ASPECTS OF NEGLIGENCE IN ISRAELI CRIMINAL LAW

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A. Introduction

The Israel Penal Law, 1977, which is deeply rooted in English common law, contained, until recently, very few definitions of basic criminal concepts. Negligence was one of the definitions lacking. The law seldom used this term explicitly when defining specific offenses in the code. The newly enacted General Part of the Criminal Law, as part of its systematic treatment of essential criminal notions, is the first piece of Israeli legislation to cope with this term.

The various aspects of negligence have been developed in Israeli criminal law since the early 50's, mainly through Supreme Court decisions, first and foremost with reference to negligent homicide. This mode of development of law has inherent limitations, since its shaping depends on occurrences of events and the consequent raising of relevant questions of law in the courtroom. However, in the Israeli case, this evolutionary process has not hindered the development of the status and importance of the said mode of fault. Court decisions have established the “structural” position of negligence as an intermediate level between mens rea offenses and strict liability violations. Quantitatively, cases of negligence have turned into a significant group of offenses; throughout the years the courts have classified a considerable number of offenses, in a wide range of topics, into this framework. Moreover, it seems that in the last decade, the status of negligence, as the middle level in the continuum of degrees of fault, has proved to be a convenient answer for courts needing to determine, through interpretation, the degree of fault required by specific offenses for which the legislature did not resolve the question explicitly. In such cases, the courts have often concluded that the balance of the interests of legal policy prohibited, on the one hand, the requirement of higher and stronger demands deriving from the

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classification of the offense as one of mens rea, and on the other hand, prevented the more lenient attitude deriving from its classification as one of strict liability.¹

A comprehensive analysis of the various aspects of negligence and the legal issues involved, is beyond the scope of this paper. I have chosen to briefly discuss four points and touch upon some of the issues raised during the development of this topic in Israeli law. Each one of these issues adds to the understanding of negligence from its particular angle.

B. The Concept of Negligence

Already, during the early 50's, the Supreme Court determined that criminal negligence has three aspects: conceptual-qualitative; physical-behavioral; and tortious. Unfortunately, the frequent preoccupation of the judiciary with the third aspect may have given the impression that these three aspects were three independent forms of negligence. For example, in cases of involuntary manslaughter, the practice of the courts to focus solely on the components of civil negligence as the basis for the offense, emphasizing the element of physical deviation, increased the sense of dissociation among the three aspects. This dissociation also found expression in the legal literature.² However, it is questionable whether such a presentation of the issue is fully accurate in view of the close array of connections which binds the three aspects in cases of offenses of criminal negligence.³ These connections emphasize each aspect's reference to, and examination of, the same substance from different angles.⁴

Negligence's structural significance derives from its conceptual-qualitative aspect. This is the aspect that many scholars allege provides the

³ And contrary to the condition with regard to mens rea offenses.
only true meaning of criminal negligence. It classifies negligence within the framework of the regular degrees of criminal fault and positions it relative to the other established terms of fault (culpability). This central aspect focuses on the examination of the defendant's mental state and emphasizes either the defendant's lack of awareness of the possible existence of a circumstantial element of the offense, or his variance from a "reasonable man's" foresight of the possible future realization of a result constituting an element of the offense. This traditional aspect is the basis for the definition of negligence in the new section 21 of the code. Under the circumstances, the gap between the defendant's mental state and that of the model to which the law compares him is absolute and polar. Therefore, it is impossible to grade or measure levels, within this aspect of negligence, between the defendant's cognitive and emotional lapses, on the one hand, and the presumed awareness and foresight of the reasonable person under the same circumstances, on the other hand.

