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Article 6

Mann v. the Queen, (1966) S.C.R. 238

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CONSTITUTIONAL LAW

Mann v. The Queen, [1966] S.C.R. 238.

CONSTITUTIONAL LAW — CRIMINAL LAW — PROVINCIAL OFFENCES OF CARELESS DRIVING.

In this, the most recent of a long line of cases, the Supreme Court of Canada has unanimously upheld the validity of the provincial "careless driving" sections—in particular, s. 60 of the Ontario Highway Traffic Act.[1] The case arose upon the conviction of the appellant Mann on a charge of careless driving under s. 60. The magistrate thereupon submitted to the Supreme Court of Ontario for adjudication the questions whether he had erred in law in finding that:

(a) s. 60 of the Ontario Highway Traffic Act was not *ultra vires.*
(b) there was no conflict between s. 60 and the dangerous driving section[2] of the Criminal Code.

Haines, J. in a thorough and exhaustive judgment was of the opinion that s. 60 was valid provincial legislation but that it came into conflict with s. 221(4) rendering s. 60 inoperative. He therefore quashed the conviction.

The Ontario Court of Appeal, in a judgment delivered by Porter C.J.O., for a unanimous court, held that both of the magistrate's questions should be answered in the negative and that the conviction should be restored. The Supreme Court of Canada, as aforementioned, concurred with this result and held s. 60 to be *intra vires.* In its judgment, the Supreme Court of Canada deals with three interrelated problems which are couched in constitutional and criminal law. However, the court has glossed over many of the issues inherent in these problems and has ignored completely the practical consequences of their decision.

As was pointed out in *Russell v. The Queen*[3] the first question that must be determined is whether the Act in question (s. 60) falls within any of the enumerated classes of subjects in s. 92 of the B.N.A. Act; that is, does it have a provincial aspect?

In construing the careless driving section, the Court was unanimous in holding that s. 60 has a provincial aspect, namely the care

1 R.S.O. 1960, c. 172, s. 60 "Every person is guilty of the offence of driving carelessly who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway and is liable to a fine of not less than $10 and not more than $500 or to imprisonment for a term of not more than 3 months and in addition may have his licence or permit suspended for a period of not more than 2 years."

2 Section 221(4) of The Criminal Code reads "Everyone who drives a motor vehicle on a street, road, highway, or other public place in a manner that is dangerous to the public, having regard to 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, is guilty of:
(a) an indictable offence and is liable to imprisonment for 2 years.
(b) an offence punishable on summary conviction."

3 (1882), 7 A.C. 829, 830.

and control of highways. The court in the *Mann* decision spends almost no time in discussing this question relying totally on *O'Grady v. Sparling*[4] as determining the point. Although it is beyond dispute that this law is settled in a cement-like finality, one wonders whether the decision is nearly so solid in its validity or in its logic. As Professor Laskin (as he then was) wrote, "[i]ndeed the dissents of Roach and Schroeder, JJ.A., in the Ontario Court of Appeal in *Yolles*[5] and the matching dissents of Cartwright and Lock, J.J. in the *O'Grady* case show how close the provincial legislation came to encroachment on the federal criminal law power".[6]

In finding that s. 55(1) (the careless driving section) of the Manitoba Highway Traffic Act had a provincial aspect, Judson, J., in *O'Grady v. Sparling*, wrote that "the power of the provincial legislature to enact legislation for the regulation of highway traffic is undoubted",[7] and he cites the case of *Provincial Secretary of the Province of P.E.I. v. Egan.*[8] He concludes from this case that s. 55(1) of the Manitoba Act is an integral part of the regulation of highways.

One must, with respect, question Judson J.'s use of the *Egan* decision to provide a provincial aspect for s. 55(1) of the Manitoba Act. In the *Egan* case, the Court went out of its way to emphasize that the impunged legislation, by which the province could revoke a person's driving license on a conviction based on s. 285(4) of the Criminal Code, did not in itself create an offence. Rinfret, J. stated "It does not create an offence, it does not add to or vary the punishment already declared by the Criminal Code, . . . it deals purely and simply with certain civil rights in the Province of Prince Edward Island, . . . it is licensing legislation confined to the territory of Prince Edward Island".[9] It is questionable whether the careless driving section attacked in *O'Grady* which explicitly creates an offence, can be justified on an unrelated licensing provision.

