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Faithfully Negligent: Religious Implications for Criminal Negligence Cases

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Abstract

Do the actions of parents in withholding medical treatment from their children due to religious influence show wanton or reckless disregard for the safety and lives of their children? This project investigates the morally and legally complicated issue of the influence of religious beliefs in criminal negligence cases. My MRP is animated by the idea that similar cases in the past have been treated with leniency and ought to be given stricter punishments.

I focus in particular on cases in which parents opt for alternative remedies or faith healing for ill children in ignorance or defiance of available medical treatments. I investigate the role of mistake of fact based on honest belief in prosecutions for criminal negligence causing death. Furthermore, I develop an argument that reliance on religious beliefs should not exculpate an accused parent from liability in criminal negligence cases.

I argue that similar cases in the past have been treated with great leniency. This research proposes that cases of faith healing deaths be treated as cases of manslaughter, namely under section 222(5)(b), and that a minimum sentence of six years' imprisonment be imposed for the death of vulnerable children.

Key Words: manslaughter, criminal negligence, religious belief, mistake of fact, failure to provide necessaries, objective fault.

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1. Introduction

Harrowing incidents of religion-based medical neglect cases in which parents, while adhering to the principles of their faiths, refuse to provide medical care to their children, are not unique to any particular faith or to any particular geographical region. While faith healing deaths occur infrequently in Canada, this phenomenon has imperiled some of the most vulnerable members of society. There have been several recent cases in which parents have not followed the advice of medical practitioners or have not sought any advice at all. Instead, they have opted for faith healing or alternative remedies to heal their ailing children. Although there may be success in these approaches to health and healing, many cases have resulted in very unfortunate outcomes – namely, the death of children.

Where there exist proven and effective solutions to common illnesses in allopathic medicine[1], why do individuals turn to alternative therapies? It is argued by Adrian Furnham, professor of psychology at the University College London, and clinical psychologist Bruce Kirkclady, that participation in alternative therapies is drawn out of a dissatisfaction with allopathic care as well as an attachment to the ideology of alternative care with the belief that it allows for a greater control over their health and healing.[2] This argument is supported by philosopher Warren Salmon who categorizes peoples' decisions to use alternative therapies into two broad groups: those relating to ideological aspect of alternative approaches to health care, and those relating to a dissatisfaction with allopathic

[1] "Allopathic medicine" refers to science-based modern medicine. It is a system in which medical doctors and healthcare professionals treat illnesses using drugs, surgery or radiation. It is also referred to as mainstream medicine, Western medicine, conventional medicine and biomedicine.; Elpern, David J. "Beyond Complementary and Allopathic Medicine" (1998) vol: 134 AOD at 11. (doi:10.1001/archderm.134.11.1473).

[2] Furnham, Adrian & Ravi Bhagrath. "A comparison of health beliefs and behaviours of clients of orthodox and complementary medicine" (1993) 32:2 British Journal of Clinical Psychology at 49.

medicine.[3] In his writing, he includes many other reasons which pertain to either of these categories as well as those which fall under both, collectively. Warren finds that some individuals prefer alternative therapies for the sole reason that they can exercise a greater degree of control over their health and care.

The existing psychological literature effectively presents the various reasons behind an individual's decision to use alternative medicine for their personal healing as compared to allopathic medicine. It also explains the rights that children have to decide for themselves and have dignity over their own bodies while also discussing parental autonomy over deciding what is best for their child. However, many questions remain unanswered and topics remain untouched. It appears there is a growing fad which is turning people towards holistic healing over allopathic medicines for reasons which vary, as discussed by multiple authors. It is crucial to determine where to draw the line; when should cultural, religious, or other external influences of a parent no longer apply to decisions made for their children? I argue that a bright line should be drawn when otherwise acceptable religious beliefs interfere with the child's medical treatment so significantly that the child's overall well-being is jeopardized.

The purpose of this major research project is to provide clarity about the conflicted moral and legal argument behind the conviction of parents who, in a criminally negligent manner, fail to protect their children. I will consider the provisions of the *Canadian Criminal Code*, particularly section 215 (failing to provide the necessaries of life) and section 222(5)(b) (criminal negligence causing death) and explain how I believe they ought

[3] Salmon, J Warren. Alternative medicines: popular and policy perspectives, ed (New York: Tavistock Publ., 1985) at 191.

to be applied to these cases. In my view how we determine the fault or culpability in these cases is debatable and subject to how morality is understood. To that end, a variety of arguments favouring convictions will be explored through a detailed look into relevant cases.

My purpose in this paper is to clarify the dichotomy between the institution of law and the inscrutable values of religious belief, and to investigate what happens when they collide, and individuals commit acts resulting in the deaths of vulnerable children. The task of discerning whether parents who withhold medical treatment should be held criminally liable for harm or death caused by their conduct is a difficult task that this study aims to make clearer. I hope that this project will have predictive utility to make an accurate prediction of how future deaths of children of criminally negligent parents could be handled in Canadian courts. Although conclusions cannot be made with certainty, a bright line rule can be proposed to deal with these sorts of cases. This proposed rule will allow for the defence of mistake of fact to be available in principle although the claim would not be able to rest on the claim that the mistake was based on a religious belief, or faith in alternative medicine.

My discussion proceeds as follows. First, I will ask whether an honest and reasonable belief in the healing power of religion should exculpate an accused parent from liability in cases of criminal negligence causing death. And second, I will inquire into the extent to which the criminal law can make exceptions, if any, for individuals with religious beliefs in cases involving objective fault offences. My thesis is the defence of mistake of fact should not be available in cases of criminal negligence causing death where the parents cause the death of their child. I argue that when there is good evidence that a child's health

or wellbeing are being negatively affected but the parents continue to pursue treatment based on their religious beliefs, their conduct is criminally negligent.

My animating question is the following: do the actions of such parents in withholding medical treatment from their children show wanton or reckless disregard for the safety and lives of their children? Put simply, do such parents depart "markedly and substantially" from the required standard of a reasonably prudent person? An additional question is the following: are their actions/omissions enough to sentence perpetrators to the maximum penalty instead of the low-range sentences that have typically been given in the past? My answer is that they do depart from the required standard of a reasonably prudent person, that when their failure to provide their child with medical help causes their child's death they should be convicted under section 222(5)(b) for criminal negligence causing death, a form of manslaughter, and that they should be required to serve longer sentences than they currently do.

2. Fault Elements and Penal Negligence

Having considered the possible reasons behind the decision to choose alternative medicine over western medicine, or completely rely on a superior power to heal a child, let us discuss the legal implications of these decisions. In our free and democratic society, we are granted certain Charter rights and freedoms to the extent that they do not interfere with or affect another individual's rights and freedoms. Therefore, where a parent makes a medical decision for a child that infringes the child's right to life, such actions are punishable by the law.

To date, faith healing and the use of alternative medicine continue to be prosecuted under two statutory heads in the Criminal Code of Canada, namely: section 215 (failing to provide the necessaries of life) and section 222(5)(b) (criminal negligence causing death). Criminal negligence causing death is a more serious offence than the failure to provide necessaries because a person guilty of the former has caused the death of another human being whereas one found guilty of the latter has at best exposed another human being to risk of harm.

