FROM FELONY MURDER TO ACCOMPLICE FELONY ATTEMPTED MURDER: THE RAKE'S PROGRESS COMPLEAT?

PETER BURNS* R. S. REID†

Vancouver

Introduction

In Canada our criminal justice system is encompassed in legislation promulgated by the federal government and primarily in the Criminal Code.[1] The provisions of the Code are derived from a *Report* and Draft Code prepared by a Commission in England in 1879 that was never adopted in that country.[2] Under the Code all common law offences not contained in it or some other legislation are abolished, although the common law rules governing justification or excuse are retained to the extent that they are not inconsistent with the Code or other legislation.[3] Since a basic common law defence is absence of *mens rea*, a short examination of the common law is called for in order to fully understand the Canadian law of felony murder and attempted felony murder.

Early English law developed the view that the person whose active conduct appeared as the visible cause of harm should be held responsible for it.[4] In Anglo-Saxon times the law treated

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

† R. S. Reid, of the Faculty of Law, University of British Columbia, and of the British Columbia Bar.

[1] R.S.C., 1970, c. C-34, as am.

[2] For a detailed account of the preparation and provisions of the Draft Code see Hooper, Some Anomalies and Developments in the Law of Homicide (1967), 3 U.B.C. L. Rev. 55.

[3] S. 7 of the Criminal Code, *supra*, footnote 1.

[4] Kenny's Outlines of Criminal Law (19th ed., 1966, by Turner), pp. 7 *et seq.*, hereinafter referred to as Kenny; Russell on Crime, I (12th ed., 1964, by Turner), pp. 18 *et seq.*, hereinafter referred to as Russell. For an account of the history of homicide see Parker, The Evolution of Criminal Responsibility (1970), 9 Alta L. Rev. 47, at pp. 68-88, and Kay, The Early History of Murder and Manslaughter (1967), 83 L.Q. Rev. 365, at p. 569.

all homicides, heinous or innocent, as matters to be expiated by the payment of a pecuniary *wer*. A man was held strictly accountable for any harmful result traceable to his active conduct and, consequently, he was not liable when he had done nothing active even though his omission to act may have been clearly the cause of harm. Thus an unsuccessful attempt to commit a crime was not an offence.[5] This changed after the Conquest when the Crown gathered within its ambit jurisdiction for the most serious offences, and the sanction of compensatory payment was replaced by physical punishment including death.

The term murder is derived from the Anglo-Saxon "morth-slaying" or "morth-works". These were secret slayings or "deeds of darkness" and the terms became latinised by the time of Edward the Confessor to read "murdrum". In fact Canute set up the notion of "murdrum" as "a protection of the Danes from the resentment of the English" whereby a fine on the hundred[6] (called "murdrum") was enacted when the killer was not found. In such a case the victim was presumed to be a Dane until otherwise established.[7] After the Conquest homicide was "murdrum" unless the Hundred in which the death occurred was able to effect a presentment of Englishry regarding the victim's origins. If the victim was French, the Hundred was fined. Effectively, in Bracton's time (1250) murder was a secret killing involving a fine on a township.

The crime of murder, then, prior to Bracton reflected the common law's causal theory of criminal responsibility. By the time of Bracton, however, the trend away from strict liability towards examination of the accused's moral culpability had begun.[8]

Mens rea in its earliest form was essentially objective. It meant little more than an outward manifestation of wicked behaviour, and moral wickedness could not be imputed to a man who has behaved in a reasonable manner. The courts at this stage were unable to regard themselves as possessing

---

[5] Pollock and Maitland, History of English Law, Vol. II (1898), p. 471.

[6] A sub-division of a county or shire having its own court.

[7] Stephen, A History of the Criminal Law of England (1883), Vol. III, pp. 23-45.

[8] For a succinct description of this process see Sornarajah, Reckless Murder in Commonwealth Law (1975), 24 Int. & Comp. L.Q. 846, at pp. 846-850.

the facilities to investigate the working of a man's mind.[9] But to the church the nature of a man's mind was all important because its primary purpose was to eliminate sin and wickedness — both faults that originated in the mind. The ecclesiastics also reflected their training in Roman law which adopted a more refined view of the distinctions in mental attitude. These influences slowly infiltrated the criminal law and reinforced the ethical proposition that a man should not be punished unless he knew he had done wrong.

By this gradual process the requirement of a mental element in crime crystallised into a rule of law. It was thus that the latin phrase, "*Et actus non facit reum nisi mens sit rea*", became the most famous maxim of English criminal law.[10] This draws a clear distinction between a man's "deed" (*actus*) and his "mental processes" (*mens*) at the time he was engaged in the conduct which resulted in the deed.[11] According to Kenny[12] this maxim means that the conduct which resulted in the deed must be inspired and actuated by the accused's *mens rea*, because in the standard case he intends to produce that consequence and regulates his conduct in order to achieve it. But it would be sufficient if he consciously takes the risk of that result occurring (described as "recklessness" rather than "intention") and, although his *mens rea* does not actuate his conduct, his *mens rea* accompanies it or is coincident with it, so that he acts with knowledge that death may result from his conduct.[13]

As already indicated, *mens rea* was initially viewed by the courts as an objective standard of morality, but this was gradually replaced by the emergence of a subjective standard. This new conception of *mens rea* led to "an unscientific and fallacious separation of crimes" into two classes which were regarded as

---

[9] As Brian C.J. in 1477 is reported to have said: "[F]or it is common knowledge that the intention of a man will not be probed, for the Devil does not know man's intention." Y.B. 17 Ed. IV, fo. 2, cited in Kenny, *op. cit.*, footnote 4, p. 12.

[10] "It is a principle of natural justice and of our law, that *actus non facit reum nisi mens sit rea.* 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.

[11] The well-known dictum, "[T]he full definition of every crime contains expressly or by implication a proposition as to a state of mind", by Stephen J. in *R.* v. *Tolson* (1889), 23 Q.B.D. 168, at p. 187, sums up the ancient recognition of a moral basis of criminal responsibility.

[12] *Op. cit.*, footnote 4, pp. 13-14.

[13] See *R.* v. *Church*, [1966] 1 Q.B. 59 (C.A.), and *R.* v. *Hyam*, [1975] A.C. 55 (H.L.).

being different in nature; *mala in se* and *mala prohibita*.[14] Although obviously a dangerous basis on which to found criminal responsibility this classification still has a residual effect and finds some appeal to the judicial mind.[15]

I. *The Meanings of Mens Rea.*

At common law the principle evolved that a man should not, generally, be held criminally responsible unless he was aware that what he was doing may cause harmful consequences.[16] He must have had foresight of the results of his conduct and it is this subjective element of foresight that constitutes the essence of *mens rea*. Glanville Williams points out that the only two states of mind that can properly fall within the concept of *mens rea* are intention and recklessness,[17] both being based on foresight of consequences. The same view has been taken by Turner,[18] and Smith and Hogan.[19]

The foresight of consequences element of *mens rea* in homicide was succinctly referred to by Pollock C.B. in the following terms:[20]

> [T]he crimes of murder and manslaughter were in some instances very difficult of distinction. The distinction which seemed most reasonable

---

[14] Kenny, *op. cit.*, footnote 4, pp. 28-29; Russell, *op. cit.*, footnote 4, p. 32. Oddly enough this defective dichotomy is still adopted by Canadian courts in distinguishing between murder and manslaughter: Tremeear, Annotated Criminal Code of Canada (6th ed., 1964), pp. 310-313, and supplement, p. 92.

[15] *R.* v. *Donovan*, [1934] 2 K.B. 498 (C.A.); *R.* v. *Takubowych* (1969), 66 W.W.R. 775 (Alta S.C.). It is interesting to note, too, that this distinction is recognised by the Law Reform Commission of Canada as one of the factors separating offences requiring *mens rea* and those of strict liability: Working Paper No. 2, The Meaning of Guilt-Strict Liability (1974), p. 4.

[16] Kenny, *op. cit.*, footnote 4, p. 32; Glanville Williams, Criminal Law, The General Part (1953), pp. 30 *et seq.* This concept of responsibility is based on a "free will" premise of human conduct. For a denial of this premise and for an alternative model of responsibility based on a determinist premise see Julien, A Determinist's Perspective of Criminal Responsibility (1970), 8 Alta L. Rev. 376.

[17] Glanville Williams, *ibid.*, p. 31; see also his definitive work, The Mental Element in Crime (1965).

[18] Kenny, *op. cit.*, footnote 4, p. 36.

