Case Note

INADVERTENCE AS RASHNESS

S Balakrishnan v PP
[2005] 4 SLR 249

It has been pointed out that the definition of rashness adopted by the Singapore courts contains a "curious anomaly." On the one hand, it appears to mirror the traditional English test of advertent recklessness which requires the offender to have an actual consciousness of an unjustifiable risk. On the other hand, the definition is accompanied by an exception to this general rule which has led commentators to ask whether rashness is strictly confined to advertent conduct or whether certain forms of inadvertent conduct can amount to rashness. This note examines the case of *S Balakrishnan v PP* and concludes that the High Court has decided on the latter interpretation of rashness.

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I. Rashness introduced

A. The case of PP v Teo Poh Leng

1 Rashness is a term used throughout the Penal Code. However, it is not defined by the Penal Code and Singapore courts usually refer to the definition given in the case of *PP v Teo Poh Leng* [1992] 1 SLR 15. The offender in *Teo Poh Leng* pleaded guilty to a charge of causing death by a negligent act under s 304A of the Penal Code. At the material time, the offender was driving a car and as she negotiated a left hand bend, she lost control of the vehicle which subsequently mounted the pavement and caused the death of two pedestrians. She was fined $5,000 and disqualified from driving for five years by the trial court. The prosecution appealed against the sentence on the ground that it was manifestly inadequate. The High Court explained the distinction between rashness

* This note is written in the author's personal capacity and does not necessarily reflect the views of the Subordinate Courts.

and negligence and held that on the facts of the case, a custodial sentence was not warranted but increased the fine to $10,000 and disqualified the offender from driving for life.

2 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* (1872) 7 MHC 119 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.

3 Secondly, he referred to *Empress of India v Idu Beg* (1881) ILR 3 All 776, where Straight J explained that rashness involved:

> Hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences.

4 Taken as a whole, the definition of rashness in *Teo Poh Leng* appears to be broadly consistent with the traditional conception of recklessness under English law which generally requires an actual consciousness of an unreasonable risk. This subjective test, which I will refer to as advertent recklessness, is also reflected in the English Law Commission's Working Paper No 31, *Codification of the Criminal Law: General Principles. The Mental Element in Crime* (1970) at p 47:

> A person is reckless if, (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and (b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present.

B. The curious anomaly outlined

5 The formulation of Holloway J in *Nidamarti* contained an exception to the general requirement of actual consciousness of risk. *Nidarmarti* suggests that an actor who becomes aware of the risk and

then takes steps which he or she believes are sufficient to prevent the risk, nonetheless acts rashly despite the fact that there is no longer a subjective awareness of this risk. Victor Ramraj does not agree that such conduct should be labelled as rash as:

> Cases involving a miscalculation or discounting of risk of harm closely resemble paradigm instances of negligence because the accused is no longer subjectively aware that he or she is taking an unreasonable risk. The mere fact that the accused is aware that a risk is involved is not sufficient to impute liability since some risks are considered reasonable ones to take such that any harm that in facts results would be non-negligent.[1]

6 As such, Ramraj concludes that *Nidamarti* creates a specific exception to the general rule that rashness requires actual awareness of an unreasonable risk. To Ramraj, this appears undesirable and a "curious anomaly" as:

> It is the conscious taking of an unreasonable risk that allows us to distinguish rashness from negligence in a principled way. To treat someone who honestly believes that the risk is a reasonable or non-existent one as rash is to engage in arbitrary classification and to reject [consciousness] as the basis for the distinction between rashness and negligence.[2]

7 Ramraj's conclusion that the *Nidarmarti* exception is a "curious anomaly" appears premised on the assumption that rashness ought to be identical to advertent recklessness under English law. But could *Nidarmarti* be a correct statement of what rashness is?[3]

C. The anomaly unresolved

8 Subsequent cases have accepted the definition of rashness laid out in *Teo Poh Leng* but have not clarified whether or not rashness requires consciousness of an unjustifiable risk in every case.

9 In *PP v Tiyatun,*[4] two persons who were employed as a domestic maid and nanny respectively pleaded guilty to a charge of causing death by a rash act under s 304A of the Penal Code. The offenders force-fed a 21

1 Victor Ramraj, "Criminal Negligence and the Standard and Care" [1999] Sing JLS 678 at 684.
2 *Id* at 685.
3 Though his point that the *Nidamarti* definition apparently does not contain a coherent principle which justifies the exception is acknowledged.
4 [2002] 2 SLR 246

month old child by pressing the nostrils of the child together while holding his hands down in order to force him to open his mouth, whereupon food was inserted into his mouth. The offenders were sentenced to nine months' imprisonment each and the prosecution appealed against the sentences. The prosecution submitted, *inter alia*, that the district judge had erred in law by holding that the offence stemmed from their ignorance as "the crux of the offence was one of acting with consciousness that mischievous and illegal consequence may follow".

10 Yong CJ agreed with this submission that the district judge had indeed erred in law and held at [8]:

> Ignorance of a fact implies a lack of knowledge or awareness of it. On the present facts, this was obviously not the case as the respondents had admitted to being conscious that death was at least a possible consequence of their method of force feeding. By their own admission, they were clearly not ignorant of the consequence, as improbable as they might have considered it to be, and had chosen to proceed regardless of their recognition of the risk of death.

11 While the High Court in *PP v Tiyatun* stated that while the offenders were clearly not ignorant because they had admitted to being conscious of the risk of death, it did not state that consciousness of risk was necessary for a finding of rashness in every case. It also did not have to deal with the issue of whether an offender was still rash if he had ruled out the risk in the belief that he had taken sufficient precautions.

12 There was a brief mention of this issue in the case of *PP v Poh Teck Huat*,[5] a case of a motorist causing death by a rash act under s 304A of the Penal Code. Yong CJ, after affirming the definition of rashness in *Teo Poh Leng*, observed at [25]:

> Thus, my starting point as to Poh's culpability was that it could not be regarded as being akin to mere negligence, as it showed callousness on Poh's part with regard to the risk that he was exposing other road users to. To this, I was guided by the fact that, by slowing down, Poh was clearly aware of the risk that he was taking, yet he had nonetheless chosen to drive on in the hope that an accident would not occur in the mistaken belief that, by slowing down, he had taken sufficient guard against it.

13 Though Yong CJ appeared to be stating that the offender was rash even though he had a mistaken belief that he had taken precautions, the

5 [2003] 2 SLR 299

context of his observations must be considered. The offender pleaded guilty to the charge and accepted that he was rash and the argument that he had no actual consciousness of an unjustifiable risk was probably not raised.[6]

14 Since the offender was unlikely to have claimed that he had eliminated all consciousness of risk when pleading guilty, the High Court may have been of the view that he had reduced but not eliminated the unjustifiable risk. Since he was still conscious of an unjustifiable risk, he would still be rash even if he believed the risk was reduced. However, the distinction between an offender who manages to completely rule out the unjustifiable risk and the offender who despite his precautions is still aware of an unjustifiable, albeit vastly reduced, risk seems to be an extremely fine one.[7]

15 Alternatively, it may well be that offences involving motor vehicles are in a separate category altogether. Professor Glanville Williams has suggested that even if advertent recklessness should be the test for most offences involving recklessness, an exception should be made for motor vehicle offences on public policy grounds and recklessness there should include acts of gross negligence.[8]

II. The case of *S Balakrishnan v PP*

16 In *S Balakrishnan v PP*,[9] the High Court finally had an opportunity to deal with the "curious anomaly" as a defendant charged with abetting a rash act claimed that he had genuinely believed that he had eliminated any unjustifiable risk.

A. The facts

17 Between 13 to 22 August 2003, at an army training facility at Pulau Tekong, an island off the north-east coast of Singapore, the Commando Training Wing of the School of Commando was conducting a Combat Survival Training Course ("CST Course") for participants from various units of the Singapore Armed Forces.

6 See Chan Wing Cheong, "Criminal Law" (2003) 4 SAL Ann Rev 180.
7 This was one of the reasons given by Lord Diplock for an expansion of the meaning of recklessness in *Caldwell:* see para 40 of this note.
8 Glanville Williams, "Recklessness Redefined" [1981] CLJ 252 at 279.
9 [2005] 4 SLR 249

18 In the afternoon of 21 August, the syllabus called for the trainees to undergo prisoner-of-war training. Essentially, the training would simulate what it would be like for trainees to be captured as prisoners-of-war. Trainees would be brought to various stations where either "hard" or "soft" interrogation techniques would be used to extract information from them.

19 One of these stations was the water treatment station where trainees were questioned by the instructors and if they did not reveal the information required, the trainee's head would be submerged into a tub of water for varying periods of up to about 20 seconds. When they were brought up to the surface, questions would be asked, and if they did not reveal the truth, would be submerged again.

20 The two victims in the case were blindfolded and had their hands bound behind their back. They were then dunked into the water tub several times. Each time, they forcibly held down though they struggled violently. As a result of this treatment, one of the victims suffered near drowning and acute respiratory distress and had to be admitted to the intensive care unit of the Singapore General Hospital. The second victim was declared dead shortly after being heli-evacuated from the Army medical centre at Pulau Tekong to Singapore General Hospital.

21 According to the lesson plan for the Combat Survival Training Course, trainees were meant to be doused with water and their heads were not be dunked into water at any time. Evidence was also led from a medical expert that such dunkings were intrinsically dangerous as it could lead to the person aspirating water and drowning.

22 All the accused persons who were charged in connection with this incident were convicted. However, two of the accused persons appealed against their conviction, Warrant Officer Balakrishnan and Captain Pandiaraj.

23 WO Balakrishnan was the course commander and Capt Pandiaraj was the supervising officer of the CST Course. They were not the persons who actually performed the dunkings. Instead, WO Balakrishnan was convicted of abetting those who performed the dunkings by illegally omitting to stop the dunkings when he had the power to do so, while

Pandiaraj was convicted of abetment by instigation as he had given instructions for the dunking to be carried out.[10]

24 During the hearing of their appeal, the appellants raised several grounds of appeal. One of the grounds of appeal raised by Pandiaraj was that while he gave instructions for the trainees to be dunked, he had set certain limits for the instructors who carried out the dunkings. In particular, he gave approval to WO Balakrishnan for the trainees to be dunked three times for 5-10 seconds each time.[11] Evidence was also led that in at least one previous CST course, trainees were also dipped into water for the same amount of time and none of the trainees had suffered any ill effects.

25 Therefore, Pandiaraj claimed that though he realised that there was a risk, he genuinely believed that he had eliminated the risk by setting limits for the instructors and therefore had no actual consciousness of an unjustifiable risk at the time of the offence.

26 Furthermore, Counsel for Pandiaraj submitted that since the instructors had exceeded those limits without his knowledge, he could not be faulted for it. In particular, the instructors had dunked the trainees for up to 20 seconds each time instead of the 10 seconds approved by Pandiaraj and had used their fingers to dig the noses of trainees which restricted their ability to hold their breath and hastened the aspiration of water into the lungs.

B. The decision

27 On appeal, the High Court made the following observations about Pandiaraj's culpability:

> The fact that Capt Pandiaraj did not intervene even though he was responsible for safe conduct of the course suggested strongly that he endorsed what was being done. This must have spurred the instructors on and given them the encouragement they required for their maltreatment of the trainees.[12]

10 As there were two victims, one who died and one who suffered grievous hurt, both Balakrishnan and Pandiaraj each faced two charges, one for abetting the offence of causing death by a rash act under s 109 read with s 304A of the Penal Code and the other for abetting the offence of causing grievous hurt by a rash act under s 109 read with s 338 of the Code.

11 [2005] SGDC 71 at [66].

12 [2005] 4 SLR 2 at [72].

