VII. MOTOR VEHICLES

*Patrick Healy**

A. *Introduction*

The point at which criminal responsibility and responsibility for incompetent driving intersect is difficult to fix with precision because the conduct involved is not easily accommodated in the traditional categories of crime. It is beyond doubt, however, that wayward driving, and especially impaired driving, is a serious social problem that in some measure should attract the criminal sanction. Furthermore, it is an intractable political problem because there is nothing to suggest that any initiatives by government will provide an effective remedy; the utility of penal liability as a mechanism for deterring defective driving is uncertain, and the efficacy of the criminal sanction is dubious. Ultimately, the incidence of dangerous and impaired driving will abate only with increased self-discipline among drivers. Even assuming the utility of legislative controls, however, the political difficulty in controlling impaired driving is especially great because neither the problem nor its solution lies entirely in provincial or federal jurisdiction, or in a single branch of either government.

With the introduction of Bill C-19,[1] the government gave notice that it favoured an extension of the criminal sanction in a partial attempt to control impaired and dangerous driving. The Bill contains proposals that would significantly affect substantive driving offences, the means of enforcing driving offences and sentencing.[2] This commentary is concerned solely with proposals that would reform the existing offences of negligent and dangerous driving and create new offences of dangerous or impaired driving causing death or bodily harm.[3]

---

* Law Reform Commission of Canada. The author advised the Department of Justice on some of the matters discussed in this article and expresses his gratitude to the Department for its permission to use materials previously prepared. This article does not necessarily reflect the Department's or the Commission's views.

[1] Criminal Law Reform Act, 1984, Bill C-19, 32nd Parl., 2d sess., 1983-84 (1st reading 7 Feb. 1984) [hereafter cited as Bill C-19].

[2] Virtually all the proposed amendments are contained in cl. 52 of the Bill which would repeal and replace present ss. 233 to 240.3 of the Criminal Code. Incidental or consequential amendments can be found in cls. 3, 49, 50, 172, 201, 206, 237, 248, 254 and 256. For background information, *see* DEPARTMENT OF JUSTICE, NEWS RELEASE (7 Feb. 1984).

[3] It should be noted that the government's proposals also reflect a policy that offences relative to the operation of conveyances should be uniform wherever possible. Accordingly, the government has consolidated offences relative to the operation of motor vehicles, vessels and aircraft. Throughout this paper, however, the "driving

B. *The Issues*

1. *Problems in Form and Content*

Provincial and federal legislation governing motor vehicles, vessels and aircraft is based on the premise that the general use of such conveyances requires rules to promote norms of orderliness and public safety. Penal offences, provincial or federal, censure deviations from these standards, and offences within the Criminal Code[4] proscribe what Parliament perceives as grave deviations that should attract the stigma of the criminal law. Although driving offences are included in Part VI of the Code among "Offences against the Person and Reputation", they intrinsically have little to do with the integrity of the person except in the broad sense that they are predicated upon a notion of public safety. Indeed, these offences have little to do with catholic notions of crime as a form of moral turpitude that is culpable because it consists of intentional or reckless actions; rather, they typify a stricter and more utilitarian form of prohibition that is intended to minimize the risk that arises from the general use of certain forms of technology. Moreover, their history is one of miscellaneous amendment; Parliament has revised the statute on several occasions in an attempt to relieve the aggravation of social problems and social costs arising from the increasing use of motor vehicles, vessels and aircraft. This legislative spot-welding has produced an amorphous collection of provisions that does not evince a coherent policy with respect to the objectives or the function of the criminal law as an instrument of social control.

Accordingly, a general issue of fundamental importance is whether, or how, Parliament should initiate a comprehensive revision of driving offences under federal jurisdiction that would transform the current miscellany of provisions into a succinct statement of public policy in the form of efficient rules. Such an undertaking would require substantive decisions with respect to the form and content of criminal sanctions and other mechanisms for securing compliance with specified objectives and policies. With respect to the criminal aspect, an enterprise of this magnitude would require a thorough consideration of the utility of the criminal sanction in driving matters, an exhaustive review of the ingredients of specific offences, and correlation with cognate offences and with the General Part. Such a mandate clearly coincides with that of the Criminal Law Review and other major initiatives in Canadian law

---

offences" under consideration should be understood to include dangerousness or impairment in the operation of any of these conveyances. *See* s. 233 (dangerous driving), subs. 239(2) (liability for causing bodily harm through impaired driving), 239(3) (liability for causing death through impaired driving) and 237(a) (definition of impaired driving), as proposed in Bill C-19, cl. 52.

[4] R.S.C. 1970, c. C-34.

reform.[5] This was certainly not the mandate that inspired the driving amendments in Bill C-19, and in this regard the proposed amendments are among the latest instances in a tradition of *ad hoc* revisions to the criminal law.

Nevertheless, the government addressed two discrete problems with respect to the content of driving offences currently included in the Criminal Code:[6]

(a) the continuing ambiguity regarding the distinction between negligent and dangerous driving; and
(b) the apparent inadequacy of the criminal law as a sanction against negligent, dangerous or impaired driving that causes death or bodily harm.[7]

---

[5] The Criminal Law Review is an initiative of the Government of Canada that contemplates a comprehensive revision of Canadian criminal law by 1987. The government's policy with regard to this initiative is set out in DEPARTMENT OF JUSTICE, THE CRIMINAL LAW IN CANADIAN SOCIETY (1982). The relationship between the mandate of the Criminal Law Review and the contents of Bill C-19 is not entirely clear: *see supra* I. INTRODUCTION. It should perhaps be noted that in addition to the government's initiative on the criminal law, it has also launched a project, known as the Federal Statutes and Compliance Project, that will, among other tasks, examine the possibility of alternatives to criminal liability as a form of sanction.

[6] Two further issues of form were considered in the proposed amendments to the driving offences: first, the degree to which driving offences should apply uniformly to the operation of motor vehicles, vessels and aircraft; second, the prolixity of the driving provisions in the Code and the need for simplification. These are chiefly formal matters and are not discussed in this article, except to the extent that driving matters might be treated as a separate part of the Code. It should be noted, however, that the government's proposals generally reflect a policy of uniform application to motor vehicles, vessels and aircraft as well as a complementary policy of consolidation and simplification. Accordingly, the phrase "driving offences" is used in this text with regard to motor vehicles, vessels and aircraft.

[7] However imperfect, statistical evidence reveals a striking disproportion between the incidence of death or personal injury in traffic cases and the incidences of charges laid for manslaughter or criminal negligence causing death or bodily harm. For statistics on this point between 1977 and 1982, *see* CANADIAN CENTRE FOR JUSTICE STATISTICS, CRIME AND TRAFFIC ENFORCEMENT STATISTICS 1981, tables 4 & 5 (1982) and CANADIAN CENTRE FOR JUSTICE STATISTICS, CRIME AND TRAFFIC ENFORCEMENT STATISTICS 1982, tables 4 & 5 (1983). (These figures are quite problematic for several reasons, two of which are that they refer only to reported "occurrences" rather than dispositions and that they appear not to distinguish driving cases of negligence from other forms of negligence). A partial explanation is simply that some occurrences are accidents or are attributable to careless driving under provincial legislation. Nonetheless, given the extraordinarily high proportion of cases in which intoxication is detected (Mr. G. Haas of the Traffic Injury Research Foundation in Ottawa estimates that alcohol is a significant factor in 49% of fatal collisions and 25% of collisions involving bodily injury) and the fact that many collisions involving intoxication also involve elements of dangerous driving, the rate of prosecution for serious offences that include death or bodily injury remains quite surprising.

2. *What is a "Driving Offence"?*

As this commentary is restricted to driving offences that are or might be included in the Criminal Code, it is necessary to define a "driving offence". To this end the provisions of the Code can be classified according to the following criteria:

(a) offences in which some act or physical condition involving the operation of, or competence to operate, a motor vehicle, vessel or aircraft is an essential element;[8]
(b) offences in which the operation of, or competence to operate, a motor vehicle, vessel or aircraft is but a possible factual element in the mode of commission;[9] and
(c) other offences involving motor vehicles, vessels or aircraft.[10]

According to these criteria, the phrase "driving offences" only embraces offences in the first class. This is the technical standard employed in these pages with respect to the reform and organization of driving offences in the Criminal Code.

