of guards. Frank Newton, a guard at the British Columbia Penitentiary, lost his arm when he opened a Christmas package from an inmate, which exploded. Mr. Newton’s limb appears many times in Cruel and Unusual as a reminder that guards too are victims of the prison system. McNeil and Vance indicate even more clearly than Culhane that it is the guard on the prison range who ultimately determines the conditions of prison life. They do this not as agents of the capitalist system by because it is part of
their job.9

Prisons are "lawless" societies. This is true in spite of the fact that a tangle of Penitentiary Regulations, Commissioner's Directives, Divisional Instructions and Standing Orders attempt to regulate all aspects of an inmate's life. The problems with this tangle of rules are twofold. Firstly, the rules are largely designed to promote institutional order and, to the limited extent that they define prisoners' rights, they are largely unenforceable.10 Secondly, in the application of these rules there is a shocking lack of fairness and due process.11

While Cruel and Unusual lacks the political analysis provided in Culhane's book, the legal critique contained in the former is clearly superior. McNeil and Vance share the view of the National Parole Board eloquently expressed by Chief Justice Laskin in Mitchell v. The Queen.12 The Chief Justice made the following comments in the course of his dissenting judgment.

The plain fact is that the Board claims a tyrannical authority that I believe is without precedent among administrative agencies empowered to deal with a person's liberty. It claims an unfettered power to deal with an inmate, almost as if he were a mere puppet on a string. What standards the statute indicates are, on the Board's contentions, for it to apply according to its appreciation and without accountability to the Courts. Its word must be taken that is is acting fairly, without it being obliged to give the slightest indication of why it was moved to suspend or revoke

9. Terrence Willet, "The Fish Screw in the Canadian Penitentiary Service" (1977), 3 Queens L. J. 424, suggests that it is the guard who exercises real power in the prison system and not the upper levels of the bureaucratic stucture. Lacking direction from above, the guards perform their task in a ritualistic and unthinking manner.

10. It was held in R v. Beaver Creek (1969), 2 D.L.R. (3d) 545 (Ont. C.A.), that the penitentiary Services owes no duty to the inmate to follow them. Furthermore, in Martineau v. Matsqui Institution (1977), 74 D.L.R. (3d) 1, the Supreme Court of Canada held 5 to 4 that a "directive" of the Commissioner of Penitentiaries was not "law" and hence prison disciplinary proceedings could not be reviewed under s.28(1) of the Federal Court Act R.S.C. 1970, c. 10 (2nd Supp.). However, Martineau v. Matsqui Institution (No. 2) (1979), 30 N.R. 119 (S.C.C.) held that certiorari was available by way of s. 18 of the Federal Court Act for breach of the duty of fairness. Whether there was such breach on the merits remains to be decided.

11. Michael Jackson, "Justice Behind the Walls — A Study of the Disciplinary Process in a Canadian Penitentiary" (1974), 12 Osgoode Hall L.J. 1, provides a glimpse of the unfair application of prison rules. As one example prisoners are not even informed in advance what constitutes an offence under the prison's private criminal code even though the result of breach can be solitary confinement.

parole. All that is said to be expressed or found in the Parole Act, and is said, moreover, to be this Court's view of the Board's powers under its decision in the Howarth case.\textsuperscript{13}

The analysis of the authors of Cruel and Unusual is supported by research of the Law Reform Commission of Canada.\textsuperscript{14} Hudson Janisch suggests a contrary view. He asserts that the Supreme Court of Canada deserves at least as much blame for the unjust result in Mitchell v. The Queen\textsuperscript{15} as the national Parole Board. Janisch states:

There was no indication that the Court really sought to inform itself as to the operations of the Board. Ironically, it turns out that the Board is far more sophisticated and sensitive in its analysis of its powers and how they should be exercised than the majority of the Supreme Court of Canada whose approach, to put it at best, was simplistic. Unhappily, as Judge Clark has observed, "It is much easier to abdicate than to analyze." William R. Outerbridge, Chairman of the National Parole Board, writing some nine months after Mitchell, indicated that he, at least, retains a healthy respect for the rule of law.\textsuperscript{16}

In light of the equally simplistic approach taken by the Supreme Court of Canada in Howarth v. The National Parole Board,\textsuperscript{17} there is much to commend a division of blame. Whoever is to blame the injustices continue. Culhane chose not to explore this aspect of prison life in Barred From Prison. In fact, Culhane's book contains little legal analysis except for the comments about her personal court battles to set aside the administrative orders barring her from the British Columbia Penitentiary and Oakalla.

