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325 — The Constitutional Infirmity of the Laws Prohibiting Criminal Negligence

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The Constitutional Infirmity of the Laws Prohibiting Criminal Negligence

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1. — Introduction

This article explores three interrelated bases upon which a court should find the laws prohibiting criminal negligence causing death to be constitutionally invalid. Each argument hinges on the fact that the provisions which prohibit criminal negligence causing death infringe an accused individual's liberty under s. 7 of the Charter. [1] Ultimately, in light of the grave penalty and social opprobrium attached to this offence, this article is a call for the adoption of a subjective *mens rea* for criminal negligence causing death with respect to either the prohibited conduct (or *actus reus* which is conduct that shows a wanton or reckless disregard for the life or safety of others) or the result (death).

The first part of this article explores the manner in which the British Columbia Court of Appeal's analysis of criminal negligence causing death offends the principle of fundamental justice requiring that individuals be presumed innocent. In two relatively recent cases, the British Columbia Court of Appeal held that "conduct that shows a wanton or reckless disregard for the life or safety of others" (the *actus reus* of criminal negligence) is "demonstrated by a marked and substantial departure from the conduct of a reasonable person in the circumstances" (the *mens rea* of criminal negligence). [2] Thus it has endorsed an approach which applies only one standard to both elements of the offence. This approach is inconsistent with both ss. 7 and 11(d) of the *Charter* because an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offencegiven this approach eliminates the need to prove an essential element (either the *actus reus* or the *mens rea*).

Second, we discuss why even if the British Columbia Court of Appeal required the separation of the *actus reus* and the *mens rea*, as the Supreme Court of Canada has, [3] the present analysis of criminal negligence causing death offends the principle of fundamental justice that laws not be vague. If the *mens rea* for criminal negligence causing death is a "marked and substantial departure from the conduct of a reasonably prudent person" then this is not an intelligible standard because it does not differ from showing a wanton and reckless disregard. Yet a finder of fact is expected to distinguish each of these requirements. This violates the principle of fundamental justice that laws not be vague.

Rather than strike the laws down, we end by arguing that a court could re-interpret the law so that the *mens rea* is intelligibly distinct from the *actus reus*. If it were to do so, the principles of fundamental justice require subjective *mens rea* for the offence of criminal negligence causing death. There is no binding precedent which has considered the constitutional validity of the objective *mens rea* applied to both the prohibited conduct and the result for criminal negligence causing death. [4] Fundamental justice requires that subjective *mens rea* attach to at least one of these elements.

2. — The Impugned Laws

Before exploring these *Charter* issues, the laws prohibiting criminal negligence causing death must be considered and delineated. The specific offence of criminal negligence causing death is to be found in s. 220(b) of the *Criminal Code*; [5] however, ss. 219, 220, and 222(5)(b) of the *Criminal Code* are interrelated and to the extent that they prohibit criminal negligence causing death, they give rise to the same constitutional problems as s. 220(b). These provisions will be referred to collectively as the "impugned laws".

A person commits homicide when "directly or indirectly, *by any means*, he causes the death of a human being". [6] "Culpable homicide *is* murder or manslaughter or infanticide" [7] and "culpable homicide that is not murder or infanticide *is* manslaughter". [8] Thus, criminal negligence causing death [9] *is* culpable homicide within the definition of the *Criminal Code*. Because it does not meet the definition of murder [10] or infanticide, [11] it *is* manslaughter under the *Criminal Code*. [12]

Many forms of manslaughter are addressed together under s. 222(5) of the *Criminal Code* which prohibits committing manslaughter in a variety of ways including, among others, by criminal negligence. [13] In addition, Parliament has provided a discrete offence of criminal negligence causing death. [14] As Professor Wilson has noted:

> The definition of criminal negligence found in s. 219 of the *Criminal Code* is used for the prosecution of the offence of criminal negligence causing death in s. 220 and for a charge of manslaughter by criminal negligence on s. 222(5)(b). Also, the penalty for conviction of either offence is identical to the penalty provided for a conviction for manslaughter: liable to imprisonment for life. In *R. v. Morrisey*, Justice Arbour noted that there is, in fact, no difference between causing death by criminal negligence and manslaughter by criminal negligence. She described the offences as "totally interchangeable". [15]

It is in part because of this complete overlap that Professor Wilson has suggested that most of the manslaughter offences in the *Criminal Code* "are redundant and entirely unnecessary" and that there is an "urgent need for comprehensive reform of Canadian criminal law, particularly the law of homicide." [16]

The redundancy of these provisions adds to the confusion in judicial interpretation and is the reason why all provisions which essentially define the conduct at issue and/or criminalize the same conduct will be considered here.

3. — Section 7 Engagement

The inquiry into the validity of legislation under s. 7 of the *Charter* requires a court to ask (1) whether the impugned laws limit the accused individual's right to liberty (the "deprivation" or "engagement" issue) and (2) if so, whether that limitation is in accordance with the principles of fundamental justice. [17]

Unquestionably the impugned laws result in a deprivation of the right to liberty given that they provide for criminal liability including imprisonment for life. Thus we can turn almost immediately to a consideration of why this deprivation is not in accordance with the principles of fundamental justice.

4. — Principles of Fundamental Justice

(a) — The Criminal Negligence Provisions Offend the Presumption of Innocence

In considering predicate offences like criminal negligence causing death courts must keep three issues analytically distinct (a) the *actus reus* of the underlying offence (b) the *mens rea* of the underlying offence and (c) the *mens rea* in respect of the result (here death).

Under s. 7, if a conviction will result in a deprivation of life, liberty or security of the person, Parliament must respect the principles of fundamental justice. One of these principles is that a minimum mental state is an essential element of an offence. [18]

Absolute liability [19] infringes the principles of fundamental justice, such that the combination of absolute liability and a deprivation of life, liberty or security of the person is a restriction on one's rights under s. 7 and is *prima facie* a violation thereof. [20] Strict liability [21] is constitutionally permissible for strict liability *regulatory* or *public welfare* offences. Fundamental justice is satisfied in those cases if there is a defence of reasonable care and the burden of proving it may be placed on the defendant. [22] In the case of true crimes, fundamental justice requires that *mens rea* be an element of the offence and the burden of proving it would be on the Crown. [23]

Criminal negligence causing death is a true crime and thus a mental element with the burden of proving it on the Crown is an essential element of the crime.

Sections 7 and 11(d) of the *Charter* will be infringed when an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence (whether this results from the existence of a reverse onus provision or from the elimination of the need to prove an essential element). [24]

In respect of criminal negligence, the Supreme Court of Canada has required that the Crown prove the *mens rea* beyond a reasonable doubt separate and distinct from the *actus reus*. [25] If, as the British Columbia Court of Appeal suggested in *Kerr* and *Lilgert*, "conduct that shows a wanton or reckless disregard for the life or safety of others" is "demonstrated by a marked and substantial departure from the conduct of a reasonable person in the circumstances", [26] then there is merely one standard to be applied and no inquiry into the mental element of the offence. This standard offends the presumption of innocence. If this is the correct standard, then the impugned laws should be struck down as unconstitutional.

This *Charter* infringement is aggravated in the case of criminal negligence causing death where there is then no inquiry into the mental element of the underlying conduct and only objective foresight applied to the *mens rea* of the consequences of that conduct. We return to this issue below following our discussion of vagueness.

(b) — The Criminal Negligence Provisions are Unconstitutionally Vague

If the British Columbia courts are wrong and the correct approach to criminal negligence requires the separation of the *actus reus* and the *mens rea*, the impugned laws violate the principle of fundamental justice that laws not be vague.