> …
>
> Even if I had found that dunking was permitted by the rules, I was of the opinion that the manner of dunking instigated by Capt Pandiaraj went far beyond any permissible boundaries and qualified as a rash act. Capt Pandiaraj admitted that dunking trainees up to four times for 20 seconds each time was risky, and indeed, that the water treatment station was the most dangerous station in the CST course. He nevertheless insisted that there was no danger because the dunking was carried out by instructors who knew the rules, but then claimed that throughout the three hours when he was stationed by the water treatment station, he did not once monitor the instructors to ensure compliance with these rules.
>
> In my view, this very admission contained all the ingredients necessary for a finding of criminal rashness. Capt Pandiaraj was conscious of the danger inherent in the manner of dunking stipulated by him but still instructed his subordinates to carry on with the act in that particular manner. He may have believed that he had minimised or even averted the danger by setting down certain guidelines for the instructors, but his criminality lay in his running the risk of doing the act. His failure to supervise the water treatment, or to stop the instructors from going beyond the guidelines he set, exhibited a recklessness or indifference as to the consequences of the dunking"[13]

C. The interpretation

28 Associate Professor Chan Wing Cheong, after referring to [101] of the High Court's judgment,[14] expressed the view that:[15]

> It is unfortunate that the court appeared to suggest in the passage quoted [above] that rashness can be proved even if the second appellant believed that he had adverted the danger. The last sentence in the quoted passage ("exhibited a recklessness or indifference…") however, suggests that the court may not have accepted that the second appellant truly believed that the guidelines had averted the danger – in which case, he would still be subjectively aware of the danger and was, therefore rash.

29 According to Assoc Prof Chan's suggested interpretation of the case, the Court elided the issue of the "curious anomaly" by finding that Pandiaraj did not actually believe that he had ruled out the risk. In such a situation, Pandiaraj would be in a similar position to the motorist in *Poh*

13 [2005] 4 SLR 2 at [100]–[101].
14 Reproduced in the paragraph above.
15 Chan Wing Cheong, "Criminal Law" (2005) 6 SAL Ann Rev 199 at 211.

Teck Huat who took precautions to reduce the risk but was nonetheless still aware that an unjustifiable risk remained.

30 Apart from the fact that the judgment did not explicitly make such a finding, such an interpretation may be difficult to square with the facts. After all, Pandiaraj was an army officer with a good service record and some years of experience. He was also entrusted with the safety of the 133 trainees in the CST Course. Would his claim that he would not have endangered the safety of his fellow soldiers by *consciously* allowing an unjustifiable risk not have some weight?

31 The primary task of determining the truth in Pandiaraj's claim that he genuinely did not believe that there was an unjustifiable risk fell on the trial judge as the trier of fact. The trial judge had this to say about Pandiaraj's culpability:

> The presence of CPT Pandiaraj at the water tub area, during the water treatment, is very significant. It indicated that he expected the instructors to conduct the water treatment as he had directed. The fact that he did not intervene when both the Deceased and Captain Ho were undergoing water treatment would suggest that he sanctioned what was being done even though he *ought to know* that harm or injury may result from the dipping. It also shows his callousness. His indifference would have emboldened the instructors to carry on with the water treatment without regard to the do's and don'ts of the lesson plan.[16] [emphasis added]

32 From the above extract, it appears that the district judge was of the view that the accused ought to have known that there was an unjustifiable risk which is quite different from saying that the accused was actually aware of the risk. In certain circumstances, a court may infer knowledge of a certain set of facts that an accused was wilfully blind to those facts. but there was no finding to this effect. Therefore, the trial judge appeared to take the position that it was not important in Pandiaraj's case for there to be a finding of an actual consciousness of risk.

33 Instead, the trial judge, immediately after saying that the accused ought to have known, described him as callous and indifferent. This was echoed by the High Court's judgment that Pandiaraj exhibited a recklessness or indifference as to the consequences of the dunking.

16 [2005] SGDC 71 at [135].

34 Therefore, *Balakrishnan* appears to have explicitly decided that an offender could be rash even if he had subjectively believed that he had averted the unjustifiable risk. In making this finding, did the courts simply apply the *Nidarmarti* exception which appears to contain no coherent principle to distinguish rashness from negligence, or did the court rely on something else? In my view, the answer to this question lies in the use of the word indifference by both the trial court and the High Court.

35 In order to develop a fuller understanding of the concept of indifference, I will now turn to the English law on recklessness. For the purpose of the following discussion, I will treat the terms "rashness" and "recklessness" as interchangeable though the ordinary meaning of rashness is wider.

III. Indifference explained

A. The need for an expanded definition of rashness: lessons from English law

36 *Balakrishnan*'s case appears to be the first occasion in which an accused was found to be rash because he was indifferent to the risk. It also appears that one who is indifferent is not conscious of an actual risk. This leads to the question as to whether this is an undesirable addition to the otherwise purely subjective test of consciousness of risk.

37 Professor Alan Norrie suggests that English criminal law concerning the identification of the fault elements of criminal conduct has developed along orthodox-subjectivist lines.[17] Though liability is assigned on the basis of subjective fault elements such as intention and recklessness (as opposed to purely objective elements as is the case with negligence), the tests are cognitive in nature and focus on the knowledge of the accused. This is the case for intention which focuses on the person's knowledge that death would result and for advertent recklessness which focuses on the person's knowledge or consciousness of the risk in question.

38 However, a purely cognitive test cannot produce a definition of rashness that is a perfect "moral fit" because we do not evaluate moral

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

culpability or blameworthiness purely in terms of what the accused knew or did not know. If we rely on a purely cognitive test for rashness which focuses on what the accused was actually aware of, this may result in definition that was under-inclusive: such a definition would not capture blameworthy conduct that we would wish to label as rash or reckless. This was precisely the problem faced in the English House of Lords in *Commissioner of Police of the Metropolis v Caldwell*.[18] As *Caldwell* recklessness does not form part of Singapore law,[19] the exact formulation of the Caldwell test need not concern us here. However, the reasons given by the House of Lords for extending the definition to recklessness to include objective elements is instructive.

39 In *Caldwell*, the offender had a grievance against a proprietor of a residential hotel. In the early hours of the morning, after getting himself drunk, he decided to take revenge against the proprietor by setting fire to the hotel. Though he succeeded in starting a fire, the flames were extinguished before any damage was caused. He was charged with destruction of property while being reckless as to whether the life of another would be endangered. The accused's defence was that he was not aware of any risk as he was drunk. The question of law certified for the opinion of the House of Lords was whether self-induced intoxication was relevant to the charge in question.

40 The House of Lords could have disposed of the matter simply by stating that self-induced intoxication would not be relevant to the charge.[20] However, Lord Diplock recognised that the traditional definition of recklessness was underinclusive and explained why the definition should be expanded. Professor Andrew Ashworth succinctly outlines these reasons:

> (a) First, the dividing line between awareness and unawareness of risk is no narrow and so difficult to prove that juries and magistrates should not be required to labour over it. It may be impossible to know whether an offender was fleetingly aware of the consequences of his action

18 [1982] AC 341

19 Victor Ramraj is of the same view, *supra*, at p 683.

20 In fact, Lord Diplock at 355 referred to the American Model Penal Code which states "When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."

> (b) Secondly, in ordinary speech, the term "reckless" is wider than awareness of risk, and includes lack of care and lack of thought.
>
> (c) Thirdly, it may be no less blameworthy for a person to fail to foresee an obvious risk than it is to see the risk and knowingly take it.[21]

41 Of these three reasons, Ashworth was of the view that the third reason was the only one worthy of being called a justification for expanding the definition.[22] However, even if the traditional definition of recklessness in terms of conscious risk-taking is underinclusive, a definition that includes inadvertent conduct runs the risk of being overinclusive unless it includes coherent principle that separates the rash from the negligent.

