DANGEROUS DRIVING AND *MENS REA*

Basil Stapleton*

I. Introduction

> The first thing to remember is that the statute contains an absolute prohibition against driving dangerously or ignoring Halt signs. No question of *mens rea* enters into the offence; it is no answer to a charge under those sections to say, "I did not mean to drive dangerously" or "I did not notice the Halt Sign."[1]
>
> It is quite clear from the reported cases that, if a man in fact adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best.[2]

Relying upon these dicta of Lord Goddard C.J. and Fenton Atkinson J., respectively, Keirstead Co. Ct. J. in *R. v. Flynn*[3] rules that *mens rea* is not an element of the offence of dangerous driving under section 221(4) of the Criminal Code. This marks the first and, to this writer's knowledge, the only, acceptance of this position by a New Brunswick court. The courts of several other provinces have taken stands on the matter that vary widely from one another. The Quebec Appeal Court in *Goodfellow v. The Queen*[4] flatly rejected the proposition that *mens rea* is not a necessary ingredient of this offence. On the other hand, in a judgment handed down several months after this Quebec decision, Higgins J. of the Newfoundland Supreme Court in *R. v. White*[5] held that the offence does not require *mens rea*. In *R. v. Marbus*[6] it would appear that the Ontario Court of Appeal by implication would not subscribe completely to the dicta of the English *Evans* case that the slightest negligence or even a driver's "incompetent best" will always support a charge of dangerous driving.[7] Campbell C.J. of the Prince Edward Island Supreme Court in *Russell v. The Queen*[8] expressed the view that "an offence (under s. 221(4) of the Criminal Code) is not constituted by a mere

* Basil Stapleton, II Law, U.N.B. Mr. Stapleton is a Sir James Dunn Scholar in Law.

1 *Hill v. Baxter*, [1958] 1 All E.R. 193, at p. 195.
2 *R. v. Evans*, [1962] 3 All E.R. 1086, at p. 1088.
3 (1964), 50 M.P.R. 96.
4 (1965), 44 C.R. 113.
5 [1965] 3 C.C.C. 147.
6 (1963), 39 C.R. 201.
7 (1963-64), 6 Crim. L.Q. 10.
8 (1965), 44 C.R. 1.

error of judgment".[9] The state of the law in Nova Scotia is clearly set out in the county court and appeal court decisions in the case of *R. v. Jeffers*.[10] Pottier Co. Ct. J., after an extensive review of the authorities, reached the conclusion that the offence of dangerour driving contrary to section 221(4) of the Criminal Code does not require *mens rea*. The four members of the Nova Scotia Supreme Court who heard the appeal were evenly divided on the issue of *mens rea*. Reference may also be made to the Alberta case of *R. v. Lykkemark*[11] in which Tavender D.C.J. decided that the word "dangerous" in section 221(4) imports a considerably greater degree of negligence than the word "careless" and that the former is to be classed as advertent negligence. It therefore follows, in his view, that Parliament has not chosen to define inarvertent negligence as a crime. Finally, in the British Columbia case of *R. v. La Fontaine*,[12] Fraser Co. Ct. J., following recent English and Australian decisions, came to the conclusion that under section 221(4) there is an absolute prohibition against driving dangerously and that drunkenness is no defence.

This sampling of decisions from the courts across Canada makes it abundantly clear that the issue of *mens rea* in relation to the offence of dangerous driving under the Criminal Code is by no means settled; much uncertainty and disagreement surround it. Presumably this state of affairs will continue until the Supreme Court of Canada makes a final pronouncement. In the meantime it is a matter which, for several important reasons, warrants close and serious attention. The purpose of this article is to highlight the most significant aspects of the question.

II. Historical Background

At the outset it would be well to outline briefly the historical background of the present section 221(4).[13] The first enactment of the Criminal Code having to do with dangerous driving as a particular offence appeared in 1938, when an amendment was made to section 285 by adding subsection (6) which reads as follows:

> (6) Every one who drives a motor vehicle on a street, road, highway, or other public place recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances

9 *Ibid.*, at p. 2.

10 [1964] 2 C.C.C. 346; (1965), 45 C.R. 177.

11 (1965), 51 W.W.R. 624.

12 (1964), 43 C.R. 328.

