Criminal Negligence and the Standard of Care: *Lim Poh Eng* v *Public Prosecutor*

Victor V. Ramraj

1999

This article was originally published at:

http://law.nus.edu.sg/sjls/index.html

Singapore Journal of Legal Studies
[1999] 678 - 693

CRIMINAL NEGLIGENCE AND THE STANDARD OF CARE

Lim Poh Eng v *Public Prosecutor*[1]

I. INTRODUCTION

NEGLIGENCE is a conceptually problematic mode of liability in the criminal law. In cases of negligence, the accused acts inadvertently; that is, the accused is not subjectively aware of the unjustified risk that is created by his or her conduct. As such, some have argued that the accused is not blameworthy, and thus that negligence is never an appropriate basis for criminal liability.[2] But even if, as others have argued,[3] criminal negligence can in certain circumstances be justified as an appropriate basis for imposing criminal liability either for utilitarian or deontological reasons, other questions arise. First, we need to know what the parameters of criminally negligent liability are so as to be able to distinguish criminal negligence from other modes of liability that bear some resemblance to negligence, such as recklessness (or rashness) and strict liability. Second, we need to know what the standard of care should be in offences of criminal negligence.

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1 [1999] 2 SLR 116 (HC) ("*Lim Poh Eng*").

2 Jerome Hall, "Negligent Behaviour Should Be Excluded from Penal Liability" (1963) 63 Columbia Law Review 633; Alan Brudner, "Imprisonment and Strict Liability," (1990) 40 University of Toronto Law Journal 738. Along similar lines, some judges have argued that, in the criminal context, negligence must be understood as including some minimal subjective awareness of the risk, even amounting to wilful blindness: see, *eg*, the judgment of Wilson J in *R* v *Tutton* (1989) 48 CCC (3d) 129 (SCC) and *R* v *Waite* (1989) 48 CCC (3d) 1 (SCC).

3 HLA Hart, "Negligence, *Mens Rea* and the Criminal Law" in *Punishment and Responsibility* (Oxford: Clarendon, 1968), 136; R Antony Duff, *Intention, Agency and Criminal Liability* (Oxford: Basil Blackwell, 1990), at 161 *ff*; Kenneth W Simons, "Culpability and Retributive Theory: The Problem of Criminal Negligence" (1994) 5 Journal of Contemporary Legal Issues 365. Michael Hor, in a wide-ranging study of the problem of criminal negligence in the medical context, surveys the various positions that the criminal law might take to negligent behaviour in "Medical Negligence: The Contours of Criminality and the Role of the Coroner" [1997] SJLS 86 at 92-101.

The recent decision of the Singapore High Court in *Lim Poh Eng* v *PP*[4] addresses both of these issues; it provides an indirect answer to the first question and an explicit answer to the second. First, the manner in which the facts of this case are characterized and the charges are framed by the prosecution implies that cases involving a 'miscalculation' or 'discounting' of the risk of harm fall within the scope of negligence rather than rashness or recklessness. Second, the High Court declares that the standard to be applied in cases involving criminal negligence is identical to the standard in civil cases. While I agree with the implicit assumption that cases involving miscalculation of risk are properly treated as cases of negligence and I agree that the accused in this case ought to have been convicted, I disagree with the proposition that the use of the civil standard in criminal cases is consistent with a clear and principled distinction between crime and tort.

II. Background

The distressing events that give rise to this case took place at the appellant's traditional Chinese medicine clinic, which was located at his home. In August 1996, less than six months before the initial visit to the clinic by the victim in this case (referred to in the judgment as 'H'), the appellant, Lim Poh Eng, had started to introduce to his patients a colonic cleansing treatment known as a 'colonic washout.' He had learned about this procedure in 1992 during a three-week course in China on the internal medicine aspect of traditional Chinese medicine and had tried the procedure on himself before introducing it to his family and, eventually, to his patients. The victim was one of the patients at the clinic for whom this treatment had been prescribed.

Her first treatment took place on January 14, 1997. The appellant's daughter, Sally Lim, gave H a tube and told her to go to the bathroom and follow the written instructions that were given to her on a piece of paper, but the procedure was not demonstrated to her. After an initial attempt to insert the tube into her rectum, H told Sally that she was having some trouble. Sally told her to try it again on her own, slowly. H did as she was told, completing the procedure, but was never directly supervised. She soon felt tired and unwell and complained to the appellant, who assured her that her reaction to the colonic washout was normal. H was unable to work that day and was unable to pass urine in the evening.

On January 15, 1997, after a second self-administered washout at the clinic, she again felt tired and unwell. She informed the appellant of her condition and told him that she had slight abdominal pain and that she had been unable to pass urine the previous night. The appellant again assured

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[4] *Supra*, note 1.

her that that her reaction was normal. The following day, H returned for a third self-administered colonic washout. After the treatment, she experienced bowel incontinence while still at the clinic. The appellant neither examined her nor prescribed any medication for her, but rather arranged a massage, which H found very painful. H returned to the clinic yet again the next day, but was too tired to perform another washout. That evening, she returned with her husband to the clinic. She showed a "shortness of breath, spoke haltingly, required support from two persons to walk, looked pale and tired, had a weak pulse and showed signs of dehydration."[5] The appellant said that she had an excess of "wind" and a deficiency of *qi* and prescribed some medicine, which H took. The appellant found that her pulse remained weak, but did not monitor her health and progress after that visit.

Two nights later, H's condition deteriorated rapidly and she was admitted to Tan Tock Seng Hospital. The surgeon who operated on her found that her anal canal had been perforated during the colonic washouts, resulting in extensive gangrene. Three further operations were needed to remove the dead tissue. After six weeks in the hospital, she recovered, but was left with the permanent loss of her rectum and was told that she would have to wear a colostomy bag indefinitely.

At his trial before the Magistrate's Court, the appellant was charged with and convicted of negligently causing grievous hurt under section 338 of the Penal Code.[6] He was sentenced to ten months' imprisonment and ordered to pay compensation to H. On appeal, the main issue was the standard of negligence in criminal cases. After reviewing the authorities, the High Court determined that as there was no binding authority on the issue, it was open to the Court to consider the matter afresh. While admitting the need to maintain a distinction between civil liability and criminal liability, the court rejected both the manslaughter standard and the intermediate standard in favour of the civil standard.

III. The Conceptual Parameters of Criminal Negligence

In terms of its blameworthiness, negligence is generally thought to fall somewhere between rash (or reckless)[7] conduct and strict liability. This difference in degree of culpability is also reflected in the criminal law:

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5 *Supra*, note 1, at 120.

6 Section 338 provides: "Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment for a term which may extend to 2 years, or with fine which may extend to $1,000 or both."

7 The concept of recklessness does not appear in the Penal Code. However, the courts tend to treat rashness as similar to or coextensive with recklessness. Indeed, rashness is sometimes

consistent with the principle of proportionality (that punishment should be proportionate to blameworthiness), offences of recklessness are treated more harshly, while offences of strict liability are generally treated more leniently. We must therefore be capable of distinguishing clearly between these various modes of culpability.

The traditional distinction between negligence and strict liability[8] is this: in offences of strict liability, only the *actus reus* need be established, whereas offences of negligence require proof that the accused's conduct did not conform to an objective standard of care.[9] This is not to say that an accused has no defence to a strict liability offence; strict liability offences still require that the conduct was voluntary and that it caused the harm in question, the two key elements of the *actus reus* of an offence. But in offences of strict liability, there is no need to consider whether the accused could have foreseen or ought reasonably to have foreseen the consequences of the impugned conduct. Like offences of strict liability, in offences of negligence the accused is inadvertent, but only in cases of negligence can the accused argue in his or her defence that the impugned conduct was *reasonable* (non-negligent).

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defined in terms of recklessness: "The criminality [in rashness] lies in running the risk of doing such an act with recklessness or indifference as to the consequences": *Empress of India* v *Idu Beg* (1881) ILR 3 All 776 at 780.

8 By the "traditional" approach I mean strict liability as it is understood in the jurisprudential writings on criminal responsibility, which is reflected in at least some of the case law: see, in the local context, *Jupiter Shipping Pte Ltd* v *PP* [1993] 2 SLR 69 (HC) (strict liability offences "may be committed even when all reasonable steps have been taken to ensure that they are not committed"). But the courts use "strict liability" to mean anything from liability, as in *Jupiter Shipping, supra*, where the reasonableness of the accused's conduct is no defence (what the Supreme Court of Canada in *Sault Ste Marie* (1978) 85 DLR (3d) 161 calls "absolute liability") to offences in respect of which due diligence might be pleaded as a defence: see Michael Hor, "Strict Liability in Criminal Law: A Re-Examination" [1996] SJLS 312; Chan Wing Cheong, "Requirement of Fault in Strict Liability" (1999) 11 Singapore Academy of Law Journal 98. The way in which the burden of proof is superimposed on the substantive definition of the offence might also alter the nature of strict liability offences in practice: see Hor, *supra*.