3. *Risk-Based and Result-Based Offences*

While it is true that the driving offences in the Criminal Code prohibit deviations from declared norms of orderliness and safety, it does not follow that all driving offences are or should be uniformly based upon notions of risk. Parliament has, of course, endorsed the view that it is

---

[8] *See, e.g.*, subs. 233(1) (criminal negligence in the operation of a motor vehicle), 233(2) (failing to remain at the scene of an accident — motor vehicles), 233(4) (dangerous driving), 234(1) (driving while impaired by alcohol or drugs), 234.1(2) (failure or refusal to comply with a roadside demand for a breath sample — motor vehicles), 235(2) (failure or refusal to comply with a demand for a breath sample — motor vehicles), 236(2) (driving with more than 80 milligrams of alcohol — motor vehicles), 238(3) (driving while disqualified — motor vehicles), s. 239 (equipment of a motor vehicle or vessel with a smoke screen), subs. 240(1) (dangerous operation of a vessel), 240(2) (failing to keep watch while towing a person by means of a vessel), 240(3) (towing a person by means of a vessel during a prohibited period), 240(4) (operation or navigation of a vessel while impaired by alcohol or drugs), 240(5) (failing to remain at the scene of an accident involving another vessel), 240(9) (operation of a vessel while disqualified), 240.1(2) (failing to comply with a demand for a breath sample — vessels), s. 240.2 (operation of a vessel with more than 80 milligrams of alcohol). It should be noted that sub. 238(3) was declared *ultra vires* in Boggs v. The Queen, [1981] 1 S.C.R. 49, 120 D.L.R. (3d) 218.

[9] *See, e.g.*, present ss. 203 (criminal negligence causing death), 204 (criminal negligence causing bodily harm), 219 (manslaughter) and 245.3 (unlawfully causing bodily harm). Though these are by no means the only offences available under this heading, they are the most apposite to driving matters.

[10] *See, e.g.*, present ss. 52 (sabotage), 75-76 (piracy), 76.1 (hijacking), 76.2 (endangering the safety of an aircraft), 76.3 (offensive weapons on an aircraft), subs. 88(2) (possession of a prohibited weapon), 89(3) (possession of an unregistered weapon), ss. 232 (interfering with transportation facilities), 295 (unlawful taking of a motor vehicle), 306 (break and enter) and 311 (possession of a master key).

appropriate to use the criminal law as a sanction against conduct that directly or indirectly creates a risk of serious harm. Criminal liability for directly threatening public safety by negligent or dangerous driving exists in current subsections 233(1) and (4),[11] which are variants of a single concept of risk-creation, and are distinguishable, if at all, by degree rather than kind.[12] Less direct is the threat of impaired driving, but it too is proscribed as a function of risk; its two variants are now prohibited in sections 234 and 236.[13] Thus, although risk-based offences dominate the driving provisions, there are two other types of offences in the Code that can or do apply to driving matters. First, there are result-based offences, which for present purposes include those that proscribe conduct causing death or bodily harm. Second, there are ancillary offences,[14] which include those facilitating the enforcement of other offences and those prohibiting conduct that is neither risk-based nor result-based.[15]

As a result, no driving offence explicitly proscribes causing death or bodily harm by negligent, dangerous or impaired driving. Moreover, with regard to risk-based driving offences, a further distinction can be made between those based on negligence or dangerousness and those based on impairment. It is suggested that the substantive ingredients of sections 234 and 236 raise no pressing issues of policy, although these provisions do raise questions concerning effective law-enforcement procedures and sentencing policy.[16] The same cannot be said regarding criminal negligence in the operation of a motor vehicle and dangerous driving: successive attempts by the courts to distinguish these offences,

---

[11] Sub. 233(1) carries a maximum penalty of 5 years' imprisonment while sub. 233(4) carries a maximum penalty of 2 years' imprisonment.

[12] Despite the differences in their ingredients, the essence of each offence is driving a vehicle in a fashion that creates a risk of danger or harm to others.

[13] Although ss. 234 and 236 both prohibit impaired driving, the distinction between the two offences must be emphasized. The former is based upon observation, typically consisting of the smell of alcohol, weaving on the road, driving at excessive speed, etc., and commonly used roadside performance tests. The latter, a *per se* rule, fixes impairment at 80 milligrams of alcohol in 100 millilitres of blood, tested in accordance with procedures and machinery authorized by the Code. The best compendium on these provisions is R. McLEOD, J. TAKACH & M. SEGAL, BREATHALYSER LAW IN CANADA (2d ed. 1982).

[14] *E.g.*, present subs. 233(2), 234.1(2), 235(2), 238(3), 240(5), 240(9), 240.1(2) and s. 239.

[15] The distinction between risk- and result-based driving offences derives from the distinction between conduct-crimes and result-crimes made by G. GORDON, THE CRIMINAL LAW OF SCOTLAND 63 para. 3-05 (2d ed. 1978); *see also* G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 78 §3.2 (2d ed. 1983). Despite the utility of distinguishing crimes that require a specific consequence from those that do not, these terms can show the distinction between the physical and mental elements of crime. *See* G. WILLIAMS, *id.*; J. SMITH & B. HOGAN, CRIMINAL LAW 31 (5th ed. 1983); Treacy v. D.P.P., [1971] A.C. 537, at 560, [1971] 1 All E.R. 110, at 120 (H.L. 1970) (Lord Diplock).

[16] Bill C-19 also includes significant proposals on both of these elements in the law: *see* cl. 52.

both as between themselves and in relation to the provincial offence of careless driving, have led to confusion.

However, the scope of criminal liability for driving that causes death or bodily harm, or that merely creates the risk of such results, has never been satisfactorily defined in Canadian law. The chief cause of this confusion is Parliament's failure to stipulate whether these matters are best dealt with in specific driving offences or in offences of general application. The crux of the problem in the current law is the concept of criminal negligence, which appears both in a specific driving offence and in generic offences.[17] Quite apart from profound uncertainty about the meaning of this concept, its application to driving cases necessarily raises issues that relate to the generic offence of manslaughter and its adequacy in driving matters, but also broader issues relating to the proper function of negligence in the criminal law.[18] Thus, a central question of policy is whether result- and risk-based liability for unlawful driving should be accommodated in generic concepts of crime or in driving offences with specific ingredients and, accordingly, specific canons of construction.[19] The proposals in Bill C-19 suggest a shift toward the latter approach, which could conceivably provide the foundation for a distinct part in the Criminal Code dealing with driving offences.

---

[17] *See, e.g.*, O'Hearn, *Criminal Negligence: An Analysis in Depth*, 7 CRIM. L.Q. 27, 407 (1965); Burns, *An Aspect of Criminal Negligence or How the Minotaur Survived Theseus Who Became Lost in the Labyrinth*, 48 CAN. B. REV. 47 (1970); Weiler, *The Supreme Court of Canada and the Doctrines of Mens Rea*, 49 CAN. B. REV. 280 (1971); Stuart, *The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence*, 15 CRIM. L.Q. 160 (1973); A. MEWETT & M. MANNING, CRIMINAL LAW 100 (1978); D. STUART, CANADIAN CRIMINAL LAW 113, 149 (1982); Stalker, *Can George Fletcher Help Solve the Problem of Criminal Negligence?*, 7 QUEEN'S L.J. 274 (1982).

[18] The literature on this vexed topic is vas. *See, e.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960); Hart, *Negligence, Mens Rea and Criminal Responsibility*, in OXFORD ESSAYS IN JURISPRUDENCE 29 (A. Guest ed. 1961); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART (2d ed. 1961); P. FITZGERALD, CRIMINAL LAW AND PUNISHMENT (1962); Fitzgerald, *Crime, Sin and Negligence*, 79 L.Q.R. 351 (1963); Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963); Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971); Urowsky, *Negligence and the General Problem of Criminal Responsibility*, 81 YALE L.J. 949 (1972); Gordon, *Subjective and Objective Mens Rea*, 17 CRIM. L.Q. 355 (1975); Griew, *Consistency, Communication and Codification*, in RESHAPING THE CRIMINAL LAW 57 (P. Glazebrook ed. 1978); G. FLETCHER, RETHINKING THE CRIMINAL LAW 259-73 (1978); H. GROSS, A THEORY OF CRIMINAL JUSTICE 419-23 (1979); Brady, *Recklessness, Negligence, Indifference and Awareness*, 43 MODERN L. REV. 381 (1980); Williams, *Recklessness Redefined*, 40 CAMB. L.J. 252 (1981); G. WILLIAMS, *supra* note 15.

[19] The Law Reform Commission of Canada has recently disapproved of this approach; *see* HOMICIDE, WORKING PAPER 33, at 59 (1984) [hereafter cited as WORKING PAPER 33].

4. *The Government's Proposals*

The gist of the proposals can be summarized as follows:

(a) repeal criminal negligence in the operation of a motor vehicle and amend dangerous driving by increasing the maximum term of imprisonment to five years;[20] and

(b) enact four new offences, causing death by dangerous or impaired driving and causing bodily harm by dangerous or impaired driving, making the former punishable by a maximum of fourteen years' and the latter by ten years' imprisonment, and making both indictable offences subject to election.[21]

C. *Proposed Amendments*

1. *Risk-Based Offences: Negligent and Dangerous Driving*

The confusion arising from the co-existence of negligent and dangerous driving in the Criminal Code is notorious.[22] That confusion arises from the necessity to distinguish driving that shows "wanton or reckless disregard for the lives and safety of others"[23] from driving that is "dangerous to the public".[24] The Supreme Court of Canada has given its attention to both of these provisions on a number of occasions: *O'Grady v. Sparling*,[25] *Mann v. The Queen*,[26] *Binus v. The Queen*[27] and *Peda v. The Queen*.[28] The Court also gave some further consideration to the concept of criminal negligence in *Arthurs v. The Queen*[29] and *LeBlanc v. The Queen*.[30] The first two cases established the constitutional points that the criminal offences of negligent and dangerous

---

[20] S. 233, as proposed in Bill C-19, cl. 52.

