SENTENCING RECKLESS OR NEGLIGENT DRIVING

1 Introduction

Combating reckless or negligent driving is a focal point of road safety policy. The problem of reckless or negligent driving is complicated by the psychological aspect of risk-taking, which appears to be an almost universal phenomenon amongst drivers (Faith *Crash – The Limits of Car Safety* (1997) 136):

> "The art of life – and the art of driving – is not to minimize risk because it would mean we would stay at home and refuse to participate in all road use. No, the art of life, of meeting the challenge that is posed by risk, is to take the precise amount of risk, no more, no less, that is necessary to maximise the benefits from the activity in question, as in driving, for instance" (citing Prof Gerald Wilde in Faith 136).

The criminal law has been enlisted to deal with the problem of dangerous driving in its various forms, which has had the effect of changing conceptions of criminality. It seems that "[c]ontrary to the popular conception of the criminal as a thief or a thug, the typical criminal today is the motorist" (Fitzgerald *Criminal Law and Punishment* (1962) 65). As Blom-Cooper and Morris (*With Malice Aforethought* (2004) 147) have commented:

> "There is little doubt that the aggressive, anti-social driver remains deeply unpopular, and, while it is recognised that not all drivers involved in road traffic incidents are equally culpable, those who are deemed to be seriously so would appear to be increasingly the subject of public concern."

Bearing these factors in mind, this note seeks to briefly traverse the most significant aspects of sentencing offenders who have committed the offences of reckless driving or negligent driving.

2 The nature of the offence

Section 63(1) of the National Road Traffic Act 93 of 1996 provides that: "No person shall drive a vehicle on a public road recklessly or negligently." This provision constitutes an endeavour to prevent the driving of motor vehicles on public roads in a manner which "may or in fact does endanger the lives or property of others" (*S v Grobler* 1964 2 SA 776 (T) 781F; and *cf S v Chitanda* 1968 1 SA 427 (RA) 429G, where the object of a similar provision was held to be to "protect the public from the *results* of the dangerous driving of a motor vehicle" (original emphasis)). Although on the authority of a 1927 Transvaal case (*R v Levine* 1927 TPD 949) it was for some time generally accepted that a statutory provision like section 63(1) creates a single offence

(*R v Collier* 1928 NPD 122; *R v Govender* 1949 4 SA 878 (N); *R v Rundle* 1953 2 SA 662 (SR); *R v Botha* 1954 2 PH O10 (O); *R v Greenland* 1962 1 SA 51 (SR); *S v Barnard* 1965 3 SA 644 (T) 646A; *R v Chitanda supra* 428G-H; and see also *R v William* 1957 2 SA 531 (SR) 533F-G), the better view is that section 63(1) creates two distinct offences (as held in *S v Cordoso* 1975 1 SA 635 (T) 638 *in fin*; *Attorney-General, Venda v Maraga* 1992 2 SACR 594 (V) 605e-g; see also *R v Gardner* 1959 2 SA 237 (E); and *S v Van Zyl* 1969 1 SA 553 (A) 557). This follows from the fact that recklessness and negligence are regarded as separate concepts (see Cooper *Motor Law* Vol I (1982) 503ff). Moreover, reckless driving and negligent driving are treated as separate offences with regard to sentence (see below) and the suspension/cancellation of a convicted person's driving licence (see below).

3 Quantum of punishment

As reckless driving is treated as the more, and negligent driving the less, serious offence, and as section 63(1) covers a wide range of culpable misconduct of varying degrees of seriousness (Cooper 525; for a negligent driving conviction based on the "sort of inadvertence of which even the best of drivers might be guilty once or twice in a lifetime", see the case of *S v Stack* 1990 1 SACR 667 (C) 667i-j), the degree of an accused's culpability thus has an important bearing on sentence (see *R v Swanepoel* 1945 AD 444 451; *S v Mkize* 1961 2 PH O14 (N); *S v Ngcobo* 1962 2 SA 333 (N) 336H-337B; *S v Clark* 1969 2 PH H172 (NC); *S v Hlatswayo* 1970 2 PH H(S) 74 (N); *S v Nkosi* 1972 4 SA 542 (N) 543A-C; and *S v Manamela* 1973 1 PH H35 (T)). In this regard there appears to be a close relationship between reckless driving and driving under the influence, but not between negligent driving and drunk driving (*S v Van der Merwe* 1984 2 SA 515 (T)) – this relationship is particularly important in the context of conditions of suspension of sentence. In *S v Maharaj* (1987 4 SA 545 (N) 547G-H), the court noted that where the driving of drunk drivers is found to be grossly negligent or reckless,

> "such conduct is to some extent slightly more blameworthy than that of drivers who may be sober at the time, in that the former will be unable to take any emergency evasive action, if called on to do so, as effectively as would the latter"

Culpability involving an appreciation of risk will usually merit a heavier penalty than culpability involving inadvertence, that is, without an appreciation of risk (*S v Mkize supra*; *S v Ngcobo supra*; *S v Bera* 1965 4 SA 411 (N) 414E-G; *S v Clark supra*; *S v Hlatswayo supra*; *S v Nkosi supra*; *S v Manamela supra*; and Cooper 526).

