

Driving Offences Occasioning Deaths in the Road Transport Act 2018 in Bangladesh: A Textual Comparison with Their Equivalents in Australia

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Abstract

Abstract: The *Road Transport Act 2018* of Bangladesh (RTA2018) has been swiftly enacted to appease public unrest triggered by the tragic death of two teenagers in the capital city. Bangladesh is an emerging economy in South Asia, which is currently striving to attain the United Nations Sustainable Development Goals (SDGs) by 2030. Road safety comes within the scope of SDGs (Goal 3) and its achievement has proven futile amidst conflicting demands of the transport sector and the general public, following deaths of thousands of people on the road every year. Bangladesh has a population of over 170 million people and an alarming record of the lowest number of vehicle-users against the highest number of accidents in the world, as revealed from a recent report compiled by several international agencies. This article critically examines specific provisions of the RTA2018 and the *Penal Code 1860* (PC1860) which directly apply to the deaths caused by offensive driving. It finds that the relevant provisions of both the RTA2018 and PC1860 are flawed in their actual definitions of ‘offences,’ making enforcement and conviction inherently difficult, and the punishments prescribed for the convicts are considered notably soft and hence ineffective deterrents. This paper submits specific recommendations to address these identified flaws, with the intention that other countries with poor road safety regulations may also be able to benefit from this analysis and implement measures to reduce casualties. Both doctrinal and comparative methods have been used in conducting legal analysis, relying on mostly primary materials and scholarly works under the theoretical underpinnings of public interest and deterrence theories.

Keywords: Road Safety, Road Deaths, Criminal Liability, Bangladesh, Australia

I. Introduction

The national economy of Bangladesh has been steadily and appreciably growing for over a decade, and the government is now striving to attain the United Nations Sustainable Development Goals (SDGs) by 2030. However, achieving Goal 3 (ensuring healthy lives and promoting well-being for all), which is inherently linked to road safety,¹ has been an extremely difficult task. This is so because deaths on the road have been a critical problem entrenched in the country for decades. Road safety is typically measured in terms of the number of crashes, fatalities and injuries.² The law that imposes criminal liability is generally a system of protection, and the State aims to protect its people from dangerous driving by holding delinquent drivers criminally liable for their offensive conduct while on the road.³

Bangladesh is the home of over 170 million people and holds an alarming record of having the lowest number of vehicle-users against the highest number of accidents in the world as found in a recent international report jointly prepared by the European Union (EU), United Nations Economic Commission for Europe (UNECE) and World Health Organisation (WHO).⁴ Unfortunately, all these fatalities happen with almost complete impunity, as no record of conviction has been found to date. Hence, pointing to a sense of ‘lawlessness’ in practice in the country’s traffic system, the Supreme Court of Bangladesh in *Government of Bangladesh v Ministry of Home Affairs* expressed its discontent by stating that:

Apparently, nothing much has been done in order to control the speed of the vehicles within the limits spelt out in [law] ... In the meantime, *hundreds and thousands of people died* in the road-accidents. Recently, it has been reported in a newspaper that nearly 25 (twenty-five) thousand people died or maimed during the period of last one year. This is a staggering figure but surprisingly *not a single case of punishment* ... has been furnished either on behalf of

1 The Government of Bangladesh, SDG Tracker – Bangladesh’s Development Monitor (2020), available at https://www.sdg.gov.bd/page/thirty_nine_plus_one_indicator/5#1 (Jan. 3, 2021).

2 Jeremy Prichard, Allison Matthews, Raimondo Bruno, Katherine Rayment and Helen James, ‘Detouring Civil Liberties? Drug-Driving Laws in Australia’, 19(2) Griffith L. Rev. 330, 339 (2010).

3 Jacob Bronsther, Two Theories of Deterrent Punishment, 53(3) Tulsa L. Rev. 461, 469-470 (2018).

4 Shankar Kumar Dey, Bangladesh at the Top—International Survey Report –Lowest Vehicle-Users, Highest Accidents –Compared to Other Countries, Daily Janakantha, Bangladesh (Mar. 4, 2018), - First Page (translated from Bengali).

the BRTA [Bangladesh Road Transport Authority] or the Inspector General of Police [emphasis added].⁵

Driving causing deaths on the road raise serious community concerns and criticism, if offenders are not adequately punished.⁶ An empirical research reveals that harm can be significantly prevented by a small risk reduction measure.⁷ Motor vehicles (MVs) are essentially a necessary part of human life, though they have the ability to kill or cause impairment, which may be occasioned by a momentary indolence or inattention of a driver.⁸ Therefore, driving is a complex art requiring constant engagement of several organs and senses of a driver, and it is a lawful act in itself when driving in compliance with laws. However, it must be admitted that automobiles (automobiles, MVs and vehicles – used synonymously) are naturally risky, and hence driving is a skill which can only be obtained typically after a certain age of maturity, which enables a driver to possess a degree of experimental control over differences in experience.⁹ King refers to deaths caused by MVs as being ‘a *sui generis*,’¹⁰ whilst judges termed such sudden demise of human life as one of the ‘most serious social problems.’¹¹ Prichard et al rightly links driving to the people’s right to life, and strongly supports regulation of this risky act as being justified, even if the regulatory measures impinge on other civil liberties.¹² Freeman et al. endorses this view and stipulates that regulation through effective countermeasures to prevent offensive driving is critically important, given its destructive impact on the community inflicted through deaths and injuries of road users, which include the erring drivers themselves.¹³ While

5 Supreme Court of Bangladesh – High Court Division (Suo Motu Rule No. 02 of 2007), 2 (unreported). See also *Bangladesh Beverage Industries Ltd v Rowshan Akhter* 62 DLR 483, at [86] (2010) (Supreme Court of Bangladesh, High Court Division).

6 Alan Bredee, Julian V. Roberts, Mike Hough, Jessica Jacobson and Nick Moon, Public Attitudes to The Sentencing of Offences Involving Death by Driving, 7 *Crim. L.R.* 525, 526 (2008).

7 Donald A Redelmeier, Robert J Tibshirani and Leonard Evans, Traffic-Law Enforcement and Risk of Death from Motor-Vehicle Crashes: Case-Crossover Study, 361 *The Lancet* 2177, 2181 (Jun. 28, 2003).

8 Steven Cammiss and Sally Kyd Cunningham, Swift and Sure Justice? Mode of Trial for Causing Death by Driving Offences, 15(3) *Criminol. & Crim. Justice* 321, 322 (2015).

9 Nadya C. Yuris, Mark W. Wiggins, Jaime C. Auton, Leia Gaicon, and Daniel Sturman, Higher Cue Utilization in Driving Supports Improved Driving Performance and More Effective Visual Search Behaviours, 71 *J. Safety Res.* 59, 60 (2019).

10 Kerry King, *A Lesser Species of Homicide*, 270 (UWA Publishing, 2020).

11 *Id.* at 272.

12 Prichard et al (2010), *supra* note 2 at 333.

13 James Freeman, Elizabeth Szogi, Verity Truelove and Evelyn Vingilis, The Law Isn’t Everything: The Impact of Legal and Non-Legal Sanctions on Motorists’ Drink Driving Behaviours’ 59 *J. Safety Res.* 53 (2016).

it is accepted that prevention of all traffic accidents is nearly impossible, proper regulation can considerably reduce such fatalities and injuries. Therefore, MVs are described to be dangerous goods and irresponsible driving resulting in deaths merits severe punishment.¹⁴

To ensure or at least promote road safety, both effective laws and constant road policing are essential as key deterrents.¹⁵ However, the public generally call for severe penalties together with ‘swift and sure justice’ for the offences causing deaths whilst driving MVs.¹⁶ Nonetheless, a widely held view is that motorists responsible for road casualties receive more often than not lenient treatment from the courts, even where they commit a serious offence such as manslaughter.¹⁷ Such a disproportionately soft approach to punishment of irresponsible driving offences is unacceptable to the public, which has shifted the trend from leniency to stringency in punishment, and the resultant awarding of more severe penalties to motorists causing deaths compared to most other involuntary killers.¹⁸ The *Road Transport Act 2018* (RTA2018) is the legislation which seeks to embrace this severity in penalties and clarity in penal provisions, however, the legislation fails to do so in its current form.

Although the RTA2018 was enacted in 2018, it was given effect only partially on 1 Nov. 2019, excluding its 10 sections of major offences including those discussed in this article. It should be noted that s125 of the RTA2018 replaces the Motor Vehicles Ordinance-1983 (MVO1983) (the previous road transport legislation) which did not contain any provisions for the driving offences causing deaths on the street, apparently leaving those offences aside for trial under the *Penal Code 1860* (PC1860).

The RTA2018 was enacted hastily in a situation when traffic control was unprecedentedly taken over by thousands of teenage school-goers following the deaths of their two fellow students caused by a bus in the capital city in July 2018. Opposition political parties supported them overtly. Hence, the immediate pur

14 Michael Hirst, *Causing Death by Driving and Other Offences: A Question of Balance* 5 *Crim. L. Rev.* 339, 352 (2008).

15 See Sally Kyd and Steven Cammiss, *Driving Offences: Promoting Consistency for Victims in ‘Victimless’ Crimes of Endangerment* 3 *Crim. L.Rev.* 223, 226 (2020).

16 See Cammiss, and Cunningham (2020), *supra* note 8.

17 See Hirst (2008), *supra* note 14, at 339.

18 *Id.* at 339.

pose of the enactment was to bring the situation under control and restore order by appeasing the public unrest. The poorness in drafting of the legislation can be attributed partly to this extraordinary circumstance under which it was legislated. Regulatory laws are usually drafted with clarity and precision; however, the RTA2018 remains vague and deficient in respect of the sections to be discussed sequentially in this endeavour. The drawbacks will arguably inhibit its enforcement in the absence of applicable judicial interpretations and separate sentencing hearing provisions in Bangladesh. Punishments prescribed by the RTA2018 are disproportionately lower compared to murder and culpable homicide not amounting to murder respectively under s302 (death sentence) and s304 (life term imprisonment) of PC1860. It is unlikely that courts will exercise their discretion in favour of heavy punishment, mainly because of alleged corruption in the judiciary in tandem with the absence of strict legal prescriptions and domestic examples of severe penalties for driving offences. Local lawyers have not yet identified the flaws as unearthed in the present attempt, largely because of paucity of research pursuits. Also, political interests are generally inherent in legislation, and the RTA2018 is no exception, which can be evident from the fact that at the time of making this legislation, the president of Bangladesh Road Transport Workers Federation was a sitting cabinet minister who has always been a strong advocate of workers' interests, arguably to the detriment of the public safety. Some of these issues will be further clarified in the discussions that follow.

This article endeavours to analyse the elements of the offences in s105 of the RTA2018 together with its integral part s304B of the PC1860 with a view to facilitating conviction with adequate punishments of transport workers for driving offences causing deaths. It consists of seven sections. Section II briefly describes the research methods to be employed in carrying out the examination of relevant laws, whilst Section III explains the theoretical underpinnings of this research. Section IV contains the critical analysis of *actus reus* and *mens rea* elements of the offences at issue, and Section V discusses penalties available against the offences at hand. Section VI presents recommendations, whilst Section VII includes concluding remarks. The legislative flaws to be uncovered in this article are unlikely to be rectified by judicial interpretations in the absence of relevant and applicable precedents.

II. Research Methods

The article will employ both doctrinal analysis and comparative methods of legal research. The doctrinal method, a traditional method of legal research, explains legal concepts and principles of all types including cases, statutes and rules.¹⁹ It requires the researcher to identify legal issues involved, analyse them and creatively synthesise them, demonstrating connections between different laws and essential legal principles enshrined in the primary materials (legislation and case law).²⁰ Pearce Committee in Australia articulates this method as ‘Research which provides a systemic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.’²¹ Accordingly, we have considered the statutory laws of Bangladesh and the Australian state of New South Wales (NSW) along with relevant common law principles where appropriate, in analysing the legal issues involved and framing recommendations for the improvement of the RTA2018 and the PC1860.

The comparative method of legal research judiciously focuses on the similarities and differences amongst the laws and legal systems being compared,²² in which one borrows from another in order to improve the former’s laws in light of the latter’s equivalents by harmonising the laws or legal systems between them. Reitz describes the comparative method as a tool, and adds that the process of such a comparison leads to specific conclusions about idiosyncratic or uncommon characteristics of each of the legal systems being compared and/or commonalities as to how the laws address a particular problem in question.²³

There is a small disagreement that an overarching function of law is to regulate human conduct to maintain order in society by resolving conflicts, protecting rights and compelling performance of duties of both natural and artificial legal persons. Comparative lawyers argue that ‘If law is seen functionally as a

19 T Hutchinson and N Duncan, *Defining and Describing What We Do: Doctrinal Legal Research* 17(1) *Deakin L. Rev.* 83 (2012).

20 *Id.* at 85 and 105.

21 Dennis Pearce, Enid Campbell and Don Harding (Pearce Committee), *Australian Law Schools: A discipline Assessment for the Commonwealth Tertiary Education Commission* (Vol 3, 1987), 17 as quoted in Terry Hutchinson, *Researching and Writing in Law* 7 (Pymont, NSW: Law Book Co, 4th ed. 2018).

22 John C. Reitz, ‘Comparative Law in the United States Today: Distinctiveness, Quality, and Tradition’ 46 *Am. J. Com. L.* 617, 620 (1998).

23 *Id.* at 624.

regulator of social facts, the legal problems of all countries are similar. Every legal system ... is open to the same questions and subject to the same standards, even in countries of different social structures or different stages of development.²⁴ It justifies comparison between laws of the countries which are unequal and diverse in terms of socio-economic development. Brand asserts that ‘comparative research is not complete until it has been demonstrated that the legal systems under consideration reach similar results in similar circumstances.’²⁵

While a lack of consensus in the literature regarding the essentials of the comparative method is noted,²⁶ the above-stated views of comparison between unequal jurisdictions have been adopted in the paper. Our research is not thoroughly comparative. It follows the type of comparison which is focused ‘on the law or legal system of a particular foreign country and use explicit comparison to domestic law solely as a frame to make clear the significant ways in which foreign law differs from domestic law or the reasons why a domestic lawyer ought to be interested in the example of a foreign legal system.’²⁷

To identify flaws in Bangladeshi laws concerning transport workers’ criminal liability for road deaths, we have chosen the corresponding statutory provisions of NSW to compare with their equivalents in Bangladesh. Additionally, in accordance with the doctrine of precedent,²⁸ we have relied upon the relevant common law principles which are germane to all jurisdictions in Australia (with either a binding or persuasive effect) and to Bangladesh with only a persuasive effect, being a foreign common law jurisdiction. Although the common law principles of one country is not binding on another, Bangladesh can still benefit from Australian and British common law principles in improving its laws. A significant consideration in choosing the NSW laws was its recent success in regulating road safety as demonstrated in the statistics that the number of road deaths in every 100,000 people has declined from 28.9 in 1970 to 4.99 in 2017 (with a low of 4.1 in 2014) over the past four-and-a-half decades.²⁹ As stated earlier, despite

24 Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law* 43, 44 (Tony Weir translated, 3d ed. 1998).

25 Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 *Brook. J. of Int’l L.* 405, 410 (2007).

26 Reitz (1998), *supra* note 22, at 618.

27 *Id.* at 620.

28 For details and relevance of the common law doctrine of precedent, see Alastair I MacAdam, and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (Sydney: Butterworths. 1998).

29 Centre for Road Safety, ‘Transport for NSW’ <https://roadsafety.transport.nsw.gov.au/statistics/fatality->

the socio-economics differences between Bangladesh and NSW, the following textual comparison will arguably provide useful guidance as to how the Australian approach can assist legal drafters in Bangladesh to improve their legal texts, particularly given both countries have common law jurisdictions.

