CAPITAL MURDER—WHETHER MURDER "PLANNED AND DELIBERATE"—WEIGHT TO BE ATTACHED TO EXPERT MEDICAL EVIDENCE—WHETHER SUBSTANTIAL WRONG OR MISCARRIAGE OF JUSTICE

In *More* v. *The Queen*,[1] a recent case in the Supreme Court of Canada, the accused was charged with capital murder pursuant to s. 202A(2) (*a*) of the Criminal Code (as enacted by 1960-61 (Can.), c. 44, s. 1). This section states:

> 202A . . . (2) Murder is capital murder, in respect of every person, where
> (*a*) it is planned and deliberate on the part of such person . . .

The accused had shot his wife with a rifle while she was sleeping. There was no evidence of matrimonial discord between the accused and his wife at any time, but he had attempted to start a business of his own which proved very unsuccessful. At the time of the shooting he was being hard pressed by creditors for payment of a large number of debts he had accumulated and was also under a great deal of tension. There was other evidence at the trial including, *inter alia*, several documents the accused had written before and after the crime, an attempt to purchase a revolver, and his purchase of the rifle. However this evidence was not referred to by the majority in their judgment, as their decision arose out of the following "incidents", which took place at the trial.

At the trial two psychiatrists were called upon to give evidence concerning the accused's mental condition at the time of the shooting. One of them, who had been practising in the field of neurology and psychiatry since 1931 and who recently retired as Associate Professor of Medicine in the University of Manitoba, expressed his opinion in the following words:

> I formed the opinion that on the 27th day of September 1962 he [the accused] was suffering from an abnormal state of mind, which is referred to as a depressive psychosis, in which the symptoms are severe depression, hopelessness, inability to sleep, loss of appetite, loss of weight, and impairment of volition—that is to say, impairment of ability to decide even inconsequential things, inability to make up a decision in a normal kind of a way. In this state, a person is so hopeless, their feelings are so hopeless, that their judgment becomes distorted, and their thinking confused.[2]

The other psychiatrist, an Assistant Medical Superintendent of the Psychiatric Institute of Winnipeg and a lecturer in psychiatry at the University there, expressed his opinion as follows:

> . . . I formed the opinion that he had during the course of last year . . . suffered from symptoms of depression, and that towards the end of the period in question . . . his condition deteriorated very markedly, so that the depression deepened and became a severe depression with great feelings of despair and despondency and hopelessness; and he suffered from brooding preoccupation which interfered with his ability to work, to reason, to think, and that at the time of the alleged offence, this condition very probably was one which in medical terms is called a 'psychosis', which is a major mental illness.[3]

It should be pointed out that the psychiatrist last-quoted above originally entered the case at the instance of the Crown, and not the accused.

1 [1963] S.C.R. 522; 41 C.R. 98.
2 *Id.*, at 111 (C.R.), 537 (S.C.R.).
3 *Ibid.*

In his charge to the jury the trial judge, when dealing with this expert evidence, read extracts from *Phipson on Evidence, Taylor on Evidence,* and Lord Campbell's decision in the *Tracy Peerage* case to the effect that expert testimony was to be given slight weight. From *Phipson on Evidence,* 10th ed., para. 1286, he quoted:

> "The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as overready to regard harmless facts as confirmation of preconceived theories . . . "

From *Taylor on Evidence,* 12th ed., p. 59, he quoted:

> "Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses . . . it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them."

The trial judge also read to the jury an excerpt from a judgment of Lord Campbell in the *Tracy Peerage* case,[4] which had been quoted by Taylor. It read:

> "Skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence."

The trial judge did qualify these quotations by prefacing them with the following statement:

> ". . . The evidence of the medical doctors, which includes psychiatrists, like any other expert who appears to give evidence in court, is on exactly the same footing as all other witnesses. You may accept his evidence in whole or in part. You may accept or reject the whole of his or their evidence, or you may accept part of it and reject the balance. In other words, you are judges of the facts."[5]

A similar statement was made following the above quotations.

