Negligence

Criminal law has long regarded the reckless law breaker as culpable and deserving of punishment. What constitutes criminal negligence is a total indifference to and disregard for the safety of the public.

The test for establishing Negligence is essentially an objective one. Maltese law, like Scots Law doesn't require that the accused has actually and subjectively realized the risk attendant upon his conduct before it can be categorized as criminally reckless. An individual who has given no thought to a Risk may be Negligent. The argument would be that the very thoughtlessness is blameworthy; the accused really ought to have given thought to the risks.

In a 1960 case in the UK - Miller Denovan Vs H.M. advocates - the two appellants had been convicted of murder in the course of a robbery. The deceased had been struck on the head with a large piece of wood. The intention of the appellants seems to have been to rob, not kill, and they were convicted on the basis of the alternative Mens Rea for murder of Wicked Recklessness.

Lord Justice General Clyde observed "both appellants displayed a callous disregard of whatever injuries they may have done to him. They centred their whole attention upon snatching all they could from his pockets, rolling his body over…. in order to get easier access them. Once their purpose was achieved they fled into the night and left him to his fate." The appellants were so intent upon robbery that they didn't notice the risk of life which their actions had brought about.

Thus, may be said to have been negligent in their acts.

Carrara defined negligence as the "Voluntary failure to take care in estimating the probable and foreseeable consequences of one's acts" In such definitions one can see that the essence of negligence consists in the possibility of foreseeing the event which has not been foreseen. Therefore, negligence lies in the failing to foresee that which is foreseeable.

Here we are referring to the Subjective theory. It is the traditional theory, first propounded by Cormignani and then elaborated by Carrara. According to this theory Negligence is a subjective fact, or in other words, a particular state of mind. It consists in a failure to be alert circumspect or vigilant whereby the true nature circumstances and consequences of a man's acts are prevented from being present in his consciousness.

A man may not foresee at all an actual result which subsequently ensues or he may foresee such a result as possible but hopes to avoid it. According to Carrara there is mere negligence in both hypotheses, provided the act was done amino nocendi. If in the second hypothesis the act was done amino nocendi, the event will be imputable as intentional, in as much as the original wrongful intent extends to the whole transaction but if the act was done with an innocent purpose there is mere negligence in respect of the effect produced because not to foresee that a thing may happen and to foresee that it will not happen amounts to the same thing.

Carrara illustrates this point by the following examples -

- I fired my gun at a wild beast in the thick of the forest. In the background there was a man and I killed him. I had not foreseen at all that the man was there, but if I could have foreseen it then I am guilty of negligence that is the first hypothesis.
- I fired at the beast at a great distance from it. There was a man, I saw him. I made an estimate of the chances, and I foresaw that, in view of the distance between the man and the target, the shot would not kill him. I made a mistaken assessment of the chances and here lies my negligence because it was possible for me- If I had taken greater care to ascertain.

A second theory is termed the Objective theory. According to this Negligence is not a subjective but an objective fact. It is not a particular state of mind, but a particular kind of conduct. It is a breach of duty of taking care, and taking care means to take precautions against the harmful results of one's actions, and to refrain from the unreasonably dangerous kinds of conduct. In this theory the question is whether the event complained of could or could not have been foreseen and avoided is irrelevant.

What is essential and sufficient is that the defendant has been responsible for conduct falling short of standard of care which every man in society is expected to use in his actions.

The very great majority of writers agree that this theory is not acceptable.

If the enquiry into state of mind of the agent is set aside, it becomes in many cases impossible to distinguish between negligent wrong doing and accident on the one hand and between negligent wrong doing and intentional wrong doing on the other hand.

The neglect of needful precautions or the doing of dangerous acts is not necessarily wrongful at all, for it may be due to inevitable mistake or accident. It may have been impossible for the doer to foresee that harmful results could ensue.

We may conclude by saying that the liability by mere negligence arises not where the harmful consequences of one's act have been foreseen, but only where such consequences have not been foreseen although they could have been foreseen

Negligence under our criminal code

The method followed by modern codes is that of refraining from giving any definition of negligence in the general provision and of the creating liability by reason of negligence not in respect of all crimes but only in respect of certain particular crimes expressed specifically. This is also the method adopted by our code

The Law sometimes makes direct use of the single word Negligence.

