

Research dissertation presented in fulfillment of the
requirements for the Degree of Master of Laws

THE NATURE OF DOLUS EVENTUALIS
IN SOUTH AFRICAN
CRIMINAL LAW

by

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November 1991

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ACKNOWLEDGEMENTS

I wish to express my grateful thanks to a number of people, without whom this dissertation would not have taken its present shape. Professor Solly Leeman has been an invaluable source of guidance and encouragement. His unerring ability to spot muddled thinking and his comprehensive legal knowledge have provided challenging and inspirational criticisms without which this work would be decidedly poorer. The errors that remain are my own.

Linda Krawitz, Mauricia Davids and Pamela Snyman of the UCT Law Library have provided unstinting help and support in obtaining the necessary research materials. Their friendly encouragement and concern is most appreciated. Maureen Taylor typed the manuscript under pressurized conditions with diligence and good humour.

This dissertation is dedicated to my grandfather, Sakkie van der Merwe, whose faith in me has always allayed self-doubt. His legacy lives on after him.

Finally, to the Person who made it all possible: to God be the glory!

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SUMMARY

INTRODUCTION

Dolus eventualis is manifestly the most important form of intention in practice in South African criminal law¹. It has received by far the most attention of all the forms of intention² and is "... well-established, commonly invoked and much analysed ..." ³. Since the South African courts embrace the psychological concept of culpability, in terms of which the question whether an accused has acted intentionally depends solely on his subjective state of mind⁴, *dolus eventualis* forms a cornerstone of subjective criminal liability.

Despite the centrality of the concept of *dolus eventualis*, it has been described as "controversial"⁵ and "a concept which can with justification be described as an enigma"⁶. This is principally due to the inability of our courts to form a clear picture of what the concept of *dolus eventualis* means. Paizes points out that judicial pronouncements on this subject have been characterized by vacillation and a

1. M A Rabie A Bibliography of South African Criminal Law (General Principles). (1987) 68. A Paizes "Dolus Eventualis Reconsidered" (1988) 105 SALJ 636, observes that "... there is no more fundamental concept in our criminal law than dolus eventualis ..."
2. M A Rabie "Criminal Law - General Principles" LAWSA vol 6 (1981) para 1-163, at para 88.
3. "Focus: Dolus eventualis" (1988) 3 SACJ 413 at 414.
4. P J Visser and J P Vorster General Principles of Criminal Law through the Cases. 2ed (1987) 337. The contrasting normative fault doctrine, which has never found explicit acceptance in South African courts, holds that fault consists in more than a mere state of mind; that it is an evaluation of that state of mind: in other words, the state of mind must be blameworthy. Thus in terms of the normative approach, one can intend to commit a crime and still lack fault, if the circumstances are such that one cannot be blamed for one's intentional conduct. C R Snyman "The Attack on German Criminal Legal Theory - A Retort" (1985) 102 SALJ 120 at 124-5.
5. R Whiting "Thoughts on Dolus Eventualis" (1988) 3 SACJ 440.
6. Focus (n3) *loc cit*.

surprising lack of clarity⁷. He notes that this uncertainty is unacceptable as it is inimical to the principle of legality, which underlies the criminal law⁸. Furthermore it constitutes a serious obstacle to any coherent and consistent system of criminal law. As Austin observes, "... words are our tools, and, as a minimum, we should use clean tools ..."⁹.

In this thesis I shall attempt to explore in detail the development of the concept of *dolus eventualis* in South African criminal law, highlighting the particular areas of dispute that have resulted in the present imperspicuity. The treatment of the problem in South African criminal law will be compared and contrasted to the developments in this regard in English criminal law. Furthermore some philosophical considerations underlying subjective criminal liability on the grounds of *dolus eventualis* will be sketched. Throughout the discussion I shall attempt to build a coherent framework for the concept of *dolus eventualis*, which will be presented at the conclusion of the thesis¹⁰.

7. Paizes (n1) *loc cit*.

8. *Ibid*.

9. J L Austin "A Plea for Excuses" (1956-7) 57 Proceedings of Aristotelian Society, 1 at 7.

10. I have made use of sources available up to the end of September 1991.

PHILOSOPHY

DEFINING INTENTION

Primary legal concepts lend themselves to philosophical analysis, none more so than the concept of "*mens rea*", which is broadly synonymous with the notion of a guilty mind or a criminal mental state¹. The most important facet of *mens rea* is the notion of intention². Austin observed that: "... Intention meets us at every step, in every department of Jurisprudence ..."³. It is indeed fundamental to acknowledge the centrality of the notion of intention in the analysis of criminal liability.

Apart from this purely juristic conception of intention, philosophers are interested in intention as a central feature of human action, and as a key determinant of moral responsibility⁴. It is therefore entirely appropriate that

1. P Gillies Criminal Law (1985) 39. The scope of this thesis does not allow for a detailed philosophical analysis of each pertinent concept in the following discussion. What follows is therefore a modest attempt to identify, in a somewhat attenuated fashion, some of the issues related to these concepts in order to fit them into a general scheme of intention. Discussion of these issues has not been at the forefront of South African legal writing, as is evident from the treatment of intention in the textbooks, whereas many English (and Common law) writers have conducted an in-depth examination of these areas. The following discussion will consequently concentrate on Anglo-American writings on the issue.
2. Certain writers hold that negligence is not a *mens rea* form, restricting "*mens rea*" to the concepts of intention and recklessness.
3. This statement is drawn from his Lectures XVIII, cited in A R White "Intention, Purpose, Foresight and Desire" (1976) 92 Law Quarterly Review 569.
4. R A Duff "Intentions Legal and Philosophical" (1989) 9 Oxford Journal of Legal Studies 76. Criminal law, being a reflection of the predominant moral views of the members of the society which it regulates, is also bound up with moral responsibility.

we should pay heed to the views of philosophers in exploring the parameters of the notion of intention. However, we should not lose sight of certain difficulties in respect of philosophical evaluations of intention.

First, a philosophical inquiry into the contours of a concept "... does not pursue a definition, but rather an account of a concept that is already implicitly defined in our language ..."⁵. Such an inquiry into the usage of language informs us that problematic terms such as "intention" are not applicable in all contexts of human action⁶; and that in many cases the question as to the existence of intention only arises if this is prompted by a special feature of the case⁷.

5. G P Fletcher Rethinking Criminal Law. (1978) 449.
6. *Ibid* 450. "... Absent unusual circumstances, it would be odd to inquire whether ... [a] driver intended to turn left The question might make sense if the driver were looking for an address on the right, and we were puzzled about whether in turning left, he simply was confused about his right and left side, or whether perhaps he changed his mind and decided to give up looking for the address. Then we would want to know what his intention was ...". H Gross A Theory of Criminal Justice (1979) 88 makes the same submission somewhat differently. "... Acting, like much else in the world, has its standard and its substandard forms. When it is said simpliciter that a person has performed a particular act, it is implied that the act is standard. When the act is nonstandard we make use of an abnormality - designating term to note this. Unintentionally is such a term, and control of the actor is the respect in which an act qualified by this term is abnormal. When we say that an act is done intentionally, we simply make a countermove against that imputation of abnormality, which itself may be expressed or only implied, and which may have actually been made already or may only be in prospect ..."
7. Fletcher (n5) 451 mentions such examples as shutting the door, folding our arms, patting down our hair. See also the quote from Gross at (n6) above.

Fletcher observes that; "... the great virtue of ... philosophical analysis is that it brings ... puzzling notions back to their natural habitat. The method of analysing ordinary usage invites us to consider what these terms mean as they are used, not what they "mean" when wrenched out of context and defined for the purposes of legal analysis ..."⁸.

However, as Duff points out, "... a philosopher who begins from the ordinary, extra-legal concept of intention must of course be alert to the possibility that, given the law's 'specific requirements', the concept's legal meaning should differ from its ordinary meaning and to the danger that her grasp of those 'specific requirements' may be inadequate ..."⁹.

The method of philosophical clarification is antithetical to the prevailing method of legal analysis which insists on classification of the act causing harm as "either voluntary or not, either desired or not, either intended or not"¹⁰. Fletcher warns that this need to classify each and every case often entails a serious philosophical error¹¹. He observes that this compulsion to classify induces a search

8. *Ibid.* However Austin cautions that "... we are looking again not merely at words ... but also at the realities we use the words to talk about: we are using a sharpened awareness of words to sharpen perception of ... the phenomena ..." (J L Austin "A Plea for Excuses" (1961) *Philosophical Papers* 130, cited in J B Brady "Recklessness, Negligence, Indifference and Awareness" (1980) 43 *Modern Law Review* 381 at 393).

9. Duff (n4) *loc cit.*

10. Fletcher (n5) 451. He adds that "... the engine of the law requires us to make a decision in every case, and therefore there is no room for a middle ground where the concept idles, where it is odd to describe the case one way or the other ...".

11. *Ibid.*

for the essence of each of these notions in order to fashion a standard by which the problematic fringe cases may be resolved¹². Such an essence is inevitably found in "... some internal event, some feature of consciousness ... present in all cases of acting voluntarily and intentionally"¹³. Since the demands of systemic thinking in law may pull us in search of "chimerical essences", we ought to take cognizance of the difference "... between an accurate philosophical account of voluntariness and intention and the way we customarily think in constructing the edifices of legal analysis ..."¹⁴.

Duff notes that the most obvious contribution a philosopher can make is at the level of ideal theory; however he concedes that "... even if legal ascriptions of criminal responsibility should ideally match moral ascriptions of culpable responsibility, the law has other purposes and other requirements which might conflict with that ideal aim ..."¹⁵.

12. *Ibid.*

13. *Ibid.* "... Producing this essence is what Wittgenstein called 'the conjurer's trick'; the fallacy of assuming that 'something happens' internally whenever one acts intentionally follows from assuming that because there is a word intention, it must name some particular thing. Thus legal theorists think of intention as a 'mental state' or a 'state of mind' that is present whenever one acts intentionally ...".

14. *Ibid* 452.

15. Duff (n4) 77. "... legal definitions and doctrines must be practicable: they must be intelligible to the judges, lawyers, jurors and citizens who have to apply them ...". Although the ordinary language concept will satisfy these requirements to some degree, the criminal legal process is subject to special constraints (the rules of evidence, the need for proof beyond reasonable doubt) which "... may make ordinary concepts inapt for the law's purposes ...".

Williams is of the opinion that philosophers have only offered limited assistance to lawyers in respect of the resolution of legal problems relating to the meaning of intention¹⁶. Nevertheless, it is in examining the ordinary meaning of the notion of intention and its relation to its technical legal usage that philosophers can contribute towards a better understanding of intention. In order to achieve this, "... we should ... begin by looking for ideal definitions which will make just those distinctions and classifications which the law should ideally make; only then should we ask whether and how these ideal definitions must be modified for the sake of practicability ..."¹⁷.

The meaning of intention remains a matter of some controversy. Williams observes that the debate is characterised by disagreement among the writers¹⁸.

This confusion has not been significantly eased by the entrance of philosophers into the field, according to Williams, who adds that the interest of the philosophers premised upon ethical grounds, has neither been followed by discussion in terms of any particular ethical theory, nor been contextualised within a discussion of the specific requirements of the criminal law. "... Instead they mix up the ordinary meaning of the word 'intention' with its desirable legal meaning ... the meaning of intention as a technical term of the law ought to be close to the literary and popular one, but there are sound reasons for saying that the two should not always be identical ..."¹⁹.

16. G Williams "Oblique Intention" (1987) 46 *Cambridge Law Journal* 417.

17. Duff (n4) 77.

18. Williams (n16) 417.

19. *Ibid.*

Uncertainty regarding the meaning of intention has also arisen from the forays of other disciplines into the area of law. Grygier points out that crime is no longer seen by criminologists as an individual phenomenon²⁰, and that adverse socio-economic conditions (social pathology) are more important in the etiology of crime than mental pathology²¹. Intention is not only somewhat spurious, in the view of many social scientists, but it is an obscure and vague concept²² which may be regarded as "... a major obstacle in the scientific attempt to co-ordinate law and the social sciences ..."²³. Grygier states that, "... in general, writings on the mental element in crime present only the jurist's view of Man, citing legal authorities and court decisions, but they ignore the scientist's view of Man. The jurist maintains that the mental element in crime must be established; the specialists in mental and social

20. T. Grygier Social Protection Code : A New Model of Criminal Justice (1977) 17. "... The stress on the subjective side of the criminal act, which is fundamental to all Western systems of criminal justice ... is rejected by most social scientists as contrary to research data ...".

21. *Ibid* 18. Grygier proceeds to list other factors which merit consideration along with adverse socio-economic conditions: "... genetics (at present, in law the xyz syndrome does not negate criminal intent; in empirical research the findings are inconclusive), family life and the tempo of social change. Studies ... suggest that the rapidity of technological, cultural and economic change may produce culture shock and have even more impact on the rate of crime than do poverty, injustice and chronic inequalities ...".

22. *Ibid* 19. Grygier cites Ancel, who remarks that "... the concept of intent is as obscure now as it was at the time of Cicero ...", and (at 20) Bentham, who whilst accepting the concept of intent as inevitable, regarded it as "... to the last degree ambiguous and obscure ...".

23. *Ibid* 20.

pathology state that it cannot be properly established
"²⁴.

A psychiatrist has argued in respect of intention that "... either no intent ... was formed at the moment of the offence, or that if it was we can never be certain when it was formed, what its content was, or indeed whether it was formed or not ..."²⁵. In terms of his view, intention should be characterised as "... a partial summation only of the basic elements of actions, which are constellations of electrical and chemical events taking place and changing extremely rapidly and subject to relativistic considerations in their temporal location ..."²⁶.

In the light of the above, the necessity of defining intention has been called into question. Does the "ordinary language" conception of intention not suffice for legal purposes? Duff observes that intention is an ordinary English term, and that the meanings of such terms and our grasp of their meanings are shown in our use of them in ordinary discourse: "... our inability to articulate definitions of those meanings shows, not that they lack clear meanings nor that we cannot understand them, but only

24. *Ibid.*

25. O V Briscoe "... For the Devil Does not Know Man's Intention ..." (1970) 44 *Australian Law Journal* 23.

26. *Ibid.* For a refutation of the value of philosophy and psychology in respect of criminal law see J Hall *Science, Common Sense and Criminal Law Reform* (1963).

that we cannot easily articulate that which we can grasp in practice ..."²⁷.

Nevertheless, Duff concedes that even if the meanings of intention and its cognates are clear and agreed, it is essential to attempt to articulate such meanings; "... for, if we are to understand the criminal law, and subject it to critical examination, we need to understand the principles by which criminal liability is ascribed, and to do this we must explain the meanings of the concepts in terms of which those principles are formulated ..."²⁸. Williams states that a precise definition of intention is required to provide the lawgiver with a language by which he can give effect to decisions of policy²⁹.

Duff avers that the courts and juries should not be left with the ordinary, everyday meaning of intention for two reasons: first, it is inappropriate to simply assume that the concept of intention has a clear, consistent and agreed ordinary usage³⁰; and secondly, it should not merely be

27. R A Duff Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law (1990) 32. Duff provides an example of this phenomenon with regard to 'time': "... Philosophers have argued interminably about what time is: but their, and our, inability to articulate a formal account of the concept does not cast doubt on our ability, as ordinary language users, to use temporal concepts; to know what time it is, or how long ago something happened, or whether X happened before Y. We show our understanding of the concept of time in our competent and consistent use of temporal concepts; and the same is surely true of the concept of intention ...".

28. *Ibid.*

29. G Williams The Mental Element in Crime (1965) 19.

30. *Ibid.* There are different species of intention (see 39 below) and it cannot just be assumed that the concept of intention is "univocal across these different uses". As Duff (n27) 33 observes, if intention does have "different shades of meaning" in different contexts or different uses, it becomes crucial to determine which

assumed in advance that 'intention' should carry the same meaning in law as in ordinary language, as the concept in law serves a specific function, to determine criminal liability, and therefore should be interpreted accordingly³¹.

Although Brett acknowledges that "there is no simple one-sentence definition of intention which will satisfy all cases in which the word is appropriate ..." ³², he dissents somewhat from Duff's views, in calling for an examination of the ordinary usage of the words used to describe these states of mind³³. Brett emphasizes the fact that he does not eschew all attempts at clarification by means of analysis and definition, although he stresses that there are limits which analysis and definition cannot transcend³⁴. It of these "shades" is (or are) relevant to its legal usage.

31. Duff (n27) 33 "... For instance, ... ordinary language distinguishes intending a result from foreseeing it even as a certain effect of my action, but this does not show that the criminal law should draw the same distinction ...". HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 116 elaborates: "... what [jurists or expositors of the criminal law] refer to is the use by the law of a concept which, though it corresponds at many points to what is ordinarily meant in non-legal use by intention, cannot be said to be identical with it ...". Hart consequently prefers to use "... the more guarded expression 'intention or something like it' ...".

32. P Brett *An Inquiry into Criminal Guilt* (1963) 87.

33. *Ibid* 208.

34. *Ibid*. Brett substantiates this argument in the following terms:

"... The criminal law, indeed the whole of the law, deals with the vast subject of human behaviour; it is one method or institution whereby that behaviour is to some extent controlled and directed. But human behaviour, at least in a modern organized and civilized society, is extremely complex, and it cannot be reduced and

is Brett's submission that in order to justify the reliance on deterrence as a *raison d'être* of criminal law, there needs to be an intimate connection between (such) a theory of deterrence and the "... realities of human behaviour ...", otherwise the criminal law will degenerate into an "... arbitrary and sometimes tyrannical system of repression ..."³⁵. He observes that in practice the criminal law largely avoids such degeneration, "... but this is only because the judges who have to administer it in practice pay more heed to the realities of human behaviour than to integrity of definition ..."³⁶. He therefore calls for the criminal law not to neglect the insights into the nature and meaning of behaviour revealed by current research into philosophy and psychology³⁷.

confined within the bounds of a few rigid definitions ...".

35. *Ibid.*

36. *Ibid.* This procedure earns judges the scorn, rather than the praise, of the majority of writers (at 209).

37. *Ibid* 212.

INTENTION AND FREE WILL

Any such venture into the realms of philosophy and psychology is met with one crucial reservation however: is there such a thing as a voluntary action proceeding from a free will? If not, any investigation of the notion of a subjective form of *mens rea* is essentially futile, as the attribution of *mens rea* to an accused is predicated upon the application of a legal fiction of "intentional conduct", which in truth does not exist. A "voluntary" act, in this context, should be understood to mean an act that is freely chosen and not in any way "compelled", "forced" or "determined".

A detailed examination of voluntariness is beyond the scope of this inquiry. However, in the light of the significance of this issue to the present discussion, a few brief comments should be made. Can we have a sound notion of intention when the philosophical debate still rages (and probably always will) whether anyone can act voluntarily?

Labuschagne sees the answer to this question in the context of the continuing evolutionary process inherent in human existence³⁸. He asks, in the light of general agreement amongst scientists that human conduct is generated by sociological, biological and intrapsychical factors, and the very fact of the existence of subjects such as psychology, sociology and criminology: "... waarom wil of kan die reg nie die feit aanvaar dat 'n mens nie 'n vrye wil het nie?"

38. JMT Labuschagne "Die Paradoks van die Individualiseringsproses in die Strafreë" (1991) 54 IHRHR 116 at 119

..."³⁹. Labuschagne ascribes this situation to the following factors:

"...

(i) Groot godsdiens van die wêreld, soos die Judaïsme, Christendom en Islam, is gebaseer op die veronderstelling dat die mens 'n vrye wil het en vir sy handeling verantwoordelik is. Die mens word hierdeur eintlik emosioneel verhinder om die beskikbare wetenskaplike kennis te volg.

(ii) Tweedens leef die oeremosie waarop die wraakgedagte gebaseer is, nog in die mens se bewussyn voort ..."⁴⁰.

It is Labuschagne's view that as man evolves further towards greater rationality, gaining more knowledge about himself, he will develop more understanding and compassion for his fellow-man, and "... hierdeur word die (emosionele) wraakgedagte geleidelik uit die mens se sisteem uitgewerk met die gevolg dat die strafreg as sodanig sal disintergreer ..."⁴¹. He therefore envisages the disappearance of criminal law, based on outdated concepts, and the introduction of a system of control, protecting the

39. *Ibid.* Grygier (n20) 20 adopts the determinist position typical of the social scientist stating that "... specialists in mental and social pathology state that [the mental element in crime] cannot be properly established ..." and further, at 23: "... the distinctions between conscious, subconscious and unconscious mental states can be made by judges and juries only if they act arbitrarily and assume knowledge that does not exist ...".

40. *Ibid.*

41. *Ibid.*

community against the actions of certain people, but not by means of punishment⁴².

In response to Labuschagne, it can be stated that there is certainly general acceptance that punishment is only justified if the person to be punished is morally blameworthy. This position involves an acceptance of the proposition that human beings have a measure of choice in performing acts that constitute their daily activities (ie "free will")⁴³. Acceptance of the opposite view, that there is no such thing as a real choice, predicated upon the argument that "... in any given situation what we do is caused or determined by our genetic inheritance or the environment in which we have been brought up or a

42. *Ibid.* H Edgar "Mens Rea" in S H Kadish (ed) Encyclopaedia of Crime and Justice vol 3 (1983) 1028 at 1038, agrees that "... the psychological model of conduct ..., the idea that we act by willing discrete behaviours, reflects ancient psychology. Surely it is a fiction, no homunculus lives inside the brain, sending out orders to animate the limbs ...". However, at 1039, Edgar points out that the concept of intention (which is predicated upon the existence of free will) is needed to articulate the substantive principles of the criminal law. "Crimes are usually defined to make behaviour punishable long before it exhausts fully the harm against which society aims to protect itself ... The articulating technique is necessary to facilitate early intervention by the police, and victims' avoidance of harm. This style of articulating supposes, however, that future plans can be evaluated ...". Edgar therefore concludes that "One needs a concept of intention even if culpability per se is eliminated from law. It would vastly enlarge the coverage of the criminal law if its present scope were maintained without the limiting effects that ensue from requiring intention to produce the complete effect ...".

43. Brett and Waller's Criminal Law : Text and Cases 5ed by C R Williams (1983) 6.

combination of both - our nature and nurture ..."⁴⁴, undermines the justification for punishment.

What are we as lawyers to make of this? Dr Johnson's adage concerning the notion of free will, that all experience is for it but all argument is against it, is probably as true today as when it was first uttered⁴⁵. No matter how imposing theoretical arguments against free will appear to be, in practice "... we behave and speak as if we have some measure of choice in our activities ..."⁴⁶. Our acceptance of the concept of free choice is informed by both common sense and personal experience⁴⁷. As Brett observes though, neither common sense nor personal experience militate against taking cognizance of recent research which indicates that the area of choice between rival courses of action is more restricted than commonly assumed, and that "... forces of which we are largely if not wholly unconscious ..." play a part in governing our actions⁴⁸. The complexity of human behaviour should under no circumstances be disregarded⁴⁹.

44. *Ibid.*

45. *Ibid.*

46. *Ibid.* "... Illusory or not, free will remains the basis of all criminal law simply because free will is the basis of all normal social behaviour ...". *People v. Garshen* (1959) 336 P 2d 492 (Cal SC) at 497.

47. Brett (n32) 212. Edgar (n42) 1040 observes further that the treatment of "free will" as a reality and not as a fiction fits well with other intellectual developments of the postwar era in such areas as political philosophy and economics.

48. *Ibid.*

49. Brett (n32) 213 observes that it is the very complexity of human behaviour which refutes the social scientific approach: "... we cannot formulate a series of exact, logical definitions and confine human behaviour within a straitjacket thus constructed. The raw material with which the social sciences deal is far too complex to be susceptible of precise and exact definition: 'the exactness is a fake' ...". He therefore concludes that

It is however almost impossible to imagine how we could discuss human activities if we did not make the assumption of some measure of choice and reflect it in our use of language⁵⁰.

Duff, noting the "long controversy" associated with the notion of free will as a precondition of criminal responsibility, offers an explanation of a measure of choice in terms of the concept of rational agency:

"... [A]n agent is 'free' in so far as his actions are guided by his understanding of good reasons for action. But if free or responsible agency is essentially a matter of rational agency then intentional agency provides the paradigm of responsible agency. This is why intention is the central or paradigm determinant of moral culpability (at least for the kind of moral culpability which flows from moral wrongdoing)..."⁵¹

An agent is not liable to moral blame for every harm which she in fact causes; it must also be proved that she was

"... in the discipline of criminal law room must be left for play in the joints ...".

50. Brett and Waller (n43) *loc cit.* A L Wood "The Implications of Social and Behavioural Sciences for Concepts in Criminal Law" (1979) 11 *Archiv für Rechts- und Sozialphilosophie* 269 at 278 offers a different social scientific approach in relation to voluntariness: "... Sociological theory can show that the legal model of man as a 'free and moral agent' is unnecessary for the concept of criminal responsibility. Man as a norm-making and - using animal suggests that evaluation of the behaviour is implicit in social life. Whether or not man is a "free" moral agent, he acts as if he were free. In the knowledge that others will hold him responsible, he tends to become 'responsible'. This rationale for criminal responsibility does not change its role in criminal law ...". Critical Legal Studies scholars make use of "intentionalistic" as well as "deterministic" description in discourse. See M Kelman *A Guide to Critical Legal Studies* (1987) 86 ff.

51. Duff (n27) 102.

morally responsible for the harm, that it can properly be attributed to her as her action, something which she culpably did⁵². Someone acting with intent or intentionally is, in comparison to someone acting recklessly or negligently, most culpable, because the individual acting with intent or in an intentional manner is most fully responsible as an agent⁵³.

Duff observes that "... as with morality, so with the law ..."⁵⁴. In order to justify a conviction, it must not only be proved that the defendant committed the relevant *actus reus*, but that she can properly be held responsible for the *actus reus*, that is, that the *actus reus* can properly be attributed to her as its agent"⁵⁵.

The underlying assumption of this argument is that criminal liability should, in principle, be ascribed in accordance with moral responsibility - this is why *mens rea* should be

52. *Ibid.*

53. *Ibid.* Duff is postulating his analysis within the bounds of the English law, which recognizes, apart from intention and negligence, a third (intermediate) basis for liability, viz recklessness. Furthermore, Duff maintains a distinction between intended and intentional agency which is explained below at 20-25.

54. *Ibid.*

55. *Ibid.* Duff asserts (at 103) that there are two dimensions to legal, as to moral guilt: the seriousness of the harm done and the agent's responsibility for the relevant harm.

required for criminal liability, and why intention should be the most serious kind of criminal fault⁵⁶.

56. *Ibid* 103. "A defendant should be criminally liable for conduct for which she can properly be held morally responsible or culpable, and the extent of her criminal liability (the seriousness of the offence for which she is convicted) should match the degree of her moral responsibility or culpability ...". Duff cites the judgments of Lord Hailsham in *Hyam* [1975] AC 55 at 78 (where he held that intention to expose another to a serious risk of death or serious injury is "morally indistinguishable" from an intention to cause death or serious injury) and Lord Diplock in *Caldwell* [1982] AC 341 at 352 (where he held that recklessness constituted by conscious risk-taking and recklessness by failing to give thought to an obvious risk created by any action are equally blameworthy); "... Both these arguments assume that the law should distinguish two 'states of mind' only if there is some significant moral difference in culpable responsibility between them ...".

INTENDED AND INTENTIONAL AGENCY

Traditionally, two different types of intention have been identified in English law : direct intention and oblique intention. Duff observes that the ordinary concept of intention has two different shades of meaning, *intending* an effect, and bringing an effect about *intentionally*, which match these two legal conceptions:⁵⁷

"I directly *intend* those effects which provide part of my reason for acting as I do. I bring about *intentionally*, not *every* expected side-effect of my action, but only those for which I am properly held responsible, and I am properly held responsible for those which are relevant to my action as providing some reason against it ..."⁵⁸.

The notion of *intending* an effect is unproblematic as it accords with the "ordinary language" conception of intention. Since this shade of meaning is in common usage, it requires no further elaboration. However, *intentional* agency is a more complex concept, as it incorporates some

57. Duff (n4) 78. M Moore "Intentions and Mens Rea" in R Gavison (ed) *Issues in Contemporary Legal Philosophy* (1987) 245 at 250, identifies a tendency towards "gerrymandering" of metaphysical positions in order to fit moral positions in the process of individuating intentions. He observes that moral or legal views may prove decisive in defining liability, identifying a dichotomy between fine-grained and coarse-grained theories of individuation which parallel the distinction between intended and intentional agency: "... A fine-grained theory of individuation will refuse to classify many more states of affairs as directly intended than will a coarse-grained theory. A fine-grained theorist, accordingly, will have every incentive to consider knowledge no less than purpose as sufficient for most serious culpability. A coarse-grained theorist, on the other hand, has a much lessened incentive to allow knowledge to be sufficient for serious culpability; for he can say that such states of affairs were directly intended without regard to the knowledge of the subject ...".

58. *Ibid.* The law itself "... determines whether an effect is relevant to my action ..." (at 79).

notions which are not always readily apparent to the man in the street, or synonymous with his understanding of intention.

To hold that a person brought about a result intentionally is to aver that he was fully and responsibly its agent⁵⁹. He can defeat this claim by showing that his act was "involuntary"; that he did not expect or realize that it would have that result; or that it was not a result for which he should be held responsible⁶⁰. Intentional action is a wider concept than intended action⁶¹, in that an agent "... brings about a result intentionally ... if he either intends to bring it about or foresees that it will certainly or probably ensue as a 'by-product' of his intended action. A 'by-product' may be defined as a result whose occurrence or non-occurrence makes no difference to the success of the agent's intended action ..."⁶².

An agent intends only those results whose expected or hoped for occurrence forms at least part of his reason for acting as he does; but "... he brings about intentionally any result which figures in the practical reasoning which informs his action, whether as a reason for the action or as a reason against it ..."⁶³. Duff observes that where we can ascribe to the agent some unitary intention, it is unproblematic to simply hold that an agent brings about intentionally those results which he aims to bring about, or

59. R A Duff "Intention, Mens Rea and the Law Commission Report" (1980) *Criminal Law Review* 147 at 152.

60. R A Duff "Intentional, Recklessness and Probable Consequences" (1980) *Criminal Law Review* 404 at 406.

61. Duff (n59) 151.

62. Duff (n60) 408.

63. R A Duff "Intention, Responsibility and Double Effect" (1982) 32 *The Philosophical Quarterly* 1 at 3.

anticipates as certain or probable by-products of his action, with the exception of those results which he intends to prevent (whose occurrence marks the failure of his intended action, even if he foresees them as probable)⁶⁴. It is more difficult however where the agent acts with a more complex intention of the form "to bring about x but to prevent y if possible", for if y occurs it marks the partial, but not complete, failure of his intended enterprise⁶⁵. Duff submits that y should still be regarded as the product of intentional action, unless the agent is justified in bringing y about in the circumstances⁶⁶.

One view of acting intentionally is that the only logical conditions of intentional agency are knowledge and control: I am the intentional agent of any effect whose occurrence I foresee with reasonable certainty and could prevent by either modifying or abandoning my action⁶⁷. Duff considers

64. Duff (n60) 408. Duff uses the example of a surgeon, who in a desperate and vain attempt to save his patient's life, performs an operation which he knows will itself probably kill the patient, to illustrate the exception. The surgeon intends to prevent the patient's death, despite his foresight of the probability that his performing the operation would kill the patient.

65. *Ibid* 409. Duff uses the example of a person planting a bomb in order to destroy a building, and taking certain precautions to avoid loss of life, although he foresees loss of life as a probable consequence of his actions.

66. *Ibid*. See his discussion at 409-410.

67. Duff (n63) 4. The qualification "with reasonable certainty" is Duff's formulation. It is submitted that a lesser degree of foresight suffices for the purpose of this view. This is reflected *inter alia* in the works of writers such as Hart, whose views are canvassed below at 67ff. Meiland draws an analogous distinction in differentiating between "non-purposive" and "purposive" intention: "... If I drive my car, knowing that this will wear down the brakes, I intend to wear down the brakes, even if this is not an intention with which I act ..." (cited *ibid* 3).

this view to be mistaken. He acknowledges that "... the criteria of intentional agency and responsibility for an effect involve the agent's knowledge of and control over that effect, but also its significance as providing a reason for or against his action: an agent's judgement of his own agency and responsibility for an effect of his action will thus depend on his judgement of its significance, and will reflect his own values, attitudes and interests ..."68. However this enquiry is not exclusively subjective: in holding someone to be the intentional agent of a particular result we are holding him responsible, ie answerable, for it: given its significance in the context of his action, its expected occurrence "... should have figured in the deliberation which informed that action, if it involves some evil, he needs to justify bringing it about ..."69.

Duff regards "intentional" as an "excluder"; it serves not so much to add anything to the claim that "A brought x about" as to exclude the plea that he was not responsible for it as its agent70. In contrast, "intend" is not an "excluder", and cannot simply be regarded as the absence of any relevant excuse71.

According to Duff, there are two problems concerning the distinction between intended and intentional actions72. First, there is a problem about the individuation of results: "... I intend to bring x about, and know that in

68. *Ibid* 5. Duff (n59) 152 states "... we count as parts of an agent's intentional action only such results as are in some way significant and for which he is responsible ..." (his emphasis).

69. Duff (n59) 152 (his emphasis).

70. *Ibid* 153.

71. *Ibid* (n21). Williams (n29) 15.

72. *Ibid*.

or by doing so I will also bring y about; I can count y as an anticipated but not intended by-product of x only if x and y are distinct results; for if they are - if 'x' and 'y' are simply different descriptions of the same result - then to intend x is to intend y ..."⁷³.

Secondly, the circumstances of an action may present a problem⁷⁴. Duff notes that we can distinguish those circumstances which are part of the agent's intended result from those which are not⁷⁵. The question arises however whether known circumstances should be included in our description of his intended action, whether or not he has any practical interest in them? Duff submits that this should be so; "... since the circumstances are given as the context in which he acts, whereas the consequences occur only because he acts, we may reasonably say that he intends his action not just under a description 'x' which picks out the result at which he aims, but under a description 'x in c' which also specifies the circumstances in which he acts ..."⁷⁶.

According to Duff, the distinction between intended and intentional agency renders nugatory any attempt to conflate all the notions of intention into a unitary account of intention ("... since any account will either be too wide for the notion of intending a result or too narrow for that of bringing a result about intentionally ...") and the confusion in the law in relation to intention reflects a failure to grasp the duality of this notion⁷⁷.

73. *Ibid.*

74. *Ibid.*

75. *Ibid.*

76. *Ibid.*

77. Duff (n27) 37.

Williams criticizes this distinction, specifically in respect of the notion of oblique intent, which Duff holds can come within the notion of "intentional action" but not "intended action": "... This is too subtle a distinction to be useful for legal purposes. Neither judge nor jury would see any difference of meaning between saying that a killing was 'intentional' and that it was 'intended', between saying that D 'intentionally' killed V and saying that D killed V by an act 'intended' to kill V ..."⁷⁸.

Whether the distinction between intended and intentional agency ought to be recognized by the law raises questions regarding competing notions of agency. The matter is further complicated by the fact that ordinary language conceptions of intention favour the recognition of intended agency whereas intentional agency has (to a greater or lesser extent) found general acceptance in the law⁷⁹.

78. Williams (n16) 425 n39.

79. Duff (n27) 104. Duff points out that while ordinary language would distinguish between intended and intentional agency, the law is not compelled to draw the same distinction. The fact that intended and intentional agency are "factually and logically distinct", whilst of interest in some extra-legal contexts, "... may not mark any significant difference in culpability or responsibility; the two species of intention may be 'morally indistinguishable'". He remarks that "... if criminal liability is a matter of responsible agency, and since I am fully responsible for the results both of my intended and of my intentional actions: then surely intentional agency should always suffice for criminal liability; the law need never require intended rather than intentional agency ...". This constitutes the consequentialist view, the non-consequentialist finds a distinct and particular moral significance in intended agency.

INTENTION IN THE CONTEXT OF CRIMINAL FAULT

Dualism

Before discussing the notion of intention in broader detail, it is necessary to place it within the context of criminal fault. It has been stated that contemporary discussions of criminal fault, reflect two kinds of assumption: one philosophical and one moral⁸⁰.

The philosophical assumption, which is related to the problem of proving a subjective mental state, is that of Dualism⁸¹. In its classical form, Dualism is a metaphysical doctrine which holds that human beings are composed of two distinct elements: physical bodies and non-physical minds. Bodies and their movements are "... public, external, observable by others ..."; minds and their processes are "... private, internal, not directly observable by others

80. R A Duff "Codifying Criminal Fault : Conceptual Problems and Presuppositions" in I H Dennis (ed) *Criminal Law and Justice : Essays from the W G Hart Workshop : 1986* (1987) 93 at 97. Duff submits that these assumptions are both influential and damaging. "... They are damaging because the philosophical assumption is untenable, whilst the moral assumption is at least arguable, and is at odds with the moral perspective which informs other aspects both of the law and of extra-legal moral understanding ...".

