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CRIMINAL LAW 1948-1958

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Introduction

From one point of view, the most significant event in criminal law in the past decade has been the adoption of the revised Criminal Code,[1] which came into effect on April 1st, 1955. But this was a revision in a limited sense only. The provisions of the old Code were simplified and rearranged, the language was made less ambiguous, an attempt was made to make the Code exhaustive of the criminal law, and certain procedural improvements were adopted. This survey is primarily concerned with substantive criminal offences, and for this purpose, the adoption of the new Criminal Code is not of such major importance as it would otherwise be. It is true, of course, that the objects of the Royal Commission on the Revision of the Criminal Code would not be achieved without a certain amount of changes in the substantive law, but this was only incidental to its main objects.

In the area of substantive law, one of the most important provisions of the new Code concerns the abolition in Canada of criminal offences at common law. Ideally speaking, a code, if it is a true codification, should become, itself, the source of the law. The difficulty in attempting to do this in respect of the criminal law lies in the fact that many common-law offences are vague and ill-defined, and yet such vagueness may, on any parti-

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[1] Stats. of Can., 1953-1954, c. 51. In general see (1955), 33 Can. Bar Rev. 1 *et seq.*

cular occasion, prove useful and desirable. The same holds true to an even greater extent for common-law defences which depend so much upon the particular circumstances, that a definition or reduction to writing would crystalise a principle which is meant to be elastic. The old codes, therefore, contained "catch-all" clauses which retained, except where superseded by the Code, the common-law offences. Where, as is the case with any criminal code, the code is meant to be exhaustive, such clauses are clearly undesirable and cause considerable difficulty. There are many Canadian cases which illustrate the difficulty involved in having two sources of criminal offences—the Code and the common law.[2] By sections 7 and 8 of the new Code, no person may be convicted of an offence at common law, of an offence under an Imperial statute or of an offence under an Act of a province made before that province became a part of Canada. On the other hand, the common law insofar as it relates to procedural matters and to defences to criminal charges is retained. The power of the courts to punish for contempt of court is also specifically preserved by the Code, if, indeed, contempt of court can be considered to be a true criminal offence.[3] After more than sixty years of a dual source of criminal law, the Commissioners were quite justified in recommending the codification of certain criminal offences and the abolition of the remainder. The offences of conspiracy,[4] public mischief,[5] indemnification of bail,[6] and compounding[7] were incorporated into the Code, and all other offences abolished by the general provisions of section 8. For the reasons above stated, no attempt was made to reduce common-law defences to writing, and these remain uncodified.

One of the objects of the new Code was to remove ambiguities and unclear language. In addition, decisions over the past ten years have led to a certain amount of clarification in the substantive law. At the same time, however, there are still aspects of the criminal law in Canada which are uncertain. More importantly, it must be remembered that many of the provisions of the Criminal Code have remained substantively unaltered since 1892, although it is true, of course, that there have been many piece-meal amendments since then. It is impossible, in the course of a few

[2] *Brousseau* v. *R.* (1918), 56 S.C.R. 22; 29 C.C.C. 207; *R.* v. *Davis* (1936), 42 R. de Jur. 379; *Frey* v. *Fedoruk*, [1950] S.C.R. 517; 97 C.C.C. 1.

[3] *Canadian Transport Co.* v. *Albury* (1952), 7 W.W.R. 49; *Poje* v. *Att. Gen. of British Columbia* (1952), 105 C.C.C. 311; *Ex parte Lunan*, [1951] O.W.N. 251.

[4] S. 408(1)(d).

[5] S. 120.

[6] S. 119(2)(d).

[7] S. 121.

pages, to discuss fully all the developments in the criminal law over the past few years. I have therefore been content to examine a few of the more important and controversial matters which have recently arisen in the area of substantive crimes.

I. *General.*

There have been a number of recent cases in which the requirement of *mens rea* has been discussed. It is unfortunate that this common-law principle is so easy to state and yet so difficult to apply in practice. In the case of *R.* v. *Beaver*[8] the accused was charged, *inter alia*, with being in possession of a drug without a licence contrary to the Opium and Narcotic Drug Act. The accused had adduced evidence that he thought that the package contained sugar of milk, but the trial judge instructed the jury that this fact was irrelevant to the commission of the offence. In the Supreme Court the majority judgment was delivered by Cartwright J., Rand and Locke JJ. concurring, and Fauteux and Abbott JJ. dissenting. The conviction was quashed and a new trial was directed on the grounds that the evidence as to mistake should have been admitted as a possible defence to the charge of possession. Cartwright J., took the view that it was impossible to possess anything unless the accused knew what he had in his possession, referring to the judgments in the older cases of *R.* v. *Ashwell*[9] and *R.* v. *Hudson*.[10] If therefore, the accused did not know that what he possessed was a package of heroin, then he could not be said to be in possession of heroin. There is, of course, ample authority in England and Canada for such a proposition,[11] and probably this represents the correct common-law view of possession as a criminal offence. In other words the judgment rested on the fact that the statute used the word "possession", it did not define this word, and thus the court applied the ordinary definition and came to the conclusion that knowledge of what was possessed was necessary, for the offence was not one of being in possession of a package, but being in possession of heroin. It does not appear from his judgment, but there is no reason to suppose that Fauteux J. would have disagreed with this common-law definition of possession. He, however, took the view that the statute was not concerned with common-law definitions, that it created a statutory offence for which knowledge or *mens rea* was not a requisite, and that if

[8] [1957] S.C.R. 531; 26 C.R. 193; 118 C.C.C. 129.
[9] (1885), 16 Q.B.D. 190. [10] (1943), 29 Cr. App. R. 65.
[11] *R.* v. *Hess*, 8 C.R. 42; [1949] 1 W.W.R. 577. See Pollock and Wright, Possession (1888), *passim*.

the accused was in possession of a package which in fact contained heroin, then he committed the offence under the statute. The learned judge supported this view from a consideration of the purpose and objects of the Opium Act, and aligned it to many of the so-called public welfare statutes.