Regarding the quantum of punishment for reckless or negligent driving, a guideline was provided by the Appellate Division in the context of a vehicular culpable homicide conviction, viz that generally speaking:

> "[I]n the absence of recklessness or some other high degree of negligence, an unsuspended sentence of imprisonment, without the option of a fine, should

> not be imposed on a first offender" (*R v Swanepoel supra* 448; and see too *R v Karg* 1961 1 SA 231 (A) 235B-C).

The prevalence of this type of offence has at various times caused the courts to express the need for the imposition of more severe sentences (see *R v Celsi* 1939 TPD 475 479; *R v Bredell* 1960 3 SA 558 (A) 560H; *S v Pelson* 1962 3 SA 244 (C) 246A-D; *S v Mhlongo* 1979 1 PH H58 (N); see too *R v Karg supra* 235C; and Cooper 526). In cases predating the dictum in *R v Swanepoel* cited above, it was suggested that an unsuspended sentence of imprisonment should be imposed even in the case of a first offender who has been guilty of "deliberate and wilful negligence or recklessness" (*R v Celsi supra* 479 and 481; and see too *R v Jaspan* 1938 TPD 1 4). This approach accords with the current practice, in that a custodial sentence has been handed down in particularly egregious manifestations of this offence of reckless driving (see *S v Edley* 1974 3 SA 382 (RA); *S v Mantile* 1985 1 SA 651 (TkSC); *S v Maharaj supra*; *S v Ngcobo* 1990 2 SACR 213 (T); and *S v Potgieter* 1991 2 SACR 135 (A)). Where the accused's conduct assumes the form of wilful disregard for the rights of other road users, by placing other road users at risk of harm (*S v Kibido* 1998 2 SACR 213 (SCA) 217b-d), then a custodial sentence is appropriate, being "clearly justified by the interests of a society that is faced with escalating carnage on the roads caused in large measure by people driving ... with reckless arrogance" (*S v Kibido supra* 217d). Thus the interests of the public must also be considered, and it has been held that given the prevalence of reckless driving, a short, sharp lesson such as a month of imprisonment may be beneficial (*S v Mantile supra* 654C-F; and see also *S v Mhlongo supra*), although each case must be dealt with on its own merits. The comments of Centlivres JA (in *R v Mahametsa* 1941 AD 83 86, cited in *S v Potgieter supra* 138c-d; and *S v Kibido supra* 216f) are still germane to present-day sentencing of the offence of reckless driving:

> "We do not disagree with the view that imprisonment is an appropriate punishment in cases of recklessness, if by 'recklessness' is meant gross negligence or a wilful disregard of the rights of other road users, as for example in the case of numbers of accidents which are caused by the dangerous practice of 'cutting in' or driving around a blind corner on the wrong side of the road, or passing another car on the crest of a hill."

A court would assess the crime of negligent driving, which by definition would not involve *dolus eventualis* or gross negligence, more leniently (see *S v Madliwa* 1991 1 SACR 296 (Tk) 298b-c). It follows that a custodial sentence, whilst notionally possible, would be extremely unlikely in the case of a first offender. Even if an accused has been guilty of recklessness or a high degree of negligence, however, a court is not bound to impose imprisonment but, apart from his culpability, must take into account his personal circumstances – "everything that affects the accused in his person, his occupation or his property" – in determining an appropriate sentence (Cooper 526; see *eg*, *R v Greenland supra*; *S v Nkosi supra*; *S v Madliwa supra* 298c-d; *S v More* 1993 2 SACR 606 (W); *S v Kibido supra* 217a-b); included in such considerations are that "such a person is not a criminal in

the everyday sense of that word; he is not a rapist or a robber or a thief, and a gaol sentence condemns him to association with people of that ilk" (*S v Mantile supra* 653H-I; and see *S v Ngcobo* (1990) *supra* 214b-c). Other cases where the court deemed a fine an appropriate penalty despite a high degree of negligence or recklessness include: *S v Grobler supra*; *S v Rossouw* 1965 1 PH O17 (O); *S v Nqwata* 1966 2 PH O56 (E); *S v Van Rensburg* 1967 2 SA 291 (C); *R v Chitanda supra*; *S v Van Zyl supra* 561A; *R v Makings* 1969 1 PH H(S) 26 (RA); *R v Lefrere* 1969 2 PH H(S) 100 (RA); *S v Clark supra*; *S v Smith* 1973 3 SA 217 (T)). Even where a driver's conduct involves so high a degree of negligence that it merits a sentence of imprisonment (see *eg*, *R v William supra* 534B-E; *S v Naidoo* 1962 1 PH O16 (N); *S v Pelson supra*; *S v Maxton* 1963 1 PH O3 (T); *S v Shupika* 1973 2 SA 471 (RA); *S v Edley supra*; and *S v Mhlongo supra*), as a rule the same sentence should not be passed as when the accused's conduct has resulted in a loss of life (Cooper 526; see *S v Naidoo supra*; see too *R v Barnardo* 1960 3 SA 552 (A) 557D-E; *S v Ngcobo* (1962) *supra* 337A-B; the absence of injury or damage caused may be relevant to sentence – see *S v Mbambo* 1969 1 PH H(S) 53 (N)).

