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C12668

COURT OF APPEAL FOR ONTARIO

OSBORNE, WEILER and AUSTIN JJ.A.

B E T W E E N :

HER MAJESTY THE QUEEN	)	**Margaret Buist for the appellant**
Respondent	)	
	)	**Catherine Cooper and Catherine Braid**
- and -	)	**for the respondent**
GWEN JACOB	)	
Appellant	)	**Heard: May 2, 1996**

OSBORNE J.A.:

I agree with Weiler J.A. that the appeal should be allowed. I do not, however, agree with her reasons for reaching that conclusion. In particular, I do not agree that to be an indecent act, as proscribed by s. 173(1)(a) of the *Criminal Code*, R.S.C. 1985, C-46, the act must have a sexual context.

In my opinion, the community standard of tolerance test must be used to answer the question whether the appellant's topless stroll in downtown Guelph constituted an indecent act. If the community standard of tolerance test is correctly applied (and I agree with Weiler J.A. that it was not) I do not think that the appellant committed the offence with which she was charged. I reach that conclusion in the light of the evidence which establishes the general context of the appellant's actions, the trial judge's findings and significantly the absence of evidence that the appellant's choice of apparel caused any harm.

I agree with Weiler J.A. that if an act must have a sexual context to be an indecent act under s. 173(1)(a) and the act does not have a sexual context, there is no need to determine if the act exceeded the community standard of tolerance. In my opinion, the context of the appellant's acts (including any elements of moral turpitude) should be considered as part of the fabric of the community standard of tolerance, not as an element of the offence.

My colleague's sexual context requirement makes the community standard of tolerance test redundant in this case. I thus propose to first consider whether an act must have a sexual context to be an indecent act proscribed by s. 173(1)(a) of the *Criminal Code*. For purposes of discussion and analysis, I am prepared to assume that the appellant's conduct on July 19, 1991 had no sexual context.

Before turning to the sexual context issue and then to the community standard of tolerance, I will refer to some of the evidence.

THE EVIDENCE

On July 19, 1991 an extremely hot, humid summer day, the appellant walked along several Guelph streets with uncovered breasts. Along the way she was seen by and spoke to a number of people, including three police officers. I will summarize the police evidence first.

Constable Mullin, a Guelph police officer, saw the appellant at about 5:00 p.m. walking on a Guelph street, with her breasts uncovered. He said that some motorists had noticed her and that they reacted with surprise and by laughing and pointing. He asked the appellant to cover her breasts. The appellant responded by telling him that since males were permitted to be in public with their chests uncovered, she had a constitutional right to walk on the street topless as well. Further, she stated that it was more comfortable in the heat to walk topless. Constable Mullin decided not to charge the appellant unless there was a complaint about her appearance.

Another police officer, Sergeant Obergan, received a complaint in respect of the appellant's appearance. He located her sitting on the porch of a Guelph residence without her top on. She refused his request to put on her shirt as she said it was her right to expose her breasts. He said that there were five or six young males sitting on a nearby porch drinking beer and watching the appellant with binoculars. He also said a bus driver slowed down, ostensibly to determine why there were police cruisers in the area. When the bus slowed down its driver and passengers apparently noticed the appellant.

A third police officer, Constable Wicinski, attended on Ontario Street where she met two male police officers who were in the process of arresting the appellant. She confirmed that the appellant was topless. During the arrest procedure, the appellant noticed two topless males walking down the street and asked Constable Wicinski why she was not arresting them. Constable Wicinski replied that "society doesn't view that as that act being wrong." Constable Wicinski also saw five or six males across the street drinking beer on a porch, staring at the appellant.

The Crown called two Guelph residents, Ms. Snarr and Ms. Pettifer. Both lived on Ontario Street, one of the streets on which the appellant walked. Ms. Snarr said that she took her two children, ages 1 and 2, to the backyard because she did not feel that it was proper for them to see the appellant in her state of undress. She also said that there were about five other children playing in the area as well as some adults and motorists who noticed the appellant. She estimated that the children were between one and ten years of age. She expressed the opinion that it is "dirty" for women to expose their breasts to public view.

On July 19, 1991 Ms. Pettifer was in her home with her husband, her brother and her brother's wife. She went outside when her husband told her that there was a women across the street who was not wearing a top. She said that she noticed the appellant sitting across the road with her breasts exposed and walked across the street to ask the appellant if she would put her top back on. When the appellant did not respond, Ms. Pettifer asked her if she had "any decency." Once again the appellant did not respond and eventually Ms. Pettifer called the police. After she had called the police Ms. Pettifer waited outside until the police arrived. Ms. Pettifer said that she saw two boys, about 13 or 14 years of age, who noticed the appellant. She also said that she observed a bus and a van, both of which slowed down, presumably as a result of their drivers seeing the appellant. She described the exposure of a woman's breasts in public as "disgusting."

The defence called three witnesses: Mr. Fairweather, Mr. Singh and Ms. Cross. Mr. Singh and Mr. Fairweather saw the appellant on July 19, 1991. Ms. Cross did not. All said that they were in no way offended by the exposure of the appellant's breasts. The defence also called Rolf Pedersen, a sociology graduate, who was an editor of the *Guelph Daily Mercury*. He identified an editorial that he wrote for the *Mercury's* Saturday, August 10, 1991 edition. The editorial expressed the opinion that it was sexual discrimination to prohibit women, but not men, from exposing their breasts in public. Mr. Pedersen said that the editorial was intended to be a commentary on changes in community standards. He testified that less than 100 people responded to the editorial. The majority expressed the view that the law

permitting only men to be topless in public did not need to be changed. Mr. Pedersen made it clear that the response to the editorial did not constitute a formal survey that was in any way statistically reliable.

ANALYSIS

(i) Does an act have to have a sexual context to be an indecent act?

My colleague refers to legislation proscribing indecency, obscenity and nudity, some of the relevant case law and the history of the community standard of tolerance test in support of her conclusion that an indecent act requires a sexual context. I will discuss the relevant provisions of the *Criminal Code* and the case law in dealing with the sexual context issue. I will then address the community standard of tolerance test and set out the basis of my conclusion that that test is the exclusive measure in determining whether the appellant committed an indecent act on July 19, 1991.

For convenience, I set out below ss. 173 and 174 (the indecency and nudity sections) of the *Code*:

> **173.** (1) Every one who wilfully does an indecent act
> (a) in a public place in the presence of one or more persons, or
>
> (b) in any place, with intent thereby to insult or offend any person,
>
> is guilty of an offence punishable on summary conviction.
>
> (2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of fourteen years is guilty of an offence punishable on summary conviction.
>
> **174.** (1) Every one who, without lawful excuse,
>
> (a) is nude in a public place, or
>
> (b) is nude and exposed to public view while on private property, whether or not the property is his own,
>
> is guilty of an offence punishable on summary conviction.

