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Who Are the "Parents of the Nation"? Thoughts on the *Stephan* Case and Section 215 of the *Criminal Code*

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Matter Commented On: Section 215 of the *Criminal Code*, RSC 1985, c C-46

Much has been written and said on the characteristics of a "good" parent. Such information is easily accessible by anyone with a library card and internet access. It can be found by a click of our mouse on various blog postings (click here for a list of parenting blogs, which share the "real truth" about parenting) and dedicated websites (click here for a list of "not-to-be-missed" websites). Even celebrity has something to say about parenting practices; cue self-styled "lifestyle" guru, Gwyneth Paltrow, who famously has her children on a controversial low-carb, sugar free diet. Social media is another fount of information, often in the form of criticism or apologies. All of these venues enforce a "normative" notion of parenting. But through all this data there seems to be a bright-line drawn between "good" and "bad" parenting. For example, "bad" parents administer cocaine to a child (*R v TB*, 2010 ONSC 1579), knowingly leave a child in a car for an extended period of time during a hot summer afternoon (*R v Huang*, 2015 ONCJ 46), or intentionally attack a child with a knife (*R v BJG*, 2013 ABCA 260). In those instances, the egregious conduct is not merely "bad" parenting but criminal behavior deserving of state imposed sanctions and its concomitant stigma. Although we can recognize "criminal" parenting when we see it, the real difficulty lies in identifying behaviors that are not so evidently "bad." The recent *Stephan* case has ignited a debate on where that line between "bad" and "criminal" should be drawn; or is the line already drawn perhaps not as bright as we might have previously believed?

David and Collet Stephan were convicted of failing to provide the necessities of life to their 19-month old child, Ezekiel, who died from bacterial meningitis after the couple rejected medical treatment for the child opting instead for naturopathic remedies. They are currently awaiting sentencing (the only written decision in the case to date is on the voluntariness of statements made by the Stephans to the police, social workers and a physician). The Stephans' seven-day trial attracted intense media and social media attention. For instance, a quick and crude Google search of "David Stephan" provided 91,400 results, while "Collet Stephan" produced 67,700 hits. Interestingly, a Google search for "David and Collet Stephan" netted 40,800 results, while the reverse search of "Collet and David Stephan" suggestively revealed only 912 web hits. This difference can probably be explained by David Stephan's very public disappointment in the verdict and the "open letter" to the jury he posted on Facebook. In any event, the reaction to the verdict was not homogeneous, with many people supportive of the couple shocked at the guilty verdict, while others were distinctly unsurprised. The reason for this disconnect may lie in the actual offence charged, which is found under section 215 of the *Criminal Code*.

Section 215(1) creates legal duties on people based on the nature of the relationships between them, or based on undertakings to care for a person in need. Under subsection 2, it is the failure to perform that duty which lies at the crux of the offence. Traditionally, criminal law is

disinclined to base criminal sanction on omissions or failures to act. This disinclination can be seen in the parameters of criminal omissions such as found in section 219, criminal negligence, wherein an omission can be an element of the offence if it involves a "duty imposed by law." Indeed, such a legal duty can be found under section 215. Even though omissions sit uncomfortably within the criminal law, section 215 as a crime of neglect has been in the *Criminal Code* since its inception in 1892.

Section 215 has changed very little over the ensuing 134 years other than making the application of the section gender neutral and increasing the maximum penalty upon conviction. Since 2005, if the Crown elects to proceed by indictment, the maximum sentence is five years incarceration, increased from the previous maximum of two years. On summary conviction the maximum has also increased to a period of eighteen months incarceration, up from six months and/or a $2,000 fine. Despite the longevity of this section, there appears to be a surprisingly small number of reported cases (a Westlaw search produced 371 cases with 149 of those pertaining to the duty of a "parent" to a child). The historical reason for the parental legal duty was to account for the husband/father deserting a wife and child, which caused an endangerment of life and health (*R v Middleton*, 1997 CanLII 12350 (ON SC) LaForme J (as he then was) at para 10). Although in later amendments, the definition of "parent" included either spouse, the broader objective of criminalizing parental conduct remained the same.