A period of imprisonment suspended on condition, *inter alia*, that the accused is not convicted of driving recklessly or negligently during a specified period may operate unduly harshly because section 63(1) covers a wide range of culpable conduct and should the accused be convicted of a contravention involving a minor degree of negligence he would be liable to undergo a period of imprisonment (*S v Clark supra*; *S v Skobele* 1975 1 SA 633 (T) 634A; and Cooper 526). In order to avoid such a situation, such a condition should be restricted to a conviction of driving recklessly during the specified period of time (*S v Smith supra*; and see too *S v Van Zyl supra*, reported in 1969 2 SA 191).

4 Cancellation or suspension of licence

The cancellation or suspension of a driving licence (though perhaps not the endorsement thereof, which may not be intended to serve as a punishment – see *S v Stack supra* 669a-b) serves a dual purpose of protecting the public and punishing the offender (*R v Hickman* 1961 4 SA 457 (SR) 459G-H; *S v Ngcobo* (1962) *supra* 337G-H; *S v Van Rensburg supra* 296E-F; *S v Markman* 1972 3 SA 650 (A) 655F-G; *S v Nkosi supra* 543G: "the withdrawal of his right to drive a heavy vehicle for three years is, in itself, a severe punishment" and 544A-B "[t]he main purpose of suspending or cancelling licences is to keep potentially dangerous drivers off the roads in the interests of other road users"). With regard to the latter factor, where the accused was merely thoughtless (and thus negligent), as opposed to reckless, the suspension of her driving licence may not be appropriate (*S v Bera supra* 414E-G; *S v Markman supra* 656D-E; and see also *S v Nagy* 1972 1 PH H45 (N)). On the other hand, where the accused has been found to have acted recklessly (such as in driving a vehicle on a busy street in heavy traffic while aware that the vehicle's brakes were faulty (see *S v Nqwata supra*), or

causing a collision from which the accused absconds whilst driving drunk (see *S v Roux* 1976 2 PH H140 (C)), suspension may be in order. In determining an appropriate sentence for a contravention of section 63(1) the court should take into account the punitive effect of a cancellation or suspension of the driving licence of the accused (*R v Hickman supra*; *S v Van Rensburg supra* 296A; *S v Nkosi supra*; *S v Markman supra* 656A-B; *S v Baloyi* 1978 3 SA 290 (T) 295G-296A; *S v Madliwa supra* 298d-e; *Attorney-General, Venda v Maraga supra* 610f-611b; see also *R v William supra*; and *R v Lefrere supra*). Where the suspension of the driving licence does not involve the accused in real financial hardship such as depriving him of a livelihood, it may be regarded as appropriate (*S v Naidoo supra*; and *R v Chitanda supra*).

In *S v Stack* (*supra* 668b-e), it was held that the magistrate should have given the accused an opportunity to address the court on the endorsement of his licence (see *S v Clark supra*).

It has been held (in *S v Smith* 1980 2 PH H171 (C)) that where the accused is convicted of a contravention of section 63(1) on the basis of his guilty plea alone, in terms of section 112(a) of the Criminal Procedure Act 51 of 1977, the accused's driving licence cannot be suspended.

5 Conclusion

It is to be hoped that the courts will continue to further refine the principles discussed above, taking into account all relevant factors. On the one hand, as indicated in the *Stack* case (*supra*), even the best drivers may on occasion be guilty of inadvertence. Given that even the slightest degree of negligence (that is, deviation from the fictional norm of the reasonable motorist) can give rise to a conviction for negligent driving (Burchell *Principles of Criminal Law* 3ed (2005) 902), sentences for negligent driving need to be appropriately adjudicated. Smart, Nysschen and Bosman (*Guide to Motor Law* (1994) 101) have remarked in this context that:

> "The reasonable motorist is fast becoming the super-being, with surmounting duties being imposed on the driver in the face of increasing traffic volumes, the advancement of traffic management, technology and the ever-increasing volumes of other road users and pedestrians."

On the other hand, it is incumbent on judicial officers to deal very firmly with reckless driving associated with the intoxicating excitement so brilliantly portrayed in the person of Mr Toad in Grahame's *The Wind in the Willows* (cited by Blom-Cooper and Morris 147):

> "As the familiar sound broke forth, the old passion seized Toad and completely mastered him, body and soul. As if in a dream he found himself, somehow … in the driver's seat … and, as if in a dream, all sense of right and wrong, all fear of obvious consequences, seemed temporarily suspended … he was only conscious that he was Toad once more, Toad at his best and highest, Toad the terror, Toad the traffic queller, the Lord of the lone trail, before whom all must give way or be smitten into nothingness or everlasting

> night. He … sped he knew not whither, fulfilling his instincts, living his hour, reckless of what might come to him."

Whilst in certain cases of unlawful driving justice may demand that the offender should be treated mercifully, the utterly uncaring and irresponsible offender, driving like Mr Toad, should receive the swingeing punishment he so richly deserves.

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg