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MEDICAL NEGLIGENCE: THE CONTOURS OF CRIMINALITY AND THE ROLE OF THE CORONER

The question of how the criminal law should treat negligently caused harm has always been practically and ethically problematic. While a wealth of authority exists for criminal negligence on the roads, negligence in other contexts, particularly in the medical sphere, has rarely reached the criminal courts. This article explores the different ways in which negligence can be criminalised and argues that the law should not be held hostage by the peculiarities of road traffic negligence, and that the matter should be considered afresh for medical negligence. The conceptually difficult role of the Coroner in making pronouncements on criminal liability where the injury is fatal is also examined.

I. Society's Response to Negligence

SOCIETY deals with negligence on the part of its health care professionals[1] in no less than four different ways. Most obviously, those injured are allowed to sue those responsible under the civil law (in tort and contract) to obtain monetary compensation for what they have suffered.[2] It is also well known that the offending party is also potentially subject to disciplinary proceedings by his or her peers in the profession, which may result in censure or suspension from practice.[3] Rather less visible is the operation of the criminal law – for the doctor may have committed an offence for which he or she may be punished by fine or even imprisonment if found guilty. Finally, if death ensues, the matter is subject to the scrutiny of the Coroner who is charged with the task of investigating and reporting on the cause of death. It is

1 Although the discussion which follows applies equally to nurses, dentists, pharmacists and others, the focus will be on doctors, concerning whom the available material deal with.

2 Analysis of negligence in civil law predominate the literature. See, *eg*, Yeo, "Standard of Care in Medical Negligence Cases" (1983) 21 Mal LR 30, Keown, "Doctor Knows Best?: The Rise and Rise of 'the *Bolam* test'" [1995] SJLS 342, and Kaan, "Civil Liability for Negligence" 2 March 1996, unpublished paper delivered at the Institute of Science and Forensic Medicine and Singapore Academy of Law Symposium on Medical Negligence in Coroner's Cases.

3 *Eg*, doctors are subject to s 23 of the Medical Registration Act (Cap 174, 1985 Rev Ed) which is triggered by conviction of a "heinous offence" or "infamous conduct" in a professional capacity.

with the last two of these processes that this discussion is concerned. Unlike civil and disciplinary proceedings, the criminal and coronial process are conceptually similar in that they are conducted at the direct behest of the public. The civil law can only be invoked by the injured party. Disciplinary proceedings are in the control of professionals in the same discipline. Criminal and coronial processes are marked by the prominent participation of the police and the Public Prosecutor, officials charged directly with the responsibility of protecting the public interest. The fundamental question is whether the criminal law and the coroner's inquiry, in its present form, is the most appropriate public response to medical negligence. Thorny issues must be raised concerning the optimal level of criminalisation and the precise role of the Coroner. It would perhaps be over-ambitious to offer clear-cut solutions, for much depends on the particular kind of social policy which is adopted. The aim here is much more modest; it is to lay bare the issues at stake and to present a fair picture of the arguments in favour of the contending positions.

II. The Criminal Law and Unintended Harm: The Underlying Ambivalence

While the criterion of negligence is the very stuff of the civil law, it is immediately problematic in the context of criminal law.[4] The negligent actor does not fit into traditional models of criminality. Central to any system of criminal law which draws from the jurisprudential well of the common law is the idea that there must be "*mens rea*" before there can be a crime.[5] Much has been said and written about what it really means,[6] but one cannot

[4] This has spawned much philosophical discussion. See, *eg*, the seminal views of Hart in *Punishment and Responsibility* (1968), chapter VI; Sistare, *Responsibility and Criminal Liability* (1989), chapter 7; Huigens, "Virtue and Inculpation" (1995) 108 Harv LR 1423; and Peiris, "Involuntary Manslaughter in Commonwealth Law" (1985) 5 LS 21.

[5] The *mens rea* principle is more clearly breached by strict liability offences, where even the exercise of due care will not exonerate the actor. Although there appears to be much political attachment to them, any principled justification is extremely difficult to uncover: see, Hor, "Strict Liability in Criminal Law – A Re-Examination for Singapore" [1996] SJLS 312.

[6] There is the rather sterile debate about whether negligence can be said to be a state of mind, or whether it is merely the absence of one. Ashworth, *Principles of Criminal Law* (1991), p 145, considers *mens rea* to cover only intention, knowledge and recklessness. However, there does not appear to be much point in resolving this question – if it is a form of *mens rea*, the further and more significant question would be whether it would be a sufficient mental element for a crime. If it is not so, it still has to be asked if negligence may justifiably be a substitute for *mens rea*.

escape from the earthy English equivalent of "an evil mind".[7] The criminal law has no problems dealing with someone who either intended harm or did something with the knowledge that harm would be the likely result. The intentional or reckless actor clearly has an "evil mind". The negligent actor who has neither intention or knowledge of likelihood of harm is not so easily disposed of. He or she may well have behaved with the best of intentions, for example, to save the life of a patient. Again, the negligent doctor may also have tried his or her (albeit incompetent) best in the interest of the patient. An "evil mind" there is not. Two questions arise. Should the criminal law intervene at all, and, if so, under what circumstances?

It is undeniable that the traditional rationale for criminal punishment is considerably weaker for the negligent actor. On the utilitarian plane, deterrence logic[8] works best where the actor makes a choice. He or she is assumed to be a calculating individual who conducts a sort of "profit and loss" projection in deciding how to behave. The benefits of committing the crime are put on one side of the scale and the deterrence of punishment by the criminal law in the other. None of this is operative in the same way for the negligent actor. Since he or she is not actually aware of the any risk, he does not have a real choice. Does the criminal law have any deterrent function at all in the face of negligent conduct? It is here that eminent legal philosophers have differed. Those who argue in favour of the intervention of the criminal law say that criminalisation would encourage the exercise of greater care, say, in medical treatment.[9] Their opponents adhere to the view that although this is possible, the deterrent effect is likely to be minimal in the case of inadvertent conduct.[10] Both sides have a point. While it is true that the deterrent value of the criminal law is significantly reduced in the case of negligent actors, it is probably wrong to say that it cannot have any deterrent effect at all. Theoretically, one would exercise more care if one knew that behaving negligently would bring with it adverse consequences to the self. But the inquiry cannot end there – it can be cogently argued that sufficient deterrence is already achieved by the potential civil and disciplinary proceedings,[11] and that although the criminal law might

7 Every first year law student is warned against equating criminal law with moral prohibitions, but save for the so-called "regulatory offences" which are said to carry no stigma, Hor, *supra*, note 5, no one has attempted to argue for a complete divorce of crime from morality.

8 Deterrence is chosen as the representative utilitarian aim, although arguments for and against incapacitative and rehabilitative theories of negligence liability would be similar.

9 *Eg*, Hart, *supra*, note 4.

10 *Eg*, Williams, *Criminal Law: The General Part* (1961, 2nd Ed), pp 122-4, and McCall Smith, "Criminal Negligence and the Incompetent Doctor" [1993] Medical Law Review 336.

11 It is conceivable that matters such as the severity of the sanctions following disciplinary proceedings are taken into account to determine whether prosecution is necessary (where negligence is a crime) and to determine the kind of sentence the guilty accused gets.

possibly add to existing deterrents, no useful purpose is served. The utilitarian verdict would ultimately turn on whether, as a matter of social policy, it is felt that the additional deterrence of the criminal law is required to prevent negligent conduct.

In the ethical or moral dimension, criminal punishment is reserved for those who are sufficiently blameworthy. Blameworthiness there clearly is for the advertent actor. Again this rests on the element of choice. He chose to act in defiance of the ground rules of society; he deserves to be punished by the criminal law. The moral culpability of the negligent actor is of a significantly lower order. It is based on imputed knowledge; that which he or she ought to have known.[12] Again the philosophers have argued over whether this level of blameworthiness deserves the sanction of the criminal law.[13] The situation again does not yield a clear answer. Although the negligent actor is clearly less blameworthy than the advertent one, this does not mean that the criminal law should not intervene for the situation of lower culpability, for the criminal law can, alternatively, take that into account at the sentencing, rather than the conviction, stage. Indeed, the matter cannot be resolved unless we have a clear enough idea of the minimum level of blameworthiness which justifies criminal punishment. Simply, society's decision makers have to decide whether the negligent actor has done something serious enough to attract the stigma and sanction of the criminal law. This is a very tricky issue and a word of caution must be sounded on the use of "public opinion" in the formulation of criminal justice policy.[14] Although the conception of blameworthiness cannot be entirely divorced from society's idea of it, there probably should not be an automatic correlation with what has been called "public opinion". "Public opinion" is notoriously difficult to measure. Even if it could be, discount must be made of judgements made under the influence of selective or sensationalist journalism or under an insufficient appreciation of all the facts.

To anticipate that which follows, the law and practice of criminal negligence have not answered these fundamental questions with one voice, either within a jurisdiction or between jurisdictions in the Commonwealth. The continuing ambivalence of the position of negligence in the criminal law creates an underlying jurisprudential tension. We shall see the extent to which this has affected the formulation and practice of the law in this area.

[12] If labels are needed, traditional criminal law is based on a cognitive theory whereas negligence liability rests on a capacity theory; see, Hart, *supra*, note 4.

[13] *Supra*, notes 9 and 10.

[14] See, *eg*, Ellis and Ellis, *Theories of Criminal Justice* (1989), pp 186-191, on the problems of relying on public opinion in the context of capital punishment.

III. Medical Negligence: Favoured Treatment?

There is one preliminary matter to be dealt with. Does negligence in the medical context call for different rules than, say, negligence in road traffic cases? The earlier judicial decisions do seem to exhibit a rather more solicitous attitude towards health care professionals. Two examples will suffice. First is *Williamson*,[15] one of earliest common law decisions on medical negligence. The accused was a man-midwife who removed a prolapsed uterus thinking that it was part of the placenta. What is significant at this point is that the jury was directed that if they found him guilty of manslaughter (by gross negligence, as it later became categorised as), "it would tend to encompass a most important and anxious profession with such dangers as would deter reflecting men from entering into it". Much to the same effect is the 1942 decision of the Privy Council in *Akerele*.[16] There was a yaws epidemic in West Africa (as it was then known). A doctor administered sodium bismuth tartrate, which was the recognised treatment then. It was however also known that too high a dose resulted in fatal poisoning. On the day in question, the doctor mixed a batch of the drug and administered it to 36 children, 5 of whom died of an overdose. The local courts found him criminally negligent but the Privy Council quashed the conviction. A critical consideration in the Privy Council seemed to have been that "care should be taken before imputing criminal negligence to a professional man acting in the course of his profession". This rather more graphic quotation from an earlier case[17] was cited with approval: "it would be fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck".

The sentiment in these earlier cases seem to be that although medical men, and presumably all professionals, are not exempt from the rules of criminal negligence, considerable restraint must be exercised in finding them guilty. *Williamson* based this preferential treatment of health care professionals on the argument that thinking people would be deterred from entering into the profession. *Akerele* had a different emphasis – the efficiency of existing doctors would be compromised if they had to operate under the threat of criminal prosecution. However, this initial sympathy for health care professionals seems to have evaporated. In the more recent decisions, we no longer see injunctions to be careful of imposing criminal liability.

[15] 3 C & P 635. See the account of the early cases in Aikenhead, *Mens Rea* (1914), chapter VII.

[16] [1943] AC 255.

[17] *Crick* (1859) 1 F & F 519.

Instead, there is a consistent trend of equal treatment – doctors, other professionals and even laymen are to be subject to the same rules. In England, the House of Lords in *Andrews*[18] treated doctors, other professionals and drivers no differently in the context of manslaughter by gross negligence. More recently, in the joint appeals of *Prentice, Adomako and Holloway*,[19] electricians and doctors were placed on the same footing. The Canadian Supreme Court, in deciding a remarkable series of appeals on criminal negligence in different statutes governing different activities, showed no inclination to formulate or apply a separate set of rules for doctors or anyone else.[20] Perhaps it is the Court of Appeal of New Zealand in *Yogasakaran* which dealt with the issue most squarely, and perhaps not without a tinge of sarcasm:[21]

> [T]o the extent that the submission (for the accused) may hint at some special protection for doctors there can be no need or warrant for it. Just as a person in charge of a thing which in the absence of precaution or care, may endanger human life is under a duty to take reasonable precaution, so a doctor should be. One cannot imagine that the medical profession with their high traditions would contend otherwise.

One can only speculate why there has been a change of judicial attitude. I suspect it has to do with the demystification of the professions. Perhaps a parallel development may be found in a similar willingness to impose civil liability on negligent lawyers.[22] In the past society was more willing to let the "noble" professions regulate themselves without the intervention of the law. Now the nobility seems to have eroded, with the professions beginning to look more like businesses. Additionally, a more classist analysis might reveal that in the past, doctors and judges were drawn from the same upper crust of society, and are therefore likely to treat each other as equals

[18] [1937] AC 576. *Bateman* [1925] 94 KB 791, a medical case, was used to interpret an early version of the offence of dangerous driving.

[19] [1993] 4 All ER 935 (CA Eng).

[20] *Naglik* [1993] 3 SCR 122 (negligence in providing necessaries to an infant child), *Gosset* [1993] 3 SCR 76 (manslaughter through careless use of firearm), *Creighton* [1993] 3 SCR 3 (manslaughter through negligent injection of cocaine) and *Hundal* [1993] 1 SCR 867 (causing death by dangerous driving). These negligence offences came under the scrutiny of the Supreme Court *via* a challenge under the Canadian Charter of Rights and Freedoms that they did not fulfil a minimum requirement of fault in a criminal offence.

[21] [1990] 1 NZLR 399, 405.

