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**The Difference Between Negligent Homicide  
and Reckless Homicide when Both of them  
Involve Consciousness of the Risk**

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**Introduction**

In reforming the Canadian law of homicide, can one formulate a crime of negligent homicide based on a definition of negligence which would require an objective test but where such negligence could be either conscious (advertent) or unconscious (inadvertent)? If the answer is yes, then how would the definition of conscious negligence, as it relates to negligent homicide, differ from the traditional or orthodox definition of recklessness as it relates to an offence of reckless homicide?

This paper will show that it is possible to have a definition of conscious negligence clearly distinguishable from recklessness.

This paper will first examine the long-standing confusion surrounding the analysis of the fault requirements of criminal negligence in Canadian law. Second, it will examine the problem which the absence of a general and simple offence of reckless homicide has caused to our definition of negligence. Third, it will look at the proposals of the Law Reform Commission of Canada (hereafter referred to as the LRC) for negligent homicide and reckless homicide ("manslaughter") based on definitions of "negligently" and on the alternative definition of "recklessly". We will see that, as both definitions include conscious risk-taking, distinguishing them is difficult.

The paper will point out that the distinction between conscious negligence and recklessness lies in the analysis of the state of mind, the "inner posture"<sup>1</sup>, of each actor: the one who acts with conscious negligence and the one who acts with recklessness. Fourth, the paper will examine the inner posture of the reckless actor - acceptance of or indifference to the risk of harm perceived. Fifth, to help analyze the inner posture of the person who acts with conscious negligence, the paper will examine the West German criminal law concepts of dolus eventualis

and conscious negligence. The concept of dolus eventualis is very similar to the present concept of recklessness as defined in Canadian law by Mr. Justice Dickson in Leary v. R.<sup>2</sup> The German concept of conscious negligence is clearly distinguished from dolus eventualis. Sixth, the paper will look at John Austin's concept of "rashness" which is virtually identical to the German concept of conscious negligence. Seventh, the paper will explain the major differences between recklessness and conscious negligence. Throughout, the paper will talk about these concepts in the context of homicide - death as a consequence.

### Negligent Homicide

Most of the provisions relating to homicide in the Canadian Criminal Code<sup>3</sup> have their origin in the English Draft Code<sup>4</sup> of 1879. In 1955, due to the confusion surrounding the degree of negligence required in manslaughter (by criminal negligence) and the reluctance of juries to convict accused persons of motor manslaughter<sup>5</sup>, Parliament enacted a new offence of criminal negligence causing death. The following accompanying definition of criminal negligence appeared in the Criminal Code:

- (1) Everyone is criminally negligent who
  - (a) in doing anything, or
  - (b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

- (2) For the purposes of this section, "duty" means a duty imposed by law<sup>6</sup>.

Since 1955, Canada has been the only country which has the questionable luxury of two offences of negligent homicide in its Criminal Code: criminal negligence causing death<sup>7</sup> and manslaughter by criminal negligence<sup>8</sup>, there being scarcely any difference between the two.<sup>9</sup> As if this were not confusing enough, the Criminal Code uses the term "reckless" to define criminal negligence.<sup>10</sup>

In the 1960 case, O'Grady v. Sparling,<sup>11</sup> the Supreme Court of Canada stated that our definition of criminal negligence was a definition of "advertent negligence" and that "inadvertent negligence" was not included. Judson, J., who rendered the judgement of the majority, adopted the following statement of J.W.C. Turner in Kenny's Outlines of Criminal Law (17th edition) at p. 34: "But it should now be recognized that at common law

there is no criminal liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again." In my view the Supreme Court of Canada should have followed instead Professor Williams' statement at p. 88 of Criminal Law, The General Part (1953):

Manslaughter can be committed by inadvertent negligence (if sufficiently "gross"), for the accused need not have foreseen the likelihood of death. Manslaughter is therefore a common-law exception to the requirement of full mens rea in crime.

Since in practice many cases of negligent homicide arise from inadvertence, the decision of the Supreme Court of Canada opened the door to great confusion which has been a nightmare for students of Canadian law ever since.

For the next 23 years, the appellate courts of the provinces ignored the requirement of subjectivity spelled out in O'Grady v. Sparling, did not elaborate on the issues of advertence or inadvertence and applied an objective test for criminal negligence.<sup>12</sup>

However, in 1983 and 1984, some Courts of appeal, influenced by the House of Lords' decision in R. v. Lawrence,<sup>13</sup> began talking about criminal negligence in terms of advertence and inadvertence. For example, in R. v. Sharp,<sup>14</sup> Morden, J.A. stated:

This was a case where the putting of the Code definition of criminal negligence to the jury with little more in the way of elaboration would have been sufficient. Proper elaboration would make clear to the jury the necessity for the driving to amount to a marked and substantial departure from the standard of a reasonable driver in the circumstances ... and that the driver either recognized and ran an obvious and serious risk to the lives and safety of others or, alternatively, gave no thought to that risk.

From a theoretical point of view, it is wrong to say that a person who recognizes and runs an obvious and serious risk to the lives and safety of others is a negligent actor. Rather, he is a reckless actor in the traditional sense. In Sansregret v. R.<sup>15</sup>, the Supreme Court of Canada stated that recklessness involves "an element of the subjective" and is distinct from negligence:

Negligence, the failure to take reasonable care, is a creature of the civil law and is not generally a concept having a place in determining criminal liability. Nevertheless, it is frequently confused

with recklessness in the criminal sense and care should be taken to separate the two concepts. Negligence is tested by the objective standard of the reasonable man. A departure from his accustomed sober behaviour by an act or omission which reveals less than reasonable care will involve liability at civil law but forms no basis for the imposition of criminal liabilities. In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal mens rea, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and takes the chance. It is in this sense that the term "recklessness" is used in the criminal law and it is clearly distinct from the concept of civil negligence.

We will see in the next part of this paper that, because of the homicide provisions in the Criminal Code, there are cases of homicide by recklessness in the traditional sense which must be dealt with as offences of criminal negligence causing death or manslaughter by criminal negligence.

Recently, in R. v. Barron,<sup>16</sup> the Ontario Court of Appeal reverted to an objective test when it stated that "For behaviour to constitute criminal negligence, however, there must be a marked and substantial departure from the standard of a reasonable person."

To summarize the law in Canada, the current test for criminal negligence is an objective one.<sup>17</sup> However, there is still some confusion on the issue of advertent and inadvertent negligence.

### Recklessness in the Law of Homicide

The Canadian Criminal Code provides that culpable homicide<sup>18</sup> is murder in several instances: s.212(a)(i) (meaning to cause death); s.212(a)(ii) (meaning to cause bodily harm knowing that it is likely to cause death, and being reckless whether death ensues or not); s.212(b) (the previously mentioned murders which also involve a mistake, either as to the identity of the victim (error in objecto) or as in the case of A intending to kill B but missing B and killing C by accident (aberratio ictus)); s.212(c) ("for an unlawful object, does anything he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to

effect his object without causing death or bodily harm to any human being."); and s.213 ("constructive murder").

Two of these definitions of murder involve in part recklessness in the traditional sense. S.212(a)(ii) requires an intent to cause bodily harm with knowledge of a likely risk of death and being reckless<sup>19</sup> whether death ensues or not. S.212(c), as interpreted by the Supreme Court of Canada<sup>20</sup> requires, *inter alia*, that the accused must not only do an act which he knows is dangerous to life, but he must do it in pursuit of a separate unlawful object which is a serious indictable offence.

There is no simple and general provision of murder by recklessness, for s.212(a)(ii) also requires an intent to cause bodily harm and s.212(c) also requires the pursuit of an unlawful object. An example will illustrate the problem that such provisions create for the traditional concept of recklessness. If A drives 80 mph in a 30 mph busy traffic area in order not to be late for an appointment and realizes that in doing so he may very well cause the death of a person but nevertheless accepts this eventuality in order not to be late, then A, if he happens to kill another person, can only<sup>21</sup> be found guilty of a crime involving negligence (criminal negligence causing death or manslaughter by criminal negligence) despite his blatant recklessness in the traditional sense. It is because of this absence of a true, simple and direct crime of reckless homicide that some homicides involving recklessness in the traditional sense are forced, fitting nowhere else, to be dealt with as offences involving negligence and have thus deformed the true meaning of advertent or conscious negligence.

As one can see, our law of homicide is in need of reform.

#### Law Reform Commission of Canada Proposals

In 1986, the LRC published the first volume of its criminal code in the report, Recodifying Criminal Law<sup>22</sup> (hereafter referred to as the Report). In c.6(1)<sup>23</sup>, it recommended a crime of negligent homicide: "Everyone commits a crime who negligently kills another person"; and in c.6(2)<sup>24</sup>, it recommended a crime of reckless homicide which it decided to call "manslaughter" and which states that "Everyone commits a crime who recklessly kills another person".

While it would have been sufficient for the General Part to define "negligently" and "recklessly", the LRC inserted a complex clause that introduces in the Code a system of element analysis (conduct, circumstances and consequences) to determine the appropriate form of culpability in the definition of the offence. The relevant part of this clause<sup>25</sup> reads as follows:

2(4)(a) General Requirements As to Level of Culpability. Unless otherwise provided:

- (ii) where the definition of a crime requires recklessness, no one is liable unless as concerns its elements he acts
  - (A) purposely as to the conduct specified by that definition,
  - (B) recklessly as to the consequences, if any, so specified, and
  - (C) recklessly as to the circumstances, if any, so specified;
  
- (iii) where the definition of a crime requires negligence, no one is liable unless as concerns its elements he acts
  - (A) negligently as to the conduct specified by that definition,
  - (B) negligently as to the consequences, if any, so specified, and
  - (C) negligently as to the circumstances, if any, so specified.