Example- section 144(2) - (Negligence of functionaries). At other times it uses the 2 words Negligence or imprudence - Section 153. In yet other cases -the most important- responsibility for the crime is incurred on account of imprudence, carelessness, unskillfulness in an art or profession or non-observance of regulations. Example - Section 225 - Involuntary Homicide

The words negligence, imprudence and carelessness are not defined, but it is clear that by them the law means generally the absence of such care and precautions as it was the duty of the defendant to take in the circumstances.

Our provisions dealing with crimes of negligence above outlined are modeled upon the corresponding provision of the Italian Code. Our Criminal code is based on the subject theory; in that the event should have been foreseeable by the ordinary man in the road. Whatever the form the negligence takes, if the ensuing harm was not only unforeseen but also unforeseeable, there cannot be any question of criminal liability in respect of

such harm, saving of course, any liability contracted by reason of the fact itself constituting the negligence (e.g. the non-observance of a regulation). So far as such a fact constitutes an offence known to the law (e.g. driving a car without a license). When we say that the event was absolutely unforeseeable we mean only that it was unforeseeable by the standard of care, which the law requires every man to use in his actions

Standard of Care

Negligence is not a ground of criminal liability except in the cases expressly laid down by law, for crimes are willful wrongs. Mere negligence is deemed an insufficient ground for the rigor of criminal justice. In as much as the carrying of fire arms and the driving of horses or cars - are known to be the occasion of frequent harm. Extreme care and the most scrupulous anxiety ass to the interests of others would prompt a man to abstain from these dangerous forms of actions. Yet it is expedient in the public interest that these activities should go on, the law doesn't insist on any standard of care which would include them, as such within the limits of culpable negligence The amount of prudence or care which the law actually demands is that which is reasonable in the circumstances of the particular case. Thus it has been said negligence is the omitting to do something that a reasonable man would do or doing something that a reasonable man wouldn't do.

Degrees of Negligence

Writers, who found their conception of negligence on the criterion of the foreseeability of the event, distinguish between: -

- Gross Negligence (Cupla Lata) - acts foreseen by all man
- Ordinary Negligence (Culpa Levis) - acts foreseen by the reasonable prudent man
- Slight Negligence (Culpa Levissima) - could not have been foreseen except by the use of some extra ordinary and uncommon care

Their doctrine is that slight negligence is not punishable. Our Criminal Code recognizes only one standard of care and therefore, only one degree of negligence: Culpa Levis

(Ordinary Negligence). Whilst slight negligence (culpa Levissima) is not punishable under our law

According to the modern writers, rather than saying slight negligence is not a ground for liability, one should say that were the harm could not have been foreseen and prevented except by extraordinary and uncommon precautions, there is no negligence at all For what the law requires is the use of reasonable care and no man is negligent merely because he doesn't show more care.

Negligence either exists or it doesn't. If it exists, it is always punishable under our law.

Contributory Negligence

Criminal liability in respect of negligence offences arises where there is an efficient causal connection between the negligence and the event complained of. If the particular negligence imputed to the defendant was not efficient cause of the event, he can't be convicted. It is however no defence that the mischief was caused by the negligence of others as well as of the defendants. If the mischief occurred by negligent act or default of several persons they are all guilty. The fact that other persons besides the defendant were also negligent doesn't avail him because were this not so each negligent party would raise the same defence and no one would be responsible. Similarly contributory negligence on the part of the victim is not a ground of defence. The fact that the deceased was himself negligent and so contributed to the accident or other circumstances by which the death was occasioned, doesn't afford a defense to an indictment for man slaughter. Contributory Negligence on the part of the deceased may perhaps be a ground for a lighter sentence.