Both primary and secondary materials will be used in carrying out an in-depth analysis of the legal issues involved in this research. Both primary (legislation and case law) and secondary materials (scholarly works, reports and newspapers) are gathered from archival sources. Whilst we mostly rely on primary materials and scholarly research publications, only a few national dailies will be used for critical information, as they are the best sources available.

III. Theoretical Underpinnings

We draw on two theories of regulation in carrying out the critical analysis of the laws concerning *actus resus* and *mens rea* of the driving offences at hand. These are the public interest theory and deterrence theory. The concept of public interest can be traced back to the origins of the political philosophy of government intervention, thenceforth these two concepts exist side-by-side in the political, philosophical and legal areas.³⁰ Arthur Cecil Pigou is said to have first developed the concept of public interest in conformity with the thoughts of renowned political philosophers such as Plato, Aristotle, Hobbes and Rousseau.³¹ There is no single definition of public interest, which is described as being the combination of all private interests, while regulatory prohibitions should be designed to measure their impacts on different stakeholders.³² Legg asserts that regulation may be employed to address, amongst other things, public good and harmful negative externalities of a business.³³ As described by Hantke-Domas, the public interest theory of regulation is generally a theory which calls for protection and

trends.html (visited Feb. 9, 2019).

30 Michael Hantke-Domas, *The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?* 15 *Eur. J. Law Econ.* 165, 166 (2003).

31 *Id.* at 166.

32 J Michael Finger and Andrei Zlate, *WTO Rules That Allow New Trade Restrictions: The Public Interest Is a Bastard Child* (UN Millennium Project Task Force on Trade, 2003), 16, *available at* <http://fordschool.umich.edu/rsie/acit/TopicsDocuments/Finger030421.pdf> (visited Jan. 10, 2021).

33 Michael Legg, 'Regulatory Theory, Litigation and Enforcement' in Michael Legg (ed) *Regulation, Litigation and Enforcement*, 1 (Pymont, NSW: Law Book Co, 2011).

benefit of the public at large.³⁴ According to Joskow and Noll, one of the foundations of the public interest theory is the prevention of negative externalities of business activities and that regulatory roles should be devoted to elimination of the harmful impacts of businesses on the public and social welfare.³⁵ From a safety perspective, Roscoe Pounds defines public interest as being the interest in safety and security of the public.³⁶ Public interest is thus strictly attached to the safety of the law, and thereby the theory involves, amongst other things, the protection of public health, safety and security.³⁷ Cho asserts that public interest is a positive and useful tool for developing a country.³⁸ The road crash fatalities have raised both economic and safety concerns in Bangladesh which is striving for socio-economic development. A World Bank report released in February 2020 finds that ‘annual road crash deaths per capita in Bangladesh are twice the average rate for high-income countries and five times that of the best performing countries in the world,’ and it highlights that the most affected persons are children and the working age population.³⁹ Hence the reliance on the public safety theory is well justified in the context of road safety in Bangladesh.

Arguably, the theory of deterrence is also equally applicable to this research. Proponents of this theory argue that people choose to abide by the law, having regard to the gains and consequences of their conduct.⁴⁰ Without delving into the debate of the effectiveness of the deterrence theory of punishment, we would accept the popular view that punishments have the impact of both general and specific deterrence on offending people and corporations as well, as the theory is about incentivising or disincentivising conduct constituting a crime.⁴¹ This is the theory which is most often invoked in justifying the widespread practice of imposing criminal liabilities and corresponding sentences.⁴² The deterrence

34 Hantke-Domas (2003), *supra* note 30, at 165.

35 Paul L Joskow and Roger G Noll, Regulation in Theory and Practice: An Overview, in Gary Fromm (ed), *Studies in Public Regulation*, 35-36 (MIT Press, 1981).

36 Hantke-Domas (2003), *supra* note 30, at 166.

37 Linus J McManaman, *Social Engineering: The Legal Philosophy of Roscoe Pound* 33 *St. John's L. Rev.* 1, 19 (1958).

38 Sungjoon Cho, *Beyond's Doha's Promises: Administrative Barriers as an Obstruction to Development* 25(3) *Berkeley J. Int'l L.* 395, 414-15 (2007).

39 The World Bank, *Bangladesh Needs \$7.8 Billion in Additional Investment for Safer Roads*, Press Release (Feb. 20, 2020), available at <https://www.worldbank.org/en/news/press-release/2020/02/20/bangladesh-needs-78-billion-in-additional-investment-for-safer-roads> (visited Jan. 5, 2021).

40 Mary Bosworth, *Encyclopedia of Prisons and Correctional Facilities*, 233 (SAGE Publications, 2004).

41 See Sylvia Rich, *Corporate Criminals and Punishment Theory*, 29(1) *Can. J. L & Jurisprudence* 97 (2016).

42 See *Id.* at 99-100.

theory is argued to be the one which is ‘most compatible with a law-and-economic view of the world,’⁴³ and this theory underpins higher punishments to create greater deterrence.⁴⁴ Simpson and Koper find that ‘the evidence in support of deterrence is equivocal.’⁴⁵ As the court in *Director of Public Prosecutions (Tas) v Watson* opines, young drivers typically commit more dangerous driving offences compared to older people, and deterrent effects work more heavily than reformatory and rehabilitative factors even on these younger people.⁴⁶ The judiciary of NSW adds increasing significance to deterrence with respect to punishment of offenders for serious driving offences.⁴⁷ A similar view is expressed by Evan J in *Wahl v Tasmania* that ‘Recent authorities of this Court have emphasised that in cases involving death or injury caused by culpable negligent driving, courts should impose penalties that will be sufficiently severe to deter both the offender and others who might be similarly minded.’⁴⁸ It is thus widely accepted by both academia and the judiciary that, criminal penalties effectively work as deterrence. We therefore reasonably rely on this theory in the analysis of laws aimed at facilitating conviction and increasing penalties for driving offences in Bangladesh.

IV. Elements of the Driving Offences Resulting in Deaths on the Road

Although this article seeks to examine the RTA2018, we have to consider the connected provisions of the PC1860 as well, without which the offences in questions cannot be fruitfully analysed. The RTA2018 contains two sections, s98 and s105, in relation to the criminal liability of transport workers for loss of life and property caused by wrongful driving. Section 98 spells out that driving a MV shall be an offence on the part of its driver or its conductor or helper, if it is driven at a speed exceeding the legal limit, or in a manner which is reckless or dangerous overtaking or overloading, or losing control of the vehicle causing any

43 Richard A Posner, *Economic Analysis of Law*, 170 (Boston: Little Brown and Company, 2d ed. 1977).

44 See Rich (2016), *supra* note 41, at 118.

45 Sally S Simpson and Christopher S Koper, *Detering Corporate Crime*, 30 *Criminology* 347, 349 (1992).

46 *Director of Public Prosecutions (Tas) v Watson* 146 A Crim R 223, [21] (2004) (Underwood J) (Austl.).

47 *McGonigle v R* NSWCCA 84 at [78-79], [92] [2020]; *Bates v R* NSWCCA 259, at [29], [32] [2020]; *Ellis v R* NSWCCA 303, at [30], [59] [2020]; *Hoskins v R* NSWCCA 18 at [64] [2020]; *Nauer v R* [2020] NSWCCA 174 at [85] [2020] (Austl.).

48 *Wahl v Tasmania* TASSCA 5, at [38] [2012] (Austl.).

accident resulting in loss of life or property. The offender shall be punished with imprisonment for a maximum of three years, or with fine not exceeding three lac taka (US\$3,750 approx.), or with both, and the court may order the whole or part of the fine to be paid to the victim.

