

MANAGING *MENS REA* IN SINGAPORE

This article looks at some of the most important issues surrounding the requirement of *mens rea* in Singapore criminal law today. The purpose is to measure the state of its health. It concludes that, although not all developments in recent years have been in that direction, the doctrine appears to be in general retreat. It makes a plea that the need for a strong *mens rea* ought to be respected in practice as it is in rhetoric, and argues that this can be done without any significant adverse impact on crime control.

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1 The law reports do not lack for lofty pronouncements of the sanctity and fundamental importance of *mens rea* as an essential element of a crime.¹ The received history is one of civilisation marching from the barbaric punishment of the person who brought about the forbidden harm to the enlightened inquiry of what was in the mind of the perpetrator.² Knowledge is the *mens rea* par excellence – harm caused inadvertently should not, ethically, be punishable, and some would say, punishment here would serve no real purpose.³ The primitive dwelt only on causation, the modern on *mens rea* as well. There emerged alongside

1 These are sometimes decorated with the Latin maxim “*actus non facit reum, nisi mens sit rea*” (an act does not make one guilty, unless the mind is guilty as well). See, for example, the older possession case of *Chan Pean Leon v PP* [1956] 1 MLJ 237 and the more recent strict liability decision in *Chng Wei Meng v PP* [2002] 4 SLR 595.

2 See the words of Cory J in the Supreme Court of Canada in *R v Daviault* [1994] 3 SCR 63 at 73:

Originally a crime was considered to be the commission of a physical act which was specifically prohibited by law. It was the act itself which was the sole element of the crime. If it was established that the act was committed by the accused then a finding of guilt would ensue. However, as early as the twelfth century, in large part through the influence of the canon law, it was established that there must also be a mental element combined with the prohibited act to constitute a crime.

3 It remains to this day that when an English court speaks of a presumption of *mens rea*, it means a presumption of knowledge. The words of the venerable Wright J in *Sherras v Rutzen* [1895] 1 QB 918 at 921, quoted with approval in the Singapore Privy Council case of *Lim Chin Aik v R* [1963] 1 AC 60; [1963] MLJ 50, are often cited:

There is a presumption that *mens rea* or evil intention or knowledge of the wrongfulness of the act is an essential ingredient in every offence ...

mens rea another icon – the principle that guilt, and therefore *mens rea*, must be proved by the prosecution beyond reasonable doubt.⁴ The reality is something else. There are indeed offences for which the prosecution must prove *mens rea* beyond reasonable doubt.⁵ There are however a growing number of significant crimes which do not require full knowledge: crimes which need only some lesser form of *mens rea* like negligence; crimes which apparently require no *mens rea* at all; crimes which presume knowledge or negligence and require the accused person to disprove it. There cannot be any doubt that influential players in the criminal process – legislators, judges, prosecutors – harbour a distinct belief that both the principle of *mens rea* and of proof beyond reasonable doubt are undesirable in a great many contexts. Yet it would be wrong to say that either principle has been abandoned entirely. I hope to chart the ebb and flow of allegiance to the principle of *mens rea* and to discern the forces which push and pull one way or the other.

I. Knowing me, knowing you: The *mens rea* of murder

2 One of the most enduring thorns in the flesh of the criminal law is s 300(c) of the Penal Code⁶ which sets out the *mens rea* required for the only kind of murder that retains any practical relevance. It is necessary to set out all the *mens rea* limbs of murder in order to appreciate the interpretational difficulties:

culpable homicide is murder —

- (a) if the act by which the death is caused is done with the *intention of causing death*;
- (b) if it is done with the intention of causing such bodily injury as the offender *knows to be likely to cause the death* of the person to whom the harm is caused;
- (c) **if it is done with the intention of causing bodily injury to any person, and the *bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death*; or**

4 I explore this in some detail in Michael Hor, “The Burden of Proof in Criminal Justice” (1992) 4 SAclJ 267, and Michael Hor, “The Presumption of Innocence: A Constitutional Discourse for Singapore” [1995] Sing JLS 365.

5 A perusal of the Penal Code (Cap 224, 1985 Rev Ed) will bear this out.

6 See prior treatments in Victor V Ramraj, “Murder Without an Intention to Kill” [2000] Sing JLS 560, and M Sornarajah, “The Definition of Murder Under the Penal Code” [1994] Sing JLS 1.

(d) if the person committing the act *knows that it is so imminently dangerous* that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[emphasis added]

3 Section 302 demonstrates what is at stake:

Whoever commits murder shall be punished with death.

4 Section 300(c) sticks out like a sore thumb. The other limbs link the *mens rea* directly to the harm caused – death must be intended or known to be likely. Section 300(c) stops short of that – no doubt the injury must have been intended, but there is no apparent requirement that the likelihood of death must be known or foreseen. This flouts the classic conception of *mens rea* – if the accused person is to be held accountable for the death, as opposed to just the injury, he or she must be proved to have known that death would be likely to ensue. The gravamen of murder is surely that the accused person chose to embark on a course of conduct, knowing that death (and nothing less) would be the likely result. The chilling s 302 prescribes one, and only one, punishment for murder: death. No sentencing discretion is needed for the crime is of the highest order: the knowing deprivation of human life.

5 It is surprising that there is little evidence that s 300(c) was noticed until relatively recently. For decades after the promulgation of the Penal Code, there seems to have been no consciousness that s 300(c) contained the seeds of a highly subversive idea.⁷ Prosecutions proceeded

7 The Penal Code was promulgated in 1871 and came into force a year later in the Straits Settlements (of which Singapore was a prominent part), but murder prosecutions for decades after that seemed to adopt a studied ignorance of s 300(c) and appeared to assume that an intention to cause death was invariably required. See, for example, *R v Ong Choon* [1938] MLJ 227, the Court of Criminal Appeal of the Straits Settlements quoted this jury direction of the trial judge without censure:

He was intending to do something and his intention must be considered by his conduct: whether he had a murderous intention or whether he had simply an intention to do a minor injury or whether he had an intention to kill

So tenacious was this assumption that well into the era of s 300(c) awareness, and on a s 300(c) charge, a trial court could say, in *PP v Ow Ah Cheng* [1992] 1 SLR 797 at 805, [42]:

We considered carefully whether the acts and intention of the accused on that fateful day would constitute murder within s 300(c) of the Code. It was finally decided that the evidence adduced was not consistent only with murder. The fact that the deceased was strangled did not prove beyond a reasonable doubt that the accused intended to cause the death of Ah Lian.

on the assumption that an intention to cause death (and perhaps its close ally knowledge that death was likely) was required.⁸ Then the dam broke. In 1956 the Supreme Court of India in *Virsa Singh v The State of Punjab* decided to take s 300(c) at its word:⁹

Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is *purely objective* and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional ... The question is not whether the prisoner intended to inflict a serious injury or a trivial one ... Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness.

6 The element of death, thus reduced to an objective inquiry, is banished from the realm of *mens rea*. It is difficult to imagine how this objective inquiry is different from the causation inquiry of whether the accused had caused death in the first place. If the assailant has caused an injury, and that injury leads to death, it can never be that the injury was not sufficient in the ordinary course of nature to lead to death.¹⁰

7 The only question is whether the accused intended to inflict the injury which turned out to be fatal – death may have been far from the mind. It is important to appreciate the difference between s 300(c) and what I have called the classical conception that there must be knowledge of the likelihood of death. Too much is sometimes made of it. It is true that in practical terms a requirement of an intention to cause an objectively fatal injury will often yield the same result as a requirement of

8 For example, *Hashim bin Mat Isa v PP* [1950] MLJ 94.

9 AIR 1958 SC 465 (“*Virsa Singh*”). This Indian decision was brought into local consciousness by the case of *Wong Mimi v PP* [1972–1974] SLR 73 and has never since been doubted. Curiously, the adoption of *Virsa Singh* was not quite necessary for the decision as the judges were disposed to find that there was an intention to kill.

10 I exclude from consideration cases of special susceptibility where, for example, a haemophiliac dies of excessive bleeding from an inflicted wound in circumstances where a person not suffering from that disorder would not have died. Section 300(b) specifically provides that in such circumstances, to be guilty of murder, the assailant must have actually known of the disorder.

knowledge that death was likely – death is normally the result of serious injuries and it is not an unfair assumption that most people must know what serious injuries are and that they are likely to cause death. Yet the criminal law should not be based entirely on what is normally the case or what most people must know – death sometimes occurs from injuries which are not normally thought of as serious, and many people do not know this. A stab to the heart, administered with significant force will normally satisfy either requirement, unless the accused is able to show that it was accidental, in the sense that the accused intended no injury at all or that another non-fatal injury was intended. But what does one do with an accused who presses a pillow onto the face of a victim in order to silence and not to kill, or an accused who slashes the leg of a victim in order to prevent escape and not to kill? Section 300(c) has the potential to make these situations murder and punishable with death, and it is in cases like these that s 300(c) is subjected to the greatest stress.

8 To the credit of our judges, they have extended a lifeline in a remarkable series of cases. This the courts achieved through the device of subtle distinctions between the injury intended and the injury which finally caused death. Embedded in s 300(c) is an inherent ambiguity: it is murder only if the injury intended was the same as the fatal injury. This uncertainty was anticipated in *Virsa Singh*:¹¹

In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on *broad lines* as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is *broad based and simple and based on common sense*: the kind of enquiry that "twelve good men and true" could readily appreciate and understand.

9 The problem with this kind of instruction is that it does not tell us exactly how particular the intention must be. It is often that injury leads to death in a chain of events – incision, severance of artery, loss of blood, death. Although it seems clear that death need not be

11 *Supra* n 9, at 467.

contemplated, it is not clear precisely how far along the chain the intention must extend. The courts have used this device sparingly but spectacularly. In *Mohamed Yasin bin Husin v PP*,¹² the Privy Council surprised the legal community by quashing a murder conviction which had been upheld in the Court of Appeal. In the course of robbery and rape, Yasin had sat on the chest of his 58-year-old victim in order to subdue her. This resulted in multiple rib fractures, shock, cardiac arrest and death. The uncertainty at the core of 300(c) was exploited to the full:¹³

In the instant case, the act of the appellant which caused the death, viz sitting forcibly on the victim's chest, was voluntary on his part. *He knew what he was doing; he meant to do it; it was not accidental or unintentional.* This, however, is only the first step ... Not only must the act of the accused which caused the death be voluntary in this sense; the prosecution must also prove that the accused intended, by doing it, to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death.

...

[I]t would *not have been necessary for the trial judges in the instant case to enter into an enquiry whether the appellant intended to cause the precise injuries* which in fact resulted or had sufficient knowledge of anatomy to know that the internal injury which might result from his act ... It was, however, essential for the prosecution to prove, at very least, that the appellant *did intend by sitting on the victim's chest to inflict upon her some internal, as distinct from mere superficial, injuries or temporary pain* [for which there was no evidence].

[emphasis added]

10 It would have been unexceptionable if Yasin had landed on his victim's chest accidentally, perhaps as a result of tripping over something.¹⁴ It would have also been uncontroversial if Yasin had intended a wholly different injury, for example, if he intended to sit on the victim's arm but missed the target and sat on her chest instead. The novelty here was that the court was willing to use this device in a situation where the accused had "voluntarily" set off a chain of events which led inexorably to death. Yasin had set about to sit on her chest and to do that with a degree of force which was (objectively) sufficient to fracture her ribs – and that is exactly what happened. The Privy Council

12 [1975–1977] SLR 34 (PC) ("*Yasin*"), [1972–1974] SLR 263 (CA).

13 *Yasin, id.*, at 36–37, [8] and [11]–[12].

14 As was the case in *PP v Abdul Nasir bin Amer Hamsah* [1996] SGHC 138.

had indulged in an inquiry which it had itself seemed to deny was necessary – the acquittal was in fact based on a lack of an intention to cause the “precise injuries” which finally killed the victim. The courts of Singapore were thrown in confusion. In a case that followed shortly, *PP v Visuvanathan*,¹⁵ the High Court quickly sought to restore the former “broad” inquiry by feebly attempting to explain away the Privy Council, saying that while the “precise injury” approach was “factually appropriate”, it was not “of universal application” – it was never spelt out why it was appropriate on the facts in *Yasin*, nor was it explained in what circumstances it is appropriate and in what others it is not.¹⁶ When the matter went up to the Court of Appeal, *Yasin* was simply ignored as if it had never been decided.¹⁷

11 Technically, neither *Yasin* nor *Visuvanathan* are clearly in the right or in the wrong. The ambiguity is inherent in the formulation of s 300(c). This uncertainty created a discretion in the courts to broaden or narrow the subjective inquiry. What the decisions do not tell us explicitly is when the discretion will be exercised one way or the other. It is of course hazardous to aspire to clairvoyance, but it is difficult to resist the speculation that the controlling factor is something which every court since *Virsa Singh* has declared to be taboo under s 300(c) – that of whether the accused contemplated death when he or she embarked on the violent enterprise.¹⁸

12 Two other children of *Yasin* seem to bear this out. In *PP v Ow Ah Cheng*,¹⁹ the accused was in the course of committing theft when he was surprised by a 14-year-old girl. Ow subdued her and pressed a pillow onto her face in order to prevent her from shouting. She died of asphyxiation. The High Court granted a rare acquittal in these terms:²⁰

The question was whether the degree of force used was *so extreme* as to be consistent only with an intent to cause bodily injury, and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. If the accused *wanted to kill* Ah Lian, the pressure

15 [1975–1977] SLR 564 (“*Visuvanathan*”).

16 *Id* at 568, [14].

17 *Visuvanathan v PP* [1978–1979] SLR 49.

18 For a recent declaration, see *Tan Chee Wee v PP* [2004] 1 SLR 479 at [42]:

Section 300(c) thus envisions that the accused subjectively intends to cause a bodily injury that is objectively likely to cause death in the ordinary course of nature. There is no necessity for the accused to have considered whether or not the injury to be inflicted would have such a result.

19 *Supra* n 7 (“*Ow Ah Cheng*”).

20 *Id*, at 804–805, [36].

that he would have applied to the larynx would have in all likelihood resulted in a fracture of the larynx or more serious injuries. The degree of force used would have been extreme as to be consistent only with an *intent to do serious harm*. [emphasis added]

13 Again, as in *Yasin*, there was nothing particularly accidental about the whole affair, but the court was persuaded to invoke the “precise intention” approach – *Ow* may have intended to cause superficial injuries to the face, but probably intended no more than that. Though it may appear curious that *Yasin* was never mentioned, the mystery dissolves when we consider that the Court of Appeal in a then-recent decision, *Tan Cheow Bok v PP*, had apparently denounced *Yasin* when it was pressed upon the court on rather similar facts.²¹ In the course of a robbery, *Tan* subdued his victim. In order to prevent the victim from shouting he stuck a knife into her mouth. A particularly interesting facet of this case was the unchallenged forensic evidence that it was actually quite difficult to kill someone that way – what happened was that the knife had entered the mouth at a specific angle, gone through a narrow passage between the vertebra and the skull, and had severed the vertebral artery, leading to bleeding and death. At any other angle, the knife would have struck the skull or the vertebra, but the injury would not have been fatal. The Court of Appeal, in convicting the accused of murder, expressly approved the High Court decision in *Visuvanathan* and refused to use the “precise injury” approach. The judges in *Ow Ah Cheng* wanted to do the opposite and could not very well do so openly, and so soon after the Court of Appeal had spoken in *Tan Cheow Bok*. The question is why the court in *Ow Ah Cheng* decided to use the “precise injury” device when the judges in *Tan Cheow Bok* refused. The only sensible distinction is the instrument of the killing – one was a knife, the other a pillow. Instinctively that ought to be a material difference, but exactly why should it be so? The only sensible reason is that an accused who uses a knife is more likely to have contemplated that death would be the result of his or her actions. Thus in *Tan Cheow Bok*, even though the objective likelihood of death resulting from the knife being lodged in the mouth of the victim was small, that piece of forensic intelligence would probably not have been in the mind of the accused – he would have been likely to have contemplated death. On the other hand, what the pillow-wielding accused did in *Ow Ah Cheng* was the opposite – it was probably something very dangerous to indulge in, but that was not immediately obvious to the untrained mind. It was plausible that the accused did not have death on his mind. A similar

21 [1991] SLR 293 at 301–302, [32]–[33] (“*Tan Cheow Bok*”).

sentiment must have operated on the Privy Council in *Yasin* itself – sitting on the chest of a 58-year-old woman with a degree of force was objectively a potentially lethal thing to do, but that would not have been apparent to a layperson:²²

[T]o fall on someone’s chest, even forcibly, is something which occurs frequently in many ordinary sports, such as rugby football, and though it may cause temporary pain, it is *most unusual for it to result in internal injuries at all, let alone fatal injuries*. [emphasis added]

14 The Privy Council could not possibly have been pronouncing on the objective forensic position – there was no expert evidence on record for the court to do that legitimately. What the court was more likely to have intended to say is that the ordinary untrained layperson, as the accused person in that case was likely to be, would probably not have contemplated that sitting on the chest would have fatal consequences.

