KNOWING, NOT KNOWING AND ALMOST KNOWING: KNOWLEDGE AND THE DOCTRINE OF *MENS REA*

Certain offences are premised on the existence of certain circumstances, such as the fact that the information a person published is false or that the white powder in the person's possession is heroin. For such offences, the doctrine of *mens rea* suggests that the offender should be punished only if he knew or was reckless to the existence of the specified circumstance. This article reviews the current state of our jurisprudence in this area. It begins by looking at the traditional fault elements prescribed for such offences, namely, actual knowledge and reckless knowledge. The important clarification by the Court of Appeal in *Tan Kiam Peng v PP* concerning the scope of the doctrine of wilful blindness will also be reviewed. After this, we will look at the relatively uncommon fault element of "does not care" which received detailed treatment in the case of *PP v Able Wang* in the context of s 199(i) of the Securities and Futures Act. Finally, we will look at an attitude-based approach to reckless knowledge as an alternative *mens rea* for the offence.

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I. Introduction

1 Certain types of offences are defined in terms of a person's awareness of the existence of a certain set of circumstances. For example, the fault element, or *mens rea*, required for the offence of drug possession is that the offender knew that what he possessed were controlled drugs. An offender who has actual knowledge of a specific set of circumstances but nonetheless carries out the proscribed conduct is said to be blameworthy. As an autonomous individual with free will, he said to have chosen the course of conduct despite having the relevant knowledge. At the other end of the spectrum of positive fault is negligence. The negligent offender does not possess any relevant knowledge; instead, he has fallen short of the standard of foresight, knowledge or capacity expected of the reasonable person in his position.

1 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 and suggestions.

2 Between the fault requirements of actual knowledge and negligence lie a number of intermediate categories. This article looks at these intermediate categories to determine whether they amount to knowing, not knowing or whether they suffer the problem of indeterminacy and should be given the label of "almost knowing". Of particular interest is the Court of Appeal's decision in *Tan Kiam Peng v PP*[2] which deals with the doctrine of wilful blindness and the High Court decision in *PP v Wang Ziyi Able*[3] which deals with the *mens rea* of "does not care".

II. Knowledge

3 We begin this essay by looking at the paradigm case of what it means to actually know that a specified circumstance exists. In the High Court case of *PP v Koo Pui Fong*,[4] Yong Pung How CJ made the following observation in relation to the meaning of actual knowledge at [17]:

> I think that it would be reasonable to say that a person "knows" a certain fact if he is aware that it exists or is almost certain that it exists or will exist or occur. Thus knowledge entails a high degree of certainty.

4 Actual knowledge comprises two categories, a person who knows for a fact (*ie*, is conscious or aware) that a set of circumstances exists, and a person who is virtually certain that it exists. The second category is uncontroversial as there is in many things never a hundred percent certainty and a person need not be one hundred percent certain before he can be fairly said to "know" that a particular circumstance exists. Both categories are described by the Court of Appeal in *Tan Kiam Peng v PP* as "actual knowledge in its purest form",[5] presumably to distinguish it from wilful blindness which is the legal equivalent of actual knowledge.

III. Wilful blindness

5 In many cases, there may be no direct evidence of the accused's actual state of knowledge. However, when there is evidence that the accused had deliberately shut his eyes to the obvious, the result of which

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2 [2008] 1 SLR 1.

3 [2008] 2 SLR 61.

4 [1996] 2 SLR 266.

5 *Tan Kiam Peng v PP* [2008] 1 SLR 1 at [157]. It should be noted that the Court of Appeal mentioned the possibility that the second category, that of virtually certain knowledge was either "pure form" knowledge, or at least something bordering on it.

he does not care to have, he may be said to have been wilfully blind to the truth: *Koo Pui Fong v PP*.[6]

6 The doctrine of wilful blindness or blind-eye knowledge (as it is known in English cases) was analysed in detail by the Court of Appeal in *Tan Kiam Peng v PP*. For the purpose of this article, we will only refer to how the Court of Appeal dealt with the position of wilful blindness along the spectrum of positive fault requirements and its relationship to actual knowledge and recklessness, its closest neighbours.

A. First principle of the doctrine of wilful blindness

7 After a comprehensive review of previous cases that dealt with the doctrine of wilful blindness, the Court of Appeal identified four central principles of which the first three are relevant to the present discussion.[7] The first principle is that wilful blindness is equivalent to actual knowledge:[8]

> The first is that wilful blindness is treated, in law, as being the *equivalent* of *actual* knowledge (see above at [106] as well as *Koo Pui Fong* (see at [104] above); *Roper* (see at [116] above); *Leslie George Griffiths* ([115] *supra* at 18); and *Westminster City Council* ([115] *supra* at 744)). Indeed, we are of the view that, given that both actual knowledge as well as wilful blindness are, more often than not, inferred from the facts and circumstances of the case, the line, in *practice*, between the two is a fine one and may, on occasion at least, even be blurred. However, it bears repeating that wilful blindness is *not opposed* to actual knowledge. [emphasis added by the Court of Appeal]

8 The difficulty with many of the authorities that the Court of Appeal referred to is that they were sometimes not clear whether the decision maker was engaging in the analytical exercise of determining whether, in law, the requirements for a finding of actual knowledge or wilful blindness were satisfied directly by the evidence before it or whether they were undertaking an evidential exercise and making inferences from the evidence in order to come to a finding of actual knowledge or wilful blindness. Therefore, in order to understand the relationship between actual knowledge and wilful blindness, a close reading of the actual judgment of the Court of Appeal is important. The Court of Appeal stated that wilful blindness is the *equivalent* of actual knowledge and, at the same time, is *not opposed* to actual knowledge.

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6 [1996] 2 SLR 266 at [23].

7 The fourth principle deals with how the doctrine of wilful blindness operates in relation to the evidential presumption under the Misuse of Drugs Act (Cap 186, 2008 Rev Ed).

8 *Tan Kiam Peng v PP* [2008] 1 SLR 1 at [123].

9 Given that there is a theoretical distinction between wilful blindness and actual knowledge, in what way is wilful blindness nevertheless the equivalent to actual knowledge? The Court of Appeal appeared to recognise that the relationship between the two may not be easy to define and that "in practice, the distinction between actual knowledge and wilful blindness is fine and on occasion blurred". Nevertheless, this article will attempt to sketch at least the outline of an answer to this question. As a starting point, it is useful to adopt the analytical framework in English cases on intention which discuss the relationship between foresight of virtual certainty and intention and treating these two concepts as analogues for wilful blindness and actual knowledge.

10 The first approach can be termed the "inference view".[9] Under this view, wilful blindness and actual knowledge are conceptually distinct. Actual knowledge may be inferred from the fact that the accused was wilfully blind to the obvious. The UK Law Commission's *Report on the Mental Element in Crime*[10] ("Law Commission Report") adopts this approach:

> On the whole, we have come to the conclusion that knowledge should be treated in a similar way to intention and for substantially similar reasons. With regard to the position of the person who is shown deliberately to have shut his eyes to the existence of the relevant circumstances of an offence, and claims that he did not actually know of their existence, we consider that a jury or court would generally infer, and so find as a fact, that he *had no substantial doubt* that those circumstances existed.[11]

11 This is similar to the approach taken by the High Court in *Koo Pui Fong v PP* where Yong CJ stated:[12]

> It seems to me that it is wholly in keeping with common sense and the law to say that an accused knew of certain facts if he deliberately closed his eyes to the circumstances, *his wilful blindness being evidence from which knowledge may be inferred*.
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> …
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> *But this is different from saying that wilful blindness should be automatically equated with knowledge.* Hence, if the respondent suspected that PW1 was an illegal immigrant but deliberately shut her

9 The terms "inference view" and "identity view" are adopted from M Cathleen Kaveny, "Inferring Intention from Foresight" [2004] 120 LQR 81.

10 (Law Com No 89, 1978).

11 The UK Law Commission's *Report on the Mental Element in Crime* (Law Com No 89, 1978) at p 27. It should be noted that in 1978, the inference view appeared to be the accepted approach to intention as well. It was only in 1999 that the House of Lords confirmed that the identity view prevailed.

12 [1996] 2 SLR 266 at [17]–[18].

> eyes to the circumstances, that in itself is strictly speaking not an alternative to knowing that PW1 had entered the country illegally, although it would be fair and almost irresistible to infer that the respondent had the relevant knowledge. [emphasis added]

12 Yong CJ in *Koo Pui Fong v PP* found support for this approach in the following passage of Lord Bridge in the House of Lords decision in *Westminster City Council v Croyalgrange Ltd*:[13]

> [I]t is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed.[14]

13 The second approach can be termed the "identity view". Under this view, actual knowledge is defined to include both actual knowledge in its purest form and wilful blindness. Through redefinition, we obviate the necessity of proving a conceptual link between the two. Once wilful blindness is found, the inquiry stops as the requirement of knowledge is satisfied. Support for this approach can be found in the judgment of Devlin J in *Roper v Taylor's Central Garages (Exeter) Ltd*,[15] where it was stated that: "The case of shutting the eyes is actual knowledge in the eyes of the law."[16]

14 An important practical difference between the identity and inference view can be illustrated by constructing a hypothetical case of an accused person who is charged with drug trafficking[17] and wishes to plead guilty. However, the accused refuses to admit to actually knowing that he was carrying drugs though he is willing to admit to the elements that make out wilful blindness. Under the identity view, the court can declare that by admitting to wilful blindness, the accused is admitting to actual knowledge and the accused can be convicted on the charge. Under the inference view, since wilful blindness is conceptually distinct from actual knowledge, the court may not be able to convict the accused on his plea of guilt since at the end of the day, the accused has not admitted to actual knowledge which is the *mens rea* of the offence. It

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13 (1986) 83 Cr App R 155 at 164.

14 It should be noted that Lord Bridge adopted the inference view, suggesting that knowledge may be inferred from a finding that one deliberately shut his eyes to the obvious.

15 [1951] 2 TLR 284 at 288.

16 Yong CJ in *Koo Pui Fong v PP* [1996] 2 SLR 266 referred to *Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 TLR 284 in the context of distinguishing constructive knowledge from wilful blindness but did not specifically refer to the above passage.

17 One could easily substitute the more common offences of dealing in contraband cigarettes or illegal video compact discs for drug trafficking in this example.

would also not be legitimate in the absence of a trial for the court to infer knowledge from an admission of wilful blindness.

15 It is suggested that the Court of Appeal has also come down in favour of the identity view in relation to knowledge and wilful blindness. In interpreting s 18(2) of the Misuse of Drugs Act,[18] the Court of Appeal stated:

> *Thirdly*, whilst the concept of knowledge in s 18(2) of the Act entails *actual* knowledge, the doctrine of *wilful blindness* should also be emphasised and is also included within the concept of knowledge in s 18(2) simply because wilful blindness is the *legal equivalent* of *actual* knowledge.[19]

16 In other words, the definition of knowledge is expanded to include a conscious awareness of the existence of a specified circumstance ("conscious knowledge") and wilful blindness. Next, the Court of Appeal sought to clarify some pronouncements by the High Court in previous cases which might otherwise have been misunderstood. For example, it referred to the following case of *PP v Iwuchukwu Amara Tochi*.[20] In *PP v Iwunchukwu*, the High Court stated:[21]

> I found that he had *wilfully turned a blind eye* on the contents of the capsules because he was tempted by the US$2000, which was a large sum to him. When Smith, who had befriended him and had appeared to help him get out of Pakistan, also offered him the US$2000, he did not want to ask any questions or check the capsules himself. Consequently, *even if he may not have actual knowledge* that he was carrying diamorphine, his ignorance did not exculpate him because it is well established that:
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> > [I]gnorance is a defence only when there is no reason for suspicion and no right and opportunity of examination …

17 If wilful blindness is the legal equivalent of actual knowledge, then the High Court would have been incorrect in saying that the offender may not have actual knowledge though he was wilfully blind. The Court of Appeal in *Tan Kiam Peng v PP* explained:

> In particular, in *PP v Iwuchukwu Amara Tochi* [2005] SGHC 233, the learned trial judge had held (at [42]) that there had been "no *direct* evidence that [the first accused] knew the capsules contained diamorphine" [emphasis added]. Reading this observation in context, it was clear that the learned trial judge had made a finding that the first accused did *not* possess *actual* knowledge that he was in possession of the drug concerned. However, it was crystal clear that he

18 (Cap 185, 2008 Rev Ed).
19 [2008] 1 SLR 1 at [139].
20 [2005] SGHC 233.
21 [2005] SGHC 233 at [48].