We largely ignore analysing s98 in this endeavour because s105 explicitly overrides it (s98), and thereby effectively makes s98 redundant in practice. Section 105 ('Crimes Concerning Accidents') of the RTA2018 attempts to define these offences by reference to the PC1860. Although s105 was meant to define offences, it begins with an overriding proviso and ends with a new penalty provision, as it reads:

Notwithstanding anything contained in this Act, if a person is grievously injured or killed in an accident involving driving a motor vehicle, offences relating to that accident shall be deemed to be offences under the relevant provisions of the Penal Code 1860:

Provided, however, that notwithstanding anything contained in s304B of the Penal Code 1860, if a person is grievously injured or killed caused by a person's reckless or negligent driving of a motor vehicle occasioning the accident, the latter person shall be punished with imprisonment of either description for a term which may extend to five years, or with a fine up to five lac taka [US\$6,250 approx], or with both.

Section 105 thus categorically negates the application of the RTA to any offences resulting in grievous bodily harm (GBH) or death and confirms the exclusive applicability of the PC1860 to these offences, as it effectively refers to the PC1860 for the definition of the offences. As an element of such offences, the first part of s105 mentions consequences which are inherently linked to actus reus, whilst its second part prescribes an overriding penalty provision for reckless or negligent driving by effectively amending s304B. The most relevant section of the PC1860 addressing driving offences is s304B (s105 refers to s304B) which is directly and exclusively applicable to the offences at issue. Clearly, as a reference provision, s105 does not contain any elements of the offence other than consequences. Instead, the elements should be looked for in s304B which defines the offences and stipulates punishments, as it provides 'Whoever causes the death of any person by rash or negligent driving of any vehicle or riding on any public way not amounting to culpable homicide shall be punished with imprisonment

of either description for a term which may extend to three years, or with fine, or with both.’

The penalty provision in s304B is evidently amended and overridden by the above-stated s105. It means, s304B will apply in defining offences and determining guilt, whilst s105 is to be followed in sentencing the convicts. Therefore, both s105 and s304B are critically examined in this article.

Section 304B does not directly mention any fault element, though prohibits certain conduct. To convict an accused, the prosecution, as a general principle called ‘the golden thread of English criminal law,’⁴⁹ bears the onus of proof of the constituent elements of the relevant offence beyond reasonable doubt.

A distinction between s105 and s304B in terms of offences is evident in that the former punishes ‘reckless or negligent’ driving whereas the latter penalises ‘rash or negligent’ driving. If the word ‘rash’ does not equate to ‘recklessness,’ then a question may arise as to how reckless driving will be punished (because of aforesaid overriding effect). We have to rely on judicial interpretations of these two terms in order to argue whether or not ‘rashness’ and ‘recklessness’ are synonymous. The discussion of rash act follows.

A. Rash Acts as Actus Reus

In s304B, the *actus reus* is obviously ‘rash’ or ‘negligent’ driving, and it does not explicitly mention any corresponding *mens rea* elements which can be derived from judicial interpretations of the offence. Notably, criminal law generally considers ‘rash’ and ‘negligent’ acts differently. As interpreted by the Supreme Court of Bangladesh in *Rashidullah v the State*:

A rash act means hazarding a dangerous and wanton act with the *knowledge* that it is dangerous or wanton and that it may cause injury but without any intention to cause injury or knowledge that it will probably be caused. The *criminality* in such a case lies in running the risk of doing the act *with recklessness or indifference* as to the consequence [emphasis added].⁵⁰

49 *Woolmington v DPP* AC 462, 481–482 (Viscount Sankey) [1935]; *Lee v The Queen* HCA 20 at [32] [2014]; *Environmental Protection Authority v Caltex Refining Co Pty Ltd* 178 CLR 477, 501 (Mason CJ and Toohey J) (1993) (Austl.).

50 21 DLR 709, 713-14 (1969) (Bangl.).

The emphasis added to the above quoted interpretation indicates the requirement of *mens rea* elements, though s304B does not explicitly require any of such fault elements, where the prescribed punishment (under s304B) is much less than that (life sentence) of the culpable homicide not amounting to murder under s299 and s304 of the PC1860. As per s57 of the PC1860, life sentence ‘shall be reckoned as equivalent to rigorous imprisonment for thirty years.’ However, the Appellate Division of the Supreme Court of Bangladesh recently ruled that the life term means 30 years in jail unless ‘till natural death’ is mentioned.⁵¹ *Mens rea* elements are to be proved by the prosecution, which generally lessens the likelihood of prosecutorial success. *Mens rea* will be discussed shortly, however, for now, a question can be asked, where does the *mens rea* come from for the offences at hand?

The above-stated interpretation makes s304B more awkward than providing any clarity to it. This is so because it encompasses the ingredients of manslaughter by unlawful and dangerous act, reckless conduct causing homicide and even probably murder in Bangladesh⁵² as well as in NSW,⁵³ despite that s304B provides for significantly low punishment. To clarify the s304B requirements further, the meaning of dangerous and wanton acts is explored below.

B. Rash Acts - Hazarding a Dangerous and Wanton Act with the Knowledge That It is Dangerous or Wanton

Notably, the CA1900 does not define ‘driving’ in NSW. However, as defined in 4(1) *Road Transport Act* 2013 (NSW), driving includes being ‘in control of the steering, movement or propulsion of a vehicle.’ The Court in *R v Affleck* held that, to prove control, it is not essential to have an ability to steer a vehicle, rather it is sufficient to be a driver if proven that the person had control over propulsion, that is, over the mode of moving and stopping the MV, e.g., releasing the brakes.⁵⁴

It is important to carry out a critical examination of the above interpretation with the meaning of ‘dangerous and wanton’ acts. ‘Dangerous driving’ may

51 *Ataur Mridha v The State*, Criminal Review Petition 82/2017 (unreported) (Bangl.).

52 See section 300 of the PC1860 (particularly the fourth point).

53 See s18 of the CA1900 (NSW).

54 *R v Affleck* 65 A Crim R 96, 98 (1992).

mean ‘very bad’ driving.⁵⁵ The central consideration for the offence would be that the driving was bad enough to amount to dangerous driving to be tested in that the defendant’s driving fell far below the standard of a competent and careful driver.⁵⁶ Dangerous driving under s52A of the CA1900 denotes ‘the driving of a vehicle by a person under the influence of intoxicating liquor or of a drug, or at a speed dangerous to others, or in a manner dangerous to others.’⁵⁷ The word ‘dangerous’ in the present context does not require evidence of some species of criminal negligence.⁵⁸ Dangerousness, as an element of *actus reus*, is to be determined by the trier of facts (the jury or the trial judge where appropriate) by employing an objective test.⁵⁹ The legal test is whether the accused’s conduct was exactly what a ‘reasonable’ driver might do.⁶⁰ An objective test applies to both careless and dangerous driving to be assessed against the standard of a competent and careful driver — ‘Where the driving falls below that standard, the driving is careless; where it falls far below that standard, it is dangerous.’⁶¹

Hewart LCJ in *McCrone v Riding* asserts that the objective standard is ‘impersonal and universal, fixed in relation to the safety of other users of the highway. It is no way related to the degree of proficiency or degree of experience to be attained by the individual driver.’⁶² Therefore, the objective test equally applies to all drivers of MVs. The NSW Court of Criminal Appeal in *Gillett v R* held that in determining ‘dangerousness’ with respect to dangerous driving (s52A), it is irrelevant as to whether the accused driver had the knowledge that he was suffering from sleep apnoea which increased the risk of epileptic seizure contributing to the fatal accident involved.⁶³ Such knowledge is an issue of *mens rea* which is *not required* in a strict liability offence.⁶⁴ Knowledge is a subjective *mens rea* element, while the test of dangerous driving is purely objective as it applies to all drivers

55 Sally Cunningham, *Driving Offences Law, Policy and Practice*, 97 (Ashgate Publishing Company, 2008).

56 *Id.* at 98.

57 P E Nygh (ed), *Butterworths Australian Legal Dictionary*, 319 (Sydney: Butterworth, 1997).

58 *King v The Queen* 245 CLR 588 at [38] (2012) (Austl.).