15 The judicial choice between the broad and precise injury approaches was faced rather more squarely in another decision of the High Court. In *PP v Lim Poh Lye*,²³ it was yet another robbery attempt and the accused had slashed the leg of the victim in order to prevent him from escaping. The femoral vein was severed and the victim died from loss of blood. The accused was acquitted of murder, but again *Yasin* was not mentioned at all. Instead the High Court relied on an earlier decision of the Court of Appeal, *PP v Tan Chee Hwee*²⁴ in this manner:²⁵

But the crucial question was whether Lim intended to cause those injuries, that is, the stab wounds, and not whether he intended to kill. Following *Virsa Singh*, the answer would certainly be “yes”, and consequently, the accused would be guilty of murder should his victim die from that intended injury. *Tan Chee Hwee*, however, *ameliorates an accidental specific injury* (asphyxia) if the intended act (strangulation) was inflicted without an intention to cause mortal injury [but for] a *specific non-fatal purpose*... [This exception to *Virsa Singh*] *would not, in my view ... apply where an assailant stabs another in a vulnerable or sensitive region of the body, such as the chest, and claims that he did so to prevent escape*. [emphasis added]

16 This decision, probably the most significant in the field since *Yasin*, was the first to openly recognise that there is a problem with

22 *Supra* n 12, at 37, [10].

23 [2005] 2 SLR 130 (“*Lim Poh Lye*”).

24 [1993] 2 SLR 657 (“*Tan Chee Hwee*”).

25 *Supra* n 23, at [15].

s 300(c).²⁶ The earlier cases, and *Yasin* itself, had pretended that it was business as usual. *Lim Poh Lye* has its difficulties. The failure to mention *Yasin* might have been understandable, given the Court of Appeal's declared distaste for it, but the reliance on *Tan Chee Hwee* is technically misplaced. In that case, what started off as theft turned disastrous when the maid of the house returned unexpectedly and surprised the accused and his confederates. In the ensuing struggle, the maid was strangled to death by the cord of an electric iron wound round her neck. The accused was acquitted because the Court had made a finding of fact that the accused persons had only intended to tie her up (around the torso) with the cord, but in the course of the struggle, the cord had accidentally slipped off the torso and onto her neck:²⁷

In the circumstances we are driven to the conclusion that the injury which was in fact caused to the maid *around her neck*, in all probability, was not intentionally but accidentally or unintentionally caused. [emphasis added]

17 Thus, so the court found, while injuries to her torso might have been intended, those “around her neck” were not. The enterprise which the accused persons had embarked upon, *ie*, tying the victim up around the torso, would not have resulted in death. The factual situation was materially dissimilar, and would have been analogous only if the court in *Tan Chee Hwee* had found that the accused persons intended to wind the cord round the victim's neck, but had not intended anything more than to silence her. There were conflicting statements given to the police about whether the accused persons had intended to wind the cord round the victim's neck, and in the circumstances the Court of Appeal had given the

26 To be fair, the earlier decision of the High Court in *PP v Sundarti Supriyanto* [2004] 4 SLR 622 had adopted the views of Prof Stanley Yeo in “Academic Contributions and Judicial Interpretations of Section 300(c) Murder” *Singapore Law Gazette* (April 2004), p 21, in characterising the predominant judicial approach as “very much objective” and describing it as follows, at [129]:

[E]ven if an accused intended to inflict only a minor injury, it was sufficient to result in a conviction for murder so long as the injury *actually inflicted* was sufficient in the ordinary course of nature to cause death. [emphasis in original]

This analysis accuses the court of ignoring the difference between intended injury and actual injury, and declares that this is not faithful to *Virsa Singh*, which required a precise correspondence between intended and actual injury. Although this thesis stems from the genuine feeling that something is amiss with s 300(c), I do not think that the court has ever denied that there must be a certain degree of correspondence between the intended and actual injury. As I have argued, that there need not be *absolute* correspondence is expressed in *Virsa Singh* itself. The real dispute has not been with respect to whether or not there should or should not be correspondence, but with the *degree* of correspondence that would suffice.

27 *Supra* n 24, at 668, [46].

accused persons the benefit of the doubt.²⁸ The true ancestor of *Lim Poh Lye* is not *Tan Chee Hwee*, but *Yasin*, which has never been overruled.

18 It is also unfortunate that *Lim Poh Lye* formulates the position in the form of rule and exception – *Virsa Singh* is the rule, *Tan Chee Hwee* the exception. The danger is that this assumes that *Tan Chee Hwee* is inconsistent with *Virsa Singh* (otherwise an exception would not be needed), and this invites future courts to find fault with it. It would have been safer to explain the situation as being the result of the inherent uncertainty embodied in s 300(c) itself, for the section does not say with what particularity the fatal injury must have been intended. Neither is the rule or the exception, but both are faithful to s 300(c).

19 That said, *Lim Poh Lye* does not explain why a “non-fatal purpose” should ameliorate the “accidental specific injury”. Nor does it explain why the amelioration should not operate if the intended injury had been to a “vulnerable or sensitive region of the body”. Again, the unexpressed rationale must be the instinct that it does matter whether the accused had contemplated death when he or she acted. Thus, where there is a non-fatal purpose, the likelihood of death being contemplated is small – the “exception” should apply to relieve the accused of murder. Where the intended injury is to a vulnerable part of the body, it is likely that death was either intended or known to be the result. *Lim Poh Lye* goes too far if it implies that these are hard and fast rules – a non-fatal purpose is not necessarily inconsistent with knowledge of lethality, neither is an intended injury to a vulnerable part of the body dispositive of such knowledge. Yet one can readily sympathise with the judge in *Lim Poh Lye* for not being explicit – this is the very inquiry which all the authorities say is not to be embarked upon.

20 This then is the core of the problem. Section 300(c)’s only reason for existence is that it does not have intention or knowledge of death as an element. Yet generations of judges from *Yasin* to *Lim Poh Lye* have, at least occasionally, balked at the idea that someone who acted without the knowledge that death would result should be convicted of murder, and without exception be punished with death. When they have been so

28 There was indeed evidence in the form of a police statement that the accused intended the wire to “go round her neck” (*supra* n 24, at 667, [41]), but the court was unwilling to accept the truth of that assertion, given the existence of several other statements which were rather less clear about what exactly was intended. It could be argued that this factual finding was wrong, and perhaps distorted by the consequence of the alternative finding, but that was not the course of the judgment.

minded, judges have seized upon an inherent ambiguity in s 300(c) – death occurs through a chain of events and s 300(c) does not tell us exactly how far along that chain the intention of the accused must extend. So, another criterion has to be found, and the only instinctive and ethical one is none other than knowledge of lethality.²⁹ In short, s 300(c) can be consistent and fair only if the judges work in an implicit calculation of knowledge of likelihood of death, but if that is done, the rationale for s 300(c) disappears, for the remaining limbs of murder can now do the job just as well. There have been attempts to make s 300(c) meaningful and more palatable – notably, it has been suggested that it embodies a requirement that a *serious* injury must have been intended.³⁰ That is better than just *any* injury – for the more serious the injury, the more likely it is that the accused would have known that death might ensue. But this has been repeatedly denied by *Virsa Singh* and almost every decision since. More importantly, the requirement of a “serious injury” itself contains an inherent ambiguity – how is seriousness to be measured? One only needs to look at the list which distinguishes hurt from grievous hurt³¹ – it would be an open invitation to argue interminably about how the list, for the purpose of murder, is too narrow or too broad. Even more significantly, the only meaningful and ethical way of deciding when serious is serious enough is, again, to work in a criterion of knowledge of likelihood of death – a serious injury is one which the accused knows is likely to cause death. It could of course be an objective criterion – a serious injury can be that which is objectively likely to lead to death, but would render the proposed intention to cause serious injury the same as the existing intention to cause any injury.

29 It is possible that some time in the future this kind of situation will give rise to problems of constitutional due process under Art 9 of the Constitution of the Republic of Singapore because of a disproportionality between the crime (s 300(c) murder) and the punishment (mandatory death), and of constitutional inequality under Art 12 because s 300(c) murder is so qualitatively different from ss 300(a), (b) and (d), that it would be unjustifiably arbitrary to lump them all together for the purpose of conviction and punishment. It is too early to predict if this will come to pass, but foreign precedents are not hard to find: for example, the Supreme Court of Canada in *R v Martineau* [1990] 2 SCR 633 declared that principles of fundamental justice required a minimum *mens rea* of subjective foresight of death for a murder conviction. I have elsewhere described a possibly nascent rule of customary international law requiring a “most serious” crime to justify the imposition of the death penalty: Michael Hor, “The Death Penalty in Singapore and International Law” (2004) 8 SYBIL 105.

30 Notably by Ramraj, *supra* n 6.

31 Section 320, Penal Code. For example, “fracture or dislocation of a bone” turns hurt into grievous hurt, but there is no way of predicting if an intention to fracture a bone is an intention to cause a serious enough injury to attract s 300(c) without adding a criterion of knowledge of likelihood of death.

21 I have no panacea for s 300(c). It is incurably infirm.³² As long as it exists, it will remain a gruesome nuisance. The situation is made worse by the mandatory death penalty that prevails for murder. A suitable discretion might take care of the problems with a proportionate penalty, but the danger of unfair labelling remains, and there are significant differences between casting something as an element of the crime and leaving that consideration to the sentencing process.³³ Can we live without s 300(c)? Lord Macaulay, the revered author of the draft Penal Code, certainly thought so. His original draft would have defined murder as follows:³⁴

Whoever does any act ... with the *intention of thereby causing death*, or with the *knowledge that he is thereby likely to cause the death* of any person. [emphasis added]

22 Clear, succinct and correct, as truly befits greatness. Lord Macaulay was anxious to reject constructive murder in the form of the infamous felony-murder rule.³⁵ He would have turned in his grave to discover that his draft would be amended to give rise to possible birth of constructive murder of a specific kind – for on its face s 300(c) may be nothing else but a species of felony-murder. Thus the far lesser *mens rea* of an intention to cause bodily injury (of any kind and severity) is elevated to the far greater *mens rea* of an intention to cause death or knowledge that death would be caused.

23 The s 300(c) problem has been characterised as a tussle between subjective and objective conceptions of liability.³⁶ *Yasin* and, one supposes, all the cases in its tradition, have been accused of imposing an alien

32 From the standpoint of technical statutory interpretation, the court has often felt impelled to search for a meaning to s 300(c) which is different from the other limbs – the Legislature is not to be presumed to have legislated in vain, and s 300(c) cannot be merely otiose. The irony is that, having discovered that different meaning to s 300(c), the court has now for all intents and purposes rendered all the other limbs otiose. One struggles to find a reported case in the past thirty years in which a court has based its decision on any of the other limbs. The last was probably *Tan Cheng Eng William v PP* [1969–1971] SLR 115 in which the Prosecution failed to make out a s 300(d) murder.

33 For example, evidential and procedural safeguards which apply to the conviction process do not clearly apply to the sentencing decision.

34 *A Penal Code Prepared by the Indian Law Commissioners* (The Lawbook Exchange, Ltd, Reprint 2002) at p 38.

35 Under this common law doctrine, a person who kills in the course of the commission of a felony is guilty of murder even if he or she does not have the *mens rea* for murder – essentially the *mens rea* of murder is constructed from proof of the *mens rea* of the felony concerned.

36 Notably *Sornarajah*, supra n 6.

subjectivist idea of liability on a more objectivist conception found in s 300(c). Be that as it may, few would argue that one ought to start with the ethical presumption that the criminal law should be as subjective as practical circumstances will allow. Rational justification of the existence of s 300(c) is rare indeed and those which exist are far from convincing. Witness the classic attempt in *Virsa Singh*:³⁷

No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences ...

24 Indeed no one has a licence to inflict injuries of any kind without lawful justification or excuse. Wrongdoers must indeed face the consequences, but why must the consequence be a murder conviction, and in Singapore, a mandatory death penalty? Will nothing else suffice? Macaulay was brilliantly contemptuous in his denunciation of felony-murder. He called it “senseless cruelty”, explaining that:³⁸

To punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life.

25 It was, if we were to follow the sentiments of Lord Macaulay, cruelty to punish someone with only an intention to injure, with the supreme penalty reserved for murder, and if it is desired to deter all acts which intentionally injure, there are other lesser offences which do the work. If it is thought that the punishment for these offences are too light, the solution is to increase the punishment, not to punish those who kill inadvertently with murder. There is no doubt that had Macaulay been shown s 300(c), this is precisely what he would have thought of it.

26 Why s 300(c) remains is an interesting question. Leaving aside the vagaries of Parliamentary attention, if it were indeed proposed that s 300(c) be repealed, what would the potential objectors say? Extrapolating from existing official discourse on *mens rea*, one can surmise that the principal objection will be this – to require the prosecution to prove either an intention to cause death or knowledge thereof will be unduly burdensome. All accused persons will then claim that they did not intend or know. The situation will be unmanageable. Leave s 300(c) there. If there are indeed deserving cases, do not worry,

³⁷ *Supra* n 9, at 467.

³⁸ *A Penal Code Prepared by the Indian Law Commissioners*, *supra* n 34, at p 111.

prosecutorial discretion will be exercised in their favour. Besides, the courts have the *Yasin* avenue of acquitting the accused. It would be tedious to respond to these objections in detail, all of which smack of an extreme form of managerialism with its dubious assumption that bureaucratic efficiency is the primary consideration in such matters. There are a number of offences for which intention or knowledge is necessary³⁹ – it has not been the experience that they have created an unmanageable situation. The prosecution routinely proves such things, and if one were to examine the facts of s 300(c) convictions, a great many would have clearly satisfied a full *mens rea* requirement. Again, looking at *Virsa Singh* – the accused plunged a spear so forcefully into the belly of the victim that his intestines fell out – how could it even be suggested that death was not contemplated?