Offences of Absolute Liability

The expression absolute liability is used with reference to the offences for which a man is responsible irrespective of the existence of either wrongful intent or negligence. These offences are exceptions to the rule:

'Actus non facit reum nisi mens sit rea'

Criminal liability in all ordinary cases is based upon the existence of mens rea:

for no man should be punished criminally unless he knows that he was doing wrong or might have known it by taking care. But there are exceptions to the rule, these are usually created by Statutory Enactments where:-

1. The penalty incurred is not great (usually not more that a petty fine imposed by a petty tribunal)
2. The damage caused to the public by the offences in comparison with the penalty is very great and were at the same time the offence is such that there would usually be peculiar difficulty in obtaining adequate evidence of the ordinary mens rea.

The following are instances of this exceptional kind of criminal liability:-

- Possessing for sale unsound meat; though without knowing it to be unsound
- Selling an adulterated (to make poorer in quality by adding another substance) article of food, though without knowing it to be adulterated
- Selling intoxicating liquor to a drunken person; though without noticing he was drunk.

In respect of this kind, the doctrine is that a person doing the prohibited act is liable to punishment however innocently he may have acted: no ignorance or mistake of fact can afford any justification or excuse Analogous to but not precisely identical with the above doctrine is the continental and our doctrine of “Contraventions”

Contraventions are, generally speaking, offences of a venial nature liable to small punishments and triable by a court of Magistrates. Unlike Crimes, in the case of Contraventions, evidence of wrongful intent is not as a rule necessary. With a few exceptions for example Section 338 (f) of our criminal code which requires a particular intent as an ingredient. As it is committed by a person who with intent to mislead the authorities produces to them genuine documents falsely attributing the same to himself or to others. And just as evidence of a wrongful intent is not as a rule needed, so likewise it is not necessary to prove negligence on the part of the defendant. But this rule also is subject to exceptions, for sometimes negligence is made by the law a constituent part of the contravention.

Example: - the contravention committed by a person who through carelessness or want of due attention throws water or dirt upon another person (Section 339(f))

This doctrine, as has already been said, has often been applied in local judicial precedent.

In the case - Police V. C. Gauci (criminal appeal 4th November 1936), Mr. Justice Harding said: “the doctrine now generally accepted is that liability for a contravention is incurred if only the fact in contravention is voluntary. It is sufficient that the accused was the voluntary efficient cause of such fact, and it isn’t necessary to show that he knew that the fact itself was unlawful. If the accused voluntarily committed the act then once that act constituted a contravention, he is answerable for it in the eye of the law.”

Vicarious Liability

(Third party responsibility in respect of Contraventions.)

Normally and naturally the person who is liable for a wrong is the person who does it. However, both ancient and modern law admit instances of vicarious liability in which one man is made answerable for the acts of another. Criminal responsibility indeed is never vicarious at the present day, except in some systems - in very special circumstances and in certain of its less serious forms. Thus in England, there are some statutory offences for which a master is liable although they are committed by his servants without his knowledge. Offences of this kind are frequently created statutes, which for the protection of the public impose regulations upon the sale of food, drugs etc. Thus for example under the licensing act 1910, a publican is held liable for the conduct of his servants if they supply refreshments to a constable on duty; or if they knowingly permit any unlawful game or any gaming to be carried out upon the licensed premises. Because as was said by Grove J, quoted by Kenny:

“If this were not the rule a publican would never be convicted. He would take care always to be out of the way”

Similar to these applications of vicarious liability in English Criminal Law is the Italian doctrine of the responsibility of third parties in contraventions. This doctrine is enshrined in an express provision in our Criminal code. In fact, Section 24 lies down as follows:

"In the case of any contravention committed by a person who is under the authority control or charge of another person not only the person committing the contravention but also such other person shall be liable to punishment"

This provision is identical word for word with Article 60 of the Italian Criminal Code of 1889. It appears clear that no fewer than 3 conditions must be satisfied in order that it may be applied. These Conditions are:

1. That a person committing the contravention be subject to the authority direction or care of another person
2. In the second place it is essential that the contravention be against a provision of law which it was the duty of the person having authority over or the direction or care of the contravener, to see that it was observed
3. Finally, in order that liability may attach to the person having authority over or the direction or care of the contravener, it must be made to appear that the former could have prevented the commission of the contravention by the use of due care

Provisions of our law - extending criminal responsibility to certain persons in respect of offences committed by others include:

Section 35(5) - Offences committed by minors

Section 39 - Offences committed by deaf mutes