

## REVISITING RASH DRIVING

This article discusses the fault element of rashness in the context of the group of Penal Code offences that deal with the doing of a rash Act. Despite their general application, many cases involving these provisions are related to bad driving. The existing cases will be examined and it will be pointed out that while the definition of rashness as advertent risk-taking had previously been affirmed as the current state of Singapore law, two recent cases involving bad driving suggest that the courts have extended rashness to include inadvertent risk-taking. This article will examine the arguments in support of inadvertent risk-taking as well as the subjectivist objections and suggest that a definition of rashness should include situations where the offender is indifferent to or shows a disregard for the personal safety of others, whether or not he is conscious of the danger his conduct created.

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### I. Introduction

#### A. *The definition of rashness*

1 The doctrine of *mens rea* suggests that a person should only be convicted of a crime if he possesses a relevant mental state or “guilty mind”. Under the Penal Code,<sup>1</sup> there is a group of Penal Code offences that has rashness as an essential ingredient of the offence. These offences are graded according to the consequences that result from the doing of the rash act. At one end, there is the doing of a rash act that endangers human life or the personal safety of others under s 336(a) and at the other end there is the doing of a rash act that causes death under s 304A(a). In between, there are intermediate offences that deal with the causing of simple hurt and grievous hurt under s 337(a) and s 338(a) respectively. In addition, the question of whether an offender is rash or merely negligent is also relevant to the sentencing of offenders for

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\* This article is written in the author’s personal capacity and does not necessarily reflect the views of the Subordinate Courts. The author wishes to thank the anonymous referee for his helpful comments.

1 Cap 224, 2008 Rev Ed.

offences such as dangerous driving causing death under s 66(1) of the Road Traffic Act.<sup>2</sup> This article discusses the meaning of rashness with particular reference to cases of bad driving and to two recent decisions of the High Court.

2 The meaning of rashness was explained by Rubin JC in the case of *PP v Teo Poh Leng*<sup>3</sup> (“*Teo Poh Leng*”). In *Teo Poh Leng*, the driver lost control of her vehicle which mounted the pavement and collided with three persons. Two of the three persons died and the driver was charged with causing death by doing a negligent act under s 304A of the Penal Code.<sup>4</sup> The driver was fined and disqualified from driving and the Public Prosecutor appealed against the sentence. Rubin JC noted that the driver was only alleged to have been negligent and sought to explain the distinction between rashness and negligence by citing three Indian cases. In *Nidamarti Nagabhushanam*,<sup>5</sup> Holloway J stated:

Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening. The imputability arises from acting despite the consciousness (*luxuria*). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.

3 In *Empress of India v Idu Beg*,<sup>6</sup> Straight J said:

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

4 Finally, in *Bhalchandra Waman Pathe v The State of Maharashtra*,<sup>7</sup> it was held that:

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2 Cap 276, 2004 Rev Ed.

3 [1991] 2 SLR(R) 541.

4 Cap 224, 1985 Rev Ed.

5 (1872) 7 MHC 119.

6 (1881) ILR 3 All 776.

7 (1967) 71 Bombay LR 684 (SC).

A culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening. The imputability arises from acting despite the consciousness.

5 The common element in these three definitions is that rashness is distinct from intention and desire and has at its roots the requirement of knowledge. This is evidenced by the phrases “acting with the consciousness” and “hazarding ... with the knowledge”. From these definitions, it also appears that rashness requires that the actor knows that he is doing an act that “may” result in consequences which are “mischievous” and “illegal”.

6 This author agrees with Victor Ramraj’s conclusion that rashness in this advertent form has previously been treated by Singapore law in a manner consistent with the English concept of recklessness which is “conscious risk-taking on the part of the accused”.<sup>8</sup> For the purposes of this article, this core definition of rashness will be referred to as “advertent risk-taking”.

7 There are two riders to this assertion though it does not affect the central premise that rashness according to *Teo Poh Leng*<sup>9</sup> appears to involve consciousness of the possibility of illegal and mischievous consequences:

(a) Victor Ramraj points out a “curious anomaly” in *Teo Poh Leng* which appears to label an actor as rash despite the fact that there is no longer a subjective awareness of an unreasonable risk.<sup>10</sup>

(b) Stanley Yeo and Neil Morgan point out that Singapore and Malaysian cases suggest that rashness is less culpable than recklessness as the latter involves a “callous disregard for the safety of other road users”.<sup>11</sup> On the other hand, rashness is less blameworthy as it does not involve a “callous disregard”. Furthermore, the driver may even have acted in the hope that the consequences will not materialise.

8 Notwithstanding these riders, both sets of authors agree with the proposition that rashness and recklessness in the Singapore context

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8 Victor Ramraj, “Criminal Negligence and the Standard and Care” [1999] Sing JLS 678 at 682 and 684.

9 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

10 Victor Ramraj, “Criminal Negligence and the Standard and Care” [1999] Sing JLS 678 at 682 and 684.

11 Neil Morgan & Stanley Yeo, “Defining the Fault Elements of Driving Offences” (2007) 19 SAclJ 205 at 222, para 36(c).

involve knowledge of the possibility of the consequence occurring.<sup>12</sup> In a later part of this article, it will be pointed out that the High Court has in a recent case explained that rashness “implies a disregard to the possibility of injury or death”.<sup>13</sup> As such, the difference between recklessness and rashness (if any) appears to boil down to the difference between a “callous disregard” and mere “disregard”. As the focus of this article is on the consciousness (or lack thereof) of risk, this suggested difference is not significant and recklessness and rashness are treated here as interchangeable terms.

9 Recently, the High Court had the opportunity to consider the meaning of rashness in two separate cases, *Lim Hong Eng v PP*<sup>14</sup> (“*Lim Hong Eng*”) and *Sankar Jayakumar v PP*<sup>15</sup> (“*Sankar Jayakumar*”). Both cases involved drivers who were charged with causing grievous hurt by the doing of a rash act under s 338 of the Penal Code<sup>16</sup> and dangerous driving causing death under s 66(1) of the Road Traffic Act.<sup>17</sup> In both cases, the definition of rashness was crucial to the determination of the appeal.

10 In *Lim Hong Eng*,<sup>18</sup> Justice Choo Han Teck applied the definition in *Teo Poh Leng*<sup>19</sup> and found the driver to be merely negligent rather than rash. Subsequently, *Sankar Jayakumar*<sup>20</sup> was also heard before Choo J and this time he affirmed the driver’s conviction. On reviewing both cases, it is suggested that the High Court decision in the second case is inconsistent with advertent risk-taking. However, it is submitted that the decision can be justified on the basis of an understanding of rashness that has advertent risk-taking as its core but is expanded to include the concept of “indifference” or “disregard”. In the final part of this article, a justification for this expanded concept of rashness generally and as it relates to cases of bad driving will be put forward.

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12 Neil Morgan & Stanley Yeo, “Defining the Fault Elements of Driving Offences” (2007) 19 SAclJ 205 at para 32.

13 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682 at [5].

14 [2009] 3 SLR(R) 682.

15 [2010] SGHC 190.

16 Cap 224, 1985 Rev Ed; Cap 224, 2008 Rev Ed respectively.

17 Cap 276, 2004 Rev Ed.

18 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

19 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

20 *Sankar Jayakumar v PP* [2010] SGHC 190.

## II. The cases

### A. *Lim Hong Eng v PP*<sup>21</sup>

11 The junction of Whitley Road and Dunearn Road is an intersection of two heavily used roads with the Singapore Chinese Girls School located at one corner of the junction and Raffles Town Club at another corner. A little further along Whitley Road, we find St Joseph's Institution while Anglo Chinese School (Barker) can be found further along Dunearn Road. An Electronic Road Pricing Gantry also helps to regulate traffic flow in the direction of the city during peak hours.

12 On the afternoon of Christmas Eve of 2006, the offender was driving down Whitley Road with the intention of turning right at the traffic-light controlled junction of Whitley Road and Dunearn Road in order to reach Raffles Town Club. When the offender reached the junction, she drove through a red light and hit a motorcycle that was travelling along Dunearn Road in the direction of the city. The rider of the motorcycle and his passenger were flung off the motorcycle. The rider suffered a compound fracture of his leg while the passenger subsequently passed away as a result of the injuries she suffered.

13 The offender was subsequently charged with causing the death of the passenger by dangerous driving under s 66(1) of the Road Traffic Act<sup>22</sup> and a charge of causing grievous hurt to the rider by the doing of a rash act under s 338 of the Penal Code.<sup>23</sup>

14 From the grounds of decision of the District Judge,<sup>24</sup> it appears that the Prosecution did not explicitly seek to prove that the offender possessed the mental state of advertent risk-taking at the time of the offence. Instead, the Prosecution took the following position:<sup>25</sup>

Position of the prosecution is clear. Prosecution is not trying to prove that the accused was speeding and neither is the prosecution trying to prove that the accused beat the red light intentionally knowing that the red light was clearly against her but yet chose to speed crossing the junction.

Prosecution's case is that the unfortunate accident happened because the accused failed to keep a proper lookout.

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21 [2009] 3 SLR(R) 682.

22 Cap 276, 2004 Rev Ed.

23 Cap 224, 1985 Rev Ed.

24 *PP v Lim Hong Eng* [2008] SGDC 320.

25 Cited by the High Court in *Lim Hong Eng v PP* [2009] 3 SLR(R) 682 at [5].

15 The District Judge made a finding of fact that the offender crossed the junction when the traffic lights were not in her favour and that this amounted to driving in a manner which was dangerous to the public. She further found that the offender's act of driving in such a situation when the lights were against her also amounted to a rash act.<sup>26</sup> The District Judge's decision is significant as the offender was found to be rash without a specific finding that she had acted with the consciousness that illegal and mischievous consequences may occur.