13 See Macdonald, "Careless, Negligent, Reckless Operation of Motor Vehicles" (1963), 6 Can. Bar Jo. 122.

> of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway, or place, shall be guilty of an offence . . .[14]

This subsection was virtually a reproduction of section 1 of the English Motor Car Act, 1903, the only difference being that the English section contained the words "or negligently" after the word "recklessly". Before 1938 dangerous driving was dealt with in Canada by legislation of the various provinces under the general heading of driving to the common danger.[15] The bringing of the offence within the Criminal Code appears to have been prompted by two major factors: (1) the great difficulty of getting convictions for motor manslaughter under the Code owing to the legal difficulties of establishing the required criminal negligence and the leniency of juries, and (2) the decision of the House of Lords in *Andrews v. Director of Public Prosecutions,*[16] which drew a distinction between the amount and degree of negligence involved in a charge of manslaughter and that involved in a charge of dangerous driving under the English Road Traffic Act.[17] In that decision Lord Atkin observed:

> I cannot think of anything worse for users of the road than the conception that no one could be convicted of dangerous driving unless his negligence was so great that if he had caused death he must be convicted of manslaughter.[18]

He also says:

> I entertain no doubt that the statutory offence of dangerous driving may be committed, though the negligence is not of such a degree as would amount to manslaughter if death ensued.[19]

In the new Code of 1953-4 there was no section dealing with dangerous driving as a particular offence. The operation of motor vehicles was covered by section 221 which provides that:

> 221(1) Every one who is criminally negligent in the operation of a motor vehicle is guilty of:
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> (a) an indictable offence and is liable to imprisonment for five years, or
>
> (b) an offence punishable on summary conviction.

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14 (1938), 2 Geo. VI, c. 44, s. 16 (Can.).

15 For example, in New Brunswick, The Motor Vehicle Act (1934), 24 Geo. V, c. 20, s. 37 (N.B.).

16 [1937] A.C. 576.

17 *Burns v. The King* (1945), 19 M.P.R. 178, at pp. 179 and 180.

18 *Andrews v. Director of Public Prosecutions,* [1937] A.C. 576, at p. 584.

19 *Ibid.*

A new section, section 191, defined criminal negligence as follows:

> 191(1) Every one 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 purpose of this section, "duty" means a duty imposed by law.

In this connection the Report of the Royal Commission on the Revision of the Criminal Code states:[20]

> In concluding the report on the subject of criminal negligence, attention should be called to the provisions of clause 221(1) which make it an offence to be criminally negligent in the operation of a motor vehicle whether or not such operation causes bodily injury to or death of another person. Because of this provision it has been unnecessary to retain subsections (1) and (6) of section 285.

The note appended to section 221 in Martin's Criminal Code reads as follows:

> Subsec. (1) is new and is to be read with s. 191. It will cover cases where there is criminal negligence although the consequences contemplated by ss. 192 and 193 do not follow. It replaces the former s. 285(6). Note that the former s. 951(3), which permitted an alternative verdict under that subsection in a case where manslaughter was charged, has been omitted in view of the new provisions mentioned.[21]

In 1960-61, section 221 of the Criminal Code was amended by adding thereto the following subsection:

> (4) Every one who drives 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, is guilty of
>
> (a) an indictable offence and is liable to imprisonment for two years, or
>
> (b) an offence punishable on summary conviction.[22]

Thus dangerous driving was reinstated as a particular offence. It is to be noted, however, that the provision regarding driving recklessly as it appeared in the former section 285(6) has been

20 *Report of the Royal Commission on the Revision of the Criminal Code* (Ottawa, 1952), p. 13; cited in *R. v. Jeffers*, [1964] 2 C.C.C. 346, at p. 370.

21 Martin's *Criminal Code* (Toronto, 1955), p. 408.

22 (1960-1), 9 Eliz. II, c. 43, s. 3.

deleted from the new enactment. The note to this new subsection in Martin's Annual Criminal Code, 1962 reads simply:

> This restores the offence that existed in s. 285(6) of the old Code. See the 1960-61 amendment to s. 569, *post*, for the alternative verdict as in the former s. 951(3).[23]

Section 569(4) makes an offence under section 221(4) an included offence under section 221(1).

Several vital questions arise at this point. (1) What were the ingredients of the offence of dangerous driving under the "old" section 285(6)? (2) Does section 221(4) simply restore the offence that existed in section 285(6)? (3) Are the cases dealing with section 285(6) applicable to section 221(4)?

For our purposes the first of these questions may be answered to the effect that the weight of authority supports the view that *mens rea* was a necessary ingredient in a charge of dangerous driving under the "old" Code. This much is conceded by some of the strongest proponents of the position that no *mens rea* is required under the present section.[24] Support for this view is to be found in *Loiselle v. The Queen*,[25] *R. v. Harrison*[26] and *R. v. Beaudry*.[27]

As for question (2), it has been suggested that:

> The omission of the term "recklessly" in the present s. 221(4) means that our present Canadian "dangerous driving" section is different from both the English legislation and the former s. 285(6). How different is a matter that remains to be settled..[28]

With reference to this suggestion, Coffin J. in *Jeffers v. The Queen*[29] commented:

> With the greatest of deference the omission of the word "reckless"—bearing in bind its context in 285(6)—creates a distinction without a difference. Section 285(6) creates two offences—one driving recklessly, the other driving dangerously. The offences are separate and I see no reason for excluding consideration of cases dealing with the dangerous driving portion of s. 285(6) when facing a problem arising out of s. 221(4).