81. *Ibid.*

...", only by one's self⁸². It is thus only possible to know what another person is thinking or feeling by inference from external or circumstantial evidence⁸³.

Some writers, taking the materialist view that human beings are purely physical beings and that minds are identical with brains, reject Classical Dualism because of its metaphysical nature⁸⁴. However, Duff observes that such writers may still be epistemological dualists, who identify with the views of Classical Dualism as to how we can obtain knowledge of another's mental states⁸⁵. Epistemological dualists hold that "... though we could in principle directly observe another's mind by observing her brain, we cannot in fact do

82. *Ibid*, F McAuley "Mens Rea : A Legal-Philosophical View" (1982) 17 *The Irish Jurist* 84 at 88, without using the term "Dualism", describes this thinking as "... a form of residual Cartesianism evident in the law, particularly the criminal law ...". He elaborates on the substance of this notion as follows: "... the mind is essentially a cognitive apparatus, whose operations are entirely independent of its immediate biological environment, not to mention the social and cultural context in which it is situated. On this view, the mind is an autonomous process of conscious rational thought, the sum of its own contents or states; while the body, the sphere of human action and volition, as the purely passive recipient of its messages, is inherently incapable of modifying, much less ignoring, its decisions and instructions ...".

83. Duff (n27) 28. He points out (at 117) that this dichotomy has an obvious affinity to the distinction between *actus reus* and *mens rea* the *actus reus* being the parallel of the "external" elements of the offence and the *mens rea* the parallel of the "internal" mental states which must be inferred. However there is not an exact parallel between the two sets of concepts because (a) the *actus reus* is sometimes defined in terms of the defendant's mental state and (b) the *actus reus* is often said to include a mental element in that it includes the concept of a voluntary act, which implies "will" or "volition" (at 117).

84. *Ibid* 118.

85. *Ibid*.

so ...", and therefore we need to infer the mental state from the behaviour we can directly observe⁸⁶.

Dualist theory which treats minds as private entities, hidden from direct observation by others, and intentions as private states of mind, which others can infer only from external evidence has been influential in the development of the criminal law. Its influence may be seen in the M'Naghten rules, which limited the scope of insanity defence to cognitive disorders, as well as in "... the century-long hostility shown by the criminal courts throughout the common-law world to the idea of widening the defence to include volitional and affective disorders ..."⁸⁷. Furthermore, McAuley avers that dualist thinking "... still exerts a strong unconscious attraction for criminal lawyers and judges, and that this is manifested clearly in their persistent identification of mens rea with conscious mental states ..."⁸⁸. The assertion by the courts that "intention", "knowledge" and "awareness" are private mental states, distinct from the external behaviour which forms part of the crime, which needs to be proved by means of inferential reasoning, is further evidence of the legacy of dualist thought⁸⁹.

86. *Ibid.*

87. McAuley (n82) *loc cit.*

88. Duff (n27) 28-9 lists a number of dicta which support such a conclusion.

89. *Ibid.*

Dualism has generally been rejected by philosophers⁹⁰. Duff observes that "... despite its apparent plausibility Dualism is a deeply mistaken doctrine: it distorts what it seeks to explain and has vitiated attempts to provide an adequate account of intention in the law ..." ⁹¹. He addresses three basic arguments in support of his view⁹².

First, since the only case in which correlations between external behaviour and inner mental states can be observed is our own, these observed correlations must provide the basis for drawing inferences from the behaviour of others as to their mental states⁹³. However, the reliability of such inferences may be questioned, because of their lack of

90. Brett (n32) 87 for example cites Wittgenstein: "... The intention with which one acts does not 'accompany' the action any more than the thought 'accompanies' speech. Thought and intention are neither 'articulated' nor 'non-articulated'; to be compared neither with a single note which sounds during the acting or speaking, nor with a tune ..." (at 86), and Ryle, who expresses a similar view: "... To frown intentionally is not to do one thing on one's forehead and another thing in a second metaphorical place; nor is it to do one thing with one's brow-muscles and another thing with some non-bodily organ. In particular, it is not to bring about a frown on one's forehead by first bringing about a frown-causing exertion of some occult non-muscle. 'He frowned intentionally' does not report the occurrence of two episodes. It reports the occurrence of one episode, but one of a very different character from that reported by 'he frowned involuntarily', though the frowns might be photographically as similar as you please ..." (at 87).

91. Duff (n27) 119.

92. *Ibid* 120.

93. *Ibid*. This is the "Argument from Analogy".

generalizability⁹⁴ and the unavailability of any means of testing these inferences⁹⁵, as not even the express statement of the agent as to his intention is decisive⁹⁶.

Secondly, Duff refers to the issue of "external behaviour" from which the mental states of others are to be inferred. He points out that Dualism holds that it is "... not people and their actions, but bodies and their 'colourless movements' ..." which we observe⁹⁷. Behaviourism, the familiar opponent of Dualism, shares this view of what observation gives us, and also insists on mental states being inferred from physical phenomena⁹⁸. These two

94. *Ibid.* "Inferences from the observed to the unobserved are usually thought reliable only if they are based on a large number of cases in which the relevant correlation has been observed: we should reject inferences based on what has been observed in just one case..." However, dualist theory by definition does not allow inferences other than those on the part of the observer. Duff therefore poses the question: "... Surely [I] cannot reliably assume that what is true of this one body is true of all these others? ...".

95. *Ibid* 121. For the dualist minds are by definition private to their owners and therefore it is impossible, in terms of dualist theory, to even in principle directly test the inferences made with regard to the mental states of another.

96. *Ibid* 122. "... The claim that I must infer others' mental states from the physical behaviour which I directly observe applies to speech as to any other kind of behaviour: a dualist cannot consistently make an exception of speech and claim that this kind of behaviour, uniquely, gives us direct access to another's mind ...".

97. *Ibid* 123. However, our descriptions of observed behaviour of others are not usually couched in the bare language of "bodies" and "colourless movements".

98. Duff (n80) 100. For further discussion of Behaviourism, see D E Blackman "On the Mental Element in Crime and Behaviourism" in S Lloyd-Bostock (ed) Law and Psychology (1980) 113 and H F M Crombag "Some Psychological Observations on Mens Rea" in D J Müller,

theories nevertheless differ as to the nature of such mental states and about how they are related to physical behaviour:

"... for a dualist, physical behaviour is the evidence from which we make inferences to the hidden realm of the mind: for a behaviourist, there is no such hidden realm - talk of mental states is nothing more than talk of patterns of behaviour ..."⁹⁹.

A dualist infers some distinct and hidden mental state from the observable behaviour of an actor whereas a behaviourist predicts an actor's observable behaviour "... and what founders that prediction is not an inference to a hidden mind, but the observable patterns of A's behaviour and the correlations between it and certain external stimuli ..."¹⁰⁰. Duff points out that if the shared assumption is to be accepted, that we directly observe only bodies and their movements, we must accept either the behaviourist view of actions purely in patterns of bodily movement (and concomitantly of a person as nothing more or other than a physical body) or the dualist view of actions as bodily movements plus some further mental ingredient (and thus of a person as a body plus a distinct mind)¹⁰¹. But should the assumption be accepted? Duff argues that it should not: to regard behaviour which we can directly observe as being purely colourless bodily movements, as would a strict dualist or radical behaviourist, "... is neither a possible account of what we observe when we observe other people, nor

D E Blackman and A J Chapman (eds) *Psychology and Law* (1984) 55.

99. Duff (n27) 124.

100. *Ibid.*

101. *Ibid* 125.

a possible basis for inferences to their intentions or other mental states ..."¹⁰².

Thirdly, Duff questions whether the dualist process of making inferences from colourless bodily movements to distinct, hidden mental states is feasible¹⁰³. Following this process through, mental states ought to be able to be identified independently of the behaviour from which they are inferred. However, Duff points out that intentions cannot be identified as distinct from behaviour. He cites two objections to this line of reasoning: that intended actions are not always preceded (or accompanied) by any conscious act or state of intending and further, that we cannot identify, among the conscious thoughts which may precede or accompany an action, some occurrent thought or mental act which can be recognized in itself as being an intention or decision¹⁰⁴. Duff therefore observes that the sharp distinction which Dualism draws between mind and behaviour is deficient.

Thus, Duff comments, the shared assumption of Dualism and Behaviourism to the effect that "... observation, knowledge and philosophical analysis must begin with physical bodies and movements: ... that these are what we directly observe; that these provide the basic data from which we must construct our knowledge of other people and their actions and intentions; that these must be basic elements in a philosophical analysis of the concepts of person and action ..." must be rejected¹⁰⁵. While the dualist view that there is "more" to human action than mere bodily movement ought to

102. *Ibid* 126.

103. *Ibid* 127.

104. *Ibid*.

105. *Ibid* 129.

be accepted, so too should the behaviourist view that that "more" does not consist in a hidden mental ingredient¹⁰⁶. Duff therefore submits that we should begin with people and their actions: "... that these are what we can directly observe, and directly know, that these are not reducible by philosophical analysis to such supposedly simpler or more basic constituents as bodies and their colourless movements ..."¹⁰⁷.

In conclusion, Duff illuminates his anti-dualist view with a few observations. While accepting the need for inferential reasoning where there is room for doubt as to an actor's intention, he observes that such inferences are in fact, contrary to the dualist view, "... drawn from the actions or aspects of actions which we observe, to the broader patterns of meaning of which they are part ..."¹⁰⁸. Intentions which have not yet been put into action (bare intentions) should on Duff's analysis be seen, not as inner mental states logically distinct from action but rather as commitments to action, in view of the conceptual logical parasitism of intention on action¹⁰⁹.

The authoritative knowledge which an agent has of his own intentions is explained by Duff, not in the context of direct observation (as does Dualism), but rather in terms of knowledge the agent has by virtue of his own intentions

106. *Ibid.*

107. *Ibid.*

108. *Ibid* 131. "... To discern an agent's intentions is to grasp the relation between her action and its context (including what else she does); what she will count as success or failure in what she does; and the truth of a range of hypotheticals about what she would do if ...; and we may be uncertain or mistaken about her intentions in so far as we are ignorant of or mistaken about any of these matters ...".

109. *Ibid* 133.

germinating in his own consciousness: to form and act on an intention is itself to know, as an agent, what I intend¹¹⁰.

Brett agrees with Duff that Dualism is based on fallacious reasoning, adding that we constantly make assessments of what is going on in other people's minds without using this "tortuous process"¹¹¹. He premises his analysis upon the "indwelling understanding" of other human beings which we have¹¹². Brett finds support for this postulation in the rules of evidence (and "countless decisions") which attach almost "overwhelming importance" to the "demeanour" of a witness in evaluating the worth of his testimony. He makes the submission that the real reason for this is "... an implicit recognition that the personal observer did not rely solely on the observable behaviour, but rather unconsciously made use of his indwelling understanding ..."¹¹³.

Competing Concepts of Responsible Agency

The moral assumption to which Duff refers is a consequentialist conception of responsible agency, in terms of which no intrinsic moral difference exists between "intention" and "foresight" and therefore intentional agency suffices for criminal liability¹¹⁴. A consequentialist's primary interest is in outcomes, and concomitantly in human actions as causes of such outcomes, although this should not

110. *Ibid* 134. "... An agent's authoritative knowledge of her own intentions thus has to do, not with her privileged status as a direct observer of her own mind, but with her privileged status as the agent of those intentions and of the actions which are structured by them ...".

111. Brett (n32) 139.

112. *Ibid*.

113. *Ibid*.

114. Duff (n80) 98; Duff (n27) 104.

imply that a person will be held responsible for every relevant outcome which he actually causes¹¹⁵. Like any other human institution, a legal system must (on a consequentialist view) be justified "... by the consequential goods which it secures (or evils which it averts) ..." ¹¹⁶. Thus, the Harm principle, in terms of which the primary aim of a criminal law system is to prevent, or reduce, the occurrence of certain kinds of harm, would be a favoured consequentialist credo¹¹⁷.

A pure consequentialist view involves justifying principles of liability by their consequences, that is, adopting those principles which would most efficiently serve the law's aim of preventing harm¹¹⁸. This view may be criticised on the basis that it is unable to generate acceptable principles of liability as it would impose liability on some who do not deserve it, for the sake of increasing the preventive

115. Duff (n80) 98. Duff notes, at (n27) 105 that "... the central consequentialist slogan is that the rightness or wrongness of actions depends solely on the goodness or badness of their consequences: an action is right if its consequences are at least as good as those of any available alternative, wrong if its consequences are worse than those of some alternative ...". He observes that consequentialists differ as to how to assess consequences as good or bad: utilitarians hold that happiness is the only intrinsic good (and unhappiness the only intrinsic evil), therefore an action derives its worth in terms of maximization of happiness (and minimization of unhappiness), while other consequentialists ascribe intrinsic value to ends other than happiness, such as freedom and justice, and assess actions as right or wrong in these terms.

116. Duff (n27) 105.

117. *Ibid.* The following discussion will be in terms of the Harm Principle.

118. *Ibid* 107.

efficiency of the law¹¹⁹. It is for this reason that a qualified consequentialist view has been postulated whereby non-consequentialist "side-constraints" are set upon the means by which consequentialist ends are pursued¹²⁰. Thus, in terms of this view, a person may be held liable only for such outcomes as can be properly ascribed to him as an agent ie for those outcomes over which he has effective control¹²¹.

Knowledge and control therefore constitute the basic conditions of criminal liability on a consequentialist view: "... an agent's culpability for some harm which she causes will be a function of the seriousness of that harm and of her responsibility for it, and she is responsible for that harm in so far as she has effective control over its occurrence. But she has such control to the extent that she knows, or could easily realise, that her action will cause that harm, and could avoid that harm by not acting thus: the basic conditions of morally culpable responsibility for the harm that our actions cause are the same as those of criminal liability; knowledge and control ..."¹²².

119. *Ibid.* "... It provides no secure foundation for the kinds of excuse (based on *mens rea*) which should, in justice, preclude criminal liability ...".

120. *Ibid.*

121. Duff (n80) 99. Thus only the guilty are allowed to be punished.

122. Duff (n27) 109. "... On this view the intentional, not the intended causation of harm is the paradigm of criminal fault. Conduct is criminal (the *actus reus*) if it causes or threatens a prohibited harm; and its agent is culpable (her *mens rea*) in so far as she controls that conduct; ie foresees its harmful effects and could avoid their occurrence: one who does what she knows will cause harm is the paradigm of a culpable criminal ...".

Duff points out that consequentialists often claim, in moral contexts, that there is no intrinsic moral difference between "intention" and foresight; that claim applies equally to the law¹²³. Therefore the law need never distinguish, with regard to culpability, between intended and intentional agency, or require intended rather than intentional agency for criminal liability - its purposes are best served by the broader definition of intention, since that captures the relevant category of responsible agency¹²⁴.

Although Duff does not regard the consequentialist conception of responsible agency as philosophically untenable, he favours a non-consequentialist view¹²⁵. This view finds an intrinsic moral significance in intended action ("... a significance dependent not on expected consequences, but on the intentions which structure it ...") and appeals to the Principle of Double Effect in drawing a distinction between whether an agent intended evil or merely foresaw it as the side-effect of his action¹²⁶. Whereas the consequentialist paradigm of crime consists of the intentional causing of harm, the non-consequentialist paradigm is an attack on the rights or interests of another, and an attack is an action which is intended to do harm¹²⁷. Duff observes that intentional agency is parasitic on

123. *Ibid* 110.

124. *Ibid* 111.

125. *Ibid*. Other writers, who oppose consequentialism, include G E M Anscombe The Collected Philosophical Papers of G E M Anscombe: Ethics, Religion and Politics (Vol 3) (1981) 36 ff and R Lyons "Intention and Foresight in Law" (1976) 85 *Mind* 84 at 86ff.

126. *Ibid*. For a brief discussion of this principle, see 64ff below.

127. *Ibid* 113.

intended agency and therefore favours the narrower, non-consequentialist view¹²⁸. He acknowledges that in many cases there will be no conflict in practical terms between the consequentialist and non-consequentialist views, and that in many cases intentional agency suffices as a basis for criminal liability¹²⁹. However, he avers that in certain cases, the two views may conflict, and in such cases, the non-consequentialist view should prevail¹³⁰.

Duff observes that a better understanding of the concepts of purpose and intention will clarify, but not settle, the question of how far the law should reflect a consequentialist or non-consequentialist conception of agency, for that is ultimately a moral rather than a philosophical issue¹³¹. Any choice between the two competing conceptions of agency is therefore ultimately linked to the morality underlying a system of criminal law.

128. *Ibid.* Duff explains that "... I bring about intentionally expected side-effects of my intended actions; the fault involved in the intentional causation of harm is likewise secondary to, and parasitic on, the central paradigm of intended wrongdoing ...".

129. *Ibid.*

130. *Ibid* 114. Duff includes crimes requiring an "intent" directed towards something beyond or other than the *actus reus* of the offence in this category.

131. Duff (n80) 103.

SPECIES OF INTENTION

The further discussion will be directed towards contrasting the notions of "ordinary" and "technical" language, of intended and intentional agency, in order to assess which of these notions, representing differing approaches to criminal liability, should be recognized and endorsed by the criminal law.

There are three basic species of intent identified by writers. The first of these, which is also the most important, is that of acting intentionally¹³², including the notions of both intended and intentional action. Hall observes that "intentional" conduct is "... inferred from end-seeking conduct in the very process of its movement towards the forbidden goal ..."¹³³. Thus, in the legal context, the situation arises where a man has done something which fits the definition of the crime insofar as it concerns the outward movements of the body and the harmful consequences following therefrom¹³⁴. At this point the question arises whether the accused acted intentionally. Brett observes that an actor may be said to be doing something intentionally where you ask him a question in the form "what are you doing?" and he replies "I am doing so-and-so", in that he reveals an awareness of what he is doing¹³⁵. This intention-statement indicates that the act

132. White (n3) 569; H Morris (ed) Freedom and Responsibility (1961) 158; Brett (n32) 87; G E M Anscombe Intention (1957) iii; Hart (n31) 117; J Hall General Principles of Criminal Law 2ed (1960) 113. Duff (n27) 40 regards this species of intention as "the core of the concept of intention", with which Hart (n31) 118 agrees.

133. *Ibid.*

134. Hart (n31) 118.

135. Brett (n32) 87.

is not, for example, "accidental". The question-and-answer process is typical of situations where some question exists whether or not to impute blame to a person¹³⁶.

The second species of intention is "... doing something with a further intention ..."¹³⁷. Hart explains this category as follows:

"A man gets into a house at night and the question is not, or not merely, 'Did he do that intentionally?' but '... Did he do that with the further intention' or (as lawyers like to say) 'with the intent', of stealing something? ..."¹³⁸.

This category may be established by asking the question: "Why did you do that?"; where the questioner will be expecting to receive an answer which will state a reason, that is, some objective which the actor hoped to achieve¹³⁹. At least a possibility of achievement must be imputable to the actor in this use of intention¹⁴⁰. Hall makes use of the term "purpose" in identifying this species of intent¹⁴¹. Although the word "purpose" is somewhat ambivalent, and

136. *Ibid.* "For example, if we see a man putting a powder (which proves on examination to be arsenic) into his wife's coffee and ask him 'What are you doing?' his reply 'I am putting arsenic in the coffee' reveals that he is intentionally poisoning the coffee. But if he replies 'I am putting sugar in the coffee' he reveals that he is poisoning the coffee by accident ..." (at 88).

137. Hart (n31) 117.

138. *Ibid* 118. If the man in the example had such an intention, "... he is guilty of burglary, even if in fact he did not steal anything ...".

139. Brett (n32) 88.

140. *Ibid.* Therefore, "... when we say that someone intended to kill when he put a substance in his neighbour's coffee, we impute to him some knowledge of his way about the process of killing generally ...".

141. Hall (n132) 113.

therefore unsuitable terminology, it is clear from his use of the term what Hall has in mind: "... whether a person has reached a decision or is consciously moving to implement it, he has a purpose, end or goal in view ..."142.

White describes this category as "... doing something with the intention of doing something else, whether or not one does the second thing ..." (There must be an intention to do the first thing)143. He identifies 2 (two) important variations within this species of intent:

- (a) The intention of doing the second thing is a mere accompaniment of doing the first thing144
- (b) The second thing is not only what one intends but also one's reason for doing the first and its intended result. It appears that the second thing can be one's reason in two ways:
 - (i) The first thing might be a means to the second;

142. *Ibid.* Hall concedes that since "purpose" sometimes means motive, it is preferable to use other words to describe this connotation of intention.

143. White (n3) 569.

144. *Ibid* 570. White cites the example of when one goes to a meeting with the intention of leaving before noon.

- (ii) The first thing might be intended as a way of doing or an attempt at doing the second thing¹⁴⁵.

The third species of intent is "bare intention"¹⁴⁶, also known as "pure intention"¹⁴⁷. Hart's description neatly encapsulates the dual aspect of this species of intent: "... bare intention ... is the case of intending to do something in the future without doing anything to execute this intention now ..."¹⁴⁸.

The first aspect; the direction of the intention towards the future, is reflected in the definitions of Morris: "... present intention to do a future act ..."¹⁴⁹ and Anscombe: "... expression of intention for the future ..."¹⁵⁰. Hall describes it as "... pointed towards the future attainment of that objective since some time, however brief, must elapse between the decision to produce the harm and the

145. *Ibid.* The first variation (i) may be illustrated by such examples as "... when one loiters with intent to steal or goes to a meeting with the intention of causing trouble ...". Thus the first thing is a means to the second. A description of the second thing is quite distinct from a description of the first. The second variation (ii), in which the first thing is intended as a way of doing or an attempt at doing the second may be illustrated by examples such as "... when one shoots to kill or waves one's arm to signal ...". A description of the second thing can also be a further description of the first thing, it is what a person is doing in doing the first. Thus the man who waves his arm is, in this instance, signalling and the man who poisons is killing.

146. Hart (n31) 117.

147. D Davidson "Intending" in Y. Yovel (ed) *Philosophy of History and Action* (1978) 41

148. Hart (n31) 117.

149. Morris (n132) 158.

150. Anscombe (n132) iii.

actual production of it ..."¹⁵¹. Brett emphasizes the temporal dimension of bare intention in the question-answer form by asking: "... What are you going to do tomorrow?", expecting "... an answer outlining a certain proposed course of activity on the part of the person to whom we are speaking ..."¹⁵².

The second aspect of bare intention relates to the fact that the intention has not yet been, and indeed, need never be, translated into action. Davidson stresses that this form of intending "... may occur without practical reasoning, action or consequence ..."¹⁵³. White concurs, stating that this species of intent consists of "... having an intention ... to do something, whether or not one does it and ... whether or not one expresses or announces that intention ..."¹⁵⁴.

Hart observes that this species of intention is not of central significance in the criminal law, though it is important in the civil law¹⁵⁵. Morris identifies conspiracy and attempt as areas where bare intention would be legally relevant¹⁵⁶. However this could only be if bare intention

151. Hall (n132) 113.

152. Brett (n32) 88.

153. Davidson (n147) 41.

154. White (n3) 569. Brett (n32) 88 also emphasizes that it is a crucial feature of a bare intention that it is not yet translated into action.

155. Hart (n31) 118. As regards the civil law, Hart points out that a landlord's right to eject a tenant as the termination of a lease may depend on the question whether he intended before its expiration to reconstruct the premises. In *Cunliffe v Goodman* [1950] 2 KB 237, a very similar situation occurred, where the issue to be resolved by the court was whether a landlord had had a bare intention to demolish a building which she owned.

156. Morris (n132) 158.

were to be accompanied by some action, in which case it would fall into one of the other species of intent.

Davidson regards intention in this form as an "... all-out judgement ..." ¹⁵⁷. He is of the opinion that "... pure intendings [Davidson's term for bare intention] constitute a subclass of all-out judgments, those directed to future actions of the agent, and made in the light of his beliefs ..." ¹⁵⁸.

Although we have examined the three major species of intent identified by the writers, this list is not exhaustive. Two further species of intent have been identified by academic writers. White has identified a further form of intention: to do one thing intending to do a second where it is only the second that one intends to do ¹⁵⁹; while Morris also mentions intending that another person shall perform some act ¹⁶⁰.

157. Davidson (n147) 56.

158. *Ibid* 59. S Hampshire "Comments" in Y. Yovel (ed) *Philosophy of History and Action*. (1978) 61 at 66, criticizes the reduction of intentions to judgments, arguing that the two concepts are quite distinct.

159. White (n3) 570, cites the examples of "... when one breaks a window intending to hit the wall beneath it or kills one man intending to kill another ...". One does not therefore intend to do the first thing, it was unintentional but nevertheless happened, whether by mistake or by accident.

160. Morris (n132) 158.

INTENTION AND DESIRE

In assessing intention, the notion of "desire" as an element of intention should be considered closely. There is an apparent link between "desiring" and "intending" in ordinary speech¹⁶¹ and this is reflected in certain legal systems¹⁶². The general assumption in German¹⁶³ and Soviet¹⁶⁴ law, for example, is that an actor intends a result only if he desires to bring about that result¹⁶⁵. It seems though that the term "desire" is generally used fairly loosely or indiscriminately in legal writing. Williams observes that (with a solitary exception) intention as to a consequence of what is done requires desire of the consequence¹⁶⁶. Kenny's scheme of intention requires, along with knowledge, that he is performing the action, that the agent "wants to do it" either for his own sake or in order to further some other end¹⁶⁷.

161. See also the link between the concepts in the usage favoured in philosophical analyses of "intention" by Davidson (n147) and M Beardsley "Intending" in A I Goldman and T Kim (eds) *Values and Morals* 163.

162. Fletcher (n5) 440 cites the German and Soviet law as examples in this regard.

163. *Ibid* n3. "... According to the standard definition: Vorsatz ist das Wissen und Wollen der Tatbestandsverwirklichung (Intention is knowing and wanting the realization of the definition of the offence) ...".

164. *Ibid* n4. "Ugol kod (RSFSR) 8 (intention requires foresight and desire as to socially dangerous consequences) ..."

165. *Ibid* n6. Common law writers such as Holmes and Salmond add further support to this view.

166. Williams (n16) 418, where he states that "... wish, desire, purpose or aim ..." are all synonymous.

167. A Kenny "Intention and Purpose in Law" in R S Summers (ed) *Essays in Legal Philosophy*. (1968) 146 at 154. Kenny's approach is predicated upon a critique of the legal conception of intention in relation to the "plain

The issue of whether an action is desired has been linked to the question of voluntariness. Fletcher identified a clear systemic significance in distinguishing between intention and desire¹⁶⁸. He observes that if intention is construed restrictively (that is, without alluding to desire), then the apparatus of analysis must include a distinct ground for solving cases of involuntary conduct¹⁶⁹. Conversely, a broader concept of intention, including an element of desiring, might, on this argument, render a separate provision on voluntariness superfluous¹⁷⁰. Thus voluntariness would be encompassed by the notion of "desire"¹⁷¹.

In order to assess the utility of the concept of "desire", it is necessary to establish the meaning of desire as a term of art within criminal jurisprudence. Sistare¹⁷² has identified five possible senses of desire, each of which signify some cognitive or affective agent condition:

(a) Wish - Sistare construes this as a mere wish, without reference to human control¹⁷³. Intentionality man's" notion of intention. The scheme of intention expounded by Kenny is therefore that of the plain man.

168. Fletcher (n5) 441.

169. *Ibid.*

170. *Ibid* 442.

171. The utility of such a conception of "desire" is questionable however, as the notion of an act usually includes the characteristics of voluntariness. Thus, without voluntariness, an "action" or "bodily movement" would not be an act for legal purposes. Fletcher (*ibid*) doubts whether "desire" and "volition" are interchangeable (450).

172, C T Sistare Responsibility and Criminal Liability (1989).

173. *Ibid* 98. Sistare characterizes this form of desire as "... the sense in which one desires to flip heads on a coin, to kill one's sister by thinking hard about it, or to be ten years younger than one is (and not just to

presupposes efficacious agency and actual causation, therefore this sense of desire is inadequate.

- (b) Urge or emotional appetite - Although it is so that satisfaction or pleasure may be provided by intentional actions, this sense of desire is not a prerequisite of intentionality - one can intend a result without obtaining psychological gratification from it¹⁷⁴.
- (c) Reason for (motive) - Though an agent has a reason for bringing about a "desired" consequence, as a criterion of intentionality such a sense of desire is unnecessary or misleading¹⁷⁵. "... The fact of the matter is that one can have a reason for doing things which one cannot do or never will do. To intend, on the other hand, implies both possibility and a minimal likelihood of performance ..." ¹⁷⁶. The requirement that an agent should have a "reason for action" adds nothing to the notion of intention.
- (d) Preference - While it is no doubt true for intention that the occurrence of a result is preferable to its non-occurrence, the notion of preference functions look that way) "...". She notes that even a bare intention differs from a wish: "... since wishes are not bound to possibility, they are not assessed in terms of effort towards fulfilment ...".

174. *Ibid* 99. As Sistaré observes (at 100), it is all too possible to intend conduct and consequences which provide no satisfaction whatsoever.

175. *Ibid* 101.

176. *Ibid* 102. "... Whereas my intentions will be questioned if I never try to stop smoking, my having a reason to stop is unaffected by either the possibility or probability of my acting towards that end. An agent can even have a reason for an action while performing it unintentionally, as when Mel accidentally breaks a vase which she had planned to destroy for the insurance money ...".

independently of intentionality and does not constitute a distinct criterion of intentionality¹⁷⁷.

(e) Choice - As noted by Sistare, "... stripped of emotional connotations and restricted to the realm of effective human agency, 'desire' may suggest the choice of some event or state of affairs ..." ¹⁷⁸. However, alongside the primary requirement of knowledge, there is no need for this additional criterion of "desire" as choice.

Thus one may conclude with Sistare that there is no sense of desire which functions as a criterion of intentionality - it either obscures the nature of intentional action, or is theoretically otiose¹⁷⁹. Although notions such as "choice", "preference" and "reason" follow from intending, none of these is required as a distinct criterion for determining intentionality.

In the light of the breadth of scope of the meaning of "desire" evinced by the above terminological considerations, the utility of the notion should be examined. Duff observes that "... there is a broad philosophical use of 'desire', and a comparably broad ordinary use of 'want', such that I do necessarily desire or want whatever I intend ..." ¹⁸⁰. However, Brett avers that the philosophic analysis of

177. *Ibid.* As Sistare points out, in the absence of an admission of preference, we would need to look either at the agent's reasons for X or his intention to X in order to establish his preference for the occurrence of X (at 103).

178. *Ibid* 103.

179. *Ibid* 104.

180. Duff (n4) 78. White (n3) 576 confirms this: "... Outside the law what someone desires (or wants) to do and what he intends to do frequently coincide ...".

intention does not regard desire of the consequence as a necessary element: "... there is no compelling ground for insisting that desire must enter into every intention of this kind ..." ¹⁸¹.

The notion of desire has been included in juristic analyses of intention as the differential between intention and recklessness ¹⁸², or intention and "unintention" ¹⁸³. While Williams concedes that no English judgment defines intention as involving desire, he considers desire to be the distinctive feature in this regard, and proposes a hypothetical example in support of his argument ¹⁸⁴. White, however, criticizes his example for not drawing a distinction "... between what a man has it in mind to do and what he desires to do ..." ¹⁸⁵.

181. Brett (n32) 89.

182. White (n3) 578.

183. Williams (n29) 11.

184. *Ibid.* Although this argument was offered in 1965, it is still relevant today. Williams' hypothetical example is based upon the case of *Finney* (1874) 12 Cox 625, in which an asylum attendant turned on a tap which let scalding water into a bath, and so killed a patient who was in the bath. The attendant thought that the patient had got out before he turned the tap on. He was tried for manslaughter. Williams postulates the following situation based on these facts: "Suppose that the attendant had previously said to a fellow-attendant: 'This chap Watkins is a nuisance in the asylum, I will see if I can't get rid of him when I bath him next' ...". Williams regards such a remark as "... proof of intention ie desire to bring about the consequence ..." which would lead to a murder verdict. Yet in each case the objective conduct might be the same and in neither case might it be initially certain that the water in the tap was hot enough to cause someone's death. Williams concludes that desire is therefore the determinative element which distinguishes between intention and other cases.

185. White (n3) 579.

Turner defends the identification of intention with desire: "... Again, a man cannot intend to do a thing unless he desires to do it. It may well be a thing that he dislikes doing, but he dislikes still more the consequences of his not doing it. That is to say he desires the lesser of two evils, and therefore has made up his mind to bring about that one ..."186. Ross observes that this defence is a dubious one: "... Understood in this way, 'desire' is not the designation of a certain mental attitude which is the basis of certain acts, but not of others. For irrespective of what a person decides to do, the decision is an expression of the fact that he desires to do what he does ..."187. It is generally accepted that a person can have "incompatible desires", or even "an intention which conflicts with a desire", which would undermine the equating of desire with intention188. As there appears to be no

186. Kenny's *Principles of Criminal Law* 19ed by J W C Turner (1966) 36. G H Gordon *The Criminal Law of Scotland* 2ed (1978) 222, points out however that "... Intention ... is not just a species of desire ... to desire an end is to intend the means adopted for the attainment of that end, even if the means are not themselves regarded as desirable. Again, a man is said to intend whichever of two possible courses of action he adopts, even although it would be true to say that the way he acted was not the way he 'really' wanted, not the way in which he would have preferred to act ...".
187. A Ross "Intent in English Law" (1979 *Scandinavian Studies in Law* 177 at 183 n8.
188. Gordon (n186) 223 cites the discussion of the relationship between intention and desire by the Judicial Committee of the Privy Council in *Lang v Lang* [1955] AC 402: "... It was there held that a husband who pursued a course of conduct which he knew would lead to his wife's leaving him intended her to leave him although he did not want her to go. Lord Porter said [at 428], "A man may well have incompatible desires. He may have an intention which conflicts with a desire: ie he may will one thing, and wish another, as when he renounces some cherished article of diet in the interest of health. But 'intention' necessarily connotes an element of volition: desire does not ...". Despite his support for the use of the notion of desire, Williams (n29) 17 concedes that "desire" is

English authority for the proposition that intention implies desire and therefore that absence of desire implies absence of intention¹⁸⁹, this would lend credence to White's conclusion that the common concomitance of intention and desire has mistakenly led to their identification and also to the suggestion of a necessary connection between them¹⁹⁰.

The use of the notion of desire as equivalent to intention has been criticized on a number of other grounds. Buxton points out that words such as "want" and "desire" have a shifting meaning in ordinary speech, and are thus inappropriate for legal use¹⁹¹. Furthermore, he adds that "... an ascription of intention in a criminal case must refer to the accused's mental attitude to the results of his own conduct ..."¹⁹². Mere wishes, preferences or longings, typically expressed in terms of the "language of desire" are inadequate and therefore "... whilst it would not be logically impossible to talk of intention in the criminal law in terms of desire, such language would or might obscure the essential requirement that an intended consequence in

"... too strong a word to use for the psychological state involved in much conduct that passes as intentional ...".

189. White (n3) 579, who also notes (at 578) that there is no intrinsic evidence that desire is the element by which intention and recklessness differ. In South Africa, the cases of *R v Mini* 1963 (3) SA 188 at 192; *S v Nkombani* 1963 (4) SA 877 (A) at 896; *S v Arnold* 1965 (2) SA 215 (C) at 217, speak of "intention plus a positive desire".

190. *Ibid* 576.

191. R Buxton "Some Simple Thoughts on Intention" (1988) *Criminal Law Review* 484 at 493.

192. *Ibid*.

that law must be sought after by action rather than just hoped for or preferred ..."¹⁹³.

Although the ordinary usage of "desire" lends itself to equating the term with intention, "... there is an equally familiar and narrower ordinary usage of these terms in which we contrast what we want with what we intend ..."¹⁹⁴. These conflicting usages of desire create confusion in the law¹⁹⁵. Duff moreover regards the "necessary truth" that I want or desire whatever I directly intend to be an "empty truism" as it does not specify an independent criterion for the conclusion that the agent intends the desired or wanted result; it rather marks an implication of the logically prior finding that he intends it¹⁹⁶. He elucidates this view as follows: "... We do not realize that an agent intends a result by realizing that he "desires" it in this broad sense; we say that he desires it because we realize that he intends it. If a legal definition of "intention" is to specify the conditions or criteria by reference to which courts may find that an agent intended a result, a definition in terms of 'desire' or 'want' is thus unhelpful ..."¹⁹⁷.

193. *Ibid.*

194. Duff (n4) 78. "... I don't want to do X, but I've got to do it (as a necessary means to my end, as the least available evil, as a duty) ...".

