AN ASPECT OF CRIMINAL NEGLIGENCE OR HOW THE MINOTAUR SURVIVED THESEUS WHO BECAME LOST IN THE LABYRINTH

PETER BURNS*

Vancouver

Introduction

Many of the outstanding issues in substantive Canadian criminal law may be traced to the time-worn maxim *actus non facit reum nisi mens sit rea*[1]—an act is not guilty unless the mind of the actor is guilty. The dual character of criminal offences, resulting in their analysis into *actus reus* and *mens rea*, is derived from this trite proposition which has given rise to more problems than it has effectively resolved.[2] Indeed, Colin Howard takes the view that:

> . . . [T]hese expressions [*actus reus* and *mens rea*] are responsible for much confusion of thought and should be abandoned in favour of any language which accurately conveys the effect of the law without in itself imposing an unnecessary burden of translation and explanation.[3]

One of the reasons put forward by Howard in support of his suggestion that criminal legal terminology should be changed to coincide with current practice is the ambivalent nature of negligence as a criterion of culpability:

> In modern usage *mens rea* refers to states of mind which include advertence to consequences, such as knowledge, intention and recklessness, but not to negligence, or as it is sometimes called, inadvertent negligence, which by definition does not.[4]

*Peter Burns, of the Faculty of Law, University of British Columbia, Vancouver.

[1] Coke, 3rd Institute (1641), 6, 107. "The intent and the act must both concur to constitute the crime": *Fowler* v. *Padget* (1798), 7 T.R. 509, at p. 514, per Lord Kenyon C.J.

[2] For example, the attempts of counsel to rely on the argument that the maxim means that the guilty act and guilty mind must concur in a temporal sense which has been rejected by the Privy Council (*Thabo Meli* v. *R.*, [1954] 1 W.L.R. 228), the English Court of Criminal Appeal (*R.* v. *Church*, [1966] 1 Q.B. 59), the New Brunswick Court of Appeal (*R.* v. *Bernard* (1961), 130 C.C.C. 165), and the Supreme Court of Canada (*Bradley* v. *R.*, [1956] S.C.R. 723), but applied for reasons rejected in *Bernard* by the New Zealand Court of Appeal (*R.* v. *Ramsay*, [1967] N.Z.L.R. 1005).

[3] Howard, Australian Criminal Law (1965), p. 10.

[4] *Ibid.*, p. 11.

This article is concerned to explore the meaning of "criminal negligence" on the highway with particular regard to a judicial dichotomy drawn between the crime of being criminally negligent in the operation of a motor vehicle[5] and that of dangerous driving.[6]

Criminal negligence is defined in section 191 of the Criminal Code:

> (1) Everyone is criminally negligent who
> (a) in doing anything, or
> (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.
> (2) For the purposes of this section "duty" means a duty imposed by law.

It has been asserted[7] that this definition is consistent with if not derived from the leading English authorities *R.* v. *Bateman*[8] and *Andrews* v. *Director of Public Prosecutions*[9] so these decisions should form a useful starting point from which to begin any discussion of section 191. *Bateman's* case concerned an appeal against conviction of manslaughter, the appellant being a doctor who had allegedly been negligent in performing an operation on the deceased woman who was experiencing a difficult child-birth. In allowing the appeal Lord Hewart C.J. described what was meant by criminal negligence at common law in the following terms:[10]

> In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as "culpable", "criminal", "gross", "wicked", "clear", "complete". But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment.

In Lord Hewart's enunciation it seems clear that criminal negligence is substantially the same as civil negligence, that is gauged against an objective test of reasonableness, but of such a high degree as to go beyond merely a matter of compensation

---

[5] S. 221(1) of the Criminal Code.

[6] S. 221(4) of the Criminal Code.

[7] *R.* v. *Savard* (1957), 26 C.R. 269 (Alta), per Ford C.J.A., at p. 270: "It is evident that the new definition of criminal negligence if not derived from, is in accord with, the leading decisions of *Andrews* v. *Director of Public Prosecutions*, [1937] A.C. 576; *Rex* v. *Greisman* (1926), 59 O.L.R. 156, 46 C.C.C. 172, [1926] 4 D.L.R. 738, 13 Can. Abr. 335; *Rex* v. *Bateman* (1925), 19 Cr. App. R. 8, 94 L.J.K.B. 791, and others." See also *R.* v. *Savoie* (1957), 117 C.C.C. 327.

[8] (1925), 19 Cr. App. R. 8.

[9] [1937] A.C. 576.

[10] *Supra*, footnote 8, at pp. 11-12.

between subjects.[11] His Lordship stated:

> It is in a sense, a question of degree, and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.[12]

Although there is a reference to differences *in kind* between the two types of negligence Lord Hewart measured it in terms of degree and made no attempt to formulate the distinction except in such terms.

A similar judicial approach to criminal negligence began to emerge in Canada where it was felt that simple negligence was insufficient to render an accused person criminally liable. At the same time a judicial confusion between recklessness, a state of mind, and negligence, a course of conduct, was also developing. One leading case *R.* v. *Greisman*,[13] presaged the conceptual confusion between these two concepts, that still plagues English and Canadian criminal law, and is sanctified by the House of Lords in *Andrew's* case:

> To constitute crime there must be a certain moral quality carried into the act before it becomes culpable. In each case it is a question of fact, and it is the duty of the Court to ascertain if there was *such wanton and reckless negligence* as in the eye of the law merits punishment.[14]

Andrews v. *Director of Public Prosecutions*[15] involved an appeal against conviction of manslaughter by Andrews to the House of Lords. The conviction arose from Andrews driving a motor van in a dangerous manner and killing a pedestrian. Lord Atkin, in the course of his judgment, referred to *Bateman's* case and indicated that in his view it laid down the correct law concerning the nature of negligence sufficient to substantiate a conviction of manslaughter. His Lordship then summarized his views:[16]

> 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. Probably of all the epithets that can be applied "reckless" most nearly covers the case.

