DEFINING THE FAULT ELEMENTS OF DRIVING OFFENCES

The legislation governing driving offences contains a bewildering array of fault elements, including "recklessness", "rashness", "negligence" and driving in a "dangerous manner" or "without due care and attention". Not surprisingly, the courts have struggled to define these concepts in a consistent and readily accessible way, and differences have emerged between Malaysia and Singapore. This article analyses the different types of fault in the light of judicial pronouncements and the facts of selected cases. It argues that, with rigorous analysis, it is possible to explain the various fault elements in terms of degrees of culpability. However, it may be desirable to simplify the law and to rationalise the statutory penalties. Consideration should also be given to the adequacy of current laws in addressing the problem of deaths and injuries caused by drunken drivers.

Neil **MORGAN**
BA (Oxon); MA (Sheffield)
PhD (Western Australia)
Professor of Law, University of Western Australia.

Stanley **YEO**
LLB (Hons)(University of Singapore); LLM (Wellington);
LLM, PhD, LLD (Sydney);
Professor of Law, National University of Singapore;
Adjunct Professor of Law, Southern Cross University, Australia.

I. Introduction

1 Motor vehicles have become an essential form of transport for people and goods, and driving is a daily activity for sizable numbers of the population. At the same time, it is undeniable that the motor vehicle is a potentially lethal device which is capable of causing death or serious injury whenever it is in motion, and that there are particular risks if the driver is intoxicated. It is essential for the criminal law to effectively target various forms of errant driving behaviour and, in Malaysia and Singapore, specific driving offences are contained in the Road Transport Act 1987[1] and Road Traffic Act[2] respectively. The primary purpose of these offences is deterrence through threat of severe punishment in the hope that drivers will be more vigilant with respect to the safety of other

1 (Act 333, Reprint 2001).
2 (Cap 276, 1997 Ed).

road users. These "road traffic legislation" offences are built around the concepts of careless, dangerous and reckless driving.

2 However, there is a complicated interplay between the specific road traffic offences and the offences of general application contained in the Penal Code. This is most apparent in cases where the accused person's driving has resulted in death. Here, it is not uncommon to find that a charge is brought for the Penal Code[3] offence of causing death by a rash or negligent act (hereinafter after called the "s 304A" offence) rather than for a road traffic legislation offence. In the very worst types of case, where the accused has used a motor vehicle as a "weapon" in order to kill or injure the victim, it is possible for the accused to be charged with murder.[4] Furthermore, if the accused has driven in a manner that he or she knows is likely to cause death, the offence may be one of culpable homicide not amounting to murder under the Penal Code. In cases involving non-fatal injuries, it is also possible to invoke Penal Code offences such as "voluntarily" (in other words, intentionally or knowingly) causing hurt or grievous hurt, and the lesser offences of causing hurt (or grievous hurt) by rashness or negligence.

3 The first part of this article will, in the main, examine the fault elements of the s 304A offence and the principal driving offences contained in the road transport legislation. The problem with the fault elements is that they are undefined and have been left to the courts to interpret and apply as best as they can. The first objective of this article is therefore to explore the legislative definitions of the offences, the prescribed penalties and the case law, and to explain the likely scope of the various offences and fault elements. As will be seen, this is no easy task since there are many uncertainties and few ready or conclusive answers. Building on this discussion, we then canvass the difficulties that arise with respect to drivers who cause death or injury whilst under the influence of alcohol or drugs, and ask whether Singapore and Malaysia should follow the direction of some Australian jurisdictions. The article concludes by mapping (but not necessarily resolving) a law reform agenda.

3 1976 (Act 574)(Malaysia); (Cap 224, 1985 Ed)(Singapore).

4 Under s 300 of the Penal Code, murder requires proof of an intention to kill; an intention to cause a bodily injury that is sufficient in the ordinary course of nature to cause death; or knowledge that the act is so imminently dangerous that it must in all probability cause death or a bodily injury that is likely to cause death. For examples of cases exploring the question of culpable homicide and murder convictions in the context of driving, see *PP v Mahfar bin Sairan* [2000] 4 MLJ 791 and *PP v Wan Chin Hon* [2005] SGHC 121.

II. Offences: Structure and penalties

4 The relationship between the offences with which we are mainly concerned, and their punishment, is best illustrated by means of a table:

Table One

The Offences and Their Penalties

Offence	Penalty (Malaysia)	Penalty (Singapore)
1. Driving without due care and attention	Section 43 RTA Maximum 1 year's imprisonment or a fine of 4,000 to 10,000 ringgit, or both	Section 65 RTA First offence: Maximum 6 months' imprisonment or a fine of $1,000, or both Subsequent offence: Maximum 12 months' imprisonment or a fine of $2,000, or both
2. Negligent driving *simpliciter*	Section 279 Penal Code Maximum 6 months' imprisonment or a fine of 2,000 ringgit, or both	Section 279 Penal Code Maximum 6 months or a fine of $1,000, or both
3. Negligence causing death	Section 304A Penal Code Maximum 2 years' imprisonment	Section 304A Penal Code Maximum 2 years' imprisonment
4. Reckless or dangerous driving *simpliciter*	Section 42 RTA First offence: maximum 5 years' imprisonment or a fine of 5,000 to 15,000 ringgit, or both Subsequent offences: maximum 10 years' imprisonment or a fine of 10,000 to 20,000 ringgit, or both	Section 64 RTA First offence: maximum 1 year's imprisonment or a fine of $3,000, or both. Subsequent offences: 2 years' imprisonment or a fine of $5,000, or both
5. Rash driving *simpliciter*	Section 279 Penal Code Maximum 6 months' imprisonment or a fine of 1,000 ringgit, or both	Section 279 Penal Code Maximum 6 months' imprisonment or a fine of $1,000, or both

6. Reckless or dangerous driving causing death	Section 41 RTA Minimum 2 years' imprisonment, maximum 10 years or a fine of 5,000 to 20,000 ringgit, or both	Section 66 RTA Maximum 5 years' imprisonment[5]
7. Rashness causing death	Section 304A Penal Code Maximum 2 years' imprisonment	Section 304A Penal Code Maximum 2 years' imprisonment

5 To assist with the exercise, the various fault elements of the offences to be examined have been divided into four clusters, namely, (i) careless driving; (ii) inadvertent risk-taking; (iii) dangerous driving; and (iv) advertent risk-taking driving. Under the first cluster are the fault elements of the first three offences in the table: driving without due care and attention, negligent driving *simpliciter*, and negligent act causing death. All of these involve an objective failure to meet the standards that are expected of a reasonable, careful driver. The term "inadvertent risk-taking" is used as shorthand for those cases where the accused has failed to recognise and take account of an obvious risk. Although this may be regarded as a form of carelessness, some cases categorise it as a species of recklessness. The third cluster comprises the fault element of dangerous driving (part of offences 4 and 6 in the table). Dangerous driving also involves an objective inquiry but, given the much higher penalties that it attracts, it should be distinguished from careless driving. The offences in the final cluster involve the subjective fault element of advertent risk-taking; namely a rash act causing death and reckless driving.

III. Careless driving

6 The use of the adjective "careless" to describe this cluster identifies the essential nature of the types of fault under consideration. The accused is charged with committing an offence because he or she breached the duty of care expected of a reasonable driver. This involves objectively measuring the accused's conduct against what a reasonable driver would have done in the same or similar circumstances. The accused's subjective belief that he or she was driving carefully, or that there was no risk in driving in that manner, is therefore immaterial.

5 Enhanced maximum penalties apply in some situations to repeat offenders: Road Traffic Act (Singapore) s 67A.

7 The first of the fault elements under the "careless driving" cluster is that of driving a motor vehicle on a road "without due care and attention" under s 43 of the Malaysian Road Transport Act and s 65 of the Singaporean Road Traffic Act (hereinafter called the "driving without due care and attention" offence). This offence (often called "careless driving") is comparable with that of negligent driving *simpliciter* under s 279 of the Penal Code, which involves driving on a public way "in a manner so negligent as to endanger human life, or be likely to cause hurt or injury to any other person".[6] However, the offence of driving without due care and attention is easier to establish since it does not require the prosecution to prove that the accused's negligent driving had actually endangered life or had been likely to cause injury. This difference has rendered the s 279 offence redundant in practice. There is also nothing to be gained by way of penalty from using the Penal Code offence; as Table One shows, in Malaysia the statutory penalty for s 279 is significantly lower than for driving without due care and attention,[7] and in Singapore the punishments are identical.[8]

8 Some interesting questions have arisen regarding the degree of carelessness required for the offence of driving without due care and attention and its relationship with the related offence under s 304A. In *Abdul bin Palaga v PP*,[9] the Malaysian High Court held that the level of carelessness required for the road traffic offence is lower than that for the s 304A offence. What, then, is the degree of carelessness required for s 304A? This seemingly simple question has generated some tortuous case law. Under Malaysian law, there are some case authorities specifying the civil standard and others which seem to have adopted an intermediate standard falling somewhere between gross negligence under the English common law of manslaughter and the civil standard of negligence.[10] If an intermediate standard of negligence is required for s 304A, it would be both just and logical to prescribe the civil standard of negligence for the offence of driving without due care and attention. This is because, being a

6 The offence attracts a maximum penalty of six months' imprisonment, or a fine, or both.

7 The Malaysian offence attracts a maximum penalty of one year's imprisonment.

8 Namely, a maximum penalty of six months' imprisonment.

9 [1973] 2 MLJ 177.

10 For the civil standard, see *Anthonysamy v PP* [1956] MLJ 247. For an intermediate standard, see *PP v Joseph Chin Saiko* [1972] 2 MLJ 129. The Federal Court case of *Adnan bin Khamis v PP* [1972] 1 MLJ 274 could be read as supporting either standard. For detailed analysis see Koh Kheng Lian, C Clarkson and N Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (Malayan Law Journal, 1989), pp 478-490; and the discussion by Yong Pung How CJ in *Lim Poh Eng v PP* [1999] 2 SLR 15 at [19]-[28].

less serious offence than s 304A, the fault element should be less blameworthy. The court in *Abdul bin Palaga* seems to have taken this view since (at least on one reading of the case) it regarded s 304A as imposing the intermediate standard.[11]

9 However, this begs a further question: what if the standard of negligence for the s 304A offence is not an intermediate standard, but simply the civil standard? This is clearly the law as it now stands in Singapore.[12] But does it mean that the offence of driving without due care and attention can be satisfied by some level of carelessness falling short of civil negligence? It is submitted that this cannot be correct and that the offence of driving without due care and attention ought still to impose the civil standard. First, it is difficult to conceive of a lesser form of carelessness than the civil standard of negligence; by what measure, other than the reasonable driver's standard of care and attention, is an accused to be assessed?[13] Secondly, even if such a measure could be devised, it would be manifestly unjust to convict and punish a driver whose carelessness was insufficient to even attract civil liability. Thirdly, coherence and consistency in the law will be promoted by rendering the degree of carelessness the same for all offences involving negligence. On this basis, it is submitted that the civil standard of negligence should likewise apply to the offence of negligent driving *simpliciter* under s 279 of the Penal Code.[14] Fourthly, the simple explanation for the difference in penalty between, on the one hand, the offence of driving without due care and attention and negligent driving *simpliciter* under s 279 and, on the other hand, the s 304A offence, is that only the latter offence requires the negligent act to have caused death. It is entirely acceptable for the same standard of negligence to apply in respect of a crime involving conduct and circumstances (driving without due care and attention or driving negligently) and one involving conduct and result (driving causing death).

11 The court relied on *PP v Joseph Chin Saiko* [1972] 2 MLJ 129 which contains statements subscribing to the intermediate standard of negligence.

12 See *Ng Keng Yong v PP* [2004] 4 SLR 89; *Lim Poh Eng v PP* [1999] 2 SLR 16; *Mah Kah Yew v PP* [1969-1971] SLR 441.

13 It may be of interest to note that a 2006 amendment to the English Road Traffic Act 1988 offence provides (under s 3AZ(2)) that "[a] person is to be regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent and careful driver." This formulation clearly specifies the civil standard of negligence.