[22] *Rondel* v *Worsley* [1969] 1 AC 191. Lawyers are, fortunately for the legal profession, seldom implicated in the negligent causing of physical harm in their professional capacity, and for that reason have not been the subject of prosecution for criminal negligence.

with the attendant policy of non-intervention. This sort of class monopoly of the professions no longer holds and the underlying reason for treating professionals differently disappears. Yet, notwithstanding the substantive law, one wonders whether different treatment may in fact be accorded in the exercise of prosecutorial discretion. The evidence is consistent with this suspicion, albeit far from conclusive:[23] whilst the prosecution of road traffic offenders who cause death is routine,[24] there is, at the time of writing, no known prosecution of doctors for negligence in Singapore.[25]

That being so, a large part of the discussion which follows applies to criminal negligence in other contexts as it does to medical cases. However, as far as possible, material pertaining to medical practice will be used. As we shall see, this is not always possible, especially in the context of material from Singapore where scarce judicial authority exists for criminal negligence in the medical sphere.

IV. The Three Positions

There are broadly three stances open to the criminal law: decriminalisation, full criminalisation and partial criminalisation. These will be discussed in turn. It ought to be mentioned at the outset that this categorisation ignores what may be called the "*actus reus*" or harm variable of criminalising negligence. Different criminal jurisdictions do draw the *actus reus* line at different places for different negligent activity. Whilst almost all jurisdictions have some sort of liability for negligent causing of death[26] and few, if any, penalise negligent damage of property.[27] Between these poles, some jurisdictions require serious harm to the person,[28] others need only mere en-

[23] Principally because the prosecutorial authorities do not publish reasons for the exercise of their discretion, and because the known cases of medical negligence causing death have not been frequent enough to form a large enough sample size; see *infra*, note 92.

[24] For recent reported decisions, see *infra*, note 108.

[25] That potential cases of medical negligence causing death exist is clear. See *infra*, note 92.

[26] *Eg*, s 304A of the Penal Code (Cap 224, 1985 Rev Ed) in Singapore, and the common law offence of gross negligence manslaughter, both of which are discussed below.

[27] The House of Lords did try to convert an offence of reckless damage to property to one of negligence by statutory interpretation in *Caldwell* [1982] AC 341, but this has largely been frowned upon by academics and judges alike: Ashworth, *Principles of Criminal Law* (1995, 2nd Ed), pp 179-183. The Penal Code of Singapore (and indeed of any of the jurisdictions modelled on the Indian Penal Code) do not contain any offence of negligent property damage.

[28] Thus in the common law it is only manslaughter by gross negligence that is a crime, no less harm will do.

[29] S 336 of the Penal Code of Singapore, *supra*, note 27, makes it an offence to negligently endanger human life or the personal safety of others.

dangerment.[29] The relevance of harm to liability and punishment is a very contentious matter,[30] especially in the context of negligent road traffic offenders.[31] As far as criminalisation is concerned, one may expect that the greater the harm, the more pressure there will be for criminalising negligence. Additionally, where very serious harms are concerned, the tendency may be to relax the level of negligence required. These tendencies feature prominently in road traffic negligence where the sheer prevalence of negligent harm in that activity seems to have had a deep influence on the law.[32] The higher the incidence of negligent harm in the course of a particular activity, the greater is the push to criminalise lower levels of negligence and harm.[33] It is for this reason that analogies with road traffic

[30] Mere endangerment is punishable with 3 months and $250: s 336 of the Penal Code. If hurt is caused in the process it is doubled to 6 months and $500: s 337 of the Penal Code. If grievous hurt is caused it is 2 years and $1000: s 338 of the Penal Code. Whether hurt or grievous hurt is caused or not is, as far as the accused is concerned, purely fortuitous; and on principle, to increase so drastically the available penalties would appear to be according too much of an emphasis to pure luck. Incongruously , s 304A, the offence of negligently causing death, differs, by way of punishment, from negligently causing grievous hurt only in that s 304A allows an indefinite fine. The maximum term of imprisonment remains at 2 years.

[31] The stock example is the comparison between the offence of reckless or dangerous driving *per se* (s 64, Road Traffic Act (Cap 276, 1985 Rev Ed)) which is punishable with 1 year imprisonment and $3000, and reckless and dangerous driving causing death (s 66, Road Traffic Act) which is punishable with 5 years' imprisonment. The five-fold increase in the maximum term of imprisonment is very difficult to justify on principle as it is based on the often purely fortuitous event of death. Even a situation where the victim is brought to death's door but miraculously does not die will not allow s 66 to be triggered. Inconsistently, although there is an offence of driving without due care, s 65 of the Road Traffic Act, there is no corresponding offence of causing hurt or death by such driving. See the detailed treatment in the English *Road Traffic Law Review Report* (1988), chapter 6. Elusive factors like "the public sense of justice" and "public opinion" seem to feature strongly in the acceptance of such a strong role for the particular harm caused.

[32] This seems to underlie the English *Road Traffic Law Review Report*, *ibid*. Indeed the very existence of special offences for road traffic cases is an expression of the social concern for the very high incidence of road traffic injury and fatality. Singapore Government statistics reveal 23 per 10,000 casualty rate from road accidents in 1995: Internet http://www.singstat.gov.sg.

[33] The difference is clearer in England where, in general, only death caused by gross negligence is an offence, but in road traffic cases, the merely driving without due care (careless driving) is enough. Even under the Penal Code, where the general negligence provisions are broader, differences remain. Thus mere carelessness is not sufficient under s 336 of the Penal Code, but life or personal safety must be endangered. The comparison is even starker when it comes to the punishment provisions. *Eg*, causing death negligently (or rashly) in general is only punishable with 2 years imprisonment (s 304A, Penal Code), but causing death by reckless or dangerous driving attracts a maximum of 5 years imprisonment (s 66, Road Traffic Act).

law must be carefully handled for one would expect a higher degree of criminalisation than is normal. At the risk of academic incompleteness, this discussion focuses on material in the area of negligent homicide. The reason is that negligent homicide is the offence which has dominated judicial attention, almost to the exclusion of other negligence offences.[34]

(a) *Decriminalising Negligence*

There has been the occasional call to banish negligence from the realm of the criminal law. The English Criminal Law Revision Committee recommended this solution for the common law offence of manslaughter by gross negligence.[35] McCall Smith, a noted authority in medical law, has repeated it in the context of medical negligence.[36] These views are based on the judgement that the low levels of culpability of the negligent actor and utility of punishing negligence do not justify the invocation of the criminal law.[37] In their opinion, the lowest punishable level is that of recklessness, acting with the subjective awareness of the risk of harm. In the context of health care professionals in particular, the point is made that civil proceedings and disciplinary proceedings are a sufficient social response to negligence. Notwithstanding the conceptual attractiveness of this position, most, if not the major common law jurisdictions have opted for some sort of negligence liability. The clear social choice appears to have been made by legislatures and courts that at least some kinds of negligently caused death or harm should call for the intervention of the criminal law. Instinctively, it does seem to be overly dogmatic to insist that negligence, no matter how grave, should never be punishable. Consider the facts of the civil case *Chong Khin Ngen and Pang Koi Fa* v *Lim Djoe Peng*.[38] Here a neurosurgeon seemed to have left a trail of negligence. There was first a negligent diagnosis of a pituitary tumour, which, as it turned out, did not exist. This was followed by a negligent prescription of surgery,

[34] One suspects that because of the high incidence of negligent harm in general, some kind of prosecutorial policy of proceeding only in cases involving death (or perhaps serious injury) must inevitably be formulated.

[35] *Fourteenth Report: Offence Against the Person* (1980), pp 56-7. Notably, the CLRC accepted the criminalisation of careless driving and driving in complete disregard for life and safety of others.

[36] *Supra*, note 10.

[37] The CLRC, *supra*, note 35 reports:
If the law of manslaughter by gross negligence were strictly enforced, many drivers, employers, workmen and parents would be in the dock on this charge. It seems to us that here again the accident of death should be ignored for the purpose of the criminal law.

[38] HC, 2 July 1993, unreported.

which was unnecessary even if the diagnosis was correct. Then there was negligent execution of the surgical operation which caused a leak of the cerebro-spinal fluid. Finally, there was negligence at the post-operative stage. The patient was discharged when she was still obviously ill. Subsequent appeals by the mother of the patient for help were never answered. The patient died soon after. In the face of such a performance,[39] few would pause to ask if the doctor was actually aware of the danger he was putting his patient in. Even if he were not, intuitively, negligence can reach a level where the absence of actual awareness of risk may perhaps go towards mitigation of punishment, but not absolution from liability.

There is however no unanimity on the extent to which negligence should be punishable. The underlying tension which fuels the jurisprudential debate of whether or not negligence is to be punishable at all spills over into the issue of the kinds of negligence which should be criminal. Different jurisdictions adopt different verbal formulae. Even where there is agreement here, the tension is not resolved, but, as we shall see, expresses itself in the process of interpretation and application. More subtly, it influences or distorts (depending on whether one feels it is desirable or not) the exercise of discretion in other stages of the criminal process – notably in sentencing, and, as we have seen, in the decision to prosecute.

(b) *Criminalising All Negligence*

The other clean solution is to criminalise every negligent act. This has the merit of simplicity. Courts are familiar with civil liability for negligence and the same test could apply for the criminal law as well. The existence of a duty of care is normally not a problem in medical negligence.[40] The only issue is whether the accused has breached the standard of a reasonably competent doctor. However, this equation of civil and criminal liability raises the spectre of over-criminalisation. The civil law refuses to take into account most individual characteristics of the particular doctor concerned. While this is thought to be justifiable for the purpose of determining how loss through injury should be distributed, many jurisdictions do not think it correct that the civil standard of liability can be directly transplanted into the criminal law which has to identify who is to be publicly condemned,

[39] The behaviour of the doctor was described as "scandalous and deplorable", *ibid*.

[40] The issue of a duty of care would normally arise where the doctor has been accused of negligently, or even intentionally, omitting to do something which would have saved someone. It is unfortunately beyond the scope of this discussion to venture into the criminalisation of omissions.

[41] For a recent series of absorbing philosophical explorations of the tort-crime distinction, see the articles in (1996) 76 Boston University LR, all of which emphasise the strong moral

fined or jailed.[41] One is remedial, the other retributive. Just as the law institutionalises procedural differences between the civil and criminal process to reflect their different functions, many believe that the substantive law should do the same by requiring something more than civil negligence.

Nevertheless, New Zealand appears to have adopted this position. The Crimes Act 1961 contained a specific provision which made doctors liable for manslaughter if any person was killed because he or she failed to exercise reasonable knowledge, care and skill. The case of *Yogasakaran*[42] concerned an anaesthetist attending to a gall bladder operation, in the course of which the patient started having difficulty breathing. He opened a drawer marked "Dopram", took out a bottle and injected its contents into the patient. Unfortunately, the bottle did not contain Dopram but Dopamine which was fatal to the patient. Someone had shelved the bottle wrongly. It emerged at the trial that a Dopram injection was indeed the correct course of action and that the doctor thought that the bottle contained Dopram. What he did not do was to inspect the colour coding of the two drugs (in New Zealand Dopram was contained in a pink bottle within a green packet, and Dopamine in a red bottle within a yellow packet), and the small print on the label of the bottle which identified the drug it contained. The Court of Appeal followed a line of New Zealand decisions which had held that there was

or deontological element of the criminal law which does not exist to quite the same extent in civil law. *Eg*, Robinson, "The Criminal-Civil Distinction and the Utility of Desert", p 201, observes that the criminal-civil law dichotomy is to be found in communist China, democratic Switzerland, monarchist Saudi Arabia, "Islamic Pakistan, Catholic Ireland, Hindu India, the atheistic former Soviet Union, industrialised Germany, rural Papua New Guinea, the tribal Bedouins, wealthy Singapore, impoverished Somalia, developing Thailand, newly organised Ukraine, and ancient Rome". He argues that blurring the distinction would not only blunt the moral force of the criminal law, but at the same time, and because of that, affect its utility in crime prevention.

42 [1990] 1 NZLR 399.

43 Cooke P, who delivered the judgement, was influenced by three matters. First is the existence of clear New Zealand authority early this century to this effect. Secondly, the problems with the gross negligence test was mentioned. Thirdly, it was pointed out that although the rule was "at first sight too severe", it was mitigated in that, in practice, the Crown still had to prove causative negligence, and to prove that beyond reasonable doubt. The problems with gross negligence will be considered below, but the second and third grounds of the decision do seem to be mildly contradictory – if the issue has caused such significant problems in England, it can hardly be the case that it makes little or no practical difference. Also, it cannot conceivably be that so many Singapore and Malaysian decisions (discussed below) have agonised over such a practically inconsequential question. The Court of Appeal also noted that it was not aware that the New Zealand rule has produced an unjust result. It is likely that this is so because the prosecutorial authorities have been doing the work for the courts. Nevertheless, the position appears to be entrenched and has been extended to negligence in the context of power boat driving: *Myatt* [1991] 1 NZLR 674.

no difference between civil and criminal negligence.[43] The only question was whether a reasonably competent anaesthetist would have checked to see that the bottle did indeed contain Dopram. It was held that he had breached this standard.