Section 215 of the Code imposes a duty on parents to, among other things, provide the necessaries of life to their dependents. When prosecuted as an indictable offence the maximum sentence is five years, while the maximum sentence for a summary offence is eighteen months. The prescribed range gives the Crown discretion to proceed based on the moral blameworthiness of the accused's actions.[4] Halsbury's Laws of Canada outline the

[4] The range between indictable offence and summary offence also gives the accused the choice between being tried in a provincial Magistrate's Court by a judge alone or in a Superior Court of Court of Queen's Bench by a jury. See Kent Roach, *Essentials of Canadian Law,* 2nd ed *(Toronto,* ON: Irwin Law, 2004) at 25.

duty placed upon parents, guardians and spouses to provide the necessaries of life to their dependants, in accordance with the Criminal Code. The duty to provide the necessaries of life has been elucidated under section 215(1)(a) of the *Criminal Code:* "everyone is under a legal duty as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years".[5]

The provision does not give guidance on what exactly constitutes 'necessaries' of life'. Section 215(1) imposes a duty and, further, section 215(2) clarifies what happens when a person fails to meet the imposed duty. Generally, an offence is only committed under section 215(2) if the breach of duty under section 215(1) involves a person in necessitous circumstances, or where there is risk of harm to that person. The definition of "necessaries of life" in Halsbury's Laws of Canada extends beyond the necessaries to preserve life to include medical aid. The courts have amplified the meaning of these provisions by including food, shelter, clothing and medical treatment, all of which are considered necessaries tending to preserve life.[6] The act of knowingly withholding medication, or a prescribed medical treatment, would fit well into this description.[7] This would lead to a conviction of criminal negligence causing death if the failure to meet the duty rose to the level of a marked and substantial departure and that the failure or omission caused the death of another human being. The essential elements of the offence constituting the failure to provide necessaries of life includes:

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[5] *Criminal Code*, R.S.C. 1985, c. C-46, s. 215(1)(a).
[6] See *R. v. Brooks*, (1902) 5 C.C.C. 372 (B.C.C.A.); *R. v. Lewis*, (1903) 7 C.C.C. 261 (Ont. C.A.).
[7] *Criminal Cod*e, R.S.C. 1985, c. C-46, s. 220.

1) proof of legal duty to provide necessaries of life to be determined by circumstances

2) failure to perform the duty must be with respect to a person in destitute or necessitous circumstances or failure to endanger life of the person to whom the duty is owed/cause of person to be permanently endangered.

Ill minor children are considered as persons in necessitous circumstances and any omission to provide them with the necessary care could permanently endanger their lives. Thus, any parent who fails to provide their child, to whom the duty is owed, with any necessary care and fits the description under section 215, would be punishable under section 222(5)(b) if that failure causes the death of their child and if that failure rises to the level of criminal negligence. This has been clarified by Fish J. in *R. v. J. (F.)*:[8] To be charged with a failure to provide the necessaries of life to a person dependent on the accused, the following must be satisfied: the accused's

> "failure to protect the child [must have] contributed to the child's death and (2) a reasonable parent in the same circumstances would have foreseen that failing to protect [the child] would cause the child's health to be endangered permanently."[9]

As mentioned earlier, section 215 and the failure to provide necessaries of life is a distinct offence from section 222(5)(b) criminal negligence causing death. However, a failure under section 215 can lead to a charge under section 222(5)(b). This makes it important to discuss the former to develop an understanding of the connection between the

[8] [2008] 3 S.C.R. 215.
[9] Ibid at para 25.

two charges. So far, I have discussed the elements constituting an offence under section 215. I will continue to examine this provision further to delve into what is meant by a marked and substantial departure from the conduct of a reasonably prudent person. Also, what the standard for a reasonably prudent person is and how an individualized approach can affect the process.

Section 215 extends to include behaviour that is meant to be punished as a marked and substantial departure from the conduct of a reasonably prudent parent where a risk to life is foreseeable at the failure to provide necessaries of life. This section only requires a marked departure, since it is an offence of penal negligence rather than criminal negligence. In some cases, however, the failure to provide the duty is so aggravated that it rises to the level of criminally negligence conduct. The trial judge in *R. v. J. (F.)*[10] stated that the approach to assessing the foreseeability should be from the standpoint not from what the respondent foresaw, objectively, from the perspective of what a reasonable parent in identical circumstances could foresee. Consideration must be placed on whether there was a discernible risk of more than a short-lived bodily harm to a child which a reasonable parent in like circumstances would have appreciated and taken steps to prevent.[11] This applies to charges of failure to provide necessaries and criminal negligence.

The description for a punishable marked departure is conduct that does not meet the standard of a *reasonably prudent* person. There are three possible standards: a failure to meet the reasonable person standard which is not criminal but gives rise to liability for a public welfare offence; a failure to meet the reasonable person standard that constitutes a

[10] Ibid.
[11] Ibid at para 30.

marked departure from the standard, which is penal negligence; and failure to meet the reasonable person standard that constitutes a marked and substantial departure, which is criminal negligence. The importance of distinguishing between these standards is elucidated in *R. v. Beatty*:

> "if every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy."[12]

Furthermore, the higher standard to meet the standard for criminal negligence has been highlighted by Kent Roach in *Essentials of Criminal Law*:

> "Section 7 of the *Charter* has been interpreted to require more than simple or civil negligence , but rather a "marked departure from the standards of a reasonable person" in order to convict a person of a criminal offence based on objective fault."[13]

Let us dissect that term further to clarify the broad description of a person that would be considered to be reasonably prudent. An extensive summary of the character of the reasonable person is found in *Arland v. Taylor*[14]:

> He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything a prudent man would do. He acts in accord with general and approved practice. His conduct is guided by considerations which ordinarily regulate the conduct of human

[12] 2008 SCC 5 at para. 34.
[13] Kent Roach, *Essentials of Canadian Law*, 6th ed *(*Toronto, ON: Irwin Law, 2015) at 75.
[14] *Arland v. Taylor* (1955), [1955] O.R. 131 (Ont. C.A.).

> affairs. His conduct is the standard 'adopted in the community by persons of ordinary intelligence and prudence'.[15]

To meet the standard of a reasonable person requires, by law, a minimum level of performance. There is no expectation of perfection or extraordinary judgment and the standard allows for the consideration of accidents and errors in judgment.[16] Since every human mind has its own way of rationalizing and making decisions, any blunt rule or standard would expect humans to also operate robotically.

Lamer C.J. argued in support of a personalized approach when factoring in age/youth, lack of experience etc. for a mother who failed to provide the necessities of life to a child in *Naglik*. The Supreme Court of Canada, however, rejected this individualized or personalized approach in *Creighton* where the majority accepted that only certain characteristics of an individual could establish incapacity, thereby exculpating the accused. McLachlin J., for example, said that

> "The question is what the reasonably prudent person would have done in all the circumstances. Thus a welder who lights a torch causing an explosion may be excused if he has made an enquiry and been given advice upon which he was reasonably entitled to rely, that there was no explosive gas in the area."[17]

In *Tutton v. Tutton*, McIntyre J. stated that criminal negligence requires "proof of conduct which reveals a marked and significant departure from the standard which could

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[15] Ibid. See also CED 2nd (online) *Negligence*, "Elements of Cause of Action: Standard of Care: The Reasonable Person" (II.4.(a).(i)).
[16] *Sigerseth v. Pederson* (1927), [1927] S.C.R. 342 (S.C.C.).
[17] Ibid.

be expected of a reasonably prudent person in the circumstances" as opposed to simple negligence. It is required to prove more than mere negligence.[18] The court held that proving negligence would not suffice rather, it must be explicitly recognized that the accused had failed to do what the reasonable person would have done. The same was explained in *R. v. Hundal*[19]: in context of Criminal Code offences, the Supreme Court indicated that there must be at a minimum a "marked departure from the standard of care that a reasonable person would observe in the accused's situation". The court unanimously accepted this position that the "test for [penal] negligence is an objective one requiring a marked departure from the standard of care of a reasonable person"[20]. Whenever the reasonableness standard is encountered to a Criminal Code offence, courts must require a proof of at least a marked or gross departure from the norm.

The discussion above endorses McLachlin J.'s view from *R. v. Creighton* that an objective standard – such as the standard in penal or criminal negligence – does not take into account personal characteristics except where those characteristics are relevant to the accused's capacity to appreciate the risks that his or her conduct was imposing on others.