It should be pointed out that this observation was made by Coffin J. in the course of a judgment to the effect that *mens rea* cannot be disregarded for the purposes of section 221(4). As will

23 Martin's *Annual Criminal Code*, 1962 (Toronto, 1962), p. 215.
24 See, of example, *R. v. Jeffers*, [1964] 2 C.C.C. 346, at 369, and *R. v. White*, [1965] 3 C.C.C. 147, at p. 150.
25 (1953), 109 C.C.C. 31.
26 [1948] O.W.N. 829.
27 (1951), 102 C.C.C. 70.
28 (1963-64), 6 Crim. L.Q. 4.
29 (1965) 45 C.R. 177, at page 192.

appear in the course of this study, the case for those who hold the opposing view rests to a considerable extent upon that omission being regarded as creating much more than "a distinction without a difference". Therefore, to find more satisfactory answers to questions (2) and (3) we must turn to an analysis of the reasoning on both sides of the issue.

III. Abolition of Mens Rea

Of the four Canadian decisions cited at the outset in support of the "no-*mens rea*" position two, *Regina v. Flynn*[30] and *Regina v. LaFontaine*,[31] are based entirely upon the English cases of *Hill v. Baxter*[32] and *Regina v. Evans*,[33] to the effect that The Road Act[34] contains an absolute prohibition against driving dangerously and that no question of *mens rea* enters into the offence. These views are accepted without reservation as applying equally to section 221(4) of the Criminal Code of Canada. The Newfoundland case, *Regina v. White*,[35] follows the decision in *Regina v. Jeffers*[36] and the latter is the only one of the four in which an analysis of the issue in terms of the "Canadian setting" is undertaken. It is appropriate, therefore, that the judgment of Pottier Co. Ct. J. be considered in some detail.

The learned justice begins his analysis with a consideration of the American and English positions. After a brief investigation he concludes:

> It appears to me that the American cases when dealing with "endangering the public" by driving a motor vehicle, hold that if the physical aspect is present and the driving is voluntary on the part of the operator, an offence has been committed, the intention of the accused is not a matter of concern.[37]

A study of the English law up to and including the *Evans* case leads him to conclude that:

> One can summarize the law of England with reference to the mental element in dangerous driving as saying that it matters not what the driver thought or whether he did his best in the circumstances.[38] There is no mental aspect necessary if there is a

30 (1964), 50 M.P.R. 96.
31 (1964), 43 C.R. 328.
32 [1958] 1 Q.B. 277.
33 [1963] 1 Q.B. 412.
34 (1960), 8 & 9 Eliz. II, c. 16, s. 2(1).
35 [1965] 3 C.C.C. 147.
36 [1964] 2 C.C.C. 346.
37 *Ibid.*, at p. 352.
38 J. E. Hall Williams, "Causing Death by Dangerous Driving—The Objective Test" (1963), 26 Mod. Law Rev., 430, at p. 432.

> dangerous driving physically. The accused must be guilty unless it can be said that the driving was through no fault of the accused on account of something beyond his control.[39]

In the course of this analysis, Pottier Co. Ct. J. dismisses the *Andrews* case as an authority of what is dangerous driving. This is of interest because, as was pointed out above, it appears that that case strongly influenced the decision to include a dangerous driving section in the Criminal Code in 1938. However, this point is now of academic interest since it is well established and accepted that *mens rea* was an element of the offence created in 1938.

This latter fact is but one of the seemingly formidable barriers which one must overcome in reaching the conclusion that the mental element is no longer required. In addition, there is the decision of the Supreme Court of Canada in *O'Grady v. Sparling,*[40] which held that sections 191 and 221 of the Code only touched advertent negligence. Further, there is the reaffirmation by the Supreme Court in *R. v. King,*[41] of the general principle that, in the words of Wright J. in *Sherras v. DeRutzen,*[42]

> There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the Act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered.

This is strengthened by the words of Lord Goddard which he expressed in *Brend v. Wood*[43] to the effect that:

> It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

A barrier to the position that there is no *mens rea* is the view of the Royal Commission on the Revision of the Criminal Code to the effect that the inclusion of section 221(1) in the revised Code made it unnecessary to retain subsection (6) of section 285 of the old Code.

Pottier Co. Ct. J. undertakes to answer each of these arguments. With reference to the first he maintains that decisions under the "old" section 285(6) are not relevant to charges under

39 *R. v. Jeffers,* [1964] 2 C.C.C. 346, at p. 359.

40 [1960] S.C.R. 804.

41 [1962] S.C.R. 746.

42 [1895] 1 Q.B. 918, at p. 921; cited in *R. v. King, ibid.,* at pp. 759-60.