While I agree with my colleague that in interpreting s. 173(1)(a) regard must be had for the sections as a whole, I do not agree with her interpretation of s. 173(1)(a) or (b). I do not think that the language of s. 173(1)(a) (the section under which the appellant was charged) requires that an indecent act must have a sexual context. There is no reference to sexual context in s. 173(1)(a). Moreover, I see nothing in s. 173(1) that would reduce the scope or meaning of "indecent" for purposes of the section.

In my view, to import a sexual context requirement into s. 173(1) would unduly limit the scope of the section in a manner inconsistent with Parliament's intention.

In contrast, s. 173(2), which deals with the exposure of genital organs to a person under 14 years of age, explicitly requires that the exposure be for a sexual purpose. This suggests that Parliament was alert to the prospect that some, but I would suggest not all, indecent acts have a sexual purpose. Parliament did not use similar language in respect of the purpose of the acts targeted in s. 173(1)(a) or (b). It seems to me that if Parliament had intended to limit the application of s. 173(1)(a) to acts that are in substance sexual, it would have said so.

My colleague has also referred to the difference between s. 173(1)(a) and s. 173(1)(b). In my opinion, subsection 1(b) (the real target of which is indecent acts committed on private property but within the public's view) adds another element that the Crown must establish — the accused's intent to insult or offend. I agree that if that intent is not established there cannot be a conviction under subsection 1(b). In my view, to secure a conviction under subsection 1(b), the act must be done wilfully, with the intent to

insult or offend and it must be "indecent", that is it must exceed the community standard of tolerance. Thus, I do not agree that an act that does not exceed the community standard of tolerance may, nonetheless, be a subsection 1(b) indecent act because it was done wilfully with the intent to insult or offend. Whether my colleague's example of breast exposure proximate to a place of worship with intent to insult would constitute an indecent act would depend upon whether the trier of fact concluded, that in all the circumstances, the intentionally insulting behaviour exceeded the community standard of tolerance.

In summary, I think that the community standard of tolerance test is relevant to acts alleged to be criminally indecent under both subsections 1(a) and (b). In any case, I see nothing in the language of subsections 1(a) and (b) that would suggest a subsection 1(a) act must have a sexual context to be indecent.

I see no benefit in comparing ss. 173(1)(a) (a publicly viewed indecent act) and 174 (nudity) beyond making two general observations. First, I think that the Crown's decision to charge the appellant under s. 173(1)(a), when the appellant might have been charge under s. 174, was a decision open to the Crown. I agree with Ms. Cooper that the Crown's exercise of its prosecutorial discretion does not give rise to a miscarriage of justice. Second, I accept that in *R. v. Verrette* (1978), 40 C.C.C. (2d) 273 (S.C.C.) the Supreme Court of Canada held that in a case of complete nudity without lawful excuse the offence is committed whether or not the nudity offends public decency or order.

Weiler J.A. contends that a sexual context is required to sustain a conviction under s. 174(1) where it is necessary to apply the community standard of tolerance test. Thus, no sexual context need be established under s. 174(1) where there is complete nudity as the community standard tolerance test is not applicable. A sexual context is also not required to convict under s. 174(2) where the accused was so clad as to offend against public order. Only where the person's attire allegedly offends against public decency under s. 174(2) is a sexual context required since the analysis involves the community standard of tolerance.

These conclusions rest on the assertions that the community standard of tolerance test is not used to determine what state of undress offends against public order and that s. 174(2) establishes an offence. Section 174(2) does no more than deem a person so clad as to offend public decency or order to be nude. The offence is set out in s. 174(1) Moreover, the comparison of ss. 173(1)(a) and 174 is not productive unless one assumes that the community standard of tolerance test is used only to assess community tolerance of things sexual, or that the test is a tolerance test of sexual conduct. According to *Verrette*, it is partial nakedness, not a sexual context, which triggers the use of s. 174(2) and thus the community standard of tolerance.

To establish that a partly clad accused was nude, the Crown must establish that the accused was so clad as to offend against public decency or order. This court held in *R. v. Giambalvo* reflex, (1982),70 C.C.C. (2d) 324 that the community standard of tolerance test should be used to make that determination. In *Giambalvo*, the accused was charged with counselling a tavern dancer to commit the offence of nudity in a public place. The trial judge held that the accused counselled the dancer to appear on stage with some clothing on, but so attired as to expose her genitalia during her performance. He found, at p. 124, that the counselled performance offended against public decency or order because "decent civilized standards of modesty appropriate to this time and this community still require that all persons, male or female, who are in a public place, at the very least, not expose their genitalia to public view." The accused was convicted and his appeal by way of stated case was dismissed.

On his further appeal to this court, Martin J.A. concluded that the trial judge had applied the wrong test to determine whether the dancer would have been dressed so as to offend against public decency or order. He said at p. 330:

> ... In my view, the standard to be applied in determining whether, in the circumstances, the performance of the dance unclad to the extent requested by the appellant, would have offended public decency or order, is the standard of community tolerance as that test has been developed in the case-law with respect to the material alleged to be indecent.
>
> ...

> The standard of community tolerance to be applied in this case is what the Canadian community would tolerate in the tavern and in the circumstances in which the dance was to be performed, not what the persons attending the performance would tolerate.

In *Giambalvo*, Martin J.A. made it clear that the community standard of tolerance is the test to be used to determine whether a person's state of undress offends against public decency or public order. I see nothing in *Giambalvo* to suggest that a sexual context is required in cases where nudity is established by resort to s. 174(2).

I see no benefit in attempting to determine whether the appellant would have been convicted had she been charged with nudity under s. 174(1). Thus, I do not propose to address that issue, apart from noting that if my colleague is correct in concluding that a sexual context is required in cases where the community standard of tolerance is used, then it would follow from *Giambalvo* (which requires use of the community standard of tolerance to determine if a state of undress offends against public decency or order) that a sexual context would be required in partial nudity cases prosecuted under s. 174.