"Recklessness"[17] may be used in two senses: in a subjective

---

[11] This was the view taken of that case by the New Zealand Court of Appeal in *R.* v. *Storey*, [1931] N.Z.L.R. 417 where the distinction was rejected on the ground that the relevant provisions in (now) the Crimes Act 1961 defined the same standard of care in criminal negligence as in civil negligence.

[12] *Supra*, footnote 8, at p. 16.

[13] [1926] 4 D.L.R. 738.

[14] *Ibid.*, at p. 743, per Middleton J.A.

[15] *Supra*, footnote 9.

[16] *Ibid.*, at p. 583. These epithets were severely criticised by Judson J. in *O'Grady* v. *Sparling*, [1960] S.C.R. 804, at p. 808.

[17] Glanville Williams, The Mental Element in Crime (1965), p. 31.

sense where it means advertence to undesired though probable consequences and the conscious taking of the risk of such consequences occurring, as opposed to a very high degree of negligence which is objectively measured. But another way of viewing the same concept is to posit that negligence is of two types: advertent and inadvertent. This is the approach generally adopted by Professor Glanville Williams,[18] and taken by the Canadian courts so far as "negligent"[19] and "dangerous driving"[20] crimes are concerned.

I. *Negligent Driving and Dangerous Driving Offences.*

The view of what is meant by criminal negligence taken by the Canadian courts largely turns on the definition of that crime in section 191 which is undoubtedly couched in part in terms requiring actual foresight of probable consequences. There seems to have been no attempt to draw a distinction between the terms "wanton" or "reckless", the former suggesting irresponsibility rather than actual foresight of probable consequences. In a recent article[21] Anthony Hooper has shown that the distinction between the crimes of criminal negligence in the operation of a motor vehicle[22] and driving a motor vehicle in a dangerous manner[23] is largely illusory. Dangerous driving is defined in section 221(4) of the Code as:

> . . . [D]riving a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place.

Briefly, both crimes have been held to require advertent negligence to be proved against the driver as an essential ingredient of the offence.[24] Hooper suggests (correctly, in my view) that, adopting this test of *mens rea* for these offences, the only possible distinguishing feature between the two crimes must be in terms of what is adverted to by the driver. This means that in order to support a conviction of dangerous driving the prosecution must prove that the driver adverted to the probability of his conduct being dangerous to the public. Whereas offences falling under

[18] *Ibid.*, p. 32. See also Glanville Williams, Criminal Law (2nd ed., 1953), p. 100.

[19] *O'Grady* v. *Sparling, supra*, footnote 16, where advertent negligence was equated with recklessness in the subjective sense.

[20] *Binus* v. *The Queen*, [1967] S.C.R. 594, [1968] 1 C.C.C. 227.

[21] Dangerous Driving: What is Advertent Negligence? (1968), 10 Crim. L.Q. 403.

[22] S. 221(1) of the Criminal Code.

[23] S. 221(4) of the Criminal Code.

[24] *O'Grady* v. *Sparling, supra*, footnote 16 (negligent driving); *Mann* v. *R.*, [1966] 2 C.C.C. 273, [1966] S.C.R. 238, 47 C.R. 400, and *Binus* v. *The Queen, supra*, footnote 20 (dangerous driving).

section 221(1) would require the prosecution to prove that the accused foresaw the probability of the actual consequences of his driving, such consequences revealing a disregard for the lives or safety of others. But this leads to an absurdity: if the distinction is as outlined above then all dangerous driving crimes are necessarily instances of negligent driving and all instances of negligent driving will amount to dangerous driving except those that do not take place on a street, road, highway or other public place. No rational distinction can be drawn between "disregard for the lives or safety of other persons"[25] and advertence to consequences "dangerous to the public".[26] The penalty for negligent driving is one of up to five years imprisonment, whereas that for conviction of dangerous driving is a penalty of up to two years imprisonment. The obvious implication is that the legislature views operating a motor vehicle with criminal negligence as being a more heinous offence than dangerous driving.[27] Yet at this point, as Hooper concludes, there is no real way to distinguish between the offences except where the driving takes place on private property.

With the Canadian Supreme Court decision of *Binus* v. *The Queen*[28] there seemed little doubt[29] that the test of dangerous driving was based on "advertent negligence" in the sense described above, mainly because of the desire of the Supreme Court to base culpability for the crime on something other than a mere failure to measure up to an objective standard imposed by the law in order to distinguish such federal offences from offences falling within the provincial function. The requirement of *mens rea* was resorted to in this context as a convenient method of dividing the provincial and federal jurisdictions to legislate over driving offences. This resulted in the situation whereby the offences based on advertence to consequences are to be found in the Criminal Code whereas provincial driving offences (whether they be termed "negligent driving", "careless driving" or "driving without due care and attention") require no such subjective test.[30]

This aspect of the development of criminal negligence was canvassed by the Appeal Division of the Nova Scotia Supreme

[25] S. 191 of the Criminal Code.

[26] S. 221(4) of the Criminal Code.

[27] This was the point being made by and forming the substance of the dissenting judgment of Judson J. in *Binus* v. *The Queen*, *supra*, footnote 20, at p. 232 (C.C.C.).