195. *Ibid.* "... If 'intention' is defined in terms of 'desire' or 'want', it will need to be explained to juries (and perhaps even to judges) that these terms are being used in their broadest sense; and there is a danger that juries (and perhaps even judges) might confuse the two uses of these terms, and wonder whether an effect which is not 'wanted' in the narrower sense is intended ...".

196. *Ibid.*

197. *Ibid.*

The differing meanings of desire that arise in respect of ordinary usage may perhaps be clarified by drawing the distinction between intrinsic and extrinsic desires. An intrinsic desire involves wanting something for its own sake, whereas an extrinsic desire involves wanting something as a means to something else, and not for itself¹⁹⁸. By making use of such a distinction, it is possible to reconcile the use of desire in the law with ordinary usage, which equates intention with desire. Used in this sense, to say that intention involves desire is to say that to intend a result involves having either an intrinsic or extrinsic desire for it: all reasons for action, all intentions, depend ultimately on an intrinsic desire for some end; but my immediate intentions may be structured by extrinsic rather than intrinsic desires¹⁹⁹.

198. Duff (n27) 54. An example of an intrinsic desire is a desire to stay alive or free from pain, while a desire for a painful operation is an example of an extrinsic desire. Beardsley uses this dual interpretation of "desire" to support the requirement of desire (the "want condition") as part of intention: "... I do not in any way deny that one can do intentionally what he wants not to do; I only insist that he is not doing it intentionally unless he wants to do it ..." (n161) 168.

199. Duff (n27) 54.

INTENTION AND PURPOSE

The term "purpose" has been used interchangeably with desire to denote intention²⁰⁰. There has also been some discussion by writers whether it is suitable to use "purpose" in this way.

Buxton favours the use of "purpose" to denote intention because it is bound up with an agent's actions, and constitutes his reason for acting as he does²⁰¹. "... These essential features of the concept of purpose fit in exactly with the requirements of the criminal law, since that law is concerned ... with the agent's mental state in relation to the results of his own actions ..." ²⁰². In Buxton's view, this approach avoids the problems associated with usage of the language of desire, by stressing that "... the intended consequence in law must be sought after by action ..." ²⁰³.

200. See, for example, Ross (n187) 184 n9; Brett (n32) 89; Williams (n16) 418.

201. Buxton (n191) 493. Alternatively, a man's purpose is "... the result that he acted in order to bring about ...". Buxton observes that "... we say a man's purpose, not only because that is what concerns us here, but also because that is the primary use of the word purpose. To speak as we sometimes do of the purpose of an object (eg the purpose of the buffers is to stop the train running on the platform) is either to make a compressed reference to the purpose of the maker of the object or to use a figurative extension of the primary meaning of purpose, by referring to what the object notionally seeks to get done ..." (at n44). R Goff "The Mental Element in Murder" (1988) 104 *The Law Quarterly Review* 30 at 42 observes that the best synonym for "intention" is "purpose". He cites dictionary definitions in support of this submission.

202. *Ibid.*

203. *Ibid* 494.

Williams has argued that purpose is not superior to desire as a synonym of intention because purpose implies desire²⁰⁴. Buxton concedes the point ("... at least in the weaker sense of the word desire..."), but argues that it does not follow from this that purpose and desire share the same meaning²⁰⁵. It is his view that the concept of purpose adds to "mere desire" a recognition of the fact that intention requires more than a wish or hope, and that it must also consist of an "act" or "other external element"²⁰⁶.

The English Law Commission included the notion of purpose in the "fault elements" of the 1985 Draft Code, as a synonym for direct intention, in the following terms:

"... [A] person acts in respect of an element of an offence - 'purposely' when he wants it to exist or occur ..."²⁰⁷.

However the members of the Law Commission who drafted the Code were apparently unsure of what to do with the notion of purpose as no offence in the Draft Code itself was defined as requiring purpose²⁰⁸. Significantly, the 1989 Code

204. Williams (n16) 418.

205. Buxton (n172) 494 n46.

206. *Ibid.* Buxton cites Williams (n16) 418 when he says that "... intention, for the lawyer, is not a bare wish; it is a combination of wish and act (or other external element) ...".

207. Duff (n27) 26. In terms of the 1985 Draft Code, a person acts "intentionally" in respect of an element of an offence "... when he wants it to exist or occur, is aware that it exists or is almost certain that it exists or will exist or occur ..." (cl 22(a)).

208. *Ibid.* The codifiers did however cite two minor offences proposed by the Law Commission which would be defined in terms of purpose (para 8.12).

abandoned the distinction between purpose and intention, merely using the term "intentionally"²⁰⁹.

A number of writers have sought to distinguish purpose and intention. Austin observes that when I am acting for a purpose, this will be known to me as the actor, as are intentions, and will guide my conduct²¹⁰. Moreover a purpose will influence the forming of intentions²¹¹. Austin views purpose as "... something to be achieved or effected as a result of what I'm doing ..." ²¹² and that often purpose consists of an actor placing herself in a position to be able to continue with the next action. He points out however that an actor need not have any purpose in acting, even intentionally²¹³, "... I act for or on (a) purpose, I achieve it; I act with the intention, I carry it out, realize it ..." ²¹⁴. Austin's views may be related to those of Anscombe, who points out that any particular conduct may

209. *Ibid.* The 1989 Code provides that "... a person acts 'intentionally' with respect to

(i) a circumstance when he hopes or knows that it exists or will exist;

(ii) a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events ..."

(cl 18(b)).

210. J L Austin "Three Ways of Spilling Ink" in J L Austin : Philosophical Papers 2ed By J O Urmson and G J Warnock (1976) 272 at 285.

211. *Ibid.*

212. *Ibid.* He gives examples: "... like the death of my aunt, or the sickness of the penguins if I did indeed feed them peanuts on purpose ...".

213. *Ibid* 286. Austin cites the example of "feeding starving children" as a case where the actor need have no purpose.

214. *Ibid.*

have a whole series of purposes, each slightly more remote than its predecessor²¹⁵. Brett views it "... quite proper to speak of any one of these as the speaker's intention, although his desire may be concentrated only on the ultimate objective. The intermediate objectives may not be truly desired, but may be contemplated and accepted because they appear to the actor as the only effective steps towards bringing about his desired aim²¹⁶.

White amplifies some of Austin's arguments. He observes that intention and purpose are different in nature: intentions, like plans, may fail to be carried out while purposes, like aims and objectives, may be unachieved or fail to be accomplished²¹⁷. Thus, purposes do not imply intentions and vice versa²¹⁸. White avers that one's purpose in doing something is one's reason for doing it; therefore to use the word "purposely" in describing one's action is to imply that one had a reason for doing it and consequently, by specifying purpose one is giving an explanation²¹⁹. In contrast, the intention with which one performs an action is not necessarily a reason, and thus to specify an intention does not necessarily mean giving an

215. Brett (n32) 90 cites Anscombe as part of his discussion.

216. *Ibid.* "Desire" is used in this passage to signify real (actual) intent. The deficiencies of "desire" as a synonym of intention in general have been discussed above, at 45-53.

217. White (n3) 573.

218. *Ibid.* "... Neither unintended purposes nor non-purposive intentions are impossible. If I purposely drop a catch, I do this intentionally; but things may serve useful purposes which it was not intended that they should serve. Even if my purpose could not have been unintentional, a purpose can be".

219. *Ibid* 574.

explanation²²⁰. White concludes that it is because the law is commonly interested in those cases where intention and purpose coincide, as when a man intentionally kills or assaults another or does so with intent, that jurists, like philosophers, have "... confused a coincidence with an identity ..."²²¹.

220. *Ibid.*

221. *Ibid* 575.

INTENTION AND FORESIGHT

Although foresight has been widely identified as a constituent element of intention, a number of writers have been concerned with drawing a sharp distinction between these notions, and have consequently rejected foresight as an equivalent concept to intention. These theories would limit the concept of intention to actual (direct) intention, constituted by the aim or objective of the actor in acting as he does, and they thus equate intention with "intending" an effect (which forms part of the reason for acting), and seek to exclude "intentional" effects (expected side-effects of actions) from the realm of intention.

Buxton holds the view that a distinction should be drawn between intentional action and an intended consequence of action, in that it is only the latter with which the criminal law ought to be concerned²²². He states that "... the concept of intentionally acting, or intentional action, cannot adequately express any requirement for conviction of qualities additional to the need to establish the voluntariness of the accused's actions, and equally the concept is a defective tool for discriminating between the different specific states of mind that may be comprehended under general statements as to *mens rea* ..."²²³. Kenny's influential analysis finds a place for foresight in the context of intention only as a junior partner of desire; his antipathy towards equating foresight with intention is clear from his statement that "... one may do an act knowingly without intending its result, if one does it without wanting to ..."²²⁴. As Miller observes: "... Thus,

222. Buxton (n191) 484.

223. *Ibid* 486.

224. Kenny (n167) 154. At 148, Kenny remarks in regard to foresight that "... the principle that a man intends all the consequences of his actions which he foresees

since intending entails wanting, an agent may very well foresee that his doing X will certainly (or probably) have as its consequence Y without thereby intending Y ..."225. Kenny's scheme of intention is supported by Miller226 and Lyons227.

Kenny identifies three reasons in support of drawing a distinction between intention and foresight. In the first place, he points out that there can be cases where society's interests would be better served if there were a "... greater deterrent penalty attached to intentional harm than to reckless homicide ..."228. Secondly, he raises the

appears to the layman far too sweeping ...". In support of this statement, Kenny cites the example of a martyr: "... When the Protestant martyr Latimer refused to recant his beliefs he foresaw that he would be burnt as a heretic. Yet it would be absurd to say that he refused to recant in order to be burnt or with the intention of being burnt ..." (at 149). Kenny also cites the example of a hangover: "Feeling miserable, I may deliberately get drunk. In doing so, I foresee that I will have a hangover; but I do not get drunk in order to have a hangover, or with the intention of bringing on a hangover ...".

225. A R Miller "Intention and Practical Reasoning" (1982) 91 *Mind* 106.

226. *Ibid.* Miller supports Kenny's view, although he very gently dissents where Kenny claims that there may be cases in which the consequences of a given act are not only foreseen by the agent but wanted by him as well, and are nevertheless unintentional.

227. R Lyons (n125) 84 ff. White (n3) 581 states that neither intention nor foresight imply each other.

228. Kenny (n167) 159. He cites the following example: In order to prevent Paul being in town on a particular day, Peter can kill him, thus making absolutely certain of his absence, or incarcerate him in a solitary spot, reducing the certainty of his absence, but also taking a serious risk that he may die before he is rescued. Kenny's reasoning is that a distinction between intention and foresight would provide a greater incentive to Peter to choose the second method, as the first method would be punished more severely. However,

"ordinary language" argument: intention should have the same meaning in the law as it does in ordinary language, that is, foresight should not be included within it²²⁹. Thirdly, Kenny avers that "... there often appears to be a clear moral distinction between intention and foresight which it may be desirable that the law should reflect ...²³⁰.

R Cross and P A Jones *An Introduction to Criminal Law* 6ed (1968) 41, state that "... some such notion as oblique intention is essential for law and morals because there are many situations in which the agent who acts with the knowledge that certain consequences will probably ensue is just as blameworthy as the man who aimed at producing those consequences ..." (cited in H Oberdiek "Intention and Foresight in Criminal Law" (1972) 81 *Mind* 389 at 394).

229. *Ibid* 160. Cf Oberdiek (n228) 394: "Philosophers excepted ... people do not usually bother to draw a sharp distinction between what a word means and what it amounts to. Confusion need not result. In *Smith* ([1960] AC 290) for instance, the trial judge very likely meant - and was taken to mean - that, from the legal point of view, foresight amounts to intention; foreseen and intended consequences, that is, are to be treated alike ...".

230. *Ibid*. Kenny seeks to distinguish between acting "knowing that" something will happen and acting "in order to" bring that thing about. He illustrates his theory with an example: "... Consider the case of two nurses, each of whom is in possession of a poison and a pain-killing drug which are indistinguishable to the eye and have in some way been mixed up in the medicine cabinet so that she does not know which is which. Nurse A gives a pill to her patient, whose money she stands to inherit, hoping but not knowing that it is the poison. Nurse B gives a pill to her patient, who is in great agony, hoping but not knowing that it is the pain-killing drug. Neither nurse is blameless; but most people, I imagine, would feel that there was an important moral difference between the actions of the two, even if the patient dies ...". Lyons (n227) 89 supports Kenny's view. T Baldwin "Foresight and Responsibility" (1979) 54 *Philosophy* 347 at 353 considers this moral distinction to be dubious, however. He postulates that "... a man who desires harm for others shows, in a perverse way, more respect for them than a man who simply doesn't care about the

Despite his attempts to distinguish between intention and foresight, Kenny is unwilling to unequivocally exclude foresight from playing a role in regard to intention. Kenny requires that concomitants or side-effects of an end or an action themselves be "... both foreseen and desired and adopted as ends ..." ²³¹ in order for the purposes of liability (that is, that the concomitants or side-effects are intended in their own right). He makes an exception with regard to side-effects however in so far as "chosen means" are concerned: "... If [the agent] chooses a means which has a certain side-effect knowing and wanting this side-effect, then it seems that he intends this side-effect, if that is his reason for choosing this means rather than another, even though he would never have performed the action at all were it not a means to his original purpose ..." ²³². Although Kenny manages to remain faithful to his concept of intention premised upon desire by adopting this approach, he concedes that a further exception is necessary ²³³. He adopts the words of Hart in equating

for them than a man who simply doesn't care about the harm he knows himself to be doing. Other people's interests at least enter into the former man's desires even when he considers only how he can harm them, whereas the latter man appears as totally indifferent to them. The former man has at least some social awareness, albeit a very corrupt one; the latter man is a monster ...".

231. *Ibid* 156. "... as in cases of killing two birds with one stone ...".

232. *Ibid*. Kenny distinguishes between "necessary" and "chosen" means: "... If there is only one means of achieving the agent's purpose then these are necessary means, but if the agent believes that there is more than one way of achieving his purpose then the means he adopts are chosen means ...".

233. *Ibid*. Kenny refers to the case of the "eccentric surgeon". In this case, D, an eccentric and amoral surgeon wishes to remove P's heart completely from P's body in order to experiment upon it. D does not desire

foresight with intent where "a foreseen outcome is so immediately and invariably connected with the action done that the suggestion that the action might not have that outcome would by ordinary standards be regarded as absurd or such as only a mentally abnormal person would seriously entertain ..." ²³⁴.

Kenny motivates drawing a distinction between intention and foresight on the grounds that "... a state of affairs is more likely to come about, other things being equal, if we set out to bring it about than if we merely passively foresee it as a likely consequence of our other projects ... ²³⁵, therefore allowing greater deterrent penalties to be attached to an intended act ²³⁶. However he acknowledges the persuasiveness of arguments against drawing such a

P's death (being perfectly content that P shall go on living if he can do so without his heart) but recognizes that in fact his death is inevitable from the operation to be performed (at 149). Kenny thus identifies the need to have a scheme of intention which includes such a case.

234. *Ibid.* The passage cited is at Hart (n31) 120. Kenny observes that though the layman's conception of intention "... does not have sharp edges ...", it is coherent, and "... most cases are clearly on one side or the other of the blurred line it draws ...".

235. *Ibid* 158.

236. Kenny substantiates his view by referring to the issue of taking precautions: "... The purpose of the law is to prevent Q, and Q is much more likely to occur if A is done in order to bring about Q than if A is simply done while Q is foreseen as more or less probable. Because, for instance, the latter activity, unlike the former, is compatible with taking precautions against the occurrence of Q ..." (at 158). Kenny further substantiates his view in terms of effort to accomplish the result: "... Moreover, if A is performed and Q does not in fact occur, then in the first case [where A is done in order that Q should happen] A is likely to be repeated until Q does occur; not so in the second ...".

distinction, in respect of results "foreseen as certain"²³⁷ and with regard to the diminished incentive to take precautions if the law were to distinguish between intention and foresight²³⁸.

A number of writers including Williams and Sistare accommodate foresight in the scheme of intention in the guise of "oblique intention": a person can be held to intend an undesired event that "... he knows for sure he is bringing about ..."²³⁹. Significantly, Buxton also acknowledges that there is a place for oblique intention, although he considers it to be limited to the crime of murder, and of extremely limited application²⁴⁰.

In evaluating the notion of foresight as an equivalent of intention, it is instructive to make reference to a moral doctrine and a philosophical principle which have been influential in this regard.

The moral doctrine in question is the Catholic doctrine of the Principle of Double Effect, in terms of which "... evil knowingly brought about might be justified (depending on the circumstances) but evil that it was the actor's purpose to bring about can never be justified ..."²⁴¹. Thus the former

237. *Ibid* 159. "... For if it is certain that Q will follow the performance of A, then it is no more likely to follow from doing A with the intention of doing B than from doing A without any such intention ...".

238. *Ibid*. "... And if the law did distinguish between intention and foresight the incentive to take precautions would actually be lessened, since the agent would know that even if no successful precautions were taken, he still would not suffer the supreme penalty ...".

239. Williams (n16) 418 ff. Sistare (n172) 94.

240. Buxton (n191) 497.

241. Moore (n57) 247. Sistare (n153) 107 gives a slightly different perspective: "... events which would be

results "... are not so much permitted consequences of conduct as eventualities to be morally endured; the effect is to further distance the agent from the taint of admittedly undesirable results ..."242. The doctrine typically operates in relation to killing in circumstances where the actor engages in some other purposive activity and knows that death might occur tangentially243.

Anscombe is a proponent of the Principle of Double Effect. Her essential argument is that any deontological ethic requires that some moral distinction be drawn between results that are directly intended and those that are only obliquely intended, on pain of incoherence in its "absolute" moral prohibitions244. Anscombe views the denial of this principle as the corruption of non-Catholic thought and its abuse the corruption of Catholic thought, both with disastrous consequences245.

The Principle of Double Effect has however been criticized by certain writers. Hart views it as "... the result of a proscribed as objective aims or means to aims are treated as morally ineffectual if they are necessary side effects of a morally approved aim ...". She uses "ineffectual" rather than "permissible", because the doctrine suggests that these results are not entirely ascribable to the agent (at 108).

242. Sistare (n172) 108.

243. Fletcher (n5) 257. Sistare (n172) 108 provides an example of the functioning of the doctrine: "... Hence the physician who destroys a foetus in order to save the woman's life has killed the foetus (impermissibly); but the physician who performs a procedure which saves the woman and causes the death of the foetus as a side effect has not killed at all ...".

244. Moore (n59) 247 n6. Anscombe's views are supported by C Fried "Right and Wrong - Preliminary Considerations" (1975) 5 Journal of Legal Studies 165-206; J L Mackie Ethics (1977) 159-168.

245. Anscombe (n125) 54.

legalistic conception of morality as if it were couched in the form of a law in rigid form ..."246. Sistare states that the distancing function of the doctrine of double effect is inoperative in law, and she further argues that it is also inoperative in ordinary moral judgement247. She points out that there is a negligible moral discrepancy between aiming and foresight of practically certain effects, which should not be reflected in differing *mens rea* categories or modes of responsible acting248.

The philosophical principle referred to earlier is the principle of diffusiveness of intent, postulated by Chisholm249. According to this principle. "... if (a) a man acts with the intention of bringing it about that P occurs and if (b) he knows or believes that if P occurs then the conjunctive state of affairs, P and Q, also occur, then (c) he acts with the intention of bringing it about that the conjunctive state of affairs, P and Q, occurs ..."250.

However, writers such as Pitcher reject the validity of the diffusiveness principle251, while others have called for

246. Hart (n31) 125.

247. Sistare (n172) 110.

248. *Ibid.*

249. R M Chisholm "The Structure of Intention" (1970) 67 The Journal of Philosophy 633.

250. *Ibid* 640, where at n4, Chisholm suggests that the diffusiveness principle could be used to justify J M Baldwin's definition of intention: "... The purpose in view of any action, along with all the consequences of the action, so far as foreseen to be certain or probable ...".

251. G Pitcher. "In Intending and Side Effects" (1970) 67 The Journal of Philosophy 659 at 663 ff, rejects the lack of distinction between "intention" and "knowledge".

major emendations of that principle²⁵². Furthermore, in terms of Chisholm's analysis, the "diffusiveness of intention" clashes with the principle of "non-divisiveness of intention", and therefore Chisholm's support of the diffusiveness principle is somewhat tentative²⁵³. It is submitted however that the diffusiveness principle is indeed functional and appropriate within the context of intentional agency.

A number of writers have supported the equating of foresight with intention. Hart favours the position that the law should "... neglect the difference between oblique and

252. J M Boyle and T D Sullivan "The Diffusiveness of Intention Principle: A Counter-Example" (1977) 31 *Philosophical Studies* 357 at 358 provide a counter-example to the diffusiveness principle: Peter, a severely handicapped adult stutterer attempts to speak in defence of his dead father's honour, which has been unjustly impugned. "Now what do we want to say about this case and others like it, where the agent struggles against the unwanted but practically inescapable concomitants of an intended act?" It may be submitted however that the counter-example does not defeat the diffusiveness principle. If Peter knows he will stutter, that it is an unavoidable consequence of his speaking, can he be said not to intend this? It is certainly not his desire to stutter, he no doubt wishes that he will not stutter, but in acting as he does when he rises up to speak, his foresight of the certain consequences of his act renders his actions intentional.

253. Chisholm (n249) 640 cites the principle of non-divisiveness of intention: "... from the facts that (i) a man acts with the intention of bringing about a certain state of affairs and that (ii) he knows or believes that that state of affairs entails a certain other state of affairs, it does not follow that (iii) he acts with the intention of bringing about that other state of affairs ...". This casts doubt upon the diffusiveness principle. Chisholm avers however that it is sufficient that the consequence is at least a part of what the actor intended - "... we may say this if we define 'a part of what he intends' as any state of affairs he thinks he will bring about in bringing about what he intends ..." (at 640).

direct intention ..."²⁵⁴. He finds supports for this view in a feature shared by these two notions, "... which any system of assigning responsibility for conduct must always regard as of crucial importance ..."²⁵⁵. He contrasts the facts of the *Desmond* case with a case of direct intention: in the case of *Desmond*, in an attempt to liberate two comrades, Barrett, one of the accused, dynamited the prison wall outside the area where he mistakenly believed they would be at exercise. Though the plot failed, the explosion resulted in loss of life. In terms of Hart's hypothetical case, Barrett shot the prison guard in order to obtain from him the keys to release the prisoners²⁵⁶. Hart concludes that in both cases, in so far as the agent "... had control over the alternative between the victim's dying or living, his choice tipped the balance; in both cases he had control over and may be considered to have chosen the outcome, since he consciously opted for the course leading to the victims' deaths. Whether he sought to achieve this as an end or as a means to his end, or merely foresaw it as an unwelcome consequence of his intervention, is irrelevant at the stage of conviction where the question of control is crucial ..."²⁵⁷.

254. Hart (n31) 121. Hart follows the Benthamite view of oblique intent, that is, he regards oblique intent as encompassing foresight of probable consequences. Brett (n32) 95 concurs, accepting foresight of probability as sufficient for intention. B Aune "Intention and Foresight" (1966) 63 *The Journal of Philosophy* 652 at 653 also accepts foresight as an equivalent of intention, although he is a proponent of only foresight of "certainty" being sufficient.

255. *Ibid.*

256. *Ibid.* The "Desmond case" is the case of *R v Desmond, Barrett and Others* (The Times 28 April 1868).

257. *Ibid* (my emphasis).

These key concepts of control and choice re-emerge in the views of other writers. Writing in 1907, Sidgwick supports liability for foreseen harm under the head of intentional wrongdoing by emphasizing the chosen nature of the consequences²⁵⁸. He includes under intention all the consequences of an act that are foreseen as certain as possible: "... we cannot avoid responsibility for any foreseen bad consequences of our acts by the plea that we felt no desire for them, either for their own sake or as means to ulterior ends: such undesired accompaniments of the desired results of our volitions are clearly chosen or willed by us"²⁵⁹.

Baldwin points out that Sidgwick's remarks are consistent with the writings of Austin and Bentham on the subject²⁶⁰. He proceeds to take issue with "... the philosophical critics of the principle that foresight is sufficient for responsibility ...", Anscombe and Kenny²⁶¹. Thus, following the arguments of these writers "... if one takes intention to be necessary for responsibility, an agent is not responsible at all for the foreseen but unintended consequences of his actions. Yet this conclusion is absurd ..."²⁶². Baldwin favours the concept of choice,

258. H Sidgwick *The Methods of Ethics*, 7ed (1907) 202.

259. *Ibid.* Anscombe (n125) 34 ff has criticized Sidgwick's definition of intention, but Baldwin (n230) 347 points out that Sidgwick "was only following an established pattern of utilitarian thought ...".

260. Baldwin (n230) 347.

261. *Ibid* 350.

262. *Ibid* 351. Yet neither Kenny nor Anscombe exclude foresight from their schemes of intention. As we have seen above (at 62-3) Kenny makes a number of concessions to foresight. Anscombe (n102) 59 observes that "... it is nonsense to pretend that you do not intend to do what is the means you take to your chosen end ...". Baldwin postulates that the principle that intention is necessary for responsibility ought to be

understanding a choice to be a practical deliberation. "... The claim that a man is responsible for those consequences of his actions which he chose to bring about is, therefore, the claim that a man is responsible for those actions which, when he deliberated what to do, he realized he would perform were he to do what in fact he did do ..."263. Moreover an agent cannot avoid responsibility for the consequences foreseen in those deliberations just by pleading that those consequences were not wanted by him, that he did not intend them. "... For he made his choice in the light of his total assessment of the situation ..."264.

Oberdiek also states that the law should treat intention and foresight alike, although he seems to elevate the concept of control as determinative265. Possible objections to treating foreseen consequences as intended (such as: that the task of juries would be unnecessarily complicated, that the notion of recklessness would be obliterated, that the intimate relationship between law and morals would be undermined and that it would result in a failure to maximise the deterrent value of punishment) are all raised by Oberdiek, who dismisses each as unfounded266.

McAuley grants implicit recognition to the concepts of control and choice within the context of murder when he poses the question: "... can it be seriously doubted that,

rejected, in favour of a scheme of *mens rea* in which intention and foresight would be separate, but equally sufficient, conditions for responsibility. This suggested development is unnecessary though if the concept of intentional agency is correctly applied.

263. *Ibid.*

264. *Ibid.*

265. Oberdiek (n228) 389.

266. *Ibid* 395 ff, for a discussion of these objections.

poses the question: "... can it be seriously doubted that, from the point of view of their capacity and opportunity to avoid causing death or serious injury, there is no material difference between the defendant who intends to kill or seriously injure someone and one who realizes that he is likely to do either of these things and decides to run the risk of doing so ..."²⁶⁷.

Indeed, as Graham avers, things can be done "intentionally even when not intended", in that things brought about as foreseen avoidable consequences of intended doings are themselves done intentionally²⁶⁸. Graham acknowledges that something could be a consequence of an intended action and yet be done inadvertently, accidentally or by mistake and so be unintentional²⁶⁹. Moreover, he observes that things done

267. McAuley (n82) 97. It is submitted that the concepts "capacity" and "opportunity to avoid" approximate the concepts of choice and control. (The emphasis is mine).

268. G. Graham "Doing Something Intentionally and Moral Responsibility" (1981) 11 *Canadian Journal of Philosophy* 667 at 668. Graham (at 669) defines foreseen consequences ("results of things done with the intention of doing them") as "events the agent knows will occur as parts of the total state of affairs that results from doing as intended ...". Furthermore (at 669) he defines avoidable consequences as "... foreseen consequences the agent knows will occur only if he or she does as intended, and does not refrain (but could refrain) from doing as intended ...". Graham proceeds to cite an example to illustrate these concepts: "... A doctor intends to examine a diseased patient, knowing that thereby he will expose himself to the patient's disease. He does not intend to expose himself to the disease. He intends only to examine the patient. And he knows he can avoid exposure by refraining from doing as intended (examining the patient). But he does as intended. He examines the patient, which is intentional because intended. He thereby also exposes himself to the disease, which he does as a foreseen avoidable consequence of doing as intended ...".

269. *Ibid.* "... An example would be if, in passing the sugar, I knock over a cup of coffee and spoil my host's

simply as foreseen consequences of intended actions are not necessarily intentional²⁷⁰. Nevertheless, Graham postulates that consequences brought about as foreseen avoidable consequences of intended actions should count as intentional²⁷¹. He substantiates his argument as follows: "... Things done as foreseen avoidable consequences are not done unintentionally, or at least are not done inadvertently, accidentally or by mistake ... this is because things done as foreseen avoidable consequences are done with expectation or foresight, and so the agent is not surprised when they occur ..."²⁷². However, not only are

suit. I do not intend to spoil the suit, but doing so is still a consequence of doing what I intend. For had I not intended to pass the sugar and thereby passed the sugar, I would not have spoiled the suit. Nevertheless, I did not spoil the suit intentionally ...".

270. *Ibid.* "... Suppose Goliath Davidson will miss an important appointment, if he does what he intends - which is to take heroin - and he knows it. But suppose further that he is addicted to the drug, and hence he cannot help but intend to take and thereby take the drug. This means he cannot refrain from doing as he intends, and so cannot avoid missing the appointment. Then it seems Goliath takes the drug intentionally, that he intends to take and thereby takes it. But it seems he does not intentionally miss the appointment. This is because he has no choice in the matter. Given he must take the drug, he must miss the appointment. It's beyond his power of decision ...". Graham regards taking the drug as intentional despite the fact that Goliath has no real choice. He motivates this in two ways: first, he avers that in relation to the drug-taking there is a pre-empting consideration - that he intends to take and thereby takes the drug, therefore taking the drug should count as intentional; secondly, Graham subscribes to the theory that people can be causally necessitated to perform intentional doings. (At 670 n2).

271. *Ibid* 670.

272. *Ibid.* "... On the other hand, things done inadvertently, accidentally, or by mistake are done without expectation or foresight, and so the agent is surprised when they occur. Thus, the doctor expects

foreseen avoidable consequences of intended actions not unintentional, they are in their own right intentional - even when they are not done with the intention of doing them²⁷³. "... This is because agents are able to avoid them, by refraining from doing as intended, and they know this. Yet they reject this option, and do as intended, thus at least tacitly deciding to bring about the foreseen avoidable consequences of their intended doings ..."²⁷⁴. Graham concludes that the distinction between doing what one intends and bringing something about as a foreseen avoidable consequence of doing what one intends (an "intentional doing") cannot be used to exonerate the agent acting with

not expect to spoil my host's suit in passing the sugar, and am surprised when I spoil the suit ...".

273. *Ibid.*

274. *Ibid.* It should be noted that on Graham's analysis the actions of the doctor in exposing himself to the disease may be performed with resignation; as typical of a person who knows he ought to do his duty, and who therefore chooses to do his duty while unhappily electing the consequences involved in doing his duty. Therefore, although he at least tacitly decides to expose himself to the disease, and thus does so intentionally, he in no way intends to expose himself to the disease. (At 671).

Further examples of intentional but not intended doings may be found in the exercise of complicated skills, like playing the piano. Although a concert pianist may not be conscious of using his fingers in a certain way, he has performed the piece many times before and prior to playing the piece he foresees that he will hit relevant keys in the usual way. Thus he is not surprised at his finger movements. Although he does not strictly intend to make the finger movements in question, he is nevertheless acting intentionally. This is because he foresees he will make the movement in doing what he intends (playing the piece) and knows he can avoid making the movement by refraining from doing what he intends. By not refraining and playing the piece he is acting intentionally, though he does not intend. (At 671-2).

foresight of possible harm²⁷⁵. Once again, it is clear that the notions of control and choice factor into the reasoning of the writer who seeks to equate foresight with intention.

It may therefore be concluded that foresight, as qualified by the notions of choice (knowledge) and control, may be regarded as equivalent to intention, in that it forms the basis of "intentional action". These considerations, in turn, provide a philosophical foundation for *dolus eventualis*.

275. *Ibid* 672. Graham observes that doctors are equally responsible for passive euthanasia and active euthanasia in moral terms. "This is because 'typically' in such cases they know that in withholding treatment ... the patient will die. Meanwhile they know that death ... can be avoided by refraining from withholding treatment and that they can refrain. But they do not refrain. Instead, they do what they intend, which is to withhold treatment. In short, death of the patient is a foreseen avoidable consequence of doing what they intend (withholding treatment) ..." (at 673). Thus, as with active euthanasia, typical cases of passive euthanasia involve "morally accountable intentional doings" (at 674). Graham concludes that "... passive euthanasia can be the intentional termination of a life, and that doctors are morally responsible for intentionally terminating a life ...".

SOUTH AFRICAN CRIMINAL LAW

INTRODUCTION

Before embarking upon a detailed study of the concept of *dolus eventualis* in South African law, it is necessary to place the concept in the context of its theoretical framework.

The basic rule relating to the mental element in crime is that the existence of *mens rea* or fault is a *sine qua non* for the existence of criminal liability, as expressed by the maxim *actus non facit reum nisi mens sit rea*.¹ *Mens rea* consists of either *dolus* (intention) or *culpa* (negligence)². Intention consists of two elements, a cognitive element and a volitional (conative) element³.

There are three different forms of intention⁴. The first of these is *dolus directus* (direct intention),⁵ which consists

1. M A Rabie "Criminal Law - General Principles" LAWSA Vol 6 (1981) para 1-163 at para 87.
2. *Ibid*, Burchell & Hunt South African Criminal Law and Procedure 2ed Vol 1 by E M Burchell, J R L Milton & J M Burchell (1983). 136.
3. CR Snyman Criminal Law 2ed (1989) 197.
4. Although the discussions in Burchell and Hunt (n2) 136-7 and LAWSA (n1) para 88 include *dolus indeterminatus*, it is submitted that Snyman's formulation *ibid* and at 214, is preferable. Snyman points out (at 214) that "... (*d*)*olus indeterminatus* is not a form of intention apart from *dolus directus*, *dolus indirectus* and *dolus eventualis*. It merely means "... the intention directed at any indeterminate victim". A person can therefore act with *dolus indeterminatus* and *dolus eventualis* simultaneously ...". *Dolus indeterminatus* is also known as *dolus generalis* (LAWSA (n1) para 88). *Dolus alternativus* (mentioned by Snyman at 214) is a related form of general intent which is similarly not a form of intention apart from the basic three forms. *Dolus alternativus* means "... the intention directed at any one of two or more possible victims ..." (Snyman at 214). Burchell and Hunt also make mention of another form of intention, conditional intention, which is similarly not independent of the basic three forms of intention. "Intention which is conditional suffices

of a person directing his will towards achieving the prohibited act or consequence.⁶

The second form of intention is *dolus indirectus* (indirect intention), which is that mental state which arises where a prohibited act or consequence is not the main goal or object of the accused, but he nevertheless foresees that it is a necessary consequence of, or condition for, the attainment of his main goal or object.⁷

Lastly, and most important for the purposes of this enquiry, is the third form of intention, *dolus eventualis* (eventual intention). Although the nature of this concept will be exhaustively analysed below, it is a useful starting point to take cognizance of the standard textbook definitions of the notion of *dolus eventualis*.

for liability where the accused is not entitled in law to impose the condition in question ..." (Burchell and Hunt (n2) 138). In De Wet and Swanepoel *Strafreg* 4ed by J C De Wet (1985) 139, De Wet seems to equate *dolus eventualis* with conditional intent ("...In hierdie verband word gepraat van voorwaardelike opset (*dolus eventualis*) of opset by moontlikheidsbewussyn ..."), but he does not take the submission any further.

5. Snymans terminological usage ((n3) 197) is adopted for the purposes of clarity and simplicity, as there is some dispute as to the meaning of "actual intention". Burchell and Hunt (n2) *ibid* regard actual intention as incorporating *dolus directus* and *dolus indirectus*, whereas LAWSA (n1) para 88 only refers to *dolus directus* when using the term "actual intention".

6. *Dolus directus* exists where a person: "meant to do the prohibited act or to bring about the criminal consequence .." (Burchell and Hunt (n2) *ibid*); "deliberately accomplishes what he actually intended and desired to accomplish .." (LAWSA (n1) *ibid*); or involves the actor "directing his will towards achieving the prohibited result or towards performing the prohibited act.. This result or act is his goal ..." (Snymans (n3) *ibid*).