My argument to this point has been that the objective standard to determine a marked and substantial departure from the standard of a reasonably prudent person is, indeed, a more suitable approach than the individualized approach otherwise proposed. What I would like to do now is shift the focus from section 215 onto the second statutory head, and the more serious, section 222(5)(b) which outlines the provisions for criminal

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[18] Kent Roach, *Essentials of Canadian Law*, 2nd ed *(*Toronto, ON: Irwin Law, 2004) at 140.
[19] (1993) 79 C.C.C. (3d) 97.
[20] Ibid at para. 108.

negligence manslaughter. I will further articulate the requirements for objective fault and explain what it means to depart from the standard of a reasonably prudent person.

The broader charge, manslaughter, is constructed negatively under section 234 of the Code, which defines it as "culpable homicide that is not murder or infanticide is manslaughter". Therefore, death that is caused by criminal negligence can either give rise to a charge under section 220, criminal negligence causing death, or section 222(5)(b), criminal negligence manslaughter. Though these are offences are divided under two statutory heads, their fault elements are identical.[21] So, what is criminal negligence? Section 219(1)(b) of the *Criminal Code* defines criminal negligence as wanton or reckless disregard for the lives or safety of other persons: "everyone is criminally negligent who (a) in doing anything, or (b) omitting to do anything that it is duty to do, shows wanton or reckless disregard for the lives or safety of other persons." An exact definition has not been provided for the terms "wanton" and "reckless" as they are *sui generis* concepts.[22]

McIntyre J. stated in *R. v. Tutton,*

> The plain and ordinary meaning of the terms "wanton" and "reckless" when used in connection with the concept of negligence would seem to include a state of being heedless of apparent danger. Section 202(1) does not use the term "reckless" as an

[21] Arbour J. stated in *R. v. Morrisey*, [2000] 2 SCR 90 that section 222(5)(b), read in conjunction with section 234 makes clear that the offence of criminal negligence causing death is a type of manslaughter. She further stated at para. 62 that: "The circumstances of this case palpably demonstrate the overlap: the accused was initially charged with manslaughter and there is nothing in the record that explains why he was committed for trial on the charge of criminal negligence causing death rather than on the original charge of manslaughter. Nothing turns on this since the two are totally interchangeable."

[22] Parliament has also not defined fault elements such as "purposely", "reckless", or "negligently" or specified which fault elements applies to each offence; *Criminal Code* R.S.C. 1985, c. C-46.

> extended definition of intention or malice, but rather employs the term as part of a definition of conduct which amounts to "negligence" in a criminal context.[23]

Then, does wanton or reckless disregard make withholding the necessaries of life worse? Where parents choose faith healing or alternative medicine, I assume they are aware of potential side effects that could put their child's life at risk – it is difficult to view this as anything other than wanton and reckless. Though there may be cases in which no visible signs of deterioration of health exist to indicate to a parent that their prayers are not working, it is still unreasonable to ignore medical treatment where it is available. Hence, their ignorance of medical treatment or failure to seek medical advice displays a wanton and reckless disregard for the health and safety of their child. Where the parent is subjectively reckless about their child's safety and death ensues, this should suffice for criminal liability under criminal negligence. The cases in which parents may not be subjectively reckless furthers our discussion into another direction which I have delved deeper into in section 4 of this paper. To hold someone criminally liable for a negligent action that caused harm to another, it needs to be proven that the accused had a fair opportunity to have chosen a different course of action but failed to do so, unreasonably.[24]

To sum things up thus far, I have stated the fault elements under section 215 and 220 that discuss the failure to provide necessaries of life and criminal negligence manslaughter. The standard of a reasonably prudent person, together with what constitutes a marked and substantial departure from the same and what it means to display wanton or reckless disregard for the lives or safety of other people have been covered thus far. I have

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[23] *R. v. Tutton*, [1989] 1 S.C.R. 1392 at para 43.

[24] Wasserstrom, Richard A. "H. L. A. Hart and the Doctrines of Mens Rea and Criminal Responsibility." (1967) 35 University of Chicago LR 1 at pp. 92-126.

also accepted that the Supreme Court of Canada was correct in applying the objective approach to criminal negligence in *Tutton* and *Creighton*. However, whether the Tuttons' belief was reasonable, is questionable and will be discussed later on in this project. The following are examples of parents and guardians of children who were charged with criminal negligence manslaughter for the death of a minor in their care. These cases demonstrate the presence of the required elements for a charge under section 2222(5)(b). Though these are not cases of faith-healing deaths, they are relevant for a basic understanding of a fact pattern that would lay a charge of criminal negligence manslaughter. This understanding will develop throughout this project to narrow the application of this provision down specifically to faith-healing deaths.

In the summer of 2003, Dominic Martin of Verdun, Quebec was dropping off his twenty three-month old daughter Audrey at day care.[25] He agreed with his wife, who was in a hurry to get to work, to drop her off first then proceed to Audrey's day care. However, after dropping his wife off, he drove on and parked in his usual park'n ride location to embark on his transit commute to work. His daughter was sound asleep in the backseat, strapped responsibly in her child seat. Upon returning at the end of the day, he found his daughter unconscious. She was rushed to the hospital but died a few hours later of heat exhaustion. Martin was charged with criminal negligence manslaughter to which he pled not guilty. The charges were dropped by the crown citing insufficient evidence to sustain the criminal charge.

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[25] "Father Charged in Baby's Death," *CBC News*, (18 July 2003), online: <https://www.cbc.ca/news/canada/montreal/father-charged-in-baby-s-death-1.379179>

In a similar case, Leslie MacDonald was to drop her grandson, Max, off at daycare after picking him up from her daughter's house. She was tired after a long night shift and drove home to sleep. Later that evening, she drove to the day care to pick up her grandson when she realized that she had forgotten her grandson in the backseat of her car. Max was rushed to the hospital by paramedics but was pronounced dead due to heat exhaustion and hyperthermia. MacDonald was charged with criminal negligence manslaughter and failure to provide the necessaries of life. Her fate was different than that of Dominic Martin as she pled guilty to the lesser offence of failing to provide the necessaries of life. The more serious charge of manslaughter was dropped.[26]

All civilians in Canada have the right to be protected from injury or physical endangerment by another individuals' wanton or reckless disregard for their lives or safety. This right is held *in rem,* against the society at large. Thus, society owes a correlative duty to not put other lives at risk. An omission to discharge a positive duty can display a wanton or reckless disregard towards those to whom the duty of care is owed can also evoke a charge of criminal negligence. Additionally, children protected by these rights are owed for the additional duty of being cared for in a manner absent of wanton or reckless disregard.

The ultimate goal of the criminal law is to have criminally negligent parents receive their legal due, not more but for the sake of needlessly dead children, not less. I will argue

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[26] Kaleigh Rogers, "Grandmother Charged In Death Of Milton, Ont. Toddler Left Alone In Hot Car" *The Globe and Mail* (5 July 2013) online: <https://www.theglobeandmail.com/news/national/grandmother-charged-in-death-of-milton-ont-toddler-left-alone-in-hot-car/article13019696/#:~:text=A-,Grandmother%20charged%20in%20death%20of%20Milton%2C%20Ont.%2C%20toddler,left%20alone%20in%20hot%20car&text=Maximus%20Huyskens%20was%20in%20the,heat%20stroke%20on%20June%2026.>

that such parents culpably commit homicide while failing to provide the necessaries of life, and that they departed markedly and substantially from the required standard. Convictions must be morally and legally justifiable though they need not be characterized by moral certainty which is a luxury rarely afforded by cases involving criminal negligence.

This section discussed the fault elements of section 215, failure to provide the necessaries of life, and section 222(5)(b) criminal negligence manslaughter. There are many complex concepts that apply to criminal negligence cases alike but are complicated somewhat when applying them to cases involving faith healings. The next section investigates the fault requirements for criminal negligence specifically determining whether a subjective or objective approach is appropriate to deal with these cases.