59 Thalia Anthony, Penny Crofts, Thomas Crofts, Stephen Gray, Arlie Loughnan and Bronwyn Naylor, *Waller & Williams Criminal Law – Text and Cases*, 345 (Chatswood, NSW: LexisNexis Butterworths, 12th ed. 2013).

60 King (2020), *supra* note 10, at 265.

61 Kyd and Cammiss (2020), *supra* note 15, at 225.

62 (1938)1 All ER 157, 158.

63 (2006) 166 A Crim R 419, 424.

64 Anthony et al (2013), *supra* note 59, at 345. *See generally McBride v R* 115 CLR 44 (1966); *R v Wilson* QWN 42 [1965]; *R v Hain* 85 WN (Pt 1) (NSW) 7 (1966) (Austl.).

equally. In a similar context, the HCA in *R v Coventry* interpreted the expression ‘driving at a speed, or in a manner which is dangerous to the public’ that it ‘describes the actual behaviour of the driver and does not require any given state of mind as an essential element of the offence,’ however, it ‘does not exclude a defence of mistake of fact on reasonable grounds or involuntariness (for example, interference by another person with the driving of the car).’⁶⁵ The HCA interprets the manner of driving as inclusive of ‘all matters connected with the management and control of a car by the driver when it is being driven. It includes starting and stopping, signaling or failing to signal, and sounding a warning or failure to sound a warning, as well as other matters affecting the speed at which and the course in which, the car is driven.’⁶⁶ The HCA adds, ‘Casual behaviour on the roads and momentary lapses of attention, if they result in danger to the public, are not outside the prohibition [...] merely because they are casual or momentary.’⁶⁷

Having regard to the above consistent interpretations of the word ‘dangerous’ in a driving context by the top courts within Australia at national and state levels, it can be inferred that the interpretation of ‘rash act’ by the Supreme Court of Bangladesh cited above seems inherently self-contradictory when the subjective knowledge requirement is added to the determination of dangerousness, whereas the highest court of Australia, HCA and that of NSW do not find any such subjective knowledge required for dangerous driving.

Another term used by the Supreme Court of Bangladesh in interpreting ‘rash act’ is ‘wanton act.’ The HCA in *Gray v Motor Accident Commission*, asserts that an ‘wanton act of driving’ is certainly more serious fault than mere negligence.⁶⁸ Consistently, in a driving context, the Court in *R v Telford* interpreted that ‘wanton driving’ indicates a positive lack of care, whilst ‘willful neglect’ implies something of a negative nature.⁶⁹ Based on these interpretations, we can draw an inference that ‘wanton driving’ is different from negligent driving, however, it does not require the accused to have the subjective knowledge that the act was wanton. This inference does not accord with the subjective requirement imposed by the aforementioned interpretation of the Supreme Court of Bangladesh

65 59 CLR 633, 638 (1938) (Austl.).

66 *R v Coventry* 59 CLR 633, 639 (1938) (Austl.).

67 *Id.* at 633, 638.

68 196 CLR 1, 28 (1998) (Austl.).

69 *R v Telford* Crim. L.R. 137 [1954]; Elaine Freer, We Need to Talk about Charlie: Putting the Brakes on Unlawful Act Manslaughter, 8 Crim. L.R. 612, 614 (2018) (Austl.).

making the prosecutor's burden to establish the elements of the offence against the accused difficult. Further complexity can be found in the interpretation as follows.

C. Rash Acts – Driving with the Criminality of Recklessness or Indifference as to the Consequence

This comes from the last sentence in the above quoted interpretation of the Supreme Court of Bangladesh, which compounds the litigation problem further.

Reckless driving has become commonplace in Bangladesh. For example, a recent survey conducted by a passenger welfare platform reveals that at least 87 percent of buses and minibuses in Dhaka (capital city) are driven recklessly in contravention of traffic rules, 'creating anarchy in the public transport sector.'⁷⁰ Consistently, another study carried out by the Accident Research Institute of the Bangladesh University of Engineering and Technology (ARI) finds that reckless driving contributes to at least 90 percent of the accidents in Bangladesh.⁷¹

As per the aforesaid judicial interpretation, the word 'rash' as *actus reus* has to meet with the criminality or fault element of 'recklessness or indifference as to the consequence.' It is to be pointed out that whilst 'reckless driving' is purely a conduct element, 'reckless indifference to consequences' is a fault element of an offence. Section 304B itself does not mention either of the two forms of recklessness. This is really a quite onerous requirement for the prosecution, where most of the cases are reported to be of reckless driving in Bangladesh. Problems are twofold: firstly, it essentially damages the strict liability nature of the offence in s304B; and secondly, the 'indifference' suggested here is probably too high for the prosecution to succeed against reckless drivers. This is so because, the sole consequence in s304B is death. Then 'indifference' to consequence would probably mean indifference to death. Such indifference is so high a degree of *mens rea* that it is generally a requirement of murder, even in both Bangladesh and NSW. Section 300 (the fourth of the four points in s300) of the PC1860 effectively represents such a requirement for murder,⁷² whilst the definition of murder in s18 (1)

70 Staff Correspondent, Public Transport: 87pc Vehicles Violate Rules, Daily Star, Bangladesh, Front page, (Apr. 22, 2018).

71 Shipon Habib, Public Transport Killing Lives, Burying Dreams, Daily Jugantor, Bangladesh, Last page, (Aug. 7, 2018).

72 'Fourthly. —'If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any

of the CA1900 directly includes ‘reckless indifference to human life’ as the first *mens rea* element. As interpreted by the HCA in *Royall v The Queen*, the prosecution is required to prove that the defendant foresaw the *probability* of death in respect of such an indifference.⁷³ A distinction is drawn between ‘probability, and ‘possibility’. In interpreting ‘intent to kill or to inflict GBH upon a person’ in a murder case, the HCA in *R v Crabbe* distinguishes between these two, and declares that ‘probability’ means the accused foresaw the relevant consequence ‘is likely to happen’; whereas ‘possibility’ denotes ‘may happen.’⁷⁴ The HCA in *R v Crabbe* ruled:

It should now be regarded as settled law in Australia, if no statutory provision affects the position, that a person who, without lawful justification or excuse, does an act knowing that *it is probable that death or grievous bodily harm will result*, is guilty of murder if death in fact results. It is *not enough* that he does the act knowing that it is *possible but not likely* that death or grievous bodily harm might result [emphasis added].⁷⁵

Section 4(1) of the CA1900 defines ‘GBH’ which includes the destruction of the foetus of a pregnant woman — whether or not the woman suffers any other harm, any permanent or serious disfiguring of the person, and any grievous bodily disease (causing a person to contract a grievous bodily disease). As interpreted by the NSW Court of Criminal Appeal in *Swan v. R*, GBH is ‘really serious bodily injury,’⁷⁶ and the term ‘really’ refers to the harm which is a more serious form of injury than actual bodily harm.⁷⁷ The Court further clarifies that in determining what constitutes ‘really serious bodily injury’ may involve questions of fact and degree of injury.⁷⁸

As regards the *probability* of death, the NSW Court of Criminal Appeal applied the above HCA rule (*Crabbe*) in a murder case of *R v Annakin*,⁷⁹ which

excuse for incurring the risk of causing death or such injury as aforesaid’: s300 of the PC1860.

73 172 CLR 378 (1991) (Austl.).

74 156 CLR 464, 465-472 (1985) (Austl.).

75 *Id.* at 469-470.

76 *Swan v R* NSWCCA 79 at [57] [2016] (Austl.).

77 *Swan v R* NSWCCA 79 at [57]–[62] [2016] (Austl.).

78 *Swan v R* NSWCCA 79 at [65] [2016] (Austl.).