All obscenity prosecutions and most acts that are the basis of criminal prosecutions alleging the commission of an "indecent act" or an "indecent performance" involve conduct that has a sexual element. It was in that context in *R. v. Mara* 1996 CanLII 1504 (ON C.A.), (1996), 27 O.R. (3d) 643 (C.A.) that Dubin C.J.O., quoting with approval Boilard J.'s statement in *R. v. Pelletier* (1985), 77 C.C.C. (3) 77 (Que. S.C.) at 89, said at p. 648:

> ... Indecency "concerns sexual behaviour or its representation which is neither obscene nor immoral but inappropriate according to the Canadian standards of tolerance because of the context in which it takes place. In other words, indecency is not a function of the behaviour itself but rather of the circumstances in which it takes place." [Emphasis added]

I readily accept that indecency "concerns" sexual behaviour but that does not mean it cannot concern other objectionable behaviour. Because "indecent" is not defined in the *Criminal Code*, I see nothing wrong with considering dictionary definitions for assistance as the trial judge did in this case. This is consistent with this court's judgment in *R. v. St. Pierre* (1974), 3 O.R. (2d) 642. In that case in issue was whether an admitted act (cunnilingus) constituted gross indecency. Dubin J.A. noted with approval at p. 645 that in an earlier appeal by the same accused, the court had said that "it would have been much better in this case, had the trial Judge given to the jury the dictionary definition of gross and the definition of indecency, there being no definition in the *Criminal Code*, and then left the matter to the jury to determine whether the acts which were committed here fell within the provisions of the section of the *Criminal Code*." The dictionary definitions of indecent and indecency (including those referred to by the trial judge) do not suggest that to be an indecent, an act requires some sexual context.

The Federal Court of Appeal in *Re Lushcer and Deputy Minister, Revenue Canada, Customs and Excise* reflex, (1985), 17 D.L.R. (4th) 503 considered what was meant by immoral and indecent. In that case a magazine had been classified under the *Customs Act*, R.S.C. 1970, c. C.40 as "immoral" or "indecent." It was submitted that the words immoral and indecent were impermissibly vague. Hugessen J. said at p. 509:

> ... the words "immoral" and "indecent" are nowhere defined in the legislation. This at once serves to distinguish the provisions ... from the obscenity provisions of the *Criminal Code*. ...
> While obscenity under the *Criminal Code* is, by statutory definition, limited to matters predominantly sexual, there is no such limitation upon the concepts of immorality or indecency, and this is so notwithstanding the judicial gloss which has carried over into the test for immorality or indecency of community standards of tolerance. As was stated by Lord Reid in *R. v. Knuller (Publishing, Printing & Promotions) Ltd. et al.*, [1973] A.C. 435 at p. 458:

> Indecency is not confined to sexual indecency: Indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting.
> [Emphasis added]

I agree with Hugessen J.'s comments. If an indecent act requires a sexual context, there would be no difference between that which is obscene and that which is indecent.

(ii) The Community Standard of Tolerance Test

Weiler J.A. has accurately reviewed the history of the community standard of tolerance test. I agree that it was first used to determine whether the exploitation of sex in the context of the *Criminal Code*'s obscenity provisions was "undue." This is required by s. 163(8) of the *Code* which defines obscenity in terms of the undue exploitation of sex.

The seminal case is *R. v. Butler* 1992 CanLII 124 (S.C.C.), (1992), 70 C.C.C. (3d) 129. In that case the court held that the community standard of tolerance test should be used to determine whether material was obscene.

In *Butler*, a store owner was charged with selling and possessing obscene material and with exposing obscene material to public view, contrary to what is now s. 163 of the *Criminal Code*. The central issue was whether the *Criminal Code* definition of obscenity in s. 163(8) violated s. 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, and if it did whether the definition of obscenity in s. 163(8) could be justified under s.1 of the *Charter*.

On appeal to the Supreme Court of Canada the accused's convictions were set aside and a new trial was ordered on all charges. Writing for the majority, Sopinka J. referred to a number of tests, including the community standard of tolerance test, used by the courts to determine what constitutes the "undue exploitation of sex." He concluded at p. 150 that the various tests were unrelated and that uncertainty as to what was in law obscene "left the legislation open to attack on the ground of vagueness and uncertainty." To solve the vagueness problem he held that in analyzing whether a publication (or any material) is obscene the community standard of tolerance test should be used. He made it clear that the community standard of tolerance test is a contemporary, national test that measures not what Canadians will tolerate for themselves but what they will tolerate for others.

In *Butler*, Sopinka J. plainly stated that the concept of "harm", is central to the community standard of tolerance analysis. He said at p. 150:

> The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. ... The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn form the material itself or from the material and other evidence.

It follows from *Butler* that in applying the community standard of tolerance test, the court must consider what harm will accrue from exposure to the allegedly obscene act or material. The correlation is inverse in the sense that the greater the harm that may flow from a particular exposure, the less the community will tolerate others being exposed to it. Tolerance cannot be assessed independently of harm.

Introducing the requirement that conduct must be sexual to be indecent seems to me to add the kind of imprecision and uncertainty that Sopinka J. was attempting to avoid in *Butler*. While Weiler J.A. would determine sexual context by reference to both objective and subjective considerations, this case illustrates the difficulty of such an analysis. If the appellant's conduct is to be measured by what she intended the appellant was making an equality, not a sexual statement. On the other hand, if the appellant's conduct is to be assessed on the basis of the response of some of those persons who observed her, the result may be different.

The analysis proposed by Weiler J.A. to determine sexual context leads to further uncertainty as that analysis involves the use of many of the same factors used in the determination of the community standard of tolerance. For example, whether the act is degrading or dehumanizing would be considered once in determining if the act has a sexual context and then a second time in determining whether the act surpasses the community standard of tolerance. To achieve certainty, in my opinion, the surrounding circumstances and any resultant harm should be considered solely within the community standard of tolerance analysis.

The community standard of tolerance test was dealt with by the Supreme Court of Canada, in the context of indecency, in *R. v. Tremblay*, 1993 CanLII 115 (S.C.C.), [1993] 2 S.C.R. 932. In *Tremblay*, the accused were charged under what is now s. 210(1) with keeping a common bawdy house for the purposes of the practice of acts of indecency. Cory J. concluded that the community standard of tolerance test, which was accepted in *Butler*, should be used to determine whether conduct was indecent. He referred to *Giambalvo* as an example of the proper application of the test. After he had reviewed Sopinka J.'s comments on harm in *Butler*, he said at p. 960:

> The same consideration of the degree of harm which may flow from the questioned work must also be relevant to the determination of the community standard of tolerance with respect to acts which are said to be indecent.

