Singapore Journal of Legal Studies
[2015] 135–161

THE WORK OF MANY HANDS: THE CONTINUING CONFUSION OVER SECTION 304A OF THE SINGAPORE PENAL CODE

SUNDRAM PETER **SOOSAY***

This article presents a critical assessment of s 304A of the *Singapore Penal Code*, the section setting out the offence of causing death by rash or negligent act. Along with providing a brief history of the offence, this article attempts to address the practical and conceptual difficulties that have come to trouble the application of the offence and to propose a way forward.

I. INTRODUCTION

The *Indian Penal Code*[1] has been in force across the former British colonies of Asia and Africa for a century and a half now, and this venerable character would suggest a Code admirably equipped to serve the purposes to which it is put. In fact, nothing could be further from the truth. The eminent English jurist Frederick Pollock once wrote of the *Indian Contract Act*[2]:

> Measures long held in suspense, perhaps by excessive scruples, have been finished and passed in something like haste. Not only the work of different hands, but work done from quite different points of view, has been pieced together with an incongruous effect… It is constantly defective and inaccurate, both in apprehending the rules of law which it purports to define and in expressing the draftsman's more or less satisfactory understanding of them.[3]

Sadly, the same could easily be said of the *Indian Penal Code*, and nowhere is this more evident than in s 304A of the Code, the section setting out the offence of causing death by rash or negligent act. As will be recounted below, the offence emerged inadvertently, the work of a number of different hands, with no single intention or organising intelligence behind it. Moreover, the offence has continued to be developed in much the same haphazard manner, through a series of ill-informed interventions by legislators, judges and academics. In the account to follow, an

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* Assistant Professor, Faculty of Law, National University of Singapore. I am grateful to the anonymous reviewer for helpful comments.

1 Act No 45 of 1860.

2 Act No 9 of 1872.

3 Frederick Pollock & Dinshah Fardunji Mulla, *The Indian Contract Act*: *With a Commentary*, *Critical and Explanatory*, 2nd ed (London: Sweet & Maxwell, 1909) at vi, vii.

attempt will be made to find some clarity in the confusion that has resulted and to propose a way forward for the offence.

II. The Inadvertent Genesis of Section 304A

Section 304A began life as a speculative proposal, making its first appearance in clause 304 of Thomas Babington Macaulay's original draft Code:

> 304. Whoever causes the death of any person by any act or any illegal omission, which act or omission was so rash or negligent as to indicate a want of due regard for human life, shall be punished with imprisonment of either description for a term which may extend to two years, or fine, or both.[4]

With the offence, Macaulay was putting into effect an approach to involuntary homicide then being explored by several early nineteenth century criminal law theorists and reformers. In English law at that time, it often did not matter whether the criminal acts to be punished were caused voluntarily or involuntarily, with the much maligned felony murder rule standing as the most notorious example. Under the rule, where a person inadvertently caused death while engaged in the commission of an offence, it was thought that he or she could be prosecuted for murder. By the early nineteenth century, enlightened opinion had turned very much against this aspect of English criminal law, and reformers generally sought to draw a clearer line between voluntary and involuntary homicide. One approach appealed to several such thinkers, and this involved explicitly distinguishing involuntary homicide and providing for it through the introduction of an entirely separate and more appropriately calibrated offence. When Macaulay drafted his Code, he drew upon these ideas and fashioned clause 304 with the voluntary-involuntary distinction very much in mind.[5]

In Macaulay's original scheme, clauses 294 and 295 provided for voluntary culpable homicide, and these required that the accused either intended to kill the victim or at the very least knew that death was a likely outcome of the act he or she carried out. Some conscious awareness of death as a possibility was therefore essential. To fill out the scheme, clause 304 provided for a general offence of involuntary culpable homicide. While conscious awareness of death as a possible result was not required, Macaulay rejected all forms of constructive liability and insisted that, even here, some form of actual fault be present as an essential feature of the offence. The mere fact that the death was caused in the course of behaviour that was unlawful or malicious could not, then, in and of itself form the basis for liability. With this in mind, clause 304 required that the death resulted specifically from an act of the accused judged to be "so rash or negligent as to indicate a want of due regard for human life". Where the accused accidentally caused death while engaged in the commission of a crime, conviction would be appropriate only where it could be shown that the accused acted in just such a rash or negligent manner. If the act in question lacked this quality of

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[4] T B Macaulay *et al*, *A Penal Code Prepared by the Indian Law Commissioners and Published by Command of the Governor General of India in Council* (London: Pelham Richardson, 1838) at 40.

[5] The importance of the distinction is clear enough from the Code itself, from Macaulay's repeated use of the words "voluntary" or "voluntarily" in the offences "voluntarily causing hurt", "voluntarily causing grievous hurt" and "voluntary culpable homicide". It is also abundantly clear from the explanatory notes Macaulay appended to his draft Code.

rashness or negligence and the death was entirely accidental, no prosecution for the death under the offence could follow, whatever the larger purpose or circumstances of the act. Moreover, where the offence did apply, the penalty to follow conviction was to reflect the culpability associated with the rashness or negligence of the act alone, and was not to be influenced in any way by the larger purpose or circumstances of the act.[6]

As is well known, when the draft Code was circulated among the judiciary in India, Macaulay's effort was widely criticised for the many needless innovations it contained. Critics felt that the enacted Code should reflect established practice to much greater extent and the homicide provisions, in particular, were thought to have suffered from Macaulay's neglect of English law. Unsurprisingly, when the Select Committee charged with preparing the Code for enactment turned their attention to the homicide provisions, they rejected Macaulay's novel scheme outright and looked instead to the more conservative proposals found in the Reports of the English Commissioners.[7] The resulting changes to the homicide offences were dramatic, taking the form of a radical reshaping of both murder and culpable homicide not amounting to murder. Most significant for our purposes here, the Select Committee appears to have rejected the sharp separation Macaulay sought to introduce between voluntary and involuntary homicide. The Committee's treatment of felony murder provides the most obvious example. Like Macaulay, the Select Committee rejected felony murder. Unlike Macaulay, however, the Committee addressed the problem by replacing felony murder with what is sometimes referred to as "reckless murder", providing for this within the offence of murder by means of the third limb of s 300.[8]

The corresponding changes to the offence of culpable homicide not amounting to murder were no less extensive. The original draft Code adopted a fairly rigid and technical approach to the offence. Though apparently set out in clause 294 of the draft Code, the offence was in fact available only through the operation of three fairly well-defined exceptions: manslaughter, consent, and defective or excessive private defence. In the amended Code, the offence—now found at s 299—was more clearly distinguished from murder and was broadened to accommodate a wider range of possible instances:

> 299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.[9]

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6 Macaulay *et al*, *supra* note 4 at 112: "When a person engaged in the commission of an offence causes death by rashness, or negligence, but without either intending to cause death, or thinking it likely that he shall cause death, we propose that he shall be liable to the punishment of the offence which he was engaged in committing, superadded to the ordinary punishment of involuntary culpable homicide."

7 The Reports of Henry Brougham's English Commissioners came to exert a considerable influence on those participating in the debate over what would become the *Indian Penal Code*. See *eg*, Sir Barnes Peacock's speech to the Legislative Council of India upon the occasion of the Third Reading of the Bill. Peacock's speech can be found in W R Hamilton, *The Indian Penal Code*: *With Commentary* (Calcutta: Thacker, Spink, 1895) at xxv-xxxvii.

8 *Indian Penal Code*, *supra* note 1. Section 300 "3rdly" deems to be murder an act causing death done "with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death".

9 *Ibid*.

Having expanded s 299 in this way, the Committee appears to have deliberately removed clause 304. Presumably, culpable but involuntary deaths not deemed to satisfy the requirements of s 300 were to be prosecuted under the enlarged s 299. That this was the Committee's intention is not entirely clear, however. The second of the three limbs included within the section, where the accused causes death by doing an act "with the intention of causing such injury as is likely to cause death", appears to have been included with just this purpose in mind. Given the overtly subjective formulation of the other two limbs, however, the objective character of the limb is easily overlooked, and s 299 has for this reason sometimes been taken to be wholly subjective in operation.[10] Where this subjective interpretation of s 299 is accepted, the removal of clause 304 poses a problem, for the homicide sections now make no provision for involuntary deaths.

Clause 304 was not entirely unrepresented in the enacted 1860 Code. Macaulay had also included a further "rash or negligent" offence in his "Offences Affecting the Human Body" chapter, found at clause 327:

> 327. Whoever causes grievous hurt to any person by any act or illegal omission, which act or omission is so rash or negligent as to indicate a want of due regard for the safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or fine which may extend to one thousand rupees, or both.[11]

While the Select Committee judged Macaulay's original clause 304 to be superfluous in light of their own amendments to the homicide provisions, they evidently found value in offences addressing "rash or negligent" acts specifically. With this in mind, they expanded the scope of clause 327, replacing it with three distinct offences modelled on the original. These sections—336, 337 and 338 of the Code when enacted in 1860—create offences which make liable the doing of acts "so rashly or negligently as to endanger human life or the personal safety of others".[12] Section 336 makes provision for a simple form of the offence, while ss 337 and 338 provide for similar acts which result in hurt and grievous hurt respectively. Section 338 provides an example of the form adopted:

> 338. Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.[13]

In redeploying Macaulay's "rash or negligent" offences in the way that they did, the Select Committee was in fact introducing a striking innovation of their own, an

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[10] The confusion over the second limb of s 299 parallels a similar confusion over s 300 "3rdly", the equivalent limb within the offence of murder.

[11] Macaulay *et al*, *supra* note 4 at 43. Clause 327 provides for an involuntary counterpart to the offence of voluntarily causing grievous hurt. In this way, the offence parallels Macaulay's original clause 304 in bringing into effect a sharp distinction between the voluntary and involuntary causing of a specific form of harm.

[12] The formulation "as to endanger human life or the personal safety of others" in ss 336, 337 and 338 appears to combine reference to "a want of due regard for human life" from Macaulay's original clause 304 with "a want of due regard for the safety of others" from clause 327.

[13] *Indian Penal Code*, *supra* note 1.

offence with no equivalent in English law at the time. Where Macaulay employed the "rash and negligent" formulation very specifically to provide a basis in fault for specific forms of involuntary harm, the Select Committee appears to have sought to make the carrying out of "rash or negligent" acts a source of liability in its own right, quite independent of the more serious offences. So repurposed, the offences continue to address harm caused inadvertently, but now the dangerous or violent character of the act causing harm must itself be inadvertent. The offences in this way create liability for what we might think of as culpable accidents, where harm arises from actions which, though not malicious or unlawful, are nevertheless judged to be sufficiently imprudent or irresponsible to deserve some measure of punishment. Where a specific form of harm is caused inadvertently as a result of a direct and deliberate act of violence, however, the more serious offences of voluntary culpable homicide and voluntarily causing grievous hurt are to be preferred.

The speculative nature of the offences meant that problems were inevitable, and an obvious one presented itself almost immediately. When the Select Committee introduced ss 336, 337 and 338, they inexplicably failed to include an accompanying offence making liable the doing of "rash or negligent" acts leading to death. Alongside the wholly subjective interpretation given s 299, this meant that there were potentially not one, but two apparent omissions suffered by the Code as enacted in 1860. Where a rapist accidentally kills his victim while trying to subdue her, this is traditionally prosecuted as involuntary manslaughter. Where the subjective interpretation of s 299 is accepted, however, such killings cannot be prosecuted under the section and no alternative provision is offered by the Code. Where, by contrast, an apartment dweller carelessly drops a heavy object from a window and causes the death of a person walking below, the act lacks the gross or wicked character traditionally associated with manslaughter and seems deserving of conviction under a lesser offence, one such as causing death by rash or negligent act. In the *Indian Penal Code* enacted in 1860, there was no such offence either.

By the time of James Fitzjames Stephen's tenure as Law Member in India,[14] it had become clear that the Code suffered an obvious lack in this respect. Though it is unclear which of the two omissions troubled the courts in India specifically in the first decade of the Code's life, some such trouble was apparently felt. Stephen sought to offer a remedy, but, like Macaulay, did not himself recognise the difference between the two forms of involuntary homicide. Stephen explained his motivation for reintroducing the offence when he put the *Penal Code Amendment Bill* before the Council of the Governor-General of India in August 1870:

> The Penal Code strangely omitted to punish what, in England, would be called manslaughter by negligence. If a man killed another by any act he knew to be likely to cause death, he committed culpable homicide, but if he caused death rashly or by negligence he committed no offence at all. This was all the more remarkable, as punishments were provided for causing hurt, or grievous hurt, by rash or negligent acts, and as in the draft prepared by Lord Macaulay there was a section which punished the offence now in question. By what accident it

[14] James Fitzjames Stephen served as the Fourth Member, or Law Member, of the Council of the Governor-General of British India between 1869 and 1872. Macaulay was the first Law Member, serving from 1834 to 1838.

> had been omitted, Mr Stephen did not know. He proposed now to insert such a section. One reason for doing so was, that the Judges had adopted a plan for evading the law which, though ingenious, and, perhaps, necessary, was, he thought, objectionable. They convicted prisoners who had caused death by a rash or negligent act of causing "grievous hurt" by a rash or negligent act. Mr Stephen had heard a Judge direct a Jury that to cause death was "to cause grievous hurt and more." This, he thought, was perfectly good sense; but as the Code defined "grievous hurt" to mean eight specified injuries, he thought it very questionable law. To convict a man who by rashness caused another to be drowned, of having "deprived him of the sight of one of his eyes," or of having "caused him to be unable for twenty days to follow his ordinary pursuits," was, to say the least, grotesque. Mr Stephen proposed to remedy the omission by providing expressly for the case of causing death by any rash or negligent act.[15]

Stephen chose to address the problem in the least thoughtful manner imaginable, by simply restoring Lord Macaulay's original clause 304 to the Code.[16] The offence introduced into the Code read:

> 304A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[17]

In introducing the offence in the way that he did, Stephen set in place a deep tension which has pervaded the life of the offence ever since, for the enacted 1860 *Indian Penal Code* was no longer Macaulay's original draft, and the restored clause 304 now had to be read alongside both the transformed homicide offences and the three "rash or negligent" offences found in ss 336, 337 and 338. How, then, are we to understand s 304A? Are we to interpret it alongside the other "rash or negligent" offences, taking it not as a species of manslaughter, but as something less, aimed more specifically at irresponsible or imprudent but generally law-abiding acts which inadvertently lead to death? Or are we are to understand s 304A as providing for a general offence of involuntary homicide, one which encompasses both negligent homicide and involuntary manslaughter?[18]

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[15] Reported in the *Proceedings of the Legislative Council of India*, vol 4 at 375. For additional discussion of the amendment, see J F Stephen, *A History of the Criminal Law of England* (London: Macmillan,1883) vol 3 at 310, 311.

[16] Stephen's intervention brings to mind the assessment of the man offered by C P Ilbert in "Sir James Stephen as a Legislator" (1894) 10 Law Q Rev 222 at 224, who said of Stephen: "His term of office lasted only half the ordinary span, but he compressed into it enough work for five law members. . . He left the Legislative Council breathless and staggering, conscious that they had accomplished unprecedented labours, but not free from some misgivings as to the quality and durability of the work for which they were partially responsible. The misgivings were not wholly without foundation. Fitzjames Stephen was a Cyclopean builder. He hurled together huge blocks of rough hewn law. It is undeniable that he left behind him some hasty work in the Indian Statute Book, some defective courses of masonry which his successors had to remove and replace."

[17] *Indian Penal Code* (*Amendment*) *Act 1870* (Act No 27 of 1870).

[18] In fact, Stephen's intention for s 304A may well have been even more confused than this. Alongside his reference to the English offence of "manslaughter by negligence", Stephen also appears to have intended s 304A to function as a complement to the other rash or negligent act offences found elsewhere within the Code. These offences do not explicitly provide for a specific penalty where death results

All these years later, the role to be played by s 304A appears relatively well established. Courts across the Code jurisdictions appear to prefer to maintain a clear distinction between the two forms of involuntary homicide, taking s 304A to provide for the lesser offence of negligent homicide while understanding s 299 to provide for both voluntary and involuntary culpable homicide where the death is the result of an unlawful or malicious act. For the most part, this has not proven difficult, as the courts have interpreted the second limb of s 299 in the objective manner envisioned by the Select Committee. Where death arises inadvertently from a violent act, the limb applies whether or not the accused actually appreciated the risk of death. Application of the third limb is more problematic. While the third limb of s 299 appears to require actual knowledge that death is a likely outcome of the act the accused carries out, the courts often interpret the limb as encompassing not only those instances where the accused actually knew that death was a likely outcome of his act, but also where he "must have known" or "ought to have known" that such a result would follow.[19]

While the courts across the Code jurisdictions have largely resolved the most basic question they faced—involuntary culpable homicide is to be addressed by s 299, negligent homicide by s 304A—they have proven less successful in clarifying what, precisely, an offence of negligent homicide entails. In Singapore, particularly, the efforts undertaken to clarify s 304A have resulted in extraordinary confusion, both practical and conceptual, and ongoing efforts appear to be making matters worse rather than better. The remainder of this article will address the many misapprehensions that have come to beset the offence of causing death by rash or negligent act. The following clarifications will be offered:

1 Rashness and negligence are not distinct in the manner now generally understood;
2 Rashness is not more blameworthy than negligence for the practical purposes of the offence;
3 Both rashness and negligence are to be assessed objectively, with the required standard provided for by the full formulation of the "rash or negligent" offences more generally; namely, that the act must be one which an ordinary

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from the rash or negligent act in question. Stephen appears to have intended for s 304A to be used to supplement those offences, coming into operation where death results. This might explain his decision to not include the reference to "endangering human life and the personal safety of others" within the section. See Stephen, *supra* note 15.

[19] See *eg*, *Public Prosecutor v Astro bin Jakaria* [2010] 3 SLR 862 at para 96 (HC) [*Astro bin Jakaria*]. By interpreting the third limb in this manner, the courts have arguably interpreted s 299 in such a way as to include something very much like the English notion of unlawful act manslaughter, and it is not clear that this is in keeping with the original intention of those responsible for the offence. A notable exception is provided by the 1976 Privy Council decision of *Ike Mohamed Yasin bin Hussin v Public Prosecutor* [1974-1976] SLR(R) 596 (PC). There, the appellant had inadvertently killed a "well nourished" 58-year-old woman in the course of an attempt to commit rape, with the fatal injury inflicted as the appellant acted to restrain the victim. The appellant was originally convicted of murder, but the Privy Council substituted a conviction under s 304A. As the appellant did not inflict the bodily injury intentionally, and the act itself could not be said to be one the appellant knew to be likely to cause death, s 299 was not applicable and s 304A was used in its place. There was, however, no examination of the relationship between s 299 and s 304A and no discussion as to whether or not use of the latter was appropriate in the circumstances.

person would judge to be so rash or negligent as to "endanger human life or the personal safety of others"; and

4 Section 304A should not be employed in the prosecution of routine road fatalities as road traffic legislation is available and is more properly employed in these instances.