> had nevertheless found that the first accused had what is, in law, the equivalent of actual knowledge as he (the first accused) had clearly been guilty of wilful blindness on the objective facts before the court.[22]

18 In other words, the Court of Appeal explained that the High Court judge in *PP v Iwuchukwu* actually meant to say that even though the offender did not have "conscious" knowledge (or knowledge in its purest form), he was wilfully blind and that is legally sufficient to satisfy the requirement of actual knowledge. The above passage, therefore, confirms that the Court of Appeal adopted the identity view on the relationship between wilful blindness and actual knowledge.

19 Another potential source of confusion that arises from the earlier cases such as *PP v Iwuchukwu Amara Tochi* may be due to the fact that the High Court did not make a clear distinction between the definition of wilful blindness and the exercise of inferring wilful blindness from the facts. Under the formulation in *Tan Kiam Peng v PP*, wilful blindness can only be satisfied by a finding of a certain level of suspicion and not merely the existence of a reason to suspect. Nevertheless; the existence of a reason to suspect, coupled with evidence about the accused's own cognitive faculties, may be part of the evidence from which actual suspicion may be inferred.[23]

B. Second principle

20 After establishing the theoretical distinction between conscious knowledge and wilful blindness, the Court of Appeal identified the second central principle that deals with the location of wilful blindness within the spectrum of positive fault elements.

21 According to the Court of Appeal, the key mental state that is associated with the doctrine of wilful blindness is that of suspicion:

> The second central principle is that *suspicion is* legally sufficient to ground a finding of wilful blindness provided the relevant factual matrix warrants such a finding *and* the accused deliberately decides to turn a blind eye.[24]

22 The suspicion must be "firmly grounded and targeted on specific facts" and mere "untargeted or speculative suspicion" is insufficient. The suspicion must be of a sufficient level to result in a

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22 [2008] 1 SLR 1 at [124].

23 The Court of Appeal in *Iwuchukwu Amara Tochi v PP* [2006] 2 SLR 503 at [6] dealt with the failure to inspect when there was a reason to be suspicious as evidence that may cause the court to disbelieve the accused's defence and find that the presumption of knowledge has not been rebutted.

24 [2008] 1 SLR 1 at [125].

finding that the reason why the offender did not make inquiries was because he was deliberately shutting his eyes to the obvious. The appropriate level of suspicion depends ultimately on the facts of each case. However, the Court of Appeal disagreed with the trial judge that the threshold level of suspicion required was at the level of a virtual certainty:[25]

> We would only disagree with one particular aspect of the above observations: That the appellant was "virtually certain" that the drugs concerned were heroin "but wilfully chose to turn a blind eye". As we have explained in some detail above (at [127] and [129]), whilst the highest level of suspicion would result in "virtual certainty", this particular level of suspicion is *not* required before the doctrine of wilful blindness can be triggered. Whilst much would turn on the precise facts before the court, one must – and this cannot be emphasised enough – *not* equate virtual certainty (which is either, or at least borders on, actual knowledge in its purest form (see also *per* Yong CJ in *Koo Pui Fong*, set out at [103] above)) with that of the level of suspicion that is a threshold element under the doctrine of wilful blindness.[26]

C. Third principle

23 The third principle set out by the Court of Appeal is that wilful blindness is distinct from recklessness insofar as the latter, theoretically[27] at least, falls short of actual knowledge.

24 The Court of Appeal explained that the main difference between wilful blindness and recklessness is that wilful blindness involves the deliberate "action" of deciding not to make further inquiries in order to avoid confirming what the situation is.[28]

25 In the case of recklessness, it is likely that the accused would also not have made further inquiries. However, his failure to do so is not characterised as deliberate.[29] Instead, this failure becomes part of the overall factual matrix that the court evaluates to determine whether or

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25 Andrew Ashworth in *Principles of Criminal Law* (Oxford University Press, 4th Ed, 2003) at p 193 takes the same position as the trial judge in suggesting that wilful blindness is only knowledge when the defendant refrained from making inquiries because he was virtually certain that his suspicion would be confirmed. However, Ashworth also refers to other jurists who take a different view.

26 [2008] 1 SLR 1 at [157].

27 In practice, a finding that a person is reckless may well lead to an inference of knowledge after the entire factual matrix of the case is considered.

28 [2008] 1 SLR 1 at [127].

29 It will be argued later that under an attitude-based conception of recklessness, his failure to check would be characterised as "could not care less".

not he was justified in continuing with his conduct despite the risk or suspicion.

26 Externally, a reckless accused and a wilfully blind accused would have behaved in the same manner by not making further inquiries. In such a situation, the factual matrix of the case assumes centre stage and it is ultimately a question of fact for the court to determine why he did not make further inquiries. This is a theme that is repeated throughout the Court of Appeal's judgment culminating with the following pronouncement:

> [T]herefore (and still on the issue of knowledge in s 18(2) of the Act), whilst *general* regard ought to be had to the concept of *actual* knowledge (*including* the doctrine of *wilful blindness*), the *main* focus ought always to be on the *specific or particular factual matrix* in the case at hand. The principal difficulty lies in the attempt to divine a universal legal norm to *comprehensively* govern what is essentially and, at bottom, a *factual* inquiry.[30]

27 However, this is not the only way to distinguish wilful blindness from reckless knowledge. An alternative approach focuses on the level of suspicion that the offender possesses. The Court of Appeal affirmed the "central importance" of the concept of suspicion in the doctrine of wilful blindness.[31] An appropriate level of suspicion is a necessary, but not sufficient, condition for a finding of wilful blindness.[32] The level of suspicion then conveniently becomes a sliding scale upon which we can locate the various knowledge-based *mens rea*.

28 The difficulty with using the level of suspicion to distinguish wilful blindness from recklessness and other states of mind is that it deals with an assessment of probabilities. A strong suspicion is a belief that it is highly probable that a specified circumstance exists while a weaker suspicion means that the offender assigns a lesser probability to the existence of the specified circumstance. An assessment by the court of the offender's assignment of probabilities is not easy to make. On the other hand, one could argue that the notion of deliberate conduct is relatively easier to understand. If so, it is preferable to use suspicion as a threshold condition but to leave the final determination of wilful blindness to a finding that the refusal to inquire was deliberate.

D. Summary of wilful blindness

29 The Court of Appeal has clarified that wilful blindness is theoretically distinct from, and lies between, the fault elements of

30 [2008] 1 SLR 1 at [141].
31 [2008] 1 SLR 1 at [127].
32 [2008] 1 SLR 1 at [125].

conscious knowledge and recklessness. However, it is definitionally equivalent to knowledge and there is no need for the court to take the further step of inferring knowledge once an offender is found to be wilfully blind.

30 As to the location of wilful blindness in the spectrum of fault elements, the Court of Appeal disagreed with the trial judge's observation that virtual certainty of the existence of a circumstance was coterminous with wilful blindness. Instead, wilful blindness was situated somewhere lower in the spectrum and could be triggered by suspicion which exceeded a particular threshold (subject to the proviso that it must result in the deliberate act of refusing to make inquiries).

31 The observation by the Court of Appeal that wilful blindness did not require virtual certainty is strictly speaking *obiter*.[33] In the subsequent discussion of the case of *PP v Wang Ziyi Able* , it is suggested that it is possible that Justice Rajah declined to follow the Court of Appeal's guidance in *Tan Kiam Peng v PP* and continued to adopt the "virtually certain" threshold for wilful blindness.

IV. Recklessness

A. Recklessness introduced

32 Until recently, there were two types of recklessness under English criminal law: advertent recklessness and objective or *Caldwell*[34] recklessness. *Caldwell* recklessness has never been part of Singapore law and the English criminal law treated *Caldwell* recklessness as an anomaly, one confined to offences under the Criminal Damage Act and not having application elsewhere.[35] Eventually, it was overruled by the House of Lords in *R v G*.[36] Therefore, it was somewhat surprising to find the prosecution in *PP v Wang Ziyi Able* arguing that "does not care" means recklessness and that recklessness refers to an objective standard akin to *Caldwell* recklessness.

33 The offender was found to have actual knowledge because he was told that the substance was "peh hoon" and "number 3" and the court found that he understood those terms to refer to heroin and "heroin number 3" respectively.

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

35 In *R v Adomako* [1994] 1 QB 302 at 322, the English Court of Appeal declined to adopt the *Caldwell* test for the offence of manslaughter and this was upheld by the House of Lords in [1995] 1 AC 171.

36 [2004] 1 AC 1034.

33 As for the rest of English criminal law, a reference to recklessness usually refers to advertent recklessness.[37] The word advertent is used to denote the fact that the offender adverted to or was conscious of the risk he was taking at the time of the offence. This is contrasted to *Caldwell* recklessness where the offender need not necessarily possess any relevant consciousness of risk at the time of the offence. However, as we shall see, the distinction is not as clear-cut as advertent recklessness contains both subjective and objective elements which is why this author prefers to use the term advertent recklessness rather than subjective recklessness. But first, we will look briefly at Singapore law to confirm that the definition of recklessness it adopts is advertent recklessness.

34 It is noted at the outset that the Penal Code[38] makes use of the word rashness instead of recklessness.[39] For example, it contains offences criminalising causing death, grievous hurt and hurt by way of a rash act. However, it appears that the terms can be used interchangeably and we will proceed on that basis.

35 In *PP v Teo Poh Leng*,[40] the High Court explained the difference between rashness and negligence. Rubin JC (as he then was) adopted two definitions of rashness and negligence which he observed were "generally accepted as correct". First, he referred to *Nidamarti Nagabhushanam*[41] where 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.

36 Secondly, he referred to *Empress of India v Idu Beg*,[42] where Straight J stated:

> 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

37 Save perhaps the offence of reckless driving which for public policy reasons refers to gross negligence.

38 (Cap 224, 1985 Rev Ed).

39 As highlighted earlier, the English equivalent under the Offences Against the Person Act 1861 uses the term "maliciously".

40 [1992] 1 SLR 15.

41 (1872) 7 MHC 119.

42 (1881) ILR 3 All 776.

> 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.