[19] Criminal Law (3rd ed., 1973), p. 46. Although these writers also point out that negligence and blameless inadvertence are also possible mental attitudes that may accompany an *actus reus*.

[20] *R.* v. *Vampleu* (1862), 3 F. & F. 520, at p. 522.

consisted in the consciousness that the act done was one which would be likely to cause death. None, however, could commit murder without that consciousness.

Although the terms "intention" and "recklessness" are the bases of *mens rea* they are usually not defined judicially. Their meaning is most often left to the "good sense" of the tribunal of fact and commentators.[21] Glanville Williams, for example, defines "intention" as the state of mind of a person who adverts to the consequences of his acts or omissions and desires them to occur or foresees that they are virtually certain to result although he may not desire them to do so.[22] This closely approximates the meaning attributed to that term by Turner who defines "intention" as the state of mind of a man who not only foresees but also wills the possible consequences of his conduct.[23] Thus, there cannot be intention without foresight as a person must anticipate the end to which the express objective[24] is directed.

On the other hand, foresight of consequences may not necessarily involve intention. Recklessness has been defined[25] as the state of mind of one who foresees the probability[26] of

---

[21] But see the decision of the English House of Lords in *R.* v. *Hyam*, *supra*, footnote 13, where "judicial definitions" of intention were made by the members of that court.

[22] The Mental Element in Crime, *op. cit.*, footnote 17, p. 20; Smith & Hogan, *op. cit.*, footnote 19, p. 43, also adopt this definition.

[23] Kenny, *op. cit.*, footnote 4, p. 36. The same author in Russell, *op. cit.*, footnote 4, p. 41, describes intention as the mental attitude of a man who has resolved to bring about a certain result if he can possibly do so.

[24] The legally relevant state of a man's mind, "intention" is distinguished from "motive" by consciously directing his conduct so as to obtain a *particular* result, whereas his motive reveals the *reason* why he wants to obtain that result. In Canada, on a more narrow plane, it appears that "specific intent" means those motives, reasons or objectives of the accused contained in the statutory definition of the crime: *R.* v. *George* (1960), 34 C.R. 1 (S.C.C.).

[25] Glanville Williams, The Mental Element in Crime, *op. cit.*, footnote 17, p. 32. This distinction has not been judicially adopted. See, *e.g.* *R.* v. *Hyam*, [1974] 1 Q.B. 99 where the English Court of Appeal equated intention with "purpose or aim" and was of the view that presight of death or grievous bodily harm as a *likely* consequence of the accused's acts is sufficient to establish the *mens rea* of murder. This view is also taken in the House of Lords: *R.* v. *Hyam*, *supra*, footnote 13, per Lord Hailsham, at p. 79, and Viscount Dilhorne, at p. 82.

[26] Kenny, *op. cit.*, footnote 4, p. 38, includes foresight of *possibilities*.

his actions producing a particular result which he does not desire, but is prepared to take the conscious risk of occurring.[27]

These states of mind, intention and recklessness, are the only ones that might properly be said to constitute *mens rea* and both are taken to be subjective. There are, of course, other bases of criminal responsibility, including negligence, which turn on objective determinants and not the state of mind of the accused. The difference between recklessness and negligence is that between advertence and inadvertence or *cause and effect*.[28] On a scale of moral values it is readily seen that intention is the state of mind which is most blameworthy followed by recklessness and, of the objective bases of criminal responsibility, gross negligence and finally, negligence.

II. *Constructive or Implied Malice*[29] *and the Felony Murder Rule.*[30]

After outlining his famous "golden thread" dictum relating to the burden of proof in criminal cases, Viscount Sankey L.C., in *Woolmington* v. *The Director of Public Prosecutions*,[31] adverted to the elements of the crime of murder:[32]

> When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice [*mens rea*] of the accused.

---

[27] It has also been confusingly referred to as a high degree of negligence: *Andrews* v. *D.P.P.*, [1937] A.C. 583; *R.* v. *Bateman* (1925), 19 Cr. App. R. 8. But as Kenny, *op. cit.*, footnote 4, p. 38, points out "it is a logical fallacy to suggest that recklessness is a degree of negligence".

[28] Kenny, *ibid.*, p. 38.

[29] No distinction was traditionally drawn between these two terms. But Lord Hailsham in *Hyam*, *supra*, footnote 13, at p. 67, points out that s. 1 of the Homicide Act 1957 (U.K.) distinguishes between these intents and that, latterly, implied malice has referred to the state of mind of one who, not having an intent to kill, intends to cause grievous bodily harm to the victim and kills him. The doctrine of constructive malice as applied in murder and manslaughter seems to Devlin to be contrary to the fundamental principles of criminal law, because "it is a device for relieving the prosecution from the duty of proving the wicked intent appropriate to the crime". Criminal Responsibility and Punishment: Functions of Judge and Jury, [1954] Crim. L. Rev. 661, at p. 666.

[30] See Howard, Australian Criminal Law (2nd ed., 1970), pp. 60-66.

[31] [1935] A.C. 462 (H.L.).

[32] *Ibid.*, at p. 482.

The *mens rea* of murder has traditionally been referred to as "malice aforethought",[33] which is a technical term with a very special meaning. It has been described as:

> [A] mere arbitrary symbol . . . for the "malice" may have in it nothing really malicious; and need never be really aforethought.[34]

Foster, in 1792, described "malice aforethought" in the following way:[35]

> When the law maketh use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense, to which the modern use of the term malice is apt to lead one, *a principle of malevolence to particulars*; for the law by the term *malice* in this instance meaneth, that a fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit.

This seems to be a rejection of the idea that an intention to kill or cause serious bodily injury was an essential element of murder. Only a "generally wicked spirit" had to be demonstrated. The way in which this could be done, apart from wilful killing, was by showing that the death resulted from the commission of a felony by the accused.[36]

It is in this area that the ancient doctrine of strict liability still creaks throughout the law of homicide[37] and intersects with the modern doctrine of *mens rea*, with its basis founded on foresight of consequences,[38] creating inevitable confusion partic-

---

[33] Malice aforethought was originally used to distinguish killings that arose from self-defence, chance medley, misadventure and justifiable homicide from other killings. The latter were described as wilful prepensed murder or murder upon malice prepensed. By the end of the fifteenth century murder with malice aforethought resulted in the loss of benefit of clergy: 1496, 12 Hen. 7, c. 7.

[34] Kenny, *op. cit.*, footnote 4, (15th ed., 1946), p. 153, cited by Smith & Hogan, *op. cit.*, footnote 19, p. 225.

[35] Introduction to the Discourse on Homicide, in A Report of Some Proceedings on the Commission for the Trial of the Rebels in the year 1746 in the County of Surrey, *etc.* (3rd ed., 1792), p. 256.

[36] This is essentially a restatement of the notion of malice laid down by Holt C.J. in *Mawgridge's* case (1707), 84 E.R. 1107, at p. 1110: "Some have been led into mistake by not well considering what passion is; they have construed it to be rancour of mind lodged in the person killing, for some considerable time before the commission of the fact, which is a mistake arising from not well distinguishing between hatred and malice . . . malice is a design formed of doing mischief to another . . . he that useth the means to do it is malicious."

[37] Devlin, *op. cit.*, footnote 29, at p. 661.

[38] Or even knowledge of surrounding circumstances; see Smith & Hogan, *op. cit.*, footnote 19, p. 3.

ularly in cases of unintentional killing. Coke had held that "if the act be *unlawful* it is murder".[39] But by Foster's time the unintentional killing could only be murder if done in the commission of a *felony* — thus the felony murder rule.[40] This rule has its origins in strict liability and evolved through a legal fiction called "implied malice"[41] which merely meant that the law felt it necessary on grounds of criminal policy to punish this class of homicide with the highest degree of severity, so "the law [became] distorted by using the term 'malice' where no malice in the proper sense really existed".[42]

The Commissioners on Criminal Law in 1839 attacked the old doctrine of implied malice[43] and considered that: "It is the wilful exposure of life to peril that constitutes the crime."[44] Sir James Fitzjames Stephen, the leading criminal law reformer in the latter quarter of the nineteenth century, attempted to change the law of homicide and abolish the felony murder rule. He had described the doctrines of both Coke and Foster in relation to it as "monstrous". In 1878 a Royal Commission with Stephen as one of its members was created to consider the law concerning indictable offences. It published a *Report* and Draft Code in 1879,[45] this last being mainly the work of Stephen,[46] which became the basis of the Canadian Criminal Code 1892.[47]

---

[39] (1644), 3 Instit. 56.