As a result of this direction to the jury and the evidence presented at the trial, the jury found the accused guilty of capital murder. On the subsequent appeal to the Manitoba Court of Appeal the conviction was sustained.[6] Even though the Court held that there had been misdirection in the charge to the jury, the majority came to the conclusion that there was "no substantial wrong or miscarriage of justice". Freedman, J. A. dissented on the ground that the expert evidence was of major importance on the issue whether the murder was "planned and deliberate", and he would have substituted a verdict of non-capital murder for that of capital murder. In the report of the Court of Appeal's decision it was extremely difficult to determine what the actual disposition of the appeal was, and it was not until the appeal to the Supreme Court of Canada was reported[7] that this could be determined.

The ground of the appeal to the Supreme Court of Canada was that the trial judge had so misdirected the jury as to the weight to be attached to the medical evidence called by the defence that the accused was not properly convicted of capital murder. At no time did the accused allege that he was legally insane, and the medical evidence was called solely to show that the shooting was not "deliberate". The importance of this will become evident when the dissenting judgment is considered. The majority of the Supreme Court held that the unwarranted disparagement

4 (H.L. Ctee. of Privileges 1843) 10 Cl. & Fin. 154, 191; 8 E.R. 700 at 715. Taylor's quotation is somewhat free, though accurate in substance.
5 *Regina* v. *More* (1963) 43 W.W.R. 30 at 33.
6 *Ibid.*
7 *Supra,* n. 1.

of this relevant medical evidence resulted in its never really being considered by the jury and thus it could be said that there was a "substantial wrong or miscarriage of justice". The case was sent back for a new trial as the court did not think it proper to substitute a verdict of non-capital murder because of the withdrawal of this evidence from the jury—virtually a withdrawal of the whole defence.

Before going on to consider the specific issue of expert evidence arising from this case it is of importance to note the different interpretations placed upon s. 202A(2) (*a*) by the majority and dissenting judges. It is submitted that the difference of opinion on this matter led to the difference of opinion on the importance of the direction to the jury and the ultimate disposition of the appeal. Cartwright, J. states in his judgment (Abbott, Ritchie and Hall J.J. concurring; Judson, J. agreeing) that:

> ". . . the defence of insanity having been expressly disclaimed, there were really only two questions for the jury. The first was whether the appellant meant to cause the death of his wife; if this was answered in the affirmative he was guilty of murder. The second, which arises under s. 202A(2) (*a*) of the *Criminal Code*, was whether this murder was planned and deliberate on his part; if this was answered in the affirmative he was guilty of capital murder."[8]

He then goes on to say that even if the evidence indicated that the murder was planned the accused could be found guilty of capital murder only if the jury were satisfied beyond a reasonable doubt that it was also deliberate, which as used in s. 202A(2) (*a*) means "considered not impulsive". The word "deliberate" does not simply mean intentional, but is an additional ingredient to be proved as a condition for conviction of capital murder. Therefore, since the evidence and facts of the defence, as to the events that happened at the moment of discharging the rifle, show that the jury could consider that the pulling of the trigger was impulsive rather than deliberate as defined above, the expert testimony became very important. As Cartwright, J. concludes:

> "The evidence of the two doctors . . . importance is that it would assist the jury in deciding the question whether the accused's action in pulling the trigger, which so far as this branch of the matter is concerned was admittedly the intentional act of a sane man, was also his deliberate act. This question is one of fact and its solution involves an inquiry as to the thinking of the accused at the moment of acting. If the jury accepted the evidence of the doctors it, in conjunction with the accused's own evidence, might well cause them to regard it as more probable that the accused's final act was prompted by sudden impulse rather than by consideration. On this question the accused was entitled to have the verdict of a properly instructed jury."[9]