Cory J. concluded that the acts in issue were not indecent because they caused no harm or risk of harm and thus did not exceed the community standard of tolerance. Cory J. said at p. 970 and 971:

> There was no harm caused by the activities. ... In these times when so many sexual activities can have a truly fatal attraction, these acts provided an opportunity for safe sex with no risk of any infection. The absence of any risk of harm could properly be taken into account in assessing community tolerance for the act.

In *R. v. Mara*, Dubin C.J.O., after referring to *Butler* and *Towne Cinema Theatres Ltd. v. The Queen*, 1985 CanLII 75 (S.C.C.), [1985] 1 S.C.R. 494, concluded that the community standard of tolerance test was the relevant test for indecency and that harm as defined in *Butler* was central to the community standard of tolerance analysis. He said at p. 650:

> In my opinion, the same test of harm [as in *Butler*] applies in determining whether a performance is indecent.

In *R. v. Hawkins* reflex, (1993), 86 C.C.C. (3d) 246, leave to appeal to S.C.C. refused (1994), 17 O.R. (3d) xvi (S.C.C.), this court held that it was incumbent upon the Crown to prove that the impugned material created "a substantial risk of harm."

In *R. v. Arnold*, a judgment of the Ontario Court of Justice (Prov. Div.), delivered February 25, 1993, [1993] o.j. 471, a case indirectly related to this case, the topless accused was part of a Kitchener protest demonstration responsive to the appellant's earlier conviction in Guelph. The trial judge, McGowan P.C.J., had the benefit of expert evidence concerning national levels of tolerance. After rejecting the argument that she was bound by the summary conviction appeal court judge's decision in this case, she considered and applied the correct test — the community standard of tolerance. In doing so, she

was alert to the significance of the issue of harm in the application of the community standard of tolerance test. Indeed, in her reasons, she quoted the same passage from *Butler* quoted above. She concluded that the accused's conduct caused no harm and thus did not exceed the community standard of tolerance. In commenting on the distinction between taste and tolerance, she aptly said at paragraph 48:

> ... Undoubtedly, most women would not engage in this conduct for there are many who believe that deportment of this nature is tasteless and does not enhance the cause of women. Equally undoubtedly, there are men today who cannot perceive of woman's breasts in any context other than sexual. It is important to reaffirm that the Canadian standards of tolerance test does not rely upon these attitudes for its formulation. I have no doubt that, aside from their personal opinions of this behaviour, the majority of Canadians would conclude that it is not beyond their level of tolerance.

I cannot agree that because the community standard of tolerance test is used to determine whether conduct was obscene (that is whether it involved the "undue" exploitation of sex) that it should, or does, follow that the use of the same test to determine whether conduct is indecent means the conduct must as a matter of law have a sexual context. The community standard of tolerance test is a general test that has been held to be relevant to the determination whether conduct is obscene and in other cases whether conduct is indecent. I do not see the logic in concluding that the use of a constant test for two different purposes should result in giving the word "indecent", as it appears in s. 173(1), the same meaning as Parliament gave the word "obscene" when s. 163(8) was added to the *Criminal Code* in 1959.

This brings me to the trial judge's reasons in this case and the test for indecency that he applied to determine if the appellant's conduct constituted an indecent act: *R. v. Jacob*, a judgment of the Ontario Court (Prov. Div.), released on January 17, 1992. After reviewing the evidence, the trial judge referred to a number of dictionary definitions of indecent and some of the case law. Weiler J.A. is correct in stating that the trial judge gave no consideration to the issue whether the appellant's conduct had a sexual context.

The trial judge stated at p. 112 of his reasons that the determination whether conduct is indecent ... "must be made in the context of the general community standards as defined by the Court. Accordingly, as a preliminary step, the Court must ascertain the general community standard." It is not clear to me what the trial judge meant by "community standard." He then reviewed some of the literature filed by the Crown and concluded at p. 120 of his reasons:

> ... It is clear to me, therefore, that the female breast constitutes a very personal and responsive part of the female anatomy and is a part of the female body that is sexually stimulating to men, both by sight and touch, and is not, therefore, a part of the body that ought to be flagrantly exposed to public view.

In his determination of the "community standard", the trial judge attached significance to the fact that women generally have chosen not to be seen publicly with their breasts exposed. He said at p. 121 of his reasons:

> ... If public exposure of breasts is generally acceptable, then one has to consider that it is acceptable for all women in all circumstances, and if a particular employer imposes a dress code on his employees, this obviously would be doing so in response for what he believed to be an acceptable standard of conduct that his customers would expect him to meet.

The trial judge then noted that neither the *Guelph Mercury* or the *Toronto Star* printed a picture of the appellant with her breasts exposed. At p. 121 of his reasons he asked the question:

> ... Is it because they thought it might be in bad taste? or indecent? This course of conduct speaks more eloquently of community standards than any editorial.

The summary conviction appeal court judge did not address the issue of the test to be applied in determining whether the appellant's activities on July 19, 1991 constituted an indecent act within the meaning of s. 173(1)(a) of the *Code*. He simply concluded that the trial judge's judgment was not unreasonable and that it could be supported by the evidence. He thus dismissed the appeal.

On the basis of the trial judge's reasons, which as I have said were accepted by the summary conviction appeal court judge, I think that Ms. Buist is correct in her submission that what the trial judge did was measure the appellant's choice of apparel and conduct against what the trial judge concluded Guelph women would deem to be appropriate for themselves. The trial judge seems to me to have applied a test similar to the test rejected by this court in *R. v. Giambalvo*.

In my opinion, both the trial judge and the summary conviction appeal court judge erred in law in applying the wrong test to determine whether the appellant's conduct was indecent. They used a test of acceptance based upon the trial judge's assessment of how women choose to act, as opposed to what the contemporary national community would tolerate.

In addition, neither the trial judge nor the appeal court judge considered the issue of harm. In fairness, this can be explained by the fact that *Butler* was decided after the appellant's trial.

In my opinion, there is no evidence of harm that is more than grossly speculative. All that the trial judge had before him was some evidence indicating specific individuals' lack of acceptance of the appellant's choice of clothing. There was nothing degrading or dehumanizing in what the appellant did. The scope of her activity was limited and was entirely non-commercial. No one who was offended was forced to continue looking at her. I cannot conclude that what the appellant did exceeded the community standard of tolerance when all of the relevant circumstances are taken into account. It follows that what the appellant did on July 19, 1991 did not constitute an indecent act.

Accordingly, I would allow the appeal, set aside the appellant's conviction and direct that she be acquitted. The fine should be remitted to her.