16 On appeal to the High Court, Justice Choo Han Teck did not agree that the accused was rash. He began his analysis by referring to the definition of rashness in *Teo Poh Leng*.<sup>27</sup> In fact, he cited all three Indian cases referred to in *Teo Poh Leng*. After scrutinising the evidence, he found that the offender was negligent rather than rash. In particular, he noted that the District Judge had made a finding that the offender had entered the traffic junction unaware not only of the fact that the lights were red against her but also that the motorcycle was passing through the junction.<sup>28</sup> On the other hand, there is nothing in the judgment to suggest that the High Court accepted the defence submission that the accused had a genuine but mistaken belief that the light was in fact green.<sup>29</sup> Next, he took note that during the trial, the Prosecution had characterised the case as one of failing to keep a proper lookout. As a result, the High Court set aside the conviction for causing grievous hurt by doing a rash act and substituted it with a conviction for dangerous driving. In addition, the sentence was reduced, presumably on the basis that the offender had originally been sentenced on the basis that she was rash whereas the High Court found the offender to be merely negligent.<sup>30</sup>

17 The High Court was clearly correct in finding that the offender was negligent rather than rash. After all, the case was originally characterised as one of "failing to keep a proper look out" and it was never put to the offender that she possessed the *mens rea* set out in *Teo Poh Leng*<sup>31</sup> or some other form of subjective fault. This goes to show that

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26 *PP v Lim Hong Eng* [2008] SGDC 320 at [47].

27 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

28 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682 at [5].

29 In the subsequent judgment of *Sankar Jayakumar v PP* [2010] SGHC 190, it was suggested that *Lim Hong Eng v PP* [2009] 3 SLR(R) 682 was a case where the evidence supported the finding that the offender genuinely believed that the lights were green. This point is dealt with in a later part of this article. At this point, it suffices to say that such a finding is nowhere to be found in the judgments of both the trial judge ([2008] SGDC 320) and the High Court in *Lim Hong Eng*.

30 Cases such as *PP v Poh Teck Huat* [2003] 2 SLR(R) 299 have affirmed that, normally, there is a distinction between the sentences imposed in cases of rash driving causing death and cases of negligent driving causing death.

31 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

the Prosecution's characterisation of the nature of the "bad" driving before the trial court is critical.

18 However, this also implies that the decision in *Lim Hong Eng*<sup>32</sup> turned on specific concessions made by the Prosecution. As such, it should not be taken as an authority for the proposition that a "failure to look out" cannot amount to rashness. Stanley Yeo makes a similar point when he pointed out that the case should not stand for the proposition that an omission can never amount to rashness and there was a risk of confusing the conduct element of the offence with the fault element.<sup>33</sup> As a "failure to look out" refers to the conduct element of the offence, the question of whether the driver was a conscious risk-taker had to be answered separately. This author suggests that a driver is rash if her failure to look out was due to her indifference to the knowable and foreseeable risks that her conduct created.

### **B. *Sankar Jayakumar v PP***<sup>34</sup>

19 The signalised cross junction of Yishun Street 72 and Yishun Ring Road is located in the middle of a housing estate with many blocks of flats in the vicinity. Jiemin Primary school is located at one corner of this junction and bordering it is Yishun Secondary School. On 13 February 2008 at about 6.45am, which would have been the start of a normal school day, the offender's car collided with a motorcyclist at this junction causing the death of the rider and serious injuries to the pillion. The offender was subsequently charged with causing the death of the rider by dangerous driving under s 66(1) of the Road Traffic Act<sup>35</sup> and a charge of causing grievous hurt to the pillion by the doing of a rash act under s 338 of the Penal Code.<sup>36</sup>

20 During the trial, an independent witness who was on Yishun Ring Road at the cross junction gave evidence that after the lights turned green in his favour, he noticed the offender's vehicle from Yishun Street 72 proceeding across the junction and thereafter colliding with the deceased. The injured pillion also gave evidence that the lights were in the deceased's favour. Together with evidence that there was no malfunction in the traffic lights, the District Judge found that the offender had proceeded through the junction after the lights had turned red.<sup>37</sup>

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32 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

33 Stanley Yeo "Criminal Law" (2009) 10 SAL Ann Rev 263 at 264, para 12.3.

34 [2010] SGHC 190.

35 Cap 276, 2004 Rev Ed.

36 Cap 224, 2008 Rev Ed.

37 *PP v Sankar Jayakumar* [2010] SGDC 49.

21 Having established the conduct element of the offences, the next issue the District Judge<sup>38</sup> had to decide was whether the fault element of the offences was made out. The offender in his defence claimed that he was a careful driver who would always check the traffic lights. Furthermore, he was travelling on a familiar route. He was certain that the lights were in his favour before he proceeded across the junction though he also said that they turned amber while he was inside the junction. He added that he would not have taken any risks as his daughter was in the car at that time. As in *Lim Hong Eng*,<sup>39</sup> there was no direct evidence of the offender's mental state save for his own testimony.

22 The District Judge rejected the offender's claim that the lights were in his favour. As for the fault element, the District Judge found that the offender had "failed to keep a proper lookout ahead of him at the traffic red signal lights when he proceeded to cross the signalised cross junction".<sup>40</sup> In other words, there was insufficient evidence to show that the offender had proceeded across the junction *knowing* that the light was already red.

23 As the reader may have noticed, the description of the offender's culpability as one of "failing to keep a proper lookout" was very similar if not identical to the finding in *Lim Hong Eng*.<sup>41</sup> However, the District Judge, after citing two of the Indian cases cited in *Teo Poh Leng*,<sup>42</sup> concluded that the offender's failure to keep a proper lookout amounted to a rash act for the following reason:<sup>43</sup>

Applying this definition to the finding that the Accused had driven into a huge signalised junction without first checking the traffic light signals and the road conditions when the lights were indeed against him, it was clear in my judgment that the Accused's act of not maintaining a proper lookout amounted to a rash act and this rash act caused Wong to suffer from grievous hurt as defined under section 320 of the Penal Code. As explained above, it was incumbent on the Accused to check the traffic light conditions before attempting to cross a signalised junction of this nature. *By not ensuring that he had the right of way when he approached and entered the intersection, he clearly disregarded the safety of other road users and risked collision with other vehicles crossing the junction along Yishun Ring Road.* [emphasis added]

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38 *PP v Sankar Jayakumar* [2010] SGDC 49.

39 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

40 *PP v Sankar Jayakumar* [2010] SGDC 49 at [56].

41 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

42 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541 at [4] and [7].

43 *PP v Sankar Jayakumar* [2010] SGDC 49 at [62].

24 While the trial judge stated that the offender had “clearly disregarded” the safety of other road users,<sup>44</sup> this in itself was not a finding of a particular mental state. After all, the meaning of disregard is to ignore or pay no attention to, something consistent with the finding that the offender had not maintained a proper lookout. Under the test for advertent rashness in *Teo Poh Leng*,<sup>45</sup> the offender had to have acted with the consciousness that illegal or mischievous consequences may occur. The offender appealed against the conviction and sentence.

25 The appeal was heard by Justice Choo Han Teck who also heard the earlier appeal in *Lim Hong Eng*.<sup>46</sup> Choo J in this case found that there was no reason to disturb the District Judge’s findings of fact and dismissed the appeal against conviction. In response to the appellant’s attempt to draw a parallel with *Lim Hong Eng*, Choo J stated that what constituted dangerous as well as rash driving were matters of fact for the trial judge to determine. *Lim Hong Eng* was therefore distinguishable as the findings of fact of the trial judge in that case supported a finding that the offender thought that the light was green in her favour.<sup>47</sup>

26 What were the key facts that enabled the High Court to distinguish the two cases? On the face of it, the findings of fact made by the trial judges in both cases were very similar. In both cases it was found that the offender had “failed to keep a proper lookout” and there was no evidence that either offender had “deliberately failed to take note of the traffic light signals”.<sup>48</sup> There was also no evidence that either offender knew that the lights were red. If rashness requires a finding of advertent risk-taking or consciousness that illegal or mischievous consequences may occur, it would seem that the offender in *Sankar Jayakumar*<sup>49</sup> should not have been found to be rash in the absence of such a finding by either the trial or appellate court.

### C. Consistency with *PP v Teo Poh Leng*?

27 The result of *Lim Hong Eng*<sup>50</sup> could have been explained as a straightforward application of the test for advertent rashness found in *Teo Poh Leng*.<sup>51</sup> In *Lim Hong Eng*, there was no finding that the offender acted with the consciousness that illegal and mischievous consequences may occur as a result of her actions. Furthermore, the Prosecution had

44 *PP v Sankar Jayakumar* [2010] SGDC 49 at [62].

45 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

46 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

47 *Sankar Jayakumar v PP* [2010] SGHC 190 at [3].

48 *PP v Sankar Jayakumar* [2010] SGDC 49 at [60].

49 *Sankar Jayakumar v PP* [2010] SGHC 190.

50 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

51 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

made various concessions during the trial in respect of the offender's culpability. In light of the failure of the Prosecution to adduce such evidence, it appeared to be a foregone conclusion that the offender was not rash under this test.