43 (1946), 62 T.L.R. 462.

the present section 221(4). This is so because of the respective structures of the old and new Codes. The old section 285(6) provided for both dangerous and reckless driving and there was no definition of, or provision for, criminal negligence elsewhere in the Code. Both of the acts envisaged by section 285(6) were treated as implying "something more than mere inadvertence or mere thoughtlessness, or mere negligence or mere error of judgment".[44] Now, however, the situation is quite different. With the revision of the Code in 1954 the offence of criminal negligence in the operation of a motor vehicle was specifically provided for under section 221(1). If wanton or reckless disregard were necessary ingredients of dangerous driving it would have meant that dangerous driving was included in these new criminal negligence provisions. However, if that were so there would have been no need to enact section 221(4) (dangerous driving) in 1960-61. The fact that a special section was provided to make dangerous driving an offence shows that it was not included in the previous legislation of 1954. Thus, section 221(4) is to be regarded not as replacing the former section 285(6) but as creating a new offence. This conclusion is strengthened by the fact that the new subsection does not contain a provision for reckless driving as did the old. This, then, is the learned Judge's answer to both the first and fourth arguments listed above.

As to the second argument, Pottier Co. Ct. J. finds not only that *O'Grady v. Sparling* is not against his position but that it, in fact, lends support to it. When the Supreme Court of Canada held in that case that sections 191 and 221 of the Code only touched advertent, but not inadvertent negligence, section 221(4) had not yet been enacted. Thus, that decision cannot be regarded as referring to the present offence of dangerous driving. Furthermore, the court went on to say that inadvertent negligence may be dealt with by Parliament when it chooses to do so. In this connection, the following extract from the judgment of Judson J. (with whom the majority of the court concurred) is of interest.

> What the Parliament of Canada has done is to define "advertent negligence" as a crime under ss. 191(1) and 221(1). It has not touched "inadvertent negligence." Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the Criminal Code as "crime", it is not crime.[45]

Pottier Co. Ct. J., interprets this as meaning that inadvertent negligence covers cases of exceeding speed limits, going through

44 *R. v. Karasick*, [1950] 2 W.W.R. 399, at p. 400.
45 [1960] S.C.R. 804, at p. 809.

red lights, and the like; that intention or *mens rea* is not a necessary ingredient for an offence when exceeding speed limits or going through red lights; and that the Canadian Parliament can make such offences crimes if and when it chooses to do so. The learned Judge then proceeds to point out that at common law:

> Negligence, of which a guilty mind was a part, was criminal negligence, that is advertent negligence, and according to *O'Grady v. Sparling* that sort of negligence is covered by s. 221(1). This leaves inadvertent negligence, where no criminal guilty mind is involved. Dangerous driving, if it occupies any of the field of negligent driving, must at least be for that part in the field of inadvertent negligence, because that is the only type of negligent driving in a criminal sense that is left under the Code outside of s. 221(1) . . . .
>
> I submit that *O'Grady v. Sparling* brings out that in so far as negligent driving is concerned, inadvertent negligence is the only kind which is involved in dangerous driving, the kind where mens rea is not an ingredient. There can be no negligent driving situated somewhere in "no man's land" between advertent and inadvertent negligence. Section 221(1) deals with advertent, and I cannot think of any negligent driving left which could be made criminal except inadvertent. Consequently, dangerous driving does not require any "mental state" other than inadvertence.[46]

From this reasoning it follows that, in answer to the third argument, the statute does, by necessary implication, rule out *mens rea* as a constituent part of the crime of dangerous driving. In the learned Judge's view, a further answer is to be found in the very wording of section 221(4) which defines the offence.

> The offence created in this section is a very definite offence. The section says that the following things create the offence:
>
> (a) One must drive a motor vehicle.
>
> (b) It must be on a street, road, highway, or other public place.
>
> (3) The driving must be in a manner that is dangerous.
>
> (4) The danger must be to the public.
>
> (5) Regard must be had to all the circumstances.
>
> (6) The nature, condition and use of said places must be taken into consideration.
>
> (7) The amount of traffic at the time must be considered.
>
> (8) The amount of traffic reasonably expected must also be considered.
>
> I cannot see how one can look at all these ingredients and say that a reserve is contemplated requiring some sort of guilty mind before the offence is complete. (1), (2), (4), (5), (6), (7), and (8) are definite facts where there cannot be any question of the individual driver's own thoughts or ideas. The only ingredient

46 *R. v. Jeffers*, [1964] 2 C.C.C. 346, at pp. 373-4.

> that can possibly have anything to do with any mental element is (3), that is, the manner of driving. It might be argued that he controls the said manner and that before he can be guilty he must have a so-called guilty mind. It appears to me that the whole section creates such a prohibition that all the section deals with is the physical fact in regard to the manner of driving and nothing else. It matters little what the driver has in mind. It is the manner that is provided against. This must show that the mental element is of no importance.[47]

In effect, then, "manner", as used in this section should be interpreted as "in a way that is dangerous". On this interpretation, the decisive test as to the "quality" of the driving becomes a purely objective one.