WEILER J.A. (concurring in the result):

The issue in this appeal is whether the appellant's display of her breasts in public was an indecent act. On a hot summer day, between five and seven p.m., the appellant walked about the streets of Guelph barebreasted. On one of Guelph's main streets, a police officer asked the appellant to put on a top and to cover her breasts. The appellant explained that she felt it was her constitutional right to go topless; it was all right for men to go topless and women should be allowed the same right. The police officer allowed the appellant to proceed on her way. The appellant walked to a residential area and then paused to talk to a man working on his lawn in front of his residence. Young children at play across the street saw the appellant's exposed breasts and ran to tell their mothers. One mother requested that the appellant cover up; when she refused to do so, the mother complained to the police.

The appellant was charged with committing an indecent act by exposing her breasts in a public place contrary to s. 173(1)(a) of the *Criminal Code*. The provincial court judge found that the appellant's act was beyond the community standard of tolerance, convicted her of committing an indecent act and sentenced her to pay a fine of $75. She appealed her conviction to the Ontario Court (General Division). The appeal judge found that the trial judge's decision was not unreasonable, that it could be supported on the evidence, and that he had not erred in law. He dismissed the appeal. The appellant now seeks to appeal to this court.

Pursuant to s. 839 of the *Criminal Code*, a further appeal to this court is permitted only with leave on a question of law. Whether the appellant's conduct was indecent raises a question of law: *R. v.*

Mara 1996 CanLII 1504 (ON C.A.), (1996), 27 O.R. (3d) 643 at 646-47 (C.A.) citing *R. v. Tremblay* 1993 CanLII 115 (S.C.C.), (1993), 84 C.C.C. (3d) 97 at 107 (S.C.C.).

In reaching the conclusion that the appellant's act was indecent, the trial judge did not consider the wording of s. 173(1)(a) as it contrasts with the wording in s. 173(1)(b). It is a canon of statutory interpretation that in interpreting one part of a section regard should be had to its context within the section as a whole. For ease of reference 173(1) is reproduced below.

> Everyone who wilfully does an indecent act
> a) in a public place in the presence of one or more persons, or
> b) in any place, with intent thereby to insult or offend any person,
> is guilty of an offence punishable on summary conviction.

Section 173(1) provides that an indecent act may be a crime in one of two ways. The mental element of "wilfully" applies to both subsections (a) and (b). No further mental element is required under subsection (a). The intention of the actor does not determine the indecent quality of the act. The subsection also requires that the act occur in a public place. The test used to determine whether the act is indecent under subsection (a) is the community standard of tolerance. This is an objective measure.

In contrast, subsection (b) requires a mental element in addition to wilfulness. The act must be done with the intention to insult or offend another person. It may take place either in public or in private. The intention of the actor to insult or offend determines the indecent quality of the act. This is a subjective standard. Here, even if the act was beyond the community standard of tolerance, if there is no intention to insult or offend, the criminal nature of the act would not have been made out. Conversely, if an act was not beyond the community standard of tolerance but it was done with the intent to insult or offend, it could be an indecent act.

To illustrate the differences between the two subsections, suppose that it is not beyond the community standard of tolerance for a woman to expose her breasts. However, it is a tenet of a certain religion that, in the presence of others, a woman's bare skin be exposed as little as possible. In an attempt to insult those who accept this faith, a female opponent of the dress restrictions imposed on women of this faith decides to expose her breasts to both the religious leader and the congregation. She does this by walking back and forth on the street in front of their place of worship. The religious leader and members of the congregation are shocked and insulted. The woman is charged under subsection (b). It seems to me that, because the woman intended to insult or offend, her act would be considered indecent despite the fact that the community at large might tolerate the public exposure of a woman's breasts. By considering the exposure of a woman's breasts to be indecent in these circumstances and criminalizing this behaviour, the court would be protecting the underlying value of respect for the religion of others which is at the heart of the *Charter* value of freedom of religion.[1] Under subsection (b) the community standard of tolerance does not have a role to play in determining whether an act is indecent. Subsection (b) enables the court to punish a person whose act is intended to show disrespect for the rights and freedoms of others.

Subsection (a), on the other hand, is different. Its underlying purpose is to recognize those values which are considered to be essential for people to exist with each other when they are together in a public place. In 1892, when the subsection was enacted, a common morality was deemed to be essential. The section was contained in a part of the *Criminal Code* entitled, "offences against morality." The parliamentary debate at this time makes it clear that Parliament intended to adopt the law of England with respect to indecency.[2] The law of England was contained in a case called *R. v. Hicklin* (1868), L.R. 3 Q.B. 360. The test used in *Hicklin*, *supra*, was whether the tendency of the matter in question was "to deprave and corrupt" those whose minds were "open to such immoral influences." Obscenity was also governed by the *Hicklin* test: see Hon. Justice Edward F. Then and Kenneth L. Campbell, "The Law of Obscenity," National Criminal Law Program on Substantive Criminal Law (1986), at p.21 citing e.g. *R. v. McAuliffe* (1904), 8 C.C.C. 21 (N.S. Co. Ct.).

Obscenity, Indecency and the Evolution of the Community Standard of Tolerance Test

Obscenity and indecency are part of the same continuum: *R. v. Stanley* (1965), 1 All E.R. 1035 at 1038 (C.A.). There is, however, one important distinction. Whether or not a work is obscene is a function of the internal attributes of the work. A work does not become obscene by reason of the place or manner in which it is shown. Indecency, on the other hand, is contextual and depends on the circumstances: *R. v. Mara*, *supra*, at pp. 654-55.

In 1959, what is now s. 163(8) of the *Criminal Code* was enacted, providing the first statutory definition of obscenity. The definition of obscenity was set out as "the undue exploitation of sex," or of sex and a series of enumerated subjects namely, crime, horror, cruelty, and violence. The inherent characteristic of an obscene work is that sex is the dominant theme.

The first case to come before the Supreme Court following this statutory definition of obscenity was *Brodie v. The Queen*, 1962 CanLII 80 (S.C.C.), [1962] S.C.R. 681, known as the *Lady Chatterley's Lover* case. Judson J. (with whom Abbott and Martland JJ. concurred) held that the common law definition of obscenity was no longer applicable and that the standard for obscenity was now the statutory one of "undue exploitation of sex" which was to be determined on an objective basis. Judson J. proposed two tests. The first was whether the work in question had artistic merit. The second test was the community standards concept which had previously been applied by the courts in Australia and New Zealand.