[40] Foster, Crown Cases and Crown Law (1792). The two broad classes of felony murder were (a) deaths caused in resisting lawful arrest by a crown officer and (b) deaths caused in furtherance of a crime of violence.

[41] Russell, *op. cit.*, footnote 4, p. 477, notes that the adjective "constructive", with its suggestion that something of substance has really been created, has latterly been preferred to the adjective "implied". For a full account of the evolution of constructive malice see Kenny, *op. cit.*, footnote 4, pp. 147-161.

[42] Russell, *ibid.*, p. 48.

[43] Fourth Report (1839), [168] XIX, 235, pp. xxiii, xxvii.

[44] *Ibid.*, p. xxviii.

[45] U.K., C. 2345.

[46] Stephen was appointed a judge of the Queen's Bench Division in 1879 and as such was able to mitigate some of the harshness of the felony murder rule in English criminal law. See *e.g.* the case of *R.* v. *Serne* (1887), 16 Cox. C.C. 311, where he cast doubt on the existence of the felony murder rule. For an account of this remarkable judge's life see Radzinowicz, Sir James Fitzjames Stephen 1829-1894 (1957), Selden Society.

[47] Martin's Criminal Code (1955), pp. 1-3. For a comprehensive description of the evolution of the Code see Mewett, The Criminal Law 1867-1967 (1967), 45 Can. Bar Rev. 726.

The Draft Code of 1879, though, was a compromise and the felony murder rule was retained in it and in the subsequently enacted Canadian Criminal Code 1892, though in a less stringent form. The old rule with all its defects remained a part of the English law until apparently abolished by the Homicide Act 1957.[48]

III. *The Criminal Code and Felony Murder.*[49]

Section 228 of the Criminal Code 1892[50] is the precursor of our section 213 today. There are dramatic differences between the two provisions that reveal a trend towards draconian solutions to certain classes of unlawful death that can only be rationalised in terms of a punitive theory of criminal justice.

Section 228 of the Criminal Code 1892 reads:

> 1. Culpable homicide is also murder in each of the following cases, whether the offender means or not death to ensue, or knows or not that death is likely to ensue:
>
> (a) If he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or

---

[48] S. 2 of the Homicide Act 1967 (U.K.); see also s. 8 of the Criminal Justice Act 1967 (U.K.). It was feared that the House of Lords in a loosely worded decision, *Director of Public Prosecutions* v. *Smith*, [1961] A.C. 290, 44 Cr. App. R. 261, [1960] 3 All E.R. 161, [1960] 3 W.L.R. 456, had resurrected the old rule. The decision was much criticised; see Cross, The Need for a Redefinition of Murder, [1960] Crim. L. Rev. 726; Williams, Constructive Malice Revived (1960), 23 Mod. L. Rev. 605 and The Mental Element in Crime, *op. cit.*, footnote 17, pp. 101 *et seq.*; Buxton, The Retreat from Smith, [1966] Crim. L. Rev. 195. But as the result of the House of Lord's decision in *R.* v. *Hyam*, *supra*, footnote 13, which declined to overrule *Smith*, this assumed result of the Homicide Act 1957 must be regarded as at least dubious.

[49] For a detailed account of the development of the earlier Canadian Law, see Edwards, Constructive Murder in Canadian and English Law (1961), 3 Crim. L.Q. 481. Since the Criminal Code of 1892 abolished the common law dichotomy between felonies and misdemeanours, it is strictly inapposite to refer to "felony murder" under the Code. Instead, the technically correct term would be "constructive murder". But the terms "felony" and "constructive" mean precisely the same thing in this context and for the purposes of continuity in this article the older term "felony murder" has been retained and used throughout.

[50] This provision became s. 260 of the Criminal Code 1927, but was in terms the same as former s. 228, although the wording arrangement had been altered.

(b) If he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or

(c) If he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

2. The following are the offences in this section referred to: — Treason and the other offences mentioned in Part IV of this Act, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary, arson.

It dealt with three classes of case that were not uncommon in Victorian times, whereby the accused in the course of crimes of violence caused death without intending to. Under subsection (a) the accused must, however, be shown to have intended *grievous*[51] bodily injury in pursuit of any of the enumerated crimes or in flight after the commission or attempted commission of such crimes. Again, pursuant to subsection (b), if the accused uses a drug to achieve any of those purposes and death results it was murder as it was under subsection (c) if the accused strangled or suffocated the victim for any of those purposes.

The current felony murder provision, section 213 of the Criminal Code,[52] reads as follows:

213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or section 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting lawful arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

(a) he means to cause bodily harm for the purpose of
  (i) facilitating the commission of the offence, or
  (ii) facilitating his flight after committing or attempting to commit the offence.

(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom:

(c) he wilfully stops, by any means the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom: or

---

[51] Grievous bodily harm means really serious bodily harm: *Director of Public Prosecutions* v. *Smith*, *supra*, footnote 48, at p. 344 (H.L.).

[52] *Supra*, footnote 1, as am. by S.C., 1974-75, c. 93, s. 13; formerly s. 202 of the Criminal Code, S.C., 1953-54, c. 51.

(d) he uses a weapon or has it upon his person
  (i) during or at the time he commits or attempts to commit the offence, or
  (ii) during or at the time of his flight after committing or attempting to commit the offence, and the death ensues as a consequence.

There are two substantive changes to the section, both designed to expand the range of criminal liability for felony murder. The first is contained in subsection (a) whereby the reference to "grievous bodily injury" has been altered to mere "bodily harm".[53] Accordingly an intent (or perhaps recklessness[54]) to cause bodily harm in the context of subsection (a) is all that the Crown has to establish today. Such bodily harm need not be serious. It could be a push involving little force that causes the victim to strike an object and die from his resulting injuries. In *R.* v. *Donovan*,[55] Swift J. held the words to mean:[56]

> [A]ny hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent but must ... be more than merely transitory and trifling.

---

[53] Hooper, *op. cit.*, footnote 2, at pp. 74-75, points out that this change appears not to have been debated by either Parliament or the Commissioners whose 1952 Report was the spur to the revision of the Criminal Code.

[54] *R.* v. *Hyam*, *supra*, footnote 13. In his note in (1974), 90 L.Q. Rev. 442, at p. 443, Glanville Williams summarised the effect of *Hyam*: "Knowledge or foresight of the probable result is sufficient to constitute criminal intent whatever the motive or desire." In Canada, however, it could be argued that where a *statute requires intention to be established* by the Crown foresight of *probable* harm is not sufficient. In this way the effect of *Hyam* in blurring the conceptual distinction between intention and recklessness may be avoided. Otherwise, for example, we would end up with the grotesque result under s. 212(a)(ii) of the Code whereby it is murder if one "*recklessly*" caused bodily harm being "reckless" whether or not death ensues. Under the *Hyam* analysis such a case would be explained as "intended" bodily harm causing "intended" death. It is suggested that even laymen would regard the failure to distinguish between intention and recklessness in this context as unacceptable. Although one commentator, Buxton, Malice Aforethought (1974), 37 Mod. L. Rev. 666, at p. 667, regards the distinction as "arid theorising".

[55] [1934] 2 K.B. 498, at p. 509 (C.A.).

[56] As distinct from grievous bodily harm which must *seriously* interfere with the victim's health or comfort. See Turner, Malice Implied and Constructive, [1958] Crim. L. Rev. 15, at p. 19; and the extensive discussion in *R.* v. *Hyam*, *supra*, footnote 13, per Lord Hailsham, at pp. 69-70, where "harm" and "injury" for the purpose of this branch of the law were equated.

The second change is more dramatic. This is the addition of subsection (d) by amendment in 1947.[57] It was designed to cover those cases where unintended death was caused during the commission of a crime of violence. Prior to 1947 this was treated as manslaughter rather than murder.[58] The immediate spur to the enactment of subsection (d) was the case of *King* v. *Hughes*[59] where the Supreme Court of Canada reversed a murder conviction of the accused who had killed a storeowner by unintentionally shooting him during a struggle in the course of a robbery. This was on the ground that the death was not caused by the voluntary act of the accused.[60] As originally enacted it read:

> In case of treason and the other offences against the King's authority and person mentioned in Part II, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, indecent assault, forcible abduction, robbery, burglary or arson, culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue,
> (a) ...
> (b) ...
> (c) ...
> (d) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.