[21] Subs. 239(2) (3), as proposed in Bill C-19, cl. 52.

[22] There is an abundance of critical writing on this subject. *See, e.g*, MacDonald, *Careless, Negligent, Reckless Operation of Motor Vehicles*, 6 CAN. B. J. 122 (1963); O'Hearn, *supra* note 17; McWilliams, *What is Dangerous Driving?*, 7 CRIM. L.Q. 297 (1964); Hooper, *Dangerous Driving: A Controversial Decision*, 9 CRIM. L.Q. 37 (1966); Hooper, *Dangerous Driving: What is Advertent Negligence?*, 10 CRIM. L.Q. 403 (1968); Burns, *supra* note 17; Kelly, Annot., 29 C.R.N.S. 252 (1975); A. MEWETT & M. MANNING, *supra* note 17, at 100-10; D. STUART, *supra* note 17, at 189-95.

The evolution of these offences is reviewed in Yolles v. The Queen, [1958] O.R. 786, 16 D.L.R. (2d) 97 (H.C.); R. v. Jeffers, [1964] 2 C.C.C. 346 (N.S. Cty. Ct.). The history of these offences is closely tied to the history of related offences in English legislation: for a brief survey, *see* R. v. Lawrence, [1982] A.C. 510, [1981] 1 All E.R. 974 (H.L. 1981).

[23] Present s. 202.

[24] Present sub. 233(4).

[25] [1960] S.C.R. 804, 25 D.L.R. (2d) 145.

[26] [1966] S.C.R. 278, 56 D.L.R. (2d) 1.

[27] [1967] S.C.R. 594, 2 C.R.N.S. 118.

[28] [1969] S.C.R. 905, 6 D.L.R. (3d) 177.

[29] [1974] S.C.R. 287, 28 D.L.R. (3d) 565 (1972).

[30] [1977] 1 S.C.R. 339, 68 D.L.R. (3d) 243 (1975).

driving required *mens rea* in the form of advertence, whereas the provincial offence of careless driving did not, and that the three offences raised no conflict between legislative jurisdictions. This, at least, is a constitutional explanation for the co-existence of the three offences. An appreciation of the problems raised by the substantive elements of subsections 233(1) and (4) requires closer attention to their interpretation by the Supreme Court of Canada.

In *O'Grady v. Sparling* the appellant argued that the provincial offence of careless driving was *ultra vires* on the basis that it was *in pari materiae* with the federal offence of criminal negligence in the operation of a motor vehicle and thus usurped Parliament's exclusive authority over criminal law under subsection 91(27) of the Constitution Act, 1867.[31] Forced to distinguish the two offences, the Supreme Court of Canada concluded that the federal offence was predicated upon recklessness, signifying advertence or subjective foresight, whereas liability under the provincial offence could be made out by proof of inadvertent negligence alone.[32] Speaking for himself and five others, Judson J. also noted, *obiter*, that, despite the distinction between the federal and provincial offences, it remained open for Parliament to impose criminal liability for inadvertent negligence.[33]

The re-enactment of a federal offence of dangerous driving in 1962[34] invited renewed constitutional challenges to provincial offences of careless driving on the same basis as the earlier appeal in *O'Grady*. In the Supreme Court of Canada, the first case on this point was *Mann v. The Queen*, later followed by *Binus* and *Peda*, though the latter two cases raised questions of substantive law.

---

[31] *Now* Constitution Act, 1982, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[32] *Supra* note 25, at 808-09, 25 D.L.R. (2d) at 157-58.

[33] *Id.* at 818, 25 D.L.R. (2d) at 152 (Cartwright J. dissenting).

[34] Dangerous driving was dropped from the Code in the general revision of 1953-54. Similarly, there had previously been a multiplicity of general offences and driving offences that all relied on a notion of negligence, but there was no consistency in the definition of negligence applied to these offences. This lack of definition was particularly apparent with regard to the form of negligence that would support a charge of manslaughter. It was also a problem in English law.

All of these various offences were repealed in the general revision and replaced by what are now ss. 202, 203, 204 and sub. 233(1). Dangerous driving was eliminated from the statute-book because the Commissioners responsible for revision sought to consolidate the previous provisions by applying a single concept of negligence to the assessment of risk-based and result-based liability. Moreover, it was their intention that this concept would be applicable to the driving offences of negligence in the operation of a motor vehicle and to the generic offences of criminal negligence causing death or bodily harm: *see* REPORT OF THE ROYAL COMMISSION ON THE REVISION OF THE CRIMINAL CODE 12-13 (1954). The concept of criminal negligence was drafted in an attempt to capture the gist of the views expressed in R. v. Bateman, 19 Cr. App. R. 8, [1925] All E.R. Rep. 45 (C.C.A.); Andrews v. D.P.P., [1937] A.C. 576, [1937] 2 All E.R. 552 (H.L.) and R. v. Greisman, 59 O.L.R. 156, [1926] 4 D.L.R. 738 (C.A.). *See also* CRIMINAL CODE 10, 369-73 (J. Martin ed. 1955); Macleod & Martin, *Offences and Punishments Under the New Criminal Code*, 33 CAN. B. REV. 20, at 29-32 (1955).

Four overlapping opinions were delivered in *Mann*, but a majority of the Court sustained the provincial legislation on the basis that the criminal offence of dangerous driving did not sanction inadvertent negligence, and therefore did not conflict with the provincial offence. There were in these opinions several assertions that dangerous driving required *mens rea* in the form of advertent negligence. This result, of course, begged for a positive definition of the distinction between the two criminal offences of negligent and dangerous driving. The opportunity to provide such a definition was presented in *Binus v. The Queen*, which went to the Supreme Court of Canada from the Ontario Court of Appeal.[35] Briefly, the task of the Supreme Court in that case was to respond to the reasons given for the Court of Appeal by Laskin J.A. (as he then was), which can be summarized as follows:

(a) the decisions in *O'Grady* and *Mann* were not binding except on the constitutional question that they decided, and thus they did not define the substantive contents of subsections 233(1) or (4);
(b) although to some extent the criminal offences of negligent and dangerous driving share common elements, they can be distinguished as follows: *mens rea* in the form of advertence or subjective foresight is an essential element of criminal negligence whereas dangerous driving is established by inadvertence or failure to observe the standard of care that a reasonable person would have exercised in the circumstances; and
(c) similarly, dangerous driving and the provincial offence of careless driving share the objective standard of deviation from a duty of care, but they can be distinguished in that the offence of dangerous driving required proof of actual danger in the circumstances of the case.

The core of Mr. Justice Laskin's opinion was based on the second point,[36] and the third was *obiter*, but neither of these could be endorsed by the Supreme Court of Canada without acceptance of the first.

Speaking for the majority, Cartwright J. (as he then was) rejected the first point on the basis that *Mann* was binding authority for the proposition that advertent negligence was an element of dangerous driving. Accordingly, what was arguably only *obiter* in *Mann* was part of the *ratio* in *Binus*, with the result that negligent and dangerous driving were distinguishable by degree and not in kind.

In 1962, however, the offence of dangerous driving was restored to the Criminal Code, S.C. 1960-61, c. 43, s. 3, chiefly at the instance of provincial law-enforcement officials: *see* PROCEEDINGS OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION for 1956, 1957, 1959 and 1960. The salient difference between the revised offence and its predecessor (R.S.C. 1927, c. 36, sub. 285(6), *enacted by* S.C. 1938, c. 44) was the apparent elimination of recklessness: *see* MacDonald, *supra* note 22. The intention of the amendment was to provide an intermediate offence between the serious crime of negligence in the operation of a motor vehicle and the provincial offence of careless driving. The principal motivation was the creation of an alternative offence to criminal negligence, upon which juries were and remain reluctant to convict; most notably when negligence is charged in a result-based offence (*i.e.*, ss. 203 and 204). A secondary aim was to augment prosecutorial discretion.

[35] R. v. Binus, [1966] 2 O.R. 324, [1966] 4 C.C.C. 193 (C.A.).

[36] *Id.* at 333, [1966] 4 C.C.C. at 203.

Whatever other defects there were in *Binus*, its salient deficiency was that the Court failed to define the constituent elements of dangerous driving. Not surprisingly perhaps, *Binus* and the next case to be appealed, *Peda*, were based upon the adequacy of the charge to the jury. Four judgments were delivered in *Peda*.