3. The Fault Requirement for Criminal Negligence

The ancient Latin maxim *actus non facit reum nisi mens sit rea* (an act does not become guilty unless the mind is guilty) displays the belief that where a crime contains a visible element, it also carries a mental component. In criminal law, the fundamental principle is that there should be no responsibility without personal fault. The Supreme Court of Canada asserted a fault requirement as a matter of constitutional imperative under section 7 of the Charter[27] in *Reference re Section 94(2) of Motor vehicle Act (B.C.)*[28] and as a matter of fundamental common law principle in *City of Sault Ste Marie*[29]. Since there is a constitutional requirement of fault for offences threatening liberty interests, the remaining question is what the fault requirement entails. There is substantial ambiguity about definition; the central issue continues to be whether to follow a subjective or objective approach.

The Supreme Court judgment in *Creighton*[30] made a clear distinction between the subjective standard of whether the accused was actually aware of a risk and the objective standard of whether the accused failed to measure up to the external standard of the reasonable person, irrespective of awareness.[31] The dilemma between which test would be appropriate in cases of criminal negligence manslaughter for parents causing the death of their children was discussed in detail in the case of the Tuttons.

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[27] Section 7 of the Canadian Charter of Rights and Freedoms guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
[28] *Motor Vehicle Amendment Act, 1982*, 1982 (B.C.), c. 36.
[29] [1978] 2 SCR 1299.
[30] (1993) 23 C.R. (4th) 189 (S.C.C.).
[31] Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed. (Toronto: Carswell, 2014).

R. v. Tutton[32]

The respondents in this case belonged to the religious sect of Jehovah's Witnesses which believes in faith healing. They were the parents of a five-year-old diabetic child, Christopher. They believed that a divine power could perform miracles to cure ailments in response to prayers. Their religious beliefs did not prevent them from seeking medical advice, nor taking medicine. However, they did believe that the Lord could cure ailments that were beyond the purview of medical science. The primary concern of the parents was to cure Christopher's diabetes and to relieve him from the necessity of taking insulin for life. They claimed to find support for their reliance on faith healing in the Bible, and it was conceded that they were both sincere in their beliefs. In October, 1980, Mrs. Tutton ceased administering insulin because she firmly and honestly believed Christopher had been healed by the power of the Lord, that is, she genuinely believed Christopher was not in danger of dying. His health immediately began to decline and was rushed to a local hospital. There, the tending doctor informed the Tuttons that failing to administer insulin could have possible fatal consequences. The doctor had obtained assurances from them that they would not withhold insulin in the future. About a year later in October of 1981, Mrs. Tutton received a vision from God informing her that her son had been cured of diabetes and no longer required any insulin medication. A few days later, they found their son not breathing and was pronounced dead on arrival.[33]

Arthur Tutton and Carol Tutton had educated themselves on the implications of diabetes and tried to understand the issue as accurately as possible. They did not withhold

[32] [1989] 1 S.C.R. 1392
[33] Ibid at para 35.

any other form of medical care from Christopher, but in relation to his diabetic condition, they believed that God would intervene.

The respondents were charged with causing their son's death by criminal negligence through omitting to provide him the necessaries of life without lawful excuse, thereby committing manslaughter. They raised the defence of honest mistake of fact which would render their conduct non-culpable. They were convicted of manslaughter and appealed to the Supreme Court of Canada which set aside the conviction and directed new trials on the basis that the trial judge failed to explain to the jury that the statutory reverse onus of proving the lawful excuse was to be applied only to the offence of failing to provide necessaires of life, not to the charge of manslaughter.[34] The court also held that a subjective awareness of risk was required, rather than the usual test of a marked and substantial departure from the objective norm.[35] There was doubt whether the case was of an omission on the part of the parents or the commission of an act that evokes criminal liability. It was determined that the fault element required for an offence would be the same for a commission and omission. On the test of fault of criminal negligence, the court was divided as to whether the test should be subjective or objective.

The debate in this case focused on the mental requirement of criminal negligence. In the subjectivist view, a "true" and serious crime requires subjective fault for a conviction.[36] According to Wilson J.,

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[34] *Supra* note 32.
[35] Ibid.
[36] One of the categories of offences recognized in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, (1978), 40 C.C.C. (2d) 353.

> "[T]he words of the section can reasonably bear an interpretation which leaves room for the mental element of awareness or advertence to a risk to the lives or safety of others or wilful blindness to such risk. Conduct which shows a wanton or reckless disregard for the lives and safety of others will by its nature constitute *prima facie* evidence of the mental element, and in the absence of some evidence that casts doubt on the normal degree of mental awareness, proof of the act and reference to what a reasonable person in the circumstances must have realized will lead to a conclusion that the accused was aware of the risk or wilfully blind to the risk."[37]

The objectivist response to this argument is that criminal negligence differs in degree from civil negligence that is a greater departure from the standard of care expected from a reasonable person. Where there is an agreement on the fundamental matter, there remains a debate on how subjective the subjective fault is and the extent to which the objective view is ameliorated by considerations unique to the accused persons.[38] The Supreme Court members who took part in the judgment were split evenly on the subjective-objective debate. McIntyre J. reasoned that criminal negligence is not an ordinary *mens rea* offence and therefore concluded that an objective test is required.[39] McIntyre J. stated[40]:

> in choosing the test to be applied in assessing conduct under section 202 of the criminal code, it must be observed at once that what is made criminal is negligence. Negligence connotes the opposite of thought-directed action. In other words, its

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[37] *Supra* note 32.
[38] MacKinnon, P. "Criminal law - criminal negligence and recklessness - criminal law reform: *The Queen v. Tutton; Waite v. The Queen"* (1990) Canadian Bar Review 69:1 at 177.
[39] The Court of Appeal accepted the objective test to be generally applicable while also concluding that a subjective test would be required where the charges are based on acts of omission, distinct from those of commission.
[40] *Supra* note 32 at pp 1429-30.

> existence precludes the element of positive intent to achieve a given result. This leads to the conclusion that what is sought to be restrained by punishment under section 202 of the code is conduct, and its results. What is punished, in other words, is not the state of mind but the consequences of mindless action"[41] and a conviction is justified where there has been a "marked and significant" departure from the standard of conduct expected from a reasonable person.[42]

According to McIntyre, introducing subjective elements into objective standards creates the risk of being underinclusive as subjective elements result in a lowering of the objective standard of liability dependent on certain characteristics. They also risk being underinclusive for the accused who have idiosyncrasies that are not articulated ex ante into the limited list of personal characteristics that are implanted in the objective standard. McIntyre J. listed characteristics that would not lower the harshness of the application of an objective standard for a driver who drove in a reckless manner which displayed a wanton disregard for the lives and safety of others. It would not matter that the driver was unable to wilfully blind himself or herself to the prohibited risk; this conduct would in itself breach the objective standard.

If a religious or spiritual belief can be used as an excuse, why not a belief of excessive self-confidence or mere ignorance? The Tuttons were educated about the risk and complications of Christopher's diabetic condition and were warned by doctors to not withdraw insulin; therefore it is my conclusion that their belief in a divine cure should not excuse. They had taken medical advice and knew that withdrawal of insulin would have

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[41] Ibid. at para 1430.
[42] Ibid at para 1431.

serious consequence. The ignorance of a parent towards medical advice and the excessive self-confidence to make their own decisions should not lawfully be excused.

The purpose of section 222(5)(b) would be defeated if it required that the accused's intention be separately proven because intentional conduct would inevitably be considered under other sections of the Code. Section 222(5)(b) aims at mindless but socially dangerous conduct. The test is of reasonableness; only proof of conduct revealing a marked and substantial departure from the standard expected from a reasonably prudent person will justify a conviction of criminal negligence.

4. Can Parents Use the Defence of Honest Belief in the context of Criminal Negligence?

To elaborate on the defence of mistaken belief, Dubin J.A. in *Tutton* stated in the Ontario Court of Appeal that the Crown must establish that the accused omitted to provide Christopher with insulin without lawful excuse. A lawful excuse in this case may have been that the person did not have the funds to purchase insulin or that due to a personal or physical incapacity was unable to obtain the medication, or did not know how to administer it. My claim is that religious beliefs are never a lawful excuse in cases involving faith-healing deaths. It is never reasonable to claim, for example, that insulin or other medication or treatment was not administered because the accused were of the view that God told them that such medication or treatment was not required.

Though mistake of fact is a recognized and lawful excuse in some cases, mistaken belief based on sincerely held religious beliefs should not be recognized as an excuse in objective fault offences because the persons purposely followed such beliefs in ignorance of other options. By this I mean, religions are generally, voluntarily followed. There is usually no forceful compliance and the parents in all the cases discussed in this study portray the minimum cognizance required in executing the standard of a reasonable person.

In *Pappajohn v. Queen*[43], clarifications were made regarding the defence of mistake of fact in cases of sexual assault. Although this interpretation applies to subjective fault offences and does not necessarily assist in reaching a definite conclusion for objective fault offences, it is still useful to discuss. In this case, Dickson J. makes clear that a belief must

[43] (1980), 52 C.C.C. (2d) 481, 14 C.R. (3d) 243, [1980] 2 S.C.R. 120, 111 D.L.R. (3d) 1.

be honest where the fault element is subjective. However, because criminal negligence causing death is an objective fault offence, it stands to reason that in order to exculpate a mistaken factual belief must be both honest and reasonable. A mistake of fact is a negation of guilty intention instead of an affirmation of a positive defence; it avails an accused who acts innocently, pursuant to a flawed perception of the facts and nonetheless commits the actus reus of an offence.[44] There is a requirement that the mistake to excuse be both honest and reasonable in cases of criminal negligence. The accused may only raise the defence of mistake of fact where the mistake is reasonable; the burden of proving such a mistake lies upon the accused.[45] I argue that in cases of death caused by criminal negligence an appeal to religious beliefs cannot be reasonable especially where there are obvious signs of deterioration of health and other medical assistance is available.

Where the parent has reason to believe that their child is ill, has been told by doctors that their child is ill, and has been instructed to follow a certain treatment or the child will die, the mistaken belief that God will cure the child's illness is unreasonable and so cannot be relied on. However, the difficult question arises where there are no visible signs of illness, doctors are unaware of any illness nor have they instructed any treatment. In that sort of case, can a parent rely on their honest but mistaken belief that God will intervene to heal the child? My answer to this is quite simple. Where the parent is unaware of their child's illness, there is no reason for them to believe that God will heal where there is nothing to be healed. What is the belief healing? It would not be logical for the parent to pray for an illness that they do not believe exists. Therefore, to raise the defence of an

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[44] Ibid at para 261.
[45] Manning, Mewett & Sankoff, *Criminal Law*, 5th Ed. (Markham, Ont.: LexisNexis Canada, 2015) at 47.

honest and reasonable mistake where their child dies due to negligence on the parent's part seems to be an easy way exculpate the consequences.

I consider the facts of of *R. v. Stephan*[46] to clarify my argument. In this case, the parents were aware of the signs and symptoms of meningitis, none of which were displayed by their child. They were concerned and vigilantly monitoring the child's health for any serious symptoms. The physical evidence established that the child's death occurred due to a deprivation of oxygen caused by laryngotracheobronchitic complications, and not from meningitis. The parents had initially been charged with the failure to provide necessaries of life, of which they were later acquitted. In this case, if the parents had raised the defence of an honest but mistaken belief, what would be the basis of the belief? Would they be praying for their child to be healed of meningitis or the underlying illness they were unaware of? To reiterate my argument, faith-healing cannot exist where there is no illness to heal. If the parents are unaware of their child's illness because the child has not displayed any visible symptoms, the parents would not honestly and reasonably be praying for that specific illness, for which they would be charged. Therefore, in the case of *Stephan*, and alike, the defence of mistake of fact should not be available.

I now turn back to the discussion of what is required before an accused can rely on the defence of mistake of fact. The Crown, in the Tuttons' case, was required to prove, beyond a reasonable doubt, that it was the duty of the Tuttons to provide their son with the necessaries of life, which happened to be daily insulin injections. The Crown needed prove beyond a reasonable doubt that the Tuttons failed to do without a lawful excuse[47], that they

[46] 2019 ABQB 715.
[47] *Criminal Code*, R.S.C. 1985, c. C-46, s. 215(2).

showed wanton or reckless disregard for his safety, and that their omission caused his death.[48]

Both the Supreme Court and Ontario Court of Appeal agreed that a new trial was needed. The Tuttons' claim was that Christ revealed Himself and announced that insulin injections are no longer required, subsequently causing their son to become seriously ill. Though the Tuttons claimed they held an honest and reasonable belief that their child had miraculously been cured, I still argue that a belief in ignorance of medical advice is unreasonable. As mentioned earlier, a subjective fault element is not required in objective fault offences. Since this case is one of objective fault, even in the absence of subjective fault, a punishable wrong has been committed.

The words of section 202 (now 219) of the Code clearly indicate that a person is criminally negligent who in omitting to do the duty that is his to do shows wanton or reckless disregard for the lives or safety of other persons. In such cases, an objective test must be employed where criminal negligence is considered to be the conduct of the accused, as opposed to his mental state or intention.[49]

R. v. Aitkian[50]

The defence of honest belief was raised in *Tutton* and thoroughly explained in *Aitkian*. The Ontario Court of Justice clarified reasons why this defence cannot be used in cases involving criminal negligence manslaughter. In this case, the parents of a 17-month-old infant girl were charged with failing to provide the necessaries of life, without lawful

[48] *R. v. Tutton,* [1985] O.J. No. 44 at para 335.
[49] Ibid at para. 45.
[50] *R. v. Aitkian,* [1992] O.J. No. 3045 (ONCJ).

excuse, and thereby causing the death of their child. Their daughter died from malnutrition and bronchial pneumonia. The parents presented the defence that they had an honest belief they were providing their child with the required necessaries. The mother had been getting various treatments from an herbalist prior to the birth of their daughter, and during pregnancy. Upon her birth, the herbalist predicted the child to be strong and healthy. A few months later, the mother refused the advice of a paediatrician to have the child immunized and continued following the advice of the herbalist regarding the care and needs of the child. After 11-months of being breast-fed and thriving, the child developed a rash that caused to wither and die. The herbalist had persuaded the parents that the visible changes in the child's health were part of a healing process. They were convinced that getting medical attention would be equivalent to "putting a gun to her head". Both parents were convicted at the initial trial but successfully approach and a new trial was ordered.[51]

The position of the accused was that they genuinely believed in the nutritional and health care advice of the herbalist despite the visibly deteriorating health of the child. The defence was supported by extensive evidence on the good character and good parenting of the accused. The photographic evidence of the pathologist depicted the progressive deterioration of the child until death by starvation. It validated that it is inconceivable that

[51] Ibid. The trials proceeded on the basis of information received from the child's father that he had asked his wife to call the police at 1:30 p.m. and the child's death occurred between 2:35 and 2:50. However, evidence tendered at all three trial proved that the 911 call was made at 2:48 p.m., leaving a difference of over an hour before the police was contacted. The police did not disclose that the male was mistaken about the time he had the conversation with his wife; the disclosure was made during the fifth week of the third trial. The accused was denied a fair trial in both the first and second trial. They were prejudiced as a result of their inability to make full answers and defence due to the Crown's inability to disclose such a significant piece of information. Then J. determined that fair play and decency was disproportionate to the public interest in continuing the trial; the indictment against both accused was stayed as an abuse of process.

parents who observed the progressive deterioration of the child could have honestly believed they were providing the child with the necessary care.