In examining the Ontario Highway Traffic Act one will readily see that the provisions include registration, licenses, driver tests, garage licenses, automobile equipment, rates of speed, rules of the road, owners liability, and the unsatisfied judgment fund. For the breach of any of those sections a separate penalty is attached. It would appear that s. 60, the careless driving section differs radically in substance from the rest of the Act. It creates a separate offence in itself.[10] Cartwright, J. (dissenting) in *O'Grady v. Sparling* states "In my opinion while the types of negligence dealt with differ . . . each seeks to repress in the public interest and with penal conse-

4 [1960] S.C.R. 804.
5 *Regina v. Yolles*, [1959] O.R. 206 (C.A.).
6 Laskin, Occupying the Field; Paramountcy in Penal Legislation, (1963), 41 CAN. BAR REV. 234, 250.
7 *O'Grady v. Sparling*, [1960] S.C.R. 804, 810.
8 *Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396.
9 *Ibid.*, at 414.
10 See *Regina v. Yolles* (C.A.), *Supra*, footnote 5, Roach J.A. dissenting at 234.

quences negligence in the operation of vehicles; each belongs to the subject of public wrongs rather than to that of civil rights. Each makes negligence a crime."[11] It is particularly interesting to read this judgment now, in the light of Cartwright, J.'s decision in the *Mann* case. One must unhappily conclude that he too succumbed to the onslaught of what might best be called the "social justification" approach employed by the majority.

McRuer, C.J.H.C. in *Regina v. Yolles*[12] adopts another forceful approach by submitting that the provinces were simply attempting to revive the old common law offence of causing death by negligence. He suggests the provinces have merely extended this by applying it to negligent driving whether or not death ensues. Porter, C.J.O. on appeal, dismisses this argument all to lightly.[13]

The final argument used both by Cartwright, J. in the *O'Grady* decision and by McRuer, C.J.H.C. in the *Yolles* case on this issue, is that by enacting s. 60 the provinces are in effect trying to fill the gaps left by Parliament in this field. Later, this note will examine the history of this legislation in an attempt to point up the constant anxiety of the provinces to protect the public from the bad driver. Cartwright, J. and McRuer, C.J.H.C.[14] contend that this section, which is quite different from the other provisions of the act, expressly violates Lord Maugham's conclusion that "legislation coming in pith and substance within one of the classes specifically enumerated in s. 91, is beyond the competence of the provincial legislatures under s. 92. In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation".[15] Thus, as Cartwright, J. writes in *O'Grady v. Sparling,*

> "It is not within the power of the provincial legislature to remedy what it regards as unwise omissions in the criminal law as enacted by Parliament. . . . It appears to me to be self-evident that the exclusive legislative authority in relation to criminal law given to Parliament by s. 91(27) must include the power to decide what conduct shall not be punishable as a crime against the state."[16]

It must be regretted that Cartwright, J., who once thought these facts were so self-evident, should reject them so meekly, only six years later.

However, the courts are so firm in asserting that s. 60 has a provincial aspect that lengthy discussion of this question would be futile. It is sufficient for the purpose of this note to raise some doubts as to the validity and logic of this 'settled law'.

Assuming therefore that s. 60 has a valid provincial aspect one must now scrutinize the matter on which Parliament has legislated in order to define exactly what conduct Parliament has made a crime by s. 221(4). Presumably if the two pieces of legislation in fact cover

11 *O'Grady v. Sparling, Supra,* footnote 7, at 818.
12 *Regina v. Yolles,* [1958] O.R. 786, 803-807 (trial).
13 *Regina v. Yolles* (C.A.), *Supra,* footnote 5, 217.
14 *Regina v. Yolles* (trial), *Supra,* footnote 12, 802.
15 *A.G. for Alta. v. A.G. for Canada,* [1943] A.C. 356, 370.
16 *O'Grady v. Sparling, Supra,* footnote 7, 821.

the same matter, the Dominion legislation must prevail. The Supreme Court of Canada, after examining the two offences in *Mann* concludes that in enacting s. 221(4), the federal Government has not legislated on the same matter as the provincial Government has in s. 60. The court is of the opinion that s. 221(4) does not make inadvertent negligence a crime and although the two offences might possibly overlap, they are definitely not repugnant.