28 Therefore, it is curious that Choo J, in his later decision in *Sankar Jayakumar*,<sup>52</sup> found it necessary to explain *Lim Hong Eng*<sup>53</sup> as a case where the offender had a genuine belief that the lights were green. After all, *Lim Hong Eng* could easily be explained as a case where the Prosecution had failed to prove the requisite mental state. Furthermore, there are some difficulties with characterising *Lim Hong Heng* as a case where the findings by the trial judge "supported" a finding that the offender believed that the lights were green.

29 The trial judge in *Lim Hong Eng* did not actually make a finding that the offender believed the lights were green. The trial judge found that she was not aware the lights had turned red which is not the same thing. According to the High Court, one can infer from these and the other findings of the trial judge that the offender genuinely believed that the lights were green. However, the trial judge also seemed to think that the offender was not paying attention to the traffic lights:<sup>54</sup>

Even though it is conceded that there was no evidence that she was speeding, because she was late for her appointment, in all probability she was rushing and therefore was inattentive when she arrived at the junction.

30 Furthermore, counsel at both the trial and appellate stage had specifically raised the defence of mistake of fact under s 76 and s 79 of the Penal Code.<sup>55</sup> If the trial or appellate court in *Lim Hong Eng*<sup>56</sup> had found that the offender possessed a genuine belief that the lights were green, it would have been incumbent on the court to consider whether any of these general exceptions were made out. In particular, the court would have had to consider issues such as whether the mistake was made in "good faith". The fact that s 76 and s 79 were not mentioned in either the trial or the appellate court judgment suggests that the defence did not even clear the first stage of proving that the offender believed that the lights were green in the first place.

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52 *Sankar Jayakumar v PP* [2010] SGHC 190.

53 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

54 *PP v Lim Hong Eng* [2008] SGDC 320 at [56].

55 Cap 224, 1985 Rev Ed.

56 *PP v Lim Hong Eng* [2008] SGDC 320; *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

31 If this analysis is accepted, it implies that *Lim Hong Eng*<sup>57</sup> and *Sankar Jayakumar*<sup>58</sup> are indistinguishable as far as the *mens rea* of the offender was concerned. The different results in *Lim Hong Eng* and *Sankar Jayakumar* cannot be reconciled with a definition of rashness that is solely confined to advertent risk-taking. The differing results can only be explained by an expanded definition of rashness that includes inadvertent risk-taking.<sup>59</sup>

#### D. *The cases re-analysed*

32 In this section, it will be shown that the different results in the two cases can be explained by the use of an expanded definition of rashness that includes inadvertent risk-taking. In *Lim Hong Eng*, the trial judge did not make any finding that the offender acted with the consciousness of the possibility of illegal or mischievous consequences. Instead, the trial judge found the offender to be rash because of the nature of her conduct:<sup>60</sup>

I found that the accused's failure to keep a proper look out and to comply with the red traffic lights, for whatever reason, at a major junction undoubtedly amounted to dangerous driving on her part which resulted in the death of the first victim. This act of driving in such a situation when the lights were against her was also a rash act

33 As pointed out earlier, if advertent risk-taking was the sole test for rashness, the High Court at the hearing of the appeal could have simply allowed the appeal on the basis that the Prosecution had not proved and the trial court had not found that the offender acted with a consciousness of illegal or mischievous consequences. In other words, the offender did not possess the necessary *mens rea*. However, Choo J adopted a different approach. After reviewing the Indian cases cited in *Teo Poh Leng*,<sup>61</sup> his Honour focused on the idea of "disregard" instead of "consciousness of illegal or mischievous consequences":<sup>62</sup>

Rashness thus implies a disregard to the possibility of injury or death. The appellant, in the present case, did not appear to have shown such disregard.

34 As the offender was not aware that the lights were red and also not aware that there was a motorcycle passing through the junction, the

57 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

58 *Sankar Jayakumar v PP* [2010] SGHC 190.

59 In this article, the terms "advertent risk-taking" and "inadvertent risk-taking" from Neil Morgan & Stanley Yeo, "Defining the Fault Elements of Driving Offences" (2007) 19 SAclJ 205 are adopted.

60 *PP v Lim Hong Eng* [2008] SGDC 320 at [47].

61 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

62 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682 at [5].

High Court felt that she did not show a “disregard to the possibility of injury or death”<sup>63</sup>.

35 The word “disregard” can mean either pay no attention to or ignore<sup>64</sup> and does not necessarily describe a mental state. In *Allan v Patterson*,<sup>65</sup> a Scottish case that endorses “objective recklessness” for reckless driving, objective recklessness is described in similar terms as a “complete disregard” of the potential danger. Furthermore, in *Lim Hong Eng*,<sup>66</sup> the High Court, in saying that the accused did not “show” such a disregard, appeared to have been making an objective evaluation of the offender’s conduct rather than a finding on her actual state of mind.

36 One interpretation of the High Court’s judgment is that it approached the question of rashness on the basis that rashness included both advertent and inadvertent risk-taking. This explains why the appeal was not allowed merely on the basis that there was no advertent risk-taking involved. Even though there was no evidence of advertent risk-taking, the High Court went further to consider whether or not the accused “disregarded” the risk. This concept will be expanded on in a later part of this article.

37 One might argue that the High Court was merely making an observation that her lack of disregard was merely a piece of evidence that supported a finding that the accused did not act with a consciousness of illegal or mischievous consequences. However, this again begs the question why such a finding was not specifically stated.

38 With this in mind, we will now look at the decision of the trial judge in *Sankar Jayakumar*.<sup>67</sup> There was again no finding that the offender acted with the consciousness of illegal and mischievous consequences. Instead, the trial judge referred to *Lim Hong Eng*<sup>68</sup> and held that the offender was rash because he showed a “disregard’ for the safety of others:<sup>69</sup>

As explained above, it was incumbent on the Accused to check the traffic light conditions before attempting to cross a signalised junction of this nature. *By not ensuring that he had the right of way when he approached and entered the intersection, he clearly disregarded the safety of other road users and risked collision with other vehicles crossing the junction along Yishun Ring Road.* [emphasis added]

63 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682 at [5].

64 *Concise Oxford English Dictionary* (11th Ed).

65 [1980] RTR 97. This case is cited in the 2005 edition of *Wilkinson’s Road Traffic Offences* (Sweet & Maxwell, 22nd Ed, 2005) as the position in Scottish law.

66 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682 at [5].

67 *PP v Sankar Jayakumar* [2010] SGDC 49.

68 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

69 *PP v Sankar Jayakumar* [2010] SGDC 49 at [62].

39 The offender's appeal against conviction was dismissed by the High Court though his appeal against sentence was allowed. In dismissing the appeal against conviction, Justice Choo Han Teck stated that there was no basis to interfere with the findings made by the trial court.<sup>70</sup> This suggests that a conviction for doing a rash act causing grievous hurt does not require a specific finding that the offender had acted with the consciousness of illegal and mischievous consequences and that it was sufficient that the offender's conduct showed that he "clearly disregarded the safety of other road users".

40 The adoption of inadvertent risk-taking as the test for rashness is not without precedent. We now turn to the case of *Balakrishnan S v PP*.<sup>71</sup> In this case, the two appellants had each been convicted of one charge of doing a rash act causing grievous hurt under s 338 of the Penal Code<sup>72</sup> and a second charge of doing a rash act causing death under s 304A of the Penal Code. The appellants were soldiers with the Singapore Armed Forces and were the Supervising Officer and the Course Commander of a Combat Survival Training Course respectively. During the course, the trainees were subjected to a water treatment station in order to simulate capture and interrogation by the enemy. This component of the course was conducted in a manner inconsistent with the lesson plan and this resulted in the death of one trainee and serious injury to another.

41 One aspect of the defence of the first appellant is that he had a genuine belief that there was no danger as the water treatment was carried out by instructors who knew the rules. An offender who had a genuine belief that the precautions taken had removed the risk should not be found to be rash if advertent risk-taking was the only applicable test. Chief Justice Yong Pung How rejected the appellant's defence and found that he did possess the necessary consciousness. However, even if he had believed that he had averted the danger, Yong CJ stated that this would not be a defence because his behaviour exhibited a recklessness or indifference to the consequences:<sup>73</sup>

In my view, this very admission contained all the ingredients necessary for a finding of criminal rashness. Capt Pandiaraj was conscious of the danger inherent in the manner of dunking stipulated by him but still instructed his subordinates to carry on with the act in that particular manner. He may have believed that he had minimised or even averted the danger by setting down certain guidelines for the instructors, but his criminality lay in his running the risk of doing the act. His failure to supervise the water treatment, or to stop the instructors from going

70 *Sankar Jayakumar v PP* [2010] SGHC 190 at [3].

71 [2005] 4 SLR(R) 249.

72 Cap 224, 1985 Rev Ed.

73 *Balakrishnan S v PP* [2005] 4 SLR(R) 249 at [101].

beyond the guidelines he set, exhibited a recklessness or indifference as to the consequences of the dunking.

42 The High Court's observation that the offender would be rash even though he may have believed that he had averted the danger is inconsistent with advertent risk-taking as the offender is no longer conscious of a risk of illegal and mischievous consequences.<sup>74</sup> As such, it suggests the High Court had already recognised that rashness includes inadvertent risk-taking even before *Lim Hong Eng*<sup>75</sup> and *Sankar Jayakumar*.<sup>76</sup>

43 The conclusion to be drawn from these cases is that the courts appear to have approached rashness on the basis that it includes both advertent and inadvertent risk-taking. While advertent risk-taking remains the paradigm form of rashness, it appears that the courts are also prepared to find an inadvertent risk-taker to be rash if his conduct shows a disregard for the safety of others, or indifference as to the risks his conduct poses. However, the High Court has not articulated the reasons for including inadvertent risk-taking as part of rashness. The next part of this article will look at the reasons why this wider definition can be justified.