We will look at each of these issues in turn. We will begin by addressing what is perhaps the most visible source of confusion: the subjective or advertent interpretation given rashness within the offence.

III. Rashness as a Mode of Negligence

Almost immediately after the *Indian Penal Code* was enacted in 1860, judges and commentators began looking for ways in which to distinguish rash acts from negligent acts, assuming, not unreasonably, that the two are different and that this difference is significant. This view, accepted in modest form by the courts, is especially important to those academic commentators for whom fault concepts like intention, knowledge, rashness and negligence are accepted as the central organising elements of criminal law more generally.[20] Informed by this understanding, determined efforts have been made to reconceptualise the offence along lines more conducive to the theoretical orientation adopted. Though clearly anachronistic and out of keeping with the actual design of the Code, this line of thinking has proven influential in recent years and culminated, in Singapore, in an ill-conceived amendment to the *Singapore Penal Code*[21] in 2008 explicitly separating the rash and negligent components of ss 336, 337, 338 and 304A. Section 304A, for example, now reads as follows:

> 304A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished—
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> (a) in the case of a rash act, with imprisonment for a term which may extend to 5 years, or with fine, or with both; or
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> (b) in the case of a negligent act, with imprisonment for a term which may extend to 2 years, or with fine, or with both.[22]

In fact, there is no significant difference between rash and negligent acts for the purposes of the offence. Rashness, properly understood, is rather merely a form, or mode, of negligent behaviour. This is clear enough from our use of the word "rash" in ordinary life. When we chide someone for behaving rashly, we criticise them for a form of negligent behaviour, for acting without thinking or for engaging in a course of conduct without adequately considering the consequences of their

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[20] This theoretical orientation is central to the account of the Penal Code given in the most prominent current Singaporean textbook: Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2nd ed (Singapore: LexisNexis, 2012).

[21] Cap 224, 2008 Rev Ed Sing.

[22] *Penal Code* (*Amendment*) *Act 2007* (No 51 of 2007). Tellingly, only ss 336, 337, 338 and 304A were amended in this way. The large number of offences employing the "rash or negligent" formulation elsewhere in the Code were left unchanged.

actions.[23] In the early nineteenth century, legal thinkers employed the term with this ordinary understanding in mind. John Austin, for example, in his influential *Lectures on Jurisprudence*, distinguished negligence *non faciendo* (negligence in not acting), which took the form of "inattention to necessity or probability of the mischief" from negligence *in faciendo* (negligence in acting), which he termed heedlessness, or, when gross, temerity or rashness.[24] In this latter mode, the party thinks of the probable mischief, but, "in consequence of a missupposition begotten by insufficient advertence, he assumes that the mischief will not ensue in the given instance or case".[25] It is this, the "[a]bsence of a thought which one's duty would naturally suggest"[26] which stands as the essence of the concept. Austin put the matter in the following way in his Lectures:

> The states of mind which are styled 'Negligence' and 'Heedlessness,' are precisely alike. In either case, the party is inadvertent. In the first case, he does not an act which he was bound to do, because he adverts not to it. In the second case he does an act from which he was bound to forebear, because he adverts not to certain of its probable consequences. Absence of a thought which one's duty would naturally suggest, is the main ingredient in each of the complex notions which are styled 'negligence' and 'heedlessness.'[27]

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[23] A person acts rashly, for example, when he or she resigns from a position abruptly, or confronts a colleague suspected of dishonesty, or makes a significant purchase, all without carefully considering the consequences of his or her action. Rashness does not, in any of these examples, refer to the deliberate running of a risk. It is precisely the lack of adequate consideration of the risk undertaken that forms the core of the concept.

[24] John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* (London: John Murray, 1873) vol 2 at 1094.

[25] Austin, *ibid*, vol 1 at 440, 441.

[26] *Ibid* at 440.

[27] *Ibid* [emphasis omitted]. The word "rash" was initially included in the Seventh Report of the English Commissioners only later to be dropped. See *eg*, the *Seventh Report of Her Majesty's Commissioners on Criminal Law* (11 March 1843) at 26: "A party may be culpable either in the doing of an act rashly, without knowing its nature or probable consequences, or in the careless and incautious manner of doing an act. Within the former predicament are comprised all cases where a person unacquainted with the effect of a powerful medicine or drug administers it to another; here he is culpably rash in so doing without some knowledge of its probable effects. Within the same class are also enumerated those instances where an offender rashly and improvidently presents a gun at another and draws the trigger, not supposing it to be loaded, when it is in truth loaded, and death results." Similarly, the conceptual distinction between rashness and negligence, but not the actual term "rash", was employed by Edward Livingston in his *Louisiana Code*: see Edward Livingston, *A System of Penal Law for the United States of America* (Washington: Gales & Seaton, 1828). Livingston included two degrees or grades of negligent homicide in his Code. The first, found in art 518, is negligence as it is more commonly understood: "The first degree of this offence, is homicide involuntarily inflicted in the performance of a lawful act, in which there is no apparent risk of life, by ordinary means, but without that care and precaution which a prudent man would take to avoid the risk of destroying human life." The second grade, found in art 521, is rashness: "Homicide of the second grade, is that which is involuntarily committed in the performance of a lawful act, but under circumstances, in a manner, or by means, which cause an apparent danger of inflicting death, without due precaution to avoid such danger." Further clarification is provided in art 522: "An important distinction between this and the first grade of negligent homicide is, that in this the risk of causing death or other great bodily harm, must be apparent; by which is meant, that it must necessarily be perceived by a common observer, without inquiry or examination, merely by witnessing the act, and reflecting on its consequences."

For the early nineteenth century thinkers, negligence therefore took two distinct forms, with culpability in both forms arising from a failure to exercise the degree of care and caution expected of the actor by his neighbours. Rash acts are typically of a more active and exceptional nature, where the actor acts imprudently or impetuously without taking the required steps to ensure that the act is carried out safely. Negligent acts, if not gross, typically arise from routine acts which, though unexceptional in and of themselves, are nevertheless commonly understood to give rise to some degree of danger to others. The actor in question will be found to have been negligent where harm results from his actions and it is felt that the harm was caused by a failure on his part to exercise the care and caution commonly expected in the circumstances. The driver of a vehicle behaves negligently, then, when he fails to pay attention to what is happening around him as he drives and for this reason is involved in an accident. He behaves rashly when he deliberately speeds up at an intersection at the prospect of a red light and, not having taken adequate care and caution in assessing the danger he is creating, is involved in an accident. Similarly, a person behaves negligently when, in control of a fire set appropriately, he fails to maintain the fire in the manner expected and harm to others follows as a result. He behaves rashly in his control of fire where he deliberately sets a fire in an inappropriate place without taking adequate care to ensure that he is not exposing others to danger. The essence of the matter in all these instances is a failure to exercise sufficient care and caution when acting in a manner the ordinary person would judge to be dangerous to others.

A compound phrase—"rash or negligent"—was likely used in the Code to draw attention to negligence *in acting* alongside negligence *in not acting*, the more familiar and intuitive form.[28] This factual difference was not, however, thought sufficiently important to require the two modes of negligence to be separated for the purposes of liability within the Code. This is appropriate, for while it can be argued that rashness is inherently more culpable than negligence, in practice the assessment of liability is so sensitive to the particularities of the acts in question as to render the distinction unimportant.[29] As liability arises in either case from inadvertence, liability ultimately is judged by the magnitude and obviousness of the danger the actor fails to advert to. To return to our driving example, we need only vary the context and surrounding circumstances to see that this is the case. Consider, first, the driver of a tanker containing combustible chemicals. Whether he is rash or negligent, whether he merely fails to pay attention or actually speeds up and darts across an intersection, his blameworthiness will be determined for the most part from the fact that he is responsible for a vehicle which poses a considerable threat to the public. Consider, by way of contrast, the driver of a small car making his way home in the middle of the night on largely deserted roads. Whether rash or negligent, whether he merely fails to pay attention as he drives or acts rashly by running a red light, in either case he will likely be considered less blameworthy than the driver in the first

[28] The likes of Austin, Livingston and Macaulay all appear to have made a point of including rashness in the belief that the word "negligence" on its own would lead to neglect of this other less obvious mode of negligence.

[29] In addition, it is often difficult to determine whether an act is rash or negligent. Where a driver of a car is using his mobile phone and causes an accident as a result, is he rash for choosing to use his phone while driving or negligent for not paying due care and attention while driving?

example, as the danger he fails to advert to is less great. Looking at both scenarios in isolation, the rash act is more blameworthy than the negligent act, certainly. It does not follow from this, however, that rash acts are generally more blameworthy than negligent ones and therefore as a rule deserve a custodial sentence where negligent acts do not, for instance. The distinction has no practical application at this level of generality.[30]

While rashness understood as a mode of negligence was clear enough to thinkers in the early nineteenth century, a very different understanding took hold in the twentieth century, and it is this understanding which today informs the interpretation of the concept in Singapore. Rashness, under this interpretation, is more properly understood in subjective terms as a dangerous act understood by the actor himself in precisely those terms. The essence of liability where rashness is involved is therefore deliberate risk-taking, found in an explicit decision to "carry on regardless"—to carry out the act despite the risk the actor appreciates as accompanying it. Two Indian decisions in particular are reliably cited in support of this subjective interpretation of rashness. The first is the 1872 Madras High Court case of *In re Nidamarti Nagabhushanam*.[31] The relevant passage is the following one:

> Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness.[32]

The passage goes on to distinguish rashness from negligence, the essence of which, unlike the former, is inadvertence:

> Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.[33]

Rashness and negligence are to be distinguished, then, by the presence or absence of consciousness of risk. The second oft-cited decision is the 1881 Allahabad High Court case of *Empress of India v Idu Beg*.[34] Once again, the essence of liability

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30 Interestingly, while Macaulay and the English Commissioners recognised no significant distinction between rashness and negligence for the purposes of liability, Livingston thought rashness to be more blameworthy than negligence, and therefore deserving of a more severe penalty. In his *Louisiana Code*, *supra* note 27, a conviction for negligent homicide in the first degree led to imprisonment for not less than two months and not more than one year. A conviction for negligent homicide in the second grade, by contrast, was punishable by imprisonment for not less than two years and not more than four years. It should be noted that Macaulay's own treatment of the issue was based to some extent on his own evaluation of Livingston's. See Macaulay *et al*, *supra* note 4 at 112: "It gives us great pleasure to observe that Mr Livingston's provisions on this subject, though in details they differ widely from ours, are framed on the principles which we have here defended." In light of the difference between the two Codes, it is not unreasonable to believe that Macaulay was aware of Livingston's belief that rashness is always and necessarily the more blameworthy of the two, but rejected this view himself.

31 (1872) 7 Madras High Court Reports 119 [*Nidamarti*].

32 *Ibid* at 119, 120.

33 *Ibid* at 120.

34 (1881) Indian Law Reports 3 Allahabad 776 (HC) [*Idu Beg*].

appears to be the deliberate running of a risk:

> [C]riminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences.[35]

Both passages have proven extraordinarily influential and are invariably cited wherever rashness as it appears in s 304A is discussed. In fact, neither decision turned on any such distinction between rashness and negligence specifically.[36] Both instead concerned the problem discussed in the previous section, namely, whether s 304A provided for an offence of involuntary manslaughter. In both cases, death had resulted inadvertently from deliberate acts of violence and, as s 299 was thought at trial to be inapplicable, the question before the court was whether s 304A could be used in its place. It was decided in both cases that s 304A was inappropriate in such instances due to the deliberate nature of the acts which led to death. The oft-cited passages were offered not as authoritative definitions of rashness and negligence, but to make clear that neither extends to instances where the accused commits a deliberate, direct act of violence.[37]

The cursory way in which the passages from *Nidamarti* and *Idu Beg* above are typically used, more for rhetorical purposes than for any illumination that might be gained from them, is characteristic of the manner in which the subjective view has been promoted, and reflects how little commentators have appreciated the difficulties created by the subjective interpretation of rashness. Quite apart from how the fine distinctions in mental states envisioned are to be made a matter of proof, an offence of rashness so conceived would have little practical application, capturing only a very small number of instances involving daredevils inclined towards deliberate risk-taking. Inadvertent risk-taking is, however, commonplace, and, unsurprisingly, prosecutions under s 304A rashness invariably arise in answer to rash acts of this latter type. The disjunction between theory and practice has had the unhappy effect of leaving judges with little choice but to impute to the accused the required consciousness of risk in a manner that is quite obviously artificial, giving decisions concerning rashness the curious quality of being at once both determinedly subjective in justification and transparently objective in operation.[38]

Moreover, the confusion engendered by the subjective interpretation of rashness extends to our broader understanding of the fault concepts employed within the Code,

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35 *Ibid* at 779, 780.

36 This is overwhelmingly true of the many subsequent Indian cases in which the passages appear. The passages are set out routinely as part of the judgment but the definitions play no part in the ultimate verdict.

37 In *Nidamarti*, *supra* note 31, the death was the result of a brutal beating and kicking and dragging by the hair of an old woman of 60 by a powerful man, who so acted without the smallest provocation. In *Idu Beg*, *supra* note 34, the accused caused the death of his wife by striking her on her left side with a heavy stick, rupturing her spleen. In offering definitions of rashness and negligence, the judgments in both instances sought to make clear that s 304A was not applicable where there was a deliberate intention to cause harm directly.

38 For examples of Singaporean decisions where the finding that there was actual contemplation of risk is unconvincing, see *Balakrishnan S v Public Prosecutor* [2005] 4 SLR(R) 249 (HC) [*Balakrishnan*]; *Public Prosecutor v Tiyatun* [2002] 1 SLR(R) 746 (HC) [*Tiyatun*]; *Ng So Kuen Connie v Public Prosecutor* [2003] 3 SLR(R) 178 (HC).

collapsing as it does the clear distinction that otherwise exists between the concepts of rashness and knowledge. Where the actor knows explicitly that the act he is to perform carries with it an element of risk, and performs the act anyway, knowing that a particular undesirable outcome is possible, he is liable not for running an abstract risk, but for acting with a form of criminal knowledge. To appreciate risk is not to appreciate risk in the abstract, after all, but to be conscious of particular adverse consequences. Macaulay recognised this himself. Indeed, while advocates of the subjective view of rashness typically assume that rashness in the *Indian Penal Code* is equivalent to recklessness in English criminal law, in fact it is knowledge which, in the *Indian Penal Code*, occupies the role played by recklessness in English criminal law.[39] The subjective interpretation of rashness leads to a duplication of function, with both s 299 and s 304A rashness thought to address advertent risk-taking, while no provision is made for inadvertent risk-taking within the relevant offences.[40]

For all that the subjective interpretation of rashness is wrongheaded, it remains somehow compelling, though the courts are invariably forced into contortions to maintain the interpretation in the face of factual scenarios clearly at odds with it. For examples, we need only look to the most recent Singaporean decisions to address the issue. Consider, first of all, the 2014 decision of *Public Prosecutor v Hue An Li*.[41] The difference between rashness and negligence was not at issue in the case, but the High Court, led by the recently appointed Chief Justice Sundaresh Menon, took the opportunity to provide guidance both on the distinction between rashness and negligence and on the subjective or advertent understanding of the former:

> In our judgment, awareness of the potential risks that might arise from one's conduct ought, in general, to be the dividing line between negligence and rashness. For both negligence and rashness, the offender would have fallen below

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[39] In an illustration Macaulay included in his draft Code to accompany his offence of voluntary culpable homicide, we see indications that Macaulay had in mind an objective, inadvertent interpretation of s 304 rashness. See Macaulay *et al*, *supra* note 4 at 39: "A knows Z to be behind a bush. B does not know it. A intending to cause or knowing himself to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here, B may be guilty of no offence, or if his firing was, under the circumstances, a rash act, he may be guilty of the offence defined in Clause 304. But A has committed the offence of voluntary culpable homicide."

[40] Proponents of the subjective interpretation often answer this criticism by insisting that s 304A rashness can be distinguished from s 299 knowledge by considering the degree of likelihood with which death follows the act in question. No guidance is given, however, as to how this might work in practice. Consider, for example, the following two scenarios. In the first, a burglar ties up his victim only for the victim to accidentally strangle himself as he struggles to get free. In the second, an inexperienced nanny force-feeds an infant, causing the infant to choke. In Singapore, the first—*Astro bin Jakaria*, *supra* note 19—led to a conviction under s 299. The second—*Tiyatun*, *supra* note 38—led to a conviction under s 304A. Could such a differentiation be achieved through an abstract assessment of likelihood?

[41] [2014] 4 SLR 661 (HC) [*Hue An Li*]. The case concerned an unfortunate road fatality. The respondent worked as a surveillance officer at a casino, and on the night in question had worked a 12-hour shift. Having taken a short nap in her car, she then proceeded to meet her friends and spend the rest of the night with them. By the time she took to the wheel of her car early the next morning, she had been awake for more than twenty-four hours. Driving home, she fell asleep at the wheel, causing her car to drift across the road and collide with a lorry carrying nine foreign workers in its rear cabin. The collision caused the lorry to flip over, leaving eight of the workers injured and killing one of them. The respondent was charged under s 304A, entered a guilty plea and ultimately received a fine. On appeal, the low penalty was challenged and a custodial sentence sought.