This, then, is the reasoning upon which Pottier Co. Ct., J. supports the position that *mens rea* is not imported in the offence. To it may be added the view expressed by Currie J. (with whom Bissett J. concurred) on the appeal. These two judges, agreeing with the finding of the trial judge on the question of *mens rea,* regard the enactment of section 221(4) as an undertaking by Parliament, following the marked English trend away from any traditional concept of *mens rea,*[48] to meet a problem of grave national concern by means of an absolute prohibition. Currie J. thus puts it:

> The congested state of traffic on our highways today, the outragiously reckless conduct of so many drivers and the mounting toll of accidents require that the applicability of doctrines of another day to new and changed conditions should be frequently examined and not rigidly adhered to for the sake of adherence.[49]

Again:

> The theory of absolute prohibition is not new. It arose out of the exigencies of the situation that brought it into being; it is the handmaid of the legislative subject-matter, designed to remove or to control certain things that disturb the good order of society. This instrument is used to a considerable extent today in matters of public health and safety on the highway. Perhaps, too, there may be signs of a trend that a presumption may be displaced by using the other side of the coin, that is to say, that recourse may be had to that other legitimate instrumentality—the subject-matter with which the legislation deals, which, said Wright J. in *Sherras v. De Rutzen,* (1895) 1 Q.B. 918 at 921, should be considered as well as the displacement of mens rea by express words.[50]

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47 *Ibid.*, at pp. 371-2.

48 *Cf.*, A. W. Mewett, 'The Shifting Basis of Criminal Law", (1963-64) 6 Crim. Law Q. 468.

49 *Jeffers v. The Queen* (1965), 45 C.R. 177, at p. 182.

50 *Ibid.*, at p. 184.

IV. Retention of Mens Rea

The case for retaining *mens rea* as a constituent element of dangerous driving may be garnered from several sources. One of these is the decision of Coffin J. (with whom Patterson J. concurred) in *Jeffers v. The Queen*.[51] The learned Judge bases his position on two grounds. The first is the undisputed fact that *mens rea* was an element of the offence of dangerous driving under the old section 285(6). The cases of *Loiselle v. The Queen*,[52] *Rex v. Miller*[53] and *Rex v. Harrison*[54] support this view.

The second branch of Coffin J.'s argument involves a consideration of *mens rea* as a general principle of criminal law and of the interpretation of criminal legislation in reference to that principle. Here, much reliance is placed upon what was said by the Supreme Court of Nova Scotia in *Regina v. Jollimore*[55] which involved driving a motor vehicle while disqualified contrary to section 225(3) of the Code. In the course of his judgment MacDonald J. said:

> Accordingly there is every reason to believe that the common law doctrine of mens rea and related doctrines as to mistake of fact, are fully operative and require for their exclusion some positive indication (by express words or necessary implication) of a contrary intention.[56]
>
> What has happened in Canada as well as in England is that where an enactment has been devoid of reference to such doctrine or to a mental requirement (usually indicated by such words as "knowingly", "maliciously", etc.) the courts have inferred an intention of the legislature to punish the prohibited act regardless of the presence or absence of any particular mental element and have done so by assumption from the nature of the public interest affected by the act. In many cases this assumption is impossible, for it rests upon the judge's evaluation of the degree of urgency which prompted Parliament to enact the measure. Though some glimpse of this may be afforded by the lightness or gravity of the penalty, that circumstance is often unilluminating. The real gravamen of complaint against such judicial assumption of purpose has been well-described by Glanville Williams:
>
> "Every criminal statute is expressed elliptically. It is not possible in drafting to state all the exceptions and qualifications that are intended . . . , The exemptions belong to the general part of the

51 *Ibid.*, at pp. 190-97.

52 (1953), 109 C.C.C. 31.

53 [1944] O.W.N. 617; [1945] 1 D.L.R. 227.

54 [1948] O.W.N. 829.

55 (1962), 36 C.R. 300.

56 *Ibid.*, at p. 310.

> criminal law, which is implied into specific defences . . . Now the law of mens rea belongs to the general part of the law, and it is not reasonable to expect Parliament every time it creates a new crime to enact it or even make reference to it.
> "The social purpose of a statute may be looked at in order to determine the type of conduct that Parliament intended to prohibit; but how can it show an intention to dispense with proof of mens rea? The question is not one of the social purposes of a particular statute but of fundamental criminal policy. The intention to create strict responsibility ought always to be evidenced by the words of a statute, not guessed at from its social purpose." (Criminal Law, p. 270)[57]

At this point the opposing view of Roach J. A. of the Ontario Court of Appeal in *Rex v. Pee-Kay Smallwares Limited*[58] should be noted. He thus gives his view:

> Where the language used is equally consistent with the intention of the legislature having been that mens rea should not be an ingredient of the offence as that it should, the question may be solved by looking at the nature of the subject matter of the legislation. That legislation may so vitally affect the public interest or the interest of the state that the inference is irresistible that the legislature intended that the mere doing of the act thereby forbidden should constitute the offence, regardless of the intention of the doer.