One should analyse the judgment of Haines, J. at trial very closely—something the Supreme Court failed to do. After admitting that s. 60 makes no express reference to the creation of an element of danger, Haines, J. writes:

> "However the use of the words 'due care and attention . . . and reasonable consideration . . .' clearly contemplate a manner of driving that is dangerous to the public or that is so similar as to be indistinguishable for *practical purposes* from the manner of driving prescribed by the corresponding section of the Criminal Code. In comparing these sections, the function of the court is not to examine each under a microscope in order to discern what minute differences exist between them. Rather the test is whether, despite their differences in details, the sections are identical in general substance. . ."[17]

Although in the recent case of *Regina v. Binus*,[18] Laskin, J.A. has purported to follow the decision of *Mann*, at one point in his judgment he writes "the difference in the two offences lies not in the standard of conduct which each involves".[19] This seems to be in complete accord with the conclusion of Haines, J. in the *Mann* decision when he writes, "Applying this criterion it is my view that the sections cover substantially the same area and penalize the same conduct".[20] Although the Supreme Court has decided different standards of conduct are established, and that dangerous driving is more than mere inadvertence; they give no concrete examples of this difference.

Spence, J., in *Mann*, writes, "[i]n my view, however . . . danger was not a necessary ingredient of the offence charged under s. 60."[21] One would be more convinced if he were shown a case that involved careless driving but did not involve danger. Spence, J. continued and suggested there might be cases of inconvience or obstruction resulting from conduct which fell within s. 60 but was not dangerous. He gives no practical example of these situations. Laskin, J.A. in the *Binus* decision tries to elucidate the problem by giving the example of a man driving down the centre line of a highway and not allowing other cars to pass. With respect, it would appear that this situation is fraught with danger.

To those who would suggest that there are different degrees of negligence applicable to each offence they should turn their attention to the statement of McRuer C.J.H.C. in *R. v. Seabrook*[22] where he

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17 *Regina v. Mann* (1965), 48 D.L.R. (2d) 481, 484 (trial).
18 *Regina v. Binus*, [1966] 2 O.R. 324.
19 *Ibid.*, at 334.
20 *Regina v. Mann* (trial), *Supra*, footnote 17, 484.
21 *Mann v. The Queen*, [1966] S.C.R. 238, 252.
22 (1952), 103 C.C.C. 7, 11.

asserted, "In applying s. 285(6) [the forerunner of the present s. 221 (4)] to certain proven facts, I can see no justification for becoming involved in a consideration of the law of civil negligence or degrees of negligence".

Having decided that each offence has the same *actus reus,* Haines J. passes on to look at the *mens rea* required by each offence. None of the judges of the Supreme Court of Canada came to grips with this argument with the possible exception of Cartwright J. who gives the most intensive judgment of the court. Perhaps because of his dissent in *O'Grady v. Sparling* he has more motivation than the others to justify his conclusion in this case. He adopted the reasoning of Coffin J. in *Regina v. Jeffers*[23] in his conclusion that s. 221(4) has *mens rea* as a constituent element of the offence. Haines J., however, examines this area in more detail. After referring to Glanville Williams,[24] he concludes: "The only two states of mind that constitute *mens rea* are intention and recklessness the latter being synonymous with advertent negligence". In analysing s. 221(4) Haines J. continues,[25] "[t]his kind of culpability is negligence. It is distinguishable from acting intentionally or recklessly in that it does not involve a state of awareness. It is the case where the actor inadvertently creates a risk of which he ought to be aware".[26] Haines J. accepts the *O'Grady* decision[27] as authority that *mens rea* is not required in order to convict one of careless driving and with respect to dangerous driving the same result is reached by Pottier, J., at trial in *R. v. Jeffers.*[28] When *R. v. Jeffers* went on appeal to the Nova Scotia Supreme Court, the court was split on this issue. Cartwright J., as aforementioned, adopted the view of Coffin J. (Patterson J. concurring), but does not even mention the opinion of Currie J., (Bissett J. concurring), who agreed with Pottier, J. at trial, that *mens rea* is not a requisite element of the offence of dangerous driving. In the light of this background, Cartwright J.'s use of Coffin J.'s judgment in *Regina v. Jeffers* as a support for his conclusion seems very shaky indeed.