### III. Inadvertent rashness revisited

#### A. *Reasons for adopting inadvertent risk-taking*

44 In a survey of the fault elements of driving offences, Neil Morgan and Stanley Yeo looked at a number of offences involving bad driving, including the offences involving rash and reckless driving.<sup>77</sup> In respect of these offences, they point out that there appears to be a divergence of approach between Singapore and Malaysia.

45 Morgan and Yeo note that the Malaysian cases have referred to English cases on reckless driving and include inadvertent risk-taking within the meaning of recklessness.<sup>78</sup> An example of inadvertent risk-taking is the situation "where drivers fail to take account of a risk that would have been obvious to a prudent driver". On the other hand, they note that the Singapore courts have yet to include the inadvertent risk-

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74 The case is discussed in Toh Yung Cheong, "Inadvertence as Rashness: *S Balakrishnan v PP*" (2007) 19 SAclJ 168.

75 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

76 *Sankar Jayakumar v PP* [2010] SGHC 190.

77 Neil Morgan & Stanley Yeo, "Defining the Fault Elements of Driving Offences" (2007) 19 SAclJ 205 at para 12.

78 Neil Morgan & Stanley Yeo, "Defining the Fault Elements of Driving Offences" (2007) 19 SAclJ 205 at para 12.

taking type of recklessness within the scheme of reckless driving offences and that the cases suggest that recklessness is limited to advertent risk-taking.<sup>79</sup>

46 Morgan and Yeo suggest two reasons why the Malaysian position can be supported:<sup>80</sup>

(a) First, the offences in question were borrowed from English legislation thereby making English judicial pronouncements on those offences highly persuasive.

(b) Secondly, given the potentially disastrous consequences of bad driving, a crime which insists on proof of an actual mental state would not have the desired deterrent effect of making drivers vigilant in looking out for serious and obvious risks.

47 This author takes the position that rashness and recklessness should include inadvertent risk-taking in certain circumstances and agrees with the two reasons put forward by Morgan and Yeo. In the next part of this article, we will look into these two reasons in more detail. Nevertheless, as Morgan and Yeo point out, the inclusion of inadvertent risk-taking in rashness or recklessness is bound to raise objections from subjectivists.<sup>81</sup> As such, this article will attempt to allay the subjectivists' fears by offering an explanation why inadvertent risk-taking can be characterised as a type of subjective fault if it is restricted to cases of "indifference" or "disregard".

#### **B. First reason: English judicial pronouncements on recklessness**

48 To illustrate the tension between the subjective and objective elements of recklessness, we will begin by looking at the English position on reckless driving. In *R v Lawrence*,<sup>82</sup> the House of Lords was called upon to consider the definition of recklessness in the context of reckless driving. As we learn from Lord Goff in *R v Reid*<sup>83</sup> that Lord Diplock's speech in *R v Lawrence* was delivered immediately after his

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79 Neil Morgan & Stanley Yeo, "Defining the Fault Elements of Driving Offences" (2007) 19 SAclJ 205 at para 17.

80 Neil Morgan & Stanley Yeo, "Defining the Fault Elements of Driving Offences" (2007) 19 SAclJ 205 at para 17.

81 Neil Morgan & Stanley Yeo, "Defining the Fault Elements of Driving Offences" (2007) 19 SAclJ 205 at para 17.

82 [1982] 1 AC 510.

83 [1992] 1 WLR 793 at 807.

speech in *Commissioner of Police of the Metropolis v Caldwell*<sup>84</sup> (“*Caldwell*”) the similarity of the definitions comes as no surprise:<sup>85</sup>

*First*, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and

*Second*, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.

[emphasis in original]

49 In *R v Reid*,<sup>86</sup> the House of Lords affirmed the direction in *R v Lawrence*<sup>87</sup> but Lord Goff came up with a different formulation which Lord Browne-Wilkinson felt was an improvement over the “abstract conceptual form” of the *R v Lawrence* direction:<sup>88</sup>

[A] jury should only convict a defendant of driving recklessly if they are sure of the following: (i) that he was in fact driving in such a manner as to create a serious risk of causing injury to some other person who might happen to be using the road, or doing substantial damage to property; and (ii) either (a) that he recognised that there was some risk of that kind involved, but nevertheless went on to take it; or (b) that, despite the fact that he was driving in such a manner, he did not even address his mind to the possibility of there being any such risk, and the risk was in fact obvious.

50 The House of Lords finally overruled *Caldwell*<sup>89</sup> in the case of *R v G*.<sup>90</sup> As *R v Reid*<sup>91</sup> is based on *Caldwell*, one would have expected *R v Reid* to have been overruled as well. However, the House of Lords in *R v G* declined to overrule *R v Reid*, which suggests that “objective” recklessness still exists for offences of reckless driving. One could speculate that the reason for leaving *R v Reid* alone was on public policy grounds and the enhancement of road safety. However, an alternative explanation is that

84 Most English textbook writers refer to the case of *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341 as the case that introduced “objective recklessness” into English law.

85 *R v Lawrence* [1982] 1 AC 510 at 526–527.

86 [1992] 1 WLR 793.

87 [1982] 1 AC 510 at 526–527. Lord Browne-Wilkinson remarked in *R v Reid* [1992] 1 WLR 793 at 819 that “after long and careful analysis of Lord Diplock’s direction with the help of very skilled counsel I have, I think, understood it and find it legally correct”.

88 *R v Reid* [1992] 1 WLR 793 at 816 and 819.

89 *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341.

90 [2004] 1 AC 1034.

91 [1992] 1 WLR 793.

overruling *R v Reid* would have no practical effect. Lord Bingham pointed out:<sup>92</sup>

In so expressing the question I mean to make it as plain as I can that I am not addressing the meaning of 'reckless' in any other statutory or common law context. In particular, but perhaps needlessly *since 'recklessly' has now been banished from the lexicon of driving offences*, I would wish to throw no doubt on the decisions of the House in *R v Lawrence (Stephen)* [1982] AC 510 and *R v Reid* [1992] 1 WLR 793. [emphasis added]

51 Nevertheless, it should be pointed out that the Scottish courts recognise an objective standard for recklessness where reckless driving is concerned. In the Scottish case of *Allan v Patterson*,<sup>93</sup> the High Court of Justiciary stated:

Judges and juries will readily understand ... that before they can apply the adverb 'recklessly' to the driving in question they must find that it fell far below the standard of driving expected of the competent and careful driver and that it occurred either in the face of obvious and material dangers which were or should have been observed, appreciated and guarded against, or in circumstances which showed a complete disregard for any potential dangers which might result from the way in which the vehicle was being driven.

52 In conclusion, the English cases adopt the orthodox subjectivist position for most offences except for reckless driving where the "objective" *R v Reid*<sup>94</sup> definition applies. However, we can expect no further development of English law on reckless driving since recklessness has been "banished from the lexicon of driving offences".<sup>95</sup> Nevertheless, this bifurcated English approach together with the adoption of "objective" recklessness in Scotland and Malaysia leads to the question as to what makes cases of bad driving so special that they need to have a separate definition for recklessness.

### **C. Second reason: Enhancing road safety and proving mental states**

53 Perhaps the answer to the earlier question of why offences involving bad driving merit special treatment can be found when one looks at the practical or utilitarian reasons for adopting such an approach. By including inadvertent risk-taking, road safety may be

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92 *R v G* [2004] 1 AC 1034 at [28].

93 [1980] JC 57 at 60. This case is cited in the 2005 edition of *Wilkinson's Road Traffic Offences* (Sweet & Maxwell, 22nd Ed, 2005) as the position in Scottish Law.

94 [1992] 1 WLR 793.

95 *R v G* [2004] 1 AC 1034 at [28].

enhanced by changing the attitudes of drivers. As the authors of the UK Home Office Consultation Paper (2005) observed at para 2.21:

If changes in the criminal law and its operation can help change the attitudes of the bad drivers who cause death and injury it will have contributed to road safety as well as public confidence in the criminal justice system

54 Another practical reason for including inadvertent risk-taking in the definition of rashness is the sheer difficulty of proving that an accused person possessed a particular state of mind at the point the alleged offence was committed. For example, the Prosecution did not appear to have led any evidence in *Lim Hong Eng*<sup>96</sup> or *Sankar Jayakumar*<sup>97</sup> on the driver's state of mind at the time of the offence and the trial court did not make any finding on the same issue. While it is conceded that the trial courts explained that there was no evidence to show that the offenders knew that the lights were red, saying that a particular mental state was absent is not the same as stating what the actual mental state of the offender was at the time.

55 In many other cases of bad driving, the only direct evidence of the offender's mental state would be his testimony. This is not surprising given the fact that such cases often turn on the evidence of an independent eyewitness who saw the offender's car proceed through a red light, but can shed no light on the offender's mental state. In light of these issues, one might appreciate why jurists who could be described as subjectivists, such as Glanville Williams, were prepared to accept gross negligence as the test for reckless driving on grounds of public policy.<sup>98</sup>

56 This is not to say that the description of the eyewitness is totally irrelevant to the issue of the driver's mental state. For example, in *Lim Hong Eng*, the fact that the eyewitness testified that the offender drove across the junction at a constant speed without any evasive action being taken supported the finding that the offender was unaware that the lights were red.<sup>99</sup> However, it is suggested that this approach is not without its problems as it gives undue weight to the testimony of the independent eyewitness and also places on the eyewitness the unenviable task of needing to describe, through untrained eyes, the manner in which the vehicle was being driven and even whether it changed its speed. It is one thing to say that the car drove through a red light and another thing to give evidence on the rate of change of velocity of a moving vehicle after what is in most cases a split second's worth of observation. There is also something disturbing about saying that the lack of evasive action is

96 *PP v Lim Hong Eng* [2008] SGDC 320; *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

97 *PP v Sankar Jayakumar* [2010] SGDC 49; *Sankar Jayakumar v PP* [2010] SGHC 190.