Such a clause creates a number of problems, one of which is finding the appropriate definition of culpability for the homicide offences. In the LRC's definitions of negligent homicide and manslaughter, does the word "kills" refer to conduct or consequence?<sup>26</sup> If killing is conduct, then manslaughter requires that the killing be done "purposely".<sup>27</sup> For the purpose of this article, the position taken is that the word "kills" in the LRC's offences involves a consequence.<sup>28</sup>

Next, and vital to this paper, are the LRC's definitions of "recklessly" and "negligently" which read as follows:<sup>29</sup>

"Recklessly" A person is reckless as to consequences or circumstances (whether the circumstances specified in the definition of a crime or, in the case of an omission, the circumstances giving rise to the duty to act) if, in acting as he does, he is conscious that such consequences will probably result or that such circumstances probably obtain.

[Alternative -- A person is reckless as to consequences or circumstances (whether the circumstances specified in the definition of a crime or, in the case of an omission, the circumstances giving rise to the duty to act) if, in acting as he does, he consciously takes a risk, which in the circumstances known to him is highly

unreasonable to take, that such circumstances may obtain or that such consequences may result.)

"Negligently" A person is negligent as to conduct, circumstances or consequences if it is a marked departure from the ordinary standard of reasonable care to engage in such conduct, to take the risk (conscious or otherwise) that such consequences will result, or to take the risk (conscious or otherwise) that such circumstances obtain.

Note that the above definition of "negligently" as it concerns consequences or circumstances corresponds to clause 11(e) in Appendix A to the LRC's Report, which is the draft legislative version of the LRC's clauses. Clause 11(e) does not contain any reference to taking a risk, "conscious or otherwise", and reads as follows:

11. For the purposes of this Code and the provisions of other Acts of Parliament that define crimes,

(e) conduct is engaged in negligently in respect of a result or circumstance if it is a marked departure from the ordinary standard of reasonable care to take the risk that the result will come about or that the circumstance exists.

Even if Parliament were to enact such a provision as c.11(e), the issues (if negligence can be either conscious or unconscious and how conscious negligence differs from recklessness) would remain unresolved problems, creating serious potential difficulties and unnecessary and expensive litigation.

There are several theoretical problems contained in the LRC's above proposals. For the purposes of this article, we will concern ourselves with the definition of "negligently" and the alternative formulation of "recklessly".

First, what is the meaning of "otherwise" in "conscious or otherwise" in the LRC's definition of "negligently"? Logic would dictate that "otherwise" means "unconscious" or "inadvertent". In one of its working papers<sup>30</sup>, the LRC had stated that negligence could arise, inter alia, from inadvertence:

...inadvertence means not noticing or paying attention; negligence means not taking enough care perhaps through inadvertence but perhaps also through other things, such as misjudging or using insufficient skill.

Parliament should formally recognize that negligence can be inadvertent or unconscious.

The second issue is the test to be applied for differentiating conscious risk-taking in "negligently" and in the alternative definition of "recklessly". At p. 21 of the Report, the LRC explains the difference as follows:

Where the risk is taken consciously, the difference between negligence and recklessness is that, in the latter instance, it is much more unreasonable to take it; this calls for a value judgment in each individual case.

The test proposed by the LRC to differentiate the two is unacceptable. The distinction between recklessness and negligence involving consciousness should not be based on the value judgment of the prosecuting authorities. Such a test opens the door to arbitrariness and unequal treatment of accused persons under the law.

The LRC's test with the words "much more unreasonable" calls for an objective evaluation of the risk perceived. One could suggest that what the LRC may have intended was that the greater the risk perceived, the more likely it is a case of recklessness than a case of conscious negligence. As Fletcher has stated:<sup>31</sup>

The orientation of the system [American and English] is toward actual risk and knowledge or risk, not the inner posture of the actor. This emphasis on external events yields the infelicitous dogma that a person's intent is to be judged by the "natural and probable" consequences of his acts." But the same orientation avoids turning to the jury and asking whether in his heart, the actor "was reconciled" with the likelihood of death.

From a theoretical point of view, it is submitted that the only way to differentiate between negligence involving consciousness and recklessness, is to analyse and define the inner or subjective posture of the actor. This is not to say that on a charge of negligent homicide for example, the Crown would have to prove this inner posture at the time of acting; after all, the gravamen of negligence is the failure to take reasonable care, which calls for an objective test. However, a definition of conscious negligence would permit one to draw a demarcation line between that form of negligence (the other form being inadvertent negligence) and recklessness.



