

LIABILITY FOR NEGLIGENT CONDUCT IN A
HETEROGENEOUS SOCIETY WITH REFERENCE
TO SOUTH AFRICAN AND GERMAN
CRIMINAL LAW

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CHAPTER 1

INTRODUCTION

(i) Lawyers methods and a sociological approach

"The law in its majestic impartiality forbids rich and poor alike to sleep under bridges to beg in the streets and steal bread."

Anatole France¹

The study of criminal law by lawyers has traditionally been confined to a consideration of general principles of criminal law and of specific crimes, the material or substantive criminal law.² De Wet and Swanepoel define the ambit of their work Strafreg in the following way:³

"Tot die materiële strafreg behoort die voorskrifte wat aandui welke handeling strafbaar is en wat die strawe is.... Hierdie werk gaan in hoofsaak oor die materiële strafreg."

It is however recognised that the material criminal law is based on conceptions of what crime is and of the nature and purpose of the criminal law and the criminal sanction. Morkel⁴ in an article dealing with the purpose of criminal law and the criminal sanction has the following to say:

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1. Quoted in Sumner Reading Ideologies 266.
 2. Rabie 6 LAWSA 5; Snyman Strafreg 1.
 3. De Wet & Swanepoel Strafreg 20.
 4. Morkel "The purpose of criminal law and the criminal sanction" 1974 (9) SJ 72.

"The criminal law is the formal cause of crime - in the absence of a set of criminal law norms there would be no crimes."

and quoting Gordon⁵ adds:

"the question involved in the formulation or amendment of a criminal code can be stated as what crime do we wish to cause."

Packer⁶ makes the same point:

"Crime is a sociopolitical artifact, not a natural phenomenon. We can have as much or as little crime as we please, depending on what we choose to count as criminal."

Commenting on the purpose of criminal law Burchell and Hunt⁷ accept it as a truism that crimes originate or persist in the government policy of the moment but maintain that as government policies vary depending on the time and the place, certain general policies can be identified which underlie the criminalisation of conduct. Among these they count the protection of individual members of society from harmful conduct and the implementation of government policies directed at public administration and social control.

Having identified the protection of society and its members from harmful conduct as one of the principal purposes of the

5. Gordon Criminal Law of Scotland 13.

6. Packer The Limits of the Criminal Sanction 364.

7. Burchell & Hunt South African Criminal Law and Procedure vol 1 3.

criminal law or one of the policy considerations on which the criminalisation of conduct is based. Burchell and Hunt identify another level on which policy plays a role:⁸

"This fundamental aim (ie the protection of society) is the source of certain policies that permeate the substantive and procedural criminal law and which seek to ensure the greatest and most effective protection of society and its individual members. At the same time it is generally agreed that whatever else it is, the criminal law should not be an instrument of tyranny and oppression. This idea receives expression in a general requirement that the criminal law should operate justly and fairly. This basic requirement in turn is the source of a further set of policies that permeates the criminal law and which seek to ensure that persons accused of crime are treated justly fairly and humanely."

While recognising that crime is an instrument of social control, a "sociopolitical artifact", and that the substantive criminal law is "permeated" by layer upon layer of policy considerations, this is not the focus of lawyers when dealing with the material criminal law. The primary concern of practising lawyers is to ascertain the meaning and application of legal principles and forms in order to advise clients and present arguments in court.⁹ Similarly, law teachers are concerned with the meaning "in law" of the concepts which they explain to law students rather than the

8. Burchell & Hunt (n7) 52.

9. Sumner (n1) 277.

social meaning.¹⁰ A consideration of the underlying assumptions and policy considerations implicit in basic legal concepts is usually confined to a general introductory section of standard criminal law textbooks and criminological or philosophical writings.¹¹ When it comes to the substantive criminal law, lawyers assume the existence of basic policies like equality and fairness embedded in the principles and forms they are dealing with. Little attempt is made either to ascertain whether those policies are in fact embodied in the principle, or to enquire whether the basic policies of fairness and equality to which every legal system supposedly adheres, are the only policies behind a particular principle.¹²

Within criminological thinking about crime and law, there has been a general recognition that there is a gap between the ideals of law and their actual practice.¹³ that the form of the law which ostensibly embodies policies of fairness

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10. "Social meaning" implies the impact which the law has on society on an individual and a collective level. This impact provides evidence of the underlying assumptions and policy considerations embedded in the abstract legal principles which make up the material or substantive criminal law.
11. See for example Hart Punishment and Responsibility; Packer (n6); Rabie and Strauss Punishment.
12. This statement needs some qualification. In a few particular instances lawyers have voiced opposition to legislation which blatantly violates principles of justice and equality. See below.
13. Young "Left idealism, reformism and beyond: from new criminology to Marxism" in Fine et al Capitalism and the Rule of Law 11 at 16.

and equality in fact hide the true role which law plays in society.

McBarnet¹⁴ writes:

"In the early days of radical deviance theory the links between law and capital seemed self-evident. Law was made by the state: the state was run by the ruling class; and law was obviously in the interests of the class which made it."

Legislation like the Group Areas Act¹⁵ which is specifically designed in accordance with the South African government's policy of apartheid fits easily into this description. Similarly, security legislation which is deemed necessary in order to ensure the safety of the state but is used to suppress any opposition to state policies, has been the focus of attention in many analyses of the role of law in South African society. In both instances lawyers have not hesitated to condemn the use of law for those purposes and have protested that the use of law for such purposes violates the principles of justice and fairness which they see as the underlying assumptions of our legal system.

It is relatively easy to conclude that law is merely "an instrument of domination in the hands of the ruling

14. McBarnet "Law and capital : The role of legal form and legal actors" (1984) 12 International Journal of the Sociology of Law 231.

15. Act No 41 of 1950.

classes"¹⁶ or an "ideological mask"¹⁷ when one considers the legislation of apartheid or the criminalisation of political opposition. But what of the general principles of criminal law? These principles are not usually conceived of as playing a "political" role or embodying any other policies but those of fairness, equality and humanity. In fact they did not originate in legislation of the government of the day but were developed in the common law to serve as an equitable basis on which persons may be held liable for criminal conduct, regardless of colour, creed or political persuasion.

The strategy of those of the persuasion described by McBarnet, who see the relationship between law and state as determined purely by class interests is "to expose the unequal reality beneath the rhetoric of equality and to thus cast doubt on the legitimacy of the system". E P Thompson¹⁸ has characterised this view in the following way:

"This (view) may easily consort with a profoundly pessimistic determinism in which (the) authoritarian state can be seen as the concomitant 'structure' of the 'capitalist formation'. And this may and often does, consort with a loose rhetoric in which civil rights and democratic practices are discounted as camouflages or as relics of 'bourgeois liberalism'. And to cut

16. See Fine "Law and class" in Fine et al Capitalism and the Rule of Law 29 at 44-45.

17. See Fine (n16) 44; Picciotto "The theory of the state, class struggle and the rule of law" in Fine et al Capitalism and the Rule of Law 164 at 166.

18. Quoted in Young (n13) 12 and Fine (n16) 29.

short the list, this very often goes along with a wholesale dismissal of all law and all police, and sometimes with a soppy notion that all crime is some kind of displaced revolutionary activity."

It is submitted that the nature of both the state and of law is far more complex than is evident from an analysis which links law, state and the interests of the ruling classes in a one-dimensional way. If law were to serve merely as an instrument of oppression in the hands of the ruling classes, it would be based solely on coercion. The effectiveness of law as a means of social control is dependent on its ability to express the rights and interests of other classes.

"[T]he effectiveness of law... as a means towards ruling class hegemony, depends upon its ideological encapsulation of a consensus constructed outside itself in other economic, political and cultural practices.... Even a highly coercive fascist state requires an ideological alliance between the ruling class and other classes (and class fractions).... Law without some hegemonic class bloc is merely naked power and thus no law at all."¹⁹

In times of social crisis this hegemony is weakened. The call for the rule of law in conflict situations expresses either a demand for the application of coercion²⁰ or for the control of coercion through the due process of law.²¹

19. Sumner (n1) 264-265.

20. See Hall et al Policing the Crisis for an account of the way in which the call for law and order has been used in Britain in order to introduce increasingly repressive measures.

21. Picciotto (n17) 165.

However, an analysis of law and state power based only on the notion of a balance between coercion and consent does not explain how law comes to take the specific form and how it can operate on both the levels of coercion and consent.

The contradictory nature of law flows from the fact that although legal principles originate in a specific society for the regulation of social political and economic relationships in that society, the continuing development of many of those principles has taken place in different social formations at different times. This is particularly apposite in the South African context as this society is a post-conquest social formation with a legacy of legal principles and notions of crime and criminality which originated and were developed in a number of other legal systems. The Roman Dutch system was superimposed on this society by the colonising power to the virtual exclusion of indigenous systems of law. In the process of development in different time periods and different societies, legal principles have become abstracted from the actual relationships to which they were initially applicable and generalised to provide a framework within which changing relationships can be accommodated.

"In this way the actual definitions and ideas which produce the legal proposal, being stated in abstract (legal) terms, takes on a universal moral character separated from its current economic, political and ideological thrust."²²

22. Sumner (n1) 269.

The separation of legal concepts from their historical roots in social relationships allows for a divergence between the abstract legal principle and its social meaning. The extent to which these two levels of meaning diverge depends on the content given to the abstract principle by the courts and changes in social, political and economic relations.

The legal content is not, however, dependent merely on the whim of the ruling classes. Although the courts are part of the state structure and the judge's own perception of the specific demands placed on the law can and does play a role,²³ the interpretation of legal principles takes place in relation to specific cases and in the context of the whole legal system, in particular the principle of stare decisis.

The conclusion which can be drawn from this analysis is summarised neatly by Young:²⁴

"I want to argue that the nature of law is contradictory: that formal equality is a gain to be struggled for, not a sham... but that formal equality obfuscates and legitimates substantive inequalities."

It is submitted that in order to come to a full understanding of the role of law in society, it is necessary to first analyse both the legal meaning of legal principles and the social meaning.

23. See Corder Judges at Work 240.

24. Young (n13) 23.

"One could not understand the social significance of a legal instrument unless one understood its technical significance (its meaning in itself), precisely because, the social significance of the discourse is embodied in its technical meaning."

The second task would be to place both meanings within the historical context, to root them in the actual changes taking place in society, in order to come to a conclusion with regard to the role of a particular legal principle on a macro level.

This dissertation deals with only the first enquiry, and cannot therefore provide an answer to the question why both the legal meaning and the social meaning of the concept of negligence has changed over time and what role the concept has played in society on a macro level.

(ii) Rationale

The aim of this study is to ascertain whether the concept of negligence (culpa) used in South African criminal law operates in accordance with the principles of fairness and equality which are assumed to be the basic policies upon which the criminal law is based, or whether the legal concept in fact hides substantial inequalities in the application thereof.

The basic premise is that South African society is heterogeneous and very different to the societies in which the concepts used in our criminal law began their development. The Roman-Dutch legal system was introduced

into this country by its Dutch colonisers. Aspects of English law were added by the later British colonial power. The norms and concepts of criminality of those legal systems have been superimposed on an African society. The question is, what the application of those norms means in this society.

In addition, ours is a rapidly changing society and therefore the demands placed on the legal system are changing. It is therefore appropriate to evaluate the concepts employed in law and question their role in this changing scenario. It is submitted that a legal system cannot remain untouched by political, social and technological changes and that legal concepts must be adapted to serve the particular needs of the society. If this does not happen, the legal system will become irrelevant to the society and cannot survive in the long term.

Chapter two entails an analysis of the concept of culpa in two different legal systems. Since a knowledge of the historical development of the concept is essential to an understanding of its modern meaning, a brief outline of the emergence and development of liability for negligent conduct is given in the first section. Thereafter the focus is on the way in which the courts have dealt with negligence liability in modern South African law.

For purposes of comparison and in order to suggest an alternative theory, one which takes account of the specific demands of a heterogeneous society, an analysis of the basis for liability for negligence in German criminal law is attempted. After some preliminary reading, the German theory appeared to offer a viable alternative to the current South African position. This is to be argued.

There are two further reasons why German law is appropriate as a comparison. First, the concept used in South African law is strongly influenced by English law, therefore a system outside the common law tradition is useful for this purpose. Secondly, the current influence of German legal doctrines and methodology on South African criminal law underlines the relevance of this kind of comparison. It is submitted that German legal concepts are not altogether foreign to South African law and it will be argued that the German concept of negligence can be applied in our system without conflicting with other basic principles of liability.