A different approach to the interpretation of section 221(4) was taken by Tavender D.C.J. in the Alberta case of *Regina v. Lykkemark*.[60] The question before the court was whether section 135(b) of The Vehicles and Highway Traffic Act,[61] which creates the offence of careless driving, is not repugnant to section 221(4) of the Code and is not *ultra vires* of the provincial legislature. The learned trial judge had resort to the Oxford New English Dictionary which defines "careless" as:

> (1) Free from care, anxiety or apprehension.
>
> (2) Unconcerned; not caring or troubling oneself; not solicitous, regardless, having no care of, about or to.
>
> (3) Not taking due care, not paying due attention to what one does, inattentive, negligent, thoughtless, inaccurate.

And it defines "dangerous" as:

> Fraught with danger or risk, causing or occasioning danger; perilous, hazardous, risky, unsafe.

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57 *Ibid.*, at pp. 310-11.

58 [1948] 1 D.L.R. 235; see also Annotation, "Mens Rea" (1952-3), 15 C.R. 349.

59 *Ibid.*, at pp. 242-3.

60 (1965), 51 W.W.R. 624.

61 R.S.A. 1955, c. 356; substituted (1963), 12 Eliz. II, c. 72 (Alta.).

The learned trial judge then proceeds:

> In coming to a conclusion in this case, "we are here on rather delicate ground" as Duff, C. J. said in the *Egan* case. . . .[62] I think, however, that I am justified in basing my decision on the clear English meaning of the words "careless" and "dangerous". It is my opinion that the word "dangerous" imports a considerably greater degree of negligence than does the word "careless" and I class the former as advertent negligence.
>
> It therefore follows that, in my view, Parliament has not chosen to define inadvertent negligence as a crime and that the Alberta careless driving section is intra vires the province and the section has not been rendered inoperative by sec. 221(4) of the Criminal Code. . . .[63]

In *Goodfellow v. The Queen*,[64] Casey J. (Rivard J. concurring) of the Quebec Appeal Court expressed the view that:

> It would be unwise to attempt a precise definition of "dangerous driving". However, since one must identify the type of driving that attracts criminal as well as civil sanction, I would say that the offence of s. 221(4) requires an element that need not be established when only civil responsibility is involved and, that this element is the deliberate incurring of risks that render almost inevitable the consequences contemplated by the Code—the threat of injury or damage to persons or property. Once this element is established, the difference between the criminal negligence and the dangerous driving of the Code becomes one of degree.[65]

The foregoing exhausts the judicial opinion on the matter in Canada to the present time. Surprisingly little has been contributed to the discussion by Canadian writers. But in a valuable article[66] T. D. Macdonald, Q.C., discussing the effect of the 1961 amendment to the Code, expressed the view that:

> Apparently, then, (leaving out of consideration constructive murder) there are four states of mind to be considered in connection with the careless or negligent operation of a motor vehicle.
>
> 1. Carelessness giving rise to civil liability;
> 2. Serious carelessness warranting conviction under a provincial statute;
> 3. Advertent negligence warranting conviction for dangerous driving; and
> 4. Recklessness warranting conviction where death ensues, for manslaughter.[67]

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62 *Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396.

63 (1965), 51 W.W.R. 624, at p. 628.

64 (1965), 44 C.R. 113.

65 *Ibid.*, at 113-14.

66 (1963), 6 Can. Bar Jo. 122.

67 *Ibid.*, at p. 134.

Despite the unqualified conclusion he reached in the third of these categories the author does raise the question "whether the enactment of section 221(4) revives the argument as to the constitutional validity of provincial legislation relating to driving a motor vehicle without due care and attention".[68] Since the Supreme Court of Canada had decided in *O'Grady v. Sparling*[69] that such provincial legislation dealt with inadvertent negligence one may assume that, in raising this question, Mr. Macdonald recognized the possibility that judicial interpretation of section 221(4) might favour the classifying of dangerous driving as inadvertent negligence. No doubt he was encouraged in this view by knowledge of the recent developments in England and probably as well by the statement of Cartwright J. in his dissenting judgment in the *O'Grady* case to the effect that when section 285(6) of the old Code was in force it was arguable that the words therein contained, "or in a manner which is dangerous to the public having regard to all the circumstances of the case", had the effect of attaching penal consequences to inadvertent negligence.[70]

The question of a possible constitutional problem arising out of the interpretation of section 221(4) was raised as well in a comment on *R. v. Evans* which appeared in The Criminal Law Quarterly.[71] This follows a comment on the same case which appeared in The Criminal Law Review,[72] where the following observation is made:

> It is unfortunate that it should be held that this offence (dangerous driving) can be committed by even the slightest negligence. It virtually destroys the distinction between dangerous and careless driving. . . . If Parliament did not intend such a distinction, it is curious that it provided for two distinct offences, one of which was plainly intended to be of a more serious nature than the other.[73]

In reference to this the later comment says:

> We must agree wholeheartedly with this observation. We might even add that in Canada it is absolutely necessary to find a distinction if the two offences are both to be held intra vires, a problem which our Federal form of government has to face but which the unitary system of government in England does not experience. As Canadians we cannot then agree, even though we wanted to, that the formula "careless driving-dangerous driving" has any validity.[74]

68 *Ibid.*
69 (1960), 128 C.C.C. 1.
70 *Ibid.*, at p. 10.
71 (1963-64), 6 Crim. Law Q. 3.
72 1963 Crim. Law Rev. 112.
73 *Ibid.*, at p. 114.
74 (1963-64), 6 Crim. Law Q., at p. 6.

