CRIMINAL LAW — HOMICIDE — MENS REA — OBJECTIVE OR SUBJECTIVE TESTS

Regina v. *Ward*[1], a recent decision of the Court of Criminal Appeal, is a most significant case which invites an examination of the position of mens rea in the law of murder.[2] The appellant Ward, who was proved to be a man of sub-normal intelligence, was convicted for murdering the eighteen-month old child of the woman with whom he was cohabiting. The case arose in the following circumstances. One evening the appellant Ward had come home after work, and began to mend the bed, after placing the child on a mattress on the floor in the same room. As he began to hammer the child began to cry. The child's crying aggravated Ward's already nervous state of mind, which was due to tiredness and to ulcer pains. He lost his temper, picked the child up, and shook her "with full force", intending only to quiet her, and not to kill or cause her grievous bodily harm. When he placed the child on the mattress "she dropped forwards and sideways", and her mother, who had been absent only fifteen minutes, returned to find her dead. The couple were in panic and buried the child in a slag heap where it remained about twenty-months before being discovered. In the medical opinion adduced by the prosecution the two fractures in the skull were not in themselves enough to cause death, but death was probably due to asphyxia.

At the trial Pilcher J. directed the jury in these terms:

> If, when he did the act which he did do, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result to the child as a result of what he did do, then, . . . he is guilty of murder. If, on the other hand, he could not as a reasonable man have contemplated that death would result in consequence of what he did, then he is guilty of manslaughter.[3]

The jury returned a verdict of murder, and the appeal was taken on grounds of misdirection as to the proper test to be applied in distinguishing between murder and manslaughter. The appellant's counsel contended that the primary matter to be considered by the jury was the accused's subjective state of mind, and that if the jury should have a reasonable doubt as to the accused's intention to kill or to cause grievous bodily harm, then the verdict should be manslaughter.

Lord Goddard rejected this submission, and lauded the trial judge's direction as "an unimpeachable summing-up, and it is a direction which has been given to one's own knowledge in scores of cases," not one of which, however, does he cite his judgment. The learned Lord Chief Justice substantially disposed of the appeal in one sentence:

> Of course, the test must be applied to all alike, and the only measure that can be brought to bear in these matters is what a reasonable man would or would not contemplate.[4]

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[1] [1956] 1 W.L.R. 423.

[2] This comment deals with the *Ward* case in the light of general principle. A comment by by S. Prevezer in [1956] Crim. L. R. deals with the effect of the *Ward* case in particular aspects of the law.

[3] At p. 425, *supra*.

[4] At p. 423, *supra*.

It is clear from the foregoing that the jury had no opportunity to consider the accused's actual state of mind; it was common ground to both counsel at the trial that the accused was not a reasonable man, and yet regard was had only to what the reasonable man would or would not have contemplated in the circumstances.

It is respectfully submitted that the *Ward* case is a departure from principle and was wrongly decided. There is abundant authority holding that no man should be convicted of murder unless he has a subjective guilty mind, but none of these cases were discussed or even referred to in the *Ward* case. In one of the early cases, *Regina v. Vamplew*[5], decided in 1863, the accused was much closer to having a guilty mind than Ward was in the instant case, yet Pollock C.B. directed the jury to consider the accused's state of mind; the jury did so and found him guilty of manslaughter. The report of the case notes that:

> The Chief Baron said, the crimes of murder and manslaughter were in some instances very difficult of distinction. The distinction which seemed most reasonable consisted in the consciousness that the act done was one which would be likely to cause death. No one, however, could commit murder without that consciousness. The jury must be satisfied before they could find the prisoner guilty, that she was conscious and that her act was deliberate. They must be satisfied that she had arrived at that maturity of intellect which was a necessary condition of the crime charged.

In *Regina v. Bubb*[6], a case where a woman was charged with starving her step-child to death, the jury were directed in these terms:

> And here it becomes necessary to explain what is meant by the expression malicious . . . You will therefore probably consider that the question resolves itself into this—Did the prisoner contemplate by the course she pursued, the death of the child? If she did, and death was caused by the course she pursued, then she is guilty of murder. But if you are not satisfied that she contemplated the death of the child, then although guilty of a culpable neglect of duty, it would amount only to the crime of manslaughter.