The argument is an old one. In an earlier case, Fauteux J. adopted this point of view even more clearly. In *R.* v. *Rees*,[12] the accused was charged with "knowingly and wilfully" doing an act which contributed to a child becoming a juvenile delinquent in that he had had sexual intercourse with a female under the age of eighteen in the honest and reasonable, but mistaken, belief that she was over that age. The accused was convicted but the conviction was quashed by the Supreme Court, Fauteux J. dissenting. The majority judgments took the view that a person cannot knowingly and wilfully do an act which contributes to a child becoming a juvenile delinquent, if he honestly and reasonably thought that his associate was not a "child", which, for this purpose, meant a person under the age of eighteen. The reasoning of Fauteux J. was that if a person knowingly and wilfully does the act (in this case, the act of sexual intercourse) then he must take the risk of the person being a "child". To put it shortly, Fauteux J. would limit knowledge to the act, whereas the other members of the court would extend it to all the elements of the offence. This latter majority view expressly overrules the older case of *R.* v. *Paris*.[13]

Other recent cases where this question has been raised include *Watts and Gaunt* v. *R.*[14] in the Supreme Court of Canada, and decisions of lower courts.[15] However, in these cases, there appears to be less disagreement in the correct application of the principles of *mens rea*. The distressing feature of these cases, particularly *R.* v. *Beaver* and *R.* v. *Rees*, is that the views of both the majority and the minority judges are, speaking in the abstract, equally supportable. In both cases, Fauteux J. relied heavily upon the purpose of the statutes. The former legislation struck at the mere possession of narcotic drugs, and would be largely nullified if such a mistake were a valid defence; an examination of the statute indicated, for the learned judge, that possession in this context embraced a wider concept than the other judges were prepared to give it. The latter legislation was designed to prevent the com-

[12] (1956), 24 C.R. 1; 109 C.C.C. 266.
[13] (1952), 16 C.R. 101; 105 C.C.C. 62.
[14] [1953] 1 S.C.R. 505; 16 C.R. 290; 105 C.C.C. 193.
[15] *R. v. Larocque* (1958), 120 C.C.C. 115; *R.* v. *Burns* (1950), 98 C.C.C. 56; *R.* v. *Dalley*, [1957] O.W.N. 123; *R.* v. *Wineberg* (1955), 20 C.R. 339.

mission of any acts which, *in fact*, contributed to the delinquency of a child; it is implicit in his judgment that Fauteux J. assumed that lack of *mens rea* would be a perfectly good defence if it actually went to the commission of the act in question if that were possible. On the other hand, the other view was that, in the former case, since the statute did not define possession, one must apply the common-law concept of possession in criminal law, which entails some knowledge of what is possessed. In the latter case, the majority view was that a person cannot do an act knowingly and wilfully which contributes to the delinquency of a child unless that person knows that the child is a child.

It is quite clear that the position is no less ambiguous today than it was in the days of *R.* v. *Prince*,[16] *R.* v. *Sleep*,[17] or even, for that matter, *Lady Fulwood's case*.[18] For almost a century, the problem of *mens rea* in certain statutory offences has been acute, and various suggestions have been made in an attempt to solve this problem.[19] It is surely by now quite apparent that the only solution possible must come from the Legislature. Phrases such as "whether or not [the accused] believes that the [female person] is fourteen years of age or more"[20] do appear in the Criminal Code, and it would seem to be a fairly easy matter to insert some such clause into those provisions which cause most difficulty. As far as I can discern there are the provisions relating to sexual intercourse, or cognate offences, to offences involving possession, and to offences relating to sales or to offering for sale. This is not necessarily an attack on the present legislation so much as a mere suggestion in order to avoid this problem as much as possible. Furthermore, merely to use some word such as "knowingly" or "wilfully" does not always solve the problem, as is seen from the case of *R.* v. *Rees*,[21] for these words may apply to one element of the *actus reus* or to the whole *actus reus*.[22] In that case, the accused knew that he was doing the act, to wit, the act of sexual intercourse, but he did not know that he was doing it with a

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[16] (1875), L.R. 2 C.C.R. 154.

[17] (1861), 8 Cox C.C. 472.

[18] (1637), Cro. Car. 484.

[19] R. M. Jackson, Modern Approach to Criminal Law (1945), p. 262. Glanville Williams, Criminal Law (1953), p. 131. Kenny, Outlines of Criminal Law, J. W. C. Turner Ed.), (1952), p. 35.

[20] S. 138.

[21] *Supra*, footnote 12.

[22] The offence of "doing any act . . . contributing to a child's being . . . a juvenile delinquent" contains two physical elements, *viz.*, the doing of the act, and the doing of it with a "child". One could argue that the word "knowingly" applies only to the act which is being done or, only to the fact that it is done with a "child" or, as the majority held, to both the act which is done, and the fact that it is done with a "child".

"child". In *R.* v. *Beaver*[23] the accused knew that he possessed a package, but he did not know that he possessed a package of heroin. I would suggest that, if the Legislature could be induced to co-operate, a sound workable principle would be to revert to the common-law rule that *mens rea* is always a requirement of any criminal offence, except in those cases where this rule is clearly and expressly dispensed with.