In his finding that *mens rea* is an element of dangerous driving, Cartwright, J. uses as a second support (after the *Jeffers* decision), the interpretation of Casey, J. in *Loiselle v. The Queen*[29] of s. 285 (6), the forerunner of the present dangerous driving section. This second foundation is even more fragile than the first in the light of *R. v. White,*[30] a more recent case which Cartwright, J. omits completely. In this case, Higgins, J. of the Newfoundland Supreme Court reviewed

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23 (1965), 45 C.R. 177.
24 Glanville Williams, Criminal Law (Second Edition), 31 and 53.
25 *Regina v. Mann* (trial), *supra,* footnote 17, at 487.
26 *Ibid.,* at 488.
27 *O'Grady v. Sparling, Supra,* footnote 7, at 810.
28 Note, (1963), 7 Crim. L.Q. 243.
29 (1954), 109 C.C.C. 31 at 38; Casey J. states "Both acts envisaged by s. 285(6) imply something more than mere inadvertence or mere thoughtlessness or mere negligence, or mere error in judgment."
30 [1965] C.C.C. 147, 150.

the case law on s. 285 (6) noting especially the *Loiselle* decision and stated:

> "I have considered the cases, and I must say that all are authority for the proposition that *mens rea* was a necessary ingredient in a charge of dangerous driving at the time when these cases were tried. That is no longer the law. The provision of s. 221 (4) in the legislation of 1961 indicates that it was not intended to legislate for offences included in criminal negligence but that a new offence was created; an offence which may be described as inadvertent negligence in which *mens rea* is not required."

Nor is any mention made in the Supreme Court of *R. v. Latimer*[31] where the court came to a similar conclusion. Even Laskin J.A. in the *Binus* case accepts the conclusion that no *mens rea* is required to convict under s. 221 (4). After stating that the very language of s. 221 (4) precludes *mens rea* as an ingredient of that offence and that the difference between s. 221 (4) and s. 60 lies not in the conduct but rather the consequences involved, he says "the negligence which will support a tort action if damage results may equally support convictions of a Provincial or Federal driving offence or both".[32] In the face of this unanswered authority the decision in *Mann v. The Queen* is simply inadequate. After deciding the *actus reus* of each offence is similar and no *mens rea* is required in either, Haines, J. has little trouble in concluding the two offences are in conflict.

There is certainly enough authority to consider the law is now settled in holding that recklessness is advertent negligence.[33] If one examines the old section of dangerous driving (s. 285 (6)) and compares it to the new s. 221 (4) it will be seen that the two are identical with the exception that in s. 221 (4), the word "recklessly" is omitted. If "reckless" is synonymous with "advertent negligence" this would suggest that what remains is inadvertent negligence, the very conduct *O'Grady v. Sparling* said was covered by s. 60.[34]

With this thought in mind, it is very revealing to look at the history of this dangerous driving section. McRuer C.J.H.C. in *Regina v. Yolles* sets out the history in a complete manner. He writes:

> "In 1906 the provincial legislature did what Parliament was unwilling to do and created the offence of driving recklessly or negligently in a manner dangerous to the public. However, in 1938, the Parliament of Canada apparently recognized this legislative field as one of criminal law and incorporated the provincial legislation in s. 285 (6). In 1939 the provinces again amplified the federal legislation by enacting the careless driving section. Finally in 1955 Parliament expressly dealt with the subject of negligence in the operation of motor vehicles by enacting s. 191 (1) and s. 221 (1)."[35]

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31 (1963), 43 C.R. 328.

32 *Regina v. Binus, supra,* footnote 18, at 235. See also *R. v. Evans* (1962), 47 Crim. App. Rev. 62, 64, 65, and also the Special Lectures of the Law Society of Upper Canada, 1966, 331-332, where a new shift in criminal law is noticed in the apparent weakening of *mens rea* as a requisite element of several offences.

33 S. C. Desch, Negligent Murder, (1963), 26 MOD. L.R. 660; see also *Supra,* footnote 24 at 53; and *Supra,* footnote 17 at 487.

34 *O'Grady v. Sparling, supra,* footnote 7, at 810.

35 *Regina v. Yolles* (trial), *Supra,* footnote 12, at 802-803.