Fauteux, J. in his dissenting judgment (Taschereau, J. concurring) differs radically from the majority in the interpretation of s. 202A, and specifically in regard to the meaning and effect of the word "deliberate". He relates this word to a time element and nothing more. He then states that Parliament did not intend to introduce "a new and secondary test of legal responsibility".[10] He then contends that to consider "deliberate" as being an additional ingredient for a charge of capital murder would be to alter the law of legal responsibility and the operation of s. 16 of the Criminal Code. Once he reached this conclusion, that the "impairment of mental capacity short of insanity was not a defence to the crime charged"[11]—capital murder, it followed that there was "no

8 *Id.*, at 108 (C.R.), 533 (S.C.R.).
9 *Id.*, at 109 (C.R.), 534-35 (S.C.R.).
10 *Id.*, at 106 (C.R.), 531 (S.C.R.)
11 *Id.*, at 107 (C.R.), 533 (S.C.R.).

substantial wrong or miscarriage of justice" resulting from the direction to the jury for the defence had specifically disclaimed legal insanity.

It is submitted that the view of the minority is clearly erroneous, and a strange interpretation of the recent addition to the Criminal Code. Parliament did not intend to establish "a new and secondary test of legal responsibility", but they intended to—and did—establish two kinds (more accurately categories) of murder: "capital and non-capital". As Cartwright, J. stated, "the enactment of s. 202A(2) (*a*) . . . has in no way affected the interpretation or application of s. 16."[12] Further, how it could be contended that its enactment changed the test of legal insanity in any case seems difficult to comprehend. Legal insanity is still a defence to murder, into whatever category the murder falls, and the test applicable has not been changed. It would seem that possibly the only reasonable difference of opinion could arise over the meaning of "deliberate" in the subsection. The majority definition seems to be the most logical and reasonable. The other interpretation would seem to relegate it merely to a position clarifying the element of time, and in this respect it would seem to be mere verbiage. Parliament did alter the law by this amendment, but not in the way Fauteux, J. contended. Murder in all cases must still be the intentional act of a sane person. However, under the circumstances here, as the charge was one of capital murder, an additional element was required—it had to be deliberate.

The view of the majority regarding the importance of the expert testimony is a welcome one, and hopefully it will set a trend for future cases. Judson, J. referring to the specific quotations on expert evidence by the trial judge, states:

> . . . as generalizations, these statements are bad. They could, moreover, have no possible application to the evidence given in this case. All the judges in the Court of Appeal were of the opinion that the medical evidence was relevant and admissible and that there was error in the judge's instruction. In the context in which this instruction was given, the only possible reference is to the evidence of Dr. Adamson and Dr. Thomson and the probable result of this unwarranted disparagement of their evidence was its withdrawal from the jury's serious consideration. On a charge of capital murder, based on an allegation that the killing was planned and deliberate, it was virtually a withdrawal of the whole defence.[13]

He then concludes:

> . . . in these circumstances the Court cannot hold that there was no substantial wrong or miscarriage of justice. I would, however, not substitute a verdict of non-capital murder. This case has never really been considered by the jury on evidence which should have been before it.[14]

The last sentence is very significant. Had there been no medical witnesses called at all, undoubtedly there would have been sufficient evidence to convict the accused of capital murder. In fact the expert evidence made up only a small portion of the totality of the evidence, and the Supreme Court of Canada could well have reached the conclusion that the evidence supported the verdict, even though some had been unwarrantedly disparaged. However they did realize that the quality of evidence is important, and did not look at the mere quantity. Once they reached the conclusion that this important medical evidence, which was relevant, and admissible, had never really been considered by the jury, a new trial was directed without any hesitation.

12 *Id.*, at 109 (C.R.), 534 (S.C.R.).
13 *Id.*, at 112 (C.R.), 538 (S.C.R.).
14 *Ibid.*

R. v. *De Tonnancourt*,[16] another Manitoba case, was relied upon by the Crown in this appeal. There Adamson, C.J. quoted the same passages on appeal as the trial judge here quoted in his charge to the jury. However in that case Adamson, C.J. used those quotations only to emphasize the fact that some of the expert witnesses involved were unreliable, as the reasons for their opinions did not appear to be based on their particular knowledge, but merely on personal convictions. These statements were not intended to apply generally to all expert testimony, as he states:

> "The evidence of an expert witness to be useful should be moderate, fair, and strictly professional."[16]

This was not so in that case. Also, there was other expert testimony presented in more moderate terms upon which the jury could base their decision. There was no question in the case of the withdrawal of relevant and admissible expert evidence from the jury. On the contrary the jury were left free to choose what expert evidence they would rely upon.