The defences of insanity and drunkenness have also been the subject of some judicial comment in the past few years. In the case of *R.* v. *Herbert*,[24] the Supreme Court of Canada for the first time discussed the onus of proof which is required in order to prove the existence of insanity. Section 16 (4) enacts that everyone shall, until the contrary is proved, be presumed to be and to have been sane. The Supreme Court, removing doubts which had previously been expressed,[25] has now made it clear that the burden of proof is no more than proving to the satisfaction of the jury, that is proving by experience and not by logic, that insanity existed. It is apparent that phrases such as "clearly proved" should be avoided. On the other hand, it is incorrect to suppose that the accused has only to raise a reasonable doubt as to his sanity, in the same way that he only needs to raise a reasonable doubt as to his guilt. The problem of giving the correct instruction to a jury will always be difficult to solve, and there is much to be said for Lord Goddard's view that words such as "proved" or "reasonable doubt" only lead to unnecessary complications.[26] Just as the jury must be satisfied that the accused is guilty, so must it be satisfied that he is insane. It means that the jury must exercise its reason and experience, not its power of logical analysis. This is abundantly clear from the recent cases dealing with the defence of drunkenness, or, more accurately, the defence of lack of *mens rea* resulting from drunkenness. In *R.* v. *Malanik*,[27] and many other cases,[28] drunkenness was raised as a defence. It is apparent that such a defence is merely the defence of lack of *mens rea*, that is, that the accused did not have the intent which is a necessary element of the particular crime of which he is charged. It operates by stating that he did not have the intent, because he could not

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[23] *Supra*, footnote 8. [24] [1955] S.C.R. 120; 20 C.R. 79.

[25] For example *R.* v. *Couture* (1947), 4 C.R. 323; *R.* v. *Harrop*, [1940] 3 W.W.R. 77; 74 C.C.C. 228; *Smythe* v. *R.*, [1941] S.C.R. 17.

[26] *In R.* v. *Summers*, [1952] 1 All E.R. 1951.

[27] [1952] 2 S.C.R. 335; 103 C.C.C. 1; 14 C.R. 367.

[28] *R.* v. *Gorzak* (1952), 103 C.C.C. 82; 14 C.R. 381; *R.* v. *Swinamer* (1955), 110 C.C.C. 386; 20 C.R. 321; *R.* v. *Hrynyk* (1949), 93 C.C.C. 100; 7 C.R. 141.

have the intent through intoxication. Since the jury must be satisfied of the guilt of the accused, the onus which is on the accused is only the onus of introducing evidence which would make them unsatisfied. Or as it is usually put, the accused has to raise a reasonable doubt in the minds of the jury.[29]

Where either the defence of insanity is raised or the defence of drunkenness, the prosecution is aided by the existence of two presumptions, namely, that every person is presumed to be sane, and every person is presumed to intend the natural consequences of his act. But these presumptions are quite different. A person must "prove" that he is insane and this he does, as has been suggested above, by making the jury satisfied that he is insane. A person does *not* have to "prove" that he did not have the requisite intent; once *any* evidence of probative value is introduced on his behalf which would indicate that he did not have the intent, then the effect of the presumption is totally destroyed, and it is the prosecution who must prove that he did have the intent, in the normal manner. The presumption as to sanity shifts the burden of proof on to the accused, whereas the latter presumption does not shift the burden of proof, but merely assists the prosecution, *in the absence of any probative evidence to the contrary,* in making out its case. By probative evidence is meant any evidence upon which a jury could reasonably come to the conclusion desired by the accused. This is why an accused must satisfy a jury that he is insane, but need only raise a reasonable doubt whether or not he had the necessary intent.[30]

Two cases should be mentioned in connection with the defence of insanity. *R.* v. *Cardinal*[31] clearly lays down the principle that there are two alternative methods of establishing insanity. This removes any doubts which may have existed before,[32] and the new Criminal Code avoids the unfortunate wording contained in the old Code.[33] If the accused did not know the nature and quality of his act, then he establishes insanity. If he did know the nature and quality, he may still establish insanity by showing that he did not know the act was wrong. *R.* v. *Kasperek*[34] is a more difficult case. There the accused shot and wounded his wife, and was

[29] See the learned judgments in *R.* v. *Hrynyk*, *supra*, footnote 28.

[30] I have avoided fixing any labels to these presumptions. They are both, of course, rebuttable presumptions, but the difference between them goes much deeper than that.

[31] (1953), 17 C.R. 373; 10 W.W.R. 403.

[32] *R.* v. *Harrop*, [1948] 3 W.W.R. 77; 74 C.C.C. 228. *R.* v. *Flett*, [1943] 1 W.W.R. 672; 79 C.C.C. 183.

[33] S. 19, which contained "and" instead of "or".

[34] (1951), 101 C.C.C. 375; (1952), 13 C.R. 206.

found guilty of wilful shooting with intent to do grievous bodily harm. The main defence was that the accused suffered from amnesia or "temporary blackout" at the time of shooting, but his counsel stressed the fact that he was not raising the defence of insanity. On appeal, it was held that amnesia was not an admissible defence, the court quoting Lord Reading L.C.J. as stating:[35]

> This Court is certainly not inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts.

The court also quoted Darling J.'s famous dictum that impulsive insanity is the last refuge of a hopeless defence.[36]

It must be stressed that insanity is only one possible defence out of several which is open to any accused person to raise. The legal limits to insanity are, by now, perfectly well defined, and any objections to them can only be met by the Legislature. The court, in *R.* v. *Kasperek* stated:[37]

> In our jurisprudence it is presumed that a prisoner intended to commit an act and intended the natural consequences of his acts .... In the case at bar the appellant attempted to raise a defence new in our law .... The only conceivable defence to the presumption mentioned, other than insanity or drunkenness, might be that at the time of the commission of the offence the prisoner was walking in his sleep or otherwise acting with his mind a total blank.

With respect, a temporary blackout or amnesia has precisely this nature, and it is by no means unknown. It has nothing to do with the defence of insanity, nor, what is infinitely more important, has it anything to do with the presumption about intending the natural consequences of one's act. The defence of sleepwalking, amnesia, and one may add, hypnotic trance, and any similar defence, is a defence that the act is not a voluntary act. In other words it goes to the *actus reus*, not the *mens rea*.[38]

The position of persons who are parties to the offence of murder has caused some considerable difficulties in recent years. There are two leading cases which might conveniently be considered, both of which were eventually considered by the Supreme Court of Canada. In *Cathro* v. *Reg.*[39] the accused and a companion were charged with murder arising from the death of their victim dur-

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[35] In *R.* v. *Lesbini*, [1914] 3 K.B. 1116, at p. 1120.
[36] In *R.* v. *Thomas* (1911), 7 Cr. App. R. 36, at p. 37.
[37] *Supra*, footnote 34, at p. 215 (C.R.).
[38] See *R.* v. *Harrison-Owen*, [1951] 2 All E.R. 727, per Lord Goddard C.J.
[39] (1955), 22 C.R. 231.

ing the course of committing robbery. The accused stated that he intended to commit robbery, but did not intend, nor did he anticipate that any violence would be used. The victim, apparently, was not actually killed by the accused. The question before the court was this: under section 202 of the Code (formerly section 260) a person is guilty of murder if death occurs during the commission of robbery if he means to cause bodily harm, or wilfully stops the breath of the victim for the purpose of facilitating the commission of the offence. Thus, the person who actually caused the death of the victim is undoubtedly guilty of murder. Under section 21 (formerly section 69) if two persons form a common intent to commit a crime and to assist each other therein, and during the course of the crime one of them commits some other offence, the other is equally a party to that offence, if he knew or ought to have known that that offence would be a probable consequence of the commission of the crime. Therefore, is it necessary for the accused, Cathro, only to intend to commit robbery and to assist therein so that if death occurs he will be liable for murder under section 202, or must he also know, or be in a position where he ought to know, that death would be a probable consequence of the robbery, or thirdly, must he know or be in a position where he ought to know, that bodily harm or wilful stopping of the breath would be a probable consequence of the robbery?

Taschereau, Locke, and Fauteux JJ. dissented from the majority of the court. Taschereau J. was of the opinion that the wording of section 202 indicates that different considerations apply to a charge of murder resulting from the commission of robbery from other offences. Section 202 is one of those rare instances where a person is guilty of an offence even though he did not intend that offence to be committed, did not intend the *actus reus*, that is death, to be committed, and may even have desired it not to be committed. If a person intends to participate in robbery, and does so participate, then he is guilty of all the offences which arise *out of the crime of robbery*. Thus, section 21 has no application except to establish the participation in the original crime. Fauteux J. appeared to take the view that the accused intended robbery, he therefore contemplated violence, and whilst he might not have contemplated murder, he at least contemplated *the circumstances in which any death would be murder* under section 202. The majority of the court, in allowing the appeal and ordering a new trial, held that a person who aids and abets the commission of a rob-

bery is only guilty of murder, where death results from that crime and is actually committed by the accomplice, if he knows or ought to know that death would be a probable consequence. This had not been sufficiently explained to the jury, and there should be a new trial. The appeal of the accomplice[40] was dismissed on the short ground that the jury could have found on the evidence that the accomplice, Chow Bew, did deal the death blow.[41]

In *R.* v. *Carey*,[42] the accused and his accomplice again intended to rob, but the former knew that the latter had with him a revolver. A policeman was shot and killed by the accomplice in the course of the crime. By a majority, the Supreme Court of Canada upheld the conviction of the accused for murder, on the grounds that the accused knew that his accomplice was carrying a loaded revolver, and therefore knew or ought to know that murder was probable. Locke and Cartwright JJ. dissented, on grounds which do not concern us here.

The law must now be stated to be that where death occurs in circumstances enumerated in section 202, the person who actually inflicts death is guilty of murder, but any accomplice is only guilty if he knows that death is a probable consequence of the original crime. This is not the common-law rule,[43] and only arises because of the provisions of section 21. My only doubt is whether this is a desirable state of the law. If the onus is always on the Crown to prove its case, will it not be difficult in some instances to convict either party of murder? Indeed, in the *Cathro* case itself, there was considerable doubt as to who actually dealt the death blow. Murder was undoubtedly committed by some one, but in such a general *mêlée*, it may be extremely difficult for the Crown to prove who committed it. In such cases, the judge must instruct the jury as to the burden of proof, and if the only eye-witnesses are the accused themselves, can any jury be satisfied that the burden of proof has been discharged? On the construction of the Code this majority view is probably correct, but even if one does not accept the extreme view of Taschereau J., some of the difficulty could be avoided by adopting the view of Fauteux J. that only the knowledge of the circumstances in which section 202

[40] *Ibid.*, at p. 253.