27 Section 300(c) was not necessary to convict the accused of murder. As we shall see the Legislature does sometimes tamper with the *mens rea* of offences which are perceived to be particularly alarming and “on the rise”, but murder is hardly a rampant crime in Singapore.⁴⁰ It is not satisfactory to leave it to prosecutorial discretion to distinguish between advertent and inadvertent causing of death. There is no guarantee that, as long as s 300(c) remains, those whom the prosecutors believe not to have full *mens rea* will not be prosecuted. If the prosecutors believe so firmly that the accused had full *mens rea*, let that be proven in court where minimum due process standards apply. Where full *mens rea* cannot be proven in court, the accused should not be guilty of murder. Even if we assume that prosecutors are unfailingly scrupulous in using s 300(c) only where they believe full *mens rea* to exist, their belief should not be elevated to the status of proven facts – prosecutors are human and can be wrong. Similarly, relying on the courts to occasionally pull a *Yasin* out of the hat is unsatisfactory. There is no guarantee that all courts would be so minded, even if they are of the view that full *mens rea* has not been proven. Given the near pariah status of *Yasin*, it is more than conceivable that at least some judges will take s 300(c) quite literally and actually think that intention or knowledge of death is irrelevant. One only hopes that these kinds of objections are not brought to bear on the

39 For example, the principal “property” offences typically require “dishonesty” which is clearly defined in s 24 of the Penal Code to be an intention to cause wrongful loss or gain.

40 The murder rate in Singapore compares favourably with that of Japan, which is legendary: Yeo Soek Lee, “Crime Trends in Singapore” <<http://www.singstat.gov.sg/ssn/feat/4Q97/feat.pdf>> (accessed 29 March 2005).

issue when the day comes for those in power to consider the repeal of s 300(c).⁴¹

II. To know or ought to know – that is the question

28 While the court cannot be held responsible for the inclusion of s 300(c) in the Penal Code, they have, in an astounding series of cases in drugs and immigration prosecutions, sought to confuse the *mens rea* of knowledge and of negligence. To know something is to be actually aware of its existence – this is normally accepted to be the higher or more blameworthy form of *mens rea*. Negligence is the situation where there is no actual knowledge, but the context or circumstances are such that a reasonable person ought to have known, or ought to have checked – this is a lower or less blameworthy form of *mens rea*, a state of mind which is occasionally made criminal. It is important to appreciate the difference between the two. Courts remind us that there is often little chance of direct evidence of knowledge⁴² – so in practice knowledge is inferred from circumstantial evidence. A large part of the assessment of circumstantial evidence involves the question of whether a reasonable person in the position of the accused would have known.⁴³ One might even say that all else being equal, the same evidence which goes to show negligence will also go to show knowledge. However, where knowledge is the prescribed *mens rea*, the fact that a reasonable person ought to have known is only

41 There are formidable obstacles in the way of any such notion. Criminal law legislation has been almost exclusively “bureaucracy driven” leading to changes which maximise the efficiency of the bureaucracy in curbing particular criminal activity. There is also a prevailing belief that the inherited English common law had somehow struck the balance too much in favour of the rights of the accused, as opposed to the interests of the prosecution (and therefore of the “public” behind it) – then Prime Minister Lee Kuan Yew has said, in his speech at the Opening of the Singapore Academy of Law on 31 August 1990, <http://www.sal.org.sg/media_speeches_salPM.htm> (accessed 30 March 2005) (also published as Lee Kuan Yew, “Address by the Prime Minister, Mr Lee Kuan Yew” (1990) 2 SAclJ 155 at 155):

In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with customs and values of Singapore society. In criminal law legislation, our priority is the security and well-being of law-abiding citizens rather than the rights of the criminal to be protected from incriminating evidence.

42 This observation needs to be significantly qualified in Singapore where there is not infrequently the existence of confessions made by the accused to the police in the course of police interrogation – see, for example, the extensive use of such statements to prove knowledge in the recent drugs case of *PP v Nguyen Tuong Van* [2004] 2 SLR 328.

43 For the reason that the fact that a reasonable person would have known bears on the credibility of an accused person who has testified that he or she did not know.

part of the inquiry – it is *probative*, not dispositive, of knowledge. It is quite possible that the facts of a particular case will show that the accused did not actually know, although a reasonable person ought to have known.⁴⁴

29 Where the Legislature has clearly prescribed a particular *mens rea* for an offence, the courts have no legitimate creative function to fashion other forms of *mens rea* which they feel will do better. Yet in a series of drugs and immigration cases, the courts have done just that.⁴⁵ The Misuse of Drugs Act (“MDA”) makes it an offence to traffic in a controlled drug, or to possess a controlled drug for the purpose of trafficking.⁴⁶ Where the drug exceeds a certain stipulated amount, the MDA famously imposes a mandatory sentence of death.⁴⁷ The question is whether, to be guilty of the offence, the accused must know that the thing trafficked or possessed is a controlled drug. The words “traffic” and “possess” and its cognate expressions are ambiguous. The precise *mens rea* of (especially) the element of possession has been historically problematic both locally and elsewhere.⁴⁸ Even so, one might have thought that given the existence of a mandatory death penalty, the uncertainty ought to be resolved in favour of the accused and a *mens rea* of knowledge required by implication. Indeed, the MDA contains a presumption which ought to have settled the matter:

44 There could be any number of reasons. For example, the accused may possess certain personal characteristics which are not taken into account for the test of the reasonable person, or the accused was simply being less prudent than a reasonable person would have been.

45 Many of the ideas in this section were developed from those first expressed in two articles: Michael Hor, “Misuse of Drugs and Aberrations in the Criminal Law” (2001) 13 SAclJ 54; Michael Hor, “Illegal Immigration: Principle and Pragmatism in the Criminal Law” (2002) 14 SAclJ 18.

46 Section 5, Misuse of Drugs Act (Cap 185, 2001 Rev Ed).

47 MDA, *id*, Second Schedule.

48 An important precedent in the pro-knowledge camp is *Toh Ah Loh v R* [1949] MLJ 54 (“*Toh Ah Loh*”), which declared, at 54–55:

Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal.

Though widely respected, *Toh Ah Loh* did not command absolute allegiance: see, for example, *Leow Nghee Lim v R* [1956] MLJ 28, and the early but able discussion of Bron McKillop, “Strict Liability Offences in Singapore and Malaysia” (1967) 9 Mal LR 118 at 137–144, who concluded rather gloomily, at 144:

It seems almost that for every case in which the courts here have opted for *mens rea* another case on the same or a similar offence can be found in which liability has been held to be strict, and *vice-versa*.

Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be *presumed to have known the nature of that drug*. [emphasis added]

30 Knowledge of the nature of the drug is the *mens rea* the Legislature had in mind – otherwise it would be pointless to presume its existence. But the burden of proof is shifted, where the presumption is triggered, to the accused to prove that there was no such knowledge. It must follow that if the accused rebuts the presumption by proving that he or she did not know the nature of the drug, the prosecution must fail. In 1979 the unfortunate case of *Tan Ah Tee v PP* was decided.⁴⁹ It was a case which was destined to plague our drugs law since. Instead of construing the MDA on its own terms, the Court of Appeal inexplicably adopted the interpretation by Lord Pearce in a House of Lords decision⁵⁰ of the English drugs legislation, a law which did not contain the crucial presumption of knowledge or the possibility of a death penalty. Lord Pearce was of the view that the offence was established in two situations where the accused did not actually know that what was in possession was drugs:⁵¹

I think that the term “possession” is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse. This would comply with the general understanding of the word “possess.” *Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. ...*

... Thus the prima facie assumption [of *mens rea*, upon proof of possession of a container with drugs in it] is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it and *no reason to suspect* that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had had *no reasonable opportunity since receiving the package of acquainting himself* with its actual contents. For a man takes over a package or suitcase *at risk as to its contents being unlawful* if he does not immediately examine it (if he is entitled to do so).

[emphasis added]

31 It is obvious that whatever the validity of these pronouncements under English law, they cannot apply to the MDA. The first proposition is

49 [1978–1979] SLR 211 (“*Tan Ah Tee*”).

50 *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 (“*Warner*”).

51 *Id.*, at 305–306.

particularly serious: it is strict liability in the strictest sense – it is not even negligence for reasonable belief does not exonerate. If the Court of Appeal had been advertent of the presumption of knowledge in the MDA, accused persons do indeed have a good defence if they can prove that they did not know, for instance, that the tablets were heroin, whether or not the belief was reasonable. The second proposition, the position for containers, builds on the first and, essentially, fixes the accused with knowledge of the “thing itself” if he or she ought to have known or checked the contents of the container in possession. It is a negligence standard upon strict liability. Again, if the Court of Appeal had been advertent of the presumption in the MDA, none of this could be the case in Singapore – whether the drug is in the open or in a container, the accused has a good defence if it is proven that there was no knowledge that he or she had controlled drugs in possession.

32 There is much that is wrong about relying on Lord Pearce to interpret the MDA, but if reliance there must be, it ought to have been on another portion of the judgment, which the Court of Appeal, surprisingly also quotes:⁵²

... Parliament may have intended what was described as a “halfway house” ... By this method the mere physical possession of drugs would be enough to throw on a defendant the onus of establishing his innocence, and unless he did so (on a balance of probabilities) he would be convicted. The Explosive Substances Act, 1883, produces this *fair and sensible* result *but it does so by express words* ... [emphasis added]

33 In other words, had there been a presumption such as the one which exists in the MDA, Lord Pearce himself would have given effect to it, and that would have been the fair and sensible thing to do. But he felt he could not legislate for Parliament. There can be no doubt that the Court of Appeal, in adopting Lord Pearce’s conclusions (and not even his reasoning), was acting *per incuriam*, because it had been inadvertent of a directly applicable statutory provision – the express *rebuttable* presumption of knowledge under the MDA.

34 One would have thought that such a clear error would have been corrected at the first opportunity but that was not to happen. A swarm of decisions since 1979 have quoted *Tan Ah Tee* with approval.⁵³ Eventually, of course, the hitherto unnoticed presumption of knowledge did catch

52 *Id.*, at 302.

53 Notably in the recent case of *Shan Kai Weng v PP*, *infra* n 63.

the attention of the court, but miraculously, some of these decisions simply quote the presumption and *Tan Ah Tee*, both with approval. Matters came to a head when the Court of Appeal split dramatically over the issue of *mens rea* in *PP v Hla Win*.⁵⁴ Hla Win was found with a bag containing heroin at a customs clearing gate at the airport. His defence was that he did not know the bag contained heroin as he had been told and was under the impression, that it contained smuggled gems. The trial judge accepted his defence in this manner:⁵⁵

I was satisfied on a balance of probabilities that the accused *did not know that the bag in fact contained heroin*. I therefore acquitted and discharged the accused. [emphasis added]

35 This was upheld by a majority in the Court of Appeal:⁵⁶

In our opinion, on the basis of the evidence before the learned trial judge, we can find no ground for saying that he was in error in so finding. It is not the law that by reason of the respondent's knowledge of the illicit nature of the content of his bag his evidence that he *did not know* that the content was drugs could not and should not be believed. Such knowledge on his part only renders it all the more difficult for the court to believe his evidence. Very much of course depends on the circumstances of the case. [emphasis added]

36 The majority had clearly, and with respect correctly, opted for a plain test of actual knowledge – the ultimate question was whether the accused actually knew he was carrying heroin. Whether he ought to have known or ought to have checked may have a bearing on whether he actually knew, but the issue was one of knowledge and not of negligence. The complete absence of *Tan Ah Tee* in the majority judgement is striking – it was as if that case did not exist. The opportunity was missed to bury that ghost clearly and decisively.

37 The dissent of the then Chief Justice, Yong Pung How CJ, was no less striking. *Tan Ah Tee* was mentioned but not pressed:⁵⁷

The established case law has set out some guidelines in considering whether the presumption of knowledge has been rebutted. In *Ubaka v PP*, the principles laid down in *Warner v Metropolitan Police Commissioner* and modified in *Tan Ah Tee v PP* were applied by the trial

54 [1995] 2 SLR 424 (“*Hla Win*”).

55 *Id.*, at 435, [34].

56 *Id.*, at 436–437, [41].

57 *Id.*, at 438, [49].

judge. In its grounds of judgment, this court quoted the following passage by the trial judge:

Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance simpliciter is not enough.

38 Instead, a curious attempt was made to marry Lord Pearce's strict liability-negligence theory with the concept of wilful blindness:⁵⁸

[W]here the accused, who is not an innocent custodian in the sense that the drugs were planted in his bag without his being aware of them, accepted the goods in *circumstances which rendered the taking of the precaution of satisfying himself* that the goods were what they purported to be and were not drugs *an imperative*, then, if he did not take the trouble to inspect them, but merely relied on another person's assurance, he would not rebut the statutory presumption of knowledge. In fact, he would be guilty of *wilful blindness to the obvious truth* of the matter. [emphasis added]

39 Criminal lawyers have always accepted that wilful blindness, correctly conceived, stands in place of a requirement of knowledge. Where the accused actually suspects to a high level of probability that he has heroin in his possession, but refuses to check because he is afraid of confirming his suspicions, he is taken to have known that he has heroin. But Lord Pearce's position was not one of wilful blindness. Lord Pearce would have found the accused guilty even if he did not suspect that the bag contained heroin – the test, for him, was whether there was *reason* for suspicion, not whether there actually was suspicion. On a theory of wilful blindness, ignorance *simpliciter* is enough, so long as the accused did not actually suspect anything. This seamless slipping from Lord Pearce's views to the idea of wilful blindness was all the more surprising in the context of what Yong CJ himself said about wilful blindness in *PP v Koo Pui Fong* in the context of immigration offences:⁵⁹

I think that it would be reasonable to say that a person 'knows' a certain fact if he is aware that it exists or is almost certain that it exists or will exist or occur. Thus knowledge entails a *high degree of certainty*. All the respondent had to show was that it was more likely than not that she did not have guilty knowledge. Of course, we would never have the benefit of going into the mind of another person to ascertain his knowledge and in every case, knowledge is a fact that has to be inferred from the circumstances. This concept of wilful blindness *does not introduce a new state of mind* to that of knowing ... It is simply a

58 *Id.*, at 438, [50].

59 [1996] 2 SLR 266 at 271, [17].

reformulation of actual knowledge. It seems to me that it is wholly in keeping with common sense and the law to say that an accused knew of certain facts if he *deliberately closed his eyes* to the circumstances, his wilful blindness being evidence from which knowledge may be inferred. [emphasis added]

40 The opportunity of getting rid of *Tan Ah Tee* once and for all was again missed, and the peculiar construction of the dissenting judgment of Yong CJ bears with it the potential of subsequent courts thinking that the concept of wilful blindness somehow justifies *Tan Ah Tee* and its introduction of strict and negligent liability.

41 The courts have persistently refused to resolve the matter and appear to be in a state of self-denial. Witness this remarkable synthesis in *Ramis a/l Muniandy v PP*:⁶⁰

The meaning of “possession” was discussed by Lord Pearce in *Warner v Metropolitan Police Comr* [1969] 2 AC 256, and followed by this court in the case of *Tan Ah Tee v PP* [1978–1979] SLR 211; [1980] 1 MLJ 49. A long line of cases has since followed the ruling in these cases. Essentially, in order to prove possession, the prosecution had to satisfy two elements: firstly, it had to prove that Ramis had physical control of the cannabis and, secondly, that Ramis *knew* that what he had under his physical control was cannabis ... [emphasis added]

42 Lord Pearce patently did not require proof that the accused “knew” he had cannabis. Nor are pronouncements in this vein uncommon.⁶¹ Lest it be thought that no harm is done if, notwithstanding a misunderstanding about *Warner v Metropolitan Police Commissioner*⁶² and *Tan Ah Tee*, the requirement of knowledge now prevails, we need look only at the decision of Yong CJ in a Magistrate’s Appeal in *Shan Kai Weng v PP* wherein it was held:⁶³

Where a person is in possession of a bag or package which, in fact, contains a controlled drug, it is presumed that he is in possession of and

60 [2001] 3 SLR 534 at [22].