In *Towne Cinema Theatres Ltd. v. The Queen*, 1985 CanLII 75 (S.C.C.), [1985] 1 S.C.R. 494, Dickson C.J.C., speaking on behalf of himself, Lamer and Le Dain JJ., discussed the community standard of tolerance test, at pp. 504-5:

> **...** it is important to remember that from the very beginning of this Court's consideration of s. 159(8) [now s. 163(8)], "community standards" have been viewed as *one* measure of "undueness" in the exploitation of sex. They have never been seen as the *only* measure of such undueness; **still less has a breach of community standards been treated as in itself a criminal offence.** [Emphasis in italics in original. Emphasis in bold added.]

At p. 507 Dickson C.J.C. concluded that it was not simply lapses in propriety or good taste, but rather the harm to society from the undue exploitation of sex that was the aim of the section. With this comment, Dickson C.J.C. rejected that portion of the standard dictionary definition of obscenity which defines these terms as that which offends propriety or delicacy. He adopted the community standard of tolerance test, but only as a measure to determine the undueness of the exploitation of sex.

In *R. v. Butler*, 1992 CanLII 124 (S.C.C.), [1992] 1 S.C.R. 452 at 483-84, Sopinka J. considered the relationship of the artistic merit test to the community standard of tolerance test and assessed where harm to the community fit in. The appellant submitted that the obscenity legislation was void for vagueness as it was not always clear which test was being applied or whether "harm to the community" was a separate, third test. Sopinka J. concluded that all the tests should be considered as aspects of the community standard of tolerance test. Thus, in order for there to be a conviction in respect of any charge of obscenity under the *Criminal Code* the Crown must prove two things: 1) the exploitation of sex as the dominant characteristic of the material or act, and 2) that this exploitation is "undue" in the sense that it is beyond the community standard of tolerance.

Initially, there was some confusion as to whether the community standard of tolerance test should be applied only to obscenity as defined in s. 163(8) or whether it should apply whenever the word obscenity was used in the *Code*. In *R. v. Hawkshaw*, 1986 CanLII 68 (S.C.C.), [1986] 1 S.C.R. 668, the Supreme Court unanimously held that the *Hicklin* test for obscenity was no longer applicable and the test articulated in s. 163 (8) was to be applied to all charges of obscenity under the *Criminal Code*.

The community standard of tolerance test, used to measure whether the exploitation of sex was undue, was not restricted to obscenity. In *R. v. Popert* reflex, (1981), 58 C.C.C. (2d) 505 (Ont. C.A.), the court sought the advantage of a consistent test in relation to a charge of using the mails for "indecent, immoral or scurrilous matter" and adopted the community standard of tolerance test in relation to immorality and indecency. The morality-based *Hicklin* test was supplemented by the community standard of tolerance test. By linking indecency to the test used to determine whether an act is obscene, namely the community standard of tolerance, the court imported the requirement of a sexual context. This conclusion is reinforced by the court's comment that the trial judge erred in purporting to apply the ordinary meaning of the term "indecent." In so doing, the court implicitly recognized that it is no longer appropriate to apply the ordinary or dictionary meaning of the word indecent.

As a result of the extension of the community standard of tolerance test to indecency, the English approach — which interprets the term "indecent" as covering a broad range of conduct but as having a somewhat lower requirement of moral turpitude than the meaning attributed to obscenity — has been abandoned: See Then J. and Campbell, *supra*, at pp. 20-21. Thus, in applying the community standard of tolerance to determine whether an act is obscene or indecent, the court is determining whether there has been an undue exploitation of sex. As Dickson C.J.C. pointed out in *Towne Cinema, supra*, offending community tolerance is not the criminal activity proscribed in the *Code*. It is the undueness of the exploitation of sex which is measured by the standard of community tolerance. Not all conduct which is beyond the community standard of tolerance is indecent. For example, if a woman stood at the corner of Queen and Yonge in Toronto and produced a hypodermic needle full of heroin and shot it into her arm, she would not be guilty of an indecent act even though the community is not prepared to tolerate this harmful conduct. She would, however, be guilty of the illegal act of possession of heroin under the *Narcotics Control Act*. An act which is beyond the community standard of tolerance because it is harmful is not necessarily an indecent act. A sexual context is required for the standard to be applied.

A number of trial decisions support the position that something other than a state of partial nudity is required in order to be found guilty of committing an indecent act. : *R. v. Beaupre* (1971), 7 C.C.C. (2d) 320 at 322 (B.C.S.C.); *R. v. Springer* (1975), 24 C.C.C. (2d) 56 at 58 (Sask. Dist. Ct.); *R. v. Bennett* (1975), 29 C.C.C. (2d) 403 at 404 (B.C.S.C.); *R. v. Hecker* reflex, (1980), 58 C.C.C. (2d) 66 at 71(Y. Terr. Ct); *R. v. Pelletier* reflex, (1985), 27 C.C.C. (3d) 77 at 89 (Que. S.C.).

The respondent relies on *Johnson v. The Queen* (1973), 13 C.C.C. (2d) 402 (S.C.C.) in support of its position that the partial nudity of Ms. Jacob in itself was an indecent act. In the *Johnson* case, the appellant removed all of her clothes and performed a dance, which, but for the fact she was completely nude, would have been unremarkable. She was charged with appearing in an immoral performance under the then s. 163(2) of the *Code* which made it an offence to take part "in an immoral, indecent or obscene performance **...** in a theatre." Ritchie J., in a judgment concurred in by Judson, Abbott, Laskin and Dickson JJ., held that the mere fact the accused was completely unclothed when there was no suggestion that the "performance" was otherwise "immoral" did not satisfy the requirements of the section and quashed the conviction. He did not find it necessary to express any opinion as to what the result would have been if the accused had been charged with participating in an "indecent performance." He did say, however, that the word "indecent" is capable of being construed so as to apply to any "undue" exposure of the naked body. In my opinion, Ritchie J. was saying that in some circumstances complete or total nudity may be beyond the community standard of tolerance. Ritchie J.'s comment does not imply that a sexual context is unnecessary. Depending on the circumstances, total nudity may import a sexual context.

Inasmuch as the term indecent is nowhere defined in the *Code*, and the dictionary definition has been rejected in *Town Cinema*, *supra*, and in *Popert*, *supra*, it is within the role of the judiciary to attempt to interpret these terms: *Butler*, *supra*, per Sopinka J., at p. 491. Determining the underlying values necessary for the coexistence of persons in places to which the public has access has never been an easy task. This is especially true now that conventional morality has been rejected as the basis for finding an act to be indecent. Instead, courts must seek to ground disapprobation of conduct by bearing in mind *Charter* rights and values: *Butler, supra,* per Sopinka J. at pp. 491-2. If the content of the conduct is ignored and regard is had only to community standards there is a danger of a majority deciding what values are important and coercing minorities to conform to those values on the basis of avoiding perceived

harm to society from non-conformity. If resort is had only to the community standard of tolerance test without there being a context-based prerequisite, then it is possible that discrimination arising from social stereotyping will be legitimized. In so far as community standards of tolerance are to be applied under s. 173(1)(a), therefore, an essential element is that the context of the conduct must first be sexual.

