

François Lareau
Ottawa, February 26, 2000

Criminal Neglect of a Child & Child Homicide

Introduction

The publication, *Child Victims and the Criminal Justice Systems: A Consultation Paper*, asks two questions about criminal neglect of a child:

Should the *Criminal Code* include an offence for extreme forms of child neglect?

If so, should the offence carry a higher maximum penalty than is currently provided for failure to provide necessities?¹

The same paper also asks if “there is a need for a new offence of child homicide?”²

While the consultation paper solicits several other answers to many other questions on different issues, this commentary will focus on the three above questions only. My answers to the three questions are “no”.

¹Department of Justice Canada, Family, Children and Youth Section, *Child Victims and the Criminal Justice System: A Consultation Paper*, [Ottawa]: The Department of Justice Canada, 1999 at p. 7. For amplification, see the accompanying paper: Department of Justice Canada, Family, Children and Youth Section, *Child Victims and the Criminal Justice System: Technical Background Paper*, [Ottawa]: The Department of Justice Canada, 1999 at pp. 16-17.

²*Ibid.*, p. 9. The issue of child homicide is also discussed in the *Technical Background Paper*, *ibid.*, at pp. 18-19.

In these comments, I will discuss s. 215(1) and the kinds of crimes of omission. I will also indicate a serious defect in the present legislation as to killing a child intentionally by omission, e.g., intentionally not feeding the child so as to cause his/her death.

The origin of these problems is the failure of the Department of Justice not to reform the law of homicide and in its decision not to have a comprehensive reform of the General Part.

Finally, I will examine the arguments advanced for the creation of a proposed offence of child homicide.

I - Section 215(1) of the *Criminal Code*

Section 215(1) of the *Criminal Code*, duty of persons to provide necessities, is part of the "Duties Tending to Preservation of Life" covered at ss. 215-217. These sections are included in "Part VII/Offences against the Person and Reputation".

The Law Reform Commission of Canada,³ The Working Group on Chapter 2 of the Law Reform Commission of Canada Report 30 "Recodifying Criminal Law"⁴ and the Working Group

³*Recodifying Criminal Law (Revised and Enlarged Edition of Report 30)*, Ottawa: Law Reform Commission of Canada, 1987 (series; Report; vol. 31) (President: Allen M. Linden).

⁴CANADA/PROVINCES, *Report of the Working Group on Chapter 2 of the Law Reform Commission of Canada Report 30 "Recodifying Criminal Law"*, [Ottawa], [Department of Justice Canada], January 1988.

on Homicide⁵ have made recommendations concerning the reform of duties and the law of homicide. None of these recommendations are discussed in the consultation paper nor in the technical document under consideration. This is unacceptable. It is ignoring the important contribution of provincial officials, scholars and federal officials.

The legislative history of s. 215 is also not examined and would be helpful in understanding the root of the problems.

In legal theory, there are two kinds of crimes of omissions. First, there are crimes of omission proper, e.g., the simple failure to provide necessities without negative consequences to the health of the child could be an offence under certain circumstances.⁶ Second, there are crimes of commission by omission, i.e., punishing the consequences arising from the failure to observe the legal duty, e.g., manslaughter by criminal negligence for failing to provide necessities of life to a child.

I believe that the concept of commission by omission, usually the subject of a provision in

⁵FEDERAL/PROVINCIAL WORKING GROUP ON HOMICIDE, *Final Report of the Federal/Provincial Working Group on Homicide*, [Ottawa], [Department of Justice Canada], June 1990, updated April 1991, xii, 170 p. (Co-Chairmen: Howard F. Morton, Ministry of the Attorney General, Province of Ontario and Jean-François Dionne, Quebec Department of Justice).

⁶This approach is taken in s. 215(2)(a)(i). Technically speaking, a crime of omission proper does not require an explicit duty, the duty is assumed by implication. For example, an offence to submit an income tax return by May 1, would imply tacitly that there is a duty to submit such a return by such a date. The difficulty in discussing offences of omission proper and offences of commission by omission in relation to our 1893 *Criminal Code* is that these modern concepts presuppose a modern code with a General Part.

the General Part of a modern criminal code, can answer some of the questions referred in the introduction.

II. Bodily Harm, Death, Crimes of Commission by Omission and s. 215(1)(a)

Let us examine, crimes of commission by omission in relation to the duty of s. 215(1)(a). We will put aside s. 215(2) for the discussion.

In criminal law theory, serious crimes of commission by omission like homicide or causing bodily harm can be committed on the one hand, by criminal negligence (hereafter referred to as “negligence”), and on the other hand, by intention or recklessness.

A. Crimes of Commission by Omission and Negligence

In cases of negligence, if the omission causes death, the offences of criminal negligence causing death⁷ or manslaughter by criminal negligence⁸ are available. If the criminal negligence causes bodily harm, then the offence available is causing bodily harm by criminal negligence.⁹

⁷Section 220.

⁸Sections 222, 234 and 236.

⁹Section 221.

The present sentences for these offences are appropriate, a maximum of life for death or 10 years for bodily harm. The answer to the first two questions in our introduction as it relates to negligence must thus be answered in the negative. However, there is a need to reform the law of negligence. Negligence should be defined in a General Part.

B. Crimes of Commission by Omission and Intention (or Recklessness)

If the commission by omission is intentional¹⁰ and death results, what is the offence? It should be murder, of course. However, a literal reading of the *Criminal Code* provisions does not allow for such an offence. The explanation is simple. In order to commit murder, you must first have a culpable homicide.¹¹ In the case of commission by omission, it cannot be culpable homicide “by means of an unlawful act” as we have an omission and not an act.¹² It can’t also be “by criminal negligence” as it is intentional.¹³ I have decided not to examine case-law here on this point.¹⁴ The *Criminal Code* is written for the citizen and not for lawyers and judges! As Professor Fitzgerald has written:

¹⁰Or by recklessness. While Canadian theorists and case-law distinguishes between intention and recklessness, it is better to interpret recklessness or what European and South American theory describes as *dolus eventualis* as a form of intention.

¹¹Section 229 reads: “Culpable homicide is murder...”.

¹²Section 222(5)(a).

¹³Section 222(5)(b).

¹⁴Such an examination could constitute the basis of a research paper.

“Who are the criminal code’s intended readers? The people governed by it - the public as Bentham thought? Those who have to administer and explain it - the legal profession and the agencies of justice - as lawyers tend to think? Those surveying its logic, coherence, and systematization - jurists and legal scientists? Or since codes start life as bills, those who are asked to enact it - the legislators? Or, finally, some combination of the above?

Surely Bentham was right. A country’s law belongs not to its nation’s judges, its lawyers, or its politicians but to all its inhabitants and citizens. The latter are surely the prime addressees of codes, statutes, and other legislation. This conclusion follows from the basic values and concepts of the common law itself.”¹⁵

It should be noticed that prior to the 1955 *Criminal Code* reform, the problem did not exist as the former provision equivalent to the present s. 222(5)(b) read as follows:

252(2) [Homicide when culpable] Homicide is culpable when it consists in the killing of any person, either by an unlawful act **or by an omission, without lawful excuse, to perform or observe any legal duty**, or by both combined, or by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person’s death, or by wilfully frightening a child or sick person. [emphasis in bold added].¹⁶

As to the intentional commission by omission resulting in bodily harm, the assault offences would not apply as the definition of assault at s. 265(1) excludes by implication, omissions. However, the offence of “unlawfully causing harm” at s. 269 of the *Criminal Code* would apply in my opinion.¹⁷ I must add that a provision on commission by omission in a General Part would

¹⁵Patrick Fitzgerald, “Codes and Codifications: Interpretation, Structure, and Arrangement of Codes”, (1990) 2 *Criminal Law Forum* 127-143 at 129-130.

¹⁶S.C. 1927, c. 36, s. 252(2).

¹⁷The Law Reform Commission of Canada, *Assault*, Ottawa: Ministry of Supply and Services Canada 1984, at p. 7 (series; Working Paper; vol. 38) was of the view that the then s. 245.3 could be committed by an act or omission. That section read: “Every one who unlawfully

greatly assist citizens (including lawyers and judges) in understanding offences such as s. 269 and its distinction with the offence of assault causing bodily harm.

Again the questions mentioned in our introduction must be answered negatively but with the important proviso that the law of homicide should be fixed to cover murder committed by the intentional omission to perform a legal duty.

C- The Idea of a Child Homicide

The two consultation documents refer to a coroners' inquiry jury recommendation that there be a "a child-specific form of manslaughter". The reasons assumed from the jury's decision are that the offence would create "more convictions and lengthier sentences than the current types of manslaughter".¹⁸

It is beyond me that the Department of Justice Canada has given so much importance to a jury recommendation and has failed to follow or consider the recommendations of the three bodies that have studied General Part matters (including duties) and homicide.

As to appropriate sentences for child manslaughter, I have enough confidence in judges to give appropriate sentences for the unlawful killing of all human beings under the present available provisions.

causes bodily harm to any person is guilty of an indictable offence and is liable to imprisonment for ten years."

¹⁸*Child Victims and the Criminal Justice System, op. cit.*, note 1 at p. 8.

As to the argument that such an offence would result in more convictions, the real issue is whether or not a reformed and simplified law of homicide would be better than the present state of the law, i.e. great confusion for the citizens and difficulty (for the criminal law lawyers).¹⁹ The obvious answer for the citizens (and the lawyers also) is yes.

When the abortion provisions were ruled unconstitutional, the Department of Justice Canada decided not to regulate abortion. For example, a woman can now have an abortion in her eighth month of pregnancy and no provision of the *Criminal Code* applies to regulate such an abortion. This is unacceptable (whether or not one is for or against abortion). The Department of Justice Canada now wants to create an offence for the better protection of the child. I must say that the word "hypocrisy" comes to my mind.

Another argument for the creation of such an offence of child-specific form of manslaughter is that "it could focus attention on society's condemnation of abusive conduct or neglect that results in the death of a child".²⁰ If such an argument was followed and with the Canadian population aging, possibly in the near future there could also be a provision for an "old person-specific" form of manslaughter! We could then have the full spectrum of the life of a person: the young, the ordinary (the current provision), and the old!

Conclusion

¹⁹Case-law now refers to two types of negligence, criminal negligence and penal negligence.

²⁰*Ibid.*, pp. 8-9.

In this short commentary, I have answered some questions from the consultation paper, *Child Victims and the Criminal Justice Systems: A Consultation Paper*. I also have shown an important defect in the law of homicide regarding the intentional killing by omission. Finally, I have shown that a new General Part and a reformed law of homicide would better protect children.

If time permits some other questions may be examined.