9 There is some question as to whether the distinction between negligence and strict liability is theoretically coherent. For instance, in "Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law" in Ellen F Paul *et al, Crime, Culpability, and Remedy* (Oxford: Basil Blackwell, 1990), 84, Larry Alexander argues that because there is no principled way of determining the time frame to be used in assessing the accused's conduct, any decision as to whether the accused's conduct is voluntary in a particular case is entirely arbitrary. Alexander argues that any act can be seen as voluntary if we look back far enough. For a refutation of Alexander's arguments, see Douglas Husak and Brian P McLaughlin, "Time-Frames, Voluntary Acts, and Strict Liability" (1993) 12 Law and Philosophy 95. Husak and McLaughlin disagree, arguing that once the concept of a voluntary act is properly understood the applicability of the voluntariness principle need not be the product of an arbitrary choice.

The second distinction, that between negligence and rashness, is the central concern in cases involving section 304A of the Penal Code. This distinction is an important one in practice because a conviction for negligence will be regarded as less serious than rashness and will attract a lighter sentence.[10] What then is the distinction between rashness and negligence? The traditional understanding of the difference between *recklessness*[11] and negligence is that while the negligent actor is inadvertent or unaware of the unreasonableness of the conduct, the reckless actor consciously assumes the risk. In cases of recklessness, the accused is subjectively aware that conduct involves an unreasonable risk that the prohibited harm will result.

The subjective approach to recklessness is firmly entrenched in other jurisdictions. For instance, in *R* v *Sansregret*[12] a rape case in which the accused obtained the ostensible consent of a woman by threatening her, the Supreme Court of Canada explains that, in contrast with negligence, and in "accordance with well-established principles for the determination of criminal liability, recklessness, to form part of the criminal *mens rea*, must have an element of the subjective".[13] Recklessness, Justice McIntyre goes on to explain, "is found in the attitude of one who, aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk.[14] On this orthodox understanding, recklessness involves conscious risk-taking on the part of the accused.[15]

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[10] This is clear from the decision of Rubin JC in *PP* v *Teo Poh Leng* [1992] 1 SLR 15 (HC) ("*Teo Poh Leng*"), where the prosecution appealed against a sentence of $5000 and a five-year disqualification from driving in a case involving death by rash or negligent act. Rubin JC held that having brought the charge under the second limb of section 304A (that is, the negligence limb), the prosecution could not then say that the sentence did not reflect the seriousness of the offence. However, the learned judicial commissioner considered the sentence to be manifestly inadequate and increased the penalty to $10,000 and disqualification for life.

[11] See *supra*, note 7.

[12] (1985) 18 CCC (3d) 223.

[13] *Ibid*, at 233.

[14] *Ibid*.

[15] In tandem with the Canadian approach, American jurisprudence rejects the notion that recklessness includes inadvertent wrongdoing, favouring a distinction between recklessness and negligence based on the subjective awareness of the accused. For example, in *Farmer* v *Brennan* (1994) 114 SCt 1970, the US Supreme Court considered the mental element requirement in an action by an inmate against prison officials for showing "deliberate indifference" in failing to keep him from harm. In the course of his judgment, Justice Souter equated "deliberate indifference" with recklessness rather than negligence, and then proceeded to examine the parameters of recklessness in the criminal law. He explained that, while recklessness in civil law includes failing "to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known," the criminal law

Since the 1981 decision of the House of Lords in *R* v *Caldwell*,[16] the English case law on recklessness has been idiosyncratic and inconsistent with the prevailing approach in other common law jurisdictions and in the academic literature. In this case, the accused, after a dispute with the owner of a hotel where he had been working, got drunk and set fire to the hotel in revenge. The fire was discovered and extinguished before any serious damage resulted and before any of the guests were injured. At trial, Caldwell pleaded guilty to the charge of intentionally or recklessly destroying or damaging the property of another, but answered not guilty to the more serious charge of damaging property with intent to endanger life or being reckless as to whether life would be endangered. Caldwell claimed that the thought of endangering the lives of the occupants of the hotel never crossed his mind. He was convicted at trial. The issue on the appeal to the House of Lords was the proper test for recklessness. In his reasons for judgment, Lord Diplock explained that the legal meaning of reckless "includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognized as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was".[17] The result in *Caldwell* is that recklessness can be subjective or objective; subjective where the accused is conscious of the risk, and objective where the accused fails to give any thought to an obvious risk. The latter category has come to be known as "*Caldwell* recklessness".