It can be seen that the basic qualification for the existence of an *actus reus* under section 260(d) was that death result from the *use* of a weapon. This was altered in 1954 so that merely *having* the weapon on the accused's person and a causal connexion between that and the death of the victim in the circumstances outlined constitutes the *actus reus* of felony murder.[61] Thus if, during the carrying out of one of the

---

[57] S.C., 1947, c. 67.

[58] For an account of the passage of this extraordinary provision see Willis (1951), 29 Can. Bar Rev. 784, at pp. 791-793.

[59] [1942] S.C.R. 516.

[60] In *Rowe* v. *The King* (1951), 100 C.C.C. 97 (S.C.C.), it was decided that, where a gun was held by an accused during the course of a robbery and it was accidentally discharged killing the victim, it was "used" within the meaning of subs. (d) and that death was a consequence of such use.

[61] This amendement has been stringently criticised by Hooper, *op. cit.*, footnote 2, at p. 75, and by Sedgwick, The Criminal Code: Comments and Criticisms (1955), 33 Can. Bar Rev. 63, at p. 71. The original s. 260(d) was regarded by Willis, *op. cit.*, footnote 58, at pp. 793-796 as being in need of repeal.

enumerated crimes an accused has a loaded gun in his belt, he slips and falls and the gun is discharged killing the victim, he is guilty of murder. This may even be so if the victim is an accomplice, since the subsection refers to "the death of a human being" and is not confined to the objects of the crime or attempted crime.[62]

IV. *From Felony Murder, to Accomplice Felony Murder, to Attempted Felony Murder, to Accomplice Felony Attempted Murder, to . . .?*

The key question which arises from the historical discussion of the doctrines of *mens rea* and constructive or felony murder is whether the latter should be retained as a legislative creation in the Code. Before providing an answer to that question, however, two anomalies created by the judicial interpretation of this doctrine by the Supreme Court of Canada call for examination. That court has created the anomalies of what shall be termed the "accomplice felony murder" rule and the "attempted felony murder" rule, and as a result has extended the range of strict liability as developed by the doctrine of constructive malice beyond its nineteenth century antecedents.

In regard to the "accomplice felony murder" rule the leading case is *R.* v. *Trineer*[63] which involved the restoration of a conviction of murder by the Supreme Court of Canada. The facts of the case were that the accused and a companion, Frank, who, to the knowledge of the accused, was armed with a hunting knife intended to rob a woman. After driving her to an isolated location Frank took the woman some distance from the car

---

[62] Taking the example to an absurd length it may also be felony murder if on the same facts the accused slips, his concealed gun is accidentally fired in the direction of the police who, aiming at him, hit and kill his accomplice. The necessary causal connexion between the weapon and the death of a human is established. One would hope that the reasoning of the Supreme Court of Pennsylvania, in *Commonwealth* v. *Redline* (1958), 137 A. 2d 472, would be applied to reject such a ridiculous and savage conclusion. But one significant distinction between *Redline* and the hypothetical above is the unambiguous wording of our s. 213(d). Even if some temporal limitation is placed on the words "causes the death", it is not clear in this jurisdiction that lawful force by a third party is excluded. Indeed, the Supreme Court of Canada has on one occasion adopted a purely mechanical construction of ss 21(2) and 213 of the Code: *R.* v. *Trineer*, [1970] S.C.R. 638, 72 W.W.R. 677, [1970] 3 C.C.C. 289, 11 C.R.N.S. 110, 10 D.L.R. (3d) 568, discussed *infra*. The unanimous judgment was delivered by Cartwright C.J.C.

[63] *Ibid.*

in which the accused remained, and inflicted multiple stab wounds on the woman which resulted in her death. Under the provisions of section 213(a) or (d) or both there was no doubt that Frank was guilty of non-capital murder as he had caused the death of a human being while committing a robbery and, at least so far as subsection (d) was concerned, the issue of his intention was irrelevant. The real question was whether Trineer, the accomplice, was also guilty of murder as a result of the application of section 21(2), of the Code which provides:[64]

> (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, *commits an offence*, each of them who knew or ought to have known that the *commission of the offence would be a probable consequence* of carrying out the common purpose is a party to that offence.

The issue of law was whether, on these facts, the accused knew or ought to have known that the commission of the offence of murder would be a probable consequence of the carrying out of the common purpose of robbery. The British Columbia Court of Appeal, following two earlier Supreme Court decisions,[65] held that reasonable foresight of the death of the victim as a probable consequence of carrying out the robbery was necessary for the conviction of Trineer.

Cartwright C.J. in delivering the reasons for reversing the British Columbia Court of Appeal and restoring the conviction at trial stated that:[66]

> If [Trineer] ought to have known that it was probable that bodily harm would be inflicted on the deceased to facilitate the carrying

---

[64] Emphasis added.

[65] *Cathro* v. *The Queen*, [1956] S.C.R. 101, 113 C.C.C. 225, 22 C.R. 231, 2 D.L.R. (2d) 270, and *Chow Bew* v. *The Queen*, [1956] S.C.R. 124, 113 C.C.C. 337, 22 C.R. 253, 2 D.L.R. (2d) 294. These cases had been interpreted by both the Ontario and British Columbia Courts of Appeal as requiring foresight of death as a probable consequence: *R.* v. *Guay and Guay* (1957), 117 C.C.C. 174, [1957] O.R. 120, 26 C.R. 28; *R.* v. *Black and Mackie*, [1966] 3 C.C.C. 187, 54 D.L.R. (2d) 674, [1966] 1 O.R. 68, aff'd [1966] S.C.R. v and ix, and an unreported judgment of the B.C. Court of Appeal, *R.* v. *Calli and Shoemaker*, July 27th, 1966. See also an article by Hartt (now the Honourable Mr. Justice Hartt), Parties to the Offence of Murder, [1958-59] Crim. L.Q. 60 and 178.

[66] *Supra*, footnote 62, at pp. 644-645 (S.C.R.), emphasis added. The learned Chief Justice had earlier in his judgment talked in terms of the accomplice foreseeing as a probability "*intentionally*" caused bodily harm, and he reiterated this proposition later. But his omission of the term "intentionally . . ." in the extract cited has inevitably caused some confusion. See our discussion *infra*.

> out of the robbery, then it was unnecessary for the Crown to establish that he ought to have foreseen that her death was likely to result. The offence contemplated by s. 21(2) (that is murder as defined in s. 202(a) and/or (d) [now section 213]) was committed when Frank inflicted the bodily harm on the deceased for the purpose of facilitating the robbery or flight. *Its character was determined when her death ensued.*

Therefore, it was not necessary for the Crown to establish that Trineer knew or ought to have known that *death* was a probable consequence of carrying out the robbery. In fact, Cartwright C.J. held that if this was the basis of the reasoning of the earlier decisions relied upon by the Court of Appeal then "they were wrongly decided and ought not to be followed". He could "find nothing in the words of s. 21(2) to support the view that foresight of the victim's death as a probable consequence of the robbery, an element expressly excluded in the definition of the offence of murder in section 202 [now section 213], should have to be found to exist before the respondent [Trineer] could be convicted of such murder by the application of s. 21(2)".[67] He went on to point out that the earlier cases did not enunciate a different interpretation, but some confusion in their application has arisen because of the frequent use in the reasons of the word "murder" without making it clear that the word as used meant murder as defined in section 202, now section 213.[68]

The court in fact was extending the strict liability provisions of constructive malice to the accomplice.[69] If Frank is guilty of murder for stabbing the victim during the robbery, no matter what his intentions were, or unlikely a consequence the death was, then Trineer, if he knew that it was probable that Frank would intentionally cause bodily harm to the deceased to facilitate the carrying out of the robbery, is also liable. It is unnecessary to establish he ought to have foreseen that death was likely to result.

This reasoning has been attacked on the grounds that the "extension of the felony murder rule and consequent restriction of the principle of *mens rea* was not linguistically required by the

---

[67] *Ibid.*, at p. 645.