Baron Bramwell's direction in *Rex* v. *Horsey*[7] is in the same vein: the accused must have been conscious that his act would cause death or grevious bodily harm in order to have malice aforethought. In all these cases there is no trace of an objective test. It is true that the objective test has been applied in some cases to find malice aforethought. *R.* v. *Whitmarsh*,[8] *R.* v. *Bottomley*[9] and *R.* v. *Lumley*,[10] were cases where the objective test was applied, and the last was before the Court in the *Ward* case. But in every one of these cases the accused persons had performed felonious operations which were fatal, and they could have been convicted of murder had the then existing doctrine of constructive malice been applied. *R.* v. *Rymell*,[11] a 1954 case, may be of support for the instant case, since both the facts of the case and the direction given the jury were very similar. The jury found the accused guilty of murder. However, the Court of Criminal Appeal substituted a verdict of manslaughter on a question of causation. It is submitted that anything that may have been

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[5](1862), 3 F. and F. 520, 176 E.R 234.
[6](1850),4 Cox C.C. 457.
[7](1862), 3 F and F. 287, 176 E.R. 29.
[8]62 J.P. 711.
[9]115 L.T. 88.
[10](1911), 22 Cox C.C. 635.
[11][1954] Crim. L.R. 60.

done in *Rymell* was undone in the same year, in *R.* v. *Lachinsky*.[12] The case involved a homicide done by a man of sub-normal intelligence, and the trial judge directed the jury that "if they were satisfied that, owing to the feeble-mindedness of the accused, he was incapable of forming the intention to cause grievous bodily harm, they must find him guilty of manslaughter." The jury returned a verdict of murder, and the Court of Criminal Appeal composed of Lord Goddard C.J., Byrne and Tucker J.J. approved the direction as "absolutely correct." This case apparently was not before the court in the *Ward* case although Lord Goddard sat on both cases.

In the ordinary case where the accused takes the stand, the jury may accept his evidence, or refuse to believe him. In the latter case they will consider the evidence, and to it they will apply the presumption that every man intends the natural consequences of his act, in order to find his intention. In the instant case, immediately after directing the jury on the objective test, Pilcher J. stated:

> In law a man is presumed to intend the natural consequences of his act, and if he therefore acts in a fashion in which a reasonable man would contemplate that he would do serious injury to the child, and death results, then he is guilty.

It is submitted that this sentence together with the previous one giving the objective test (quoted *supra*) clearly indicate that the learned trial judge is confusing a matter of evidence with a substantive rule of law. The presumption of natural consequences is treated as an irrebuttable legal presumption, for its application is deemed mandatory. The true position was set out by Denning L.J. in *Hosegood* v. *Hosegood*[13] a statement of the law which was adopted *in toto* by the Ontario Court of Appeal in *Regina* v. *Giannotti*.[14] Denning L.J. states:

> When people say that a man must be taken to intend the natural consequences of his acts they fall into error; there is no "must" about it, it is only "may". The presumption of intention is not a proposition of law but a proposition of ordinary common sense. It means this: that a man is usually able to foresee what are the natural consequences of his acts, so it is as a rule reasonable to infer that he did foresee them and intend them. But while it is an inference which may be drawn it is not one that must be drawn. If on all the facts of the case it is not a correct inference then it should not be drawn.

The instant occasion is not the first on which men of high authority have mistaken a law of evidence for substantive law. The thesis of "objective liability" in the criminal law was propounded by Holmes in his Common Law. In Holmes' view,

> The law is continually transmuting moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated[15] . . . The tests of liability are external and independent of the degree of evil in the particular person's motives or intentions.[16] . . . The standards do not merely require that every man get as near as he can to the best conduct possible for him. They require at his own peril to come to a certain height. They take no account of his incapacities, unless the weakness is so marked as to fall into the well-known exceptions, such as infancy or madness.[17]

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[12][1954] Crim. L.R. 216.

[13](1950), 66 T.L.R. 735, at 738.

[14](1956), 115 C.C.C. 203, at 213

[15]The Common Law, p. 38.

[16]*Ibid.*, p. 50.

[17]*Ibid.*, p. 50.