The physical-behavioral aspect focuses on the external facet of negligence. It examines the defendant's overt behavior, and defines as negligence the deviation in his act or omission from the reasonable modes of behavior expected in the given situation. Negligence, in this sense, is the involvement in a conduct in which a reasonable person would not become involved, under the same circumstances, at least not without taking some precautionary measures. The emphasis on the external behavioral expression of the deviation in terms of actus reus, grants this aspect of negligence a quantitative dimension, enabling the measurement of the gap between the defendant's behavior and that of the model of normative conduct in terms of slight, regular or gross negligence. The degree of deviation is determined by factors including

6 Sections 20-22 of the Penal Law, 1977, which are part of the newly enacted General Part of the Israeli Criminal Code underline this structure.
the nature of the risk (e.g. death, injury, damage to property),\(^9\) and probability and the possibilities and costs of precautionary measures that could have been taken to prevent the danger.\(^10\)

The immediate connection between the two mentioned aspects is evident. Even though a deviation from acceptable behavior could have derived, in principle, from any possible mental state (intention, recklessness etc.), it was the negligent offender's lack of foresight under the circumstances of the consequences of a certain act or omission (the conceptual facet) that resulted in the physical conduct that constituted the deviation from the norm (the behavioral facet).\(^11\)

As previously stated, the third aspect of negligence developed by the Judiciary evolved from the law of torts\(^12\) and has since been applied, first and foremost, to the offense of involuntary manslaughter. In Israeli criminal law this offense deals with death causing that does not derive from a \textit{mens rea} and constitutes a residual case. The requirement of this aspect is simply breach of a care-taking duty that causes death.\(^13\)

This third aspect is but a particular instance of the combination of the first and second aspects. Conduct breaching the reasonable duty of

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\(^9\) Negligence offenses are typically limited to the most serious kinds of danger and protect the most important social values. This is due to the heavy burden that these offenses place on the potential perpetrator relative to the burden placed by \textit{mens rea} offenses. See Kremnitzer, \textit{supra} n. 2, at 73.


\(^12\) For a thorough analysis of the civil tort of Negligence, see Porat, "The Tort of Negligence in the Rulings of the Israeli Supreme Court — A Theoretic Perspective" (forthcoming in the \textit{Israeli Law Yearbook} 1994-1995, ed. by Prof. Rozen-Zvi); Gilad, "On the Elements of the Tort of Negligence in Israeli Tort Law" (1989) 14 \textit{Iyunei Mishpat} 319. Some writers, however, stress the differences between negligence in tort law and in criminal law. See Kremnitzer, \textit{supra} n. 2, at 74-76; Gur-Arye, \textit{supra} n. 10, at 262-263.

\(^13\) These requirements were established in the early 50's. See e.g., \textit{Rotenshtrych v. A.G.} (1953) 7 \textit{P.D.} 58. Though the definition of this offense, in sec. 304 of the Penal Law, 1977, has been recently modified, it seems that its basic structure remained untouched.
care is no less than the physical behavioral aspect of negligence.\textsuperscript{14} Such conduct is also a deviation from the reasonable norm of behavior and an external expression of the unawareness and lack of foresight expressed in the conceptual aspect.\textsuperscript{15} This illustrates the relationships, interactions and feedbacks between the three aspects of negligence. On the other hand, the civil tort-law aspect of negligence has its own unique characteristics. Not only is it limited to negligence cases terminating in fatal injuries, but the civil-tort-law duty of care toward a victim is a prerequisite to the examination of the deviant behavior. Hence, it is possible to have situations in which the apparently negligent act or omission might not constitute grounds for imposing responsibility, since the perpetrator did not owe the deadly injured victim a duty of care within the tort law realm (e.g., the death of a trespasser intending to commit a crime caused by a landlord).\textsuperscript{16}

C. The Model For Comparison

The determination of a norm or model for comparison is the most basic requirement in negligence, as it is only the deviation from such norm, due to unawareness and lack of foresight which constitutes negligence. The models for comparison in Israeli criminal law have always been those of the “reasonable man”, “reasonableness” and “reasonable” or “objective” foresight. However, the interpretation of these terms by the Supreme Court has changed significantly.

Two principal approaches exist, each derived from different starting points. The objective approach wishes to turn reasonableness and objective foresight into an instrument that should set down desired modes of behavior. It essentially focuses on the general good, and as an outcome, leans toward general, uniform and even somewhat strict determinations, sometimes designed to raise the standard of require-

\textsuperscript{14} For a different view, distinguishing between negligent behavior as a physical elements, on the one hand, and breach of a duty of care, on the other hand, see Porat, \textit{supra} n. 12, at 16 \textit{et seq}.