In the third chapter, selected cases will be discussed and an attempt made to apply the German concept of culpa to these cases to ascertain whether a different conclusion would have been reached. On this basis the practical differences between the two approaches will be discussed and evaluated in terms of the social meaning in South African society.

Finally, some general conclusions will be drawn about the role of the concept of culpa in South African society and the need to adapt the concept to ensure formal as well as substantive justice in this social context.

CHAPTER 2NEGLIGENCE IN CRIMINAL LAW(i) Introduction to Mens Rea and Culpa

"The thought of man is not triable; the devil alone knoweth the thought of man."

Chief Justice Brian 1477²⁵

"The state of a man's mind is as much a fact as the state of his digestion."

Lord Justice Bowen²⁶

The maxims nulla poena sine culpa and actus non facit reum nisi mens sit rea embody the basic rules according to which conduct is judged to be criminal and therefore penalised. The first expresses the general principle of no penalty without fault.²⁷ The second is even more explicit in holding that the act does not make a man guilty unless it is

25. Quoted in Hart The morality of the Criminal Law 7.

26. Hart (n25) 7.

27. Sayre "Mens rea" (1932) 45 Harv L R 974.

accompanied by an evil²⁸ or guilty²⁹ mind. In other words, liability for the commission of a crime is dependent on the offender not only having performed the outward act which the law prohibits or having caused a forbidden effect, but on his or her having done so in a certain frame of mind.³⁰ Bodenstein³¹ expresses it as:

"a certain connection between the psyche of the actor and the forbidden effect caused by his act."

This is the mental element in criminal liability referred to as mens rea.

The earliest form of reaction against wrongs was revenge, exacted by the person wronged or his family against the person who committed the wrong. Revenge was based on the injury caused, not on fine considerations of the mental factors which accompanied the action. This is true of

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28. The term 'fault' is used to denote the connection between the psyche of the actor and his outward conduct on the basis of which the actor is held liable in criminal law. Fault is exhaustively defined by reference to dolus and culpa and is often used as a synonym for mens rea. This is a more limited concept than the concept of blameworthiness used in German law (see below) which approximates liability itself, although it appears that South African writers are increasingly using the term blameworthiness instead of fault. See Snyman (n2) 121; Hunt South African Criminal Law and Procedure vol II 400; S v Zoko 1983 (1) 871 (NPD) at 888.
29. Bertelsman "The essence of mens rea" 1974 AJ 34.
30. Burchell and Hunt (n7) 125; De Wet and Swanepoel (n3) 103; Snyman (n2) 119; Rabie (n2) 64.
31. Bodenstein "Phases in the development of criminal mens rea" (1919) 36 SALJ 323.

ancient Germanic, Roman and English society.³² At a very early stage in the development of legal systems in those societies, it appears that intentionality played a role in determining criminality as well as in the fixing of punishment.³³ After analysing a number of fragments bearing on the mental requisites for criminality Sayre³⁴ comes to the conclusion that:

"In certain cases at least criminal liability might attach irrespective of the actor's state of mind. But because the old records fail to set forth a mens rea as a general requisite of criminality one must not reach the conclusion that even in very early times the mental element was entirely disregarded. The very nature of the majority of the early offences rendered them impossible of commission without a criminal intent."

It was in the Roman system that this mental element was more fully developed. This development from the law of the Twelve Tables to the Justinian law is important because of the influence it has exerted on modern criminal law, by means of Medieval Italian law and Canon law.³⁵

32. See De Wet and Swanepoel (n3) 3; Bodenstein (n31) 324; Sayre (n27) 976.

33. For a detailed discussion of the development of mens rea in Germanic and Roman law see Bodenstein (n31) 324-349. A similar comment is made about English law by Sayre (n27) 975-994; See also Burchell and Hunt (n7) 11-22.

34. Sayre (n27) 981; See Bodenstein (n31) 325 who makes the same point in relation to Germanic law; De Wet and Swanepoel (n3) 104; and Erenius Criminal Negligence and Individuality 25.

35. Sayre (n27) 983; Bodenstein (n31) 327; Erenius (n34) 26.

The initial distinction made in Roman Law, was between casus fortuitus (accident/misadventure) and fault.³⁶ This fault concept did not embrace different forms of fault and as most of the early crimes were those involving harm caused to an individual's person or property, which required intent, the only form of mens rea recognised until classical Roman Law was dolus, a will directed towards an unlawful effect.³⁷ Gradually however exceptions were made and certain cases of casus fortuitus were punished. Bodenstein is at pains to point out that these were cases where it was considered undesirable from a policy point of view for the act to go unpunished.

"Only when crimes are considered from a social point of view it is realized that the task of the lawgiver is not identical with that of the moralist, that public interest requires repressive measures, not merely against immoral but also against unsocial conduct."³⁸

Thus two forms of fault became distinguishable in Roman Law, ie dolus and culpa.

Yet, even after the recognition of culpa as a form of fault, cases of punishing acts of negligence were still treated as

36. The latin term culpa is often used in different senses in legal writing. In the maxim "nulla poena sine culpa" it denotes fault and could be used here in the same sense. In modern times however the term is most often used to denote negligence and it is in this narrower sense that it has been employed throughout.

37. Bodenstein (n31) 328; Erenius (n34) 26-27.

38. Bodenstein (n31) 328. See Erenius (n34) 27.

exceptions to the rule that mere misfortune was not punishable.³⁹ The continuing development of both *dolus* and *culpa* took place in relation to specific acts and not as part of the development of a general doctrine of *mens rea*.⁴⁰ Both forms remained relatively underdeveloped in Roman law.

The lack of systematisation of general principles and the undeveloped state of both *dolus* and *culpa* in Roman law, resulted in some difficulty in clearly distinguishing the two concepts.⁴¹ The same difficulty is experienced in modern South African law with regard to the distinction between conscious negligence and *dolus eventualis* and the question of whether *dolus* always excludes *culpa* and vice versa.⁴²

The systematic identification and development of the general principles applicable to all particular crimes is a relatively new development in South African criminal law.⁴³

39. Erenius (n34) 27.

40. Burchell and Hunt (n7) 16; Sayre (n27) 994; Bodenstern (n31) 332; Badenhorst "Die Oorsprong en betekenis van die begrip misdaad" 1982 TSAR 211.

41. See Morkel Towards a rational policy of criminal fault 8; Bertelsman "What happened to *luxuria*" (1975) 92 SALJ 59 and Van der Merwe "Die Verband tussen *mens rea* en skuld" (1976) 93 SALJ 280.

42. See S v Zoko 1983 (1) 871(NPD); S v September 1972 (3) SA 389(C); S v Alexander 1982 (2) SA 801; Van Zyl "S v Zoko : Nuwe definisie vir Strafbare manslag" (1983) 46 THRHR 100.

43. Badenhorst Die Inhoud van die Misdaadbegrip in die Suid-Afrikaanse Strafreë 2; Burchell and Hunt (n7) 48.

Much of our criminal law, in particular the general principles, consists of legal rules which are not contained in legislation but are part of the common law, which is Roman-Dutch law.⁴⁴ To state that our common law is Roman-Dutch is however misleading. In reality, modern South African criminal law is the product of a process of assimilation of a number of legal systems, in the first instance the Roman and Roman-Dutch systems, but with a substantial contribution from English law and some Continental systems.⁴⁵

As a result of the reception of Roman law in Holland between the 13th and 17th centuries,⁴⁶ the Roman law notions of *dolus* and *culpa* were incorporated into the criminal law of Holland, and found their way into South African law via the Roman-Dutch law which was applied at the Cape after the Dutch settled here in 1652. Initially no distinction was made in Roman-Dutch law between general principles and specific crimes.⁴⁷ Thus no general doctrine of *mens rea* was developed. By 1652 such a distinction had however been recognised but very little theoretical development of the

44. Snyman (2) 5; De Wet and Swanepoel (n3) 2.

45. Snyman (n2) 12-13; Badenhorst (n43) 2-3.

46. Burchell and Hunt (n7) 22.

47. Badenhorst (n40) 210-214.

general principles and their elements was achieved in Roman-Dutch law.⁴⁸

Although Roman-Dutch law was retained after the British occupation of the Cape, English law was very influential especially after the second British occupation in 1806.⁴⁹ By this date a distinction between the general part of criminal law and the specific crimes had been recognised in English law, but the general considerations still played an insignificant role. The point of departure for the general considerations was the maxim actus non facit veum nisi mens sit rea.⁵⁰ Two basic elements, actus reus and mens rea were derived from this maxim, the first denoting the objective element of the crime, "an unlawful physical condition" and the second, the subjective element, "an unlawful mental

48. Badenhorst (n40) 214; Burchell and Hunt (n7) 27; See Badenhorst (n43) 12-56 for a detailed discussion of the development of Roman-Dutch law.

49. Snyman (n2) 10; See Badenhorst (n43) 59-79; Burchell and Hunt (n7) 34-40; Snyman "Die invloed van die Engelse en die Duitse Reg op die Suid-Afrikaanse Strafreë" (1981) 14 DJ 71.

50. This maxim originated in English law and is not found in the Corpus Iuris Civilis. See Sayre (n27) 988; Burchell and Hunt (n7) 125; Snyman (n2) 121.

condition".⁵¹ Early South African criminal law adopted this basic distinction.⁵²

Modern South African criminal law is characterised by a more scientific development of general principles along lines suggested by continental systems, particularly German law.⁵³ The advent of this scientific phase was heralded by the appearance of the first edition of De Wet and Swanepoel's Strafreg in 1949. Instead of identifying only two basic principles of liability as in English law, those of actus reus and mens rea, De Wet and Swanepoel's classification was based on the German system which identified actus, criminal imputability, unlawfulness and "Schuld" or mens rea.⁵⁴ As a result of the influence of lawyers trained in this tradition⁵⁵ and the fact that this methodology contributes to clarity and legal certainty⁵⁶ as well as meeting the

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51. Badenhorst (n40) 215-216; Badenhorst (n43) 184-186; Burchell and Hunt (n7) 125; Snyman (n2) 123. This is still the basic distinction drawn in English law, see the arrangement of topics in Smith and Hogan Criminal Law and Williams Criminal Law.
52. Badenhorst (n40) 217; Badenhorst (n43) 70-71; Snyman (n2) 27; See the arrangement of contents in Burchell and Hunt (n7) xi.
53. Burchell and Hunt (n7) 48; Snyman (n2) 13; Badenhorst (n43) 2; Badenhorst (n40) 210; Snyman (n49) 74.
54. Snyman (n49) 72; Badenhorst (n43) 110-128; Burchell and Hunt (n7) 48; Snyman (n2) 13; Badenhorst (n40) 218.
55. Burchell and Hunt (n7) 48-49; Snyman (n49) 74.
56. See Morkel (n41) 1-2 on the importance of clarity and legal certainty.

basic requirement of nulla poena sine culpa,⁵⁷ the German classification has found its way into South African law.⁵⁸ The initial influence of German law on the South African system via De Wet and Swanepoel's book, reflected the pre-Second World War German development. Some aspects now reflected in our law have however since been rejected in German law. One of the areas in which German law has changed radically since then, is the fault concept.⁵⁹ South African law has not achieved the same kind of theoretical refinement as in German law.⁶⁰

In our law, dolus and culpa are recognised as the two forms of mens rea.⁶¹ One of the reasons why the concept of mens rea is problematic is that whilst these forms developed in Roman law in relation to specific acts, they have been grouped together as the mental elements for all crimes under

57. Jescheck "The doctrine of mens rea in German criminal law" 1975 CILSA 112.

58. See the identification of the elements of the crime in Mkise 1959 (2) SA 260(N) at 264D-E; Badenhorst (n43) 138-142. The continuing influence of German law has not however been without its critics, see Snyman's comment on such critics (n49) 74-75; Du Plessis "Hans Welzel's final conduct doctrine" (1984) 101 SALJ 301; Du Plessis "Wavering fortunes on the Strafrechtswetenskaplike front" (1986) 103 SALJ 2.

59. Snyman (n49) 75; Van der Merwe "Die Psigologiese v die Normatiewe skuldbegrip" (1983) 7 SACC 33-34; Jescheck (n57) 112-116.