[28] *Ibid.*

[29] Apart from an inexplicable comment in (1968), 10 Crim. L.Q. 17 which effectively extracts the opposing minority view of Judson J. as the ratio of that case.

[30] See *e.g.* s. 138 of the Motor Vehicle Act, R.S.B.C., 1960, c. 253: "No person shall drive a motor vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway."

Court in *R.* v. *Belbeck*[31] in dismissing an appeal against conviction of criminal negligence in operating a motor vehicle and causing death. The decision was rendered by McKinnon J.A. who took the view that:

> It appears to me that the terms "advertent" and "inadvertent" negligence have been adopted by the courts in recent cases to rationalize the constitutionality of provincial enactments on careless driving, and to provide a constitutional demarcation line between dangerous driving under the *Code* and careless driving as contained in provincial statutes. One should I think be very careful before applying these terms when considering the evidence in criminal negligence, dangerous and careless driving cases.

The learned judge then referred to the reasoning of Laskin J.A. in *R.* v. *Binus*[32] in the Ontario Court of Appeal:[33]

> What I understand Laskin J.A. has set forth . . . is that the element of *mens rea* may be found in the blameworthy state of mind which the reckless disregard for the lives or safety of others imputes to the accused, and it is not necessary to otherwise establish any knowledge or intent.[34]

McKinnon J.A. stated the requirement of *mens rea* in criminal negligence in the following way:[35]

> While it must be granted that *mens rea* is an essential ingredient in an offence of criminal negligence . . . this ingredient of *mens rea* may be found in evidence of conduct amounting to a wanton or reckless disregard for the lives or safety of other persons—*and such conduct alone amounts to criminal negligence, regardless of intention or absence of intention.*

It does not seem to me that McKinnon J.A. is purporting to set up a rule whereby the conduct of the accused is the hypostasis of criminal negligence from which the required *mens rea* may be objectively determined. Instead His Lordship appears merely to be stating the obvious: criminal negligence requires *mens rea*, the mental element is not intention but whatever it is, it may be proved by inferences from the conduct of the accused as well as direct evidence as to the accused's state of mind. The use of the term *mens rea*, if he was attempting to set up an objective test, is entirely inappropriate and his conclusion is based largely on Laskin J.A.'s clearly subjective test in the Ontario Court of Appeal decision of *Binus*.

The only objective test attempted to be set up by Laskin J.A.

[31] [1968] 2 C.C.C. 331, at p. 336.
[32] [1966] 4 C.C.C. 193, at p. 199.
[33] Although the reasoning of Laskin J. concerning the *ingredients* of dangerous driving was clearly overruled by Cartwright J. for the majority of the Supreme Court in the subsequent appeal (*Binus* v. *The Queen*, *supra*, footnote 20, at p. 229 (C.C.C.)), this aspect of his judgment touching on criminal negligence was not in dispute.
[34] *Ibid.*, at p. 338 (C.C.C.).
[35] *Ibid.*, at p. 342. Italics mine.

in that case[36] was with reference to dangerous driving which was not in issue in *Belbeck*.

One case since *Binus* clearly illustrates the practical impossibility of predicating the factors that constitute criminal negligence as opposed to those comprising dangerous driving.[37] In *R.* v. *Northam*[38] the Appellate Division of the Alberta Supreme Court by a two to one majority upheld the acquittal of the respondent on a charge of criminal negligence in the operation of a motor vehicle and allowed his cross appeal against conviction of dangerous driving. Allen J.A. (with whom McDermid J.A. concurred) referred to the clear conflict in reasoning between that of the majority of the Supreme Court and that of Judson J. in *Binus* despite the fact that in that case Judson J. concurred in the result. The test that Judson J. would have laid down for the crime of dangerous driving was essentially an objective one based on the breach of the standard of care that a prudent person would exercise in the circumstances which results in danger to the lives or safety of others. Although objective, His Lordship distinguished his test from civil negligence in terms of degree, that is it must go beyond bare negligence in the civil sense.

This test is obviously inconsistent with the majority view[39] that advertent negligence is required to be proved to sustain a conviction of dangerous driving. Allen J.A., following the majority test in *Binus*, held that "some degree of advertent negligence is required to sustain a conviction of dangerous driving".[40] On the facts it seemed that the evidence was as consistent with the accident having been "occasioned by inadvertent negligence by [the respondent] as that it was caused by any recklessness or advertent negligence on his part".[41] As a result the conviction of dangerous driving was quashed.

---

[36] Wrongly, in all probability, in the light of the majority decision of the Canadian Supreme Court on subsequent appeal: *Binus* v. *The Queen*, *supra*, footnote 20. The irony of Laskin J.'s position is that in the later case of *Peda* v. *The Queen*, see *infra*, footnote 48, he rendered a minority judgment setting up the *Binus* test in the Ontario Court of Appeal and on appeal to the Supreme Court of Canada the subjective *Binus* test seems to have been weakened, if not lost.

[37] It is at this point Theseus realizes he is lost.

[38] [1968] 4 C.C.C. 321 (Alta).

[39] Based on *O'Grady* v. *Sparling*, *supra*, footnote 16, and *Mann* v. *R.*, *supra*, footnote 24.

[40] *Supra*, footnote 20, at p. 335 (C.C.C.). Here Theseus is resigned to the fact that he is likely to remain lost in the labyrinth forever. If advertent negligence is the same as subjective recklessness how can one distinguish between degrees of recklessness without reference to the likely consequences adverted to?