To all appearances this decision was neat and simple. Yet one only has to look at the final disposition of the case to see that the underlying tension is at work even here. The trial judge recorded the conviction but took the unusual course of discharging him without a sentence on the grounds that there were extenuating circumstances. The Court of Appeal did not interfere. The result is curious. The whole purpose of criminalising an activity is to sentence and punish the actor. The court had to embrace the contradictory propositions that there was a crime but the criminal need not be punished. This looks like a classic illustration of what has been called the "hydraulic" theory of discretion in the criminal process.[44] The difficult policy decisions are suppressed by the substantive law at the conviction stage only to re-appear at the sentencing stage. One may speculate that, in such a situation, these questions would have also emerged earlier on, in the exercise of prosecutorial discretion. Jurisdictions which intend to emulate the New Zealand model are well advised to consider carefully the potential that the equation of civil and criminal negligence may squeeze difficult decision making from the openness and appealability of a judicial decision to convict

[44] The most discussed aspect of criminal justice "hydraulics" in Singapore, or indeed anywhere, seems have been in the context of mandatory (or mandatory minimum) sentencing: see Yeo, "Mandatory Minimum Sentences : A Tying of Judicial Hands" [1985] 2 MLJ clxxxvi, and the *Report of the Canadian Sentencing Commission* (1987), chapter 5.

[45] The greatest advantage of judicial, as opposed to prosecutorial, decision making is the higher degree of public accountability. Chief Justice Lamer of Canada in the recent Singapore Academy of Law Lecture 1996, "The Tension Between Judicial Accountability and Judicial Independence", 5 Sept 1996, Internet http://www.sal.org.sg, said:

> In an important sense, of course, our judiciary is, and for a long time has been, accountable to the public for the manner in which it performs its most important function, adjudicating the disputes that come before it. That accountability consists in the fact that, with only the rarest of exceptions, court hearings are held in public; the fact that reasons must usually be given to support court rulings; the fact that both those rulings and those reasons are open to comment and criticism by the public, the media, the profession and the academic community; the fact that decisions made by lower courts can be appealed to high courts

Even within the sphere of judicial decision-making, there is a difference between a decision to convict and a decision determining the sentence to be given. For reasons which are not entirely clear, although learning on pre-trial process is plentiful, the same cannot be said of the rules governing the post-conviction stage of sentencing, which has traditionally been treated as the orphan of the criminal process. This has led a leading English writer to call for "clear and fair rules for post-conviction hearings" to be "devised as soon as possible": Ashworth, *Sentencing and Penal Policy* (1983), p 95.

to the less visible processes of the criminal justice system.[45] Put simply, most people (and judges) do not believe that all negligence, regardless of its degree, should be criminal. The temptation to reach a morally acceptable result by alternative means is strong.[46]

(c) *Criminalising Gross Negligence*

The vast majority of the common law jurisdictions use a formula for criminal negligence which, instead of resolving the tension, enshrines it. They are agreed that mere civil negligence will not do. To be criminal, negligence must be something more. The forefather of this approach is the judgement of Lord Hewart CJ in *Bateman*.[47] It was another child-birth death where part of the uterus was removed by a doctor who thought it was the placenta. Criminal negligence, the judge noted, had been described as gross, culpable, wicked, clear, complete and even criminal. Whatever the epithet, the judge held, in words which have been repeated ever since, the incompetence must go "beyond a matter of mere compensation between subjects" and show "such disregard for life and safety of others as to amount to a crime against the State and conduct deserving of punishment".[48] This higher standard of negligence has received the recent reaffirmation of the House of Lords in *Adomako*.[49] In Canada, it is the constitutionally mandated minimum condition for criminalisation.[50] More importantly for Singapore, it is the accepted understanding of criminal negligence under the Penal Codes

[46] Or, alternatively, where the temptation is resisted, the criminal justice system may well produce fruit which is unpalatable to social sensibilities.

[47] [1925] 94 KB 791 (CCA, England).

[48] *Ibid*, p 794.

[49] [1994] 3 All ER 79, 86.

[50] See, *eg*, *Creighton* (1993) 105 DLR (4th) 632, p 647 (Lamer CJC), p 669 (McLachlin J), and the comment by Stuart, "Continuing Inconsistency But Also Now Insensitivity That Won't Work" 23 CR (4th) 240. The Canadian courts use the language of "marked departure" from the standard of the reasonable man. The Supreme Court has assumed a role of reviewing substantive due process to ensure that "the morally innocent" are not punished, or more specifically, that the mental element of an offence is sufficiently blameworthy to justify the stigma and sentence of a conviction, p 640-1 (Lamer CJC). Only strict and absolute liability offences are exempt – because the stigma is weak and burden of a conviction is light. Although such a position is possible under arts 9 and 12 of the Constitution of the Republic of Singapore, it remains to be seen if the courts here are willing to adopt so overt a policy making role as this. Nevertheless, there should be no reason why the Canadian learning on this cannot be used where the statutory provision is ambiguous, as Singapore's is.

[51] *Eg*, see an early statement in Huda, *The Principles of the Law of Crimes in British India*, Tagore Lectures 1902, p 212-5. See also what is perhaps the earliest academic discussion here, SKD, "Conflicting Judgements in the Federation of Malaya and the Colony of

of India and Sri Lanka.[51]

It is not difficult to see why this definition of criminal negligence has attracted much criticism. It is no easy task drawing the line between ordinary civil negligence and criminal gross negligence. The word "gross" implies that there is quantitative difference – but the problem is that negligence cannot be so measured. Other adjectives like "culpable" and, of course, "criminal" make the definition circular.[52] Simply, criminal negligence is negligence which is criminal. That it must be negligence which deserves punishment seems to put the cart before the horse, for properly one must first decide that it is a crime: it then follows that it is deserving of punishment. Judges (and juries, where they exist) must, one supposes, in the end resort to some sort of rough moral calculus to answer what is essentially a question more legislative than judicial – not whether this behaviour is a crime, but whether it should be. Critics have a point when they condemn this as an invitation to arbitrary justice.[53] Inconsistent results are inevitable, and this, in my view, is adequately demonstrated in two prosecutions in England. Both came up for joint consideration in the Court of Appeal in *Prentice, Sulman, Adomako and Holloway*.[54] The first prosecution concerned a patient who had leukaemia. His consultant physician prescribed two kinds of cancer medication – vincristine which was to be administered intravenously, and methotrexate which had to be done intrathecally by a lumbar puncture. On the day of the treatment, the Consultant was not present. Prentice was a pre-registration houseman who was asked by a secretary in the hospital to administer drugs. Prentice told the Registrar that he was unsure how to do it. The Registrar told him to ask Sulman, a houseman, to supervise. Sulman agreed to supervise, although he had only one previous experience of administering vincristine and had attempted a lumbar puncture (which failed) only once. There was a crucial misunderstanding between Prentice and Sulman: Prentice was under the impression that Sulman was supervising

Singapore" [1957] MLJ vi, vii-viii. For a recent example of the gross negligence standard being used in a medical negligence situation, see *State of Gujarat* v *Dr Maltiben V Shah* (1993) XXXIV(2) Gujarat Law Reporter 1600. For Sri Lanka, see Peiris, *Offences Under the Penal Code of Sri Lanka (Ceylon)*, (1982). S 304A is worded identically in India, Sri Lanka, Singapore and Malaysia.

52 That much the Lord Chancellor was willing to accept in *Adomako*, *supra*, note 49, p 83. Leigh, "Liability for Inadvertence: A Lordly Legacy" (1995) 58 MLR 457, 469 thinks that the circularity is "unavoidable".

53 Gardner, "Manslaughter by Gross Negligence" (1995) 111 LQR 22, 26, looks on the bright side, arguing that it "brings an element of participatory democracy to the handling of crime". The "democratic" nature of the participation may be doubtful in jurisdictions without a jury.

54 [1993] 4 All ER 935. The prosecution involving Holloway, an electrician, is not discussed here.

the entire procedure, but Sulman thought that he was only supervising the lumbar puncture (and not the administration of the drug). As a result, neither checked the drug which was given intrathecally. Vincristine (which was supposed to have been administered intravenously) was injected into the spine and the patient died. At the trial, the jury found both doctors to be criminally liable for gross negligence. On appeal, however, the convictions were quashed. The Chief Justice ruled that the jury had not been properly directed that criminal negligence had to be to the point of criminality. More significantly, the Chief Justice was unhappy that the jury had not been impressed with all the excusing and mitigating circumstances such as inexperience, inadequate supervision, the fact that Prentice asked for help and that there was an unfortunate misunderstanding between them.

Compare this attitude with the way the next prosecution was handled. Adomako was an anaesthetist attending to an operation to treat a detached retina. The patient was under general anaesthesia and could only breath through an endo-tracheal tube which was connected to a ventilator by a device at the chest area. The tubes and connector were covered under a sheet. A Dr Said had set up the equipment but one hour into the operation, he had to leave, so Adomako took his place. The tube became disconnected from the ventilator but the ventilator alarm did not sound. Adomako did not know that something was amiss until a machine which registered blood pressure and pulse every 3 minutes went off. He thought it was an oculo-cardiac reflex (which is possible for this sort of operation) and administered atropine (which was the correct response for such a condition). All his efforts did not work. The cardiac arrest team was summoned and it was only then that the disconnection was discovered – too late to save the patient. Adomako had simply failed to check the connector. Just as in the earlier prosecution, the jury returned a verdict of guilty to a charge of manslaughter by gross negligence. On appeal, the Chief Justice sung a very different tune. The conviction was upheld. The jury was entitled to find gross negligence. The House of Lords thought the same.[55] But why was there no need to emphasise the excusing and mitigating circumstances here? That there were such circumstances cannot be in doubt. Adomako had a full time job in another hospital. He worked weekends at the hospital in question to augment his salary. He had only three and half hours of sleep the night before. He had never acted as the sole anaesthetist in eye operations. He was unfamiliar with the ventilator system used. Had the ventilator alarm been in proper working order, he would have immediately detected the disconnection.

In my view, it is not easy to reconcile the approach of the courts in the two prosecutions. For some reason Prentice and Sulman managed to

[55] *Supra*, note 49.

draw some sympathy, but Adomako did not. But then again Adomako was not completely done in – although the court made quite a show of sentencing him to 6 months' imprisonment, the sentence was suspended for one year, with the effect that he does not serve the sentence unless he re-offends within a year,[56] something which he is highly unlikely to have an opportunity to do. In effect he was not really punished. The paradox is even greater here than it was in the New Zealand decision, for gross negligence is defined as negligence deserving of criminal punishment. The underlying tension is not resolved, even with the criterion of gross negligence.

V. Civil and Criminal Negligence: The Boundaries

The preceding discussion demonstrates amply that the focus of attention of the learning on criminal negligence has been on the degree of negligence. Some jurisdictions equate the degree of negligence required for civil and criminal law – any deviation from reasonable standards of conduct suffices. Most jurisdictions demand something more, in the form of a gross or substantial departure from what is reasonable. Debate over the possibly different degrees of negligence should not obscure two other potential differences between civil and criminal negligence. The first is the degree of subjectivity (or objectivity) of the reasonable man or doctor against whom

[56] That the whole idea of a suspended sentence is theoretically flawed has been clear since Bottoms classic critique in "The Suspended Sentence in England, 1967-78" (1981) 21 British Journal of Criminology 1. The courts, however, appear to find the suspended sentence a convenient escape valve for what they think are unmeritorious prosecutions or over-broad criminal laws. The suspended sentence was also used to spare a negligent nurse, who failed to check blood types before a transfusion: *Lockyer* (1980) 13 CR (3d) 185. See *Manjanatha* [1995] 8 WWR 28 (Sask.CA) for a rare instance of a doctor actually having to serve a term of imprisonment; but the doctor's behaviour was quite exceptional and bordered on recklessness – an anaesthetist left an anaesthesized patient in the operating room to make a personal phone call and in his absence the equipment failed and the patient died.

[57] It appears that ever since criminal law scholars have written about the subject in Singapore, they have advocated a modified (subjectivised) reasonable person test for the purpose of criminal negligence. McKillop in his impressively comprehensive "Negligence Offences in Singapore and Malaysia" [1967] 1 MLJ xii, xxvi, xivi, at xxxi, suggests the "more pertinent" (than the degree of negligence) inquiry of asking not only whether a reasonable man would have foreseen the risk, but also "whether the accused had the capacity to foresee and avoid". More recently, Canagarayar, "Recent Developments in the Law Relating to Criminal Negligence in Singapore and Malaysia" [1981] 2 MLJ clxii, at clxviii, speaks of the "more realistic" approach of asking "[d]id the accused, in the circumstances, exercise special care in regard to his conduct in view of his limitations as to sight, judgement, muscular reaction, health, strength or experience". The seed for this view seems to have been Hart, *Punishment and Responsibility*, (1968), p154, who warned that "if our conditions of liability are invariant and not flexible, *ie*, if they are not adjusted to the capacities of the accused,

the particular accused is to be measured.[57] It is well known that in civil law this fictional reasonable person has a very low degree of subjectivity indeed.[58] For example, no allowance is made for the inexperienced – hence the classic situation of the learner driver being held to the same standard as the reasonably experienced driver.[59] Similarly, the civil law will hold the trainee to the standards of the reasonably competent qualified doctor.[60] It is here that the criminal law may be markedly different. We have seen from the case of *Prentice and Sulman*[61] that the English common law requires very particular characteristics such as inexperience, absence of proper supervision and the existence of a misapprehension into account. One can be reasonably certain that these factors would be irrelevant to a civil claim in negligence. This inclination to subjectivise the reasonable person in the context of criminal negligence is not uncontroversial and has sparked off a sharp disagreement in the Supreme Court of Canada.[62] Lamer CJC held that subjective factors beyond the control of accused which affects his capacity to act as a reasonable person must be considered before criminal responsibility for negligence can attach.[63] McLachlin J, for the opposing view, contended that to do so would be to dilute the whole purpose of negligent criminality, which is to ensure that all persons involved in a

then some individuals will be held liable for negligence though they could not have helped their failure to comply with the standard".

58 See, *eg*, Stanton, *The Modern Law of Tort*, (1994), who summarises thus, at p 68: "the characteristics and personal abilities of the individual defendant are the elements in the factual equation which are not considered".

59 *Nettleship* v *Weston* [1971] 2 QB 691.