### The Inner Posture of the "Reckless" Actor

Both Canadian scholars and Mr. Justice Dickson, now the Chief Justice of Canada, have defined the inner posture of the "reckless" actor. Fortin and Viau have stated<sup>32</sup> that "Recklessness is an active state of mind as it requires consciousness and acceptance of the risk" (translation and emphasis added).

Dissenting in the Supreme Court decision of Leary<sup>33</sup>, Dickson J. stated that recklessness is "foresight or realization on the part of the person that his conduct will probably cause or may cause the actus reus, together with assumption of or indifference to a risk, which in all circumstances is substantial or unjustifiable" (emphasis added). Dickson J.'s definition correctly focusses on the inner posture of the "reckless" actor which is either acceptance of or indifference to a risk that is foreseen and which risk is unjustifiable and substantial. In a proposed homicide offence based on that definition of recklessness, the aim of the actor is not to cause death, nor is there any virtual or practical certainty that his conduct will result in death. The actor views the substantial (in the sense of serious and real) and unjustified risk of death as a side-effect that could result from his conduct aimed at a goal other than that of causing death. He may hope that he will not cause death or be indifferent in that regard, but he accepts or is indifferent to the risk of death in order to achieve the goal of his conduct.

We have seen above that the LRC has stated that "Where the risk is taken consciously, the difference between negligence and recklessness is that, in the latter instance, it is much more unreasonable to take it; this calls for a value judgment in each individual case." But is it not true to say that the more unreasonable the risk is, the more likely it is that the trier of fact will conclude that the actor "accepted" or was "indifferent" to the risk?

The analysis of the inner posture of the person who acts with conscious negligence in the Canadian context is very difficult as there is presently no discussion of this point in case-law, nor in textbooks. The LRC had correctly initiated the analysis of conscious negligence by stating as we have seen above that "negligence means not taking enough care perhaps through inadvertence but perhaps through other things, such as misjudging....", but why it decided not to pursue this analysis of "misjudging" is not explained in the rather short comment that follows the definition of "negligently" in the Report.

At this juncture, it would be beneficial in our analysis of conscious negligence to glance at the law of another jurisdiction which has elaborated on a theory of conscious negligence. Anyone who has read Fletcher's book Rethinking Criminal Law<sup>34</sup> will admit the richness of the German criminal law theory which has influenced the development of the criminal law in several countries.<sup>35</sup> We will look briefly at the German criminal law concepts of dolus eventualis and of conscious negligence.

### The German Concepts of Dolus Eventualis and Conscious Negligence

Under s.15 of the 1975 Penal Code of the Federal Republic of Germany, only intentional acting is punishable unless the law imposes punishment for negligent acting. Unlike other European criminal codes, the German Penal Code does not define "intention" or "negligence".

German case-law and theoretical literature recognize that intention comprises two elements, knowledge and will,<sup>36</sup> and comes in three forms: a) direct intention (absicht) "where the perpetrator aims at achieving the relevant unlawful consequences"<sup>37</sup>; b) oblique intention ("direkter Vorsatz" or dolus directus) "where the perpetrator foresees such unlawful consequences as certain ("gewiss") to follow from his conduct, although this is not his aim or purpose"<sup>38</sup> and c) dolus eventualis ("bedingter Vorsatz") which we will now examine.

Professor Jescheck states<sup>39</sup> that case-law usually utilizes the theory of consent to define dolus eventualis in that "the actor must have consented to the result or at least have taken it into account." (translation) However, Professor Jescheck adds:<sup>40</sup>

More accurate, and corresponding more closely to the psychological state of the actor in case of uncertainty as to the realization of the non-desired result, is a recent theory requiring for dolus eventualis that the actor believed the result seriously possible and reconciled himself with that possibility.  
[translation]

Dealing with the topic of dolus eventualis in Rethinking Criminal Law, Professor Fletcher explains<sup>41</sup> that foresight and indifference to the possible result would also fall under dolus eventualis.

As for negligence under German law, Professor Jescheck states<sup>42</sup> that "A person acts with negligence (fahrlässig) when he brings about the constitutive elements of the offence by reason of an involuntary violation of a duty of care"

(translation). Negligence can be either unconscious ("unbewusste Fahrlässigkeit") or conscious ("bewusste Fahrlässigkeit"). Professor Jescheck explains<sup>43</sup> the two types of negligence as follows:

In the first hypothesis [unconscious negligence], the actor because of a lack of care, does not think of the possibility that he may bring about the constitutive facts of the offence; in the second hypothesis [conscious negligence], he in fact recognizes the real risk for the protected interest, but underestimates it or overestimates his own capabilities, trusting that he will not bring about the offence. Between the two types of negligence, there is no difference as to the degree of culpability. But the practical significance of the distinction consists essentially in the fact that in admitting the concept of conscious negligence it is possible to clearly distinguish it from dolus eventualis.