This decision is problematic because *Caldwell* recklessness is indistinguishable from criminal negligence; both involve inadvertent risk-taking. Moreover, its seems clear that someone who deliberately takes a risk is more culpable than someone who is unaware that he or she is taking a risk. More recent English decisions have attempted to limit the sorts of situations to which *Caldwell* would apply, implicitly recognising that there is a difference in culpability between *Caldwell* recklessness and ordinary recklessness.[18] In any event, *Caldwell* represents a departure from the way that recklessness is generally understood in other common law jurisdictions, and it has not been followed in Singapore.

"generally permits a finding of recklessness only when a person disregards a risk of harm *of which he is aware*" (at 1978). To the extent that this judgment regards recklessness as conscious risk-taking, it is entirely consistent with the traditional, subjectivist, approach to the criminal law.

16 [1981] 1 All ER 961.

17 *Ibid*, at 966.

18 According to Michael J Allen in *Criminal Law* (3rd ed, London: Blackstone Press, 1991), the "spectre of *Caldwell* has diminished with its shadow being confined largely to offences under the Criminal Damage Act 1971" (at 72): see *Adomako* [1995] 1 AC 171 (HL), which suggests a shift back to subjective recklessness, particularly in cases of involuntary manslaughter.

Subject to one important qualification, the position in Singapore with respect to rashness has been consistent with the traditional approach to recklessness. Thus, in cases involving both negligence and rashness, the accused takes an unreasonable risk, but only in cases of negligence is the accused unaware of that risk. The qualification to this approach concerns a third situation: cases involving a miscalculation or discounting of the risk. These are situations in which the accused becomes conscious of the existence of a risk, but then takes what he or she believes are reasonable steps to prevent the risk from materialising.[19] The accused believes (wrongly) that the risk is no longer present or is no longer an unreasonable one.

Following *Nidamarti Nagabhushanam*,[20] the Singapore courts have classified cases involving a miscalculation or discounting of risk under the heading of rashness. Holloway J's definition of rashness in *Nidamarti* was adopted and applied by the High Court in *Teo Poh Leng*:

> Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, *and often with the belief that the actor has taken sufficient precaution to prevent their happening.* The imputability arises from acting despite the consciousness (*luxuria*). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the negligent of the civic duty of circumspection.[21]

Putting aside momentarily the highlighted passage, the position in *Nidamarti* seems to accord with the traditional definition of recklessness as conscious risk-taking. But the highlighted passage suggests that where the accused becomes aware of the risk and then takes steps which he or she believes are sufficient to prevent the risk, the accused acts rashly despite the fact that there is no longer a subjective awareness of an unreasonable risk.

Cases involving a miscalculation or discounting of the risk of harm closely resemble paradigm instances of negligence because the accused is no longer

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19 One example of this type of situation is *Chief Constable of Avon and Somerset Constabulary* v *Shimmen* (1986) 84 Cr App R 7, in which the accused broke a window while demonstrating a karate kick to his friends. He recognized that he was taking a risk, but "weighed up the odds and thought I had eliminated as much risk as possible by missing by two inches instead of two millimetres" (at 12). The Divisional Court held that he was reckless because he recognized the risk but did not take adequate steps to eliminate it.

20 (1872) 7 MHC 119.

21 *Supra*, note 10, at 16 (emphasis added).

subjectively aware the he or she is taking an unreasonable risk. The mere fact that the accused is aware that a risk is involved is not sufficient to impute liability since some risks are considered reasonable ones to take such that any harm that in fact results would be non-negligent. For instance, I may be aware that I am taking a risk of harming someone every time I get behind the wheel of a car. But if while driving competently I happen to kill someone, my consciousness of the risk will not make my conduct blameworthy; the statistical risk necessarily associated with driving is not under normal conditions considered unreasonable.

In cases involving a miscalculation or discounting of the risk, the accused proceeds on the belief either that the risk has been eliminated or that it is no longer an unreasonable risk to take. It is the conscious taking of an *unreasonable* risk that allows us to distinguish rashness from negligence in a principled way. To treat someone who honestly believes that the risk is a reasonable or non-existent one as *rash* is to engage in arbitrary classification and to reject culpability as the basis for the distinction between rashness and negligence.

Let us now return to *Lim Poh Eng*. As the categorisation of the accused's conduct as rash or negligent was not directly addressed in this case, the facts that would enable us to make this determination were not sufficiently canvassed in the judgment. However, the facts do suggest three possibilities: (1) that the accused was aware of the risk that the victim's complaints were serious but was willing to take that chance; (2) that the accused was not aware that he was taking a risk at all; or (3) that the accused believed that there was a small risk that the victim's complaints were serious, but on further reflection thought it was unlikely that they were.