[41] In which case, of course, he would come directly under s. 202, and the problem of s. 21 would not arise. But, *quaere?* The jury might have found him to be an accomplice and convicted him under the misdirection. See *R.* v. *Eng Git Lee* (1956), 18 W.W.R. 272, for the direction to the jury in the case of a third accomplice.

[42] (1957), 25 C.R. 177; 118 C.C.C. 241.

[43] *R.* v. *Betts and Ridley* (1930), 22 Cr. App. R. 148. See Hartt, Parties to the Offence of Murder, in (1958), 1 Cr. L.Q. 60.

would apply is sufficient.[44] In any case, this last view would seem to be desirable on the not unimportant ground of common justice.

The cases of *R.* v. *Cline* and *R.* v. *Gordon and Carey*[45] should be briefly noted. They deal with attempts to commit crimes. In the former case, the accused was charged with an indecent assault upon a small boy, and was found guilty of an attempt. The judgment of Laidlow J.A., on behalf of the Ontario Court of Appeal, discusses the constituent elements, mental and physical, to an attempt. The mental element, from a purely legal point of view, presents no difficulty, although there may be some problem in proving its existence. *R.* v. *Cline* also examines the admissibility of evidence of similar facts in order to prove the existence of a criminal intent on the present occasion, and decides that such evidence is admissible in order to show a course of conduct demonstrating the existence of such intent. The *actus reus* has always presented difficulties, and it is a matter of some relief to see that the court decisively rejected any single test as a formula for determining when an action constitutes an attempt. Nice sounding words rarely help in concrete fact situations, and the court, quite properly it would seem, held that what constitutes an attempt depends upon the nature of the crime which is being attempted. Some crimes (such as, for instance, obtaining by false pretences) may require a long series of acts before they are completed; others, such as murder, may be completed almost immediately, so that the series of acts is very short. Some require preparation, and some may be completed on the spur of the moment. It seems to me not difficult, *in any given situation*, to decide whether a person's acts constitute an attempt, although it seems quite undesirable to try to find a formula for abstract cases. *R.* v. *Gordon and Carey* adds a salutory note of warning to the effect to be given to section 24(2). By that section, the judge is to determine whether the acts committed by the accused constitute an attempt. However, the jury remains the trier of fact and must still determine whether those acts have actually been committed by the accused. It is therefore of importance that a judge, in applying section 24(2) should not withdraw the decision of the facts from the jury, but merely rule whether the facts, *as they shall be found by the jury*, do or do not constitute an attempt. There is no

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[44] See also the recent cases of *R.* v. *Harris* (1952), 105 C.C.C. 301; *R.* v. *Simmons* (1954), 110 C.C.C. 309; *R.* v. *Guay*, [1957] O.W.N. 143.

[45] *R.* v. *Cline*, [1956] O.W.N. 497; *R.* v. *Gordon and Cary* (1957), 25 C.R. 177.

doubt, of course, about the validity of this, but it is a point which might easily be overlooked.

II. *Specific Offences*

There have been a few cases over the past ten years which involve aspects of various sexual crimes. Of section 149 concerning the offence of gross indecency, little more can be added at this time to the growing amount of antagonistic literature.[46] Recent cases[47] must surely indicate beyond any doubt the need for urgent and drastic legislative revision. In one or two important decisions the issue of consent in a charge of rape has arisen for consideration. In *R.* v. *Bursey*[48] the Ontario Court of Appeal again stressed that where consent is an issue, the onus is on the Crown to prove that consent was lacking and not on the defense to prove that the prosecutrix consented. Consent is as much a state of mind as intent or *mens rea*, and, like them, is to be proved by the circumstances and the conduct of the prosecutrix. This is brought out in other cases[49] which need not now be of concern to us.

The case of *R.* v. *American News Co. Ltd.*[50] is of the greatest importance in the law of obscenity. The accused was charged with having in its possession a book alleged to be obscene literature for the purpose of sale. The Ontario Court of Appeal unanimously held that the test for obscenity was still that which was laid down by Cockburn J. in the case of *R.* v. *Hicklin* in 1868,[51] namely that literature was obscene if it tended to deprave and corrupt those into whose hands the book might fall. Laidlow J.A., after a full examination of the history and development of the crime of obscenity, does not expressly state who must be open to depravity and corruption, but it is implicit that it refers to those who might reasonably be expected to read it. Presumably, even a medical book only intended to be read by doctors and in fact only read by them is capable of depraving and corrupting the medical profession. Laidlow J.A. also gave what appears to be the correct inter-

[46] Sedgwick, The New Criminal Code (1955), 33 Can. Bar Rev. 63, at p. 70; Lovekin, Freudian Conundrums (1958), 1 Cr. L.Q. 52; Mewett, Gross Indecency under the New Criminal Code (1957), 22 Sask. Bar Rev. 40.

[47] *R.* v. *J.* (1957), 118 C.C.C. 30; *R.* v. *K. and H.* (1957), 118 C.C.C. 317; *R.* v. *B. and S.* (1957), 23 W.W.R. 465.

[48] (1957), 26 C.R. 167.

[49] *R.* v. *Thomas* (1952), 103 C.C.C. 193; *R. v. Fenn* (1951), 100 C.C.C. 55.

[50] [1957] O.R. 145.