A vague law provides no adequate basis for legal debate and is "not intelligible." The rule against vagueness protects fair notice to citizens and places limitations on enforcement discretion. [27] A law should only be declared unconstitutionally vague where a court has embarked upon the interpretive process, but has concluded that interpretation is not possible. [28]

However, while the "threshold for finding a law vague is relatively high," [29] courts have declared laws to be unconstitutionally vague even after that law has been the subject of judicial interpretation. In such circumstances the question is whether the law "is capable of being given a constant and settled meaning by the courts." [30] If no workable meaning has emerged from the caselaw and a law is not susceptible to being given a constant and settled meaning, it will be struck down. [31]

Although it has been the subject of judicial consideration, judges have repeatedly bemoaned the unintelligibility of s. 220. [32] As predicted by Professor Wilson, courts have found it "difficult if not impossible" to distinguish between "conduct that satisfies one element of the offence but not the other, an *actus reus* of wanton and reckless disregard and a *mens rea* of marked and substantial departure." [33]

The impossibility of this task is highlighted by decisions from Canadian courts of appeal reaching opposite conclusions as to how to approach the two elements of the offence. First, in *R. v. Tayfel*, the Manitoba Court of Appeal overturned a trial conviction of criminal negligence causing death because the trial judge "imported into the *actus reus* enquiry the marked and substantial departure enquiry of the *mens rea* element". [34] In contrast, more recently in *Kerr* and again in *Lilgert*, discussed above, the British Columbia Court of Appeal upheld a trial judgment which had done exactly the same thing when it explained:

> I am satisfied the trial judge's instructions adequately conveyed the objective fault element of criminal negligence causing death. The gravamen of the offence is conduct that shows a wanton or reckless disregard for the life or safety of others, as demonstrated by a marked and substantial departure from the conduct of a reasonable person in the circumstances, that has caused death. [35]

Thus, these two Canadian courts of appeal arrived at opposite conclusions about the permissibility of importing into the *actus reus* enquiry the marked and substantial departure enquiry of the *mens rea* element.

The co-mingling engaged in by the British Columbia Court of Appeal is not constitutionally permissible as is explained above. However, this co-mingling points to the impugned laws' impermissible vagueness. The *actus reus* of criminal negligence is to do anything or omit to do anything that it is his duty to do and to show wanton or reckless disregard for the lives or safety of other persons. [36] Criminal negligence causing death requires the additional element of causing death. [37] If the *mens rea* for criminal negligence is a "marked and substantial departure from the conduct of a reasonably prudent person," then this is not an intelligible standard. How does a marked and substantial departure differ from showing a wanton and reckless disregard? Surely the latter swallows the former and yet the finder of fact is expected to distinguish each of these requirements. It is because finders of fact are deprived of an intelligible standard to apply to each of the conduct and the mental state of the accused that the same single standard is being impermissibly applied to both in British Columbia. As such, the impugned laws unjustifiably infringe an accused individual's right to liberty under s. 7 in a manner which violates the principle of fundamental justice that laws not be vague.

(c) — The Criminal Negligence Provisions Require Subjective *Mens Rea*

The impugned laws unjustifiably infringe an accused individual's right to liberty under s. 7 of the *Charter* in a manner which does not accord with the principle of fundamental justice that requires subjective *mens rea* for such offences.

Below we develop three propositions: (a) the Supreme Court of Canada has recognized that subjective *mens rea* is required as a matter of fundamental justice for some offences; (b) there is no binding authority considering the constitutional validity of an objective *mens rea* applied to both the underlying offence and the result in respect of criminal negligence causing death; and (c) fundamental justice requires that a subjective *mens rea* be applied to at least the underlying offence or the result for criminal negligence causing death.

(d) — Subjective *Mens Rea* is Constitutionally Required for Some Offences

The Supreme Court of Canada has recognized that there are certain crimes where, "because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime" in order to avoid punishing the morally innocent. [38]

The offences of theft, [39] murder, [40] attempted murder, [41] and war crimes against humanity committed outside of Canada [42] all require subjective *mens rea.*

(e) — No Binding Precedent Considering the Constitutionality of Modified Objective *Mens Rea* for Criminal Negligence Causing Death

Criminal negligence causing death also constitutionally requires subjective *mens rea* of either the prohibited conduct or the result.

The Supreme Court of Canada has recognized that there are five distinct types of criminal offences in which an objective or modified objective *mens rea* has been applied [43] and they are: (a) duty-based offences in ss. 215-217.1; (b) offences which are expressed in terms of careless conduct; (c) offences defined in terms of dangerous conduct; (d) offences based on criminal negligence; and (e) predicate offences.

We develop below that while an objective *mens rea* in respect of *the prohibited conduct* may be acceptable for offences in categories (a)-(d), the rationale that has been articulated for applying this low level of *mens rea* in each circumstance is not applicable in respect of criminal negligence *causing death*. Even if fundamental justice requires only an objective *mens rea* in respect of the conduct of criminal negligence, [44] fundamental justice requires that there be at least an element of subjective *mens rea* in respect of *either* the conduct *or* in respect of the result for the offence of criminal negligence causing death.

(i) — *Mens Rea* of the Prohibited Conduct

As to *duty-based offences*, *R. v. Naglik*, [45] concerned a constitutional challenge to the offence of failing to provide the necessaries of life to a child under the age of 16 years. Lamer C.J. reasoned that "[t]he concept of a duty indicates a societal minimum which has been established for conduct" and that a "duty would be meaningless if every individual defined its content for him- or herself according to his or her subjective beliefs and priorities." [46] Lamer C.J. considered that the stigma attached was less than that attaching to constructive murder [47] and noted there was "no minimum penalty for this hybrid offence, and a maximum prison term of two years if the Crown proceeds successfully by indictment" which meant the sentencing judge "can tailor the sentence to the circumstances of the particular offence and offender, eliminating the danger of the accused being punished to a degree out of proportion to the level of fault actually found to exist. [48] The availability of the defence of lawful excuse also prevented punishing the morally innocent. [49]

In *H. (A.D.)*, the Supreme Court of Canada rejected as a matter of statutory interpretation (rather than constitutional law), that *Naglik* mandated an objective *mens rea* for the offence of child abandonment under s. 218 of the *Criminal Code*. [50]

For the same reasons expressed in *H. (A.D.)*, the *Naglik* rationale does not mandate an objective *mens rea* for the offence of criminal negligence causing death. Criminal negligence may be committed by "[e]very one," it is not restricted to persons in particular relationships or under specified statutorily created legal duties. The concept of duty in the offence of criminal negligence becomes relevant only in relation to an omission and the reference to "legal duty" in relation to omissions simply gives effect to the common law principle that criminal responsibility generally does not arise from an

omission unless there is a pre-existing legal duty to act. The effect of the reference to duty in s. 219(b) of the *Criminal Code* is to ensure that the offence applies to omissions by those with a legal duty towards a child. However, the criminal negligence offence does not impose any such duties and people with no duty may be liable.

And while *H. (A.D.)* did not consider whether an objective *mens rea* would be constitutionally sufficient for child abandonment, the Court's reasoning in both *Naglik* and *H. (A.D.)* illuminate why it would not be sufficient for the offence of criminal negligence. One of the rationales for the objective *mens rea* is that the concept of a duty indicates a societal minimum which has been established for conduct and a duty would be meaningless if every individual defined its content for him- or herself according to his or her subjective beliefs and priorities. Of course, this rationale does not apply to criminal negligence which is not restricted to people under specified legal duties. Further, criminal negligence causing death is a more serious offence, signifying more blameworthy conduct, than duty-based offences. [51] *Naglik*, then, is of limited assistance to the question of the constitutional validity of the impugned laws.