[translation]

In an important English-language article on this topic, Professor Morkel<sup>44</sup> states that conscious negligence, "entails a decision [on the part of the actor] that the outcome of his conduct will be a happy one."

In cases of both dolus eventualis and conscious negligence, the actor foresees before acting that his conduct may cause the unlawful consequence. However, it is what happens afterwards in the mind of the actor that differentiates the two concepts. In cases of dolus eventualis, the actor reconciles himself to the possibility that the consequence will result, while in cases of conscious negligence the actor trusts that the consequence will not occur.

At this stage, it would be useful to give examples of dolus eventualis and of conscious negligence. An example of dolus eventualis, could be the situation<sup>45</sup> where A has been given a "contract" to burn a house down. A knows that B is inside the house and that if he sets the building on fire, there is a risk that B may not have the time to escape and may die in the fire. A's only goal is to burn the house down in order to collect the contract money. However, A accepts that by setting the house on fire, B may eventually die. An example of conscious negligence, could be the situation<sup>46</sup> where hunter C who sees both a wild animal and another hunter, D, in the vicinity. C realizes that he may miss his shot and hit D, but he reassures himself by saying that he is a good shot and there is no risk. He shoots and kills B:

On the basis of the foregoing, one can conclude that there is not much difference between dolus eventualis and the Canadian definition of recklessness as found in Leary. However, the same cannot be said about conscious negligence, of which the Canadian theory is still at the stage of infancy. This is somewhat surprising as this was a matter studied at length by the influential English author, John Austin.

### John Austin

In his Lectures on Jurisprudence<sup>47</sup>, Austin distinguished between "intention" and "rashness". In Austin's days, "recklessness" had not yet become a separate concept. He described "rashness"<sup>48</sup> as follows:

The party, who is guilty of rashness thinks of probable mischief; but, in consequence of a missupposition begotten by insufficient advertence, he assumes that the mischief will not ensue in the given instance or case.... The party runs a risk of which he is conscious; but he thinks (for a reason which he examines insufficiently) that the mischief will probably be averted in the given instance.

Austin provided the following example of "rashness":<sup>49</sup>

My yard or garden is divided from a road by a high paling. I am shooting with a pistol at a mark chalked upon this paling. A passenger then on the road, but whom the fence intercepts from my sight, is wounded by one of the shots. For the shot pierces the paling; passes to the road; and hits the passenger....

When I fire at the mark chalked upon the fence, it occurs to my mind that a shot may pierce the fence, and may chance to hit a passenger. But, without examining carefully the ground of my conclusion, I conclude that the fence is sufficiently thick to prevent a shot from passing to the road. Or, without giving myself the trouble to look into the road, I assume that a passenger is not there, because the road is seldom passed. In either case, my confidence is rash; and, through my rashness or temerity, I am the author of the mischief. My assumption is founded upon evidence which the event shews to be worthless, and of which I should discover the worthlessness if I scrutinised it as I ought.

According to Austin, in order for an actor to be guilty only of rashness, his incorrect supposition must be "absolutely confident and sincere"<sup>50</sup>. Austin analyzes the same example and explains<sup>51</sup> when this situation may be one of intention instead of rashness:

But, instead of assuming confidently that the fence will intercept the ball, or that no passenger is then on the road, I may surmise that the assumption upon which I act is not altogether just. I think that a passenger may chance to be there, though I think the presence of a passenger somewhat improbable. Or, though I judge the fence a stout and thick paling, I tacitly admit that a brick wall would intercept a pistol-shot more certainly. Consequently, I intend the hurt of the passenger who is actually hit and wounded. I think of the mischief, when I will the act; I believe that my missupposition may be a missupposition; and I, therefore, believe there is a chance that the mischief to which I advert may follow my volition.

If one compares the German concept of conscious negligence with that of Austin's rashness, one realizes that the two concepts are virtually the same.

#### The Differences between Recklessness and Conscious Negligence and the Theory of Mistake

The first difference concerns the will of the actor towards the unlawful result. In cases of recklessness, there is a positive expression of the will towards the possible unlawful result in that the actor has accepted or is indifferent to it. In cases of conscious negligence, the will of the actor towards the possible unlawful result is absent, as the actor has concluded that the result will not ensue from his conduct.