14 There is dicta in *PP v Mills* [1971] 1 MLJ 4 at 5 per Williams CJ, supporting this contention.

10 The Singapore High Court case of *PP v Tan Lian Tiong*[15] serves to illustrate the difficulties of the current law. The accused was a motorcyclist who had knocked down an old man at a pedestrian crossing, killing him. Visibility at the scene of the accident was poor because it was night, the street lighting was dim and it was raining. Furthermore, the traffic lights at the crossing were in the accused's favour. The prosecution charged the accused with causing death by a negligent act under s 304A. The trial judge acquitted the accused of this charge and also turned down the prosecution's request to amend the charge to one of driving without due care and attention under s 65 of the Road Traffic Act. On appeal, the High Court upheld the trial judge's decision to acquit the accused of the s 304A offence after examining the evidence and agreeing with the trial judge that the accused was unable to see the deceased until it was too late. Accordingly, the accused had not been negligent in causing the pedestrian's death. The court also opined that it might have been more appropriate for the accused to be charged with the s 65 offence and stated that it "did not feel that the nature of the accident warranted the harsh criminal sanctions of a charge under s 304A".[16] There are two ways to read this decision. On one reading, the court was intimating that a lesser degree of carelessness will suffice for the s 65 offence. However, an alternative reading is that the court was merely asserting that it s 304A was inappropriate because the accused had not been negligent *in causing the pedestrian's death*. That finding was immaterial to the s 65 offence which was only concerned with whether he had driven *without due care and attention*; the s 65 offence did not require asking whether a failure to exercise due care and attention had caused the accident and the resulting death. This second view seems to us to be preferable as it allows the same degree of negligence to apply to both s 65 and s 304A. However, it is unfortunate that the court did not articulate its reasons more fully.

IV. Inadvertent risk-taking

11 We turn next to the problem posed by drivers who fail to take account of a risk that would have been obvious to a prudent driver. This type of fault is a form of carelessness that, according to some Malaysian cases, is embraced by the offence of "driving of a motor vehicle on a road recklessly". It is not clear if this is also the position in Singapore. Where no injury was caused, reckless driving offences are found in s 42 of the Malaysian Road Transport Act and s 64 of the Singaporean Road Traffic

15 [2002] 3 SLR 461.
16 *Id*, at [25].

Act. Where death is caused by reckless driving, the relevant offences are s 41 of the Malaysian Act and s 66 of the Singaporean Act.

12 Noting that these provisions were borrowed directly from the English Road Traffic Act, the Malaysian courts have referred to English case law for illumination.[17] In particular, the following passage by Lord Goff of Chieveley in the House of Lords case of *R v Reid* has been relied on:

> [A] jury should only convict a defendant of driving recklessly if they are sure of the following: (i) that he was in fact driving in such a manner as to create a serious risk of causing injury to some other person who might happen to be using the road, or doing substantial damage to property; and (ii) either (a) that he recognised that there was some risk of that kind involved, but nevertheless went on to take it; or (b) that, despite the fact that he was driving in such a manner, he did not even address his mind to the possibility of there being any such risk, and the risk was in fact obvious.[18]

13 For the purposes of our discussion, type (a) will be described as "advertent risk-taking" driving, and type (b) as "inadvertent risk-taking" driving. We shall consider type (b) here and cover type (a) in Part VI.

14 The comparison in Table One[19] of the penalties for reckless driving (both *simpliciter* and where death is caused) shows that recklessness is far more serious than driving without due care and attention and negligence. Lord Goff's pronouncement in *Reid* highlights why this is so, namely, that the accused's driving created a *serious* risk of causing injury to persons or *substantial* damage to property and that he failed to think of the possibility of such a risk, even though it would have been obvious to anyone who thought about it. A driver taking such high risks, even "inadvertently", can generally be regarded as more culpable, and deserving of more severe punishment, than one who has merely breached the civil standard of negligence. As the Malaysian High Court in *PP v Zulkifli bin Omar* put it:

> The duty to take care (ie to avoid risk) is part of the obligations of any driver. If he drives in a way that in fact involves an obvious and serious

17 As we shall see, for some unexplained reason, the Singapore courts have not referred to recent English case authorities on reckless driving, although they have done so for dangerous driving which is the other type of fault recognized by the offence originating from England.

18 [1992] 3 All ER 673 at 693 and cited with approval by the Malaysian High Court in *PP v Zulkifli bin Omar* [1998] 6 MLJ 65 at 72.

19 See para 4.

> risk and gives no thought to the matter of risk or to the circumstances which make such risk apparent he is in *gross* breach of those duties.[20] [emphasis added]

15 The legislation supports such an approach to different degrees of blameworthiness. Section 41(4) of the Malaysian Road Transport Act allows for an alternative verdict of driving without due care and attention under s 43 of the Act if the more serious offence under s 41 (*ie*, reckless driving causing death) is not proved. This ensures that a driver who was not so grossly in breach of his or her duty as to be regarded as "reckless", may nevertheless be found to have breached the duty expected of a reasonable driver to be careful and attentive.

16 A further point that arises is the relationship between recklessness in the sense of inadvertent risk-taking on the one hand and negligence under s 304A on the other. If our preceding analysis is correct, and inadvertent recklessness is generally more culpable than negligence, it makes sense for negligence under s 304A to carry the same meaning as civil negligence. If s 304A was held to involve an intermediate standard of negligence, it would be very difficult to differentiate the fault element for this offence from that for inadvertent recklessness. Arguably, this is another reason why the Malaysian courts should subscribe to the civil standard of negligence for the s 304A offence.

17 To date, the Singapore courts have yet to include the inadvertent risk-taking type of recklessness pronounced in *Reid* within the offences under ss 64 and 66 of the Road Traffic Act, and the cases suggest that recklessness is limited to advertent risk-taking.[21] However, the Malaysian position can be supported on a number of grounds. One is that the offences in question were borrowed directly from English legislation thereby making English judicial pronouncements on those offences highly persuasive. Another reason is the activity sought to be criminalised itself: the potential is great for a moving motor vehicle to cause death or serious injury or significant damage to property. A crime which insists on proof of purely subjective fault (such as actual advertence to the risk) will not have the desired deterrent effect of making drivers vigilant in looking

20 [1998] 6 MLJ 65 at 75 per Vincent Ng J. There is room for further debate on aspects of our analysis. For example, it could be argued that very high degrees of negligence are just as blameworthy as inadvertent risk taking. However, as explained in para 13, inadvertent recklessness involves a higher threshold of fault than simple negligence, and the majority of cases involving inadvertent recklessness will involve a higher degree of fault than negligence.

21 See paras 30-32.

out for serious and obvious risks. To allay objections from subjectivists who insist on the concept of recklessness being confined to subjective mental states, we could limit the objectivising of that concept by *Reid* to driving offences. Indeed, that was exactly the stance taken in the English Court of Appeal in *R v Prentice*.[22] We now turn to the offence of dangerous driving, which is also objective in nature.

V. Dangerous driving

18 This type of fault is contained in the clause "driving of a motor vehicle on a road in a manner which is dangerous to the public". This appears in s 42 of the Malaysian Road Transport Act and s 64 of the Singaporean Road Traffic Act where no injury was caused, and in ss 41 and 66 of the Malaysian and Singaporean Acts respectively where death was caused. As noted earlier, this form of fault is comparable in terms of level of blameworthiness to reckless driving involving inadvertent risk-taking since both forms of fault are prescribed for the offences in question. Furthermore, these two forms of fault share in common the fact that they are objectively based, it being immaterial whether the accused knew of the risk or danger posed by his or her driving. However, in other respects, the inquiry into dangerous driving differs from that concerning reckless driving involving inadvertent risk-taking.

19 For dangerous driving, the court has to determine whether the accused had posed a danger to the public by the way he or she handled the motor vehicle. Such a determination is arrived at by assessing the manner of driving and the risk it created for other road users "having regard to all the circumstances including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road".[23] Additionally, the courts have required the accused to have "fall[en] below the care and skill of a competent and experienced driver, in relation to the manner of

22 [1994] QB 302 at 322. However, the House of Lords in *Adomako v R* [1995] 1 AC 171 subsequently held that inadvertent recklessness should no longer apply and that cases of motor manslaughter should be treated in the same way as other forms of manslaughter.

23 These circumstances are specified in the provisions themselves. They relate to dangerous driving and not to reckless driving, contrary to the opinion of the Malaysian High Court in *PP v Zulkifli bin Omar* [1998] 6 MLJ 65 at 72.

driving and the relevant circumstances."[24] The correctness of this pronouncement will be questioned below.

20 For now, a comparison between dangerous driving and driving involving inadvertent risk-taking may be made. As noted previously, the inquiry into inadvertent risk-taking focuses on the failure of the accused to give any thought to the serious and obvious risk that he or she had created when driving. That determination involves asking whether the accused should have been careful in keeping a lookout for serious and obvious risks of injury or damage occasioned by his or her driving. Thus, the manner of driving and the danger it posed are not central or even vital to the determination of whether the accused was careless in not giving any thought to the risk he or she had created. This distinction may be drawn at a theoretical level in order to rationalise the current law. However, we recognise that the distinction may be too fine to be given much importance in practice.

21 The reported cases on dangerous driving are limited in number but suggest that the courts will convict only where the circumstances of the case showed that the manner of driving was not merely careless but blatantly dangerous to the public. This is encapsulated in the judicial observation that "[c]areless driving may well be dangerous though all careless driving are not necessarily dangerous."[25] Examples given by the Singapore High Court in *Lim Poh Eng* are "overtaking a vehicle on the wrong side of it, or overtaking in the face of oncoming traffic, or overtaking when unable to see oncoming traffic, or crossing a junction against traffic light".[26] However, even these examples are not necessarily conclusive that the driving was dangerous. In one case,[27] the accused was acquitted of the offence even when he had, while driving on an expressway, overtaken a vehicle from the left and then cut across diagonally from the leftmost lane to the lane on the extreme right before hitting a boy who had dashed across the expressway. The court reached this decision after noting that the accused was not travelling at excessive speed, the prosecution had not established that he had failed to keep a lookout and that, even if the accused had seen the boy, there was nothing to indicate that he would be crossing the expressway.

24 *Ramiah v PP* [1972] 2 MLJ 258 at 259 per Raja Azlan Shah J and approved of by the Malaysian Court of Criminal Appeal in *Tan Thang Sang v PP* [1975] 1 MLJ 204 at 205.

25 *Lim Poh Eng v PP* [1969-1971] SLR 247 at 251 per Choor Singh J, after considering the English case of *R v Evans* (1962) 47 Cr App R 62.

26 *Id*, at 250.

27 *PP v Teo Lian Seng* [1996] 1 SLR 19.

22 The distinction between dangerous driving and driving without due care and attention is therefore clear in principle; the higher the degree of objective fault, the more likely it is that the case will be one of dangerous driving. Provided that negligence under the Penal Code involves the civil standard, it is easy to distinguish dangerous driving from negligence. However, it would be less easy to draw this distinction if negligence involves some form of intermediate standard.

23 Reverting to the judicial pronouncement that the accused must have fallen below the care and skill of a competent and experienced driver, this may be doubted as being part of the local law. In *Ramiah v PP* where this pronouncement was made, the court relied heavily on the following comment by Megaw LJ in the English case of *R v Gosney*:

> We do not accept that the offence of dangerous driving is 'an absolute offence'. We do not accept that a driver who has been completely blameless can be held guilty … In order justify a conviction, there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver causing the situation.[28]

24 It is clear from this comment that Megaw LJ's ruling stemmed from his concern not to make the offence one of absolute liability. Under English law, a person charged with an absolute liability offence cannot plead a reasonable mistake of fact. Furthermore, English law does not recognise offences of strict liability in respect of which the prosecution need not prove any *mens rea* in order to secure a conviction, but where the accused can plead reasonable mistake of fact. By contrast, Malaysian and Singapore law clearly recognises this type of offence on account of s 79 read with s 40(2) of the Penal Code.[29] Section 79 provides for the defence of mistake of fact exercised in good faith (*ie*, with "due care and attention") and s 40(2) provides for a General Exception such as s 79 to apply to offences within and without the Penal Code. Consequently, a person charged with dangerous driving under the road traffic legislation would be able to plead a defence of reasonable mistake of fact. Such an

28 [1971] 3 All ER 220 at 224. This judicial pronouncement has since been embodied under the English Road Traffic Act 1988, s 2A which states that a person is to be regarded as driving dangerously if :

> (a) the way he drives falls far below what would be expected of a competent and careful driver, and (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

Contrast this with the English offence of driving without due care and attention where a lower level of negligence of "falls below" is specified: *supra* n 13.

29 See further Chan Wing Cheong, "*Requirement of Fault in Strict Liability*" (1999) 11 SAcLJ 98.

avenue, if available under English law, would have gone a considerable way in allaying Megaw LJ's concerns over convicting the completely blameless driver.

25 Our courts would be much closer to the mark by following the lead taken by the Australian courts of jurisdictions which have also adopted the English offence of dangerous driving.[30] The High Court of Australia has held that the critical element of the offence is the serious potentiality of danger to others, whether realized by the accused or not, that was occasioned by the manner of driving.[31] Negligent driving does not invariably constitute dangerous driving since the offence of driving in a dangerous manner causing death requires proof of a "serious breach of the proper conduct of the vehicle" as opposed to the deviation from the standard of care expected of a careful driver.[32] The High Court in *McBride v The Queen* described the task of the prosecution as follows:

> It is essential to define what is charged as the manner of driving, so that when that has been found, the two succeeding questions can be dealt with, namely, was that manner of driving in itself or in its circumstances so dangerous to the public and, did the impact which caused the death or injury occur whilst the vehicle was being so driven. Of all these matters the jury are to be satisfied beyond all reasonable doubt.[33]

26 In Australia, dangerous driving falls within the category of strict liability offences where the prosecution need only prove the physical (or conduct) element laid down in the legislation, and no additional fault requirement is read in. This means that the accused is liable unless he or she can successfully plead reasonable mistake of fact.[34] This approach to imposing liability is essentially the same as under Malaysian and Singapore law. However, there is an important difference; in Australia, the accused only has to satisfy the evidential onus of proof, and the prosecution must disprove the defence beyond reasonable doubt. In Malaysia and Singapore, the accused must establish the defence on the balance of probabilities.[35]

30 For example, s 52A of the Crimes Act 1900 (NSW); s 19A of the Criminal Law Consolidation Act 1935 (SA); s 167A of the Criminal Code 1924 (Tas).

