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# Criminal Law -- Homicide -- Constructive Murder -- Canadian Criminal Code -- Section 212(c) -- Historical Origins of "Unlawful Object"

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CRIMINAL LAW—HOMICIDE—CONSTRUCTIVE MURDER—CANADIAN CRIMINAL CODE—SECTION 212(c)—HISTORICAL ORIGINS OF "UNLAWFUL OBJECT".—In Canada, the prosecution is fortunate in murder cases because it does not have to specify the particular provision of the Criminal Code[1] under which it hopes to prove the guilt of the accused. All that is required in the formal charge is a reference to that nebulous section 205, a vague, declaratory legislative provision which defines nothing in particular, describes no specific ingredients of any offence and prescribes no penalties. In summary, section 205 tells us that homicide is culpable or not culpable; culpable homicide is murder, manslaughter or infanticide.

In most murder cases, the Crown, and the trial judge in due course, had relied on section 212(a) and (b) and, until quite recently, section 212(c) was ignored. This situation has changed and that last sub-section has become quite important, particularly in cases heard by the Ontario Court of Appeal.

Sections 212 and 213 of the Criminal Code provide detailed descriptions of murder. The latter section gives a very broad definition of what used to be called felony-murder (although our Code has never used the distinction between felony and misdemeanour). Murder in section 213 is defined as a death caused while committing or attempting to commit one of a catalogue of crimes most of which are violent in nature (or at least potentially violent).

Section 212(a) defines classic, subjective murder which is committed by persons who cause death when they mean to cause death or mean to cause bodily harm that they know is likely to cause death and are reckless whether death ensues or not.

Section 212(b) adds nothing new except that it introduces the concept of transferred intent.

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[32] *Cf. H. M. Humphrey Ltd* v. *Baxter Hoare & Co. Ltd* (1933), 149 L.T. 603; *Britain & Overseas Trading (Bristles) Ltd* v. *Brook's Wharf & Bull Wharf Ltd*, [1967] 2 Lloyd's Rep. 51, at p. 60.

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[1] R.S.C., 1970, C-34, as am.

Finally, section 212(c), in which we are most interested, provides:

> Where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

This description of murder has two ingredients which we do not find in the other sub-sections of 212. The definition of *mens rea* is broader because there is mention of "ought to know" and there is the phrase "notwithstanding he desires to effect his object . . .". Secondly, the sub-section includes the phrase "for an unlawful object".

This last phrase is not defined in the Code. We find similar expressions in two other sections which have a direct or indirect connection with homicide. Section 21(2) describes participation of persons in criminal enterprises and has always been important in murder;[2] the sub-section describes liability for two or more persons "who form an intention in common to carry out an unlawful purpose . . .". This provision has been very important in murders which fall under section 213 but has not caused any relevant discussion in relation to 212(c). Section 205 has already been mentioned. In sub-section (5) of 205, culpable homicide is defined to include death caused "by means of an unlawful act". Unfortunately, there is no further explanation in the Code. Given the existence of sections 205(5), 212(c) and 217 (which provides that "culpable homicide that is not murder . . . is manslaughter") we could surmise that culpable homicide by "unlawful act" (or "object"?) could be either murder or manslaughter.

Before we seek any legislative scheme for a progression of homicide offences in the Code, we should trace the genesis of section 212(c) the wording of which has remained unchanged since 1892.

The conventional wisdom of the history of 1892 Code is that it was based on the English Draft Code which was written by James Fitzjames Stephen. This is essentially true although two Canadians, George Wheelock Burbidge and Robert Sedgewick, made a significant and original contribution to the Canadian Code.

Stephen published his *Digest of the Criminal Law*[3] in 1877 and then used that work as the basis for the English Draft Code of 1879.

The *Digest* does not include anything like our section 212(c). The closest is found in the article 223 on murder where malice

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[2] *E.g.*, *Regina* v. *Trinneer*, [1970] S.C.R. 638.