Speaking for himself and two others, Cartwright C.J.C. dissented on the basis that dangerous driving required *mens rea* in the form of advertent negligence and that a proper charge to the jury should include instruction to the effect that the Crown must establish "that there was 'negligence of sufficient gravity to lift the case out of the civil field into that of the *Criminal Code* . . . something more than mere inadvertence or mere thoughtlessness, or mere negligence or mere error of judgment' that there was on the part of the accused 'knowledge or a willful disregard of the probable consequences or a deliberate failure to take reasonable precautions' ".[37] Mr. Justice Cartwright also said this: "No doubt there may be cases where evidence of the manner in which an accused did in fact drive may, in the absence of an acceptable explanation, be sufficient evidence to warrant a finding that his conduct involved 'advertent negligence' ".[38]

Speaking for himself and four others, Judson J. concluded that advertent negligence was an element of dangerous driving, but that this element could be inferred from evidence of the accused's driving and from the assumption that some voluntary mental function is required to drive a car.[39] In his view the jury need not be given special instruction on the matter of inadvertence.[40]

Pigeon J. accepted that advertent negligence was essential to dangerous driving, but concluded that advertence could be inferred from evidence of the circumstances:

> Although *mens rea* is always required, it is only in exceptional circumstances that the jury need instructions in this connection. In most cases the fact itself is sufficient proof of the intention. It is only when a question arises as to the existence of this element of the offence that the jury need be bothered with it.
>
> Therefore, in my view, the practical question is whether, in the circumstances of this case, there was something from which the jury might reasonably have concluded that, although objectively considered the accused's driving was "dangerous", it could be unconsciously so or be attributable to inadvertence.[41]

Ritchie J. concurred with Pigeon J. and with Judson J.

The confusion in the law after *Peda* was only aggravated by two subsequent judgments of the Supreme Court of Canada. In *Arthurs v. The Queen*, Mr. Justice Ritchie wrote for the majority that the definition of

---

[37] *Supra* note 28, at 912, 6 D.L.R. (3d) at 183, quoting from Loiselle v. The Queen, 17 C.R. 323, at 332, 109 C.C.C. 31, at 38 (Que. Q.B. 1953).

[38] *Id.*

[39] *Id.* at 916, 6 D.L.R. (3d) at 186.

[40] *Id.* at 918, 6 D.L.R. (3d) at 189.

[41] *Id.* at 921, 6 D.L.R. (3d) at 191.

criminal negligence in what is now section 202 of the Criminal Code does not include deliberation as a necessary ingredient. Thus, "conduct disclosing wanton or reckless disregard for the lives or safety of others constitutes *prima facie* evidence of criminal negligence".[42] Similarly, de Grandpré J. concluded for the majority in *LeBlanc v. The Queen*[43] that Duff J. (as he then was) had established a precedent in *R. v. Baker* when he defined criminal negligence for a unanimous court as "a want of ordinary care in circumstances in which persons of ordinary habits of mind would recognize that such want of care is not unlikely to imperil human life".[44] De Grandpré J. then referred to *O'Grady v. Sparling* and the requisite element of advertence in criminal negligence. Notwithstanding his citation to *Peda* and Pigeon J.'s view that "in most cases, the fact itself proves the intent",[45] de Grandpré J. evidently perceived no discrepancy between the standard advanced by Duff J. and the requirement for advertence. In his dissenting opinion in *LeBlanc*, Dickson J. (as he then was) said that proof of advertence was established according to an objective standard, but agreed with de Grandpré J. that subjective intent was not an element of criminal negligence.[46]

The jurisprudence on negligent and dangerous driving is a morass of conflicting *dicta*. What the courts say and what they do are not the same, although what they do also remains somewhat ambiguous. The courts say that both negligent and dangerous driving require *mens rea* in the form of advertence, which distinguishes them from the provincial offence of careless driving. As for proof of advertence, the courts say that dangerous driving can be established by assessing the circumstances against an objective standard of safe driving. In cases of criminal negligence, the element of advertence is inferred from evidence of the particular circumstances of the occurrence and the characteristics of the accused at the time. What they say, therefore, is that liability for negligent or dangerous driving is not based entirely upon an objective standard of safe conduct, but that proof of advertent misconduct can be made by reference to an objective standard.

The greatest discrepancy between what the courts say and what they do is between the basis of liability and the manner of proof. Assuming that there is no constitutional bar to the concurrence of negligent, dangerous and careless driving, the orthodox interpretation of the Supreme Court of Canada regarding the substantive content of these three offences, can be summarized as follows:

---

[42] *Supra* note 29, at 292, 28 D.L.R. (3d) at 568-69. *See also* LeBlanc v. The Queen, *supra* note 30, at 346, 68 D.L.R. (3d) at 248 (Dickson J. dissenting).

[43] *Id.*

[44] [1929] S.C.R. 354, at 358, [1929] 2 D.L.R. 282, at 285.

[45] *Supra* note 28, at 921, 6 D.L.R. (3d) at 191.

[46] *Supra* note 30, at 346, 68 D.L.R. (3d) at 249.

(a) liability for criminal negligence is predicated upon advertence or subjective foresight and, therefore, not upon an objective standard of conduct, although advertence can be inferred from evidence of the circumstances;
(b) liability for dangerous driving requires proof of actual danger and advertent negligence, which can be inferred from the facts; and
(c) liability for careless driving exists solely upon proof that the accused deviated from the standard of care expected of a reasonable and prudent driver.[47]

The case law, however, including *dicta* by the Supreme Court of Canada, reveals at least three variants of the orthodox interpretation.

First Variant

(a) criminal negligence imports subjective foresight but the inference of such advertence can be facilitated by reference to an objective standard of care;[48]
(b) dangerous driving requires proof of actual danger and advertence but the inference of such advertence can be based upon an objective standard of care;[49] and
(c) as in the orthodox interpretation, above.

---

[47] *See, e.g.*, R. v. Hnatiuk, 45 A.R. 125, [1983] 6 W.W.R. 76 (C.A.); R. v. Belanger, 24 M.V.R. 280 (Ont. H.C. 1983); R. v. Grunert, 12 Sask. R. 272, 11 M.V.R. 271 (Q.B. 1981); R. v. Crone, 13 M.V.R. 105 (Alta. Q.B. 1981); R. v. Titchner, [1961] O.R. 606, 29 D.L.R. (2d) 1 (C.A.); R. v. Forgeron, 29 C.R. 36, 121 C.C.C. 310 (N.S.S.C. 1958); R. v. Savard, 119 C.C.C. 92, 22 W.W.R. 473 (Alta. C.A. 1957).

[48] *See, e.g.*, R. v. Babb, [1984] 3 W.W.R. 324, 25 M.V.R. 164 (B.C.C.A.); R. v. Eichorn, 23 M.V.R. 226 (B.C.C.A. 1983); R. v. Chiechie, 21 Man. R. (2d) 211, 21 M.V.R. 221 (C.A. 1983); R. v. Doubrough, 35 C.C.C. (2d) 46 (Ont. Cty. Ct. 1977); R. v. Walker, 8 N.S.R. (2d) 300, 18 C.C.C. (2d) 179 (C.A. 1974); R. v. Moroz, 5 C.C.C. (2d) 277, [1972] 2 W.W.R. 307 (Alta. C.A. 1971); R. v. Rogers, 4 C.R.N.S. 303, [1968] 4 C.C.C. 278 (B.C.C.A.); R. v. Belbeck, 3 C.R.N.S. 173, [1968] 2 C.C.C. 331 (N.S.C.A. 1967); R. v. Torrie, [1967] 2 O.R. 8, [1967] 3 C.C.C. 303 (C.A.); R. v. Taylor, [1963] S.C.R. 491, 40 D.L.R. (2d) 12; R. v. Louks, 27 C.R. 112, 119 C.C.C. 236 (N.S.C.A. 1957); R. v. Fortin, 29 C.R. 28, 121 C.C.C. 345 (N.B.C.A. 1957); R. v. Savoie, 117 C.C.C. 327 (N.B.C.A. 1956); R. v. Stewart, 117 C.C.C. 346 (N.B.C.A. 1956); R. v. Gagnon, 25 C.R. 38, 115 C.C.C. 82 (Que. Q.B. 1956).

[49] *See, e.g.*, R. v. Hubble, 24 Sask R. 156, 22 M.V.R. 166 (Q.B. 1983); R. v. Deptuch, 16 Sask. R. 340, 12 M.V.R. 318 (Q.B. 1981); R. v. Benson, 16 Sask. R. 142, 14 M.V.R. 126 (Q.B. 1981); R. v. Flemming, 30 N.S.R. (2d) 142, 1 M.V.R. 230 (C.A. 1979); R. v. Fotti, 2 Man. R. (2d) 182, [1979] 1 W.W.R. 652 (C.A. 1978); R. v. Lowe, 6 O.R. (2d) 585, 21 C.C.C. (2d) 193 (C.A. 1974); R. v. Zavitz, [1972] 1 O.R. 628, 5 C.C.C. (2d) 348 (C.A. 1971); R. v. Prince, [1970] 2 C.C.C. 213, 73 W.W.R. 328 (Man. C.A.); R. v. Northam, [1968] 4 C.C.C. 321, 64 W.W.R. 353 (Alta. C.A.). This statement in the text observes the distinction between the requirement for liability and the manner of proving such a requirement. It is suggested that in so doing, the statement accurately describes current law.

Second Variant

(a) as in the orthodox interpretation, above;
(b) liability for dangerous driving is based upon an objective standard of care;[50] and
(c) as in the orthodox interpretation, above.

Third Variant

(a) liability for all three offences is based upon an objective standard of care and the gravity of the instant offence, as perceived by the police, the prosecutor, the judge or the jury.[51]

Such is the confusion in the Canadian criminal law that one cannot identify which of the four propositions above most closely approximates current practice.[52] The ambiguity between negligent and dangerous driving demonstrates that there is ample scope for revision of these offences.

The proposal to repeal criminal negligence in the operation of a motor vehicle and to increase the maximum penalty to five years' imprisonment on indictment for dangerous driving is a sound solution. It eliminates the confusion between the two offences and compensates for restricting the scope of liability by expanding the scope on sentence. Provincial legislation that creates offences to punish careless driving can be justified on jurisdictional grounds and on the basis that careless driving does not necessarily connote conduct that warrants the criminal sanction. On the other hand, there is no substantive reason why the criminal law should provide for negligent and dangerous driving as separate offences. Negligence and dangerousness are variants of a single concept of risk-creation, even as defined in their respective sections. It is of little moment whether one subscribes to the orthodox interpretation, according to which advertence is an essential element of both offences, or to the current trend in jurisprudence, by which liability is grouped according to an objective standard of care. Even if one accepts that the distinction by degree between the two criminal offences has some allure for prosecutorial discretion, this too only emphasizes that the Code in its present form seeks to punish varying degrees of risk-creation.

The proposals reflect the policy that there is no jurisprudential justification for imposing liability under two heads, with varying

---

[50] *See, e.g.*, R. v. Babb, *supra* note 48; R. v. Stebbings, 19 M.V.R. 57 (B.C.C.A. 1983); R. v. Clark, 35 A.R. 361, [1982] 2 W.W.R. 133 (C.A.); R. v. Hsu, 13 B.C.L.R. 348 (Cty. Ct. 1979); R. v. Mueller, 32 C.R.N.S. 188, 29 C.C.C. (2d) 243 (Ont. C.A. 1975); R. v. Beaudoin, [1973] 3 O.R. 1, 12 C.C.C. (2d) 81 (C.A.).

[51] While this variant is perhaps too cynical to qualify as a representation of current practice, it does capture a large measure of the discretion that is involved in the investigation and prosecution of driving offences.

[52] It is suggested however, that the first variant is closer to a description of current law.

penalties, where the evil is the mere creation of a risk.[53] It can be argued that there are such disparities in risks that some forms of risk-creating conduct should attract a criminal sanction while others should not, but it is quite indefensible that the law should create two heads of criminal liability for a single act.[54] Indeed, if it is accepted that the evil that the law should be addressing is the threat of causing death or bodily harm, there is even less justification for the co-existence of negligent and dangerous driving. Prosecutorial discretion is not a substantive justification for maintaining both offences. It is, however, an important factor with regard to sentencing policy. As the typical sentence under subsection 233(1) is markedly less than the maximum sentence under subsection 233(4),[55] the proposals provide complete compensation for the loss of prosecutorial choice between the two offences. Although

---

[53] Until 1977 Britain also maintained three offences of reckless, dangerous and careless driving. The intermediate offence was repealed by the Criminal Law Act 1977, U.K. 1977, c. 45, s 50, following a recommendation by the James Committee: *see* THE DISTRIBUTION OF CRIMINAL BUSINESS BETWEEN THE CROWN COURT AND THE MAGISTRATES' COURTS (Cmd. 6323, 1975). *See also* R. v. Lawrence, *supra* note 22, at 522-25, [1981] 1 All E.R. at 979-82. The question of policy, of course, is whether the standard adopted should be the higher standard of recklessness or the lower standard.

[54] The root of this problem is the notion that there are distinguishable degrees of negligence for purposes of criminal liability. This problem is an old one, but the crux of it is the following passage in Lord Atkin's speech in Andrews v. D.P.P., *supra* note 34, at 583, [1937] 2 All E.R. at 556:

> The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established.

These observations are undoubtedly merited with regard to manslaughter by means of a negligent act, but the same cannot be said with regard to risk-based crime that contemplates the same prohibition. It is difficult indeed to sustain a meaningful distinction between driving that shows disregard for the lives and safety of others and driving that endangers the public. When Lord Atkin speaks of degrees of negligence for purposes of the criminal law, he is speaking of degrees that separate civil and criminal liability, not two standards of criminal negligence.

[55] Terms of imprisonment, when imposed, are almost invariably less than two years (thereby keeping the accused out of a federal penitentiary) and sentences typically include a fine, suspension or probation. The same pattern is evident in cases of criminal negligence causing death or bodily harm under ss. 203 or 204. *See*, *e.g.*, R. v. Switzer, 18 M.V.R. 156 (B.C.C.A. 1982); R. v. Braun, 16 M.V.R. 304 (B.C.C.A. 1982); R. v. Jackson, 15 M.V.R. 247 (Ont. Dist Ct. 1982); R. v. Tompkins, 46 N.S.R. (2d) 358, 11 M.V.R. 132 (N.S.C.A. 1981); R. v. Grant, 45 N.S.R. (2d) 90, 10 M.V.R. 53 (C.A. 1981); R. v. Cédras, 61 C.C.C. (2d) 387, 11 M.V.R. 22 (Que. C.A. 1981); R. v. Middaugh, 11 M.V.R. 167, 6 W.C.B. 220 (Ont. Dist. Ct. 1981); R. v. Métivier, 10 M.V.R. 39 (Que. C.A. 1981); R. v. Hutchin, 6 M.V.R. 225 (Que. C.A. 1980); R. v. Moriarty, 3 M.V.R. 200 (Ont. C.A. 1979); R. v. Comeau, 33 N.S.R. (2d) 77, 2 M.V.R. 321 (C.A. 1979); R. v. Darrach, 18 Nfld. & P.E.I.R. 81, 1 M.V.R. 130 (P.E.I.S.C. 1978). For further reference, *see* R. NADIN-DAVIS & C. SPROULE, CANADIAN SENTENCING DIGEST, Vol. 1, 53, 54, 65 (1982).

sentence is ultimately in the discretion of the judge, a maximum of five years' imprisonment for dangerous driving should afford ample scope to reflect the gravity of the conduct involved.

2. *Result-Based Offences: Dangerous or Impaired Driving Causing Death or Bodily Harm*

While the proposals to reform the risk-based offences of negligent and dangerous driving should be welcomed, the proposed creation of result-based offences of dangerous or impaired driving causing death or bodily harm is more problematic. The issues involved are complex and the proposals, even if enthusiastically endorsed as an appropriate decision in social policy, would engender further jurisprudential difficulties. Before summarizing the salient problems, it is useful to survey the government's apparent objectives.

(a) *The Intent of the Proposals*

In some respects the central concern in policy is quite simple. As noted above, the driving offences provide for conduct that creates a risk to public safety, but they do not specifically provide for circumstances in which the risk of death or bodily harm has been realized, even though there is often a clear causal connection between those results and that which Parliament has defined as criminal conduct in the operation of a motor vehicle. This obvious anomaly would be insupportable were it not that the Code allows prosecution in these circumstances under its more general provisions if a causal relationship can be established between the proscribed results and the conduct that was negligent or otherwise unlawful. Despite this apparent flexibility in the law, there is a significant discrepancy between the incidence of fatal or serious collisions and the rate of conviction under offences that prohibit causing death or bodily harm, even though the incidence of impairment in serious collisions is extremely high.[56]

Generally, there are two approaches to the enactment of crimes that proscribe unlawful driving causing death or bodily harm. Parliament could bring the matter within the general law of crimes against the person or it could enact specific driving offences. As a result of the revision of 1953-54, current Canadian law reflects the former approach.[57] The relevant provisions of the Criminal Code are the following:

---

[56] In conversation with the author, Mr. G. Haas of the Traffic Injury Research Foundation said that in 48.9% of collisions in which the *driver* was killed alcohol was a significant factor.

[57] This was one objective in creating a definition of criminal negligence for the consolidation of 1953-54. *See* note 34 and accompanying text. *See also* WORKING PAPER 33, *supra* note 19, at 59, where special offences are discouraged.

section 203	causing death by criminal negligence;
section 204	causing bodily harm by criminal negligence;
paragraph 205(5)(*a*)	manslaughter by means of an unlawful act;
paragraph 205(5)(*b*)	manslaughter caused by means of criminal negligence; and
section 245.3	unlawfully causing bodily harm.

Two observations can be made immediately about these provisions. First, the proscribed results may be caused either by criminal negligence or by means of an unlawful act.[58] Second, there is no material distinction between section 203 and paragraph 205(5)(*b*).