61 Less self-contradictory are cases like *Sim Teck Ho v PP* [2000] 4 SLR 39 at [13], which described the position as follows:

Therefore, in order to prove possession, the Prosecution must prove that there is first, physical control over the controlled drug, and second, knowledge of the existence of the thing itself, that is the existence of the controlled drug, *but not the name nor nature of the drug*. [emphasis added]

However, nowhere in judgments such as these is there even an attempt at reconciling this with the presumption of knowledge in s 18(2). If this is the position, then it becomes pointless to presume knowledge of the “nature” of the drug.

62 *Supra* n 50.

63 [2004] 1 SLR 57 at [23]–[24] (“*Shan Kai Weng*”).

knows the nature of the controlled drug. It is *open to the accused to rebut these presumptions: PP v Hla Win* ... The Court of Appeal in *Tan Ah Tee v PP* ... considered the sort of explanation required to rebut the presumption of knowledge of the nature of the drug under s 18(2) MDA The court approved the approach of Lord Pearce in the House of Lords decision, *R v Warner* ..., accepting that the word “possession” in the MDA should be construed as Lord Pearce had construed it.

...

The position under our law, therefore, is that possession is proven once the accused knows of the existence of the thing itself. *Ignorance or mistake as to its qualities is no excuse*. The appellant knew that the tablet was in his car. He believed it to be a sleeping pill, which, like the aspirin of the hypothetical in *Warner* and *Tan Ah Tee*, is a drug. As such, his ignorance as to the qualities of the tablet did not provide him a defence to the charge of possession ...

[emphasis added]

43 The opposite has happened – instead of *Tan Ah Tee* being made to conform to the majority decision in *Hla Win*, *Hla Win* has been conscripted to the cause of *Tan Ah Tee*. It went totally unnoticed that it defies any known logic to say, on the one hand, that the accused is open to rebut the presumption that he did not know the nature of the drug, and then to say that even if he does succeed, it is not an excuse. *Shan Kai Weng* was thankfully not a capital case,⁶⁴ but there is every danger that the same kind of reasoning will prevail even where the death penalty is at stake.

44 The confusion between knowledge and negligence permeates another set of crimes – the immigration offences. The original provisions for the offence of harbouring were simple:⁶⁵

Any person who ... *harbours* any person who has acted in contravention of the provisions of this Act or the regulations ... shall be guilty of an offence ...

64 It was a charge of possession *simpliciter* for which the death penalty is not the prescribed punishment, but there is no indication in the cases that the meaning of possession on a charge of mere possession is any different from the meaning of possession for the purpose of trafficking, which is a capital crime. One hopes that if the courts insist on adopting *Tan Ah Tee* and *Warner* for mere possession, they can at least contemplate a different definition for possession for the purpose of trafficking.

65 Sections 57(1)(d), 57(1)(ii) and 57(7), Immigration Act (Cap 133, 1995 Rev Ed).

[The offence of harbouring] shall be punished with imprisonment for a term of *not less than 6 months* and not more than 2 years and shall also be liable to a fine not exceeding \$6,000 ...

Where, in any proceedings for an offence [of harbouring], it is proved that the defendant has given shelter to any person who has remained in Singapore unlawfully for a period exceeding 90 days after the expiration of any pass issued to him or who has entered Singapore [unlawfully], it shall be presumed, until the contrary is proved, that the defendant has harboured him *knowing* him to be a person who has acted in contravention of the provisions of this Act or the regulations.

[emphasis added]

45 The parallels with the MDA are almost exact. The offence of harbouring does not on its face contain any particular *mens rea* words. However, the existence of the presumption indicates clearly that the legislative intent is that the *mens rea* is actual knowledge of unlawful status of the person sheltered. The punishment for harbouring, though certainly not of the same order, involves a mandatory term of imprisonment.

46 Once again, there were problems from the start. In *PP v Vadivelu*,⁶⁶ a decision which has never since been doubted, it was held that:⁶⁷

To rebut the presumption of knowledge it is not enough for the respondent merely to deny knowledge or the acquisition of knowledge. Even if the respondent proves to the satisfaction of the court that he in fact does not know that these three Indians were overstayers, he is still *not entitled to be acquitted unless he proves on a balance of probabilities that he could not have reasonably known* that they were overstayers (see *PP v Koo Cheh Yew & Anor*). [emphasis added]

47 Once again, despite the clear legislative intent that actual knowledge was the relevant *mens rea*, albeit with the burden of proof reversed, the court insisted on the lower standard of negligence. Reliance was yet again placed on a foreign decision, this time the Malaysian case of *PP v Koo Cheh Yew*.⁶⁸ Both the decision in *Koo Cheh Yew* itself, and the resort made to it in *Vadivelu* are riddled with problems, but suffice it to

66 [1992] 1 SLR 105 (“*Vadivelu*”).

67 *Id.*, at 115, [79].

68 [1980] 2 MLJ 235 (“*Koo Cheh Yew*”).

say that the Malaysian case came out so oddly only because it was dealing with what it perceived to be a plea of ignorance of the law.⁶⁹

48 Subsequent decisions not only failed to correct the error, but extended it to the companion offence of employing an illegal immigrant.⁷⁰ The employment offence, as with harbouring, is governed by a presumption of knowledge,⁷¹ which the courts took, on the authority of *Vadivelu*, to be rebuttable not by lack of knowledge alone, but by lack of negligence as well. In *Naranjan Singh s/o Ujagar Singh v PP*,⁷² an unreported employment decision, error was compounded with confusion when the court, after quoting *Vadivelu* with approval, continued:

[I]n practice the courts have treated [the employment offence] as if it did impose a *strict liability*, and have placed a high obligation on the part of an employer of foreign workers to establish that they were not illegal immigrants or overstayers before employing them. To my mind this strict approach, certainly as regards s 57(1)(e), must be taken. To allow an employer to evade the section by doing what would, in effect, amount to *wilfully shutting his eyes* to [the] immigration or employment status of his foreign employee, would make proper control and enforcement impossible. It cannot be placing too onerous a *duty upon employers in Singapore to require them to screen* their foreign workers before employing them ... [emphasis added]

49 No less than three states of *mens rea* are treated interchangeably. First, strict liability, where both knowledge and negligence are not

69 *Koo Cheh Yew* had to deal with a very similarly constructed set of customs offences. A list of customs offences was followed by a presumption of knowledge in these terms: "any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant". The defendant in this case had pleaded that he was not aware that pianos from South Africa were prohibited when he brought them into Malaysia. The majority in the Federal Court seemed to have been distracted by the characterisation that this was a plea of mistake of law, and ruled that here, as with all cases in which mistake of law is pleaded, the defence can succeed only if the defendant "could not have possibly known" of the existence of the law concerned. With respect, Suffian LP was clearly right when he held, in dissent, that the existence of the presumption of knowledge showed the Legislature's intention that ignorance of the law here was indeed a defence. Certainly, if the Legislature desires to create a defence of ignorance or mistake of law, it is not for the judges to say otherwise. Needless to say, *Vadivelu* and the Singapore immigration offences were not even concerned with a plea of ignorance of the law.

70 Section 57(1)(e), Immigration Act.

71 Section 57(8), Immigration Act:

Where an immigration offender is found at any premises or place, other than premises used solely for residential purposes, the occupier of the premises or place shall be presumed, until the contrary is proved, to have employed him *knowing* that he is an immigration offender. [emphasis added]

72 [1993] SGHC 38.

required for conviction. Second, negligence, where the accused is required to take reasonable steps to check. Third, wilful blindness, which, as we have seen, ought to be equivalent to actual knowledge. Eventually the Legislature was to step in, but in a most curious manner. It obviously did not want to say that *Vadivelu* was wrong, but neither did it legislate to make it clear that negligence or due diligence, and not knowledge, was to be the appropriate *mens rea*.⁷³ What it did do was to simply assume that the negligence standard was the law and proceeded to specify the minimum level of checking the employer or harbourer was expected to perform in the exercise of due diligence.⁷⁴ What is now in the statute are the two offences of harbouring and employment, both still technically offences of knowledge, with an edifice of due diligence or negligence built on it.⁷⁵ The confusion between knowledge and negligence is complete.

50 The Legislature was once again to lay its clumsy hands on the immigration offences, and on the harbouring offence in particular. There is no doubt, however, that the exercise was well-intentioned. The Ministerial speech in Parliament is to be applauded for its recognition of different levels of blameworthiness:⁷⁶

What is new in these amendments is that those found guilty of *negligently harbouring* an immigration offender *will not face mandatory imprisonment*. This will, therefore, bridge the gap in the current Act where the prosecution either has to prosecute offenders for an offence that carries a mandatory imprisonment sentence, or let them off with a stern warning. Also, the courts will have some leeway not to have to send an offender to jail, if found guilty. [emphasis added]

73 Thus the presumption of knowledge in s 57(8) remains for the employment offence, and until the most recent amendment in 2004 (to be discussed in what immediately follows), s 57(7) contained the presumption of knowledge for the harbouring offence.

74 There is enigmatic s 57(9) which reads:

[I]t shall not be a defence for the defendant to prove that the person harboured or employed by him was in possession of a pass or permit issued to the person under this Act or the regulations unless the defendant further proves that he had exercised due diligence to ascertain that the pass or permit was at the material time valid ...

Technically, this is nonsense – it has never been a good defence for the defendant merely to prove that the person concerned “was in possession of a pass or permit”. The only defence was that the defendant did not know that the person concerned was an immigration offender. The fact that the person concerned showed that he had something like a pass or permit is relevant only because it is probative of the defendant’s story that he did not realise he was dealing with immigration offenders. Possession of a pass or permit is certainly not the only possible piece of evidence.

75 Section 57(10), Immigration Act.

76 *Singapore Parliamentary Debates, Official Report* (16 November 2004), vol 78 at col 1071.

51 What the Legislature actually did was this.⁷⁷ First it created a sophisticated structure of three offences – knowingly harbouring, recklessly harbouring, and negligently harbouring. The original presumption of knowledge has now disappeared and in its place a new presumption of recklessness and negligence (upon proof of the *actus reus*) stands. The peculiarities now begin. The presumption of recklessness can be rebutted only by proof that at least two of the three stipulated checks have been performed. The presumption of negligence is rebuttable only on proof that all three stipulated checks have been done. The first two offences of knowing and reckless harbouring carry the same mandatory term of imprisonment and sentencing range.⁷⁸ The offence of negligent harbouring does not carry any mandatory penalty, nor is the sentencing range quite as severe.⁷⁹ While the punishment structure would lead us to believe that the key difference is between the more serious knowing/reckless harbouring on the one hand and negligent harbouring on the other, reckless harbouring turns out not to be recklessness at all – but a species of negligence. Criminal lawyers understand the difference between recklessness and negligence to be this – that recklessness can be established only if there is actual suspicion of a state of affairs; and that negligence is the absence of such suspicion, but the circumstances are such that the accused ought to have suspected.⁸⁰ But the form of “recklessness” legislated is not recklessness, as commonly understood, at all – for one may perform only two of the three checks and yet not entertain actual suspicion that the person employed was illegal. It appears to be, in the scheme of things, a form of gross negligence.

52 However well meaning, the legislative activity surrounding the Immigration Act has been most unfortunate for the consistent development of *mens rea* in Singapore.⁸¹ Can it now not be argued that

77 The new ss 57(7A) to 57(7D).

78 Section 57(1)(iv) provides for a mandatory term of at least six months' imprisonment, to a maximum of two years.

79 Section 57(1)(v) provides for a discretionary term of imprisonment for up to one year.

80 For example, see the adoption of the Court of Appeal in *Ng Kwok Chun v PP* [1993] 1 SLR 55 at 64, [37], of the pronouncement of the Supreme Court of Canada in *R v Sault Ste Marie* (1978) 85 DLR (3d) 161 at 170:

Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction.

81 As a matter of internal logic, the new hierarchy applies only harbouring offences and not, as yet, to employment offences – it is not easy to understand why.

when the Legislature uses the term “knowledge”, it might be taken to have meant negligence as well? Can it also not be plausibly assumed that the stipulation of “recklessness” as the *mens rea* of an offence might also include negligence, though perhaps of a grosser kind? One only hopes that terminological use of *mens rea* terms in the Immigration Act will eventually be considered to be anomalous and strictly confined.

53 The two tales of drugs and immigration have the same theme. Unlike the context of s 300(c) murder where the statutory provision itself was problematic, the words in the drugs and immigration legislation were crystal clear and required actual knowledge. The court remarkably took matters into its own hands and interpreted knowledge to include negligence, and even strict liability, as well. The drugs scene is still in a degree of confusion, but the Legislature does seem to have implicitly approved of what the court did in the immigration cases. The increasing official disenchantment with the *mens rea* of knowledge deserves some exploration. It is, perhaps not generally known, of an ancient pedigree. One example will suffice and it is to be found in the existing definition of the term “voluntarily” in the Penal Code:⁸²

A person is said to cause an effect “voluntarily” when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew *or had reason to believe* to be likely to cause it.

Illustration

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery, and thus causes the death of a person. Here A may not have intended to cause death, and may even be sorry that death has been caused by this act; yet, *if he knew* that he was likely to cause death, he has caused death voluntarily.

[emphasis added]

54 On closer examination, the illustration seems strange. Quite apart from the fact that the concept of causing death voluntarily no longer has any particular significance under the Penal Code,⁸³ the definition includes the phrase “or had reason to believe”, something which is not reflected in the illustration at all. The reason is because

82 Section 39.

83 Macaulay had used the concept of causing death voluntarily to define culpable homicide and murder. The Indian colonial legislators saw it fit to do otherwise.

Macaulay's original draft did not have the phrase.⁸⁴ Why the Indian colonial authorities included it is perhaps a matter of a degree of conjecture, but one may speculate that there was a certain loss of faith in the *mens rea* of knowledge, and that it was felt that it might be too difficult for the prosecution to handle. Expressions of such fear are not difficult to find in the drugs and immigration cases. The court in *Vadivelu* declared:⁸⁵

It is quite clear from the [mandatory] punishments ... that the legislature intends to curb the problems of illegal immigrants, overstayers and employment of illegal immigrants by discouraging the employment or harbouring of such persons. This *would not be achieved* if mere negligence and recklessness on the part of the accused to enquire about the status of the illegal immigrant or overstayer, if he knows or has reason to believe that the person is a foreigner, would be sufficient to rebut the presumption of knowledge. [emphasis added]

55 And of the potential of convicting the innocent, the court in *Tan Ah Tee* quoted Lord Pearce as saying:⁸⁶

It would leave some unfortunate victims of circumstances who move innocently but rashly in shady surroundings and who carry packages or tablets for strangers or unreliable friends. But I think even they would have an opportunity of ventilating their story and in some cases, if innocent of any knowledge and bad motives obtaining an acquittal. Some of the persons in some of the rather far-fetched circumstances

84 *A Penal Code Prepared by the Indian Law Commissioners, supra* n 34 at p 42. The failure to harmonise the amended definition of "voluntarily" with the rest of the draft Code has also resulted in a clash with the "hurt" provisions. *Eg*, s 321 says:

Whoever does any act with the *intention* of thereby causing hurt to any person, or with the *knowledge* that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt". [emphasis added]

This is the original draft and obviously contains no reference to the negligence limb subsequently added to the definition of "voluntary" in s 39. One does sympathise with any judge who apparently has to resort to contortions like this one, found in *Sim Yew Thong v Ng Loy Nam Thomas* [2000] 4 SLR 193 at [18]:

There is no definition of the term "knowledge" in the Penal Code. In my judgment, for the purposes of s 321 of the PC, the term "knowledge" encompasses both recklessness (where an accused knows he is likely to cause a result) and negligence (when an accused has reason to believe that he is likely to cause a result). I was reinforced in this view by the general definition of the term "voluntarily" in s 39 of the [Penal Code] ...