79 37 A Crim 131, 152 (1988).

has been later affirmed by the HCA in *Royall v The Queen*.⁸⁰ The HCA in *Royall v The Queen* affirms that under the qualification set out in s18 of the CA1900, the prosecution had to prove that the defendant foresaw the *probability* of death, and foresight of probability of GBH is not enough *mens rea* for murder.⁸¹ Consequently, it means reckless indifference to GBH, rather than death, will be a case of manslaughter.⁸² The NSW Court of Criminal Appeal in *Chen v. R* reinforced the connotation that the Crown must prove beyond any reasonable doubt to establish recklessness as *mens rea* (to prove reckless infliction of actual bodily harm or reckless wounding) that the defendant foresaw the possibility of that particular type of harm to occur.⁸³ Applying this interpretation of Australian courts to the context within Bangladesh, the foresight of *probable* death would be necessary to ensure conviction under s304B of the PC1860, though the foresight of *possible* death would apply to other consequences. Hence, the interpretation in question lays a huge burden on the prosecution under s304B.

The above requirement could be revisited and eased by paying due regard to the interpretation of recklessness in the particular context of deaths on the street. The House of Lords in *R v Seymour* addressed the question of *mens rea* needed to be proved in cases of vehicular manslaughter and held that objective recklessness has to be established.⁸⁴ As viewed by the HCA in *R v Coventry*,⁸⁵ recklessness refers to indifference to consequences, which applies to only reckless driving offences, such an indifference is not an essential element in either of culpably negligent driving or of driving at *a speed which is dangerous to the public, or in a manner which is dangerous to the public, so mens rea is not required*. The offence of dangerous driving is established, if it is proved that the driver's acts created real or potential danger to the public (now changed to 'danger to another person or persons'), and the existence of danger will be determined based on 'all the circumstances of the case, e.g., the character and condition of the road-way, the amount and nature of the traffic that might be expected, the speed of the motor

80 172 CLR 378 (1991). See also *R v White, Eaves and Parker* 17 NSWLR 195 (1988) (Austl.).

81 172 CLR 378, 395 (1991). See also *R v Solomon* 1 NSWLR 321 [1980] (Austl.).

82 David Brown, David Farrier, Luke McNamara, Alex Steel, Michael Grewcock, Julia Quilter and Melanie Schwartz, *Criminal Law – Materials and Commentary*, 757 (Annandale, NSW: The Federation Press, 6th ed. 2015).

83 NSWCCA 116 at [65] [2013] (Austl.).

84 2 AC 493 [1983] (Austl.).

85 59 CLR 633, 637& 639 (1938) (Austl.).

vehicle, the observance of traffic signals, the condition of the driver's car'.⁸⁶

Even for a manslaughter charge against reckless driving occasioning death, which is much higher than the charge under s304B,⁸⁷ does not require that high level of *mens rea* in the common law definition of the offence, which applies in NSW. This hierarchy of charges is recognised in NSW as well, as the NSW Court of Criminal Appeal in *SBF v R* held that manslaughter is placed above s52A offence in the hierarchy of offences, and an alternative guilty verdict of dangerous driving offence under s52A is permitted if the accused is indicted for murder or manslaughter.⁸⁸ In this regard, Lord Roskill in *R v Seymour* opined referring to *R v Lawrence*:

Where manslaughter is charged and the circumstances are that the victim was killed as a result of the reckless driving of the defendant on a public highway, the trial judge should give the jury the direction suggested in *R. v Lawrence* but it is appropriate also to point out that in order to constitute the offence of manslaughter, the risk of death being caused by the manner of the defendant's driving must be very high.⁸⁹

Lord Diplock in *R v Lawrence*,⁹⁰ in which the appellant's reckless driving caused death, formulated a standard direction to a jury to factually determine reckless manslaughter:

First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and Second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.

86 *R v Coventry* 59 CLR 633, 639 (1938) (Austl.).

87 Manslaughter offence is defined in s299 of the PC1860 for which the maximum life term imprisonment can be awarded under s304, as opposed to the maximum three years imprisonment under s304B.

88 NSWCCA 231 at [108] [2009]. See also *R v Borkowski* NSWCCA 102 at [56] [2009] (Austl.).

89 AC 510 HL [1982].

90 AC 510 HL [1982].

Now if we apply the above interpretation of ‘indifference as to the consequence’ given by the Supreme Court of Bangladesh, we find a need for clarification of inconsistency. This is because indifference as to death preceded by ‘probably’ is equated to intention to kill.⁹¹ This very high degree of *mens rea* element cannot be a requirement of an offence which is punishable with only 3 years imprisonment, as opposed to death or life term sentence respectively for murder and manslaughter in Bangladesh.⁹² Given the lenient punishment, probability of foresight of bodily harm resulting in death could have been enough, if such a *mens rea* element is to be added to the definition on any logical ground, as opposed to imposing strict liability.

Amid such judicial interpretations by different courts of highest ranks in their respective jurisdictions, which are inconsistent with that of the Supreme Court of Bangladesh, recklessness as a fault element under s304B of the PC1860 with respect to reckless driving needs to be redefined clearly by the Court or legislature by revisiting the existing judicial meaning of a rash act. Otherwise, prosecution of reckless drivers and their associates (helpers, conductors) with success under s304B would be extremely difficult which is evident in the present paucity of instances of conviction.⁹³ Another ambiguity is found regarding ‘dangerousness’, as discussed below.

D. Whether Dangerous to the Public or to Any Persons

Dangerousness, which denotes a person’s ‘propensity to cause serious physical injury or lasting psychological harm,’ is an important consideration in the administration of criminal justice.⁹⁴ According to the Supreme Court of Bangladesh, a rash act as incorporated in the interpretation at hand, ‘means hazarding a dangerous and wanton act with the knowledge that it is dangerous or wanton...’⁹⁵

It is uncertain whether the act has to be dangerous to ‘another person or persons’ or to the public (excludes the errant driver’s passengers). The difference

91 *R v Crabbe* 156 CLR 464, 469 (1985) (Austl.).

92 Sections 300 and 302 of the PC1860 (Bangl.).

93 ‘Not a single case of punishment’ was found by the SCB as noted in *Government of Bangladesh v Ministry of Home Affairs*, Supreme Court of Bangladesh – High Court Division (Suo Motu Rule No. 02 of 2007) (unreported). We have not found any successful case under s304B of the PC1860 either.

94 Estellu Baker, *Dangerousness, Rights and Criminal Justice*, 56(4) Mod. L. Rev 528 (1993).

95 *Rashidullah v the State* 21 DLR 709, 713-14 (1969) (Bangl.).

between ‘another person or persons’ and ‘the public’ can be found in the interpretation of s52A of the CA1900. Section 52A previously criminalised ‘driving at a speed, or in a manner, which is dangerous to the public.’ In resolving the question whether passengers of a vehicle involved in an accident are the member of public, the NSW Court of Criminal Appeal in *R v S* pronounced that:

The ‘public’ can include a passenger in the vehicle but in circumstances where the activity of ‘driving in a manner dangerous to the public’ is part of a joint escapade on the part of the driver and passengers, they being the only persons endangered by the activity, then it is not proper to characterise the passengers as the ‘public.’⁹⁶

To avoid the complexity as to the circumstances when passengers will be regarded as members of the public, the law has now been changed from ‘the public’ to ‘another person or persons.’⁹⁷ Likewise, the word ‘dangerous’ used in the interpretation of the Supreme Court of Bangladesh needs to be clarified whether it implies dangerous to the public or any person, before any such dispute arises and a prosecution is frustrated in Bangladesh.

This discussion demonstrates the shortcomings and loopholes of Bangladeshi laws in view of their Australian (NSW) counterparts. Lack of legal clarity always favours the alleged offenders who are entitled to take advantage of the prosecutorial failure to prove the case beyond reasonable doubt against them. Weaknesses in the law are destined to frustrate the purpose of any legislation. Hence, a revision of the PC1860 and the RTA2018 has become necessary before the MVs contribute to more deaths and physical and mental impairment of human beings, leaving endless pain for the survivors and successors of the deceased victims.