The first possibility, which would bring the accused within the standard definition of recklessness (as conscious risk-taking), seems unsupported by the facts. There is no evidence that the accused knew that there was a risk but chose to run that risk. At first, he considered her condition to be a normal reaction to the procedure. Later, as her discomfort worsened, he considered her condition and took steps to address it by arranging a massage and prescribing some medicine; but he does not seem to have deliberately run the risk that her condition was more serious than he thought is was. It is more likely that he either discounted that risk or that he was unaware that there was a risk at all. Of course, there may well have been other evidence to suggest that he was aware of a serious risk, but chose not to address it. From what can be discerned from the judgment, however, this was not the case.

The fact that the prosecution chose to proceed with a charge of *negligence* suggests the second possibility, that the accused was not aware of the risk at all. This is the only option that is consistent with the definition of negligence in *Nidamarti*, which defines negligence as inadvertent risk-taking. But this

conclusion does not sit comfortably with the facts either. Given that the accused was aware of the victim's numerous complaints and that he tried to address her concerns during the last visit, it seems unlikely that the accused did not turn his mind at all to the possibility that the victim's complaints suggested a more serious problem.

This leaves us with the third possibility: that we are faced here with a case involving a miscalculation or discounting of a risk that is being treated as an instance of negligence. It seems likely from the facts that the accused did turn his mind to the possibility that her symptoms indicated a more serious problem, but exercised his judgment honestly (though unreasonably according to the standards of his profession) and concluded either that there was no risk or that the risk was negligible. If this is a correct interpretation of the facts, then the prosecution has implicitly rejected the definition of rashness in *Nidamarti*. The accused seems here to have considered the possibility that her condition might deteriorate or that it might signify a more serious problem and to have come to a conclusion that he had, in the words of the *Nidamarti* definition of rashness, "taken sufficient precaution" to address her condition.[22]

We can only speculate as to why the prosecution elected to treat this case as an instance of negligence, but the facts of the case make it clear that the definition of rashness in *Nidamarti* is unsatisfactory. Much to their credit, both the prosecution and, arguably, in light of its acquiescence to the prosecution's approach, the High Court, rejected this problematic definition. However, until the *Nidamarti* definition is formally rejected by the Singapore courts, a curious anomaly in the definition of rashness lingers in the local jurisprudence.

IV. The Standard for Criminal Negligence

Proceeding, then, on the assumption that it was dealing with a case of negligence, the High Court confronted one of the enduring issues relating to criminal negligence: the standard to be applied. The case law reveals three options. The first option is to follow the English approach to manslaughter and insist on a high degree of negligence amounting to "gross negligence."[23] A second option is to use the civil standard of negligence.[24]

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[22] Alternatively, he believed that by giving her medication and arranging a massage for her, he had taken sufficient steps to address her concerns.

[23] See *R* v *Bateman* (1925), 19 Cr App R 8 ("*Bateman*"). The "gross negligence" approach was adopted in the Malaysian case, *Cheow Keok* v *PP* (1940) 9 MLJ 103 (CA).

[24] This is the approach that was adopted in the two local cases, *Woo Sing* v *R* (1954) 20 MLJ 200 (Singapore HC) and *Mah Kah Yew* v *PP* [1969-1971] SLR 441 and the Malaysian case, *Anthonysamy* v *PP* (1956) 22 MLJ 247 (HC).

A third possibility is a "hybrid" or "intermediate" approach, which locates the standard for negligence under section 304A somewhere between the civil standard and the English manslaughter or "gross negligence" standard.[25]

In *Lim Poh Eng*, the High Court reviewed the case law and concluded that although the position in Singapore was clearly in favour of the civil standard, there were no binding decisions of the Court of Appeal, so it was open to the High Court to reconsider the standard of negligence.[26] The appellant argued, based on the Privy Council's decision in *Dabholkar* v *King*,[27] that the standard for cases of criminal negligence should have been the intermediate standard. The High Court disagreed, affirming the appropriateness of the civil standard.

The Court acknowledged that that there was "no doubt"[28] that criminal negligence is distinct from civil negligence, but argued that even if the civil standard is used there are still two essential differences between criminal and civil liability for negligence. First, the court pointed to the difference in the standard of proof: unlike civil negligence, criminal negligence had to be proved beyond a reasonable doubt. Second, the court observed that in an offence involving negligence, negligence is not the sole criterion of liability.