Case law has distinguished the duty imposed as a result of a familial or family-like relationship from the duty arising from an undertaking to care for a person in need. In the latter case, it is this "undertaking" to protect and provide for another person that controls the duty. This focus on an "undertaking" has its genesis in contract law as noted in Burbidge's Digest of the Criminal Law published in 1890 before the *Criminal Code* was introduced. In Article 269 the duty to provide the necessaries of life arises "by contract or by law, or by the act of taking charge." This concept of "taking charge" with a resultant undertaking to assist is consistent with common law omissions, which arise from a positive act of the accused. Once an accused acts by undertaking to care for another then the duty to continue those actions arises. Any failure or neglect of that undertaking or duty, which results in harm or a risk of harm, becomes the omission under the criminal law. Much of the legal controversy regarding this duty naturally focuses on the actual initial act or undertaking and in what circumstances the law should find such a duty to exist.

In the matter of a "parent, guardian or head of a family" who fails to provide the "necessaries of life" for a child under sixteen years, it is the ongoing nuclear relationship which binds them. Case law, as it relates to a parent's duty to a child, does not focus on the creation of that relationship. Rather, the more pressing issue, in terms of the *actus reus* requirements, is whether or not the neglect constitutes a failure to provide the "necessaries of life" which endangers the life or health of the child. In the 1912 *Sydney* case (20 CCC 376 (SKCA)), the term "necessaries" included "food, clothing, shelter, and medical attendance." That list was non-exhaustive and depended upon the circumstances of the case. The term also acquires its meaning from the *Criminal Code* as the heading under which section 215 is found is entitled *Duties Tending to Preservation of Life*. By this "preamble," necessaries must be those which "tend to preserve life" and are not necessaries "in their ordinary legal sense" (*Rex v Brooks* (1902), 5 CCC 372 (BCCA)).

This uncodified judicial definition of "necessaries of life" has broadened in scope over the years to reflect society's changing values. Modernity lies at the core of these changes as technological advances, the humanistic approach, and as mentioned earlier, the advent of media has required more or even different parental obligations. The "necessaries of life" has become more than

adequate subsistence as it reflects society's concern to protect the most vulnerable in our society from harm. To that end, Justice G. A. Martin in the 1981 Ontario Court of Appeal case of *Popen* (60 CCC (2d) 232) found the "necessaries of life" should not be confined to specific necessities such as food and shelter. Rather, it also includes a more general duty to provide "necessary protection of a child from harm" (*Popen* at para 20). This broader definition was applied in the *Hariczuk* case, [1999] OJ No 1424 (ONCJ), in which Justice Vaillancourt found a parental duty, under section 215, to provide a safe environment for a child. Tragically, the accused, who was making great progress in his drug addiction treatment in order to be a "good" parent to his six-year old son, prepared his methadone treatment by mixing it with his son's favourite beverage. Although Mr. Hariczuk cautioned his son not to drink it, the child did so when he awoke thirsty in the middle of the night. In that case, Hariczuk was convicted of manslaughter.

Although society shares the obligation to protect children as seen through the myriad of child protection legislation both federally and provincially, public policy requires parents to meet the standard of conduct of a reasonably prudent parent. It is in those cases where the failure in the section 215 duty is a "marked departure" from the norm, that the criminal law bright-line is drawn between a "bad" parent and a "criminal" one (*R v Naglik*, [1993] 3 SCR 122, 1993 CanLII 64 (SCC), Lamer CJ at paras 45 to 46). This marked or criminal departure from the accepted standard of care constitutes the *mens rea* or fault element of the offence under section 215. It is an objective standard of liability, which does not depend on the awareness or intention of the accused but on the legal construction of a standard embodied by the "reasonably prudent parent". Therefore, the determination of criminal responsibility depends on "a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the failure to provide the necessaries of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child" (*Naglik* at para 46; *R v JF*, [2008] 3 SCR 215, 2008 SCC 60 at para 8).

Despite Lamer CJ's great efforts in the late eighties and early nineties to imbue the objective standard with the personal characteristics of the accused as a concession to human frailties in order to ensure the morally innocent would not be captured by the criminal law, the "reasonably prudent parent" does not "look" like the accused. The modification to the objective standard, if it can even be called that, lies in the requirement that the trier of fact assess the standard in light of the circumstances of the case. Therefore, it is in the determination of the facts and how they connect to both the *actus reus* and *mens rea* requirements that will result in a finding that certain parental conduct is or is not criminal.