60. This does not mean that the German theory is unproblematic see below.

61. Burchell and Hunt (n7) 136; De Wet and Swanepoel (n3) 137; Snyman (n2) 126; Rabie (n2) 64; Van der Merwe (n41) 280.

the name of mens rea, a concept derived from English law.⁶² The modern notions of dolus and especially culpa do not necessarily fit neatly into what is understood to constitute a guilty mind, the subjective element of liability in the English law classification.⁶³

Historically, culpa was seen as the exceptional form of mens rea, the rule being that liability was attached to intentional violations of the criminal law. Culpa is no longer an exception in modern South African law. Only one Roman-Dutch common law crime for which mens rea in the form of culpa is required, is recognised in our modern law, ie culpable homicide. In terms of numbers, however, crimes of negligence account for a large proportion of the cases before the courts. The increased number of accidents due to the hazards of modern technology and road traffic has led to a multiplication of culpable homicide cases. At the same time, the number of statutory crimes for which culpa is sufficient mens rea has increased in recent years due to an increase in legislative activity necessitated by social industrial and technological development.

62. Snyman (n2) 121; Erenius (n34) 80.

63. See Bertelsman (n29) 35 et seq; Snyman (n2) 123; Van der Merwe (n41) 281 et seq. Difficulty in accommodating culpa in the mens rea concept have led Anglo American writers like Hall and Williams to exclude negligence from their definitions of mens rea. See Hall General Principles of Criminal Law 3; Williams (n51) 14.

Although in the case of many statutory offences the act itself gives no indication as to whether mens rea is an element of the crime or whether strict liability is intended, the courts tend to favour a construction requiring mens rea at least in the form of culpa.⁶⁴

As a result of this increased regulation of all spheres of life, in business, industry, social life, people are increasingly confronted with situations in which their actions may have criminal legal implications. In a country like South Africa in which many people move from rural, often culture-bound and educationally disadvantaged backgrounds into a regulated social and economic life in the cities, it becomes particularly pertinent to ask how the courts deal with negligence liability and what are the social implications thereof.

(ii) Culpa in South African Criminal Law

Both the distinction in English law between actus reus and mens rea as well as the classification of general principles by De Wet and Swanepoel⁶⁵ into actus, unlawfulness, imputability and mens rea distinguish between objective and subjective elements of liability. The enquiry regarding mens rea is a subjective one into the psyche of the

64. Bertelsman (n41) 60; Rabie (n2) 81; Burchell and Hunt (n7) 192; 219.

65. As in the classical theory of criminal law in German law. See Jescheck (n57) 113-115..

offender,⁶⁶ a psychological enquiry, hence the classification of the guilt concept in South African criminal law as "psychological".⁶⁷ Since culpa is recognised as a form of mens rea, one would also expect it to be subjectively determined. This would entail an enquiry into the subjective state of mind of the accused in the light of his personality and capabilities.

Writing in 1937 on the meaning of culpa in South African criminal law, Coertze⁶⁸ argues:

"In so 'n geval straf ons die dader as hy die verbode gevolg veroorsaak. Op 'n wyse wat ons hom verwyf. Ons verwyf hom dat hy nie die sorg aan die dag geleê het wat hy volgens die eise van die gemeenskap aan die dag moes lê. Ons verwyf hom dat hy nie vooruit gesien het, wat hy volgens die eise van die gemeenskap vooruit moes sien nie."⁶⁹

A person acts negligently when he fails to live up to the expectation of the community with regard to what he foresaw and the care he took. The question is however what does the community expect of a person? According to the courts, the

66. See Smith and Hogan (n51) 31; Burchell and Hunt (n7) 125-126; De Wet and Swanepoel (n3) 156-157.

67. Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (Rumpff Report) para 2.1; Bergenthuin "Die algemene toerekeningsverbaarheidsmaatstaf" (1985) 18 DJ 277; Snyman (n2) 125; Snyman (n49) 75-76; Snyman "The normative concept of mens rea" (1979) 28 International and Comparative Law Quarterly 212; Badenhorst (n43) 125.

68. Coertze "Wat beteken culpa in die Suid-Afrikaanse Strafreë" (1937) 1 THRHR 85.

69. My italics.

answer to this question is, that the community expects a person to conduct himself in the same way as the reasonable man or the Roman bonus paterfamilias. Thus they postulate the reasonable man as a standard against which the conduct of an individual accused is measured.⁷⁰ Accordingly, a test⁷¹ to determine whether a person has acted negligently has been formulated in the following way.⁷²

- (a) Would the reasonable man in the position of the accused have foreseen the occurrence of the prohibited consequences⁷³ or the existence of the circumstances in which certain acts or omissions are circumscribed.⁷⁴

70. R v Meiring 1927 AD 41; Burchell and Hunt (n7) 196 especially the cases referred to in their note 601; Rabie (n2) 83; Snyman (n2) 197; Morkel Nalatigheid as grondslag vir Strafregtelike aanspreeklikheid 158, 162-166.

71. This test is the same in private law, see R v Meiring 1927 AD 41 at 46; Burchell and Hunt (n7) 196-197; Morkel (n70) 158; Rabie (n2) 83.

72. R v Burger 1959 (2) SA 110(T) 113; Kruger v Coetzee 1966 (2) SA 428(A) 430; Burchell and Hunt (n7) 203; Rabie (n2) 82; Snyman (n2) 197; Morkel (n70) 165; Morkel (n41) 106.

73. In the case of materially defined crimes (result crimes).

74. In the case of formally defined crimes (conduct crimes).

(b) Would the reasonable man have taken steps to guard against the possibility of the occurrence of such consequences or refrained from the prohibited action⁷⁵ or performed the required action.⁷⁶

(c) Did the accused conduct himself like a reasonable man in the circumstances.

If the answer to the third question is no, the conclusion that the courts draw is that the person acted negligently.⁷⁷

This test is objective.⁷⁸ The standard is not determined by reference to the individual capacities or characteristics of the accused but by reference to those of the hypothetical reasonable man. This was stated explicitly in *Mbombela*⁷⁹

75. Where the commission of an act is prohibited.

76. Where omissions are subject to penalty.

77. Mens rea must exist in respect of all the elements of the crime, thus the test is applicable to the actus and the unlawfulness elements. The wording of the test will vary accordingly. S v de Blom 1977 (3) SA 513(A); Whiting "Changing the face of mens rea" (1978) 95 SALJ 1; Burchell and Hunt (n7) 203; Botha Wederregtelikheidsbewussyn in die Strafreq 331; Rabie (n2) 64; Snyman (n2) 203.

78. Burchell and Hunt (n7) 196; Snyman (n2) 196; Morkel (n41) 4; Morkel (n70) 158; Bertelsman (n29) 37; Van der Vyver "Subjectivity or Objectivity of Fault" (1983) 100 SALJ 587; Corbett "An Objective approach to Punishment in a Multi-Racial Society" (1926) 11 IRW 24.

79. 1933 AD 269. The discussion of the reasonable man standard in this case was not specifically related to culpa but it is submitted that by implication it applies to culpa. See the discussion of *Mbombela* in Chapter 3 below.

"I have no doubt that by the law of this country there is only one standard of reasonable man.... It seems to me... that... the race or the idiosyncrasies or the superstitions or the intelligence of the person accused do not enter into the question."⁸⁰

and in Nyokong the court did not hesitate to describe the reasonable or normal person as a fiction.⁸¹

In addition, the test itself makes no mention of an evaluation of the state of mind of the accused. The test is designed to evaluate conduct. It is in respect of his actions that the individual complies with or falls below the standard of the reasonable man.

The anomaly of using an objective standard and a test which evaluates conduct, to determine culpa as a form of mens rea which is by definition a state of mind which should be judged subjectively, has not escaped the notice of academic writers or the courts. Responses have been of three varieties:

A. A redefinition of culpa to mean conduct or an attribute of conduct instead of a form of mens rea.⁸²

80. At 272-273. Hugo "Can Murder and Culpable Homicide overlap?" (1973) 90 SALJ 334 at 337.

81. 1975 (3) 792(O).

82. S v Nqubane 1985 (3) SA 677A at 686-687. See Botha "Culpa - a form of mens rea or a mode of conduct" (1977) 94 SALJ 29; Burchell and Hunt (n7) 194; Du Plessis (n58) 6; Edgerton "Negligence, Inadvertence and Indifference" (1926) 39 Harvard Law Report 852.

- B. An insistence on the use of a subjective test for culpa.⁸³
- C. A change of emphasis with regard to both the definition of mens rea and the test for culpa.⁸⁴

In Nqubane⁸⁵ Jansen JA argued:

"Dolus connotes a volitional state of mind. Culpa it would seem may entail no state of mind at all. The mere labelling of culpa as a form of mens rea does not necessarily and decisively point to the contrary. The view generally held by our courts is that culpa is constituted by conduct falling short of a particular standard, viz that of the reasonable man."

This view is common among Anglo-American lawyers.⁸⁶

Edgerton⁸⁷ subscribes to what he calls the conduct theory:

"Negligence neither is nor involves either indifference or inadvertence or any other mental characteristic, quality state or process. Negligence is unreasonably dangerous conduct.... Freedom from negligence... requires only that one's conduct be... as little likely to cause harm as the conduct of a normal person would be."

If negligence is conduct, what is meant by conduct? Jansen does not define conduct in Nqubane. Edgerton equates

83. De Wet and Swanepoel (n3) 153.

84. Burchell and Hunt (n41) 36.

85. (N82) at 686E. See Milton 1985 Annual Survey 408.

86. See Didcotts consideration of English authorities in Zoko 1983 (1) SA 871(NPD) at 885G-886B.

87. Edgerton (n82) 852.

conduct simply with physical action⁸⁸ and states furthermore that no particular mental attainment precludes negligence.

Thus:

"negligent conduct and consequently liability, may coexist with normal and proper advertence and anxiety."⁸⁹

In Zoko⁹⁰ Didcott J considered the mode of conduct theory but felt constrained to reject it.

"The reason is that our law, our criminal law at all events, does regard negligence as a state of mind rather than a type of conduct."

This rejection is based on the theoretical acceptance of negligence as a form of mens rea, mens rea being defined as a state of mind.

A far more fundamental objection to the construction of culpa as conduct, is that this amounts to strict liability.⁹¹ The logical conclusion that negligence as conduct, leads to, is that liability may be imposed even where conduct is accompanied by "normal and proper advertence and anxiety",⁹² and even in cases where it may be physically and mentally impossible for the accused to attain

88. At 854. See Erenius (n34) 127.

89. At 854; See also his note 23.

90. 1983 (1) SA 871(NPD) at 886-887. See Du Plessis (n58) 6; Van Zyl (n42) 101.

91. Botha (n82) 29; Erenius (n34) 125.

92. Below.

the required standard of conduct. While it is doubtful whether Jansen in Nqubane envisaged liability for conduct accompanied by normal and proper advertence, liability in cases where the accused is physically or mentally unable to reach the required standard of conduct still amounts to strict liability.⁹³ Even Du Plessis who, in principle, believes "that culpa should be tested objectively - very objectively in fact"⁹⁴ baulks at the acceptance of the mode of conduct theory.

"With respect I am not sure that that is all there is to criminal negligence. Criminal law is concerned with conviction and punishment : the question why the accused acted as he did must be important in any inquiry into criminal conduct."⁹⁵

A determination of negligence which only takes notice of external motions, totally excludes the actor as a person, it has lost all contact with the individual accused.⁹⁶

The conduct theory is in conflict with a fundamental rule of criminal responsibility, embodied in the nulla poena sine culpa maxim. The historical development of South African criminal law demonstrates a tendency to exclude strict liability. This can be seen in the rejection of the "versari in re illicita" doctrine on the express ground that

93. Botha (n82) 29.

94. Du Plessis (n58)1.

95. At 7.

96. Erenius (n34) 127.

it is in conflict with the fault principle in our law,⁹⁷ and the trend to interpret statutory offences as including mens rea in the form of at least culpa.⁹⁸ In addition none of the theories of punishment are compatible with strict liability.⁹⁹

It is submitted that strict liability is not desirable or acceptable to the broader community in South Africa.¹⁰⁰ It is also submitted that a concept of negligence which has lost all contact with the individual accused is inappropriate in South Africa precisely because the community is made up of individuals from very different backgrounds and levels of competence.¹⁰¹

The second proposed "solution" to the subjective mens rea - objective test for culpa dichotomy is the rejection of the objective test altogether and the adoption of a subjective test for culpa. De Wet and Swanepoel argue that the objective test is of no value in a legal system that bases

97. S v Van der Mescht 1962 (1) SA 521(A) at 534E; S v Bernardus 1965 (3) SA 187(A) at 296E-F and S v Mtshiza 1970 (3) SA 747(A) at 752A. See De Wet and Swanepoel (n3) 107; Burchell and Hunt (n7) 127; Rabie (n2) 64.

98. De Wet and Swanepoel (n3) 105; Kemp "Die relevansie van die normoortreding by statutêre nie-gevolgsmisdade" (1986) 49 THRHR 20 at 22.