None of the offences cited above is particularly effective in circumstances where death or bodily harm is the result of impaired or dangerous driving. Proof of impairment will not of itself support a finding of negligence, unless accompanied by extrinsic physical evidence of conduct that shows wanton or reckless disregard for the lives and safety of others. This position has been repeatedly affirmed in the courts[59] and represents sound reasoning: impairment, being a physical condition in the actor, cannot itself cause death or bodily harm. Impairment is only a contributing factor, not the immediate cause; it certainly does not supply the necessary ingredient of fault. It would be draconian to impose liability for manslaughter simply because the driver was impaired when the harm in question occurred; such a proscription would effectively dispense with proof of any fault or causation. Similarly, as a result of judicial interpretation, the "unlawful act" required by paragraph 205(5)(*a*) and section 245.3 must be inherently dangerous to physical safety.[60] It is far from clear whether impaired or dangerous driving *simpliciter*, in the absence of extrinsic physical

---

[58] A word should be said about present s. 245.3 (unlawfully causing bodily harm). As this section does not refer to an "unlawful act", it is not clear that the adverb "unlawfully" would be interpreted in the same way. Although the new section represents an amendment to the law of assault, there is no reason why s. 245.3 should not be applied to driving cases. It is assumed here that if it were applied to driving cases it would be interpreted as an unlawful act. This view is shared by D. WATT, THE NEW OFFENCES AGAINST THE PERSON 62 (1984). *See also* note 60 *infra*.

[59] *See, e.g.*, R. v. Walker, *supra* note 48; R. v. Pisler, 8 C.C.C. (2d) 387, [1972] 5 W.W.R. 497 (B.C.C.A.); R. v. Boucher, [1968] 4 C.C.C. 251 (Que. C.A. 1967); R. v. Ferguson, 44 C.R. 20, [1965] 1 C.C.C. 123 (Sask. C.A. 1964); R. v. MacLean, 129 C.C.C. 276, 34 W.W.R. 230 (Alta. C.A. 1961); R. v. Rodgers, 103 C.C.C. 97, 6 W.W.R. 128 (B.C.C.A. 1952); R. v. Savoie, *supra* note 48; R. v. Wilmot, 74 C.C.C. 1, [1940] 2 W.W.R. 201 (Alta. C.A.).

[60] *See, e.g.*, R. v. Cole, 34 O.R. (2d) 416, 64 C.C.C. (2d) 119 (C.A. 1981); R. v. Tennant, 7 O.R. (2d) 687, 23 C.C.C. (2d) 80 (C.A. 1975); Alec v. The Queen, [1975] 1 S.C.R. 720, 48 D.L.R. (3d) 158 (1974); R. v. Hilborn, [1946] O.R. 552, [1947] 1 D.L.R. 383 (C.A. 1946). Speaking for the Ontario Court of Appeal in *Cole*, Lacourcière J.A. concluded that the element of dangerousness was essential only if the unlawful act alleged was not a criminal offence. This distinction is subject to doubt: *see* McDonald, Comment, 24 CRIM. L.Q. 402 (1982). Canadian courts have generally followed English

evidence, reveals the quality of dangerousness required by the judicial construction of "unlawful act".[61]

As for the discrepancy between the incidence of impairment in serious collisions and the rate of conviction for causing bodily harm or death in driving cases, its immediate cause would appear to be the exercise of prosecutorial discretion. Four possible reasons can be identified. First, evidence of causation may be weak. Second, the decision to proceed with a prosecution for criminally negligent driving or dangerous driving (subsection 233(4)), impaired driving (section 234) or "over 80" driving (section 236), relieves the prosecution of the burden of proving the specific result and causation. Third, since death and bodily harm caused by unlawful operation of a motor vehicle are rarely intended consequences, the authorities, like juries, commonly regard them as accidental consequences, not as serious crimes against the person. Finally, offences in which the causing of death or bodily harm is an essential ingredient are triable only on indictment, unlike negligent, dangerous or impaired driving. Even where the more serious offences are charged, the low rate of conviction may be attributed in some measure to plea-bargaining and to convictions under included or alternative charges.

Thus, for purposes of legislative reform, the issue is this: the criminal law, either as enacted or as applied, does not explicitly proscribe unlawful driving that causes death or bodily harm where the offending conduct is less than reckless. Accordingly, if it is accepted that the incidence of death and bodily harm due to dangerous or impaired driving warrants increased scope for the criminal sanction, one option for reform would be the creation of an offence, based on fault to a lesser degree than criminal negligence, in which evidence of impairment could be adduced in establishing fault. Another option would be to create offences of causing death or bodily harm by impaired driving. A third option, which the government has followed, would be to combine the previous two.

The crux of the proposal to create new result-based offences is to extend the criminal sanction against certain kinds of unlawful driving that cause harm by lowering the threshold of liability. Predicated on notions of denunciation and deterrence, this objective reflects a utilitarian decision in policy that the incidence of death or bodily harm caused by dangerous or impaired driving is so great that the force of the

---

jurisprudence on the criteria of dangerousness: *see* R. v. Mitchell, [1983] 1 Q.B. 741, [1983] 2 All E.R. 427 (C.A.); D.P.P. v. Newbury, [1977] A.C. 500, [1976] 2 All E.R. 365 (H.L. 1976); R. v. Church, [1966] 1 Q.B. 59, [1965] 2 All E.R. 72 (C.C.A. 1965); R. v. Larkin, [1943] K.B. 174, [1943] 1 All E.R. 219 (C.C.A. 1942).

As noted previously, it is unclear whether Canadian courts will interpret s. 245.3 (unlawfully causing bodily harm) in such a fashion as to require dangerousness as an aspect of unlawful conduct.

[61] In R. v. Williams, 10 Man. R. (2d) 112, 63 C.C.C. (2d) 143 (C.A. 1981) it was argued, and not rejected, that impaired driving (s. 234) and dangerous driving could support a charge of manslaughter by means of an unlawful act. The convictions were quashed on other grounds.

criminal law should be brought to bear upon the problem. This decision has political dimensions, but it also reflects a more difficult problem of assessing public morality; that is, it is arguable that the public may now view the conduct caught by the government's proposals as morally and criminally culpable. If this is so, the central question remains whether criminal driving offences, at least driving offences that consist of causing death or bodily harm, would be better placed among other offences against the person or in a separate part of the Code. To appreciate this difficulty, however, it is necessary to examine first some of the problems with the government's proposals.

(b) *Problems Concerning the Relationship of the Proposed Offences and Other Offences Against the Person*

The difficulties concerning the proposed offences are of two broad types: the possibility of duplication with existing offences and the possibility of an unwarranted expansion of criminal liability. The latter problem is more complex and ultimately it is a question of policy that may be resolved by the exercise of Parliamentary sovereignty rather than jurisprudential theory, but it raises significant points of legal principle that should not be overlooked.

Do the proposed offences duplicate the existing offences of causing death or bodily harm by criminal negligence or an unlawful act? With regard to results caused by negligence, the strict answer is negative; but with regard to results caused by unlawful acts the case is uncertain.[62] There is no duplication with death or bodily harm caused by criminal negligence because, on the one hand, impairment is not included within the notion of negligence or dangerous driving[63]and, on the other, dangerous driving is theoretically a lesser and, therefore, distinct form of prohibition. Thus, even though dangerous driving causing death or bodily harm could, in a given case, be included within existing offences based on negligence,[64] its ingredients are categorically different. Whether the proposed offences duplicate current offences predicated upon the commission of an unlawful act is unclear because no jurisprudence in Canada would support a case for conviction under this head based upon dangerous or impaired driving, even though the meaning of "unlawful act" might include dangerous driving and possibly impaired driving (subject to proof of causation and debate on the requisite elements of *mens rea*).[65] As a result, the problem of duplication is quite minor.

---

[62] *See* R. v. Williams, *id.*

[63] *See* note 59 *supra*.

[64] Inclusion is expressly permitted by present sub. 589(5).

[65] There is, however, some confusion between manslaughter by criminal negligence and by an unlawful act: *see* R. v. Kitching, 32 C.C.C. (2d) 159, [1976] 6 W.W.R. 697 (Man. C.A.), *leave to appeal to S.C.C. denied*, [1976] 2 S.C.R. ix, 32 C.C.C. (2d) 159n; R. v. Williams, *supra* note 61.

Thus, whether or not the conduct enjoined by them would be captured by existing offences based on an unlawful act, the new offences reflect the decision that dangerous driving and impaired driving provide a sufficient foundation upon which to construct liability for death or bodily harm, subject to proof of causation.[66] This policy implies several significant assumptions about the creation of criminal offences. First, it implies that the government has accepted, at least to a limited degree, that constructive liability is justified in certain cases of death or bodily harm, whether the foundation of liability is an offence based on a notion of negligence or some other unlawful conduct. Second, it implies that the government is prepared to accept some variant of negligence that is less stringent than criminal negligence (recklessness) as a basis of constructive liability. These assumptions have further ramifications with regard to much broader issues in the criminal law: whether, or how, negligence and constructive liability should be incorporated in the criminal law; whether an unlawful act is a tenable basis of constructive liability and, if it is, whether it can co-exist with criminal negligence; and, finally, the requisite element of *mens rea* in cases of constructive liability.