As mentioned earlier in this section, in order to exculpate, a mistaken factual belief must be honest and reasonable in criminal negligence cases. Where there are obvious signs that a child's health is deteriorating, it is difficult to label the belief as one that is honest and reasonable. Relating back to the standard of a reasonably prudent person, a prudent parent would be able to detect such blatant signs of deterioration. Therefore, in criminal negligence cases, where the mistake of fact is unreasonable and even dishonest, the defence should not be allowed.

5. The Tuttons' Conception of Indifference

A term used repeatedly when discussing the charge of criminal negligence manslaughter is "recklessness". *Merriam-Webster* simply defines the term as a lack of proper caution or careless of consequences.[52] In legal terms, it carries quite a complex understanding. The application of this term varies depending on the offence, whether it is objective or subjective.

The Ontario Court of Appeal adopted a version of recklessness in the form of indifference in *Tutton*. The Court held that recklessness is a constituent element of criminal negligence. It was held in *F.(J.)* that where the jury is not satisfied that the parents displayed a wanton and reckless disregard for the safety of their life, they would be required to acquit the accused of the crime of manslaughter. Recklessness does not directly translate to an indifference to risk. So, were the Tuttons reckless in their decision to withdraw insulin?

McIntyre J. quotes himself from *Sansregret v. The Queen*[53] in *Tutton* in support of the objectivist approach:

> "I expressed the view that "recklessness, to form a part of the criminal *mens rea,* must have an element of the subjective". I then went on to say that, "[i]t is in this sense that the term `recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence... [I]t is in this sense that the term `recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence. It was argued upon the basis of these words and later comments on the nature of negligence in relation to the criminal law that a subjective test should

[52] Webster, Noah. *The Merriam-Webster Dictionary,* Pocket Books, 1977.
[53] [1985] 1 S.C.R. 570 at pp. 581-82.

> therefore be applied in considering the existence of criminal negligence under s. 202 of the *Code*. I would reject that argument on the basis that the concept of recklessness there described is not applicable in a case under s. 202 of the *Code*. Sansregret was charged with rape, a crime which involves positive mind-directed conduct on the part of the accused which aims at the accomplishment of a specific result. It is a traditional *mens rea* offence and a mental state must be proved, in that case an intention to persist with his purpose despite the fact that the complainant's consent has been extorted by threats and fear. Recklessness on his part forms a part of the *mens rea* (the blameworthy state of mind) and has to be proved on a subjective basis as part of the mental element of the offence. In this sense, the words in *Sansregret v. The Queen* are apposite. Section 202, on the other hand, has created a separate offence; an offence which makes negligence -- the exhibition of wanton or reckless behaviour -- a crime in itself and has thus defined its own terms. As noted by Cory J.A. in *R. v. Waite*, s. 202 of the *Code* was enacted in its present form as a codification of the offence which had emerged in Canadian jurisprudence, and in respect of which the necessary *mens rea* may be inferred on an objective basis from the acts of the accused."[54]

The question is not whether the crime had also been portrayed in the mind of the perpetrator. Rather, the question is whether, regardless of the images that transpired in the actor's consciousness, he or she can be blamed for committing the unlawful and wrongful act. This approach is evaluative instead of descriptive. The wrongful act is not attributed to the actor solely based on particular facts but on the basis of social and legal evaluation of

[54] *Supra* note 32 at para 44.

the facts bearing whether said person can be blamed for the crime.[55] This approach considers things far beyond what the wrongdoer was thinking to attempt to evaluate the other facts in a broader social and moral context. An immediate advantage of this approach that is holistic and objective in terms of assessing culpability for deaths caused unintentionally is that the trier of fact is not restricted to only evaluating direct evidence of the accused's psychological states. If, in accordance with social and legal evaluation, it has been decided that the accused should have acted otherwise then the criminal fault could be fairly attributed to the negligent qua careless wrongdoer. This is the theoretical basis that motivated the objectivist wing in *Tutton*.[56]

A detailed analysis of each term used in these provisions allows for a deeper understanding of how the law is, and ought to be, applied to cases involving these specific charges. Furthermore, it assists in the development of my argument that decisions made by parents to ignore medical advice and treatments are not reasonable and therefore, the defence of mistake of fact should not be available in such cases.

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[55] George P. Fletcher, "*Basic Concepts of Criminal Law"* (New York, NY: Oxford University Press, 1998).
[56] George Fletcher, "Fault of Not Knowing," (2002) 3 Theoretical Inquiries in Law 2 at 277.

6. Failure to Provide the Necessaries of Life

Section 215(1)(a)(ii) discusses the failure to fulfill the duty to provide necessaries of life where the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely the health of that person to be endangered permanently. This section mentions that the person who is under the duty will be held criminally liable if the failure to perform the duty is likely to cause a risk to the child's life. So, what is considered objectively foreseeable? Should a prudent parent involved in such crimes be able to predict the consequences of their actions? I argue, yes. A reasonably prudent person, as discussed earlier, would be able to judge the approximate consequences of their acts or omissions. This obligation was further explained in detail in *Naglik.*

R. v. Naglik[57]

Christine Naglik and her common law husband, Peter Geoffrey People, were charged with aggravated assault and failure to provide necessaries of life to their infant son, Peter Naglik. Peter, aged 11 weeks, was brought to the hospital after sustaining a number of serious injuries including: fractured ribs in at least 15 places, a broken collarbone, a fractured vertebra, two skull fractures, and haemorrhaging of the brain and retina. These injuries caused permanent and irreversible damage. The injuries were estimated by physicians to have been sustained over a period of about four weeks. Naglik provided exculpatory statements at trial concerning her child's condition that were inconsistent with

[57] *R. v. Naglik,* [1993] 3 SCR 122

the medical evidence at trial. Naglik did not testify before the judge or jury whereas People did testify, denying any involvement in causing injuries to the child.[58]

Section 215(1)(a)(ii) penalizes the failure to perform the duty of providing necessaries where "the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently". It punished the marked departure from conduct expected of a reasonably prudent parent, where it is objectively foreseeable that the failure to provide the necessaries would result in a risk of danger to life, or permanent endangerment to the health of the child. The Crown is required to prove, beyond a reasonable doubt, that the circumstances were objectively foreseeable, and the conduct of the accused was a marked departure from the standard of care required in such circumstances. As the objective basis of criminal liability does not per se violate the Charter, the conviction does not carry a social stigma nor such a severe penalty that a conviction based on penal negligence would trigger a Charter violation under section 7. The lack of a minimum penalty allows the sentencing judge to tailor the sentence to the specific circumstances of the particular offence and convict. This eliminates the possibility of being punished at a level that is unproportionate. Furthermore, the availability of the defence of lawful excuse under section 215(2) serves to prevent punishing morally innocent persons, even where the accused may fail to meet the objective test of penal negligence.

In accordance with the reasons given in *Creighton*, while determining what the accused "ought to have known", the trier of fact must determine how a reasonable person

[58] Ibid at p.129.

would have acted in a similar circumstance. These circumstances should not include any personal characteristics of the accused that deprive her of the capacity appreciate the risk. Youth, inexperience, and lack of education were not considered to have deprived the accused of the capacity to appreciate the risk associated with treating her child with neglect. Therefore, she must be held to the standard of a reasonably prudent person.

Naglik was charged under ss. 197(2)(a)(ii) and 197(3) (now ss. 215(2)(a)(ii) and 215(3)) of the Criminal Code, which make the failure to fulfil the duty to provide necessaries an offence where "the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently". Section 215(2)(a)(ii) punishes a marked departure from the conduct of a reasonably prudent person in such circumstances where the potential risk is objectively foreseeable. In this case, it was objectively foreseeable that the failure to provide the necessaries of life would lead to the risk of permanent endangerment to the health of the child, and potentially a risk of danger to their life. *Creighton*[59] described a few offences in which the nature of the unlawful act itself is so risky that the consequences are presumed to be objectively foreseeable and give rise to another offence. The circumstances under section 215(2)(a)(ii) need to be proven by the Crown, beyond a reasonable doubt, that they were objectively foreseeable, and the conduct represented a marked departure from the standard of care required by those circumstances.[60]

In this section, I discussed what the duty to provide necessaries of life entails and what is considered as an “objective foreseeability of risks” arising from the failure of duty.