Another type of offence attracting only an objective fault element is those offences addressing *careless conduct*. [52] For example, in *R. v. Finlay*, [53] the Supreme Court of Canada applied an objective fault standard to careless storage of a firearm. Lamer C.J. and Sopinka J. upheld the constitutionality of this *mens rea* on the basis of an interpretation of the objective test which provided that there "must be made 'a generous allowance' for factors which are particular to the accused, such as youth, mental development, education . . ." [54] and on the basis that "given the nature of the offence, the absence of any proof of advertence in the imposition of a conviction, and the range of punishment upon conviction, there is not sufficient stigma arising from a conviction under s. 86(2) to require a subjective *mens rea*." [55] The majority concurred with Chief Justice Lamer except that they relied on a purely objective test for *mens rea*. [56] In analyzing the requisite *mens rea*, the Court noted Parliament's intent to "impose on all people owning or using firearms a specific and rigorous duty of care" and that the activity was "inherently dangerous." [57]

Again, a stricter *mens rea* requirement is required for criminal negligence given that it does not share this factor, specifically, criminal negligence may involve activities which are *not* inherently dangerous and over which Parliament has not imposed a specific and rigorous duty of care. Further, criminal negligence causing death is a more serious offence, signifying more blameworthy conduct, than careless conduct offences. [58]

Turning to *offences defined in terms of dangerous conduct*, in *H. (A.D.)* the Supreme Court of Canada noted in respect of dangerous driving:

> [57] . . . Several factors justified adopting an objective rather than a subjective fault requirement: driving is a regulated activity in which people choose to engage; driving is automatic and reflexive in nature; and the text of the offence focuses on the manner of driving, all of which suggest that the offence seeks to impose a minimum uniform standard of care. Cory J. noted, for example, that "[l]icensed drivers choose to engage in the regulated activity of driving. They place themselves in a position of responsibility to other members of the public who use the roads": at *Hundal*, p. 884 . . . [59]

While courts often refer to "negligence" in discussing dangerous driving and while the majority judgment in *Beatty* purported to refer to "negligence-based offences," it is significant that what was at issue in *R. v. Hundal*, [60] *R. v. Beatty* [61] and *R. v. Roy* [62] was *not* criminal negligence but the lesser offence of dangerous driving. In *H. (A.D.)*, the Supreme Court of Canada recognized that offences defined in terms of dangerous conduct were a distinct category of offence from negligence-based offences.

Criminal negligence shares none of the factors which justified adopting an objective fault requirement for dangerous conduct, specifically, criminal negligence applies to some activities which are *not* regulated, which are *not* automatic and reflexive in nature, and in respect of which accused individuals do *not* necessarily place themselves in a position of

responsibility to other members of the public. [63] Further, the offence of criminal negligence is a more serious offence, signifying more blameworthy conduct than the offence of dangerous driving. [64] Thus a stricter *mens rea* requirement is required. Indeed, La Forest J., who concurred with Cory J.'s majority decision in *Hundal*, drew a distinction between dangerous driving and criminal negligence for which he said subjective *mens rea* was required. [65]

Turning to *criminal negligence offences*, [66] the *actus reus* and *mens rea* have been set out above. At issue in *Vaillancourt* was *Criminal Code* s. 213(d) which imposed criminal liability for the result (death) of an intentional criminal act (having a weapon while committing or attempting to commit an offence). Lamer J., for the majority stated that "[i]t may well be that, as a general rule, the principles of fundamental justice require proof of a subjective *mens rea with respect to the prohibited act*, in order to avoid punishing the 'morally innocent.'" [67] The majority reasoned (again without deciding) that "I am presently of the view that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight" *of the result*, but stopped short of so holding. Instead Lamer J. accepted that "it is arguable that different considerations should apply *to the mental element required with respect to that result*" [68] (as opposed to with respect to the prohibited act). The majority therefore assumed "but only for the purposes of this appeal, that something less than subjective foresight *of the result* may, sometimes, suffice for the imposition of criminal liability for causing that result *through intentional criminal conduct*." [69] The majority held at:

> 28 . . . [F]or the reasons I have already given for deciding this case more narrowly, I need not and will not rest my finding that s. 213(d) violates the *Charter* on this view, because s. 213(d) does not, for reasons I will set out hereinafter, even meet the lower threshold test of objective foreseeability [of death]. I will therefore, for the sole purpose of this appeal, go no further than say that it is a principle of fundamental justice that, absent proof beyond a reasonable doubt of at least objective foreseeability [of death], there surely cannot be a murder conviction. [70]

Thus the majority struck the law down on the basis that as a principle of fundamental justice, there cannot be a conviction in the absence of proof beyond a reasonable doubt of at least objective foreseeability of the result. [71]

(ii) — *Mens Rea* of the Result

A final category of offence requiring only an objective fault element is *predicate offences*. In *H. (A.D.)*, the Supreme Court of Canada explained:

> [59] . . . These are offences such *a*s unlawful act manslaughter and unlawfully causing bodily harm which require the commission of an underlying unlawful act. They have been found to require the mental element for the underlying offence but only objective foresight of harm flowing from it: see, e.g., *R. v. DeSousa*, [1992] 2 S.C.R. 944 (unlawfully causing bodily harm); *R. v. Creighton*, [1993] 3 S.C.R. 3 (unlawful act manslaughter). Without reiterating the detailed reasons given in those cases, I simply underline that these offences are ones in which the commission of the predicate or underlying offence has actual and serious consequences. As Sopinka J. said in *DeSousa* (at p. 967) and McLachlin J. repeated in *Creighton* (at p. 55): "The implicit rationale of the law in this area is that it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused.". . . [72]

Criminal negligence causing death (under either s. 220 or s. 222(5)) is a predicate offence.

Cases which have considered the constitutional validity of predicate offences have usually focussed on the foreseeability *of the result* as opposed to the *mens rea* required *for the underlying offence*.

In *R. v. DeSousa*, [73] the accused while in a fight threw a glass bottle that shattered against a wall causing fragments of glass to injure an innocent bystander. He was charged with unlawfully causing bodily harm. The Court held that "unlawfully" required a statutory offence with a constitutionally sufficient mental element and that there was "no constitutional

requirement that intention, either on an objective or subjective basis, extend to the consequences of unlawful acts in general." [74] On the facts in *DeSousa*, the Court contemplated an underlying unlawful act with a subjective *mens rea*. [75]

Likewise in *Creighton*, the accused was convicted of unlawful act manslaughter. The underlying offence was trafficking under the *Narcotic Control Act*. The Supreme Court of Canada held that objective foreseeability *of the risk of death* was constitutionally sufficient to ground liability for unlawful act manslaughter. [76] The Court specifically noted, that "a fault requirement based on objective foreseeability of the risk of bodily harm, *coupled with the fault requirement of the predicate unlawful act (which itself must be constitutionally sufficient)*, satisfies the principles of fundamental justice under s. 7 of the Charter." [77] But again, the Court was faced with an underlying offence which required subjective *mens rea* of the unlawful conduct. [78]

There have been a couple of cases where the Supreme Court of Canada has been faced with considering the proper *mens rea* of the result when the underlying offence required only objective *mens rea* of the underlying conduct.