One might have expected the court to take the s 321 interpretation for the purpose of voluntarily causing hurt, rather than to distort the meaning of "knowledge" in order to preserve a degree of consistency with s 39, on both the principle that the ambiguity ought to be resolved in favour of the accused, and the maxim that the specific is to be preferred over the general, *generalia specialibus non derogant*.

85 *Supra* n 66, at 116, [86].

86 *Supra* n 49, at 220, [23].

which have been envisaged in argument would still be left in difficulties. But I do not think that Parliament intended to cater for them in its efforts to stop a serious evil.

56 The gist is clear. It is not so much that there is any ethical strength in a desire to water down knowledge to negligence and even strict liability, nor is this the direct intent of those who would do so. The fear is that the prosecution would be put to insurmountable evidential difficulties were the *mens rea* of knowledge insisted upon. The possibility of injustice is recognised, but it is believed that this can perhaps be minimised by prosecutorial discretion, and is, ultimately, the price that has to be paid for dealing with “serious” social problems.

57 Is the fear justified? The courts often emphasise that knowledge need not be proven by direct evidence alone, and that it is permissible to prove knowledge by circumstantial evidence. Indeed, there are entire families of offences which require a high degree of knowledge, particularly those which require “dishonesty”⁸⁷ or something to be done “corruptly”,⁸⁸ and it has never been suggested that the prosecution faces insurmountable difficulties.⁸⁹ Proof comes by way of inferences from the behaviour of the accused, from statements made under interrogation to law enforcement officers, the testimony of others, and occasionally from the use of presumptions.⁹⁰ Even in drugs and immigration prosecutions, one comes across case after case where the courts declare that negligence or strict liability is necessary for enforcement, and in the same breath find

87 In the Penal Code, this requires an “intention of causing wrongful gain ... or wrongful loss” (s 24), and is the key *mens rea* element for “offences against property” such as theft (s 378), criminal misappropriation (s 403) and criminal breach of trust (s 405). See, for example, *Er Joo Nguang v PP* [2000] 2 SLR 645 at [39], where Yong Pung How CJ declared:

[I]t must be stressed that *negligence is insufficient* to make out an offence of [criminal breach of trust]. [emphasis added]

88 Sections 5 and 6, Prevention of Corruption Act (Cap 241, 1993 Rev Ed). See, for example, the pronouncement in *Fong Ser Joo William v PP* [2000] 4 SLR 77 at [31] and [33]:

The guilty knowledge that must be established for a conviction under s 6(a) of the Act refers to whether the appellant *knew or realised* that what he did was corrupt ... The question of whether the appellant possessed the relevant guilty knowledge was a *subjective one*. [emphasis added]

89 Indeed if that had been the experience, one would have expected the Legislature to act with alacrity.

90 For example, s 8, Prevention of Corruption Act, *supra* n 88, which applies to public officials. Notably, the Penal Code offences of dishonesty typically do not contain such presumptions.

on the facts that knowledge is proved.⁹¹ Few are the cases where it has actually mattered that the *mens rea* is negligence and not knowledge.⁹² Yet those cases exist and it must be asked whether securing a conviction under those limited circumstances is so crucial to the enforcement of the statute. Caution must be exercised when considering the declarations or wishes of those responsible for enforcement, for what is more convenient an excuse for prosecutorial failure than that the law is against them?⁹³ Suggestions that the law has produced a particular unmeritorious acquittal must be examined closely to see if there are more convincing alternative explanations – could the investigation or prosecution have been conducted in such a way as to overcome the alleged difficulty? Care must also be taken not to respond hastily and unthinkingly to anxiety over a particular social problem. The phenomenon of tweaking the criminal justice system just to show the public that the government is serious and doing something is prevalent the world over – we must be on guard against it happening in Singapore.

58 What would have been the more prudent way? Where the legislature is clear about *mens rea*, that ought to settle the matter for the courts – knowledge means knowledge and not anything else, whatever the judges may think about enforcement. The Legislature is quite capable of acting to amend the *mens rea* where it thinks fit. Where on a consideration of all available material, the Legislature genuinely believes that the *mens rea* of knowledge is unworkable, it is nonetheless desirable to preserve an element of proportionality in labelling and punishment. This can be done by the creation of a separate layer of negligent offences with less severe penalties. If it is desired to create further distinctions between classes of negligence, more layers can be formed, and perhaps a sentencing discretion will deal with it adequately. What is unacceptable is the concurrent expansion of *mens rea* (to include negligence or strict liability) and the preservation of the same mandatory punishment structure as that which prevailed when *mens rea* meant knowledge and nothing but knowledge. That would only bring about needless disproportionality. The most recent changes to the immigration offences are certainly a step in the right direction, albeit a small and clumsy one.

91 In the fateful case of *Tan Ah Tee*, *supra* n 49, itself, the trial judges had found on the evidence that both accused persons actually knew that the bag in their custody contained heroin – a finding not contradicted by the Court of Appeal. For another example in an immigration case, see *Loo See Mei v PP* [2004] 2 SLR 27, where a finding of knowledge in the form of “wilful blindness” was upheld on appeal.

92 An example is *Hla Win v PP*, *supra* n 54, discussed above.

93 This is explored in some detail in Hor, “Illegal Immigration: Principle and Pragmatism in the Criminal Law”, *supra* n 45.

III. Negligence: Gross and simple

59 The rise of negligence as the *mens rea* of choice has been dramatic.⁹⁴ The Penal Code is sparing in the use of negligence.⁹⁵ Modern offences typically contain a negligence alternative, and this means that, in practice, it is the only limb which matters. Consider this offence under the Terrorism (Suppression of Financing) Act:⁹⁶

Every person who directly or indirectly, *wilfully* and without lawful excuse, provides or collects property —

- (a) with the *intention* that the property be used ; or
- (b) *knowing* or having *reasonable grounds to believe* that the property will be used,

in whole or in part, in order to commit any terrorist act, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 10 years or to both.

[emphasis added]

60 The institutional inexperience shows. The negligence language (“reasonable grounds to believe”) appears to have been simply added without adequate thought. First, it clashes with the use of the *mens rea* word “wilfully”. It is clear that someone can only “wilfully” collect funds for the commission of terrorist acts if there is actual knowledge of the terrorist purpose,⁹⁷ but sub-section (b) then tells us that if the collector

94 The discussion in this section grew from ideas first canvassed in Michael Hor, “Medical Negligence: The Contours of Criminality and the Role of the Coroner” [1997] Sing JLS 86. See also Victor Ramraj, “Criminal Negligence and the Standard of Care [1999] Sing JLS 678.

95 These offences often have to do with activity which endanger life and limb – for example, causing hurt (s 337) or grievous hurt (s 338) negligently, and negligent conduct with respect to poisons (s 284), fire (s 285) and explosives (s 286). They are offences of a relatively minor order, attracting a maximum penalty of, typically, six months imprisonment. When they appear with the alternative *mens rea* of rashness, the maxima go up – for example two years’ imprisonment for causing death by rash or negligent act (s 304A). Atypical are offences of negligently allowing prisoners (s 129, three years’ imprisonment) or persons in lawful custody (s 223, two years’ imprisonment) to escape.

96 Cap 325, 2003 Rev Ed, s 3.

97 See, for example, the approval in *Chng Gim Huat v PP* [2000] 3 SLR 262 at [76]–[77] of an earlier description of the meaning of wilfulness (in the context of wilful tax evasion) in *The Queen v Senior* [1899] 1 QB 283 at 290–291:

‘[W]ilfully’ means that the act is done deliberately and intentionally, not by accident or inadvertence ... Therefore, if the [accused] harboured an honest mistake as to the nature of the payments, he would not be guilty of the offences charged ...

did not actually know but ought to have known, that is sufficient. The problem is not new and has never been satisfactorily resolved. In one other similar situation,⁹⁸ the court applied the negligence standard without addressing the problem of inconsistency with words indicating a higher degree of *mens rea*. One might have thought that the principle that interpretational ambiguities ought to be settled in favour of the accused would have applied. The drafting solution is simple – either adopt one or the other, not both. One is tempted to speculate that the failure to identify and fix such a long-standing problem stems from a certain legislative awkwardness when it comes to the handling of negligence as a criminal concept. Second, there is a massive bunching together of vastly different degrees of *mens rea* – from intention (which presumably means that the motive of the accused is to aid terrorist activity), to knowledge, to negligence. Problems of fair labelling arise – it would be akin to creating one large offence of homicide from intentional to negligent killing. Problems of proportionate punishment portend. Again, this is not new, and has emerged in the context of the famous s 304A of the Penal Code:

Whoever causes the death of any person by doing any *rash* or *negligent* act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both. [emphasis added]

61 It is now established that the difference between rashness and negligence is advertence – one is rash when one is actually aware of the risk of death, one is merely negligent when one is not so aware, but ought to have been.⁹⁹ Advertent risk of death is of course far more blameworthy

98 A similar piece of sloppy drafting is found in s 411, Penal Code, which defined the offence of dishonest receipt of stolen property:

Whoever *dishonestly* receives or retains any stolen property, knowing or *having reason to believe* the same to be stolen property, shall be punished ... [emphasis added]

This formulation is clearly nonsensical – dishonesty under the Penal Code requires, by s 24, knowledge of wrongful gain or loss. One who does not know but only has reason to believe that the property concerned was stolen can never be dishonest. Faced with this, the court in *Ow Yew Beng v PP* [2003] 1 SLR 536 at [11] said:

Section 411, read with s 24, clearly envisages that an individual can be dishonest, *ie* having an intention to cause wrongful gain or loss, even though he has no actual knowledge, but only reason to believe that the property was stolen ... Logically, dishonesty under s 411 would have to bear the broader meaning of an intention to cause gain or loss which the accused *either knows or has reason to believe was wrongful*. [emphasis in original]

There is certainly no logical way out – either s 24 or s 411 is wrong. It is just as impermissible to add words to s 24, as it is to ignore the phrase “or having reason to believe” in s 411.

99 *PP v Teo Poh Leng* [1992] 1 SLR 15.

than its inadvertent counterpart. After some uncertainty, the court sought to impose a more or less strict sentencing guideline prescribing imprisonment for rashness and fines for mere negligence.¹⁰⁰ Unfortunately, there is now indication that that the court does not consider this to be a hard-and-fast rule, and where it feels so moved might sentence a negligent offender to a term of imprisonment. In *PP v Poh Teck Huat*, the court explained it as follows:¹⁰¹

A simple examination of the *language of s 304A* shows that Parliament had clearly accorded the sentencing court a discretion to impose a fine or sentence of imprisonment regardless of whether death is the result of a rash or negligent act.

...

In examining the moral culpability of an offender, the scale would start with mere negligence and end with gross recklessness. However negligence does not end nicely where rashness begins and there is *a certain measure of overlap*. As such, it is possible for the moral culpability of an offender who has committed a rash act to be akin to that of a negligent act.

[emphasis added]

62 The omnibus offence begins to mislead the court. The sentiment seems to be that the sheer proximity of the two states of *mens rea*, as it appears in the section, must mean that, although they are different, they are not all that different. Of course, properly conceived, negligence (inadvertent risk-taking) can never overlap with rashness (advertent risk-taking). Conscious risk-taking must always be morally more culpable.¹⁰² The solution is again simple – the Legislature needs to say clearly that this is so, and it should do that by creating out, of the omnibus offence, two different offences, named differently and punished differently. The case for structurally discriminating between the states of *mens rea* applies with greater force for offences like those in the Terrorism Act which involve, in an all-encompassing offence, *mens rea* of a spectrum of culpability and

100 *Id.*, at 17, [8]:

[T]he mere fact that a human life is lost due to negligent driving of a motor car does not justify a custodial sentence in the absence of an allegation of callousness and it is no part of the duty of the courts to punish with savage sentences every motorist who has the misfortune to have an accident, which results in a loss of life, even though the accident be due to an error of judgment on the part of the driver.

See also *PP v Gan Lim Soon* [1993] 3 SLR 261, and *PP v Tiyatun* [2002] 2 SLR 246.

101 [2003] 3 SLR 299 at 302–303, [14] and [20].

102 Given that the risk taken is of the same order of seriousness.

punishment of a far greater range of severity. Clearly a different and more sophisticated approach is needed if the *mens rea* of negligence is to be an increasingly important feature of the criminal landscape. Simply tacking on words like “reasonable grounds to believe” after “knowing” carries with it the danger of confusing two distinct *mens rea* of very different blameworthiness.

63 What does criminal negligence mean? This has proven to be one of the most persistent problems in the history of Singapore criminal law. With the advent of the age of negligence, the question assumes an even greater significance. Criminal negligence has received the most judicial attention in the context of s 304A of the Penal Code which contains absolutely no explication of the concept of the negligence which it employs. This eventually led to the courts of British Malaya and their successor courts squabbling over its precise meaning for decades. They fell into three camps. There were those who could see no reason why the English common law standard of “gross negligence” should not apply¹⁰³ – the civil law may define its own negligence for its purposes, but the criminal law chooses to punish only if negligence attains a certain degree of seriousness. There were those who were set against the standard of gross negligence,¹⁰⁴ either for reasons of autonomy or of policy – the Penal Code should not be a slave of the English common law, and if the standard of gross negligence were to be imposed, jury convictions might be impossible to achieve. Of those who opposed gross negligence, some hinted at some sort of intermediate standard,¹⁰⁵ while others were of the

103 Notably, the Federated Malay States decision of *Cheow Keok v PP* [1940] 1 MLJ 103. This decision was subsequently overruled by the Federal Court of Malaysia in *Adnan bin Khamis v PP* [1972] 1 MLJ 274, now the governing decision in Malaysia, but the Federal Court was unclear as to what was to stand in place of the test of gross negligence: “mere carelessness or inadvertence, without anything more, is not enough, in our opinion, to establish guilt ... [but the test to be applied is] whether or not a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from such conduct”.

104 Principally the Court of Appeal of Sarawak, North Borneo and Brunei in *PP v Mills* [1971] 1 MLJ 4 (“*Mills*”). The Singapore case of *Mah Kah Yew v PP* [1969–1971] SLR 441 felt itself bound by *Mills* for reasons of *stare decisis*.

105 This was the position in *Lai Tin v PP* [1939] 1 MLJ 248 (“*Lai Tin*”), a Perak decision, and of at least Whitton J in *Woo Sing v R* [1954] MLJ 200 (“*Woo Sing*”), a Singapore decision. Murray-Aynsley who had authored *Lai Tin* (“I would not go so far as to say that the degree of negligence necessary to support a civil action should be applied without reservation. A criminal charge and a civil action should be approached in a different spirit”), presided over *Woo Sing* as Chief Justice of Singapore and had become rather more enigmatic – he no longer thought it “necessary to lay down a different standard of negligence in civil and criminal cases”.

firm view that the neatest solution would be to equate the standard of criminal negligence with civil negligence.¹⁰⁶

64 Two decisions, both of which had Yong CJ sitting as a High Court judge,¹⁰⁷ purported to clear this matter up once and for all in favour of the last view. The first was the decision in *Lim Poh Eng v PP*,¹⁰⁸ where the equation between the criminal and civil standard was justified in this manner:¹⁰⁹

While there is *no doubt a need to maintain a distinction* between civil liability and criminal liability, it is questionable whether it is necessary to have an intermediate standard of negligence in order to maintain that distinction. Even without a different standard of negligence, there are still two essential differences between a tort in negligence and criminal liability which involves negligence. First, in a crime which involves negligence, the breach of the civil standard of negligence has to be *proved beyond reasonable doubt*, as opposed to a balance of probabilities. Secondly, in a crime which involves negligence, negligence is *not the sole criteria of liability*. For example, in the case of an offence involving s 338 of the Penal Code, in addition to proving negligence, the Prosecution has to prove grievous hurt to a person and that the act endangered human life or the personal safety of others ...