[41] *Ibid.*, at p. 336 (C.C.C.). See on this point *R.* v. *Craig* (1969), 68 W.W.R. 289, where the British Columbia Court of Appeal ordered a new trial where the trial judge in a case of criminal negligence in the operation of a motor vehicle directed an acquittal. The trial judge based his directed verdict on the ground that the evidence was as consistent with inadvertent

Another recent case indicates the confusion that has entered into the application by our courts of the criminal negligence and dangerous driving provisions of the Code. In *Attorney-General of Saskatchewan* v. *Meili*,[42] Pope D.C.J. in an oral judgment allowed an appeal by the Crown against the respondent's acquittal of dangerous driving *on the ground that* the accused had driven his motor car at a speed of 120 miles per hour on a highway, and apart from the speed there was nothing to indicate his driving was otherwise improper. In allowing the appeal the learned District Court judge held:[43]

> . . . [T]o constitute the offence of dangerous driving there must be recklessness. The accused must have intended to do what he did and his faulty driving must be more than a mistake in judgment or mere negligence. In the case before us this question, of course, does not arise. There is no doubt but that the accused intended to do what he did. *Mens rea* is indeed present.

The learned District Court judge then went on to hold that driving at that speed for the period of time concerned was recklessness and "in my opinion constituted a grave danger to the public . . .".[44]

It would seem then that the test being applied here is subjective so far as the finding of recklessness is concerned since the respondent intended[45] to drive at 120 miles per hour. One point which is open to question is the learned District Court judge's total approach to the problem: If, as was ruled in the *Binus* case, the *mens rea* of dangerous driving is advertent negligence then the accused must be found by the court to have adverted to *at least some of the probable consequences flowing* from his acts or omissions, otherwise recklessness, as a state of mind, has not been proved. For example, a man may drive at 100 miles per hour on a deserted highway in broad daylight without adverting to the probability of danger to the public from his actions. He may not even advert to consequences that on an objective test would be found to be likely to cause danger to the public. In such a case could the accused be convicted of dangerous driving? In most instances, of course, inferences of such foresight could be

---

negligence as with advertent negligence and that the rule in *Hodge's* case (1838), 2 Lew. C.C. 227 operated on the facts of the case in favour of the accused. Nemetz J.A. held that the facts did not support resort to the rule in *Hodge's* case and that it was a matter for the jury to determine whether there was negligence and if so whether it was advertent or inadvertent.

[42] (1969), 67 W.W.R. 310.

[43] *Ibid.*, at p. 315.

[44] *Ibid.*

[45] A man may be said to have intended the consequences of his acts when he foresees that such consequences *may* result and desires that they should do so, or foresees that they are substantially or morally certain to result: Glanville Williams, *op. cit.*, footnote 17.

drawn from the accused's conduct, but it is submitted that a court is not entitled merely on a finding that an accused intended to drive *in the manner charged* (as here at 120 miles per hour) and from that finding alone determine the second issue, that is whether the accused actually foresaw the probability of danger unless such a conclusion is an inference properly supported from the commission of the *actus reus.*

Of course the court must find that an accused is exercising his volition[46] in driving his vehicle and to that extent is driving it intentionally, but we are not here concerned with the volitional aspect of the accused's acts or omissions but with the state of mind required by section 221(4) of the Code to accompany the *actus reus.* The *actus reus* of the offence being the driving of a motor vehicle in a manner which is dangerous to the public, that is found as a fact by the tribunal of fact to have been dangerous in all the circumstances. Unless the accused intended not merely to drive but to drive dangerously or was reckless as to the danger[47] caused by his driving he should not, on the *Binus* test, be convicted of the offence of dangerous driving.

II. *Retreat to Judicial Obscurantism: Peda* v. *The Queen.*[48]

The Supreme Court of Canada in a decision that should prove a landmark in obscurantist jurisprudence seems now to have decided that a trial judge need not go into the question of *mens rea* at all when charging a jury in dangerous driving cases. This case is of such signal significance to the practitioner that each judgment shall be analysed in some detail so far as it touches on the meaning of dangerous driving defined in section 221(4) of the Criminal Code.

The case concerned an appeal from the Ontario Court of Appeal dismissing an appeal against conviction of dangerous driving.[49] The appellant, a taxi driver, had collided with another vehicle after entering an exit lane on an expressway, swerving from it back onto the expressway and over the median strip into the face of oncoming traffic. It appears that the car the appellant was following off the expressway braked suddenly immediately prior to the appellant losing control of his vehicle. The appeal to the Supreme Court was dismissed by a six to three majority.

---

[46] *R.* v. *Minor* (1955), 15 W.W.R. 433, 112 C.C.C. 29.

[47] This is still open, of course, since something less than danger to others may be all that is required to be foreseen as a probability if the driving is objectively dangerous, which it must be before there is any *actus reus.*

[48] (1969), 7 C.R.N.S. 243; Supreme Court of Canada, dated June 2nd, 1969. Coram: Cartwright C.J., Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

[49] [1969] 1 O.R. 90, 4 C.R.N.S. 161.

Judson J. delivered the judgment of what at first sight seems to be the majority reasoning of the court. The issue was whether the trial judge's charge to the jury *in terms of section 221(4) itself and without reference to any mental ingredient of that offence, whether advertent negligence or otherwise*, was sufficient in the light of the *Binus* decision. It was felt by Judson J.[50] that such a direction "is adequate and correct". His Lordship reasserted his minority position in *Binus* that "the essence of the offence is the manner or character of the accused's driving. . . . [The jury's] task is to determine the actual behaviour of the driver in the light of the section and while this will necessarily entail some consideration of the state of mind of the driver, as a car does not drive itself, it does not mean that a jury must find a given state of mind exists before they can convict . . .".[51]

With all due respect to the learned judge's views it is submitted that this enunciation of the meaning of the offence outlined in section 221(4) is both invalid and retrograde in principle. It completely confuses the distinction hitherto clearly drawn by the law between the *actus reus* of an offence and *mens rea*. Both are ingredients of an offence unless both[52] or either have been specifically excluded or excluded by necessary implication by the terms and subject matter of the statute under consideration.