McNeil and Vance express much more concern in Cruel and Unusual about the erosion of the rule of law than does Culhane in Barred from Prison. This is not surprising in light of Culhane's view of law as a tool of class oppression. However, both books decry the complete lack of privacy inside prison walls.

In chapter one of Cruel and Unusual McNeil and Vance reveal that even conversations with visitors are monitored and censored by the prison administration. Both books provide a good analysis of the

\begin{itemize}
  \item \textsuperscript{13} Id., at 577
  \item \textsuperscript{14} P. Carrière and S. Silverstone, The Parole Process, A Study of the National Parole Board (Ottawa: Law Reform Commission of Canada, 1976)
  \item \textsuperscript{15} Supra, note 12
  \item \textsuperscript{16} H. Janisch, "Reviews: Administrative Law of the Seventies and Administrative Law" (1978), 4 Dal. L.J. (No. 3) 824, at 841
  \item \textsuperscript{17} [1976] 1 S.C.R. 453
\end{itemize}
special problems of women in prison and suggest that the presence of male guards provides an additional invasion of privacy.\textsuperscript{18} Culhane also discussed in \textit{Barred From Prison} the censorship of prisoners' mail both to and from the institution.\textsuperscript{19}

The authors of \textit{Cruel and Unusual} are at their best when discussing the inhumanity of solitary confinement. It is an alarming comment upon Canadian society that it continues to accept, blindly or otherwise, such degradation of the human condition.\textsuperscript{20} This point is well articulated in \textit{Cruel and Unusual}.

Dr. Richard R. Korn, another expert witness heard by the Federal Court, said conditions at British Columbia Penitentiary were comparable to those at San Quentin. That kind of solitary was described as a form of murder. Dr. Korn was executive director of the Centre for the Study of Criminal Justice at Berkeley, California.

"What I can't understand in British Columbia Penitentiary is the gratuitous cruelty, the unnecessary cruelty," Dr. Korn said. "The tininess of the cell, the threadbare character of the articles. . . ." Forcing men to sleep with their heads near the toilet under a light that burned constantly, was primitive and shocking to the United States penologist.

"You wouldn't treat animals like that. They'd die," Léonel Beaudoin said when the Subcommittee toured the "penthouse" fourteen months later . . . (p. 27)

The Federal Court case to which McNeil and Vance refer resulted in a declaration that disassociation (a euphemism for solitary confinement) as practised in the British Columbia Penitentiary was "cruel and unusual punishment".\textsuperscript{21} Mr. Justice Heald's judgment in \textit{McCann v. The Queen} contains a wealth of expert testimony on the consequences of solitary confinement. An excellent example is the following testimony of Dr. Fox, a professor of Psychology at the

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\item \textsuperscript{18} The treatment of women's prisons in both \textit{Cruel and Unusual} and \textit{Barred From Prison} is unusual in that it avoids a voyeuristic emphasis on lesbianism which according to Lee H. Bowker, \textit{Prisoner Subcultures} (Toronto: Lexington Press, 1977) at 77-92, has been overstated both as a problem and as a fact.
\item \textsuperscript{19} Pursuant to \textit{The Penitentiary Service Regulations} 1962, SOR/62-90 as amended, s.2.18, there is a clear power to censor. Some guidance on the breadth of this power is provided by the Supreme Court of Canada in \textit{Solosky v. The Queen} (1979), 30 N.R., 380 which stressed the need to balance prisoners' rights and institutional needs.
\item \textsuperscript{20} See R. Caron, \textit{Go-Boy-Memoirs Of A Life Behind Bars} (Toronto: McGraw-Hill, 1978) for a shocking first-hand account of human degradation in Canadian prisons.
\item \textsuperscript{21} \textit{McCann v. The Queen} (1976), 29 CCC (2d) 337 (F.C.T.D.)
\end{enumerate}
University of Iowa.