At this point, then, the legal issue is this: does the creation of two new driving offences of homicide and bodily harm, based upon the construction of liability from much lesser risk-based crimes (with a corresponding diminishment of the element of *mens rea*), do violence to our concepts of criminal liability?[67]

The new offences would be specific *driving offences*, and thus distinguishable in form and substance from generic offences against the person of the kind previously mentioned. Those generic offences are open to criticism for their uncertainty and lack of prescriptive value.[68] The proposals for these specific result-based driving offences, however, would allow for two possibilities in the future with regard to constructive liability and the role of negligence in the criminal law. The first is the abolition of generic offences and the creation of specific offences, using the latter where the former are ineffectual; the second is the co-existence of the two types of offence. However, abolition could not be supported in the present case because the proposal to make specific offences resulted from the deliberate decision to lower the threshold of liability from that required for proof of criminal negligence or, apparently, unlawful acts within the meaning of paragraph 205(5)(*b*).

---

[66] *See, e.g.*, R. v. Field, 51 C.C.C. 80, [1928] 3 W.W.R. 757 (Alta. C.A.); R. v. Wilmot, *supra* note 59; R. v. Jakubowych, 66 W.W.R. 755 (Alta. S.C. 1968); Williams, *Causation in Homicide*, [1957] CRIM. L. REV. 429, 510; G. WILLIAMS, *supra* note 15; J. HALL, *supra* note 18, at 247-95.

[67] For a thorough survey of this question, *see* G. FLETCHER, *supra* note 18, at 235-42, 259-74, 285-90. *See also* H. GROSS, *supra* note 18, at 419-23; N. MORRIS & C. HOWARD, STUDIES IN CRIMINAL LAW 7-16 (1964); Hall, *supra* note 18; Hart, *supra* note 18.

[68] Hall, *id.*; J. HALL, *supra* note 18.

Nevertheless, there are more general reasons to justify both the abolition of generic offences and the creation of specific offences that depend upon constructive liability. In brief, the latter offences allow for careful control over the extent to which general principles of the criminal law should give way to purely utilitarian objectives. Despite their complete dependence on constructive liability and reliance on a comparatively slight notion of negligence,[69] these offences are a direct sanction against an isolated problem. Moreover, these result-based offences are predicated upon conduct that is universally accepted as a threat to public safety. For these reasons the new offences do not suffer from the uncertainty and lack of prescriptive value that attach to generic offences based on constructive liability.

(c) *Problems Related to the Offences Themselves*

Assuming that the proposed offences are defensible despite their expansion of constructive liability, several points must be made about the offences themselves.

(i) *Dangerous Driving Causing Death or Bodily Harm*

The problems relating to the constituent elements of these new offences are corollaries of those relating to the risk-based offences, as interpreted by the courts, although the additional elements of death or bodily harm raise issues concerning the law of manslaughter or assault, and problems in causation.

As stated earlier in the discussion of risk-based offences, the definition of negligence in section 202 of the Criminal Code has led to utter confusion of the mental element, the physical element and the manner of proof. Dangerous driving is less amorphous but it too is a species of negligence, thus raising difficult questions with respect to the requisite mental element. Proof of dangerous driving is commonly considered to consist of actual danger to others and departure from the standard of care expected by the prudent driver; proof of fault is seen to flow from dangerousness in the manner of driving.[70] The question, then, with regard to the proposed offences, is whether the Crown will be obliged to demonstrate awareness of the consequences and awareness of the circumstances, or whether simple inadvertence will suffice. The principal difficulty concerning these offences, and the policy of lowering the threshold of liability for unlawful driving that causes death or bodily harm, revolves around the problem of the requisite *mens rea* and the viability of a lesser form of negligence as the foundation of liability for such serious consequences.

---

[69] At least with regard to those proposed offences based on dangerous driving.

[70] *See, e.g.*, R. v. Lowe, *supra* note 49; R. v. Beaudoin, *supra* note 50; R. v. Torrie, *supra* note 48.

At one extreme, if a purely objective test of dangerousness would support a conviction for dangerous driving, it might be argued that the position advocated for by the government amounts to strict liability for involuntary manslaughter, or involuntarily causing bodily harm. But if dangerous driving requires proof of advertence, it follows in theory that there are several possible views with regard to the foreseeability of harm for purposes of a result-based offence, the mere possibility of harm, the foreseeability of possible harm in these or similar circumstances, and the specific harm foreseeable to the accused with respect to a particular person in these circumstances.[71] These views, obviously, move progressively away from mere negligence towards knowledge or even intention. However, given that the offence of dangerous driving is now either one of inadvertent negligence or one in which advertent negligence is inferred primarily by reference to an objective standard of care, it seems that the government contemplates little more than the mere possibility of harm in the circumstances. Thus, even if foreseeability is proved or provable by inference from the facts, it might look very much like a fiction, constructed from liability for a deviation from an objective standard of care.[72] To that extent, it will also have the appearance of strict liability with regard to both the prohibited result and the circumstances of the offence.

The proposal is thus susceptible to all the criticisms that have been directed at the decisions of the House of Lords in *Caldwell*[73] and *Lawrence*,[74] especially the latter.[75] In *Lawrence* Lord Diplock held for a unanimous House that the offence of reckless driving is proved where the Crown establishes that the accused was driving in a manner that created an obvious and serious risk of physical injury or substantial damage to property, and that in doing so he failed to give any thought to the possibility of such a risk or, having recognized the risk, persisted in

---

[71] As dangerous driving causing death or bodily harm is unquestionably a form of constructive liability, based on a form of negligence rather than recklessness, it seems clear that the requisite mental element would not extend to awareness of a specific result because that would only transform the offence into one of recklessness. Thus, there are really two possibilities that may themselves be indistinguishable: advertence to actual danger in the circumstances created by the manner of driving or awareness of danger inferred from the deviation from a standard of care.

[72] For a general discussion of this view, *see* D. STUART, *supra* note 17, at 130-40.

[73] Comm'r of Police of Metropolis v. Caldwell, [1982] A.C. 341, [1981] 1 All E.R. 961 (H.L. 1981).

[74] R. v. Lawrence, *supra* note 22.

[75] *See, e.g.*, Williams, *supra* note 18; Griew, *Reckless Damage and Reckless Driving: Living with Caldwell and Lawrence*, [1981] CRIM. L. REV. 743; Briggs, *In Defence of Manslaughter*, [1983] CRIM. L. REV. 764; Syrota, *Mens Rea in Gross Negligence Manslaughter*, [1983] CRIM. L. REV. 776; Leigh & Temkin, *Recklessness Revisited*, 45 MODERN L. REV. 198 (1982); R. CROSS & P. JONES, INTRODUCTION TO CRIMINAL LAW 28 (10th ed. R. Card ed. 1984); Ashall, *Manslaughter — The Impact of Caldwell?*, [1984] CRIM. L. REV. 467; Syrota, Reply, [1984] CRIM. L. REV. 476; Briggs, Reply, [1984] CRIM. L. REV. 479.

taking it.[76] Thus, according to Lord Diplock, an absence of thought will suffice for proof of *mens rea*. Such a conclusion is problematic not only because it is logically inconsistent, but also because the concept of recklessness involved may be extended to other offences that can be committed by recklessness, thereby generally lowering the threshold of liability in the criminal law.[77] The offences proposed by the Canadian government are not open to such severe attacks because dangerous driving is a unique offence in that its ingredients are very specific; thus, the lowering of the standard of liability does not carry the ramifications implied by the decisions of the House of Lords in *Caldwell* and *Lawrence*.

Even though the decisions in *Caldwell* and *Lawrence* were concerned with recklessness, and thus with what in Canada would be construed as criminal negligence,[78] the proposed offences of dangerous driving causing death or bodily harm remain similarly liable to attack. Following the analysis of dangerous driving earlier in this article, there are three possible approaches to the new offences. The first is that dangerous driving requires proof of advertence to the harm, but that such proof can be inferred from the circumstances. Second, the requisite element of *mens rea* consists of a failure to advert to the risk of harm, which can be inferred from the circumstances. Third, liability for dangerous driving causing death does not depend on proof of *mens rea* but on violation of an objective standard and proof of causation. Clearly, the first standard corresponds most closely to the traditional notion of recklessness[79] and is the most stringent of the three alternatives. There is no question that proof under the first alternative would suffice for conviction under the new offence; indeed, it would also suffice in most cases for conviction under current sections 203, 204, 205 and 219. The

---

[76] The relevant passage in Lord Diplock's conclusion in *Lawrence*, *supra* note 22, at 527, [1981] 1 All E.R. at 983, is as follows:

> 1. Mens rea is involved in the offence of driving recklessly.
>
> 2. The mental element required is that before adopting a manner of driving that in fact involves an obvious and serious risk of causing physical injury to some other person who may happen to be using the road or of doing substantial damage to property, the driver has failed to give any thought to the possibility of there being any such risk, or, having recognised that there was some risk involved, has nonetheless gone on to take it.