98 Glanville Williams, "Recklessness Redefined" [1981] CLJ 252 at 279.

99 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682 at [5].

evidence that a motorist was not rash. Does it then mean that taking evasive action is evidence of rashness? If a driver takes precautions that turn out to be inadequate, is he in a worse position than a driver who takes no precautions at all? This is a question we will return to when examining the case of *Mohamed Iskandar bin Basri v PP*.<sup>100</sup>

#### IV. A reply to the subjectivist objection

In the context of 'mens rea', then, current doctrine appears to suffer from two major shortcomings. First, a combination of dualism and a narrow reading of philosophical accounts of capacity responsibility militates to designate 'subjective' 'mens rea' in the sense of intent, foresight, knowledge and belief as the paradigm forms of 'mens rea'. Negligence and 'objective' recklessness tend to be marginalised as instances of 'mens rea'.<sup>101</sup>

57 While a number of reasons have been offered to support the inclusion of inadvertent risk-taking in the meaning of rashness, they do not directly answer the subjectivist objections to inadvertent risk-taking. Before offering a reply, a brief sketch of the subjectivist position will be attempted and some problems faced by the courts in applying the subjectivist approach highlighted:

(a) *The problem of occurrent and non-occurrent mental states.* While subjectivism may well insist on the existence of a mental state, it appears to struggle with whether it requires an occurrent mental state in the sense that a particular thought must have flashed through the mind of the offender at the time of the offence. If it turns out that subjectivism does not actually require a particular thought to flash through the mind of the offender, then the chasm between advertent risk-taking and inadvertent risk-taking is far narrower than initially thought and easily bridged by introducing an attitudinal test involving indifference or disregard.

(b) *The problem of moral fit.* Advertent risk-taking as the sole criteria for rashness is morally under-inclusive as it excludes certain categories of actors whom we would consider rash. This is illustrated by comparing the culpability of the calculated risk-taker against that of the callous but ignorant.

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100 [2006] 4 SLR(R) 440.

101 Nicola Lacey & Celia Wells, *Reconstructing Criminal Law* (Butterworths, 2nd Ed, 1998) at p 46.

### A. *Responsibility and subjectivism*

58 In countries where motor vehicles are a major form of both private and public transport, the criminal law has an important role to play in the regulation of behaviour on the roads. The right to drive a motor vehicle in Singapore is earned through the passing of a basic theory test, a final theory test and a practical driving test. After passing the driving test, drivers are placed on probation for one year and required to display a probation plate on the vehicle they are driving. There is an innate presumption that all licensed drivers have the ability to drive in a safe and proper manner. If a driver has the capacity to appreciate that a particular action he is going to take may lead to harmful consequences, he has a choice not to carry on. In the context of driving, this means that a driver should only proceed when it is safe to do so.

59 If a driver causes harm in the course of driving a motor vehicle, we ask whether he was responsible for the harm caused. The principle of *mens rea* answers the question in the following manner: a person should only be held criminally liable for events or consequences which they intended or knowingly risked.<sup>102</sup> This principle is grounded in individual autonomy and states that persons should be liable for the choices that they make. In the case of a rash or reckless act, this means that a person who knowingly takes an unjustifiable risk that causes injury is culpable because he chose to proceed. A person who does an act while being unaware that his actions could cause injury is generally considered less blameworthy and not deserving of the label of rashness. Nonetheless, if his behaviour falls below what is reasonably expected, he may be labelled as negligent.

60 The above description is representative of the orthodox subjectivist approach to criminal responsibility which informs the English textbook tradition.<sup>103</sup> Orthodox subjectivism has its roots in Kantian individualism which accords individuals the status of autonomous moral agents with freedom of choice. Individuals are allowed to “choose their life plans and to pursue their own conceptions of the good”. Orthodox subjectivism holds that “informed voluntary choices of action are both necessary and sufficient to justify blame and punishment”.<sup>104</sup>

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102 While the principle of *mens rea* has been stated in various forms, the formulation found in Andrew Ashworth, *Principle of Criminal Law* (Oxford University Press, 4th Ed, 2003) at p 87 is adopted in this article.

103 Ian Dennis, “The Critical Condition of Criminal Law” (1997) *Current Legal Problems* 50 at 213. This aspect of Dennis’s article is also discussed in Allan Norrie, *Punishment, Responsibility and Justice* (Oxford University Press, 2000) at p 2.

104 Ian Dennis, “The Critical Condition of Criminal Law” (1997) *Current Legal Problems* 50 at 213.

### **B. The problem of occurrent mental states**

61 The subjectivist objection to inadvertent risk-taking relates to the assertion that the inadvertent offender did not know of or intend the illegal and mischievous consequence. However, what is the level of the subjectivist's commitment to the existence of a "guilty mind"? Apart from insisting that the offender possess *mens rea* such as consciousness of the possibility of illegal and mischievous consequences, it appears that subjectivism should require that this state of mind be present at the time the offence was committed and also that it be an occurrent thought that flashed through the offender's mind at that point. The reason for this is that under subjectivism, the offender is held to be culpable because he made an informed voluntary choice and had the ability to choose otherwise.

62 An occurrent mental state refers to an actual thought or state of knowledge that occurs in the offender's mind.<sup>105</sup> When we deny the existence of an occurrent mental state, we sometimes say that "the thought never crossed my mind". How persuasive is the subjectivist position that such a claim marks the dividing line between rashness and negligence? Is thoughtlessness sufficient to make a person less morally culpable than one who actually thought about it, but made an incorrect decision to proceed?

63 One argument against this subjectivist claim is that it is based on an incomplete understanding of what it means to know or be aware of something. Antony Duff argues a person can be aware of something even if he does not explicitly think about it at that point of time:<sup>106</sup>

The occurrence or the non-occurrence of certain explicit thoughts is irrelevant to whether I am actually aware of what I am doing: my actions can manifest my awareness even if no explicit thoughts about the relevant facts pass through my mind at the time; and the occurrence of such thoughts is a manifestation of knowledge only if they are appropriately related to my actions and reactions.

64 Duff's argument is of particular relevance to bad driving. Driving is often a habitual and even reflexive action which might take place without the existence of explicit thoughts flashing through the mind of the driver. One of Lord Diplock's reasons for introducing "objective" recklessness in the case of *Caldwell*<sup>107</sup> was what he felt to be the overly fine distinction created by advertent recklessness. Professor

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105 The term "occurrent mental state" is used in Antony Duff, *Intention, Agency and Criminal Liability* (Basil Blackwell, 1990) at p 160.

106 Antony Duff, *Intention, Agency and Criminal Liability* (Basil Blackwell, 1990) at p 160.

107 *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341.

Andrew Ashworth provides a succinct summary of Lord Diplock's reasoning.<sup>108</sup>

The dividing line between awareness and unawareness of risk is so narrow and so difficult to prove that juries and magistrates should not be required to labour over it. It may be impossible to know whether an offender was fleetingly aware of the consequences of his action.

65 Where habitual and reflexive driving actions are concerned, it could be argued that there is no clear dividing line. Is it useful in such situations to focus our efforts on trying to find out what flashed through the offender's mind at the time of the collision? Unless the accused confesses that he was aware of the risk but nonetheless decided to press on, the accused's mental state would have to be inferred from conduct observed by eyewitnesses. For cases involving the beating of a red light, very often the eyewitness would only be able to say that the car beat a red light and caused a collision. Sometimes, the eyewitness would give some evidence of the speed at which the driver was travelling. Rather than attempting the exercise of reconstructing the mental state of the accused at the time of the offence, would time be better spent inquiring whether the accused's conduct manifests a form of indifference or carelessness that can be characterised as callous?

66 In the English case of *R v Parker*,<sup>109</sup> the offender was convicted of recklessly damaging a public telephone. One of the defences he put forward was that he was frustrated because he had failed to operate the phone successfully and his banging of the phone was a reaction to the frustration he felt. As such, the offender claimed that it did not occur to him that what he was doing might damage the phone. The Court of Appeal dismissed the offender's appeal. Lord Justice Lane also made the following observation:<sup>110</sup>

... against the background of fact that he knew of the circumstances which surrounded his act (and quite plainly had he directed his mind to the matter must have realised the likelihood, if not the inevitability, of damage).

67 The above passage suggests that recklessness is not necessarily an occurrent mental state that has to exist at the time of the offence. Professor Ashworth explains *R v Parker*<sup>111</sup> as a case of broadening the time frame from the moment of the act itself to an earlier and calmer

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108 Andrew Ashworth, *Principle of Criminal Law* (Oxford University Press, 4th Ed, 2003) at p 184.

109 [1977] 1 WLR 600.

110 *R v Parker* [1977] 1 WLR 600 at 604.