60 *Wilsher* v *Essex Area Health Authority* [1986] 3 All ER 801.

61 *Supra*, note 54.

62 *Creighton* (1993) 105 DLR (4th) 632. See the commentary in Healy, "The Creighton Quartet: Enigma Variations in a Lower Key" 23 CR (4th) 265.

63 *Ibid*, p 646. Three other judges agreed with the Chief Justice when he said "the trier of fact must pay particular attention to any human frailties which might have rendered the accused incapable of having foreseen what the reasonable person would have foreseen". The English Law Reform Commission Report on *Involuntary Manslaughter* (Law Com No 237, 1996), p 50, recommended that negligent homicide should require that the "accused be *capable* of appreciating the risk at the material time" and that it was immaterial whether the incapacity was because of a "*permanent* disability" or because the accused was "*temporarily* tired or ill".

64 *Ibid*, p 668. Four others agreed with McLachlin J, who said that "the approach advocated by the Chief Justice personalizes the objective test to the point where it devolves into a subjective test". There are some lower level cases on medical negligence which support this position: see *Sullivan and Lemay* (1986) 31 CCC (3d) 62 (BCSC), where midwives with no formal training were held to the standard of a competent doctor, and even a competent (specialist) obstetrician; and *Rogers* [1968] 4 CCC 278 (BCCA), where a naturopath was held to the standard of a competent doctor.

particular activity conform to a uniform standard of conduct.[64] Nevertheless, there does appear to be a strong case for a greater degree of subjectivisation of the reasonable man for the purpose of the criminal law. The civil law itself is not entirely objective – it is well known, for example, that a different and higher standard applies to a specialist as compared with a general practitioner,[65] or at the other end, a lower standard applies to children as compared with the adults.[66] More importantly the civil law is concerned with the question of compensation or a just distribution of losses and because of that may presumably take into account matters, such as insurance coverage,[67] which have no relevance to the criminal law. The criminal law, on the other hand, is charged with the task of deciding who should receive society's condemnation. It does make sense that punishment should not be visited upon those who, because of some peculiar circumstance or characteristic, cannot be expected to behave as an ordinary (objective) reasonable person would. Yet, to subjectivise the reasonable person or doctor completely would make nonsense of the idea of negligence. The subjectivisation must stop somewhere and the logical line for that would be to include only those characteristics which are not in themselves blameworthy – peculiarities which the accused has brought on himself ought not to count. Thus a houseman who is called upon to do a procedure which he is not familiar with is entitled to have his inexperience taken into account where he has requested for supervision, but might not be so treated if he failed to ask for guidance. Difficult questions remain. Doctors are well known to be required to work for extremely long hours.[68] What of a doctor who makes a mistake under conditions of sleep deprivation? Is he to be judged by the standard of the reasonable doctor deprived of sleep? It is by no means clear whether this particular condition was brought on the doctor by himself or whether this was something beyond his control. Here, it does seem pointless to punish the doctor, but equally, if nothing is done, the law is made to appear hopelessly impotent. Many have argued that it is not the doctor, but the system which is criminal – this is explored in the next section.

There is one other potential difference between civil and criminal negligence. This is particularity of foresight. This is most clearly seen in

[65] *Eg*, see Rogers, *Winfield and Jolowicz on Tort*, (14th Ed), p 129, and *Chong Khin Ngen and Pang Koi Fa* v *Lim Djoe Phing*, *supra*, note 38.

[66] *McHale* v *Watson* (1965) 115 CLR 199 (HC Australia).

[67] This figured prominently and overtly in the judgement of Lord Denning MR in *Nettleship*, *supra*, note 59.

[68] So too, it seems, are professional drivers or factory workers. At least they, unlike doctors, are presumably covered by the limitations of hours of work in the Employment Act (Cap 91, 1985 Rev Ed), ss 2, 38.

the case of negligent causing of death. The civil law requires only formability of the kind that was suffered.[69] Thus to be liable for death, formability of only some kind of is necessary. The criminal law may require more. It may insist that death (and nothing short of that)[70] be reasonably foreseeable. Precisely what ought to be foreseeable was to be the battleground for yet another difference of views in the Canadian Supreme Court in *Creighton*, with the Chief Justice insisting on forseeability of death,[71] but McLachlin J settling for forseeability of bodily harm which is not trivial or transitory.[72] What practical difference this makes to negligence analysis is uncertain. While it may be easy enough to tell apart forseeability of minor injury from forseeabilty of death, the line becomes rather thin in the case of formability of more serious injury and death. Yet such a difference would cover the "egg-shell skull" situation where, unknown to the doctor, his patient suffers from some condition which his negligent harm, normally not fatal, causes death. Whereas in civil law, the tortfeasor must take the victim as he finds him,[73] the criminal law may yield a different rule – the accused takes his "victim" only as he can reasonably foresee him to be.

VI. Corporate Criminal Liability – A More Radical Critique

At this point we ought to pause to consider a very strong emerging critique of traditional criminal law analysis of negligence which focuses almost exclusively on the liability of individuals for negligent harm.[74] It can be convincingly argued that this is a rather myopic approach for, in the context of medical negligence, a lion's share of the blame in most cases goes to

[69] See, *eg*, Stanton, *supra*, note 58, pp 95-100. It appears that although the "*Wagon Mound* principle" ([1961 AC 338]) of forseeability of the injury for which compensation is claimed is the law, it has been subjected to so many exceptions that "it will rarely place severe limitations on the extent of loss which is to be compensated by the tortfeasor", at 100.

[70] Or in the case of the offence of negligent causing of hurt or grievous hurt, *infra*, note 84, that hurt or grievous hurt, as the case may be, must be reasonably foreseeable.

[71] *Supra*, note 62, at 645-6.

[72] *Ibid*, p 659.

[73] See Stanton, *supra*, note 58, p 98-100.

[74] See, *eg*, Wells, *Corporations and Criminal Responsibility* (1993), and Sullivan, "Expressing Corporate Guilt" (1995) 15 OJLS 281, who describes her work as being "imbued with the conviction that the activities of limited companies inflict too great a cost in terms of injury and death on workers they employed and the community at large".

[75] Harvey, "Doctors in the Dock: Criminal Liability for Negligent Treatment Resulting in the Death of a Patient" [1994] XVI(2) The Liverpool LR 201 writes, p 208:

> Even individual acts of negligence are often identifiable as the product of some larger collective process. Systems and policies may subject hospital staff to a punishing commitment of work in an environment where fear of discipline or dismissal or some

the system under which doctors have to work.[75] Take the case of *Prentice and Sulman*.[76] Even if one could agree with the jury that the individual doctors were not grossly negligent, to leave matters at that has an uneasy feel to it. The immediate question would be this – why were inexperienced doctors required by the hospital administration to perform delicate procedures without adequate supervision? For that matter, even if one could agree that Adomako was grossly negligent, why was it that he was allowed to work under conditions of sleep deprivation? It makes little sense to single out individual doctors who happen to make mistakes – another doctor will take his place and be required to perform under less than satisfactory work systems and conditions. An acceptable social response must involve bringing hospitals, as a corporation, to book.[77] Precedents already exist under pollution and factory laws.[78] Corporations engaged in health care management should be treated no differently.[79]

Yet there are formidable issues to be settled before corporations may by punished for negligent harm – the tools of the criminal law were fashioned for individuals, not sophisticated management systems.[80] One question is the meaning of negligence for a corporation. Although there is the well known concept of the breach of a reasonable system of work which can be transplanted from the civil law, there is not likely to be an inclination to subjectivise the standard, because the restraint which society ought to exercise in punishing individuals may not apply to the punishment of corporations. However, the foremost problem seems to be to devise a suitable

other disadvantage for criticism of policy may lead to situation where unacceptable chances are taken.

76 *Supra*, note 54.

77 It appears that in Holland, a hospital has been successfully prosecuted for negligent manslaughter in circumstances very similar to *Adomako*, *ibid*, where a faulty alarm supposed to signal the disconnection of anaesthetic equipment caused death: Harvey, *supra*, note 75, p 210-1.

78 *Eg*, s 33, Factories Act, (Cap 104, 1985 Rev Ed), and the provisions of the Prevention of Pollution of the Sea Act, (Cap 243, 1991 Rev Ed), discussed in *Jupiter Shipping Pte Ltd* [1993] 2 SLR 69.

79 The Government Hospitals Act (Cap 119, 1985 Rev Ed) contains no provision for criminal or any other sanctions. The Private Hospitals and Clinics Act (Cap 248, 1985 Rev Ed), s 8, vests administrative power in the Director of Medical Services to suspend or revoke the licence to provide medical services. Nevertheless, just as the suspension (through disciplinary proceedings) of individual doctors is thought to be an insufficient social response, so too should the sanction of administrative suspension against a negligent hospital be insufficient.

80 See the detailed discussion in the Report of the English Law Reform Commission, *supra*, note 63, Part VIII.

81 Wells, *supra*, note 74, pp 34-38. See also the recommendations of the English Law Reform Commission, *ibid*, p 124-5.

punishment for corporations.[81] Imprisonment is out of the question. Fines are likely to be treated as a tax which the corporation may well pass on to the consumer. It may be argued that the mere publicity of a conviction would be a sufficient deterrence as the business of the corporation would be adversely affected, but this is unlikely to work in the context of hospitals in Singapore where there is not all that much of a choice. Then there is the idea of corporate incapacitation which works very much like the suspension of a driver's licence[82] – the offending hospital is suspended for a period. This solution may involve a grave disruption to the provision of health care and for that reason may be practically unpalatable. By far the most promising suggestion has been to follow a corporate rehabilitation or probation model instead. This approach prescribes the making of provision for restructuring orders where an independent court appointed administrator becomes a member of the governing body of the hospital with full rights to sit at all meetings. The appointee's function is to see that the necessary steps are taken to prevent negligent systems-related injuries from happening again, and to make periodic reports to the court on the progress of his work.[83]

Shifting the focus of the criminal law away from individuals and towards management systems will probably do much to diffuse the underlying tension between the need for the criminal law to do something in the face of negligent harm and the unsatisfactoriness of punishing doctors for mere negligence. It provides a third alternative – something constructive can be done to prevent the recurrence of negligent harm, without unfortunate individuals being subjected to the heavy hand of the criminal law. True enough, this option may not always be open – for example, when the hospital has done all it reasonably can to devise a safe system of work, but individual doctors negligently cause harm nevertheless. Yet we can only gain by exploring the possibility of restructuring orders in cases where hospitals can be reasonably expected to do more.

VII. Negligent Criminality in Singapore

Broadly, there are two sources of negligent crimes in Singapore. First, the

[82] S 42 Road Traffic Act (Cap 276, 1994 Rev Ed).

[83] These orders to remedy the situation come in varying degrees of "intrusiveness". See, eg, the recommendation of the English Law Reform Commission, *supra*, note 81, modelled on factory legislation (see, in Singapore, s 90 Factories Act (Cap 104, 1985 Rev Ed)), which appears to be enforceable only by a fine for non-compliance. Compare this with the more interventionist measures described by Wells, *supra*, note 81.

Penal Code contains a rather comprehensive spectrum of negligence offences ranging from the negligent creation of risk to life or personal safety, to the negligent causing of hurt, to the negligent causing of death.[84] Negligently caused damage to property is not thought to be sufficiently serious to engage the Penal Code.[85] Then there is the existence of negligence offences outside of the Penal Code.[86] These govern particular activities and the most prominent set of offences outside the Penal Code are those found in the Road Traffic Act.[87] As there is no statute dealing specifically with negligent medical activity, the focus of the discussion will be on the general negligence offences in the Penal Code, and in particular section 304A, the negligent causing of death.[88] The question which has vexed the courts of Singapore and Malaysia for decades is the meaning of negligence in section 304A.[89] In particular these courts have had the greatest difficulty trying to decide what degree of negligence is required. Perhaps one cannot expect much by way of statutory guidance – the provisions of the Penal Code are more than a century old and drafted well before the development of scholarly discourse on criminal negligence.[90] There is thus no definition of negligence and the field is wide open for the courts to delineate the boundaries of criminal negligence.

The issue has however been overlaid with a great many cases, almost all of which were decided in the context of road traffic offences. As far as medical negligence is concerned there is only one old Malayan authority that a nurse must be grossly negligent to come within the section.[91] Care must be exercised before decisions on road traffic negligence are transposed

84 Ss 336 (endangerment), 337 (hurt), 338 (grievous hurt), 304A (death).

85 There are no corresponding provisions in the chapter XVII which deals with offences against property. However, offences with the "having reason to believe" formula may conceivably be interpreted as offences of negligence, see McKillop, *supra*, note 57, at xvii-xviii. Also, negligent property damage is an offence under more specific statutes, *eg*, s 83, Railways Act (Cap 263, 1985 Rev Ed), and more recently, s 25 The National Parks Act (Cap 22 of 1996).

86 *Eg*, s 41, The Singapore Armed Forces Act (Cap 295, 1995 Rev Ed).

87 See the description in McKillop, *supra*, note 57, at xlvi-xlix.

88 The section provides that

> Whoever causes the death of any person by doing any rash or negligent act ... shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both

89 The debate seems to have begun in the 1930s and gone on until the 1970s. Since then, the issue appears to have been quiescent.

90 It must be said that the widely held view is that Sir James Stephen who drafted the original Indian version in 1870 intended to state the position at common law, *ie*, manslaughter by gross negligence: McKillop, *supra*, note 57, p xviii, esp footnote 69.