... When comparing psychological treatment or punishment with physical treatment or punishment, Dr. Fox said the psychological punishment was worse, that no physical punishment could approach the psychological punishment suffered by these plaintiffs. At pp. 45-6, he said: "Miller is at a place now where in fact he is very close to believing that he would prefer almost to be dead than to be exposed to it any further. Most of them prefer to die, they hang themselves rather than sustain it. That's what the suicides are about. That is what the mutilations are about... It is infinitely more cruel to keep people alive in torture than it is to kill them."

At p. 48 he said: "There is a loss of something else in these people produced by this condition which is never recoverable, and I say that with total conviction, and what is lost is the ability to love." And still referring to this "loss of ability to love", Dr. Fox said at p. 50: "On the part of us, to remove it [the ability to love] is to endanger any individual that confronts them ever again. To remove that from a person is to make them into a sub-human — it is sub-human, and to do that is to be faced with a wild beast..."22

It should be emphasized, however, that McCann v. The Queen decision is not Supreme Court of Canada authority and only applied to the specific conditions in the British Columbia Penitentiary in 1975. Furthermore, there is a more repressive side to Mr. Justice Heald’s judgment which is ignored by the authors of Cruel and Unusual. At page 374 of his judgment Mr. Justice Heald supported the right of a prison administrator to put an inmate into solitary confinement without even a prior hearing. This was justified in Mr. Justice Heald’s view because order must prevail in a community of dangerous and violent people.23

Culhane, although she undoubtedly shares the outrage of McNeil and Vance, does not convey her reaction to prisons as coherently in Barred from Prison. As an example, her description of conditions in the British Columbia Penitentiary during the 1976 riots is compelling but diffuse, because she quotes extensively from prisoners’ diaries.

22. Id., at 359-360
23. Id., at 374; William Outerbridge, Chairman of the National Parole Board, suggests that the image of the prison inmate as “dangerous and violent” is a perception perpetrated by a sensational media and it is not in accord with reality. W. Outerbridge “Public Perceptions and Penal Reality: Some Issues of Prison and Parole” (paper delivered at the Boyd Memorial Lecture, School of Social Work, University of Toronto, October 17, 1974)
As an exposé of the reality of prison life both books are worth reading. The different political stances of the authors are revealed in their recommendations for change. While McNeil and Vance call for the creation of a professional guard corp, modelled upon the R.C.M.P., and an extensive work program to combat idleness, Culhane advocates the abolition of prisons and the creation of treatment centers with supervision by a Peoples' Tribunal. Neither prescription for change is likely to be adopted.

Cruel and Unusual and Barred From Prison provide the factual foundation for an intelligent consideration of two important issues. What are the acceptable limits of punishment in a humane society? Who should set these limits of tolerance? On the first issue, Culhane implicitly rejects punishment in favour of treatment. McNeil and Vance do not appear to reject punishment per se but object to stripping prisoners of basic human rights and the protection of law. In regard to the second issue, Culhane's Peoples' Tribunal could be the appropriate agency to set the limits of tolerance. McNeil and Vance object to the limits of punishment being set by prison administrators and prison guards but place their confidence in more traditional social agents — legislatures and courts.

If criminals are viewed not as victims of the social system but as rational people who have opted for the exciting and lucrative profession of crime, it is easier to defend punishment as a means of making crime less attractive. James Q. Wilson combines this rational view of crime with a Hobbesian view of human nature and reaches the following conclusion:

... Intellectuals, although they often dislike the common person as an individual, do not wish to be caught saying uncomplimentary things about humankind. Nevertheless, some persons will shun crime even if we do nothing to deter them, while others will seek it out even if we do everything to reform them. Wicked people exist. Nothing avails except to set them apart from innocent people. And many people, neither wicked nor innocent, but watchful, dissembling, and calculating of their opportunities, ponder our reaction to wickedness as a cure to what they might profitably do. We have trifled with the wicked, made sport of the innocent, and encouraged the calculators. Justice suffers, and so do we all.