> the requisite objective standard of the reasonable person. The harsher sentencing regime for rashness is justified on the basis that the offender was actually advertent to the potential risks which might arise from his conduct, but proceeded anyway despite such advertence. . . In short, advertence to risk will generally be an essential element of rashness.[42]

Predictably enough, however, Menon CJ was led immediately to qualify the statement:

> We have qualified this statement of principle as one that would "generally" apply because there remains a class of cases where the risks may be said to be so obvious had the offender paused to consider them that it would be artificial to ignore this fact. . . We leave it open as to whether advertence to risk must actually be proved before a finding of rashness can be made in this class of cases ("'blatantly obvious risk' cases"). In our judgment, it would be best to develop this issue by case law rather than by a pre-emptive statement of principle.[43]

Similarly, the notion that rashness is more blameworthy than negligence was affirmed, only then to be qualified in much the same way:

> The dichotomous sentencing regimes for the negligence and the rashness limbs of s 304A entail the possibility of a conviction under the rashness limb carrying a more lenient sentence than a conviction (of a different person in different circumstances) under the negligence limb. This is because it is entirely plausible for a person to be advertent to the potential risks that might arise from his conduct, and yet be less culpable than another who is oblivious to such risks. We emphasise that it is the presence of mitigating and/or aggravating factors, and not merely the categorisation of an offender's conduct as rash or negligent, that will be determinative of the actual penal consequences that follow upon the commission of a s 304A offence.[44]

The matter came up even more recently in *Jali bin Mohd Yunos v Public Prosecutor*,[45] a criminal reference before the Singaporean Court of Appeal, and here the matter was taken up at greater length. Like *Hue An Li* above, the case concerned a road fatality. The applicant had failed to stop at a red traffic light and, in the resulting collision with another vehicle, caused the death of a pedestrian. At the initial trial, a sentence of four months imprisonment was handed down on the understanding that the applicant's actions were rash, amounting to a "blatant and flagrant disregard of basic safety requirements".[46] The applicant claimed that he had not deliberately ignored the red light but had instead blindly followed the vehicle in front of him. The applicant conceded that while he had been negligent in not paying sufficient attention to the road while driving, he denied that he had been subjectively conscious of the risk he took when he drove his vehicle across the traffic junction. This being the case, a lighter sentence was appropriate.

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42 *Ibid* at para 45 [emphasis omitted].
43 *Ibid*.
44 *Ibid* at para 62.
45 [2014] 4 SLR 1059 (CA) [*Jali*].
46 *Ibid* at para 8.

The judgment is interesting in that it represents a further step in what appears to be a steady movement in the direction of acknowledgement of the inadvertent nature of rashness.[47] And yet, even here, despite the concessions made to inadvertence, quite heroic contortions were made to preserve the subjective interpretation. The Public Prosecutor, building on the concession made in *Hue An Li*, submitted that rashness also included those instances where the accused "ought, as a reasonable person, to have been aware of, and therefore taken cognisance of, the risk".[48] The subjective interpretation dies hard, however, and while this "extension" was ultimately accepted by the court, Phang JA nevertheless felt the need to make a strong case for the advertence of risk in the immediate instance:

> We pause to observe that the terminology just utilised is possibly somewhat misleading. In particular, the reference to "inadvertent risk taking" suggests that the accused... did not in fact (consciously) take any risk at all. This is not, strictly speaking, correct. In such a situation, the accused cannot be said to have acted without any consciousness of the consequences of his actions (like, for example, an automaton). In the present case... the Applicant knew that he was driving across a junction which was controlled by traffic lights. However, he did not bother to check the lights, claiming that he had followed the vehicle in front of him instead. He claims that this last-mentioned omission merely constituted negligence instead of rashness. With respect, there is no reason in principle why an omission to do something (here, to check the traffic lights at a signalised traffic junction) could not constitute rashness. The concept of rashness connotes a heedlessness or indifference towards risk. In the present case (and, indeed, in all such similar cases), the risk is clear: If a driver drives into the junction when the traffic lights are not in his favour, there would be a clear possibility of an accident as well as other undesirable (even horrendous) consequences ensuing (including damage to property and/or personal injury or even (as was the case here) death). If a driver drives in such a manner, how can it be said that he had not taken a conscious and deliberate risk that the consequences just mentioned might in fact (and, in this case, did) result?[49]

Phang JA appears in this passage to concede that the applicant's culpability was found in his failure to check the lights before crossing the junction, but was himself apparently more focused on the less significant distinction to be made between negligence in acting and negligence in not acting:

> [I]t is clear and axiomatic that when a driver drives into a signalised traffic junction, he must ensure that the traffic lights are in his favour in order to avoid the dire (or even tragic) consequences that might ensue if they are not, in fact, in his favour. If he chooses to drive into such a junction and does not bother to check the state of the traffic lights, he is not merely negligent; he has committed a rash or reckless act. In this particular case, the Applicant claimed that he had

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47 In *Jali*, *supra* note 45, a 2011 article by District Judge Toh Yung Cheong is cited in which an argument is made in support of the acceptance of inadvertent rashness. See Toh Yung Cheong, "Revisiting Rash Driving" (2011) 23 Sing Ac LJ 271.

48 *Jali*, supra note 45 at para 20.

49 *Ibid* at para 21 [emphasis omitted].

> not checked the state of the traffic lights because he assumed they were in his favour as he was following the vehicle in front of him. In our view, the Applicant had not, literally, checked the state of the traffic lights precisely because he was using an alternative "criterion" instead, *viz*, the vehicle in front of him. If (as it in fact turned out) that this was not an appropriate "criterion", the Applicant cannot utilise a literal omission in order to justify what was, in both substance as well as form, a deliberate act that was, in the circumstances, not merely careless but rash or reckless in nature.[50]

With respect, there are in fact two quite separate questions here. There is, first of all, the question of whether or not the risk-taking was advertent or inadvertent. Did the applicant know that he was running the risk of causing an accident as he crossed the junction? If so, this would amount to advertent risk-taking, a form of criminal knowledge. If he did not know that he was running such a risk, there is a further question: was he acting rashly or negligently? If he crossed the intersection knowing that the light was red but believing, erroneously, that he could safely cross, then his act was rash because he had deliberately undertaken a dangerous act without taking the required action to properly ascertain the level of risk involved. If, however, he crossed the intersection believing the light to be green when it was not, doing so because he failed to be sufficiently alert, then his act was negligent. In *Jali*, it seems quite clear that there was no advertent risk-taking. As to whether the act was rash or negligent, it does appear, from the report, to have been the latter rather than the former. The applicant appears to have been daydreaming or to have been lulled into a stupor by the routine nature of his driving and, so distracted, crossed the junction in the mistaken belief that the light was green.[51] If an alternative "criterion" was applied, as Phang JA put it, it was applied negligently, without careful thought as to whether doing so was appropriate.

While the reference offered by the Court of Appeal in *Jali* is to be welcomed in representing a step in the direction of a return to the original understanding of rashness as inadvertent rather than advertent, it is, in another respect, much to be regretted, for it represents yet another example of the unhappy way in which s 304A is presently being developed in Singapore. Phang JA concluded the reference with the following clarification:

> To conclude, the Question referred to this court is answered as follows:
>
> (1) A finding of rashness in sentencing in road traffic offences requires consciousness as to the risk by the accused (who is in charge of the vehicle concerned). In this regard, rashness and recklessness are treated as interchangeable concepts.
>
> (2) Such consciousness includes:
>
> (a) situations in which there was in fact subjective appreciation of the risk by the accused; and

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[50] *Ibid* at para 22 [emphasis omitted].

[51] Phang JA's reference to an automaton is notable. As many drivers will attest, driving is a routine activity which does very easily become automatic.

> (b) situations in which the risk is so obvious that the accused ought, as a reasonable person, to have known of it inasmuch as had he paused to consider it, it would have been artificial to have ignored such a risk.[52]

Rashness, then, is now *both* objective and subjective, encompassing both advertent and inadvertent risk-taking. Where does this leave us? Having placed so much importance on advertence as the basis of a distinction between rashness and negligence, we now find that rashness is not necessarily advertent after all. What does this mean for the penalty following conviction? Should a higher penalty always and necessarily apply in the case of advertent rashness? Should inadvertent rashness attract a higher penalty than negligence? And what of the overlap with s 299? If rashness is now recognised in both advertent and inadvertent forms within s 304A, how, practically, are we to distinguish instances where the actor knows that harm is likely to result from those instances where he knows that he is running the risk of causing a specific form of harm?

Against this background of deepening confusion in Singapore, it is instructive to consider the offence as it is found in the *Myanmar Penal Code*.[53] Section 304A of the *Myanmar Penal Code* reads:

> 304A. Whoever causes the death of any person by doing any rash or negligent act not punishable as culpable homicide or murder shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine: provided that, if such act is done with the knowledge that it is likely to cause death, the term of imprisonment may extend to ten years.

The form the offence now takes in Myanmar reflects an amendment made to the offence in 1947, which saw the third limb of s 299 moved into s 304A.[54] So amended, s 304A in the Myanmar Code can be said to include both a simple and an aggravated form of the offence. The simple form makes liable the inadvertent causing of death, whether by rash or negligent act. In the aggravated form, a more severe penalty is provided for advertent risk-taking leading to death. The result is very like the Singaporean offence as it stands in light of the *Jali* decision, though in Myanmar the offence is rational and thoughtfully organised.[55] There is some work to be done before the same can be said of the offence as it is found in Singapore.

IV. An Elusive Standard of Negligence

The confusion into which the rashness component of the offence has fallen is eclipsed by an even more dramatically unhappy fate suffered by the negligence component. Indeed, with the confusion around negligence in s 304A we approach the true difficulty at the heart of the offence, for the subjective interpretation given rashness merely disguises the problem to be found there, and it is this problem we encounter

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[52] *Jali*, *supra* note 45 at para 32.

[53] India Act 45 of 1860.

[54] So amended, s 299 extends only to those instances where death results from the intentional infliction of a bodily injury likely to lead to death.