7. LAWSA (n1) *ibid*, Burchell and Hunt (n2) 137, Snymans (n3) *ibid*.

De Wet and Swanepoel define *dolus eventualis* as follows:

"Iemand handel opsetlik ten aansien van 'n gebeure ... indien hy hom die gebeure as moontlik voorstel en in weerwil daarvan handel. Hy versoen hom met die risiko dat dit sal plaasvind, en neem dit as 't ware op die koop toe".⁹

Burchell and Hunt, in turn, define *dolus eventualis* in respect of consequences,⁹ in the following terms:

"... Legal intention (*dolus eventualis*) in respect of a consequence consists of foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not".¹⁰

Snyman simply defines *dolus eventualis* as follows:

"... X (an accused) (a) subjectively foresees the possibility that the prohibited result may flow from his act, and (b) reconciles himself to this possibility ...".¹¹

Dolus eventualis has been referred to in the case law¹², as well as by some writers¹³, as "constructive intent". This

8. De Wet and Swanepoel (n4) 139.

9. For the sake of brevity, *dolus eventualis* in respect of circumstances is dealt with separately (below 234-7), although the requirements for *dolus eventualis* relating to circumstances and *dolus eventualis* relating to consequences are the same. The following discussion and the examples used in the analysis of the notion therefore relates equally to *dolus eventualis* in respect of circumstances. (See Burchell and Hunt's treatment of the two kinds of *dolus eventualis* (n2) 140-160).

10. *Ibid* 141.

11. Snyman (n3) 198. Snyman equates (b) with recklessness, thus an alternative formulation of (b) would be: "... was reckless of whether the result would ensue ...".

12. *R v Nsele* 1955 (2) SA 145 (A) 151 B, *S v Arnold* 1965 (2) SA 215 (C) 217 H.

13. BWK Whaley "Criminal in our Courts: *Dolus Eventualis*" (1967) *Responsa Meridiana* 117; J B Thom "Recent Devel-

term has been criticized as misleading by a number of jurists¹⁴. Burchell and Hunt state that the term seems to wrongly imply a "... fictitious imputation of intention..."¹⁵. Van Niekerk opines that the use of the term "... unconsciously and insidiously perhaps contributes towards diluting and corroding the true meaning of *dolus eventualis*, making it a kind of lesser *dolus* and even something approximating *culpa lata*. 'Constructive' intent has a built-in shade of meaning that there is in fact no real intent but only a kind of intent which the law regards as tantamount to intent ..." ¹⁶.

Another term used for describing *dolus eventualis* is "legal intention", which is the favoured usage of Burchell and Hunt¹⁷. It may be submitted however that even the use of this term is somewhat problematic. Strauss¹⁸ points out that actual intention¹⁹ is as much 'legal' intention as is *dolus eventualis*, in the sense that it is "juridically relevant and juridically defined"²⁰.

opments of Criminal Law" (1965) 1 *Speculum Juris* 9 at 11.

14. Burchell and Hunt (n2) 137 n110; B v D van Niekerk *Dolus Eventualis, A Mitigating Factor?*" (1968) 85 *SALJ* 122 at 127; SA Strauss "Book Review: *South African Criminal Law and Procedure Vol 1* (1970) (By EM Burchell & PMA Hunt)" (1970) 87 *SALJ* 471 at 478.
15. *Ibid.*
16. Van Niekerk (n14) 127.
17. Burchell and Hunt (n2) 137 ff.
18. Strauss (n14) 478.
19. The learned author is referring to both *dolus directus* and *dolus indirectus* when he mentions "actual intention" (see (n5) above).
20. Bertelsmann indicates his negative opinion of the term when, in criticizing the 'diluted' *dolus eventualis* present in South African law, he indicates that it is appropriate that such an impure notion be called

Dolus eventualis has even been held to convey a technical and artificial meaning of the word "intention"²¹. It should however be borne in mind that *dolus eventualis*, like *dolus directus*, is a form of intention in its own right²².

Certain jurists have expressed concern at the technicality of the *dolus eventualis* notion, and stated that *dolus eventualis* should be so defined that it resembles the meaning ascribed to intention by the man in the street²³.

"legal" intention (W Bertelsmann "The Essence of *Mens Rea*" (1974) *Acta Juridica* 34 at 41 n 34.

21. *R v Huebsch* 1953 (2) SA 561 (A) 567 D-E.

22. LAWSA (n1) para 89; Van Niekerk (n14) 124; see *S v Nkombani* 1963 (4) SA 877 (A) 883 C-D; *S v De Bruyn* 1968 (4) SA 498 (A) 511 A-B.

23. EM Burchell "Criminal Intent" (1973) 8 *Speculum Juris* 23 at 35; W Bertelsmann "What happened to luxuria?" (1975) 92 *SALJ* 59 at 75.

HISTORY

Burchell and Hunt succinctly describe the historical development of *dolus eventualis* as follows: "... (a)lthough the seeds are to be seen in the views of the Commentators, it was largely through Carpzovius that the doctrine of *dolus eventualis* found its way into the Roman-Dutch law via German law ..."24. It is instructive to examine in a little more detail the developmental path of the notion of *dolus eventualis*.

In the thirteenth century, St Thomas Aquinas, the scholastic theologian and metaphysician, analysed the issue of the crime that is not part of the goal of the actor, but occurs as a consequence or result of the intended act25. As this consequence does not form part of the goal of the actor, it may be argued that it is not intended and thus the actor cannot be held liable for the crime. Aquinas speculated on the nature of cause and effect and concluded that an effect is caused by an act if the effect ordinarily, necessarily or naturally flowed from the act26.. Consequently, an effect that occurred only seldom or accidentally was not caused by the act. It was therefore Aquinas' conclusion that a person who intended a cause or act intended also the natural or inevitable effect or consequence of such a cause or act27.

This influential analysis would certainly have factored into the thinking of the Commentators, who were directly responsible for the origin and development of the notion of

24. *Burchell and Hunt* (n2) 137 n110.

25. "Focus : Dolus Eventualis" (1988) 3 SACJ 413.

26. *ibid.*

27. *ibid.*

indirect will. Botha describes the theoretical concerns of the Commentators²⁸:

"Hulle wou die versari-leer met die Romeins-regtelike beginsels omtrent aanspreeklikheid versoen en het geleer dat 'n dader ook gestraf kan word vir gevolge wat hy casu veroorsaak het op dieselfde wyse asof hy hulle dolo veroorsaak het, indien daar culpa praecedens aan sy kant was. Dié basis van aanspreeklikheid is egter getemper deur die dader nie verantwoordelik te hou vir al die gevolge wat uit sy optrede voorspruit nie, maar slegs vir daardie gevolge wat neig om daaruit voort te spruit (tendit verisimiliter ad eventum secutum). 'n Buitengewone straf is opgelê as die dader die gevolg kon en behoort te voorsien het"²⁹.

Later writers held that the punishment for *dolus* was only imposed where a consequence was the aim of the actor. Covarruvias adopted the theory of Aquinas that an actor also wills the consequences of his act which naturally and probably flow from his actions. Such consequences may be regarded as willed. Covarruvias named this condition of the will *voluntas indirecta*³⁰. Through Carpzovius, the doctrine of *voluntas indirecta* was received into the German law under the title of *dolus indirectus*³¹.

Carpzovius argues that the desire to kill can be *directe et per se* or *indirecte et per accidens*³². The former exists if the actor has *animus occidendi*, and the latter if he willed that which follows the act *immediate et per se non per*

28. DA Botha "Die Rol van *Dolus* en Opset in die Strafreë" (1980) 97 SALJ 277.

29. At 282.

30. *ibid.*

31. *ibid.*

32. *ibid.*

*accidens*³³. The desire to kill can therefore be *voluntas directa* or *voluntas indirecta*.

It may be seen from the works of the different German writers how the notions of *voluntas directa* and *voluntas indirecta* later became known as *dolus directus* and *dolus indirectus*. Bodenstein is of the opinion that Boehmer was the first to correctly solve the problem of *dolus indirectus*, all superfluous matter being discarded³⁴, and that he was far in advance of his times; his fundamental ideas being "... identical with those of the present-day Dutch and German schools ..."³⁵.

Despite the above considerations regarding the development of *dolus indirectus*, the significant period of evolution of the concept of *dolus eventualis* for the purposes of this enquiry only began after 1945. It appears that the South African courts were compelled to address the question of the nature of liability for the undesired consequences of an intended act, in response to the prevalence of housebreakings during the war years that involved the unplanned killing of householders who offered resistance to the burglars³⁶. Prior to the courts giving serious consideration to this kind of issue, the academic writers made mention of this kind of liability, and formulated it in various ways.

33. *ibid.*

34. H D J Bodenstein "Phases in the Development of Criminal Mens Rea" (1919) 36 SALJ 323; (1920) 37 SALJ 18 at 22.

35. *Ibid* 25. Bodenstein discusses Boehmer's views at p21-26 of the article.

36. Focus : *Dolus Eventualis* (n25) 413. See also the remarks of Holmes JA in *S v De Bruyn* 1968 (4) SA 498 (A) 509 G-H.

As early as 1920, Bodenstein identified three shades of *dolus*³⁷, which correspond with the present trichotomy, mentioned above³⁸. The shade of *dolus* corresponding with *dolus eventualis* is expressed by Bodenstein as follows: "... the effect caused by wilful act or inaction is foreseen as a possible consequence, the agent, however, neither wishes it nor aims at it ..." ³⁹. Bodenstein then proceeds to analyse the *wilstheorie* (will-theory) and the *voorstellingstheorie* (preconception-theory)⁴⁰, before citing a number of formulations of *dolus eventualis*, all of which, in Bodenstein's opinion, properly describe the mental state of the person who is guilty of *dolus eventualis*. Thus it would be *dolus eventualis*, "... whenever the agent had beforehand consented to or approved of the effect ..." (Van Hamel), or "... when the agent is so keen on the effect that he is prepared to take into the bargain, if need be, the undesired effects, or when the fact that he foresaw the effect as something certain to ensue would not have caused him to abstain from action ..." (Simons), or "... when the agent comes to the conclusion: 'Well, if the undesired effect ensues I am also game with it', or the agent, imagining the actual ensuing of the effect foreseen as possible, nevertheless proceeds to act at the risk of its ensuing, as if the agent says to himself: '... whether it ensues or not, I will do it in any case ...' ..." ⁴¹.

37. Bodenstein (n34) 26.

38. 75 above.

39. Bodenstein (n34) 36.

40. *Ibid* 26-31.

41. *Ibid* 31.

Coertze, writing in 1937⁴², appears to be the first South African jurist to adopt the Afrikaans description of *dolus eventualis*, "opset by moontlikheidsbewussyn", which he described as existing if the actor "een gevolg (nie die verbode gevolg nie) tot doel gestel het terwyl hy die moontlikheid voorsien het dat 'n verdere gevolg (die verbode gevolg) daaruit voort kan vloei, maar hy geen sekerheid het, dat die verbode gevolg nie in sal tree nie ..."⁴³.

Unfortunately the superior theoretical formulations of Bodenstern and Coertze were not incorporated into the standard practitioner's handbook, Gardiner and Lansdown⁴⁴. Thus it may be seen in the fourth edition of this work, published in 1939, that the term '*dolus eventualis*' does not occur in the discussion of *mens rea*⁴⁵. *Mens rea* itself is divided into three categories; the category loosely approximating *dolus eventualis* being circumscribed as follows:

"...*Mens rea* in a less and mediate degree is found in those cases in which an offender, without specific malice or intention directed to the crime charged, consciously sets forth upon a wrongful or unlawful design, and in the execution of it reaches a criminal result greater than, short of, or otherwise different from that proposed, but which he should reasonably have contemplated as a possible consequence of his conduct..."⁴⁶.

Gardiner and Lansdown do not classify this form of *mens rea* as intention⁴⁷. Such a formulation may of course be

42. LI Coertze "Wat beteken *Culpa* in die Suid-Afrikaanse Strafrek?" (1937) 1 THRHR 85.

43. *Ibid.*

44. FG Gardiner and CWH Lansdown *South African Criminal Law and Procedure*, which shall be referred to as *Gardiner and Lansdown*.

45. At 30 ff.

46. *Ibid* 36.

47. See their description of intention, *ibid* 38.

criticized for its acceptance of the *versari* notion, although it should be borne in mind that this formulation was no doubt influenced by the presumption that a person intends the natural and probable consequences of his acts⁴⁸.

Gie clearly includes *dolus eventualis* in the theory of intention⁴⁹, in the following formulation: "... dus word 'n gevolg ook as gewil beskou as die dader op die oomblik van sy handeling die moontlikheid voorsien het dat die verbode gevolg deur sy handeling veroorsaak kan word ..."⁵⁰.

48. See 97ff below. It is significant that this terminological confusion is carried over into AV Lansdown's *Outlines of South African Criminal Law and Procedure* 2ed (1960) at 11-14, where the authorities favouring *dolus eventualis* are dealt with as equivalent to *dolus directus* ("acting deliberately and with contemplation of the consequences of his conduct") and as something less than *dolus directus* ("without specific malice or intention directed to the crime charged, consciously sets forth upon an unlawful purpose and reaches a criminal result different from that which he originally proposed but yet one which must reasonably have been contemplated as a possible consequence ...").
49. CJC Gie 'n *Kritiek op die Grondslae van die Strafreë in Suid-Afrika* (PhD thesis, 1941, University of Pretoria) 99. Gie limits his consideration to materially defined crimes however.
50. *Ibid.* It is instructive to note that this definition makes no reference whatsoever to the volitional component, in the form of recklessness or otherwise. In the learned author's analysis of the law circa 1941 (at 118 ff), he divides the notion of intention into four categories: 'oogmerkopset' ie *dolus directus*, 'sekerheidsbewussyn' ie *dolus indirectus*, 'skuldige gees', and intention attributed to the actor through the operation of a presumption either on the grounds of the consequences of his action, or his action itself. The absence of an explicit form of *dolus eventualis* in this analysis is significant. Gie states at 126 that "... voorbeelde van die laaste opsetsvariasie - die opset by moontlikheidsbewussyn-is geheel en al nie te vind nie, omdat die werklike voorsien van die moontlikheid van die intrede van die gevolg deur die dader nie as 'n eis van opsetlikheid gestel word nie

Hence, the theoretical suggestions in respect of *dolus eventualis* prior to 1945. Once *dolus eventualis* was accepted by the courts as a fully fledged form of intention, it mushroomed in importance, since it was seldom possible to prove *dolus directus* or even *dolus indirectus*, and thus the prosecution began to rely more and more heavily on *dolus eventualis* to obtain convictions. It may be noted that the incorporation of *dolus eventualis* within the realm of intention has not always been wholeheartedly welcomed by South African jurists - it is significant that a jurist of the stature of EM Burchell could, as recently as 1973⁵¹, have stated:

"Our law ... has chosen to cover the hiatus [between intention and negligence] by expanding the meaning of intention to include legal intention (*dolus eventualis*). As will be seen presently, the wisdom of this approach is doubtful for it gives rise to grave problems unless the limits of legal intention and negligence are clearly defined ..."⁵².

...". It may be submitted that the presumption of intention (on the basis that the accused must have intended the natural and probable consequences of his act) exercised a considerable influence on the law at this time, and that this is the reason for the paucity of actual authority, at this stage, in respect of *dolus eventualis*. See 97ff below.

51. Burchell (n23).

52. At 25.

RELATIONSHIP TO OTHER FORMS OF *DOLUS*

The scope and ambit of the operation of the concept of *dolus eventualis* is inherent in the relationship of *dolus eventualis* to other forms of *dolus*. It seems to be an established principle in our law that in a crime requiring intention it is sufficient for the state to prove that the accused had either *dolus directus*, *dolus indirectus* or *dolus eventualis*⁵³. This holds true for both materially defined crimes and formally defined crimes⁵⁴.

There have been arguments raised in support of *dolus eventualis* constituting as great a degree of culpability as *dolus directus*. De Wet and Swanepoel opine that "... die omstandigheid dat die dader by *dolus eventualis* die uitslag van sy opsetlike optrede aan die noodlot toevertrou en miskien selfs hoop dat die ergste nie sal gebeur nie, verminder nie die skuldgehalte nie ..."⁵⁵.

Van Niekerk strongly supports this statement when he says that:

"... *Dolus eventualis* is not in any way a lesser kind of *dolus*; it is the direct or actual intention to bring about an unlawful result should ... circumstances make this result inevitable in the execution of a wider design. Put differently, and related specifically to murder cases, *dolus eventualis* is the callous disregard of the possibility ... that a certain act may lead to the death of a person..."⁵⁶.

53. Snyman (n3) 197, Burchell and Hunt (n2) 138-9.
54. Snyman (n3) 205, Burchell and Hunt (n2) 139. Burchell and Hunt however add that where the statute in question expressly requires intent of a particular kind, the court may insist on actual as opposed to legal intention.
55. De Wet and Swanepoel (n4) 141 n 190.
56. B v D. Van Niekerk "*Dolus Eventualis* Revisited" (1969) 86 SALJ 136 at 140. At (n14) 126 Van Niekerk elaborates as follows: " Why should the accused, if

Van Niekerk therefore concludes that *dolus eventualis* is not susceptible to gradation and that it therefore should not *per se* have any bearing on the question of mitigation.

There have however been opposing arguments raised, most notably those of Loubser⁵⁷. Citing a number of appellate judgments in favour of his argument⁵⁸, Loubser contends that *dolus eventualis* is "moreel minder verwytbaar ..." ⁵⁹. These views are shared by Van Der Merwe, who labels *dolus eventualis* "... 'n geringer vorm van skuld ..." ⁶⁰. Therefore, a finding of *dolus eventualis* will generally result in a lighter sentence than a finding of *dolus directus*. However, Loubser is at pains to point out that the implication of this point of view is not that *dolus eventualis* is a lesser or inauthentic form of intention (mindere of onegte vorm van opset) but just that it is morally less blameworthy because the actor merely has

the situation does in fact materialize, on principle be treated more leniently because there existed the possibility that for some fortuitous reason there had been at the time of preparations the possibility that the situation in question might not materialize? By his callously opting to act, regardless of the consequences which he foresees as being well within the realm of the possible, his intention is not less blameworthy than that of a person who has the intention of bringing about only that situation without any other ulterior designs".

57. MM Loubser "Die Implikasies van die Onderskeid tussen *Dolus Eventualis* en *Dolus Directus*" in JJ Gauntlett (ed) JC Noster: 'n Feesbundel (1979) 139-145.

58. *S v Mini* 1963 (3) SA 188 (A) 192; *R v Mharadzo* 1966 (2) SA 702 (RA) 703; *S v Manyathi* 1967 (1) SA 435 (A) 438; *S v Sigwahla* 1967 (4) SA 566 (A) 571; *S v Sebeka* 1968 (1) SA 495 (A) 497; *S v Mohlobane* 1969 (1) SA 561 (A) 568; *S v Harman* 1978 (3) SA 767 (A) 770 (cited *ibid* 142 n 16 & 17).

59. *ibid* 142-3.

60. NJ Van der Merwe "Die Verband tussen *Mens Rea* en Skuld" (1976) 93 SALJ 280 at 285.

foresight of the possibility of an occurrence rather than foresight of the certainty of an occurrence⁶¹. According to Loubser, the gradation of intention is juridically feasible ("juridies bestaanbaar") in terms of the recognition of differing forms of intention in our law, and therefore it should be accepted as such⁶².

Loubser illustrates his argument, that *dolus eventualis* is not in any way a lesser form of intention, by taking issue with the submission of Burchell and Hunt that *dolus eventualis* would be insufficient in respect of knowledge of unlawfulness of minors between the ages of 7 and 14 and in the *actio libera in causa* situation, and that 'actual intention' was required⁶³. With regard to knowledge of unlawfulness, Loubser emphasizes that *dolus eventualis* is sufficient as a *mens rea* form for criminal liability to ensue ie it suffices that the accused foresaw the possibility that he was acting unlawfully and reconciled himself to this possibility⁶⁴. Loubser points out that to exclude *dolus eventualis* as a *mens rea* form for knowledge of unlawfulness in the case of minors between the ages of 7 and 14 would be logically unacceptable, because once the minor reconciles himself to the possibility that he might be acting unlawfully, he should be held accountable for his actions⁶⁵. The difference between *dolus directus* and *dolus*

61. *ibid* 143.

62. *ibid* 142. MM Loubser "Versagende Omstandighede by Moord: die Gradering van Skuld" (1977) 40 IHRHR 333 at 338.

63. Burchell and Hunt (n2) 139 n 123. They also submit that legal intention (*dolus eventualis*) would not suffice for knowledge of unlawfulness in respect of insane persons.

64. Loubser (n57) 144.

65. *ibid*.

eventualis in this situation, according to Loubser, should only be taken into account in relation to sentencing⁶⁶.

Loubser employs similar reasoning in respect of the *actio libera in causa* situation:

"...Volgens een standpunt [that of Burchell and Hunt] behoort aanspreeklikheid op grond van 'n *actio libera in causa* slegs te ontstaan waar die dader vooraf beoog (d w s met *dolus directus*) om homself in 'n toestand te plaas waarin hy normaalweg nie strafregtelik aanspreeklik sou wees nie, ten einde in daardie toestand 'n besondere misdaad te pleeg. Logies is daar egter geen rede waarom hierdie soort aanspreeklikheid nie ook kan ontstaan waar die dader vooraf slegs moontlikheidsbewussyn ten opsigte van die misdaad het en hom daarmee versoen nie. Waar iemand byvoorbeeld die moontlikheid voorsien dat hy in 'n toestand van dronkenskap 'n ander sal doodmaak, maar hom versoen met daardie moontlikheid en voortgaan om hom dronk te drink en dan wel 'n ander doodmaak, behoort hy skuldig te wees aan moord..."⁶⁷.

It is Loubser's submission that this should apply to both materially defined crimes and formally defined crimes, and that only in respect of sentence should the degree of foresight be taken into account⁶⁸.

Dolus eventualis has also been called into question in the area of attempt liability. Bertelsmann uses the issue of liability for attempt to criticize the concept of *dolus eventualis* in South African law⁶⁹, by making use of *inter*

66. *ibid.*

67. *ibid.*

68. *ibid.* In referring to "degree of foresight", it appears as if Loubser is referring to the difference between *dolus directus* and *dolus eventualis*, and not between foresight of a real possibility and foresight of a remote possibility (see 142).

69. Bertelsmann (n23) 73-74. The learned author quotes JC Smith in "The Element of Chance in Criminal Liability" (1972) 1 Natal University Law Review 4 at 11, who views

alia the following example: "Suppose the driver of a car, simply relying on good luck, 'recklessly' overtakes on a blind rise; suppose there happens to be no oncoming traffic, no accident and no harm whatsoever, would the man be charged with attempted murder?"⁷⁰ The learned author concedes that *dolus eventualis* is usually regarded as sufficient as a *mens rea* form for attempt, but he makes the submission that a careful study of the decided cases would reveal that this rule is only applied in certain situations, and that most other attempts, committed with *dolus eventualis*, even if they can be proved, are never prosecuted⁷¹. Bertelsmann proceeds to suggest that *dolus eventualis* falls short of intention even as the law understands it⁷².

However Loubser⁷³ praises the approach adopted by the court in *Huebsch*⁷⁴, where the Appellate Division accepted that *dolus eventualis* was an appropriate *mens rea* form for attempted murder⁷⁵. There is furthermore a widely accepted the fact that *dolus eventualis* could suffice for attempt liability as "rather startling". Smith however equates *dolus eventualis* with English law recklessness, which is not a valid comparison, these terms not being equivalent. See 177 below.

70. *Ibid* 74. The learned author also uses examples based on the cases of *R v Hedley* 1958 (1) SA 362 (N) and *S v Fernandez* 1966 (2) SA 259 (A).
71. Bertelsmann (n20) 40. Bertelsmann doubts whether a man who planted a time bomb in a building with *dolus eventualis* in respect of causing death would be charged with attempted murder if no person was in the building at the time of the explosion and nobody got hurt.
72. *ibid*. Bertelsmann makes this suggestion based on his expected answer to his query *ibid*.
73. Loubser (n57) 143.
74. *R v Huebsch* 1953 (2) SA 561 (A).
75. At 567.

view that where an accused has embarked on a criminal course of conduct with foresight of the possibility of the harmful result, but then has second thoughts and takes successful precautions against its occurrence, although there is no unlawful result and therefore obviously no liability for the completed crime, the accused may nevertheless be convicted of attempt in spite of a belated voluntary withdrawal⁷⁶. Should the precautions prove unsuccessful and the harmful result occur, despite the accused envisaging that the precautions would be adequate to prevent the harm ensuing, there will be no foresight on the part of the accused, and thus no *dolus eventualis* in respect of the harmful result⁷⁷. However there might still be attempt liability, on the basis of the prior conduct and state of mind of the accused⁷⁸.

Whereas it is generally accepted that the meaning of *dolus directus* embodies the man in the street's understanding of the term 'intention', the meaning of *dolus eventualis* is not usually equated with the ordinary meaning of 'intention'. *Dolus eventualis* has a 'legal' meaning, as it was adopted into the realm of intention by the courts. However, it is submitted that Loubser's argument above⁷⁹ is sound in that *dolus eventualis* does not in any way constitute a lesser form of *dolus*.

76. MM Loubser and MA Rabie "Defining *Dolus Eventualis*: A Voluntative Element?" (1988) 3 SACJ 415 at 426-7. See also M A Rabie "Die Verweer van Vrywillige Terugtrede by Poging - 'n Tweede Mening" (1981) SACC 56 at 58-61. For a contrary view, see CR Snyman "Vrywillige Terugtrede as 'n Verweer by Poging" (1980) SACC 169 and JMT Labuschagne "Dolus Eventualis : Die Filosofiese Onderbou" (1988) 3 SACJ 436 at 440.

77. Loubser and Rabie (n76) 427.

78. *Ibid.*

79. 88 above.

However, a finding that the accused had acted with *dolus eventualis* may lead to extenuating circumstances⁸⁰. The courts have shown a rare unanimity in agreeing that *dolus eventualis per se* is not an extenuating circumstance, but in combination with other factors may be regarded as lessening the guilt of the accused⁸¹. It is submitted that even the views of Van Niekerk⁸², and De Wet and Swanepoel⁸³, may be synthesized into the prevailing view of the courts on this basis. To restate the proposition: *Dolus eventualis* is not a lesser form of *dolus* in any way and it should suffice for any crime for which intention is required. However, in combination with other mitigating factors, it may serve as ground for extenuation. *Dolus eventualis* could play a role in this context in respect of the new dispensation regarding the death sentence. Section 277(2)(b) of the Criminal Law Amendment Act 107 of 1990 provides that the death sentence shall be imposed if the presiding judge of court, with due regard to the finding on mitigating or aggravating factors, "is satisfied that the sentence of death is the proper sentence". In view of this discretion granted to the court, it is submitted that the court will carefully consider the facts of the case before imposing a death sentence where *dolus eventualis* was present. It may therefore be that this

80. Loubser (n57) 142-3.

81. Snyman (n3) 428. "... Nor can the fact that X had only *dolus eventualis*, not *dolus indirectus*, *per se* amount to an extenuating circumstance. It can, however, depending upon the circumstances, indicate that killing was not his principal aim, and that he did not really desire death to ensue (although he foresaw it as a possibility). This consideration may indeed operate as an extenuating circumstance...". See Snyman (n3) 428 n 71, for further references.

82. 87 above (see n56).

83. 87 above (see n55).

legislative provision has effectively excluded the death sentence where there is *dolus eventualis*⁸⁴.

84. In the past year, the Appellate Division has had a number of opportunities to apply this provision, *inter alia*, *S v Masina and Others* 1990 (4) SA 709 (A); *S v Senonohi* 1990 (4) SA 727 (A); *S v Nkwanyana and Others* 1990 (4) SA 735 (A); *S v Ntuli* 1991 (1) SACR 137 (A); *S v Mdau* 1991 (1) SA 169 (A); *S v P* 1991 (1) SA 517 (A); *S v S* 1991 (2) SA 93 (A); *S v Mncube en 'n Ander* 1991 (3) SA 132 (A); *S v Matshili and Others* 1991 (3) SA 255 (A). See the discussion of this new development in J. H. Van Rooyen "South Africa's New Death Sentence: is the Bell Tolling for the Hangman?" (1991) 4 SACJ, 79.

ANALYSIS OF DOLUS EVENTUALIS

COGNITIVE COMPONENT

SUBJECTIVE FORESIGHT AND THE PRESUMPTION OF INTENTION.

It has been established for a number of years in our law that the test in respect of intention is invariably subjective in nature⁸⁵. It is therefore required of the court, in determining the state of mind of the accused at the time of the commission of the act, to establish whether it has been proved by the State that the accused "... subjectively foresaw the possible occurrence of the consequence in question..."⁸⁶. This is the subjective test, relating to foresight of consequences. The objective test, in contrast, neglects the accused's state of mind and is concerned with the enquiry as to whether a reasonable man in the accused's position would have foreseen the consequences of his act, that is, whether the accused 'should' or 'ought to' have foreseen them irrespective of whether he did in fact have foresight of the consequences of his act⁸⁷. Flowing from the fact that the enquiry into intention is subjective, it follows that it is not enough to say that the accused probably foresaw the consequence - if a reasonable possibility exists that he did not foresee the consequences of his act, it cannot be said to be beyond reasonable doubt that he did⁸⁸.

The inherent subjectivity of the notion of intention is therefore crucial in assessing criminal culpability on the basis of intention. Any intrusion of objective factors into the test for intention would effectively blur the

85. LAWSA (n1) para 90; Snyman (n3) 203 and Burchell and Hunt (n2) 141.

86. LAWSA (n1) *ibid*.

87. Burchell and Hunt (n2) 141.

88. LAWSA (n1) para 90.

distinction between subjective foresight and objective foreseeability⁸⁹ and would consequently allow negligence to suffice for offences requiring intention. Any such circumlocution of the principles of *mens rea* is clearly unacceptable to legal science⁹⁰.

Although a number of cases have alluded to the difficulties of distinguishing between, on the one hand, whether an accused had actual foresight of possible consequences or merely ought to have foreseen them⁹¹, and on the other hand, between *dolus directus* and *dolus eventualis*⁹²; the dividing lines between negligence and *dolus eventualis*, and between *dolus eventualis* and *dolus directus*, are nevertheless distinctly drawn, and should not be blurred⁹³. Hofmeyr JA, in *Mienies*⁹⁴, was no doubt attempting to identify precisely such difficulties in distinction when he said "... (d)olus eventualis is 'n elastiese begrip, aan die een uiterste kan dit grens aan nalatigheid, veral culpa lata, en aan die ander kant aan dolus directus..."⁹⁵. Labuschagne criticizes this statement, pointing out that in principle, negligence cannot border on intention (as he further remarks: "... 'is'

89. *S v Sigwahla* 1967 (4) SA 566 (A) 570 D.

90. *R v Myers* 1948 (1) SA 375 (A) 383; *R v Oliver* (2) 1959 (4) SA 145 (D) 146 CD; *S v Klopper* 1976 (1) PHH 5(A), cited in LAWSA (n1) para 90 n5.

91. *R v Horn* 1958 (3) SA 457 (A) 466 H; *S v Nkombani* 1963 (4) SA 877 (A) 883 DE; *S v Mashelle* 1972 (2) PHH 136 (A); *S v Sabben* 1975 (4) SA 303 (A) 304 CF, cited in LAWSA (n1) para 90 n8.

92. *S v Harman* 1978 (3) SA 767 (A) 770 D.

93. *S v Dladla* 1980 (1) SA 1 (A) 3-4.

94. *S v Mienies* 1978 (4) SA 560 (A).

95. At 562.

kan nie sinvol grens aan 'moes' nie ..."⁹⁶), and that Hofmeyr JA's statement is therefore unacceptable⁹⁷. It is submitted that Labuschagne is correct. Negligence and intention are completely separate concepts: intention embodies a state of mind, a culpable knowledge or foresight, whereas negligence relates to a lack of any foresight where the reasonable man would have had such foresight⁹⁸. Therefore, by definition, the concepts of negligence and intention cannot overlap, or even border on one another, as Hofmeyr JA suggests, and any such proposition should be rejected in favour of clarity and principled legal science.

Whilst the careful separation of intention and negligence, and the corresponding subjective enquiry into the foresight of the accused prevails in our courts today, it was not always so. The Appellate Division in fact referred to the objective test for intention with apparent approval on several occasions in the first half of this century⁹⁹. It appears that the primary reason for the acceptance of the objective test for intention was the adoption from English

96. JMT Labuschagne "Vonnisbespreking : *S v Mienies* 1978 (4) SA 560 (A)" (1979) 12 De Jure 180 at 181.

97. *ibid.*

98. *Luxuria* or conscious negligence does incorporate an initial foresight of the possibility of harm occurring, but such foresight is dismissed by the actor, resulting in an unreasonable lack of foresight, and criminal liability on the basis of negligence.

99. Burchell and Hunt (n1) 141. At n137, Burchell and Hunt cite as authority for this point the following cases: *R v Jolly* 1923 AD 176 at 186; *R v Jongani* 1937 AD 400 at 406; *R v Longone* 1938 AD 532 at 539, 541-2; *R v Duma* 1945 AD 410 at 417; *R v Shezi* 1948 (2) SA 119 (A) at 128-30; *R v Koza* 1949 (4) SA 555 at 560.

law of the presumption that a man intends the natural and probable consequences of his acts¹⁰⁰.

This presumption has been relied on in a number of cases in South Africa¹⁰¹. The apparent justification for its use, which introduces an objective test for intention, is that "... it is impossible to explore the recesses of a criminal's mind, and consequently the law says that a person must be presumed to intend the reasonable consequences of his acts ..." ¹⁰². In using the presumption, the courts have stressed that the basis of the presumption was fact¹⁰³ rather than law and it could therefore be drawn or not depending on the evidence; and it was rebuttable¹⁰⁴.

The principal objection to the so-called 'presumption' of intention is precisely that it results in an objective test of intention and consequently an overlapping between

100. As Burchell and Hunt point out (*ibid*). It appears that in Roman and Roman-Dutch law intention was regarded as a subjective concept.
101. See Burchell and Hunt (n2) p189 n543 for a list of the cases in which the presumption was applied.
102. JH Pain "Some Reflections on Our Criminal Law" (1960) *Acta Juridica* 289 at 297 n68, citing Gardiner and Lansdown (2ed) p37 ((n44) above).
103. Burchell and Hunt (n2) 189 n544 point out that "... there is really no such thing as a 'presumption' of fact ...". DR Stuart, "Presumed Intention in Criminal Law" (1967) 84 *SALJ* 256 at 259, also makes this point, quoting Wigmore on Evidence (3ed) (1940), X, 2491, pp288-9, which describes it as "... an improper term for the rational potency, or probative value, of the evidential fact...", and suggests that it "... be discarded as useless and confusing". Ogilvie Thompson JA apparently approved these remarks in *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) 574.
104. *R v Kewelram* 1922 AD 213 at 217; *R v Jolly* 1923 AD 176 at 181, 189; *R v Taylor* 1949 (4) SA 702 (A) 713; *R v Nkatlo* 1950 (1) SA 26 (C) 31; *R v Nsele* 1955 (2) SA 145 (A) 151; *R v Nkosi* 1960 (4) SA 179 (N) 180-1

intention and negligence¹⁰⁵. Bodenstein warns against adopting this "... pernicious maxim ..." which has "had such fatal results in the past and caused the untimely death of thousands of human beings ..." ¹⁰⁶. He goes on to plead, "... let us once and for all drop the aberrations of past ages and do away with the notion that it is possible to say that a person intentionally caused effects which he actually did not foresee, though he ought to have foreseen them or that we are entitled in the cases of so-called 'implied malice' to punish a wrongdoer for intentionally causing an effect even in the absence of proof that his actual state of mind at the time of doing the act was such that it can be justly said that he intended the effect ..." ¹⁰⁷. It is clear that the use of this "notion" involved a simple adoption of the objective approach to intention. As Stuart points out, "... the presumption, whether or not it is regarded as rebuttable, is simply the test of negligence - that of reasonable foresight - masquerading in a different form" ¹⁰⁸. Glanville Williams further illuminates this statement when he says that the application of the presumption "... is tantamount to saying that a consequence is intended ... provided that it was probable in fact - ie a reasonable man would have foreseen it as probable Consequently, if it were admitted that a man is to be taken to intend the natural and probable consequences of his acts, the result would be to destroy the subjective definition of intention and to efface the line

105. Burchell and Hunt (n2) 189.

106. Bodenstein (n34) 34.

107. *Ibid.*

108. Stuart (n103) 259.

between intention and negligence. Such a mangling of the concept of intention cannot be admitted ..."¹⁰⁹.