B. Moral fit

42 One concept that seeks to fill the gap in the "moral fit" of advertent recklessness is the concept of practical indifference. Antony Duff argues the concept of practice indifference can be marshalled to distinguish the reckless from the merely negligent and thus provide the necessary "moral fit." According to Duff, recklessness can be portrayed as a kind of practical indifference which can be manifested both in choosing to take an unreasonable risk, in failing to notice an obvious risk, or in acting on an unreasonable belief that there is no risk.[23] Duff states:

> The indifference which constitutes recklessness is a matter, not of feeling as distinct from action, but of the practical attitude which the action itself displays.[24]

43 Indifference is not determined by an inquiry into what flashed through the accused's mind at the time of the offence. Instead, the court is required to interpret the facts and circumstances surrounding the accused's conduct to see if it reveals an actor who was indifferent to the protected legal interests of the victim. However, it is not just any sort of indifference that leads to a finding of recklessness. Alan Norrie states that:

21 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 3rd Ed, 1999) at p 188.
22 *Ibid*.
23 Antony Duff, *Intention, Agency and Criminal Liability* (Basil Blackwell, 1990) at 157.
24 *Id* at 162.

> Duff argues that an actor need not be aware of a risk if his actions manifest a form of indifference or carelessness that can be characterised as callous.[25]

44 According to Duff, the test of practical indifference still treats recklessness as a "subjective" notion as it refers to the accused's attitude towards the victim's interests. Attitudes, according to Duff, are as "subjective" as intentions or knowledge. Though practical indifference appeals to an objective standard insofar as the accused must be shown to have been culpable in either in failing to notice the risk or in believing that there was no risk, this was no different from the traditional subjective test which considers whether the risk taken by the accused was an unjustifiable one.

45 In the context of the offence of reckless rape,[26] the English Court of Criminal of Appeal has adopted an approach similar to Duff's concept of practical indifference insofar as it looks at the attitude of the accused. The English Court of Appeal has consistently held that an offender commits rape recklessly if he "could not care less"[27] or "carried on regardless"[28] of whether or not the victim was consenting. As recently as 2000, despite what might be termed a 'retreat' from the unbridled objectivism of *Caldwell* recklessness,[29] the English Court of Appeal in *R v Adkins* [2000] 2 All ER 185 appeared to affirm that reckless rape could still be committed without an actual consciousness of a risk that the victim was not consenting. Roch LJ, in dealing with a defence submission that the trial judge was required to give a direction to the jury on mistaken belief in consent, held:

> The question of honest belief does not necessarily arise where reckless rape is in issue. The defendant may have failed to address his mind to the question whether or not there was consent, or be indifferent as to whether there was consent or not, in circumstances where, had he addressed his mind to the question, he could not genuinely have believed that there was consent.

25 Norrie, *supra*, at 70. As the reader may recall, the words "callousness" and "indifference" appear next to each other in the district judge's judgment.

26 Section 1(2)(*b*) of the English Sexual Offences Act 1956.

27 *R v Thomas* (1983) 77 Cr App R 63; *R v Breckenridge* (1984) 79 Cr App R and [1984] Crim LR 174; *R v Taylor* (1985) 80 Cr App R 327. See also Simon Gardner, "Reckless and Inconsiderate Rape" [1991] Crim LR 172 and Helen Power, "Towards a Redefinition of the *Mens Rea* of Rape" (2003) 23 OJLS 379.

28 *R v Gardiner* [1994] Crim LR 455.