[68] *Ibid.*

[69] In Canada the provisions of the Criminal Code govern exclusively, yet it is interesting to note that at common law where two or more persons are parties to a common design for the use of unlawful violence and the victim is killed, then all the parties to the common design are equally liable to be convicted of murder: Report of the Royal Commission on Capital Punishment (1949-1953), Cmd. 8392, p. 43.

relevant sections . . . and was accomplished with little reference to the decided authorities or the implications for the criminal law process of the step the court was taking".[70] This criticism is undoubtedly valid and Trineer should have only been convicted if he foresaw that death was a probable consequence of committing the robbery, not as the Supreme Court held because he foresaw the commission of bodily harm during the robbery. Yet, it was held that the "offence" was committed when Frank stabbed the victim in carrying out the robbery and only "its character was determined when her death ensued".[71] This in effect, is a very forced and artificial interpretation of the word "offence" in section 21(2) and has resulted in an anomaly whereby the court, in interpreting language in order to decide a particular case, appears to have lost sight of its role in developing a cohesive criminal law process based upon the historical antecedents which led to the 1892 Code, particularly a rational development of the doctrine of *mens rea*.[72]

One feature of the *Trineer* decision which was bound to give rise to difficulty in application was the emphasis Cartwright C.J. placed upon the probable consequence that Trineer should have known that Frank would "intentionally" cause bodily harm to the deceased. In repeating his conclusion he stated that:[73]

> . . . it is my opinion that on the true construction of s. 202 [now 213] and s. 21(2) as applied to the circumstances of this case it was necessary to support a verdict of guilty against the respondent [Trineer] that the Crown should establish (i) that it was in fact a probable consequence of the prosecution of the common purpose of the respondent and Frank to rob Mrs. Vollet that Frank for the purpose of facilitating the commission of the robbery would *intentionally* cause bodily harm to Mrs. Vollet (ii) that it was known or ought to have been known to the respondent that such consequence was probable and (iii) that in fact Mrs. Vollet's death ensued from the bodily harm.

---

[70] Weiler, The Supreme Court of Canada and the Doctrine of Mens Rea (1971), 49 Can. Bar Rev. 280, at p. 363.

[71] *Supra*, footnote 62, at p. 645 (S.C.R.). A leading commentator has stated that he "can see no support at all in the Code for this novel revision of the concept of 'offence' which was used to convict Trineer of murder". Weiler, In the Last Resort, A Critical Study of the Supreme Court of Canada (1974), p. 114.

[72] The Supreme Court of Canada's continued insensitivity to the pivotal effect of the doctrine of *mens rea* in the criminal process is reflected in the violence done to the doctrine in its recent decision of *R.* v. *Kundeus* (1975), 32 C.R.N.S. 135.

[73] *Supra*, footnote 62, at pp. 645-646 (S.C.R.), emphasis added.

Earlier he had held that all the "respondent ought to have known [was] that it was probable that bodily harm would be inflicted on the deceased".[74] The extent and impact of this phrase is greatly modified if the probable consequence is that the bodily harm had to be intentionally inflicted. In the latter situation the accomplice would not only have to agree to commit a robbery, but would also have to know that it was probable that intentional bodily harm would be caused. If so, he then takes the risk of death resulting.

This interpretation would restrict the scope of the constructive malice provisions involving the liability of accomplices, for an accomplice would not be guilty of murder where death resulted from a negligent or accidental act by the actual perpetrator, or where actual or imputed foresight of the accomplice was other than that of intentional bodily harm by the actual perpetrator.

Under section 213(d), however, the person who uses a weapon or has it on his person at the time of committing the robbery and a death ensues as a consequence would be guilty of murder, whether or not the death resulted from an accident without any intention to cause death or bodily harm. But the accomplice to the robbery should not be guilty of murder unless the bodily harm was intentionally caused and foreseeable as such. An example would be the situation where Frank had told Trineer that he was merely going to tie the victim to a tree and in doing this he tripped and killed her with the knife. In our view this should not give rise to liability for accomplice felony murder but we fear that this is the state of the law in Canada on a literal view of dicta by Fauteux C.J. in *R.* v. *Caouette*.[75] There the Chief Justice was of the opinion that "[the accomplice] knew or ought to have known, not only that [the actual perpetrator] would have with him and would use if needed the weapon [a rifle] . . . [and] also that [the accomplice] knew or ought to have known that if the need arose [the actual perpetrator] would cause bodily harm by whatever means he

---

[74] *Ibid.*, at p. 644. This dictum which omits reference to "intentional" bodily harm was cited by Fauteux C.J. in the majority reasoning of the Supreme Court of Canada in *R.* v. *Caouette*, [1973] S.C.R. 859, at p. 866, (1972), 9 C.C.C. (2d) 449, 32 D.L.R. (3d) 185. The Ontario Court of Appeal has recently held that omission of the word "intentional" in a trial judge's charge to the jury was not a fatal defect as his use of the word "inflict" in reference to bodily harm imported the necessary element": *R.* v. *Riezebos* (1975), 26 C.C.C. (2d) 1, at p. 21.

[75] *Ibid.*

could in order to facilitate the commission of this theft or his flight".[76]

There is no reference in this extract to foresight, actual or constructive, of *intentionally* applied force referable to section 213(d). This was construed by the Ontario Court of Appeal in *R.* v. *Riezebos*[77] as leaving the question open. Indeed, the court took the view that a proper construction of section 213(d) may not even require foresight of the probability of use of the weapon by the accomplice, but did not decide the matter.[78] Should *Trineer*, then, be read subject to the *Caouette* logic?[79] In his reasoning Cartwright C.J. emphasised his test of liability as applying to the definition of murder contained in section 202(a) or (d), or both, now section 213(a) or (d), or both. But surely the question of intentionally causing bodily harm has no application to section 213(d)[80] at all unless it is interpolated as a constructive gloss on the otherwise clear wording of that provision.

It appears to us that the reference to knowledge of intentionally caused bodily harm with regard to section 213(d) in Cartwright C.J.'s judgment in *Trineer* is likely to be disregarded if the matter is reviewed by the Supreme Court of Canada. In the light of the clear statement by Fauteux C.J. in *Caouette*,

---

[76] *Ibid.*, at pp. 866-867 (S.C.R.).

[77] *Supra*, footnote 74, at p. 20, where it was stated that it was not entirely clear whether Fauteux C.J. intended to enunciate, as a proposition of general application, that knowldge or foreseeability of use of the weapon was a necessary element of liability of a party for murder under s. 213(d) through s. 21(2), as opposed to a comment limited to the factual situation in that particular case.

[78] *Ibid.*

[79] The Ontario Court of Appeal in *R.* v. *Paquette* (1974), 19 C.C.C. (2d) 154, at pp. 155-156, has held in following *Trineer*, that to convict of murder in the course of a robbery through the combined application of ss 21(2) and 213, the Crown must prove that it was a probable consequence of the common purpose that one of the other perpetrators would intentionally cause bodily harm for the purpose of facilitating the commission of the robbery and that it was known or ought to have been known to the accused that such consequence was probable.

[80] The confusion created by Cartwright C.J. referring to s. 213(a) and (d) was discussed and the view taken by the Ontario Court of Appeal in the *Riezebos* case, *supra*, footnote 74, at p. 19, that "although [Cartwright C.J.] had previously referred to s. 202(a) and (d), [he] was applying s. 21(2) to s. 202(a) [now 213(a)] only". It further held, at p. 20, that "a separate direction should be given in relation to each subsection, leaving it to the jury to conclude which one is applicable according to its view of the facts".

the ambivalence of the Ontario Court of Appeal in *Riezebos*, and the judicial sentiment of the Supreme Court of Canada as reflected in *Trineer* and later in *R.* v. *Lajoie*,[81] we reluctantly conclude that the *Caouette* dictum is likely to be followed.

Such a result would be a further erosion of the doctrine of *mens rea* unaccompanied by any discernible social or ethical gains. We are at a loss to perceive why an accomplice should be guilty of murder in a situation where death ensued from the accidental use of a weapon by the actual perpetrator. But the positivistic approach of the Supreme Court of Canada in construing the felony murder provisions of the Code leads us to the gloomy conclusion that *Caouette* expresses the "correct" law on the subject.

If one accepts the doctrine of *mens rea* as the major basis of criminal liability[82] then surely the Supreme Court should be concerned with maintaining it rather than creating anomalies in the criminal law process that are not called for under the provisions of the Code. If the *Trineer* decision can be classified as the "accomplice felony murder rule", it also laid the basis for a further extension of the doctrine of constructive murder with its strict liability provisions into the area of attempted murder.

It must be remembered that when a person is convicted of murder under the constructive murder provisions of the Criminal Code he is punished not because he foresaw the consequences of his conduct, but because a death resulted from or during the commission of a specified offence. He is punished not for the intention to kill, nor for the foresight of its likelihood, but because of the death. In all instances of murder, it is the death, the *actus reus*, which the law desires to prevent, whereas the *mens rea* is only the necessary condition for the infliction of punishment.