37 The definition in *PP v Teo Poh Leng* is virtually synonymous with the definition of advertent recklessness found in the Law Commission Report, *The Mental Element in Crime*,[43] endorsed by the House of Lords as recently as in 2003 in *R v G*,[44] and enacted by Australia in the form of the Criminal Code Act 1995. As such, rashness and recklessness are generally regarded as interchangeable terms in Singapore law.[45]

38 While *PP v Teo Poh Leng* dealt with recklessness as to consequences, the current position in English and Australian law is that the test for recklessness as to the existence of a particular circumstance (sometimes called "reckless knowledge") is identical. Recklessness as to circumstances is defined in s 5.4 of the Schedule to the Australian Criminal Code Act 1995 as:

> Recklessness
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> (1) A person is reckless with respect to a circumstance if:
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> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
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> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (2) A person is reckless with respect to a result if:
>
> (a) he or she is aware of a substantial risk that the result will occur; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (3) The question whether taking a risk is unjustifiable is one of fact.
>
> (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

39 Where the *mens rea* of an Australian federal offence involving the giving of false information is stated to be recklessness and the statute

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43 (Law Comm 89).

44 [2004] 1 AC 1034.

45 Victor Ramraj has suggested that there is a "curious anomaly" in the definition put forward in *PP v Teo Poh Leng* and the author has argued that it is not an anomaly as, in certain circumstances, indifference may amount to rashness. See Victor Ramaj, "Criminal Negligence and the Standard of Care" [1999] SJLS 678 and the author's earlier article, "Inadvertence as Rashness" [2007] 19 SAcLJ 168.

does not provide any overriding definition of the term, an Australian court will apply the definition in s 5.4(1), recklessness in respect to a circumstance.

B. Recklessness and the ghost of Caldwell

40 The High Court in *PP v Wang Ziyi Able* noted that objective recklessness was virtually synonymous with negligence. It referred to the following extract from *Criminal Law in Singapore and Malaysia: Text and Materials*,[46] where the authors had this to say about *Caldwell* recklessness:

> Although some theoretical distinctions remain (Glanville Williams 1981), 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 added by the High Court]

41 The High Court went on to explain that since s 199(ii) of the Securities and Futures Act[47] clearly contemplated "constructive knowledge tested against an objective standard" (*ie*, negligence), the presumption against tautology would require the court to construe s 199(i) as providing for fault based on a different standard (*ie*, a subjective standard).

42 The High Court was clearly right in finding that *Caldwell* recklessness was not part of Singapore law given the clear demarcation between negligence and rashness (recklessness) in *PP v Teo Poh Leng*.[48] There was also no reason to change Singapore law and incorporate *Caldwell* recklessness since the latter was regarded as an anomaly by English law and overruled in 2003.

C. Virtually synonymous but not identical to negligence?

43 The concluding remark from Koh *et al* which the High Court quoted did not go so far as to say that objective recklessness was identical to negligence. Instead, it cited Glanville Williams' article[49] and observed that there were theoretical distinctions but, in practice, it was "virtually synonymous" with negligence. In this part of the article, we will look at the theoretical distinction mentioned by Glanville Williams.

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46 K L Koh, C M V Clarkson & N A Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (Singapore: Malayan Law Journal Pte Ltd, 1989) at p 61.

47 (Cap 289, 2006 Rev Ed).

48 [1992] 1 SLR 15.

49 Glanville Williams, "Recklessness Redefined" [1981] CLJ 252.

44 We will begin with Lord Diplock's formulation of "objective recklessness":[50]

> In my opinion, a person charged with an offence under section 1(1) of the Criminal Damage Act 1971 is "reckless as to whether any such property would be destroyed or damage" if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.

45 *Caldwell* recklessness includes advertent recklessness but goes beyond it by extending recklessness to all those who fail to give any thought to the possibility of a risk which may be described as obvious. A person who fails to give any thought does not possess any relevant state of mind. Instead, blameworthiness depends on whether the risk created would be "obvious".

46 In *Punishment and Responsibility*,[51] H L A Hart sets out the principle that an individual should not be held criminally liable unless he had the capacity and a fair opportunity to do otherwise. Professor Glanville Williams took up this point by suggesting that Lord Diplock's formulation in *Caldwell* recognised a "conditionally subjective" test that looked at whether the offender had the capacity to appreciate such a risk:

> Obvious to whom? Two answers are possible. "Obvious risk" may bear, first, a conditionally subjective meaning: the risk would have been obvious to (which must mean "known to") the defendant (this very person) *if* he had thought about it (and, perhaps, if he had been in a fit state to think about it). Or it may bear an objective meaning: the risk would have been obvious to a reasonable man.[52]

47 Although Professor Williams uses the term "conditionally subjective", he does not consider the test to be subjective as the person in question would have had no relevant mental state since this mental state is a hypothetical speculation. However, he recognises that the conditional subjective test would be more lenient to him than a purely objective test.[53] On the other hand, Ashworth[54] argues that where a person has the capacity to take the care necessary to avoid a harm that a reasonable person would recognise, but fails to do so, he can be said to have been negligent in a manner that can be designated as subjective.

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50 *Commissioner of Police of the Metropolis v Caldwell* [1981] 2 WLR 509 at 516.

51 H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968) at p 181.

52 Glanville Williams, "Recklessness Redefined" [1981] CLJ 252 at 268.

53 Glanville Williams, "Recklessness Redefined" [1981] CLJ 252 at 269.

54 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th Ed, 2003) at pp 88 and 194.

However, the important issue is not the label to be attached but whether such a capacity-based test is sufficient to sustain a distinction between *Caldwell* recklessness and negligence.

48 The difficulty with the conditional subjective is in identifying the traits or characteristics that are legally relevant to the inquiry. For example, is the fact that a person is addicted to glue sniffing relevant to the conditional subjective test?[55] Unlike the defence of diminished responsibility, where expert medical opinion delimits the factors that can be taken into account in determining diminished responsibility, the scope of a universally applicable conditional subjective test may be indeterminate. In *R v G*,[56] two boys, aged 11 and 12, were convicted for recklessly causing damage. One of the issues was whether the *Caldwell* test could simply be modified to take into account the defendant's youth or lack of mental capacity. Lord Bingham rejected this argument for a number of reasons, including the practical difficulty of such a test:

> Third, any modification along these lines would open the door to difficult and contentious argument concerning the qualities and characteristics to be taken into account for purposes of this comparison.[57]

49 Even though the conditional subjective test may not have sufficient determinacy to form the theoretical basis of a distinction between *Caldwell* recklessness and negligence, it may still be useful as part of an evidential test in clear-cut cases. In fact, a version of the conditional subjective test was used by the High Court as part of an evidential test to arrive at findings of fact concerning Able Wang's state of mind. We will return to this later. For the moment, we should pause and remind ourselves of the Court of Appeal's exhortation in *Tan Kiam Peng v PP* that ultimately there is nothing wrong with legal norms pitched at a fairly high level of generality and that the main focus in such cases should be on factual inquiry. Furthermore:

> What, however, should be eschewed is the attempt to formulate a universal legal norm that purports to *comprehensively* govern the various (and variegated) fact situations. This leads, as we shall see, to *excessive refinements and fine distinctions that hinder (rather than facilitate) the task at hand*.[58]

50 Given the fact that the Court of Appeal in *Tan Kiam Peng v PP* clarified that wilful blindness was located lower down the spectrum of positive fault elements than previously held by the High Court, is there

55 See Alan Norrie, "From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer" [2002] 65 MLR 538.

56 [2004] 1 AC 1034.

57 [2004] 1 AC 1034 at [37].

58 [2008] 1 SLR 1 at [141].

sufficient conceptual space available for a further *mens rea* that sits between wilful blindness and recklessness? Should we even try to divine a legal norm that establishes the theoretical space of such a *mens rea* or is it ultimately a factual inquiry? We now turn to this issue and look at the *mens rea* of "does not care".

V. The *mens rea* of not caring

> Questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective. [Lord Diplock][59]

51 Our attention now turns to another fault element that concerns a person's awareness, or lack thereof, of a specified circumstance. In s 199(i) of the Securities and Futures Act ("SFA"),[60] a person is guilty of an offence if, *inter alia*, "he does not care whether the statement or information is true or false".

52 The English criminal law textbooks by Glanville Williams and Andrew Ashworth, both of which were referred to by the Court of Appeal in *Tan Kiam Peng v PP*, contain no reference to the *mens rea* of does not care. However, we now have local authority that explains the meaning of these words.

A. The case of PP v Able Wang

53 In *PP v Wang Ziyi Able* ("*PP v Able Wang*"),[61] the accused, Able Wang ("AW"), a full-time stock market trader, was charged with an offence under s 199(b)(i) of the SFA for disseminating false information through an online forum that was likely to induce the sale of Datacraft shares, and that at the time of dissemination, he did not care whether the information was true or false.

54 AW made two posts on an online investment forum to the effect that Datacraft, a public listed company, had been raided by the Commercial Affairs Department ("CAD").[62] This turned out to be untrue. The main issue before the court was whether the accused "did not care" about whether the information was true or false before making the relevant posts.

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59 *Commissioner of Police of the Metropolis v Caldwell* [1981] 2 WLR 509 at 516.

60 (Cap 289, 2006 Rev Ed).

61 [2008] 2 SLR 61.

62 The actual post was: "*Heard CAD raided Datacraft office last Friday again.*" However, when read together with a second post where he asserted the reliability of the source of the information, it was held that this was in effect an assertion that there was an actual raid and that this information was in fact false.

55 The thrust of the accused's defence was that he had heard rumours of a CAD raid on Datacraft from his friend, an employee with OCBC securities, and he genuinely believed that it was true.

56 The High Court rejected the assertion by the Defence that he had heard rumours of a CAD raid. The High Court held that at best, AW heard that there was CAD "follow-up action". As the word "raid" connoted something far more serious and egregious compared to "follow-up action", AW was, therefore, not merely repeating a rumour of follow-up action but distorting the information (this of course meant that the High Court also rejected AW's assertion that he believed that the words "raid" and "follow-up action" could be used interchangeably). The High Court suggested that it was not possible for him to have had a "benevolent reason" for distorting information.[63]

57 AW was a trader with considerable information-gathering capabilities. He would read 50 to 100 reports on each trading day and make calls to obtain information. Yet, there was no corroboration of the rumour from any other source over a three-day period. As such, the High Court observed that he had the "temerity" to post the message "I know what I am talking" [sic] on the online forum in response to a challenge by another forum member as to the reliability of his information.

58 The High Court also made additional findings concerning the credibility of AW's evidence and noted contradictions between his statement to the CAD and his evidence in court. After considering all the evidence in the case, the High Court rejected AW's defence and found that the Prosecution had proven its case beyond a reasonable doubt and that AW disseminated information not caring whether it was true or false.

B. The meaning of "does not care" under s 199(i) of the SFA

(1) The two alternatives presented

59 During the hearing of the appeal in *PP v Able Wang*, the prosecution submitted that "does not care" is equivalent to recklessness. First, the prosecution referred to *Summit Holdings v PP*[64] where Yong Pung How CJ equated "does not care" with recklessness:

> It is one thing to say that one is reckless or does not care whether he is reproducing infringing copies and it is another to say that he is

63 [2008] 2 SLR 61 at [104].
64 [1997] 3 SLR 922.

> engaged in the business of counterfeiting CD-ROMs and therefore there must be a large number of infringing products in the premises.

60 Secondly, the prosecution pointed out that a local textbook has also equated "does not care" with recklessness. In *Principles and Practice of Securities Regulation in Singapore*, Professor Hans Tjio states:[65]

> The Securities and Futures Act section 199 prohibits a person from recklessly or knowingly making or disseminating materially false or misleading statements which are likely to induce other persons to subscribe for, purchase or sell securities of the corporation or which are likely to affect the market price of securities.