99. Snyman (n2) 120; Morkel (n41) 2-3.

100. See above. This is also the conclusion drawn by the South African Law Commission in its Report on the investigation into the application of mens rea in statutory offences GP-S 300 September 1982 at 90.

101. See the argument of De Wet and Swanepoel (n3) 153-154.

liability on the blameworthiness of the actor's state of mind¹⁰² and describe the test as a contradictio in terminis.¹⁰³

If culpa is to be defined in terms of a state of mind, the question is, what is the content of the state of mind of the negligent actor? Van der Linden defines culpa as:

"met behoorlijk gebruiken van zijn verstand en oplettendheid."¹⁰⁴

De Wet and Swanepoel accept this definition and argue that the failure to use your mental abilities or powers is as much a state of mind as an intention to commit an unlawful act.

"In albei gevalle het 'n mens te doen met die gesindheid van die persoon ten opsigte van die geoorlooftheid van sy doen of late. In die eerste geval (dolus) verwyf mens hom omdat hy 'n ongeoorloofde doen of late wil. In die tweede geval verwyf mens hom omdat hy sy geestekragte nie inspan om ongeoorloofde optrede te vermy nie."¹⁰⁵

Accordingly, the question which the courts should be asking in order to determine whether an accused acted negligently, is whether a particular person in that particular situation has fully used his mental powers or abilities to avoid the commission of the offence. In particularising the accused,

102. (n3) 15.

103. (n3) 155.

104. See De Wet and Swanepoel (n3) 153.

105. (n3) 153.

his person mental and physical capabilities and his personal knowledge and experience must be taken into account.¹⁰⁶

Obviously this is in direct conflict with the objective test which appears to have been accepted in South African law.¹⁰⁷ For our purposes this is not a fatal objection and even if it were, it is questionable whether the purely objective test finds unqualified support in our case law.¹⁰⁸

A more serious objection is that the subjective test is inconsistent with the reasons for punishing negligence. It has been pointed out in relation to Roman law that social policy considerations necessitated the criminalisation of negligent conduct.¹⁰⁹ The same argument holds for modern society. Liability is imposed on those who fail to maintain a standard of conduct necessary for social intercourse and the safety of individual members of society. The subjective test does not set a standard by which the accused's conduct is to be judged. The implication is that:

106. De Wet and Swanepoel (n3) 156.

107. Morkel (n70) 176; Rabie (n2) 85.

108. This aspect will be dealt with shortly.

109. Above.

"Each man is a law unto himself and a subjective standard in that sense can only mean that the quality of such men's conduct is answered by the norms of his own behaviour. In that event liability would truly be 'as variable as the length of the foot of each individual'."¹¹⁰

It can be argued that the subjective test advocated by De Wet and Swanepoel implicitly includes a standard, that the accused's conduct is to be judged by the standard of his mental and physical capabilities. The test would be whether the accused made full use of his mental and physical powers. In that case however, only physical and mental abilities would be taken into account. This would exclude other factors like religious or cultural beliefs which may be relevant to the accused's course of conduct in a particular situation,¹¹¹ and could lead ultimately to liability in the absence of personal fault.

The third approach in the trilogy of arguments aimed at eliminating the inconsistency in the use of an objective test to determine the existence of the subjective element of the crime, is the line of least resistance, and appears to be the trend in judicial decisions on culpa. It involves an acceptance of culpa as a form of mens rea, meaning a blameworthy state of mind and the use of the established objective test but the inconsistency is 'solved' by a change of emphasis with regard to both aspects. The theoretical

110. Millner quoted in Hunt South African Criminal Law and Procedure vol II 1st ed 378.

111. See Hunt (n110) 378.

inconsistency is purportedly solved by emphasising blameworthiness as an element of mens rea, thus importing an objective normative element into the subjective notion of mens rea while at the same time, modifying the objective test to allow for some personal characteristics of the accused.¹¹²

The view that one cannot classify culpa as a state of mind, as the actor's mind is said to be blank vis-a-vis the consequences or illegality of his actions rests on the premiss that mens rea means "a state of mind" which necessarily involves a cognitive state of mind.¹¹³ Burchell and Hunt¹¹⁴ contend:

"It is more accurate though to understand mens rea as denoting a condition of blameworthiness expressed in terms of the state of mind of an actor in relation to a prohibited act or consequence.... Where dolus is mens rea, blameworthiness is postulated upon X's intentional bringing about of some unlawful act or consequence; where culpa is mens rea, blameworthiness is postulated upon X's inadvertence vis-a-vis an unlawful act or consequence."

The use of the objective test is then rationalised by arguing that the failure of the actor to live up to the

112. See Rabie (n2) 84; Schäfer "The swing towards the subjective test for negligence in criminal law" (1978) 41 IHRHR 201; Goosen "The objective test for criminal negligence - a re-evaluation" 1979 Obiter 60 at 61.

113. This argument would relate only to unconscious negligence. In the case of conscious negligence a cognitive mental state does exist.

114. Burchell and Hunt (n7) 195; Hunt (n28) 413-414.

standard of the reasonable man is blameworthy and that therefore there is no contradiction involved in the use of an objective test for mens rea.¹¹⁵

This argument does not however account for personal blameworthiness.¹¹⁶ Discomfort felt at the absence of any enquiry into subjective blameworthiness has led to the introduction of subjective elements into the objective reasonable man test. Initially this was done by emphasising that the reasonable man is placed in the position or the same circumstances as the accused.¹¹⁷ This still means however that only external factors accompanying the act are taken into account, the personal characteristics of the accused play no role.¹¹⁸

Some decisions however indicate a tendency on the part of the courts to take personal characteristics into account.¹¹⁹

115. Burchell and Hunt (n7) discuss objections to this argument at 196.

116. Fault has come to be defined as blameworthiness within this argument. See (n28).

117. See S v Bernardus 1965 (3) SA 287(A) at 300F; S v Olivier 1969 (4) SA 78(N) at 84A; S v Burger 1970 (3) SA 529(A) at 534 G-H; S v Southern 1965 (1) SA 860(N) at 861.

118. See Jones v Santam Bpk 1965 (2) SA 542(A) at 551G; Snyman (n2) 200. Even in the case of children - see van der Vyver (n78) 587; Labuschagne "Strafregtelike aanspreeklikheid van kinders" 1978 ISAR 250 at 266.

119. In general see Bertelsman (n3) 62; Burchell and Hunt (n7) 201; Schäfer (n112) 203; Botha (n82) 38; Goosen (n112) 63; Hunt (n28) 416.

In S v Van As¹²⁰ the court described the reasonable man test in the following way:

"Hierdie diligens paterfamilias is natuurlik 'n fiksie en is ook maar al te dikwels nie 'n pater nie. Hy word 'objektief' beskou by die toepassing van die reg, maar skyn sowel objektief as subjektief beoordeel te word omdat hy 'n bepaalde groep of soort persone verteenwoordig wat in dieselfde omstandighede verkeer as hy met dieselfde kennisvermoë. Indien 'n persoon dus nie voorsien nie wat die ander persone in die groep wel kon en moes voorsien het, dan is daardie element van culpa... aanwesig."

This dictum suggests that the reasonable man standard should be adapted to the particular group to which the accused belongs.¹²¹ In casu the court was faced with an accused who had knowledge and experience beyond that of the ordinary person.¹²² This has long been an accepted exception to the purely objective reasonable man test,¹²³ but it can be argued that the principle applies equally to persons belonging to a group with less knowledge or experience than the average person.¹²⁴ The emphasis on the accused being representative of a particular group or kind of person leads

120. 1976 (2) SA 921(A) at 928D-E.

121. Rabie (n2) 85; Goosen (n112) 64.

122. At 929 F-G in casu knowledge of judo and boxing.

123. See Burchell and Hunt (n7) 199; Goosen (n112) 64-65; Snyman (n2) 202-203; Bertelsman (n41) 63.

124. Schäfer (n112) 205; Goosen (n112) 65. See the localised reasonable man in S v Dalindyebo 1980 (3) SA 1049 (TK) discussed by Cameron and Van Zyl Smit "The Clapham Omnibus (Local model)" 1980 Annual Survey 521, and also the reasonable child test used in S v T 1986 (2) SA 112.

one to the conclusion that there is not only one standard of reasonable man, but that the standard may be variable to account for different conceptions of the reasonable man.

The first difficulty with this approach is the identification of the "group" to which the individual accused belongs. Which groupings are relevant in this context? Do race, class and religion constitute groups which should be recognised for the purposes of determining what a reasonable man would have done in a given situation? It is submitted that it would be more helpful to refer to the particular community to which the person belongs. In such a case at least the community to which the accused belongs would be objectively ascertainable although the characteristics of the community would have to be established by evidence.

But even then such classification does not necessarily say anything about a particular person's abilities and disabilities. The individual accused with disabilities not seen to be characteristic of the group to which he has been assigned, is in exactly the same position he would be in if there were only one reasonable man. Personal blameworthiness would once again be absent.

A number of decisions however indicate a willingness on the part of the courts to take subjective considerations into

account on an individual basis.¹²⁶ In R v Mara¹²⁶ the court said:

"Killing in the course of an unlawful assault is culpable homicide, if the accused, given his mental and physical make-up, would, had he thought about the matter inevitably have recognised that in some way danger to life might be involved in the act."¹²⁷

In S v Le Roux,¹²⁸ the court confirmed a conviction of entering a National Part without a permit on the following grounds, without reference to the reasonable man test:

"Dat 'n polisiebeampte met nege jaar diens agter die rug so onkundig kan wees kan ek nie aanvaar nie. Na my mening dui alles daarop dat die appellant wel deeglik besef het dat hulle in die omgewing van die wildduin kampeer, maar hy het nie die minste moeite gedoen om vas te stel waar die grense is nie. Die penarie waarin die appellant beland het is dan sy eie onverskilligheid te wyte."¹²⁹

It is clear from this decision that the accused's personal knowledge and experience was the basis for his liability.

125. See Bertelsman (n41) 63; Schäfer (n112) 204; Burchell and Hunt (7) 201; Goosen (n112) 68; Rabie (n2) 85.

126. 1966 (1) SA 82 (SR) at 83G.

127. My emphasis.

128. 1969 (3) SA 725T at 729.

129. My emphasis.

In S v De Blom¹³⁰ Rumpff CJ said that where mens rea in the form of culpa is required, a defence of ignorance of the law may be successful if:

"Wat al die omstandighede betref, dit redelik moontlik is dat sy met die nodige omsigtigheid te werk gegaan het om haar op hoogte te stel van wat van haar verwag word in verband met die vraag of toestemming om geld uit te neem nodig is of nie."

and found that with regard to the contravention of certain exchange control regulations,

"haar getuienis redelik moontlik waar mag wees, dat in die omstandighede van die saak as geheel, dit redelik moontlik is dat sy kon gedink het dat sy geen toestemming tot die uitneem van die juwele nodig gehad het nie en dat gesien haar ondervinding in die verlede, waarby sy ongesteurd toegelaat was om juwele uit te neem en weer terug te bring, daar geen juridiese blaam op haar rus nie omdat sy nie navraag gedoen het omtrent die vraag of toestemming nodig is...."¹³¹

In spite of the application of a subjectivised enquiry in such cases, the courts have been reluctant to openly reject the established objective reasonable man test.¹³² In a number of cases also they have unanimously approved the objective test for culpa, yet in fact used the subjective capabilities of the accused to determine liability.¹³³

130. 1977 (3) SA 513(A) at 532-533.

131. My emphasis.

132. Goosen (n112) 78; Burchell and Hunt (n7) 201.

133. See Bertelsman (n41) 64.

In S v Arenstein¹³⁴ the accused failed to comply with a police notice issued in terms of the Suppression of Communism Act. The court held that:

"the appellant failed to exercise that circumspection or care which is required of any person to whom a notice... has been delivered."

This indicates a failure to live up to a required standard, yet the factors taken into account indicate that the court was concerned with subjective mens rea.

"he knew that a failure to comply with the notice would be a serious matter. For him compliance with the notice was not a difficult matter.... On these circumstances it seems to me that to have forgotten to report... reveals a rather casual attitude towards requirements of the notice."¹³⁵

Similarly in S v Qumbella¹³⁶ the court purported to apply the test of what "a reasonable man in the position of the appellant... would have realised",¹³⁷ yet the court investigated the events relating to the appellant's recent history in order to appreciate the situation in which he found himself.¹³⁸ Most of these pertained to his subjective conception of his position. And in S v Duma¹³⁹ the court

134. 1964 (1) SA 361(AD) at 367-8.

135. At 367-8 emphasis added.

136. 1967 (4) SA 577AD.

137. At 580H.

138. At 579E.

139. 1970 (1) SA 70(N).

again specifically referred to the objective test yet applied a subjective one. The court said that it was for the state to prove that "although the appellant genuinely believed that he had picked up a toy, a diligens paterfamilias in his position would not have entertained that belief...",¹⁴⁰ yet went further and made a finding on the following basis:

"The appellant in this case was either convinced that the object which he picked up was a toy, or he was not so convinced. If he was so convinced that it was a toy and had no thought of it being anything but a toy, it is difficult to conceive of there being a duty upon him to enquire whether perchance it was a firearm...."¹⁴¹

What these few cases illustrate is that the courts are not unaware of the theoretical contradiction inherent in the use of an objective test when enquiring into a form of mens rea, which by definition should entail a subjective enquiry. More importantly, they demonstrate that the courts are not altogether comfortable with the objective reasonable man test especially in cases where it is clear that a particular accused did not have the ability to think and act as the reasonable man would. The oft-quoted dictum of Beadle CJ in R v Nkomo¹⁴² gives an indication of some of the reasons why this test is inappropriate in South Africa.

140. At 76G.

141. At 76D. See also S v Fernandez 1966 (2) SA 259(A); S v Van Dventer 1963 (2) SA 475(A); S v Van der Mescht 1962 (1) SA 521(A).

142. 1964 (3) SA 128 SR at 131.

"In England with its relatively homogeneous population, the test of "the reasonable man" has caused enough difficulty in attempting to define the standard. In a country such as this, with its diverse, multi-racial community, whose social and education standards vary over almost the widest possible range, the task is wellnigh impossible."

(iii) A German Comparison

The theoretical separation of the objective and subjective elements of liability and the concomitant psychological concept of mens rea adhered to in modern South African criminal law¹⁴³ are to a large extent based¹⁴⁴ on the classical theory of criminal law of 19th century Germany.¹⁴⁵ According to this theory the term "Schuld" which was used to denote the subjective or mental element of liability, encompassed intention (Vorsatz)¹⁴⁶ and negligence (Fahrlässigkeit) and was defined as:

"die seelische Beziehung des Täters zum Erfolg."¹⁴⁷

German law, however, no longer accepts this subjective-objective separation of the elements of liability or the

143. Supra.

144. Certainly in the case of De Wet and Swanepoel's Strafreg. Earlier analyses based on English law are also basically at least in accordance with this theory.

145. Jescheck (n57) 115; Snyman (n67) 212; Van der Merwe (n59) 33; Bergenthuin (n67) 277; Erenius (n34) 74.

146. Erenius (n34) 74.

147. Welzel Das Deutsche Strafrecht 139.

psychological concept of mens rea.¹⁴⁸ After a long period of development and refinement of the basic concepts of criminal law, German theorists have come to the conclusion that "Schuld" does not consist merely in a certain mental content, but that the essence of "Schuld" is the blame attached to the formation of the decision to act or not to act.¹⁴⁹

Welzel¹⁵⁰ comments:

"Die Schuld erschöpft sich nicht in dieser Relation eines sachlichen Missverhältnisses zwischen Handlung und Rechtsordnung sondern begründet den persönlichen Vorwurf gegen den Täter, dass er die rechtswidrige Handlung nicht unterlassen hat obwohl er sie unterlassen könnte."

Thus the current definition of mens rea in German criminal law is:

"Schuld ist Vorwerfbarkeit."¹⁵¹

148. Erenius (n34) 75; Jescheck (n57) 119; Bergenthuin (n67) 27; Snyman (n67) 211.

149. Welzel (n147) 138; Jescheck (n57) 117); Jescheck Lehrbuch des Strafrechts 326; Maurach Deutsche Strafrecht 298; See also Erenius (n34); Snyman (n2) 124; Snyman (n67) 23-24; Snyman "The 'finalistic' theory of an act in criminal law" (part two) 1979 SACC 136; Bertelsman (n29) 35-36; Badenhorst (n43) 242; Van der Merwe Die leerstuk van Verminderde Strafbaarheid 23-24.

150. Welzel (n147) 138.

151. Jescheck (n149) 326; Maurach (n149) 298; Welzel (n147) 139; Erenius (n34) 75; See however Schönke-Schröder Strafgesetzbuch 154-155.

Embedded in the concept of blameworthiness (Vorwerfbarkeit) is a normative consideration. The blame or reproach is an expression of a value judgement by the court, thence the description of the German concept of mens rea as "normative".¹⁵² It is normative in the sense that it expresses a relation between the wrongdoer personally and the legal order in society and is not merely a finding of a state of mind of the accused.¹⁵³

Snyman comments:

"Omdat skuld 'n beoordeling is en nie 'n gesindheid nie, kan 'n mens... sê dat skuld geleë is 'in die kop van die beoordelaar' en nie 'in die kop van die dader nie'.¹⁵⁴

This statement does not however reveal the full implications of the normative theory. According to the definition "Schuld ist Vorwerfbarkeit", mens rea is not merely blame or reproach, but blameworthiness. Therefore the question must always be, what is the person to be blamed for? In what does the blameworthiness lie?¹⁵⁵

152. Erenius (n34) 75; Snyman (n149) 136; Bertelsman (n29) 36; Badenhorst (n43) 242; Bergenthuin (n67) 276; Maurach (n149) 301.

153. Snyman (n2) 124; Snyman (n67)) 216.

154. Snyman (n2) 124-125.

155. Schönke-Schröder (n151) 154-155 argue that the 'Schuld' concept is more complex than the "Schuld ist Vorwerfbarkeit" definition allows for. According to them, 'Vorwerfbarkeit' is merely the process of evaluation, while 'Schuld' is the subject matter of that reproach. See below.

Snyman identifies the illegal act as the object of the blame.¹⁵⁶ The German theorists however make it clear that blame is not primarily attached to the act itself, but rather to the decision to act (Willensbildung):¹⁵⁷

"Da es der Wille ist, durch den der Täter sein Verhalten normgemäss hätte steuern können, so ist primärer Gegenstand des Schuldvorwurfs der Wille und erst durch ihn hindurch auch die ganze Handlung."¹⁵⁸

Even more importantly, this decision to act is evaluated in the light of the actor's personal abilities:

"Hier geht es um die Frage, unter welchen Voraussetzungen der Täter Als Person von Fleisch und Blut für eine rechtswidrige Handlung verantwortlich gemacht werden darf. Um dies beurteilen zu können, wird geprüft, auf welche Weise der rechtswidrige Handlungswille zustande gekommen ist."¹⁵⁹

Liability can accordingly only be established where the person was capable of taking a decision and acting in accordance with the requirements of the community as set out in the legal norm.

156. Snyman (n2) 124; Snyman (n149) 136-137.

157. Snyman justifies his identification of the act as the object of the blame by pointing out that the will "must always manifest itself in an act." Snyman (n149) 137 footnote 53; also (n2) 124. It is however important to maintain the primacy of the decision to act, to avoid the consequences of the mode of conduct theory, see above.

158. Welzel (n147) 139; See also Jescheck (n149) 326.

159. Jescheck (n149) 326 (emphasis added). See also Welzel (n147) 139; Snyman (n2) 124.

"Er hätte sich normgemäss motivieren können. In diesem 'Dafür-Können' des Täters für seine rechtswidrige Willensbildung liegt das Wesen der Schuld."¹⁶⁰

The development of the normative concept of mens rea was but one aspect of a larger development of the general principles of criminal law and the elucidation of the relationship between the various concepts.¹⁶¹ According to Welzel, one of the first cracks in the analysis of criminal liability as consisting of independent subjective and objective elements and the psychological concept of mens rea, became evident on closer examination of unconscious negligence:

"Worin sollte denn bei der unbewusste Fahrlässigkeit die seelische Beziehung des Täters zum Erfolg bestehen? Die unbewusste Fahrlässigkeit war die erste Klippe, an der der psychologische Schuldbegriff scheiterte."¹⁶²

Unconscious negligence could not satisfactorily be explained by reference to a psychological state of mind in the same way as intentionality could, because the kind of state of mind involved in the case of dolus is completely absent, the

160. Welzel (n147) 138.

161. Jescheck (n56) 113. A full account of this development is impossible within the confines of this dissertation and in fact not essential to the enquiry as much of the development centres around the content of the actus reus and the place of intention within the structure of criminal liability. For a detailed analysis see Badenhorst (n41) 21-48.

162. Welzel (n147) 139.

mind is blank vis-a-vis the consequences.¹⁶³ The role of the court in making a value judgement in order to find liability is much clearer in the case of negligence, even in the way in which culpa was dealt with in the pre-normative stages of development.¹⁶⁴

The untenability of a rigid division between subjective and objective elements of liability became clear when it was shown that the actus reus cannot always be defined independently of the subjective intention or knowledge of the accused. This is best illustrated by reference to offences which require some specific intention in addition to the intention to perform an act. Theft, for example, requires the intention to deprive the owner permanently of the benefits of ownership for the mere removal of an object to be an actus reus relevant to the offence.¹⁶⁵ It had become clear to German theorists that the external act and the psyche are far too closely interrelated to be categorically divided into objective and subjective elements. It is in this context that Welzel describes the development of the normative concept of mens rea as:

163. See, however, my analysis of the state of mind involved in negligence above. This problem does not arise if mens rea is seen as consisting in the blameworthiness of the decision to act, see below.

164. See Erenius (n34) 74-75; Jescheck (n57) 117; Welzel (n147) 140; Maurach (n149) 301-301.

165. Jescheck (n57) 116; Snyman (n67) 213; Badenhorst (n43) 239-242; Snyman "The Attack on German Criminal Legal Theory - a retort" (1985) 102 SALJ 120 at 123.

"der Ersetzung des Gegensatzpaares Objektiv-Subjektiv durch das Gegensatzpaar Sollen-Können." 166

These insights have been taken to their ultimate theoretical and practical consequences in the finale Handlungslehre, the final conduct theory.¹⁶⁷ According to the classical theory of criminal law the act is merely a movement of the body. The aim of the person acting is irrelevant to the actus reus, it only becomes relevant at a later stage, when deciding whether the person had mens rea or not. This is the crux of the distinction between the objective and subjective elements of liability.¹⁶⁸

The finale Handlungslehre¹⁶⁹ is based on a different conception of human behaviour. According to this theory every human act is purpose orientated. The will is crucial to the act as the directing of the will to a particular goal determines the character and structure of the act. Every act is therefore by definition an intentional act. Applied

166. Welzel (n147) 140.

167. This theory is not accepted by all German theorists and does not necessarily affect the content of negligence in criminal law, but bears some investigation because it is in the context of the finale Handlungslehre that most of the current debate regarding criminal negligence is taking place in German legal theory. See Snyman "The finalistic theory of an act in criminal law" (part one) 1979 SACC 3 and part two (n149).

168. Snyman (n167) 5; Snyman (n67) 213.

169. Also referred to as the doctrine of Finalismus Jescheck (n57) 117.

to criminal law, this means that intention or dolus belongs to the structure of the actus reus.¹⁷⁰

"With the elimination of intent as the last psychological factor from the concept of mens rea, the transition to the purely normative idea of mens rea was accomplished."¹⁷¹

This leads to a reorganisation of the other elements of liability, in particular, knowledge of unlawfulness becomes central to the mens rea enquiry. The accused is reproached for deciding to act despite his knowledge of unlawfulness.¹⁷²

Negligence does not however fit neatly into this scheme. While the act involved may be purpose orientated, the purpose is not relevant to the actus reus. The actor did not intend the unlawful consequences, in fact he may not even have considered them.¹⁷³ Welzel¹⁷⁴ maintains that the same principles apply to negligent conduct despite the fact that the purpose aimed at falls outside the definition of the crime.

170. See Jescheck (n149) 169; Snyman (n67) 214; Snyman (n167) 8-11; Erenius (n34) 76.

171. Jescheck (n57) 117.

172. Jescheck (n57) 117; Jescheck (n149) 169; Snyman (n149) 137-138; Snyman (n67) 215).

173. See Snyman (n67) 217.

174. Welzel (n147) 175.

"Da die Rechtswidrigkeit des fahrlässigen Deliktes durch die Verletzung der objektiven Sorgfalt bei Vornahme der Täterhandlung begründet wird, bedeutet hier 'Erkennbarkeit der Rechtswidrigkeit'; die individuelle Erkennbarkeit der Sorgfaltswidrigkeit der Täterhandlung."

Thus the unlawfulness of negligent conduct lies in the violation of the duty of care demanded by the interests of society expressed in the legal norms. The blameworthiness consists in the accused not directing his will in accordance with the required standard of care while he could have done so in the light of his personal abilities.

Jescheck denies the applicability of the finale Handlungslehre to crimes of negligence, maintaining that the finale Handlungslehre has led to a clarification of the content of negligence and had shown that negligence is not merely a form of fault, but a particular kind of culpable act which differs fundamentally from intention with regard to both the unlawfulness element and the structure of fault.¹⁷⁵

"Damit wurde zugleich die prinzipielle Scheidung der Vorsatz- und Fahrlässigkeitstaten vollzogen, die nicht erst als Schuldformen, sondern schon im Unrechstatbestand auseinandertreten."¹⁷⁶

In spite of this difference of opinion, Jescheck comes to the same conclusion as Welzel regarding the content of

175. Jescheck (n149) 457.

176. Jescheck (n149) 170. He is however more ambivalent about the applicability of the finale Handlungslehre to crimes of negligence in (n57) 118-119.

blameworthiness in such cases.¹⁷⁷ When dealing with conscious negligence, it is said that the actor did foresee the danger inherent in his actions and that the illegal consequence may follow but decided that those consequences would not be realised. He is blamed for his lack of care in taking this decision. In the case of unconscious negligence the actor is blamed for not foreseeing the consequences of his actions when he could have done so if he had taken due care.¹⁷⁸

It is submitted that the normative concept of mens rea can support itself without reference to the "finale Handlungslehre". This contention is supported by the similar conclusions reached by both Jescheck and Welzel with regard to the blameworthiness of negligent conduct.

The development of the "finale Handlungslehre" has however illustrated the fundamental differences between intention and negligence. Consequently, the content of negligence has been defined to reflect the particular real issues involved in crimes of negligence.¹⁷⁹

177. Jescheck also proposes the same means of determining liability in cases of negligence see below.

178. Jescheck (n149) 459; Welzel (n147) 175; See Morkel (n70) 136-137.

179. Jescheck points out that the insight that the notation of a duty of care is a consideration in crimes of negligence in addition to the actual causing of the consequences, was already reflected in the classical theory of criminal law, but maintains that this insight has been developed into a new "Fahrlässigkeitsdogmatik" (n149) 170.

In practice in accordance with the normative approach in Germany, liability for negligent conduct is based on a double enquiry.¹⁸⁰ The first enquiry is whether the accused acted with the care and foresight required by the community in the particular circumstances. Secondly, it must be proved to the satisfaction of the court that the particular accused, given his physical and mental capabilities, had the capacity to deal with the situation in accordance with this standard of care and foresight.

Jescheck¹⁸¹ writes:

"One can conclude from decisions of the federal Supreme Court, that a defendant will be found criminally negligent only if, in addition to his responsibility for causing the injury, there was a lack of the objectively required duty of care due to his personal inattention and if this lack of care was in fact the cause of the forbidden consequences."

The first enquiry is an objective one. It is based on the premiss that each member of the community is expected to adhere to a certain standard of care in order to avoid injury or harm to other members of the community or the community as a whole. The duty of care arises from

180. See Jescheck (n149) 457; Jescheck (n57) 118; Welzel (n147) 175-176; Schönke-Schröder (n151) 221; Morkel (n70) 138; Morkel (n41) 92; Snyman (n67) 217; Erenius (n34) 76; Maurach (n149) 486.

181. Jescheck (n57) 119.

statute¹⁸² or from involvement in certain activities¹⁸³ or simply from life experience based on the criminalisation of negligent conduct.¹⁸⁴ It is however for the court to determine the standard of care required in all these cases. How this is to be done, is the subject of much disagreement.

German civil law defines the standard as:

"Die im Verkehr erforderliche Sorgfalt."¹⁸⁵

Jescheck agrees that this reflects the position in criminal law as well and expands on this idea as follows:¹⁸⁶

"Was in der Gemeinschaft an Vorsicht und Aufmerksamkeit erforderlich ist, um Rechtsgutsverletzungen zu vermeiden."

According to Jescheck, the standard of care is to be determined by reference to three particular duties of care. These particular duties represent aspects of the general duty of care (Sorgfaltsgebot). All three duties are not necessarily always applicable, the combination of duties may vary depending whether one is dealing with advertent or inadvertent negligence and the facts of the particular case.

182. eg Traffic offences.

183. eg Some professions.

184. The actor has a duty to avoid damage or harm to others because experience teaches that the law protects certain interests. See Jescheck (n149) 471.

185. Jescheck (n149) 468.

186. Jescheck (n149) 468.

A. The duty of identification and foresight of the danger to a protected interest,¹⁸⁷ which is determined by reference to:

"der gewissenhafte und besonnene Mensch des Verkehrskreises, dem der Handelnde angehört; und zwar in der konkreten Situation in der er sich befunden hat und bei Betrachtung der Gefahrenlage 'ex ante'."¹⁸⁸

This standard of the "gewissenhafte und besonnene Mensch" is not mentioned in his discussion of the other duties of care.

B. The duty to avoid the unlawful consequences which an actor foresees, which is determined by reference to different standards. In uncomplicated cases, the duty is simply to avoid the consequences by desisting from the planned action. In inherently dangerous situations eg the use of dangerous industrial machinery or medical operations, the actor has a duty to take all the precautionary measures necessary in the situation, to avoid the danger or at least to contain it. There is, however, a qualification:

"Je grösser der soziale Wert der vom Täter vorgenommenen Handlung ist, desto eher werden Gefahren bei der Ausführung in Kauf genommen werden dürfen."¹⁸⁹

187. This is obviously not applicable to advertent negligence.

188. Jescheck (n149) 468.

189. Jescheck (n149) 470.

C. The third duty identified is that of information and preparation. The standard differs depending on the particular case. Jescheck merely defines it by reference to the degree of knowledge and experience without which it would be irresponsible to undertake a certain action with its accompanying risks.¹⁹⁰

Schönke-Schröder does not identify different duties of care. According to them, it is accepted that the standard is a "Durchschnittsmaßstab" with reference to:

"was ein einsichtiger und besonnener Mensch tun würde und könnte."¹⁹¹

This standard must however, be varied in relation to particular professions or jobs and in cases where the accused may have knowledge and experience beyond that of the average person, especially in situations which are inherently dangerous.¹⁹²

This standard of the "einsichtiger und besonnener Mensch" is similar to the standard of the reasonable man applied in South African law.¹⁹³ It is however submitted that there is much more emphasis placed on the expectations of the community with regard to the average person than on the

190. Jescheck (n149) 470.

191. Schönke-Schröder (n151) 225.

192. Schönke-Schröder (n151) 225.

193. See Morkel (n70) 140; Morkel (n41) 95.

reasonableness of the conduct, although in many situations the standard would be the same. As in our law, the standard is determined by reference to the particular situation in which the accused finds himself and any knowledge and/or experience that he possesses and which is in excess of that of the average person, are taken into account.¹⁹⁴

A second substantive enquiry into the abilities and capabilities of the accused is absent in South African law.¹⁹⁵ It is stressed by all the German writers referred to, that a person can only be blamed for not acting in accordance with the standard of care required, if he was in a position to do so.

It can be said that the first stage of the enquiry establishes the potential blameworthiness of the accused's conduct, but that liability only follows on a finding of the personal blameworthiness of the accused, in making a decision to act contrary to the expectations of the community.

This means that personal blameworthiness is the ultimate test.¹⁹⁶

194. See above.

195. Personal factors do however play a role with reference to imputability and the subjectivised reasonable man test.

196. See Jescheck (n149) 459; Schönke-Schröder (n151) 221; Maurach (n149) 486; Welzel (n147) 139.

[Das] Missbilligungsurteil der Rechtsordnung trifft den Täter nicht schon dann, wenn er hinter den Ansprüchen des Sollens, sondern erst, wenn er hinter dem Mass seines persönlichen Könnens zurückgeblieben ist." 197

A number of personal factors are taken into account at this stage, to determine whether the accused had the ability to take a decision in accordance with the expectations of the community. These include the actors physical and mental abilities as well as his actual knowledge and experience. 198 Many of the factors which are taken into account as mitigating circumstances in South African law would play a role here. 199

It is submitted that the German methodology more adequately reflects the basic principle of nulla poena sine culpa than the South African test for criminal negligence. The normative concept does not merely hold an accused blameworthy for not adhering to a standard of care expected by the community, but stresses that an actor cannot be blamed for anything but that which he was personally capable of.

197. Maurach (n149) 486.

198. Schönke-Schröder (n151) 221.

199. Loubser contends that such factors already play a role in determining dolus in murder cases. See Loubser "Versagende omstandighede by moord" (1977) 40 THRHR 333.

"Schuld ist Vorwerfbarkeit der Willenbildung.
Alle Schuld ist demnach Willensschuld. Nur das,
wofür der Mensch willentlich etwas kann, kann ihm
zur Schuld vorgeworfen werden." 200

CHAPTER 3

APPLICATION OF THE GERMAN APPROACH TO FOUR SOUTH AFRICAN CASES

Commenting on the psychological and the normative theories of guilt, Snyman²⁰¹ states:

"Die verskil tussen hierdie twee skuldbegrippe is, algemeen gesproke, nie 'n verskil wat in die praktyk tot botsende eindresultate lei, in die sin dat 'n toepassing van die een tot 'n skuldigbevinding aanleiding sal gee nie. Dit gaan hier eerder oor die plek en teoretiese groepering van die belangrikste begrippe in verband met aanspreeklikheid...."

In terms of the question posed at the beginning of this dissertation, whether the concept of negligence used in South African criminal law is one most suited to the society in which it operates,²⁰² Snyman's statement would appear to put an end to at least part of the enquiry. If the practical consequences of the psychological and the normative theories are the same, and the issue at stake is the question of the theoretical place of the general concepts of criminal liability in relation to each other, the only question which would remain for consideration, would be whether a reorganisation of the general principles

201. Snyman (n2) 123.

202. See above.

of criminal liability would make the concept of negligence any more appropriate to the South African situation.²⁰³

I am not, however, convinced that the German theory with regard to negligence²⁰⁴ would always render the same results in practice as the South African method. In order to make a finding on this point, four South African cases have been selected, on the basis of which a comparison of the two approaches will be made. There is however a fundamental difficulty in such a comparison. It has been contended²⁰⁵ that a change in emphasis can be detected with regard to the test for negligence in South African caselaw, towards a more subjective approach, but that this development has been arrested by the decisions in Nkwenja²⁰⁶ and Nqubane.²⁰⁷ No conclusion can therefore be drawn on the basis of an application of the German approach to any one South African case. The cases which have been selected broadly represent the development in South Africa of changing attitudes towards liability for criminal negligence. It is submitted that these will be sufficient to demonstrate whether an

203. This will be discussed in the following chapter.

204. Whether Snyman is correct with regard to dolus would have to be established by means of a separate investigation.

205. Above.

206. 1985 (2) 550A.

207. 1985 (3) 677A.

adoption of the German approach would bring about any changes, and if so, in which type of cases.

(i) R v Mbombela²⁰⁸

Mbombela was convicted of murder in terms of the Native Territories Penal Code²⁰⁹ by a judge sitting with a jury in the Umtata Circuit Local Division. On appeal this conviction was set aside and a verdict of guilty of culpable homicide in terms of the same Act²¹⁰ was substituted.

The accused was a young man of between 18 and 20 years of age, who lived in a kraal in the vicinity of Butterworth in the Transkei. According to the evidence, he was of below normal intelligence, but not so mentally defective as to be exempt from liability.²¹¹

The charge arose from the killing of a young child who the accused had bona fide believed to be a "Tikolosche". There was evidence of a widespread superstitious belief in the "Tikolosche", an evil spirit which occasionally assumed the form of an old man with small feet. When some children spotted "something that had two small feet like those of a human being"²¹² in a hut, they called the accused. Assuming

208. 1933 AD 269.

209. Act 24 of 1886.

210. Section 135.

211. Section 26 of the Penal Code defined "Insanity".

212. At 270.

that this was the evil spirit, the accused attacked and killed it with a hatchet. On dragging out the body, he found that he had killed a child.

The court found that a verdict of murder was not competent as the accused had no intention to kill a human being.²¹³ The question was therefore whether the accused should be convicted of Culpable Homicide in terms of the Code.²¹⁴ The verdict of guilty of culpable homicide appears to be based on the unreasonableness of the accused's mistake of fact in believing that the form in the hut was a "Tikolosche". In coming to this conclusion the court decided that there was only one standard of reasonableness, namely that of the reasonable man, and that "the race or the idiosyncrasies or the superstitious or the intelligence of the person accused do not enter into the question."²¹⁵ By implication the reasonable man would not have come to the conclusion that the feet in the hut belonged to a "Tikolosche".

In casu the question of what the reasonable man would have done, was linked to a mistake of fact. Proof of a bona fide and reasonable mistake of fact denies culpa.²¹⁶ The

213. Therefore the homicide did not fall within the definition of murder in terms of the Code.

214. Section 135 "Homicide is culpable when it consists in the killing of any person either by an unlawful act or by a culpable omission to perform or observe any legal duty".

215. At 273-274.

216. See Burchell and Hunt (n7) 180.

question of mistake of fact is merely the other side to the mens rea coin. According to the reasoning of the court, if the reasonable man would not have believed in the "Tikolosche", the accused's belief would be unreasonable. As a result his mistake of fact would be unreasonable and he would be found to have been negligent in failing to foresee that he was attacking a child.

In terms of the German approach, the first enquiry would be, what standard of care the community required of the accused. It is submitted that in community where belief in the "Tikolosche" is widespread, the decisive question would not be whether the belief was unreasonable, but whether, given that belief, the community required the accused to verify that what he was attacking was a "Tikolosche".²¹⁷ In relation to this duty of care, the accused may well be found not to have displayed the degree of care and foresight required by the community in this respect. If, in addition, the fear of facing the "Tikolosche"²¹⁸ was shared by the community, the finding may be that the accused was not required to verify this fact. He would therefore be acquitted at this stage.

The second stage of the enquiry could lead to an acquittal in the case where the accused is found not to have complied

217. In terms of Jescheck's identification of the specific duties arising from the general duty of care. See Jescheck (n.149) 468.

218. At 270 of the judgement.

with the standard of care established in the first enquiry. Given that the accused was of below average intelligence, and 18 years old, can he be expected to have acted with the degree of care required at the first stage? The answer to this question would depend on the evidence adduced regarding the accused's abilities and the court may find that the accused was incapable of complying with the expectations of the community.²¹⁹

(ii) R v Mara²²⁰

A much more subjective approach was used in this case. The accused was an adult urban African. The facts were shortly that the accused and the deceased became involved in a quarrel in the course of which the accused knocked the deceased down. The accused then stamped on the deceased's head with a booted foot. As a result of the assault, the deceased regurgitated some of the stomach contents which caused partial respiratory obstruction. At the time the deceased suffered from a heart condition and the strain caused by the respiratory obstruction brought about heart failure.

The Supreme court confirmed a conviction in the Regional court of culpable homicide. Young J set out the

219. See Jescheck (n57) 118.

220. 1966 (1) 82 (SR).

requirements for a finding of culpable homicide as follows:²²¹

"Killing in the course of an unlawful assault is culpable homicide if the accused, given his mental and physical make-up, would, had he thought about the matter, inevitably have recognised that in some way danger to life might be involved in the act. In the case of the ordinary average man he must be taken to know, as a matter of common experience, that some people suffer from latent ailments and succumb to assaults which would kill a healthy person. But in the absence of knowledge of special circumstances, this would apply only to serious assaults."

The court came to the conclusion that:²²²

"... the accused must, if he had thought about the matter, have realised that death might result from the serious assault he committed."

Although the court defines the crime in terms of what an accused "given his mental and physical make-up" would have foreseen, the mental and physical make-up of the accused was not the subject of any investigation. The court implies that he is an average man and that because this was a serious assault he ought to have foreseen that death might result from his attack.

It is submitted that the same conclusion would be reached on the German approach. The objective duty of care owed the community could be defined in the same way as "the average man" test in *casu*. The duty of care involves a duty to

221. At 83H.

222. At 84A.

foresee that some people suffer from latent ailments and that a serious assault may lead to death. Thus the accused would have failed with respect to taking the care required of him by the community. The second test would not negative this finding. As the accused displayed no particular disabilities rendering him incapable of living up to the expectations of the community, in this case an adult urban African in an urban community, he would be found guilty of culpable homicide. It is, however, submitted that the court would have to conduct a more thorough investigation into the accused's particular mental and physical capabilities before coming to this conclusion.

(iii) S v Va AS²²³

This decision has been hailed as an indication of a general trend towards mitigating the objective test for negligence in criminal law with a measure of subjectivity.²²⁴ Rumpff defined the reasonable man in the following way:

"Hy word 'objektief' beskou by die toepassing van die reg, maar skyn wesenlik sowel 'objektief' as 'subjektief' beoordeel te word omdat hy 'n bepaalde groep of soort persone verteenwoordig wat in dieselfde omstandighede verkeer as hy, met dieselfde kennisvermoë."

The accused in this case was 27 years old and had some knowledge of judo and boxing. The deceased weighed 105 kg

223. 1976 (2) SA 921(A).

224. See Schäfer (n112) 202; Goosen (n112) 64-67; Burchell and Hunt (n7) 202.

and was described as "baie vet". In the course of a verbal altercation, the accused slapped the deceased, who lost his balance and fell backward banging his head on the cement floor. As a result he died.

The court found that it was for the State to prove that the death of the deceased was reasonable foreseeable by a person in the accused's position. Even if it was taken into consideration that the accused had some knowledge of boxing and judo, the result of his slap was so extraordinary that it could not be said that the accused should have foreseen the consequences.

In terms of the German approach it is submitted the result may have been the same. It can be said that the community would not have expected the accused to have foreseen the death of a large person resulting from a slap in the face even if the particular capabilities of the accused were taken into account.

Although reliance was placed on the capabilities of the accused in the judgement of Rumpff CJ, the court held that the consequences of the action of Van As were in any case not reasonably foreseeable. Thus it appears that a similar test as in German law was used. The capabilities of the accused in fact did not play a major role because the consequences were in any case not reasonably foreseeable ie the reasonable man would not have foreseen the possibility of death ensuing.

(iv) S v Nkwenja en 'n Ander²²⁵

The accuseds were convicted of culpable homicide in the Witwatersrand Local Division. On appeal this conviction was set aside by a majority of the Appellate Division.

The two accuseds, young Black males had planned to rob a man and woman who were sitting in a car parked in a lonely spot. They approached the car and opened the doors simultaneously. According to the woman who was the main prosecution witness, she heard a thud²²⁶ and saw the accused slump forward. She was threatened with a knife and raped. The man was injured and died of brain haemorrhage. It could not be established how he had been injured. It appeared from the medical evidence that the injuries were slight but according to the evidence of the district surgeon, "relatively small force can cause relatively big injury".²²⁷

The majority of the court²²⁸ held that it had not been proved beyond reasonable doubt that the accused ought reasonably to have foreseen that their actions could cause the death of the deceased in the light of the fact that the injuries were so slight. The minority²²⁹ however, held that

225. 1985 (2) 560(A).

226. "'n slag".

227. At 5641.

228. Per Rabie CJ.

229. Per Jansen JA.

the appellants ought reasonably to have foreseen at the time of planning the attack, that the occupants might be injured and die. Both judgements follow an objective approach and the emphasis throughout appears to be what is reasonably foreseeable.²³⁰ Rabie CJ in the majority judgement consistently emphasises the reasonableness of the accuseds conduct. At 570 he comments:

"(dit is) natuurlik waar dat die appellante die gebruik van geweld beoog het, maar die vraag is of hulle redelikewys moes beseef het dat daardie geweld van so 'n aard sou kon wees dat dit tot die dood van die oorledene kon lei."²³¹

The basis for the finding that the death of the deceased was not reasonably foreseeable was the absence of evidence that either of the accused carried a weapon and the absence of conclusive medical evidence that great force was used in the attack.²³² No personal factors were taken into account. The minority judgement similarly emphasises the reasonable foreseeability of the death of the deceased²³³ with no reference to the personal insight of the accused.

On an application of the German approach the result would possibly have been the same as the majority decision. Although the emphasis would be different. The question

230. They differ essentially as to the time at which the death ought to have been foreseen.

231. At H.

232. At 570 1 - 571C.

233. At 572G-H.

would be whether the community expected the accuseds to have foreseen that their actions could lead to the death of the deceased.

But what is reasonably foreseeable and what the community expects is not necessarily the same. It could be argued that the community expects a person who attacks another in this manner, to foresee that relatively slight force may cause enough harm to kill the person attacked. If this were the conclusion, the next stage of the enquiry would be to establish what knowledge and experience the accused had and what their capabilities were. No evidence was led in this regard and it is difficult to draw any realistic conclusion but it is possible that the accused could be acquitted after this enquiry if it is established that in the light of their individual knowledge and experience, they could not have foreseen that their attack could have killed the deceased.

It is submitted that there are differences between the South African and German approaches on two levels, which correspond with the two levels of enquiry into negligence in German law. It has become apparent from the discussion of South African law in general and from the brief investigation of 4 specific cases, that the approach of the courts in this country when dealing with cases of negligence, is not uniform. It can, however, be stated in broad terms that differences between the South African and the German approaches are apparent (a) where a purely

objective reasonable man test is used which takes no account of differences in community expectations or of individual disabilities;²³⁴ and (b) where a more subjectivised reasonable man test is used which accounts for differences in community expectations but does not take individual disabilities peculiar to an individual accused into consideration.²³⁵ In cases where a purely subjective test is used, there would be little practical difference between the two approaches.²³⁶

Differences on the first level of enquiry depend to a large extent on the content given to the reasonable man test.²³⁷ It is not clear from the German writers discussed exactly which factors should be taken into account when determining the expectations of the community. However, it is submitted that by virtue of the enquiry being an objective one and by the use of the concept of the 'community' it can be inferred that objective factors common to the community as a whole are applicable when establishing the standard. But this presupposes a homogeneous community "mythical consensus of

234. eg Mbombela's case above.

235. eg Where the reasonable man is related to a particular group as appears from Van As above or on the approach in Dalidyabo 1980 (3) SA 1049(TK).

236. eg The test enunciated in Mara above. See also the discussion of eg S v Arenstein 1964 (1) SA 361(A) and S v Duma 1970 (1) SA 70(N) in chapter 2(ii) and the theoretical objections to the subjective approach above.

237. The theoretical differences will be discussed in the next chapter.

opinion".²³⁸ If it were to be translated into the South African context, it is submitted that the homogeneous nature of South African society should be taken into consideration. Differing expectations should be taken into account on a regional and/or cultural basis.

In a case like Mbombela, the attack took place in a community which believes in evil spirits. Community expectations in that society would differ to community expectations eg in a upper middle class white community in Cape Town. The enquiry is much more problematic in culturally mixed communities which exist in the cities, where recourse cannot be had to regional differences. Didcott²³⁹ summarises the problem well and provides part of the solution.

"The problems are compounded enormously in a mixed country like South Africa with its variety of races, cultures, languages and religions and its wide social and economic differences. No single group has a monopoly on such a society's 'right thinking'²⁴⁰ members and the 'mythical consensus' must encompass them all. Subjectivity inevitably intrudes whenever this is sought. A Judge would doubtless hesitate to see himself as the epitome of all 'right thinking' persons, or to say so at any rate. He is seldom likely on the other hand, to attribute to the 'right thinking' a viewpoint sharply in conflict with his own. More often he

238. Didcott J in Demmers v Wyllie and Others 1978 (4) SA 619(D) at 629A.

239. In Demmers v Wyllie and Others 1978 (4) 619(D) at 629C.

240. In casu the problem was discussed in relation to defamation but is equally applicable to the expectations of the community or the reasonable man with regard to negligence.

decided what he personally thinks is right and then imputes it to the paragons. To others, however, the tenets thus decreed may seem merely the innate prejudices of the group or class from which he has sprung. That they indeed are is the danger against which he must guard."

In mixed communities the same problems arise in determining the expectations of the community as in determining the reasonable man. Therefore, if the reasonable man were determined by reference to either regional differences or where those are applicable or taking into account the nature of mixed communities, there would be little difference between the South African test and the first objective enquiry in German law.

Likewise, with regard to the second enquiry in German law, the reasonable man test may render the same result depending on the formulation of the reasonable man.

If the reasonable man is formulated to reflect community differences as argued above, the factors taken into account on the second German enquiry would be absent and the outcome of the case would be different if on the German approach there are factors which would justify the court in holding that the accused was not in a position to comply with the objective standard.

Again the German writers are not altogether clear as to the precise factors to be taken into account in relation to the second enquiry. In accordance with the purpose of this enquiry, to determine personal blameworthiness, it is

submitted that any factor which may have had a bearing on the accused's decision to act in the situation which gave rise to him being accused of negligence, should be taken into account. These would include age, education, physical and mental abilities, religious beliefs, cultural beliefs etc. Some of these factors may be the same as could be taken into account in establishing the expectations of the community. But the aim would be to establish whether there are personal factors which would justify the court in coming to the conclusion that a particular accused was not able to live up to the expectations of the community.

CHAPTER 4

CONCLUSION

Historically, the criminalisation of negligent conduct and the development of the concept of culpa took place in response to policy considerations which dictated that some unintentional acts be punished. The grouping together of dolus and culpa as the two forms of mens rea and the definition of mens rea as "a state of mind" were later developments. This meant that two dissimilar concepts were defined in the same way, a definition which firstly does not reveal the full implications of the maxim actus non facit reum nisi mens sit rea from which the terms mens rea was derived and secondly, is more immediately relevant to the concept of dolus than to culpa because it is most often used in the sense of a cognitive mental state, while culpa almost always indicates a non-cognitive state of mind.²⁴¹ A further development was the identification of the reasonable man as the prototype of non-negligence or the standard according to which an actor is judged to have been negligent or not.²⁴²

German law appears to have passed beyond this stage of development and, it is submitted, arrived at a clearer definition of what negligence is and accordingly how a court

241. This argument excludes conscious negligence.

242. *Supra*.

should go about judging whether an actor has been negligent in any given case. This development is characterised by two very important distinctions:

1. The recognition that liability for negligent conduct is inherently based on a normative value judgement. The question which confronts the courts is whether the accused can be blamed for deciding to take a certain course of action rather than whether he had "a guilty or evil mind".²⁴³
2. An adherence to the concept of nulla poena sine culpa because this normative judgement does not pertain merely to the conduct of the accused or the consequences of his actions, but only holds a person liable for that for which he can be held personally responsible.

It is submitted that both theoretically and in practice the German approach is more appropriate in South Africa than the present state of the law. Theoretically more appropriate because it gives effect to the basic principles on which criminal liability in this country is based: nulla poena sine culpa and actus non facit reum nisi mens sit rea. And more appropriate in practice because it is better equipped to deal with the nature of South African society and the demands placed on the criminal law in such a society.

243. See above.

The theoretical arguments have been canvassed in the sections dealing with the South African and German law and can be summarised as follows:

A theoretical inconsistency arises from labelling negligence as a form of mens rea while in practice it is tested objectively. Three broad responses to this approach have been discussed:

- (i) The mode of conduct theory, which removes negligence from the sphere of mens rea and defines culpa not as a state of mind, but as a mode of conduct. It has been argued that this methodology leads to strict liability and a negation of the principle of nulla poena sine culpa.
- (ii) The purely subjective approach which holds that negligence is a state of mind and should be determined subjectively in the same way as dolus. The most important objection to this argument is that it ignores the social policy considerations which lie at the root of the criminalisation of negligence by failing to set a standard according to which the accused's conduct can be measured. It therefore ignores the normative content of culpa.²⁴⁴ If it is argued that the test implicitly sets a standard, that of the accused's mental and physical capabilities, it can be argued that

244. See also the discussion of the German concept.

the test will lead to liability without personal fault where factors other than the accused's mental or physical abilities play a rôle in his decision to act.

(iii) The compromise argument recognises the normative content of culpability and at the same time endeavours to give effect to the principle of nulla poena sine culpa by taking personal characteristics into account when setting the standard on the basis of which this normative judgement is made. It is, however, submitted that: first, this endeavour has at best been erratic and, secondly, the setting of such a standard will not necessarily take account of the special disabilities of a particular accused. The erratic nature of the more subjective standard is largely due to the fact that a court has to contend with a long line of decisions emphasising the objective nature of the test for negligence using the standard of the reasonable man. In addition the scope for individualisation is limited because it appears that the standard is set with reference to the groups to which an accused belongs. It is not clear which groups are relevant for these purposes and even then, because disabilities not shared by the rest of the group are not taken into account an actor may be held liable for failing to live up to a standard which he in fact could not meet.

The practical problems inherent in the South African approach are associated first with the reasonable man test and secondly with the lack of clear provision for personal accountability. Both aspects have been discussed in the previous chapter. The question which remains is what are the more general social implications of the South African approach to negligence?

In a discussion of the reasonable man concept in The Magistrate²⁴⁵ Van Dam²⁴⁶ comments on the difficulty experienced in giving content to the reasonable man and recounts the following incident:

"'n Paar jaar gelede het Dr van der Merwe in 'n lesing aan aspirant streeklanddroste, dié redelike man probeer omskryf. My ou vriend 'Buster' Brown het aan die einde van die lesing, met 'n dood ernstige gesig gesê 'Dit lyk my of die redelike man net die gewone Groep III Landdroos is.' Die opmerking was in ligte luim gewees, maak ek verstout my om te sê dat dit baie na aan die kol was."

At present all the South African judges and most of the magistrates are drawn from one section of the community. In a socially and culturally diverse society such as South Africa the fact that the reasonable man, the standard against which everyone is measured, is determined by

245. The official organ of the Justice Department Magistrate's Association of South Africa and South West Africa.

246. Van Dam "Die redelike man" (1976) 11 IM 101.

reference to the conceptions of the judicial officers drawn from one section of the community is problematic.

This is compounded by the fact that the group from which the majority of judicial officers are drawn, the white racial group, are in fact a minority group who also wield political power in this country. It is submitted that these factors inevitably have a bearing on the social meaning of legal concepts in South Africa.

Van Dam²⁴⁷ denies that such factors play a role in the court's perception of "the reasonable man".

"Die opgeleide regterlike beampte is natuurlik bewapen met 'n rykdom van ondervinding, presedent en regsreëls wat meebring dat sy denkkrigting gebalanseerd, onpartydig en regverdig is."

My submission is that the view that judicial experience necessarily leads to impartiality and balance is a myth. The existence of racial or cultural bias on the part of the presiding officer is well illustrated in the following opinion of Rumpff CJ in S v Augustine.²⁴⁸

"Blykbaar het die advokaat vir die verdediging en die verhoorhof nog nie die ondervinding opgedoen nie dat inderdaad Kleurlinge en Swartmense soms mense steek sonder enige rede, behalwe oënskynlik steeklus."

247. Van Dam (n246) 102.

248. 1980 (1) SA 503A at 506A.

After a thorough investigation of the role and attitudes of the South African Appellate Judiciary 1910-1950, Corder²⁴⁹ comes to the following conclusion:

"In the final analysis the overall picture which emerges is one of a group of men who saw their dominant role as the protectors of stability in the social formation of which they formed an integral part. This conception of their task, was, doubtless, influenced by their racial and class backgrounds, education and training. The judges expressed it in terms of a positivistic acceptance of the concept of legislative sovereignty, despite a patently racist political structure, and of a desire to preserve the existing order of legal relations, notwithstanding its basis in manifest societal inequalities."

It is not suggested that judicial officers deliberately use concepts like "the reasonable man" in order to deny justice to other groups. The submission is rather that the background of judicial officers and the segregated nature of South African society does not provide the kind of experience necessary to be balanced and impartial in ascertaining the characteristics of the reasonable man when dealing with the situations which fall outside their racial and cultural frame of reference. At best the use of a stock phrase like "the reasonable man" simply does not motivate the presiding officer to make allowances for the customs and perception of other groups and at worst might "disguise the innate group or class prejudices of the judge".²⁵⁰

249. Corder (n23) 237.

250. Cameron and Van Zyl Smit (n124) 522.

In the context of shaping the criminal law in order to serve the interests of the whole society, the swing to a more subjective evaluation of negligence is a welcome sign of sensitivity to the unfair consequences of the application of the reasonable man test. But the recent judgements in Nkwenja²⁵¹ and Nqubane²⁵² place a question mark behind the reality of a swing to a subjectivised test. While it is not possible to state conclusively that the tide is turning against the recognition of differences in community perceptions of the reasonable man and individual responsibility, the question may still be posed: Why the change in attitude in those two cases? One possible explanation is that opposition to the state resulting in the escalation of violence in this country and reflected in increasingly violent crime against whites,²⁵³ has led to an attempt to use the standard of the reasonable man in an effort to contain such violence. It has been argued that the use of a purely objective test for negligence may lead to strict liability. This means that the reassertion of an objective test for culpa means that strict liability is being used in an effort to suppress or contain political opposition. Is this a defensible use of negligence liability?

251. 1985 (2) SA 560A.

252. 1985 (3) SA 677A.

253. See eg newspaper reports.

It has been argued²⁵⁴ that the standard of behaviour determined by reference to what the community expects of an accused may differ from the standard determined by reference to the reasonable man, depending on the formulation of the reasonable man test.²⁵⁵ The concept of community expectations is however not unproblematic and it is conceded that it could be used in the same way as the reasonable man test to give expression to the presiding officer's own perception of what his community views as acceptable behaviour. But there are at least two advantages attached to this formulation of the standard. First, the concept of community expectations makes it clear that the standard is to be determined by reference to the community and that by implication the composition of South African society should be taken into account. Secondly, the expectations of the community are able to be established by means of evidence much more easily than the characteristics of the mythical reasonable man.²⁵⁶ This would make it much more difficult for the culpa test to function as a mask behind which racial, class or cultural prejudices are concealed, and would also provide a basis for criticism if this were done. It is submitted that this standard can provide clarity regarding the basis of liability and contribute to a

254. Supra.

255. Above.

256. See below.

coherent system of criminal law which is rooted in the specific society in which it operates.

The notion of the use of evidence to establish what the community expectation is in a specific situation needs some elaboration.²⁵⁷ It could be argued that even if the standard of community expectations spells it out much more clearly that differing community expectations are to be taken into account, the innate group prejudices of a presiding officer will still play a role especially in the light of the denial that judicial officers necessarily deliberately use legal concepts to deny justice to other groups.²⁵⁸

It is submitted that one of the ways of providing a safeguard against unconscious prejudice is to confront the judicial officer with evidence of community perceptions. Where the community involved is culturally or otherwise different to that of the group to which the presiding officer belongs evidence would be essential to establish what that community's expectations are as the presiding officer has no experience on which to draw to determine the standard.

It would be much harder to restrict the role of unconscious prejudice in a case involving a mixed community because a

257. This notion does not derive from the German law.

258. See above.

judge would possibly represent one of the groups in such a community. But it is submitted that evidence of differing perceptions can still at least reduce the possibility of those prejudices playing a role.²⁵⁹

The second part of the enquiry into liability recognises the need for individualisation in the application of legal norms.²⁶⁰ This is particularly necessary in a country like South Africa where in addition to regional cultural differences which can be taken into account when establishing the standard according to which an individual's conduct is to be measured, great differences may exist within communities especially in the case of mixed communities. For example, differences in education standards and opportunities may affect a particular person's ability to deal with the kind of regulation necessitated by a technologically developed economy.²⁶¹ religious beliefs not shared by the rest of the community may dictate a certain course of action not in accordance with the expectations of the community, factors like age or mental and physical disabilities may have a bearing on an individual's actions in a given situation.

259. This has already been recognised with regard to dolus with the adoption of the subjective test for dolus.

260. It is not possible to go into detail regarding the form which this evidence should take. It is suggested that both lay and expert witnesses may be called eg community leaders, anthropologists and sociologists.

261. See above.

It is submitted that the survival of the South African legal tradition is dependent on the ability of all lawyers to adapt the legal system to society and to provide individualised justice which will take account of the individual's abilities and capacities to cope with the demands of the legal system and to regulate their behaviour accordingly.

There however appears to be some opposition to the continuing influence of German law in South Africa. Critics of German "Strafrechtmissenschaft" aver that the criminal law is merely a reflection of the moral code of a society and that the intricate concepts of German theory are in fact an impediment to the development of criminal legal theory in South Africa. Responses to suggestions that the German methodology could provide a fruitful basis for the development of South African criminal legal theory, have often been of the following kind:

"Our system of viewing a crime as consisting of a mental element and a physical element may not be perfect, but it works well."²⁶²

It is not contended here that the whole of German legal doctrine should be uncritically grafted onto South African criminal law. It is however, submitted that a stubborn adherence to our Roman-Dutch and English heritage may retard the growth of criminal legal theory and render the criminal

262. See Labuschagne "Die Normatiewe Skuldbegrip" (1985) 18 DJ 381.

law ineffective to deal with the changing demands of the society. Having investigated the development of both South African and German concepts of liability on the basis of negligence it is submitted that the German methodology is both consistent with the basic principles of Roman-Dutch law and appropriate to the practical needs of a legal system in a heterogeneous society.

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