---

[81] [1974] S.C.R. 399, (1973), 10 C.C.C. (2d) 313, 20 C.R.N.S. 360, 33 D.L.R. (3d) 618, aff'ing the majority judgment of the British Columbia Court of Appeal, [1971] 5 W.W.R. 385, (1971), 4 C.C.C. (2d) 402, 16 C.R.N.S. 180.

[82] For a lucid discussion supporting this premise see, Weiler, *op. cit.*, footnote 70, at pp. 280-290. See also Stuart, The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence, [1972] Crim. L.Q. 160. The writer, at p. 178, referring to s. 213, said: "The Code contains homicide provisions that not only drastically reduce or abandon the notion of *mens rea* but also codify the unnecessary and severely criticised notion that a lesser crime can be inflated to a serious crime such as murder or manslaughter if death results, however unexpectedly."

Under section 212(a)(ii)[83] of the Code the necessary *mens rea* for murder is defined as follows:

> (a) where the person who causes the death of a human being . . .
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.

Therefore, a person convicted under this section is punished because he foresaw the consequences of his conduct, that is the death. He is punished for both the *actus reus* and for his *mens rea*. Whereas in the law of attempts it is the *mens rea* that is regarded as being of primary importance and which the law desires to prevent, therefore a sufficient *actus reus* becomes the necessary condition for the infliction of punishment. The sole purpose of the *actus reus* is to fix the existence of the *mens rea*. For a completed crime, the *mens rea* may consist of either intention or recklessness as both embody foresight of consequences, yet, as Turner has pointed out,[84] where the crime is not complete, the law of attempts by its very nature requires as sufficient *mens rea* nothing less than intention — an intention to commit the full offence, that is the *actus reus* of the full offence. Recklessness can have no place in the law of attempts. On this reasoning it is inconceivable how the doctrine of constructive malice would have any application at all. Yet, the Supreme Court of Canada in *R.* v. *Lajoie*[85] has decided that both recklessness and constructive malice have a role to play in establishing the intent required to convict a person for attempted murder.[86]

Under the Code, section 222 is the charging section which, although not defining attempted murder, specifies the punishment:

> Every one who attempts by any means to commit murder is guilty of an indictable offence and is liable to imprisonment for life.

An "attempt" is defined by section 24(1):[87]

> Every one who, *having an intent to commit an offence*, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

---

[83] Under s. 212(a)(i) an intent to kill is the *mens rea* required.

[84] Turner, Attempts to Commit Crimes (1933-35), 5 Camb. L.J. 230, at p. 235.

[85] *Supra*, footnote 81.

[86] See, Burns and Reid, Comment (1973), 8 U.B.C. L. Rev. 364.

[87] Emphasis added.

At common law the *intent* to commit the *actus reus* of the full offence is the principal ingredient of an attempted offence and nothing short of an *actual intent* to kill must be proved to successfully prosecute a charge of attempted murder. This position was clearly enunciated by Lord Chief Justice Goddard in *R.* v. *Whybrow*, who stated in part:[88]

> In murder ... if a person wounds another or attacks another either intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm.... But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm.

In the unanimous judgment of the Supreme Court of Canada in *R.* v. *Lajoie*,[89] delivered by Martland J., it was decided that a conviction for attempted murder merely requires an intent to commit murder in *any* of the ways provided for in the Code — whether under section 212 or section 213 and that it was not necessary to prove the specific intent to kill.[90]

In *Lajoie* the court was concerned with an accused who had shot and severely wounded a taxi driver in an inept robbery attempt. The accused had fired and missed the driver inside the taxi cab, then had pursued the fleeing driver and shot him purposely in the back. Fortunately the victim's life was saved as a result of prompt medical assistance.

In upholding the conviction for attempted murder it was held that section 212(a)(ii) and section 24 "must be read together and due regard must be had to both sections in

---

[88] (1951), 35 Cr. App. R. 141, at pp. 146-147. For the previous corresponding Canadian position see Popple, Attempted Murder (1960), 33 C.R. 242 (annotation).

[89] *Supra*, footnote 81.

[90] Thus settling the controversy in this country as to whether or not a specific intent to kill was required, for a conviction of attempted murder. The reasoning of the Ontario Court of Appeal in *R.* v. *Ritchie*, [1970] 3 O.R. 417, was adopted notwithstanding the criticism of Silverman's annotation: (1970), 16 C.R.N.S. 295.

determining whether or not an attempt to murder has been established".[91] If it could be established that the accused intended to cause bodily harm of a kind he knew was likely to cause death, and was reckless as to whether or not death ensued, he would be guilty of murder under section 212(a)(ii) if death in fact did ensue. However, if death did not ensue, then under the wording of section 222, an attempt to commit murder would have been proved.[92]

The line of reasoning adopted by Martland J. does not take into account the conceptual theory of the law of attempts; in fact it reflects the trap of legal positivism[93] which rigidly adheres to the statutory provisions of the Code. Under section 212(a)(ii) a person is punished not only for the death of another human being but also because he foresaw its likelihood, therefore it is not necessary to prove an actual intention to kill. But under the logic employed in *Lajoie* if an accused merely intended to commit bodily harm and that is all in fact he commits, if he foresaw the likelihood of death and was reckess as to its occurrence, he is guilty of attempted murder. He is thus to be punished for being reckless in respect to an event, death, which he did not intend and in fact never occurred. By a process of *reductio ad absurdum* we arrive at the extraordinary result that a person can be found guilty of attempting to "murder recklessly".[94]

The obvious difficulties in applying this reasoning have not been long in making themselves apparent. In *R.* v. *Ross (Foster)*[95] Matas J.A., of the Manitoba Court of Appeal, held that the requisite intent required under section 212(a)(ii) was not the same as that required by section 228[96] (dealing with

---

[91] *Supra*, footnote 81, at p. 403, (S.C.R.), quoting the reasoning of Schroeder J.A. of the Ontario Court of Appeal in *R.* v. *Ritchie*, *ibid.*, at p. 423.

[92] *Ibid.*, at p. 405.

[93] For an analysis of the positivist theory of judicial decision-making adhered to by the Supreme Court of Canada see, Weiler, *op. cit.*, footnote 70, at p. 281.

[94] For a discussion of this question see, Mewett, Attempt to Murder Recklessly (1972), 15 Crim. L.Q. 10, and Burns and Reid, *op. cit.*, footnote 86, at pp. 368-369.

[95] [1975] 5 W.W.R. 712 (Man. C.A.), per Matas J.A., Hall J.A., concurring; Guy J.A., concurring in the result but delivering separate reasons.

[96] S. 228 provides: "Every one who, *with intent* (a) to wound, main or disfigure any person, (b) *to endanger the life of any person*, or (c) to prevent the arrest or detention of any person, discharges a firearm, air

intentionally causing bodily harm) so that an acquittal of attempted murder does not necessarily result in an acquittal of an offence under section 228. In arriving at this conclusion Matas J.A. stated that:[97]

> [N]owhere in the *Lajoie* decision is it suggested that the intent under s. 228(b) is the same as the intent under the second branch of s. 212. What did Parliament intend by retaining both s. 212(a)(ii) and s. 228(b) in the Code? Firstly, there is an obvious difference between the two sections: an offender who is convicted of attempted murder under s. 212(a)(ii) is liable to imprisonment for life, whereas under s. 228(b) he is liable to imprisonment for 14 years. Secondly, there could be a distinction, as a matter of degree, between the two sections, depending on the view that a jury might take of the seriousness of the intent of the accused. *Intent of the accused could be to endanger life but might fall short of an intention to extinguish life, whether under the first or second branch of s. 212(a).*

This reasoning highlights the difficulties that any court is faced with in relating attempted murder to "causing bodily harm with intent". The distinction between the two offences is described as being one of degree based on an intent to endanger life compared with an intent to extinguish life. But this distinction is irrelevant for the purposes of section 212(a)(ii). All that is required to support *mens rea* under this provision is an intent to cause "bodily harm that [the accused] knows is likely to cause death, and is reckless whether death ensues or not". How can this be sensibly distinguished from an intent to "endanger life", which in terms goes beyond an intent to cause bodily harm? The only logical way in which a distinction can be drawn is where the intended endangerment of life does *not* involve force causing bodily harm. Yet on the facts of *Ross* itself this is exactly what occurred! There the victim was shot and injured by her husband. We respectfully suggest that even if the distinction drawn in *Ross* is valid it was misapplied on the facts.[98]

---

gun or air pistol at or *causes bodily harm in any way to any person,* whether or not that person is the one mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and is liable to imprisonment for fourteen years." Emphasis added.