Determination of Sexual Context

Ordinarily, the sexual context of the acts in question is so little in doubt that it is not in issue. This was the case in *R. v. Mara, supra,* where Dubin C.J.O. adopted the definition of indecency of Boilard J. in *R. v. Pelletier* reflex, (1985), 27 C.C.C. (3d) 77 at 89 (Que. S.C.):

> Indecency concerns sexual behaviour or its representation which is neither obscene nor immoral but inappropriate according to the Canadian standards of tolerance because of the context in which it takes place. In other words, indecency is not a function of the behaviour itself but rather of the circumstances in which it takes place.

How does one determine when conduct has a sexual context? The matter was considered in *R. v. Chase* 1987 CanLII 23 (S.C.C.), (1987), 37 C.C.C. (3d) 97 (S.C.C.). In that case, McIntyre J., on behalf of the court at p. 101, adopted the position of Martin J.A. in *R. v. Alderton* reflex, (1985), 17 C.C.C. (3d) 204 (Ont. C.A.), and Laycraft C.J.A. in *R. v. Taylor* 1985 CanLII 138 (AB C.A.), (1985), 19 C.C.C. (3d) 156 (Alta. C.A.) to the effect that it is an act which, viewed objectively in all the circumstances, is done for sexual gratification. At p. 103 McIntyre J. made some apposite remarks concerning the concept of a sexual assault and the nature of indecency:

> While it is clear that the concept of a sexual assault differs from that of the former indecent assault, it is nevertheless equally clear that the terms overlap in many respects and sexual assault in many cases will involve the same sort of conduct that formerly would have justified a conviction for an indecent assault. The definitional approach to indecent assault, also an offence not defined in the *Criminal Code* therefore offers a guide in our approach to the new offence, as recognized by Laycraft C.J.A. After many years of dealing with the concept of indecent assault, the courts developed the definition, " an assault in circumstances of indecency." This, of course, was an imprecise definition but everyone knew what an indecent assault was. [3] The law in that respect was reasonably clear and there was little difficulty with its enforcement. In my view then, a similar approach may be adopted in formulating a definition of sexual assault.
>
> Applying these principles and the authorities cited, I would make the following observations. Sexual assault is an assault **...** which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one:" Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?" (*Taylor, supra, per* Laycraft C.J.A., at p. 162 C.C.C.,p 269 C.R.)

As applied to this case, the question is, would a reasonable bystander, fully apprised of all the circumstances, have considered the appellant's act was sexual in the sense that she was exposing her breasts for the sexual gratification of herself or someone else? The exposure today of a woman's breasts in public does not automatically import a conclusion that this act is being done for the sexual gratification of the actor or the audience. For example, the exposure of a woman's breasts in public in order to breastfeed a child is not done for the sexual gratification of the woman or anyone else. It affords women, who choose to nourish a child by breastfeeding, mobility. This example illustrates the importance of the circumstances

in determining whether an act is sexual. Consideration of the circumstances, according to McIntyre J. at p. 103, includes consideration of any part of the body touched, words and gestures accompanying the act, and the intent or purpose of the person committing the act, to the extent that this may appear from the evidence. While the motive of the accused person is but one factor to consider, its importance will vary depending on the circumstances. Here, Ms. Jacob did not touch or stroke her breasts. With respect to words, I consider that underlying the remarks of the police officers and the mother who spoke to Ms. Jacob was a concern that Ms. Jacob was degrading the essential human dignity of herself and the members of her sex by exposing her breasts. The rude remarks made by some men upon seeing Ms. Jacob barebreasted would tend to support this view. But the reasonable bystander would not be fully informed without also considering Ms. Jacob's reply to the police officer protesting against what she viewed as discrimination, [4] her conversation with the man working on his front lawn which was unremarkable, and her reply to the mother who spoke to her. Having regard to these conversations and weighing them in all the circumstances, the reasonable bystander would not, in my opinion, conclude beyond a reasonable doubt that the appellant was exposing her breasts for the sexual gratification of herself or someone else. As a result, the appellant's conduct lacks the sexual context for being an indecent act within the meaning of s. 173(1)(a).

Differences Between s. 173(1)(a) and 174

Both s. 173(1)(a) and s. 174 are now found in the part of the *Code* entitled "Disorderly Conduct." It is the position of the respondent that there is no substantive difference between s. 173(1)(a) and s. 174 of the *Code* and that Ms. Jacob could have been charged under either section. Section 174 states:

> (1) Every one who, without lawful excuse,
> (a) is nude in a public place, or
> (b) is nude and exposed to public view while on private property, whether or not the property is his own,
> is guilty of an offence punishable on summary conviction.
>
> (2) For the purposes of this section, a person is nude who is so clad as to offend against public decency or order.
>
> (3) No proceedings shall be commenced under this section without the consent of the Attorney General.

The respondent submits that a sexual context is not required in order for there to be a conviction under s. 174(1). I agree, but I must also point out that the reason for this is that the community standard of tolerance test does not apply to s. 174(1): *R. v. Verrette* (1978), 40 C.C.C. (2d) 273 (S.C.C.). Under s. 174(2), if a person is clothed so as to offend against public decency or in a manner which offends public order, the accused is considered to be nude. The community standard of tolerance was used to determine whether a dance performed by a partially clothed person in a public place offended public decency: *R. v. Giambalvo* reflex, (1982), 70 C.C.C. (2d) 324 (Ont. C.A.). In that case no argument was made concerning the sexual context of the dance and the court did not address the issue I have addressed in these reasons.

The wording of s. 174(2) specifically requires the court to consider whether the person who is partially clad offends against public order. A sexual context is not necessarily required in determining whether public order has been offended. In the context of this case that question would be a major consideration. The exposure of the appellant's breasts took place on the main streets and residential streets of Guelph. Approximately 250 people in all saw the appellant during her walk-about. There was no advance indication of the appellant's demonstration. For this reason the circumstances of this case differ from the situation where adults choose whether to enter a topless bar or whether to watch or to let their children watch a television program depicting barebreasted women. The people in Guelph could not

choose whether to see, or to have their children shown, the appellant's breasts. The right of the parents living in the neighbourhood to raise their children according to their moral beliefs was interfered with by the appellant thrusting upon the children a contrary influence which they had no opportunity to avoid.