An additional problem with the use of an intermediate standard of negligence is the *difficulty of applying it in practice*. While there is abundant case law which defines what the civil standard of negligence is in different situations, there is a dearth of authority which explains what the intermediate standard would be. The problem is compounded by the fact that, even within the law of tort, the civil standard varies in accordance with the circumstances.

...

In view of the variations even within the civil standard of negligence, an intermediate standard of negligence would be too elusive a concept to be workable.

[emphasis added]

65 The court itself acknowledges that a distinction between civil and criminal negligence must be maintained. The reason is not hard to find. It

106 The earliest clear articulation of this was in *Anthonyssamy v PP* [1956] MLJ 247 (“negligence for the purposes of s 304A and of other sections in the Code where negligence is an ingredient of the offence is the same as in civil matters”).

107 The Court of Appeal has yet to pronounce on the matter and it must remain a possibility that it may not agree with the former Chief Justice.

108 [1999] 2 SLR 116 (“*Lim Poh Eng*”).

109 *Id*, at [27]–[28].

stems from the fundamental difference between the focus of the civil law on the compensation of private individuals, and the preoccupation of the criminal law on punishment on behalf of the State. No doubt both civil and criminal negligence are predicated on a conception of blameworthiness. Yet the role that moral culpability plays in civil negligence is much more nuanced and muted. Civil negligence is sometimes not simply about whether a particular individual was sufficiently blameworthy, but about the *relative* blameworthiness of several parties. Civil negligence is ultimately concerned about who is to bear a loss that has already occurred, and because of this, factors which have little to do with culpability sometimes impinge – the primary example being the “deep pockets” phenomenon.¹¹⁰ The cornerstone of civil negligence is *objective* foreseeability. We can expect all others to behave like ordinary or reasonable persons would and to order our lives according to that expectation. If someone else behaves in a manner which is out of the ordinary or unreasonable and in the course of which I am injured or my property damaged, I can expect to be compensated. Civil liability attaches because of a failure to live up to an objective standard and ultimately is unconcerned with individual culpability. Looking at it from a more pragmatic or institutional perspective, there are negligent acts which do not sufficiently engage the public interest, and for which the imposition of civil liability at the behest of the party wronged is response enough. The heavy hand of the criminal law may not yet be warranted. If we move up the ladder of severity, conceivably there comes a point when the public interest is sufficiently implicated and the concurrent imposition of criminal punishment is thought necessary. The issue is what difference is difference enough.

66 The court admitted that a distinction exists and indeed ought to be maintained. It was, however, of the view that because other mechanisms exist to demarcate the civil from the criminal, the standard of negligence need not be different. Gross or intermediate negligence is unnecessary and indeed would make too much of a difference between civil and criminal negligence. The reasons which the court gives for this belief are far from convincing. It is said that the difference in burdens of proof is a sufficient difference – criminal liability requiring the higher burden of proof beyond reasonable doubt. Underlying the superficial appeal of this piece of reasoning is a fundamental misunderstanding of

110 Yong CJ himself acknowledged this in *Ng Keng Yong v PP* [2004] 4 SLR 89 at [77], describing some of these non-culpability factors as “extraneous considerations of insurance and risk allocation”.

the difference between the *evidential* function of the rules on burden of proof and the *substantive* function of the rules on *mens rea*. The burden of proof is significant only where the facts are in doubt – the rules operate to break the evidential deadlock. The principle of proof beyond reasonable doubt for criminal liability is an expression of the sentiment that we must be extra sure of the facts before we punish. The balance of probabilities formula reflects the relativity of the civil calculus – as between two parties, the party which shows that the facts (in its favour) are more likely than not true, should win on the facts. The burden of proof has no function when the facts are clear – as it was in both *Lim Poh Eng* and *Ng Keng Yong v PP*,¹¹¹ the case that followed it. When the facts are not in doubt, the substantive law operates to decide liability. Where there is no real factual dispute, as seems to be the case in the recent decisions, it means nothing to say that there is a difference in the burden of proof. The analogy would be saying to someone, “since I have given you so much food and drink, you don’t need any clothes to wear”.

67 The argument for the second alleged distinction is even more puzzling and rather easy to dispose of. The court proposes that criminal liability cannot be established by negligence alone. Taking s 338 of the Penal Code as an example, the court said that, in addition to negligence, “grievous hurt” and endangerment had to be proved as well. We look at s 338:

Whoever causes *grievous hurt* to any person by doing any act *so rashly or negligently as to endanger human life or the personal safety of others*, shall be punished with imprisonment for a term which may extend to 2 years, or with fine which may extend to \$1,000, or with both. [emphasis added]

68 How these two elements can be construed as being a difference between civil and criminal liability is a complete mystery. True enough grievous hurt must be proved, but how is a civil claim to succeed without proof of injury? Lest it might be thought that only grievous hurt will suffice, one need only look at s 337 which imposes liability for the negligent causing of simple hurt. The supposed requirement of endangerment is illusory. The governing phrase is “so negligently as to endanger” – the negligence inquiry (whether a reasonable person ought to have foreseen danger) cannot be separated from the element of endangerment itself. The court, rather suspiciously, did not refer to

111 *Ibid.*

s 304A, the provision which it was directly concerned with. There is no language of endangerment there.

69 Whether or not a higher standard of negligence is desirable or not, the court was of the view that it would be too elusive and unworkable – the application of the civil standard is uncertain enough, what more if the criminal court were to impose another higher standard. One need only contemplate the disastrous consequences which might flow from adopting the same line of reasoning for the rules on burden of proof – the civil standard is uncertain enough, surely we cannot countenance yet another standard for criminal cases. The truth is that several major common law jurisdictions do indeed maintain precisely this difference in the standard of civil and criminal negligence;¹¹² there is no evidence that it has proven to be unworkable and elusive. One should not pretend that a higher criminal standard would be easy to define, but we know that different degrees of negligence exists, and indeed are presumably taken into account in sentencing. Preserving the distinction would give the criminal court a justifiable discretion to consider certain kinds of civil negligence not to be criminal as well. It is an uncertainty which we can well live with, if it means that we can have a *substantive* distinction between what is civil and what is criminal.

70 Failure on the standard of care front did not deter lawyers from pressing ahead with the argument that, whatever the standard of care might be, the attributes of the reasonable person can be more subjectivised for the purposes of criminal law.¹¹³ This was rebuffed by Yong Pung How CJ sitting as a High Court judge in *Ng Keng Yong*.¹¹⁴ The case was a local sensation. A naval vessel under the control of a trainee officer had mistakenly thought that an approaching ship was on one side

112 For example, see the words of the Supreme Court of Canada in the leading case of *R v Anderson* [1990] 1 SCR 265:

In a civil negligence case concerned with adjustment of losses, the connection between conduct and consequences is often quite tenuous. The mythical reasonable man has been equipped with a great deal of clairvoyance in order to compensate the innocent victim. Often the defendant will not, in fact, have foreseen the consequences of his negligent acts for which he is held accountable on an objective basis. In a criminal case the connection must be more substantial ... That is the rationale for the requirement of a marked departure from the norm.

In England, “gross negligence” is required: *R v Adomako* [1995] 1 AC 171. In Australia, see *Callaghan v The Queen* (1952) 87 CLR 115.

113 The issue is still open in Canada, with the Supreme Court divided in *R v Tutton* [1989] 1 SCR 1392.

114 *Supra* n 110.

of the vessel when it was actually on the other – a collision killing several crew members ensued. The court not only affirmed what it said in *Lim Poh Eng*, it proceeded to carry the civil–criminal equation to its logical conclusion:¹¹⁵

It is ... established that the criminal *standard of negligence is the same* as that in civil negligence. *Nettleship v Weston* was a case that dealt directly with the issue of standard of care. Since I took the view that *Nettleship v Weston* represented the correct approach to a trainee's standard of care in civil negligence, it necessarily applied in the present criminal context. This *flows strictly* from my earlier decision in *Lim Poh Eng*. [emphasis added]

71 *Nettleship v Weston*¹¹⁶ was, of course, that infamous English tort case which established that a learner driver was to be held to the standard of a competent experienced driver. The court explained its attraction for the holding in this manner:¹¹⁷

A doctrine of varying standards depending on the defendant's experience was too uncertain to be viable ... any other alternative was *simply too ambiguous and uncertain*.

...

Even if I were minded to accept the second appellant's argument that she should be held to a lower standard because she was still a trainee, that still begged the question of what standard the second appellant should have been held to. The second appellant argued that all she had to do was take her training seriously. Assuming that I was prepared to agree with this, *I could not see any logical reason to limit such an indulgence to the facts of this case*.

...

Holding a trainee to the same standard as a qualified professional is also sound as a matter of policy ... This may seem harsh, but to subject her to a lower standard of care would *unfairly place the safety of everyone else around her at risk*.

[emphasis added]

72 It is important first to appreciate that, contrary to what the court believed, the adoption of *Nettleship* did not “flow strictly” from the decision in *Lim Poh Eng* that civil, as opposed to gross or intermediate, negligence governed s 304A. The court in *Lim Poh Eng* was not concerned

115 *Supra* n 108, at [84].

116 [1971] 2 QB 691 (“*Nettleship*”).

117 *Supra* n 108, at [76]–[79].

with the question of whether or not the concept of the reasonable person encompassed certain peculiarities – the holding there was that, assuming we know the characteristics of the reasonable person, is the standard of negligence simple, gross or intermediate? It would have been entirely consistent for the court in *Ng Keng Yong* to have held that, although the test of simple negligence applied, the relevant reasonable person was an ordinarily competent trainee.

73 The court then advanced several substantive arguments supporting the use of *Nettleship* in criminal cases. Whatever its desirability in civil cases, I am concerned here only with its transplantation into the criminal context. Just as in *Lim Poh Eng*, the court once again demonstrated its aversion to ambiguity and uncertainty. The truth is that the concept of the reasonable person is inherently uncertain. People are not the same, and when you impose on them the concept of “a reasonable person” you inevitably have to decide which of those characteristics of the person at hand ought to be transposed to the reasonable person, and which should not. The court ought to have recognised that this inherent ambiguity is not confined to s 304A. The Chief Justice had himself spelt out a far more sensitive and workable approach to criminal negligence in a slightly different context. In *Koh Hak Boon v PP*,¹¹⁸ the Chief Justice had to explain the standard of negligence embodied in the offence in s 414 of the Penal Code:

Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or *has reason to believe* to be stolen property, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both. [emphasis added]

74 The Chief Justice had this to say about the reasonable person in the context of criminal law and it deserves to be quoted at length:¹¹⁹

Whether or not a person had ‘reason to believe’ certain property was stolen property ... is a test to be applied by the court, **but from the perspective of the accused person**. It must relate to the standards of belief of a reasonable man and not to those of any particular accused person, since the legislature could hardly have intended that, *ceteris paribus*, a conviction might depend on whether the accused reasons like a cretin or a genius. However, **some element of subjectivity must be involved**, because what might be apparent to a person with specialized knowledge of a certain field might not be apparent to a layman of even very high intelligence. For example, a jewellery expert might be able to

118 [1993] 3 SLR 427.

119 *Id*, at 430, [13].

say with certainty that a certain gem identifiable to him by reason of his expertise is stolen, whereas to even a very intelligent layman the identity of the gem and its implications might not be apparent. The logical conclusion was that ***the court must assume the position of the actual individual involved (ie including his knowledge and experience)***, but must *reason* (ie infer from the facts known to such individual) from that position like an objective reasonable man. [emphasis added in bold italics]

75 Uncertainty and ambiguity did not faze the court then, it ought not to now. Just because we cannot be absolutely certain how far we should go does not mean that we don't try at all. We go as far as we reasonably can. The court in *Ng Keng Yong* employed the time-honoured "slippery slope" argument – if we recognise one characteristic, what is there to prevent the infusion of every other characteristic? But if a slippery slope there be, we are already on it – there are already reasonable women, reasonable children and reasonable foreigners. Is there a logical boundary to the class of included characteristics? A similar problem is encountered in the law concerning the defence of provocation, for the court has held that to succeed the accused must show that a reasonable person would have been provoked. The Court of Appeal in *Lau Lee Peng v PP* drew the line thus:¹²⁰

[T]he fact that the second requirement [of the reasonable person being provoked] is to be determined objectively does not mean that any *characteristics of the accused*, including mental infirmities, could not be taken into account if they affected the gravity of the provocation. But *individual peculiarities which merely affected the accused's power of self-control but not the gravity of the provocation* should not be taken into account ... [emphasis added]

76 There will be occasion to discuss the law of provocation in detail and whether this method of drawing the line is satisfactory, but for our present purposes it is sufficient to observe that the court can and does stop slipping down slippery slopes. For the moment, I offer only a brief description of where the line can be logically drawn. Take the example of a drunken motorist – it would be surprising if any court can be persuaded that he or she ought to be judged on the basis of a reasonable intoxicated driver. But what if it emerges that unknown to driver, someone had spiked his or her drink, the effect of which was not apparent until the car was already on the road, and a fatal accident occurred as he or she was trying to stop the car on the side of the road

120 [2000] 2 SLR 628 at [28].

when he or she realised something was wrong? The picture changes and it would seem unduly harsh to hold the driver to the standard of a reasonable sober driver. The intuitive line is therefore to be drawn between excusable or justifiable characteristics (such as involuntary intoxication) and inexcusable or unjustifiable ones (such as voluntary intoxication).

77 Yet all this means only that there should be no obstacle to the courts using a much more subjective test of the reasonable person for criminal purposes – is there any good reason why the courts should do so? It is first necessary to deal with the idea that holding a trainee to the standard of a trainee would unfairly put at risk the safety of everyone around her. Expecting a trainee to exhibit the skill of a trained person is nothing but expecting a level of skill which the trainee can never reasonably be expected to attain. How indeed does that enhance the safety of those around her? Similarly, it might be argued that expecting a child to have the judgment of an adult is also required to enhance the safety of the public. The traditional rationale of the criminal law is weak indeed – for what is the use of deterring a trainee or a child from behaviour which is only to be expected of a reasonable trainee or child. What would really enhance safety? Take the facts of *Ng Keng Yong*. The fairer and more efficient position would be this – the trainee is to be judged on the standard of a reasonable trainee of her experience and training. The supervisor ought to be judged on the standard of a reasonable supervisor. If the trainee performed as a reasonable trainee did, there is no earthly reason why she ought to be subjected to criminal punishment. So too the supervisor – if he had supervised negligently, he ought to be punished; if not, again there is no reason to punish. If both performed reasonably, then we need to ask if the authorities which set up the training system had been negligent, perhaps in failing to provide the resources for adequate supervision. If it is found that they have not set up a reasonable system of supervision, they should be criminally responsible. If all parties behaved reasonably, then perhaps no one ought to be criminally liable – it is not the case that someone must be held criminally liable every time there is death or injury.

78 The situation might be very different for civil liability, for there the issue there is not who is blameworthy and is to be punished, but who should pay for the loss. The court was keenly aware of this critical difference:¹²¹

121 *Supra* n 110, at [77].