[59] [1993] 3 S.C.R. 3.
[60] Ibid at p. 144.

Naglik is a leading case that upheld the basis of the criminal charge to require proof of a marked and substantial departure from the standard of care that a reasonable person would take in those circumstances. This discussion adds to the overall purpose of the MRP as it forms the basis for the understanding of the charge of criminal negligence manslaughter. It assists in answering a major question: was the conduct of the parents a marked and substantial departure from the standard of a reasonably prudent person, to the extent that it is criminal conduct?

To this point, I have presented many reasons supporting my argument that mistake of fact under a religious belief should not exculpate in cases of criminal negligence. I have discussed the fault elements, the fault requirements, and the relevant Criminal Code provisions. Let me now turn to considerations having to do with sentencing and punishment.

7. Sentencing of Offenders

After considering the fault elements, and detailed explanations of what is required to hold an individual accountable for a crime under section 222(5)(b), I move on to the considerations made when sentencing the offenders. The Canadian sentencing approach requires judges to impose fit sentences that reflect the principles and objectives while considering the circumstances of the offence and the offender. The statutory structure points at the available sanctions while suggesting the quantum band for each specific sanction. Judges recognize sets of factors that affect the gravity of the offence and the culpability of the offender then apply the factors to decide on which factors to impose and the quantum of each sanction. Depending on the consequential effect of the factors, they are known as either aggravating or mitigating factors. Section 718.2(a) of the Criminal Code, RSC 1985, c C-46 requires judges to reduce or increase a sentence by considering the aggravating or mitigating circumstance applicable to the offender or the offence. Examples of aggravating circumstances are listed in the Code, though it is not an exhaustive list and many widely discussed factors are not included, meanwhile, there is no mention of possible mitigating factors.

Section 718 outlines the fundamental purposes of sentencing; to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

To assess the moral culpability of an offender, it is crucial to consider their state of mind which requires a case-by-case analysis. The culpability of the offender is increased where they were aware, or wilfully blind, to the fact that their unlawful conduct could put their child's life at risk. The purpose of holding such parents accountable for their actions if to establish and enforce a minimum standard of care. Thus, the willingness of an offender to adhere to the standards of care is crucial.

As section 718 points out, there are five main objectives of sentencing. In cases of criminal negligence causing death where parents have opted to heal with religion over allopathic care, I believe that the most important objectives are denunciation and deterrence. Since these cases have periodically been arising, the sentences have been very lenient hence, not effectively reflecting these objectives. In the following case, the principles of sentencing were considered in accordance with the aggravating and mitigating factors to determine an appropriate sentence.

R. v. Lovett[61]

The accused was convicted of criminal negligence causing the death of her seven-year-old son and failure to provide the necessaries of life – the latter was stayed under the

[61] 2017 ABQB 703.

Kienapple principle.[62] The child had become ill with a cold that, because it was left untreated, developed into an ear infection causing the child's tympanic membrane to burst. Despite the child's worsening health, the accused failed to seek medical attention even when the illness progressed to cause pain, fever, dark urine, jaundice, and the child was unable to stand up. The accused called 911 when the child began slurring his words but was declared dead when the paramedics arrived. The child died of sepsis due to group A strep and parainfluenza. The child had lost substantial weight and every organ was infected, causing him to die an excruciating and unnecessary death. It had been made clear from the evidence that antibiotics could have cured the ear infection. the accused acknowledged her failure to seek medical attention and that she misjudged the situation. Though she did express genuine remorse, she did not accept that medical help could have avoided the situation. The Crown sought four to five years' imprisonment while defence sought one-year imprisonment plus probation. She was sentenced to three years' imprisonment as her actions were akin to manslaughter and caused the death of a child who required her protection.

The aggravating factors considered in this case were that the accused did not seek medical treatment despite the visible deterioration in the child's heath over a two-week period, so the gravity of the offence was severe. Though the accused did not intend to harm

[62] Enunciating the doctrine of *res judicata* in *Kienapple v. The Queen,* [1975] 1 S.C.R. 729, Laskin J. said that the term "best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences." Furthermore, he stated that the "relevant inquiry is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences" and that the doctrine should apply where there is a guilty verdict on one count and "the same or substantially the same elements make up the offence charged in a second count".

her child, her dependence on natural remedies was not working which is an abuse of trust. The overall moral blameworthiness was high because she knew the extent of the illness but chose to continue following natural remedies that caused Ryan to suffer.[63]

Some mitigating factors included her evident remorse, lack of criminal record, low-risk of re-offending and the suffering caused by the death of her child. Defence argued that Ms. Lovett did not intentionally try to inflict harm as she was trying her best to cure him, though in a misguided way. The Defence compared this to circumstances in which parents intentionally inflict harm or abuse their children and argued that Ms. Lovett's conduct was not malicious nor worthy of high moral blameworthiness.[64] Though Ms. Lovett did not intentionally mean to harm her child, he was completely dependent on his mother. Her misguided views were a form of abuse in the end and her behaviour cannot be considered as a momentary lapse of judgement. This raises her moral culpability from the low range to the higher end.

The crown relied on *R v Hosannah*[65], in which the defendants were found guilty of manslaughter for failing to properly feed and care for their child. They had an ill-advised and negligent vegan diet for the child and ignored medical advice and warning signs as she lost weight. She died of malnutrition and asthma complications. A sentence of 30 months was imposed. This case is similar because the parents followed their own system and held a mistrust of the medical system, leading them to ignore warning signs of problems. However, in this case, the death was not directly caused by the malnutrition but also by the

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[63] *Supra* note 58 at para. 36.

[64] Ibid at para. 37.

[65] *R v Hosannah,* 2015 ONSC 2050.

asthma attack for which the parents were not faulted. Ms. Lovett's actions, on the other hand, directly contributed to her son's death.

The defence in *Lovett* compared this case to *R v Guertin*[66] in which the accused pleaded guilty to failing to provide the necessaries of life for his toddler over four days who was suffering from an infection that led to his death. The Defence suggested the moral culpability was worse in that case because the omission was caused by neglect whereas here Ms. Lovett was a doting mother.[67] Though it is important to assess the degree of moral culpability when deciding the appropriate sentence, it is not correct to say that intentional infliction of harm is equal to omission of care. As far as this case is concerned, intentional withholding of care amounts to abuse.

The *Criminal Code* does not define the term "abuse". Though it is normally associated with an act, not an omission, prolonged omissions, such as starvation (failure to provide food) or failing to seek and follow medical advice could amount to abuse, especially where the conduct is deliberate. This is consistent with the ordinary definition of "abuse". For example, the *Canadian Oxford Dictionary*[68] defines "abuse" as "maltreatment of a person", and "abusive" as "tending to abuse others: violent".[69]

The sentences given in these cases depict a recurring pattern towards the lower end of the scale. From the cases discussed above, none of the sentences exceeds 3 years'

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[66] *R v Guertin*, 2016 QCCQ 11256.
[67] Supra note 58 at para. 55.
[68] *Canadian Oxford Dictionary*, (Oxford University Press: Ontario, 1998)
[69] A thorough discussion of what acts or omissions can be considered "abuse" was discussed in *R. v. Stephan*, 2017 ABCA 380 at para 24.

imprisonment. If all these cases had been handled under section 222(5)(b), the maximum penalty could be life imprisonment. Though I do not suggest imposing the maximum, the penalty should reflect the individual's moral culpability. Where the moral culpability is high, as it is in most cases in which non-traditional medicine is used, the penalty should reflect the same. I argue that the minimum sentence for criminal negligence causing the death of a child should be six years' imprisonment, with a maximum penalty of life imprisonment (as it already stands for charges of manslaughter). Since sentencing is so fact specific, it is difficult to discern an exact sentence that could uniformly apply to all criminal negligence manslaughter cases.