61 Next, the Prosecution sought to define recklessness as gross negligence, citing an English case, *R v Bates*,[66] which applied the dictionary meaning of reckless in the context of s 12(1) of the Prevention of Fraud (Investments) Act 1939:

> The ordinary meaning of the word reckless in the English language is "careless, heedless, inattentive to duty".

62 Next, the Prosecution also referred to the ordinary meaning of care which is defined by the *Shorter Oxford English Dictionary* as:

> Serious attention; heed; caution.

63 On the other hand, the Defence argued before the trial judge and the High Court that the appropriate *mens rea* was that found in *Derry v Peek*[67] in light of the textbook *Australian Corporation Law: Principles and Practice Vol 2*[68] which dealt with a similarly worded provision. As such, the Defence argued that an honest belief in the truth of a statement would be a defence to the charge and that honesty was determined subjectively based on the personal belief of the maker of the statement. For this proposition, they cited *Baron Uno Carl Samuel Akerhielm v Judicial Committee*[69] where the headnote stated:

> The question was not whether the [appellants] in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity but whether he honestly believed the representation to be true in the sense in which he understood it, albeit erroneously, when it was made.

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65 Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (Singapore: LexisNexis, 2004).

66 [1952] 2 All ER 842.

67 (1889) 14 App Cas 337.

68 *Australian Corporation Law: Principles and Practice, Vol 2* (Butterworths, 1991) at pp 73 and 197.

69 [1959] AC 789.

64 Finally, the defence submitted that since s 199(ii) of the SFA made reference to an objective state of knowledge, it follows that s 199(i) refers to a purely subjective test. It would be consistent with legislative intent to have two limbs which are mutually exclusive, otherwise one would render the other otiose.

(2) The High Court's adoption of Derry v Peek

65 The High Court appeared to accept the defence submission that the *mens rea* for s 199(i) of the SFA was a subjective one incorporating the type of *mens rea* found in *Derry v Peek*. In setting out the ingredients of this *mens rea*, it is significant that the High Court did not simply adopt the standard definition of recklessness but instead put considerable emphasis on the requirement of dishonesty:

> [T]he phrase "does not care whether the statement or information is true or false" in s 199(i) of the SFA equally points towards a *Derry v Peek-type of subjective recklessness which requires dishonesty*. [emphasis added][70]

66 What exactly is a "*Derry v Peek*-type of subjective recklessness which requires dishonesty?" How is it different from other types of recklessness that do not require dishonesty? We begin this inquiry by looking at the English case of *Derry v Peek* which was summarised succinctly by the High Court in *PP v Able Wang*:[71]

> The Tramways Act 1870 (c 78) (UK), which was a special Act incorporating a tramway company, provided that carriages on tramways might be moved by animal power or, with the consent of the Board of Trade, by steam power. The directors of the tramway company issued a prospectus containing a statement that, by the above Act, the company had the right to use steam power instead of horses on tramways. The plaintiff subscribed for shares in the company on the faith of this statement. The Board of Trade, however, refused to grant its consent to the use of steam power, and the company subsequently had to be wound up. The plaintiff brought an action of deceit against the directors founded upon the false statement in the company's prospectus.
>
> In order to determine the requisite mental element for an action of deceit, Lord Herschell drew a distinction between not caring whether a statement was true or false and being *negligent* in making a false statement. He stated at 361:
>
> > To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want

70 [2008] 2 SLR 61 at [78].
71 [2008] 2 SLR 61 at [79]–[80].

> of care, a false statement, which is nevertheless honestly believed to be true.
>
> [emphasis added]

67 The High Court then referred to Lord Herschell's formulation at 374:

> [F]raud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) *recklessly*, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. *To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth*. [emphasis added]

68 However, the context of Lord Herschell's formulation must be taken into account. At all times, Lord Herschell was emphatic that for the action to succeed, actual fraud had to be proved.[72] In other words, the defendants must have knowingly made a false statement. This can be seen in the way Lord Herschell approached the application of the law to the facts of the case:

> It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is that they *fraudulently represented* that by the special Act of Parliament which the company had obtained they had a right to use steam or other mechanical power instead of horses. *The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts.*[73] [emphasis added]

69 From the above passage, it appears that the fact that a person did not care whether the statement was true or false was, under Lord Herschell's approach, merely evidence which assisted the court to determine whether the defendants knowingly made a false statement or whether they had an honest belief in the truth.

70 According to the High Court, though Lord Herschell equated fraud with recklessness, the idea of dishonesty is introduced through his reference to an "honest belief in its truth". Therefore, Justice Rajah held that *Derry v Peek*:

> [S]tands for the proposition that the mental element of not caring whether a statement is true or false requires the absence of an honest

72 (1889) 14 App Cas 337 at 373: "This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion, lie."

73 (1889) 14 App Cas 337 at 376.

> belief, on the part of the maker of the statement, in the truth of the statement, and, consequently, *subjective dishonesty* in the dissemination of that statement. When logically extrapolated and applied to offences concerning the making or dissemination of false statements, an *honest* belief in the truth of a statement, however unreasonably held, would exculpate an accused person from conviction where the offence in question is tied to a *Derry v Peek-type of (subjective) mens rea*. [emphasis added]

(3) Is Derry v Peek *the same as advertent recklessness?*

71 As the reader may surmise from the above paragraphs, the author views the High Court's repeated reference to *Derry v Peek* and dishonesty as an effort by the High Court to recognise a *mens rea* that was similar but not identical to advertent recklessness. This is notwithstanding the fact that the High Court, in its subsequent decision on sentence, remarked:[74]

> Given that the respondent was convicted under s 199(*b*)(i) of *reckless, rather than dishonest* (under s 199(*b*)(ii), second limb) dissemination of information … [emphasis added][75]

72 In the author's view there was no indication that the High Court in its sentencing decision intended to contradict its earlier analysis that the *mens rea* for s 199(b)(i) of the SFA involves subjective recklessness requiring dishonesty. However, there is nevertheless a complication introduced as the High Court, in the above extract, is clearly referring to dishonesty in the sense of a person making a false statement with actual knowledge of its falsity as that is essentially what the second limb of s 199(b)(ii) involves. It is here argued that, on the other hand, the High Court's reference in its first decision to dishonesty refers to something other than actual knowledge of the statement's falsity.

73 As the following analysis of the *mens rea* of "does not care" proceeds on this basis, it is necessary to explain the reasons for this view.

74 The main reason for adopting this view is based on a textual reading of the High Court's judgment. In particular, it is striking that while the High Court repeatedly made reference to dishonesty and the idea of "no honest belief" in its judgment, it hardly made reference to recklessness. In particular, it never once referred to the test of reckless

74 [2008] 2 SLR 1082 at [27].

75 The decision on the verdict was delivered on 29 November 2007 ([2008] 2 SLR 61) while decision on the sentence was delivered on 11 March 2008 ([2008] 2 SLR 1082).

knowledge outlined in the Law Commission Report[76] or to any Singapore cases defining rashness.[77] If the High Court was merely stating that the *mens rea* of s 199(i) of the SFA was reckless knowledge, there was no need for it to dwell so extensively on *Derry v Peek*'s requirement of dishonesty which is wholly unnecessary for a finding of advertent recklessness.

75 The persuasiveness of this reason is highly dependent on what the High Court meant by dishonesty. One possibility is that the High Court was simply using the term dishonest to describe all persons who recklesslessly make false statements; in which case the *mens rea* is simply that of advertent recklessness. However, it is argued that the High Court judgment lends support for the proposition that dishonesty for the purposes of s 199(i) of the SFA is something over and above the ingredients of advertent recklessness. An offender possessing the *mens rea* of "does not care" is more culpable than one who is merely reckless and as a result deserves to be labelled as "dishonest".

76 Support for the proposition that dishonesty is distinct from recklessness can also be found in s 13(1)(b) of the English Prevention of Fraud (Investments) Act 1963 which states that the offence of recklessly making a statement to induce a person to buy or sell shares can be committed "dishonestly or otherwise". This is discussed in more detail in a later part of this article.

77 The next part of this article will attempt to uncover what this additional element is. It begins by evaluating the *Derry v Peek*-type *mens rea* and concludes that it does not fit comfortably with modern conceptions of recklessness. This will then lead on to an analysis of how the High Court modified the *mens rea* to make it fit better.

C. Derry v Peek *evaluated*

(1) Parliamentary intent in using "does not care"

78 The author's reasons for viewing the decision in *PP v Able Wang* as setting out a *mens rea* that is based on recklessness but contains an additional element that results in the offender being described as "dishonest" have already been set out. Next, it is suggested that a reading of the SFA shows that "does not care" is different from "recklessness".

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76 The Law Commission report was referred to by the Court of Appeal in *Tan Kiam Peng v PP* [2008] 1 SLR 1 at [34] in the context of the *mens rea* of knowledge.

77 The author takes the position that rashness and recklessness are used interchangeably in Singapore's criminal law.

79 Both the Australian Corporations Act and the SFA suggest a difference between "does not care" and recklessness. To illustrate this point, reference will be made to two different offences that concern the making of statements. Section 1041F of the Australian Corporations Act 2001 and s 200(1)(c) of the SFA make it an offence to induce a person to deal in financial products by, *inter alia*, (a) by making or publishing a statement, promise or forecast if the person knows, or is *reckless* as to whether, the statement is misleading, false or deceptive.

80 On the other hand, s 1041E of the Australian Corporations Act 2001 and s 199(b) of the SFA make it an offence to make a statement or disseminate false or misleading information likely to, *inter alia*, induce persons to buy or sell financial products, when the person, *inter alia*, *does not care* whether the information is true or false.

81 Therefore, by using "does not care" for one offence and "reckless" in a similar offence in the very next section, it appears that the Singapore and Australian legislatures have made a deliberate distinction between the two terms.[78]

(2) The suitability of Derry v Peek*: The English experience*

82 It is here argued that while the High Court recognised a *Derry v Peek*-type *mens rea* for s 199(i) of the SFA, it was also aware of certain issues concerning the suitability of the original test in *Derry v Peek* and applied it in a modified form. This also explains the High Court's characterisation of the *mens rea* of s 199(i) of the SFA as being of the same "type" rather than simply saying that it was identical to the *mens rea* found in *Derry v Peek*. In this section, we will look at the problems the English courts have faced in attempting to use *Derry v Peek* for the purposes of the criminal law.

83 The main issue concerning the suitability of *Derry v Peek* is the fact that it arose out of a case of deceit and fraud, elements which are not required by s 199(i) of the SFA and many other offences involving

78 This leads to the question of why there should be a deliberate distinction when the offences are similar. A tentative answer is offered based on the fact that the conduct element of a s 199 SFA offence is minimal compared to the conduct element of a s 200 SFA offence. Certain market participants such as day-traders thrive on rumour and gossip and an impulsively uttered statement in a coffeeshop such as "Datacraft got raided" would satisfy the *actus reus* of the offence of s 199 but not s 200 SFA. In the circumstances, a "stricter" form of recklessness may be justified for s 199(i) of the SFA given the serious consequences that may follow a conviction (one assumes that the sentence for a s 199(i) conviction would, *ceteris paribus*, be more serious than the sentence for a s 199(ii) "ought reasonably to have known" conviction.

the giving of false statements. In *Nocton v Lord Ashburton*,[79] the plaintiff sued for loss caused by non-fraudulent misrepresentation in a fiduciary relationship. The defendant claimed that he could escape liability in view of *Derry v Peek*'s requirement of dishonesty. However, the House of Lords made the observation that *Derry v Peek* was not universally applicable to all actions involving false statements. Lord Shaw of Dunfermline said:[80]

> [I]t should not be forgotten that *Derry v Peek* (1889) 14 App Cas 337, was an action wholly and solely of deceit, founded wholly and solely on fraud, was created by this House on that footing alone, and that – this being so – what was decided was that fraud must ex necessitate contain the element of moral delinquency. Certain expressions by learned Lords may seem to have made incursions into the region of negligence, but *Derry v Peek* as a decision was directed to the single and specific point just set out.