I acknowledged the second appellant's point that *Nettleship v Weston* was influenced to some extent by extraneous considerations of insurance and risk allocation, none of which were relevant in the present case. [emphasis added]

79 Yet without any explanation or justification, the point, although acknowledged, was dismissed. Its significance must have been this – take away the insurance and risk-allocation factor and there is little, if any, strength left in the holding in *Nettleship*.

80 The poverty of any utilitarian justification is compounded by the lack of any ethical support. This was perhaps what the accused had argued in *Ng Keng Yong*, although in an apparently garbled form:¹²²

The second appellant contended that the strict approach in *Nettleship v Weston* was inappropriate for a criminal charge because “the status of a trainee is itself *diametrically opposed to the concept of mens rea* ... [as] a trainee is still trained to know what is right and what is wrong.” ... [T]his line of reasoning completely misses the point. Section 304A *does not require proof of intention or knowledge*.

81 There is no doubt that the negligence arm of s 304A does not require intention or knowledge. But I do not think that counsel for the accused could have suggested otherwise. The contention which was probably intended was this. *Nettleship* was a decision on civil liability. The concept of *mens rea* is not present in civil cases and is peculiar to criminal offences. *Mens rea* has to do with blameworthiness and culpability of the person being charged. It is therefore inconsistent to hold the accused to a standard of behaviour which he or she cannot reasonably attain, with the result that criminal liability attaches without real culpability or blameworthiness on the part of the accused.

82 It is unfortunate that with the rise of negligence as the preferred *mens rea* in Singapore criminal law, the court has chosen, not only to reject the idea of a different and higher level of negligence for criminal offences, but to apply an extreme objectivist approach to negligence under s 304A. Such an approach is ethically indefensible and of little if any pragmatic value. Fortunately, there is a contrary tradition in some other areas where a negligence criterion is encountered – for offences with the “reason to believe” formula and for the defence of provocation, the court has fashioned a sensitive, subjectivist view of negligence in keeping with the radical differences between civil and criminal liability.

122 Id at [86] and [87].

One can perhaps be cautiously optimistic that this alternative approach will eventually prevail throughout the criminal law.

IV. Strict liability: Spoilt for choice

83 The question of what a court is supposed to do when the Legislature is silent concerning a *mens rea* requirement has long exercised the minds of observers of the Singapore criminal law.¹²³ Earlier commentaries discern a dichotomy of approaches.¹²⁴ Some courts adopted the methodology of the English common law.¹²⁵ Briefly, this required the court to apply an initial presumption that the prosecution is to prove full (and actual) knowledge of the fact in question. Then the court is to undertake an analysis of whether the Legislature impliedly intended *mens rea* not to be a requirement of the offence. Various pieces of circumstantial evidence are said to go into this task – whether the creation of the offence was a matter of social concern or for the protection of the public, whether the offence carried a social stigma or particularly severe penalties, whether the omission of a *mens rea* requirement will promote observance of the legislation.¹²⁶ If the presumption of *mens rea* is not rebutted, then full knowledge must be proved by the prosecution. If the presumption is rebutted, then the offence becomes one of strict liability and the presence or absence of *mens rea* is irrelevant to liability. Cases which have used this approach have come out one way or the other, often without any convincing reason why the result ought to have been so.¹²⁷

84 The other cases choose what has been called the Penal Code approach – so called because it focuses on s 79 of the Penal Code which

123 For what is perhaps the first, see McKillop, “Strict Liability Offences in Singapore and Malaysia”, *supra* n 48, which ends with an indictment (at 144) which, unfortunately still rings true: “It seems almost that for every case in which the courts here have opted for *mens rea* another case on the same or a similar offence can be found in which liability has been held to be strict, and *vice-versa*.”

124 See for example, M Sornarajah, “Defences to Strict Liability Offences in Singapore and Malaysia” (1985) 27 Mal LR 1 at 6, which speaks of a “two track system of criminal law”.

125 See, for example, *PP v Mohamed Ibrahim* [1963] MLJ 289 (offence of possession of obscene books for sale deemed to be of strict liability), a case which is all the more striking as it had to do with the imposition of strict liability on a Penal Code offence.

126 This last factor came to the fore in a Privy Council decision from Singapore: *Lim Chin Aik v R* [1963] MLJ 50.

127 See, for example, Michael Hor, “Strict Liability in Criminal Law: A Re-Examination” [1996] Sing JLS 312, my earlier attempt to explore the issue.

seems to declare a reasonable mistake of fact to be a general defence.¹²⁸ These cases automatically apply s 79 when the Legislature is silent with the result, in effect, that the relevant *mens rea* is negligence, but the burden of proof is reversed. The accused must disprove negligence on a balance of probabilities. In short, under this scheme, there is no such thing as strict liability. For a while the “common law” approach cases seemed to run in a parallel stream alongside the “Penal Code” cases, the twain neither meeting nor acknowledging each other.

85 In recent years, the court has sought to merge the two streams, and the result is a fairly consistent *framework* for dealing with legislative silence on *mens rea*. The common law approach of presumption and rebuttal of a knowledge requirement has been preserved.¹²⁹ Thus if the court decides that the presumption is not rebutted, actual knowledge must be proved by the prosecution. However, if the presumption is held to be rebutted, and this is where the change is, the court will nonetheless allow the accused the opportunity of disproving negligence.¹³⁰ The inspiration for this development was surprisingly to be found not, as one would have expected, in the Penal Code, but in Canadian common law.¹³¹ Unlike the English common law, Canadian courts have, for all offences punishable with imprisonment and construed as being of “strict liability”, afforded the defence of due diligence.¹³² This minimum *mens rea* requirement was mandated by the Canadian Charter of Rights and Freedoms. It was only several years later that the connection between Canadian due diligence and the defence of reasonable mistake in s 79 of

128 See *Tan Khee Wan Iris v PP* [1995] 2 SLR 63 (defence of mistake under s 79 applicable to offence of providing public entertainment without a licence, the defence failing on the facts). This is the preferred approach of Chan Wing Cheong, “Requirement of Fault in Strict Liability” (1999) 11 SAclJ 98, who wrote, at 119:

[T]he courts should firmly grasp the nettle in the recent developments and finally reject the possibility of imposing liability without fault. However, this should not be through the adoption of common law but on the basis of a finely worked out compromise seen in the Penal Code provisions.

There is technical appeal and the advantage of certainty in this view, but the question is whether the “finely worked out compromise in the Penal Code” is the best we can do to provide optimal force to the principle of *mens rea*.

129 See, for example, *Bridges Christopher v PP* [1997] 1 SLR 406 (official secrets offence) and *PP v Ng Chee Kheong* [1999] 4 SLR 56 (insider dealing offence).

130 See, for example, *Tan Cheng Kwee v PP* [2002] 3 SLR 390; *Chng Wei Meng v PP*, *supra* n 1; and *Comfort Management Pte Ltd v PP* [2003] 2 SLR 67.

131 The decision which started this trend was *M V Balakrishnan v PP* [1998] SGHC 416. It appears to have been followed ever since.

132 The seminal decision is *R v City of Sault Ste Marie*, *supra* n 80, placed on a constitutional footing in *R v Wholesale Travel Group Inc* [1991] 3 SCR 154, but limited to offences which carry a possibility of imprisonment in *R v Pontes* [1995] 3 SCR 44.

the Penal Code was made.¹³³ The problem is that, while the two are conceptually similar, there are potential differences between Canadian due diligence and Penal Code mistake. We need to look at s 79:

Nothing is an offence which is done by any person who ... by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

86 One example of a possible difference is this – it is widely believed that s 79 cannot avail an accused person if, based on the facts as he or she reasonably believed it to be, another (lesser) offence would have been committed – for then the accused would not be able to say he or she believed “himself to be justified by law”.¹³⁴ It has not been definitively decided for Canadian due diligence what the result would be under these circumstances, and there is language in its principal decision which goes one way or the other.¹³⁵ Another is that Canadian due diligence is now a constitutional mandate overriding even an express statutory deprivation of the defence.¹³⁶ It remains to be seen if due diligence in Singapore will be carried this far.¹³⁷ Yet another difference is that Canadian due diligence might well be moving towards the position, at least for some offences, that the burden on the accused with respect to due diligence is merely one of production and not of persuasion, whereas s 79 firmly places the burden of persuasion on the accused.¹³⁸

- 133 Perhaps for the first time in *Comfort Management Pte Ltd v PP*, *supra* n 130 at [31]:
[A]n accused is entitled to be acquitted if he can prove on a balance of probabilities that he has taken due care and attention to comply with the statutory requirements. This conclusion is not only just and logical, but also mandated by s 79, read with ss 40(2) and 52 of the Penal Code.
- 134 For example, where the accused reasonably believed he or she was importing obscene DVDs, but was actually importing heroin.
- 135 Consider the description of the defence of due diligence of Dickson J in *R v City of Sault Ste Marie*, *supra* n 80, at 1325–1326:
The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission *innocent*, or if he took all reasonable steps to avoid the *particular event*. [emphasis added]
The accused may of course have been knowingly committing the lesser offence, and thus not acting innocently, but may have taken reasonable steps to avoid committing the “particular event” (*ie*, the greater offence).
- 136 *R v Wholesale Travel Group Inc*, *supra* n 132.
- 137 The development of constitutional due process has been rudimentary and not particularly encouraging, but the point has never been decided or even argued. The principal controversy has been whether or not there is such a thing as constitutional due process in Singapore: *Ong Ah Chuan v PP* [1980–1981] SLR 48 (yes), *Jabar v PP* [1995] 1 SLR 617 (no). See Thio Li-ann, “Trends in Constitutional Interpretation: Oppugning *Ong*, Awakening *Arumugam*? [1997] Sing JLS 240.
- 138 See the baldly split decision in *R v Wholesale Travel Group Inc*, *supra* n 128. Casting a burden of persuasion on the accused to prove due diligence on a balance of probabilities would violate the presumption of innocence according to Charter

87 While the use of a “common law” version of due diligence is technically difficult to defend in view of (the enacted) s 79, there is pragmatic sense in the result that the “common law” defence is not bound by the peculiar limitations of reasonable mistake in s 79. Be that as it may, due diligence or reasonable mistake, this development is one of the few bright spots in a bleak landscape. Again, although it has not been explicitly decided that either due diligence or reasonable mistake is invariably available – in Canada it is limited to offences which put the accused in risk of imprisonment¹³⁹ – the indications are that they are.¹⁴⁰ The result is perhaps the complete abolition of strict liability itself,¹⁴¹ called absolute liability in Canada,¹⁴² where *mens rea* of any kind is irrelevant to liability. No doubt it is the lowest form of *mens rea* – negligence with the burden reversed – but it is *mens rea* no less. Were cases like *PP v Mohamed Ibrahim*¹⁴³ and *PP v Teo Kwang Kiang*¹⁴⁴ to be decided today, the result may or may not be different – but at least the accused persons will now have the opportunity of showing that they had behaved reasonably, which is all that can be legitimately expected of them.

88 But all is not well at the first stage – the preservation of the process of presumption and rebuttal of *mens rea* (which the prosecution has to prove) has meant the continuation of all the arbitrariness and illogicality that has plagued it in the past. If one were to line up the cases in which the presumption prevailed against those in which it was held to be rebutted, one would search in vain for any convincing distinguishing feature between them. Consider, on the one hand, *Bridges Christopher v*

jurisprudence, and would require strict justification to survive Charter scrutiny. Imposing a burden of production is less intrusive and requires less justification.

139 Or imprisonment in default.

140 In *Comfort Management Pte Ltd v PP*, *supra* n 130, the court applied the due diligence defence to an offence which carried a maximum penalty of a \$5,000 fine. All fines in Singapore are potentially subject to imprisonment in default: s 224(b)(iv), Criminal Procedure Code (Cap 68, 1985 Rev Ed).

141 Although it remains to be seen if the courts will resile from its current position of strict liability (*ie*, Canadian absolute liability) for the offence of contempt of court: see, for example, *AG v Lingle* [1995] 1 SLR 696, *AG v Wain* [1991] SLR 383. These decision pre-date the invention of “due diligence” in the late 1990s. In principle, there is no reason to treat contempt of court differently, but it is such a peculiar offence that it is not immediately obvious what due diligence might mean in that context.

142 The recent trend, since the adoption of Canadian due diligence, has been for Singapore courts to use the strict–absolute liability dichotomy.

143 *Supra* n 125 (accused held strictly liable for being in possession of obscene books for sale).

144 [1992] 1 SLR 9 (accused held strictly liable for possession of contaminated vegetables for sale).

*PP*¹⁴⁵ where the court upheld the presumption of *mens rea* in the context of an offence of communicating an official secret in these terms:¹⁴⁶

[T]here must be knowledge that the information is secret official information. The same applies to the other things mentioned in s 5(1). I do not see how removing the requirement of knowledge will be *workable* ... It is a fact of life that the actual duty of communication is often delegated to subordinates ... The person actually doing the communication may well turn out to be a very junior officer ...

It is no part of the duty of the junior officer to question each and every order from his superiors to communicate the information to whomever he is directed to. Adopting a strict liability approach would mean that the junior officer would have committed an offence under this Act if, unknown to him, his superior or someone higher up actually has no authority to order the release of the information or has wrongly (or wrongfully) classified certain information as not being secret official information ...

An officer or government servant is *entitled to rely* on his or her superior's representation that any particular piece of information is not secret official information ... The entire civil service cannot operate like the secret police. In any event, the deputy public prosecutor has not explained how imposing strict liability on a member of the public can *further the objective of protecting government secrets*.

[emphasis added]

89 It is certainly not true that making official secrets offences strict liability, especially when there is now the recourse to the defence of due diligence, would be “unworkable”. There are in existence regimes of strict liability where many people currently operate with just such a sword of Damocles suspended over them. Also, the court could not have been serious about the failure of the prosecution to explain how the objectives of the Act will be protected by strict liability. The answer is simple and is the same as for any justification for strict liability. All those who would deal with official secrets will redouble their efforts to make sure that such information is not leaked to the public. What the court was perhaps really saying was that it would be unfair to impose strict liability – with the result that totally blameless people would be guilty of a criminal offence. However, strict liability is always unfair, and it is not more so simply because those who would be slain by it happened to be government servants.

145 [1997] 1 SLR 406.

146 *Id.*, at [74]–[76].

90 In a similar vein is *PP v Ng Chee Kheong*, which refused to hold that the offence of insider trading was one of strict liability. The court described the *mens rea* requirement to be “an *intention to use* the undisclosed information *knowing* that the information was price-sensitive and unavailable to the public”¹⁴⁷ and rejected the entreaties of the Prosecution to the contrary in this fashion:¹⁴⁸

[N]o legislative intent would be served by adopting a strict liability approach toward trading by an insider as it would *discourage competent entrepreneurial persons from holding directorial positions* in companies. Furthermore, ... to interpret the offence as a strict liability one would place *morally innocent* persons at risk of being convicted for mere possession of inside knowledge especially when the test of what is material information is an objective one. Such an interpretation is clearly not consonant with *the consequences of conviction*. Under s 104 of the Act, the convicted person can be fined up to \$50,000 or imprisoned up to seven years. Under s 105, he is also liable to pay compensation to the other party to the transaction who has suffered loss. [emphasis added]

91 Surely, the same considerations apply with equal force, *mutatis mutandis*, to every context in which strict liability is urged upon the court. Strict liability will always discourage people from engaging in the activity in question. The morally innocent will always be at risk if *mens rea* is done away with. It is simply not the case that the court has a particularly good track record of preventing offences with serious penalties from being construed as offences of strict liability. Even the Legislature, which normally leaves such matters to the courts, responded with alacrity to this uncharacteristic display of liberalism.¹⁴⁹

92 We turn now to decisions which went the other way. In *Tan Cheng Kwee v PP*,¹⁵⁰ the court opted for strict liability in the context of the offence of causing a heavy vehicle, which was in excess of the permitted height, to be driven on a public road. The court reasoned as follows:¹⁵¹

It was patently clear to me that s 79(1) of the Act fell within that class of statutory offences that dealt with *public safety* ...