31 (1992) 173 CLR 572.

32 *McBride v The Queen* (1966) 115 CLR 44 at 50 per Barwick CJ.

33 *Id*, at 51.

34 See further, P Fairall and S Yeo, *Criminal Defences in Australia* (LexisNexis, 2005), ch 2. The English law does not recognize this type of offence, only 'absolute liability' offences where the accused has no recourse to a defence of reasonable mistake of fact.

35 *He Kaw Teh v The Queen* (1985) 157 CLR 523.

27 In favour of treating the offence of dangerous driving as an offence of strict liability is the relatively high requirement placed on the prosecution in establishing the dangerous manner of the accused's driving. If this can be proved, it can be argued that it is not unreasonable then to place on the accused the burden of establishing a reasonable mistake of fact. In sum, until such time as a local court reverses the ruling in *Ramiah*, the additional fault requirement expressed in that case should be proven. However, it is submitted that our courts would do well to consider the most appropriate approach at the next available opportunity.

VI. Advertent risk-taking driving

28 This cluster of fault elements for driving offences comprises purely subjective mental states which are very different from the objectively based fault elements for careless driving and dangerous driving. There are two types of subjective mental states, one of which (as judges by the maximum penalties) should be less culpable than the other. The first is "rashness" as found in the offence of causing death by a rash act contained in s 304A of the Code. As well, there is the offence under s 279 of the Penal Code of driving on a public way in a manner so rash as to endanger human life or cause hurt or injury to another person.[36] The second and more blameworthy type of fault is "reckless" driving involving advertent risk-taking found in ss 41 and 42 of the Malaysian Road Transport Act and ss 64 and 66 of the Singaporean Road Traffic Act. This is type (a) of Lord Goff's interpretation of the English offence of reckless driving in *Reid*, quoted earlier.[37]

29 Dealing first with rashness, the courts have often contrasted it with negligence in order to bring out the subjective nature of rashness under s 304A of the Penal Code. Additionally, they have held that rashness is the graver form of fault and this is reflected in sentencing practice.[38] Rashness has been judicially defined as follows:

> A culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening.[39]

36 In Part 3, we discussed the alternative form of fault provided for this offence, namely, negligent driving.

37 See para 12.

38 For example, see *PP v Poh Teck Huat* [2003] 2 SLR 299.

39 *Balchandra Waman Pathe v State* (1967) 71 Bombay LR 684 and cited with approval in *PP v Teo Poh Leng* [1992] 1 SLR 15 and *PP v Poh Teck Huat* [2003] 2 SLR 299. The

30 Although this judicial definition of rashness has been formulated in respect of the s 304A offence, it is submitted that it applies equally to rash driving *simpliciter* under s 297 of the Penal Code.

31 This definition merits close attention. First, the word "may" is significant because it denotes that the law requires the accused to have known of the *possibility* of the consequence happening. Knowledge of a higher risk, such as of the probability (*ie*, likelihood) of the consequence materialising would bring the case into the realm of culpable homicide not amounting to murder under s 299 of the Penal Code.[40] Secondly, it refers to the accused's desire for the consequence not to happen. The concluding words re-enforce this by pointing to the fact that many cases of rashness involve persons taking precautions to avoid the danger which they know their conduct has created. Doubtless, rashness is a concept that will apply in some cases where the accused has clearly recognised a risk, has no particular "hope" that the consequences will not ensue, and has not taken precautions; but the point is that it may also cover much lower levels of culpability.

32 In relation to reckless driving involving advertent risk-taking, our courts have held that such a form of fault comprises the accused knowing of the risk of possibly causing injury created by his or her driving, and carrying on without any regard or concern for the safety of other road users. The cases in this area have not articulated the law with the desired clarity. However, the difference between advertent recklessness and rashness appears to lie in the degree of culpability; recklessness seems to involve callous behaviour on the part of the accused; whereas a person may be rash even if he or she hopes that the consequences will not materialise.[41] The Malaysian High Court case of *PP v Zulkifli bin Omar* described reckless drivers as having shown a "callous disregard for the safety of other road users".[42] Likewise, in *Seah Siak How v PP*, the Singapore High Court spoke in terms of "heedless rashness" and held that reckless driving causing death under the predecessor of s 66 of the Road

quote from *Balchandra Waman Pathe* was borrowed from the earlier Madras High Court case of *In re Nidarmati Nagabhushanam* (1872) 7 MHCR 119 at 120 which was also cited by the Singapore High Court in *PP v Teo Poh Leng* [1992] 1 SLR 15.

40 The relevant fault element of which states that the accused commits that offence if he does an act "with the knowledge that he is likely by such act to cause death".

41 Regrettably, no court appears to have noted this difference. As shown by our discussion, a comparison of the two types of fault brings out their respective natures much more clearly.

42 [1998] 6 MLJ 65 at 74 per Vincent Ng J.

Traffic Act required the prosecution to prove that the accused driver was "heedless of the state of affairs on the road at the time in question".[43]

33 The facts of the Singapore High Court case of *Mohamad Iskandar bin Basri v PP*[44] may be used to illustrate the potential difference between rashness under s 304A and reckless driving involving advertent risk-taking under the road traffic legislation. The appellant was the driver of a fire engine who, in responding to an emergency call, drove at high speed across a road junction while the traffic lights were against his favour. Unfortunately, his fire-engine collided into a taxi proceeding across the junction, killing one person and injuring three others. The appellant pleaded guilty to the charge of causing death by a rash act under s 304A, and appealed against his sentence. Since it was a sentencing appeal, it was unnecessary for the High Court to elaborate on the meaning of rashness. However, the facts lend themselves well to illustrating the likely relationship between rashness and recklessness. As a preliminary matter, the appellant clearly possessed the subjective mental state required by both these forms of fault, namely, of knowing that his conduct created the risk of injury to other road users. Why then did the prosecution charge the appellant with the lesser offence? The answer is probably that the evidence showed that the appellant had hoped to avoid the consequences of the risk he created. By having the siren of his fire-engine wailing and its lights flashing, he had assumed, albeit wrongly, that all the other vehicles at the junction had noticed his fire-engine and would give way to him. This is entirely consistent with the definition of rashness cited earlier.[45] It seems quite likely that the prosecution would have brought a charge under s 66 of the Road Traffic Act had the facts been that the appellant had sped through the red lights for the sheer thrill of it, thereby displaying a callous disregard for the safety of other road users in the vicinity.[46]

34 Although distinctions can be drawn in principle between reckless driving involving advertent risk-taking and rash driving, it may well be

43 [1965] 1 MLJ 53 at 53 per Wee Chong Jin CJ, noting that the lexical meaning of "reckless" conduct was that it was "characterised or distinguished by heedless rashness".

44 [2006] 4 SLR 440.

45 See para 28.

46 The High Court in *Mohamad Iskandar bin Basri* [2006] 4 SLR 440 at [26] gave the example of "a young man driving fast and furious for the sheer thrill of it" to differentiate the appellant's case for sentencing purposes. It is submitted that the prosecution would have no hesitation charging the young man with the more serious s 66 offence.

that in practice, a court will have difficulty deciding which of the two states of mind is applicable. Normally, it will have to rely on inferences drawn from the conduct of the accused, the surrounding circumstances and other circumstantial evidence. Since the penalties for the two offences differ markedly, it can be argued that there should be strong evidence of "callous" risk-taking for the prosecution to prefer a charge of reckless driving rather than rashness, and for the court to convict for that more serious offence.

VII. Fault elements: Summary

35 The fault elements for offences under the road traffic legislation and the Penal Code are difficult to fathom for two reasons. First, the legislature has provided little guidance other than to indicate which offences are more blameworthy than others through the different penalties assigned to them. Secondly, although the legislature has not defined the various types of fault, it has used specific terms to describe each of them, and we must attempt to give meaning to each of those terms. To prevent confusion, our courts should carefully adhere to these terms and studiously avoid using one term for another. Unfortunately, there are many case examples where the courts have been lax, such as where the word "rash" has been used to describe "reckless" driving;[47] "recklessness" to describe "rash";[48] and the concept of "duty of care", which properly relates to negligence, has been applied to "rashness" under s 304A.[49]

36 However, the following propositions represent our attempt to inject greater rationality into the area, having regard to the structure of the offences, the prescribed penalties, case analysis, and deductive reasoning:

> (a) The fault element of the offence of driving without due care and attention under the road traffic legislation is arguably the same for the offence of negligent driving *simpliciter* under s 279 of the Penal Code, as well as for negligent act [in this case, driving] causing death under s 304A of the Code. In Singapore,

47 *Seah Siak How v PP* [2965] 1 ML 53 at 53; *PP v Zulkifli bin Omar* [1998] 6 MLJ 65 at 78.

48 *PP v Poh Teck Huat* [2003] 2 SLR 299 at [9] and [20]; *Mohamad Iskandar bin Basri v PP* [2006] 4 SLR 440 at [25] and [27].

49 *Mohamad Iskandar bin Basri*, *id*, at [26].

this is the civil standard of negligence, and it is probably the same in Malaysia.

(b) English authorities have identified two alternative forms of reckless driving. The first may be described as reckless driving involving inadvertent risk-taking. It covers cases where the driver gave no thought to a serious risk created by his or her driving which would have been obvious to anyone who thought about it. Such inadvertence constitutes a gross breach of the duty of care expected of a reasonable driver and is generally regarded by the law as being more culpable than the offences of driving without due care and attention and negligent driving. This form of fault is recognised in Malaysia but has yet to be recognised as a form of recklessness in Singapore. There are good reasons why Singapore may decide to follow suit.

(c) The second form of reckless driving may be described as reckless driving involving advertent risk-taking. It comprises the subjective mental state of a driver who knows that there is a risk of injury as a result of his or her driving, but who chooses to carry on. Both Malaysian and Singaporean cases suggest that this offence involves a callous disregard for the safety of other road users.

(d) Rash act [in this case, driving] causing death under s 304A of the Penal Code is another form of subjective fault. This type of fault should be the same as for the offence under s 279 of the Penal Code of driving in a rash manner so as to endanger human life or cause injury to others. It comprises a driver knowing of the risk of injury created by his or her driving and carrying on. Importantly, liability for rashness may arise even if the accused has acted in the hope that the injury will not happen. If, as we have argued, callousness is the hallmark of advertent recklessness, rash driving is less blameworthy than reckless driving.

(e) Although both negligence and rashness satisfy the s 304A offence, a rash act causing death is more blameworthy than a negligent act causing death. The conventional view of the criminal law is that, given the same fact situation (in this case causing death by driving), fault comprising a subjective mental state is generally more culpable than fault that is objectively based. The same may be said for negligent and rash driving *simpliciter* under s 279 of the Penal Code.

(f) Driving in a dangerous manner is a distinct form of fault recognised by the road traffic legislation. It comprises the particular way a driver has handled a motor vehicle and whether it thereby created a danger to the public, having regard to all the circumstances of the case. This inquiry is objective, but it is not always easy to prove the level of fault required.

(g) Different offences have been created and heavier penalties prescribed where death has occurred as opposed to cases where there is no such result. This does not mean that the fault element for the fatal offence is different from its non-fatal counterpart; they are exactly the same, with the heavier penalty serving only to mark the fact that death has been caused. Hence, the standard of negligence for the offence of negligent act causing death (s 304A) is the same for the offence of negligent driving *simpliciter* (s 279) as well as for the non-fatal offence of driving without due care and attention (s 43 of the Malaysian Road Transport Act; s 65 of the Singaporean Road Traffic Act). The same may be said for the offence of reckless or dangerous driving causing death, and that of reckless or dangerous driving *simpliciter* under the road traffic legislation.

37 We have made all these propositions somewhat tentatively and with a suspicion that the story still has some way to run, as the courts continue to finesse and develop the law. It is also obvious by now, that a strong case can be made for greater simplicity and clarity in the law. However, before mapping a possible framework for reform, it is pertinent to consider whether, as in Australia, it is necessary to introduce new laws to deal with the problem of intoxicated drivers.