Bearing in mind the blurring of intention and negligence occasioned by the use of the 'presumption', it follows that even an accused who completely lacks any foresight of the consequences of his act may be held responsible. This endorses the view of Swanepoel¹¹⁰ that the presumption was associated with the old doctrine of *versari in re illicita*. The *versari* doctrine provides that a person who commits an unlawful act is criminally liable for all the consequences that follow, irrespective of whether they are foreseen, foreseeable or intended. It is therefore simply a form of strict liability, ignoring the mental state of the accused. Morkel points out that upon the application of the presumption "... sou dit dus dikwels vir die staat bloot nodig wees om die handeling te bewys - die nodige opset sou dan as noodwendige afleiding volg ..."¹¹¹. Clearly this disregard of intention smacks of *versari*-type reasoning. The *versari* doctrine was rendered obsolete¹¹² by the decisions in *Van der Mescht*¹¹³ and *Bernardus*¹¹⁴.

109. G Williams Criminal Law: The General Part, 2ed (1961) 90.

110. In Die Leer Van Versari In Re Illicita in die Strafreë (1944) p57 et seq, cited in *S v Mokonto* 1971 (2) SA 319 (A) at 325H; *S v Sikweza* 1974 (N) SA 732 at 736 A.

111. DW Morkel "Die Bewys van Opset" (1982) 7 IRW 69 at 70.

112. However in *S v Johnson* 1969 (1) SA 201 (A), the Appellate Division appeared to have revived the doctrine in holding an accused liable for culpable homicide, despite the fact that when he killed the deceased he was not conscious of what he was doing because of his state of voluntary intoxication ie his act was involuntary, and there was no question of his having any *mens rea*. Botha JA limited the scope of this finding to the area of voluntary drunkenness. However, despite its limited ambit, it seems that this decision revived the notion of *versari in re illicita*. See Burchell and Hunt (n2) 129. For the latest law on

It has been suggested that the application of the presumption could even impute a fictitious intention to the accused¹¹⁵. Furthermore, in some decisions the presumption was seen to cast a burden of disproof, not merely the evidential burden, on the accused, contrary to the general rule¹¹⁶.

The *locus classicus* of the objective approach¹¹⁷ is the judgment of Kotze JA in *Jolly*¹¹⁸, where the learned judge says "It is a well-settled rule that an accused person must be taken to have intended the ordinary and natural consequences of his act, consequences which he could have foreseen ...". The presumption was followed in the Appellate Division in a number of cases¹¹⁹ prior to 1950,

the subject of intoxication, see *S v Chretien* 1981 (1) SA 1097 (A).

113. 1962 (1) SA 521 (A).

114. 1965 (3) SA 287 (A).

115. In *R v Elias* 1964 (3) SA 144 (SR) at 146-7, Beadle CJ applies the presumption leading him to "... leave entirely open the question whether or not in a particular case it is still open to an accused to show that notwithstanding that the natural and probable consequences of his act may have been to cause grievous bodily harm, in the peculiar circumstances of the particular case, he did not intend that result ...".

116. Burchell and Hunt (n2) 189 n 546. See *S v Kola* 1966 (4) SA 322 (A) 327, following the early Appellate Division decisions in *R v Kewelram* 1922 AD 213 at 216-7 and *R v Mashanga* 1924 AD 11 at 12. For criticism of these decisions, see Stuart (n103) 257-8.

117. Pain (n102) 298.

118. *R v Jolly* 1923 AD 176 at 186.

119. *R v Kewelram* 1922 AD 213 at 216-7; *R v Mashanga* 1924 AD 11 at 12; *R v Butelezi* 1925 AD 160 at 169; *R v Weiss* 1934 AD 41 at 42; *R v Taylor* 1949 (4) SA 702 (A) at 713.

as was the objective approach¹²⁰. In fact, as Burchell and Hunt point out, in *Longone*, *Duma* and *Shezi*, the Appellate Division "... appeared to have held that the requisite intention would be present if the accused ought to have foreseen the consequences of his conduct without it being actually found whether in fact he did foresee them ..."¹²¹. However, one must concur with Burchell and Hunt when they cite Van den Heever JA's statement in *Nsele* with approval, that there is "... no case in which it has been authoritatively decided that, in spite of a finding as a fact that an accused person did not foresee the possibility of a certain act, he is nevertheless guilty on the ground that he should have foreseen that possibility ..."¹²².

Since the onset of the 1950's¹²³, there has been a gradual swing in our courts in favour of the subjective test for intention¹²⁴, in response to the need to distinguish clearly

120. *R v Jongani* 1937 AD 400 at 406 (judgment of Watermeyer AJA); *R v Longone* 1938 AD 532 at 539, 541-2; *R v Duma* 1945 AD 410 at 417; *R v Ndhlanguisa* 1946 AD 1101 at 1106; *R v Shezi* 1948 (2) SA 119 (A) at 128-130; *R v Koza* 1949 (4) SA 555 (A) 560. Snyman (n3) 203 n 29, cites *R v Sikepe* 1946 AD 745 at 756 as authority for the objective test for intention. In fact, the case of *Sikepe*, following the direction taken in *R v Valachia* 1945 AD 826 at 831, is an example of the application of the subjective test for intention.

121. Burchell and Hunt (n2) 141.

122. *Ibid*, *R v Nsele* 1955 (2) SA 145 (A) 151.

123. Although a subjective approach was already followed in cases such as *R v Sofianos* 1945 AD 809 at 812, *R v Valachia* 1945 AD 826 at 831; *R v Sikepe* 1946 AD 745 at 756; *R v Morela* 1947 (3) SA 147 (A) 154; *R v Thibani* 1949 (4) SA 720 (A) 730.

124. In cases such as *R v Mkize* 1951 (3) SA 28 (A) 33; *R v Huebsch* 1953 (2) SA 561 (A) 567; *R v Du Randt* 1954 (1) SA 313 (A) 316; *R v Hercules* 1954 (3) SA 826 (A) 831; *R v Bougarde* 1954 (2) SA 5 (C) 8.

between intention and negligence in homicide cases¹²⁵. This development culminated in the case of *Nsele*¹²⁶, where Schreiner JA took issue with the authority (*Garnsworthy*¹²⁷) cited in the trial court.

The formulation of the common purpose doctrine in *Garnsworthy* apparently advocates an objective test for the *mens rea* of a party to a common purpose¹²⁸, in its use of the words "ought to have known" and "ought naturally to know"¹²⁹. However Schreiner JA, after indicating that the language of Dove-Wilson JP was "quite general and not in terms restricted even to homicides"¹³⁰, quotes a later passage in the *Garnsworthy* judgment¹³¹ as support for the view that the trial court in *Garnsworthy* "... was not satisfied to find a person guilty of murder only because he ought to have known that a killing by his companions might ensue, but apparently required to be convinced that he must actually have known that there was a risk of such killing ..."¹³². Schreiner JA thus applied the subjective test to the facts in *Nsele* as did Van den Heever JA, who rejected the objective test in the following terms: "... stupidity, lack of foresight, negligence - which may consist in *non intellegere quod omnes intelligunt* - cannot to my mind ever be a substitute for the intent, actual or constructive,

125. Burchell and Hunt (n2) 141 n142.

126. 1955 (2) SA 145 (A).

127. 1923 WLD 17.

128. E.M. Burchell "The Meaning of Criminal Intent" (1955) 72 SALJ 240 at 241.

129. At 19.

130. At 147 E.

131. At 22.

132. At 147 H.

which is requisite to support a charge of murder ..."¹³³. Since *Nsele*, there has been a consistent application of the subjective test for criminal intention in our courts¹³⁴.

133. At 151.

134. See cases cited by Burchell and Hunt (n2) 142 n 144. But see *R v K* 1956 (3) SA 353 (A) 357 where Centlivres CJ excludes the operation of the presumption from the *mens rea* enquiry where children between the ages of 7 and 14 are involved, without rejecting the operation of the presumption *in toto*, as might be expected in the light of *R v Nsele* 1955 (2) SA 145 (A) and *R v Bergstedt* 1955 (4) SA 186 (A) which unequivocally rejected the objective test for intent. This conclusion followed the learned Chief Justice's rejection of the objective formulation "ought to have known", used in the trial court. Furthermore, the presumption was mentioned with approval in *R v Nkosi* 1960 (4) SA 179 (N) 180, although the court regarded it as rebuttable, and qualified it by the requirement of proof of actual intent. In these circumstances, it is submitted, clarity demands the complete exclusion of the presumption from the enquiry into *dolus*. The presumption was also applied in *R v Elias* 1964 (3) SA 144 (SR), as well as in the Appellate Division in *S v Kola* 1966 (4) SA 322 (A) 327, where Trollip AJA stated that "... in the absence of any evidence from him explaining his conduct, it must further be presumed that he thereby intended to conceal his identity, for that would be a reasonable and probable consequence of concealing his sex ...". Stuart (n103) 257 notes that Trollip AJA seemed to regard the presumption as rebuttable, "... casting the burden of disproof, not merely the evidential burden, onto the accused ...". As noted above (at 101) this is unacceptable.

PROOF OF DOLUS EVENTUALIS

Dolus eventualis therefore requires proof of actual subjective foresight on the part of the accused that the particular consequence in question might possibly occur¹³⁵. However direct evidence of the state of mind of the accused is seldom available and therefore, to determine the mental state of the accused a court must "rely chiefly on inferences drawn from conduct"¹³⁶ and "from the circumstances in which the crime was committed"¹³⁷. Holmes JA, in *Sigwaha*¹³⁸, set out the requirements for the degree of proof as follows:

"Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so...¹³⁹. Furthermore, the "... inference sought to be drawn must be consistent with all the proved facts, which must be such that they exclude every other reasonable inference save the one sought to be drawn..."¹⁴⁰.

The court is to guard against "armchair reasoning", that is, imputing to the accused a mental state, based on facts emerging only after the act had been committed, or based on what someone else (whether the judge, magistrate or

135. LAWSA (n1) para 90. See also *R v Poteradzayi* 1959 (2) SA 125 (FC) 129 A; *S v Dlodlo* 1966 (2) SA 401 (A) 405 F.

136. Snyman (n3) 203.

137. LAWSA (n1) para 90.

138. 1967 (4) SA 566 (A).

139. At 570.

140. *S v Dlodlo* 1966 (2) SA 401 (A) at 405 H.

reasonable man) would have thought were he in the shoes of the accused at the time of the act¹⁴¹. In assessing subjective foresight, the court will *de facto* "...draw conclusions on the ground of objective probabilities based on general human experience ..." ¹⁴². There is thus a burden placed upon the judges to draw conclusions based on the available factual evidence placed before them, and not on their own sense of justice¹⁴³.

The court should therefore guard against proceeding too readily from the proposition that the accused "ought to have foreseen" to the postulation that he "must have foreseen" and further to the postulation that he "by necessary inference did in fact foresee" the possible consequences of his conduct¹⁴⁴. In this regard a caveat needs to be mentioned regarding the terminology used by the courts, in relation to the oft-used phrase "must have foreseen". As Snyman notes¹⁴⁵, where the phrase is used in its proper context, indicating that the inference is drawn from the evidence by the court that the accused actually foresaw death, its use is unproblematic.

"However, if by 'must have foreseen' is meant not 'did in fact foresee' but 'should (as a reasonable man) have foreseen', the wrong test is being applied in respect of intention, namely an objective instead of a subjective one. The words

141. Snyman (n3) 204.

142. Translation of *S v Dladla* 1980 (1) SA 1 (A) 4H in *LAWSA* (n1) para 90.

143. Morkel (n111) 72.

144. *B Bradshaw v S* 1977 (1) PH H60 (A) 65 per Wessels JA, who adds that "... (t)he several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances which attended the conduct being enquired into ...".

145. Snyman (n3) 204.

'should', 'ought to' and sometimes even 'must' describe the objective test to determine negligence, not the subjective test in respect of intention..."¹⁴⁶.

It should be noted though that in the majority of cases, there may be little difference between the result in the application of the objective and subjective tests, for where it is established that the accused "ought to have foreseen" the consequences it could usually be shown that he "must have foreseen" and therefore by inference "did foresee" them¹⁴⁷. Whatever the similarities in substance between them, the crucial distinction between the tests remains however: as a result of the adoption of the subjective test, in those instances where the state cannot prove that the accused had actual foresight of the consequences, he will escape criminal liability¹⁴⁸.

Morkel points out that in effect the test remains objective in nature, but the finding is that the accused "subjektief die gewraakte strafbare gevolge van sy handeling gewil of, na gelang van die omstandighede, voorsien het"¹⁴⁹. The learned author proceeds to comment upon this in the following terms:

"Indien hierdie feit ingesien word, blyk baie van die skynbaar onoorkomelike probleme van 'n sinvolle skuldteorie veel eenvoudiger. Aanvaarding van die uitgangspunt dat dit streng gesproke verkeerd is om van 'n subjektiewe toets vir opset te praat, sal lei tot 'n sinvolle toepassing van die stel reël '...must have foreseen and therefore did foresee...'. Die wanbegrip dat 'n werklik

146, *ibid*.

147. Burchell and Hunt (n2) 142.

148. *Ibid*. This statement relates to criminal liability on the basis of intention. Criminal liability on the basis of negligence may still be founded upon the facts of the case.

149. Morkel (n111) 73.

subjektiewe toets vir skuld moontlik is, kan slegs lei tot verwarring en kan inderdaad pogings om behoorlik te onderskei tussen subjektiewe en objektiewe skuld kompliseer ..."¹⁵⁰.

The imputed foresight of the reasonable man that the accused 'ought to' or 'should' have foreseen does not suffice for proof of intention, thus excluding the possibility of constructive or fictitious intent¹⁵¹. It follows that the adoption of the subjective test implies that the more unintelligent, superstitious and lacking in foresight the accused is, the more difficult it will be to establish *dolus eventualis* on his part¹⁵².

In the light of the above, what has become of the presumption that a man intends the natural and probable consequences of his act? As seen above, the 'presumption' has been rejected as a front for the objective test of intent by the Appellate Division. However the maxim may still have some value "... not as a presumption, affecting the onus of proof, but as an inference of fact ..."¹⁵³. Holmes JA neatly encapsulates the scope of functioning of such an inference of fact when he states that "... the practical approach is to eschew piecemeal processes of reasoning, and to look at all the facts at the end of the case, and from that totality to ascertain whether the inference in question can be drawn and that inferences do not affect the incidence of the onus of proof - they assist its discharge ..."¹⁵⁴.

150. *Ibid.*

151. Burchell and Hunt (n2) 143. See *S v Nkombani* 1963 (4) SA 877 (A) 883.

152. LAWSA (n1) para 90.

153. *Ibid.*

154. *S v Sigwahla* 1967 (4) 566 (A) at 569 H.

In drawing an inference of *dolus eventualis* in respect of murder, the court will consider such objective factors as: the inherently dangerous nature or severity of the assault leading to the victim's death¹⁵⁵, the type of weapon used¹⁵⁶, the position and nature of the wound which was inflicted¹⁵⁷, as well as the objective probabilities of the case and general human experience¹⁵⁸. Failure to testify on the part of the accused may in certain circumstances strengthen the inference of *dolus eventualis*¹⁵⁹. It should however be borne in mind that these factors are merely aids employed in answering the ultimate question, namely whether the accused subjectively foresaw the possibility of the prohibited consequence (or circumstance) and whether he reconciled himself to that possibility¹⁶⁰. The court is therefore required to examine all the facts of every particular case in considering the inference of *dolus*

155. LAWSA (n1) para 90.

156. Snyman (n3) 204.

157. LAWSA (n1) para 90. In respect of the last two factors, Rabie points out that intention to kill cannot simply be inferred from the fact that a lethal weapon was used, while such intention may be inferred even if the wound was not in what is usually regarded as a vital part of the body.

158. Snyman (n3) 204. See *R v Mlambo* 1960 (2) SA 55 (W) 58 G - H; *S v Nkombani* 1963 (4) SA 877 (A) 883 D; *S v P* 1972 (3) SA 412 (A) 416-7; *S v Beukes* 1988 (1) SA 511 (A) 552 DE. It follows, furthermore, that because the test for intention is subjective, all factors bearing on the state of mind of the accused, including voluntary intoxication and provocation must also be taken into account. See LAWSA (n1) para 90 n38 and n39.

159. LAWSA *ibid*. See *S v Mini* 1963 (3) SA 188 (A) 195-6; *S v Nkombani* 1963 (4) SA 877 (A) 893 FH.

160. Snyman (n3) 204.

*eventualis*¹⁶¹. Because this enquiry is a factual one, little purpose is served by referring to case law, although cases with similar sets of factual circumstances may be relevant¹⁶².

However, it is submitted that any recourse to such factors should in no way impinge upon the essential inquiry into whether the accused had the necessary *mens rea* to be found guilty of the offence in question. All these normative factors, and others, should therefore be downplayed and should not interfere with the assessment of the criminal liability of the accused according to the psychological approach.

161. LAWSA (n1) para 90. As Snyman (n3) 204, points out, the upshot of the inferential enquiry is that a court is unlikely to find that an accused "foresaw a very improbable possibility or that he reconciled himself to it" in the absence of the accused making an admission. *

162. LAWSA *ibid*. The process of reasoning that must be followed in determining the existence of subjective foresight in regard to *dolus* was reiterated in *S v Stigling* 1989 (3) SA 720 (A). R Whiting "Thoughts on Dolus Eventualis" (1988) 3 SACJ 440 states that "... conscious risk-taking may take a very wide variety of forms, and the decision in a given case on whether or not the requirements of *dolus eventualis* have been satisfied may be influenced by a number of factors ...". He discusses such factors as "the type of activity" involved in the creation of harm (*ibid*), "the type of risk" involved (441) and the fact that "the conduct involved is not an act but an omission or failure to comply with a legal duty to act" (442). Whiting regards the cases where these factors will exclude *dolus eventualis* as "relatively uncommon" (*ibid*). A Paizes "Dolus Eventualis Reconsidered" (1988) 105 SALJ 636 at 643 indicates that a moral judgement of some sort may be required in assessing *dolus eventualis*.

[DEGREE OF FORESIGHT]

It is now settled law that the cognitive component of *dolus eventualis* requires proof of foresight of the possibility of the occurrence of a consequence, rather than the higher standard of foresight of the probability of a consequence occurring. Although some doubt existed in early cases as a result of some confusion in terminology, it appears that "more than mere realisation of the consequences as possible"¹⁶³ was required. An express requirement of probability was laid down in a number of cases: in *Garnsworthy*¹⁶⁴ it was required that the foreseen consequence be "...obvious and probable..."¹⁶⁵, in *Longone*¹⁶⁶ the court stipulated the need for a "reasonable probability"¹⁶⁷, while in *Bergstedt*¹⁶⁸, "some probability"¹⁶⁹ was required. Other cases requiring more than foresight of a possibility include *Ngcobo*¹⁷⁰ (which was followed in *Butelezi*¹⁷¹), which

163. Pain (n102) 301.

164. *R v Garnsworthy* 1923 WLD 17.

165. At 19.

166. *R v Longone* 1938 AD 532.

167. At 539.

168. 1955 (4) SA 186 (A).

169. At 188. This dictum is somewhat problematic in the light of the fact that it proceeds from Schreiner ACJ, whose dicta in *Thibani* 1949 (4) SA 720 (A) 729-30 and *Nsele* 1955 (2) 145 (A) 148 are important authority for the requirement of mere foresight of a remote possibility. It is difficult to reconcile the *Bergstedt* dictum, which lays down a similar requirement to that of the objective test with the tenor of the rest of the judgment which unequivocally upholds the subjective test for criminal intent.

170. 1921 AD 92.

171. 1925 AD 160 at 161.

utilized the term "calculated"¹⁷² to express the requisite mental state of the accused¹⁷³.

In certain cases¹⁷⁴, it was decided that the accused must have foreseen that the act in question was "likely" to cause the particular result. However "likely" is an elastic word, difficult of exact definition¹⁷⁵, and it therefore may lead to misunderstanding since it can refer both to the probability and the possibility of the occurrence of the

172. At 94-5.

173. Burchell and Hunt (n2) 144 n 156 cite *R v Jolly* 1923 AD 176 (Kotze JA's judgment) as further authority for this proposition, but the learned judge is simply applying the presumption of intending the natural and possible consequences, and is therefore not identifying any foresight requirement.

174. Prior to 1958, the following cases all required foresight of a "likely" consequence by the accused: *R v Genele Xutu* 1941 (1) PH H7 (W) 11; *R v Marthinus* 1942 CPD 247 at 250 (although the court eventually applied the presumption that the probable consequences of an act are intended); *R v Kubuse* 1945 AD 189 at 199; *R v Sofianos* 1945 AD 809 at 812; *R v Valachia* 1945 AD 826 at 830-1; *R v Sikepe* 1946 AD 745 at 756; *R v Strauss* 1948 (1) SA 934 (A) 940; *R v Kuzwayo* 1949 (3) SA 761 (A) 770; *R v Ncetendaba* 1952 (2) SA 647 (SR) 651; *R v Mazumpa* 1953 (2) PH H151 (O) 308; *R v Koning* 1953 (3) SA 220 (T) 230-1; *R v Edwards* 1957 R & N 107 (SR) 112. The term "likely" is also used by TB Barlow "Digest of the Law of Murder and Culpable Homicide" (1950) 67 SALJ 393 at 398, describing foresight required for *dolus eventualis*.

175. EM Burchell "The Intent to Kill: 'Probable' versus 'Possible'" (1950) 67 SALJ 110-111, who points out that "... 'likelihood' means no more than 'possibility' when used in the test of foreseeability to be applied in delict cases to determine whether or not the defendant owed the plaintiff a duty to take care (see *Joffe & Co Ltd v Hoskins* 1941 AD 431 at 451). But no assistance in interpreting the word 'likely' in the test for murder [the crime in question which Burchell was discussing, following the case of *Valachia (ibid)*] can be derived from delict cases where the issue is one of negligence, not of intention ...".

result¹⁷⁶. There are nevertheless indications in our case law that when using the term 'likely', the courts are referring to foresight more substantial than mere possibility. In the case of *Koning*¹⁷⁷, Ramsbottom J cited *Ngcobo* and *Valachia* as authority and then proceeded to equate "calculated"¹⁷⁸ with "likely"¹⁷⁹ in his discussion of eventual intention¹⁸⁰. Secondly, in the case of *Horn*¹⁸¹, Van Blerk JA contrasted "possibility" with "likely"¹⁸². Finally, in *Sikweza*¹⁸³, Holmes JA states that "likely" used to be the test for the cognitive component of *dolus eventualis*, but that foresight of possibility is now required. The implication of this statement is that Holmes JA views "likely" as equivalent to probability rather than possibility.

176. LAWSA (n1) para 91.

177. *Koning* 1953 (3) SA 220 (T) 230-1

178. As the term is used in *Ngcobo* 1921 AD 92 at 94-5.

179. As the term is used in *Valachia* 1945 AD 826 at 830-1.

180. At 230.

181. 1958 (3) SA 457 (A).

182. At 467.

183. 1974 (4) SA 732 (A) 736.

On occasion the courts have been somewhat equivocal concerning the degree of foresight required for *dolus eventualis*, using the phrase "probable or possible"¹⁸⁴. Other cases have made reference to the accused's act involving "some risk to life"¹⁸⁵ (instead of foresight of a possible occurrence)¹⁸⁶. This formulation at first glance appears to be as nebulous as "likely" insofar as it fails to indicate whether the accused must foresee the possibility or the probability of the deceased's loss of life¹⁸⁷. It has however been confirmed in the case law that "some risk to life" refers to the possibility (rather than the probability) of death occurring¹⁸⁸.

Despite the earlier terminological confusion, it is now firmly established that the accused need only foresee the possibility of harm occurring. As Van Blerk JA states in

Horn:

"It would be incongruous to limit a wrongdoer's constructive intent to cases where the result which he has foreseen was likely to cause death and not to infer such intent where the result he had foreseen was, although possible, not likely"¹⁸⁹.

184. *R v Geere and Others* 1952 (2) SA 319 (A) 322; *R v Hercules* 1954 (3) SA 826 (A) 831.

185. *R v Jolly* 1923 AD 176 (Innes CJ's judgment); *R v Huebsch* 1953 (2) SA 561 (A) 567; *R v Du Randt* 1954 (1) SA 313 (A) 316; *R v Horn* 1958 (3) SA 457 (A) at 465 D (Beyers JA's judgment).

186. LAWSA (n1) para 91.

187. *Ibid.*

188. *R v Horn* 1958 (3) SA 457 at 467 AB; *R v Nemashakwe* 1967 (3) SA 520 (RA) 523B; *R v Tazwinga* 1968 (2) SA 590 (RA) 591DE; *S v Ushewokunze* 1971 (2) SA 360 (RA) 363 EH.

189. 467 B, where Van Blerk JA equated "likely" with "probable" (see 113 above).

As Burchell and Hunt point out¹⁹⁰, the determining factor in criminal cases relating to negligence is that the accused should have foreseen the possibility of harm, as the reasonable man would have, were he in the shoes of the accused. Upon the application of the objective test for *dolus eventualis*, intention would only be found to be present where the State was able to prove that the accused should have foreseen the occurrence of the consequence as probable¹⁹¹. Foresight of a possibility would be insufficient, as acceptance of the foresight of a mere possibility as sufficient would blur the distinction between *dolus* and *culpa*. However, now that it is settled law that only the subjective test suffices for intent (and the objective test for negligence), there is less danger of such confusion and foresight of a mere possibility suffices¹⁹².

The dictum in *Horn* was confirmed in the subsequent case law, although the terminology used was not in any sense uniform. Some cases have phrased the requirement as being "some risk to life"¹⁹³, whereas other cases have simply required foresight of a "possibility", without qualifying the scope of foresight required in any way¹⁹⁴. Still other cases

190. Burchell and Hunt (n2) 143-4.

191. *Ibid.*

192. *Ibid.*

193. See 114 above. See, *inter alia*, *R v Poteradzayi* 1959 (2) R & N 31 (FSC) 34; *R v Mneke* 1961 (2) SA 240 (N) 244 B; *R v Basson* 1961 (3) SA 279 (T) 280; *R v Nemashakwe* 1967 (3) SA 520 (RA) at 523; *S v Van Zyl* 1969 (1) SA 553 (A) 557; *S v Haines* 1969 (2) SA PH H191 (N); *S v Dhlamini and Another* 1972 (1) SA 807 (A) 817; *S v Magubane* 1975 (3) SA 288 (N) 292.

194. *R v Bougarde* 1954 (2) SA 5 (C) 9; *S v Malinga and Others* 1963 (1) 692 (A) 695; *S v Mangondo* 1963 (4) SA 160 (A) 162; *S v Nkombani and Another* 1963 (4) SA 877 (A) 883, 891, 895; *S v Sigwahla* 1967 (4) SA 566 (A) 570; *S v Van Niekerk* 1970 (3) SA 655 (T) 657; *S v Mtshiza* 1970 (3) SA 747 (A) 752; *S v Kramer en Andere*

indicate that foresight of a mere possibility is required through the use of the phraseology "appreciated ... might"¹⁹⁵. The lone authority favouring foresight of a probability was the decision of the Rhodesian Supreme Court in *R v Mabena*¹⁹⁶, although the word "likely"¹⁹⁷ was used in *Sikunyana*¹⁹⁸, *Mawena*¹⁹⁹ and *Ntuli*²⁰⁰.

Despite the fact that foresight of a possibility is regarded as sufficient by the courts, the probability of a consequence occurring may well be relevant in drawing an inference of actual foresight on the part of the accused. As Loubser and Rabie point out, "... the greater the likelihood or probability of death, the stronger would be

1972 (3) SA 331 (A) 334; *S v P* 1972 (3) SA 412 (A) 416; *S v Kritzinger* 1973 (1) SA 596 (C) 602 E; *S v Sikweza* 1974 (4) SA 732 (A) 736; *S v Grove-Mitchell* 1975 (3) SA 417 (A) 422 D; *S v Sabben* 1975 (4) SA 303 (A) 304; *S v Kgwane* 1977 (2) SA 454 (O) 455; *S v V* 1979 (2) SA 656 (A) 668; *S v Tissen* 1979 (4) SA 293 (T) 295 EF; *S v Zimiri* 1981 (2) SA PH H196 (A); *S v Nhlapo* 1981 (2) SA 744 (A) 750-1; *S v Mbatha* 1987 (2) SA 272 (A) 285 C.

195. *S v Loubser* 1971 (1) SA PH H14 (A) at 24; *S v Thody* 1971 (2) SA 213 (N) 216, and see the judgment of Williamson JA in *S v Mini* 1963 (3) SA 188 (A) 192.

196. 1967 (3) SA 525 (R) 527.

197. It is submitted that "likely" refers to foresight of something more than a mere possibility, see 113 above.

198. *R v Sikunyana* 1961 (3) SA 549 (E) 552 DH.

199. *R v Mawena* 1962 (1) SA 896 (FC) 904.

200. *R v Ntuli and Another* 1962 (4) 238 (W) SA 241 A, despite citing *R v Horn* as the law to be applied (at 240 G), and quoting such terminology as "risk to life" (head note) and "actually appreciated that death was a possible result" (at 466) from *R v Horn*, which is clear authority for foresight of a possibility. The court was following the older formulation in *R v Valachia* 1945 AD 826 at 831.

the inference that the accused in fact foresaw it"²⁰¹. It follows that the more improbable the consequence in question, the more difficult it would be to prove foresight on the part of the accused by inference²⁰².

As seen above, the courts tend to refer to foresight of a "possibility" or "risk of death", unqualified by any adjective defining the substance of the requisite foresight. On occasion however the courts have been more specific; holding that the requirements for *dolus eventualis* would be satisfied by foresight of a possibility, "even if slight"²⁰³, "faint"²⁰⁴, "improbable"²⁰⁵, "highly improbable"²⁰⁶ or even "however remote"²⁰⁷. Authority for the view that foresight of any possibility, however remote, is sufficient for a finding of *dolus eventualis*, is bolstered by the statement of Schreiner JA in Nsele²⁰⁸: "... provided that the risk must have been and therefore, by inference was, present to the mind of the accused, and provided that he was reckless whether or not it matured in death, I do not think that the seriousness of the risk is material ..."²⁰⁹. Further support is lent by Holmes JA in

201. Loubser and Rabie (n76) 417. See *R v Horn* 1958 (3) SA 457 (A) 467 C.

202. Loubser and Rabie *ibid*, *R v Horn (ibid)* 465 BC, *S v Nkombani* 1963 (4) SA 877 (A) 891 D, *S v Dladla* 1980 (1) SA 1 (A) 4 H.

203. *S v Mini* 1963 (3) SA 188 (A) at 191 H.

204. *S v Ngubane* 1985 (3) SA 677 (A) 685 FG.

205. *ibid*.

206. *S v Shaik* 1983 (4) SA 57 (A) 62 FG.

207. *R v Thibani* 1949 (4) SA 720 (A) 729-30; *S v De Bruyn* 1968 (4) SA 498 (A) 510 G.

208. *R v Nsele* 1955 (2) SA 145 (A).

209. At 148.

the case of *De Bruyn*²¹⁰, where the learned judge makes the following submission: "... If ... an accused were to admit that he foresaw the possibility of death, on the footing that anything is possible, that would contribute to a conviction for murder ..." ²¹¹.

Although the question of the remoteness of the possibility has relevance in the area of inferential proof of the subjective foresight of the possibility by the accused²¹², in the sense that the more remote a possibility is, the less likely it is that the accused had actual foresight of it²¹³, it is clear that a person who foresees, for example, a possibility of death, is not entitled to take a chance and gamble with another person's life on the basis that the risk is slight and death is unlikely, highly improbable or remote²¹⁴.

Remoteness is also relevant to the question of blameworthiness: if an accused had foresight of a remote possibility of death, but regarded death as "... although possible, extremely unlikely ...", this could constitute extenuating circumstances in taking the risk of the occurrence of death²¹⁵. Foresight of a remote possibility of death would thus usually signify a lesser blameworthy mental condition than foresight of a real possibility of death, but this is not always the case. As Paizes points out, it is "... at least arguable that the blameworthiness

210. *S v De Bruyn* 1968 (4) SA 498 (A).

211. At 511 DE.

212. *S v Malinga and Others* 1963 (1) SA 692 (A) at 694 H.

213. *S v Shaik* 1983 (4) SA 57 (A) at 62 DE.

214. Loubser and Rabie (n76) 417. See also *R v Horn* 1958 (3) SA 457 (A) at 465C.

215. *S v De Bruyn* 1968 (4) SA 498 (A) 511 DE.

of one who deliberately exposes another to what he regards as slight risk of death is commensurable to the blameworthiness of one who is conscious that his act will expose another to the real risk of death but does not desire it to have that effect ..."²¹⁶.

There is therefore a strong line of authority running through a number of Appellate Division cases that foresight of a remote possibility is sufficient to constitute the cognitive component of *dolus eventualis*²¹⁷. Furthermore, there are a large number of cases which indicate that foresight of a mere possibility suffices, without actually qualifying the substance of such a possibility in any way²¹⁸. Yet despite the acceptance of the sufficiency of foresight of a remote possibility (in respect of *dolus eventualis*) by the highest court in the land, a contrary view has developed in our case law and in the writings of certain jurists to the effect that what is required for *dolus eventualis* is foresight of a real possibility²¹⁹,

216. Paizes (n162) 643.

217. *R v Thibani* 1949 (4) SA 720 (A) 729-30; *R v Nsele* 1955 (2) SA 145 (A) 148; *S v Mini* 1963 (3) SA 188 (A) 191; *S v De Bruyn* 1968 (4) SA 498 (A) 510 (followed explicitly in the Provincial Division cases of *S v Dube* 1972 (4) SA 515 (W) 520; *S v Peppenene* 1974 (1) SA 216 (D) 220; *S v Sinzani* 1979 (1) SA 935 (E) 938); *S v Dladla* 1980 (1) SA 1 (A) 4; *S v Shaik* 1983 (4) SA 57 (A) 62; *S v Ngubane* 1985 (3) SA 677 (A) 685.

218. See cases at (n194) above.

219. *S v Ushewokunze* 1971 (2) SA 360 (RA) 364 BC, *S v Ostilly* 1977 (4) SA 699 (D & CLD) 728 D; *S v Moodie* 1983 (1) SA 1161 (C) 1162 B. Loubser and Rabie (n76) 417 n 22 cite *S v Ncwane* 1978 (2) PH H 218 (A) as authority for the notion that a real possibility of harm should be foreseen; however the court refers to a real possibility in the following terms (at 316): "... The notion that the result of the assault was not foreseen, nor even contemplated by the appellant as a real possibility, is fanciful in the circumstances of this case ...". It is submitted that the court is referring to the establishing of a real possibility on

foresight of a substantial risk²²⁰ or the reasonable possibility of harm eventuating²²¹.

Despite the strong support for the notion that foresight of any possibility is sufficient as a constituent of *dolus eventualis* in our case law, there has been some academic criticism of this view. For the purposes of analysis, the arguments raised by the jurists against acceptance of foresight of any possibility as a requirement may be divided into three areas of dispute: first, whether foresight of a remote possibility may be classified as intention at all; secondly, a policy-based argument asserting that acceptance of such a standard would lead to unjust results; and thirdly, that such a standard has no utility in practice. Each of these arguments shall be examined in turn.

Burchell and Hunt consider it to be doubtful whether an accused can even be said to "foresee" a possibility if he

the facts of the case and not as a requirement, and that Loubser and Rabie are consequently mistaken in referring to *Ncwane* as authority for the requirement of foresight of a real possibility.

220. *R v Steenkamp* 1960 (3) SA 680 (N) 684 FG.

221. *S v Tazwinga* 1968 (2) SA 590 (RA) 591 D, followed in *S v Ushewokunze* 1971 (2) SA 360 (RA) 363, and *S v John* 1969 (2) SA 560 (RA) 565. Further authority for the acceptance of only foresight of a "reasonable possibility" as sufficient for *dolus eventualis* is to be found in *R v Suleman* 1960 (4) SA 645 (N) 646 H. This authority proceeded from a most improbable source, Holmes J (as he then was), who later went on to sculpt *dolus eventualis* as a concept in the Appellate Division, particularly in regard to insistence on foresight of any possibility as a requirement, in cases such as *Mini* and *De Bruyn* ((n217) above). Burchell and Hunt (n2) 146 n 174 cite the minority judgment of Steyn CJ in *Nkombani* (n202) above as implying "something more than a mere possibility", but any such implication was never concretized in that judgment, which simply interprets the evidence as insufficient to found an intention of murder.

thinks of it but considers it very remote; "... surely he cannot be said to 'intend' a consequence, even in the legal sense of intention ... if he foresees it only as a very remote risk, or as a hundred-to-one chance or, ... 'on the footing that anything is possible' ..."222.

Snyman agrees with this assessment, opining that "*dolus eventualis* is absent if X [the accused] foresees the possibility only as remote or far-fetched ..."223. Morkel amplifies this point somewhat. Using German authority to explain the requisite degree of foresight, which he regards as "moelik definieerbaar en bepaalbaar", he expresses the need for a knowledge ("kennis") of the particular circumstances or risk224. He goes on to point out that the knowledge to which he is referring is not simply of an abstract, generalized sort225, nor need it be immediately directed towards the consequence or result226, but instead it entails concrete knowledge or awareness of specific circumstances ("konkrete bewuswees van bepaalde omstandighede ...")227.