The second difference is that in cases of recklessness, the unlawful result is less important in value for the actor than the object of his conduct, while in cases of conscious negligence, the unlawful result is more important in value for the actor than the object of his conduct.<sup>52</sup> In a situation of homicide by conscious negligence, had the actor realized his mistake by thinking seriously, reasonably and sufficiently about the matter, he would most probably have refrained from acting. Professor Fletcher states that conscious negligence "requires an affirmative aversion to the harmful side-effect."<sup>53</sup> He adds:<sup>54</sup>

The best way to state the distinction is to employ a contrafactual conditional. If the actor knew that the side effect [the unlawful consequence] was going to occur, would he act in the same way? If yes, then the actor is reconciled to the side effect [situation of dolus eventualis]

A possible third difference between recklessness and conscious negligence may be that, at the precise time of acting, there is for recklessness the presence of consciousness of risk, but for conscious negligence there is the absence of it. If we say that for conscious negligence, the actor has concluded in his mind that the result will not occur, is it not right to say that at the precise moment of acting he no longer takes the risk into account, and therefore he is not conscious of any risk? That would in fact mean that the conscious negligence has been transformed at the precise time of acting to a case of unconscious negligence.<sup>55</sup>

The theory of mistake may be helpful in resolving or confirming the distinction between recklessness and conscious negligence. Mistake of fact, if honest but unreasonable, negates recklessness.<sup>56</sup> Mistake of fact, if honest but unreasonable, does not negate a crime of negligence. In conscious negligence, the actor makes a mistake by concluding that the unlawful consequence will not happen. His honest mistake regarding the risk, even if unreasonable, negates recklessness. However, that same mistake, if unreasonable, does not negate a crime of negligence, since the essence of negligence in that case is having made that unreasonable mistake. As Professor Williams has stated<sup>57</sup> "Where the crime requires gross negligence the mistake to justify conviction must be grossly unreasonable."

### Conclusion

The purpose of this article has been a) to indicate that if there is to be a crime of negligent homicide and one of reckless homicide in a new Canadian Criminal Code, it will be important to clearly distinguish recklessness from conscious negligence, and b) that such a distinction is possible.

We have seen in this article that:

- (1) criminal negligence in the Canadian law of homicide is tested objectively and that our courts have not yet articulated clearly how this negligence can arise;
- (2) there is no simple and general Canadian offence of murder by recklessness, which means that some homicides by simple recklessness are incorporated in the offences

of criminal negligence causing death or manslaughter by criminal negligence, thus deforming the true meaning of criminal negligence;

- (3) the LRC has proposed an offence of manslaughter (reckless homicide) and negligent homicide based on definitions of acting "recklessly" and "negligently";
- (4) the LRC's definition of "negligently" recognizes that negligence can involve taking a risk consciously; however, this paper has argued that the test presented to distinguish the alternative formulation of "recklessly" from negligence, is unacceptable since it calls for a "value judgment" by the prosecuting authorities;
- (5) while negligence calls for an objective test, the only way to differentiate recklessness from conscious negligence is to look at the inner posture of the actor at the time of acting;
- (6) Dickson, J.'s judgment in Leary captures the inner posture of the reckless actor which is either "assumption" (acceptance) of or "indifference" to the risk foreseen;
- (7) the German concept of dolus eventualis is very similar to Dickson, J.'s concept of recklessness and that the German concept of conscious negligence is that the actor foresees the risk but trusts that the unlawful consequence will not ensue;
- (8) Austin's concept of "rashness" is virtually identical to the German concept of conscious negligence;
- (9) the two concepts may be distinguished as follows:
  - (a) In cases of recklessness, there is present a positive expression of the will (acceptance or indifference) towards the possible unlawful consequence, while in cases of conscious negligence, there is an absence of any will towards the possible unlawful consequence;
  - (b) In cases of recklessness, the side-effect of the actor's conduct is for him less important than the object of his conduct, while in conscious negligence, the side-effect of the actor's conduct is for him more important than the aim of his conduct; and

(c) In cases of recklessness, there is consciousness of the risk at the exact time of acting, while in conscious negligence, such consciousness has disappeared. In conscious negligence, the actor has mistakenly concluded in his mind that there is no risk. This being so, at the precise time of acting, he is no longer conscious of any risk. He has eliminated it from his mind. His conscious negligence has transformed itself into unconscious negligence.

- (10) finally, the theory of mistake may be helpful in explaining the difference between the two, in that an unreasonable mistake negates the recklessness required in a crime whereas it constitutes the essence of the crime of negligence.