The basis of this proposal for a minimum sentence of six years' imprisonment is based on several cases in which death was caused by criminal negligence and the deceased was a child or a person in necessitous circumstances. Firstly, consider *R v Plein*[70]. In this case, the respondent was convicted of criminal negligence causing death and given a sentence of 14 years – 8 years for manslaughter in the death of his mother Erika and six years' imprisonment for criminal negligence causing death in the death of his sister Cindy. Plein had failed to provide the necessaries of life and care to his mother and sister, both whom were blind and cognitively impaired and for whom he was the sole caregiver. The trial judge concluded that the crime involved an exceptionally high level of moral blameworthiness and to be on the "very high end of the moral culpability scale".[71]

[70] 2018 ONCA 748.
[71] Ibid at para 90.

In the Ontario decision of *R. v. Summers*[72], the father of an infant daughter had pled guilty to manslaughter after violently shaking her to death. The Crown agreed that an appropriate range of sentence was eight to ten years. He was sentenced to eight years' imprisonment, less credit for time in custody. Another Ontario decision is *R. v. Desmanche*[73], in which the respondent was convicted of manslaughter in respect of the death of his infant son. He was sentenced to ten years for manslaughter.

Although these cases can be used for reference for a general sentencing range, they cannot be referred to directly because there remain major differences. The parents in cases of faith healing deaths do not intend to hurt their child (despite the fact that intention is not considered for objective fault offences), nor do they engage in physical conduct for the purpose of directly hurting or injuring their child. In my opinion, the act of hitting a child or violently shaking them to death are evident aggravating factors that do require greater punishments. The cases above suggest sentences higher than 8 to 14 years. However, I propose a lower minimum punishment because these parents did not physically lay hands on their children, nor did they intend to cause harm to their children. Rather, it was a failure of a duty to provide the necessary care and act as a reasonably prudent person would in similar circumstances.

The sentences given in the past to cases of criminal negligence manslaughter based on religious influence or a belief in alternative therapies have been three years' imprisonment or less. In my opinion, those sentences do not reflect the sentencing goals of denunciation

[72] 2014 SCC 26, [2014] 1 SCR 575.
[73] 2016 ONCA 17.

nor deterrence. With an increase in the length of penalties, parents of children would, hopefully, be more hesitant before opting out of advised medical care.

Society is shocked when vulnerable children are killed by their own parent(s), the persons who hold a position of trust vis a vis that child. Society needs to be assured that sentences will deter others who may consider hurting or neglecting their child whether it is intentionally or through misguided belief that lead to criminally negligent decisions.

8. Analysis

There is a stark contrast between parents who sincerely, though mistakenly, believe their child to be healed and those who want to believe their child is healed. I do not believe there is anything mitigating nor exculpatory in the sincere mistake. It is my opinion that faith healers, as well as those who resort to alternative medicine or natural remedies, blind themselves to the natural and predictable fate of their children.

The parents in *Tutton* had claimed to have honestly believed their child to have been healed by God. However, my response remains the same. An honest belief should only be considered to the extent that is still within the threshold of "reasonable". Thus, one who is reasonable does not permit the death of a child that visibly shows signs of deteriorating health. Dickson J. in *Pappajohn* stated that the defence of mistaken fact should avail in objective fault offences when the belief is both honest and reasonable. However, I argue there should be a limit on the use of this defence. Although the defence is available in principle, a religious belief that is ignorant of repetitive medical advice is neither reasonable nor should it be exculpatory in these specific cases of criminal negligence causing the death of a child.

After looking into these cases, from *R v. Tutton* to *R. v. Lovett* I strongly believe they have been treated with excessive leniency. Where the accused is held legally responsible for their failure to provide their child with the necessaries of life, I find no reason to not charge all such cases under section 222(5)(b), as were the Tuttons, criminal negligence manslaughter, that carries a maximum penalty of life imprisonment. Since each of these cases are judged based on their unique characteristics where the fault elements are

somewhat lower, I do not propose the maximum penalty to be imposed as a hard and fast rule but the sentence should be on the higher end of the range. Also, it would not be completely unprecedented to have cases of negligent parents causing the death of their children to be convicted for criminal negligence manslaughter as it has already been done in cases like Leslie Macdonald and *R. v. Blaue*. In the cases discussed earlier, the elements required to hold an accused liable for criminal negligence manslaughter were fulfilled by the parents, so it is disheartening to witness their sentences be so trivial.

I do not believe it should be relevant that their decision was based on religion. In other words, holding an honest religious belief should not be a mitigating factor nor should it act as an aggravating factor. Since a religious belief should not exculpate in these cases, it should not be a contributing factor in giving greater penalties. The purpose of this paper is to suggest just punishments for these acts in consideration that the victims are vulnerable, and the excuse is not sufficient to evade persecution. It is not to target a certain sect of individuals for their beliefs and practices.

The central theme in this paper was to critically analyze the way cases are currently being dealt with and to present reasons why religious beliefs should not exculpate in cases involving criminal negligence causing bodily harm or death. The role of honest beliefs in these cases had acted as mitigating factors to give the respondents the benefit of the doubt where their actions reflected their mistaken belief. This raises the question. Would it be too harsh to charge an individual with manslaughter if they had an honest and reasonable belief in faith healing? The answer to this question circles back to the reasonableness threshold. Though a free and democratic society gives its people the freedom of conscience, every

right comes with a correlative duty. Every parent has the duty to provide their children with the necessaries of life and to protect them from foreseeable harm. The children in these cases are a part of the most vulnerable section of society requiring extra care. Should the exercise of freedom of conscience be protected even if it causes the death of a child? In my view it should not be.

9. Conclusion

Where personal beliefs reflect morality, protect human rights, and promote social well-being, there is no grievance in freely exercising conscience and religious belief. However, when there is a vast dichotomy between the belief and anything recognizably humane, then such beliefs should not be celebrated nor protected. This is particularly so when such people behave in ways that society can predict will threaten lives and attract the censure of the criminal law.

If centuries ago, people believed their life and health was dependent on rituals and traditions such as keeping demons at bay by chanting around a fire, they were not to be blamed. Those communities relied on the best remedies known to them at the time. Today, the prosecution might argue to the trier of fact that "rubbing oil on a diabetic child today is not the same thing as chanting around a fire a thousand years ago. Every culture at every time in history would have known the difference between doing something and doing nothing."

The freedom to practice a faith should only be exercised to the extent that it does not harm another individual's rights or freedoms. In the cases discussed above, the strong religious beliefs of the parents resulted in the death of another human being, which I believed should be treated with utmost severity, as would any other case of criminal negligence manslaughter. However, looking at the sentences given in past cases, they have been very insignificant.

No child should die an excruciating and unnecessary death. Though we live in a free society where we can make decisions for ourselves, to certain extents, religious proponents should be deterred from choosing their own course of action for their children in ignorance of medical advice. In liberal democracies around the world, parents must realize they are stewards, not the owners, of their children. Though they do have the freedom to pass on their own cultural and religious values and beliefs, those values and beliefs should not jeopardize or endanger a life.

Clear guidelines and regulations to educate parents on the expected standard of necessitous care, would allow for a better understanding for those who may be under mistaken beliefs. Furthermore, harsher penalties would also act as deterrents for religious individuals. It is difficult to expect practices to change where the punishments for those acts are minimal. Greater penalties, with a minimum of six years' imprisonment, would have great deterrent values.

I am confident that this study will be of use to those with a particular interest of law involving topics of religious healing and use of alternative medicine. The existing literature on the topic of faith healing deaths provides a detailed sociological approach though a gap remained in the legal sphere. This paper will also be a useful resource for legal scholars investigating themes relating to criminal negligence and similar legal topics. I hope this paper sparked a further discussion on the morality regarding this topic; where should the line be drawn to restrict religious beliefs from infringing the rights of others?

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