In the case of *O'Grady v. Sparling* the Supreme Court said this section dealt with advertent negligence and not inadvertent negligence, though the latter, the Court suggests, was within the Federal Criminal Law power.[36] Less than twelve months later, in 1961, Parliament again, as in 1938, took cognizance of this legislative opportunity, presented by Judson, J., in *O'Grady*, and re-enacted the dangerous driving section but this time omitting the word "recklessly" (i.e. "advertent negligence"). Surely this is not mere coincidence. With respect, it does not require much imagination to realize what kind of conduct s. 221 (4) was aimed at. It is little wonder the Supreme Court glossed over or completely omitted these considerations.

Having decided that s. 60 has a valid provincial aspect and that s. 221 (4) covers a different subject matter than s. 60, this would seem sufficient to uphold the provincial careless driving section and answer, in the negative, the final question of whether these sections are so similar as to be conflicting.

Although the judges spend very little time on this third question, and almost all of their efforts are spent drawing distinctions between the two offences, it is very revealing to analyse the courts', (especially Fauteux J.'s), reasoning on this issue of conflicting legislation and their interpretation of the "paramountcy" doctrine. At the outset it must be emphasized the B.N.A. Act does not expressly provide for a doctrine of paramountcy.[37] However, in the past the courts have recognized such a principle as inherent in the B.N.A. Act which gives to the Federal legislation the stamp of supremacy.[38]

The majority of the court in *Mann v. The Queen* dealt with this issue summarily, again basing its decision on the case of *O'Grady v. Sparling*. In this case, Judson, J. wrote, "a prior enactment does not become a matter of criminal law merely because it consists of a prohibition and makes it an offence for failure to observe the prohibition".[39] After deciding that the Manitoba careless driving section did have a provincial aspect (the control of automobiles on the highways) Judson, J. stated that "even though there may be some overlapping in a particular case between the two enactments, this did not constitute repugnancy and did not mean the Provincial enactment was inoperative".[40] He claims that the two provisions deal with different subject matters, and were enacted for different purposes and con-

[36] *O'Grady v. Sparling, supra,* footnote 7, per Judson J. at 809 "Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the Criminal Code as a crime, it is not a crime."

[37] With the exception of the concurrent fields of agriculture and immigration, S. 95 of the B.N.A. Act, (1867), 30 & 31 Vict., c. 3.

[38] See *A.G. Ont. v. A.G. Can.*, [1896] A.C. 348, 366 where Lord Watson stated "It may now be settled law that . . . the enactments of the Parliament of Canada, in so far as there are within its competency, must override provincial legislation." See also *Grand Trunk Railway Co. of Canada v. A.G. Can.*, [1907] A.C. 65, 67-68.

[39] *O'Grady v. Sparling, Supra,* footnote 7, at 811; See also *Quong-Wing v. The King*, (1914) 49 S.C.R. 440.

[40] *Ibid., O'Grady v. Sparling.*

cludes, therefore, that "[b]oth enactments can live together and operate concurrently".[41]

It would seem that Judson, J. in talking in terms of conflict and repugnancy is leaning towards the reasoning of Lord Watson in the *Local Prohibition Case* where he states: "The repeal of a provincial statute by the Parliament of Canada can only be affected by repugnancy between its provisions and the enactments of the Dominion".[42] The court in *O'Grady v. Sparling* is thus implicitly rejecting the test of Lord Dunedin in *Grand Trunk Railroad of Canada v. A.G. Canada.*[43] Indeed Mr. Justice Laskin in a pre-judicial utterance, succinctly points out that Judson, J.'s reasoning "excludes application of paramountcy in cases where provincial legislation is challenged on the basis of measuring penal enactments in provincial regulatory statutes against blunt prohibitions in the Criminal Code".[44]

As aforementioned, the majority of the judges in the *Mann* case accept *in toto* the reasoning of Judson, J. in *O'Grady v. Sparling.* After deciding at some length Parliament has not defined "inadvertent negligence" as a crime, Cartwright, J. tersely concludes . . . "I find the present case indistinguishable from *O'Grady v. Sparling* and would dismiss the appeal".[45] Ritchie J. also feels the two sections deal with different subject matters and for different purposes and "that this case is therefore governed by the decision of this court in *O'Grady v. Sparling*".[46]

It would seem then that the majority of the judges, in the *Mann* decision, have adopted Judson J.'s test in *O'Grady v. Sparling* of focussing on the object and purpose of the legislation, in this area, where the provincial penal statute is attacked as encroaching on the Federal Criminal Law power, in order to circumscribe the paramountcy principle.