As we have seen, in *Regina v. Lykkenmark,*[75] a clear distinction was drawn between these offences, with the provincial legislation being held *intra vires*. It remains to be seen, however, whether such legislation will meet with a similar fate when the question comes before the courts, as surely it must, elsewhere in Canada.

The Canadian comment goes on to point out the "ludicrous situation" that would arise if Canadian courts were to accept the *Evans* doctrine. It would mean that the more serious offence of dangerous driving could be committed by an act which would not warrant a conviction of the lesser offence of careless driving which requires a higher degree of culpability than the *Evans* case seems to demand. This view is based on the analysis of the offence of careless driving by MacKay J. A. in *R. v. Beauchamp.*[76] With reference to a charge of driving without due care and attention under section 29(1) of The Highway Traffic Act of Ontario[77] the learned judge was of the view that the standard of care and skill to be applied is not that of perfection. A driver is required to exercise a reasonable amount of skill, and to do what an ordinary prudent person would do in the circumstances. The standard is an objective one, fixed in relation to the safety of other users of the highway. It is not enough, however, to support a conviction under section 29(1) that the accused's conduct should be shown to fall below this standard. Since the subsection creates an offence that is quasi-criminal in nature, it must appear that the accused's conduct has been of such a nature that it can be considered a breach of duty to the public, and as such deserving of punishment by the state.

It is submitted that the driver who exhibits "the smallest amount of negligence" or who is doing "his incompetent best" would not be guilty of the offence of careless driving as defined by MacKay J. A. Still less could he be said to be guilty of the more serious offence of dangerous driving.

In concluding this part some attention must be given to section 569(4) of the Code which provides that:

> Where a count charges an offence under section 192, 193 . . . arising out of the operation of a motor vehicle . . . or an offence under subsection (1) of section 221, and the evidence does not prove such offence but does prove an offence under subsection (4) of section 221 . . . the accused may be convicted of an offence under subsection (4) of section 221. . . .

75 (1965), 51 W.W.R. 624.

76 [1953] O.R. 422.

77 R.S.O., 1950, c. 167.

Since sections 192, 193, and 221(1) all deal with offences involving criminal negligence, the fact that dangerous driving is an included offence in each of them means that it too must contain an element of advertent negligence. In the New Brunswick case of *Prosser v. The Queen*[78] McNair C. J., delivering the judgment of the court, defined an included offence as ". . . one, sometimes spoken of as a 'lesser offence', all the essential ingredients of which are to be found among the essential ingredients of the offence charged".[79]

Elsewhere it has been pointed out that:

> The term "lesser offence" often used to indicate an "included offence" is misleading, for an included offence is one which is part of another offence and not one which is of a minor but related character.[80]

The conclusion to be drawn from these two statements is that the offence of dangerous driving is part of the offence of criminal negligence in the operation of a motor vehicle and that its essential ingredients are to be found among those of the latter offence. From this it is arguable that one of the essential ingredients of the offence of dangerous driving is advertent negligence.

V. Conclusion

An analysis of the foregoing arguments in support of the "absolute prohibition" position reveals that they rest very heavily upon a particular view of what Parliament "must have intended" by the 1961 amendment to the Code. It seems clear that the ultimate resolution of the present controversy will centre around an interpretation of Parliament's intention by the Supreme Court of Canada. It is perhaps unfortunate that the conventional rules of interpretation of statutes to which our courts adhere prevent them, at least openly, from having recourse to the one source that might make certain what Parliament did intend, *viz.*, the expressions of policy and the debates which accompanied the passage of the bills through Parliament. We are not so restricted in our investigation. This comment, therefore, will conclude with a consideration of the relevant debate.

The matter was first introduced in the Commons on March 26, 1961, by Mr. Baldwin (Peace River) who directed the following question, which is instructive in its content, to the Minister of Justice:

78 (1959), 127 C.C.C. 111.

79 *Ibid.*, at p. 114.