91 *Low Boon Hiong* (1948-49) MLJ Supp 135 (HC, Kuala Lumpur). The authority of this decision is somewhat tarnished in that the judge felt bound by *Cheow Keok*, *infra*, note 100, which was later repudiated.

onto other activities. It is true that, conceptually, it will be difficult to find any reason to distinguish road traffic cases from others. Yet it is impossible to ignore that emotionally and practically, road traffic negligence is different. The reason is clear – it is the extraordinarily high incidence of road traffic death and injury.[92] The legislative response was to enact the Road Traffic Act[93] which superimposes onto the Penal Code scheme essentially three additional offences – dangerous driving *per se*, careless driving and causing death by dangerous driving.[94] Whatever the original purpose of the creation of these new offences was,[95] their introduction has resulted in conceptual chaos in the context of the carefully structured offences of negligence in the Penal Code. Leaving aside the problems of recklessness and rashness (advertent risk taking or harm),[96] how is causing death by dangerous driving (Road Traffic Act) different from causing death by negligent driving (304A)? Logically, it appears that as dangerous driving has a maximum sentence of more than two times that of negligent driving, dangerous driving must be something more serious[97] and yet cannot amount to advertent harm (which is covered by the offence of reckless driving). It would be tempting to try to rationalise these offences thus. At the lowest level is careless

[92] Statistics show that in 1995 alone, there were 23 road traffic casualties per 10 000 residents, *supra*, note 32. It is not known how many of these were later classified as being caused by negligence. By way of comparison, between 1 Jan 1992 and 21 Sept 1995, 105 medically associated deaths were reported to the Coroner, out of which an open verdict was recorded for 14 cases and criminal negligence found in 2: Chao, "An Overview of Fatal Iatrogenic Injuries in Singapore" in Proceedings of the *22nd Annual Seminar of the Medico-Legal Society of Singapore*, 2 and 3 Nov 1996, p 94.

[93] Cap 276, 1994 Rev Ed. The first version of this appeared in 1961.

[94] Respectively, ss 64, 65 and 66. Sections 64 and 66 also envisage "reckless driving".

[95] We discuss below how the original rationale of s 66 of the Road Traffic Act in England, the reluctance of juries to convict for ordinary manslaughter by gross negligence, may have unduly influenced the shape of cases interpreting s 304A.

[96] The interpretation of recklessness in England has been mired in the question of whether there can be inadvertent recklessness (where the accused is not actually aware of the risk): Ashworth, *supra*, note 27, pp 175-188. The most recent movement is to consider an act to be reckless only where there is advertent risk-taking: Ashworth, *supra*, note 27, at 183. Local exposition of rashness is rare, but it is widely believed, on Indian authority, to be advertent recklessness: Koh, Clarkson, Morgan, *Criminal Law in Singapore and Malaysia* (1989), p 477. The result appears to be that recklessness in s 66 of the Road Traffic Act means the same thing as rashness in s 304A of the Penal Code, with the resulting disparity between the imprisonment maximum of 5 years in s 66, but only 2 years in s 304A. Perhaps the more severe punishment for s 66 can be explained on the greater social need to deal with road traffic deaths.

[97] That s 66 dangerousness is more difficult to establish than s 304A negligence was impliedly accepted in *Lim Chin Poh* [1969] 2 MLJ 159, where the High Court refused to uphold a s 66 conviction, but instead substituted it with a s 304A conviction.

(meaning negligent) driving *simpliciter*, and where death is caused, negligent driving causing death (304A). At a higher level of negligence is dangerous driving simpliciter, and where death is caused, dangerous driving causing death. At the highest level would be offences involving recklessness. In short, 304A becomes the offence of careless (negligent) driving causing death, an offence not found in the Road Traffic Act.[98] Although this does not solve all the problems associated with rationalising 304A with the Road Traffic Act, it is a workable model. Thus, for road traffic cases, there is the temptation to read 304A negligence as a lower or normal level of negligence and to reserve higher levels of negligence for dangerous driving. The cases however do not articulate their reasons in this manner, and this possible motivation for interpreting 304A as normal or civil negligence must remain speculative. If this is true, however, then the logic of construing 304A as civil negligence for other activities is not quite as compelling, as there would then be no need to rationalise 304A with any other provision. This does not mean that 304A should not, on this account alone, be read as civil negligence. We are thrown back to the general jurisprudential question of the degree of negligence which is required before it can be called criminal, without regard to the special circumstances of specific road traffic legislation.

VIII. Section 304A: Three Approaches

It is now necessary to survey the state of the case-law on the meaning of negligence in section 304A. Three lines of authority are discernible. The first is the early trend of cases which decided that section 304A was to be interpreted consistently with the offence of gross negligence manslaughter in the common law. That was how the Indian courts have always interpreted the section and it remains to this day the established meaning of section 304A in India.[99] There is no doubt that the Indian cases were influential in the Malayan case of *Cheow Keok*,[100] the leading authority that criminal

[98] The North Report, *supra*, note 3, p 83, considered the introduction of just such an offence – causing of death by careless driving – but decided against it, ostensibly on the ground that such an offence would give too much weight the fortuitous event of death. Paradoxically, the North Report did not also recommend the abolition of the offence of causing death by reckless or dangerous driving.

[99] *Supra*, note 51.

[100] (1940) 9 MLJ 104. That this was the widely accepted meaning of negligence, not just for 304A, but for all offences of negligence can be seen in *Mohamed Saleh* (1940) 9 MLJ 187, which held that the offence of negligently allowing a prisoner to escape requires gross negligence.

negligence had to be gross negligence. Nevertheless, despite this early unanimity, the gross negligence interpretation was slowly but surely abandoned in Singapore in *Woo Sing*,[101] in Malaysia in *Adnan bin Khamis*,[102] and in Borneo in *Mills*.[103]

What could possibly explain this about-turn? It is not easy to discern from the judgements why the gross negligence test was rejected. The courts seemed to have been preoccupied with the rather "nationalistic" pursuit of pointing out the Penal Code should not be interpreted in accordance with the common law. It is necessary to examine the possible reason for this rejection.[104] It has been suggested that as "section 304A carries a maximum of two years' imprisonment whereas English manslaughter carries a maximum of life imprisonment; it is arguable that section 304A was therefore intended to embrace cases with a lower degree of fault than gross negligence". [105] This apparent "arguability" however ignores a fundamental difference in the structure of homicide offences in England and in Singapore. The English offence of manslaughter is a very broad range of offences extending from circumstances just short of murder to negligent homicide. The sentencing maximum has, therefore, to take into account offences the higher end of the manslaughter spectrum. Section 304A, however, expressly excludes culpable homicide which forms the higher end of homicide offences in Singapore. It is more appropriate to compare the "going-rates" for negligent homicide. As far as English manslaughter is concerned, the accused in *Adomako*[106] was sentenced only to six months' imprisonment, but suspended for twelve. As the suspended sentence is not available in Singapore, the equivalent effect would be achieved by a conditional discharge,[107] a "pun-

[101] (1954) 20 MLJ 200 (HC full bench, by a majority).

[102] [1972] 1 MLJ 274 (FC Malaysia).

[103] [1971] 1 MLJ 4 (CA Sarawak, N Borneo and Brunei).

[104] The Federal Court in *Adnan bin Khamis*, *supra*, note 102, p 277 had some rather strange arguments against the gross negligence approach for s 304A. *Eg*, the court argued that if the gross negligence approach is taken for s 304A, it must be taken for s 223 (negligently suffering a prisoner to escape) as well. In a situation where the jailer falls asleep on duty and the prisoner picks his pocket for the keys and makes good his escape, a court will be "required" to acquit (which would be an injustice) because such "passive negligence" cannot "reach the heights" of the gross negligence test. The court never explains why "passive" negligence cannot be gross as well. With respect, the court confused the degree of negligence (gross or otherwise) with the categorisation of the actus reus as being an act or an omission. It is clear that where there is a legal duty to act positively, an omission stands in the same position as a positive act (s 32 and 43, Penal Code) and may be just as "gross".

[105] Koh, Clarkson and Morgan, *supra*, note 96, p 480. See also, a similar point in *Mills*, *supra*, note 103, p 5.

[106] *Supra*, note 19.

[107] S 8, Probation of Offenders Act (Cap 252, 1985 Rev Ed).

ishment" well within the 2 years' maximum under section 304A. In Singapore, the trend in section 304A sentencing seems to be to reserve imprisonment only for rashness, and to prescribe a fine for negligence.[108] Thus, notwithstanding the sentencing maxima, negligent homicide appears to be viewed in practice with broadly similar severity.

The reasons which have been given in support of the rejection of the gross negligence test do not convince and we must look deeper and, with that, enter into the realm of speculation as to why most courts have been averse to gross negligence. The answer, perhaps, lies with the English experience of prosecuting road traffic offenders with manslaughter by gross negligence. It is well known that the introduction of the specific offence of causing death by reckless or dangerous driving was introduced in England in 1930 because of the "reluctance of juries to convict reckless motorists of manslaughter".[109] The colonial judges of Singapore and Malaysia could not but have been aware of this. In Singapore, this "road traffic homicide" was enacted only in 1963.[110] Thus, before this, the fear must have been very real that juries would be equally reluctant to convict drivers of an offence under section 304A if the judges held that local juries are to be directed in the same fashion as they would have been in England where there is prosecution for manslaughter. Even after the enactment of specific road traffic legislation, the fear that juries would be unduly reluctant to convict someone of other negligence offences may have persisted.[111] If this indeed was the underlying reason for the rejection of the gross negligence approach, then it can no longer apply to Singapore which has both enacted special legislation for road traffic homicide[112] and also completely abolished the jury system.[113] Also, if this speculation is correct, the rejection of the gross negligence approach was not based on any considered principle or

[108] *Gan Lim Soon* [1993] 3 SLR 261 and *Teo Poh Leng* [1992] 1 SLR 15. There is the older case of *Gould* (1962) 28 MLJ 435 (HC) which approved a three months' sentence of imprisonment for s 304A, but it appears that that may no longer be the practice. Furthermore, a factor which may have complicated matters is the failure of the accused to stop and help the victim after the accident.

[109] The North Report, *supra*, note 31, at 51. Presumably "reckless" is used here to include gross negligence as well.

[110] Ordinance 26 of 1961.

[111] Hence the otherwise opaque reasoning of the Federal Court in *Adnan bin Khamis*, *supra*, note 104.

[112] Perhaps the only specific road traffic offence before the Road Traffic Act, *ibid*, was enacted was s 279 of the Penal Code. This is, however, only an offence of endangerment and was not specifically catered to the causing of death.

[113] Criminal Procedure Code (Amendment) Act 18 of 1960 (non-capital cases), and CPC (Amendment) Act 17 of 1969 (capital cases).

policy, but on the tactical need to evade the idiosyncrasies of jury decision-making.

Just as the *Cheow Keok* line of cases seemed to show a slavish allegiance to the common law, the subsequent decisions which reject gross negligence appear to be obsessed with the task of exorcising the common law from section 304A; so much so that there has been no agreement on the precise test which is supposed to replace gross negligence. There are two leading contenders. First is the adoption of the civil standard. Authority is to be found principally in the Malaysian decision of *Anthonysamy*,[114] and, rather more controversially, the judgement of the majority judges in *Woo Sing*.[115] As the judgement of Buhagiar J in *Anthonysamy* appears to the approach in current usage at least in the Coroner's Court,[116] it must be carefully scrutinised. First, the learned judge seems to make the argument that section 304A must be read in the same way as any other offence of negligence in the Penal Code, which, he held, had to be construed as requiring only civil negligence. The fault in this reasoning is simply that there is no compelling reason why these other negligence offences must be read as meaning only civil negligence. Or, more controversially, even if the lesser negligence offences require only civil negligence, there is no necessary contradiction in the more serious ones requiring more.[117] In principle, where the accused stands in danger of greater punishment, it is not unreasonable to require a higher degree of *mens rea*. Secondly, Buhagiar J thought that gross negligence was "more akin to the *mens rea* in section 299 of the Penal Code for offences of culpable homicide not amounting to murder" which requires "knowledge that he is likely by such act to cause death". The implication is that to read section 304A as gross negligence would be to duplicate this third limb of the offence of culpable homicide not amounting to murder. Again, this is not particularly persuasive. Duplication

[114] (1956) 22 MLJ 247 (HC Malaya).

[115] (1954) 20 MLJ 200 (HC full bench, Singapore). Although Murray-Aynsley CJ did say that it was not "necessary to lay down a different standard of negligence in civil and criminal cases", he had earlier, in *Lai Tin* (1939) 8 MLJ 248, at 249, also declared that he "would not go so far as to say that the degree of negligence necessary to support a civil action should be applied without reservation". I am indebted to Coroner Hamzah Moosa for this point, originally made in his findings in CI/1107/91, 21 Apr 1995, which contains an admirably comprehensive description of the authorities in this area.

[116] Coroner's Finding in CI/1107/91, *ibid.*

[117] *Glennis Royden Lamperd* (1983) 63 FLR 470 (Federal Court of Australia). The Federal Court saw no problem in adhering to a gross negligence standard for manslaughter (*Callaghan* (1952) 87 CLR 115 (HC Australia)), but imposing a less stringent one for the offence of negligently causing a naval vessel to be stranded under the Naval Discipline Act.