That this "object and purpose" approach is merely a "social policy" test or a judicial scheme to circumvent the paramountcy doctrine is borne out very crudely in the earlier decision of *Reference Re sect. 92 (4) of the Vehicles Act, 1957 (Sask.) c. 93.*[47] Here the Supreme Court held *intra vires* a provincial enactment which coerced a person to take a breathalizer test on the threat of the loss of his driver's license for 90 days notwithstanding s. 224 (4) of the Criminal Code, which expressly allowed a person to refuse such a test. From this decision it becomes very obvious that by employing this social justification test, the court requires little imagination to be able to

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41 *Ibid.*
42 *A.G. Ont. v. A.G. Can., supra,* footnote 38, at 366.
43 Where at 67, 68, Dunedin C.J. stated: "First . . . there can be a domain in which Provincial and Dominion legislation may overlap in which case neither legislation will be ultra vires if the field is clear; and secondly that if the field is not clear and in such a domain [if] the two legislations *meet,* the Dominion legislation must prevail."
44 *Supra,* footnote 6, at 237.
45 *Mann v. Queen,* [1966] S.C.R. 238 at 247.
46 *Ibid.,* at 251.
47 [1958] S.C.R. 808.

find a provincial "object or purpose" for almost any provision, thus avoiding the paramountcy doctrine.[48]

This reasoning certainly is discouraging to the Federalists. However, the majority of the court (Cartwright, Martland, Ritchie and Spence J.J.) in the *Mann* case do not seem satisfied merely to adopt Judson J.'s reasoning in *O'Grady v. Sparling* in this aspect of the case and they still feel it necessary to spend most of their time pointing up minor distinctions and differences in the two offences and concluding Parliament still has not defined inadvertent negligence as a crime. They do not, in short, seem to be denying the existence of a paramountcy doctrine.

However, as a result of the judgment of Fauteux, J. (with whom Judson and Abbott J.J. concurred), the paramountcy doctrine may even be denied the benefit of being ignored. It would seem that Fauteux, J. is going to some extremes in his judgment and implicitly inferring the distinctions drawn by the other judges between the two offences are irrelevant. He makes no factual distinctions between the two offences whatsoever and concentrates his efforts in asserting s. 60 has a separate object and purpose, that "the two sections differ in subject matter as well as to legislative purpose, and legal and practical effect".[49] After stating s. 60 is a valid provision in relation to the regulation of highways he asserts that when there is a conflict between the provincial regulatory power and the criminal law power of Parliament, the latter could never be validly construed,

> ... to a point leading to the gradual and eventual absorption or virtual extinction of the provincial regulatory power. Indeed, both these powers must be rationalized in principle and reconciled in practice whenever possible. I do not think that because the circumstances of a particular case may bring it within the scope of both s. 221 (4) and s. 60, one may validly conclude that s. 60 does not impose a duty to serve *bona fide* ends not otherwise secured and in no way conflicting with s. 221 (4) . . . I see no obstacle in preventing both enactments living together and operating concurrently.[50]

Fauteux, J. seems keenly aware that the criminal law power could be used to usurp many otherwise valid provincial regulatory measures if the paramountcy doctrine were to prevail, and he seems determined to destroy this doctrine as well as any wide definition ever given the criminal law power.[51] Indeed the paramountcy doctrine as interpreted by Martland, J. in *Smith v. The Queen*,[52] once thought to be overly restrictive and narrow, may no longer be in the extreme. The result of this rationale of Fauteux J.'s judgment is that the paramountcy

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[48] For a complete analysis of judicial review in this area, see Lederman, The Concurrent Operation of Federal & Provincial Laws in Canada, (1962-3) 9 McGILL L.J. 185.

[49] *Supra*, footnote 45, at 250.

[50] *Ibid.*

[51] Certainly one must consider as at an end the wide definitions giving supremacy to the criminal law lower in *P.A.T.A. v. A.G. Can.*, [1931] A.C. 310 and *A.G. B.C. v. A.G. Can.*, [1937] A.C. 368, 376.