The second argument raised is that foresight of a remote possibility ought to be rejected as a requirement of *dolus eventualis* on policy grounds, as this notion is "... far too

222. Burchell and Hunt (n2) 146.

223. Snyman (n3) 199.

224. DW Morkel "Die Onderskeid tussen Dolus Eventualis en Bewuste Nalatigheid: 'n Repliek" (1982) 45 IHRHR 321 at 323, as required by s16(1) of the German Criminal Code.

225. *Ibid.* Morkel's example in this regard is knowledge in the sense of "Ek ken my oom".

226. *Ibid.* To continue the analogy, Morkel points out that such knowledge "beteken nie noodwendig dat ek op hierdie oomblik aan my oom dink nie".

227. *Ibid.*

wide ..."²²⁸ and could thus lead to "... anomalous and unjust results ..."²²⁹. Burchell and Hunt use the example of an ordinary road user (motorist) to illustrate this argument, pointing out that applying the remote possibility criterion²³⁰ would mean that every time a person drove his car, he would have *dolus eventualis* in respect of some other user of the road, and therefore he would be a murderer should death result from his driving²³¹. Morkel furthers the argument on the grounds of policy by pointing out that it is the creation of unreasonable risks that need to be combated by the censure of society (and indeed, even the punishment of negligence is based on these considerations)²³². It is Morkel's view that foresight of a remote possibility can be equated with a reasonable risk, whereas only actions taken with a concurrent foresight of real, substantial or unreasonable risk should incur liability²³³. Therefore, based on this underlying policy consideration, Morkel opines that the mere foresight of a remote possibility is simply insufficient as a basis for intention²³⁴. The argument is further advanced by Morkel when he says that: "As die voorsien van 'n werklik verwyderde moontlikheid goedsmoeds opset kon daarstel sou

228. Whiting (n162) 445.

229. Burchell and Hunt (n2); 146. Paizes (n162) 642 makes the same point albeit somewhat more guardedly, pointing out that to hold the accused responsible in these circumstances would not be "ordinarily desirable".

230. The learned authors assume recklessness to be present.

231. Burchell and Hunt (n2) 146. Snyman (n3) 199 agrees that attributing *dolus eventualis* to someone in these circumstances is problematic.

232. Morkel (n224) 322-3.

233. *Ibid.* Morkel cites American, English and German authority in support of his arguments.

234. *Ibid.*

dit tot die absurde resultaat lei dat 'n persoon vanweë sy besondere insig opset sou kon hê terwyl sy optrede nog nie eens van dié van die redelike man afgewyk het nie en daar dus in die betrokke omstandighede nog nie eens van nalatigheid sprake kon wees nie ..."²³⁵. Morkel concludes that in the light of these considerations, it is preferable by far to require at least foresight of a concrete possibility, the deliberate disregard of which it would be in the interests of the community to punish²³⁶.

The final argument raised against foresight of a remote possibility as a criterion is that such a notion simply has no utility in practice. Paizes states that although there are statements by our courts at the highest level that foresight of a remote possibility suffices, *dolus eventualis* has not once been found to be present where the accused has foreseen the possibility of the relevant consequence eventuating as slight or remote, but not real²³⁷. Whiting agrees, remarking that "a remarkable disparity" exists between such statements and the way in which the courts have in fact applied the law²³⁸. Morkel in turn considers it highly unlikely that the courts would actually put such statements into practice²³⁹. Citing the dictum in *Mini*²⁴⁰,

235. *Ibid.*

236. *Ibid.*

237. Paizes (n162) 642.

238. Whiting (n162) 444.

239. DW Morkel Towards a Rational Policy of Criminal Fault (LLM thesis, University of Pretoria (1981) 64.

240. *Ibid.* *S v Mini* 1963 (3) SA 188 (A) 196 (per Williamson JA) "... In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems to me that a trier of fact should try mentally to project himself into the position of that accused at that time. He must, of course, also be on his guard against the insidious subconscious influence of *ex post facto* knowledge.

Morkel identifies the inherent circumspection of the courts lest they be guilty of the armchair approach. Morkel further opines that the occasions when the courts stated that a remote possibility would be sufficient were in fact "isolated instances" which "... do not, in fact, establish the inference that this is the legal position ..."²⁴¹. The learned author continues this argument by indicating that a scrutiny of such cases, including *Horn*²⁴², *Malinga*²⁴³, *Thibani*²⁴⁴, and *De Bruyn*²⁴⁵ "... tends to show that the courts, in fact, require a real possibility ...".²⁴⁶ This view proceeds from the following consideration:

"It must be borne in mind that crimes are committed in real factual circumstances and that the statements of the courts must be judged or evaluated in the light of such circumstances ..."²⁴⁷.

Whiting calls into question the motivation of the *dicta* in favour of a remote possibility, pointing out that "... no reason has ever been given for saying that the foresight required for *dolus eventualis* need be of no more than a remote possibility, and one can only speculate as to why this view should have been adopted ..."²⁴⁸.

241. Morkel (n239) 64 n 3.

242. *R v Horn* 1958 (3) SA 457 (A).

243. *S v Malinga and Others* 1963 (1) SA 692 (A).

244. *R v Thibani* 1949 (4) SA 720 (A).

245. *S v De Bruyn* 1968 (4) SA 498 (A).

246. Morkel (n239) 64 n 3.

247. *Ibid.*

248. Whiting (n162) 444. Whiting suggests that the reason for this view might be related to the issue of a second limb to *dolus eventualis*.

In the light of the above considerations, a number of jurists have indicated that they are in favour of the cognitive component of *dolus eventualis* requiring more than a remote possibility. Some writers go as far as suggesting that the test should be related to foresight of the probability of harm, rather than foresight of a mere possibility of harm occurring²⁴⁹. Pain adopts and endorses Glanville Williams' view that knowledge of a bare possibility should suffice for *dolus eventualis* if the conduct has no social utility, but the slightest social utility will introduce an enquiry into the probability of harm and a balancing of the hazard against social utility²⁵⁰.

Burchell and Hunt indicate that foresight of a probability would be a preferable requirement, but in the light of the Appellate Division antipathy towards 'probability', the minimum degree of foresight required is foresight of a real or substantial possibility²⁵¹. The learned authors opine that insistence upon this requirement would "... confine intention to a state of mind that can properly be regarded as such and keep the dividing line between intention and negligence clearcut ..."²⁵².

Snyman, who essentially concurs with Burchell and Hunt, is in favour of a "substantial or reasonable possibility" constituting the requisite degree of foresight²⁵³. Morkel also follows this view, insisting on foresight of a concrete

249. Whaley (n13) 118.

250. Pain (n102) 301, cites Glanville Williams, who is referring to the English law notion of recklessness.

251. Burchell and Hunt (n2) 146-7.

252. *Ibid.*

253. Snyman (n3) 199.

possibility²⁵⁴. Labuschagne also insists on more than a remote possibility, favouring a requirement of a "reëel-konkrete moontlikheid"²⁵⁵. Paizes²⁵⁶ and Whiting²⁵⁷ both favour the requirement of foresight of a substantial possibility; however both authors concede that in certain specified cases, foresight of a remote possibility will suffice²⁵⁸. It appears that where it is the wrongdoer's

254. Morkel (n239) 65; (n224) 323.

255. Labuschagne (n76) 438-9. "Myns insiens behoort die voorsienbaarheid deur beide die begrippe 'reëel' en 'konkreet' gekwalifiseer te word. Die bewering kan aan die hand van die volgende hipotetiese voorbeeld verduidelik word: elke motorbestuurder weet dat as hy 'n ander motor by 'n blinde hoogte verbysteek daar 'n reëele (werklike) moontlikheid bestaan dat hy met 'n aankomende voertuig kan bots. Dit is egter nie te sê dat 'n motoris in 'n konkrete situasie ('n op-hierdie-oomblik situasie) noodwendig so 'n moontlikheid sal voorsien nie. Daar kan verskeie redes wees waarom 'n motoris nie op 'n gegewe tyd die moontlikheid voorsien dat daar 'n motor van vooraf sal kom nie. Daarom is dit suiwerder om te vereis dat die dader die intrede van 'n sekere gevolg of verrig van 'n sekere handeling (of late) as 'n reëel-konkrete moontlikheid moet voorsien..." Labuschagne suggests an important role for policy factors limiting and determining the degree of foresight, when he indicates that "... die voorsieningsvereiste word begrens deur die (veranderende) eise van 'n progressief-leefbare gemeenskap ..." in "Vonnisbesprekings: S v Dladla 1980 (1) SA 1 (A)" (1980) 13 *De Jure* 164 at 165.

256. Paizes (n162) 642.

257. Whiting (n162) 446.

258. The learned authors make use of similar examples to illustrate their arguments. Whiting (*ibid*) 443, cites the oft-quoted hypothetical case of the pistols: "... A person possesses a number of pistols, knowing that only one is loaded but not knowing which one it is. He takes one of the pistols at random, puts it against another person's temple, and pulls the trigger. His object is not to kill the other person but merely to expose him to the risk of death. If he happens to have selected the loaded pistol, with the result that the other person is killed when he pulls the trigger, will he be guilty of murder? Superficially it might appear

purpose to expose the victim to the risk of death (or, as Whiting phrases the proposition, "the wrongdoer has *dolus directus* in relation to the creation of the risk ...")²⁵⁹, the wrongdoer will have *dolus eventualis* irrespective of the remoteness of the possibility²⁶⁰.

Having examined the objections to the acceptance of the foresight of a remote possibility as sufficient for the proof of *dolus eventualis*, and the alternative suggestions of those writers favouring a more stringent alternative as constituting the requisite foresight²⁶¹, the existing

that the answer should depend on how many pistols there were in all, because obviously the more pistols there were the slighter would be the possibility of a fatal outcome. However, the case differs from the ordinary case of killing with *dolus eventualis* in an important respect, namely that here it is the wrongdoer's purpose to expose the victim to the risk of death, or, to put it another way, he has *dolus directus* in relation to the creation of the risk. It seems that a case like this should be treated in the same way as a case where the wrongdoer has *dolus directus* in relation to the result itself. If so, it should not matter how many pistols there were in all: even if there were a hundred pistols, so that he saw the chance of a fatal outcome only as very slight, the wrongdoer should still be guilty of murder ...". Whiting takes this example from Williams (n109) 59-60, who cites it as having been used by the English Criminal Law Commissioners of 1833, whose opinion is reflected above. Paizes (n162) uses substantially the same example, except that he refers to the number of chambers in a revolver instead of the number of pistols (at 642-3).

259. Whiting *ibid.*

260. *Ibid.* Paizes (n162) 642. Whiting qualifies the requisite foresight by introducing the question of social utility at 446 n 13; "... where the act involved is without social utility ...", the accused will be held liable, even if his foresight was only of a remote possibility, where he consciously created the risk.

261. For a comparative view in respect of Zimbabwean law, see G Feltoe "States of Mind in the Zimbabwean Criminal Law" (1985) 3 Zimbabwe Law Review 16, and A Guide to

authority in favour of foresight of a remote possibility may be examined. It is however instructive first to assess, in turn, the validity of each of the arguments raised against the remote possibility notion.

Despite the doubts raised above whether foresight of a remote possibility could be classified as a species of foresight at all, it is submitted that there can be no doubt that Engers is correct when he states unequivocally that "... (t)o say that foresight of a remote possibility is not foresight is straining both language and logic ..."²⁶². To borrow a phrase from Glanville Williams, to say that foresight is not foresight, is simply an "abuse of language". It is further submitted that writers such as Burchell and Hunt and Snyman err in excluding foresight of a remote possibility from the ambit of *dolus eventualis*. A crucial distinction has to be drawn at this point: where an accused foresees the possibility of harm, however remote, and consciously and in good faith rules out the risk of such a consequence occurring, he cannot be held to have intended the consequence if it occurs. By ruling out the risk in this manner, the accused has no foresight of the consequence occurring, and thus cannot intend its occurrence. He can however be held liable on the basis of negligence where his standard of conduct deviates from that of the reasonable man²⁶³. On the other hand, it follows that where an accused

Zimbabwean Criminal Law (1989), where at 5, the learned author favours foresight of a "real" possibility.

262. KAB Engers "Dolus Eventualis - Which Way Now?" (1973) *Responsa Meridiana* 219 at 223.

263. Examples of cases the courts made a finding of negligence although the accused had had subjective foresight of the possibility of the harm occurring include: *R v Hedley* 1958 (1) SA 362 (N); *R v Tsutso* 1962 (2) SA 666 (SR); *S v Fernandez* 1966 (2) SA 259 (A); *S v Qumbella* 1967 (4) SA 577 (A); *S v Le Roux* 1969 (3) SA 725 (T).

foresees the possibility of harm, however remote, and continues to act, despite such foresight, then he is responsible in law for the consequence occurring, because he intended such a consequence. As mentioned above, such 'intention' is not identical to "intention" in its ordinary sense, but is by its very nature a form of intention punishable by legal sanction²⁶⁴. The accused's conduct is blameworthy because he foresees the possible harm and accepting that it might (possibly) occur, he chooses to take a chance that such a consequence will not follow, instead of abstaining from his proposed course of conduct. Remoteness of the possibility may be relevant to extenuating circumstances and punishment (blameworthiness), but in principle, it cannot affect criminal liability: the accused consciously chose to take the risk, however remote, and so in principle has a "callous disregard"²⁶⁵ for the possibility of the harm occurring and a concomitant direct intention to bring about the harm should certain circumstances arise²⁶⁶.

Morkel's insistence on a concrete knowledge of awareness of specific circumstances will be discussed in more detail below²⁶⁷, but following the above line of reasoning, it may be submitted that if Morkel is attempting to exclude foresight of a remote possibility from the ambit of knowledge required for *dolus eventualis*, by his emphasis on the "concrete" nature of the knowledge, then he is mistaken, on the same basis as Burchell and Hunt and Snyman are.

264. Such an intention falls within the ambit of intentional action (20ff above).

265. Van Niekerk (n56) 140.

266. *Ibid.*

267. 157-9 below.

②
 The second (policy-based) argument against acceptance of a remote possibility raises the spectre of injustice and "anomalous results ..."²⁶⁸. It is instructive to adopt the same example cited above, that of the ordinary road user (motorist), to deal with the issues raised by this argument. Although the prospect of thousands of potential murderers behind the wheel (who, despite having faint misgivings about their conduct, can hardly be described as calculating killers) is rather alarming, this potential mass liability must be seen in context. First, the caveat mentioned above²⁶⁹ regarding ruling out of the risk bears repeating - where a remote possibility is foreseen and then discounted, there can be no foresight. It is only where the accused consciously chooses to take the risk of the harm occurring that *dolus eventualis* may arise. However, it must be emphasized that mere foresight of a remote possibility does not necessarily entail liability on the basis of *dolus eventualis*. Loubser cogently deliniates this situation as follows:

"... verder kan ook betoog word dat indien selfs die geringste mate van moontlikheidsbewussyn aanspreeklikheid kan meebring, niemand dit byvoorbeeld met 'n motor op straat durf waag nie indien hy bewus is van die statistiese moontlikheid van dood of besering in motorongelukke en hom daarmee versoen nie. Die antwoord hierop is egter dat moontlikheidsbewussyn ten opsigte van die bepaalde omstandighede van elke geval vereis word en dat geen hof opset sal aanvaar bloot op grond van 'n voorafgaande bewussyn van, en onverskilligheid jeens, 'n abstrakte statistiese moontlikheid van skade of besering nie ..."²⁷⁰.

268. Burchell and Hunt (n2) 146.

269. 128 above.

270. Loubser (n57) 141.

A further important limitation is that the consequence must be unlawful per se and that it must occur with knowledge of unlawfulness, at least in the form of *dolus eventualis*²⁷¹.

The argument that foresight of a remote possibility is simply never applied as a criterion in our courts (despite the authoritative statements establishing it as such in the case law), and thus serves no practical utility is an important criticism. Certainly, if this argument were valid, the imposing academic debate surrounding the required degree of foresight for *dolus eventualis* would be largely irrelevant. However, it is submitted that this argument too can be rebutted. Nevertheless, Morkel's identification of the inherent circumspection of the courts in dealing with the entire question of foresight²⁷² is, it is submitted, basically sound. The caution of the courts is born of the desire not to impose *ex post facto*, "armchair" reasoning upon the facts of a case. This trend is to be welcomed insofar as it serves as a constant reminder to the courts not to impose an extrinsic logic in dealing with the inferential reasoning required to prove foresight. However, it is further submitted that this reminder to the courts should not be allowed to obscure the principled scientific-legal approach by excluding foresight of a remote possibility from the consideration of the courts on policy-based grounds.

There have also been criticisms levelled at the jurists who, in criticizing the acceptance of a remote possibility, state that foresight of something more than a slight possibility

271. FFW Van Oosten "Dolus Eventualis en Luxuria - Nog 'n Stuiwer in die Armbeurs" (1982) 45 THRHR 183 at 193. See 165ff below for a discussion of the issue of knowledge of unlawfulness.

272. See 124 above.

is required for *dolus eventualis*²⁷³. Van Oosten has criticized the views of Burchell and Hunt, who opine that only foresight of a real possibility suffices as a requirement for *dolus eventualis*²⁷⁴, on the grounds that according to the viewpoint of the learned authors, even if the accused has reconciled himself to the result occurring, there would be no *dolus eventualis*²⁷⁵, and at most the accused would incur liability on the basis of *luxuria*²⁷⁶. Writers such as Snyman are subject to the same criticism in requiring a reasonable possibility²⁷⁷ - once again the accused with foresight of a 'unreasonable' possibility, who had reconciled himself to the possibility of the risk occurring would escape liability for intentional conduct²⁷⁸.

A further pertinent criticism is that all the terminology used to describe foresight of greater than a remote possibility is subject to interpretation and is consequently somewhat vague²⁷⁹. Terms such as "real", "reasonable", "concrete" and "substantial" are all relative terms,

273. The views of these jurists are reflected above at 125-7.

274. Burchell and Hunt (n2) 146.

275. Van Oosten (n271) 189.

276. Burchell and Hunt hold that the remoteness of a possibility of harm occurring is the dividing line between *dolus eventualis* and conscious negligence (*luxuria*). For a discussion of this view, see 211-4 below.

277. Snyman (n3) 199.

278. In terms of Snyman's theoretical framework, conscious negligence is not distinguished from *dolus eventualis* on the basis of foresight, but instead on the basis of volition. Conscious negligence would therefore not automatically follow. See (n670) below.

279. Such terms incorporate value judgments and are therefore inherently vague and open to interpretation.

subjectively defined by the person using them. It is therefore well-nigh impossible to describe exactly what the content of a possibility, which is greater than a remote possibility, entails. Furthermore, even terms such as "faint", "slight" and "remote" are subject to interpretation, making distinctions between the "more probable" and the "less probable" sets of terms rather hazardous. It is submitted that the simplest solution would be to accept that foresight of any possibility suffices for *dolus eventualis*²⁸⁰.

280. This solution remains somewhat simplistically phrased in this form, and should not be accepted without some qualification. The content of such foresight is discussed below at 339-348.

It is now necessary to examine the case law to assess the validity of the arguments of those who plead for a foresight requirement greater than a remote possibility.

Since 1958, when it was finally authoritatively settled in the case of Horn²⁸¹, that foresight of a possibility was sufficient to constitute the cognitive element of *dolus eventualis*, there have been a handful of cases which have been cited as authority for foresight of a real, reasonable or substantial possibility²⁸².

The first set of cases to be analysed are those requiring foresight of a "reasonable possibility". The earliest of these is Suleman²⁸³. As stated earlier, the preference of Holmes, J (as he then was) for this terminology is difficult to reconcile with his later judgments which established the concept of *dolus eventualis* and, more particularly, with the learned judge's unequivocal acceptance of a remote possibility²⁸⁴. The learned judge's insistence on

281. R v Horn 1958 (3) SA 457 (A).

282. As mentioned above, at 111ff, there have been a few cases which have suggested that foresight of a probability was required. The only explicit authority amongst these is the Rhodesian case of Mabena 1967 (3) SA 525 (R) 527, which simply expresses the foresight requirement as one of probability, without citing any authority for this view. The cases of Sikunyana 1961 (3) SA 549 (E), Mawena 1962 (1) 896 (FC), and Ntuli 1962 (4) SA 238 (W), express the foresight requirement as "likely". However, not one of these cases provides any strong authority for foresight of a probability. Sikunyana and Mawena simply apply the case of Valachia 1945 AD 826, which was decided before the seminal decision of Horn, and are therefore somewhat ambiguous (as is the use of "likely" in Valachia itself). The confusion in Ntuli has already been referred to above (at (n200)).

283. 1960 (4) SA 645 (N).

284. In cases such as S v Mini 1963 (3) SA 188 (A) 191 and S v De Bruyn 1968 (4) SA 498 (A) 510.

"reasonable possibility" in this judgment becomes even more mysterious when *Thibani*²⁸⁵ and *Nsele*²⁸⁶ are cited as authority, as both cases provide unequivocal authority for foresight of a remote possibility. In the light of these considerations, *Suleman* cannot be regarded as strong authority for the view that a more substantial degree of foresight is required for *dolus eventualis*. *

The next important case requiring foresight of a "reasonable possibility" is that of *Tazwinga*²⁸⁷. Beadle CJ cites (at 591) the cases of *Du Randt*²⁸⁸ and *Nemashakwe*²⁸⁹, both of which required foresight of "some risk to life". The learned judge then proceeds to accept in the next breath that the requirement is appreciation of "a reasonable possibility of risk to life"²⁹⁰. There is however no indication of how the learned judge established this requirement from the authority at hand. This is significant because the other cases which provide some authority for the "reasonable possibility" proposition in actual fact simply follow *Tazwinga*. In *John*²⁹¹, for example, the court merely cites *Nemashakwe*²⁹² (which required foresight of 'some risk to life') and *Tazwinga*²⁹³, without further examining the

285. 1949 (4) SA 720 (A).

286. 1955 (2) SA 145 (A).

287. 1968 (2) SA 590 (RA).

288. 1954 (1) SA 313 (A).

289. 1967 (3) SA 520 (RA).

290. At 591.

291. 1969 (2) SA 560 (RA) 565.

292. 1967 (3) SA 520 (RA).

293. 1968 (2) SA 590 (RA).

issue, whilst in *Ushewokunze*²⁹⁴, Beadle CJ simply cites the relevant portion of his own judgment in *Tazwinga*²⁹⁵ as being a synopsis of the current state of the law.

The solitary case requiring foresight of a substantial risk is that of *Steenkamp*²⁹⁶, which does not examine the question of the degree of foresight at all, save for the adoption, without comment, of the "substantial risk" phraseology.

Lastly there remains a set of cases which require foresight of a real possibility. The case of *Ushewokunze*²⁹⁷ is the first of these. Beadle CJ accepts both "reasonable possibility"²⁹⁸ and "real possibility"²⁹⁹ as valid terms in his judgment, indicating some equivalence between the concepts. However, in respect of the foresight of a real possibility, the learned judge cites the submission of Hunt³⁰⁰ as authority that knowledge requires actual foresight of the real possibility in the circumstances. In the case of *Ostilly*³⁰¹, the learned judge indicates that "... to prove legal intention ... it must be shown that a

294. 1971 (2) SA 360 (RA) 363 E-H. Engers (n262) 222 observes that this dictum relates only to "special intent" crimes.

295. 1968 (2) SA 590 (RA).

296. 1960 (3) SA 680 (N).

297. 1971 (2) SA 360 (RA).

298. At 363 E-H.

299. At 364 B-C.

300. At 364 A of the judgment: "... In short, therefore, it is submitted that X has 'knowledge' if he actually foresees the real possibility that the goods have been stolen, and he nevertheless receives them, whatever his motive for abstaining from further enquiries and even though his suspicions cannot be characterised as "belief" ...".

301. 1977 (4) SA 699 (D & CLD).

real possibility of that consequence resulting was foreseen
 ..."³⁰².

As authority for this proposition, the learned judge cites Burchell and Hunt³⁰³. It is instructive to note that Burchell and Hunt cite the cases of *Ushewokunze* and *Ostilly* as authority for the proposition that foresight of a real possibility is required for *dolus eventualis*³⁰⁴. However in each of these cases, the learned judges were relying for their authority on Burchell and Hunt. It follows therefore that in effect, in citing *Ushewokunze* and *Ostilly* as authority, Burchell and Hunt are relying on their own authority.

The final case which may be cited as authority for the "real possibility" view is that of *Moodie*³⁰⁵, a case of fraud, which simply accepted the need for a "real" possibility without reference to any other authority, and in the following terms:

"... such intention [intention to defraud] is proved if an accused person knew that there was a possibility that his cheque would not be met, not merely a remote possibility but a real possibility
 ..."³⁰⁶.

302. At 728 DE.

303. At 728 E. "... It is sufficient if the accused, having foreseen the real possibility of the existence of the circumstances in question, nevertheless persisted in his conduct irrespective of whether it existed or not ...".

304. Burchell and Hunt (n2) at 148 in respect of foresight of consequences and at 158 in respect of foresight of circumstances.

305. 1983 (1) SA 1161 (C).

306. At 1162B.

It may therefore be concluded that the casuistic authority for the proposition, that foresight of more than a remote possibility is required for *dolus eventualis*, is somewhat limited, and in a number of respects tends to be confusing. None of the important Appellate Division judgments supporting foresight of any possibility are mentioned or distinguished from the above cases in the judgments handed down by the courts. Furthermore, there has been no attempt in the case law to provide an argument in favour of the acceptance of a real possibility as the standard for legal intention in South African criminal law, and in the majority of cases the requirement seems to be postulated on the strength of no more authority than the "regsgevoel" of the particular judge in question³⁰⁷.

In order to further assess the relative weight of these cases it is important to contrast them with the cases regarded as providing authority for the acceptance of foresight of a remote possibility as sufficient for *dolus eventualis*. Morkel's contention that upon closer scrutiny, it can be seen that "... the courts in fact require a real

307. It is possible that these judges may have been influenced by the theoretical discussion of *dolus eventualis* in other legal systems. In Continental legal systems, such as Germany, there are two theories of *dolus eventualis*: the "consent theory" (Einwilligungstheorie) and the "probability theory" (Wahrscheinlichkeitstheorie). The former requires foresight of the possibility of harm, and that the actor "takes the consequence into the bargain"; while the latter focuses on the degree of probability of the harm as perceived by the actor: where he is "confident" that the consequence will not occur, there is negligence, where he "expects" that it will occur, there is *dolus eventualis*. See H Silving *Criminal Justice*, Vol II (1971) 684-6. It appears that the proponents of the "real possibility" test have been influenced by the approach embodied in the Wahrscheinlichkeitstheorie, while the Einwilligungstheorie approach has prevailed in our law. A detailed discussion of these approaches in the European context is however beyond the scope of this thesis.

possibility ...". and that the cases expressing the view that a remote possibility suffices "... do not establish the inference that this is the legal position ..." 308, deserves closer examination. The cases of *Thibani*, *Horn*, *Malinga* and *De Bruyn* 309 are cited as examples in this regard by Morkel.

Schreiner JA in *Thibani*, in discussing the question of foresight, attempts to give substance to the term likely 310, as used in the case of *Valachia* 311. The learned judge points out that the term is potentially confusing and misleading 312, noting the court's cautious response to this problem in *Valachia* 313. Schreiner JA then proceeds to affirm that foresight of a mere possibility suffices for legal intention 314. before stating significantly; "... (f)ollowing the example set out in *Valachia's* case (*loc cit*) I shall add that provided the requisite recklessness is present it may even be correct to say that realisation of the possibility of death resulting,

308. Morkel (n239) 64.

309. *Thibani* 1949 (4) SA 720 (A); *Horn* 1958 (3) SA 457 (A); *Malinga* 1963 (1) SA 692 (A); *De Bruyn* 1968 (4) SA 498 (A), cited *ibid* n3.

310. At 729.

311. 1945 AD 826 at 831. Both *Thibani* and *Valachia* are murder cases.

312. As Schreiner JA observes in respect of the use of "likely": "... it is an elastic word, which may lead to misunderstanding unless its meaning in the context is explained ..." (at 729).

313. "... it may be that something less than this in certain respects will amount to murder ..." (at 831, cited in *Thibani* at 729).

314. "... I do not think that it would matter whether he thought that death would very probably result or whether he thought that, though reasonably possible, it would very probably not result ..." (at 729).

even as a remote chance, would suffice ..."³¹⁵. At no stage does the learned judge allude to the necessity for a higher degree of foresight ("real"), and although the statement of the learned judge is obiter, it nevertheless is strongly persuasive in favour of a remote possibility³¹⁶.

The next important case to be considered is that of Nsele³¹⁷. Regarding the issue of degree of foresight of a possibility, Van den Heever JA does not make any significant contribution to the debate, although the learned judge reaffirms that foresight of a possibility suffices for *dolus eventualis*³¹⁸. However, Schreiner JA, in a separate concurring judgment states (in discussing the case of *Garnsworthy*)³¹⁹ "... provided that the risk must have been, and, therefore, by inference was, present to the mind of the accused, and provided that he was reckless whether or not it matured in death, I do not think that the seriousness of the risk is material ..."³²⁰. Although, once again, the learned

315. *Ibid* 729-30, although on the facts the learned judge finds "... it is not necessary for present purposes to go to that length ...".

316. All Appellate Division *obiter dicta* have strong persuasive value. As JTR Gibson points out in *Wille's Principles of South African Law* 7ed (1977) 8, although *obiter dicta* are not binding on other courts. "... if made by an eminent judge they are most valuable as reasoned statements, and they may very well influence the courts on a later occasion ...".

317. 1955 (2) SA 145 (A), also a murder case.

318. At 152 "... In the circumstances the inference seems to me inescapable that appellant must have foreseen the possibility - even the probability ..." of the result occurring and that "... he was reckless whether or not this foreseen possibility materialized ...".

319. *R v Garnsworthy* 1923 WLD 17, cited at 147.

320. At 148, the learned judge refers to the case of *Thibani* 1949 (4) SA 720 (A) at 729 as authority for this statement.

judge's statement is clearly *obiter*, the strength of the persuasive authority of the dictum cannot be disputed.

The case of *Horn* is widely regarded as the case in which it was finally unequivocally decided by the Appellate Division that foresight of a possibility constituted the cognitive element of *dolus eventualis*³²¹. In this case too, two separate concurring judgments were delivered. Beyers JA examines the decided cases dealing with intention to kill, including *Valachia* and *Thibani*³²², and concludes that in each of these cases "... the risk to life was real and substantial ..." one which, unquestionably, was "... likely to result in death ..." ³²³ and that the expression "... some risk to life involved ..." arose in this context³²⁴. The learned judge then turns his attention to the case of *Nsele* and cites the *obiter dictum* of Schreiner JA³²⁵, opining that this statement "... enlarges upon the question of risk ..." ³²⁶. After considering the case at hand in the light of these decisions, Beyers JA concludes that "... there are two essential elements in the enquiry, namely (1) an appreciation by the wrongdoer that his act entails a risk to life, and (2) recklessness on his part whether death ensues or not ..." ³²⁷, and further that neither of these elements

321. *R v Horn* 1958 (3) SA 457 (A), particularly Van Blerk JA's statements at 466-7. See Burchell and Hunt (n2) 144.

322. *R v Valachia* 1945 AD 826; *R v Thibani* 1949 (4) SA 720 (A), as well as *R v Sofianos* 1945 AD 809; *R v Huebsch* 1953 (2) SA 561 (A); *R v Du Randt* 1954 (1) SA 313 (A); at 462-4 of the judgment.

323. At 463.

324. *Ibid.*

325. *R v Nsele* 1955 (2) SA 145 (A) 148.

326. At 464.

327. At 465.

were proved by the State in this case. It is difficult to extract any guidance regarding degree of foresight from this dictum, as the phrase "a risk to life" is somewhat ambiguous³²⁸; however it is significant that the learned judge, in coming to his decision, states the following: "... But, that is not to say that a person who does foresee a risk of death is entitled, because the risk is slight, to 'take a chance' and, as it were, gamble with the life of another ..."³²⁹.

It is submitted that this statement indicates that the learned judge accepts that foresight of a slight possibility is sufficient, where the accused "takes a chance", to constitute criminal liability on the basis of *dolus eventualis*. Van Blerk JA, in dealing with the question of degree of foresight, makes it clear that "... actual appreciation ..." of a possibility is required³³⁰; furthermore "... the more likely death was, the stronger is the inference that he in fact appreciated the risk to life ..." ³³¹. Although the learned judge does not attempt to quantify the "possibility" of which he speaks, it is significant that there is no attempt on his part to limit such a concept to a "real possibility".

Morkel cites *Malinga*³³² as authority for the view that a remote possibility suffices. There is however no explicit support for this notion in the case, although Holmes JA follows the line taken in *Horn* in requiring foresight of a

328. 114 above.

329. At 465.

330. At 466.

331. At 467. It is submitted that implicit in this statement is an acceptance of a remote possibility as sufficient for the purposes of criminal liability.

332. 1963 (1) SA 692 (A), cited in Morkel (n239) 64n3.

possibility, the remoteness of the possibility being relevant to the subjective question of foresight thereof³³³. Once again, it may simply be noted that the court makes no attempt to restrict foresight to a real possibility.

The case of *Mini*³³⁴ also dealt with the crime of murder: the appellant stabbed the deceased, but the knife only penetrated three-quarters of an inch into the body of the deceased. As a result of the stabbing, the deceased died some ten days later. On an appeal from a murder conviction to the Appellate Division, it was found by the majority of the court that the accused did not have the requisite foresight in order to have intent to kill, and that the murder conviction had to be set aside. Williamson JA delivered the judgment on behalf of the majority of the court³³⁵. The learned judge used the phrase "... appreciates ... might ..." in assessing the degree of foresight³³⁶. This phraseology clearly is simply equivalent to possibility³³⁷, and does not favour the real possibility line. As in all cases where there is an indication that foresight of a mere "possibility" suffices, without any further quantifying adjective, there is an argument that such a formulation favours the acceptance of the remote

333. At 694 G-H. *Horn* 1958 (3) SA 457 (A) is explicitly cited as authority for this proposition. It may once again be submitted that this constitutes an implicit acceptance of the sufficiency of the foresight of a remote possibility for the purposes of criminal liability.

334. 1963 (3) SA 188 (A).

335. Steyn CJ and Wessels JA concurring.

336. At 192, 196.

337. This seems evident at 196 "... In this case, I am not concerned that an ignorant Bantu must necessarily have known that death was a possible result of the wound he was inflicting on the deceased".

possibility line³³⁸. A remote possibility may be remote, but it remains a possibility. Similarly, the "... appreciates ... might ..." formulation favours the acceptance of any possibility which is appreciated; a person who appreciates that a remote possibility may potentially result has foresight of such a possibility.

The minority judgment of Holmes JA is rather more direct in its approach, and its favouring of the remote possibility line. At 190, the learned judge sets out the requirement of foresight simply as "foresees the possibility", however at 191, on the facts of the case, the learned judge, in finding the accused guilty of murder, states the following "... In these circumstances it seems to me that, as a matter of logic and robust common sense, the only reasonable inference is that the appellant did foresee the possibility, even if, slight, of death resulting from what he was about to do and was doing ...". Although this dictum arises from a dissenting judgment, it nevertheless constitutes strong authority for the remote possibility approach.

Morkel's final example of a case favouring a remote possibility, which, in his view, does not however establish the inference that this is the legal position, is the case of *De Bruyn*³³⁹. All three judges in this case agreed on the result of the appeal against a conviction of murder in the Transvaal Provincial Division, confirming the conviction of the first appellant, and altering the verdict in respect of the second appellant to culpable homicide³⁴⁰.

338. As Engers (n262) 222 points out "... the very fact that the cases speak of foresight of a 'possibility' rather than a 'probability' is an indication that even a very remote possibility is sufficient ...".

339. *De Bruyn* 1968 (4) SA 498 (A).

340. The facts of this case may be briefly summarized as follows: "The first appellant wanted to 'teach the deceased a lesson'. With the help of the second

However the court was not in agreement on all the relevant issues, and each member of the court delivered a judgment. Van Blerk JA merely refers to foresight of a possibility ("moontlik") as a requirement, but does not attempt to describe such a possibility in any detail³⁴¹. In contrast Holmes JA enters into a broad discussion concerning the nature of *dolus eventualis* and its relationship to extenuating circumstances³⁴². The learned judge leaves the reader in no doubt whatsoever concerning his views on the degree of foresight required to constitute *dolus eventualis*. Discussing the requirements for *dolus eventualis* (on page 510 of the judgment), he uses the phrase "however remote" no fewer than three times in relation to subjective foresight of the possibility, thus emphasizing that foresight of any possibility will suffice for legal intention. Holmes JA's statement at 511 adds further weight to this view: "... if an accused ... were to admit that he foresaw the possibility of death, on the footing that anything is possible, that would contribute to a conviction for murder ...".