[3] A Digest of the Criminal Law (Crimes and Punishments) (1877).

aforethought is defined to include "(c) an intent to commit any felony whatever".[4] At that time, felony included many crimes which were not very serious and even more that could not be called inherently violent. In other words, Stephen was adhering to a strict interpretation of the felony-murder rule. The illustrations which accompany article 223 mostly describe clear acts of violence such as arson, explosives and serious assault. There are two questionable examples; Coke's old chestnut about "shooting at a domestic fowl, intending to steal it, and accidentally killing B"[5] and "A, a thief, pursued by B, a policeman, who wishes to arrest A, trips up B, who is accidentally killed".[6] The second illustration is a clear statement of a "crime control" policy because a policeman was killed. This situation is covered by section 213 and does not concern us in an examination of section 212(c).

The first example has been thoroughly discounted by many commentators, including Mr. Justice Stephen who explained the fowl case to the jury in *Serné*:[7]

> . . . he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law . . . the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed . . . instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder.

Some other illustrations furnished by Stephen describe deaths caused by unlawful acts which include assault (without intending to kill or do grievous bodily harm), failing to cover a mine shaft, and throwing stones down a coal mine. The authorities cited by Stephen suggest that such killings would only be manslaughter.

Stephen has often been imagined as a Draconian retributivist. This is partly due to his attitudes toward malice and revenge. He supported a conviction of murder (and a mandatory death penalty) for those who killed while committing felonies of violence. He believed that such persons showed a clear disposition for "evil" and should be punished accordingly. In lesser cases, where there was merely implied malice, he was quite prepared to see a verdict of manslaughter. Such an amelioration did not originate with Stephen. Forty years before the English Draft Code, the Criminal Law Commissioners, in effect a parliamentary committee, complained in

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[4] *Ibid.*, p. 144.

[5] *Ibid.*, p. 146.

[6] *Ibid.*, p. 147.

[7] *Regina* v. *Serné and Another* (1887), 16 Cox C.C. 311, at p. 313 (Central Crim. Ct).

1839 that implied malice was "loosely defined or rather is not defined at all".[8] The Commissioners had great difficulty in coming to a definition, observing that the borderline between murder and something less would depend on the facts. They were attracted by Foster's formulation of *mens mala*—"the heart regardless of social duty" which they further described as a:

> . . . figurative expression used to denote the criminal apathy or indifference with which an act is wilfully done which puts human life in peril. Whether such a peril be wilfully occasioned is a question not of law but of fact, depending on a consideration of the nature of the act done, the circumstances under which it is done, the probability that the act done, under those circumstances would be fatal to life, and the consciousness on the part of the offender that such peril would ensue.[9]

A little later, the *Report* condensed this statement of "malice" to "the mere question whether the offender, being conscious of the risk, wilfully exposed life to danger".[10]

In turn, article 10 of a Digest drafted by the Commission simply defined murder as a killing "of malice aforethought".[11]

"Malice aforethought" in murder is defined in later articles as "voluntary" killing which in turn is described as a death resulting from "any act or unlawful omission done or omitted with intent to kill or do great bodily harm to any other person, or whensoever any one wilfully endangers the life of another by any act or unlawful omission likely to kill . . .".[12]

The Commissioners preserved the felony-murder rule but with some circumscription:

> The killing is also of malice aforethought whensoever one in committing or attempting to commit any felony with force or violence to the person or dwelling-house of any other, or in burning or attempting to burn such dwelling-house or in committing or attempting to commit any felony from which danger may ensue to the life of any other person, shall happen to kill any other person.[13]

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[8] Fourth Report of Her Majesty's Commissioners on Criminal Law (London, 1839), reprinted in the Irish University Press Series of British Parliamentary Papers; Reports from The Royal Commission on the Criminal Law with Appendices and Index, 1834-1841 (Shannon, 1971), pp. xxii and 254. (The references represent the internal pagination of the individual reports and the overall pagination of the reprint.)

[9] *Ibid.*

[10] *Ibid.*, pp. xxv and 257.

[11] *Ibid.*, pp. xxxiii and 265.

[12] *Ibid.*

[13] Art. 53, at pp. xl and 272. Taschereau in his treatise on Canadian criminal law defined "malice aforethought": ". . . it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, a heart regardless of social duty, and deliberately bent upon mischief. And in general any formed design of doing mischief may be called malice." Taschereau, The Criminal Law Consolidation and Amendment Acts (1874), p. 165.