In *Gosset*, the Supreme Court of Canada held that an objective *mens rea* applied to the offence of careless handling of a firearm in a context where this was the underlying offence for a charge of manslaughter; however, no constitutional question was stated or conveyed to the provincial Attorneys General and the issue was not addressed by the Court. [79]

At issue in *Hundal* was the constitutional validity of the objective *mens rea* for the offence of dangerous operation of a motor vehicle causing death. [80] The accused argued that s. 7 required that he could not "be convicted without proof beyond a reasonable doubt of a subjective mental element of an intention to drive dangerously." [81] The Court held that the *mens rea* would be met when it could be determined that "viewed objectively, the accused was, in the words of the section, driving in a manner that was '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'." [82] As to whether it was necessary to prove a mental element extending to the consequences (death) of the unlawful conduct (dangerous driving), the Court in *Hundal* did not address this issue directly. [83] However, in *Creighton* the majority clarified that in cases such as dangerous operation of a motor vehicle causing death, "proof of the accused having engaged in prohibited conduct which is such that any reasonable person would inevitably have foreseen the risk involved will serve as a substitute for objective foresight, relieving the prosecution from having to introduce additional evidence to prove the existence of such foresight." [84]

It is questionable whether this "double objective" *mens rea* satisfies the principles of fundamental justice even for dangerous driving causing death. However, on the assumption that it remains good law, it would only comply with fundamental justice because of the various societal concerns outlined in *Hundal* [85] such as: (a) the licensing requirement which shows that those who drive are familiar with the standards of care which must be maintained and yet chose to engage in this regulated activity placing themselves in a position of responsibility to other members of the public; [86] (b) the automatic and reflexive nature of driving a great deal of which is "done with little conscious thought" but instead is "reactive and not contemplative" and "every bit as routine and familiar as taking a shower or going to work"; [87] and (c) the statistics which demonstrate the obvious and urgent need to control the conduct of drivers to prevent the tragic social costs of deaths and disabling injuries flowing from the operation of motor vehicles. [88] As was set out above, none of those concerns necessarily arise in criminal negligence causing death thus the double objective standard should not be applied to this offence.

There are two Supreme Court of Canada cases considering the fault element for criminal negligence. *Tutton* was described above. In that case, Lamer J. went out of his way to say that his *interpretation* of the criminal negligence provision was not to be confused with a determination of its constitutional validity since that was not in issue. [89] Wilson J. agreed with him on this point. [90] Thus *Tutton* was not determinative of the constitutional validity of the modified objective test. The

constitutional validity of the provision was also not considered in the Court's more recent judgment in *JF* which clarified that the fault element was the modified objective standard of a "marked and substantial departure." [91]

It must be acknowledged that in *Tutton* the Court engaged in a consideration of whether the offence in question required proof of a blameworthy state of mind under foundational principles of penal liability and fundamental justice. Nevertheless, in neither *Tutton* nor *F. (J.)* was the Court faced with a notice of constitutional question with respect to the *mens rea* required for the impugned laws which involves only objective *mens rea* for the underlying conduct and only modified objective foreseeability of the result. [92] Failure to give notice of such a question precludes the Court from making a constitutional determination. [93] And indeed, no court has considered the constitutional validity of this double objective *mens rea*. The Supreme Court of Canada's conclusions as to *mens rea* in these other cases should therefore not be determinative in such a case for all the reasons set out above. Instead, it remains open to the courts to determine that a subjective *mens rea* is constitutionally required for either the underlying act or the result of the conduct in the context of criminal negligence causing death.

(f) — Subjective Mens Rea is Required In Light of Stigma and Penalties

Subjective *mens rea* of either the underlying conduct or the result could be found to be constitutionally required if the offence of criminal negligence causing death is one of those crimes for which "because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime." [94]

There are two main branches to the analysis of social stigma. First the court must look to the conduct being punished to determine if it is of sufficient gravity to import significant moral opprobrium on the individual found guilty of engaging in such conduct. [95] The second branch of the stigma test concerns the moral blameworthiness not of the offence, but of the offender found guilty of committing it.

(i) — Conduct Being Punished

Turning to the first branch of the analysis, in the case of criminal negligence causing death, there can be no doubt that we are dealing with a very serious criminal offence.

The result of the conduct consists of killing someone as a result of showing wanton and reckless disregard for their life. In this respect, criminal negligence causing death (and manslaughter by criminal negligence) gives rise to the stigma of being labelled by the state and the community as responsible for the wrongful death of another. "Clearly, there can be no conduct in our society more grave than taking the life of another without justification." [96]

(ii) — Moral Blameworthiness of Offender

The second branch of the stigma test concerns the moral blameworthiness not of the offence, but of the offender found guilty of committing it. [97]

In *Creighton*, the Court's analysis of this factor was somewhat circular. In determining whether or not a subjective *mens rea* was constitutionally required, the Court observed that "as a general proposition, more stigma will attach to those who knowingly engage in wrongful conduct than to those who recklessly or inadvertently engage in the same conduct" and thus "the stigma which attaches to a conviction for unlawful act manslaughter is significant, but does not approach the opprobrium reserved in our society for those who knowingly or intentionally take the life of another. It is for this

reason that manslaughter developed as a separate offence from murder at common law." [98] The Court did not find that subjective *mens rea* was required for manslaughter.

But the result in *Creighton* should not be determinative with respect to criminal negligence causing death given that in *Creighton* the Court was considering an individual who was being convicted of manslaughter in circumstances where he had subjective intention for the underlying act. Thus there was no chance of convicting a moral innocent in an absolute sense. Here we are dealing with an offence which has been approached as requiring possibly no mental element [99] or at best an objective mental element [100] and only objective foresight of consequences.

The imposition of criminal liability in the absence of proof of a blameworthy state of mind, either as an inference from the nature of the act committed or by other evidence, is an anomaly which does not sit comfortably with the principles of penal liability and fundamental justice. [101] This is particularly so in offences carrying a substantial term of imprisonment which by their nature, severity and attendant stigma are true criminal offences aimed at punishing culpable behaviour as opposed to securing the public welfare. [102] It is for this reason that there is a presumption that Parliament intends crimes to have a subjective fault element. [103] These comments apply to *all* charges of manslaughter. But much more uncomfortable should be the imposition of very significant criminal liability in the absence of proof of any blameworthy state of mind of either the underlying act or the result.

Fundamental justice requires subjective *mens rea* for the offence of theft. Bemoaning the vaguery of the notion of social stigma, Professor Hogg has noted, "theft is one of the least severely punished offences in the *Criminal Code*: in some circumstances, theft attracts a *maximum* penalty of six months' imprisonment." [104] We note, however, that theft can attract a penalty of up to ten years imprisonment in specified circumstances. [105] In contrast, the charge of criminal negligence causing death can lead to penalties including *imprisonment for life*. [106] The possibility of such a lengthy term of imprisonment indicates the moral blameworthiness that the state attaches to the offender.

As was explained above, criminal negligence [107] is thus more serious, signifying more blameworthy conduct, than are careless conduct offences, dangerous conduct offences, and duty-based offences. Criminal negligence causing death [108] is a more serious offence, signifying more blameworthy conduct, than unlawful act manslaughter which is predicated on a careless, dangerous or duty-based offence. Thus the stigma which attaches to a conviction for criminal negligence causing death is significant and surpasses that attaching to these other offences.