80 P. J. Gloin, "Included Offences" (1961-2), 4 Crim. Law Q. 160.

> Having in mind the slaughter and the necessity of striving to cut down the accidents and this dreadful toll of human lives which continues to infest our highways, does the Minister think it might be worth while to consider *restoring an offence of an intermediate nature* where convictions might more readily be obtained, rather than having *only the offence of criminal negligence* of which juries and judges are loath to convict?[81]

To this Justice Minister Fulton replied that he was glad to be able to say that "in our study of this matter we have come to the conclusion that [this] suggestion is a proper one".[82] Then on June 19, 1961, the Minister introduced the Bill to amend the Code. Included among the suggested amendments was the addition of subsection (4) to section 221. In reference to this the Minister said:

> Another amendment which I am sure will be of great interest to the house generally, and perhaps particularly to lawyers, is a provision of the bill which *restores the offence of dangerous driving which used to be an offence under the old code.* At the time of the Criminal Code revision, however, this offence was dropped in favour of the offence of criminal negligence in the operation of a motor vehicle. There is a long history, both in this country and in other countries, of an attempt to formulate an offence under which juries would convict, in appropriate cases, for the reckless or dangerous operation of a motor vehicle which caused death or bodily harm. Juries at one time shied away from convicting persons of manslaughter arising out of death caused by the negligent operation of motor vehicle because of the rather awesome connotation of that word.
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> This tendency led to the enactment, some years before the Criminal Code revision, of the offence of reckless or dangerous driving, coupled with a provision to the effect that if upon a charge of manslaughter the jury was not satisfied that manslaughter was proved, it might convict of that other offence. Apparently, juries have tended similarly to shy away from convicting for criminal negligence in such circumstances. At the present time, the offence of *dangerous driving having been removed,* it is felt, and widely felt, that there are many cases where *persons who have been guilty of criminal negligence* in the operation of their motor vehicles *are nevertheless escaping* with a much milder penalty because of the reluctance of juries to convict of manslaughter or of criminal negligence.
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> We are accordingly reinstating, at the request of the provinces, *the old offence* of dangerous driving. We are however, omitting the word "reckless" because to employ the word seems to have the effect of elevating the offence to the same plane as criminal negligence, thus creating a distinction without a difference which would make it very difficult to charge juries.[83]

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81 Debates, House of Commons, Canada, 1960-61, Vol. V at p. 5410; italics added.

82 *Ibid.*, at p. 5418.

83 *Ibid.*, Vol. VI, at pp. 6540-41.

In the debate which ensued Mr. Aiken (Parry Sound-Muskoka) made the following observations:

> While the technical reasons for omitting the dangerous driving section from the Code when it was rewritten are well known to members of the legal profession, I believe the general public failed to understand the significance. Many people never did quite understand why dangerous driving was no longer an offence. *Dangerous driving,* of course, *always has been an offence,* only under a different classification and a different name.
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> . . . The criminal negligence section was not particularly designed to cover dangerous driving of a motor vehicle; nevertheless *it was included as part of the general offence of criminal negligence.* Now it is made very clear that dangerous driving of a motor vehicle on the highways is in itself an offence.[84]

And Mr. Deschatelets (Maisonneuve-Rosemont) expressed the view that:

> . . . As for section 4 which makes it an offence to operate a motor vehicle in a way which endangers the public's safety, that is merely the re-enactment of a provision which existed before. . . .[85]

Finally, Mr. Paul (Berthier-Maskinonge-Delanaudiere) observed that:

> Considering the dangers incidental to driving nowadays on our increasingly congested highways, I feel we must take stricter steps to bring to reason those who drive their vehicles without paying any heed to the rights of those they meet on the highways. . . . I believe we are right in being even stricter with those who, because of carelessness, youth, stupidity or intoxication constitute real hazards to the public safety.[86]

These excerpts represent the views of the members who spoke on the amendment. It is submitted that only the last of these, the view of Mr. Paul, could possibly be construed as supporting the absolute prohibitionist position. Taken as a whole, the speeches give a clear indication that it was the intention of the Government and of Parliament simply to clarify the then existing situation regarding motor vehicles offences under the Code. It was the failure of the courts to recognize that dangerous driving was an included offence under section 221(1) that necessitated this clarification. The fact that Parliament chose to achieve this end by adding the new subsection (4) rather than by changing the wording of section 221(1) should not change the effect of the amendment. It was not intended that a "new" offence of dangerous driving be created thereby.

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84 *Ibid.*, at p. 6548.

85 *Ibid.*

86 *Ibid.*, at p. 6561.

In the not improbable event that the final pronouncement on this matter comes down on the side of the absolute prohibitionists, it will be well to keep in mind just what significance this would have in relation to the accused driver. In particular, it is to be recognized that this would not leave him defenceless. For, regardless of the fate of *mens rea,* the *actus reus* will continue to be an essential element of the offence. Thus, in order for the prohibited act to be committed there must be a willed movement or omission.[87] There must be an intent in the *actus reus* itself, irrespective of *mens rea.*[88] If, therefore, an accused person is not driving voluntarily, as for example, when he is struck with a stone, attacked by a swarm of bees or overcome by a sudden illness which he could not reasonably have anticipated, he could not be accused of driving dangerously.[89]

87 See Glanville Williams, *Criminal Law, The General Part,* 2nd ed. (1961), pp. 11-13.

88 See generally, Gerard La Forest, "Mens Rea in Hunting Offences", (1961-2), 4 Crim. Law Q. 437.

89 *R. v. Jeffers,* [1964] 2 C.C.C. at 358.