[118] This is especially so with s 304A, in its present form, was not part of the original Penal Code in India.

is hardly unknown or intolerable in the drafting or construction of the substantive criminal law.[118] Indeed, Buhagiar J does not explain why he is willing to countenance the "duplication" between section 299 and causing death by a rash act under section 304A. The standard distinction is to say that although both require knowledge of a certain likelihood of death, section 299 requires a higher probability of death occurring. This is a difference of degree, unlike the qualitative distinction between actual knowledge (section 299 and causing death by a rash act) and imputed knowledge (negligence). While it may be true that "[i]n most cases where death has been caused by such a high degree of negligence it will be possible to infer that the offender acted with such knowledge", there will obviously be cases where there is negligence without knowledge. What is at stake is the fundamental and moral distinction between recklessness (or rashness) and negligence.[119] Most intriguing is the final reason: it was said that sections 32 and 43 of the Penal Code supported the marriage of civil and criminal negligence. The combined effect of these provisions is this - generally, omissions may qualify as "acts" where it would be "illegal" not to act positively. It would be "illegal" where, *inter alia*, the omission "furnishes ground for a civil action". Thus, it is said, criminal negligence must mean civil negligence. No doubt there appears to be a thematic similarity between the reliance of the Penal Code on the civil law in determining when an omission is an act, and in the reliance of these line of cases on the civil law in setting the standard of negligence in section 304A. Nevertheless, one does not necessarily "support" the other. Sections 32 and 43 deal with the ambit of criminal liability for omissions – whether or not there was a duty to act in the first place – not with the separate and distinct question of the standard of care to be expected, once it has been shown that there was a duty to act. Thus even if an omission, by sections 32 and 43, qualify as an "act", it does not automatically become a "*negligent* act". It is the word "act" which sections 32 and 43 are concerned with, not the word "negligent".[120]

Drawing away from the technicalities of legal reasoning, we have to

[119] The distinction is clearly seen in the facts of *Manjanatha*, *supra*, note 56, where the anaesthetist leaves the operation theatre in the middle of an operation with no one to replace him (and therefore he must have known of the risk) and those of *Adomako*, *supra*, note 49, where the anaesthetist tries his level best to correct the fault in the anaesthetic equipment but negligently fails to do so (and therefore did not know of the risk; otherwise he would have corrected it).

[120] Koh, Clarkson and Morgan, *supra*, note 96, p 487-8, considered this a "serious difficulty with the reasoning in *Anthonysamy*". That such was the limited intention of the drafters is clear from the writings of Lord Macaulay, excerpted in Koh, Clarkson and Morgan, p 53-54.

be cognisant of the more practical implications. If this position were to be established in Singapore, then the situation would be same as in New Zealand where criminal negligence seems to follow automatically from a finding of civil negligence, with all its attendant problems. As we have seen, this sort of "over-criminalisation" often has a hydraulic effect on other stages of the criminal process. One can think of this possible impact on the exercise of prosecutorial discretion – it is unlikely that there will be sufficient resources to proceed against all cases of simple negligence, so the prosecution will have to come up with internal (unpublished) guidelines as to the kinds of negligence which should be proceeded against. No doubt a number of factors will be relevant but much, it is speculated, will be determined by the degree of negligence exhibited by the potential accused. Instead of the court openly deciding whether negligence was gross, the discretion is transferred to the more secret processes of administrative decision making. There must be some sort of prosecution policy of separating serious from less serious negligence with respect to road traffic cases, given the frequency of road traffic deaths. On the other hand, the relative rarity of detected medical negligence may mean that no such policy has yet been formulated for the prosecution of medical negligence. One can also imagine the potential distortion of the sentencing process. Sentencing courts will be tempted to overuse unusual dispositions like conditional discharges (as appears to have happened in New Zealand). Already, there seems to be an emerging practice from cases like *Gan Lim Soon* and *Teo Poh Leng* that the negligence limb of 304A should only attract fines and not imprisonment.[121] Thus, the lower the level of negligence required for liability, the more the courts will seek a "way out" by resorting to dispositions on the low end of the penal ladder. Even more subtly, the lowering of the standard of level of negligence may also put pressure on the courts to modify the rules of causation. It is well known that, for offences bearing a high degree of *mens rea*, the courts are extremely reluctant to find that the chain of causation is broken by intervening or contributory causes. It has been noted that the attitude of the courts is markedly different for offences of negligence. Cases like *Lee Lai Siew* and *Lee Kim Leng* seem to recognise a break in the chain of causation which would be unthinkable for intentional or reckless crimes.[122] The lowering of the required standard of negligent can only amplify this "bending" of the rules of causation in negligent crimes.

The second contender ascribes to neither the gross negligence or the

[121] *Supra*, note 108.

[122] Respectively, (1964) 30 MLJ 285 (HC) and [1978] 1 MLJ 259 (HC, Kota Kinabalu). See the detailed treatment in Koh, Clarkson and Morgan, *supra*, note 96, at 390-93.

civil negligence standard. Instead an intermediate standard is chosen, higher than civil negligence, but lower than gross negligence. Local authority for this approach may be found in the minority judgement in *Woo Sing*,[123] the decision in *Lai Tin*[124] and the Malaysian case of *Adnan bin Khamis*.[125] Indeed, high authority is available for this compromise position in the Privy Council decision of *Dabholkar*,[126] interpreting similar legislation in another jurisdiction. Surprisingly, this case has never been cited in the local section 304A decisions. This approach has the potential of avoiding the unsatisfactory, and perhaps counter-intuitive, equation of civil and criminal negligence. Tactically too, it may have allayed the apprehensions of those who feared that juries would be unduly reluctant to convict on a test of gross negligence. Yet it seems to be a situation of having one's cake and eating it – whatever could an intermediate standard mean? Civil negligence is breach of the standard of a reasonable person, criminal negligence is so serious a breach that the criminal law should intervene – there appears to be little place for an intermediate position.[127] What really are these pronouncements on intermediate negligence trying to get at? Two possibilities are suggested. First, as far as the debate on the degree of negligence is concerned, they show a desire to preserve a clear distinction between civil and criminal negligence, but the wish not encourage juries to be excessively sparing with

[123] *Supra*, note 101, at 20. Although Whitton J agreed with the majority judges that gross negligence did not apply, he thought that "a higher degree of negligence is necessary in order to establish a criminal offence than is sufficient to create civil liability".

[124] *Supra*, note 115.

[125] *Supra*, note 102, at 278, Although the Federal Court rejected the gross negligence test, it also held that "mere carelessness or inadvertence" is not enough and that culpable negligence connotes fault or blameworthiness". More pointedly, the Federal Court silently refused to endorse (at least expressly) the view in *Anthonysamy*, *supra*, note 114, that criminal and civil negligence was, in substantive law, the same.

[126] (1948) 35 AIR PC 183. The Privy Council was interpreting a section of the Tanganyikan Penal Code, which used the "rash or negligent" formula. Interestingly, the facts on which the appeal arose concerned an allegedly negligent surgeon who was accused of giving negligent treatment in a manner likely to endanger life. The Privy Council said, at 184, "although the negligence must be of a higher degree than the negligence which gives rise to a civil claim for compensation in a Civil Court, it is not, in their Lordships' opinion of so high a degree as that which is necessary to constitute the offence of manslaughter".

[127] If gross negligence is negligence which is criminal, *Bateman*, *supra*, note 18, then to prescribe an intermediate standard would be to require a court to find the accused guilty of a crime when his negligence is not high enough to be criminal. Perhaps cases which reject the gross negligence test, but which require something more than civil negligence fail to appreciate the inherent flexibility (and vagueness) of gross negligence. Bodley J, dissenting, in *Mills*, *supra*, note 103, p 6, was absolutely correct to say that "[a]ny less exacting standard (than gross negligence) would to my mind create a criminal offence out of a tort".

convictions. The resulting position, unfortunately, does not make much sense in substantive law. With the passing of juries from the scene, perhaps these judges would have opted for gross negligence were the issue to be decided today. Secondly, although the word "intermediate" is suggestive of a difference of quantity of negligence, perhaps what these cases are really trying to get at is a difference of quality. Perhaps the reasonable man or doctor in criminal law is to be invested with a greater number of subjective factors than his civil law cousin. As we have seen, a lively debate is going on within the Supreme Court of Canada on this very issue, but, unfortunately, local judicial articulation of this possibility is rare.[128] However, academic writers like McKillop and Canagarayar have advocated this kind of approach for many years.[129] They have been saying that arguments over the degree of negligence is likely to be futile, so the focus should be on subjectivising the reasonable person for the purpose of criminal law. Indeed this idea finds express mention in modern provisions like section 52 of the Civil Defence Act[130] under which liability is predicated on the accused not exercising "such care as *he* could reasonably be expected to exercise having regard to *his training and experience*". Whilst on the subject of the quality of negligence, mention should perhaps be made of the possibility of an "intermediate" standard requiring a greater particularity of foresight than would be necessary for civil negligence. Analysis of this "reference point" of foresight is rare, either in judicial decisions or in academic discourse. Section 304A does not contain any express mention of such a reference point, but were the courts so minded to fashion such an approach, there is a precedent in the Penal Code itself: section 269 makes it an offence to do any negligent act "*which he has reason to believe* to be likely to spread the infection of any disease dangerous to life".

IX. Criminal Negligence and Singapore

[128] The Federal Court in *Adnan bin Khamis*, *supra*, note 102, at 278, has language closest to a heightened subjectivisation of the reasonable man for the purposes of the criminal law (italics added):

> we think the test to be applied ... is to consider whether or not a reasonable man in the *same* circumstances would have been aware of the likelihood of damage or injury to others ... This test is partly objective and partly subjective – objective in the sense that the situation must be one fraught with potential risk of injury to others ... It is also subjective in that such a situation should have arisen by reason of some *fault* on the part of the accused.

[129] *Supra*, note 57.

[130] Cap 42, 1985 Rev Ed. This remarkably progressive piece of legislation contains some of the latest learning in criminal jurisprudence.

What then is the verdict on the meaning of criminal negligence in Singapore? Unfortunately, there is no clear answer. The last time a Singapore court dealt squarely with the issue was in *Mah Kah Yew*[131] where a full bench of the High Court simply quoted with approval cases rejecting the gross negligence approach but did not say what was to be in its place,[132] cases which stood for the civil negligence test[133] as well as cases which may be interpreted as adopting an intermediate approach.[134] It appears that the judges were again preoccupied with rejecting gross negligence and did not apply their minds to exactly what should take its place.[135] To complicate matters, the recent case of *Teo Poh Leng* quoted with approval Indian authorities which have always espoused a gross negligence standard.[136] The best view to take is that the question is wide open. Section 304A contains no guidance as to the matters in contention. The authorities do not speak with one voice, and, in any event, as far as Singapore is concerned, there is no definitive Court of Appeal judgement. If and when the matter comes up for decision, it is hoped that the court will examine the matter afresh, unencumbered by the peculiarities of cases arising from road traffic negligence. Important questions of principle and policy have to be answered. Is there any convincing reason, either morally or in terms of utility, why all civil negligence must also be criminal, bearing in mind the potential "hydraulic effect" this may have on prosecutorial discretion, sentencing and the determination of causation issues. If the answer is yes, then the civil negligence approach should be adopted. If the answer is no, then there are three independent and combinable means by which criminal negligence may be distinguished

[131] [1971] 1 MLJ 1. Unfortunately for the development of the substantive law, almost the entire judgement was dedicated to a question of *stare decisis* – whether the earlier Court of Appeal decisions in Malaya and Borneo was binding on a Singapore High Court: see Beckman, *Case Analysis and Statutory Interpretation* (1992), pp 125–138. In the event, the court held that it was bound by *Mills*, *supra*, note 103.

[132] *Mills*, *ibid.*

[133] *Anthonysamy*, *supra*, note 114.

[134] *Woo Sing*, *supra*, note 115.

[135] The appellant had argued that s 304A required the same high degree of negligence as the English manslaughter rules prescribe; to which the court seemed to have said, "No": *Mah Kah Yew*, *supra*, note 131, p 2.

[136] *Supra*, note 108. This and other recent cases were immediately concerned only with the issue of sentencing. It appears that s 304A (2 years imprisonment) has been used as a watered-down version of s 66 of the Road Traffic Act (death by reckless or dangerous driving, maximum 5 years). Accused persons seem to be so overjoyed with being charged under the lesser offence of s 304A that they plead guilty. The other recent case, *Gan Lim Soon*, *supra*, note 108, which was also a road traffic case where the accused pleaded guilty, is not clear on what the substantive law is. The older case of *Gould*, *supra*, note 108, is also unclear on the standard of negligence required, although there the charge was contested.

from civil negligence – the degree of negligence, the subjectivity of the reasonable person and the particularity of foresight. While enough has been said of the latter two, a word more ought to be said of the first. The cases do appear to have foreclosed the possibility that 304A requires gross negligence. It has been hinted that this need not be so. It will not do to reject it just because it is also the position in the common law. It has been argued that the seeming discrepancy in maximum penalties is not conclusive of the matter. More speculatively, it has been suggested that the aversion to gross negligence may have stemmed from the interplay between 304A and the offences in the Road Traffic Act, and from the English experience of juries reluctant to convict motorists of manslaughter. These have no relevance, at least, for other kinds of negligence. Lastly, while degrees of negligence do commonsensically matter, to fashion an intermediate standard for 304A would complicate matters unnecessarily – if gross negligence means negligence which ought to be punished, then it is not an immutable standard, but one which varies from time to time and from society to society. There is simply no place left for an intermediate standard. Indeed the language of gross negligence is expressly used in the context of offences in other statutes.[137] It is not alien to our criminal law.

There remains the question of corporate criminal responsibility. It has been suggested that development on this front may well take the heat off the difficult questions which dot the field of individual criminal liability. Corporate responsibility is not ignored in our laws. Section 11 of the Penal Code extends its prohibitions to "any company, association or body of persons, whether incorporated or not". Section 57 of the Criminal Procedure Code[138] prescribes the means by which a corporation is made subject to criminal processes. There is no formal impediment to hospitals and the like being prosecuted under section 304A and its family of negligence offences. Likewise, there is nothing to prevent courts and coroners from holding corporations guilty of such crimes. Yet this prosecutorial avenue is seldom explored in the context of section 304A. One can perhaps guess that this may be because corporate responsibility is not quite appropriate to most cases of road traffic negligence, which forms the bulk of potential section 304A situations. As we have seen, this may not be so in the case of medical negligence in hospitals. Although the words in section 304A are not the most suitable ones for corporate defendants, the courts can probably get

[137] S 20 of the Sale of Food Act (Cap 283, 1985 Rev Ed) refers expressly to "culpable negligence". The Central Sikh Gurdwara Board Act (Cap 375, 1985 Rev Ed), s 15, uses "gross negligence".