Courts have recognized that underlying offences upon which the predicate offence of manslaughter is based may attract a more stringent degree of *mens rea*. [109]

Application of a subjective mental element resonates with Professor Roach's suggestion that subjective fault should be fully constitutionalized under s. 7 and that "departures from subjective fault could be justified in non-emergency situations under section 1 as a proportionate restriction on the accused's rights to be judged on the basis of his or her subjective fault." [110]

This subjective standard is what Justice Wilson advocated in *R. v. Waite*, [111] although she was prepared to accept that specific intent was not required cautioning that specific intent might place "too high an onus on the Crown" [112] and stated that "the mental element in criminal negligence is the minimal intent of awareness of the prohibited risk or wilful blindness to the risk." [113]

The offence of criminal negligence causing death constitutes the gravest conduct in our society and has the potential to attract the gravest penalty available under the *Criminal Code*. An individual accused of this offence is subject to extreme

social stigma and fundamental justice requires subjective *mens rea* with respect to the underlying conduct or the result or the offence.

5. — Conclusion

We have attempted to lay bare the three interrelated ways in which the offence of criminal negligence causing death offends the *Charter*. Each argument hinges on the fact that the impugned laws infringe an individual's right to liberty under s. 7 of the *Charter* and further that this deprivation is not in accordance with the principles of fundamental justice: (a) that requires that individuals be presumed innocent (and relatedly infringes s. 11(d) of the *Charter*); (b) that laws not be vague; or (c) that certain serious offences require subjective *mens rea*. These breaches of ss. 7 and 11(d) are not demonstrably justified in a free and democratic society. Given the extreme gravity of the social opprobrium and penalty which attaches to the offence of criminal negligence causing death, these frailties of the current impugned laws must be remedied.

Footnotes

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1 *Canadian Charter of Rights and Freedoms, s. 12*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("*Charter*").

2 *R. v. Kerr* (2013), 305 C.C.C. (3d) 127, 593 W.A.C. 189, 56 M.V.R. (6th) 1, 347 B.C.A.C. 189, 2013 CarswellBC 3546, [2013] B.C.J. No. 2565, 2013 BCCA 506, 110 W.C.B. (2d) 375 (B.C. C.A.), at para. 37 ("*Kerr*"). This approach was endorsed by the British Columbia Court of Appeal again in *R. v. Lilgert* (2014), 318 C.C.C. (3d) 30, 16 C.R. (7th) 346, 627 W.A.C. 95, 72 M.V.R. (6th) 23, 365 B.C.A.C. 95, 2014 CarswellBC 3783, [2014] B.C.J. No. 3101, 2014 BCCA 493, 119 W.C.B. (2d) 2 (B.C. C.A.), at para. 48, leave to appeal refused 2015 CarswellBC 1285, 2015 CarswellBC 1286 (S.C.C.) ("*Lilgert_C.A.*"), leave to appeal to the Supreme Court of Canada sought and under reserve. The authors were co-counsel along with Glen Orris, Q.C. in *Lilgert*. See *contra R. v. Tayfel* (2009), 250 C.C.C. (3d) 219, 72 C.R. (6th) 45, [2010] 1 W.W.R. 600, 466 W.A.C. 300, 88 M.V.R. (5th) 1, 245 Man. R. (2d) 300, 2009 CarswellMan 563, 2009 MBCA 124, 86 W.C.B. (2d) 129 (Man. C.A.), at paras. 82-90, leave to appeal refused (2010), 416 N.R. 386 (note), 520 W.A.C. 318 (note), 268 Man. R. (2d) 318 (note), 2010 CarswellMan 684, 2010 CarswellMan 685, [2010] S.C.C.A. No. 241 (S.C.C.) ("*Tayfel*").

3 *R. v. F. (J.)*, [2008] 3 S.C.R. 215, 236 C.C.C. (3d) 421, 60 C.R. (6th) 205, 299 D.L.R. (4th) 42, 242 O.A.C. 338, 380 N.R. 325, 2008 CarswellOnt 6339, 2008 CarswellOnt 6340, [2008] S.C.J. No. 62, 2008 SCC 60, 79 W.C.B. (2d) 894 (S.C.C.), at paras. 2, 8-11 ("*F. (J.)*").

4 See text *infra*, at pp. 10-20 especially 19-20. The authors applied to have these constitutional questions stated and considered in *Lilgert* for the first time at the British Columbia Court of Appeal. The Court refused to consider the constitutional questions raised: *Lilgert_C.A.*, *supra*, footnote 2, at paras. 7-22.

5 *Criminal Code*, R.S.C. 1985, c. C-46, s. 220(b) (*"Criminal Code"*).

6 *Ibid.*, at s. 222(1).

7 *Ibid.*, at s. 222(4).

8 *Ibid.*, at s. 234.

9 *Ibid.*, at s. 220.

10 *Ibid.*, at s. 229.

11 *Ibid.*, at s. 233.

12 For a similar discussion of the *Criminal Code* manslaughter provisions see Larry C. Wilson, "*Beatty, J.F.*, and the Law of Manslaughter" (2009-2010), 47 Alta. L. Rev. 651, at p. 652 ("Wilson").

13 *Criminal Code*, *supra*, footnote 5, at s. 222(5)(b).

14 *Ibid.*, at s. 220.

15 Wilson, *supra*, footnote 12, at p. 656 citing *R. v. Morrisey*, [2000] 2 S.C.R. 90, 148 C.C.C. (3d) 1, 36 C.R. (5th) 85, 191 D.L.R. (4th) 86, 585 A.P.R. 1, 259 N.R. 95, 187 N.S.R. (2d) 1, 77 C.R.R. (2d) 259, 2000 CarswellNS 255, 2000 CarswellNS 256, REJB 2000-20235, [2000] S.C.J. No. 39, 2000 SCC 39, 47 W.C.B. (2d) 231 (S.C.C.), at para. 61 ("*Morrisey*").

16 *Ibid.*, at pp. 656 and 652.

17 *PHS Community Services Society v. Canada (Attorney General)*, (*sub nom. Canada (Attorney General) v. PHS Community Services Society*) [2011] 3 S.C.R. 134, 272 C.C.C. (3d) 428, 86 C.R. (6th) 223, 336 D.L.R. (4th) 385, [2011] 12 W.W.R. 43, 22 B.C.L.R. (5th) 213, 421 N.R. 1, 526 W.A.C. 1, 310 B.C.A.C. 1, 244 C.R.R. (2d) 209, 2011 CarswellBC 2443, 2011 CarswellBC 2444, [2011] A.C.S. No. 44, [2011] S.C.J. No. 44, 2011 SCC 44, 205 A.C.W.S. (3d) 673, 96 W.C.B. (2d) 322 (S.C.C.), at para. 84.

18 *R. c. Vaillancourt*, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289, 47 D.L.R. (4th) 399, 209 A.P.R. 281, 81 N.R. 115, 68 Nfld. & P.E.I.R. 281, (*sub nom. Vallaincourt v. R.*) 32 C.R.R. 18, 10 Q.A.C. 161, 1987 CarswellQue 18, 1987 CarswellQue 98, [1987] S.C.J. No. 83 (S.C.C.), at para. 27 ("*Vaillancourt*").

19 In a crime of absolute liability, a person may be guilty even with no intention to commit a crime.

20 *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)* (1985), [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, 48 C.R. (3d) 289, 24 D.L.R. (4th) 536, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 36 M.V.R. 240, 18 C.R.R. 30, [1986] D.L.Q. 90, 1985 CarswellBC 398, 1985 CarswellBC 816, [1985] S.C.J. No. 73 (S.C.C.), at paras. 12, 72-75.

21 The difference between *strict* and *absolute* liability is whether the defence of a *mistake of fact* is available: in a crime of *absolute liability*, a mistake of fact is not a defence.

22 Peter W. Hogg, *Constitutional Law of Canada,* loose-leaf, 5th ed. (consulted on 23 April 2015) (Toronto: Thomson Reuters Canada Limited, 2007), ("Hogg") ch. 47, at p. 47-35.