**ENDNOTES**

- 1 This is the expression used by Professor George P. Fletcher in Rethinking Criminal Law (Boston: Little Brown, 1978) at 447.
- 2 [1978] 1 S.C.R. 29 at 34.
- 3 R.S.C. 1970, c. C-34.
- 4 Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners (London: Queen's Printer, 1879).
- 5 Report of Royal Commission on Revision of Criminal Code (Ottawa: Queen's Printer, 1952) at 12-13.
- 6 For a detailed history of that section and its interpretation see R. v. Waite (1986), 28 C.C.C. (3d) 326 (Ont. C.A.).
- 7 Criminal Code, *supra*, note 3, section 203 which reads "Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life."
- 8 Ibid., sections 205(5)(b) 217 and 219. S. 205(5)(b) reads "A person commits culpable homicide when he causes the death of a human being, (b) by criminal negligence". S. 217 reads "Culpable homicide that is not murder or infanticide is manslaughter". Finally, s. 219 states that "Every one who commits manslaughter is guilty of an indictable offence and is liable to imprisonment for life". In practice, our courts use the definition of criminal negligence found in s. 202 for the purpose of s. 205(5)(b) (e.g. R. v. Mack (1975), 29 C.R.N.S. 270 (Alta. C.A.) and R. v. Davis (1977), 37 C.C.C. (2d) 114 at 117 (Sask. C.A.)). The expression "manslaughter by criminal negligence" is not found in the Criminal Code but is used here to differentiate between a conviction of manslaughter based on a culpable homicide by criminal negligence and other types of culpable homicide, such as culpable homicide by means of an unlawful act (s. 205(5)(a)).
- 9 The minor differences are in regard to the causation rules (St-Germain v. R., [1976] C.A. 185 at 194) and the fact that s. 203 relates to causing the death of a "person" while s. 205(5) refers to causing the death of a "human being" (R. v. Marsh (1979), 2 C.C.C. (3d) 1 (B.C. Co. Ct.) and R. v. Sullivan and Lemay (1986), 55 C.R. (3d) 48 at 61-62 (B.C. Co. Ct.)). See also R. v. Williams (1982), 63 C.C.C. (2d) 141 at 148 (Man. C.A.).

- 10 In R. v. Barron (1984), 39 C.R. (3d) 379 at 390 (Ont. H.C.J.); revd on other grounds (1985), 23 C.C.C. (2d) 544 (Ont. C.A.) Ewaschuk, J. stated that the "general doctrine of recklessness has...been confused with the specific term "reckless" as used in the definition of the offence of criminal negligence."
- 11 O'Grady v. Sparling, [1960] S.C.R. 804 at 809.
- 12 See cases cited in R. v. Waite, supra, note 6.
- 13 [1981] 1 All E.R. 974 (H.L.).
- 14 (1984), 12 C.C.C. (3d) 428 at 436 (Ont. C.A.). See also R. v. Hnatiuk (1983), 45 A.R. 125 at 131-132 (C.A.).
- 15 [1985] 1 S.C.R. 570 at 581-582.
- 16 (1985), 23 C.C.C. (3d) 544 at 550. See also the case of R. v. Waite, supra, note 6, where the Court of Appeal expressly mentioned that the test of negligence in so far as it concerned positive acts was an objective one. As for criminal negligence by omission, the present test in Ontario is a subjective one following the decision of R. v. Tutton and Tutton (1985), 18 C.C.C. (3d) 328 (Ont. C.A.) leave to appeal to the Supreme Court of Canada granted.
- 17 With the exception of criminal negligence by omission in Ontario, see supra, note 16.
- 18 Criminal Code, supra, note 3, s. 205(5). The two most common ways of committing culpable homicide are "by means of an unlawful act" or "by criminal negligence".
- 19 The word "reckless" in the official French version of the Criminal Code reads "indifférent". This is probably the true meaning. See J.F. Stephen, Digest of the Criminal Law (London: MacMillan, 1887) at 165.
- 20 R. v. Vasil, [1981] 1 S.C.R. 469.
- 21 Some may argue that the actor could also be found guilty of manslaughter by unlawful act but that position is doubtful. See R. v. Wilmot (1940), 74 C.C.C. 1 (Alta. C.A.), R. v. Kitching and Adams (1976), 32 C.C.C. (2d) 159 at 170 (Man. C.A.), leave to appeal to the Supreme Court of Canada refused, R. v. Williams (1981), 63 C.C.C. (2d) 141 at 150-151 (Man. C.A.) and Smith & Hogan, Criminal Law (London: Butterworths, 1983) at 316-318.

- 22 Vol. 1 (Report 30) (Ottawa: Law Reform Commission of Canada, 1986).
- 23 Ibid. at 53. The draft legislative version of that clause in Appendix A to the Report is c. 37 at 108.
- 24 Ibid. The draft legislative version of that clause in Appendix A is c. 38 at 108.
- 25 Ibid. at 19-20. The draft legislative version of that clause in Appendix A is c. 9 and 10 at 99-100.
- 26 For a discussion of this point, see P.H. Robinson & J.A. Grall "Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond" [1983] 35 Stan. L. Rev. 681 at 709-710 and 720-721.
- 27 Comment made to the Department of Justice Canada by Professor G.P. Fletcher.
- 28 This position is confirmed by the one of the LRC in the comment to c. 2(4)(a) that conduct refers to the "initial act", such as pulling the trigger of a gun.
- 29 Law Reform Commission of Canada, supra, note 21 at 20-21. The draft legislative versions of these proposals in Appendix A of the Report are c. 11(c) to (e) at 100.
- 30 Omissions, Negligence and Endangering (Working Paper 46) (Ottawa: Law Reform Commission of Canada, 1985) at 22. The footnote for the quotation is "54 See P. Fitzgerald, "Road Traffic As the Lawyer Sees It", in J.J. Leeming, Road Accidents--Prevent or Punish? (London: Cassell & Company Ltd., 1969), p. 157."
- 31 Rethinking Criminal Law, supra, note 1 at 447.
- 32 Traité de droit pénal général, (Montréal: Thémis, 1982) at 109. All translations of passages cited are by the author of this paper.
- 33 Supra, note 2. The dissent of Dickson, J. in that case was not concerned with the definition of recklessness, which was not discussed in the majority opinion of the court.
- 34 Fletcher, supra, note 1.
- 35 Ibid., at 467.