147 *Supra* n 129, at [48] (emphasis added).

148 *Id.*, at [45].

149 The amended provisions on insider dealing are now found in Pt XII, Div 3, Securities and Futures Act (Cap 289, 2002 Rev Ed). They were drafted in direct response to this decision: *Singapore Parliamentary Debates, Official Report* (5 October 2001), vol 73, cols 2136–2137.

150 [2002] 3 SLR 390.

151 *Id.*, at [17]–[21].

The *severity of the penal sanction* is but one of the many factors that the court has to take into account in trying to ascertain Parliamentary intent. While a slight penalty may be a factor in favour of construing an offence as one based on strict liability, there is by *no means a definitive correlation*. Parliament has the power to prescribe severe penalties for strict liability offences in order to achieve its legislative purpose.

A strict liability reading would rigorously *promote the intention of Parliament* by encouraging, or coercing, drivers and owners of heavy motor vehicles to exercise a fair degree of care and consideration in their activities. On the contrary, imputing a state of mind as a necessity for every single element of the offence would not only *severely stultify the legislative purpose* but would actually go against its very grain. After all, drivers and owners of heavy motor vehicles with high loads risked causing serious public harm if they did not positively take care. *Harm might also be done if they were merely passive, knew nothing or were honestly mistaken* about the facts and did not know that they had to obtain the requisite licences that would immediately tell them which roads were out of bounds to their vehicles.

[emphasis added]

93 The attitude of the court is completely different, but not on the basis of any apparent principle. Causing a vehicle which is beyond the permitted height to be driven on public roads is indeed a matter of public safety, but so too the unauthorised disclosure of official secrets. Indeed it might be argued that the potential damage to the nation is likely to be far less for the over-height vehicle. The severity of punishment, which played a significant role in the insider trading decision, and which ought to have weighed even more heavily here with the mandatory imprisonment of one year, is now downplayed without explanation. In the official secrets and insider trading decisions, the court could see no legitimate governmental purpose to be served by strict liability – here the court sweepingly declares that the legislative purpose cannot be served without strict liability. Once again, no convincing reason is advanced, nor are the two earlier *pro-mens rea* decisions even deserving of mention. The court is now particularly impressed with the *harm* that might be done regardless of *mens rea*, a consideration curiously and inexplicably absent from both the official secrets and insider dealing decisions. Gone is the tender concern about the conviction of the “morally innocent”, and so is the potential disincentive to people who might embark on the activity in question.

94 One other pro-strict liability decision was *Chng Wei Meng v PP*,¹⁵² which held that the offence of driving under disqualification was one of strict liability and the prosecution need not prove that the accused knew he or she was under disqualification. A barrage of reasons was given:¹⁵³

In my opinion, there were several factors, which strongly suggested that Parliament intended liability to be strict. Firstly, is the *absence of any statutory defences* for s 43(4) of the Act. Secondly, as is the case for the majority of strict liability offences, the offence of driving under disqualification is *not a truly "criminal" offence* but one that is regulatory in nature. Thirdly, s 43(4) is clearly *concerned with the protection and safety of the public* as it prohibits persons without valid or subsisting licences from driving on our public roads and highways and endangering human lives ... Fourthly, I found it significant that active promotion of the observance of s 43(4) is very much *dependent upon personal compliance* by the individual since the traffic police are often unable, save in cases where the offender has been stopped for some other offences or on the off-chance when random checks are being conducted, to identify and stop disqualified persons from driving on the roads ... it is *no great hardship for a person who intends to drive to determine* whether or not he is in fact qualified (or disqualified) to do so.

...

The *severity of the penalties* which s 43(4) attracts – a maximum prison term of three years – *does not necessarily bar* a construction of strict liability ... [T]he legislature could reasonably have intended severity to be a significant deterrence and there is nothing inconsistent with imposing severe penalties for offences of strict liability.

[emphasis added]

95 The severity of punishment was again sidelined without justification, and one begins to wonder whether or not this supposed factor is nothing but a part of an elaborate attempt at *ex post facto* rationalisation. In none of the decisions we have examined so far, pro-*mens rea* or pro-strict liability, were there statutory defences – indeed if there had been, the issue of strict liability would not have arisen, for the Legislature would have spoken. Another of those mysterious distinctions, oft employed but never satisfactorily explained, was used – the offence in question was not “truly criminal” but “regulatory”. Notably the court does not explain why an offence which concerned the grave matter of endangering human lives and which carried a maximum penalty of three

152 *Supra* n 1.

153 *Id.*, at [18]–[20].

years' imprisonment was not truly criminal. How the fact that the statutory injunction was "dependent upon personal compliance" led to the inevitability of strict liability is also never explained. One does struggle to imagine any offence which is not so dependent. It may be "no great hardship" for the driver to determine whether or not there was a disqualification order in place, but only if he or she is actually put on inquiry. Indeed on the facts, the accused was indeed warned of the strong possibility of disqualification – there would not have been any problem securing a conviction even if *mens rea* had been presumed. Far from demonstrating the need for strict liability, the case actually shows that strict liability is unnecessary for most, if not all, of the cases in which prosecution is normally pursued.¹⁵⁴

96 It is tempting to surmise that the presumption of *mens rea* is upheld or held to be rebutted on grounds which remain unexpressed. Be that as it may, if there is such a thing as a presumption of *mens rea*, it ought to be taken seriously. Those who would like to see it rebutted ought to be put to strict proof. Mere declarations that life would be impossible without strict liability are insufficient. The court must scrutinise each of these claims – exactly what is the hardship alleged and is it really the case that there is no alternative but to impose strict liability. These crucial issues seem presently to be dealt with in the realm of conjecture and untested assumptions. That will not do. My belief is that those who are responsible for state prosecution are not really interested in bringing to book those who genuinely were not aware that they were offending – our prosecutors are better people than that. My suspicion is that prosecutions are normally pursued only if the prosecutors are convinced that there is *mens rea*. Strict liability is pressed upon the courts because the prosecutors feel either that they may not be able to prove *mens rea*, or that it would be administratively too costly to do so. With criminal justice, as with most things, you pay for what you get – one should not pretend that an improvement in the quality of due process will not carry with it certain administrative costs. The question is whether those costs are so onerous as to be intolerable. One must of course be open to the possibility that they might, in some cases, be – but such a conclusion should only be reached after careful scrutiny of the evidence. A claim that *mens rea* will impose intolerable costs on the criminal justice system must be strictly justified to the court, in each and every case where strict

¹⁵⁴ See also *Lee Cheong Ngan alias Lee Cheong Yuen v PP* [2004] SGHC 91, where the court did not have to decide the strict liability issue as *mens rea* was proven on the facts.

liability is pressed. It must be remembered that even if the court were to get it wrong (in the eyes of the prosecutorial authorities), no great calamity befalls for the Legislature retains the power to make the *mens rea* position explicit.¹⁵⁵ The Legislature has no problems acting decisively and quickly where it feels that the court's insistence on full *mens rea* is unduly burdensome.

97 There is one other interesting development in the continuing saga of strict liability. Where the Legislature fails to make *mens rea* explicit, the court has to decide whether to introduce *mens rea* by implication. It was generally understood that the only kind of *mens rea* which can be so presumed was knowledge. So the choice was between the prosecution proving knowledge (where the presumption prevails), or, as we have seen, the accused disproving negligence (where the presumption is rebutted). There are indications that the court is willing to presume, not only knowledge, but negligence as well – with the result that the *mens rea* is negligence, but the prosecution bears the burden of proof. *Foo Siang Wah Frederick v PP*¹⁵⁶ concerned the offence of obstructing or hindering a policeman or corruption official in the course of investigating corruption charges. The issue was what was the appropriate *mens rea* with respect to the fact that the person hindered was a policeman or a corruption official, and with respect to the fact that that official was acting in the course of duty. The court rejected strict liability as being “unduly harsh”. The court also rejected the requirement of full knowledge as being unduly solicitous of unmeritorious accused persons. Instead it did something which few thought was possible – it upheld the presumption of *mens rea*, but the *mens rea* of negligence:¹⁵⁷

In my view, a reasonable half-way house would be to require the Prosecution to prove that the accused either knew or *had reason to believe* that the person hindered or obstructed was a police or [corruption] officer, whom he also either knew, or *had reason to believe*, was acting in the execution of his duty. [emphasis added]

98 Although the court did not say it explicitly, it must have also felt that the defence of due diligence, which requires the accused person to disprove negligence and which follows necessarily from a finding of strict liability, was also unduly harsh. So now there are two halfway houses – the defence of due diligence and the presumption of negligent *mens rea*.

155 Subject, of course, to constitutional constraints, which at the moment are unclear in Singapore.

156 [2000] 2 SLR 405.

157 *Id*, at [50].

This is a significant innovation – for even if one is of the view that negligence is the appropriate *mens rea*, there is no necessary compulsion that it is the accused who must disprove it. Perhaps even the court is not sufficiently cognisant of its importance, for this other halfway house is not even mentioned, let alone considered in the strict liability cases we have looked at. Why would it not have been appropriate in either the over-height vehicle or the driving under disqualification cases for the prosecution to prove negligence, as opposed to the accused disproving it?

99 The phenomenon of halfway houses is the most interesting development in the field of strict liability in recent years. There are no longer cases of true strict liability where *mens rea* is completely irrelevant to liability – the emergence of halfway houses allows the accused person, at least, to disprove negligence. But this is a pro-*mens rea* development only if the halfway house solution is being applied for offences which would have otherwise be construed as strict liability. Similarly the newly-fashioned presumption of negligence is a positive development only if the result would have otherwise been either strict liability or the defence of due diligence. My fear is that halfway houses can cut both ways. The temptation would be to resort to them, illegitimately in my view, where otherwise the result would have been to uphold the presumption of the full *mens rea* of knowledge. The temptation is strong because halfway houses have the apparent appeal of the image of a court behaving reasonably and fairly to both sides. To yield to it would be wrong. Negligence liability still punishes those who are ultimately not aware that they are offending. In some cases negligent offenders are subject to the same mandatory punishment as witting offenders. In all cases negligent offenders are labelled in the same manner as their knowing counterparts. The primary presumption must still be the presumption of full knowledge and it must be a strong one. Each and every attempt to lower the *mens rea* requirement, whether to a presumption of negligence or to a defence of due diligence must be strictly and convincingly justified. When in doubt, the court should opt for the highest form of *mens rea*, not settle for halfway houses.

V. *Mens rea* in retreat

100 The state of *mens rea* in Singapore is not a particularly happy one. Historical reasons, such as the ones which underlie s 300(c) murder and the definition of voluntariness in the Penal Code, combine with more recent legislative and judicial choices which consistently undermine the principle of full *mens rea*. The single most striking feature has been the advent of negligence as the *mens rea* of choice. In striking fashion, the

drugs and immigration cases demonstrate how negligence has muscled in, even where the Legislature has been explicit that only knowledge should be the *mens rea*. A parallel development has been the equating of criminal with civil negligence, both in terms of the standard of care and the rather extreme objectivist view of it, resulting in a significant lowering in the threshold of what has to be shown for criminal negligence. A little more promising have been developments in strict liability where it can perhaps be cautiously declared that true strict liability no longer exists in Singapore. This has been the work of bold judicial innovation in the development of the defence of due diligence and the presumption of negligent *mens rea*. Yet the danger is real that the existence of these halfway houses will tempt the court to opt for negligence where it might have decided on full *mens rea* in the past. Instrumental arguments about the unworkability of the principle of full *mens rea* have been very far from convincing – the courts in turn accepting or rejecting them for reasons yet to be discerned. The ethical and symbolic cost of punishing the innocent must not be forgotten. The plea here is for the appropriate scrutiny, both judicial and legislative, of claims that the requirement of full *mens rea* would adversely and intolerably affect the criminal justice system. The bureaucracy will almost invariably try to make their job of enforcement easier.¹⁵⁸ Our judges and lawmakers must play their part in being a restraining influence. The plea here is also for our judges to reconsider the content of criminal negligence, a concept which probably cannot be resisted entirely. As more and more crimes of a serious order become predicated on negligence, the need to set apart the criminal from the civil assumes a hitherto unknown urgency.

VI. Postscript

101 Since this article went into production, there have been some significant developments. Only a brief description is offered here to the put the reader on notice. A more satisfactory treatment of them will have to wait for another day.

¹⁵⁸ I do not, of course, suggest that there is necessarily any selfish interest in this – the saving of cost for the bureaucracy is the saving of cost for all taxpayers. Similarly, bureaucratic efficiency is normally a boon not only to the bureaucracy but to all.

Murder

102 The Court of Appeal delivered its judgment in *PP v Lim Poh Lye*,¹⁵⁹ reversing the trial court and finding the accused guilty of murder. The Court of Appeal quite rightly dismissed the relevance of *Tan Chee Hwee*,¹⁶⁰ and expressly sidelined *Yasin*¹⁶¹ by quoting with approval *Visuvanathan*.¹⁶² *Yasin* was not overruled, only restricted to its facts, and so is technically susceptible of resurrection. It remains to be seen if the *Yasin* “lifeline” has been cut once and for all.

Knowledge versus negligence in drug cases

103 There have been major judicial pronouncements defending the line between a *mens rea* of knowledge and a *mens rea* of negligence. *PP v Tan Kiam Peng*¹⁶³ contains an erudite discourse by V K Rajah J on the issue with this conclusion:

The uncompromising and distinct line between recklessness and negligence on the one hand and actual knowledge and wilful blindness on the other must be vigilantly policed and preserved by the courts and cannot be lightly dismissed as a mere semantic nicety.¹⁶⁴

104 In the Court of Appeal decision of *Iwuchukwu Amara Tochi v PP*,¹⁶⁵ Choo Han Teck J delivered the judgment of the Court, warning against

[creating] a wrong assumption that there was some sort of positive legal duty, meaning that the first appellant was bound in law to inspect and determine what he was carrying, and that consequentially, if he did not do so, he would be found liable *on account of that failure or omission*. The [Misuse of Drugs] Act does not prescribe any such duty.¹⁶⁶
[emphasis in original]

159 [2005] 4 SLR 582.

160 *Supra* n 24.

161 *Supra* n 12.

162 *Supra* n 15.

163 [2006] SGHC 207.

164 *Id*, at [30].

165 [2006] 2 SLR 503.

166 *Id*, at [6].

Rashness, negligence and section 304A of the Penal Code

105 In the Ministry of Home Affairs' recently-unveiled proposals to reform the Penal Code,¹⁶⁷ an intention is expressed to formally bifurcate section 304A – where death is caused by a rash act, the maximum penalty shall be five years' imprisonment; where it is caused by a negligent act, the maximum remains at two years' imprisonment. This would enforce the conceptual distinction between rashness (or recklessness) and negligence, but while five years for the reckless causing of death is perhaps conceivable, one must think very hard for a situation in which two years' imprisonment might be thought to be an appropriate punishment for a negligence offence.

167 The Ministry's consultation paper and draft Penal Code (Amendment) Bill are available at <<http://www.reach.gov.sg/olcp/asp/ocp/ocp01d1.asp?id=3683>> (accessed 22 December 2006).