23 *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 67 C.C.C. (3d) 193, 8 C.R. (4th) 145, 84 D.L.R. (4th) 161, 4 O.R. (3d) 799 (note), 49 O.A.C. 161, 38 C.P.R. (3d) 451, 130 N.R. 1, 7 C.R.R. (2d) 36, 1991 CarswellOnt 117, 1991 CarswellOnt 1029, EYB 1991-67633, [1991] S.C.J. No. 79, 30 A.C.W.S. (3d) 660, 14 W.C.B. (2d) 208 (S.C.C.), at paras. 184, 211-13, 217.

24 *Vaillancourt*, *supra*, footnote 18, at para. 31.

25 *R. v. F. (J.)*, *supra*, footnote 3, at paras. 2, 8-11 ("*F. (J.)*").

26 *Kerr*, *supra*, footnote 2, at para. 37; *Lilgert_C.A.*, *supra*, footnote 2, at para. 48; see *contra Tayfel*, *supra*, footnote 2, at paras. 82-90.

27 *Canada v. Pharmaceutical Society (Nova Scotia)*, (*sub nom. R. v. Nova Scotia Pharmaceutical Society*) [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289, 15 C.R. (4th) 1, 93 D.L.R. (4th) 36, 313 A.P.R. 91, 43 C.P.R. (3d) 1, (*sub nom. R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 139 N.R. 241, 114 N.S.R. (2d) 91, 10 C.R.R. (2d) 34, 1992 CarswellNS 15, 1992 CarswellNS 353, EYB 1992-67391, [1992] S.C.J. No. 67, 34 A.C.W.S. (3d) 1092, 16 W.C.B. (2d) 460 (S.C.C.), at para. 63 ("*NS Pharmaceutical*"); see also *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, (*sub nom. Canadian Foundation for Children v. Canada*) [2004] 1 S.C.R. 76, 180 C.C.C. (3d) 353, 16 C.R. (6th) 203, 234 D.L.R. (4th) 257, 70 O.R. (3d) 94 (note), 183 O.A.C. 1, 46 R.F.L. (5th) 1, 315 N.R. 201, 115 C.R.R. (2d) 88, 2004 CarswellOnt 252, 2004 CarswellOnt 253, REJB 2004-53164, [2004] S.C.J. No. 6, 2004 SCC 4, 60 W.C.B. (2d) 81 (S.C.C.), at para. 16.

28 *R. v. Canadian Pacific Ltd.*, (*sub nom. Ontario v. Canadian Pacific Ltd.*) [1995] 2 S.C.R. 1031, 99 C.C.C. (3d) 97, 41 C.R. (4th) 147, 125 D.L.R. (4th) 385, 24 O.R. (3d) 454 (note), 82 O.A.C. 243, 17 C.E.L.R. (N.S.) 129, 183 N.R. 325, 30 C.R.R. (2d) 252, 1995 CarswellOnt 968, 1995 CarswellOnt 532, EYB 1995-67436, [1995] S.C.J. No. 62, 27 W.C.B. (2d) 485 (S.C.C.), at para. 79.

29 *Canada v. Pharmaceutical Society (Nova Scotia)*, *supra*, footnote 27, at p. 632.

30 *R. c. Morales*, [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91, 17 C.R. (4th) 74, 144 N.R. 176, 12 C.R.R. (2d) 31, 51 Q.A.C. 161, 1992 CarswellQue 18, 1992 CarswellQue 121, EYB 1992-67825, [1992] S.C.J. No. 98, 17 W.C.B. (2d) 580 (S.C.C.), at para. 21 ("*Morales*").

31 *Ibid.*, at paras. 24-25.

32 *R. v. Tutton*, [1989] 1 S.C.R. 1392, 48 C.C.C. (3d) 129, 69 C.R. (3d) 289, 35 O.A.C. 1, 98 N.R. 19, 13 M.V.R. (2d) 161, 1989 CarswellOnt 84, 1989 CarswellOnt 959, EYB 1989-67453, 7 W.C.B. (2d) 304 (S.C.C.), at para. 9 ("*Tutton*"); see also *R. v. Anderson*, [1990] 1 S.C.R. 265, 53 C.C.C. (3d) 481, 75 C.R. (3d) 50, [1990] 2 W.W.R. 481, 105 N.R. 143, 19 M.V.R. (2d) 161, 64 Man. R. (2d) 161, 1990 CarswellMan 190, 1990 CarswellMan 375, EYB 1990-67179, [1990] S.C.J. No. 14, 9 W.C.B. (2d) 237 (S.C.C.), at para. 10; *Tayfel*, *supra*, footnote 2, at para. 70, leave to appeal refused (2010), 416 N.R. 386 (note), 520 W.A.C. 318 (note), 268 Man. R. (2d) 318 (note), 2010 CarswellMan 684, 2010 CarswellMan 685, [2010] S.C.C.A. No. 241 (S.C.C.).

33 Wilson, *supra*, footnote 12, at p. 655.

34 *Tayfel*, *supra*, footnote 2, at para. 86, see also paras. 82-90.

35 *Kerr*, *supra*, footnote 2, at para. 37; *Lilgert_C.A.*, *supra*, footnote 2, at para. 48.

36 *Criminal Code*, *supra*, footnote 5, at s. 219.

37 *Ibid.*, at s. 220.

38 *Vaillancourt*, *supra*, footnote 19, at paras. 27-28.

39 *Ibid.*, at paras. 27-28.

40 *R. v. Martineau*, [1990] 2 S.C.R. 633, 58 C.C.C. (3d) 353, 79 C.R. (3d) 129, [1990] 6 W.W.R. 97, 109 A.R. 321, 76 Alta. L.R. (2d) 1, 112 N.R. 83, 50 C.R.R. 110, 1990 CarswellAlta 143, 1990 CarswellAlta 657, EYB 1990-66938, [1990] S.C.J. No. 84, 11 W.C.B. (2d) 3 (S.C.C.) ("*Martineau*"); see also *R. v. Sit*, [1991] 3 S.C.R. 124, 66 C.C.C. (3d) 449, 9 C.R. (4th) 126, 50 O.A.C. 81, 130 N.R. 241, 8 C.R.R. (2d) 317, 1991 CarswellOnt 1027, 1991 CarswellOnt 120, EYB 1991-67631, [1991] S.C.J. No. 72, 14 W.C.B. (2d) 65 (S.C.C.).

41 *R. v. Logan*, [1990] 2 S.C.R. 731, 58 C.C.C. (3d) 391, 79 C.R. (3d) 169, 73 D.L.R. (4th) 40, 74 O.R. (2d) 644 (note), 41 O.A.C. 330, 112 N.R. 144, 50 C.R.R. 152, 1990 CarswellOnt 1002, 1990 CarswellOnt 110, EYB 1990-67560, [1990] S.C.J. No. 89, 11 W.C.B. (2d) 4 (S.C.C.).

42 *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 28 C.R. (4th) 265, 112 D.L.R. (4th) 513, 70 O.A.C. 241, 165 N.R. 1, 20 C.R.R. (2d) 1, 1994 CarswellOnt 61, 1994 CarswellOnt 1154, EYB 1993-67654, [1994] S.C.J. No. 26, 23 W.C.B. (2d) 3 (S.C.C.), reconsideration / rehearing refused (June 23, 1994), Doc. 23023, 23097 (S.C.C.).