[52] [1960] S.C.R. 776, 800, where he wrote that "there is only conflict within the meaning of paramountcy when compliance with one law involves breach of the other."

doctrine must be considered dead: for once one can discern two aspects, one provincial and one federal, to support a given matter, by Fauteux J.'s reasoning both pieces of legislation would be valid.

That this rationale has merit is unfortunately borne out by the judicial interpretation of the *Mann* decision in a most recent judgment of Laskin J.A., in *Regina v. Binus* where he writes: "I may add that even if there were no difference, (between s. 60 and s. 221 (4)) that would not, under the principles enunciated in *O'Grady v. Sparling* and *Mann v. The Queen*, affect the constitutionality of the Provincial enactment".[53]

Thus, as a result of adopting and extending a "social policy" test of analysing the object and purpose of the legislation, even if Parliament has occupied the field, had made inadvertent negligence a crime, or had even enacted s. 221 (4) in the very words of s. 60, it would seem that the courts may still hold the provincial enactment valid. Thus if Fauteux J.'s reasoning is to prevail on this point, the *Mann* decision must stand for "the permissibility of two complementary policies, one federal, one provincial, in the field of the protection of members of the public from the bad driver".[54]

Apart from the criticism that Fauteux J.'s reasoning is seemingly an unprecedented and unwarranted interpretation of the paramountcy doctrine, his judgment and the conclusion reached by the other members of the court is open to a far more serious criticism—namely, the practical consequences of such a decision.

As a result of this decision it may be that the bad driver faces double liability and penalties for the same act. Both in the aforementioned article[55] and in his text on Canadian constitutional law, Professor Laskin (as he then was) expresses the view that "this makes possible plural penal liability for the same act and it is questionable whether it is good policy in a federal state to invite it".[56] And again in the same text, he writes: "Certainly there must be some compelling reason to subject persons to double liability if both the Dominion and Provincial legislation seek to meet the same social problem in the identical way regardless of the differences of object or purpose in the constitutional sense".[57]

This dual liability which the *Mann* decision encourages may be attacked effectively from several different angles.[58]

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53 *Regina v. Binus*, [1966] 2 O.R. 324 at 335.
54 Laskin, Canadian Constitutional Law, 1966, (Third Edition) 140.
55 *Supra*, footnote 6, at 262.
56 Laskin, *Supra*, footnote 54, at 130.
57 *Ibid.*, at 107.
58 Inherent in this issue of dual liability are two equally repulsive possibilities. The first possibility is of coercing the accused to enter a plea of guilty to the lesser offence by threatening to proceed with the more serious charge. The second is the possibility of convicting him of both.

This note has only analyzed the first, but one must be equally aware of the second. Although less frequently employed in practice by the Crown

[*Footnote continued on next page*]

Firstly, it can leave (and has left) the law in a confused and muddled state. It is one thing to say in theory that the two sections are different but it is quite another to apply this distinction.[59] Even the courts have had difficulty in attempting to apply the *Mann* decision. Laskin J.A. in his judgment in the *Binus* decision at one point concludes: "I do not however read the *Mann* case as providing a guide to the ingredients of the offence of dangerous driving sufficient for the purposes of the substantive criminal law as contrasted with the purposes of constitutional demarcation of law-making power".[60] This statement will do little to assist the practitioner in advising his client as to the conduct covered by either offence. Laskin J.A. then proceeds to find the difference in the two sections, as interpreted from the *Mann* decision not in the standard of conduct but rather in "the prohibited consequences themselves!"

As the editors of the CRIMINAL LAW QUARTERLY write, "[t]o the general practitioner who cares little for rationalizations but who daily faces practical situations in Magistrates' Courts there is now no practical difference between careless and dangerous driving. The court in this case (*Binus*) in our respectful opinion is still trying vainly to rationalize the irrational".[61] In an earlier article in the same volume the editors state that "any differentiation in the type of negligence supporting one or the other seems to have been lost, and if, in a federal system of government, there is a failure to distinguish the two, one must fall".[62]

When the dual penalty is threatened and the courts and the practitioners are unable to distinguish between the two types of conduct which give rise to the penalties, two extremely inequitable results occur.