\textsuperscript{15} Note, however, that this criminal law interpretation to the civil tort of negligence is not necessarily in accord with the elements of the civil action. In particular, the tort of negligence conceptually captures also acts or omissions based on subjective \textit{mens rea}. See e.g., Kremnitzer, \textit{supra} n. 2, at 77; Gur-Arye, \textit{supra} n. 10, at 261.

\textsuperscript{16} Sec. 17 of the Civil Wrongs Ordinance (New Version) 1968 (2 L.S.I.[N.V.] 5).
ments relative to commonly used norms. The other, more subjective, approach centers on the individual defendant, and is based on flexibility, and on consideration of, and adjustment to, the individual's needs and capacities.

Originally, the term reasonableness served to characterize a wide objective criterion of an average ordinary person's scope of foresight and behavior in a given set of circumstances. Thus, in England, over half a century ago, the "reasonable person" was described as the "man in the street" or the "person using public transportation." A distinguished judge at that time added that no one should expect the reasonable person to have the agility of an acrobat nor the vision of a Hebrew prophet. When the Israeli Supreme Court analyzed this term with regard to provocation in accusations of murder with malice aforethought, the idea was expressed that the "reasonable person" is a regular Israeli, with all his typical virtues, disadvantages, characteristics and customs. The courts specifically rejected a model based upon an ideal and unrealistic person, that scholars had envisioned and described in their imagination.

Much has been written on the major difficulties in determining the qualities of reasonableness and their accumulation into a single or even several models. In Israel, however, additional obstacles were added to these well known inherent difficulties. The new obstacles arose from the character of Israel as a state recently established by immigrants from more than one hundred states and cultures, carrying with them a wide range of concepts, beliefs and modes of observation and conduct. Israel is far from having shaped a cultural character and typical way of life. These circumstances add an additional layer of doubt to the possibility of drawing a current and realistic "reasonableness" model or models.

Gradually, a different trend, one which should not be totally dissociated from the activist school of thought in the Israeli Supreme Court,

17 See, for example, Hall v. Brooklands Auto Racing Club (1933) 1 K.B. 205, 224.
started to gain momentum. The courts ceased to refer to the reasonable person as a common individual and to reasonableness in general as a copy of reality, and began subjecting the term to judicial evaluation and turned it into an instrument for the judicial determination of appropriate public policy. Reasonableness ceased to be measured on the basis of the estimated qualities and characteristics of an average person. Instead, in many cases the question was determined based on the general perception of the judges, their experience and their perspective of the appropriate demands of society upon a careful person in a given situation. Furthermore, the term “reasonableness” became an instrument for expressing views on proper legal policy with regard to a desired degree of caution in society. Judges did so, conscious that their required behavioral norms, which they defined as reasonable, were often higher than those applied by an average person.

Thus, the Supreme Court firmly rejected a defendant’s attempt to plea a reasonableness based upon testimony of average citizens that, like him, they could not have foreseen a certain dangerous result. In another case, the Supreme Court clearly declared that “it often happens, especially within the range of workplace safety regulations, that all those occupied in a certain activity testify that everyone in the said field behaves in a certain manner. Nevertheless, the court requires higher norms. It is the duty and obligation of the court to determine reasonable norms of behavior.”

The Supreme Court has been cautious in using its creation as a device to direct legal policy, and has not set extremely high standards of care, far removed from ordinary existing modes of behavior. The Court has been keenly aware that a judicial decision removed too far from practical life might turn into a dead letter in the law books. It


23 Avnat v. The State of Israel (1992) 46(i) P.D. 1, at 6 et seq. See also Endel v. The State of Israel (1991) 45(v) P.D. 276, at 288 et seq.


26 Tzur v. The State of Israel, supra n. 22, at 631.
seems that the justices comprehended the threat to the status of the
court system stemming from possible detachment from the public's
manner of life. Thus, the Supreme Court's policy decision to establish
new norms of caution was effected only in instances in which the justices
felt that the transformation was not just desirable but also possible,
without exercising extraordinary effort. Usually, each decision to do so
was a function of the importance of the value the courts wished to
protect, the probability of its endangerment, and the availability, com-
fort and cost of the recommended measures of caution.

The innovative terminology in section 21 of the new General Part,
i.e. מניין הרחב (man in the street) indicates that its authors prefer
to use the ordinary-average criterion as a basis for determining rea-
sonableness, although this is not an inevitable interpretation. How
will the court system interpret this measuring stick? Will they give up
the social-political power of actively shaping norms of behavior? There
are good reasons to doubt it.

D. Legal Standards and Negligence

In many areas, the provisions of the law explicitly determine stand-
ards of behavior and specify, often in great detail, the required modes
of conduct. Workplace safety regulations, traffic regulations, nuisance
prevention provisions, health regulations, animal disease regulations,
weights and measures provisions — all are samples of a great variety
of standards enacted by the legislature. Each one of these standards
reflects a chosen balance of interests.

In this regard, a question arises as to the relationship between
explicit legislative standards of care and the criterion of reasonableness,
the deviation from which constitutes negligence. Obviously, not main-
taining a specific standards imposed by the legislature is a reason for
imposing criminal liability in cases where this act or omission forms an
independent and separate negligence offense (e.g., driving without lights
or proper brakes, failing to fence off a dangerous piece of machinery).
However, is there a more comprehensive relationship, consisting of,

27 It is worth mentioning, that this term has been adopted by the Supreme Court in
Azuales v. The State of Israel, supra n. 19, with regard to the objective facet of the
term provocation.
necessary and sufficient conditions, between these explicit standards and the requirements of foresight and reasonableness in other negligence offenses?

This issue has two aspects: first, does maintaining the standard and applying the measures of precaution specified in the law assure, in every case, that the conduct performed is not negligent? and second, does failure to maintain one of the standards and not applying the measures stated in the law necessarily lead to the conclusion that the behavior was negligent?

It seems that both conclusions are negative. The legal standard imposes a comprehensive criterion which seeks to fit itself generally to all possible situations, while objective foresight and reasonableness are always anchored in concrete reality. Negligence by its nature is a context-dependent concept, and has no significance unless it specifies with regard to what, and under which circumstances, it applies.

Maintenance of all the legal standards and the preservation of all the precautionary measures mentioned in them usually does prevent conduct from being viewed as negligent. Indeed, adherence to the legal provisions ensures the maintenance of the criteria of reasonableness and foresight, namely assures lack of negligence, with regard to vast generalizations and common risks in their regular configuration. Therefore, a manufacturer will not be held criminally negligent with regard to a damaged product that turned out to be harmful, if the manufacturing process and its control mechanisms met the requirements specified by law. Similarly, a contractor might protect himself from being accused of negligence following the collapse, for unclear reasons, of a scaffold, if he had obeyed construction regulations. In each case the defendant fulfilled the level of reasonable foresight embodied in the regulations, and the unfortunate occurrences exceeded this range of expectations.

However, it is clear that reasonableness and objective foresight are measures which are sensitive to the circumstances of an event. Changes in circumstances change the equation of regular foresight, with the result that mere maintenance of the general standard does not suffice. Thus, for example, driving, even within the permitted speed limit, will be considered negligent if performed on a crowded street lacking sidewalks; installing a scaffold according to the legal specifications might be negligent after a rainstorm had strongly affected the ground's stability.

The converse situation has an identical result: though failure to meet the requirements of a legislative standard might constitute an inde-
dependent offense, it need not necessarily constitute negligence. As above, the determination will depend on the context. Leaving a car with the keys in the ignition constitutes an independent traffic violation. However, whether it constitutes a separate negligence offense, may hinge upon examination of the circumstances, whether it was within fenced private premises or on a street where kids might be playing. Even driving above the speed limit should be viewed differently if done on a remote road, where there is little traffic, as opposed to a busy street in a residential area.

One might even suggest that in certain cases and in the right context, the requirements of causation and the criteria for negligence should not be disassociated. The sensitivity of the negligence criteria and its strong dependence on the circumstances also extends to the examination of causation. For instance, saying that a person was negligent for having failed to keep the required distance behind another vehicle and colliding with it means not only that the result was reasonable and objectively foreseeable, but also that the collision was due to the failure to maintain the distance standard.

E. The Capacity to Maintain the Model Requirements

Another central issue in negligence offenses is the defendant’s ability to measure up to the requirements specified by the model. Criminal law has always been aware of the difficulty that might arise from the setting up a uniform and arbitrary criteria for reasonableness and foresight. It is the recognition of this difficulty that lies behind the view that these criteria must form a flexible multi-faceted model, which gives circumstances their proper weight. In other words, Criminal law acknowledges that it deals with a set of reasonable persons and not with

28 E.g., involuntary manslaughter as a result of unpermitted use of the said car.
29 See in this connection the tort law case Agbarya v. HaMeiri (1972) 26(i) P.D. 743, at 750.
31 In other scenarios, however, the two elements — negligence and causation — should be distinguished, e.g., had the cause of the said accident been a sudden brake failure that would not have permitted a safe full stop even had the distance standard been maintained, then lack of causation would prevent the conviction of the driver, though his conduct would still be defined as negligent.
a single precise standard that serves as a basis for determining everyone's degree of negligence.

Various expressions in English case law indicate that consideration of a defendant's relevant and significant physical and mental limitations has often shaped a court's determination of whether the defendant acted reasonably. In principle, a blind person's degree of negligence in a situation where vision is relevant will be determined by comparing it to the level of reasonable caution required from such a handicapped person. This may result in finding a defendant not guilty, even though identical conduct performed by a seeing person might be declared gross negligence. Likewise, an identical laboratory mistake committed both by an experienced scientist and by his new trainee may be ruled negligent for the former and not negligent for the latter. The experienced scientist might suffer from being compared to the standard of the reasonable professional in his field, while the new trainee might benefit from being compared to the standard of a reasonable person not expert in the said field.

Naturally, the example case of the new trainee presumes that the court would determine that, under the circumstances, one of limited professional qualifications should not be considered negligent merely for performing the laboratory activity in the course of which the mistake occurred. The court might conclude that a reasonable new trainee would not have performed such activity at all, out of awareness of his limitations and the activity's inherent danger.

There are a number of opinions regarding which of the defendant's qualities should be taken into account when forming a suitable reasonable person model, and whether it is proper for such model to reflect less evident characteristics which, nevertheless, have some significance under the circumstances.


33 Weingarten v. The State of Israel (1978) 32(ii) P.D. 29; Smith and Hogan, supra n. 1, at 92-93.

34 Arutz and Lupo v. The State of Israel (1980) 34(i) P.D. 679. See also Kremnitzer, supra n. 2, at 91-92.

In this regard, special attention should be given to the trend suggesting greater consideration of the personal qualities of the defendant. This view blurs the borderline between the objective, general measure and analysis of the event, on the one hand, and the subjective examination of the event from the perpetrator's personal perspective, on the other. It shifts the emphasis from the objective approach in favour of the more subjective one. Expression of this can be found in German law. In its extreme form, it would define negligence as the unfulfillment of imposed duties that the defendant was capable of carrying out, i.e., whether, under the circumstances, the particular defendant exhausted his potential capacity of understanding and performance.

This approach has the advantage of better conforming to the principle of culpability. It does so because it bases its justification for imposing responsibility on the defendant's failure to exert himself to his potential to maintain the standard. In this way, it colors the judgment with a personal, subjective tone. The approach also better serves deterrence: the objective model, which would place liability upon an individual who exhausted his subjective physical and mental powers, so undermines criminal law's objective to direct the behavior of its subjects.

36 See Hart, supra n. 10, at 152 et seq.; Brady, "Punishment for Negligence: A Reply to Professor Hall" (1972) 22 Buffalo L.R. 107, at 113-115. See also Husak, supra n. 32, at 132-136; Fletcher, "The Theory of Criminal Negligence" (1971) 119 U. Pa. L.R. 401, at 426; Levy and Lederman, supra n. 4, at 517 et seq.

37 For a review of the continental approach see Kremnitzer, supra n. 2, at 79-80; Fletcher, ibid.

38 Kremnitzer, supra n. 2, at 88 et seq. Kremnitzer further alleges that in light of the new Basic Law: Human Dignity and Liberty it is difficult to accept an objective negligence criterion. See p. 36 in this issue. Prof. Burkhardt also sees the principle of culpability as demanding an individualistic standard (p. 82 in this issue).

Anglo-American courts have rejected the individualistic approach. See State v. Williams 484 P. 2d. 1167 (Washington, 1971); Edgmon v. State 702 P. 2d. 643, 645 (Alaska, 1985). The court here held that individual capabilities would have to be considered in assessing recklessness (necessary in Alaska for a manslaughter conviction) but that "[i]n contrast, peculiarities of a given individual — his or her intelligence, experience, and physical capabilities — are irrelevant in determining criminal negligence [necessary for the lesser negligent homicide offense] since the standard is one of a reasonably prudent person". See also S.H. Kadish, Blame and Punishment (1987) 96-97.

However, "merging the standard of evaluation with the conduct to be evaluated" reduces the deterrence to people suffering from limitations. Under a regime adopting this relatively subjective model, such people might chance an act or omission which they would not otherwise, lest they fail to maintain the requirements of caution and reasonableness (e.g., an elderly person with slow reactions who would avoid driving). Such people might take into consideration the fact that if they do whatever they can, they will not be defined negligent, even though objectively their level of caution is below the reasonable one.

This trend of individualizing the model of reasonableness has been restrained by the development of another approach, supporting the addition of appropriate public policy criteria to the issues of reasonableness and objective foresight in negligence.

It is doubtful whether a general, satisfactory solution to the problem presented can eventually be found. The struggle between the desire to use high standards as instruments of public policy and the necessity to recognize individualization, is an old and general issue in law, encompassing many topics. In the criminal arena, it is expressed in issues such as absolute liability and proper punishment, namely, Kantian ideas of reward versus ideas of deterrence. Ultimately, the length of the blanket remains fixed, and by attempting to cover our head we may end up exposing our feet, and visa versa. One should keep in mind that shaping a desired solution is by itself a question of public policy, and in many cases compromise and balance will be the key words.

In any event, in trying to reach a suitable balancing point, one should consider that one's decision is not disconnected from the issue regarding the extent of negligence offenses in criminal law, with which we started the discussion. He who seeks to shift the balancing point in negligence toward the idea of desired standards as an instrument to achieve appropriate public policy, should be aware that this trend better suits the tendency to somewhat limit the expansion of the category of negligence offenses, especially when it might be at the expense of mens rea offenses. Criminal law cannot afford a bi-dimensional gross deviation from the elementary idea of personal subjective fault, i.e., a deviation

40 Fletcher, supra n. 36, at 426.
41 The validity of this argument depends on the assumption that the engagement in the said activity by itself will not be considered negligence. See Kremnitzer, supra n. 2, at 91-92.
that would be too gross in its quantitative extent and simultaneously too deep and significant in its qualitative content. On the other hand, he who tends to comply with the trend of individualization of criminal negligence might be more lenient in expanding the extent of the category, especially at the expense of strict liability offenses, and sometimes even on account of *mens rea* offenses. This is so because, in such an approach negligence does not constitute an exaggerated deviation from personal liability principles. Some of the qualities forfeited when transferring an offense from the category of *mens rea* to the category of negligence are regained by adding a subjective layer to the core of deviation when defining negligence.

Each of these two basic approaches has its strong points. However, section 21 and the explanatory notes of the new General Part of Criminal Law seems to reflect a clear preference for a factual rather than normative form of standardization of negligence, defining reasonableness as the ordinary person’s standard. The notion of deviation from subjective fault, embodied in this approach, consistently led the lawmakers to strictly limit the category of negligence offenses. Hence, the authors proposed that this group consist solely of offenses in which negligence is explicitly required by the legislature, thus not allowing the courts to interpret additional provisions as negligence offenses.