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Defining and distinguishing 'Criminal' negligence: Evaluating the efforts of the Indian judiciary

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Abstract
Imposing criminal liability for negligence have been subject of great debate in the common law world and the meaning of the same is under dispute. Negligence is made the mental element of several offences described in the Indian Penal Code. The Code lacks a general part and it had been the judiciary that was vested with the task of defining and interpreting the various concepts under it. This research paper enquires into how the concept of negligence had been defined by the Indian Judiciary. It is a critical analysis of judicial pronouncements. It also looks into the difference of negligence in civil and criminal law and how the courts have been trying to reflect this while making decisions. It has been observed that negligence has been defined in terms of lack od proper care and caution. In order to distinguish negligence found and label it as 'criminal', various means have been employed. The resort to a demand for a higher degree of negligence, qualifying the term negligence with gross and requiring moral blameworthiness by asserting on the relevance of the common law doctrine of *mens rea* had been all observed in case laws. This paper reveals that the approach had not been consistent. While it regards the attempt at definition by the judiciary, it condemns the way negligence have been tried to be qualified especially in the absence of a legislative hint to that effect.

Keywords: negligence, gross negligence, *Mens rea*, blameworthiness, Indian judiciary

Introduction
The first attempt at defining the term negligence was made in 1956 in the case of *Blyth v. Brimingham Waterworks Co.* It was described as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do. This is ideally the definition of negligence in tort. The Indian Judiciary while defining criminal negligence has always tried to bring a distinction between civil and criminal negligence. This attempt was basically because it took into account the fact that liability in criminal law involved more serious repercussions and implied a moral blameworthiness. It was not just a matter of compensation between the parties involved. Every crime has its toll on the society at large. As it is known, the Indian Penal Code does not contain a General part defining the various terms it uses to describe the mens rea required for offences. This task had been undertaken by the judiciary as it decided each case obviously taking serious aid from the common law and insights from several other jurisdictions. In course of time a body of literature embedded in case laws have been created, developed and asserted through further case laws. This research article is an enquiry into what is 'criminal negligence' and how is it made distinct from negligence in tort.

Definitions proposed by the Indian Judiciary
Indian courts have always been influenced by the common law judges as the roots of our law run deep into common law principles. The style is well justified when it comes to tort which is largely uncodified and relies on these principles. The trend had been the same even in criminal law administration where the statutes are largely codified. Even in the mid-nineteenth century, there was not much clarity in the English approach to carelessness. There was never a consistent description of the terms negligence and recklessness and they were indistinguishable. Recklessness was often understood as a lack of care. The situation was more muddled with courts leaving the decision on the level of fault required for a conviction in cases of involuntary manslaughter at the discretion of the jury. Many terms like 'criminal', 'complete', 'gross', 'gross and criminal' etc. were used to qualify the negligence required under criminal law to make the jury understand. However, the understanding of negligence could never reach a firm ground.

Meanwhile, the earliest of Indian judgments with a considerable attention on defining the term 'negligence' was delivered back in 1872. In *Reg* v. *Nidamarti Nagabhushanam,* Mr. Justice Holloway explained the meaning of negligence, concurrently differentiating it from the concept of rashness that always teams up with the concept of negligence under the code. It was defined in the following terms. 'Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor

has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection'. The imputability of rashness on the other hand arose from acting despite the consciousness. The definition was reiterated and examined in the case of *Empress* v. *Ketabdi Mundul* by the Calcutta High Court. It said that the imputability in cases of negligence arose from the neglect of the civic duty of circumspection. It said that S.304 A of the Indian Penal Code does not apply to cases where there had been a 'voluntary' commission of an offence.

In 1881, the Allahabad High Court had the opportunity to witness Mr. Justice Straight formulating a definition for the term 'negligence' while discussing it under S.304A of the I.P.C. in *Empress of India* v. *Indu Beg*. This turned out to be the most quoted and reiterated definition of negligence and rashness by the Indian Judiciary. The definition warrants to be elucidated as such: *'*Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances under which the charge has arisen, it was the imperative duty of the accused person to have adopted'.

Let this be examined and fragmented into pieces. First, the definition brings in a new adjective to somehow differentiate criminal negligence from negligence of common parlance. It says that an act or omission constituting criminal negligence should be gross and culpable. Second, it should be the breach of an inalienable duty to take reasonable and proper care. The second part is in essence the same as that contemplated by Mr. Justice Holloway. i.e. the neglect of the civil duty of circumspection. The amount of care and circumspection expected of a reasonable and prudent man will have to be determined in every case. What had been added is the first part qualifying the act of failure or neglect with the term gross and culpable. What these adjectives really mean and how have they altered the fate of acts of negligence in criminal law courts unveiled in the decades that followed. For the sake of being faithful to the sub-heading, that discussion may be postponed to a succeeding section and let the attempts at defining 'negligence' be focused upon.

The difference between negligence under civil law and negligence under criminal law or the employment of various adjectives to negligence had all been in order to immunise some acts from the net of criminal liability when the courts find the accused not morally culpable. In other situations, where the court is free from such moral dilemma, it finds finding and defining negligence a rather easier task. *In Re Ambalal,* the Madras High Court defined negligence as 'the conduct that falls below the standard established for the protection of others against unreasonable risk or harm'. In the same year, the Bombay High Court proposed a simple definition for negligence in *State* v. *Balachandra Waman Pathe.* The court was dealing with a motor accident case where the accused knocked down two girls at a pedestrian crossing and one of them died. It said that 'criminal negligence is neglect to take that precaution which a reasonable and prudent person is expected to take under circumstances pertaining to each case' and the accused was sentenced to six months simple imprisonment. What is peculiar about these definitions is the absence of any epithet qualifying negligence to demarcate the purview of 'criminal' negligence. The requirement of duty to take care is not stressed and all that is there is a reasonable man standard. As per this definition, there is no difference between civil and criminal negligence and negligence has just one simple straight meaning. A similar definition was given by the Hon'ble Supreme court of India in *Mohammed Aynuddin v State of Andhra Pradesh*. It defined 'criminal' negligence as a failure to exercise duty with reasonable care and proper care and precaution against injury to the public generally or any individual in particular. In the immediately preceding definitions, the stress is on failure to take reasonable precautions.

In 2007, the Apex Court used another opportunity to define a negligence act in *Prabhakaran v State of Kerala* where a ten year old boy was run over by a bus driven by the accused and where there was sufficient evidence to show that the accused was over-speeding. Negligence was defined as an act done without doing something which a reasonable man guided by those considerations that ordinarily regulate human conduct would do or act which a reasonable and prudent man would not do. The extent of reasonableness, it was said, depended upon the circumstances of each case. The definition has the same ingredient as discussed above- failure to take reasonable precaution. No epithets were used to qualify negligence and it seems that the judgment understood negligence in the same sense of the word as it existed in civil law. But in the *obiter,* the court had without mentioning the source, restated the definition of negligence proposed in the case of *Empress v Indu Beg* where, as already seen, negligence is qualified by the terms 'gross' and 'culpable'. The court had also reiterated the definition in *Nidamorti Nagabhoosahnam.*

In the same year the Apex court stated in *Rathnashalvan* v. *State of Karnataka* that negligence is a breach of duty imposed by law and added that in criminal cases, the amount and degree are the determining factors. The amount and degree of care would have to be measured by the reasonable man standard. This definition is different from those mentioned above as it narrowed down the nature of duty. The breach should be of a duty imposed by law and not any duty which in the attending circumstances would reasonably fall upon the actor. The content of the duty was not specified however. The duty may be to take care or to take reasonable precaution or to be cautions enough to generate awareness about the possible risks and act accordingly.

From the above discussion, it can be seen that the Indian judiciary have made multiple attempts to define negligence under the I.P.C. But, it must be said that the courts have not been much serious about defining negligence or maintaining a continuous thread in the development of judicial understanding of the concept. Despite this, a common underlying factor that negligence is characterised with in the greatest number of judgments is the failure to take reasonable precaution which was the duty of the defendant to take. Glanville Williams, who also defined negligence in the same lines mentioned negligence as the 'neglect to exercise due

caution where the mind is not actively, but negatively or passively at fault'. It may be safely concluded that the Indian judiciary while deciding on cases of negligence under the Indian Penal Code has mostly defined (or understood) negligence as 'the failure in the duty to take reasonable care and precaution.' It may be noted that though the much-quoted definition by Mr. Justice Straight says the failure must be gross and culpable, these qualifying words are omitted from the definition derived for two reasons. First, these words were unique to the definition proposed by Straight, J. and second, these words have been used by the judiciary largely in differentiating criminal from civil negligence in expressing the difference in degree and not to explain what negligence is as such.

Justice Straight *V* Justice Holloway- Conduct *v* Belief

Let's look at the implications of the definition of negligence thus derived from judicial pronouncements. First, there should be a duty to take care- the duty to take care could be legal or that arising out of the reasonable expectations upon the actor in the specific circumstances. The apex court has once clarified that the breach of duty should be one that is imposed by law. Hence it should be concluded that negligence in criminal law must be understood as a breach of the duty imposed by law and no other. Now, what duty is to be breached? It is said in the definition that the breach should be that of a duty to take reasonable care and precaution. This means that negligence is chiefly understood as an omission. It's not doing something required of the actor. Or, it's doing some act in a way it wouldn't have been done by a reasonable person. When a person, say for instance X, is acting, the question of care and precaution arise in his mind only after realisation of a possible risk. X may act with or without realising the risk involved. In the event of X realising the risk and going forward to act as he pleases without taking any care or precautions shouts indifference and X shall be culpable of rashness. This means that when we are gauging negligence, the question of care and precaution may not lead us in the right direction. The question should be about the failure to perceive the risk involved where it was the duty of the actor to have acquired that awareness. This was the essence of the definition proposed by Mr. Justice Holloway in *Nidamarthy Nagabhushanam* which was later on summarized as the failure of the civic duty of circumspection.

Negligence was defined as acting without the consciousness of risk in the circumstances that show that the actor would have had the consciousness if he had taken the care incumbent upon him. This concept of neglect of the civic duty of circumspection had also been subsequently endorsed several times by the honourable Apex court of India in a number of judgments, though not as much as the definition proposed in *Indu Beg*. It is interesting to note the definition of Negligence proposed by the American Model Penal Code (hereinafter MPC) which also reflects this understanding. As per the MPC, a person is said to act negligently when he 'should' be aware of 'a substantial and unjustifiable' risk that a particular circumstance exists or that a particular result shall occur. Also, the risk must be of such a nature that considering the nature and purpose of his conduct, the actor's failure to perceive it involves a gross deviation from the standard of care of a reasonable person in the actor's situation would observe. The idea that the defendant 'should have been aware of the risk' makes it very much objective. The focus is on the defendant's unjustified unawareness of risk. The code has maintained a strict difference between recklessness and negligence in terms of advertence and inadvertence.

The understanding of negligence as a failure in the duty to be cautious is not alien to Indian Judiciary. The difference between the duty to take precaution and the duty to be cautions is too wide to be left unseen. However, the weight of judicial pronouncements tilts highly in favour of the definition proposed by Mr. Justice Straight. Looking closely at the definitions proposed by Mr. Justice Straight and Mr. Justice Holloway, the difference runs very deep. Consciously or unconsciously, the Indian Judiciary has favoured one of it highly above the other but still not abandoning the other wholly, evidenced by the occasional reiterations. This might be because in India, especially under the Indian Penal Code, it had not been necessary to strictly distinguish between advertence and inadvertence.

The Need to Differentiate Civil and Criminal Liability

Criminal law and civil law each serve different purposes and follow different procedural rules. They provide tools by which the courts as well as the legislators decide upon and analyse their courses of action. The key characteristics of criminal law are its punitive purpose, extremely high procedural barriers to conviction, the stress on blameworthiness and the harsh punishments that can be imposed. On the contrary, civil law is all about compensation and hence focuses more on damage rather than blameworthiness. The sanctions as well as the procedural safeguards guaranteed by civil law are also very low. Hence the differentiation between the causes of action that would trigger a process under criminal law or civil law is also important as the consequence varies in course and result. In *R v Bateman*, manslaughter by negligence was discussed and Lord Hewart C.J. stated how criminal negligence is different from civil negligence. To satisfy the requirement of civil liability it's enough to prove that the defendant owed a duty of care, there was a breach of such duty and it resulted in death. It is enough if it's proved that the defendant's conduct fell short of a reasonable standard. The civil remedy will then depend on the amount of damages done. However, in criminal courts, he said, besides proving the three conditions above stated, the amount and degree of negligence must also be proved. It should be proved to have gone beyond a mere matter of compensation with such blatant disregard for human life and safety that it would amount to a crime against the state deserving punishment.

The intricacy of the distinction between civil and criminal negligence have always been acknowledged and pointed out as the reason why a proper demarcation is impossible. Courts repeatedly stated that it is dependent on the time, place and circumstance of each case. These factors influence the gauging of 'reasonableness' and consequently deciding upon the amount and degree of criminal negligence. The impossibility to predict outcomes with certainty has been acknowledged even by the apex court that once stated in *Martin F.D'Souza v Mohd. Ishfaq* that the outcome shall depend *inter alia*, on the notions of the judge concerned who is hearing the case as well. This is a truth that is widely accepted but seldom acknowledged.

The Stand of Indian judiciary

Understanding the way criminal law defines negligence is not enough to understand the culpability of a negligent act. The Indian Judiciary have made vehement efforts to maintain a distinction between negligence in tort and negligence in criminal law. There seems to be no other term qualified by various epithets and the scope and ambit discussed so much in the court rooms as was done for 'negligence'. The discussion on criminal liability for negligence can never happen without a discourse on the distinction between criminal negligence and civil negligence. This is because each time the courts are pushed to determine the degree of negligence that can be attributed criminal liability, they struggle to determine the boundary between civil and criminal negligence. Various phrases like 'gross negligence', 'negligence of a high degree', 'criminal negligence' etc., in turn form a tautology leaving a student no clue as to understand what and where exactly the difference lies.

A higher degree of negligence, more than which is sufficient to establish civil liability had always been demanded by criminal law. In fact, the judiciary has brought the terminology of 'civil negligence' and 'criminal negligence' in course of its attempt to differentiate between both. In the simplest terms, the difference has been stated as this- tort liability is determined by the damages incurred and criminal liability is determined by 'the amount and degree' of negligence. Negligence is primarily a concept of tort law. Subjectively it could mean a careless state of mind and objectively, a careless conduct. As stated in *Shiv Ram* v.*State*, in our country, the areas of overlap between tortious civil liability and criminal offences is much greater than that in England. This in fact is a challenge when differentiating criminal negligence from civil negligence is attempted.

One of the earliest judgments trying to draw a line of separation between negligence in civil and criminal law was *Ghacko John v Sirkar* written in 1943. Accordingly, criminal negligence must be 'gross' and there must be something more than a mere omission or neglect of duty. The view was influenced by Brett J., who opined that in order to be found culpable, the jury must be satisfied that the offender had a wicked mind in the sense of being reckless or careless irrespective of the result. The Privy Council in 1948, while interpreting negligence under S.222(e) of the Tanganyika Penal Code opined that negligence need not be as grave as required under the English law of manslaughter. Yet, it was said that it should be of a higher degree than the negligence that gives rise to a claim in a civil court.

In 1949 the Allahabad High Court in *Tika Ram* v.*Rex* pointed out two major differences between the two. First, negligence in criminal law should be culpable and gross rather than being the result of just an error of judgment or defect of intelligence. Second, the concept of contributory negligence has no role in criminal law. The idea of difference between civil and criminal negligence has its roots in an array of English authorities. Most of these English cases where ones where the charge was manslaughter. However, a perusal of these authorities shows that the differentiation drawn using words like gross where nothing but an indeterminate reference to provide a leeway to the judge. For example, in *John Williamson's* case it was said that in order to be guilty of negligent manslaughter, the accused should have had the 'grossest ignorance' or the 'most criminal inattention' and that a mere mistake of judgment can invite only a civil remedy. In *Elliot's* case it was said that a person should be found guilty of 'gross' negligence or 'recklessly' negligent conduct and that an intellectual defect or mistake in judgment can only be a subject of civil remedy.

Requiring a Higher Degree of Negligence

It is often said that the difference between civil and criminal negligence lies in the difference in degrees. The concept of degrees of negligence is not something which is commonly accepted without criticism. The courts themselves have on various occasions expressed their reservations on the degrees of negligence. They often regard it as a struggle made by the English judges to somehow covey to the jury in laymen's terms the intricate understanding about criminal negligence. Kenny had been very sceptical about the 'degrees' of negligence. According to him, when inadvertence is a state of mind, it means a complete absence of any particular thought. It is in fact a nullity and that of nullity, there can be no degrees. While this may be true, as Smith and Hogan say, there can be degrees of fault in failing to advert. The more obvious the risk, the greater will be the fault of failing the duty to circumspect. Where the precautions to be taken are simple, the failure to take them is gross.

The court in *Emperor v W.S. Priestly* appreciatively quoted *Andrews Andrews* v. *Director of Public Prosecutions* from the House of Lords which from then on remained a permanent authoritative presence in the native judgments despite of the changes in English jurisprudence and the body of academic literature that came later on. In it, Lord Atkin stated that a simple lack of care such as that contributing a civil liability is not enough for criminal law which require a 'very high degree' of negligence. The epithet he chose to describe it best was 'reckless'. i.e., as per Lord Atkin, a conduct should be recklessly negligent for it to invite criminal liability. The idea was adopted by the courts in India with great approval. It was held that where negligence is an essential ingredient, the negligence established should be 'culpable' or 'gross' and not one simply based on an error of

judgment. The difference in requirement of proof was also highlighted by the court in this case. where a mere preponderance of probability was sufficient in civil proceedings, in criminal proceedings the guilt must be proved beyond all reasonable doubt. The same was said by the Hon'ble Apex court in *Jacob Mathew's* case. It was said that in order to be guilty of criminal negligence, the degree of negligence must be gross or of a very high degree. It may be noted that most English authorities relied on to find the meaning of negligence was written in the context of charges of manslaughter which is a very serious offence and invited grave penalties. In the Indian context, the discussions arise only with offences that are lesser in seriousness and gravity. For the same reason, the higher standard of proof of negligence or rashness required by the English courts cannot be required by the Indian courts.

In 1966, the Madras High Court made an earnest effort to distinguish the degree of criminal negligence. It opined that it was safe to draw an understanding about the 'degree' with the aid of S. 279 of the I.P.C. It should be of the kind that endanger life or cause hurt or injury to any person. The standard of negligence must be such as would be rated as criminal by an 'intelligent and sensitive community'. The questions that that help determine this would be whether there was a 'callous disregard of consequences' or a lack of 'elementary caution' or 'ordinary cicumspection'.

Asserting the Requirement of *Mens Rea.*

The law of tort, as it is known, has little concern about the moral culpability of the defendant. Civil law finds it appropriate enough to impose liability irrespective of moral blameworthiness. All it cares is whether the defendant was negligent and if so, should he bear the loss incurred by the plaintiff out of such negligence. Once the former is established, the later follows unless some doctrines like the doctrine of remoteness or lack of foreseeability etc. goes against fixing liability, or compensation is precluded by some policy reason. In criminal law, the question whether the accused deserves to be punished is always prominent. This prompts the decision makers to search for moral culpability before imposing criminal liability over a person. This is a peculiar aspect of criminal law deeply rooted in its common law origins. Basing criminal responsibility solely on the immorality involved was constantly criticised. The Wolfendon Committee opined that enforcement of morality is not a proper object of the criminal law. Criminal offences have a huge bearing on the society as such. As per the committee the function of the criminal law is 'to preserve public order and decency, to protect the citizens from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others.' The public has an interest in the prevention and prosecution of an offence. As Allen observed, behavior is criminalised 'because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of the society.' Hence, the requirement of a conduct to be morally blameworthy need not always be stressed

There have been attempts to demarcate 'criminal negligence' from 'civil negligence' using the phrase 'mens rea'. For example, in *Dhanji Vallabhdas* v. *State*, a judgment by the Saurashtra High Court, it was said that mere carelessness would not be sufficient to fix liability, which would require the rashness or negligence to be criminal enough. And that required a 'mens rea*'* or guilty mind. It has been held that a 'mere mistake' or 'intellectual defect' is not sufficient to constitute criminal rashness or criminal negligence in India. The courts seems to require an active state of mind that is at fault for both rashness and negligence. How comfortably it sits with the true meaning of the term 'negligence' and it's understanding in general is questionable. Lord Atkin had in *Andrews* v. *DPP* specifically stated that the connotation of mens rea is not of much help to distinguish negligence that is criminal and this view had been quoted with approval in several judgments as already seen.

The Allahabad high Court in 1963 made a detailed discussion on English and Indian positions on the point and made the observation in *Dhanji Vallabhdas* v. *State* that, criminal negligence is one that requires a particular *mens r*ea and that the notion of degrees of negligence won't help much in distinguishing a tort from a criminally culpable wrong. The fact that these qualifying words could have been used by the legislature at will and that they did not do so should also be considered. Mens rea being a well-recognised principle, its requirements can be read into a provision creating a criminal offence and then the courts may proceed to specify what it means with reference to a particular provision. It was opined by M.H. Beg J., that by trying to find this fundamental doctrine in the statutory provision, the true meaning of the provision shall be discovered rather than roaming outside the statute. Lord Atkin's view was also discussed and the court observed that the considerations that influenced Lord Atkin in lying down how criminal negligence should be explained to the jury is not the same in courts of law where a sound and reasonable interpretation of the terms would be enough to serve the purpose. The court stated that criminal negligence or rashness is one that requires a particular 'mens rea*'*. Even the apex court has stated that mens rea is an essential ingredient that cannot be excluded when a charge in a criminal court consists of criminal negligence. The difference between civil and criminal negligence was said to be the presence and absence of mens rea respectively in *Jacob Mathew* v.*State of Punjab.*

A perusal of case laws gives the impression that Indian courts make the strongest stress on the difference between civil and criminal negligence when they find from the facts of the case that the accused doesn't deserve a criminal liability being imposed. In 1962, a case came before the Madras High Court wherein an amateur driver applied accelerator instead of break in a bid to stop his car and in turn crushed two girls against a taxi that was parked on the right side of the road. The court in its decision cites various authorities and reasons the difference that should be maintained between negligence under the civil law and under the tort law. Courts try to bring in the point that to make a person criminally liable, there must be something more than a blameworthy

inadvertence that shall be the matter of tort law alone. The court reiterated that to be criminal, the accused should have shown such disregard to the life and safety of others so as to amount to a crime against the state.

Mens Rea is a phrase that have itself undergone much changes in understanding and relevance. But till now, except for some lone voices of dissent from the judiciary and academia, *mens rea* hold the meaning of a subjective guilty mind in India. Using the tool of mens rea to differentiate culpable negligence from the rest can never be compatible with understanding negligence in criminal law. This is because it can be made legitimate only by understanding negligence as a completely subjective element.

Qualifying Negligence as Gross

The adjective gross has been in use to describe negligence requiring a criminal liability since a long time in common law. Though negligence emerged as a standard for criminal liability in homicide cases during the sixteenth century, the insistence that it should be 'gross' or 'criminal' is a nineteenth century development. What lead to this was an increase in maximum penalties for manslaughter in 1822 whereby someone convicted of manslaughter could be sentenced to transportation for life or for some shorter period, imprisonment with or without hard labor for up to three years or with fine. From then on, attempts have been made to define and understand the 'gross' standard of negligence and explaining it had not been easy. It was said that to be culpable, negligence should be wicked, in the sense that the actor was reckless and careless as to whether death occurred or not. As seen, there was no attempt to draw any distinction between recklessness and gross negligence. Most nineteenth century judges where little concerned with categorising negligence as subjective or objective.

In fact, they were not much bound to fit the concept respecting the strict bifurcation as is stressed by modern academics. Gross negligence was understood and used in two ways- qualitatively and quantitatively. Qualitatively it was understood as 'indifference' and quantitatively it was understood as a 'great departure from expected standard'. In the 1980's the English courts used 'indifference' to define the terms 'recklessness' and 'wilful neglect' more often. It was used in contexts where the accused did not advert to the possible consequences of his conduct. The culpable state of mind was the uncaring attitude towards the victim's interests. Indifference concerned itself with a complex 'affective' state of mind rather than a simple 'cognitive' state of mind. A Duff also understood 'indifference' in the same line. Jeremy Horder opines that understanding gross negligence as indifference would be necessary in cases where there is no set standard to measure the degree of deviation. In cases where the actor had a duty towards the victim and where such duty is governed by settled rules or codes of conduct, the variation from this set standard can be measured. Examples are that of doctors, employers, drivers etc. In other cases like that of parents or people looking after the sick or infirm, the use of indifference as a form of gross negligence shall aid better in the absence of a set standard of conduct.

Studying Indian case-laws gives the impression that negligence, in order to be punishable in Indian courts was often, though not always, required to be gross. 'Gross' was the term used to imply the higher degree that set apart culpable negligence from negligence that invited only civil remedies. The apex court itself has stated that to prove negligence under criminal law, three ingredients should be proved- that there existed a duty, that a breach of such duty occurred and that the breach should be 'gross'. It implies that the defendant's conduct diverged widely from that of a reasonable man. It was considered tenable that whenever a criminal statute used the term negligence, it should be understanding as penalising only criminal or gross negligence. What conduct can be safely categorized as 'grossly negligent' should be understood in order to ensure predictability and certainty in law. It may be easily said that the facts and circumstances in each case determine the grossness of the related negligent act. But it is worth ascertaining if any trend can be deducted from the already decided cases.

As seen in the above sections, it was in *Empress of India v Indu beg* that the epithet first appeared to describe criminal negligence. In the case of *Tika Ram* the accused, a motorist was acquitted as he could not be held to be 'grossly' negligent or 'reckless'. The judgment that quoted *Andrews v D.P.P.* in approval considered 'gross negligence' synonymous to 'recklessly negligent'.

The opinion of the courts as to employing the term 'gross had not been consistent though. *Shiva Ram v State* was a case where the accused was charged under S. 3034A. He had dozed off due to tiredness while driving a truck with defective breaks. Had he taken a break and rested, he could have avoided the accident. In this case, the court appreciatively quoted *Tika Ram* in the context of how negligence was understood and applied in criminal law. But the court had strong opinion against the usage of epithets such as 'gross' to describe negligence. In its view, the omission from the part of the legislature in adding any qualifying word to negligence should be understood as intentional. And for this reason, reading in words like 'grossly' or 'high degree' etc. by the courts is not warranted. It was in tune with the opinion expressed by Kenny that it is unfortunate how negligence often gets adorned with some moral epithets like 'wicked', 'gross', or 'culpable' as it leads to great confusion of thought and principle. But this decision was a class by itself as judicial opinion before and after this judgment remained in favour of using the adjective 'gross'.

In *Jacob Mathew's* case, the apex court was dealing with medical negligence and the judgment became a turning point in the interpretation of 'negligence' under S.304A of the IPC. It also tried to lay to rest the debate that surrounded negligence and whether a bifurcation of the concept as civil and criminal is reasonable. The distinction was said to have been existent from the beginning of the emergence of the concept of negligence. It was said by the court in this case that the word negligence should be read as if it is qualified with the epithet 'gross'. The court in fact read in the word 'gross' into the S.304A of the I. P. C. and added that when a charge in a criminal court consists of criminal negligence, mens rea cannot be excluded. The Apex court in *Martin F.*

D'Souza reiterated the decision in *Jacob Mathew* and also said that to fasten criminal liability in medical negligence cases, it must be proved that the negligence should be gross or should amount to recklessness. Gross negligence was used synonymous to recklessness by the apex court.

A perusal of the case laws leaves the impression that while trying to define negligence and draw its boundaries, not always have the courts stressed on 'grossness' of the act. It seemed that in some cases negligence in the form of failure in the duty to take precaution was sufficient while in others a gross negligence was demanded. Wherever there was an attempt to differentiate between civil and criminal negligence, the term gross came into play. The difference, it was suggested, lies basically in the degree and judgment in each case. Negligence would become gross if it fell short of the 'reasonable standard' by a considerable standard. What would be that considerable standard shall depend upon the facts and circumstances of each case. But as said, not always was this attempt made. This can only mean that not always did the criminal law demanded negligence to be gross. A view in tune with this trend was expressed by Simester and Sullivan who opined that there were two types of negligence in criminal law- ordinary and gross. But it is beyond the judiciary to establish and entertain such a demarcation when the legislature has not indicated any such differences in the provisions that made negligence culpable.

Conclusion and Suggestions.

The Indian Judiciary has in Criminal courts, defined 'negligence' as the failure to take proper care and caution where there is a duty imposed by law. It was defined and mostly understood as a failure of conduct rather than as a failure of belief. The culpability of 'negligence' as per the definition proposed by the Indian Judiciary lies at the observable level of failure to take reasonable standard of care and caution. There is no enquiry directed at ascertaining whether such failure to take care and caution followed from a failure to contemplate the risk or not. The distinction between criminal and civil negligence was stressed in most cases. In tune with almost all the major common law jurisdictions, Indian Courts also strictly held the view that the difference between civil and criminal liability cannot be over looked.

Different tools were put into use to safeguard and explain the difference and there had been no consistent method to express the difference. It is observed that no theoretically fit or logically certain means was adopted for the purpose and hence it becomes hard to justify the tools adopted. The epithets of criminal and gross were put to use in most cases without attempting to explain what exactly they meant. In certain other cases, the stress was made on the requirement of a higher standard. This higher standard may not always be the same as 'gross' negligence. This is because that gross negligence is often explained in terms of recklessness which is presently understood and applied as a subjective state of mind in common law jurisdictions. At other times the requirement of mens rea was demanded. None of these had a consistent meaning and not at all times were these required. Wherever used, 'gross negligence' was interpreted at par with the English concept of 'recklessness'. Negligence of a higher degree, however, may or may not be a subjective fault element.

Wherever mens rea requirement was sought for, an extremely subjective normative fault element was demanded. The question as to how far this concept of moral blameworthiness is ingrained into and given importance in the Indian Penal code is quite interesting. The fact is that the code has given high consideration for the blameworthiness of the offences that it mentioned. It contains very few regulatory offences and almost all the offences mentioned carry a moral fault element within it. We see that there are elements that bring in the consideration of moral blameworthiness of the offender also in the chapter on general exceptions. Justifications come into play when the question of wrongfulness arise after the satisfaction of the requirements of an offence. It speaks about the rightness of an act. On the other hand, excuses exonerate an actor from liability of a wrongful deed. It doesn't say that the act is in any way right.

Regarding the link between culpability and moral blameworthiness Hampton have opined that culpability is based on the choice to defy moral norms. According to her, the grades of immorality depended on the degrees of rebellion, which are indicated by the degrees of Mens rea that served the additional purpose of indicating the severity of offences and the mental attitude accompanying its performance. It establishes the presence of a defiant mind in the form of knowledge, intention, recklessness etc. Here, recklessness include the objective meaning as well, which relate to the acts of those who 'had to know' that their acts could result in harms unintended In fact the inadvertence expressed within 'recklessness' by some scholars like *Hampton* is what the courts in India had been trying to fit into 'negligence'.

The solution lies in doing away with all the epithets, adjectives, qualifications and appellations that are used to distinguish culpable negligence. A satisfactory definition is already in place and it is not much different from the definition of negligence at tort. A strict adherence to the rules of evidence already in place in Criminal Law and the insistence on proving that the negligent act of the accused was the proximate and efficient cause of death would be sufficient to bring liability on those who deserves it. Jurisprudence shall benefit greatly if the need for substantial and procedural consistency in proving criminal negligence is not lost sight of when deciding the cases.

Reference

1. Duff A. Intention, Agency and Criminal Liability, Oxford: Basil Blackwell, 1990.
2. Simester AP, Sullivan GR. Criminal Law Theory and Doctrine, Hart Publishing, Oregon (3rd edn, 2007.
3. Andrews v Director of Public Prosecutions, All. E.R, 1937, 552.

4. Arumugham Pillai v Gnanasoundara Paandian and Ors, A.I.R Mad. 362, 1962.
5. Bala Chandra v State of Maharshtra, A.I.R S.C. 1319, 1968.
6. Blyth v. Brimingham Waterworks Co., 11 Ex. Ch. 781, 1856.
7. Empress of India v Indu Beg, A.W.N. 132, 1881.
8. Empress v Ketabdi Mundul, I.L.R. 4 Cal.764, 1879.
9. Findlay Stark, Culpable Carelessness, Cambridge University Press, UK, 2018.
10. Fletcher G. Rethinking Criminal Law (Boston Toronto: Little, Brown and Co. Chapter 10, 1978.
11. Ghacko John v Sirkar Tr. L. Rule 710, 1943.
12. Glanville Williams, Criminal Law, Stevens & Sons Ltd., London 2nd ed., 1961.
13. H W Smith v Emperor, A.I.R. 196 Cal. 300.
14. J. Hampton, 'Mens Rea' 7 Law and Philosophy,1990:1:19-25.
15. Smith JC, Brian Hogan. Criminal Law,Butterworths, London 7th edn, 1992.
16. Jacob Mathew v State of Punjab, 2005. 6 S.C.C. 1.
17. Jeremy Horder, "Gross Negligence and Criminal Culpability", 47 the University of Toronto Law Journal 4 Autumn, 1997, 495-521.
18. John Oni Akerele v The King, A.I.R, 1943. P.C. 72
19. Smith KJM. Layers, Legislatorsan Theorists: Developments in English Criminal Jurisprudence, Oxford: Clarendon Press, Chs,1998:5:9.
20. Kenneth Mann, "Punitive Civil Sanctions: The Middle-ground Between Criminal and Civil Law", 101 Y.L.J 8, 1992, 1795-1873.
21. Kurban Hussein Mohamedalli Rangawalla v State of Maharashtra, (195) 2 S.C.R. 622.
22. Law Commission, 'A Criminal Code for England and Wales' (Law Com No 177 1989) Vol 1 <https://www.gov.uk/government/publications/the-law-commission-report-on-criminal-code-for-england-and-wales-april-1989> accessed 14 November 2021.
23. Malay Kumar Ganguly v Sukumar Mukherjee, (2009) 9 S.C.C. 221.
24. Martin F.D'Souza v Mohd. Ishfaq, A.I.R. 2009 S.C. 2049
25. Mohammed Aynuddin v State of Andhra Pradesh, A.I.R. 2000 S.C. 2511.
26. Muncipal Corporation of Greater Bombay v Laxman Iyer, (2003) 8 S.C.C. 731.
27. Prabhakaran v State of Kerala, A.I.R. 2007 S.C. 2376.
28. R v Bateman, Cri. L.R. 8 (B) at, 1925, 10.
29. R v Pittwood 19 TLR 37, 1902.
30. R v Williamson, 3 C&P 635, 1807.
31. R. v Elliot, 16 Cox. Cr. C. 710.
32. R. v Holroyd, 2 M&R 339, 1841.
33. R. v Kimber, 77 Cr. App. Rep. 225 (C.A.), 1983.
34. R. v Noakes, 4 F&F 921, 1866.
35. Rathnashalvan v State of Karnataka, A.I.R S.C. 1064, 2007.
36. Reg v Nidamarti Nagabhushanam 7 Mad. H.C. 119, 1872.
37. Rex v John Williamson, 172 E.R. 579, 1807.
38. Riddell v Reid, 4a A.C. at p.31.
39. S.N. Hussain v State of A.P., A.I.R S.C. 685, 1972.
40. Shiva Ram v State, A.I.R Al. 196, 1965.
41. Simester AP et al. Criminal Law Theory And Doctrine, Oxford,Hart publishing (3rd ed., 2007).
42. State Government v Bhawanesh Kumar, A.I.R. M.P. 205, 1958.
43. State of Kerala v Kunhandy, M.L.J. (Cri.) 325, 1961.
44. State v Balachandra Waman Pathe, A.I.R. Bom. 122, 1966.
45. Sushil Ansal and Ors. v State through C.B.I. and Ors., 6 S.C.C. 173, 2014.
46. Syed Akbar v State of Kanataka, 1 S.C.C. 30, 1980.
47. The Wolfendon Committee Report on Homosexual Offences and Prostitution. Cmnd. 247, 1957.
48. Tika Ram v Rex, A.I.R. All. 300, 1950.
49. Turner. J.W. Cecil, Kenny's Outlines of Criminal Law, The Syndics of the Cambridge University Press (19th edn, 1966.