[97] *Supra,* footnote 95, at p. 718, emphasis added.

[98] In arriving at his decision Matas J.A. relied on *R.* v. *Owens,* [1970] 2 C.C.C. 38 (B.C.C.A.), a case decided prior to *Lajoie* following the *Whybrow* test of *mens rea* in attempted murder. There it was held that the requisite intent under s. 228(b) was one of endangering life whereas attempted murder required an intent to kill. This distinction is quite appropriate and is easily applied so long as the *mens rea* of attempted murder is maintained as one of an intent to kill.

In our submission the paradox was created by *Lajoie* and can be resolved only by reversing the position adopted in that case and setting up a requirement of a specific intent to kill as the *mens rea* of attempted murder. Unless this is done we will no doubt continue to be faced with legal sophistry, attempting to draw subtle distinctions between the *mens rea* of these two sections. It is submitted that *Lajoie* has rendered section 228(b) largely nugatory — all aggravated assaults involving intentional bodily harm are by definition attempted murder — if death may result as a probability.

Moreover, how will the Crown establish that the accused foresaw the likelihood of death and was in fact reckless as to its occurrence — will this be established by a subjective or an objective test?[99] Is an inference to be drawn from the accused's conduct at the time or from the type of harm done or both? Is the standard of the reasonable man to be applied to the circumstances so that an objective test becomes the criterion for determining whether the elements of section 212(a)(ii) are satisfied? If so, will a dullard or violent-tempered individual be punished for what a reasonable man would have been able to foresee, even though the accused himself did not foresee the likelihood of death nor was reckless as to its occurrence which in fact did not occur? Surely this conceptually confusing situation serves no purpose in our criminal law. For what is the law purporting to prevent or punish where there is neither death nor an intention to kill and the offence is described as attempted murder? The result is merely a retributive response to the accused's conduct and a further erosion of the doctrine of *mens rea.*

Another example of the problem, that can result in relying on objectively drawn inferences from either the accused's conduct or the type of harm done is illustrated by the recent Manitoba Court of Appeal decision in *R.* v. *Letendre.*[100] The facts were that the accused in the course of a robbery had placed a gun in the victim's ribs and then pulled the trigger causing serious bodily injury, but not death. The accused was convicted of attempted murder, attempted robbery, and assault causing bodily harm. The trial judge in charging the jury concerning the application of section 213(d) to the charge of attempted murder had

---

[99] For an excellent account of the way in which objective tests of *mens rea* remain in the criminal law see Gordon, Subjective and Objective *mens rea* (1975), 17 Crim. L.Q. 355.

[100] (1975), 25 C.C.C. (2d) 180, per Freedman C.J.

instructed the jury on the question of intent, and pointed out that the essential point for the jury to decide was whether or not the trigger was deliberately pulled by the accused.[101]

Counsel for the accused contended that an intent to pull the trigger was by itself insufficient and in addition there must be an intent to cause death, or an intent to cause *grievous* bodily harm coupled with a recklessness whether death ensues or not.[102] Freedman C.J. rejected this ground of appeal on a consideration of the facts as a whole and held that, "a jury would have little difficulty in *ascribing*[103] to the accused an intent to cause death or *grievous* bodily harm likely to cause death accompanied by a recklessness whether death ensued or not", where the gun whose trigger the accused pulled was at the time placed against the victim's ribs.[104]

It is submitted that this reasoning is open to objection in the form in which it is stated. The Manitoba Court of Appeal appears to have applied an entirely objective test of responsibility to determine whether or not an accused intended the natural consequences of his acts for both branches of section 212(a) — and thereby has resurrected the spectre of the *Director of Public Prosecutions* v. *Smith*.[105] On the basis of the reasoning in *Letendre* an ascription of intention can be made *simply* from the objective character of the accused's conduct to satisfy not only the direct intent to kill, but also the intent to cause

---

[101] *Ibid.*, at p. 182. The trial judge's charge to the jury on the question of intent under s. 213(d) is clearly in error as this constructive malice provision of the Code does not require any intent on the part of the accused; it merely requires that the accused use or possess a weapon in the course of the robbery and a death ensue as a consequence.

[102] *Ibid.* Here counsel for the accused is arguing that the intent required is one of the required *mens rea* for either of the branches of s. 212(a) — in para. (i), direct intent to kill, or in para. (ii), intent to cause bodily harm, and not *grievous* bodily harm (see discussion *supra*), and being reckless as to whether or not death ensues. Neither of these intents has any application to s. 213(d), although the latter intent would be relevant to s. 213(a). The distinction between s. 213(a) and (d) in conjunction with a charge to a jury has already been made by the Ontario Court of Appeal in *R.* v. *Riezebos*, *supra*, footnote 74.

[103] The meanings of the term "ascribe" relevant to this context are, "to impute, assign, refer...", The Shorter Oxford English Dictionary (1973), p. 113.

[104] *Supra*, footnote 100, at p. 182.

[105] *Supra*, footnote 48. For a critical comment on the case see Ryan, The Objective Test of Intention in Criminal Liability, [1960-61] Crim. L.Q. 305; see also the criticisms cited in *supra*, footnote 48.

bodily harm being reckless as to the likelihood of death ensuing — all in circumstances where no death occurred. This may not have been what the court intended to do, but its statement leads to that conclusion. It certainly highlights the desirability of articulating the inference of intention from objectively established facts in the terms referred to by the Ontario Court of Appeal in *R.* v. *Ortt*.[106]

Although the law of England and the United States requires an actual intention to kill to establish a conviction for attempted murder this is not the case in Canada. The reasons given by Martland J. in *Lajoie* for reaching this conclusion were based upon the elimination of the preliminary governing words "with intent to commit murder" from the attempted murder section in the 1954 Code. Prior to the 1954 revision "it was those words", according to Martland J., "which were . . . construed, in their context, as meaning an actual intent to kill", and "it was this kind of intent which was in the mind of Goddard L.C.J. in the *Whybrow* case when he referred to intent becoming the principal ingredient of the crime of attempted murder".[107] Now the word "intent" does not appear at all in section 222; it can only be found in section 24(1) which refers to "having an intent to commit an offence". On this basis, and because of the application of the specific provisions of section 212 and section 24 of the Code which must be read together, Martland J. maintained that "in the light of the wording of s. 210 [now section 222] there may be an intent to do that which constitutes the commission of the offence of murder without that intent being to kill the victim".[108]

What difference is there between the "intent" in the eliminated phrase from section 210, now section 222, "with intent to commit murder", and in the phrase in section 24, "an intent to commit an offence"? Surely "the offence" in section 24 is the *offence* of murder. In this context the only logical meaning to attribute to "the offence" is the *actus reus of the full offence.* The *actus reus* of murder is the death of the victim and the intent should be that required in all other jurisdictions, namely, to kill! To draw a distinction between the "intents" in the two phrases makes no sense, and it is submitted that the elimination

---

[106] [1968] 2 O.R. 307.

[107] *Supra,* footnote 81, at pp. 405-406 (S.C.R.).

[108] *Ibid.,* at p. 406.

of the word "intent" from section 210, now section 222, in the 1954 Code did not in fact change the intent required.[109]

In an endeavour to substantiate its reasoning in differentiating between the two "intents" the Supreme Court of Canada, in *Lajoie*, relied upon the earlier decision of *Trineer* where the court "dealt with a situation somewhat analogous to the present one".[110] Martland J., in *Lajoie*, held that the judgment in *Trineer* was based on the reasoning that "the commission of the offence, referred to s. 21(2), as applied to the offence of murder, contemplated and included commission of that offence in the manner defined in s. 202(a) and/or (d) [now section 213]".[111] On the basis of this analogy Martland J. concluded his reasoning in *Lajoie* in this crucial passage:[112]

> In relation to the present case the important point is that, in applying s. 21(2) to the offence of murder, this Court held, in the *Trineer* case, that "the commission of the offence" meant commission in any of the ways contemplated by the Code and not merely its commission in the form of an intentional killing. Similarly, in my opinion, when s. 24(1) refers to "an intent to commit an offence", in relation to murder it means an intention to commit that offence in any of the ways provided for in the Code, whether under s. 201 [now section 212] or under s. 202 [now section 213].