111 [1977] 1 WLR 600.

time.<sup>112</sup> In other words, so long as the offender had the capacity to reflect and realise that there was a risk of damage, he would be considered reckless even if the thought did not occur to him at the time of the offence. Adopting this interpretation, *R v Parker* supports an extension of the concept of recklessness using capacity-based criteria. As suggested earlier, capacity-based criteria can be considered to be “subjective” as it respects the principle of individual autonomy which underpins the principle of *mens rea*.<sup>113</sup> If a person did not have the capacity to appreciate the risk even if he directed his mind to it, he should not be labelled as rash. However, as also mentioned earlier, just because a capacity-based theory of liability is subjective does not mean that it is the moral equivalent of rashness.

68 *R v Parker*<sup>114</sup> also does not tell us exactly when “time framing” should be used. If used too liberally, a person who causes an avoidable consequence would be rash because if he had directed his mind to it, he could have avoided it. In fact, “time framing” appears suspiciously similar to the adoption of a capacity-based theory of liability as the sole determinant of rashness, which is something that was rejected earlier in this article. Many events that we might regard as “accidents” might be labelled as rash if a person’s capacity to appreciate the risk were the sole test. On the other hand, “time framing” may be a necessary device to get around the insistence on an occurrent mental state at the time of the offence.

69 For example, a driver who is engrossed in a conversation on his handphone (whether or not a hands-free kit was used) and consequently fails to keep a proper lookout may have been oblivious to the risk at the time of the collision. Under the subjectivist approach, he would not be considered rash unless “time framing” was used to determine his awareness of the risk of injury or death before he started using his phone while driving. Another example of when “time framing” might be used is when persons who throw “killer litter” out of high-rise flats are charged with doing a rash act that endangers the life or personal safety of others. His capacity to appreciate the risk had he thought about

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112 Andrew Ashworth, *Principle of Criminal Law* (Oxford University Press, 4th Ed, 2003) at p 182.

113 A similar issue arises in the context of s 300(b) of the Penal Code (Cap 224, 2008 Rev Ed) which talks about the offender knowing that the bodily injury he intends to cause is likely to cause the death of the person to whom the harm is caused and s 300(c) which talks about the offender intending to cause injury, and the injury intended is sufficient in the ordinary course of nature to cause death. Does the offender have to reflect on the likelihood of death being caused as he plunges the knife into the victim to satisfy this requirement? For a discussion on s 300 of the Penal Code, see Michael Hor, *Managing Mens Rea in Singapore* (2006) 18 SAclJ 314.

114 [1977] 1 WLR 600.

it is as important to his culpability as whether or not the risk actually occurred to him at the point he threw the object out of the flat.

70 The fact that “time framing” should be needed to find rashness in the above examples suggests that there may be something lacking in the traditional orthodox subjectivist definition in the first place. Writers such as Alan Norrie have highlighted the problem of “moral fit” as our judgments on culpability are imperfectly mirrored by the orthodox subjectivist definition. Around the edges of the definition, devices such as “time framing” are needed to give judges the “moral elbow room” to convict the culpable.<sup>115</sup>

71 In *Lim Hong Eng*,<sup>116</sup> the offender drove through a red light at a major traffic-light controlled junction. There did not appear to be an explicit discussion by either the trial or the appellate court as to whether or not the accused acted with the consciousness that illegal and mischievous consequences may occur. During the appeal, the High Court emphasised the finding that the offender did not know that the lights were red and did not intend to beat the red lights.<sup>117</sup> However, there was no explicit finding by the High Court that the defendant possessed a genuine belief, whether one in good faith or otherwise, that the lights were green.

72 By focusing on the offender’s knowledge of whether the lights were red, did the court misunderstand the nature of rashness? The essence of advertent risk-taking is awareness of risk that turns out to be unjustified. Rashness does not require proof of “knowledge” or “intention”. If the offender has “knowledge” or “intention”, he could arguably possess the *mens rea* needed for the offence of culpable homicide.

73 For a situation where a driver runs a red light, it is suggested that his state of mind would fall within one of the following three possibilities and that he would either be:

- (a) not aware that the lights were red and possessed a genuine belief that the lights were green; or
- (b) not aware that the lights were red but aware of a risk that the lights were red or would turn red before entering the junction; or
- (c) aware that the lights were red before entering the junction.

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115 See, for example, on the idea of “moral fit” and “moral elbow room”, Alan Norrie, “After *Woolin*” [1999] Crim LR 532.

116 *PP v Lim Hong Eng* [2008] SGDC 320; *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

117 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682 at [5].

74 One could argue on a wider view of rashness that a person who did not believe that the lights were green before proceeding through the junction must logically be taken to have been aware of the risk that the lights were red. Awareness in this case may well be a non-occurrent mental state. In other words, the risk that the lights could be red did not actually occur to her at that point. However, if she had thought and reflected about it, she would have realised that there was a risk that the lights were red. If she had reflected further, she would also be aware that if she ran a red light, there was a risk that it would result in a collision. It would therefore have been unjustified for her to proceed when such a risk existed because the effort of confirming the actual colour of the lights was minimal and the possible consequences of not checking were very serious. This is similar to the approach taken in *R v Parker*,<sup>118</sup> where the court held that because the offender must have known that he was dealing with breakable material, he must also have been aware of the risk of breakage, notwithstanding the fact that there was no evidence that the thought flashed through his mind just before the commission of the offence.

75 Similarly, in the case of *R v Pembilton*,<sup>119</sup> the accused threw a rock at a man, but missed and hit a window.<sup>120</sup> If the accused were charged with reckless damage to property, would he be able to escape liability by claiming that he was not conscious of any risk of damage to property at that time? Would it help him to claim that he really “wasn’t thinking of the consequences”? It would seem fair to say that when he threw the rock, he was at the very least indifferent to the risk of damage.

76 If subjectivism is able to accept a device like time framing as consistent with its insistence on advertent risk-taking, it would seem that the difference between advertent risk-taking and inadvertent risk-taking is minimal since in the case of time framing, the offender did not possess the *mens rea* for the offence at the time of the offence either.

77 On the other hand, an alternative conclusion is that subjectivism rejects time framing and insists that an offender is only rash if the Prosecution could prove that the awareness of risk flashed through her mind at the time the offence was committed. Applying this to a case of running a red light, this would mean that an offender is only rash if she was aware of a risk that the lights were red but she nevertheless made a deliberate decision to proceed without confirming the colour. It is suggested that such a restrictive test is morally

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118 [1977] 1 WLR 600.

119 [1874–1880] All ER 1163.

120 The English cases on this issue are discussed in Jeremy Horder, “Two Histories and Four Hidden Principles of *Mens Rea*” [1997] LQR 113 at 117.

underinclusive as it is not in accord with the community's moral judgment on what it means to be rash.

**C. *The problem of moral fit***

78 At this point we will pause to look at a summary of the arguments so far. First, if subjectivism insists on the existence of actual knowledge of the risk of consequences at the time of the offence, and further insists that such a thought must have occurred in the offender's mind, it is underinclusive as it excludes a variety of thoughtless conduct that we would consider rash. Secondly, if subjectivism while insisting on such knowledge acknowledges the legitimacy of devices such as time framing, it is actually accepting inadvertent risk-taking albeit under a different label and the subjectivist objection to inadvertent risk-taking must fall away as long as we are able to meaningfully distinguish it from negligence. In this part of the article, an explanation will be offered as to why the subjectivist account of rashness is underinclusive and why it matters. As for the question of whether inadvertent risk-taking is overinclusive as it is virtually synonymous with negligence, this issue will be dealt with after examining the idea of rashness as indifference.

79 In this section, having sketched out the subjectivist position, it is suggested that the third reason for adopting inadvertent risk-taking as part of rashness is that a purely subjectivist account of recklessness is an imperfect moral fit and not in accord with our personal view of blameworthiness. It is underinclusive as it excludes cases that ought to be regarded as reckless. This is why the English courts have stretched the concept of recklessness with devices such as "time framing", "indifference" and "objective recklessness" to convict culpable but inadvertent risk-takers. On the other hand, if recklessness were indistinguishable or "virtually synonymous" with negligence, it would be overinclusive as the label of rashness might be attached to an offender whom we consider to be merely negligent.

80 Andrew Ashworth points out that there are a number of situations where reliance on the awareness requirement, which he calls the "centrepiece of advertent recklessness" may fail to yield an acceptable grading of blameworthiness:<sup>121</sup>

One is the person who acts impulsively or in a temper, 'without thinking'. The other is the person who fails to think about the consequences out of indifference to them. A third possibility would be where D states that he was so preoccupied with other aspects of what

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121 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th Ed, 2003) at p 183.

he was doing as to give no thought to a particular consequence (although the courts might be reluctant to accept such a defence).

81 Why is it important to seek a definition of rashness with an appropriate “moral fit”? An underinclusive or overinclusive conception of rashness impinges on the principle of “fair labelling” and ultimately on the legitimacy of the criminal law. This principle suggests that the Legislature should make distinctions between offences that are committed rashly and those that are committed negligently in order to ensure that “widely felt distinctions between kinds of offences” are respected and signalled by the law.<sup>122</sup> For example, a driver who is labelled as “rash” is generally thought of as being more culpable and deserving of greater punishment by the courts and greater condemnation from the community compared to a driver who is merely labelled as “negligent”.