An offence's *actus reus* may be variously defined as:

> All elements in the definition of the crime except those that relate to the accused's state of mind . . . [comprising] also . . . the surrounding circumstances, in so far as they are relevant.[53]

or

> Such result of human conduct as the law seeks to prevent.[54]

or

> . . . [*A*]*ctus reus* means the whole definition of the crime with the exception of the mental element . . . [it] is all the external ingredients of the crime. . . .[55]

It is patent that all that section 221(4) defines is the *actus reus* of the crime of dangerous driving and whatever *mens rea* was intended by Parliament must be drawn from the subject-matter and general purport of that offence. Judson J. does not

---

[50] With whom Fauteux, Abbott, Martland and Ritchie JJ. concurred.

[51] *Supra*, footnote 48, at pp. 251-252.

[52] Where the *actus reus* is excluded "status offences" result, see Burns, Status Offences—Some Recent Developments in New Zealand and South Australia (1968), 42 A.L.J. 52. Where *mens rea* is dispensed with the offence is one of strict liability and only if both the *actus reus* and *mens rea* have been excluded can an offence be properly described as one of absolute prohibition.

[53] Smith and Hogan, Criminal Law (1965), p. 27.

[54] Kenny, Outlines of Criminal Law (19th ed., 1966), p. 17.

[55] Glanville Williams, *op. cit.*, footnote 18, pp. 18-19.

attempt to imply that dangerous driving is an offence of strict liability but instead leaves the whole question of *mens rea* open, apart from an allusion to "some consideration of the state of mind of the driver, as a car does not drive itself . . .". This last reference seems to be directed not at *mens rea* at all but at the mental aspect of the voluntary movement(s) comprising an *actus reus*.[56] In other words, all that Judson J. seems to be saying is that the jury may regard the mental state of the driver charged with dangerous driving in order to determine whether or not he is acting of his own volition ("a car does not drive itself"). In the event of the driver's acts being non-volitional, he will not in law be deemed to have "caused" the *actus reus* of the offence so long as the absence of volition was not brought about by accused's own fault.[57] In such a case, certain defenses will be available to the accused such as automatism,[58] act of God or act of a stranger,[59] or, generally, some supervening cause [60] having produced the *actus reus*.

The significant point concerning this approach is that the learned judge is considering a mental element that is relevant only to the establishment or otherwise of the *actus reus*[61] and is in no way concerned with the *mens rea* of the crime itself. If, as Judson J. asserts, the jury does not have to find that a given state of mind must be found by the jury before it can convict an accused of dangerous driving he must be taken to be asserting either one of two things:

> (1) That the *actus reus* must be proved and that so long as a reasonable man would have foreseen the commission of the *actus reus* the accused may be convicted. Mere inadvertence would not suffice and this test can be equated with recklessness in the objective sense. Thus the test of the accused's *mens rea is objective* and his actual state of mind is irrelevant in determining his culpability; or
> (2) That the crime of dangerous driving is one of strict liability and only the *actus reus* need be proved by the prosecution.

The first possibility should be rejected as a result of the apparent policy throughout the Criminal Code to dispense with objective or imputed states of mind as a form of *mens rea* as far as possible. Such a retrogressive interpretation of section 221(4) would place

---

[56] See Glanville Williams, *op. cit., ibid.*, pp. 11-13 and *Ryan* v. *The Queen* (1967), 40 A.L.J.R. 488, particularly the judgments of Barwick C.J. and Windeyer J.

[57] *R.* v. *King*, [1962] S.C.R. 246; Glanville Williams, *op. cit., ibid.*, p. 12.

[58] For example *R.* v. *Minor, supra*, footnote 46.

[59] *Norcock* v. *Bowey*, [1966] S.A.S.R. 250.

[60] *Kilbride* v. *Lake*, [1962] N.Z.L.R. 590.

[61] Although automatism at least has a dual aspect and is most often referred to by courts as negativing *mens rea*. This approach is wrong in principle because by definition the existence of automatism is essentially a denial of a voluntary *actus reus*; "Automatism means action without conscious volition": *R.* v. *Cottle*, [1958] N.Z.L.R. 999, per Gresson P.

a person accused of that crime in the same position as the accused in *Director of Public Prosecutions* v. *Smith*[62] where the accused's actual state of mind was deemed irrelevant in determining his intent in the face of a *legal* presumption that a man is deemed to intend the natural consequences of his acts. Such an objective determination of an accused's state of mind so far as "intent" is concerned has been rejected in most jurisdictions.[63] Unless the Legislature has given a clear direction by defining an objective test[64] it is submitted that our courts would be acting contrary to principle in setting up such a criterion of criminal liability.

The other alternative is clearly untenable. One has only to refer to the judgment of Pigeon J. in the same case where he states:

> When in *Mann* v. *The Queen* this Court had . . . to consider subsection 4 making "dangerous driving" a lesser offence, the question arose whether inadvertent negligence consisting in dangerous driving had thereby been made a crime. Following the principle[65] established in *Beaver* v. *The Queen*[66] and *The Queen* v. *King*[67] it was, in effect, decided that *mens rea* was an element of the offence of "dangerous driving" as of other criminal offences generally.[68]

Bearing in mind the subject-matter of the crime of dangerous driving, the fact it is a *crime* and one subject to heavy penalty the presumption in favour of *mens rea* being required to be proved before section 221(4) is breached is strengthened. The only real question is: what is the *mens rea* of that offence?