V. Leniency in Punishments

The second paragraph of s105 of the RTA2018 indicates that the legislature realised the need for increased punishments to create deterrence and to punish

96 22 NSWLR 548, 548 (1991) (Austl.).

97 The amendment is attributed particularly to *R v S* 22 NSWLR 548 (1991): see The Second Reading speech by the Attorney General, Parliamentary Debates (Hansard), Legislative Council (27 Oct 1994) 4792-4794, 4794, as cited in A M Blackmore and G S Hosking, *New South Wales Criminal Law*, 232 (Pymont, NSW: Law Book Company, 2010).

the offenders adequately. Nonetheless, the amended punishments did not go far enough. As stated earlier, s105 has raised imprisonment from three years under s304B of the PC1860 to five years, and changed pecuniary penalties from an unspecified amount (s304B) to a maximum of five lac taka (US\$6,250 approx.). The increased maximum prison term of five years is inadequate; moreover, s105 does not set any minimum threshold period of incarceration. This gives the sentencing judges an enormous discretion in the absence of any practice of separate sentencing hearing and guideline judgments. Further leniency is permitted by using ‘or’ between the imprisonment and fines. It cannot be said that s105 has increased the amount of maximum fines, though it replaces an indefinite amount with a definite maximum limit, which is not punitive either. Notably, it curtails the judges’ discretion to exceed five lac taka, but does not stipulate any minimum amount, which heightens judicial discretion further. This unrestrained discretion may not be safe in the context of Bangladesh where allegations of corruption against judges are widespread. For example, a 2016 survey conducted by Transparency International Bangladesh (TIB) disclosed that 48.2% of people pay bribes to the judiciary in the country.⁹⁸ The overall corruption in Bangladesh is staggering as it scored 26 out of 100 in the 2019 Corruption Index Report of Transparency International, a German based organisation.⁹⁹ There is a likelihood that the actual punishments may often be influenced by corruption, and the minimum amount of prison term and fines can be so low that it may not have any deterrent effect on anyone in practice.

The inadequacy of the punishments in the above laws of Bangladesh can be clearly argued when compared with their equivalents in NSW. Section 52A(1) of the CA1900 stipulates imprisonment of normally 10 years, whilst s52A(2) imposes 14 years for an aggravated version of the offence. Section 52A deals with the consequence of GBH and death by dangerous driving, along the line of s105 of the RTA2018. Section 52(3) of the CA1900 prescribes seven years imprisonment for dangerous driving occasioning GBH, whereas s52A(4) sets forth 11 years of imprisonment for aggravated dangerous driving occasioning GBH (circumstances of aggravation are described in subsection 7 of s52A). Thus, separate punishments are prescribed for causing GBH and death in NSW. The jail term for causing GBH in NSW are considerably higher than those prescribed under s105 of the RTA2018 and 304B of the PC1860 for death in Bangladesh. The

98 FE Report, Graft in Services Sector on the Rise, Financial Express, Bangladesh, Economy (Jun. 30, 2016).

99 Transparency International. 2019. Corruption Perception Index, *available at* <https://www.transparency.org/en/countries/bangladesh> (visited Jan. 1, 2021).

terms of imprisonment for the offences resulting in death (subsections 1 and 2 of s52A) are even much higher compared to their counterparts in Bangladesh. It is to be mentioned that unlike the case in Bangladesh, there is no pecuniary penalty prescribed in NSW in addition to or in lieu of imprisonment. However, this does not soften the actual punishment in any way in that, the fines in Bangladesh can be very low and too small to work as a deterrent. Moreover, the court may order any small amount of fine as the total punishment. Conceivably, the imprisonment terms in NSW are meant to be the maximum limit,¹⁰⁰ and the judges have the discretion to order a shorter term of jail. However, this discretion in NSW is unlikely to be problematic because, NSW law requires separate sentencing hearing and there is no allegation of corruption in the judiciary, so far as we are aware of. The higher punishments in NSW are appreciated by both the judiciary and academia. For example, when the punishment was increased in NSW, its Court of Criminal Appeal in *R v Slattery* (1996) noted that increasing the penalties by amending legislation signifies the seriousness of the offences and recognises the prominence of the principle of deterrence.¹⁰¹ The Court spells out:

The action of the legislature in almost tripling the maximum sentence for a particular type of offence must be taken by the courts as reflecting community standards in relation to the seriousness of that offence, and the courts are required to give effect to the obvious intention of the legislature that the existing sentencing patterns are to move in a sharply upward manner.¹⁰²

The importance of deterrence has been reiterated more recently by the NSW Court of Appeal in *R v Manok* where Wilson J asserts that it is important ‘because of the prevalence of the activity of driving, and the terrible consequences that can flow from a failure by a driver in the management of a motor vehicle.’¹⁰³ Wilson J adds ‘It is important that all drivers be deterred from driving dangerously by the sentences imposed on those who transgress.’¹⁰⁴

Further, the penalty provision currently contained in s304B will be essen-

100 For example, s52A(1) provides that ‘A person convicted of an offence under this subsection is liable to imprisonment for 10 years.’

101 *R v Slattery* 90 A Crim R 519, 523–524 (1996). For the deterrence principle, see Freeman et al (2016), *supra* note 13, at 59.

102 *R v Slattery* 90 A Crim R 519, 524 (1996).

103 *R v Manok* NSWCCA 232 at [78]–[79] [2017] (Austl.).

104 *R v Manok* NSWCCA 232 at [78]–[79] [2017] (Austl.).

tially redundant, because it prescribes sentences for causing death by rash or negligent driving, and s105 of the RTA2018 has clearly overridden the penalties in s304B. So, s304B penalties will not be applicable when s105 of the RTA will be given effect (currently suspended). We recommend that the penalties presently prescribed under s105 be increased in line with those of s52A of the CA1900 and that s304B be amended accordingly.

VI. Findings and Recommendations

Indeed, no perfect solution exists anywhere that will make all drivers to drive safely and responsibly, however, we all should obey the traffic regulation and be more defensive while driving.¹⁰⁵ Many drivers are prone to misjudge or overestimate their ability to avoid risk and to drive in accordance with the required standard.¹⁰⁶ Drivers' punishments should be proportionate to their degree of fault or failure,¹⁰⁷ and they should be punished for their wrongdoings, regardless of any consequence thereof.¹⁰⁸ A balance should be stricken out between the harm caused and the culpability in the construction of offences that merit punishment.¹⁰⁹ Although some scholars argue that penalties will not create deterrence to all, particularly to those who are overconfident of their ability to avoid being caught;¹¹⁰ a question remains to be answered what may happen in the absence of no threat of punishment. In response, one can reasonably infer that the criminal activities will increase significantly. Delivering justified punishment is generally viewed to be one function of criminal law, whilst some scholars claim that this is the sole function.¹¹¹ The NSW Court of Criminal Appeal notes in a 2020 driving offence case of *Rummukainen v R*, that general deterrence is always a significant consideration in determining punishments for offences involving tragic death of a human being.¹¹²

105 Vincente J Vaicaro, *Selective Enforcement: Does Increased Traffic Enforcement Have an Impact on Lowering Traffic Accidents?* (2008), M.S. thesis, 61-62, California State University, Long Beach.

106 Kyd and Cammiss (2020), *supra* note 15, at 227.

107 King (2020), *supra* note 10, at 263; Kevin C Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 *Dick. L. Rev.* 1, 3 (1984).

108 Kyd and Cammiss (2020), *supra* note 15, at 243.

109 Editorial, *Sentencing for Causing Death by Driving Offences*, *Crim. L. Rev.* 253 (2007).

110 *See* Nicola Padfield, *Time to Bury the Custody 'Threshold'?* 8 *Crim. L. Rev.* 593, 610 (2011).

111 Michael S Moore, *Placing Blame: A Theory of Criminal Law*, 28-29 (Oxford Univ. Press, 1997).

112 *Rummukainen v R* NSWCCA 187 at [16], [29] [2020] (Austl.).

The foregoing critical analysis of the elements of the driving offences resulting in death and corresponding sentences leads to the following specific findings and recommendations.

