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## NEGLIGENCE IN POLISH AND ENGLISH CRIMINAL LAW

### Abstract

*The author presents in this article the differences in understanding of negligence in Polish and English criminal law. It analyses and discusses the relation between guilt, culpability and negligence in the two legal systems. Criminal responsibility in Polish and English law is based on mens rea, which is defined as an element of crime related to the defendant's state of mind at the time of committing the crime. In English criminal law mens rea means intention, recklessness, negligence, intoxication, and culpability. Nowadays in Polish criminal law the relation between mens rea and culpability is determined by the normative theory of guilt.*

*The first part of this paper contains an outline of the evolution of criminal responsibility for negligent acts in the Polish criminal code and English common law. The second part provides a detailed analysis of the criteria for a negligent act in the two systems. In the last part the author asks an important question: should negligence be punishable? These considerations lead the author to a number of conclusions.*

### Keywords

*negligence – guilt – culpability – criminal code – common law – mens rea – punishment*

### I. AN OUTLINE OF THE EVOLUTION OF CRIMINAL RESPONSIBILITY FOR NEGLIGENT ACTS IN THE POLISH CRIMINAL CODE AND ENGLISH COMMON LAW

Criminal responsibility in Polish and English law is based on mens rea, which is defined as an element of crime related to the defendant's state of mind at the time of committing the crime<sup>1</sup>. In English criminal law *mens*

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<sup>1</sup> J. Herring, *Criminal Law. Text, Cases and Materials*, Oxford 2004, p. 140.

*rea* means intention, recklessness, negligence, intoxication, and culpability. It can be stated that this term concerns the subjective element of a crime, guilt, and the excuse of intoxication, which makes a criminal act inculpable.

Nowadays in Polish criminal law the relation between *mens rea* and culpability is determined by the normative theory of guilt<sup>2</sup>. According to that theory, *mens rea* and guilt (guilty mind) should be distinguished. As *mens rea* means intention, recklessness, and negligence and it is expressed in a statute, guilty mind means that the defendant's act is inexcusable (although it has been committed with intention, recklessly or negligently) and it is not defined by law. In the other words, committing a criminal act with intention, recklessness, or negligence is not sufficient to impute criminal liability as it may be inculpable. Although there is no definition of guilt in Polish criminal law, it is certain that it is determined by the actor's age, his sanity at the time of the crime, and the question of whether a reasonable man would have done the same as the actor did if he found himself in the same circumstances (ordinary circumstances). In this context intention, recklessness, and negligence have nothing to do with culpability because they determine committing a criminal act, not the defendant's guilt. That is why committing a criminal act is not sufficient for criminal liability.

The problem of negligence is that it is hardly possible to distinguish *mens rea* and guilt here. In modern Polish criminal law, a criminal act committed with negligence has always been a crime although the definition of negligence changed during the course of history. In the criminal code of 1932 (section 14) it was defined as an act in which an actor did not consider the possible result of committing the criminal act although he could or should have considered it.

This definition was criticised in the literature for a few reasons. First of all, it was argued that there was no sound reason for limiting criminal

<sup>2</sup> About the definition of guilt in Polish criminal doctrine see e.g. K. Buchała, *Wina – wina nieumyślna [Guilt – Unintentional Guilt]*, ZNUJ-Prace Prawnicze [ZNUJ Legal Papers] 1977, p. 74; G. Rejman, *Teorie i formy winy w prawie karnym [Theories and Forms of Guilt in Criminal Law]*, Warszawa 1980, p. 146 et seq.; A. Wąsek, *Ewolucja prawnokarnego pojęcia winy w powojennej Polsce [Evolution of Interpretation of Guilt in Polish Post-war Criminal Law]*, Przegląd Prawa Karnego [Criminal Law Review] 1990, p. 5; A. Zoll, [in:] *Kodeks karny. Komentarz. Część ogólna. Komentarz do art. 1-116 [Criminal Code. Commentary. General part. Commentary to Articles 1-116]*, Warszawa 2012, pp. 78-81; T. Kaczmarek, *Spory wokół pojęcia winy w prawie karnym [Disputes Concerning a Notion of Guilt in Criminal Law]*, [in:] *Rozważania o przestępstwie i karze. Wybór prac z okresu 40-lecia naukowej twórczości [Reflections on Crime and Punishment. Selection of Publications from 40-years of Academic Work]*, Warszawa 2006, pp. 267-273; A. Marek, *Ujęcie winy w prawie karnym jako problem kodyfikacyjny [Guilt in Criminal Law as a Codification Problem]*, [in:] *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci prof. A. Wąska [About the Theory and Practice of Criminal Law. Volume in Honour of Prof. A. Wąsek]*, Lublin 2005.

responsibility for negligent acts only to crimes with a certain result. Such a definition excluded criminal liability for a negligent crime, in which a certain result was legally indifferent. Secondly, it is worth stating, that according to section 14 of the criminal code of Poland of 1932, a person acted negligently if according to law he or she should have predicted the possibility of causing a criminal result although he or she had no individual ability to foresee it. Furthermore, the actor was criminally responsible for a negligent act if according to law he was not obliged to predict the possibility of committing a crime, but at the time of the act he had the individual capacity to foresee it. It could lead to the unacceptable conclusion that such an actor could be criminally responsible even though no regulation obliged him to predict the negative results of his act<sup>3</sup>. It was argued that an actor could be liable for a result caused negligently only when he or she was obliged by law to predict a certain risk of committing a crime and had the individual ability to foresee it at the time of the criminal act<sup>4</sup>. In the Polish literature there were attempts to eliminate this inappropriate regulation by narrowing the interpretation of section 14 of the Polish Criminal Code of 1932. It was emphasised that it was a case of when an actor was obliged by law to foresee some risks and had the individual ability to predict them<sup>5</sup>. Such perception of negligence was acceptable because it rationally limited criminal responsibility for a negligent act in comparison with the definition of negligence in the criminal code of 1932. This interpretation was also made in favour of a defendant.

Unquestionably during the debate over the new criminal code it was emphasised that negligence must be defined in a way which would prevent potential interpretation problems as mentioned above. According to section 7 § 2 of the Criminal Code of 1969, an actor was criminally responsible for a negligent act if he did not predict the risk of committing a crime although by law he was obliged to predict it and had the individual ability to foresee it. This definition of a negligent act avoided the inaccuracy of the similar definition in the Polish Criminal Code of 1932. To make an actor criminally liable for a negligent act it was necessary to state whether there was any regulation which obliged him to predict the crime risk and whether his state of mind and character allowed him to foresee the crime.

<sup>3</sup> W. Wolter, *Z rozważań nad nieumyślnością* [Reflections Concerning Unintentionality], *Państwo i Prawo* [State and Law] 1962, vol. 5-6, p. 801; H. Popławski, *Niedbalstwo jako postać winy nieumyślnej* [Negligence as a Unintentional Guilt], *Palestra* [The Bar] 1962, vol. 10, p. 50.

<sup>4</sup> S. Pławski, *Przyczynek do zagadnienia winy w polskim prawie karnym* [Contribution to the Issue of Guilt in Polish Criminal Law], *Wojskowy Przegląd Prawniczy* [Military Law Overview] 1956, no. 4, p. 375.

<sup>5</sup> Wolter, supra note 3, p. 802 and the authors mentioned in that article.

Both precautions must have been fulfilled contrary to the regulation in the Criminal code of 1932. In the literature it was stated that the individual characteristics of an actor had to be taken into consideration before giving an opinion as to whether he or she was able to predict the risk of crime or he or she ought to have predicted it.

Such regulation was criticised by those who were in favour of a normative doctrine of guilt according to which guilt existed when an actor committed an inexcusable act even though it had nothing to do with *mens rea* (intention, recklessness and negligence). It was emphasised that *mens rea* is a substantial element of a criminal act defined in a statute, but it is not sufficient to sentence an actor; it was not equated to guilt. In other words intention, recklessness, and negligence must be described in a statute. It is not sufficient to state that an actor committed an act with intention, recklessly, or negligently. The other condition of his criminal responsibility was guilt, which was not defined in the statute. In order to distinguish properly intention, recklessness, and negligence from guilt, the regulation concerning *mens rea* and guilt was divided in the Polish Criminal Code of 1997. In section 1 § 3 it is stated that there is no crime if there is no guilty mind. In section 9 § 1-2 of the code there is an explanation of what an intentional, reckless, and negligent criminal act is. According to section 9 § 2 of the Criminal Code of 1997, a negligent act must have been committed when the action was taken without intention, the act is a result of the breach of safety rules (not necessarily codified in a statute) which apply in a certain situation, and the actor could have predicted the criminal act.

Traditionally in English criminal law it is obvious that criminal responsibility is dependent on *actus reus* and *mens rea* according to the Latin maxim: *actus non facit reum nisi mens sit rea* (an act cannot lead to criminal liability unless the actor's mind is guilty)<sup>6</sup>. In modern criminal law *actus reus* is called the conduct element of crime, and *mens rea* is called the fault element of crime<sup>7</sup>. In other words, committing a criminal act is not sufficient to impose criminal responsibility.

Just as in Polish criminal law, there are two types of *actus reus* (which is a certain act committed by the defendant) concerning the question of whether it creates a result or not. First of all, it is a conduct crime in which

<sup>6</sup> Although see C.M.V. Clarkson, *Understanding Criminal Law*, London 2001, pp. 15-20 who shows that this distinction becomes more and more confusing and inappropriate.

<sup>7</sup> A. Ashworth, *Principles of Criminal Law*, Oxford 1999, p. 98.

the mere act means *actus reus* regardless of the results which may come out of it. Secondly, there are result crimes where the lack of result may lead only to the responsibility for the attempt<sup>8</sup>.

*Actus reus* must go with *mens rea*, which is a “blameworthy or culpable state of mind”. Both these elements of a crime must coincide in time<sup>9</sup>. It must be stated that the types of *mens rea* are intention, recklessness, and negligence. As shown above, in English criminal law the blameworthy or culpable mind means *mens rea* (intention, recklessness, and negligence). In other words, intention, recklessness, and negligence mean culpability. This solution is based on the psychological theory of guilt which expresses culpability and blameworthiness only in the actor’s state of mind at the time of the criminal act. This theory has been rejected in Polish criminal law, which – respecting the German doctrine of guilt – distinguishes between the defendant’s state of mind (intention, recklessness, and negligence) and guilt. For example, if two men were hanging on a rope over an abyss, and the one who was above cut the line below because the line higher up was breaking, he intended to kill his friend, but he was not culpable. He must have been aware that cutting off the line below would send his friend to his death, but he had no choice. He could not say that he had no intention of killing the man if he had seen the abyss below and had been aware of the consequences of falling. The question arises whether he had any other choice? Had he not cut the line, they both would have dropped into the abyss and been killed together. According to this, intention, recklessness, and negligence are not sufficient to say that the actor is culpable. It means that culpability must be based on four presuppositions: 1) awareness or capacity of awareness of unlawfulness; 2) ability to act according to law; 3) decision to act; 4) the actor acts differently from what the law could expect him under the circumstances<sup>10</sup>. In modern Polish criminal law there is a distinction between *mens rea* (state of the actor’s mind at the time of a crime) and culpability, which is understood as a situation in which the defendant’s act is inexcusable even though it was intentional, reckless, or negligent. In other words, in Polish criminal law, if the defendant acts intentionally, recklessly, or negligently, it does not have to mean that he is culpable or blameworthy. This trend to distinguish intention, recklessness,

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<sup>8</sup> Clarkson, *supra* note 6, pp. 13-14.

<sup>9</sup> *Ibidem*, p. 14.

<sup>10</sup> C.R. Snyman, *Criminal Law*, Durban 1995.

and negligence from culpability can also be seen in English criminal law, although generally the relation between them is closer to the psychological than to the normative theory of culpability<sup>11</sup>.

In English common law, contrary to Polish criminal law, negligence was not sufficient for criminal liability except for responsibility with some exceptions. Because negligence is not a “subjective” state of the actor’s mind, it is not treated as *mens rea*, which is why generally it cannot lead to criminal responsibility based on *mens rea*<sup>12</sup>. In negligence, as A. Ashworth puts it, there is no intention or awareness of the risk the actor causes, which is essential for making somebody criminally liable<sup>13</sup>. That is why criminal responsibility in English law has always been based on intention and recklessness rather than on negligence. However, it must be mentioned that some authors state that there is a place for individuality in negligence and it may lead to the conclusion that it is also subjective. As H.L.A. Hart puts it, in negligence there is some place for the actor’s mental and physical capacities in order to state whether he could have taken the necessary precautions<sup>14</sup>. Even though the subjective element of a crime such as an individual’s capacity to take precautions can be found in a negligent act, it is argued that it should not be the basis for criminal liability as a rule, because the criminal law is the law’s most condemnatory form. That is why the criminal law should be reserved for the most serious offences<sup>15</sup>. In conclusion, it must be stated that a negligent act should be criminalised only on the basis of the *ultima ratio* rule when: the harm is great, the risk of the harm is obvious and the actor has the individual capacity to take the required precautions<sup>16</sup>. These conditions of liability for negligence seem to narrow it and exclude criminal responsibility for a negligent act in cases where the risk of serious harm is not well-known, and where less serious harms are possible. In English law very few crimes are based on negligence. Generally, criminal responsibility for a negligent act is possible when manslaughter, public nuisance, and careless driving are concerned<sup>17</sup>.

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<sup>11</sup> See e.g. Clarkson, *supra* note 6, pp. 18-20.

<sup>12</sup> See e.g. M. Allen, *Textbook on Criminal Law*, Oxford 2003, pp. 97-98; Ashworth, *supra* note 7, p. 197.