[51] (1868), L.R. 3 Q.B. 360. See also R. S. MacKay, The Hicklin Rule and Judicial Censorship (1958), 36 Can. Bar Rev. 1.

pretation of the disputed case of *R.* v. *Martin Secker Warburg Ltd.*[52] in which Stable J. pointed out that what might violently corrupt persons of one age might have no effect upon the morals of another. In his direction to the jury he stated that they were to judge the question of depravity and corruption by the standards of today and not by the standards of 1868. Laidlow J.A. expresses this by stating that the test remains the same but the standards vary from age to age. The other members of the court accepted this, and, indeed, it is difficult to find any possible grounds for attacking such a statement. The test, therefore, becomes whether any person who might reasonably be expected to read the book would tend to be depraved and corrupted by it, according to today's standards.

Put in this fashion doubts begin to arise as to the test itself. Depravity and corruption are fighting words. Pornography frequently raises erotic images—in fact, it would not be very pornographic if it did not. This might in turn lead to increased sexual stimulation which will either subside or find some release. But is this depravity and corruption? Surely no one on earth seriously imagines that the adolescent who reads Henry Miller by flashlight under the blankets and has erotic images is depraved and corrupted. But perhaps people do imagine this. Yet I would be the first to agree that pornography is undesirable, and the legitimate subject matter of a criminal offence. How then can we solve this dilemma?

In the first place, I urge most strongly that a jury is not a fit body to adjudicate upon matters of obscenity. An examination of the leading cases[53] indicates clearly that one of the major difficulties is to get juries to appreciate that they are not arbiters of good taste, nor even of the desirability of publishing the book under examination. They are not concerned with whether they themselves would be likely to buy it and enjoy it. They are solely to decide whether the book would tend to deprave and corrupt people who might read it. I find it difficult to imagine that a jury is capable of drawing such distinctions. Unless one is practiced at the task, the difficulty of adequately distinguishing between an objective judgment, and a subjective value-judgment in any matter concerning probabilities is almost insurmountable. If a juror is filled with erotic images whilst reading a particular book which is

[52] [1954] 2 All E.R. 683.

[53] In addition to these two mentioned, see *R.* v. *Reiter*, [1954] 1 All E.R. 741; *R.* v. *National News Co.*, [1953] O.R. 533.

not well written, it is asking too much to expect him not to jump to the conclusion that the book is therefore obscene. On the other hand, if the book is well written, a jurer is likely to blame himself rather than the author for any erotic images he has. I would thus suggest that the question whether a book is in fact obscene should be one for the judge and not the jury. Even then, of course, the problem will still remain, but there will be less likelihood of confusion.

But there still remains the need for an adequate test. I venture to suggest that no book in the world ever has or ever could have a tendency to deprave and corrupt the "average, decent, well-meaning man or woman"[54] who might read it. It might shock him, it might excite him, it might disgust him, it might have no effect at all on him. Is it not quite clear that the use of such words as depravity and corruption connotes a baseless, meaningless moral standard which is quite out of conformity with present-day standards? In all crimes involving sex or obscenity it is difficult to get away from moral value-judgments, but if an objective test can be found, then this is infinitely more desirable. Pornography, obscene literature, and the like have this in common. All are designed to arouse the sexual passions of the reader. There are certainly, many passages in many books which deal with sex in a blunt, even crude way. There are also many medical and legal treatises which an adolescent would find more than moderately stimulating. Obscenity is a criminal offence, and would it not be more fitting to look at the crime from the viewpoint of the criminal rather than the viewpoint of the non-existent average, decent, well-meaning man? The novel, as Stable J. pointed out, is a commentary on life. If the intent of the author is to arouse the sexual passions of the reader then he is not concerned with any *bona fide* attempt to write such a commentary. I would suggest that a better test would be to ask whether this book is primarily designed to arouse the sexual passions of the reader. No doubt this could be enlarged so as to include a publisher or disseminator, and no doubt the phrase "sexual passions" could be defined so as to include deviations from the norm, and sexual revulsions. The phrase would clearly need delimitations, but this does not seem to be an insuperable problem. The intent or the design of the author could quite easily be proved in the usual manner by looking at what he has written and the way in which it has been written. At least, let us get away

[54] Per Stable J. in *R.* v. *Martin Secker Warburg Ltd.*, *supra*, footnote 52, at p. 686.

from a test formulated at a time when "legs of tables were actually draped and rather stricter females never referred to gentlemen's legs as such but called them their "understandings".[55]

Offences involving the concept of criminal negligence have long produced some considerable difficulties. Under the new Criminal Code, it is an offence to cause bodily harm,[56] or death[57] by criminal negligence, or to be criminally negligent in the operation of a motor vehicle.[58] Section 191 contains a single definition of criminal negligence as the doing or the omission of anything by a person who "shows wanton or reckless disregard for the lives or safety of other persons". It is clear that wherever criminal negligence is an element of an offence, this concept must be tested by section 191. It thus follows, that if an accused has been found not to have been criminally negligent under section 192 in causing the death of another person, he cannot be found guilty of the lesser offence of operating a motor vehicle in a criminally negligent manner.[59]

The definition of criminal negligence was derived from the common-law test as formulated principally in the case of *Andrews* v. *The Director of Public Prosecutions*.[60] Criminal negligence is one of those concepts which are perfectly easy to apply in practice, but extremely difficult to formulate into a legal definition. It is now beyond doubt that there is a distinction between ordinary negligence (which appears in the Code in connection with various relatively minor offences[61]) and criminal negligence. The former connotes a lack of care in performing a duty which the accused must perform, whereas the latter connotes a recklessness towards the safety of others. In *R.* v. *Canadian Utilities Ltd.*[62] the accused was convicted of manslaughter in that it criminally negligently caused the death of a boy when he touched some high-tension wires which the accused had allowed to remain too close to the top of a slag heap upon which children were in the habit of playing. It is suggested that it is in this type of case that the essential elements of recklessness and wantonness are lacking. For example, in the more recent case of *R.* v. *Savard*,[63] the Supreme Court of Alberta expressly drew the necessary distinction between negligence sufficient to support a claim for compensation and that degree of