Even this most pessimistic view of criminal behavior cannot justify treating prisoners in an arbitrary and inhumane fashion. The loss of freedom and social stigma that flow from a criminal conviction are in themselves a serious punishment. Any further punishment at the hands of guards and prison administrators can only produce a sense of bitterness and injustice which will result in more crime and violence. Thus the creation of more humane prison environments is a matter of social defence as well as social justice.

The "[b]loody instructions" that are taught in our prisons may indeed return to "plague th' inventor". This is true not only because the victims of this "bloody instruction" will lash back against those who teach them but also because an acceptance of invasions of human rights behind bars paves the way for an acceptance of similar invasions outside the bars. The most shocking reality that emerges from Cruel and Unusual and Barred From Prison is not the injustice and inhumanity in the prisons, but rather the fact that Canadian society has been unwilling to do very much about it.

A. Wayne MacKay
Faculty of Law
Dalhousie University


This book has something for everyone — postal codes for all Canadian law faculties, Latin and French legal terms, excerpts from the Steven Truscott trial, quotes from Lord Denning and Professor John Willis, and even reasonably succinct discussions on just about any aspect of the law in Canada that a fledging law student ever needed to know.

In the preface to the book Professor Waddams has referred to his work as "this little book". Granted, the physical size of the publication is only 4 1/2 inches by 7 1/4 inches, but, by any other measurement, the work must be considered as monumental. It is well conceived, well organized, and is presented with an understanding of, and affection for, the law that is found far too infrequently in legal writing.
Those who are fortunate enough to teach first year law students have inevitably experienced the joys or frustrations of watching the students slowly begin to grasp the basics of our Court systems, little by little to learn the language of the law, and gradually to understand the purposes of our legal processes. This book, that should be made mandatory for all law students, will greatly hasten that dilatory but essential transitory phase in law teaching and will make it much more meaningful. The book commences with a chapter on ‘What Is Law?’ Contrary to most discussions on the nature of law, however, this chapter does not contain dogmatic, pedantic, or philosophical statements on the topic, but rather sets traditional theory in the context of factual situations arising from cases such as *R. v. Dudley and Stephens*¹ and examples such as “B steals A’s watch and sells it to C, who pays value for it in good faith” [p. 7]. The effect is that potentially difficult concepts, such as Justice or the Rule of Law, becomes understandable, while, at the same time, because of the questions that are posed, an appreciation for the complexities of the concepts is gained.

Chapter Two deals with Legal Education and the traditional criticisms of law teachers are squarely addressed. By now, one realizes that Professor Waddams is a great advocate for the law, with all it strengths and all its weaknesses. But the chapter is not all discussion. Practical information is given — how do law schools use L.S.A.T. scores? what is a case brief? (utilizing an example from Lord Denning and a challenge to the reader to pick out the relevant facts); what can students expect in classes? The Chapter ends with a refreshing piece of advice from the author, who states at p. 50:

If you find the examples of legal reasoning given in this book dull, or if they seem unrelated to anything of real value and importance, or if you think that detailed discussion and the drawing of subtle distinctions between cases is a waste of time, you may well be a wiser person than the writer of this book. But the study of law will not suit you.

The following several chapters of the book deal with the basic problems, methodology, techniques, and historical sources of the law in a highly readable but amazingly concise manner. The Courts of Equity and Equitable Doctrines are covered in only seven pages, but these pages contain more flavour for the topic and give more

¹(1884) 14 Q.B.C. 273.
basic introductory understanding than most law graduates could hope to offer.

The final portions of the book discuss the present sources of the law. Statutes and statute-making is examined. Constitutional law is introduced. Illustrative examples are used (Is a mushroom a vegetable?) and the respective roles of Legislators and Judges looked at. The Court Systems are explained and are commented upon. The Legal Profession is inspected and ethical problems introduced in the final chapter.

The book does not, however, conclude at the last chapter. There follow six Appendices that contain *inter alia* common Latin and French legal words and phrases, addresses of Canadian law schools, and common abbreviations. As a readily portable resource, these Appendices, by themselves, make the work worthwhile and useful.