Accordingly it is submitted that the articulation of principle outlined above[69] by Judson J. is incorrect to the extent that it implies an objective test of *mens rea.* This view is strengthened by the learned judge's own statement that dangerous driving is not an offence of "inadvertent negligence".[70]

On the technical issue as to the binding effect of the majority decision in *Binus* in the case at bar, Judson J. was able to demonstrate that the statements by the majority in *Binus* per Cartwright C.J.[71] were *obiter* dicta. This conclusion was reached on the ground

[62] [1962] A.C. 290.

[63] Canada: *Bradley* v. *R.*, [1956] S.C.R. 723; Australia: *Parker* v. *R.* (1963), 37 A.L.J.R. 3; and England: s. 8 of the Criminal Justice Act 1967, c. 80 (U.K.).

[64] As has been done, *e.g.* in the duties set out in ss 45 and 187 of the Criminal Code.

[65] That there is a presumption in favour of *mens rea* when a court construes penal statutes.

[66] [1957] S.C.R. 531.

[67] *Supra*, footnote 57.

[68] *Supra*, footnote 48, at p. 255.

[69] See p. 56, *supra.*

[70] *Supra*, footnote 48, at p. 254. Another argument might be that Judson J. is attempting to create an alternative subjective test of advertent negligence which is of *lesser degree* than that required for criminal negligence. But see the comments on Pigeon J.'s judgment, *infra.*

[71] *Supra*, footnote 20, at p. 229 (C.C.C.).

that, because the court in *Binus* concluded there was no substantial miscarriage of justice and declined to allow the appeal on that ground it was not an essential step in the reasoning leading up to that conclusion to examine the effect of and apply the *Mann* decision. Cartwright C.J. was prepared to assume that this view of what he said for the majority in *Binus* concerning the effect of *Mann* is not binding authority on a strict application of the principle of *stare decisis* as to the manner in which a judge must instruct a jury in dangerous driving charges. The learned Chief Justice also took the view, however, that:

> It appears to me . . . that the combined effect of the judgments of this Court in *O'Grady* v. *Sparling*[72] and *Mann* v. *The Queen*[73] is to decide that s. 221(4) does not render inadvertent negligence a crime.[74]

Judson J. confined the legal issue in this case to: What is the proper instruction to put to a jury in a case involving a change under section 221(4)? He held that the wording of the subsection is in itself sufficient[75] but also accepted that the provision "does not create a crime of inadvertent negligence".[76]

This leaves trial courts, practitioners and commentators in an unenviable position. The case appears to hold that a trial judge needs only to instruct a jury in terms of section 221(4) itself, which does not define what *mens rea* is required to be proved. We are told that the offence is not one of inadvertent negligence which means, assuming it not to be one of strict liability, that either advertent negligence (recklessness) or intention is the *mens rea* required. But the learned judge also holds that whatever *mens rea* is required to be proved, one hopes beyond reasonable doubt by the prosecution, *no particular state of mind need be found by the jury to exist.* Does this mean *any* state of mind will suffice or any state of mind beyond inadvertent negligence? It cannot be seriously entertained that the learned judge is attempting to set up a rule whereby a trial judge is under no duty, where *mens rea* is an ingredient of an offence, to properly instruct the jury in that regard. Yet *mens rea is* an ingredient of the crime of dangerous driving as, in the words of Judson J. himself, "the subsection does not create a crime of inadvertent negligence". This being so, the learned judge's conclusion that "it is not necessary . . . for the trial judge to instruct the jury as to the difference

[72] *Supra*, footnote 16.
[73] *Supra*, footnote 24.
[74] *Supra*, footnote 48, at p. 246.
[75] There being, in his view, nothing in the *Mann* decision requiring a trial judge to go beyond the definition of dangerous driving in his instructions to the jury. But this would set up an entirely objective test of the crime and this was not what *Mann* decided.
[76] *Supra*, footnote 48, at p. 254. Judson J. could hardly avoid this conclusion which was reached in *Mann* by Ritchie J. with whom His Lordship had there concurred.

between advertent and inadvertent negligence" seems both "heretical" and illogical.[77]

What then, according to the majority[78] reasoning, comprises the crime of dangerous driving? The *actus reus* is simply defined in terms of section 221(4) itself, but the *mens rea* is as elusive as the legendary Minotaur. One can only reflect on the wisdom of the highest court in the land indulging in technical debate of this nature paying little regard to the practical consequences of such an exercise. Certainly there was confusion as to the distinction between criminal negligence in the operation of a motor vehicle and dangerous driving as a result of the *Binus* decision. But if the majority reasoning is adopted by our courts then confusion will have been compounded at the expense of firmly established judicial principle, namely that *all* the ingredients of a crime must be established beyond reasonable doubt and a trial judge is under a duty to properly instruct a jury as to what those ingredients are.

Turning to the separate reasons of Pigeon J. (with whom Ritchie J. concurred) one is faced with additional problems. His Lordship took the view that *Mann's* case only decided that section 221(4) created an offence requiring proof of *mens rea* and "therefore differs in nature from statutory offences aimed at specific acts irrespective of intention". The learned judge seems here to be drawing a distinction between offences requiring proof of *mens rea* and those of strict liability or those based on objective negligence. He then went on to distinguish between criminal negligence and dangerous driving in the following manner:[79]

> By virtue of s. 191.1, a conviction for "criminal negligence" requires "wanton or reckless disregard for the lives or safety of other persons". As against that, subsection 4 contemplates danger to other persons only. There is, therefore, ample room for distinction between the two offences, even excluding inadvertence from the lesser [dangerous driving].