84 Lord Parmoor echoed this:[81]

> My Lords, reference was made during the hearing in your Lordships' House to the case of *Derry v Peek* (1889) 14 App Cas 337 That case decides that in an action founded on deceit, and in which deceit is a necessary factor, actual dishonesty, involving mens rea, must be proved. The case in my opinion has no bearing whatever on actions founded on a breach of duty in which dishonesty is not a necessary factor.

85 As has been pointed out, *Derry v Peek* is an uncommon *mens rea* not cited in English criminal law textbooks by authors such as Glanville Williams and Andrew Ashworth. There has been occasional reference to *Derry v Peek* by the English courts, but even then, the courts appear to be in two minds about its suitability in respect of offences concerning the making of false statements.

86 One offence where the applicability of *Derry v Peek* was considered was s 12(1) of the English Prevention of Fraud (Investments) Act 1939. Section 12(1) makes it an offence to make a reckless statement or give a reckless promise in order to induce some other person either to purchase shares or to sell shares.

87 The meaning of "reckless" in the context of this provision was considered by no less than three judges of the High Court in three different cases, and none of them agreed what it meant. The first case

79 [1914] AC 932.
80 [1914] AC 932 at 970.
81 [1914] AC 932 at 978.

was *R v Bates*.[82] In this case, Donovan J stated that the ordinary meaning of the word "reckless" was "careless", "heedless", "inattentive to duty" and decided that the word should bear its full and natural meaning. As such, he held that recklessness included cases where there was a high degree of negligence without dishonesty. This decision was approved in an *obiter* comment by Lord Goddard CJ in *R v Russell*.[83] In these two cases, no reference was made to *Derry v Peek*.

88 The second case on the section (by then re-enacted with identical wording as s 13(1) of the Prevention of Fraud (Investments) Act 1958) was the decision of Salmon J in *R v Mackinnon*.[84] In this case, Salmon J referred to *Derry v Peek* and observed that "ever since *Derry v Peek*, the word 'reckless', used in relation to a false statement, strongly suggests a statement made not caring whether it be true or false; that is, a dishonest or fraudulent statement as distinct from one which is made with an honest belief in the truth".[85]

89 In addition, Salmon J noted that the purpose of the Act was to prevent fraud and that:

> It would be surprising if Parliament, in a section creating a number of offences whose very essence is fraud, had included an offence which has nothing to do with fraud.

90 However, the idea of a "fraud on the market" has lost currency in modern securities regulation. The framework of modern legislation suggests that the current focus has shifted to regulating "market misconduct" and protecting the investing public. In addition, there are other objectives such as the promotion of "fair, orderly and transparent markets" and the facilitation of "efficient markets for the allocation of capital and the transfer of risks".[86] False information that influences trading patterns, whether given dishonestly or otherwise, has a potentially adverse effect on market efficiency and stability. The fact that the objectives of a statute had nothing to do with the prevention of fraud was one of the reasons why the Court of Appeal rejected a *Derry v Peek*-style *mens rea* for a Trade Descriptions Act offence (this case is discussed later). Therefore, the above reason for incorporating a *Derry v Peek*-type *mens rea* involving dishonesty would not be as compelling today.

82 [1952] 2 All ER 842. The Prosecution in *PP v Able Wang* relied on this case in its submissions.
83 [1953] 1 WLR 77.
84 [1959] 1 QB 150.
85 The High Court in *PP v Able Wang* quoted this passage in its judgment.
86 Securities and Futures Act (Cap 289, 2006 Rev Ed) s 5.

91 The third case on the section was the decision of Paull J in *R v Grunwald*.[87] Paull J disagreed with *R v Bates* that recklessness included a high degree of negligence and at the same time disagreed with *R v Mackinnon* that dishonesty was essential to recklessness. It is not clear from the judgment of Paull J what definition he was adopting for recklessness. His contribution to the jurisprudence on the matter was that the statement had to be "rash",[88] which was not particularly helpful though he also said that its maker had to have "no real basis of facts on which he could support" it.

92 By this time, the Legislature had apparently had enough of this and amended the law in 1963. The replacement for s 13(1) includes in parenthesis the words "dishonestly or otherwise" to make it clear that an offence can be committed recklessly even though there is no dishonesty involved: *R v Staines*.[89]

93 Another instance of *Derry v Peek* appearing in the criminal law concerns s 14 of the Trade Descriptions Act 1968. Section 14 of the Act makes it an offence to, *inter alia*, recklessly make a statement which was false in the course of a trade. This time, recklessness was defined in the Act in the following manner in s 14(2)(b):

> [A] statement made regardless of whether it is true or false shall be deemed to be made recklessly, whether or not the person making it had reasons for believing that it might be false.

94 One would have thought that such a formulation would have excluded the application of a *Derry v Peek*-type *mens rea*. Nonetheless, in *Sunair Holidays Ltd v Dodd*,[90] another case before the Divisional Court of the Queens Bench, Lord Parker CJ, after referring to s 14, observed:[91]

> In other words, this by statute is importing the common law definition of "recklessly" as laid down in *Derry v Peek* (1889) 14 App Cas 337, and adopted ever since.

95 In *MFI Warehouses Ltd v Nattrass*,[92] a differently composed Divisional Court of the Queens Bench which included Lord Parker's successor, Lord Widgery CJ, had to decide on the meaning of recklessness under the same Act. The court noted that Lord Parker CJ's observation in *Sunair Holidays Ltd v Dodd* was merely dicta and held that recklessness under s 14 did not require dishonesty. In deciding this,

87 [1963] 1 QB 935.
88 [1963] 1 QB 935 at 940.
89 (1974) 60 Cr App R 160.
90 [1970] 1 WLR 1037.
91 [1970] 1 WLR 1037 at 1040.
92 [1973] 1 WLR 307.

they had reference to the specific definition in s 14(2)(b) as well as the objectives of the Act:

> I have much sympathy with the view of Salmon J. that where a criminal offence is being created and an element of the offence is "recklessness", one should hesitate before accepting the view that anything less than "*Derry v Peek* recklessness" will do.[93] On the other hand, it is quite clear that this Act is designed for the protection of customers and it does not seem to me to be unreasonable to suppose that in creating such additional protection for customers Parliament was minded to place upon the advertiser a positive obligation to have regard to whether his advertisement was true or false.[94]

96 As such, Lord Widgery CJ held that the offender would be reckless under s 14 if:

> … the prosecution can show that the advertiser did not have regard to the truth or falsity of his advertisement even though it cannot be shown that he was deliberately closing his eyes to the truth, or that he had any kind of dishonest mind.[95]

97 Given the troubled history of *Derry v Peek* in English criminal law, the Law Commission had this to say about the case:

> *Derry and Others v Peek*, which was only concerned with the meaning of fraud in the civil law, has in our view had a somewhat confusing influence on the meaning of recklessness in relation to offences in which the making of a false statement is an essential element.[96]

98 The Law Commission, while agreeing that recklessness should not be confused with negligence, saw no reason for dishonesty[97] to be part of the definition of recklessness.[98] Instead, they saw considerable merit in harmonising the definitions of recklessness as to result (*eg*, as to the occurrence of a proscribed harm) and recklessness as to circumstances (*eg*, as to the truth of a statement) and this is reflected in their suggested formulations for both.

99 In conclusion, the pronouncements of Salmon J in *R v Mackinnon* that were quoted by the High Court must be read in context. In particular, Salmon J was dealing with an offence "whose very essence

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93 Despite this observation, there is no evidence of the English courts adopting the *Derry v Peek* definition for any other offence involving recklessness. As this article will go on to show, the courts have moved towards cognitive based tests of recklessness.

94 [1973] 1 WLR 307 at 313.

95 [1973] 1 WLR 307 at 313.

96 Law Commission Report, para 63.

97 The Law Commission was referring to dishonesty in the *R v Ghosh* [1982] 3 WLR 110 sense as footnote 185 of the Report shows.

98 Law Commission Report, para 64.

is fraud" just as *Derry v Peek* was an action founded "wholly and solely on fraud". A survey of the English criminal law shows that the *Derry v Peek*-type recklessness does not appear to be part of the current definition of recklessness and given the criticism by the Law Commission, the chances of it resurfacing appear to be extremely low.

(3) Incompatibility with the modern doctrine of mens rea

100 The Law Commission recognised that *Derry v Peek* had a "somewhat confusing influence" but did not elaborate. In this part of the article, it will be argued that *Derry v Peek* is liable to cause confusion as a substantive requirement of dishonesty or fraud is incompatible with the modern doctrine of *mens rea* which adopts a cognitivist stance towards the ascription of subjective fault.

101 English authors belonging to the "subjectivist" school, such as Professor Andrew Ashworth, assert that one of the fundamental concepts in the justification of criminal laws is the principle of individual autonomy. Each person is viewed as an autonomous individual with the capacity to make meaningful choices. As such:

> [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.[99]

102 At the same time, Ashworth recognises that some formulations of the principle of autonomy pay little or no attention to the social context in which all of us are brought up and the context of powerlessness in which many have to live.[100] Professor Alan Norrie argues that this is the case in the modern doctrine of *mens rea* that is based on an abstract figure isolated from the social and moral contexts in which crime occurs. This figure, the responsible individual, possesses sufficient free will to make meaningful choices and the ability to know or foresee the consequences that may flow from those choices.[101]

103 This "morality of form" stresses the cognitive and volitional powers of the individual, and it is, therefore, no surprise that the

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

100 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th Ed, 2003) at p 30.

101 Alan Norrie, *Crime, Reason and History* (Butterworths, 2nd Ed, 2001).

modern doctrine of *mens rea* assigns fault with reference to a cognitive standard. Intention is specified in terms of foresight of a virtually certain outcome while recklessness looks at the consciousness of risk. Even the modern English test of dishonesty asks whether the offender knew that his conduct was dishonest.[102]

104 Even words which ostensibly contain substantive moral information have been recast in purely cognitive terms. For example, in the English case of *R v Cunningham*,[103] the offender was charged with maliciously causing the victim to inhale a noxious substance contrary to the Offences Against the Person Act 1861. The trial judge directed the jury that maliciously meant wickedly.[104] However, the Court of Appeal disagreed and held that malice simply meant recklessness.

105 The cognitive test seeks only to identify the existence of the offender's knowledge of the circumstances or consequences and excludes from consideration factors such as the offender's motive and the personal circumstances that led him to commit the offences.

106 The English Court of Appeal decision in *Re A (Children) (Conjoined Twins: Surgical Separation)*[105] illustrates this point. This case concerned conjoined twins who would die within a few months of their birth if they were not separated. Unfortunately, separation was virtually certain to cause the death of one of the twins while allowing the other to have a life which was worthwhile. The hospital caring for the twins applied for a declaration that it would be lawful to carry out the separation surgery notwithstanding the fact that one twin would die. The Court of Appeal granted the declaration sought by the hospital primarily on the grounds of necessity. The Court of Appeal needed to rely on necessity as it was unable to find that the doctors performing the operation did not possess the *mens rea* of murder. Brooke LJ observed pointedly:[106]

> Now that the House of Lords has set out the law authoritatively in these terms, *an English court would inevitably find that the surgeons intended to kill Mary*, however little they desired that end, because her death would be the virtually certain consequence of their acts. [emphasis added]

107 The above case is an illustration of why moral judgment cannot be completely eliminated from the criminal law. Cognitive tests

102 *R v Ghosh* [1982] 3 WLR 110.
103 [1957] 3 WLR 76.
104 Scottish Law recognises a *mens rea* of "wicked recklessness": see Lord Goff, "The Mental Element in the Crime of Murder" (1988) 104 LQR 30 at 53.
105 [2001] 2 WLR 480.
106 [2001] 2 WLR 480 at 549.

expressed in terms of the degree of one's knowledge of a particular circumstance or consequence imperfectly mirror our judgments of blameworthiness. However, where the core of the offence definition is concerned, expressions of substantive moral values find difficulty co-existing with cognitive concepts. To resolve this difficulty, moral judgments have to be evacuated from the core concept and shunted to the periphery where they find their expression in the law on defences as was the case in *Re A (Children) (Conjoined Twins: Surgical Separation)*,[107] or even in the evidential exercises juries have to undertake.[108]

108 All this poses a problem for any attempt to incorporate fraud or dishonesty into a recklessness-based *mens rea*. The modern doctrine of *mens rea* will seek to convert these ostensibly substantive moral labels into requirements based on cognition. It is argued later in this article that the High Court made a similar conceptual move in converting dishonesty into "no honest belief" in which the word "honest" becomes otiose. In such a situation, the distinction between the "*Derry v Peek*-type recklessness" and other fault elements in the cognitivist line-up is unclear unless the High Court is able to identify a further element that separates them.

(4) Difficulty in distinguishing it from wilful blindness

109 The reason for adding a distinct requirement of dishonesty to that of recklessness is presumably to create a *mens rea* that is not as easy to satisfy as recklessness *simpliciter*. But when we try to create a *mens rea* formulation that is stricter than recklessness, we may end up with something virtually equivalent to the next *mens rea* in the cognitivist line-up, that of actual knowledge in the form of wilful blindness.

110 Wilful blindness has also been described as a form of dishonesty. The Court of Appeal in *Tan Kiam Peng v PP* referred to the English House of Lords' decision of *Jones v Gordon*:[109]

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107 Jurists have recognised that the criminal law creates a division between offences and defences and textbooks follow this convention; however, the theoretical basis for the distinction is not as clear. See: Glanville Williams, "Offences and Defences" (1982) Legal Studies 2 at p 233.

108 The House of Lords in *R v Woollin* [1999] 1 AC 82 at 96, after defining intention to include foresight of a virtual certainty, stated that the jury was *entitled to find* that a defendant intended a consequence he foresaw as virtually certain. Sir John Smith put it aptly in his letter to the Criminal Law Review [Crim LR (1999) 246] when he stated: "why the jury should be entitled to find that it is not intention, when, in law, it is, is a question which I am quite unable to answer." The answer suggested by Alan Norrie is that the House of Lords wanted to give juries "moral elbow room" to work around the definition in deserving cases: See Alan Norrie, "After Woolin" [1999] Crim LR 532.

109 (1877) 2 App Cas 616.

> If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not to have taken it, still he would be entitled to recover. *But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind – I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover – I think that is dishonesty.*[110] [emphasis added by Court of Appeal]

111 The word "wilful" connotes an intentional and conscious decision on the person's part. In another English case cited by the Court of Appeal, *Manifest Shipping Co Ltd v Uni-Polaris*,[111] Lord Clyde stated:

> Blind-eye knowledge in my judgment requires a conscious reason for blinding the eye. *There must be at least a suspicion of a truth about which you do not want to know and which you refuse to investigate.* [emphasis added]

112 A person who is wilfully blind to the truth can be fairly said to be dishonest. He engages in the intentional conduct of shutting his eyes to the obvious and one can infer from this intentional conduct that he knew that he was being dishonest; the purpose of his non-inquiry was to prevent himself acquiring the relevant knowledge. There is therefore a clear conceptual distinction between wilful blindness and traditional advertent recklessness. This was clearly stated by the Court of Appeal in *Tan Kiam Peng v PP*:[112]

> To elaborate, it is clear that wilful blindness, being (as we have seen) the equivalent of actual knowledge, is distinct from recklessness which, theoretically at least, falls short of actual knowledge. Indeed, wilful blindness necessarily entails an element of *deliberate* action inasmuch as to the extent that the person concerned has *a clear suspicion* that something is amiss but then embarks on a deliberate decision not to make further inquiries in order to avoid confirming what the actual situation is, such a decision is necessarily a *deliberate* one.

113 The problem arises when one seeks to identify a subset of recklessness where the offender can be fairly labelled as both "reckless" and "dishonest." Dishonesty is traditionally associated with actual knowledge or intentional conduct. For example, the English definition of dishonesty (which is also incorporated in certain offences of the

110 [2008] 1 SLR 1 at [108].
111 [2003] 1 AC 469 at [3].
112 [2008] 1 SLR 1 at [127].

Australian Corporations Act 2001) in *R v Ghosh* states that an offender is dishonest if (a) his conduct is dishonest according to the standards of ordinary people; and (b) he knows that his conduct is dishonest according to the standards of ordinary people. In Singapore's Penal Code,[113] dishonesty is defined in terms of an intention to cause a wrongful loss or wrongful gain. Both definitions of dishonesty are incompatible with a *mens rea* based solely on recklessness.

(5) Conclusion

114 This article has attempted to show that *Derry v Peek* was ultimately about fraud and the requirement of dishonesty flowed directly from this. However, the modern doctrine of *mens rea* adopts a cognitivist standpoint and modern securities regulation has moved on from prevention of fraud to investor protection and ensuring market stability.

115 It should, therefore, come as no surprise that the High Court did not say that the *mens rea* in s 199(i) of the SFA was identical to that in *Derry v Peek*. Instead, it stated that the *mens rea* of s 199(i) of the SFA was the same "type" as that in *Derry v Peek*. In the next section, it will be explained why the *mens rea* adopted by the High Court was similar but not identical.

D. The High Court's solution

> A person can either have knowledge of a fact or not at all. There is no intermediate stage. [Yong CJ][114]

(1) The High Court's modification of the mens rea

116 A person may make a false statement recklessly without being dishonest. As highlighted in the preceding discussion on English criminal law, s 13(1) of the Prevention of Fraud (Investments) Act 1963 states that the offence of recklessly making a false statement can be committed "dishonestly or otherwise" which suggests that "regular" recklessness can be distinguished from an egregious type of recklessness involving dishonesty. However, the Act does not tell us what dishonesty means in this context and how to distinguish the two types of recklessness.[115]

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113 (Cap 224, 1985 Rev Ed).

114 *PP v Koo Pui Fong* [1996] 2 SLR 266 at [19].

115 As has been highlighted, it was more of a way to eliminate the applicability of the *Derry v Peek mens rea*.

117 The *mens rea* in *Derry v Peek* has been identified by the High Court in *PP v Able Wang* as a particular type of subjective recklessness that requires "subjective dishonesty". When *Derry v Peek* was decided in the 19th century, dishonesty appeared to have a substantive moral meaning along the lines of the dictionary definition of dishonest as "disposed to lie, cheat, defraud, or deceive". The case itself centred on an allegation that the company had made a false statement in order to deceive investors. As Lord Dunfermline explained in *Nocton v Ashburton*,[116] *Derry v Peek* involved "moral delinquency".

118 There are significant conceptual difficulties in attempting to graft a substantive moral conception of dishonesty onto a modern conception of recklessness expressed purely in terms of an awareness of risk. The High Court circumvented this difficulty by saying that a person is dishonest when he has no honest belief in the truth:

> One is dishonest if one makes a statement without believing in its truth.[117]

119 In other words, the High Court recast a substantive moral concept in cognitivist terms. Two issues arise from this step. The first issue is that when a person has "no honest belief in the truth", it does not necessarily mean that he has a disposition to "lie, cheat, defraud or deceive". The second issue is that by recasting dishonesty in cognitive terms, no distinct concept of dishonesty is allowed to emerge and the modified *mens rea* is assimilated by the existing concept of advertent recklessness.

120 The phrase "no honest belief in the truth" can simply be rewritten as "no belief in the truth". After all, if dishonesty is purely subjective, it is conceptually impossible to have a "dishonest belief in the truth". You either believe it is true, or you do not. Instead of honest belief, we should say just say "belief" or at most "genuine" or "positive" belief. This is clearly shown by the following passage from *Horrocks v Lowe*[118] (quoted by Yong CJ in *Maidstone v Takenaka Corp*)[119] where Lord Diplock stated:

> Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief".

116 [1914] AC 932.

117 [2008] 2 SLR 61 at [77], quoting from Robert Baxt, H A J Ford & Ashley Black, *Securities Industry Law* (Butterworths, 5th Ed, 1996).

118 [1975] AC 135.

119 [1992] 1 SLR 772 at [48].

121 Having established that the key to this *mens rea* is the absence of a positive belief in the truth rather than the presence of dishonesty as an additional component, the next issue is how it relates to the concept of reckless knowledge. The High Court observed:[120]

> When logically extrapolated and applied to offences concerning the making or dissemination of false statements, an *honest* belief in the truth of a statement, however unreasonably held, would exculpate an accused person from conviction where the offence in question is tied to a *Derry v Peek*-type of (subjective) *mens rea*.

122 The above paragraph affirms that the *mens rea* is subjective in the sense that a subjectively genuine belief is sufficient to exculpate an accused person. In one sense, this *mens rea* is stricter than recklessness as a person can be reckless even if he had a genuine belief if that belief was due to the accused's thoughtlessness or practical indifference.

(2) The evidential approach to ascertaining "no honest belief in the truth"

123 The argument has been developed in the earlier parts of this article that *Derry v Peek mens rea* is incomplete because the concept of dishonesty as it was understood in the 19th century sits uncomfortably with the modern definition of recklessness. We almost know what it is, but not quite. The incompleteness is perhaps understandable given the fact that *Derry v Peek* was decided in the 19th century before the modern developments in the doctrine of *mens rea*. Therefore, the High Court in *PP v Able Wang* had to develop the *Derry v Peek mens rea* into a complete *mens rea* for the purposes of s 199(i) of the SFA. The High Court did this in stages. One important practical step involved the outlining of a comprehensive evidential approach to be used to identify and differentiate "no honest belief" from other types of fault.

124 Professor Williams' first category of the conditional subjective test which was covered earlier is interesting as it suggests that we can evaluate the actual accused person by checking whether if he, possessing all his characteristics and traits, puts himself in a fit state to think and actually thinks about the matter, would have known of the risk. In fact, the High Court, in the different context of how knowledge of falsehood is to be inferred from the evidence, stated something remarkably similar:

> I should also add at this point that the question of whether reasonable grounds exist to support a belief in the truth of a statement should be analysed from the perspective of a reasonable person *calibrated against the relevant qualities and characteristics of the accused person*. In other

120 [2008] 2 SLR 61 at [82].

> words, the qualification, profession, intellect, experience and skills, amongst other personal attributes, of the accused should be considered in assessing whether there were indeed reasonable grounds for him to believe that the statement or information which he disseminated was true. This would accord with the ultimately subjective nature of the s 199(i) *mens rea*, since it infuses the subjective qualities of the accused with an objective analysis of the relevant facts.[121]

125 Though the High Court has rejected *Caldwell* recklessness as the appropriate *mens rea*, the spectre of the conditional subjective test emerges in *PP v Able Wang* as something that supports a strong evidential inference. By relegating it to the realm of evidential inference, the objection that the conditional subjective is not actually a mental state is avoided. The difference between Professor Williams' conditional subjective and the approach of the High Court in *PP v Able Wang* was that Professor Williams saw the conditional subjective as something that made *Caldwell* recklessness more lenient than regular negligence. In *PP v Able Wang*, the accused's superior qualifications may have made it harder for him to claim that he had an honest belief:

> As stated at [87] above, the assessment of whether there were reasonable grounds to believe in the truth of the alleged CAD raid must necessarily be conducted against the background of the respondent's relevant attributes. The respondent was a full-time and seasoned private equities trader at the material time; he also had a Bachelor of Science degree in accounting and finance from the New York University. He was, therefore, not by any stretch of the imagination an amateur dabbling in the securities market. Further, one of the Defence's witnesses, Mr Chir, confirmed that the respondent was "*very careful about usage of words*" [emphasis added] (see NE at p 88). Sam Wong also stated in his examination-in-chief that the respondent was "quite knowledgeable about the stock market" (see NE at p 4). It is in this context that we must consider whether there were reasonable grounds for a person like the respondent to have believed in the truth of the information which he disseminated on the SI forum – *viz*, the news of the alleged CAD raid.[122]

126 The operation of a conditional subjective test in areas of the English criminal law, such as the defence of provocation,[123] is to recognise that people may possess relevant psychological traits or be of a certain personality type that reduces their "control". Applied to the question of belief, this would relate to characteristics that would make people believe certain things more readily than others. Such a limitation is used to narrow the scope of the inquiry to traits affecting cognitive

121 [2008] 2 SLR 61 at [87].

122 [2008] 2 SLR 61 at [119].

123 See Alan Norrie, "From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer" [2002] 65 MLR 538.

ability and to avoid the contentious issue of what other characteristics are relevant.[124] The High Court appeared to go further than this by taking into account characteristics such as the social background of the offender.

(3) The approach to "no honest belief in the truth" summarised

127 To recap, the procedure the High Court appeared to have adopted in *PP v Able Wang* to determine whether the evidence supported the finding of the requisite *mens rea* is:

> (a) First, the court should determine whether the notional reasonable person would have had a positive belief in the truth of the information given the facts known to the accused. If the court finds that the reasonable person would not have had such a belief, this is a strong inference that the accused did not have such a belief.
>
> (b) Secondly, the court should determine whether the notional reasonable person with the relevant traits and characteristics of the accused would have had a positive belief in the truth of the information given the facts known to the latter. If the court finds that this person would not have had such a belief, this is an even stronger inference that the accused did not have such a belief.
>
> (c) Thirdly, the court should determine whether the accused had in fact a positive belief in the truth of the statement as the accused is entitled to be acquitted if he has a positive but unreasonable belief. The court will take into account any evidential inferences from the first and second stage, and other evidence such as assessments of the credibility of witnesses.

128 When the High Court discussed the substantive *mens rea* requirement for s 199(i) of the SFA, the requirement of recklessness was not discussed in detail and left embedded within the concept of dishonesty or no honest belief in the truth. However, we were unable to flesh out the concept of dishonesty because it merged with the concept of positive belief. However, from the evidential tests proposed by the High Court, we begin to see the *mens rea* taking shape.

129 The evidential tests make it clear that the Prosecution's burden is to prove that the accused had no positive belief in the truth. Of course, it is hard to prove such a negative proposition directly and, in practice, there would be a large reliance on the evidential tests which are objective (or conditionally subjective) in nature. This is different from

124 *R v G* [2004] 1 AC 1034.

advertent recklessness where the Prosecution simply has to show that the person making the statement was aware of the risk that the statement was false and that it was an unjustified risk for him to take.

(4) An objection: does an offender with no honest belief possess any relevant state of mind?

130 So far, the *mens rea* for the *Derry v Peek*-type *mens rea* has been expressed in terms of the negative proposition that the offender did not have a positive belief in the truth. As this *mens rea* is said to be subjective, the next question we have to ask is what is the relevant state of mind for such a *mens rea*? A jurist who considers himself a subjectivist would raise the objection that the lack of a relevant state of mind cannot amount to a state of mind.[125]

131 For offences relating to an offender's knowledge of circumstances under the modern doctrine of *mens rea*, the key state of mind apart from actual knowledge of the circumstances is that of a consciousness of a risk that the specified circumstances exist, or to put it more simply, a suspicion that they exist. The law approaches the question of knowledge in cognitive terms and different levels of suspicion may give rise to different legal conclusions. A suspicion that amounts to a "virtual certainty" may be labelled as actual knowledge, while lesser degrees of suspicion may be labelled as wilful blindness or recklessness.[126]

(5) The solution: recognition that assumption of responsibility matters

132 It is here argued that the solution the High Court adopted to complete the *mens rea* was to recognise that in certain situations, reckless conduct was coupled with an assumption of responsibility and awareness that others would rely on the offender's conduct. In such a situation, the "assumption of responsibility" is the additional element that entitles the court to label the offender as "dishonest". This aspect is illustrated by the following extract from *Derry v Peek* that the High Court cited:[127]

> [A] person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it *knows*,

125 "To say that absence of a state of mind is a state of mind is an abuse of language": Glanville Williams, "Recklessness Redefined" [1981] CLJ 252 at 256.

126 However, it is argued in this article that the level of suspicion is not the sole determinant of the label to be attached and that the existence of wilful or deliberate conduct is also relevant.

127 [2008] 2 SLR 61 at [79].

> yet at least that he *believes* it to be true. *And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true.*

133 The High Court viewed this assumption of responsibility by endorsing or warranting the truth of the information as a manifestation of the dishonesty required by s 199(i) of the SFA:

> To summarise, a subjective interpretation should be accorded to the s 199(i) *mens rea*. Such mental element *requires some dishonesty* on the part of the maker of the statement in question, *which may be manifested by his endorsement of the veracity of the statement or information* when disseminating it despite not having an honest belief in the truth of the statement or information.[128] [emphasis added]

134 On the facts of *PP v Able Wang*, this requirement was also easily satisfied since the accused would have known that people read investment forums in the hopes of obtaining "stock tips" and would act on them at short notice. The "assumption of responsibility" or "awareness of reliance" was reinforced in the High Court's view by the terms and conditions of the website:

> As a forum member who had agreed to the terms and conditions of the SI forum (see [6]–[7] above), the respondent should have been well aware of the severe repercussions of breaching the prohibition contained in the caution above. Nevertheless, he proceeded to post on the SI forum information that was *both* unreliable and untrue. He must have appreciated that this information could harm many others financially if and when they acted on what was in reality nothing more than, as stated in the first OCBC report and the second OCBC report, "[s]peculative" information.[129]

135 While the accused may have been reckless to the truth of the statement, this alone did not result in a finding of dishonesty. Instead it was the deliberate conduct of the accused in warranting the truth of the statement while knowing that others may rely on it that provided the additional element. The High Court placed some significance on this aspect of the accused's culpability in its decision on sentence:

> It was hardly an innocent or negligent posting, but rather a *cold and calculated* measure which sought, with two mutually-reinforcing statements, to dispel their readers' well-founded scepticism.[130] [emphasis added]

128 [2008] 2 SLR 61at [88].
129 [2008] 2 SLR 61at [118].
130 [2008] SGHC 37 at [23].

(6) How different is it from wilful blindness?

136 With this refinement to the *Derry v Peek mens rea*, there is more conceptual space created between it and wilful blindness. If the original requirement of fraud and dishonesty in *Derry v Peek* were retained, it would have been identical to the *Tan Kiam Peng v PP* definition of wilful blindness.

137 A person who believes that a statement is false automatically has no belief that it is true and should be taken to know that the statement is false. This is a straightforward example of actual knowledge.

138 On the other hand, a person who has no belief that a statement is true does not necessarily believe that the statement is false for a number of reasons. He may be indifferent as to whether it is true or false or he may be wilfully blind to the fact that it is false. The first situation can fairly be labelled as recklessness and the second situation as both recklessness and wilful blindness.[131] It is suggested that the reasons for his lack of positive belief are the key to determining blameworthiness and the correct labels to be attached to the offender. In order to determine the reasons for his lack of positive belief, it is suggested that one looks at the attitude of the person towards the risk that the information is false, and that an attitude based conception of recklessness becomes useful for this purpose.

139 The High Court did in fact make reference to the accused's attitude in evaluating his conduct. In response to a cautionary posting by another forum member about posting false information, he had, as the High Court described it, "the temerity to inform Papabull (and all others who accessed the SI forum), after being cautioned to '[t]ake care', that '*I know what I am talking* [sic]. *Do you honestly think that the papers and CNA knows* [sic] *it all?*'" Elsewhere, the High Court expressed the view that the accused's behaviour was "irresponsible",[132] which is a conclusion about his attitude rather than his knowledge.

140 In essence, this explains why the High Court in *PP v Able Wang* found not only that the accused *did not care* that the information was false but that he *knew* that the information was false. It is here argued that the High Court's view of the *mens rea* was one that sits between actual knowledge and recklessness. It is, in effect, a *mens rea* of "almost knowing". Even if advertent recklessness is identified, the evaluation of blameworthiness is still incomplete as one waits for further information

131 The possibility of a third situation where a person without a positive belief in the truth would not be rash or wilfully blind is not discounted but it would be a very unusual situation for this to occur.

132 [2008] 2 SLR 61 at [118].

containing "moral sorting power" that enables a determination of whether a person is merely reckless, so egregiously reckless that he deserves the label "dishonest", wilfully blind, or some combination of the above.

141 This ties in with the earlier analysis based on the High Court's theoretical exercise in setting out the ingredients of the *Derry v Peek*-type *mens rea*. To recap, the *Derry v Peek*-type *mens rea* is a subset of recklessness, basically a more egregious form of recklessness that deserves the label "dishonest" as well. Only this form of recklessness will do for s 199(i) of the SFA and lesser forms of recklessness are insufficient to attract liability. Conceptually, we can say that this more egregious form of recklessness amounts to "almost knowing" and is distinct from actual knowledge and wilful blindness. However, such a theoretical distinction may be hard to maintain in practice. If the evidence shows that the offender manifested a high degree of recklessness to the truth, this evidence may form part of the factual matrix that leads to the evidential inference that the offender was wilfully blind. One might, therefore, conclude that the *mens rea* of "does not care" is "virtually synonymous" with the *Tan Kiam Peng v PP* definition of wilful blindness.

142 On the other hand, if Justice Rajah's original definition of wilful blindness as involving a suspicion amounting to a "virtual certainty" is adopted, this overlap more or less disappears. Wilful blindness under the definition steers well clear of recklessness and is closely aligned with actual knowledge. It may well be the case that Justice Rajah in *PP v Able Wang* declined to follow the Court of Appeal's definition of wilful blindness in *Tan Kiam Pengv PP* (which was strictly speaking *obiter*). In which case, we still do not know what wilful blindness means.

VI. A suggested reformulation

143 It is unfortunate that the Legislature did not use the same *mens rea* term for both s 199(i) and s 200(1)(c) of the SFA. In particular, it is the author's view that s 199(i) of the SFA should have used the word "reckless" instead of "does not care".

144 The purpose of this part of the article is to suggest that an expanded conception of advertent recklessness would provide a better moral fit for offences of giving false statements than traditional advertent recklessness. This will allow the *mens rea* for offences involving the reckless making of false statements to become better aligned with the *mens rea* for offences of recklessly (or rashly) causing injury, damage, or other prohibited consequences. Harmonisation will also allow for a consistent development of these concepts and avoid the

anomaly of different tests of recklessness for different offences that existed in English criminal law due to *Caldwell*.[133]

A. The meaning of care

145 While the High Court explained in great detail why "does not care" refers to a *Derry v Peek*-type recklessness, a discussion of the meaning of the word "care" itself was relegated to a single paragraph at the end of the High Court's discussion on the *mens rea*. The High Court, after reviewing the District Judge's use of the word "care", observed that there are several meanings of the word care and threw its weight behind the following meaning:

> As mentioned above at [56], the trial judge appears to have understood the word "care" in the following manner: "[t]o feel concern (great or little), be concerned, trouble oneself, *feel interest*" [emphasis added] (see p 894 of *The Oxford Dictionary*). With respect, I am unable to fathom any compelling reason for Parliament to have specifically enacted legislation directed at persons who disseminate statements or information that they are not *personally interested in* or *concerned with*. In my view, "care" as stated in s 199(i) of the SFA refers, instead, to the *prudence* or *diligence* to be exercised in determining the veracity of the information or statement which one disseminates; this accords with *The Oxford Dictionary*'s description of "care" (at p 894) as "[t]o be careful, to take care". This must be the only basis upon which the above discussion on the interpretation of the s 199(i) *mens rea* is predicated.[134]

146 The High Court was no doubt right in rejecting any definition of "care" that related to "feeling interest for". However, its own definition of "care" faces a difficulty. If the word care refers to the exercise of prudence or diligence, then "does not care" must necessarily mean that the person "does not exercise prudence or diligence". This appears to run contrary to the High Court's insistence that "does not care" refers to a "subjective" *mens rea* and its rejection of the prosecution's "objective" interpretation.

147 In the next section, an alternative meaning of "care" that makes reference to the attitude of the offender is suggested. An offender should not be said to "not care" merely because he is not prudent or not diligent; he should only be said to "not care" if his lack of prudence or diligence is *blameworthy* to such a degree that it is the moral equivalent of subjective recklessness.

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133 *Caldwell* recklessness was basically confined to offences under the Criminal Damage Act by the time the House of Lords got around to overruling it.

134 [2008] 2 SLR 61 at [89].

B. An alternative meaning of care

148 Under this alternative meaning, care refers to the attitude of the person towards the possibility or risk that the statement he is making may be false. If a person does not care, he manifests a blameworthy attitude of indifference towards the risk.

149 In fact, the word "care" was used to refer to the attitude of the offender by the House of Lords in *R v Sheppard*.[135] It is suggested that this 1980 case, being a more recent treatment of the concept of "not caring" than the authorities cited before the High Court in *PP v Able Wang*, reflects a more modern approach to the *mens rea* of recklessness.

150 In *R v Sheppard*, the offender was charged with wilfully neglecting a child under s 1 of the Children and Young Persons Act 1933. The question before the court was what "'was the meaning of the *mens rea* term 'wilful'". When English courts are faced with an archaic *mens rea* term, their approach is to define it in terms of the modern fault concepts of either intention, recklessness or negligence. The Court of Appeal agreed with the trial judge that wilful meant negligent. In a three-two decision, the House of Lords disagreed and ruled that wilful meant reckless.

151 Lord Diplock stated that to be guilty of wilful neglect, he must be at least "reckless" as to the risk to his child which the failure to provide care creates and that recklessness is shown when:

> Either that the parent was aware at that time that the child's health might be at risk if it was not provided with medical aid or that the parent's unawareness of this fact was due to his *not caring* whether his child's health was at risk or not.[136] [emphasis added]

152 Lord Edmund-Davies, agreeing with Lord Diplock, stated:

> A parent reckless about the state of his child's health, *not caring* whether or not he is at risk, cannot be heard to say that he never gave the matter a thought and was therefore not wilful in not calling a doctor. In such circumstances, recklessness constitutes mens rea no less than positive awareness of the risk involved in failure to act. [emphasis added]

153 Under the *R v Sheppard* formulation of recklessness, a person is reckless if he is conscious of an unjustifiable risk or if he displays an indifference or "does not care" attitude towards the risk. After *R v Sheppard* came the high-water mark of Lord Diplock's attempt to expand the concept of recklessness in *Commissioner of Police of the*

135 [1980] 3 WLR 960.
136 [1980] 3 WLR 960 at 964.

Metropolis v Caldwell,[137] which was another three-two decision with Lord Edmund-Davies crossing over and leading the dissenters. But whatever the faults of the *Caldwell* decision, writers such as Andrew Ashworth have recognised that Lord Diplock was stating an important truth: that, sometimes, a failure to think about a risk is as blameworthy as conscious awareness of one.

154 In *Recklessness Redefined*, Glanville Williams, after referring to *Derry v Peek* and *R v Sheppard*, expressed the view that it would be best if the definition of recklessness did not refer to the concept of "care" as the latter concept could be mistaken for negligence. If the word "care" was to be used at all, Williams states that according to *Derry v Peek*, it means "not mentally caring" or "at least, being sufficiently indifferent to the risk to be prepared to run it in order to secure some personal end".[138]

155 A recent Singapore decision appears to have endorsed indifference as capable of amounting to recklessness. In *S Balakrishnan v PP*,[139] one of the offenders, Pandiaraj, was charged with abetting by instigation the offences of causing death and causing grievous hurt by a rash act. One of his defences was that he had genuinely believed that there was no risk remaining as he had averted the risk by setting certain guidelines. Yong CJ held:[140]

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

156 As highlighted earlier, the fact that the accused in *PP v Able Wang* assumed responsibility and was aware that others might rely on his statement was an important factor in deciding that AW had the relevant *mens rea*. It should be added that the "assumption of responsibility" approach can easily be worked into practical indifference as shown by *S Balakrishnan v PP* where the fact that Pandiaraj was the course commander with responsibility for the safety of the trainees was no doubt a telling factor. In the context of the test of reckless knowledge, if a person had assumed responsibility for the accuracy of a statement, he would usually not be justified in publishing the statement while conscious of a risk that the statement was false, especially since it is so easy to add the appropriate disclaimers such as the fact that the information was speculative.

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137 [1982] AC 341.
138 Glanville Williams, "Recklessness Redefined" [1981] CLJ 252 at 281.
139 [2005] 4 SLR 249.
140 [2005] 4 SLR 249 at [101].

157 It has been argued elsewhere that the High Court's opinion in *S Balakrishnan v PP* that the offender would be rash even if he believed that he had averted the danger as his conduct exhibited a "recklessness or indifference" incorporates an attitude-based test for criminal rashness in the Penal Code.[141] Strictly speaking, practical indifference does not refer to an actual state of mind possessed by the individual and would not be considered to be a "subjective" test by a thorough-going subjectivist such as Glanville Williams. However, Antony Duff has argued that practical indifference is no less subjective than advertent recklessness as the latter also contains an objective element in the form of requiring that the risk be unjustified.[142]

C. Practical indifference applied to recklessness knowledge

158 The above authorities that speak of an attitude-based concept of recklessness deal with cases of recklessness as to consequences. Offences involving false statements relate to recklessness as to circumstances, that is, whether a person was reckless as to the existence of a particular fact (*ie*, that the statement was untrue or misleading). The Law Commission Report and the Australian Criminal Code Act view both types of recklessness as identical though the exact formulation has to be changed to suit each type. In other words, there should not be a separate test for the reckless making of false statements.

159 If one accepts the need for a unified test of recklessness, this is another reason for rejecting *Derry v Peek* in view of its limited application. On the other hand, the attitude-based test for recklessness which has been outlined earlier is usable in both types of offences. A person who believes that a statement is true, but does so because he possesses an attitude of practical indifference to the risk (*ie*, not merely because his belief is unreasonable) that it may be untrue, is as blameworthy as a person who adverts to an unjustified risk that his statement may be false but carries on to make the statement.

160 Returning to the case of *PP v Able Wang*, it is suggested that the offender there exhibited a practical indifference amounting to recklessness. He had a total of three days to verify the truth of the rumour which contained allegations of a very serious matter. In fact, he did make attempts to verify it which suggests that he was aware of the risk that it was untrue. Despite being unable to verify the truth of the statement, he "pressed on" and made the statement anyway on Monday.

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141 Toh Yung Cheong, "Inadvertence as Rashness: *S Balakrishnan v PP*" [2007] 19 SacLJ 168.

142 Antony Duff, *Intention, Agency and Criminal Liability* (Basil Blackwell, 1990) at p 157.

161 The main difference between practical indifference as recklessness and the *Derry v Peek*-type *mens rea* rests in the treatment of persons with positive but unreasonable beliefs. If a person has a positive belief in the truth of the information, the *Derry v Peek*-type *mens rea* does not proceed to examine his reasons for holding that belief. Practical indifference, on the other hand, will do so and, in certain circumstances, will label such a person as reckless despite the fact that he had a positive belief.

162 On the facts of *PP v Able Wang*, a court would also be able to find that AW was indifferent to the risk that the information was false. In particular, AW had the whole weekend to verify the information. The fact that his other sources, including his lawyer, told him they had not heard of such a rumour would have made him aware of a risk that the information was false. Nevertheless, despite not being able to verify the rumour after two days, AW pressed on regardless and published the information.

VII. Conclusion

163 This article has outlined the position of the traditional fault elements of actual knowledge and reckless knowledge in our local jurisprudence. Added to this is the recent clarification by the Court of Appeal that wilful blindness, while being the legal equivalent of knowledge, nevertheless does not require the stringency of a virtually certain suspicion before being triggered. The upshot of this is that there is very little conceptual space available between wilful blindness and reckless knowledge for a new *mens rea* to be created.

164 However, it is not clear whether the High Court in *PP v Able Wang* adopted the Court of Appeal's definition of wilful blindness. Whatever the case, the High Court in *PP v Able Wang* felt that the appropriate *mens rea* for "does not care" was recklessness and an additional element. The High Court concluded that this additional element was dishonesty and made reference to *Derry v Peek*. However, dishonesty in *Derry v Peek* was "actual dishonesty" or "fraud" and tantamount to actual knowledge of falsity. The High Court got around this by recasting the original requirement of dishonesty into the purely cognitive test of "no honest belief in the truth". Under this formulation, the word "honest" is otiose and a distinctive concept of dishonesty fails to emerge. As such, the High Court needed to identify a further element that explained what it meant to be dishonest, and it did this by recognising the additional element of assuming responsibility by warranting the truth of the statement as the key to the identification of dishonesty. However, it has been suggested that theoretical difficulties

arise as the line between the modified *Derry v Peek mens rea* and the existing categories are at certain points indistinct.

165 Though the High Court successfully navigated the theoretical difficulties of applying a 19th century *mens rea* to a modern offence concerning securities regulation, it is suggested that *Derry v Peek* is more trouble than it is worth. The confusion it engendered was recognised by the English Law Commission and it does not appear to play any further part in English criminal law. Furthermore, reckless knowledge, if it incorporates an attitude-based conception of recklessness, is more than up to the task of identifying blameworthy behaviour in the context of false or misleading statements. There is also no good reason for s 199(i) and s 200(1)(c) of the SFA to require different fault elements when the offences are similar. As such, Parliament may wish to consider amending s 199(i) by replacing "does not care" with "reckless" when it has the opportunity to do so.