VIII. Intoxicated drivers who kill or injure: Australian developments

38 All modern societies face problems of substance abuse of one sort or another. It is well known that alcohol consumption can hinder a person's capacity to drive, and in many countries alcohol consumption is directly associated with many of the most serious incidents on the roads, including fatalities and serious injuries. Legal drugs such as sleeping tablets and illicit amphetamine based drugs (such as "speed" and "ice") can also have a deleterious effect on driving capacity. In the case of sedatives, the drugs may well slow the driver's reaction time. In respect of amphetamines, there is evidence that drivers may experience an elevated sense of their capacities and may be prepared to engage in high risk behaviours.

39 The local law does, of course, deal with intoxicated drivers (and with illicit drug use generally) through a variety of offences. For example, "driving under the influence" is an offence under s 44 of the Malaysian Road Transport Act and s 67 of the Singaporean Road Traffic Act. Proven use or possession of illicit drugs can also trigger a charge under the Malaysian Dangerous Drugs Act[50] or the Singaporean Misuse of Drugs Act.[51] However, there are no specific provisions relating to causing death or injury by driving whilst intoxicated. Some Australian jurisdictions have recently enacted significant new legislation to tackle such problems.

40 The New South Wales Crimes Act 1900 (ss 52A and 52AA) and the Western Australian Road Traffic Act 1974 (ss 59, 59A and 59B) have adopted a similar approach. For our purposes, we will use the Western Australian model. The context to the Western Australian amendments was simple and tragic.[52] A young girl called Jess Meehan was run over and killed as she crossed a major road on her bicycle. The driver of the vehicle was not licensed to drive and was also well over the legal blood alcohol limit. Western Australia does not have the same array of potential driving offences as Malaysia and Singapore but does have the offence of dangerous driving causing death. The driver was not initially charged with this offence because the police took the view that, on the available evidence, it would be difficult to prove (i) that he was driving dangerously; and (ii) that his dangerous driving was the cause of the girl's death. He was therefore charged with driving under the influence of alcohol, and driving whilst under suspension and without a valid licence. However, the penalties for these offences were relatively light and the political and media perception was that justice had not been done.

41 The police response was to reconsider their initial decision not to charge the driver with dangerous driving causing death. Some time later, he was charged with this offence. Quite properly, under the law as it stood, the trial judge directed the jury that they had to consider the objective quality of the accused's driving. In other words, the question was whether he had been driving in a manner that was dangerous having regard to all the circumstances. The fact that he was drunk was not conclusive of this question; it was simply a matter that they could take

50 1952 (Act 234, Revised 1980, Reprint 2000).
51 (Cap 185, 1998 Rev Ed).
52 See Parliament of Western Australia: *Report of the Legislative Council Standing Committee on Legislation in Relation to The Road Traffic Amendment (Dangerous Driving) Bill 2004*, (*Report No 23)*, (Tabled Paper No 2791, tabled on 27 October 2004); available at <www.parliament.wa.gov.au> (accessed 7 September 2007)

into account, along with the other evidence. The jury was obviously not satisfied that he had been driving dangerously, as he was acquitted of dangerous driving causing death and of the lesser alternative offence of dangerous driving.

42 The legislature's response to this sequence of events was to enact "Jess's Law" - amendments to the Road Traffic Act that have dramatically changed the nature of the questions that fall to be considered and the onus of proof in such cases. The main features of the law as it now stands are as follows:[53]

> (a) Under s 59, the offence of dangerous driving causing death or grievous bodily harm is committed where a motor vehicle is "involved in an incident occasioning the death of, or grievous bodily harm to, another person and the driver was … driving the motor vehicle- (a) while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle; or (b) in a manner … that is, having regard to all the circumstances of the case, dangerous to the public or any person." Thus, unlike Malaysia and Singapore, the offence extends to the causing of very serious injuries as well as death.[54] There is also a separate offence, with the same basic wording, to cover such cases where bodily harm is caused.[55] However, for present purposes, the most important difference is the explicit reference to the driver being under the influence of alcohol or drugs and not just to the "quality" of the driving.
>
> (b) The wording of s 59 still places a high burden on the prosecution, which must prove that the accused was so much under the influence that he or she was *incapable* of having proper control. However, the real "teeth" of Jess's Law lie in the deeming provisions of s 59B(5). This states that "a person who had … a percentage of alcohol in his blood of or exceeding 0.15% shall be deemed to have been under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle." In other words, in cases involving drugs or where the blood

53 These laws have not been the subject of any case law to date; generally on their potential scope see the report in the previous footnote.

54 In Western Australia, grievous bodily harm involves injuries that endanger life or that cause or threaten to cause permanent injury to health: Criminal Code 1913 (WA) s 1.

55 Section 59A.

alcohol content (BAC) is below 0.15, the normal rules apply. However, in cases where the BAC is above 0.15, the prosecution does not have to prove that the driver was driving dangerously or was actually "incapable" of having proper control. As shown by Jess Meehan's case, this simplifies the prosecution task immensely, especially in cases where there are no independent witnesses who can attest to the quality of the driving.

(c) This is not an offence of absolute liability, in that a defence of limited scope is open to the accused under s 59B(6): "It is a defence for the person charged to prove that the death, grievous bodily harm or bodily harm occasioned by the incident was not in any way attributable (as relevant) (a) to the fact that the person charged was under the influence ….; or (b) to the manner … in which the motor vehicle was driven." This defence places the onus of proof on the accused person, who must establish it on the balance of probabilities. Its inclusion appears to be intended to oust the possible operation of other excuses (such as "accident") where the prosecution bears the persuasive burden.[56]

43 The new laws did not, of course, have retrospective effect but their effect can best be illustrated by reference to the facts of the Jess Meehan case. The issues in the case would now run as follows: (i) the prosecution would have to prove beyond reasonable doubt that the accused's BAC exceeded 0.15 at the relevant time; (ii) if this is proved, he is deemed to have been incapable of exercising control of the vehicle; (iii) he will be convicted unless he can prove on the balance of probabilities that the death was "not in any way attributable" to his BAC. It will be difficult for the defence to prove that the death was "in no way attributable" to the driving but in Jess Meehan's case, it would presumably have come down to proving that the manner in which she was riding her bicycle was the sole cause of her death. Clearly, it is quite possible that the new laws would have led to a different result; the prosecution would not have had to prove that the accused had driven in an objectively dangerous

56 It is unnecessary for present purposes to debate the intricacies of the Western Australian law but it may be noted that the excuse of "accident" states that the accused is 'not criminally responsible for … an event that occurs by accident.' There may well be a legal challenge to the question of whether this excuse has actually been excluded by Jess's Law; see n 49 and N Morgan, *Submission to the Legislative Council Standing Committee on Legislation in Relation to The Road Traffic Amendment (Dangerous Driving) Bill 2004.*

manner, nor would they have needed to prove causation according to the normal rules of criminal responsibility.