The subtlety of the learned judge's reasoning completely escapes me. Pigeon J. accepts that the crime of dangerous driving requires proof of *mens rea* and cannot be based on inadvertent or objective negligence. It must therefore be either advertent negligence (recklessness) or intention that is required to be proved. Since advertent negligence, on any scale of values, is the less heinous state of mind, we may assume that this is the *mens rea* required. It is also the *mens rea* required in criminal negligence.

---

[77] It is beyond argument that the ingredients of a criminal offence are a question of law and it is an elementary proposition of criminal evidence and trial procedure that: "It is clearly the duty of the judge to instruct the jury on all matters of law. . . .": Cross, Evidence (3rd ed., 1967), p. 63.

[78] Subject to the comments at p. 64, *infra*.

[79] *Supra*, footnote 48, at p. 256.

What, then, is the distinction between advertent negligence for the lives or safety of other persons and advertent negligence of *danger* to other persons? It is submitted that no rational distinction can be drawn; where a man actually foresees the probability of *danger* to others as the result of acts or omissions, he must be taken to foresee that those others are placed in a position of physical *unsafety*. He may not actually foresee the probability of life being endangered but this is not necessary for a conviction under section 221(1) as long as he foresees the probability of others' *safety* being affected as a consequence of what he is doing.[80]

Pigeon J. then turned to the issue before the court after pointing out that the words "wantonness" and "recklessness" in section 211(1) clearly exclude mere inadvertence, whereas the term dangerous driving in section 221(4) does not *necessarily* do this. His Lordship took the view that *Binus* was not binding on the present court so far as the majority view in that case had held that a judge must instruct a jury that dangerous driving by inadvertence is not contemplated by section 221(4) for the same reasons as expressed by Judson J.[81] Having determined that he was not bound by the majority view to that effect in *Binus*, Pigeon J. held it to be mistaken in any case:[82]

> With great deference to them [the majority in *Binus*], I must disagree because only such instructions need be given as the case being tried actually requires. 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.

Since there was no evidence to indicate that the accused's driving was either unconscious or inadvertent (presumably meaning unaware of road traffic conditions), His Lordship took the view that the only conclusion to reach from the fact that the accused's taxi became out of control, ran across a highway exit lane, over a median strip, and collided with another vehicle because the car ahead of him suddenly applied its brakes, was that the accused was driving dangerously. In an apparent *non sequitur* the learned judge held:[83]

> This result could only obtain if he was driving dangerously. When one is not driving dangerously, he does not lose control of his car because the driver of the car ahead suddenly puts on the brakes, especially on an exit ramp where this is to be anticipated.

---

[80] The only real difference in my view is in terms of *actus reus*. The *actus reus* of criminal negligence is of wider scope than that of dangerous driving which is limited to acts and omissions occurring in streets, roads,
[81] See p. 58, *supra*.
[82] *Supra*, footnote 48, at p. 256.
[83] *Ibid.*, at p. 257.

Having ruled out, on the facts, the possibility of the accident arising out of inadvertent negligence, Pigeon J. concluded, despite his earlier acceptance of the proposition that the crime of dangerous driving requires proof of *mens rea*, that the trial judge was under no duty to instruct the jury to acquit if they found the accident occurred by his inadvertence. His Lordship clearly arrives at this point on the ground that since there was no evidence of inadvertence, it could not properly be put to the jury. No fault can be found in this reasoning so far as it goes, but it certainly is incomplete. The prosecution still must prove the mental element of the crime and if it is advertent negligence the jury should have received proper instructions as to the legal meaning of that term.

The reliance placed by the learned judge on what he describes as being an ordinary rule that one must be deemed to intend to do what he is actually doing is also confusing. This presumption is merely a rebuttable one of fact and not one of law,[84] and may be taken into account together with all the other proved facts to determine whether or not the prosecution has established that the accused had the required mental state at the relevant time beyond reasonable doubt. It is submitted that it is totally wrong to set up as a principle of law that "in most cases the fact itself is sufficient proof of the intention",[85] unless the learned judge is using intention in its volitional sense with reference to the commission of the *actus reus* and not with reference to the *consequences* of the accused's acts (that is the *actus reus*) with which *mens rea* is essentially concerned. But if he is using the term intention in its volitional sense then most of what Pigeon J. concludes in terms of *mens rea* cannot be supported. If it is being used with reference to the consequences of the *actus reus* then, it is submitted, it is untenable in law.[86]

Pigeon J. concluded by conceding that dangerous driving is a kind (a lesser kind) of criminal negligence and, because of the possibility of confusion when a trial judge instructs a jury, that no reference to negligence at all should be made by the judge in his charge to the jury concerning dangerous driving crimes.

But this, of course, places the real issue firmly back at square one: if no reference is to be made to negligence, what state of mind *is* to be referred to and described by the trial judge as being the *mens rea* of the crime? Surely it is sheer verbalism at this

[84] *Bradley* v. *R.*, *supra*, footnote 63.

[85] It is preferable to adopt the statement of Cartwright C.J. to the effect that "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". *Supra*, footnote 48, at p. 248.

[86] *Ibid.*

stage of the judicial development of criminal negligence and dangerous driving to require a trial judge to refer to and describe "recklessness" as the *mens rea* of dangerous driving and "advertent negligence" as that required in criminal negligence cases, when "recklessness" and "advertent negligence" are in this context synonymous terms of art.