43 *R. v. H. (A.D.)* (2013), [2013] 2 S.C.R. 269, 295 C.C.C. (3d) 376, 2 C.R. (7th) 1, 358 D.L.R. (4th) 1, [2013] 7 W.W.R. 25, 444 N.R. 293, 575 W.A.C. 210, 414 Sask. R. 210, 2013 CarswellSask 304, 2013 CarswellSask 305, EYB 2013-221977, [2013] S.C.J. No. 28, 2013 SCC 28, 106 W.C.B. (2d) 640 (S.C.C.), at para. 56 ("*H. (A.D.)*").

44 *Criminal Code*, *supra*, footnote 5, at s. 219.

45 *R. v. Naglik*, [1993] 3 S.C.R. 122, 83 C.C.C. (3d) 526, 23 C.R. (4th) 335, 105 D.L.R. (4th) 712, 65 O.A.C. 161, 157 N.R. 161, 17 C.R.R. (2d) 58, 1993 CarswellOnt 990, 1993 CarswellOnt 116, EYB 1993-67523, [1993] S.C.J. No. 92, 20 W.C.B. (2d) 440 (S.C.C.) ("*Naglik*").

46 *Ibid.*, at para. 33.

47 *Ibid.*, at para. 40.

48 *Ibid.*, at para. 41.

49 *Ibid.*, at para. 42.

50 *H. (A.D.)*, *supra*, footnote 43, at para. 68.

51 In criminal negligence, the Crown is bound to prove that the accused's act or omission represented "a marked *and* substantial departure" (as opposed to merely a marked departure for failure to provide the necessaries of life): *F. (J.)*, *supra*, footnote 25, at paras. 13, 89.

52 *H. (A.D.)*, *supra*, footnote 43, at para. 58.

53 *R. v. Finlay*, [1993] 3 S.C.R. 103, 83 C.C.C. (3d) 513, 23 C.R. (4th) 321, 105 D.L.R. (4th) 699, [1993] 7 W.W.R. 513, 156 N.R. 374, 52 W.A.C. 241, 17 C.R.R. (2d) 46, 113 Sask. R. 241, 1993 CarswellSask 348, 1993 CarswellSask 470, EYB 1993-67951, [1993] S.C.J. No. 89, 20 W.C.B. (2d) 425 (S.C.C.) ("*Finlay*").

54 *Ibid.*, at para. 29; *R. c. Gosset*, [1993] 3 S.C.R. 76, 83 C.C.C. (3d) 494, 23 C.R. (4th) 280, 105 D.L.R. (4th) 681, 157 N.R. 195, 17 C.R.R. (2d) 77, 57 Q.A.C. 130, 1993 CarswellQue 16, 1993 CarswellQue 2047, EYB 1993-67880, [1993] S.C.J. No. 88, 20 W.C.B. (2d) 445 (S.C.C.), at paras. 31-44 ("*Gosset*").

55 *Finlay*, *supra*, footnote 53, at para. 32.

56 *Ibid.*, at paras. 37-38.

57 *Ibid.*, at para. 24.

58 In criminal negligence, the Crown is bound to prove that the accused's act or omission represented "a marked *and* substantial departure" (as opposed to merely a marked departure for careless handling of a fire arm). For analogous reasoning see *F. (J.)*, *supra*, footnote 25, at paras. 13, 89.

59 *H. (A.D)*, *supra*, footnote 43, at para. 57.

60 *R. v. Hundal*, [1993] 1 S.C.R. 867, 79 C.C.C. (3d) 97, 19 C.R. (4th) 169, 149 N.R. 189, 38 W.A.C. 241, 43 M.V.R. (2d) 169, 22 B.C.A.C. 241, 14 C.R.R. (2d) 19, 1993 CarswellBC 489, 1993 CarswellBC 1255, EYB 1993-67097, [1993] S.C.J. No. 29, 19 W.C.B. (2d) 82 (S.C.C.) ("*Hundal*").

61 *R. v. Beatty*, [2008] 1 S.C.R. 49, 228 C.C.C. (3d) 225, 54 C.R. (6th) 1, 289 D.L.R. (4th) 577, [2008] 5 W.W.R. 1, 76 B.C.L.R. (4th) 201, 371 N.R. 119, 420 W.A.C. 7, 57 M.V.R. (5th) 1, 251 B.C.A.C. 7, 179 C.R.R. (2d) 247, 2008 CarswellBC 307, 2008 CarswellBC 308, [2008] A.C.S. No. 5, [2008] S.C.J. No. 5, 2008 SCC 5, 76 W.C.B. (2d) 609 (S.C.C.).

62 *R. v. Roy*, [2012] 2 S.C.R. 60, 281 C.C.C. (3d) 433, 93 C.R. (6th) 1, 345 D.L.R. (4th) 193, 430 N.R. 201, 547 W.A.C. 112, 28 M.V.R. (6th) 1, 321 B.C.A.C. 112, 259 C.R.R. (2d) 361, 2012 CarswellBC 1573, 2012 CarswellBC 1574, [2012] S.C.J. No. 26, 2012 SCC 26, 100 W.C.B. (2d) 695 (S.C.C.).

63 For *e.g.*, in each of the following cases the accused was convicted of criminal negligence causing death: *R. v. Metron Construction Corp.* (2013), 300 C.C.C. (3d) 212, 309 O.A.C. 355, 2013 CarswellOnt 12217, [2013] O.J. No. 3909, 2013 ONCA 541, 109 W.C.B. (2d) 95 (Ont. C.A.), the deaths of six people from a swing stage collapse; in *R. v. McDonald* (2013), 568 W.A.C. 317, 409 Sask. R. 317, 2013 CarswellSask 210, [2013] S.J. No. 193, 2013 SKCA 38, 106 W.C.B. (2d) 484 (Sask. C.A.), the death of a sick baby who the accused had failed to take to the doctor; in *R. v. Pauchay* (2009), 64 C.R. (6th) 91, [2009] 2 C.N.L.R. 314, 333 Sask. R. 167, 2009 CarswellSask 137, [2009] S.J. No. 128, 2009 SKPC 35, 83 W.C.B. (2d) 294 (Sask. Prov. Ct.), the death of two children from exposure to the elements; *R. v. Medeiros* (2002), 163 O.A.C. 46, 2002 CarswellOnt 2884, [2002] O.J. No. 3396, 55 W.C.B. (2d) 151 (Ont. C.A.) the death of a child left in the care of a 10 year old. In each of the following cases the accused was convicted of criminal negligence causing bodily harm: *R. v. Cripps*, 2006 CarswellOnt 1731, [2006] O.J. No. 1042, 69 W.C.B. (2d) 39 (Ont. S.C.J.) shooting a pellet rifle at a broken bottle and accidentally striking a passerby.

64 *R. c. Landreville* (1994), 91 C.C.C. (3d) 274, [1994] R.J.Q. 925, 4 M.V.R. (3d) 242, 63 Q.A.C. 305, 1994 CarswellQue 1, 1994 CarswellQue 2485, 24 W.C.B. (2d) 57 (C.A. Que.); *R. c. Champagne* (1995), 44 C.R. (4th) 341, 21 M.V.R. (3d) 150, 1995 CarswellOnt 958, 29 W.C.B. (2d) 460 (Ont. Gen. Div.). The two offences have different penalties (14 years vs. life imprisonment) and a different fault element (marked departure vs. marked and substantial departure). Further dangerous driving is an included offence, under s. 662(5) of the *Criminal Code*, *supra*, footnote 5, where a count charges criminal negligence and the evidence does not prove such offence.

65 *Hundal*, *supra*, footnote 60, at para. 11.

66 *Kerr*, *supra*, footnote 2, at paras. 24-25; *H. (A.D.)*, *supra*, footnote 43, at para. 61.