The Saskatchewan Court of Appeal in the case of *R.* v. *Schonberger*[17] was faced with the same problem as the Supreme Court of Canada here. In that case the trial judge had also read the previously quoted passage from *Phipson on Evidence* in his charge to the jury. After citing this quotation and noting the cases on which the statement is founded Gordon, J.A. states:

> "It is interesting to note that these cases were decided in the years 1849, 1843 and 1873 respectively. The first two were cases in which sanity was involved, the last was in respect as to how a mine should be worked. Science has developed to an extraordinary degree since these cases were decided.
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> With every respect I think the modern view is set forth in the article 'Evidence' in 7 *CED* (Ont.), 2nd ed., pp. 150-154 ('expert witnesses') in which the cases cited in *Phipson* are not referred to. There the learned author says that in many cases expert evidence is the only guide and in my view this is such a case . . . The guilt of the accused of murder depended upon the evidence of these experts and to weigh it properly the jury must be properly instructed."[18]

This statement by Gordon, J.A. was indeed prophetic, as it would seem to correspond closely to the view of the majority in the case under consideration. There is no indication in the reports that counsel for the present appellant referred to that case on the appeal although he would have been well advised to do so.

Two recent cases in the English Court of Criminal Appeal are instructive in showing how expert evidence in two jury trials for murder was handled. In both cases the defence of diminished responsibility was raised which, if upheld by the jury, would have reduced the charge from capital murder to manslaughter. Also there was no impropriety in the direction to the jury in either case.

In the first case, *R.* v. *Matheson*,[19] three doctors gave evidence to the effect that the accused was of diminished responsibility. At no time were their qualifications questioned, nor was any evidence presented in rebuttal. Despite this expert evidence, actually the only evidence for the defence, the jury rendered a verdict of guilty of capital murder. Lord Goddard, C.J., delivering the judgment of the Court, held that the

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16 (1956) 18 W.W.R. 337.
16 *Id.*, at 342.
17 (1960) 31 W.W.R. 97.
18 *Id.*, at 101.
19 [1958] 2 All E.R. 87.

verdict of the jury was contrary to the uncontested evidence of the experts and had to be set aside. Even though the question of the appellant's abnormality of mind was a question for the jury and not for the medical witnesses to decide, the verdict could not be supported on the evidence which was all contrary to it.

In *R.* v. *Jennion*[20] there was a conflict in the medical evidence. It was held that despite the eminence of the medical men it was still for the jury to determine the issue.

The foregoing cases are not an exhaustive list, but they do serve to illustrate that expert evidence is a valuable asset in a court of law. In its search for the truth a court should use whatever means possible to bring relevant and admissible evidence before it, and then weigh and evaluate it. In this regard a court must realize that conditions change and evidence, which at one time may have been of dubious value, may now be of much greater value. A criticism of the legal system has often been that it lags behind the times, and in many cases it is justified in so doing. However *More* v. *The Queen,* and many of the other cases noted above, show that the Courts are not opposed to changing with the times, especially when it is in the interests of justice to do so.

It may be argued that the above cases do not go far enough, in as much as the jury still is the ultimate judge. To refute this argument one may refer to *R.* v. *Matheson.*[21] *R.* v. *Jennion*[22] may be explained by its peculiar circumstances. Probably the difference illustrated by these cases is not so much one of substance, as one of form and procedure. Many comments have been made on what would be the best procedure to use in bringing expert evidence into court so as to prevent conflict. When a satisfactory system of procedure is adopted many of the disadvantages that some critics contend are inherent in the reception of expert evidence will vanish.

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20 [1962] 1 All E.R. 689.
21 *supra*, n. 19.
22 *supra*, n. 20.