<sup>13</sup> Ashworth, *supra* note 7, p. 197.

<sup>14</sup> H.L.A. Hart, *Punishment and Responsibility*, Oxford 1968, chapter 2 and 5.

<sup>15</sup> Ashworth, *supra* note 7, p. 197.

<sup>16</sup> *Ibidem*, p. 197.

<sup>17</sup> J. Smith, *Smith & Hogan Criminal Law*, London-Dublin 1999, pp. 91, 92.

## II. THE CRITERIA FOR A NEGLIGENT ACT IN POLISH AND ENGLISH CRIMINAL LAW

In the Polish criminal code of 1997, according to section 9 § 2, a negligent act is committed when the defendant has no intention of committing a crime, but commits it as a result of the breach of safety rules which bind him in a certain situation, and if he has the capacity to foresee the risk of committing it. Especially the last condition of a negligent act has been the source of heated argument in Polish jurisprudence since the criminal code came into force. It is not certain whether the capacity of risk foresight means predictability only for a reasonable man (the objective ability to predict a criminal act) or whether it should also be considered if the actor has the individual capacity to foresee the risk of crime.

As A. Zoll puts it, the capacity to foresee the risk of crime mentioned in section 9 § 2 of the Polish Criminal Code means objective ability<sup>18</sup>. In the author's opinion, negligence is based on whether the risk the actor runs is foreseeable for a reasonable man regardless of the actor's individual capacity to predict it at the time of commitment. As the author says, it is the consequence of the distinction between *mens rea* (which is intention, recklessness, and negligence) and guilt (which is a totally different condition of criminal responsibility). The individual capacity to foresee the risk the actor runs is a matter of guilt, not negligence, which is a form of *mens rea*. According to A. Zoll, the mixture of objective and subjective elements in negligence in section 9 § 2 of the Polish Criminal Code is inappropriate. The objective element of negligence (the foresight of risk for a reasonable man) is the matter of *mens rea* and act conduct, whereas the subjective element (individual capacity to foresee the risk) is the matter of guilt. If it is certain that a reasonable man would not foresee the risk the actor runs, it is not possible to say that defendant committed a criminal act based on negligence and there is no point in analysing further the problem of guilt.

It is necessary to mention another point of view about the idea of a negligent act according to section 9 § 2 of the Polish Criminal Code. As A. Wąsek argues, negligence expressed in that section cannot be limited only to the statement whether a reasonable man would have the capacity to foresee the risk the actor runs. It is equally important to consider whether the actor has the individual ability to estimate the risk. According to him, section 9 § 2 of the Polish Criminal Code does not allow for interpretation

<sup>18</sup> A. Zoll, [in:] *Kodeks karny. Część ogólna. Komentarz do art. 1-116* [Criminal Code. Commentary. General Part. Commentary to Articles 1-116], Warszawa 2012, pp. 157-158.

according to which negligence must be based only on the reasonability of an ordinary actor. The regulation says that negligence occurs when the actor commits a crime as a result of a breach of safety rules binding in a certain situation provided the actor has the capacity to foresee the criminal act. The section says nothing about what the reasonable man can foresee, in other words whether the risk which is caused by the actor is foreseeable for a reasonable man. This leads to the conclusion that the attempt to distinguish precisely *mens rea* and guilt in a negligent act was not successful<sup>19</sup>. According to A. Wąsek, to state whether the actor acts negligently it is necessary to find the basis for the obligation to foresee the risk of harm. It is a general and objective criterion of a reasonable man. Nevertheless it is not sufficient to say that the actor performed an act negligently. The individual capacity is also important to decide whether the negligent act can be the basis of criminal responsibility<sup>20</sup>.

The first opinion is not correct. It is not appropriate to limit negligence only to the capacity of an ordinary man, as it leads to unacceptable conclusions. A person who caused a certain result which is forbidden by law must be then called an actor if the result was foreseeable for a reasonable man, even though this person had no individual capacity to foresee the act. For instance, if in a certain case it is stated that a reasonable man had the capacity to foresee the results which were caused, the actor must be treated as a man who committed a criminal act no matter whether he had the individual capacity to foresee it. The actor will not be criminally liable because of lack of a guilty mind, but he is still called an actor though he has no capacity to foresee the risk he caused. A question must be raised if it accords with human dignity to call somebody an actor of a criminal act if he has no individual capacity to foresee it according to section 30 of the Polish Constitution. It must be admitted that the distinction between *mens rea* and guilt in Polish criminal law makes the structure of a crime more clear. If there is no negligence at least, an unintentional criminal act is not committed, but if there is negligence – the actor committed an illegal act if it is so stated in the statute. It does not mean he is criminally liable. His criminal responsibility is dependent on guilt.

Undeniably it is very difficult to distinguish the criteria of negligence and guilt especially when we claim that negligence is also based on the

<sup>19</sup> W. Mąciór, *Zasady odpowiedzialności karnej w projekcie kodeksu karnego z 1995r.* [Principles of Criminal Responsibility in the Draft of Criminal Code of 1995], Państwo i Prawo [State and Law] 1996, vol. 6, p. 70.

<sup>20</sup> A. Wąsek, *Kodeks karny. Komentarz. Tom I* [Criminal Code. Commentary. Vol. I], Gdańsk 1999, pp. 118-119.

actor's individual capacity to foresee the risk of crime. The problem of this distinction may be solved if the criteria of guilt are combined with the origins of the actor's decision to commit an act, not with the capacity of foresight of the risk. It is a consequence of the purely normative attitude towards the problem of guilt. In the light of that theory, guilt is based on inexcusability of an actor's decision to commit a crime which is dependent on the reason for such decision. The criteria of the capacity must be combined with negligence, and the question why the actor made a decision to commit a negligent act must be interconnected with the problem of guilt. For example, the actor's state of mind, his maturity, knowledge, experience, and physical condition determine his capacity for foreseeing the risk. If the actor has appropriate knowledge to foresee the risk, he may be negligent. However it does not mean that he is guilty, as it is determined by the reason why he did not make use of the knowledge. If he makes no use of this knowledge because he does not concentrate his attention, he will be guilty of committing a crime. Still it must be mentioned that the criteria of capacity to foresee the risk and of the origins of actor's decision to commit an act are not clear. In some cases it is very difficult to make a distinction between the individual criteria of risk foresight and the source of the actor's decision to commit a crime. For instance, the actor's maturity and his mental disability may lead to the lack of capacity to foresee the risk of crime and can determine the ground of his decision. In other words, sometimes the same criteria concern the individual capacity to foresee the risk and guilt.

To conclude the discussion over the section 9 § 2 of the Polish Criminal Code of 1997, *in fine*, an amendment to that section was proposed in 2013. According to that proposal, recklessness and negligence were to be based only on lack of intention without conditions such as objective or individual criteria of crime prediction. As a *mens rea* no intention was to be sufficient to say that the actor acted unintentionally under the conditions that the crime was objectively predictable. It is worth emphasising that the objective prediction of crime was no longer to be an element of *mens rea* (as an element of negligence) but the element of *actus reus* (the amended section 1 § 1a of the Polish Criminal Code of 1997). The criminal act was committed unintentionally if the actor had no intention of committing it (*mens rea*), but the commission was predictable for a reasonable man (not for the certain actor; *actus reus*).

This proposal was criticised for a few reasons. First of all, such a regulation does not face the standard of *nullum crimen sine lege* on the basis

of section 42 of the Polish Constitution<sup>21</sup>. This regulation says that criminal responsibility can be based only on the act which is stated precisely in the statute. Saying that recklessness and negligence mean only lack of intention is far away from that precision. Secondly, lack of intention as a condition of recklessness and negligence could be inferred from section 9 § 1 of The Polish Criminal Code *a contrario*. If the section states clearly what the intention is, then the lack of conditions of intention must lead to the conclusion it is the case of recklessness or negligence. If negligence and recklessness were to be limited to lack of intention, there would be no need to emphasise it in section 9 § 2 of the Polish Criminal Code of 1997. Such a regulation of unintentional acts repeated the same conclusion which emerged from section 9 § 1 of the Code *a contrario*. Thirdly, it was argued that the proposed amendment led to the broadening of criminal responsibility for an unintentional act. It deprived recklessness and negligence of additional conditions such as prediction (recklessness) or capacity for prediction (negligence) of risk. In the case of an unintentional criminal act, only a lack of intention (apart from the conduct itself) had to be proved, not the capacity of the prediction of a crime. Fourthly, it led to the presumption of unintentional commission (reckless or negligent). If in a certain case there was no possibility of proving intention, it must be presumed that the actor acted without intention. It meant a presumption of negligent commitment. A negligent act was committed when it was foreseeable for a reasonable man and the actor had no intention of committing it. These were the only conditions of ascribing it. Fifthly the amendment makes it hardly possible to distinguish a reckless act and a negligent act because in both cases only lack of intention was sufficient.

These arguments led to another proposal for an amendment in section 9 § 2 of the Polish Criminal Code. According to the proposal of the 5<sup>th</sup> of November 2013, this section described recklessness and negligence as acts without intention, under the condition that in certain circumstances committing a crime could be predicted. It must be noticed that this new formula for a reckless or negligent act is not based only on the objective criteria of a reasonable man but takes into consideration also individual "circumstances". The authors of the project must have been aware of the necessity to consider subjective and individual criteria in recklessness

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<sup>21</sup> J. Lachowski, *Ocena projektowanych zmian art. 9 kk [Opinion Concerning Proposed Changes in the Art. 9 of Criminal Code]*, Państwo i Prawo [State and Law] 2014, vol. 1, pp. 86-89; on the contrary e.g. W. Wróbel, *Określenie strony podmiotowej czynu zabronionego z perspektywy funkcji gwarancyjnej [Determination of an Actor of a Criminal Act from the Perspective of a Guarantee Function]*, [in:] *Umyślność i jej formy [Intent and Its Forms]*, Toruń 2011, p. 10 et seq.

and negligence and they expressed their awareness by putting particular emphasis on “certain circumstances”. Still they made no distinction between recklessness and negligence in the project, which did not go with the principle of individualisation of criminal responsibility. Finally, section 9 § 2 of the Polish Criminal Law has not been amended. This section left the argument about objective or subjective interpretation of the risk prediction in section 9 § 2 of the Code unsolved.

In English criminal law, just as in Polish criminal law, negligence is based on lack of intention or risk foresight. The defendant does not realise he runs the risk while committing an act and thinks he is acting appropriately. He is not aware of the danger that is caused by his act. Unlike in case of recklessness, there is no prediction of risk. Generally, negligence in English criminal law is based on objective grounds<sup>22</sup>. The actor is liable for a negligent act if he did not behave reasonably in the circumstances in which he acted. If his decision were reasonable, he could not bear the responsibility for the negligent act<sup>23</sup>.

The criteria of negligence are also a subject of discussion in English criminal law. There is no agreement as to what negligence is. For some authors, it is not easy to establish the difference between a negligent act and an act caused by panic or fear. In the case of panic and fear usually there is no room for rational reflection, that is why such an act is hardly negligent<sup>24</sup>. Another problem is the question of whether the risk assessment should be related to the standard test of a “reasonable” or “ordinary” man. The problem is whether negligence occurs when an actor does not live up to the standard that people should abide by or to the normal standard<sup>25</sup>. Some argue that in negligence cases it is essential to compare the actor to a reasonable man with the defendant’s characteristics. An example is given of a blind actor who commits a crime without intention. In order to determine whether he was negligent, it is essential to compare his behaviour to a blind reasonable man in the same circumstances<sup>26</sup>. In other words, there is not one general type of the reasonable man test. Negligence must not be based on a comparison of the defendant’s act with the behaviour of any reasonable man, but to the behaviour of a reasonable man who has the same characteristics as the actor. It is important to state whether a reasonable man of similar age, sight, hearing, and education would behave in the same

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<sup>22</sup> See e.g. Smith, *supra* note 17, p. 90.

<sup>23</sup> See e.g. Herring, *supra* note 1, p. 165; Clarkson, *supra* note 6, p. 71.

<sup>24</sup> Herring, *supra* note 1, p. 195 and the cases the author refers to.

<sup>25</sup> *Ibidem*.

<sup>26</sup> *Ibidem*.

way as the actor did<sup>27</sup>. It is important to mention that in English criminal law doctrine it is stated that the reasonable person test is arbitrary. As L. Alexander, K. Kessler Ferzan and S. Morse have remarked “reasonable person in the actor’s situation” is hardly definable<sup>28</sup>. They stress two boundaries of this structure. Firstly, the reasonable person in the actor’s situation has the knowledge about all the facts that determine a correct moral decision. On the other side there is the reasonable person who has all the actor’s beliefs<sup>29</sup>. In the first case, the reasonable person always chooses the action that prevents the harm because he knows everything that allows him to avert the risk. If the actor causes the risk in that case, he is always responsible for the act, and this responsibility actually means strict liability. In the second case, when the reasonable person always knows what the actor knows, there is no question of there having been a negligent act if there is no awareness of the risk<sup>30</sup>. It must be agreed that in these cases negligence is somewhere between strict liability and recklessness, but it is not certain where exactly it should be situated. In conclusion, the authors claim that “the reasonable actor is neither the actual actor nor the omniscient god, but some construct that lies in between. Because there is no principled way to determine the composition of this construct, punishment for negligence is morally arbitrary”<sup>31</sup>. This means that criminal responsibility for a negligent act is actually arbitrary, which may lead to the conclusion that it collides with the *nullum crimen sine lege* principle.

### III. SHOULD NEGLIGENCE BE PUNISHABLE?

Differently from Polish criminal law, responsibility for a negligent act in English law has traditionally been rejected with some exceptions. The reason for such an attitude to negligence was that *mens rea* was defined as a state of mind and in a negligent act there is no state of mind, but the so called “blank state of mind”. The actor does not foresee the risk emerging from his action which was foreseeable for a reasonable man. If negligence means “blank state of mind” towards the committed act, it cannot be treated as subjective *mens rea*. If the subjective *mens rea* is substantial for criminal responsibility, the lack of that element must lead to no criminal

<sup>27</sup> M. Allen, *Textbook on Criminal Law*, Oxford 2003, pp. 98-99.

<sup>28</sup> L. Alexander, K. Kessler Ferzan, S. Morse, *Crime and Culpability. A Theory of Criminal Law*, Cambridge 2009, p. 81.

<sup>29</sup> *Ibidem*, p. 82.

<sup>30</sup> *Ibidem*.

<sup>31</sup> *Ibidem*.

liability<sup>32</sup>. In the English doctrine of criminal law the discussion as to whether a negligent act should be punishable is in progress. As some authors claim, the penalty for negligent acts should not stimulate diligence, as such acts reflect only moral fault. They state that deterrence, which is one of the “faces” of punishment, concerns the probability of punishment by the actor before committing a crime. To make this estimation, the actor must be aware of the risk of crime in order to make any calculation. In a negligent act there is no awareness of the risk<sup>33</sup>. Hence, there is no point in punishing for a negligent act. Moreover, it is emphasised that punishing the actor for a negligent act does not prevent him from committing such an act in the future. On the other hand, there are authors who state that punishing someone for a negligent act may cause greater foresight as to the risks; still it is certain that such responsibility is extraordinary<sup>34</sup>. As the criminal law is *ultima ratio*, it is remarked sometimes that negligent acts should be prevented by education and insurance against the risk<sup>35</sup>. Some researches argue that there is no moral legitimacy in imputing criminal responsibility to somebody who was not aware of the risk that he was committing a crime<sup>36</sup>. Still, it is also stated that if the risk of fatal, serious consequences, which come out of a negligent act is high, society is bound to take any measures to guarantee safety. In that case, even punishment is acceptable<sup>37</sup>.

In Polish criminal law liability for an unintentional act is not a rule. According to section 8 of the Polish Criminal Code, responsibility for a reckless or negligent act is possible only when it is clearly allowed by the statute. It means that not every intentional criminal act has its unintentional parallel act in the statute. If criminal responsibility for a reckless and negligent act is extraordinary, then it should be clearly stated in law what recklessness and negligence are. Traditionally, in Polish criminal law, acts committed through negligence have always been punishable. Nevertheless it is not certain whether a negligent act should lead to criminal responsibility.

In the Polish doctrine there are hardly any authors who clearly state that criminal responsibility for a negligent act should be excluded. As T. Kaczmarek puts it, following M. Król-Bogomilska, indirect intention (the actor predicts the criminal act and accepts it, section 9 § 1 of the

<sup>32</sup> Clarkson, *supra* note 6, p. 71.

<sup>33</sup> Smith, *supra* note 17, p. 94 and the authors mentioned there.

<sup>34</sup> *Ibidem*.

<sup>35</sup> *Ibidem*.

<sup>36</sup> Alexander, Kessler Ferzan, Morse, *supra* note 28, p. 71.

<sup>37</sup> Smith, *supra* note 17, p. 94 and the authors mentioned there.

Polish Criminal Code of 1997 *in fine*) is based on unclear criteria and the presumption of the acceptance of the risk, and that is why it should be eliminated from the categories of intention. In the author's opinion, in that case there would be also no room for negligence which is a far more unclear example of objective responsibility<sup>38</sup>. On the other hand, as the author says, the exclusion of liability for negligence in criminal law does not seem to be reasonable for reasons of criminal policy<sup>39</sup>. In the older doctrine of criminal law it was stated that negligence is combined with a presumption of guilt and that the borderline between negligence and the lack of negligence is so slight that sometimes it is hardly noticeable<sup>40</sup>. As M. Król-Bogomilska puts it, the reasonable man standard as a basis of responsibility for negligent criminal act leads to a presumption of negligence when the actor's behaviour does not comply with the "artificial" reasonable man behaviour standard<sup>41</sup>.