The judgment of Rumpff JA takes issue with Holmes JA's views on extenuation, concurring with the judgment of Van Blerk JA. As far as the question of degree of foresight is concerned, this judgment has been identified by some commentators as indicating that the learned judge favours foresight of a substantial possibility above foresight of a remote possibility³⁴³. This has been inferred from Rumpff

appellant he struck the diminutive deceased to the ground and kicked the deceased's head with his shod foot". (PJ Visser and JP Vorster *General Principles of Criminal Law Through the Cases*, 2ed (1987) 358).

341. At 499.

342. At 509 ff. This discussion is obiter, but is exceedingly valuable in clarifying the nature of *dolus eventualis*.

343. Visser and Vorster (n340) 364. See also Burchell and Hunt (n2) 146 n 174.

JA's description of *dolus eventualis* in the case of murder as "... die wete dat die dood kan intree en 'n aanvaarding van daardie gevolg ..." ³⁴⁴. However, it may be submitted that this definition does not necessarily favour foresight of a real possibility. "The knowledge that death could occur" (my translation) is somewhat ambivalent, as even a remote possibility could conceivably occur. To have knowledge of a possibility, as we have seen above, does not imply that such a possibility must necessarily be of a substantial nature ³⁴⁵.

The next important case concerning foresight of a remote possibility is that of *Fick* ³⁴⁶. Harcourt J rejected a submission by counsel for the appellant that before an inference of intention to kill could be established there had to be proof of foresight of a real or reasonable possibility in the following terms:

"... The requirement, as I appreciate the law, does not incorporate the adjectives which Mr Roux would wish to attach to the word 'possibility' as indicating what must be foreseen by an accused person. As I appreciate it, what must be foreseen is that there was an appreciation on the part of the *de cuius* that the injury, which he intends to inflict on another may cause death, and that he nevertheless inflicts that injury reckless whether death will ensue or not ... where there is no conscious infliction of an injury, what is required, as I appreciate the law, is that there should be, in the words of Holmes JA in *S v Sigwahla* 1967 (4) SA 566 (AD) at p570, the following situation ... [that] the accused subjectively foresaw the possibility of his act causing death and was reckless of such result ..." ³⁴⁷.

344. At 505.

345. It may therefore be submitted that there is also implicit support for foresight of a remote possibility in this statement.

346. 1970 (4) SA 510 (N).

347. At 514 F-H.

Burchell and Hunt criticize this judgment on the grounds that "depending on the meaning one gives to the word 'appreciation', there could be little or no difference between the test of appreciation by the accused that his conduct may cause death and the test of foresight of 'real' or 'reasonable' possibility. And in any event, it seems that, in the circumstances of the case, Fick must have foreseen a 'real' or 'reasonable' possibility of risk to the lives of the complainants ..."348. With the greatest respect, it is submitted that this line of reasoning is difficult to follow. Firstly, there ought to be no confusion regarding the learned judge's use of the word "appreciation", as it is clear that the learned judge's reference to *Sigwaha* provides a context in which this term ought to be understood. It is submitted therefore that the term "appreciation" is simply equivalent to the fact that "... the accused subjectively foresaw the possibility ...".

In the light of the learned judge's rejection of the real possibility line, it follows that this "appreciation" effectively means foresight of any possibility. Burchell and Hunt's further submission that "in any event" Fick had foresight of a "real" or "reasonable" possibility of harm adds nothing to the issue at hand: whether or not the foresight of the accused on the facts was of a real possibility, a probability or a virtual certainty is not significant; what is significant is that in law, the finding of the court (per Harcourt J³⁴⁹) is that foresight of any possibility suffices for *dolus eventualis*, an appreciation of the possibility of harm occurring is enough to constitute the cognitive element of legal intention.

348. Burchell and Hunt (n2) 148.

349. James JP concurring.

The formulation of *dolus eventualis* in *De Bruyn* by Holmes JA, in which the learned judge described the cognitive element of *dolus eventualis* in relation to murder as being "subjective foresight of the possibility, however remote, of his unlawful conduct causing death to another ..." was cited as the existing law by the court in the cases of *Dube*, *Pepenene* and *Sinzani*.

It is not until 1980 that another case is reported in the Appellate Division in which the issue of the degree of foresight is involved. In the case of *Dladla*, Jansen JA 350. At 510.

351. 1972 (4) SA 515 (W) 520. Engers (n262) 221, criticizes this judgment for its confusing terminology, such as "... subjectively what he ought to have foreseen ..." (which is a contradiction in terms as whenever we consider what the accused ought to have done, an objective test is involved) and "did he subjectively reasonably foresee it?" (which similarly combines the objective reasonable test and subjectivity within the same phrase). Engers at 225, further points out that in not finding that the accused foresaw the possibility of death, the learned judge (Irving Steyn J) was reflecting the "inherent conservative approach" which the courts adopt and that this judgment is an example of the approach in our courts whereby a remote possibility is held to be "... not foreseen at all, not even remotely ..." (at 222). Van Oosten (n271) cites *Dube* as authority for the proposition that foresight of at least a real or reasonable possibility is required for *dolus eventualis*. It is submitted that the learned writer is mistaken in this view, in the light of the fact that Irving Steyn J cited Holmes JA's formulation of *dolus eventualis* in *De Bruyn* as authority (thus providing support for the remote possibility line) and furthermore that, (at 521) on the facts, the learned judge found that "there can be no question of his not caring about [the risk]; he did not think about it ...". It was therefore the view of the court that *Dube* simply did not have foresight of the possibility of the harm occurring.

352. 1974 (1) SA 216 (O) 220.

353. 1979 (1) SA 935 (E) 938.

354. 1980 (1) SA 1 (A).

refers to "... die subjektiewe beskouing van die dader toe hy die handeling begaan het, of hy die moontlikheid as 'n vae of sterk moontlikheid beskou het ..."³⁵⁵. As Labuschagne points out³⁵⁶, further interpretation of the phrase "vae of sterk moontlikheid" can be gleaned at 4H in the judgment, where the learned judge says:

"... Die kwessie van bewys moet ook nie toegelaat word om die saak te vertroebel nie. By bepaling of die dader subjektief die moontlikheid van die gevolg voorsien het en hom daarmee vereenselwig het, sal wel afleidings gemaak moet word op grond van die objektiewe waarskynlikhede, wat op algemene menslike ervaring berus. Dit sal egter seker selde bo redelike twyfel bevind kan word dat 'n dader 'n uiters onwaarskynlike moontlikheid voorsien het en hom daarmee versoen het, tensy hy dit miskien self erken ..."

Labuschagne points out that it can be inferred from this passage that foresight of any possibility will suffice for dolus eventualis³⁵⁷. The learned judge, by incorporating discussion of foresight of a remote possibility into the question of proof of intention, by necessary implication incorporates foresight of any possibility into the notion of dolus eventualis.

As Morkel's assessment of the position of foresight of a remote possibility (cited above)³⁵⁸ was written in 1981, it is fitting to evaluate this assessment at this point, as the above cases would all have been available at the time of writing his assessment. First it is submitted that Morkel

355. At 3G.

356. Labuschagne (n255) 164 at 165.

357. *Ibid.* Van Oosten (n271) 184 does not regard the case of *Dladla* as providing authoritative support for any particular degree of possibility to be required for foresight. It is submitted that Labuschagne's approach is correct.

358. Morkel (n239) 64 n3.

is incorrect in regarding the cases in which the courts expressed support for the view that a remote possibility would suffice for *dolus eventualis* as "isolated instances". As is evident from the above discussion, there is a strong body of support for this view in the case law. Secondly, it is submitted that Morkel's view that these cases do not establish the inference that this is the legal position is a mistaken view. The authorities for the view that only foresight of a real or substantial possibility will suffice are by no means compelling³⁵⁹, whereas those cases favouring foresight of a remote possibility are mainly Appellate Division judgments. Despite the obiter nature of many of the statements regarding foresight of a remote possibility, it is significant that no judge has ever explicitly refuted any of these dicta, thus implying a tacit acceptance thereof³⁶⁰.

Thirdly, Morkel's contention that a scrutiny of cases which express the view that a remote possibility will suffice "... tends to show that the courts, in fact, require a real possibility ..." ³⁶¹ cannot be supported. On the contrary, as can be seen from the above analysis of these cases³⁶², there is no support whatsoever for the notion of a real possibility amongst them. Morkel's statement supporting this contention, that crimes are committed in "real factual circumstances, and that the statements of the courts must be evaluated in the light of these circumstances"³⁶³, seems to

359. See 134-8 above. There is not a single Appellate Division judgment prior to 1981 in support of a real or reasonable possibility.

360. Cases that require merely foresight of a possibility (as mentioned at (n194) above) also provide support for the remote possibility line - see Engers (n262) 222.

361. Morkel (n239) 64 n3.

362. 138-149 above.

363. *Ibid.*

refer to proof of foresight rather than to add anything to the question of degree of foresight³⁶⁴.

Even if Morkel's assessment had some validity at the time³⁶⁵, a few recent cases stand in stark contradiction to his views. In the case of *Shaik*³⁶⁶, Diemont JA stated the following in respect of foresight of a remote possibility:

"... No doubt the more remote or unlikely the possibility of injury, the more difficult it will be for the court to draw the inference that the accused foresaw what might happen (see *S v Dladla en Ander* 1980 (1) SA 1 (A) at 4) but, as was stated by Holmes JA in *S v De Bruyn en 'n Ander* 1968 (4) SA 498 (A) at 510, legal intention is present if the accused '... foresees the possibility, however remote, of his act resulting in the death of another ...'. In other words, if an accused admits that he foresaw a possibility of injury or worse, or there is other direct evidence to that effect, or if the facts are such that an adverse inference must be drawn, it will not assist the defence to show that the risk of injury or worse appeared unlikely, highly improbable or remote ..."³⁶⁷.

Jansen JA, in the case of *Ngubane*³⁶⁸ further emphasized the irrelevance, in principle, of the remoteness of the risk foreseen when he states:

"In principle it should not matter in respect of *dolus eventualis* whether the agent foresees (subjectively) the possibility as strong or faint, as probable or improbable ... provided his state of mind in regard to that possibility is

364. Cf Loubser and Rabie's analysis below at 156-60.

365. It is submitted that the assessment is inaccurate.

366. 1983 (4) SA 57 (A).

367. At 62 D-F. Trengrove and Cillie JJA concurred in this judgment.

368. 1985 (3) SA 677 (A).

'consenting', 'reconciling' or 'taking into the bargain' ..."³⁶⁹.

It is furthermore notable that in the case of *Mazibuko*, heard in the Witwatersrand Local Division (per McCreath JP), the court convicted the accused of murder on the basis of *dolus eventualis*, despite the fact that the court found that the foresight of the possibility of death on the part of the accused could have been "... no more than [foresight of] a remote possibility ..."³⁷⁰.

369. At 685 F-G.

370. *S v Mazibuko and Others* 1988 (3) SA 190 (A) at 199-200. The Appellate Division found that "... the irregularity was not of the order which per se vitiated the trial ..., but since the possibility of prejudice arising from the irregularity could not be ruled out ..., the conviction and sentence on the count of murder could not stand ..." and remitted the matter to the court *a quo* to consider the reopening of the case of No 1 accused. *S v Goosen* 1989 (4) SA 1013 (A) (which related to the separate trial of a co-accused of *Mazibuko*) refers to the result of this remission to the court *a quo* (at 1015 FG) "... Volledigheidshalwe dien gemeld te word dat nadat hierdie Hof in *S v Mazibuko and Others* (supra) uitspraak gegee het, die saak teen die vier medebeskuldigdes voor McCreath R en assessore heropen is. Mazibuko het toe getuig dat die karabyn as't ware per ongeluk afgevuur is. Die resultaat was dat in 'n ongerapporteerde uitspraak, gedateer 10 Augustus 1988, al vier onskuldig aan moord bevind is. Omdat Mazibuko egter na die Hof se mening nalatiglik die oorledene se dood veroorsaak het, is hy op die moordklag aan strafbare manslag skuldig bevind en gevonnissen tot ses jaar gevangenisstraf ...".

Despite this revised finding on the facts, it is submitted that the readiness of the trial court (per McCreath J) to hold the accused liable for murder on the basis of their *dolus eventualis*, in the form of foresight of a remote possibility, provides further support for the line of authority that, in principle, foresight of a remote possibility suffices for *dolus eventualis*.

Apart from the support for the remote possibility view in the cases mentioned above, a number of jurists are also in favour of this view³⁷¹.

Engers states that "... (t)aking the ordinary meaning of the words, we may say that a person 'foresees a possibility' when he contemplates that the given event may occur. No matter how unlikely he considers such occurrence, the moment he contemplates that it may occur he foresees it as a possibility. This is by and large also the view of our courts ..." ³⁷². It is therefore clear that Engers supports the view that foresight of a remote possibility constitutes the requisite cognitive component of *dolus eventualis*. However, recognizing the controversy surrounding the issue, the learned author attempts to clarify how such a notion should be used in our law. Engers poses the question whether foresight of a very remote possibility can be linked to acting recklessly, and concludes that if the accused

371. No discussion of any question arising in South African criminal law is complete without a reference to De Wet and Swanepoel's views. Loubser (n57) 139 observes that the work of Professor J C De Wet "... het die afgelope paar dekades die toon aangegee wat die regs wetenskaplike ontleding van die algemene beginsels van die Suid-Afrikaanse strafreg betref, en dit sal ook in die afsienbare toekoms so wees ... ". No specific statement is made by the learned authors regarding the degree of foresight. It may be argued that although there is no explicit statement in this regard, the observation of the learned authors, at (n4) 140, that the prevailing trend in our law is that "... geleidelik is al hoe meer klem daarop gelê dat dit nie gaan oor wat die beskuldigde moes of behoort te gesien het nie, maar oor wat hy inderdaad voorsien het ...", indicates no quantifying of foresight and thus no limit on foresight apart from the fact that the accused had to actually have foresight of the possibility ("... inderdaad voorsien ..."). However, as Morkel (n239) 65) points out, the learned authors' view the reconciliation of the actor to the risk (the voluntative element) as more important (see De Wet and Swanepoel at 140).

372. Engers (n262) 221.

discounts the possibility, because the chances of it occurring are, in his view, negligible, then he is not taking a conscious risk (and there is therefore no *dolus eventualis*), "... whereas if he thought of it as a real or probable possibility, then he did take such a risk, and *dolus eventualis* would have been present ..." 373.

This reasoning has led Van Oosten³⁷⁴ to regard Engers, along with Burchell and Hunt, as a proponent of the view that there can be no recklessness without foresight of at least a real possibility³⁷⁵. To adopt this point of view however would be to acknowledge that Engers' opinion is inherently contradictory: it is his view that foresight of a remote possibility suffices for the cognitive component of *dolus eventualis* (foresight), but excludes the voluntative component (recklessness) - such foresight is therefore at the same time sufficient for *dolus eventualis* and insufficient for *dolus eventualis*. It may be submitted that the lack of clarity of the terms used by Engers may have contributed to this confusion. Engers speaks of the accused "discounting" the possibility of the harm occurring on the grounds of remoteness, whereupon he cannot be said to have taken a conscious risk³⁷⁶. If one gives the word "discount" its ordinary meaning in the context, it can be equated to "disregard". This submission becomes clearer if it is accepted that disregarding the possibility would be akin to ruling out the risk, in which case the accused indeed cannot

373. *Ibid* 223.

374. Van Oosten (n271).

375. At 186-7; "... Anders as Burchell en Hunt vereenselwig Engers dus die werklikheid of verwyderheid van die voorsiene moontlikheid met die 'roekeloosheidselement' of 'onverskilligheidselement' van *dolus eventualis*".

376. Engers (n262) 223.

be said to have taken a conscious risk³⁷⁷. It is therefore submitted that this interpretation of Engers is to be favoured so that logical consistency may prevail. Engers' use of the terms "real or probable" possibility only create confusion in the light of his unequivocal assertion that "... to say that foresight of a remote possibility is not foresight is straining both language and logic ..."³⁷⁸. It is submitted that Engers is trying to indicate that the possibility was "real" to the actor in the sense of being perceived as a potential consequence, rather than trying to establish a foresight requirement greater than a remote possibility.

Van Oosten also favours a remote possibility as sufficient foresight for *dolus eventualis*³⁷⁹ as does Du Plessis³⁸⁰, who approvingly states the law to be that "a possibility actually foreseen no matter how remote, is a possibility and suffices for *dolus eventualis* ..."³⁸¹. Loubser, writing in 1979, supports foresight of any possibility as sufficient: "... Dit is te betwyfel of 'n minimum mate van sekerheid hoegenaamd voorgeskryf kan word ... Dit wil voorkom asof die enigste logies regverdigbare kriterium steeds bloot die aanwesigheid al dan nie van 'n subjektiewe moontlikheidsbewussyn is ... Mits daar so 'n subjektiewe moontlikheidsbewussyn gepaardgaande met onverskilligheid ten

377. The issue of ruling out the risk is discussed above at 128. See also the discussion at 212-5 below.

378. Engers (n262) 223.

379. Van Oosten (n271) 192. Van Oosten criticizes foresight of a real possibility as a requirement for *dolus eventualis* since it leads to "... onbevredigende en teenstrydige resultate ...". The gist of his arguments may be found at 132 above.

380. JR Du Plessis *The Law of Culpable Homicide in South Africa* (D Phil thesis, Rhodes University, 1986).

381. At 153.

opsigte van daardie moontlikheid bewys word, is *dolus eventualis* aanwesig ..."³⁸².

Almost a decade later, Loubser once again expresses his views on the question of the degree of foresight, in conjunction with Rabie³⁸³. The views of the learned authors may be gleaned from the following extract:

"... It is submitted that too much emphasis must not be placed upon the mere contemplation by the accused of the theoretical possibility of the consequence in question, with a consequent neglect of his consideration as to whether or not that possible consequence will actually ensue. It is not only the abstract statistical possibility that must be considered in establishing the accused's intention, but that possibility, and especially the likelihood of its occurrence in the light of the particular circumstances of the case in question. In this sense the consequence must at any rate be 'concretely' possible, as Morkel suggests. In short, the accused who does not foresee a possibility as real, does not foresee that it will materialize in the circumstances It appears therefore that what is required is not merely foresight of an abstract possibility of a consequence, but that the accused concluded that it might occur in the particular circumstances. It follows that an accused who considers a possibility as remote, but nevertheless foresees that it may ensue in the circumstances, has *dolus eventualis* ..."³⁸⁴.

The learned authors later reaffirm their support for the view that foresight of a remote possibility suffices for the cognitive element of *dolus eventualis*, in the following terms:

382. Loubser (n57) 141-2.

383. Loubser and Rabie (n76).

384. At 418.

"... the cognitive element of dolus eventualis requires foresight of the possibility of the harmful result in the sense of a conclusion that the result may occur in the particular circumstances. A person who has come to such a conclusion and nevertheless proceeds to act, reckons with the possibility of the harmful result in question and therefore acts intentionally. The degree of probability of the occurrence of the harmful result will be of evidential importance regarding the inference as to whether the actor subjectively concluded that the harmful result may occur, but foresight of a real or substantial possibility of such occurrence is not required ...³⁸⁵.

It is submitted that the learned authors' cogent argument is entirely correct in its conclusion that foresight of any possibility of harm occurring is sufficient³⁸⁵. However, the reasoning of the learned authors bears closer examination. At 418, "... an abstract statistical possibility ..." is rejected in favour of a conclusion by the accused that the possibility might occur in the circumstances. There can be no disputing this reasoning. However, the learned authors, referring to the likelihood of the occurrence of the possibility in the light of the case's particular circumstances, require that the consequence be "... concretely possible, as Morkel suggests ...", stating that "... the accused who does not foresee a possibility as real, does not foresee that it will materialize in the circumstances ...". It is submitted that the use of terminology such as 'concrete' and 'real' only serves to sow confusion. Accepting that the learned authors only require foresight of a remote possibility of a consequence for criminal liability to ensue, it is necessary to ascertain

385. Loubser and Rabie (n76) 434.

386. Snyman's reference to Loubser and Rabie (n76) as authority for the view that the foreseen possibility "... must be a concrete one ..." ((n3) 199n9) cannot be supported in the light of the two extracts from Loubser and Rabie cited above.

the intended meaning of such terminology. It appears that the learned authors are attempting to stress that the accused must have actual foresight of the possibility of harm occurring. However it is submitted that implicit in foresight as the acceptance of the possibility (however remote) of harm occurring, is the necessity of the possibility being "real" or "concrete" to the actor. If such possibility were not "real" in this sense, it could hardly be classified as foreseen, as the risk of the harm occurring would have been ruled out by the actor, and there could be no foresight or intention. It is therefore submitted that any use of such terms as "real" or "concrete" to describe foresight is at best tautologous and at worst highly confusing.

Furthermore, the analogy with Morkel's requirement of foresight of a 'concrete' possibility is particularly unhappy. Morkel attempts to formulate this requirement by drawing a distinction between foresight "... to such a degree of probability that he [the perpetrator] has to count on (reckon with) its existence - ie that he foresees it as concretely possible ..." ³⁸⁷ and foresight of a lesser possibility. The learned author seeks to distinguish between the different forms of foresight through the use of terminology which describes the attitude of the actor towards the foreseen risk: an actor who foresees "... certain consequences as following from his conduct but at the decisive moment decides that it will not occur ..." is consciously negligent ³⁸⁸ (as a result of unreasonably ruling out the possibility of the harm occurring) in

387. DW Morkel "The Distinction Between Dolus Eventualis and Advertent Negligence" (1981) 5 SACC, 162. As Morkel elaborates at 173, "... according to the accused on a preponderance of probability the 'damage' is to result from his conduct ...".

388. *Ibid* 172.

contrast to the actor who trusts that the foreseen consequences will not occur (foresight of a remote possibility³⁸⁹) and the actor who hopes that the foreseen consequences will not occur (foresight of a 'concrete' possibility³⁹⁰). Although it is clear from Morkel's discussion that foresight of a remote possibility, despite its remoteness, nevertheless is a conscious awareness of the possibility of the harm occurring, it is equally clear that the learned author does not favour liability for intentional conduct where the foresight is merely of a remote possibility³⁹¹. Instead Morkel insists on the standard

389. *Ibid* 170-3.

390. *Ibid*.

391. It is evident from Morkel's example at 171-2 that his understanding of the term 'trust' (used by him to describe the mental state relating to foresight of a remote possibility) does not encompass the actor ruling out the risk of the harm occurring, but rather reflects an evaluation by the actor, in the light of his perception of the circumstances, of the possibility of the risk of harm occurring being remote. Thus, in Morkel's theoretical framework an actor who 'trusts' that a possibility of harm will not occur still has foresight of the possibility of the harm occurring, although he regards this possibility as remote. Although he has foreseen the risk of harm, he persists in his conduct. It is therefore submitted that Morkel's attempt to designate foresight of less than a 'concrete' possibility as a lack of foresight is unacceptable: the fact that the actor does not "... at the decisive moment foresee the relevant results as concretely possible ..." (173), does not mean that the actor is negligent (as Morkel indicates), because he still has foresight of the possibility of harm occurring. It is contrary to legal logic to describe a state of mind as absence of a state of mind. The learned author's adaptation of the dictum in *Dladla* 1980 (1) SA 1 (A) 4 is therefore not persuasive, as it interprets subjective foresight in terms of the limitation he himself places on foresight (at 173). It may further be observed that the distinction between "hope" and "trust" is a vague one, incapable of certain definition, and problematic in terms of legal certainty.

being foresight of a concrete possibility, thus qualifying the degree of foresight required.

It may therefore be submitted that the approval by Loubser and Rabie of Morkel's "concrete" possibility, despite their rigid adherence to the remote possibility line is unfortunate as it creates a farrago of conflicting terminology.

It is now necessary to turn to the latest developments in the law. Although, as stated above, it is to be welcomed that the courts exercise an inherent caution in relation to proof of intention, so that the burden of proof is not lightly discharged by the State, it is problematic when this caution results in the nature of intention being qualified. It appears that the Appellate Division has begun to move in this direction in the last two cases before it dealing specifically with the nature of *dolus eventualis*, and that a consequent movement towards the requirement of foresight of a real possibility has taken place.

A number of jurists have favoured the view that "... if the possibility of the result occurring was remote or far-fetched, *dolus eventualis* will probably be absent in that [the accused] did not reconcile himself to the possibility that the result might ensue ..."³⁹². This view seems to have been accepted by the Appellate Division in the cases of *Ngubane*³⁹³ and *Beukes*³⁹⁴.

In *Ngubane*³⁹⁵, Jansen JA states that:

392. Snyman (n3) 199. See also Engers (n262) 223.

393. 1985 (3) SA 677 (A).

394. 1988 (1) SA 511 (A).

395. 1985 (3) SA 677 (A).

"... In principle it should not matter in respect of *dolus eventualis* whether the agent foresees (subjectively) the possibility as strong or faint, as probable or improbable ,, provided his state of mind in regard to that possibility is 'consenting', 'reconciling' or 'taking into the bargain'. However the likelihood in the eyes of the agent of the possibility eventuating must obviously have a bearing on the question whether he did 'consent' to that possibility. No doubt this is what Snyman (*Sirairreg* at 169) has in mind when he states that '... as die dader die gevolg slegs voorsien as 'n verwyderde of vergesogte moontlikheid is daar na my mening nie *dolus eventualis* nie ...'"³⁹⁶.

The learned judge goes on to add³⁹⁷ that:

"... if the agent persists in his conduct despite foreseeing a consequence as a real or concrete possibility, the inference could well be drawn that he 'reconciled' himself to that consequence, that he was 'reckless' of that consequence ..."³⁹⁸.

The views of the learned judge have however been roundly criticized. Paizes³⁹⁹ responds to Jansen JA's statement as follows:

"... The inference ... is that one is less likely to consent to or reconcile oneself to or take into the bargain consequences if one foresees the likelihood as real or concrete ... the fallacy of such a proposition is patent: one who acts after foreseeing the real possibility of his act causing

396. At 685 F-H. The quote from Snyman is in substance equivalent to the quote at (n392) above.

397. At 686 A-B.

398. Thus, persistence in conduct despite foresight of a real or concrete possibility results in the inference of the volitional element or 'consent' to the consequences (according to Jansen JA). It is questionable whether this statement relates to a stipulation of the necessary degree of foresight required for liability, or whether it simply relates to proof by inferential reasoning.

399. Paizes (n162).

the death of another consents to the real possibility of death ensuing; one who acts after foreseeing only the slight possibility of his act causing the death of another reconciles himself to the slight possibility of death. In short, one who performs a voluntary act 'reconciles himself' to or 'takes into the bargain' nothing more and nothing less than what he foresees at the time he performs that act ..."⁴⁰⁰.

Whiting agrees with Paizes⁴⁰¹, stating that "... (b)y acting with foresight of a remote possibility that a result will occur, ... one necessarily reconciles oneself to there being a remote possibility that it will occur or takes this remote possibility into the bargain If a person sees a risk as only very slight, he is surely more likely to reconcile himself to it or take it into the bargain than if he sees it as substantial ..."⁴⁰².

However, similar reasoning to the *Ngubane* court was applied in the case of *Beukes*⁴⁰³. After referring to the difficulty of proving foresight of a remote possibility⁴⁰⁴, Van Heerden JA remarks:

"... Dit kom my dus voor dat die tweede element normaalweg slegs bevredig is indien die dader die intrede van die gevolg as 'n redelike moontlikheid voorsien het ..."⁴⁰⁵.

400. At 638.

401. Whiting (n162).

402. At 445. As JM Burchell points out ("Recent Cases : S v Beukes 1988 (1) SA 511 (A)" (1988) 1 SACJ 157 at 158): "... Aside from the fact that it is difficult to grasp the difference between the conscious taking of a risk and accepting the foreseen possibility into the bargain, it is clear that a person may equally accept into the bargain a real or remote possibility of a consequence occurring ...".

403. *Beukes* 1988 (1) SA 511 (A).

404. At 522 C-E.

405. At 522 E.

Paizes questions the relevance of the problems of proof upon which the learned judge bases his conclusions ⁴⁰⁶. First, Paizes points out that it is not true that it is more difficult to prove foresight of a remote possibility than foresight of a real or substantial possibility, by means of inferential reasoning, and that in fact the opposite is usually true⁴⁰⁷. Secondly, the requirement set out by Van Heerden JA that the necessary inference is only drawn if the facts indicate that there was an objectively assessed, reasonable possibility that the consequence would result⁴⁰⁸, is criticized by Paizes. The learned author points out that the reasonable possibility of a consequence, objectively viewed, does not entitle the court to infer subjective foresight of such a possibility⁴⁰⁹. Furthermore, as Paizes points out:

"... even if one may, in the circumstances, infer such foresight from facts which indicate that, objectively viewed, there was a reasonable possibility of the consequence ensuing, this does not ... furnish a rational basis for concluding (as Van Heerden JA seems to have done at 522 E-F) that one only takes into the bargain or reconciles oneself to a consequence if one foresees the chance of that consequence ensuing as reasonably possible... "⁴¹⁰.

406. Paizes (n162) 640.

407. *Ibid.* "... It would take less, for instance, to persuade one that an accused whose act caused the death of the deceased foresaw the possibility of his act causing that result as a one in a hundred chance than that he foresaw it as, say, a one in ten chance ...".

408. *Ibid.*

409. *Ibid.* "... It is only where this is the only reasonable inference, that is, where all other reasonable inferences are excluded ...".

410. *Ibid.*

The learned author concludes that Van Heerden JA has attempted to forge a fundamentally unsound connection between "... the substantive principles relating to the degree of foresight required for legal intention ..." and "... the rules governing inferential reasoning ..."⁴¹¹. It is therefore submitted that the attempts of the court in *Ngubane*⁴¹² and *Beukes*⁴¹³ to use the volitional component of *dolus eventualis* to qualify the degree of foresight required for the cognitive component of *dolus eventualis* are objectionable in principle. As Whiting cogently states "... even if it were to be accepted that reconciling oneself to a possibility or taking it into the bargain is something distinct from acting with foresight of that possibility, it would still seem wrong to say that, if when he acted a person foresaw the happening of a result only as a faint or remote possibility, this would tend to indicate that he did not take this possibility into the bargain or reconcile himself to it. Indeed, the exact opposite would seem to be true ..."⁴¹⁴.

411. *Ibid.*

412. *Ngubane* 1985 (3) SA 677 (A).

413. *Beukes* 1988 (1) SA 511 (A).

414. Whiting (n162) 445.

KNOWLEDGE OF UNLAWFULNESS

The element of knowledge of unlawfulness in respect of *dolus eventualis* has seldom, if ever, been dealt with as an independent requirement to be proven by the prosecution. Generally the element of unlawfulness seems to be regarded by the courts as implicit in the subjective foresight requirement⁴¹⁵ and it is therefore dealt with in these terms by much of the case law. It is therefore appropriate to consider the element of knowledge of unlawfulness at this point in the enquiry.

A number of jurists have discussed the element of unlawfulness in more explicit terms than is usual in the case law. In discussing the cognitive element required for intention, Snyman identifies two subsections, "... the first being knowledge of the proscription, and the second knowledge of the unlawfulness of the act ..."⁴¹⁶. Labuschagne includes knowledge of unlawfulness in his analysis of *dolus eventualis* (which consists of three "opsetskante") as "die bewussynkant", in terms of which the actor must be aware of the possibility that his conduct is unlawful, along with an awareness of the possibility of the existence of the relevant facts and/or consequences⁴¹⁷. De Wet and Swanepoel regard knowledge of unlawfulness (wederregtelikheidsbewussyn) as an *elementum essentiale* of intention "... in Mens handel slegs dan dolo malo wanneer hy hom willens en wetens in stryd met die regsorde stel ..."⁴¹⁸.

415. For example, Holmes JA in *De Bruyn* 1968 (4) SA 498 (A) at 510, in listing the requirements for *dolus eventualis*, characterized the foresight requirement as "... subjective foresight of the possibility, however remote, of his unlawful conduct causing death to another ...".

416. Snyman (n3) 214.

417. Labuschagne (n76) 437.

418. De Wet & Swanepoel (n4) 152.

However, it is not necessary to prove that the accused had knowledge of "... the detailed requirements of the offence charged, or the exact section or wording of the law in question, or the penalty for transgression, but merely that he knew, or at least foresaw the possibility, that what he was doing was contrary to the law in the broad sense ..."419. Labuschagne points out that it is not necessary that the actor should be aware that his actions would be prohibited by the criminal law *per se*, and that knowledge that his actions are prohibited in delict or administrative law would suffice for a knowledge of unlawfulness420, as would knowledge that his actions contravened principles of African customary law421.

In assessing guilt, it is not necessary to prove that the actor actually knew his conduct was unlawful. It is sufficient to prove that he foresaw the possibility of such unlawfulness, and yet proceeded with this course of conduct, reckless as to whether his actions were unlawful or not422. *Dolus eventualis* is therefore sufficient to constitute knowledge of unlawfulness423. However, where the actor is convinced that his proposed course of conduct is not unlawful, there will be no knowledge of unlawfulness and consequently no intention (and thus no criminal liability on the basis of intention) should he in fact be acting unlawfully. This mistake of law negating intention need not be reasonable as long as it is essential (related to the

419. Burchell and Hunt (n2) 168.

420. J M T Labuschagne "Wederregtelikheidsbewussyn en Dolus Eventualis" (1989) 14 (2) *IRW* 81.

421. *Ibid* 84.

422. Burchell and Hunt (n2) 167; De Wet and Swanepoel (n4) 152.

423. De Wet and Swanepoel *ibid* 153. See *S v Hlomza* 1983 (4) SA 142 (E); *S v Magidson* 1984 (3) SA 825 (T).

essential or material element of the crime) and genuine (ie not feigned but honest or *bona fide*)⁴²⁴.

Before 1977, South African law relating to knowledge of unlawfulness laboured under yet another English law presumption, *ignorantia iuris neminem excusat* (ignorance of the law does not excuse). As may be assumed from the Latin the doctrine was first formulated in Roman law⁴²⁵. The scope of the application of this rule is not clear⁴²⁶. What is of primary significance is that the rule was first expressed as such as part of the English Common Law, and it is in this system that its real development occurred⁴²⁷.

Although the presumption that ignorance of the law does not excuse found a substantial body of support in the case law⁴²⁸, there was an equally strong body of case law which either allowed inroads into the rule by means of a "claim of right"⁴²⁹ or explicitly required knowledge of unlawfulness

424. Burchell and Hunt (n2) 169.

425. In its original form, the rule was stated as follows: "... *Juris quidam ignorantiam cuique nocere, facti vero ignorantiam non nocere* ..." (D 22.6.9.). However, De Wet and Swanepoel ((n4) 153-4) find support in *Mommsen* and in a number of texts from the Digest (*inter alia* D 5.3.25.6., D 2.1.7.4., D 29.5.3.22, D 48.5.39.1, D 48.10.15.1) for the proposition that "... wederregtelikheidsbewussyn wel 'n onmisbare element van *dolus* was" (see (n4) 154 n254, n255).

426. Certain writers are of the opinion that ignorance of the law did not excuse, with certain exceptions (eg Snyman ((n3) 217), while others opine that the rule was nowhere near as broad and wide-ranging (eg De Wet and Swanepoel (n4) 153-4).

427. E R Keedy "Ignorance and Mistake in the Criminal Law" Harvard Law Review (1908) XXII 75 at 77 n 10.

428. Burchell and Hunt (n2) 161. See cases at 161 n 245.

429. *Ibid* 160-1.

for *mens rea*⁴³⁰. As Burchell and Hunt point out, "... the most that could be said of the state of the authorities prior to 1977 was that where the defence of ignorance or mistake of law arose in naked form, it was almost invariably rejected, but where it was raised in the guise of a claim of right, it was usually accepted ..." ⁴³¹.

In 1977, the Appellate Division unambiguously settled the question in the case of *De Blom*⁴³². The effect of this decision is that ignorance or mistake of law, like ignorance or mistake of fact, always negatives *mens rea*; that is, liability invariably requires *mens rea* in respect of the unlawfulness element (ie the unlawfulness element is essential to criminal intention), along with the other elements, of the crime in question⁴³³. Intention is therefore now a purely subjective concept; and when an actor is convinced in his own mind that he is legally entitled to act in a certain way, he has no criminal intention⁴³⁴. Thus the presumption that ignorance of the law does not excuse is no longer applicable in our law and non-culpable ignorance or mistake of law no longer attracts criminal liability. Burchell and Hunt praise the *De Blom* decision on this basis, and more specifically on the grounds that it satisfies the "nulla poena sine culpa" principle, *mens rea* requirements and considerations of fairness and justice⁴³⁵.