The judgment of Cartwright C.J.[87] proceeded on the basis that although the majority statements on the effect of the *Mann* decision in *Binus* may be regarded as *obiter* on a strict application of *stare decisis*[88] the combined effect of *O'Grady* v. *Sparling* and *Mann* was to determine that dangerous driving is not a crime of inadvertent negligence:[89]

> . . . [U]nless we are prepared to depart from the *ratio decidendi* of both of these cases, we cannot say that s. 221(4) has created a crime of "dangerous driving" where the manner of driving is in fact dangerous but the conduct of the accused does not amount to advertent negligence (as that expression was used in *O'Grady* and in *Mann*).

In my view this summation of the effect of *O'Grady* and *Mann* is entirely correct and Cartwright C.J.'s cautionary comment that to view them otherwise may be to reopen the whole constitutional validity of the provincial statutes reviewed in those decisions seems appropriate. The learned Chief Justice took the view also that as long as advertent negligence is an ingredient of dangerous driving, "it is essential that the trial judge should so instruct the jury in all cases in which on the evidence they might properly find the conduct of the accused dangerous in fact, did not involve advertent negligence".[90]

This is the only clear statement in the three judgments delivered by the court that the prosecution must prove both *actus reus* and *mens rea*. Both Judson and Pigeon JJ. admit the crime is one going beyond inadvertent negligence but neither considers that specific instruction to the jury by the trial judge on what *mens rea* is required is necessary. Pigeon J. would only render it necessary where the mental element is in dispute, but on a not guilty plea, unless the *mens rea* has been admitted by the accused, is it not always in dispute except where certain legal presumptions apply?[91]

Cartwright C.J. conceded that the terms "advertent" and "inadvertent" negligence need not specifically be used in the trial judge's charge to the jury so long as the quality of the negligence required to be proved is clearly explained, that is that it goes

---

[87] With whom Hall and Spence JJ. concurred.
[88] See p. 58, *supra*.
[89] *Supra*, footnote 48, at p. 247.
[90] *Ibid.*
[91] For example, certain statutory presumptions casting the burden of disproof on to the accused.

beyond mere objective negligence of the civil variety, it must be something more than mere thoughtlessness or error in judgment, and that "there must be knowledge or wilful disregard of the probable consequences or a deliberate failure to take reasonable precautions".[92] In other words, the *mens rea* of the offence is recklessness and the trial judge must charge the jury to this effect.[93]

But again no attempt is made at any point to define in law the difference between what must be adverted to in criminal negligence cases involving driving offences and dangerous driving. It is submitted that if the reasoning of Judson J. is adopted as setting out the *ratio decidendi* of *Peda*, it cannot be held to lay down any rules binding on trial courts other than the proposition that the effect of the *Mann* decision was not defined in any binding sense by the majority in *Binus*. In other words, Judson J. for the majority in *Peda* has not held that dangerous driving does *not* require advertent negligence to be proved as a necessary ingredient.

III. *Postscript To Peda* v. *The Queen.*

According to the summary of concurrences and conclusions of the Supreme Court attached to the three judgments delivered, the breakdown is as follows:

(1) Judson J. delivered the majority reasons and conclusion concurred in by four others, including Ritchie J.

(2) Pigeon J. delivered separate reasons and arrived at the same conclusion as the majority (that is to dismiss the appeal) concurred in by Ritchie J.

(3) Cartwright C.J. for the minority would have allowed the appeal and delivered a dissenting judgment concurred in by two others.

On the face of it, then, Ritchie J. concurred in the reasoning of both Judson J. and Pigeon J. but in many respects their reasoning is entirely different. Indeed, Cartwright J. in his judgment specifically adopts the statement of the combined effect of *O'Grady* v. *Sparling* and the *Mann* decision drawn by Pigeon J. This renders the ratio of the case very difficult to ascertain.[94]

It is submitted that on analysis this decision is authority for little else than the discrediting of what now appears to be *obiter* statements in *Binus* on the effect of the *Mann* decision. But even this must remain a doubtful proposition having regard to that

[92] *Loiselle* v. *The Queen* (1953), 17 C.R. 323, at p. 332, per Casey J.

[93] The Chief Justice would have allowed the appeal on the ground that on the evidence a properly instructed jury might well have either convicted or acquitted the appellant.

[94] It seems to be of no little significance that the editors of the report in (1969), 7 C.R.N.S. 243 have made no attempt to elicit a *ratio* for the decision in their headnote to the case.

court's extraordinary facility for revising its substantive position within such a short period of time.

In my view the *Peda* decision is in clear conflict with the principle of legality "*nulla poena sine lege*" which is the primary rationale of a Criminal Code. The mental ingredient of the crime of dangerous driving is now totally unclear and how practitioners will advise clients to plead[95] or how trial courts will handle the issue must be regarded as uncertain. Whereas, the state of law was unsatisfactory after *Binus* it is now even more confused "but as many eminent Judges have stated, 'hindsight is always better than foresight' . . .".[96]

---

[95] As a matter of practice counsel should specifically place *mens rea* in issue when appearing on defended charges of dangerous driving. Pigeon J. in *Peda, supra*, footnote 48, held that the wording of s. 221(4) was sufficient charge to the jury only where *mens rea* was not in issue.

[96] *R.* v. *Giardine* (1939), 71 C.C.C. 295, at p. 300, per Daly Co. Ct. J. It is suggested that there is no longer any way in which this issue can be judicially resolved in a satisfactory manner. Instead, if Parliament wishes to set up a rational test of dangerous driving, whether objective or subjective, it should take the earliest opportunity of doing so.