A. Elements of the Offences in s105 of the RTA2018 and s304B of the PC1860 - Actus Reus Abstruse

Section 105 of the RTA2018 relies completely on s304B of the PC1860 which was meant to define the offences with elements. It identifies ‘rash’ or ‘negligent driving’ as *actus reus* elements. Negligence is generally tested objectively, so it is less complicated for the prosecution. However, the meaning of ‘rash driving’ is unclear and its interpretation by the Supreme Court of Bangladesh compounds the complexity as it raises more questions than providing answers. For example, the interpretation includes reckless driving as a rash act. The appropriate test dilemma exists— whether the test is subjective or objective; and whether it is purely *actus reus* element in divorce from *mens rea* consideration. Recklessness, as *mens rea*, generally involves subjective consideration. However, reckless driving as *actus reus*, as we have shown, should be proved by applying a pure objective test. So further interpretation of the ambiguities surrounding ‘rash driving’ raised in this article is necessary. We recommend that the word ‘reckless driving’ be confined to *actus reus*, and thereby be proved objectively.

B. Elements of the Offences —Clarity about ‘Reckless Indifference to Consequences’ as Mens Rea Needed

As alluded to earlier, the interpretation of s304B by the Supreme Court of Bangladesh adds ‘reckless indifference to consequences,’ though it does not make an applicable sense. If the phrase ‘reckless indifference’ is extended to *mens rea*, the specific meaning of reckless indifference, such as whether it refers to indifference to human life or to GBH or just bodily harm should to be clarified. As shown previously, these three variants of ‘indifferences’ are hugely different from one another with respect to the seriousness of offences, spanning from murder to simple assault. Therefore, the current interpretation of rash acts warrants a revisit in the interest of justice. Our recommendation is to make the s304B offences as those of strict liability in line with their equivalent in NSW.

C. Whether Dangerous to the Public or to Any Person

Section 304B proscribes dangerous driving under ‘rash driving’ as judicially interpreted. This criminalisation is quite logical. However, as alluded to earlier, a clarification is needed as to the qualification of the prohibited conduct. As discussed earlier, the NSW law (s52A) previously used ‘dangerous to the public,’ which has been subsequently replaced with ‘dangerous to another person or persons’ following judicial interpretations that the word ‘public’ does not include ‘passengers’ of the vehicle involved in an impact occasioning death or GBH. The interpretations of Australian courts are certainly non-binding on those in Bangladesh, however, these still will have a persuasive effect as both being common law jurisdictions. Hence paying due regards to such a judicial interpretation of Australian courts, s304B of the PC1860 could be clarified in order to avoid prosecution being futile against true offenders killing in most cases their own passengers along with others.

D. Elements of Offences and Punishments Should be Consistent

Currently s105 of the RTA2018 and s304B of the PC1860 are not consistent in term of elements and punishments of the offences. Section 105 provides for punishment against ‘reckless or negligent’ driving occasioning deaths or GBH, whereas s304B punishes the offences of causing death by ‘rash or negligent’ driving. Although ‘negligent’ is common between the two sections, ‘reckless’ and ‘rash’ are not identical words as discussed earlier. The expressions of the offences in these two sections need to be brought to a parity in the interest of clarity. Also, the punishments prescribed in s304B should be amended, because s304B applies to exclusively driving offences, and s105 overrides the punishments ordained in s304B and sets down higher punishment for the same offence. Therefore, there is no reason to keep s304B punishment unchanged.

E. Inadequacy in Penalties

Although s105 increases prison term for the driving offences causing death and GBH from three years to five years, it is still inadequate to create effective deterrence. The inadequacy is evident when this sentence is compared with that of the identical offences in NSW, which sets out normally 10 years and 14 years for aggravated version of the offences. Unlike NSW, neither RTA2018 nor the

PC1860 mentions anything about aggravated versions of these offences, meaning that the same five years of incarceration applies to aggravated offences as well. This is overtly unjustified and inadequate. An inexplicable position remains in respect of pecuniary penalties in that s105 stipulates the maximum fine at five lac taka (US\$6,250 approx.) in place of an unspecified amount under s304B. As argued earlier, the judges can determine an actual minimum amount as low as they desire or deem appropriate on a case-by-case basis in an environment where judges' consideration may be influenced by unfair interference (e.g., bribes). The maximum of taka five lac is considered inadequate, whereas the actual amount can be any sum of money. We recommend that the maximum amount can be raised to seven lac taka (US\$8,750 approx.) and the minimum can be set down to one lac taka (US\$1,250 approx.) depending on the severity of crimes and financial ability of the offenders.

VII. Conclusions

Laws are at the heart of road safety,¹¹³ and laws are made for enforcement in order to create deterrence and punish wrongdoers. Clarity is the nucleus of law, without which enforcement becomes dubious and offenders can claim the benefit of doubt. Law enforcement signifies the realisation of the ends stated or inherent in a given law, and reminds the public of the force of law.¹¹⁴ We have examined the relevant provisions of the RTA2018 and the PC1860 using doctrinal and comparative methods of legal research relying upon public interest and deterrence theories. We have found that the RTA2018 provisions of driving offences causing death on the road are currently flawed with respect to the identification of critical elements of the offences. Moreover, the interaction between s304B of the PC1860 and s105 of the RTA2018 has made the situation clumsy, owing to the existing disparity and lack of clarity. Conceivably, the PC1860 is long-dated legislation, whilst the RTA2018 was enacted in October 2018 at a time when unprecedented public unrest was demonstrated in a way which was grief-stricken, conflictual, inconsolable and politically unmanageable — without inflicting serious harm to the

113 Ted R Miller, David T Levy, and David I Swedler, *Lives Saved by Laws and Regulations That Resulted from the Bloomberg Road Safety Program*, 113 *Accid. Anal. Prev.* 131, 135 (2018).

114 See S M Solaiman, *Investor Protection and Judicial Enforcement of Disclosure Regime in Bangladesh: A Critique*, 34 *Com. L. World Rev.* 229 (2005); S M Solaiman, *Investor Protection Through Administrative Enforcement of Disclosure Requirements in Prospectuses: Bangladeshi Laws Compared with Their Equivalents in India and Malaysia*, 12 *J. Financ. Crime* 360 (2005).

protesters. That outcry was sparked by the tragic deaths of two minor school-goers on 29 July 2018 in the capital city on a footpath by a bus.

People wanted ‘road safety law,’ whereas the government has presented ‘road transport law’ which has been unable to ensure safety on the road, as evident from recent reports disclosing that road accidents claimed the lives of 6,686 and left 8,600 others injured across Bangladesh in 2020.¹¹⁵ These casualties happened despite the pandemic-struck lockdown across the country throughout the year in varying degrees. Regardless of the context of the legislation, perfection in legal drafting cannot always be expected. We have identified specific flaws in the laws and we recommend that both s105 and s304B be amended in line with our submissions made above. It is essential to significantly reduce road deaths, and the State has a constitutional obligation to protect the people’s right to life.¹¹⁶ We reiterate the heartbreaking assertion of the Supreme Court of Bangladesh in the present context in *Bangladesh Beverage Industries Ltd v Rowshan Akhter*, ordering compensation to the survivors of an MV accident victim:

Every child is born with expectation of life... Death is inevitable but premature death in whatever form is not expected and cannot be consoled. Accidental death [is] also a premature death. Government is answerable to all such premature death as Government is to protect the citizen and is responsible for the life of a citizen as such, ...¹¹⁷

Finally, law alone cannot bring its purpose to its full fruition regardless of its quality, unless it is properly enforced by honest, efficient and accountable agencies, which could be a topic of a future research.

115 FE Report, 6,686 Killed in Road Accidents in 2020: Report, Financial Express, Bangladesh, National (Jan. 9, 2021).

116 The Constitutional of Bangladesh 1972, Art 32.

117 62 DLR 483, para 86 (2010) (Bangl.).

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