[55] Though the offence as it is found in Myanmar avoids some of the problems suffered by its counterpart in Singapore, some difficulties remain. This author favours a different solution, set out at the conclusion of this article.

more directly when we turn to the other component of the offence. As explained above, whether our concern is with a rash or negligent act, what is at issue is culpability for a failure to exercise the care and caution expected by an ordinary person. An obvious question then follows: How rash or negligent must the act be to justify prosecution under the offence? Identifying the extent to which the actor must have failed to exercise care is not difficult in specific and familiar activities like driving a car or working with explosives. Here we do not necessarily need to articulate a standard, as it usually will be enough simply to speak of culpably negligent driving, for instance, and what is required will be evident enough to the ordinary person. Section 304A has posed such difficulty, however, because it is a *general* offence of negligence, an offence to be used in a wide range of quite different factual circumstances. As a general offence, there is need for a standard to guide objective assessment of the negligent act. Section 304A lacks such a standard and the result has been no small amount of confusion. As we will see, there is, it turns out, a fairly obvious solution, one courts across the Code jurisdictions have found their way to without much difficulty. Remarkably, however, this solution has been rejected in Singapore in favour of an altogether more nebulous one.

As related above, Macaulay's original intention with clause 304 was to create a general offence of involuntary homicide which made no distinction between involuntary manslaughter and negligent homicide. The Select Committee responsible for preparing the Code for enactment rejected this approach to involuntary homicide and removed the clause. In doing so, however, they failed to clearly provide for either form of involuntary homicide. The Select Committee did, however, embrace the "rash or negligent" formulation, placing it at the centre of a set of offences—ss 336, 337 and 338—which were to address negligently caused harm. Unlike the majority of "rash or negligent" offences found in the Code, however, these were not organised around clearly defined dangerous activities.[56] The three sections did, however, include a standard. For a conviction under one of the three sections to follow, the prosecution was required to prove that the act in question was so rash or negligent as to "endanger human life or the personal safety of others".

The absence of an obvious offence of involuntary manslaughter led James Fitzjames Stephen to later restore clause 304 to its original position in the Code, apparently meaning for it to function in the manner of the English offence of manslaughter by negligence. Though it is not entirely clear why he did so, he removed reference to "endangering public life and the personal safety of others" from the definition of the offence.[57] This meant that s 304A, unlike the other three "rash or negligent" offences found in the "Offences Affecting the Human Body" chapter, was not only of general application, but offered no explicit standard by which the rash or negligent act in question was to be judged. This would not be a problem if the offence were indeed to function in the manner of the English offence. The degree of negligence taken for granted by the other "rash and negligent" offences was naturally much lower, however, making the higher English standard inappropriate. This left the original question: How rash or negligent would the accused have to be for a conviction under s 304A to follow? In answer to this, the courts

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[56] See *eg*, s 285 of the *Singapore Penal Code*, *supra* note 21, which sets out the offence of "negligent conduct with respect to any fire or combustible matter".

[57] For a possible explanation, see *supra* note 18.

identified an obvious solution: As with the other three "rash or negligent" offences, the prosecution should be required to prove that the act in question was so rash or negligent as to "endanger human life or the personal safety of others". Unhappily, the adoption of this solution was hindered by injudicious reference to a civil standard of negligence in a number of decisions, and, as we will see below, this alternative has been taken up in Singapore.

It is important to note that questions concerning the standard of negligence have not really troubled the courts in India to any great extent. Though it is often said that the standard adopted there is the English one of manslaughter by negligence, this has never been true in practice. The misconception arises from influential pronouncements made by textbook writers—Ratanlal and Dhirajlal, and Gour, specifically—who correctly reported Stephen's intention for the offence.[58] In practice, however, the high standard has never been required by the courts in India. Indeed, s 304A has from early on been used routinely in India in the prosecution of road fatalities, where the degree of negligence required falls far short of the English standard. The degree of negligence required has at times been described by the Indian judges as "gross" or "wicked", but the terms, when used in this way, have typically referred not to the English standard but rather to indicate more loosely that something more than a mere lapse must be involved, that there must be some form of criminal fault on the part of the accused.[59]

While the courts in India have largely avoided the problem, the issue developed quite differently in Malaysia and Singapore. The difficulties appear to have begun with the 1938 Malaysian decision of *Lai Tin v Public Prosecutor*.[60] Prior to 1938, the matter does not appear to have troubled the courts. It is most likely that, as in India, the English standard was thought to apply in theory, without this belief interfering with the application of a lower standard in practice. From *Lai Tin* onwards, however, the textbook account began to be taken seriously, with predictable difficulties arising as a result. In *Lai Tin*, a driver took to the road in a car with brakes so maladjusted that the car swerved violently every time the brakes were applied. A death resulted and the appellant was prosecuted under s 304A. Understandably, the Magistrate felt that a road fatality would not satisfy gross or "wicked" negligence of the sort required by the English offence of gross negligence manslaughter and, this being the case, concluded that s 304A required a lower standard of negligence. A conviction followed, with the Magistrate's decision becoming the subject of an appeal. Affirming the Magistrate's decision, Murray-Aynsley J questioned the wisdom of applying the English standard. In doing so, he placed emphasis on the integrity of the Code as a source of law in its own right, independent of the background provided by English law. More specifically, he felt that accepting the prevailing view would lead to a

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58 See *eg*, Ratanlal Ranchhoddas *et al*, *Ratanlal & Dhirajlal's Law of Crimes*, 23rd ed (New Delhi: Bharat Law House, 1991) vol 2 at 1195; Hari Singh Gour, *Penal Law of India*, 10th ed (Uttar Pradesh: Law Publishers,1996) vol 3 at 2706.

59 That the courts in India have managed to avoid the problems with the offence now being experienced in Singapore has much to do with a quirk of Indian judicial practice, where decisions typically include some recitation of textbook theory only for the judge to go on to decide the matter before the court entirely on the merits of the immediate case. Theory, in India, does not appear to trouble practice overly.

60 [1939] MLJ 248 [*Lai Tin*].

"double standard", with the high standard of negligence required by s 304A at variance with the lower standard used in other "rash or negligent" offences.[61] With this in mind, Murray-Aynsley J decided that a lower standard of negligence also applied within s 304A, though he was less clear about what this lower standard might be:

> I would not go so far as to say that the degree of negligence necessary to support a civil action should be applied without reservation. A criminal charge and a civil action should be approached in a different spirit. . . In the present case the learned Magistrate has held that the Appellant was guilty of negligence but not of such negligence as would be considered sufficient for conviction for manslaughter in England. In my opinion the facts of the case disclose a substantial and serious degree of negligence. Whether or no in the present case it would be sufficient for a conviction for manslaughter, it is in my opinion sufficient for a conviction under s 304A, and the appeal must be dismissed.[62]

The departure was to be short-lived, however, for the *Lai Tin* decision was considered and emphatically rejected the very next year in the case of *Cheow Keok v Public Prosecutor*.[63] Less than a year after that, the question was considered a third time, in *Public Prosecutor v Mohamed Salleh Bin Bitam*; *Public Prosecutor v Bachita Singh*.[64] Again, *Lai Tin* was rejected, here in a rather impatient manner.[65] Moreover, the court made the further extraordinary decision of finding not merely s 304A, but all the "rash or negligent" offences to be subject to the same high English standard. This would clearly have made the offences unworkable, however, and a move to a lower standard of negligence was inevitable. Fourteen years later it came.[66] Murray-Aynsley CJ, who had first expressed doubts concerning the appropriateness of the higher English standard in the 1939 decision of *Lai Tin*, revisited the issue in the 1954 Singaporean case of *Woo Sing and Sim Ah Kow v R*.[67] This time he pointed even more emphatically to the importance of considering the integrity of the Code as a source of law in its own right.[68] Having rejected the high standard of negligence required by the English conception, the question then followed: if not the high English standard, then what standard? This time Murray-Aynsley CJ felt that the only alternative available was that of the civil standard, though he appeared, once again, to be somewhat ambivalent.[69]

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61 *Ibid* at 249.

62 *Ibid.*

63 [1940] MLJ 103 [*Cheow Keok*].

64 [1940] MLJ 187 [*Bachita Singh*].

65 *Bachita Singh*, *ibid*, is particularly interesting and includes an extended exchange between the Deputy Public Prosecutor and the judge in which the former tried to convince the court to depart from the English standard.

66 The issue came before the courts on two further occasions in 1940: *Lee Fung v Public Prosecutor* [1940] MLJ 115 and *Kuan Choon Hin v Public Prosecutor* [1940] MLJ 114.

67 [1954] MLJ 200 [*Woo Sing*].

68 *Ibid*: "As regards interpretation, we are dealing with a code. In the first instance we study the words of the code itself. We are not justified in looking outside the code in order to give a special meaning to the words used in it."

69 Murray-Aynsley CJ's exploration of the matter extended to a single line in his judgment, *ibid* at 201: "I do not think it is necessary to lay down a different standard of negligence in civil and criminal cases, although, of course, a higher standard of proof is required in the latter cases." Whitton J, however, dissented on this point: *ibid*.