The trial judge found that public reaction to the appellant's movement about the streets of Guelph was varied and perhaps predictable. Some people, in particular parents whose children had been playing in front of their homes, found the appellant's exposure of her breasts to be offensive. Other witnesses did not. A lot of people walked up from both ends of the street to see what the commotion was about. Vehicular traffic slowed down, including the York Road bus. One witness described a van which almost broadsided her husband's car. The trial judge described it as follows:

> Young children in the company of their mothers would point to the breasts and bring them to the attention of their parent; older teenagers when they learned of the young lady in their neighbourhood brought out their lawn chairs and their beer and passed their binoculars around so the others could get a good view. Some of the older men made rude remarks.

It seems clear from the foregoing that the psychological comfort of a number of people in the neighbourhood was interfered with by the appellant's exposure of her breasts and her persistence in it. Conduct which materially affects the reasonable comfort and convenience of people constitutes a public nuisance: *Attorney General v. P.Y.A. Quarries Ltd.*, [1957] 1 All E.R. 894 at 902 (C.A.). Public order would thus be offended. Social nuisance, including street congestion, and general detrimental effects on passers-by or bystanders, especially children, was considered by Lamer J. in *Reference re ss. 193 and 195.1(l)(c) of the Criminal Code*, 1990 CanLII 105 (S.C.C.), [1990] 1 S.C.R. 1123 as part of the reason justifying the limitation of expression of persons communicating for the purposes of engaging a prostitute. If, as the appellant's counsel suggests, the exposure of Ms. Jacob's breasts constituted expression, it might be that deference to public order would similarly justify limiting it. Mention should also be made of *R. v. Dieleman* reflex, (1995), 20 O.R. (3d) 229, a decision of Adams J., who held that, where the use and enjoyment of contiguous private property is affected by conduct on a public street, a privacy interest protected by s. 7 of the *Charter* is affected. Adams J. recognized a need to balance the right to protest, which is protected under the *Charter* as part of the right to freedom of expression, with privacy interests under the *Charter*. If the appellant had been charged under s. 174, a court could, in applying the section, consider and balance the competing individual interest of the appellant and the interest of the community in public order. It is quite possible that, under s. 174, even if the appellant met the community standard of tolerance, she could have been convicted for offending public order. The fact that a sexual context is not necessarily required under s. 174 is linked to the fact that it is not always necessary to apply the community standard of tolerance test under s. 174.

Errors of the Trial Judge and Summary Conviction Appeal Court Judge

The trial judge's task was not an easy one. Given the paucity of guidance on the subject of indecency, it is perhaps not surprising that he erred in his interpretation of s. 173(1)(a). The trial judge concluded that the appellant's act in exposing her breasts went beyond the community standard of tolerance and it was for this reason that he convicted her. The trial judge erred in that he did not determine whether the appellant's act had a sexual context before applying the community standard of tolerance test.

The trial judge also erred in the manner in which he applied the community standard of tolerance test. The trial judge observed that the fact women do not go about with their chests bare was an indication that they did not approve of such conduct for themselves. He concluded that the appellant had offended the community standard of tolerance and convicted.

Although the fact that women do not go about with their chests bare is an indication that they do not approve of such conduct for themselves, it does not follow that such conduct is beyond the community standard of tolerance. The community standard of tolerance means allowing what is not actually approved: *Towne Cinema Theatres*, *supra*, per Wilson J. at 522. What is beyond the community standard of tolerance is what Canadians will not abide other Canadians seeing, in the case of a

performance or exhibition (*Towne Cinema Theatres, supra*, per Dickson C.J.C., at p. 508), or doing, in the case of gross indecency or an indecent act (e.g. *R. v. St. Pierre*, (1974), 17 C.C.C. (2d) 489 (Ont. C.A.)).

The trial judge further erred in the manner in which he applied the community standard of tolerance test inasmuch as he does not appear to have considered whether there was any harm to the community by the appellant's act in exposing her breasts: *Butler, supra,* at p. 485.

The trial judge's errors in applying the community standard of tolerance do not mean that the appeal must automatically be allowed. Having regard to the facts as found by the trial judge, this court would have to independently consider whether the appellant's acts were beyond the community standard of tolerance, including the question of harm, before allowing the appeal on this basis. It is not necessary for me to undertake this independent review having regard to what I see as the preliminary error made by the trial judge in not determining whether the appellant's act had a sexual context. Nor is it necessary for me to determine whether harm to the community could also encompass the disruption of public order and I do not propose to do so. Given my conclusion, I do not propose to deal with the other grounds of appeal raised by the appellant.

Conclusion

In applying the community standard of tolerance test under s. 173(1)(a), one must bear in mind that this test is not an end in itself. If the term indecent were to mean whatever the community will not tolerate, there is a danger that discrimination by the community will be seen as harmful and legitimized. The community standard of tolerance is a measure of whether conduct is unduly sexual. In order for an act to be an indecent act under s. 173(1)(a), the act must be a sexual act in the sense that the act is done for the sexual gratification of the accused or others. In this case, a reasonable bystander, fully informed of all the circumstances, would not conclude that this was the case. Secondly, the trial judge erred in the manner in which he applied the community standard of tolerance test. For these reasons I would grant leave to appeal, allow the appeal and order that an acquittal be entered.

C12668

COURT OF APPEAL FOR ONTARIO

OSBORNE, WEILER and AUSTIN JJ.A.

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

- and -

GWEN JACOB

Appellant

J U D G M E N T

RELEASED:

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[1] Legislation which was enacted in response to conditions prevailing a century ago should be interpreted in the light of contemporary standards if such an interpretation is compatible with the legislative language. See, e.g., *Royal Trust Co. v. Potash* (1986), 31 D.L.R. (4th) 32l.

[2] *House of Commons Debates* (25 May 1892) at 2968.

[3] I am not aware of any conviction for indecent assault which was not of a sexual nature.

[4] The correctness of the appellant's belief is not the issue before this court. Reference to objective biological differences and the equality rights contained in s. 15 of the *Charter* is found in *R. v. Hess,* 1990 CanLII 89 (S.C.C.), [1990] 2 S.C.R. 906; *Weatherall v. Canada (A.G.)* 1993 CanLII 112 (S.C.C.), (1993), 2 S.C.R. 872; and *R. v. Nguyen*, [1990] 2 S.C.R. 905, as applied by this court in *R. v. D. (F.)* *reflex, (1993), 12 O.R. (3d) 725.*