67 *Vaillancourt*, *supra*, footnote 18, at para. 27 (emphasis added).

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*, at para. 28.

71 The majority noted that because the provision substituted proof beyond a reasonable doubt of other elements for proof of objective foresight of death, it offended the rule against selfincrimination. And of course the Court, in *Martineau*, *supra*, footnote 40, resolved that fundamental justice required subjective *mens rea* of the result for murder: *Martineau*, *supra*, footnote 41, at paras. 11-12. In *R. v. Nelson* (1990), 54 C.C.C. (3d) 285, 75 C.R. (3d) 70, 38 O.A.C. 17, 21 M.V.R. (2d) 245, 44 C.R.R. 193, 1990 CarswellOnt 79, [1990] O.J. No. 139, 9 W.C.B. (2d) 719 (Ont. C.A.), the Court rejected that the principles of fundamental justice required subjective *mens rea* for the offence of criminal negligence in the operation of a motor vehicle. That decision is not binding and is not even persuasive authority for this case.

72 *H. (A.D.)*, *supra*, footnote 43, at para. 59.

73 *R. v. DeSousa*, [1992] 2 S.C.R. 944, 76 C.C.C. (3d) 124, 15 C.R. (4th) 66, 95 D.L.R. (4th) 595, 9 O.R. (3d) 544 (note), 56 O.A.C. 109, 142 N.R. 1, 11 C.R.R. (2d) 193, 1992 CarswellOnt 1006F, 1992 CarswellOnt 100, EYB 1992-67573, [1992] A.C.S. No. 77, [1992] S.C.J. No. 77, 17 W.C.B. (2d) 215 (S.C.C.) ("*DeSousa*").

74 *Ibid.,* at p. 946.

75 Similarly in *Canada v. Pharmaceutical Society (Nova Scotia)*, *supra*, footnote 27, at paras. 117-22, the Supreme Court of Canada rejected a constitutional challenge to the *Competition Act* offence of conspiring to lessen competition unduly. In doing so, the Court noted that the challenged provision had both a subjective mental element (the accused had to enter into an agreement) and an objective element (the accused knew or ought to have known the agreement would lessen competition).

76 *R. v. Creighton*, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189, 105 D.L.R. (4th) 632, 65 O.A.C. 321, 157 N.R. 1, 17 C.R.R. (2d) 1, 1993 CarswellOnt 115, 1993 CarswellOnt 989, EYB 1993-67521, [1993] S.C.J. No. 91, 20 W.C.B. (2d) 435 (S.C.C.), at para. 30 ("*Creighton*").

77 *Ibid.*, at paras. 24-28.

78 The offence of criminal negligence causing death is a more serious offence, signifying more blameworthy conduct, than the offence of manslaughter by other objective *mens rea* unlawful acts and thus requires a more stringent level of *mens rea*: *F. (J.)*, *supra*, footnote 25, at paras. 13, 89. It should also be noted that *F. (J.)* was a manslaughter by criminal negligence case and did not raise the constitutional validity of the *mens rea* requirement.

79 *Gosset*, *supra*, footnote 54, at para. 20.

80 Dangerous operation of motor vehicles *simpliciter* is an offence under s. 249(1) and (2) of the *Criminal Code*. Dangerous operation of a motor vehicle causing death is culpable homicide under s. 222(5)(a) of the *Criminal Code* and also prohibited by s. 249(3) and (4) of the *Criminal Code*.

81 *Hundal*, *supra*, footnote 60, at para. 25.

82 *Ibid.*, at para. 43.

83 But see *Ibid.*, at paras. 31 and 38. The Court applies an objective standard to foresight of consequences.

84 *Creighton*, *supra*, footnote 76, at para. 27.

85 Concerns which in light of the Supreme Court of Canada's recent judgment in *Bedford v. Canada (Attorney General)*, (*sub nom. Canada (Attorney General) v. Bedford*) [2013] 3 S.C.R. 1101, 303 C.C.C. (3d) 146, 7 C.R. (7th) 1, 366 D.L.R. (4th) 237, 128 O.R. (3d) 385 (note), 312 O.A.C. 53, 452 N.R. 1, 297 C.R.R. (2d) 334, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, [2013] S.C.J. No. 72, 2013 SCC 72, 110 W.C.B. (2d) 753 (S.C.C.) are likely better addressed under s. 1 of the Charter rather than within the s. 7 analysis.

86 *Hundal*, *supra*, footnote 60, at paras. 30-31.

87 *Ibid.*, at paras. 32-33.

88 *Ibid.*, at paras. 36-37.

89 *Tutton*, *supra*, footnote 32, at para. 51.

90 *Ibid.*, at para. 29.

91 *R. v. F. (J.)*, *supra*, footnote 25, at para. 9.

92 *Creighton*, *supra*, footnote 76, at paras. 55-56.

93 *Eaton v. Brant (County) Board of Education* (1996), [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385, 31 O.R. (3d) 574 (note), (*sub nom. Eaton v. Board of Education of Brant County*) 97 O.A.C. 161, 207 N.R. 171, 41 C.R.R. (2d) 240, 1996 CarswellOnt 5035, 1996 CarswellOnt 5036, [1996] S.C.J. No. 98, 68 A.C.W.S. (3d) 863 (S.C.C.), at paras. 44-55. The Court left open whether the Attorney General's consent or *de facto* notice which is equivalent to written notice might leave room for a court to consider the constitutional issue.

94 *Ibid.*, at para. 21.

95 *Ibid.*, at para. 22.

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*, at paras. 22-23.

99 *Kerr*, *supra*, footnote 2.

100 *Tayfel*, *supra*, footnote 2.

101 *Tutton*, *supra*, footnote 32, at para. 6.

102 *Ibid.*, at para. 6.

103 *H. (A.D.)*, *supra*, footnote 43, at paras. 23-29.

104 Hogg, *supra*, footnote 22, ch. 47, at p. 47-42.

105 *Criminal Code*, *supra*, footnote 5, at s. 334(a).

106 We are not aware of any case of criminal negligence that has led to the sentence of life imprisonment.

107 *Criminal Code*, *supra*, footnote 5, at s. 219.

108 *Ibid.*, at s. 220.

109 *R. v. Curragh Inc.* (1993), 25 C.R. (4th) 377, (*sub nom. R. v. Curragh Inc. (No. 2)*) 349 A.P.R. 185, 125 N.S.R. (2d) 185, 1993 CarswellNS 20, [1993] N.S.J. No. 401, 22 W.C.B. (2d) 55 (N.S. Prov. Ct.), reversed on other grounds [1997] 1 S.C.R. 537, 113 C.C.C. (3d) 481, 5 C.R. (5th) 291, 144 D.L.R. (4th) 614, 468 A.P.R. 1, 209 N.R. 252, 159 N.S.R. (2d) 1, 1997 CarswellNS 88, 1997 CarswellNS 89, [1997] S.C.J. No. 33, 34 W.C.B. (2d) 17 (S.C.C.).

110 Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault" (2001), 61 Univ. of Toronto L.J. 545, at p. 548 see also pp. 570-572, 574-576.

111 *R. v. Waite*, [1989] 1 S.C.R. 1436, 48 C.C.C. (3d) 1, 69 C.R. (3d) 323, 35 O.A.C. 51, 98 N.R. 69, 13 M.V.R. (2d) 236, 1989 CarswellOnt 85, 1989 CarswellOnt 960, EYB 1989-67455, [1989] S.C.J. No. 61, 7 W.C.B. (2d) 330 (S.C.C.).

112 *Ibid.*, at p. 1443.

113 *Ibid.*, at p. 1438.

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