29 See Ramraj, *supra*, at 683.

46 Both Norrie and Ashworth are unconvinced by Duff's assertion that practical indifference is "subjective." Norrie points out that practical indifference relies upon an interpretation of behaviour that may have nothing to do with the actual attitude of the defendant.[30] However, the same could be said of the traditional test where a court's assessment of whether the risk is justifiable may be different from defendant's assessment. Ultimately, it appears to be a question of emphasis and Ashworth points out that under practical indifference, the issue of reasonableness takes on greater prominence and suggests that it would be better to explicitly recognise this.[31] On the other hand, Ramraj appears to reject practical indifference as a form of recklessness and classifies it as a type of negligence.[32]

C. Balakrishnan *explained in terms of practical indifference*

47 I will now return to the case of *Balakrishnan* to explain why the decision can be explained in terms of the concept of practical indifference rather than a case decided on the *Nidarmarti* exception. Pandiaraj may have genuinely believed that he had eliminated any unjustifiable risk by his instructions and from the fact that there were no injuries caused in previous courses. He may well have claimed that as a trained soldier, he would not consciously endanger the safety of the 133 fellow soldiers under his care. However, there was evidence led from the prosecution medical expert that there was a clear risk.

48 Under Duff's test of practical indifference, Pandiaraj would be reckless if his failure to notice the risk was due to a callous indifference to the risk. As the earlier extract of the judgment shows, the trial judge found Pandiaraj to be callous and indifferent. It is submitted that he was right in making this finding for the following reasons:

> (a) The defendant was not a trained medical professional and did not seek expert advice on the risks involved, so his conclusion that his method dunking was "safe" was unreasonable as he had no basis to so conclude.
>
> (b) Despite the fact that he was the supervising officer, the defendant displayed a 'couldn't care less' attitude to the dunkings as during the three hours he was stationed by the water treatment

30 Norrie, *supra*, at 74.
31 Ashworth, *supra*, at 187.
32 Ramraj, *supra*, at 692.

> station, he did not once monitor the instructors to ensure compliance with the rules.

49 At the hearing of the appeal in the High Court, Yong CJ adopted a similar approach. First, he held that the defendant was conscious of the risk. Secondly, he held that even if the defendant had believed that he had averted the danger:

> 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.

50 It therefore appears that the High Court accepted that inadvertence in the form of indifferent behaviour could amount to rashness and held in the case of Pandiaraj that either:

> (a) The defendant was rash because he was reckless. He was conscious of the risk and did not genuinely believe that he had averted the danger; or
>
> (b) The defendant was rash because he was indifferent. Even though he was subjectively not aware of an unjustifiable risk because he believed he had averted the danger, he had nevertheless embarked on a course of conduct that was objectively an unjustifiable risk, and this was rash because of his "couldn't care less" or indifferent attitude which was manifested in his conduct at the time of the offence.

IV. Conclusion

51 Was the High Court in *Balakrishnan* correct in affirming *Teo Poh Leng* to be an accurate statement of the law and at the same time holding that indifference could amount to rashness? In my view the High Court was correct. If the relevant definitions in *Teo Poh Leng* are read without making the assumption that they are intended to be a restatement of advertent recklessness under English law, it would seem they would include certain types of inadvertent conduct as well. Such a definition would also be perfectly consistent with the ordinary meaning of rashness which the Concise Oxford English Dictionary (Oxford University Press, 9th Ed, 1995) defines as:

> Reckless, impetuous, hasty, acting or done without due consideration.

52 As *Balakrishnan*'s case does not explain why the offender was rash even though he believed he had averted the risk, I have referred to the writings of Antony Duff and to the English cases on reckless rape to suggest that the attitude of an offender towards the existence of a risk matters as much as his actual consciousness of the risk.

53 The exact parameters of indifference have to be worked out and the question of how conscientious a defendant must be in order to avoid being labelled as indifferent has yet to be answered. However, the idea of a conscientious person avoiding liability is echoed in s 80 of the Code:

> Accident in the doing of a lawful act.
>
> 80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.
>
> Illustration
>
> *A* is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of *A*, his act is excusable and not an offence.

54 Ultimately, whether one agrees whether indifference should amount to rashness depends on whether one agrees that it may be no less blameworthy to see a risk but because of a callous and indifferent attitude, come to an unreasonable conclusion that the risk has been averted, than it is to see the risk and knowingly take it. Whether indifference is an "objective" or "subjective" test, it is suggested that it nonetheless provides a principled basis for explaining why certain forms of inadvertent conduct should be classified as rash instead of negligent.