82 The principle of “fair labelling” enhances the legitimacy and force of the criminal law by giving due weight to community conceptions of culpability. To paraphrase the anthropologist Max Gluckman, if the people have a different view of right and wrong than those of the judges, the judges can punish them, but not convict them.<sup>123</sup>

83 In the context of beating red lights, is the ignorant and oblivious driver always less culpable than the calculated risk-taker? Why should it always be less blameworthy to drive through a traffic light junction without looking at the traffic light than to look at the lights, realise it is red, and proceed after taking what turn out to be insufficient precautions? Assuming that the court finds that the defendant did not pay attention to the traffic lights, the first scenario is an example of negligence according to *Lim Hong Eng*.<sup>124</sup> On the other hand, the second scenario is one of rashness because, on hindsight, the defendant is adjudged to have taken an unjustified risk given all the circumstances of the case. It should be noted that all rashness requires is that he be aware of the risk, it is not necessary for him to know or believe that the risk was unjustified. The fact that the risk is unjustified is an *ex post facto* objective assessment by the court.

84 In *Mohamed Iskandar bin Basri v PP*<sup>125</sup> (“*Mohamed Iskandar*”), the offender was the driver of a Singapore Civil Defence Force vehicle who was responding to a fire. With the vehicle’s siren and blinking lights turned on, the offender proceeded across a traffic junction even though the lights were against him. The offender’s assumption that other

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122 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th Ed, 2003) at p 89.

123 Max Gluckman, *Order and Rebellion in Tribal Africa* (Routledge 1963) at p 182.

124 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

125 [2006] 4 SLR(R) 440.

vehicles would give way was misplaced and there was a collision with a taxi resulting in the death of one passenger and serious injuries to the others. He pleaded guilty to a number of charges including the causing of death by doing a rash act under s 304A of the Penal Code.<sup>126</sup>

85 In *Mohamed Iskandar*,<sup>127</sup> the offender was an advertent risk-taker as he was aware that the lights were against him but he nonetheless still proceeded across the junction without ensuring that he had a clear view of the junction before driving through it. In fact, there was a lorry waiting at the red light junction which had partially obstructed his view. His sole precaution, in turning on the sirens and blinking lights, was insufficient to turn the risk he was running from an unjustified risk into a justified one given his lack of a clear view. However, as Morgan and Yeo point out, the offender in *Mohamed Iskandar*, while advertently rash, did not display a “callous disregard” for the safety of other road users in the vicinity. Instead, his mistake was assuming wrongly that others would give way to him as his siren was on.<sup>128</sup>

86 According to the judgment in *Lim Hong Eng*,<sup>129</sup> rashness connotes a disregard as to the possibility or risk of injury or death. The driver in *Mohamed Iskandar*<sup>130</sup> appears to have considered this risk which is why he turned on the sirens and blinking lights. Nonetheless he felt that the need to reach the scene outweighed the risk. In what sense did the offender in *Mohamed Iskandar* and for that matter *Sankar Jayakumar*<sup>131</sup> disregard the risk while the offender in *Lim Hong Eng* did not? This is the crux of the matter; using the existence of a particular mental state to determine the boundary between rashness and negligence leads to an imperfect moral fit particularly where thoughtless behaviour is concerned.

87 Contrast *Mohamed Iskandar*<sup>132</sup> with a situation where a driver went through a red light without any idea what colour the light was. In the latter case, she did not know it was red, but neither did she have a belief that the light was green. In other words, she went through the junction indifferent to, or not caring, what colour the traffic lights were. Her indifference can be assessed objectively by the fact that any reasonable motorist would want to know the colour of the traffic light before proceeding and that it takes minimal effort to confirm the colour. If one is 10m from the traffic light and still unsure what colour the

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126 Cap 224, 1985 Rev Ed.

127 *Mohamed Iskandar bin Basri v PP* [2006] 4 SLR(R) 440.

128 Neil Morgan & Stanley Yeo, “Defining the Fault Elements of Driving Offences” (2007) 19 SAclJ 205 at 220, para 33.

129 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

130 *Mohamed Iskandar bin Basri v PP* [2006] 4 SLR(R) 440.

131 *Sankar Jayakumar v PP* [2010] SGHC 190.

132 *Mohamed Iskandar bin Basri v PP* [2006] 4 SLR(R) 440.

lights are, surely one should slow down? If a driver proceeds through a traffic light junction despite not having a genuine belief that the lights were green, should she be labelled as rash?

88 The case of *Mohamed Iskandar*<sup>133</sup> also highlights another issue with the definition in *Teo Poh Leng*.<sup>134</sup> According to *Teo Poh Leng*, a person is rash if he acts with the consciousness of risk even though he may have believed that he had taken steps to reduce the risk. This seems to suggest that even if the offender in *Mohamed Iskandar* took additional precautions when running the red light, he would still be rash since he would have been conscious that there is always a risk involved in running red lights. It is suggested that there must come a point where we are prepared to say that despite the offender's consciousness of the risk, the risk he ran was reasonable or justifiable. In such a situation, the offender would not be rash though he may have been negligent. Many people are engaged in day-to-day activities that involve some risk. If the risks that they run are judged to be reasonable or justifiable, perhaps because they promote some desirable social outcome such as allowing emergency vehicles to arrive on the scene quicker, those that run such risks should not be automatically labelled as rash.

## V. Towards a redefinition of rashness for road traffic cases?

### A. A capacity-based theory as a starting point

89 As a first step in improving the "moral fit" of the definition of rashness, we now turn to a capacity-based theory of liability. Before a person can be held responsible for certain consequences that have occurred, there must be something to connect the person to these consequences. The traditional justification for *mens rea* as the basis for the ascription of blame is the principle of individual autonomy. Each person is viewed as an autonomous individual with the capacity to make meaningful choices. As such:<sup>135</sup>

[D]efendants should be held criminally liable only for events or consequences which they intended or knowingly risked. Only if they were aware (or, as it is often expressed, 'subjectively' aware) of the possible consequences of their conduct should they be liable. The principle of *mens rea* may also be stated so as to include the belief principle, since in some crimes it is not (or not only) the causing of consequences that is criminal but behaving in a certain way with knowledge of certain facts.

133 *Mohamed Iskandar bin Basri v PP* [2006] 4 SLR(R) 440.

134 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

135 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th Ed, 2003) at p 87.

90 However, there is a counter-argument to this reasoning in the form of a capacity-based theory of liability. A person who negligently causes harm who had the capacity or ability to avoid the harm can be blamed for causing the harm as long as there are sufficient signals to alert the reasonable citizen to the need to take care. A capacity-based theory holds a person who “just did not think” when he could have to be responsible while it exonerates a person who “could not have done otherwise”.<sup>136</sup>

91 This theory of liability could be called “subjective” insofar as it allows for exceptions for persons who could not be expected to attain the standard and foresight of the reasonable citizen. As Ashworth puts it, this is the “culpability of unexercised capacity”.<sup>137</sup> The offender’s capacity to appreciate the risk can be considered the starting point in developing any definition of inadvertent risk-taking.

### **B. Can inadvertent risk-taking be distinguished from negligence?**

92 One other objection that has to be dealt with is whether inadvertent risk-taking can be distinguished from negligence. In *PP v Wang Ziyi Able*,<sup>138</sup> V K Rajah JA rejected the adoption of “objective recklessness” as the *mens rea* for an offence under s 199 of the Securities and Futures Act.<sup>139</sup> His Honour referred to the following observation made by K L Koh, C M V Clarkson and N A Morgan<sup>140</sup> in relation to the test for objective recklessness set out in *Caldwell*:<sup>141</sup>

Although some theoretical distinctions remain ... the practical effect of these developments [*ie*, the shift from a subjective test of recklessness to an objective one] is that *the test of recklessness is virtually synonymous with that of negligence*. [emphasis in judgment]

93 Negligence is a fault element usually defined in terms of a person falling below the standard expected of a reasonable person. The difficulty with *Caldwell*<sup>142</sup> recklessness is that it says that if the risk was obvious and if the person ought to have known about the risk because it would have been obvious to the reasonable man, he is reckless. On the other hand, inadvertent risk-taking defined in terms of indifference and disregard scrutinises the capacity of the actor to appreciate the risk as

136 H L A Hart, *Punishment & Responsibility* (Oxford University Press, 2nd Ed, 2008) at p 152.

137 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th Ed, 2003) at p 194.

138 [2008] 2 SLR(R) 61.

139 Cap 289, 2006 Rev Ed.

140 K L Koh, C M V Clarkson & N A Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (Malayan Law Journal Pte Ltd, 1989).

141 *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341.

142 *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341.

well as his attitude towards the victims' interests. The court inquires into indifference not by asking about the mental state of the actor, but by an interpretation of his behaviour in order to determine whether or not he was indifferent or showed a disregard for the safety of others.

94 Returning to the judgment of the High Court in *Lim Hong Eng*,<sup>143</sup> it appears that the court had also embarked on a similar interpretive exercise. Choo J did not appear to disagree with any of the findings of fact of the trial judge, instead, his interpretation of the findings of the trial judge led him to conclude that the offender was more "negligent than rash" and that she did not show a disregard for the safety of others. If this is correct, it shows that the High Court was more concerned with the existence of inadvertent risk-taking since there was no evidence that the offender acted with a consciousness of illegal and mischievous consequences.

### C. Proposal

95 This author suggests two changes. First, the definition of rashness should be updated. The definitions suggested by the English Law Reform Commission<sup>144</sup> or Australian legislation<sup>145</sup> can act as a starting point and the eventual definition should be broadly similar to the orthodox subjectivist view. This can be supported by the earlier observation made by Victor Ramraj<sup>146</sup> that it appears that the approach taken by the Singapore courts is already consistent with the advertent risk-taking approach. A restatement of the law should obviate the need for the Singapore courts to quote from three 19th century Indian cases whenever there is a need to explain the meaning of rashness.