Both of these reasons are problematic. Let us consider the second point first – the argument that to establish liability under the negligence branch of section 338, something more than negligence must be proved. The negligence branch of section 338 provides that "whoever causes hurt to any person by doing any act so ... negligently as to endanger human life or the personal safety of others" shall be punished. But do the words "as to endanger human life or the personal safety of others" add anything to the nature of the negligence? Can we really conceive of a tort case involving grievous hurt caused by negligence that does not also endanger human life or the personal safety of others? If not, then it is not clear how, if the civil standard were

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[25] Several cases, including many of the Malaysian cases, imply that an intermediate standard is appropriate, but do not attempt to articulate precisely what this standard should be. For instance, in *PP* v *Mills* [1971] 1 MLJ 4 (Sarawak, North Borneo and Brunei CA), Chief Justice Williams for the majority rejected the English "gross negligence" approach, but did not expressly adopt a civil standard. See also *Adnan b Khamis* v *PP* [1972] 1 MLJ 274 (Malaysia FC). However, the Privy Council in *Dabholkar* v *King*, [1948] AIR 183, a case on appeal from East Africa, expressly adopted an intermediate standard, holding that "although the negligence which constitutes the offence in these circumstances must be of a higher degree than the negligence which gives rise to a claim for compensation in a Civil Court, it is not...of so high a degree as that which is necessary to constitute the offence of manslaughter" (at 184).

[26] *Supra*, note 1, at 123.

[27] *Supra*, note 25.

[28] *Supra*, note 1, at 124.

used, section 338 could impose any *additional* element beyond what is already required to be proved in cases of civil negligence. An act that negligently causes grievous hurt necessarily involves conduct that endangers the life or safety of others.

The argument concerning the standard of proof is equally problematic. If the only difference between civil and criminal liability is a difference in the standard of proof, virtually every case of civil liability involving grievous hurt or death would be a case of criminal liability. Where someone is grievously hurt or dies as a result of a person's negligence, that case would *necessarily* give rise both to a claim in civil negligence and a criminal charge. Of course both the plaintiff and the prosecution might have difficulty proving their respective cases, and the prosecution would by virtue of the standard of proof have a more difficult task, but, questions of proof aside, the act would be an instance of both civil and criminal negligence. However, the claim that there is an important distinction between civil and criminal negligence is typically regarded as more than a mere procedural difference; cases such as *Bateman*[29] which use a gross negligence standard imply that there is a categorical difference in the nature of negligence itself. So why not apply the gross negligence standard?

The High Court in *Lim Poh Eng*, while conceding that it was free "to review the law on the standard of negligence"[30] did not consider the gross negligence standard, apparently because the appellant was arguing for an intermediate standard. But it is not clear that the gross negligence standard should have been rejected outright.

One argument against using the gross negligence standard in the context of section 304A of the Penal Code (death by rash or negligent act) is that it is premised upon a much more serious offence, the English offence of manslaughter, which carries a maximum penalty of life imprisonment. In contrast, section 304A carries a maximum term of only two years, suggesting that "section 304A was intended to embrace cases with a much lower degree of fault than gross negligence in English law".[31] But this argument is unconvincing. As Michael Hor has argued, the offence of manslaughter in English criminal law is more a wide-ranging offence than death by rash or negligent act under section 304A, encompassing circumstances ranging between situations "just short of murder to negligent homicide.[32] Thus, he

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[29] *Supra*, note 23.

[30] *Supra*, note 1.

[31] KL Koh *et al*, *Criminal Law in Singapore and Malaysia* (Singapore: Malayan Law Journal Pte Ltd, 1989), at 480.

[32] See also Hor, "Medical Negligence," *supra*, note 3, at 110.

argues, the sentencing for manslaughter "has ... to take into account the offences at the higher end of the manslaughter spectrum."[33] It would therefore be more appropriate to measure the penalties imposed under section 304A against the typical penalties for manslaughter by negligence. Hor argues that the latter fall well within the two-year maximum penalty under section 304A.[34] It turns out, then, that section 304A is no less serious an offence than its English counterpart, manslaughter by criminal negligence. In any event, whatever the case may be in relation to section 304A, the maximum penalty for causing *grievous harm* by rash or negligent act in section 338 of the Penal Code can also run as high as imprisonment for two years,[35] so the argument that *this* offence is not a serious one is even less convincing.