The striking feature of "this little book" is the amount of information contained in it, the issues that are discussed, the criticisms that are offered, and the constructive suggestions that are given. All of this is presented in a most readable manner, with appropriate humour throughout. Major legal cases and principles are introduced, and familiar examples are used and are repeated in different contexts in order to give a broad perspective of the law and a fine introduction to it. The book provokes, excites and challenges. In short, it does have something for everyone.

The book does, however, leave itself susceptible to one major criticism, and that is that it should have been published by someone long ago. Thankfully, Professor Waddams has given us the benefit of his many obvious talents now. This book is a 'must' for law students. For others, I highly recommend this book to you.

Brian C. Crocker  
Faculty of Law  
Dalhousie University

This loose leaf service aimed at the practitioner's market goes far beyond the federal Divorce Act in its scope. The index tabs include such matters as (i) interpretation, (ii) grounds for divorce, (iii) jurisdiction: duties: bars, (iv) matrimonial property: settlements, (v) corollary relief, and (vi) decrees: appeals: rules: evidence. Even from this cursory indication of contents it will be seen that item (iv) goes far beyond matters of federal jurisdiction, and though this section eschews any attempt comprehensively to cover the field it does deal with thirty-seven matters arising under common law and equity such as joint bank accounts, the presumption of advancement, implied, resulting and constructive trusts, dower, fraudulent conveyances, marriage contracts, separation agreements and the constitutional relationship between corollary relief under the Divorce Act and matrimonial property under provincial laws. However, it was beyond the scope of the book to analyze the eleven new matrimonial property statutes introduced by the provinces. Such an undertaking would require a book in itself. The book does, however, contain a useful bibliography, though some omissions are discernible; e.g., H. A. Finlays' Family Law in Australia (2nd ed.) and G. Baxter and M. Eberts' The Child and the Courts.

Since such books are essentially practical research guides rather than intended to be read like a textbook, the true test of the value of such a book is to see how it solves a number of practical problems. In this connection the quality of the index is of cardinal importance. Although the value of the book has been recently commented on by David Hubley in Nova Scotia Law News, there appears to be room for improvement here. A more detailed index and additional sub-headings would make it easier for a practitioner faced with a problem on, say, lump sum order to locate the appropriate passages within the forty or so pages.

On other occasions the entries are rather too concise. For instance in the section on blood tests there are a number of cases cited but it might have been helpful to include (however briefly) what the

1 Sydney: Butterworths, 1979.
3 (1979) 6 Nova Scotia Law News 77.
rationes decidendi of the cases were. The reference to provincial legislation in the same section covered only the Ontario Children's Law Reform Act, no doubt reflecting the Ontario roots of its authors, and on the scientific value of blood tests no mention was made of the valuable article by Dr. Barbara Dodd in Medicine, Science and the Law.4

Clearly Payne faces considerable competition from other loose leaf series such as the C.C.H. Family Law Guide. His series is, however, considerably less expensive, and when the reviewer tried to trace a number of the sort of practical problems that a practitioner might have to solve such as (1) whether it is possible to seek maintenance for the first time after a decree absolute, (2) whether third parties seeking custody are precluded from doing so if a divorce court has entrusted a spouse with custody or (3) whether the court has power to order the transfer of specific assets, the researcher was quickly referred to relevant authorities. For Nova Scotians, however, important cases such as Archibald v. Archibald5 and Colbert v. Colbert6 have not yet been incorporated in the series.

Keeping up to date with family law cases tends to be like swimming against the flood, and this is particularly true when the editors do not have the assistance of collaborators scattered across Canada. Some significant cases which do not yet seem to have been mentioned include Levy v. Levy7 and Norgard v. Norgard8 on whether a divorce court order for periodical payments binds the husband's estate, and Spooner v. Spooner9 and K. v. K.10 on the incorporation of separation agreements into the divorce court order for corollary relief. This is not, however, intended to detract from the overall value of the series which is already of great use to the profession and has the potential to be even more so.

Alastair Bissett-Johnson
Faculty of Law
Dalhousie University

7 (1978), 24 N.S.Q. (2d) 271.
8 (1979), 8 R.F.L. (2d) 268 (Ont. C.A.).
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