The civil standard was not the only option, however, and the obvious solution to the problem was identified in a decision that came soon after, the 1955 Brunei decision of *Public Prosecutor v PG Mills*.[70] The case concerned a road fatality, and, at trial, the higher English standard had been preferred. Like Murray-Aynsley CJ, Williams CJ was influenced by a concern for consistency across the Code itself. He was influenced particularly by the relatively modest punishments that appeared to be characteristic of the "rash and negligent" offences.[71] While Williams CJ followed Murray-Aynsley CJ in rejecting the higher English standard, he did not follow the latter in collapsing the important distinction between civil and criminal liability for negligence. Instead, in keeping with his concern for the integrity of the Code, he drew the required standard from the "rash and negligent" offences more generally, finding it in the requirement that the act causing death must be one an ordinary person would judge to have been negligent to such a degree "as to endanger human life or the safety of others".[72]

Cheow Keok and *Bachita Singh* continued to be cited by defence counsels, leaving the courts in Malaysia and Singapore to wrestle with the issue over the course of a number of further decisions. The decision in *Mills* was followed closely in 1956 by *Anthonysamy v Public Prosecutor*,[73] a Malaysian decision which concerned yet another road fatality. Buhagiar J affirmed *Woo Sing* in rejecting the higher English standard. Crucially, however, here emphatic and unequivocal support was given to the civil standard:

> The test, therefore, for determining negligence and rashness is whether a reasonable man in the same circumstances would have realized the prospect of harm and would have stopped or changed his course so as to avoid it: the test is the same in tort and "criminal intention" or "wicked mind" are immaterial… For the purposes of these sections no higher degree of negligence is required than that in civil matters.[74]

The matter was far from settled, however. In the next decision in our series, the 1970 Singaporean decision of *Mah Kah Yew v Public Prosecutor*,[75] Wee Chong Jin CJ explicitly favoured the standard of negligence proposed in *Mills*:

> In *Mills*' case the court declined to follow *Cheow Keok v PP*. . . and agreed with *Woo Sing and Sim Ah Kow v R*. . . It held that the nature and degree of negligence in an act causing death required to support a conviction under s 304A is the same as that in any other act carried out so rashly or negligently to endanger human

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70 [1971] 1 MLJ 4 [*Mills*].

71 *Ibid* at 5: "I do not see how homicide under section 304A with its comparatively limited scale of punishment can be said to be the equivalent of a felony. It is more logical to equate the standard of negligence required in s 304A cases with that in offences of rashness and negligence carrying punishments of comparable severity: for instance, section 336 (rash or negligent act endangering safety), 279 (rash or negligent driving), 337 (causing hurt by rash or negligent act) and 338 (causing grievous hurt by rash or negligent act) which, together with fines of varying severity, carry maximum sentences of three months, six months, six months and two years' rigorous imprisonment respectively."

72 *Ibid*.

73 [1956] MLJ 247.

74 *Ibid* at 249. This case would come to be the only one in the series in which emphatic and unambiguous support is given to collapsing the civil-criminal distinction.

75 [1968-1970] SLR(R) 851 (HC) [*Mah Kah Yew*].

> life or the safety of others where that act was the immediate cause of death and not the remote cause.[76]

This was followed in 1972 by the Malaysian decision of *Adnan bin Khamis v Public Prosecutor*.[77] Again, the court looked to the *Mills*' decision in insisting that the accused must have acted in a manner a reasonable man would recognise as likely to cause damage or injury to others:

> In the first place, mere carelessness or inadvertence, without anything more, is not enough, in our opinion, to establish guilt. . . [W]e think the test to the applied for determining the guilt or innocence of an accused person charged with rash or negligent conduct 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 resulting from such conduct and taken adequate and proper precautions to avoid causing such damage or injury.[78]

With this, the matter appeared relatively settled.[79] Notwithstanding the unhelpful references made to a civil standard, the courts ultimately resolved the confusion surrounding the offence in the most obvious and sensible manner. To do this, the courts sought a standard which could be applied consistently across all of the offences within the Code employing the "rash or negligent" formulation, a standard appropriate given the nature of the offences involved and the penalties imposed in each. Most importantly, the courts had arrived at a standard native to the criminal law, one that avoided the confusion, difficulty and potential injustice that would come from collapsing the important distinction historically maintained between civil and criminal law.[80]

In Singapore, however, the matter did not end there, and a dramatic reversal came with the 1999 Singaporean decision of *Lim Poh Eng v Public Prosecutor*.[81] The case concerned an injury suffered by a woman who had availed herself of the "colonic washouts" offered by the appellant, a practitioner of traditional Chinese medicine. The case was in fact prosecuted under s 338 rather than s 304A, but Yong Pung How CJ took the opportunity to consider the standard of negligence required in all of the "rash or negligent" offences. In his review of the decisions related above, Yong CJ correctly recognised the emphatic rejection of the higher English standard. Of the two alternatives on offer, however, he opted for the civil standard, though he appeared to do so more from a lack of understanding than from a carefully

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[76] *Ibid* at para 21. Wee CJ apparently took *Woo Sing*, *supra* note 67, and *Mills*, *supra* note 70, to be in agreement on this point. More significantly, however, greater weight was given to *Mills* and it was the standard adopted in the other "rash or negligent" act offences, and not the civil standard, that is favoured in the judgment.

[77] [1972] 1 MLJ 274 [*Adnan bin Khamis*].

[78] *Ibid* at 278.

[79] In 1972, the issue came before the court in *Public Prosecutor v Joseph Chin Saiko* [1972] 2 MLJ 129. Here, it was held that the standard of negligence required was the same as would be required on a charge under the equivalent offence in the *Road Traffic Ordinance*.

[80] Indeed, it can be argued that Murray-Aynsley CJ and Buhagiar J were not really endorsing a civil standard of negligence more generally, but were instead simply giving expression to the sense both men had that no standard was required at all in the cases before them. Both cases concerned negligent driving, and what constitutes culpably negligent driving can be determined relatively easily without recourse to an explicit standard.

[81] [1999] 1 SLR(R) 428 (HC) [*Lim Poh Eng*].

considered assessment of the authorities. Yong CJ noted that while Williams CJ had clearly rejected the higher English standard in *Mills*, he was unable to make sense of the alternative offered in its place. This passage from *Mills* in particular mystified him:

> In my view. . . the nature and degree of negligence in an act causing death required to support a conviction under s 304A(1) is the same as that in any other act carried out so rashly or negligently as to endanger human life or the safety of others where that act was the immediate cause of death and not the remote cause.[82]

CJ Yong explained:

> It is clear. . . that the majority [in *Mills*] rejected the standard of gross negligence required for the common law offence of manslaughter. It is however less clear what the latter part of the above *dicta* means. The phrase "any other act carried out so rashly or negligently as to endanger human life or the safety of others" is essentially the same as that in ss 336, 337 and 338 of the Penal Code which uses the phrase "any act so rashly or negligently as to endanger human life or the personal safety of others". In effect what Williams CJ seems to have said is that the standard of negligence for s 304A(1) is the same as that in ss 336, 337 and 338, which is very different from saying that the civil standard of negligence applies in criminal cases.[83]

Yong CJ expressed similar incomprehension at the solution favoured in *Adnan bin Khamis*:

> While it is clear that the Federal Court in *Adnan bin Khamis v PP* rejected the gross negligence standard of the common law offence of manslaughter and replaced it with a general test couched in terms of the reasonable man, it is not clear whether this test was regarded as a civil standard of negligence or an intermediate standard. . .[84]

Unable to make sense of the standard actually favoured by the courts in the authorities cited, the standard which today continues to be applied in India and Malaysia, Yong CJ opted for the civil standard.[85] The worrying implications of this development were not immediately apparent in *Lim Poh Eng*. *Lim Poh Eng* was followed, however,

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82 *Mills*, *supra* note 70 at 5, cited by Yong CJ in *Lim Poh Eng*, *ibid* at para 22.

83 *Ibid*.

84 *Ibid* at para 30.

85 In addition, Yong CJ appears to have misread *Mah Kah Yew*, *supra* note 75, in believing that decision to have explicitly endorsed the civil standard. As related above, this is not true. While support for the civil standard, as articulated in *Woo Sing*, *supra* note 67, was explicitly expressed in the decision by the District Court judge, on appeal before the High Court it was *Mills*' decision which was explicitly endorsed. See *Mah Kah Yew*, *supra* note 75 at para 21: "In *Mills*' case the court declined to follow *Cheow Keok v PP*. . . and agreed with *Woo Sing and Sim Ah Kow v R*. . . It held that the nature and degree of negligence in an act causing death required to support a conviction under s 304A is the same as that in any other act carried out so rashly or negligently to endanger human life or the safety of others where that act was the immediate cause of death and not the remote cause. In our judgment, by virtue of the effect of s 88(3) of the Malaysia Act and of the case *Re Lee Gee Chong* (decd). . . the Federal Court and the High Court of Singapore would be bound to follow *Mills*' case if the point came up for consideration during the period when Singapore was part of Malaysia. Consequently, by virtue of s 13 of the Republic of Singapore Independence Act 1965, this court is bound by the decision in *Mills*' case."

by the 2004 decision of *Ng Keng Yong v Public Prosecutor*.[86] In that case, two officers in the Republic of Singapore Navy were held responsible for four deaths resulting from a collision at sea. The naval officers were convicted for negligence under s 304A and, on appeal, challenged this finding. The collision had occurred when the appellants were navigating their vessel through a channel against the flow of traffic and, on appeal, this was taken, in conjunction with a failure to maintain an appropriate distance from the other vessel, to satisfy the requirements of the offence. In their defence, the appellants sought to argue that their actions were in fact in keeping with routine practice.[87] The argument was to no avail. Where, under the appropriate criminal standard, the prosecution would have had to show specifically that the appellants' lapse was one an ordinary person would judge to have been so negligent as to endanger human life or the personal safety of others, here there was no such requirement.[88] Indeed, there was no need to show criminal fault of any kind. It was enough that the appellants had departed from the procedure set out in the official regulations.