[138] Cap 68, 1985 Rev Ed.

by. What is really problematic is finding a suitable sentence for guilty corporations. At the moment, the fine is the only possible penalty. We have seen that this is not entirely satisfactory in the context of corporations. The most promising disposition, the forced restructuring order, is probably not available in Singapore. Express statutory grounding is necessary and desirable. If statutory precedent is necessary, a close approximation may be found in section 90 of the Factories Act[139] under which the court may, in addition to or instead of imposing a penalty, make an order to remedy the cause of the contravention. Pending the enactment of such a provision, even a fine is better than nothing at all.

X. Medical Negligence and the Coroner's Inquiry

Such is the sanctity of life that where death appears to have come about by means which are sudden, unnatural, violent or unknown, the jurisdiction of a special judicial officer, a Coroner, is brought into play.[140] Where evidence exists of such circumstances, the Coroner must hold an inquiry.[141] Where medical negligence is suspected as a cause of death, it is at least unnatural.[142] Anyone who comes to the knowledge of such a death is bound to report it to the police, who in turn are bound to inform the Coroner.[143]

What then is the role of the Coroner? A bit of history is necessary to appreciate the significance of the current debate that is going on in a number of common law jurisdictions.[144] The office of the Coroner finds its roots in 12th century England. He was originally concerned primarily with fiscal matters on behalf of the Crown. It appears that death was a financial matter in medieval England. The Coroner had the power to confiscate objects connected with the death (the *deodand*), which started off with things like the murder weapon, but progressed to the sometimes sizeable possessions

[139] *Supra*, note 78.

[140] S 273, Criminal Procedure Code, *supra*, note 138 requires the police to notify the Coroner. See also s 22 which imposes a duty on anyone aware of such deaths to inform the police.

[141] S 276 of the Criminal Procedure Code. There are three other cases of a compulsory inquiry: in cases of deaths in custody, deaths by capital punishment (s 278), and by direction of the Public Prosecutor (s 278).

[142] In a death potentially resulting from medical negligence the refusal of the pathologist to certify the death as natural sparks off police involvement and subsequently the coronial process.

[143] Ss 22 and 273, Criminal Procedure Code.

[144] The fascinating historical tale of the Coroner's office is recounted in the English Report of the Committee on *Death Certification and Coroners* (The Brodrick Report) (1971), chapter 10. See also Matthews and Foreman, *Jervis on Coroners* (11th Ed, 1993), pp 3-4.

of the deceased. The Coroner also enforced the *murdrum* fine, which was a sort of tax for a dead body being found in a particular village. In the course of time, these fiscal interests disappeared, but the Coroner's concern with the causes of death prevailed. Until rather recently, the Coroner had to function in the context of rudimentary versions of a police force and prosecutorial system, and the science of forensic pathology in its infancy. It was the Coroner who played a key role in death investigation and in bringing those responsible to book. We do have an interesting account of the early coroners of Singapore.[145] They were almost all medical men; enterprising fellows who actually had to direct death investigations. They had to contend with rather uncooperative police officers who, in one incident, refused to consider it their duty to bring a dead body from a bush somewhere back to the mortuary for a post-mortem to be conducted, no doubt because of the state of decomposition of the corpse. This rather chaotic (to us, at least) picture eventually gave way to the establishment of a highly organised police force with a fair degree of professionalism. Concurrently, knowledge of forensic pathology improved tremendously. The prosecutorial system was fine-tuned with the focus of responsibility on the Public Prosecutor. These parallel developments has led to a phenomenon common throughout the Commonwealth – the progressive shrinking of coronial functions in practice. A well-trained police force can conduct death investigations without the supervision of the Coroner.[146] Similarly, the pathologist needs no urging from the Coroner, who, somewhere along the line, had become legally qualified Magistrates.[147] The Public Prosecutor is quite capable of making prosecutorial decisions without the intervention of the Coroner. The nub of the issue is this: under these circumstances, does the Coroner serve any useful purpose? Those who argue for the continued existence of Coroners will point to the possible independent and legitimising function of a judicial officer in death investigation. We need to look more closely at how the Coroner may contribute to the process in the context of a highly efficient and professional system of policemen, pathologists and prosecutors.

XI. Fact-Finding and Fault-Finding

[145] YK Lee, "The Coroner in Early Singapore (1819-1869)" (1972) 14 Mal LR 103.

[146] It is significant that in the many death investigations featured in the popular television serial *Triple Nine*, which is reportedly vetted by the Police Force for authenticity, the Coroner never appears.

[147] S 10 of the Subordinate Courts Act (Cap 321, 1993 Ed) provides that Magistrates and Coroners have the same basic qualifications. It is the practice in Singapore for Magistrates to hold concurrent appointments as Coroners as well.

If we can safely discount the investigative role of the Coroner, there remains really two functions that he may have. The first is the task of fact-finding. Even after all the investigative leg-work has been done, someone ought to sift through all the material and make some sort of public determination as to how the death was caused.[148] This satisfies the social desire to have a proper accounting and explanation for deaths. It is especially important in situations where a death may have caused public alarm and may well have been the subject of gossip and rumour.[149] More prospectively, the Coroner has the power to make recommendations to the appropriate authorities to prevent a recurrence of such deaths.[150] In this respect, most jurisdictions still feel that the Coroner has a useful role to play. Indeed, it is similar to its grander, but *ad hoc*, relative – the Commission of Inquiry, an institution which has been used regularly in Singapore in the face of social tragedy.[151] Causes are examined and suggestions made for avoiding it in the future. For this purpose, the Coroner need form no definite conclusions about civil or criminal liability, and is for this reason uncontroversial.

The Criminal Procedure Code, however, also embodies the idea that the Coroner should go beyond a neutral factual inquiry. He must also ask whether "any person is criminally concerned in the cause of the death" and to make a finding thereon.[152] The Coroner is statutorilly directed to make conclusions about breaches of the criminal law. Indeed this extended mandate is

[148] S 284, Criminal Procedure Code requires the Coroner to inquire "when, where, how and after what manner the deceased came by his death". Sim and Ward, "The Magistrate of the Poor? Coroners and Deaths in Custody in Nineteenth-Century England" in Clark and Crawford (Eds) *Legal Medicine in History* (1994), p 245, at 263, call it a "scientific enterprise in which doctors, lawyers and policemen would combine their respective professional skills to arrive at some objective truth".

[149] Sedley, "Public Inquiries: A Cure or a Disease" (1989) MLR 469, at 470 writes:

> By being public it (an inquiry) it borrows one of the strengths of the legal system, funnelling the arguments away from the anarchy and subjectivity of public debate and into the apparently objective and orderly forum of a proceeding which the world can watch but in which nobody speaks unless spoken to.

[150] It is for this reason that s 306 of the Criminal Procedure Code requires the Coroner to transmit the findings to the Commissioner for Labour where "it appears that the death of any workman was due to injuries received in the course of his employment". It is not known how often such recommendations are made.

[151] *Eg*, the Lai *Commission of Inquiry into the Sentosa Cable Car Accident* (1983), and the Thean *Commission of Inquiry into the Collapse of Hotel New World* (1987). This is governed by a separate piece of legislation, the Commission of Inquiry Act (Cap 48, 1985 Rev Ed). By way of comparison, a Commission of Inquiry may investigate and make findings into whatever is charged to it by the President, s 2; it is not limited to investigations connected with death, *eg*, the Sinnathuray *Commission of Inquiry into Allegations of Executive Interference in the Subordinate Courts* (1986).

[152] S 284, Criminal Procedure Code.

buttressed by the extraordinary power vested in the Coroner to order the prosecution of anyone against whom there is *prima facie* evidence of a crime, bypassing even the Public Prosecutor.[153] It is obvious that this focus of coronial concern here is no longer factual but legal; the Coroner is to identify people to prosecute, and even to initiate such prosecutions. It is this fault-finding function that many jurisdictions now find difficult to accept. There are primarily two objections. The first is rooted in a comparison between coronial and trial procedure. The Coroner's Inquiry is simply procedurally inadequate for the purpose of determining criminal guilt.[154] There is no clear charge, nor is time given for the person concerned to prepare a defence. Neither is he or she entitled to the privilege against self-incrimination[155] or the right to cross-examine (or call) witness[156] until he is named as a potential accused.[157] There are no clear rules as to the burden of proof [158]or as to the question of standing.[159] There is, arguably,

[153] S 292, Criminal Procedure Code. The power is discretionary and is exercisable when "sufficient grounds are disclosed for charging any person under the Penal Code with having caused or assisted in causing the death". It appears that this power has not been used in the recent past, CI 1107/91, *supra*, note 115. One may speculate that this is probably because even Coroners (in modern times) perceive prosecution to be within the exclusive jurisdiction of the Public Prosecution.

[154] See Scott, "Procedures At Inquiries – The Duty To Be Fair" (1995) 1 LQR 596, who, at 597, emphasises the "investigative or inquisitorial" nature of an Inquiry as compared with the "adversarial" character of the criminal process.

[155] S 290, Criminal Procedure Code, provides that at the close of "prosecution" evidence, an "accused person" is to be told that he or she is not obliged to say anything, but whatever is said may be used in subsequent proceedings. In this respect, coronial process is more favourable – in the normal criminal process, adverse inferences may be drawn from a failure to testify (s 123, Criminal Procedure Code).

[156] S 288, Criminal Procedure Code.

[157] The Code simply uses the word "accused", which must perhaps be read rather loosely as anyone who might potentially be charged. It cannot mean "charged" as s 280 requires the Coroner to adjourn proceedings once someone has been charged.

[158] The fact-finding role would point towards the civil standard of balance of probabilities, but the fault finding role would demand proof beyond reasonable doubt. See Matthews, "The Coroner and the Quantum of Proof" (1993) 12 Civil Justice Quarterly 279. It appears that in England, proof beyond reasonable doubt is required for a finding of unlawful killing, but proof on a balance of probabilities is all that is needed for a finding of lawful killing or misadventure. In Canada an intermediate "high probability" standard is used. It is uncertain which of these is currently in use in Singapore. It is not clear if s 5 of the Criminal Procedure Code imports the English rules.

[159] The fault-finding role would tend to make the rules of standing stricter, but the fact-finding function, with its larger focus, would encourage more liberal rules of standing. See Manson, "Standing in the Public Interest at Coroner's Inquests in Ontario" (1988) 20 Ottawa LR 637 and Bechard, "The Issue of Granting Standing at Inquests" (1991) 34 Crim LQ 55.

[160] It would be simply inadmissible opinion of a third party.

no real right to mount a defence. It is established that although the Coroner's actual finding is inadmissible at a subsequent criminal trial,[160] any testimony by the potential accused or his witness can be used against him or his witness in cross-examination.[161] There are thus severe tactical disadvantages in an accused person testifying or calling witnesses at a Coroner's Inquiry.[162] Additionally, there is no clear right of appeal.[163] The Public Prosecutor cannot order a re-opening of an inquiry where a Coroner has already implicated someone.[164] Revisory powers of the High Court do not apply to the Coroner's findings.[165] Perhaps the only remedy for anyone aggrieved is by way of judicial review, a rather blunt weapon for correcting coronial errors, for it is accepted doctrine in administrative law that the reviewing court does not question the merits of the finding, only that it was made *intra vires*.[166] More generally, there appears to be no clear position on the applicability of the normal rules of evidence to the Coroner's Inquiry. English law seems to have settled for a situation where the rules of admissibility do not apply,

[161] S 147, Evidence Act (Cap 97, 1990 Ed). See the attempted use of testimony at an Inquiry in later civil proceedings in *AG* v *Rada Baskaran* [1972] 2 MLJ 169. It also appears that the accused's testimony at the inquiry has been used as evidence at the subsequent criminal trial, at least where there is no objection by the defence: *Cumming* (1891) Straits Law Reports (NS) 41. Two other specific hearsay exceptions are found in s 303 (testimony of credible witness at inquiry unavailable at trial) and s 304 (report of pathologist at inquiry unavailable at trial).

[162] The possible tactical advantage of testifying and calling witnesses at an inquiry appears to be that a "successful defence" at the inquiry might forestall further proceedings, see CI 1107/91, *supra*, note 115.

[163] The ordinary appeal provisions do not mention the Coroner's Court, *eg*, s 247, Criminal Procedure Code.

[164] S 281(2), Criminal Procedure Code.

[165] S 266(2), Criminal Procedure Code. The position in Malaysia is different after an amendment in 1967, see *Derek Selby Decd* [1971] 2 MLJ 277.

[166] See *Chng Suan Tze* [1989] 1 MLJ 69 for the most comprehensive local discussion on the limits of judicial review. There does not appear to have been any application to review the Coroner's finding in Singapore. It is not unknown in the United Kingdom, see, *eg*, Elliot, "Recent Developments in the Law Relating to Coroners" (1981) 32 NILQ 353.

[167] See *Jervis on Coroners*, *supra*, note 144, at 225, 230-237. See the Malaysian case of *Loh Kah Keng (deceased)* [1990] 2 MLJ 126 (HC Penang) where it was held that although the Coroner must respect the provisions of the Evidence Act concerning public interest immunity, she was not bound by the ordinary rules of evidence and may call for the privileged documents to be examined by the Coroner "for her own consumption" so that she can "take cognisance of it". Although this makes sense as far the fact-finding role of the Coroner (which is emphasised in the judgement) is concerned, withholding the privileged documents from the accused is bound to create problems of fairness from the fault-finding point of view.