[77] Note that since the decisions in *Caldwell* and *Lawrence*, the House of Lords has expressly equated manslaughter with reckless driving causing death: R. v. Seymour, [1983] 2 A.C. 493, [1983] 2 All E.R. 1058 (H.L.); Gov't of the U.S.A. v. Jennings, [1983] 1 A.C. 624, [1982] 3 All E.R. 111 (H.L. 1982). *See also* R. v. Pigg, [1982] 2 All E.R. 591, [1982] 1 W.L.R. 762 (C.A.) for an extension of the rule in *Caldwell* and *Lawrence* to rape.

[78] Although it must be emphasized again that, at least with regard to driving offences based on criminal negligence, Canadian case law is uncertain on the requisite mental element in negligence. *See* text at section C.1 *supra*.

[79] *Cf.* R. v. MacCannell, 54 C.C.C. (2d) 188 (Ont. C.A. 1980); R. v. McDowell, 52 C.C.C. (2d) 298 (Ont. C.A. 1980).

real ambiguity lies in the distinction between the second and third alternatives. In one, the purely objective standard of driving would imply that advertence is irrelevant. In the other, however, there are two lines of argument for purposes of a result-based offence: first, an inference of an absence of thought is sufficient for proof of *mens rea* with regard to the perception of a risk of harm (the consequences) but not with regard to the risk inherent in the manner of driving (the circumstances); second, that an absence of thought will suffice for proof of *mens rea* with regard to the perception of dangerousness and the perception of the risk of harm. Thus, the only distinction is that the first variant purports to sustain a vestige of advertence. It is suggested, however, that the difference between the apprehension of harm and the apprehension of dangerousness is a metaphysical wisp in driving cases. In fact, the second and third alternatives both amount to liability gauged by an objective standard simply because the second alternative, following from *Lawrence*, rests on the fiction that a failure to act in accordance with standards of safe driving, demonstrable on particular facts, is sufficient for proof of *mens rea* (advertence). It does not follow, however, that liability for inadvertent negligence necessarily implies strict liability regarding all elements of the offence, chiefly because inadvertent negligence admits of any defence that will dispel proof of negligence in driving. Moreover, even if an offence imposes an element of strict liability, such as *mens rea* in regard to actual harm, it does not preclude any defence that might be raised concerning any other element of the offence.

(ii) *Impaired Driving Causing Death or Bodily Harm*

These offences are perhaps the most problematic of the four proposed offences, and it is suggested that the government would improve its recommendations for reform by deleting them. The principal thrust of these offences is hortatory and, thus, predicated on notions of denunciation and deterrence. The problems relating to the offences based on impairment are two-fold. First, the substantive offence of impaired driving has no logical connection with death or bodily harm that could sustain an argument that the offence involves an element of *mens rea* with regard to the result and, second, there are practical difficulties in proof of causation. As the former point was previously discussed, the discussion here will focus on the problems with regard to proof of causation.

Apart from the possible hortatory effects, the government has presumably specified impaired driving as a separate foundation of liability on the assumption that there may be cases of conduct falling short of dangerousness in which the aspect of impairment is sufficient to warrant a determination on the issue by the trier of fact. (Was this driver in such a state that, but for his impairment, he would have had the mental alertness and physical reflexes to avert the result?) These cases would be rare. If impairment alone cannot support a finding of negligent or dangerous driving, it is difficult to imagine many cases in which it could

supply sufficient evidence of causation in law. Absent a rebuttal by the accused, the trier of fact might be satisfied that the elements of the offence had been made out simply upon proof of death or bodily harm and the driver's impairment in the same transaction. This would practically relieve the prosecution of its burden to prove fault unless the voluntary consumption of an intoxicant is considered a sufficient basis upon which to impose liability for all consequences. Indeed, an offence of this type would allow for convictions against two or more impaired drivers, even where the evidence did not clearly identify the party or parties (whether impaired or not) whose conduct actually caused death or bodily harm.

Although impairment of itself cannot cause death or bodily harm, it can diminish the competence of a driver and thus contribute to a manner of driving that causes those results. In many instances impaired driving that "causes" death or bodily harm would also amount to dangerous driving; thus it is questionable whether the additional offences are actually required. The chief line of argument against the new offences is that they are logically impossible. As causation does not consist merely of proof of impaired driving and bodily harm, it would be difficult to prove that impairment caused the particular result. This argument would fail perhaps in view of the rather relaxed approach to causation established by the Supreme Court of Canada in *Smithers*. A second line of argument, noted above, is that the offences cannot sustain a sufficient connection between the elements of fault in impaired driving and the results.

D. *Conclusion*

With the increase of death and bodily harm caused by dangerous and impaired driving, the government evidently sought to strengthen the severity of the law and clarify it at the same time. Its success, if these proposals are enacted, will only be partial. The rationalization of risk-based offences of negligent and dangerous driving is entirely sensible, but the proposals for new result-based offences will be troublesome. Those based on impaired driving should be withdrawn because of the problems they raise with regard to causation and the apparent reliance on a form of constructive liability that approaches strict liability. Moreover, the number of cases in which a prosecution for these offences could be put to a trier of fact, without also giving rise to a prosecution for dangerous driving causing death or bodily harm, would be few indeed. Even though the offences based on dangerous driving mark a substantial expansion of constructive liability, they are sound because they are circumscribed with sufficient restraint by virtue of their own ingredients.

The proposals for the amendment of the current offences of negligent and dangerous driving and for the creation of four new offences represent an attempt to police a specific and undeniable social evil. The

efficacy and desirability of such offences are ultimately questions of social policy. The jurisprudential aspects of the problem, however, are considerable and most of them can be traced to the ambivalence in the law with respect to generic offences and specific offences that rest on similar concepts.

The practical objectives of these proposals are to expand the scope of the criminal sanction in cases where death or bodily harm is caused by unlawful driving, especially where impaired driving is involved, and to eliminate the confusion between negligent and dangerous driving, without sacrificing any flexibility in the law. It should be noted that these two proposals are severable. Similarly, the element of impaired driving could be severed from the first proposal, if it is considered that the causal relationship between impairment and death or bodily harm is too tenuous and remote. The theoretical objective is to isolate a governing criterion, dangerous driving, that can serve as the paradigm for the driving offences of causing death, bodily harm or risk. Acceptance of the first proposal does not preclude prosecutions under sections 203 or 204 or under paragraphs 205(5)(*a*) or (*b*) of the Criminal Code. Similarly, rejection of the second proposal does not preclude acceptance of the first, because result-based offences grounded upon negligence and dangerousness can co-exist as easily as negligent and dangerous driving do.

If both options were accepted, however, the scheme of offences available to the prosecution would be as follows:

(a) serious criminal offences: manslaughter or causing death or bodily harm by criminal negligence or by an unlawful act; and
(b) driving offences:
    (i) criminal:
        1. dangerous or impaired driving causing death or bodily harm (result-based),
        2. dangerous driving (risk-based),
        3. impaired driving (sections 234 and 236, risk-based);
    (ii) non-criminal:
        1. provincial offence of careless driving.

In other words, prosecutorial discretion would be exercised according to the following choices:

(a) serious criminal offences or driving offences;
(b) if driving offences, criminal or non-criminal;
(c) if criminal, result- or risk-based.

Notwithstanding the elimination of criminal negligence in the operation of a motor vehicle, the two proposals would capture result-based offences that are not caught by existing provisions of the Code because dangerous driving is a larger and inclusive category. Moreover, the elimination of negligent driving would not handicap the prosecution. By definition, dangerous driving would be included within dangerous driving causing death or bodily harm.

Even with the withdrawal of the result-based offences of impaired driving causing death or bodily harm, the proposals beg questions with

regard to future reforms of the criminal law. To what extent should the criminal law rely on notions of negligence, constructive liability and strict liability? If Parliament is to rely on any or all of these concepts, should it do so in the creation of generic offences, that is, offences that are unspecific as to the mode of commission, or should it rely on them only in the creation of specific offences for the cure of a specific evil? Following the view that the criminal law should evince a bias against the concepts of negligence, constructive liability or strict liability, only exceptional problems would warrant the creation of specific offences.

If this should be the policy of the law, however, further problems will arise with respect to the criteria that justify the creation of specific offences and the form that the development of the criminal law should take. The acceptance of exceptional specific offences might, at an extreme, imply a proliferation of scattered prohibitions without any theoretical coherence; thus, mere utilitarianism would subvert the general principles of criminal law. In the present instance, the creation of specific driving offences raises the question whether there should be a distinct part of the Code dealing with driving matters. Provided that the offences are sufficiently coherent, on grounds of both principle and utility, Parliament should do just that.