V. Negligence and Vehicular Homicide

The account presented above is remarkable enough, but there is a further dimension worthy of note, and this is the role that road fatalities have played in the development of the offence. From its introduction in 1870, s 304A has been employed overwhelmingly in the prosecution of deaths resulting from negligent or careless driving. The practice continues today in Singapore, despite the introduction of the *Road Traffic Act*[89] in 1963, which includes within it three specifically formulated driving offences: reckless or dangerous driving (s 64), driving without due care or reasonable consideration (s 65), and causing death by reckless or dangerous driving (s 66). With the introduction of these offences, we might have expected this particular use of s 304A to cease. In fact, as evidenced by the 2014 decisions of *Hue An Li* and *Jali*, no change in the practice has come about.[90] That this should be the case appears to be due to an omission suffered by the 1963 Act. Though it is unclear why, the Act does not include an offence of causing death by careless or negligent

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86 [2004] 4 SLR(R) 89 (HC) [*Ng Keng Yong*].

87 It was accepted practice at the time for such vessels to patrol the channel against the flow of traffic and the vessel in question had routinely maintained a closest point of approach of three cables. When the presence of the other vessel became known to them, the appellants ordered a series of alterations but erred in believing the other vessel to be on their starboard side rather than on their port side, with the result that the alterations actually brought the vessels even closer together. As this was their only error, the appellants were ultimately convicted not for acting rashly or negligently in any substantial sense, but for failing to observe the relevant regulations to the letter. The decision bears a striking resemblance to an earlier one, *Balakrishnan*, *supra* note 38, in which two officers in the Singapore Armed Forces were held responsible for a death which occurred during a military training exercise. As in *Ng Keng Yong*, *supra* note 86, though the appellants' actions were in keeping with routine practice, they were convicted for failing to observe the letter of the relevant regulations.

88 It should be noted that s 280 of the *Singapore Penal Code*, *supra* note 21, makes liable the rash or negligent navigation of vessels. The offence includes the full formulation and requires that the accused was not merely rash or negligent, but "so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person".

89 Cap 276, 2004 Rev Ed Sing.

90 *Hue An Li*, *supra* note 41; *Jali*, *supra* note 45.

driving. The overwhelming majority of road fatalities are of precisely this character, however, arising much more frequently from individuals driving without due care or reasonable consideration, as opposed to driving recklessly, or at a speed or in a manner dangerous to the public.[91] Given this omission, prosecutors have had no choice but to continue using s 304A.

The use of s 304A to address road fatalities has done much to hamper efforts to clarify the offence, as the road traffic accidents prosecuted typically offer the courts little opportunity to engage with s 304A as an offence specifically formulated to address the problem of negligent homicide. When cases which might more appropriately be prosecuted under the offence do occasionally appear—cases such as *Ng Keng Yong* and *Balakrishnan*, for example—lack of familiarity with the peculiar challenges posed by negligent homicide has left judges ill-equipped to clarify and develop the offence appropriately. The overlap with the *Road Traffic Act* has, moreover, proven a source of confusion in another more specific way. The use of the term "reckless" within ss 64 and 66 of the 1963 Act has at times been taken to inform the interpretation of "rashness" in s 304A, a move which has further obscured the appropriate understanding of the latter term. Moving forward, the road traffic offences will need to be more sharply distinguished from the Penal Code offence if clarity as to the appropriate application of s 304A is to be attained.

VI. Conclusion and Proposals for Reform

And so we have the story of s 304A in Singapore. Ironically enough, an offence concerned with harm caused inadvertently, through carelessness, itself came into being inadvertently, through a series of careless omissions and ill-conceived interventions. As a result, the offence lacks definition and has come, over the years, to do work properly assigned to three separate offences concerned with harm caused inadvertently: involuntary manslaughter, causing death by careless or negligent driving, and negligent homicide. The confusion arising from this lack of clarity as to function has been exacerbated by well-intentioned but ultimately misguided attempts to clarify the offence conceptually rather than pragmatically or functionally. The seemingly irresistible but ultimately wrongheaded move to separate rashness and negligence, for instance, reflects a tendency to seek to clearly distinguish and define the concepts contained within the offence, rather than improve the offence's practical workability.[92] It is submitted that what is required is not conceptual but practical clarity, a better sense of the specific category of problem the offence exists to address. If the offence is to be rescued from its present dismal state, appropriately formulated

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[91] See *eg*, *Public Prosecutor v Teo Poh Leng* [1991] 2 SLR(R) 541 (HC); *Public Prosecutor v Tubbs Julia Elizabeth* [2001] 2 SLR(R) 716 (HC); *Lim Hong Eng v Public Prosecutor* [2009] 3 SLR(R) 682 (HC); *Public Prosecutor v Ng Jui Chuan* [2010] SGDC 521. Indeed, even in *Public Prosecutor v Poh Teck Huat* [2003] 2 SLR(R) 299 (HC), where the act was rash rather than negligent, what was involved was rashness as a mode of negligence, a failure to take care far short of reckless or dangerous driving.

[92] Legal thinkers like Oliver Wendell Holmes Jr and Roscoe Pound championed pragmatism over formalism or conceptualism. For a passage that is particularly apt, see *eg*, Roscoe Pound, "Mechanical Jurisprudence" (1908) 8 Colum L Rev 605: "Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation."

offences will need to be provided in answer to each of the three distinct forms of culpable action which have in the past been addressed by s 304A.

The first of these is the offence of culpable homicide not amounting to murder. This should be addressed by amending or supplementing s 299 to bring it more explicitly in line with present judicial practice across the Code jurisdictions. The section, however formulated, should clearly encompass both the voluntary and involuntary causing of death where this results from direct, deliberate acts exhibiting an obviously dangerous or violent character.

Secondly, an offence of causing death by careless or negligent driving should be introduced into the *Road Traffic Act* and guidelines issued to prosecutors to ensure that prosecutions under s 304A for road fatalities should be contemplated only in exceptional circumstances. Road traffic offences are in many ways quite unlike the moral offences contained within the Penal Code and the two sorts of offences should not be confused.[93]

Finally, there is s 304A itself. Much of the work to be done here is negative rather than positive, an undoing of the harm that has been done to the offence over the years through the interventions of judges, legislators and academics. The explicit distinction recently made in Singapore between rashness and negligence should be abandoned, and the inadvertent and objective nature of both components explicitly acknowledged. Whether the act is rash or negligent, liability arises from a failure on the part of the accused to exercise the care and caution expected in the circumstances by an ordinary person. In addition, the full formulation found in the other "rash or negligent" offences should be restored to s 304A to provide the required standard. The following reformulation of ss 336, 337, 338 and 304A would achieve all of this in a single entry:

> 336. Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others:
>
> (a) shall be punished with imprisonment for a term which may extend to 6 months, or with fine which may extend to $2,500, or with both;
> (b) where hurt is caused, shall be punished with imprisonment for a term which may extend to 1 year, or with fine which may extend to $5000, or with both;
> (c) where grievous hurt is caused, shall be punished with imprisonment for a term which may extend to 4 years, or with fine which may extend to $10,000, or with both;
> (d) where death is caused, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.[94]

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[93] More detailed consideration of the relevant offences in the 1963 *Road Traffic Act*, *supra* note 89, is outside the scope of the present article.

[94] The proposal is a conservative one, extending only to a change in the location of the offence within the Code and the undoing of regrettable changes made in the course of the unfortunate development of the offence. In light of the confusion the "rash or negligent" formulation has itself caused, however, consideration might also be given to removing the word "rash" altogether. Section 219 of the *Canadian Criminal Code*, RS C 1985, c C-46, provides an alternative. The section deems criminally negligent any person "who (a) in doing anything, or (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons". Note that the provision extends to both negligence in acting and negligence in not acting, and explicitly states a standard.

There is, however, a more radical alternative, one this author favours. It is worth asking whether s 304A should be retained at all. It is important to bear in mind not only the unfortunate, rather hapless way in which the offence came into being, but also its questionable utility. As noted above, s 304A is still used predominantly in answer to road fatalities. If adequate provision is made for causing death by negligent driving within the *Road Traffic Act*, the number of prosecutions brought under s 304A would fall away dramatically. Of the cases that remain—cases like *Lim Poh Eng*, *Ng Keng Yong* and *Balakrishnan*—these arguably are more appropriately prosecuted as instances of voluntarily causing hurt, voluntarily causing grievous hurt or culpable homicide not amounting to murder. Where the individuals involved are not sufficiently blameworthy to justify prosecution under these more serious offences, it is perhaps best for us simply to accept the harm as accidental. In modern criminal law, it is accepted that punishment should reflect actual fault rather than harm. The "rash or negligent" offences too often are applied contrary to this commitment, with prosecutions motivated by a desire to address the harm caused rather than through any more thoughtful consideration of the fault of the individual concerned. This inclination to reason from harm rather than fault, in conjunction with the more specific developments recounted above—the civil standard applicable where negligence is involved, the ease with which courts can impute the required state of mind where it is rashness—has led to an offence so opaque and amenable to arbitrary application as to be an instrument ideally suited for use in the pursuit of policy goals or to meet the needs of political expediency.