[168] S 2(1), Evidence Act.

[169] S 2, Subordinate Courts Act (Cap 321, 1985 Rev Ed).

but the rules of privilege do.[167] In Singapore, the Evidence Act applies to "judicial proceedings",[168] but although Coroners are judicial officers,[169] it is not entirely clear whether the Inquiry is a judicial proceeding. It should be now apparent that if the Coroner is to retain his fault-finding functions and at the same time accord sufficient fairness to those who may be prejudiced, there are difficult procedural matters to resolve. The answer is not quite so simple as to reform coronial procedure to conform to ordinary trial process. The rather more fluid shape that current coronial procedure has taken, although unsuitable for the narrow and accusatorial task of fault-finding, is, on the other hand, well adapted for the more wide-ranging and inquisitorial nature of fact-finding. Changes made to accord greater fairness to potential accused persons may compromise the freedom the Coroner now has to uncover all the facts surrounding a death.[170]

One should pause at this point to consider the obvious argument that the procedural differences are justifiable in that the Coroner's finding does not have quite the same effect as a finding of guilt in a criminal court. It has no legal effect and no punishment may be visited upon any person found guilty by the Coroner unless ordinary due process is accorded to him in a regular criminal court. It is an inquiry, not a trial. On the other hand, there is considerable substance to the contending view that a Coroner's finding of guilt is sufficiently damning to require ordinary procedural protection. The Inquiry and its findings are normally public.[171] Laymen will not easily draw a distinction between Coroners and Magistrates, especially in Singapore where they are the same cohort of people wearing different hats for each proceeding.[172] Nor will the public appreciate the subtle distinctions between the Coroner's Court and the ordinary courts. Particularly in the context of doctors and other professionals, Coroner's findings of criminal negligence, for example, are likely to receive generous publicity – the damage would already have been done, perhaps regardless of what happens later. More speculatively, the Coroner's finding of criminal guilt may be a significant influence on the exercise of prosecutorial discretion, a topic to which we must now turn.

As the fault-finding function of the Coroner has the potential to duplicate the ordinary criminal processes, it is desirable to look at the relationship between the Coroner and the other two decision making bodies – the criminal court and the Public Prosecutor. As far as the criminal court is concerned,

[170] The point is forcefully made in the context of commissions of inquiry by Scott, *supra*, note 154.

[171] S 298, Criminal Procedure Code, does give the Coroner a discretion to hold proceedings in camera. It is not known how often this power is exercised.

[172] *Supra*, note 147.

its primacy is embodied in section 280 of the Criminal Procedure Code. Where someone has been charged with a homicide offence, the Coroner must adjourn his inquiry. Although he may resume the inquiry after the completion of criminal proceedings, he cannot reach a finding inconsistent with the criminal court.[173] It appears that in practice, the inquiry is seldom, if ever, resumed. Nevertheless, there is a danger of duplication, and hence confusion, in situations where the person thought to be responsible is charged only after the completion of the Coroner's Inquiry. Whether the Coroner finds him guilty or not, there is nothing to stop him or her from being tried in a criminal court. Unlike the Coroner, who cannot make a finding inconsistent with that of a criminal court, the criminal court is entirely at liberty to disagree with the Coroner. Where this happens, it is completely understandable for the public to be confused – one court finds guilt, another exonerates.[174]

The dynamics between the Coroner and the Public Prosecutor is also not easily resolved. Where the Public Prosecutor has decided not to prosecute, or has not yet made a decision, the Coroner must proceed. Whichever way the Coroner finds, the potential for conflict is there. If he exonerates a potential defendant, the Public Prosecutor may have some explaining to do if he (the Public Prosecutor), disagreeing with the Coroner, decides to prosecute nevertheless. Similarly, if the Coroner makes a finding of criminal guilt, it would be natural for the public to expect a prosecution to follow. For the Public Prosecutor to refuse to proceed in the face of such a positive finding by the Coroner would be create a picture of inconsistency. Although this may be technically explicable, for example, in that the Public Prosecutor has to take into consideration matters which are either not available or relevant at a Coroner's Inquiry,[175] it is not something that the layperson would easily appreciate. The conflict is even sharper where the Coroner exercises his power to charge the potential defendant, but the Public Prosecutor does not wish to proceed. Ultimately, the Public Prosecutor has the last say in that he may refuse to lead evidence, in which case an acquittal must follow.[176] It has to be asked whether the

[173] The purpose is, presumably, to deal with matters apart from criminal guilt, *eg*, to make recommendations to prevent a similar occurrence.

[174] The point has been made above that the subtle differences between the two courts are likely to be lost on the layperson. Again, it is unknown how often such "inconsistent" findings have occurred in the past.

[175] *Eg*, fresh evidence not available to the Coroner and public policy considerations apart from sufficiency of evidence.

[176] It is unknown whether this has happened in Singapore.

[177] Similar dynamics in England are described in Wells, "Inquests, Inquiries and Indictments: The Official Reception of Death by Disaster" (1991) 11 LS 71.

"pressure" which the Coroner's fault-finding functions places on the exercise of prosecutorial discretion is desirable nevertheless.[177] The answer depends on how one feels about the degree of centralisation of prosecutorial power in the hands of the Public Prosecutor. Proponents of a high degree of centralisation would argue that the Coroner's fault-finding role unnecessarily duplicates and complicates the work of the Public Prosecutor – apparently inconsistent decisions by the Coroner and the Public Prosecutor would be a potential source of embarrassment for both. Those who are not quite so comfortable with so much power in the hands of one person would argue that the Coroner is a vital, independent presence and influence on the decision to prosecute. They may also point to enhancement of public accountability through the transparent process of a Coroner's inquiry, as compared with the largely opaque, administrative style of prosecutorial decision making.[178]

Yet, even if one wanted to preserve the fact-finding function of the Coroner and do away with the fault-finding, the separation of the two roles cannot be so neatly achieved. One of the major practical arguments in favour of the present position is that satisfactory fact-finding almost inevitably involves fault-finding.[179] The fear is that an inquiry which stops short of fault finding would be too shallow to be of any use in satisfying the public need for an open investigation of all suspicious deaths. Conceptually, findings of fact can be distinguished from findings of law, but pragmatically, there are many ways of framing a finding of fact, some of which are more akin to conclusions of legal guilt. Take the factual situation of *Yogasakaran*.[180] The Coroner may simply find that the death was caused by the injection of a certain drug into him, or he may go further to find that the anaesthetist injected the lethal drug. If this is as far as he goes, the Inquiry will probably be open to the charge of pointlessness. Then the Coroner may find that the doctor administered the drug by mistake. If the Coroner is to make recommendations as to preventative measures in the future, this finding is probably insufficient. Finally, the finding may sound like this: the death was caused by the administration of the wrong drug because the doctor did not check the label on the container. This comes very close to a finding

[178] This is especially significant where the police itself are under suspicion: see The Warwick Inquest Group, "The Inquest as Theatre for Police Tragedy: The Davey Case" (1985) 12 Journal of Law and Society 35.

[179] See, *eg*, Wells, *supra*, note 177, at 82, who writes, "[t]he need to establish a cause merges inevitably ... into questions of blame allocation". See also Matthews, "What is the Coroner For?" (1994) 110 LQR 536 for a description of how the English courts have created exceptions to the statutory prohibition on fault-finding.

[180] *Supra*, note 21.

of criminal negligence.

XII. Some Comparisons

Where do the different jurisdictions stand on the question of coronial fault-finding? Singapore, as we have seen countenances a rather strong element of fault-finding.[181] The Coroner is directed by the Criminal Procedure Code to look for persons criminally responsible and to make a finding thereon. The Coroner has no discretion as to his fault-finding role. Even more, the Code gives the Coroner the power (though this is discretionary) to charge the potential defendant where there is *prima facie* evidence of guilt. Malaysia's Code is much the same, except that the power to charge the potential defendant does not exist.[182] The position in England is much more equivocal. The power to charge was abolished in 1977.[183] The Coroner is not to make a finding of homicide and there cannot be any determination of civil or criminal liability.[184] To all appearances, these provisions erase the fault-finding role of the Coroner. However, the courts appear to have intervened and decided that the law allows for a finding of "unlawful killing" and of "lack of care".[185] This seems to have been rationalised on the ground that the rule which forbids the determination of legal liability must be subordinated to the primary task of the Coroner to make a finding on how the deceased came by his death. There appears to have been a subtle judicial manoeuvre to reintroduce an element of fault finding.[186] A much clearer position at the opposite end of the spectrum is achieved in Ontario where the removal of fault-finding is substantially achieved.[187] Indeed even the fact-finding role of the Coroner is expressly subordinated to the prohibition against any finding of legal responsibility.[188] Any finding expressing any conclusion of law cannot be received.[189] Presumably, these provisions would render "unlawful killing" and "lack of care" findings impossible in Ontario.

[181] This is described above.

[182] See *Ahmad bin Din* (1956) 22 MLJ 235 (HC Ipoh). Nor does there appear to be such a power in Brunei: *Goh Chai Hing* [1956] SNBB Supreme Court Reports 36 (HC Brunei). See generally, Hamid, *Criminal Procedure* (1994), pp 790-5.

[183] *Jervis on Coroners*, *supra*, note 144, p 251.

[184] S 11(6), Coroners Act 1988, c 13; and r 42, Coroner Rules 1984, SI 1984/552

[185] See Matthews, *supra*, note 179.

[186] It is unclear if this was because of a belief that fact-finding and fault-finding are inevitably linked, or because it was thought desirable as a matter of policy for the Coroner to pronounce on issues so close to a determination of guilt.

[187] See Manson, *supra*, note 159, pp 638-48.

[188] S 31(1) and (2), Coroners Act, chapter c37.

[189] S 31(4), Coroners Act, *ibid*.

At the far end of the spectrum are the proposals made by Law Reform Commissions in England and Hong Kong. In England, the Brodrick Commission suggested that where the Coroner encounters *prima facie* evidence of criminal responsibility, he or she should have the discretion to adjourn the inquiry and refer the matter to the prosecuting authority.[190] The Law Reform Commission of Hong Kong would take matters even further and make the discretion to refer to the prosecuting authority mandatory where there is suspicion of criminal homicide.[191] Where the prosecutor decides not to proceed, the Coroner is to be informed of the decision. Thereafter, the Coroner should simply publish the prosecutor's decision not to proceed. The inquiry is not to be resumed. Where charges are preferred, the Coroner must leave the matter entirely to the criminal court. In effect, these recommendations would have the Coroner retreat entirely from fault-finding, leaving it to the prosecuting authority to decide whether to have the matter determined in a criminal court.

XIII. The Coroner's Fault-Finding Role in Singapore

Published studies on the practice in the Coroner's Court in Singapore is regrettably non-existent. Although the underlying rationale of the Coroner's Inquiry is conduct an open investigation into the cause of death, public access to the Coroner's findings is remarkably elusive.[192] As far as medical negligence is concerned, findings of criminal negligence, though thankfully rare, are not unknown. Eminent forensic pathologist, Professor Chao Tze Cheng, reports of 11 such cases between 1976 and late 1996, involving nurses and doctors, ranging from house officers to senior consultants.[193] Yet there does not appear to have been any direction by the Coroner, in finding criminal negligence, to try the persons responsible. It is not known exactly why coroners in Singapore have not exercised their power to charge potential defendants. It appears that this is also true of criminal negligence in other contexts. The prevailing practice seems to be for the Coroner to leave the decision to prosecute entirely to the Public Prosecutor.[194] The

[190] *The Brodrick Report*, *supra*, note 144, at 182-6.
[191] *Report on Coroners* (Topic 14) (1987).
[192] Unlike the judgements of the superior courts and, in some cases of the subordinate courts, the findings of the Coroner are not published. Coronial proceedings are, however, open to the public, and occasionally very brief and incomplete reports of the findings make their way to the local newspapers.
[193] "An Overview of Fatal Iatrogenic Injuries in Singapore" in Proceedings of the *Annual Seminar of the Medico-Legal Society*, 2 & 3 Nov 1996, at 94.
[194] CI/1107/91, *supra*, note 115.

practical position thus approximates that which exists in England – there is fault-finding but prosecution is left to the prosecuting authority. There has not been, to the knowledge of this writer, any decision by the Public Prosecutor to prosecute in any of these 11 cases of a positive coronial finding of medical negligence in Singapore. It is again unknown why this has been so – whether it was because the Public Prosecutor disagreed with the Coroner's assessment of the available evidence, or whether the Public Prosecutor has taken into account evidence not before the Coroner, or other public interest considerations which do not concern the Coroner. More significantly, it is unclear if the Coroner's findings have influenced the prosecuting authorities in any way, or if there has been public concern that the Coroner's positive findings of criminal negligence have not been followed through with a prosecution. In short, while the law concerning the Coroner's Inquiry is reasonably clear, there is much groundwork to be done before we can come to any firm conclusions about how it is working out in practice. Anyone so minded to review or reform the strong fault-finding element of coronial law in Singapore, perhaps along the lines of the Ontario system or of the regimes suggested by the Law Reform Commissions, would be well advised to make a careful study of these matters first.[195]

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[195] The essential points in this article were first presented by the author at two conferences: the Symposium on Medical Negligence in Coroner's Cases (jointly organised by the Institute of Science and Forensic Medicine and the Academy of Law), 2 Mar 1996; and the 8th Combined Scientific Meeting on Iatrogenic Injury – Causation, Prevention and Legal Implications (jointly organised by the Academy of Medicine, the Society of Pathologists and the Medico-Legal Society), 3 Nov 1996. The author also wishes to thank the officers of the Attorney-General's Chambers for their kind assistance – the views expressed here are mine and do not, of course, represent their opinions.

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