And later, dealing with the specific crime of murder:

> What is foresight of consequences? . . . If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act knowing the present state of things, is guilty of murder and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence foresaw.[18]

Holmes' thesis of objective liability and the *Ward* case stand well together But it is significant that Holmes wrote The Common Law in 1881, that his theory has been politely ignored by other writers, and that judicial opinion has been consistently opposed to it, at least until this late date. Jerome Hall, in his text Principles of Criminal Law, devoted a complete chapter to an examination of objective liability, and in the course of refuting the theory, stated that its basis lies in the assumption that the foundation of criminal law is expediency, not moral culpability.[19] Apparently, the chief reason for the adoption of expediency as an underlying principle of criminal law lies in the difficulty of discovering a man's true state of mind. Those who propound objective liability in effect assert that because it is too difficult to discover the true state of a man's mind, we will ignore it, and apply the objective test *ex post facto*, and thus "formulate" a state of mind. But Bowen L.J. was not impressed with the difficulty and he said in one case, "the state of a man's mind is as much a fact as the state of his digestion",[20] and in another case:[21]

> It is said that you cannot [look into a man's mind], . . . therefore what follows? It is said that you are to have fixed rules to tell you that he must have meant something, one way or the other, when certain external phenomena arise. The answer is that there is no such thing as an absolute criterion which gives you a certain index to a man's mind. There is nothing outside his mind which is an absolute indication of what is going on inside. So far from saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him.

If this reasoning is applicable in a mere case of fraud, would it not be even more so in the case of murder?

Hall points out that Holmes has confused the law of evidence with substantive law:[22]

> A fair inference from Holmes' argument generally is that because rational findings of fact necessarily rest on external evidence, therefore the substantive rules of law must be external.

Holdsworth comes to grips with the problem:[23]

> The presence or absence of this element of wrongful intention is . . . perhaps the chief test which distinguishes criminal from civil liability . . . The general rule of the common law is that crime cannot be imputed without *mens rea*. It is of course quite another question how the existence of that *mens rea* is to be established . . . we must adopt an external standard in adjudicating upon the weight of the evidence adduced to prove or disprove *mens rea*. That of course, does not mean that the law bases criminal liability upon non-compliance with an external standard. So to argue is to confuse the evidence for a proposition with the proposition proved by that evidence.

It is submitted that these objections to Holmes' theory are valid, and since the *Ward* case proceeds on the basis of objective liability they apply here as well.

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[18] *Ibid.*, p. 53.

[19] At p. 181.

[20] *Edgerton* v. *Fitzmaurice*, (1885), L.R. 29 Ch. 459, at 483.

[21] *Angus* v. *Clifford* [1891] 2 Ch. 449 at 471,

[22] Principles of Criminal Law, p. 176.

[23] History of the English Law (5th ed.), vol. 3, p. 374.

.: is submitted that the learned Lord Justices in the *Ward* case did no: ... regard to the development of *mens rea* in the law of murder, and that the principle of the case hampers such progressive development. J.W.C. Turner in Russell on Crime[24] sets out the modern view of the *mens rea* required in murder after tracing its historical development:[25]

> The new test consists in the requirement that the accused person, when pursuing the line of conduct . . . which resulted in the harm for which he is charged, must have been aware that such harmful consequences would or could follow.

Kenny points out that there are three stages of development in the history of *mens rea* in murder.[26]

> 1. The stage of absolute or strict liability in which the law looked to the consequences of a man's conduct.
> 2. The stage in which the medieval applied an objective moral test to the conduct leading to those consequences.
> 3. The stage, . . . when the law came to adopt a subjective test: that is to say, it now looked primarily at the attitude of the defendant's mind which inspired his conduct.

It is apparent that the approach has become increasingly more subtle over the years: the courts become bolder, and more and more they attempt to discover what lay in the accused's mind when he did the act. They were aided in this by a concurrent development in the law of evidence; i.e. the accused became competent to give evidence at his own trial. The *Ward* case ignores this development, and therefore it is submitted that it is an unwarranted throw-back to an earlier stage of our law.

It is submitted that objective liability, or the idea that "all must be treated alike" ought never to become a principle of the criminal law. As Hall points out[27] the basis of this theory is expediency, and it is submitted that expediency is an unworthy guide in that part of the law which, more than any other, ought to be humane. It is inhuman to sentence a man to death when there is no guilty consciouness on his part attaching to the act complained of. It is only the sceptical realism of the objective approach that allows this dire result, and it is submitted that sceptical realism ought not to be given precedence over humanity. It is submitted that the *Ward* case ought to be rejected in Canada, and that full effect be given to the principle *actus non facit reum, nisi mens sit rea* at least in the law of murder.

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[24]Russell on Crime (10th Ed. by J. W. C. Turner), Vol. 1.

[25]At p. 21

[26]Kenny's Outlines of Criminal Law, (16th Ed.), p. 113

[27]Principles of Criminal Law, p. 114