This definition limited felony-murder to life-endangering acts. Article 67 of the *Report*, in defining manslaughter, accentuated the Commission's desire to limit murder because the lesser form of homicide is described as death resulting "from any unlawful act or unlawful omission, attended with risk of hurt to the person of another".[14]

These recommendations never reached the statute book. The English Draft Code[15] was similarly ignored. The 1879 attempt to codify the criminal law included a sub-section similar to section 212(c) of the Canadian Criminal Code with one important difference. The proviso at the end of section 212(c) of the Canadian law states "notwithstanding that he desires to effect his object without causing death or bodily harm to any human being" while the Draft Code ends with the words "though he may have desired that his object should be effected without hurting anyone".[16] There seems a difference in quality here so long as we assume "bodily harm" is a stronger phrase than "hurting anyone".

The wording of the Draft Code is surprising in light of the earlier Criminal Law Commissioners' *Report* and the formulation in Stephen's *Digest*. The *Report* of the Criminal Code Commissioners, who included Stephen, is no more enlightening. Indeed the remarks found there are positively confusing and show a disturbing disparity between the spirit of the *Report* and the letter of the Draft.

The Commissioners wisely decided to abandon "malice aforethought" because it was misleading. In particular, the *Report* commented that "the inaccuracy of the definition is still more apparent when we find it laid down that a person may be guilty of murder who had no intention to kill or injure the deceased or any other person, but only to commit some other felony, and the injury to the individual was a pure accident. This conclusion was arrived at by means of the doctrine of constructive or implied malice. In this case as in the case of other legal fictions it is difficult to say how far the doctrine extended".[17]

In the process of rejecting malice aforethought, the Commissioners noted that the term included the bare intent "to commit any felony". They admitted that this might be thought too broad but they cited, in support, Foster who recited Coke's famous fowl example. They obviously had not studied Foster as carefully as their 1839

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[14] *Op. cit.*, footnote 8, pp. xlii and 274.

[15] Report of The Royal Commission Appointed to Consider The Law Relating to Indictable Offences: With An Appendix Containing A Draft Code embodying the Suggestions of the Commissioners (London, 1879).

[16] *Ibid.*, s. 174(d).

[17] *Ibid.*, p. 24.

predecessors. They redeemed themselves in the actual Draft by limiting "felony-murder" in section 175 to cases where the accused meant to inflict "grievous bodily injury for the purpose of facilitating the commission" of a limited range of offences almost the same as those now found in section 213 of the Canadian Criminal Code.

There is no explicit explanation of what was to become section 212(c) of our Code although there is a suggestion in these remarks of the Commissioners:

> For practical purposes we can make no distinction between a man who shoots another through the head expressly meaning to kill him . . . and a man who, intending *for some object of his own*, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, *hoping indeed that death may not be caused*, but determined to effect his purpose whether it is so caused or not.[18]

The 1839 *Report* had not envisaged anything as wide as this but the Commissioners at that time were living in a period of comparative calm. The years between 1839 and 1879 had seen the 1848 convulsions in Europe, the most active years of the Chartists, the effects of trade unionism, the fears of anarchism and the activities of the Fenians. These events, and the political climate they created, provoked a response epitomised in the worship of force and might be seen in Carlyle's writings.[19]

The Fenian "menace" may not have been the most serious threat but the reported cases might suggest otherwise. In the decade preceding the 1879 Code, there had been at least two cases with Fenian overtones. The 1867 case of *Regina* v. *Allen and Others*[20] would probably now fall under section 213 of our Code although there was some question about the legality of the warrants on which the alleged murderers of a policeman had been held. This may explain the partiality for the "unlawful object" (falling short of a felony of violence) provision although this seems specious because the defendant's behaviour was clearly recklessly murderous under what is now section 212(a) of our Code. Perhaps it is not coincidental that one of the judges on the *Allen* case was Blackburn J. who presided over the 1879 Commission.

The second Fenian case was closer to the railway explosion example given in the 1879 *Report* of the Commissioners. In *Regina* v. *Desmond and Others*,[21] the six accused were charged with murder of a prisoner who had been killed when the conspirators had blown a

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[18] *Ibid.*, italics added.

[19] Houghton, The Victorian Frame of Mind, 1830-1870 (1959), Ch. 9.

[20] (1867), 17 L.T.N.S. 222 (Lancaster Special Commission).