Firstly as the CRIMINAL LAW QUARTERLY noted, there is no difference between the two offences. One exception is listed and described as "Crown Attorney's choice", and the editors advise that, "counsel's best course of action is to negotiate a plea of guilty of the lesser charge

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Attorney, it is certainly not unknown. In the case of *Regina v. Devries* (County Court in Ontario) (1964) 2 C.C.C. 203, Reville, J. found the accused guilty under s. 225 (3) (d) of the Criminal Code (driving while disqualified) after he had earlier entered a plea of guilty, on the identical set of facts, to s. 13 (1) of the Ontario Highway Traffic Act (driving without holding an operator's license). Reville, J. dismissed both the defences of *res judicata* and *autrefois convict*. Although Laskin in his pronouncements on double jeopardy (*Supra*, footnotes 55, 56, 57), would seem to suggest that under our federal system, this is constitutionally valid, it is questionable whether this is so when viewed in terms of substantive criminal law. It is debatable that Reville, J.'s interpretation of *autrefois convict* (that the accused is charged with the offence and not the facts) is the correct one and it could still be forcibly argued that a person cannot be convicted twice on the same set of facts. For a complete discussion of this whole area of double convictions and *autrefois convict* in our federal system, see the recent article by M. L. Friedland, Double Jeopardy and the Division of Legislative Authority in Canada, (1967) 17 U. TORONTO L.J. 66.

[59] Law Society of Upper Canada, Special Lectures 1966, at 332.

[60] *Regina v. Binus, Supra*, footnote 53, at 329.

[61] Note, (1965-66) 8 CRIM. L.Q. 341.

[62] Note, (1965-66) 8 CRIM. L.Q. 4.

with the threat of making a charge of dangerous driving last all day. With today's busy calendars that is by far the best weapon in the defense arsenal".[63] At best this is a shoddy manner to dispose of the accused's rights. In effect it amounts to a bribe, and coerces defendants to plead guilty to the lesser charge to avoid the harsher penalty. Surely this is not a desirable result and yet it is a result the Supreme Court of Canada seems determined to have effected.

Even more disconcerting is the pertinent and valid conclusion of Professor Hopper that:

> depending as it does upon this discretion, the decision is more likely to be taken by reference not to the accused's conduct, but to the consequences of the conduct. . . . Assuming that the accused drove carelessly and as a result injured someone, it will not be difficult to obtain a conviction for dangerous driving. Yet, other drivers who do not injure anyone may well have driven far more dangerously and be far more deserving of punishment, but only be charged with and convicted of the lesser offence.[64]

This view of the difference between the two offences is in accord with Laskin J.A.'s interpretation of the *Mann* decision in *R. v. Binus.* Surely it is unfair to punish the accused more severely under the more serious charge of s. 221 (4) because of extenuating circumstances over which he had no control and which in no way reflect on his degree of fault.

It seems the Supreme Court of Canada is determined to help the provinces in their war against the bad driver and the alarmingly high dead toll on the highways. With respect, it appears quite clear that the court has affirmed this social justification approach with zeal and enthusiasm in order to do their part to suppress this public enemy. It is certainly an admirable thought and one should not perhaps be too quick to criticize a progressive and modern thinking court. However, in adopting this social policy test it seems that they have not considered the consequences of their decision, consequences which although may aid in suppressing this evil, have created others just as ugly and odius. One cannot overemphasize the totally precarious and injurious position the accused is put into as a result of allowing both enactments to stand.

We can all sympathize with the courts' attempt to sharply reduce one of the nation's highest killers, but the means adopted in this case to achieve that end not only could raise serious constitutional imbalances but could coerce many defendants to enter pleas of guilty to charges of careless driving that are at best questionable or else penalize him for acts over which he had no control. Both are to be violently opposed. A far more effective line for the courts to employ to achieve their goal, would be to declare s. 60 superceded by s. 221 (4)

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[63] *Supra,* footnote 61. See also Glanville Williams, *Supra,* footnote 24, at 117. "The question whether the defendant is brought into court under the major and minor charge depends merely on the discretion of the prosecutor without governing rules."

[64] Hopper, Dangerous Driving, A Controversial Decision, (1966) 9 CRIM. L.Q. 37, at 41.