- 36 H.-H. Jescheck, "Droit Pénal" in M. Fromont & A. Rieg eds, Introduction au Droit Allemand, vol. 2 (Paris: Cujas, 1984) 255 at 275. This book is in French but Jescheck's contribution was translated from German. In English, see C.R. Snyman, Criminal Law (Durban: Butterworths, 1984) at 154.
- 37 D.W. Morkel "On the Distinction Between Recklessness and Conscious Negligence" (1982) 30 Am. J. Comp. L. 325 at 328.
- 38 Ibid.
- 39 Jescheck, supra, note 36 at 269. The very important German concepts of wrongdoing and attribution as it applies to intention and negligence are not discussed in this paper.
- 40 Ibid. at 272.
- 41 Supra, note 1 at 446-447.
- 42 Supra, note 36 at 275. Negligence by omission is discussed at 278.
- 43 Ibid. at 275.
- 44 Morkel, supra, note 37 at 330.
- 45 A modified version of an example used by Snyman, supra, note 36 at 155. The example of the driver not wanting to be late, discussed in the text in the part "Recklessness in the Law of Homicide", would also be a case of dolus eventualis.
- 46 A slightly modified version of an example used by P. Logoz, Commentaire du Code Pénal Suisse (Neuchâtel: Delachaux & Niestlé, 1976) at 97. The concepts of dolus eventualis and conscious negligence are not particular to German theory; it is recognized in several European countries, such as Switzerland and Austria, and in several South American countries.
- 47 R. Campbell, ed., 3rd ed. (London: John Murray, 1869). A pertinent fact is that John Austin studied in Germany.
- 48 Ibid. at 440-441.
- 49 Ibid. at 434 and 441.
- 50 Ibid. at 442.
- 51 Ibid.

52 Logoz, supra, note 46 at 92-94. Professor Logoz states:

[for dolus eventualis] Given the choice between two unpleasant solutions (either give up the desired act, or carry out that act but risk bringing about some harmful result), the actor chose the second. For him, the harmful consequence of his act is simply the least of two evils. So in the end one can say that, in the case of dolus eventualis, the actor made up his mind out of selfishness to go ahead with the act anyway.

[for conscious negligences, the] individual acted not out of selfishness but out of rashness; he didn't give the matter sufficient thought.

[translation]

See also H. Mannheim "Mens Rea in German and English Criminal Law" (1935) 17 J.C.L. & I.L. 82 at 92-93.

53 Rethinking Criminal Law, supra, note 1 at 446.

54 Ibid. (his footnote 27).

55 See the authorities mentioned in G. Erenius, Criminal Negligence and Individuality (Stockholm: P.A. Norstedt & Söners Förlag, 1976) at 78 (distributed in the U.S. by Fred B. Rothman & Co.). See also Morkel, supra, note 37 at 330-331.

56 Beaver v. R., [1957] S.C.R. 531, 538 and Pappajohn v. R., [1980] 2 S.C.R. 120.

57 Criminal Law, The General Part (London: Stevens & Sons, 1961) at 202. See also Law Reform Commission of Canada, Recodifying Criminal Law, supra, note 22, at 27 (clause 3(2)(b)).

**"Reform of the Criminal Law"**  
(July 26-29, 1987)  
The Inns of Court, London

**The Difference Between Negligent Homicide  
and Reckless Homicide when Both of them  
Involve "Consciousness of the Risk"**

by François Lareau of the Quebec Bar

**ERRATA**

The endnotes 27 and 46 should read instead:

27 Professor G.P. Fletcher made the following comment to the Department of Justice Canada:

If the relevant conduct is killing, I find it hard to understand how in a case of reckless killing, one could require that the actor engage "purposely" in the act of killing. All the actor can do in a case of reckless risk creation is be aware that he is creating the risk.

46 A slightly modified version of an example used by P. Logoz, *Commentaire du Code Pénal Suisse* (Neuchâtel: Delachaux & Niestlé, 1976) at 97. The concepts of *dolus eventualis* and conscious negligence are not particular to German theory; it is recognized in other European countries, such as Switzerland and Austria.