[21] (1868), 11 Cox C.C. 146 (Central Crim. Ct).

hole in the wall of the Clerkenwell House of Detention to liberate a colleague named Burke. One of the conspirators, Barrett, was convicted of murder and once again one of the judges Cockburn C.J., was to have a decisive role in the fate of the English Draft Code. Cockburn C.J. had relied upon the fowl example to convict Barrett and was reported as saying:

> If a person seeking to commit a felony should *in the prosecution of that purpose* cause, although it might be unintentionally, the death of another, that, by the law of England, was murder.[22]

Once again, Barrett could have been convicted under section 212(a) of the Canadian Criminal Code or its English Draft Code equivalent. The extension found in section 212(c) was quite unnecessary.

Canada had also had its Fenian scares and perhaps this explained the inclusion of the "unlawful object" provision. In addition, the Macdonald Government was somewhat preoccupied with railways at the time of the passage of the 1892 Code and this may have added to the attraction of section 174(d) of the English Draft Code.[23]

As stated earlier, George Wheelock Burbidge was one of the drafters of the 1892 Canadian Code. He was a Judge of the Exchequer Court at the time but had previously been Deputy Minister of Justice. In 1890, he had published *A Digest of the Criminal Law of Canada*,[24] which was expressly modelled on Stephen's *Digest*. The description of murder in Burbidge's work is an exact copy of Stephen's, including the latter's illuminating appendices.[25] Therefore the definition of murder in Burbidge

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[22] The Times newspaper, April 28th, 1868, cited by Stephen, *op. cit.*, footnote 3, pp. 160-161, note 4, emphasis added. The Clerkenwell explosion case was cited with approval by Stephen J. in *Serné*, *supra*, footnote 7, at p. 314.

[23] This provision (s. 174(d) or 212(c)) does not appear in the Criminal Code (Judiciable Offences) Bill of 1878, Bill No. 178 introduced on May 14th, 1878.

If we look at Bill No. 170 introduced on May 12th, 1879, we find that s. 174 is identical to s. 174 of the Draft Code examined by the Commissioners.

Similarly, it is also found unaltered in Bill 2 called Criminal Code Bill dated February 6th, 1880.

[24] A Digest of the Criminal Law of Canada (Crimes and Punishments): Founded by Permission on Sir James Fitzjames Stephen's Digest of the Criminal Law (1890).

[25] Stephen, *op. cit.*, footnote 3, p. 360 said: "Foster to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence, by confining it to cases in which the unintentional violence is offered in the commission of a felony. This rule has in modern times had a singular and unexpected effect. When Coke and Hale wrote, the infliction of hardly any bodily injury short of a maim was a felony. Cutting with intent to disfigure was made felony by the Coventry Act; shooting was made felony by what was called the Black Act; and by later statutes it has been provided that the intentional infliction of grievous bodily harm in any way whatever shall be felony (see Article 236(a)). The result is that Foster's rule as to the

includes "an intent to commit any felony whatever"[26] but no mention of an "unlawful object" provision although it does find its way into Sir John Thompson's Code of 1892.

When Crankshaw published his first commentaries on the Code in 1894,[27] there are no cases which relate to what is now section 212(c).[28] The illustrations which could possibly relate to unlawful acts or objects are all applicable to section 213[29] (and the felonies of robbery, arson or choking) or section 212(a)(ii).

In the 1902 edition, Crankshaw does offer more enlightenment but the discussion is found in the manslaughter section.[30] He discussed *Regina* v. *Salmon*[31] and *Regina* v. *Archer*[32] and about the latter case, he said:

> The last case approaches very closely to the idea of murder, as defined in section 227(d) which makes it murder if the offender, *for any unlawful object*, does an act which he knows or ought to know . . . etc. A distinction, however, may be drawn from the fact that in [*Archer*] the object of the accused—that of obtaining possession of the gun which was his own property—was not an unlawful object, although the means used, attempting to regain possession of it by force, were unlawful.[33]

The writer creates some confusion because he seems to suggest that homicide under section 227(d) may be manslaughter. In a general description of the difference between manslaughter and murder, Crankshaw said:

> . . . if, by an unlawful act . . . one causes the death of another, *meaning* to cause death, it will be murder. If, however, in doing the unlawful act . . . one kills another, *not meaning* to kill any one, it will, in general, be manslaughter only. It may, however, even then—notwithstanding the absence of intention to kill—be murder, under some circumstances; as, where the offender's intention is to cause some bodily injury which he knows to be likely to cause death; and he is reckless whether death ensues or not. And so, if a person, without intending to hurt anyone, proceed, for some unlawful object—say with the object of robbing a bank—to do an act (such as the blowing open, by explosives, of a safe or vault), whereby the watchman, who happens to be in an adjoining office, is killed, the question would arise whether the act of blowing

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intent to do grievous, as distinguished from minor, bodily harm being essential to malice aforethought now rests on statutory authority, for no one can intentionally inflict on another grievous bodily harm without committing a felony, and to cause death by a felonious act is murder." Burbidge, *op. cit.*, *ibid.*, p. 518, reproduced this passage.

[26] *Ibid.*, p. 217.

[27] Crankshaw, The Criminal Code of Canada (1894).

[28] Then s. 227(d) of the 1892 Code.

[29] Then s. 228 of the 1892 Code.

[30] Then s. 230 of the 1892 Code.

[31] (1880), 6 Q.B.D. 79 (Ct of Crown Cases Reserved).

[32] (1857), 1 F. & F. 351, 175 E.R. 750 (Norfolk Circuit Ct).

[33] *Op. cit.*, footnote 27, p. 247, italics in original.

open the safe or vault was an act which the accused knew or ought to have known to be likely to cause death.[34]

Most of the cases cited by Crankshaw fall under the present section 213.[35] In the section on manslaughter, he did give one example which could come within section 212(c). He described the case of a workman, on the top of a house under construction, throwing stones or other materials which kill a person below. This seems a reasonably clear case in the "unlawful object" category but Crankshaw said it could be murder, manslaughter or misadventure "according to whether there is an entire absence of care, or according to the degree of the precautions taken and of the necessity of any such precautions. If the workman threw the stones etc. without giving any previous warning to persons passing beneath, and at a time when it was likely for a person to be passing, it would be murder".[36]

In the third edition of 1910, Crankshaw is at last able to cite one Canadian case to illustrate section 212(c). This case, *The King* v. *Chisholm*[37] is inappropriate because it is a clear case of manslaughter (resulting in a suspended sentence). The English cases cited, including *Serné* (which resulted in an acquittal), are equally uninstructive because they are all illustrations of manslaughter or less.

The other well-known commentator was Tremeear whose second edition[38] appeared in 1908. In explanation of section 212(c), he cited two English cases, *Regina* v. *Jones*[39] which was another clear case of manslaughter and *Regina* v. *Weston*[40] which has some factual resemblance to *Regina* v. *Tennant and Naccarato*.[41]

The jury in *Weston* returned a finding that the "gun was levelled at the deceased unnecessarily under the circumstances, but without any intention of discharging it, and that it went off accidentally",[42] which Cockburn C.J. construed to be a verdict of manslaughter.

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[34] *Ibid.*, p. 244, italics in original.

[35] Then 3. 228 of the 1892 Code.

[36] *Op. cit.*, footnote 27, p. 245. The only authorities cited are Foster, Coke and Hale.

[37] (1908), 14 C.C.C. 15 (Halifax Co. Ct).

[38] The Criminal Code and the Law of Criminal Evidence in Canada (2nd ed., 1908).

[39] (1874), 12 Cox C.C. 628 (Oxford Circuit).

[40] (1879), 14 Cox C.C. 346 (Crown Court).

[41] (1976), 23 C.C.C. (2d) 80 (Ont. C.A.).

[42] *Supra*, footnote 40, at p. 352. An editor of this case had added, *ibid.*: "It must not be supposed that the Lord Chief Justice intended to lay down anything contrary to the law laid down in many cases—that even a blow in self-defence will not excuse or even reduce to manslaughter the instant recourse to deadly murderous

A Canadian case[43] had finally been decided which specifically raised the question of "unlawful object" homicide, although it was hardly necessary because the facts fell squarely under the protection of section 213 (or even 212(a)). The facts had Fenian overtones although its resemblance to *Regina* v. *Allen* was merely fortuitous. The accused was being returned to jail in a cab after a trial for burglary. Some unknown persons threw revolvers into the cab and in the consequent struggle, a police officer was killed. The trial judge Falconbridge C.J.K.B. instructed the jury about the law of participation (under what is now section 21(2)) and said that it was clearly murder where the accused acted "with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force . . ."[44]. The trial judge referred to no particular section of the Code but the five man Ontario Court of Appeal made it tolerably clear that the accused's murder conviction should be affirmed because he was a party to the transaction and was attempting to escape from lawful custody which was an offence mentioned in the felony-murder provision of what is now section 213.[45]

Tremeear's[46] comment at this juncture was:

> If a man does an illegal act although its immediate purpose may not be to take life, yet if it be such that life is necessarily endangered by it and the doer knows or believes that life is likely to be sacrificed by it, it is murder.

After a decade, there was no Canadian decision which had used section 212(c). *Rex* v. *Elnick, Clements and Burdie*[47] was another case in this genre. The judgment of the full bench of the Manitoba Court of Appeal is a very scholarly one but it was, in effect, superfluous because the trial judge had insisted upon instructing the jury on both sections 212 and 213 although only the latter was necessary as it was a clear case of murder in furtherance of an armed robbery. In addition to explaining those two sections, the trial judge had also told the jury that if the "accused did not intend to fire the gun at all, his offence would be manslaughter because, if a man,

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violence causing death. . . . This was intended to be conveyed . . . with the present case, that if the prisoner intentionally fired the gun not from such alarm as suggested, but on account of ill-will, then the act was murder. The jury in their verdict [of manslaughter] negatived the state of alarm suggested, but also negatived intention, and found that the gun went off by accident."

[43] *The King* v. *Rice* (1902), 5 C.C.C. 509 (Ont. C.A.).

[44] *Ibid.*, at p. 512.

[45] *Ibid.*, at p. 517, per Osler J.A., who commented that constructive murder was "a phrase which has no legal meaning".

[46] *Op. cit.*, footnote 38, pp. 200-201. This is taken from Cockburn C.J. in *Barrett*, *supra*, footnote 22.

[47] (1920), 33 C.C.C. 174 (Man. C.A.).

while doing an unlawful act, kills another, although he did not intend to do him any hurt, it is manslaughter''.[48]

This case is complicated by the fact that the Court of Appeal decided that the substantive common law still applied in Manitoba. Consequently, the court examined, and implicitly approved, the fowl case, doubted the liberality of Stephen J.'s direction in *Serné*, cited Cockburn C.J. in *Barrett*, but finally decided that these authorities were unnecessary because the act being committed by Elnick and his confederates, which resulted in the victim's death, was ''an act of violence done in the course or pursuance of a felony involving violence''.[49] This decision was made very soon after the House of Lords decision in *D.P.P.* v. *Beard*[50] and the Manitoba court decided that the trial judge in *Elnick* had misdirected the jury because ''Elnick was engaged in the commission of a crime of violence and his intention to discharge the revolver cannot be regarded separately from his avowed intention to commit robbery''.[51]

Once again, we see that precise direction of the jury in terms of section 213 would have obviated the difficulties and have shown the very limited use of section 212(c). Indeed, until the rash of recent decisions on this latter section, the only situation in which section 212(c) appears to be needed is the case of abortion. The Manitoba Court of Appeal had serious doubts about the ''extraordinary view'' expressed in two English cases[52] of abortion followed by the death of the woman where it was laid down that a jury may find a verdict of manslaughter ''if the death was so remote a contingency that no reasonable man would have taken it into his consideration''.[53] A Quebec court examined this problem in the 1948 case of *Molleur* v. *The King*.[54]

The appellant doctor, convicted of murder, in *Molleur* had claimed, quite rightly, that section 259(d), that is the present section 212(c) was the only description of murder in the Code which could apply to his case of a death arising out of an illegal abortion. He argued that section 259(d) only applied to an ''illegal act involving personal violence'' and that it was ''not enough to know that the unlawful act [*sic*] is generally dangerous, but it is necessary to know that it is dangerous in a particular case''.[55] E.M. McDougall J.

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[48] *Ibid.*, at p. 177.

[49] *Ibid.*, at p. 187.

[50] [1920] A.C. 479 (H.L.).

[51] *Supra*, footnote 47, at pp. 188-189.

[52] *Regina* v. *Whitmarsh* (1898), 62 J.P. 711; *Rex* v. *Lumley* (1912), 22 Cox C.C. 635 (Central Crim. Ct).

[53] *Rex* v. *Elnick*, *supra*, footnote 47, at p. 186.

[54] (1948), 93 C.C.C. 36 (Que. K.B., App. Side).

[55] *Ibid.*, at pp. 43-44.

declined to answer this issue because he was content to reduce the crime to manslaughter on his interpretation of "likely" in the sub-section. He adopted the words of Anglin J. in the enigmatic case of *Graves* that it would only be murder if the death "was, under the circumstances, such a natural or probable consequence of their conduct that the defendants should have anticipated it".[56] The doctor would have to know or should have known of the danger when he undertook the operation and as this was not proved, it was only manslaughter.

Three Australian states[57] have adopted various forms of the English Draft Code, including something very like section 212(c). That country's highest court[58] has examined section 302(2) of the Queensland Criminal Code which provides that it is murder "if death is caused by means of an act done in the prosecution of an unlawful purpose which act is of such a nature as to be likely to endanger human life . . .". Dixon J. decided that this sub-section had no application in a case where the accused had assaulted the deceased in such a way that death had resulted. The judge criticised the jury direction because it was "founded on the view that the assault on the deceased woman constituted at once the unlawful purpose and the dangerous act".[59] In any case, if this view is incorrect, Dixon J. considered the direction wrong because the trial judge "gave a direction that if the prisoner unlawfully assaulted the deceased woman, in such a way as to be likely to endanger her life and her death resulted, it amounted to murder. This we regard as a serious misdirection because of the absence of any reference to intent".[60]

Admittedly the Queensland provision is not identical to the Canadian Code section 212(c) but we should note that the "unlawful purpose" is given a justly limited meaning. In addition, Dixon J. is telling us that the equivalent of section 212(c) must not be treated as constructive murder, or worse, a form of misdemeanour-murder.

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[56] *Graves* v. *The King* (1913), 47 S.C.R. 568, at p. 584.

[57] Queensland, Criminal Code Act 1899, 63 Vict., No. 9, s. 302(2): "If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life . . . it is material that the offender did not intend to hurt any person." Western Australia, Criminal Code, Reprinted Act 1956, is identical to the above provision.

Tasmania, Criminal Code Act 1924, s. 157(c) provides that it is murder "if the offender for any unlawful object does an act that he knows to be likely to cause death and thereby kills any person though he may have desired that his object should be effected without hurting anyone".

[58] *Hughes* v. *The King*, [1950-1951] Qd S.R. 237 (Aust. High Ct).

[59] *Ibid.*, at p. 243.

[60] *Ibid.*

The Australian courts have strengthened this impression in two subsequent decisions.[61]

In the last five years, Canadian courts have reviewed a number of cases under section 212(c). *Regina* v. *Tennant and Naccarato*[62] led off the brigade in a thoughtful judgment of the Ontario Court of Appeal. The court rejects the argument made in *Hughes* (and many other cases) that an assault cannot be the "unlawful object" for the purposes of section 212(c). The learned judges seem to think that any other interpretation would defeat the purposes of the sub-section. At first, they appear to be applying a more stringent test under section 212(c) and yet they immediately follow it with this obscure passage:

> We are, nonetheless, of the view that s.212(c) ought not to be given an interpretation which permits foreseeability under s.212(c) to be substituted for the intent required under s.212(a)(i) and (ii) in cases where personal injury is not inflicted for a *further* unlawful object. To hold otherwise would largely nullify the provisions of the section with respect to the necessity for proof of the requisite intent to kill or to inflict bodily harm which the offender knows is likely to cause death in order to constitute murder (apart from the limited class of case falling within a more stringent definition of murder). Accordingly, s.212(c) is not applicable where death is caused by an assault which is not shown to have been committed for the purpose of achieving some other unlawful object. It is, however, applicable where death is caused by a separate act which the accused ought to have anticipated was likely to result in death, and which was committed to achieve some further unlawful object; that unlawful object may be an assault.[63]

The judges' "unlawful object" argument seems no stronger here but if we ignore that particular problem, is the court saying anything more than the *mens rea* needed in section 212(a) must also be proved for a charge of murder based on section 212(c)? Perhaps the "unlawful object" issue has obscured the problem. We might have all been more convinced if that phrase had been qualified by such explicit words as "inherently violent". This argument could certainly be made as Naccarato was wielding a gun. Then again, if we are dealing with accused persons wielding loaded guns, which are by definition dangerous, then we could argue, once again, that section 212(c) is unnecessary and guilt should be obtained under section 212(a). Is this implied in this passage from the judgment?:

> The jury should then have been told that if they had a reasonable doubt that the gun was discharged accidentally and if they were not satisfied beyond a reasonable doubt that the appellant Naccarato procured and used the gun for an unlawful object and knew or ought to have known that his use of the gun in the circumstances was likely to cause death, they must acquit him of murder. But they must then consider whether or not he was guilty of manslaughter. When

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[61] *Rex* v. *Brown and Brian*, [1949] Vict. L.R. 179 (Vict. Full Ct); *Regina* v. *Gould and Barnes*, [1960] Qd R. 283 (Qd Ct of Crim. App.).

[62] *Supra*, footnote 41.

[63] *Ibid.*, at p. 94.

> death is accidentally caused by the commission of an unlawful act which any reasonable person would inevitably realize must subject another person to, at least, the risk of some harm resulting therefrom, albeit not serious harm, that is manslaughter.[64]

The same court has further examined this problem in *Regina* v. *De Wolfe*.[65] A conviction of murder was quashed and a new trial ordered. Zuber J.A. makes it quite clear, by a circuitous route, that there will be no more interpretations of "unlawful object" which are as broad as the one in *Tennant and Nacaratto*. He viewed that decision and *Graves*[66] as "high-water marks of the construction and application of [212(c)] and should not be construed as points of departure".[67] The Ontario Court of Appeal was bound by the Supreme Court of Canada decision in *Graves* and managed to distinguish *Tennant and Nacaratto* on the rather doubtful basis that the accused in that case entered into a conspiracy before the killing. Zuber J.A. criticised the application of the "unlawful object" criterion because it would subject the accused's "mental processes to an unrealistic dissection".[68]

Unfortunately, Zuber J.A. did not help us very much in our search for *mens rea* necessary for section 212(c). The Court of Appeal hesitated to pursue this issue because of the new trial but Zuber J.A. did imply that the sub-section is not meant to create constructive murder. His Lordship said:[69]

> . . . it does not appear that in this case the possession, pointing or using a firearm . . . can be the unlawful *object* contemplated by s.212(c). . . .
>
> The jury was told, in effect, that if De Wolfe was engaged in the commission of an unlawful act which he knew or ought to have known was likely to cause death, and thereby caused death, he could be guilty of murder pursuant to s.212(c). . . . This is not the law, and this instruction was a serious misdirection.

We shall have to wait for further enlightenment because this "serious misdirection" is very similar to the passage from *Tennant and Naccarato* quoted earlier although the latter judges do talk about

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[64] *Ibid.*, at p. 96.

[65] (1977), 31 C.C.C. (2d) 23 (Ont. C.A.).

[66] *Supra*, footnote 56.

[67] *Supra*, footnote 65, at p. 29.

[68] *Ibid.*, at p. 30.

[69] *Ibid.*, at p. 26. Emphasis in original.

*De Wolfe* was followed in *Regina* v. *Ritchie* (1976), 31 C.C.C. (2d) 208 (Ont. C.A.). On the question of unlawful object, see *Regina* v. *Messarobba*, [1974] 8 W.W.R. 191 (Alta Sup. Ct, App. Div.); *Regina* v. *Quaranta* (1975), 24 C.C.C. (2d) 109 (Ont. C.A.); *Regina* v. *Desmoulin* (1976), 30 C.C.C. (2d) 517 (Ont. C.A.). The earlier cases of *Regina* v. *Blackmore* (1967), 1 C.R.N.S. 286 (N.S. Sup. Ct), and *Downey* v. *The Queen*, [1971] N.Z.L.R. 97 (N.Z.C.A.) were not approved in *Regina* v. *Tennant and Nacaratto*.

onus, place emphasis on acquittal rather than guilt and refer to the use of the gun "in the circumstances".

We must seriously question the need for section 212(c) in murders where the accused's behaviour is inherently or potentially dangerous. Such cases should attract liability under the mental element of recklessness found in section 212(a). Sub-section (c) should not be used to stretch manslaughter into murder.

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