[55] *Ibid.*
[56] S. 193.
[57] s. 192, and 194(5)(b).
[58] S. 221.
[59] *R.* v. *Ross* (1957), 23 W.W.R. 612.
[60] (1937), 26 Cr. App. R. 34.
[61] Such as in the use of explosives, or by persons performing dangerous acts, or in surgical operations.
[62] (1954), 110 C.C.C. 251.
[63] (1957), 22 W.W.R. 473.

negligence which is a crime against the state. If one's act goes to the extent of not paying any heed to the safety or the lives of others, the negligence is criminal. If, on the other hand, the accused does think about others, and does pay attention to the safety or lives of other persons, but nevertheless falls short in a duty he owes to others, his negligence is not criminal.[64] Care must be taken to ensure that the jury is sufficiently aware of the distinction between the two types of negligence.

As might be expected, sections 222 and 223 have given the courts some trouble in recent years. Section 222 makes it an offence for a person to drive or have the care or control of a motor vehicle, whether it is in motion or not, while intoxicated or under the influence of a narcotic drug, and section 223 makes it an offence for a person to drive a motor vehicle or have the care and control of a motor vehicle, whether it is in motion or not, while his ability to drive is impaired by alcohol or drugs. Leaving aside the problem of being under the influence of drugs, we can see that section 222 is concerned with intoxication and section 223 is concerned with impaired ability to drive. There is obviously a difference in degree between the two states, since a conviction under section 223 may be obtained although the accused is charged under section 222.[65] Older definitions of intoxication which refer to the impairment of the driver's ability, or the danger involved in his driving, are now, since the adoption of the separate offence of impaired driving,[66] of somewhat less use. Intoxication merely means drunk, or stupefied with liquor; under the influence indicates that the accused is not drunk, not stupefied, but has had sufficient liquor to slow his processes and reactions. The difficulty of forming a definition, again, does not mean that the two conditions cannot be distinguished in any given fact situation.

The meaning and scope of the phrase "care or control of a motor vehicle" formerly gave the courts some difficulty,[67] most of which would now appear to have been obviated by the new Criminal Code. Problems which have arisen in the past include whether a person can be in care or control of a motor vehicle which is incapable of being set in motion under its own power,[68] whether a person is in care or control of a motor vehicle which is being

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[64] See the recent cases of *R.* v. *Louks* (1958), 119 C.C.C. 236; *R.* v. *Trapnell* (1957), 118 C.C.C. 392.

[65] S. 224(1).

[66] Adopted in 1951.

[67] *R.* v. *Butler* (1939), 73 C.C.C. 86; *R.* v. *Manning* (1941), 75 C.C.C. 283; *Arsenault* v. *R.* (1946), 86 C.C.C. 43.

[68] *R.* v. *Young* (1939), 71 C.C.C. 340.

towed by another vehicle,[69] or what effect an absence of any intention to set the car in motion had upon the guilt of the accused.[70] "Motor vehicle" is now defined by section 2(25) as a vehicle that is,

> drawn, propelled or driven by any means other than by muscular power but does not include a vehicle of a railway that operates on rails.

Section 224(2) provides that:

> For the purpose of sections 222 and 223, where a person occupies the seat ordinarily occupied by the driver of a motor vehicle he shall be deemed to have the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion.

It is suggested that the definition of motor vehicle which is contained in the Code now makes it clear that a motor vehicle does not cease to be a motor vehicle merely because *at any given moment* it is incapable of being set in motion under its own power. In both *R.* v. *Swarychewski*[71] and *R.* v. *Rye*[72] it was held that cases decided before the adoption of section 2(25) can no longer be regarded as authoritative. In the latter case it was held that a person could be still in the care or control of a motor vehicle even though the car was stuck in a snow bank and incapable of being extricated under its own power. It should also follow that if the vehicle is a motor vehicle under section 2(25) and if it is in motion, then it does not cease to be so merely because it is being towed along by some means other than its own power. This is in accordance with the earlier decision of *R.* v. *Henry*.[73] It is suggested that even if the contrary case of *R.* v. *Higgins*[74] could be supported before 1955, the new Code leaves no room for such a decision now.

Nevertheless, section 224(2) remains of great importance. "Care or control" is not defined in the Code at all, and in the normal case, a definition is not necessary. It embraces the person who can immediately operate the car or direct its operation, such as the driver or the employer of a chauffeur. But section 224(2) goes one stage further. It enacts that any person sitting in the driver's seat is in the care or control of the car, unless that person can establish that he did not enter the car for the purpose of setting it in motion. This is not necessarily difficult to establish. For in-

