February 28, 2017

# Criminal Negligence and the Reasonable Parent

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**Case Commented On:** *R v Lovett*, 2017 ABQB 46 (CanLII)

In *R v Lovett* the Alberta Court of Queen's Bench added a new entry to the rapidly developing jurisprudence on criminal negligence. For much of the past 20 years, the SCC has grappled with articulating the appropriate *mens rea* standard required by Section 219 of the *Criminal Code*. Starting with *R v Tutton*, [1989] 1 SCR 1392 (CanLII), the Court has wavered a bit as to whether the Crown could prove that the accused committed an unlawful act or omission showing a "wanton or reckless disregard for the lives or safety of other persons" with regard to an objective standard (that of the "reasonable person") or whether it must prove that the accused had subjective awareness of such a risk. As of 2008, with *R v JF*, (2008) SCC 60 (CanLII), the standard has ostensibly been settled as objective: criminal negligence requires only "a marked and substantial departure from the conduct of a reasonably prudent person in circumstances in which the accused either recognized and ran an obvious and serious risk… or, alternatively, gave no thought to that risk" (*JF*, at para 9). Notably, this standard requires a higher deviation from the standard of care than that required in other objective fault *offences*: the departure must be marked *and substantial* as opposed to simply marked.

The case law has nonetheless struggled with the question of whether and to what extent an accused's individual "circumstances" should be taken into account. *R v JF* made it clear that individual characteristics of the accused, such as age and education, do not change the uniform standard of care required of everyone. Only reasonably held mistakes of law will present a defence, subject only to the rather extreme exception that arises when the accused has an "incapacity to appreciate the nature of the risk which the activity in question entails." *R v Creighton*, [1993] 3 SCR 3 (CanLII) at page 61. Despite the SCC's pronouncement that individuated standards should not be relevant beyond this one exception, the lower courts have nonetheless on occasion taken into account such individuated factors as age and military training, leaving the objective test still somewhat foggy.

In *Lovett* the ABQB applied the laws of criminal negligence to a particularly tragic set of facts. Tamara Lovett's seven-year-old son Ryan died after a month of brutal illness (at para 2). Ryan caught what appears to have been a parainfluenza virus—which in and of itself is not treatable—but then contracted a secondary bacterial infection (at para 103). That infection ought to have been treated with anti-biotic penicillin, which would have allowed a full recovery in 24 to 48 hours (at para 104). Throughout the course of his illness Ryan suffered from a wide range of fairly dramatic symptoms, including pus pouring out of his ear, swollen lymph nodes which caused his arm to swell, fever, extreme lethargy, groin pain, extreme weight loss, and jaundice (at paras 106-107).

Throughout the course of her son's illness Ms. Lovett refused to take him to receive professional medical care. The Crown led evidence that she had, while searching for home remedies, conducted internet searches such as "earache mucous," "earaches and hydrogen peroxide,"

"vinegar and water for ear infections," "how to rapidly relieve an earache, using supplies you probably already have in your home," "reiki healing throat," and "reiki healing throat music" (at para 80). A friend of Ms. Lovett's testified that when she came to visit the Lovetts Ryan was "gravely ill" and "in a state of supreme suffering" (at para 94). When she urged Ms. Lovett to take Ryan to the doctor she refused (at para 98). Ms. Lovett herself testified to her general distrust of doctors, stating that "I wasn't dealing with doctors, so I didn't even-it wasn't even part of the regime" (at para 100). In lieu of professional medical help she appears to have attempted to treat the child with dandelion tea, Vitamin D, potato poultices, massage, and children's Advil (at paras 90, 123).

On March 2, 2013 at 4am, after about a month of this course of treatment, Ms. Lovett finally called 911 (at para 52). Ryan had diarrhea and began slurring his words, ultimately beginning to go into convulsions and throw up (at para 52). Unfortunately, when EMS arrived Ryan was most likely already dead (at para 53).

Ms. Lovett was charged with two separate offences: failing to provide the necessaries of life to a minor child contrary to section 215 of the *Criminal Code* and criminal negligence causing death contrary to section 220 of the *Code.* The Crown's theory of the case premised the section 220 violation on the section 215 violation itself. To get a conviction under section 220 they would need to show the omission of a legal duty (here the section 215 duty), a showing of wanton or reckless disregard for Ryan's life and safety, and the fact that this omission caused Ryan's death. As described above, the Crown would also need to show that Ms. Lovett's breach constituted a "marked and substantial departure" from the standard of care. (By contrast, the section 215 offence—which carries a lower punishment—requires only the "marked departure" the SCC articulated for other objective fault offences in *R v JF*.

To answer these questions the court needed to determine "when a reasonable parent, in Ms. Lovett's circumstances, would have sought out medical help" (at para 58). In beginning this analysis it conducted a fairly thorough review of the somewhat unusual background circumstances of Ms. Lovett's life. The Lovetts were living in poverty, and she barely managed to cover expenses through her housecleaning jobs (at para 60). The court observes that "why she had wound up in this situation is somewhat of a mystery" given her level of education, computer and sales skills, and large divorce settlement from a prior marriage (at paras 61-63). The reasons somewhat sarcastically note that "With Ms. Lovett's education and training it is unclear why she wound up cleaning houses for a living, or why she thought that she needed help from the government, but that was the situation she found herself in" (at para 65).