Admittedly, there are problems with the gross negligence standard, not the least of which are its circularity and ambiguity. For instance, the definition of criminal negligence in *Bateman* tells us, tautologically, that it is negligence that is criminal.[36] Indeed, the High Court's criticism of the intermediate standard is equally appropriate in relation to the gross negligence standard: the difficulty, as the Chief Justice observed in *Lim Poh Eng*, is that it is "too elusive a concept to be workable".[37] Of course, this point should not be taken too far, lest we are prepared to concede the validity of the sceptical claim that, despite its pretensions to the contrary, the criminal law is really indeterminate, and its interpretation thus subject to extra-legal consider-

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[33] *Ibid.*

[34] *Ibid.* Of course, section 304A also includes death by *rash* act, which further complicates the comparison. One might therefore be inclined to think that rashness and negligence are both less serious than reckless and negligent manslaughter respectively. But this argument suggests a problem more with the penalty for death by rash act than it does in respect of death by negligent act. But this is as much an argument for increasing the penalty for offences falling within the rashness branch of section 304A as it is for rejecting the gross negligence standard (and, for that matters, creating separate offences for death by rash act and death by negligent act). Of course, this would leave unresolved other problems relating to the distinction between death by rash act and both the third clause of section 299 and section 300(d) of the *Penal Code*, but the resolution of these issues lies well beyond the scope of this paper.

[35] *Supra*, note 6.

[36] Specifically, *Bateman* states: "In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted to a crime, judges have used many epithets, such as 'culpable,' 'criminal,' 'gross,' 'wicked,' 'clear,' 'complete.' But whatever the epithet used and whether an epithet is used or not, in order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between the subjects and showed such disregard for the lives and safety of other persons as to amount to a crime against the state and conduct deserving of punishment" (see *supra*, note 23, at 11-12).

[37] *Supra*, note 1, at 125.

ations.[38] But the fact that the standard for negligence should vary according to the circumstances is not problematic unless these variations in the standard are made arbitrarily. However, we need not assume that a principled explanation for adjustments in the reasonable person standard, either in the civil or criminal context, is necessarily unavailable.

We come now to the central proposition in *Lim Poh Eng*. The High Court rejects both the gross negligence standard and the intermediate standard for criminal cases, offering in their place the ordinary civil standard for negligence.[39] But the Court insists that it can do so without obliterating the distinction between civil and criminal liability. If, as I have suggested, the two arguments that it advances in support of this distinction are unconvincing, we need to consider whether there is any other way of preserving a substantive distinction in the law, while avoiding the problems associated with the elusive intermediate and gross negligence standards.

First of all, it should be observed that the rejection of the gross negligence standard and the intermediate standard does not necessarily mean that we must adopt the civil standard *per se*. As a general rule, the objective standard in the civil context does not make allowances for the *capacity* of the tortfeasor to comply. This can be seen in the celebrated English cases, *Vaughan* v *Menlove*,[40] which entrenched the objective standard of care into the civil law of negligence. Chief Justice Tindal rejected the argument that the defendant's ability to comply was relevant. While the civil standard might take account of the "well-known exceptions such as infancy and madness,"[41] it generally disregards the tortfeasor's capacity to comply with the objective standard. Thus, as one leading textbook on the law of torts explains, tort law "finds 'fault' in a failure to live up to an ideal standard of conduct which may be beyond the knowledge *or capacity* of the individual".[42]

But we need not take the same approach to criminal negligence. To ensure that only those who are able to comply with the negligence standard are

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38 See, for instance, Mark Kelman's Critical Legal Studies-style argument in "Interpretive Construction in the Substantive Criminal Law" (1981) 33 Stanford Law Review 591.

39 *Supra*, note 1, at 125.

40 (1837) 132 ER 490.

41 Oliver Wendell Holmes, *The Common Law* (New York: Dover Publications, 1991), at 50.

42 RFV Heuston and RA Buckley, *Salmond and Heuston on the Law of Torts* (21st ed, London: Sweet & Maxwell, 1996), at 23. Of course, in practice the law may well take account of some of the personal characteristics of the accused: John G Fleming, *The Law of Torts* (9th ed, North Ryde, New South Wales: LBC Information Services, 1988), at 119. However, the starting point for the civil courts in negligence cases is the proposition that the defendant's capacity to comply with the standard is not taken into consideration. Thus, Fleming observes that on "the whole, the law has chosen external, objective standards of conduct" which "means that individuals are often held guilty of legal fault for failing to live up to a standard which as a matter of fact they cannot meet" (at 119).

subjected to criminal liability, we might, as HLA Hart proposes in his influential article, "Negligence, *Mens Rea* and the Criminal Law," apply a two-stage test which distinguishes the standard of negligence from the accused's capacity to comply:

> (i) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?
>
> (ii) Could the accused, given his mental and physical capacities, have taken those precautions?[43]

Hart calls the first part of the test the "invariant standard of care" and the second, the "individualised conditions of liability".[44] Only where the first question is answered in the negative *and* the second in the affirmative is *criminal* liability for negligence justified. The accused then is punished "for a failure to exercise control".[45] This test therefore preserves the distinction between criminal and civil liability by taking into consideration the accused's ability to comply with the "objective" standard of care.