As stated earlier, it is submitted that this conclusion is erroneous. In *Trineer* the doctrine of constructive murder was extended to encompass accomplices who knew or ought to have known that intentional bodily harm would be inflicted on the victim. But *Lajoie* goes even further, and concludes that a person can be punished for attempted murder under the operation of the doctrine of felony murder, the entire rationale of which is based upon the occurrence of a death. Without a death there is no basis to ignore the principles of the doctrine of *mens rea*. In fact, without a death section 213 has no application at all. While the reasoning in *Trineer* may be criticized for being an unwarranted extension of the rule of strict liability based upon constructive malice, the reasoning in *Lajoie* with respect

---

[109] It is significant that at the time of the elimination of these words J. C. Martin who had been research counsel to the Royal Commission to revise the Criminal Code, 1947-1952, and who as editor of Martin's Criminal Code (1955), in annotating the new s. 210 [now section 222], wrote, at p. 396, that s. 210 "is the former s. 264, in general terms *without change in effect*".

[110] *Supra*, footnote 81, at p. 406 (S.C.R.).

[111] *Ibid.*, at pp. 406-407.

[112] *Ibid.*, at pp. 407-408.

to section 213 is simply erroneous and entirely without foundation in the criminal law.

Just how far the anomalies created by the artificial rules of "accomplice felony murder" and "attempted felony murder" can be extended is illustrated by *R.* v. *Barber*,[113] a decision of the British Columbia Court of Appeal confirming a conviction of attempted murder. Here was created an "accomplice felony attempted murder" rule. The accused and Kraft committed a robbery, and in the ensuing escape Kraft shot and wounded a police officer. Barber did not fire a shot. The trial judge charged the jury on the matter of intent by referring to section 213(a)(ii), that is, that "he means to cause bodily harm for the purpose of facilitating his flight". Counsel for the accused unsuccessfully argued that this is not the kind of intent which can "logically and properly be applied to a charge of attempted murder as distinguished from murder".[114] McFarlane J.A., however, relied upon the crucial concluding paragraph of the judgment of Martland J. to uphold the trial judge's charge and declined to consider the application of section 213 to attempted murder by Martland J. in *Lajoie* as *obiter* dictum.[115]

Barber is a mechanical extension of the reasoning in *Trineer* and *Lajoie*, and clearly illustrates their inherent errors. If Kraft had killed the police officer then Barber, on the reasoning in *Trineer*, would also have been guilty of murder if he foresaw the probable consequence of Kraft intentionally causing bodily harm to facilitate the escape. Since the police officer was only wounded, therefore on the reasoning in *Lajoie*, Barber was guilty of attempted murder since he would have been convicted of murder if death had ensued. A person can be liable to the severe penalty of life imprisonment under a conviction for attempted murder in the situation where he only intends to be a party to a robbery and he foresees the other party intentionally causing bodily harm, and that in fact is all that occurs.

Moreover, what if Barber did not "know or ought to have known" that Kraft would intentionally cause bodily harm? We have concluded that, despite the reasons of Cartwright C.J. in *Trineer* an accomplice can be found liable under section 213(d) if the actual perpetrator's use or possession of a weapon resulted in a death. The logically savage endgame would be for an

---

[113] Unreported, February 28th, 1973, Vancouver, 1010/72.

[114] *Ibid.*, at p. 3.

[115] *Ibid.*, at pp. 5-6.

accomplice to be found guilty of attempted murder where he did not know but had reasonable grounds for knowing the actual perpetrator would probably carry a weapon during the course of a robbery. Pursuant to *Barber*, if the weapon is used by the actual perpetrator he is guilty of attempted murder, *ergo* it is attempted murder on the part of the accomplice also, by combining the effects of sections 213(d), 21(2) and 222.

Conclusion

The "overall aim of the criminal law is the aim of self-protection"[116] and this can be attained by society in a variety of ways. The pre-Norman technique was to resort to a system of strict liability. The current device of criminal responsibility based on the doctrine of *mens rea* is described by the Law Reform Commission of Canada as the "theological approach of guilt and punishment".[117] This latter approach has been under attack by social scientists who advocate a return to strict liability with the mental state of the wrong-doer going to the question of treatment-punishment rather than that of guilt or innocence.[118]

But our system of criminal justice is not a pure one. It reflects the causal theory of criminal responsibility in part as well as the theological approach. The Law Reform Commission of Canada has recommended "that the law of real crimes continue to be based on and require *mens rea*".[119] We subscribe to this view[120] and ask, what could be a more real crime than that of murder or attempted murder? On a scale of values based on heinousness these are both near the extreme upper point.

The primary cases we have focussed attention on, *Trineer* and *Lajoie*, are reflections of the court's attempts to provide social defence in the face of perceived threats. The conduct of

---

[116] Working Paper No. 2, *op. cit.*, footnote 15, p. 8.

[117] *Ibid.*, p. 17.

[118] Wootten, Crime and the Criminal Law (1963), and Menninger, The Crime of Punishment (1968). Ironically, the academic wheel has not been long in swinging against these authors, whose views enjoyed considerable popularity in the sixties. For devastating attacks on the "social-welfare" and "medical" models of social response see Ross, The Campaign Against Punishment, [1970] Scandinavian Studies in Law 111; Andenaes, The Future of Criminal Law, [1971] Crim. L. Rev. 615; and Ross, On Guilt Responsibility and Punishment (1974).

[119] Working Paper No. 2, *op. cit.*, footnote 15, p. 19.

[120] For the reasons outlined, *ibid.*, pp. 17-19.

the accused in both cases was highly egregious and the physical consequences of their conduct was objectively designed to inspire a reaction of social outrage. Placed within the context of widely expressed public concern for general safety and the courts' social role, the decisions are understandable. But we respectfully submit that they are not a proper legal response to the issues they raised. *Trineer* ignored the contextual framework of the murder definition with its unstated policy objectives buried in the doctrine of *mens rea*, and *Lajoie* extended this approach to an entirely different offence.

We have attempted to show that the judicial application of the felony murder rule was wrong in principle and bound to lead to conceptually confusing results. Worse, we have attempted to demonstrate that morally objectionable[121] consequences have occurred and will continue to occur if the rules laid down in *Trineer* and *Lajoie* remain unchanged. The penalties for murder and manslaughter are different,[122] and those of attempted murder and causing bodily harm with intent are even more discrete.[123] But for practical sentencing purposes the distinctions may be largely irrelevant. How many attempted murderers *are* sentenced to more than fourteen years imprisonment? Why should Trineer if, as we suggest, guilty of manslaughter, not be sentenced to life imprisonment because of the peculiar facts of his case? But why pretend his mind was, in moral terms, the equivalent of that of Frank?

It is too late, now, to turn back the judicial clock. The rules regarding felony-murder and its derived offences have been clearly delineated by the Supreme Court of Canada. One of the indicators of the state of a nation's civilisation is the way in which it treats its criminals, including the means by which a declaration of criminality is made.

Our view is that legislative action is urgently required to reinforce the principle of criminal responsibility, wedded in the doctrine of *mens rea*, recently eroded in this area. Perhaps a

---

[121] Morally objectionable, that is, if one accept the *mens rea* premise of criminal responsibility.

[122] Murder (non-capital), s. 218(2) of the Code, and manslaughter, s. 219 of the Code, render the accused liable to life imprisonment. With murder there is no discretion whereas with manslaughter there is a judicial discretion.

[123] Attempted murder, (s. 222 of the Code), renders the accused liable to life imprisonment, whereas causing bodily harm with intent (s. 228 of the Code) renders the accused liable to 14 years imprisonment.

further degree of murder has to be created to express society's outrage at the actions of its Trineers,[124] but the difference between attempted murder and causing bodily harm with intent must be regained to preserve the integrity of the doctrine of *mens rea*. We would suggest, however, that the most desirable course would be to entirely abolish the felony murder provisions of the Code together with its derived doctrines.

If the doctrine of *mens rea* can be applied in the way described in this article in relation to such serious offences, what is its chance of survival when dealing with lesser "real crimes"? Without resorting to the *cliché* of the "floodgates argument" we merely point to the continued expansion of the "*Trineer* rule" since it was laid down and leave the reader to draw his or her own conclusion.

---

[124] Degrees of murder were established by, now, s. 214 of the Criminal Code. Under this provision first degree murder is planned and deliberate murder or that referred to in subss (3), (4) and (5). All other murder is second degree murder pursuant to subs. (6). A conviction of first degree murder renders the defendant subject to life imprisonment without opportunity of parole for 25 years: s. 669(a) of the Criminal Code. Perhaps a new category of murder in the third degree should be created to encompass felony-murder, *etc.*, malefactors.