It must be agreed, according to what was referred to above, that the criminalisation of a negligent act does not deter anyone from committing such crimes. A negligent actor does not know that he is committing an unintentional crime. Moreover, he thinks he is acting legally and is not causing any unlawful risk. The criminal law can hardly stimulate a human being's behaviour only when the actor realises that a certain act is forbidden under the threat of penalty. A negligent actor does not realise that what he is doing is forbidden by law. He may be aware that the results which emerge from his action are penalised, but he does not realise that he is causing this criminalised result at the time of crime. That is why the penalisation of such an act can hardly prevent him from committing it.

It must be remembered that the criminal law is subsidiary to the measures accepted in the other branches of the law<sup>42</sup>. Therefore the criminalisation of an act is justified if the sanctions characteristic of the other branches are not sufficient. Remembering that a criminal sanction for a negligent act can hardly deter anyone from risky actions, and considering the subsidiary

<sup>38</sup> T. Kaczmarek, *Sporne problemy umyślności* [Disputable problems of intent], [in:] J. Majewski (ed.), *Umyślność i jej formy* [Intent and its Forms], Toruń 2011, p. 41.

<sup>39</sup> Ibidem.

<sup>40</sup> W. Maćjor, *Problem przestępstw nieumyślnych na tle aktualnych wymagań teorii i praktyki* [A Question of Unintentional Crimes from the Perspective of the Current Requirements of Theory and Practice], Kraków 1968, p. 73 et seq.; A. Gubiński, *Zasady prawa karnego* [Principles of Criminal Law], Warszawa 1996, p. 71; M. Król-Bogomilska, *Formy winy w prawie karnym w świetle psychologii* [Types of Guilt in Criminal Law from the Perspective of Psychology], Warszawa 1991, p. 116.

<sup>41</sup> Król-Bogomilska, supra note 40, pp. 115-116.

<sup>42</sup> See eg. A. Zoll, W. Wróbel, *Polskie prawo karne. Część ogólna* [Polish Criminal Code. General Part], Kraków 2010, pp. 25-26.

role of the criminal law in relation to other law branches, the problem of the usefulness of the criminalisation of a negligent act must be raised. The need for the criminalisation of acts based on negligence may seem to be doubtful especially when given that there is no agreement about the criteria of negligent act expressed in section 9 § 2 of the Polish Criminal Code of 1997. The lack of definite criteria of negligence in Polish criminal law, giving the limits of criminal responsibility for an unintentional act, leads to the conclusion that the limits of criminal responsibility for a negligent act are not clear. If the limits of criminal responsibility are not clear, it may be argued that criminal acts of negligence do not live up to the *nullum crimen sine lege* standard. Criminal law is based on the “*ultima ratio*” principle and operates with the most severe sanctions. The limits of criminal responsibility must then be clear. It cannot be agreed that even though the limits of a negligent act are not clear, a person who has committed such an act (the negligent criminal act was committed) may not be criminally responsible because of the lack of guilt. First of all, there is no precise definition of guilt in the Polish Criminal Code of 1997. Secondly, in Polish criminal doctrine there is no agreement as to what guilt is. There are a few theories of guilt (psychological theory, normative theory, functional theory, relative theory) and each defines it in a different way presenting different limits of criminal liability<sup>43</sup>. If it is not possible to present clear boundaries of liability for a negligent act, it should not be penalised. It cannot be agreed that the “reasonable person test” limits criminal responsibility for a negligent act. A “reasonable person” is an artificial figure, with unclear criteria, which makes the problem of negligence in criminal law more complex and may lead to confusion when establishing the limits of criminal liability for such an act. The lack of clear criteria for a negligent criminal act may also lead to different court sentences in similar cases where negligence is at stake. The same case judged in one court may be judged differently in another. Thus it is very close to the breach of the principle of equal treatment of citizens in the same circumstances by law (section 32.1. of the Constitution of Poland).

The only reason for the criminalisation of a negligent act is the kind of harm that can emerge from it. The more serious the harm, the more solid is the degree of the criminalisation. The more serious the results of a human being’s action, the bigger the temptation to make it a statutory crime. Even in such cases the question must be asked whether criminalisation of such

<sup>43</sup> About theories of guilt see J. Lachowski, [in:] R. Dębski (ed.), *System prawa karnego. Tom III. Nauka o przestępstwie. Zasady odpowiedzialności karnej* [System of Criminal Law. Vol III. Principles of Criminal Responsibility], Warszawa 2013, p. 618 and the authors mentioned there.

a negligent act will protect an individual from serious consequences in the future. It must be agreed that a more adequate way of preventing such serious harms is to educate people as to how not to create dangers and risks. Obligatory insurances are also a good solution in order to provide a form of compensation in such cases<sup>44</sup>. The criminal law is a very “simple” solution, but supposedly its effectiveness in preventing a negligent act may be very slight.

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<sup>44</sup> Smith, *supra* note 17, p. 90-96.