In the medical context few would dispute that, as in *Lim Poh Eng*, the invariant standard of care would have to be adjusted to take into account the special skills of the accused.[46] However, the precise manner in which the second limb of Hart's test is to be understood (for instance, what subjective characteristics of the accused ought to be taken into account) is an issue that would need to be examined and refined through the case law.[47] But this test does provide us with a principled starting point from which to articulate a distinct approach to criminal negligence.

A complementary approach to the distinction between civil and criminal negligence is to consider why it is that some sorts of negligent conduct are regarded as criminal while others are not. For instance, negligent damage

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[43] In *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), at 154.

[44] *Ibid.* Hart refrains from using the terms "objective standard" and "subjective standard" on the grounds that they "obscure the real issue" (at 153).

[45] *Ibid*, at 153.

[46] *Supra*, note 1, at 121.

[47] A physical disability or mental illness that made it impossible for the accused to comply with the standard should clearly be taken into account in applying the second branch of Hart's test. Other characteristics that might be considered are suggested by Lamer J (as he then was) in *R* v *Tutton*, *supra*, note 2, where he argues that a "generous allowance" must be made in criminal negligence cases "for factors which are particular to the accused, such as youth, mental development, education" (at 142).

to property is not criminalised in Singapore. One explanation for the difference is that the more serious the harm, the greater the duty to take care. Where the conduct is so dangerous that it poses a threat to the life or safety of others, the duty to take care might be seen to expand beyond a mere civil duty into a criminal law duty. This is not to suggest that there is some "additional element" in cases involving criminal negligence; rather, only some forms of civil negligence would involve harm serious enough to trigger duties enforceable through the criminal law. As a society, we are willing to allow tort law to regulate human conduct, and require those who inadvertently cause harm to compensate their victims. But where the interests are sufficiently serious, those who negligently cause harm demonstrate what legal philosophers have called a 'practical'[48] or 'culpable'[49] indifference to the life and safety of others that is blameworthy in a way that can justifiably attract criminal liability. Perhaps this is the kernel of truth in the otherwise unhelpful and circular formulation of criminal negligence in *Bateman*: some forms of negligence do go beyond mere matters of compensation.[50]

V. CONCLUSION

It seems, then, that a rejection of the gross negligence and intermediate standard need not lead us automatically to the conclusion that the civil standard must apply. Of course, applying Hart's test to the facts of *Lim Poh Eng* would probably lead to the same conclusion as that which the High Court reached in this particular case; the accused breached an objective standard of care with which, as a trained professional, he had the capacity to comply. But in other cases it may well suggest a different conclusion. The problem with *Lim Poh Eng* is not the result,[51] but rather the unqualified

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[48] R Antony Duff, *Intention, Agency & Criminal Liability* (Oxford: Basil Blackwell, 1990), at 162.

[49] Kenneth W Simons, "Culpability and Retributive Theory," *supra*, note 3.

[50] Of course, an offence of criminal negligence might also give rise to a claim for compensation in tort. The ability of courts under the Criminal Procedure Code to issue compensation orders, which taking place within the context of the criminal proceeding, is strictly speaking a *civil*, not a criminal, remedy.

[51] That is to say, the conviction is defensible. I would question, however, whether the argument (*supra*, note 1, at 127) that the accused's conduct in this case is *more* serious than causing death by rash or negligent act in road traffic cases (where the penalties are generally lower) is defensible. In both situations, the so-called practical or culpable indifference which gives rise to the harm might persist for some time before the harm materialises and the risk created by the accused's conduct of a similarly serious magnitude; it would seem, then, that at most the accused's conduct in this case is *equally* as serious as the conduct in road traffic cases under section 304A.

claim that the civil standard is the proper standard in criminal negligence cases. Fortunately, it remains open for the courts in subsequent cases to modify the standard so as to retain the *substantive* distinction between crime and tort, by taking into account the capacity of the accused to comply.

VICTOR V RAMRAJ*

* BA (McGill), MA, LLB, PhD (Toronto), Barrister & Solicitor (Ontario); Visiting Fellow, Faculty of Law, National University of Singapore.