44 Jess's Law is undoubtedly draconian and it is intended to act as a strong deterrent. In Australia, it is unusual (though it is becoming increasingly common) for the onus of proof to be reversed, and the terms of the "causation defence" in s 59B(6) are very narrow. We are not recommending that Malaysia and Singapore should follow precisely this model but consideration should be given to the merits of the two key facets of Jess's Law. First, there may be some merit in extending the concept of dangerous driving to include specific reference to intoxication, and to include a deeming provision (or, alternatively, a rebuttable presumption) that a BAC of more than 0.15 renders the driver "incapable". Secondly, however, in terms of causation, we do not recommend any change akin to that in New South Wales and Western Australia; we believe that the prosecution should be required to satisfy the normal rules of proof.[57]

IX. Conclusion: Mapping reform

45 A bewildering and complicated array of provisions is applicable to driving offences. Some of these offences are contained in specific road traffic legislation and at one time judges took the view that these specific offences would supplant the Penal Code.[58] In the first part of this article, we tried to rationalize the various offences but it was a difficult task given the inter-related and overlapping fault elements. It is beyond the scope of this article to assess all the options but it is appropriate to map the issues that arise in any consideration of reform.

A. Simplicity

46 The first question should be whether it is desirable to retain all the various fault elements that have been identified or whether it is possible to reduce their number without reducing the effectiveness of the law. This should be possible; one of the problems that bedevils our law is that the current structure reflects historical misunderstanding more than logic. The offences of dangerous and reckless driving causing death were

57 We are, however, of the view that the causation principles in the criminal law need a ground up review: see S Yeo, N Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis), forthcoming.

58 *Adnan bin Khamis v PP* [1972] 1 MLJ 274 (Federal Court, Malaysia).

introduced in England to circumvent a specific problem, namely, the difficulty of persuading juries to convict drivers of manslaughter by gross negligence. The offences were then superimposed onto our law even though the problem did not exist here as s 304A of the Penal Code, properly understood, does not require proof of gross negligence.[59]

B. Are road traffic legislation offences necessary?

47 One option would be to consider amending the Penal Code to cover the field and to repeal the driving offences under the road traffic legislation. However, in modern society, it probably makes more sense to have a comprehensive code relating to driving offences. If so, consideration may need to be given to excluding the Penal Code offences which are based on rashness and negligence from offences on the roads, and to making the road traffic legislation the sole source of liability. This would allow the legislature to consider the fault elements that best address the problem of driving offences. It would also allow the courts to develop the jurisprudence of such offences unencumbered by the shadow of the Penal Code. It would, of course, still be necessary to apply the Penal Code to the most serious offences where the offence is one of culpable homicide or even murder.[60]

C. Defining the fault elements: Legislative and judicial responsibilities

48 At present, the road traffic legislation contains three main fault elements: lack of due care and attention, dangerous driving and reckless driving. The Penal Code contains specific driving offences and generic offences based on rashness and negligence, as well as culpable homicide. There are therefore six "tiers". By contrast, most jurisdictions rely on fewer fault elements. In England and Australia, for example, there is now generally just a three-fold distinction: was the case one of driving without due care and attention, dangerous driving or manslaughter? It should be noted that English law has abandoned the separate offence of causing death by reckless driving, partly in response to the problems surrounding the meaning of recklessness.[61]

59 As noted in para 8, there was a degree of confusion at the time the road traffic offences were introduced as to what standard of negligence applied to s 304A.

60 See para 2.

61 In 1977, English law changed to repeal the offence of dangerous driving causing death in favour of a single offence of reckless driving causing death. In 1991, the

49 There is a good deal to be said for considering a streamlined approach locally. Given our history as a codified system, there is also much in favour of the legislature then providing some basic definitions of the specified fault elements. An example of this is s 1 of the English Road Traffic Act 1991 which now provides that a person is regarded as driving dangerously if:

> (1) … (a) the way he drives falls far below what would be expected of a competent and careful driver, and (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous. …
>
> (3) …. 'dangerous' refers to danger either of injury to any person or of serious damage to property; and … regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

50 English law also now gives a statutory definition to the offence of driving without due care and attention which talks of the person 'falling below' (as opposed to 'far below') the standards of a competent and careful driver.[62] As already noted, consideration might also be given to the question whether the definition of dangerous driving should refer to intoxication and whether certain levels of intoxication should give rise to a presumption against the accused person.

D. Penalties

51 If the offence elements are reassessed, there will also need to be a reconsideration of the most appropriate penalties for the different tiers of offence. Should the current regime be retained, some fine tuning is required. At present, the most obvious anomaly concerns the penalties under s 304A. Rashness involves significantly greater fault than negligence, a fact that is recognised in sentencing decisions,[63] and is conceptually much closer to advertent recklessness than to negligence. However, it attracts the same maximum as negligence and less than rashness.

52 Looking first at Singapore, there is therefore a good deal to be said for the proposal to increase the maximum penalty of offences of

offence of reckless driving causing death was repealed and replaced by dangerous driving causing death.

62 For the precise text see n 13 above.

63 *PP v Poh Teck Huat* [2003] 2 SLR 299.

rashness under s 304(A) to five years' imprisonment.[64] However, given that reckless driving seems to be used in cases involving a *high degree* of rashness,[65] there should be some differentiation in penalty between reckless driving and rashness. It may be appropriate for Singapore to consider increasing the maximum for such offences to, say, seven years' imprisonment. This will differentiate rashness and recklessness but will also ensure that the maximum under the Road Traffic Act is less than the maximum of ten years' imprisonment that applies to culpable homicide not amounting to murder where the fault element is knowledge rather than intent.

53 In Malaysia, the maximum penalty under the road traffic legislation is 10 years' imprisonment and the minimum is 2 years, whereas the maximum under s 304A is just two years. There are some problems with this. It does not make sense for the *minimum* for dangerous driving under the Road Transport Act to be equivalent to the *maximum* under s 304A, because the culpability involved in rash driving may well be greater than in dangerous driving. The current structure also makes too much depend on the choice of charge. For these reasons, it is recommended that the Malaysian legislature should increase the maximum penalty for rash act under s 304A to around 5 years.

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64 Penal Code (Amendment) Bill 2006 (Singapore), s 40. Unfortunately, the Bill does not also propose increasing the penalty for rash driving *simpliciter* under s 279 of the Penal Code.

65 See para 30.