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[69] *R.* v. *Higgins* (1928), 50 C.C.C. 381; *R.* v. *Henry* (1934), 61 C.C.C. 207.
[70] *R.* v. *Thomson* (1940), 15 M.P.R. 300.
[71] (1957), 22 W.W.R. 91 (Man. C.A.).
[72] (1958), 24 W.W.R. 49 (Alta. A.D.).
[73] *Supra*, footnote 69.
[74] *Ibid.*

stance, if he can show that he had no ignition keys, and could not start the car, or that he could not drive and would not attempt to drive, such an absence of purpose might be proved. Furthermore, if the car is in fact out of commission to the knowledge of the accused, and the accused does not try to start it,[75] he is well on the way to proving that he was going to wait until he was no longer under the influence of alcohol, or until some other person would drive the car. Thus the fact that the car is not capable of moving under its own power, is, it is suggested, irrelevant in determining whether it is a motor vehicle, but it might be very relevant in determining whether the person occupying the driver's seat intended to attempt to drive the car or set it in motion.[76] It must, however, be noted that the exception to section 224(2) only applies where the accused *enters* the car without the necessary purpose. In *R.* v. *Perigny*[77] the accused drove to a deserted park, stopped the car, and decided to rest until he had sobered up. He was charged with being in control of a motor vehicle while his ability to drive was impaired by alcohol. The prosecution relied on the fact that he had been found in the driver's seat in the park. Girard J. S. P. held that the accused established that he did not intend to set the car in motion until he had sobered up, or until some one should come by and drive it for him. But there seems little doubt that the accused entered the car with the intention of driving, did, in fact, drive, and only later desisted. It may be doubted whether this is within the exception to section 224(2). Certainly, the decision might have been a little easier to support if the accused had left the car for a few minutes, and then re-entered solely with the intention of sleeping the alcoholic effects off, although one can see that several nice problems could arise.

Under the old Code, there were two distinct offences of receiving property knowingly obtained by an indictable offence, and retaining possession of property so obtained.[78] The distinction between these two offences led to some difficulty in the application of the doctrine of recent possession. This doctrine is nothing more than a presumption which states that where a person is in possession of property which has been recently stolen, then he is presumed to have come by it dishonestly, that is, knowingly, unless he can provide a reasonable explanation for his possession.

[75] In *R.* v. *Rye*, *supra*, footnote 72, the accused had obviously attempted to start the automobile.

[76] See the judgment of Porter J.A. in *R.* v. *Rye*, *ibid.*

[77] (1958), 27 C.R. 1.

[78] S. 399 of the old Code. See *R.* v. *Searle* (1929), 51 C.C.C. 128. *Contra, Ecrement* v. *R.* (1945), 84 C.C.C. 349.

In *R.* v. *Clay*,[79] the accused was charged with receiving and retaining possession of a stolen shotgun. He was acquitted of receiving but convicted of retaining, and from this he appealed, eventually, to the Supreme Court of Canada, on three grounds. The major question before the court was whether the doctrine of recent possession could apply to the charge of *retaining* stolen goods, so that a person who could be shown to have *retained* possession of goods recently stolen could be presumed to have known that they were stolen, or whether such a doctrine only applied to *receiving*, so that a person who *acquired* goods which were recently stolen could be presumed to have known that they were stolen. Of the nine judges, four held that the doctrine did not apply to the offence of retaining and would allow the appeal, and five that it did apply. Unfortunately, two of the five judges agreed that the appeal should be allowed on other grounds. The result was that the majority judgment of six judges, contained four judges who thought that the doctrine did not apply, and two who thought that it did, and the minority judgment contained three judges who thought that the doctrine did apply.[80] This situation has been recently resolved in the later case of *R.* v. *Suchard*[81] in which all the judges of the Supreme Court of Canada held that the doctrine of recent possession did not apply to the offence of *retaining* stolen property, but only to the offence of *receiving* stolen property.

These two offences have now been combined into the single offence under section 296 of having anything in one's possession knowing that it was obtained by an indictable offence. The effect of this change would appear to be that it is now necessary for the Crown only to show that the accused had stolen property in his possession knowingly, without the added burden of showing that he received it, or that he retained it. In the offence of receiving stolen property, knowledge or the presumed knowledge, had to be coincidental to acquisition,[82] whereas in the case of retaining, knowledge was subsequent to acquisition. Now, it is only necessary that *at any time* possession and knowledge be contemporaneous. Since the reason for the rule enunciated in *R.* v. *Suchard* appears to be that in the offence of retaining there is a time lag between the acquisition of the property and the acquisition of knowledge, it would follow that under the new offence of having

[79] [1952] S.C.R. 170; 13 C.R. 97.
[80] See *R.* v. *Shepherd* (1954), 11 W.W.R. 336.
[81] (1956), 23 C.R. 207.
[82] *Ibid.* per Fauteux J. at p. 209.

stolen property in one's possession, there is no room for the application of the doctrine of recent possession. Apart from the offence of theft itself, it is only when the gist of the offence alleges coincidental knowledge and acquisition, that the presumption can operate. The new Code removes any allegation of such coincidental knowledge and acquisition, and thus, it would seem to remove the operation of the presumption. This must follow from the reasoning in *R.* v. *Suchard* and *R.* v. *Clay*, and yet it hardly seems a desirable result. The presumption only operates, in any case, where the property has been *recently* stolen, and it does not seem unjust to use it in the new offence for the purpose of showing, where the property has been recently stolen, the contemporaneity of possession and knowledge.

These appear to me to be the major points of interest in substantive criminal law which have arisen in the course of the past ten years. There are, of course, many others. The lessons which seem to emerge most clearly are these. First, the procedural and verbal changes in the Criminal Code are capable of having great effect upon the substantive law. It is therefore important to realize that many of the older cases may be affected, even though not directly. Secondly, the Criminal Code is still far from perfect. Conflicts between, for example, section 202 and section 21[83] would not arise if the legislation were clearer. Or again, the problem of eliminating the requirement of *mens rea* from certain statutory offences can only adequately be solved by express and clear legislation. But the Code is still new. Undoubtedly during the next ten years there will be many more cases which will aid in its interpretation and clarification.

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[83] See page 454 *supra*.