96 As highlighted earlier in the discussion about emergency vehicles rushing to someone's aid, the *Teo Poh Leng*<sup>147</sup> definition does not explicitly differentiate between the running of reasonable and unreasonable risks. Instead, an actor is rash if he is conscious of the risk even if believed he had taken sufficient precautions. It is suggested that allowance should be made in the definition for the running of reasonable or justified risks similar to the English and Australian definitions cited above.

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143 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

144 English Law Commission's Working Paper No 31, *Codification of the Criminal Law: General Principles. The Mental Element in Crime* (1970).

145 Schedule to the Criminal Code Act 1995 (Commonwealth) (Australia) para 5.4.

146 Victor Ramraj, "Criminal Negligence and the Standard and Care" [1999] Sing JLS 678 at 682 and 684.

147 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

97 Secondly, the restated definition should include inadvertent risk-taking in the form of “indifference” or “showing a disregard” for the safety for others. In the event that it is felt that a wider conception of rashness cannot be applied across the board to all offences, there are reasons why it should at least apply to traffic offences. As outlined earlier, a bifurcated approach to rashness is not unprecedented. Morgan and Yeo have pointed out that Malaysian cases accept a form of inadvertent rashness where bad driving offences are concerned.<sup>148</sup> In England, the House of Lords declined to overrule *R v Reid*<sup>149</sup> while overruling *Caldwell*,<sup>150</sup> which means that “objective recklessness” is still the test for reckless driving cases. “Objective recklessness” is also part of the law in Malaysia and Scotland as well.

98 In the earlier discussion, reasons have been suggested as to why a person’s culpability is not solely dependent on the existence of a mental state but arises from the choices made as well as the capacity to make the right choice.

99 A person has to prove his competency and ability to operate a motor vehicle before he is awarded a driving licence. Therefore, a driver’s ability to live up to the expected standard of a “reasonable driver” is a given. As Chief Justice Yong Pung How noted in *PP v Poh Teck Huat*:<sup>151</sup>

It bears repeating that the motor car is clearly a potentially lethal device. Thus any driver who gets behind the wheel must appreciate the responsibility placed upon his shoulders.

100 Similarly, the authors of the UK Home Office Review of Road Traffic Offences Involving Bad Driving Consultation Paper (2005) have observed at para 1.4 that:

[H]uge strides have been made in improving safety through engineering and technical design, and the education and training of driving has improved beyond recognition. No qualified driver has any excuse or reason for not knowing how to drive well. The right to drive is a privilege, earned by proving competence in safe driving, and withdrawable on proof of incompetence and dangerousness.

101 All these factors answer what Ashworth points out is one of the standard objections to “objective” fault: that “objective” standards are

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148 Neil Morgan & Stanley Yeo, “Defining the Fault Elements of Driving Offences” (2007) 19 SAclJ 205 at 212, para 12.

149 [1992] 1 WLR 793.

150 *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341.

151 [2003] 2 SLR(R) 299 at [15].

sometimes uncertain and do not communicate clearly to the public what is expected of them in every given situation:<sup>152</sup>

[A]ny improved moral 'fit' obtained by moving more towards objective standards must be weighed against the greater detraction from the principle of maximum certainty that is likely to result. Objective standards inevitably rely on terms such as reasonable, ordinary, and prudent. They appear much more malleable and unpredictable than subjective tests that ask whether or not a defendant was aware of a given risk.

102 Cases of bad driving often involve similar situations repeating themselves over and over. For example, the beating of red lights is an example of an easily avoidable occurrence. Even before a driver approaches a red light, he already knows how traffic lights operate and how they may change colour. He also knows well in advance what the possible consequences of beating a red light are and that he should only proceed if the lights are green. If his failure to take steps to confirm the colour of the lights is due to an indifference to or disregard for the risk of proceeding into a junction without knowing the colour of the lights, he should be labelled as rash.

103 Other types of cases not involving bad driving may involve situations where a person may be encountering an unfamiliar or unforeseen situation. It may not be fair or realistic to say that if he reflected upon it, he would have been aware of the risk. In such cases, Ashworth's observation about the principle of maximum certainty would have some weight. This is one argument why inadvertent risk-taking should be confined to traffic offences since standards of good driving and what to expect at a signal-controlled junction are knowable in advance.

**D. *Reserve dangerous driving for serious cases where the culpability of the driver crosses a certain threshold***

[M]anslaughter covers purely accidental killings as well as killings by deliberate exposure to risks. This may look helpful for pedestrians and cyclists, but in fact it is probably unhelpful, because the association of really bad conduct with much less bad tends to devalue the offence of manslaughter. The question of whether the defendant acted deliberately or accidentally is not a jury matter, affecting guilt or innocence, but 'merely' a factor affecting sentence.<sup>[153]</sup>

104 An additional point to be made here concerns the grading of offences and the labelling of offenders. In the past, the offence of

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152 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th Ed, 2003) at p 197.

153 J R Spencer, *Motor Vehicles as Weapons of Offence* [1985] Crim LR 29 at 36.

causing death by dangerous driving has been treated by the courts and Prosecution as more serious than the offence of causing death by a rash act under s 304A of the Penal Code.<sup>154</sup> Prior to the 2008 Penal Code amendments, the punishment for the offence under s 304A was a fine or imprisonment of up to two years or both while the punishment for the offence of causing death by dangerous driving was mandatory imprisonment of up to five years without the option of a fine.

105 While the two offences are slightly different and there may invariably be areas of overlap, it is suggested that the courts should preserve the grading distinction between the two offences. In the event that a trial judge finds that an offender charged with causing death by dangerous driving was merely negligent and on the lowest end of culpability, the court should consider reducing the charge to one of causing death by the doing of a negligent act under s 304A of the Penal Code.<sup>155</sup>

## VI. Conclusion

106 Advertent risk-taking should remain central to the definition of rashness. However, some cases of bad driving may involve habitual, reflexive or unthinking behaviour. In some cases, it may not be helpful to pin the determination of culpability on whether a particular thought flashed through the mind of the offender just before he committed the offence. Instead, if such behaviour demonstrates an indifference to or disregard for the safety of other road users, reasons have been given as to why the offender should be labelled as rash.

107 The case of *Lim Hong Eng*<sup>156</sup> is unusual as the result was influenced by a number of significant concessions that the Prosecution made. Such concessions suggested that the offender was more negligent than rash and the High Court was clearly right in making this finding. However, as pointed out earlier, the High Court could have simply allowed the appeal by finding that the Prosecution had not proved and the trial court had not found that the offender acted with the consciousness of the possibility of illegal and mischievous consequences. The fact that the High Court went on to consider the issue of whether the offender disregarded the safety of others suggests that the court was also examining the issue of inadvertent risk-taking. Ultimately, *Lim Hong Eng* should be considered to be an exceptional case and does not

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154 Cap 224, 2008 Rev Ed. The District Judge in *PP v Lim Hong Eng* [2008] SGDC 320 at [54] made a similar observation.

155 Cap 224, 2008 Rev Ed.

156 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

stand for the proposition that a “failure to look out” would merely be regarded as negligence.

108 On the other hand, the decision of the trial judge in *Sankar Jayakumar*<sup>157</sup> illustrates how *Teo Poh Leng*<sup>158</sup> is to be applied and the correct approach to be taken. In particular, it should be noted how the trial judge in *Sankar Jayakumar* applied the High Court’s observation in *Lim Hong Eng*<sup>159</sup> that “rashness implies disregard” and found the offender to be rash even without a specific finding that he acted with the consciousness of the possibility of illegal and mischievous consequences. At the hearing of the appeal,<sup>160</sup> the High Court found no reason to interfere with the trial judge’s findings. Reasons have been given above as to why the approach of the High Court in both cases shows that the courts approach rashness as including inadvertent risk-taking.

109 An expanded definition of rashness that includes indifference to or disregard for the personal safety of other road users will contribute to road safety and give the public confidence that the criminal justice system metes out the appropriate convictions and punishments. It takes minimal effort to check the colour of the traffic lights before proceeding through a junction. The benefits in terms of collisions avoided are immeasurable while the consequences of not doing so can be disastrous. Since the concept of inadvertent risk-taking is not clearly stated in the definition in *Teo Poh Leng*<sup>161</sup> save for a brief reference to “indifference”, it is hoped that the High Court will take the opportunity to restate the definition of rashness in order to settle any controversy over its meaning.

## VII. Postscript

110 After this article was submitted for publication, another case involving an allegation of rash driving was decided by the District Court. The case of *PP v Ng Jui Chuan*<sup>162</sup> involves a driver who decided to drive a motor car despite feeling tired. The driver fell asleep at the wheel and caused the death of a pedestrian. The District Court found that the Prosecution had not adduced any evidence to show that the driver “consciously considered” the risk of falling asleep while driving. On the other hand, the driver consistently maintained in his evidence in court that he did not consider the risk of falling asleep at the wheel. After finding that the Prosecution had not proven that the driver was rash, the

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157 *PP v Sankar Jayakumar* [2010] SGDC 49.

158 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

159 *Lim Hong Eng v PP* [2009] 3 SLR(R) 682.

160 *Sankar Jayakumar v PP* [2010] SGHC 190.

161 *PP v Teo Poh Leng* [1991] 2 SLR(R) 541.

162 [2010] SGDC 521.

District Court convicted him on a lesser charge of causing death by the doing of a negligent act.

111 This case is noteworthy as the District Judge explicitly stated that the sole test for rashness is advertent risk-taking. In other words, he did not go further to deal with the issue of whether the driver was indifferent to or disregarded the risk. The Prosecution has appealed against the verdict and sentence imposed.

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