Of course, this suggests a range of contextualized conduct that will attract penal sanctioning. In fact, many cases involving the death of a child result in charges of murder (section 229) or manslaughter (section 222(5)(a) or (b)) or criminal negligence causing death (section 221). The legal duty found under section 215 can provide the underlying unlawful act for all of these charges, even for the offence of murder, which requires a subjective fault element. For example, in *R v Boittneau*, 2011 ONCA 194, the grandparents were convicted of second-degree murder for the neglect of their grandson. Another Alberta trial is soon to begin in which the parents are charged with first-degree murder as a result of the death of their son who died of a bacterial infection, allegedly contracted as a result of neglect. Some cases, not involving a fatality, may also be subject to a criminal negligence charge, under section 219 of the *Criminal Code*, predicated on section 215 as the legal duty required as part of the *actus reus* of the offence. In those cases, the prosecution must not only establish the required elements of section 215 but must also prove that the conduct of the accused, objectively viewed, displayed a "wanton and reckless disregard for the lives and safety of others" and was a marked and substantial departure

from the required standard. The higher degree of departure being both "marked" and "substantial" is consistent with the higher possible penalties upon conviction (see *R v ADH*, [2013] 2 SCR 269, 2013 SCC 28 Cromwell J at para 61).

Understanding the background and make-up of section 215 does assist us in discussing the *Stephan* case and the resultant public interest in the file. In many ways, the circumstances fit easily within the legal duty outlined in section 215 and the judicial interpretation of the necessaries of life. There are many cases where a parent's failure to provide a child with prompt and adequate medical attention has resulted in a conviction under section 215 or for the more serious offences of criminal negligence or manslaughter. Some of these cases arise in the context of the belief system of the parents, typically on religious grounds. In the seminal case of *Tutton and Tutton*, [1989] 1 SCR 1392, Arthur and Carol Tutton were convicted of manslaughter as a result of stopping their diabetic child's insulin injections in favour of faith healing. The Supreme Court of Canada sent the matter back for retrial but on the basis of the inadequacy of the charge to the jury on the defence of mistake of fact. In that case too, public opinion was divided. According to a news article describing the conviction, "a number of supporters cried and embraced" the Tuttons.

Although factually, the *Stephan* case seems to "fit" the kind of conduct prosecuted under section 215, the emphasis must not be on the tragic outcome but on whether the conduct was a "marked departure" from the reasonable parent standard. As with so many legal terms, "marked" is not quantified but is to be read in the context of the criminal sanction. As with driving offences, to attract a criminal sanction, the conduct must involve more than mere imperfections. Thus, the question of what is "marked" is not based on "are these parents "bad" parents," or even, "based on my own personal standards are these parents bad parents," but rather the question is based on the societal standard in place in the context of the circumstances. Therefore, it is not those who occasionally slip off that standard or even those who are continually slightly below that standard, who should be subject to society's ultimate approbation through our criminal law. For instance, in the *Brennan* case, 2006 NSPC 11, Rhonda Brennan was acquitted of failing to provide the necessaries of life to her two-month old child. The child was born seven and a half weeks premature. Although the baby initially gained weight and seemed to thrive while in the hospital, once in the mother's care, the baby's weight declined. Ms Tutton generally followed medical instruction, took her baby to the public health nurse and pediatrician, and implemented a feeding regime. In acquitting Tutton, Provincial Court Judge Tufts found that although she failed to adequately feed the baby, the risk of harm to the child would not have been apparent to a reasonably prudent parent. Another parent may have been more "attuned" to the situation and more "aggressive" in their approach but the accused's conduct was not a marked departure from the standard (at para 65). In the *Stephan* case, people will disagree on the verdict based on their own concept of parenting and strongly held beliefs but, accepting that the jury was properly instructed on the law, the finding of guilt would be based on a finding that in all of the circumstances, objectively viewed, the Stephans' conduct was a marked departure from that of the reasonably prudent parent.

Still, there is room for debate over the criminalization of parenting and the efficacy of permitting the law access into our most intimate relationships (in a different context I harken back to Prime Minister Pierre E. Trudeau's oft quoted statement that "The state has no business in the bedrooms of the nation"). We should, as a society, discuss where the line should be drawn and when we should "invite" the law into our homes or sanction its entrance through our *Criminal Code* in the guise of *parens patriae* (Latin for "parents of the nation"). Perhaps we should also reconsider how we judge ourselves and our neighbours, particularly on social media. In an age of opting out of vaccinations and home schooling, the boundaries of "good" and "bad" parenting seem to shift and waver with each Twitter re-tweet and every Facebook "like": Was that lunch nutritious enough? Do my kids go to bed too late? Are my children too scheduled? And, finally, am I being judged for my parental decisions? Although all of these concerns are a far cry from the kind of conduct underlying section 215, all of those criminal cases, including the *Stephan* case, raise the tension we all feel between private life and public expectations.