Of greater relevance to the actual charged conduct, the court also notes that Ryan had never seen a doctor apart from a couple of visits to a chiropractor shortly after his birth (at para 66). Indeed, he lacked a birth certificate or an Alberta Health Care number (at para 67). According to the court's reasons, Ms. Lovett "felt that [Ryan] could decide at 18 years old if he wanted the government to know about him" (at para 67).

In determining how far Ms. Lovett's conduct departed from the standard of care, the court "[took] into account that Ms. Lovett was living in poor circumstances," though "she was well educated and knew very well that she did not have to pay for any medical treatment available only blocks away" (at para 115). Based on the actual ratio in *R v JF*, which calls for a non-individuated objective standard, it is not clear exactly what role either Ms. Lovett's poverty or education had to do with the legal test. On the one hand, poverty creates a set of external physical limitations which may be relevant to what any reasonable person is capable of effecting

in such a situation—though, as the court notes, that is not actually relevant when the issue is freely available health care. Her level of education—to the extent that it made her conduct less reasonable in the court's view—seems plainly irrelevant to a universal standard intended to apply to all people alike. To the extent that the court's reasons seem to pass judgment on Ms. Lovett's failure to capitalize on her educational and professional opportunities, they seem to veer into subjective territory rejected by the SCC.

That aside, the reasons focus primarily on how Ms. Lovett repeatedly ignored an enormous quantity of physical symptoms: she "took an obvious and seriously incredible risk with Ryan's health and well-being by taking it on herself to diagnose what remedies would be useful to Ryan without the assistance of more medically qualified help." (at para 129) In particular, the court rejected Ms. Lovett's defence of honest mistake of fact based on her purported belief that Ryan only had a cold which could be cured by home remedies (at para 130). The court notes that, not only was such a belief unreasonable given the nature and severity of his symptoms, it could not have been honest based on the Internet searches she conducted (at para 130). She knew "that he had an infection, swollen glands, a fever, an inability to stand, weight loss, dark urine, jaundice, none of which symptoms are from a simple cold" (at para 130).

The court does accept the defence's basic premise that simple negligence does not constitute criminal negligence: there is indeed "a line" between a departure from the standard of care, a "marked departure" punishable under section 215, and a "marked and substantial departure" punishable under section 220. In this case, the court held that Ms. Lovett's persistent ignoring of increasingly severe symptoms was far enough on the other side of such a line as to warrant punishment under both sections 215 and 220. In coming to this conclusion, the court also notes the policy tension at the heart of this case. Simply put: parenting is a deeply personal endeavor, and parents can and do adopt a wide range of approaches to their children's health which may reflect individual values. The court notes that "although there are parents that chose alternative methods to raise their children, and treat them when they are ill, society is not going to intervene." (at para 138) That said, "there are minimum standards," which in this case required Ms. Lovett to seek out medical care once Ryan's illness had evolved into an obviously apparent multi-level infection" (at para 138). Ms. Lovett was therefore guilty on both counts, though only the criminal negligence charge was entered given that the two offences arose out of the same facts and elements. *R v Prince*, [1986] 2 SCR 480 (CanLII).

In a world where "alternative" schools of parenting now question the scientific validity of fairly basic medical measures such as vaccines, the interaction of section 215 and the criminal negligence offences is particularly salient. *Lovett* stands for the proposition that a line must be drawn between respecting parents' privacy and autonomy when it comes to alternative practices and enforcing a baseline standard of care to prevent horrible deaths like Ryan's. This is an important balance for our criminal laws to strike, and *Lovett* presents a tragic example of how the system can respond to parents who take insupportable risks with their children's lives.

That said, the case does suggest a couple of questions. If courts conducting the *mens rea* calculus for objective fault offences openly take into account parents' poor life choices, in the way the ABQB appeared to here, does this raise uncomfortable rule of law problems along the fault lines of class bias? It is pretty clear that Ms. Lovett should have been guilty regardless of education, due to the extreme facts of this particular case, but one can imagine less clear cases where implicit judgments about a parent's irrelevant economic, romantic, and professional history could drive determinations.

The objective standard announced by the SCC would seem to guard against such risks, and lower courts stray into dangerous territory in ignoring it. How, for example, might we apply the law of criminal negligence in a case like the many recent ones where a parent has inadvertently left a child in a car to die of heat stroke? Is a split second of forgetfulness on a busy morning more or less criminal based on the parent's level of education or failure to secure resources? It may be that split second decisions will fall into the same category as certain examples of reckless driving under section 349, to which the SCC applied an objective test precisely due to the reflexive nature of driving making it difficult to evaluate an individual's subjective fault. (see *R v Hundal,* [1993] 1 SCR 867 (CanLII)). And, like those cases, it may be that courts will not find marked departures for fleeting acts of negligence, as opposed to the drawn-out, deliberate omissions of Ms. Lovett). Nonetheless, in applying the criminal law to the sphere of domestic existence, courts must take particular care in constructing the law's view of the "reasonable parent."

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This post may be cited as: Erin Sheley "Criminal Negligence and the Reasonable Parent" (28 February, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/02/Blog_ES_Lovett.pdf