430. *Ibid* 162. See cases at 162 n 304.

431. *Ibid* 163. De Wet and Swanepoel (n4) 154 n259 points out that in relation to this question "... was daar aanknopingspunte na albei kante toe ...".

432. 1977 (3) SA 513 (A).

433. Burchell and Hunt (n2) 164.

434. L Kok "Skuldmetamorfose : De Blom, Dladla en Chretien" (1982) 6 SACC 27.

435. Burchell and Hunt (n2) 165.

The *De Blom* decision has however been criticized by a number of jurists, principally on the grounds that in the light of the strict requirements of crimes requiring intention as *mens rea* and the effect of *De Blom* in excluding non-culpable ignorance of the law from criminal liability, it appears that in certain cases an accused will be acquitted where the "regsgevoel" of the community (and even legal science) would be in favour of holding him criminally liable⁴³⁶. These jurists are in favour of only excusing the accused on the ground of an absence of knowledge of unlawfulness if such ignorance or mistake is reasonable or unavoidable⁴³⁷.

However it is submitted that such qualification of *mens rea* amounts to little more than a partial application of the *ignorantia juris* presumption, which is based on the fiction that everyone is presumed to know the law. As De Wet and Swanepoel state "... Hierdie ... fiksie was nog nooit 'n waarheid nie, en dit is vandag ook nie"⁴³⁸. Any such qualification of the *mens rea* principle ought therefore to be eschewed. It is incorrect to suggest that the abolition of this presumption will hinder the operation of criminal justice. De Wet and Swanepoel cogently answer any such suggestion in the following terms:

"By die meeste misdade weet elkeen en iedereen dat sy optrede ongeoorloof mag wees, want die reg is tot baie groot hoogte 'n weerspieëling van die regsbesef van die gemeenskap waarin dit geld. Selfs by misdade wat dan sogenaamd eties kleurloos is, sal min oortreders eerlik kan beweer dat hulle nie geweet het dat hulle optrede ongeoorloof is nie ... Die enkelinge wat wel onwetend "oortree", kan straffeloos uitgaan, sonder dat daardeur die maatskaplike orde aan ondergang blootgestel was ..."⁴³⁹.

436. Kok (n434) 28 and writers there cited.

437. Snyman and Whiting, cited by Labuschagne (n420) 88.

438. De Wet and Swanepoel (n4) 153.

439. *Ibid.*

Labuschagne points out that it is only in relation to *mala prohibita* (ie statutory crimes without a strong moral censure as an undertone) that problems arise with regard to knowledge of unlawfulness⁴⁴⁰. However, in respect of *mala prohibita*, it is appropriate that the courts should be cautious in imputing knowledge of unlawfulness for the very reason that there is no moral censure attached to many statutory crimes. It follows therefore that the truly ignorant or mistaken accused should be excused. As De Wet and Swanepoel argue⁴⁴¹, it is a small group of people who can claim *bona fide* legal ignorance. The spectre of endless acquittals is therefore not of any real significance, particularly if one considers that someone can only be excused once for a particular mistake of law⁴⁴². Furthermore, being excused from criminal liability for intention does not exclude possible criminal liability on the grounds of negligence.

Knowledge of unlawfulness does not only entail awareness on the part of the accused that his conduct is unlawful. The alternative meaning of knowledge of unlawfulness is that the accused is aware that his conduct is not covered by a

440. Labuschagne (n420) 86. These crimes are, according to Labuschagne, "... ook gewoonlik misdade wat in esoteriese wetgewing versteek is ...". Labuschagne sees the trend supported by De Blom as evidencing the further development of law in the form of the "dekonkretiseringsproses" in the following terms:

"... Hiervolgens is die strafreg in 'n ontwikkelingsproses vanaf die sintuiglik - waarneembare uiterlikhede van die mens se gedrag na die (innerlike) menslike gees agter sy optrede. Die erkenning van afwesigheid van wederregtelikheidsbewussyn as strafregtelike verskoningsgrond is bloot 'n verdere ontwikkeling in genoemde dekonkretiseringsproses wat in sy diepste wese 'n (evolusionêre) natuurproses is ...".

441. 169 above.

442. Labuschagne (n420) 86.

justification ground.⁴⁴³. Burchell points out that despite the presence of the requisite foresight and recklessness, the conduct of the accused may be justified on the ground of a defence which excludes the element of unlawfulness⁴⁴⁴. Thus the person who thinks that he is entitled to act as he wants to has no criminal intention because of a lack of knowledge of unlawfulness⁴⁴⁵. This applies equally to someone who in good faith exceeds the bounds of a justification ground⁴⁴⁶. If the actor is aware that he is exceeding the bounds of the justification ground, he may be held to act intentionally, although in these circumstances there may be grounds for extenuation⁴⁴⁷.

In respect of the present enquiry, it therefore needs to be emphasized that knowledge of unlawfulness can take the form of *dolus directus* and *dolus eventualis* (just as is the case with circumstances or consequences)⁴⁴⁸. Therefore, to prove knowledge of unlawfulness it need not be proved that "... die dader seker was dat sy handelings ongeoorloof is ingevolge 'n besondere wetteregtelike bepaling, waarvan hy kennis gedra het ..., dit is voldoende as hy die

443. Snyman (n3) 215.

444. Burchell (23) 33, where Burchell offers the following example: "... the surgeon who performs a dangerous operation hoping to save the patient's life but realizing, to adopt the view which I have advanced, the real possibility of death, is not guilty of murder if death does result when the operation is justified by consent of the patient or by necessity".

445. For example see Snyman (n3) 215: a mistake in respect of the existence of a justification ground will exclude unlawfulness. The learned author cites examples of consent and putative private defence.

446. De Wet and Swanepoel (n4) 155.

447. *Ibid.*

448. Loubser (n57) 144.

moontlikheid voorsien het dat sy handeling regtens ongeoorloof is en hom daarmee versoen het ..."449. As Morkel points out, "... the person who acts despite his knowledge of the possible infringement of the law commits himself to such infringement by the very fact that he becomes active despite such knowledge ..."450.

It is the view of Burchell and Hunt that legal intention is insufficient and that actual intention is required in respect of knowledge of unlawfulness in the case of minors between the ages of 7 and 14⁴⁵¹. Loubser criticizes this view as not logically justifiable; "... want indien die minderjarige hom inderdaad versoen met die moontlikheid dat hy ongeoorloof handel, behoort hy aanspreeklik te wees. Die verkil tussen moontlikheidsbewussyn en sekerheidsbewussyn behoort slegs by strafoplegging in ag geneem te word ..."452. It may therefore be submitted that, in principle, there should be no distinction between *dolus directus* and *dolus eventualis* for the purposes of knowledge of unlawfulness.

The above considerations are particularly important in the light of the case of *Aitken*⁴⁵³, where the court (per Van den Heever J) raised the question whether *dolus eventualis* could suffice in establishing knowledge of unlawfulness.

Following a conviction of theft in a magistrate's court on the basis of *dolus eventualis*, the accused appealed successfully to the Cape Provincial Division on the ground

449. *Ibid.* See W Bertelsmann (n20) 46.

450. Morkel (n387) 170.

451. Burchell and Hunt (n2) 243-5.

452. Loubser (n57) 144.

453. 1988 (4) SA 394 (C).

that this form of intention was insufficient for a conviction on the offence charged. The court (per Van den Heever J), classifying the accused's defence as either a claim of right or a mistake of fact, stated that where this defence is raised the onus remains on the state to prove knowledge of the unlawfulness of his conduct on the part of the accused⁴⁵⁴. The court stressed that the knowledge of the unlawfulness of the accused's conduct is required and that a mere suspicion ordinarily would be insufficient⁴⁵⁵. Van den Heever J proceeds to identify theft as an offence requiring *dolus directus* as its *mens rea* form (at 400F), prior to stating unequivocally that for any offence where *dolus* is the requisite *mens rea*, nothing less than "guilty knowledge" suffices, that is, actual intention (*dolus directus*), in the form of knowledge, must exist in respect of circumstances⁴⁵⁶.

The learned judge continues (at 401 G-H) as follows:

"... *dolus eventualis* ... cannot be used to short circuit a century of jurisprudence and constitute a mere suspicion of wrongfulness into proof beyond reasonable doubt of knowledge of wrongfulness. In logic more would be necessary to satisfy the requirement of the law. The strength and source of the suspicion could be such that an honest man would be put upon inquiry - information from others, a report by the police, and so on. Lack of inquiry may have been due to naiveté, stupidity, sensitivity, ... or dishonesty. It is only the latter motivation which would provide the final nail of logic in the coffin of conviction that an accused knew that his conduct was wrongful ...".

454. M C Maré "Recent Cases: S v Aitken 1988 (4) SA 394 (C)" (1989) 2 SACJ 114 at 115.

455. At 399 H-I of the judgment, cited in Maré *ibid*.

456. At 401F. See J H Pain "Dolus Eventualis and Theft" (1989) 106 SALJ 594.

It appears from this passage that the court considered factors such as the strength and source of the suspicion as well as the reason for the accused's lack of inquiry as factors from which knowledge of unlawfulness could be inferred⁴⁵⁷. Maré points out however that in the absence of direct intention or knowledge of unlawfulness, the court should have tested the accused's mental state against the requirements for *dolus eventualis*⁴⁵⁸. Pain also criticizes the exclusion of *dolus eventualis* as a sufficient form of intention for knowledge of unlawfulness, particularly as *dolus eventualis* suffices as a form of intention for the consequences of an act as well as all the other circumstances of an offence⁴⁵⁹. The learned author continues; "... (i)t is doubtful if even the English law [where the *mens rea* requirement varies between crimes] countenances variation in the *mens rea* requirement for circumstances within the same offence ..." ⁴⁶⁰.

457. Maré (n454) 116. Labuschagne (n420) 84 interprets the passage at 401F as authority for the sufficiency of *dolus eventualis* in respect of knowledge of unlawfulness "in gepaste omstandighede". In the light of the passage at 399 H-I of the judgment and the words of the learned judge at the outset of this passage (at 401F); "... Assuming there might be some virtue in using the concept of *dolus eventualis* in assessing the evidence in a theft charge, that concept cannot be used to short-circuit a century of jurisprudence and constitute a mere suspicion of wrongfulness into proof beyond reasonable doubt of knowledge of unlawfulness ..." (my emphasis), it is submitted that this passage can hardly be construed as strong support for the applicability of *dolus eventualis* in these circumstances. Labuschagne favours a "reel-konkrete moontlikheid" (which requires that the actor "bewus wees van die reële moontlikheid dat 'n regsnorm 'n sekere optrede verbied" as well as an awareness that "sy optrede in die konkrete situasie verbode is") above a "vae moontlikheid".

458. Maré *ibid.*

459. Pain (n456) 594-5.

460. *Ibid* 595.

To what extent will the remarks of the learned judge in *Aitken* influence the law? It is a well-established fact that in South African law it is not necessary for an accused to be certain that his act is unlawful (ie that the accused should have *dolus directus* or *dolus indirectus*); it suffices that the accused should have *dolus eventualis* in respect of the unlawfulness of his act⁴⁶¹. Therefore, irrespective of whether the accused relied on mistake of fact or mistake of law as the basis for his defence of absence of awareness of unlawfulness, all that is required is that the accused should have foresight of the possibility that his act might be unlawful and that he accepted this into the bargain⁴⁶². Whatever the reasons of the accused for "... failing to make enquiries to dispel or confirm his suspicions is irrelevant ..." if the accused complies with the basic requirements for *dolus eventualis*⁴⁶³.

461. Maré (n454) 117.

462. *Ibid.* Maré expresses the volitional element as "reconciled himself to this possibility", but for the content of the volitional element in *dolus eventualis*, see 176ff below. See *S v De Blom* 1977 (3) SA 513 (A) at 530; *R v Churchill* 1959 (2) SA 575 (A); *R v Z* 1960 (1) SA 739 (A); *R v Suleman* 1960 (4) SA 645 (N); *R v Markins Motors* 1959 (3) SA 508 (A) 516; *S v Marshall* 1967 (1) SA 171 (O) 177.

463. Maré *ibid.*

VOLITIONAL COMPONENT : RECKLESSNESS

Along with subjective foresight of the possible occurrence of harm, the courts have insisted on a volunative component, usually expressed as recklessness on the part of the accused whether the consequence will ensue or not⁴⁶⁴. Despite the fact that the requirement has frequently been stressed by the courts, its meaning has seldom been examined⁴⁶⁵. However the requirement has been expressed in a number of different ways. Recklessness has been interpreted as a contentment on the part of the accused to take the risk in question, in order to achieve the larger design⁴⁶⁶, simply "not caring what the result may be"⁴⁶⁷ or "knowing that the wound was likely to cause death and regardless whether death resulted or not"⁴⁶⁸. Further explanations of the notion include that the accused (foreseeing the consequence) "nevertheless does" the deed⁴⁶⁹ or was "nevertheless ... ready to associate with ... the enterprise"⁴⁷⁰ or "allowed ... [the] matter to go forward as planned"⁴⁷¹; alternatively that the accused "persisted in

464. Visser and Vorster (n340) 370; LAWSA (n1) para 92; Loubser and Rabie (n76) 419; M A Rabie A Bibliography of South African Law (General Principles) (1987) 68. See Burchell and Hunt (n2) 151 n 206 and LAWSA (n1) para 92 at n1 for a list of cases, where this was required.

465. Burchell and Hunt (n2) 151.

466. *R v Jolly* 1923 AD 176 at 182.

467. *R v Huebsch* 1953 (2) SA 561 (A) 568.

468. *R v Koning* 1953 (3) SA 220 (T) 231 EF.

469. *S v Mini* 1963 (3) 188 (A).

470. *R v Nsele* 1955 (2) SA 145 (A).

471. *S v Nkombani* 1963 (4) SA 877 (A).

such cause reckless as to the consequences of his acts"⁴⁷² or "was indifferent about it and nevertheless persisted"⁴⁷³. Holmes, JA in *De Bruyn*⁴⁷⁴ in establishing the requirements for *dolus eventualis*⁴⁷⁵, (having mentioned "subjective foresight of the possibility, however remote, of ... unlawful conduct causing death to another..."⁴⁷⁶) identifies the necessity for "... persistence in such conduct, despite such foresight ..."; "... an insensitive recklessness (which has nothing in common with *culpa*)" and "the conscious taking of the risk of resultant death, not caring whether it ensues or not ..." ⁴⁷⁷. The verb "reck" has been defined as "to take heed of something, so as to be alarmed or troubled thereby or so as to modify one's conduct or purpose on that account"⁴⁷⁸.

In practice, it seems as if most cases require that the accused should be reckless as to the possibility of the consequence ensuing, although numerous ways have been adopted to express this⁴⁷⁹. Due to this conceptual confusion, Du Plessis has suggested that "recklessness" be omitted or supplanted with a "clearly neutral" word such as "heedless"⁴⁸⁰. However, Loubser and Rabie point out that

472. *S v Arnold* 1965 (2) SA 215 (C) 219B.

473. *J D P Naude v S* 1977 (1) PH H9 (A) (translation).

474. 1968 (4) SA 498 (A).

475. At 510.

476. *Ibid.*

477. *Ibid.* Engers (n262) 223 opines that this statement is probably the best definition of 'recklessness' in *dolus eventualis* in South African law.

478. *S v Nkombani* 1963 (4) SA 877 (A) 896 D.

479. Loubser and Rabie (n76) 419-20.

480. Du Plessis (n380) 157.

most of the concepts used by the courts to indicate recklessness seem to be synonymous: "... (t)hus reckless means careless or heedless, heedless means careless or regardless, while regardless means heedless, indifferent or careless ..." ⁴⁸¹ It is doubtful therefore whether this distinction suggested by Du Plessis is helpful.

Despite the lack of certainty regarding the precise meaning of recklessness, one thing is clear: the notion of recklessness is not equivalent to the English law notion of recklessness ⁴⁸². However Bertelsmann is of the opinion that in the development of *dolus eventualis*, our courts adopted the English law concept of recklessness wholesale into our law ⁴⁸³.

It should be noted that reckless conduct *per se* is not sufficient to establish *dolus eventualis* (irrespective of the degree of recklessness) ⁴⁸⁴. Recklessness is therefore not equivalent to intention ⁴⁸⁵. There must therefore be

481. Loubser and Rabie (n76) 421.

482. Morkel ((n387) 164) states that; "... It needs no argument that the element of recklessness in the South African *dolus eventualis* does not have the same meaning as in England or the USA. It is clearly not gross negligence as a form of fault, but is an element of a form of fault. It is submitted that it could only involve a specific state of mind resembling the normal semantic meaning of the term ...". Engers (n262) 233 and Snyman (n3) 200 also stress that the English law term 'recklessness' is not equivalent to 'recklessness' in *dolus eventualis*. Jansen JA reaffirms this view in *S v Ngubane* 1985 (3) SA 677 (A) 685. K Van Rooyen expresses a dissenting view in "Vonnisbesprekings: *S v Rabson* 1972 (4) SA 574 (T)" (1973) 9 De Jure 82.

483. Bertelsmann (n20) 41 n34; Bertelsmann (n23) 70.

484. LAWSA (n1) para 93.

485. T Verschoor and R W Alberts *Misdad, Verweer en Straf* (1986) 211, where the learned authors cite the cases of *S v Dube* 1972 (4) SA 515 (W) and *S v Du Preez* 1972 (4) SA 584 (A) as authority for this proposition. In *Dube*

subjective foresight of the possibility of a result occurring⁴⁸⁶. The voluntative element, recklessness, is proved by inference; just as is subjective foresight⁴⁸⁷. Thus factors such as "... previous deliberation and preparation, coupled with failure to render assistance and the absence of any signs of surprise, regret or sympathy..."⁴⁸⁸ may give rise to an inference of recklessness or from any "grave consequences which in fact flow from the accused's act and the still graver consequences which might be expected to flow from it"⁴⁸⁹. Recklessness could also be inferred from the seriousness of the risk⁴⁹⁰. Barlow opines that "... (t)he amount of recklessness required will, of course vary with the circumstances present ...", citing the example of a

despite " 'n erge graad van roekeloosheid..." (according to Verschoor and Alberts), lack of subjective foresight of the possibility of harm resulted in a verdict of culpable homicide, based on negligence. The learned authors conclude that "... opset om te dood kan derhalwe nie van sy roekeloosheid afgelei word nie ...". In *Du Preez* the appellant's murder conviction in the court *a quo* was reduced to one of culpable homicide on appeal, once again on the basis of lack of subjective foresight. As pointed out at 589D (per Ogilvie-Thompson CJ) "... To shoot with a pistol in the direction of a moving human being leaving so small a margin of safety, may indeed be fairly described as reckless conduct, but reckless conduct per se is not necessarily to be equated with *dolus eventualis* ...".

486. See cases cited in (n485) *R v Horn* 1958 (3) 457 (A) 466 G; *R v Poteradzayi* 1959 (2) SA 125 (FC) 129 AB; *S v Nduneni* 1972 (3) 799 (C) 800-1. LAWSA (n1) para 92; Loubser and Rabie (n76) 420.

487. Engers (n262) 223-4; LAWSA (*ibid*); Loubser and Rabie (*ibid*). *R v Poteradzayi* 1959 (2) SA 125 (FC) 129 D; *S v Maree* 1964 (4) SA 545 (O) 551 E.

488. LAWSA *ibid*.

489. *Ibid*. *R v Poteradzayi* 1959 (2) SA 125 (FC) 129 DE.

490. LAWSA *ibid*; *R v Horn* 1958 (3) 457 (A) 465 C.

comparatively light blow being sufficient in the case of a child or a weak person⁴⁹¹.

It appears that in every case where the accused is acquitted on the ground of having no intention to cause the harm which has resulted, the element found to be lacking is foresight and recklessness is not discussed at all⁴⁹². As Loubser and Rabie opine "... a possible explanation why recklessness so seldom features in practice, is that this element is usually almost automatically inferred from the fact that the accused foresaw the possible occurrence of the result in question and nevertheless persisted in his conduct ..." ⁴⁹³. This naturally aggravates the difficulty of assigning a precise meaning to the term "recklessness", as well as raising serious doubts concerning the practical importance of recklessness (the absence thereof never having excluded the finding of *dolus eventualis*) Burchell and Hunt mention *Chitate* as the sole exception (where *dolus eventualis* was lacking because of the absence of recklessness)⁴⁹⁴. However, it is submitted by Burchell and Hunt that this case was wrongly decided, because with regard to the meaning of the recklessness element of *dolus eventualis*, the learned judge's interpretation "... seems to indicate that it is a matter of motive, or indifference, or callousness ..." ⁴⁹⁵ and that recklessness was present since the accused, foreseeing the possibility of death, nevertheless continued

491. Barlow (n174) 398-9.

492. P T Smith "Recklessness in Dolus Eventualis" (1979) 96 SALJ 81 - see the cases cited at 81 n4. Burchell and Hunt (n2) 153.

493. Loubser and Rabie (n76) 421.

494. Burchell and Hunt (n2) 153. *R v Chitate* 1968 (2) PH H337 (R).

495. *Ibid* 152 n 225.

to act, irrespective of whether death resulted or not⁴⁹⁶. In fact, in a number of cases, the decision appears to have been handed down solely on the basis of foresight, without any consideration being given to recklessness⁴⁹⁷. Rabie⁴⁹⁸ mentions the case of *Van Jaarsveld*⁴⁹⁹ as an example of judicial support for the notion that "... if the accused foresaw the possibility of death, but proceeded with his action in the genuine belief that death would not take place, he did not have *dolus eventualis* since the element of recklessness was lacking ..."⁵⁰⁰. However, it is submitted that the learned author is mistaken in this regard: where an accused genuinely rules out the risk of harm occurring, he has *no* foresight; despite having initially foreseen the risk, the accused proceeded to rule out the possibility of the risk occurring⁵⁰¹. It is therefore the lack of foresight which excludes a finding of *dolus eventualis*.

496. *Ibid.*

497. See the cases cited in Burchell and Hunt (n2) 153 n 229. Loubser and Rabie (n76) 421; "It may be assumed that in the great majority of cases proof of recklessness would in fact be furnished by the accused's action with foresight of the possible consequences".

498. LAWSA (n1).

499. 1974 (1) PH H9 (A).

500. At para 92.

501. It is apparent from the judgment of the court in *Van Jaarsveld*, per Muller JA; that the decision turned on foresight rather than recklessness: "... Alhoewel beskuldigde gesê het dat hy 'n kans gevat het dit was nietemin duidelik dat wat hy bedoel het was hoewel hy die moontlikheid voorsien het dat hy die klaagster kan raakskiet hy nogtans in sy gemik van die moment tevrede was dat ... hy haar nie sou raak nie ...". The court proceeds to find no *dolus eventualis* on the facts of the case.

Engers, despite conceding that the concept of recklessness is seldom used by our courts (and when used, is merely superficially considered) and that the courts tend to concentrate on the foresight requirement⁵⁰², is of the opinion that the notion of recklessness deserves to be put to better use. It is the submission of Engers that the recklessness requirement should be employed in supplementing the foresight requirement in elucidating the situation where the accused only has foresight of the remote possibility of the harm occurring⁵⁰³.

502. *Op cit* 223.

503. Engers' views have been briefly discussed above at 153-4, but, for the sake of completeness, a few brief remarks may be made concerning his use of the term 'recklessness'. It is Engers' argument (at 223) concerning foresight of a remote possibility that it is preferable to say "... that the accused foresaw the possibility but that he was not reckless because he thought it so unlikely. If he mentally discounted the possibility, then he did not take a conscious risk, whereas if he thought of it as a real or probable possibility, then he did take such a risk, and *dolus eventualis* would have been present ...". For a discussion of terminological problems in this argument, as well as an alternative interpretation thereof, see 154-5 above. It is the present writer's view that the above argument confuses lack of foresight with absence of recklessness, and that failure to "take a conscious risk" amounts to an absence of *dolus eventualis* on the grounds of a lack of foresight, rather than an absence of recklessness. Engers discusses recklessness in relation to a defence of confidence later in his article (at 227), submitting that "... (a) defence of confidence, it is submitted, attacks the element of recklessness, not the element of foresight. Supreme confidence on the part of the accused does not necessarily imply that he did not foresee death. What it implies is that the accused considered that death was a very remote or very unlikely (or even an 'impossible') possibility ...". On the basis of this reasoning, allied to his argument at 223, Engers would regard "confidence" as excluding *dolus eventualis* where the foreseen possibility is remote (despite his acceptance in principle that there should be no limitation on the scope of the possibility for the purposes of foresight (at 223)). It is submitted that

It is instructive to turn now to the case law in point⁵⁰⁴. Following Smith's assessment of the seminal nature of the case of *Valachia*⁵⁰⁵, Greenberg JA's judgment will form the centrepiece of the discussion of the law.

The first mention of recklessness in our law appears in the cases of *Laubscher*⁵⁰⁶, where the accused were held to have acted "apparently wantonly and recklessly"⁵⁰⁷; and *Ulyett*⁵⁰⁸, where the accused was held to exhibit "a reckless disregard"⁵⁰⁹ for the complainant, a victim of an assault with intent to do grievous bodily harm⁵¹⁰. The first explicit statement in which "... a form of intention less

it cannot be said that "supreme confidence" does not necessarily imply absence of foresight. Surely it is implicit in "supreme confidence" that the actor considers the risk so unreal, that he entirely excludes the possibility of the harm occurring - were the accused to act despite awareness of the possibility of harm occurring (however remote), it is submitted that *dolus eventualis* will be present because the necessary foresight is present. The use of recklessness in this manner therefore serves to exclude *dolus eventualis* on the basis of the remoteness of the accused's foresight (which, according to Engers, negates recklessness) despite an earlier acceptance of foresight of a remote possibility as sufficient for the purposes of *dolus eventualis*. This reasoning does not allow for a coherent conception of *dolus eventualis*.

504. Smith's useful analysis (n492) will be applied to the law.

505. *Ibid* 84. *R v Valachia* 1945 AD 826.

506. *R v Laubscher* 1913 CPD 123.

507. At 126.

508. *Ulyett v R* 1919 SR 34.

509. At 35.

510. The English courts had confronted the problem of acting despite the foresight of the possibility of harm in *R v Desmond, Barrett and Others* (*The Times* 28 April 1968) and *R v Serné and Another* (1887) 16 Cox CC 311.

than desire of the consequences ..." 511 is required appears in the case of *Ngcobo*⁵¹². Foresight only seems to have become an established requirement with the cases of *Kewelram*⁵¹³ and *Jolly*⁵¹⁴. The requirement of recklessness *per se* is to be found in *Gardiner and Lansdown*, from the first edition⁵¹⁵ onwards, but it is not until the fifth edition that any express authority is given⁵¹⁶.

This line was followed in a few cases *inter alia* *Qenele Xutu*⁵¹⁷, *Marthinus*⁵¹⁸, *Butelezi*⁵¹⁹, and *Jongani*⁵²⁰, but none of these cases give any form or substance to

511. Smith (n492) 81.

512. 1921 AD 92, where it was held (at 94 - 5) that: "... An intention to kill is an essential element in murder... Such an intent is not confined to cases where there is a definite purpose to kill, it is also present in cases where the object is to inflict grievous bodily harm, calculated to cause death, regardless of whether death results or not ...". Smith (*ibid* 82) regards the expression "regardless of whether death results or not" as a form of prototypical recklessness.

513. 1922 AD 213 at 216.

514. 1923 AD 176 at 182.

515. "If one person commits an act upon another, knowing that this act is likely to cause death but reckless whether death results or not, he is held in law to intend to kill" F G Gardiner and C W H Lansdown *South African Criminal Law and Procedure* 1ed (1917) 1009.

516. It is Smith's submission ((n492) 82) that the learned authors were probably relying on s140 of the Transkeian Penal Code, Act 24 of 1886 (C), although this was not expressed.

517. 1941 (1) PH H7 (W).

518. 1942 CPD 247.

519. 1925 AD 160.

520. 1937 AD 400.

"recklessness"⁵²¹. Some Appellate Division cases decided before *Valachia's* case in 1945 required only foresight of the consequences, without recklessness or any equivalent⁵²². Smith argues that, prior to the *Valachia* decision, the case law supported the view that foresight of the consequences sufficed for *dolus eventualis*, recklessness being a vague and superfluous requirement⁵²³.

The case of *Valachia*⁵²⁴ had important consequences for the law as far as the notion of recklessness is concerned. As Smith points out, virtually all the cases in which authority is given for requiring recklessness rely either directly or indirectly, on the judgment of Greenberg JA in *Valachia*⁵²⁵.

521. In *Quebele Xutu and Marthinus*, Gardiner and Lansdown's statement ((n515) above) is adopted. However no jury direction is reported in the former case, and in the latter case, the presumption that the natural and probable consequences of the accused's act are intended, was applied. No authority for the use of recklessness is given in *Butelezi* or *Jongani*. In *Butelezi*, the recklessness requirement appears only in reference to the trial court findings and the court (per Solomon JA) confirmed the conviction on the ground that the test in *Ngcobo's* case (1921 AD 92) was satisfied on the facts of the case, whereas in *Jongani*, Curlewis CJ remarked *obiter* at 405 "... when the stabbing of another with a knife is done recklessly and regardless of the consequences ... the assailant can be found guilty of murder if death ensues as a result of the wound ..." which, as Smith observes (at 83), seems to equate "recklessly" with "foresight of the possible consequences". The accused was eventually convicted as an accessory after the fact to murder on the basis that he "must have contemplated and known the possibility" that the consequence would occur (at 405). It is thus apparent that none of the above cases give any definite form to the meaning of recklessness. See the discussion by Smith (n492) 82-3.

522. Smith *ibid* 83 n 32.

523. *Ibid* 83.

524. 1945 AD 826.

525. Smith (n492) 84. See the cases cited at 84 n 35.

Referring to section 140 of the Transkeian Penal Code, Greenberg JA states the following:

"We may, I think, conclude from these authorities that the crime of murder will at all events have been committed if it be proved ... that the accused killed the deceased by an act which they must have known to be of such a dangerous character that death would be likely to result therefrom, and were reckless whether it did or not ..."⁵²⁶.

The citation of the Transkeian Penal Code as authority is problematic in this instance because the Penal Code has its roots in English law⁵²⁷. It appears therefore that the notion of recklessness was adopted into our law in this manner. As Smith points out, recklessness in the Transkeian Penal Code amounts to "... an attitude towards the apprehended risk of death ..."⁵²⁸. In conclusion, Smith submits that the introduction of the requirement of recklessness into *dolus eventualis* is an "historical accident" and that by adopting section 140 of the Transkeian Penal Code *Valachia* introduced an English law concept into our law⁵²⁹.

526. At 831.

527. As Smith (n492) observes at 85: "... The Transkeian Penal Code is substantially an enactment of the Draft Code contained in the Report of the Commission on Indictable Offences of 1879, and s140 of the Transkeian Penal Code is identical in every material respect to clause 174 of the Draft Code. The Draft Code is largely the work of Sir James Fitzjames Stephen, and is based ultimately on his Digest of the Criminal Law. Section 140 of the Transkeian Penal Code is thus a statement of the English law of malice aforethought, drawn up by an English judge ...".

528. *Ibid* 86.

529. *Ibid*.

Categories: recklessness as negligence, recklessness as indifference and recklessness as a conscious risk⁵³⁰.

530. This is the framework of analysis adopted by Smith (n492), exclusively in respect of "recklessness". The equivalent concept of "reconciliation with the possibility of harm" is dealt with at 198 below.

Recklessness as negligence

Because of the proximity in substantive approach of the notion of recklessness to its English law counterpart, as well as its most frequent use in ordinary speech (which has implications of socially undesired conduct), recklessness is often referred to in the context of negligence⁵³¹. The conceptual confusion which this generates is aptly illustrated by Van den Heever JA's statement in *Hercules*⁵³² to the effect that:

"... It is a matter of inference, however; but it cannot be based ... on what the appellant ought to have foreseen, but on what he must have foreseen. Apart from recklessness whether death, the probability or possibility of which was foreseen,

531. Smith (n492) 87 cites *R v Chitate* 1968 (2) PH H337 (R) and *S v De Bruyn* 1968 (4) SA 498 (A) as containing examples of the language of the courts indicating an assessment of the reasonableness of the accused's conduct in relation to recklessness, instead of an assessment of the state of mind of the accused in relation to the possibility of harm. Furthermore in *S v Van Zyl* 1969 (1) SA 553 (A) 559 D, Steyn CJ states: "... Uit die voorgaande blyk dit, meen ek, dat die gewone betekenis van 'roekeloos' ... ook slaan op growwe nalatigheid met of sonder risiko bewustheid ...". Engers (n262) 223 n 29 points out that it is said that if an untrue statement is made "recklessly" this is sufficient to constitute fraud (all the other requirements for fraud being satisfied). "... Here 'recklessly' means 'without caring whether or not the statement is false', and in this sense recklessness comes very close to gross negligence ...". He considers recklessness in the ordinary sense of the word to mean negligence. However Engers distinguishes the recklessness required for *dolus eventualis* on this basis. In the English law, recklessness is regarded as akin to negligence. As Glanville Williams states (The Mental Element in Crime (1965) 20) "... Recklessness is a state of mind, essentially negligent, where there is foresight that a certain result will probably or may possibly follow...".

532. 1954 (3) SA 826 (A).

results, that is *dolus* in law, a person cannot commit murder by negligent conduct ..."⁵³³.

In a number of other cases, recklessness appears to have been equated with gross, inadvertent negligence, with the courts consequently rejecting the notion on the basis that foresight must be of a subjective nature in order to constitute intention⁵³⁴. In *Strydom*, in respect of a charge of assault with intent to do grievous bodily harm, the learned judge (Dowling J) stated that "... heedlessness and recklessness cannot ... take the place of an actual proved intention ..."⁵³⁵. This dictum was rejected in a consideration of the question of proof in later cases⁵³⁶, but it is the submission of Smith that the learned judge was equating recklessness and gross negligence⁵³⁷.

In the case of *Du Preez*⁵³⁸, the Appellate Division overturned a murder conviction (based simply on the recklessness of the accused in respect of the possibility of death) on the grounds that the accused had only been grossly negligent. The court emphasized that the subjective intention of the accused had to be proved beyond reasonable doubt. Furthermore, although the court agreed with the court *a quo* as to the inherent recklessness of the accused's conduct, it was at pains to point out that "... reckless conduct per se is not necessarily to be equated with *dolus eventualis* ..."⁵³⁹. This statement has been criticized by

533. At 831.

534. Smith (n492) 88-9.

535. 1956 (3) SA 681 (T) 683.

536. *R v Edwards* 1957 R & N 107 (SR); *S v Basson* 1961 (3) SA 279 (T); *S v Sikunyana* 1961 (3) SA 549 (E).

537. Smith (n492) 89.

538. 1972 (4) SA 584 (A).

539. At 589.

Morkel⁵⁴⁰, on the basis that recklessness must fall within the ambit either of negligence or of intention; "... it is difficult to comprehend that recklessness can sometimes be a shade of intention and sometimes a shade of negligence ..."⁵⁴¹. It is thus Morkel's submission that "... the court erred when implying that recklessness may sometimes manifest itself in a form of negligence ..."⁵⁴² and that the correct approach was followed in the case of *Ellis*⁵⁴³, where the court held that no matter how gross the nature of a negligent act, gross negligence can never be equated with recklessness⁵⁴⁴.

Smith raises the argument⁵⁴⁵ that there might be possible merit in equating recklessness with negligence, as a supplementary requirement to foresight, to eliminate possible policy problems relating to foresight of a remote possibility, by excluding from the realms of foresight consequences following inherently reasonable action. However, as Smith points out, such a meaning would be inconsistent with most of the cases in our law⁵⁴⁶. Although

540. D W Morkel "The Meaning of the Concept of Recklessness" (1979) 4(2) TRW 67.

541. *Ibid* 67-8.

542. *Ibid* 71.

543. *R v Ellis* 1959 (4) SA 497 (SR), cited *ibid* 69-70.

544. At 498.

545. Smith (n492) 88.

546. *Ibid* 89. Smith also outlines an objection to the view of recklessness that equates it with negligence: "... (T)he unreasonableness of the accused's conduct has nothing to do with mens rea, and should be considered in connection with a defence against unlawfulness. When an accused raises private defence or the defence of necessity, he argues that in the circumstances a reasonable man would have acted as he did. The value judgement that the court has to make in adjudicating such a defence is thus identical to that involved in

it appears that Holmes JA's explicit rejection of any association between recklessness and negligence in *De Bruyn*⁵⁴⁷ has not been taken any further in any subsequent judgment, implicit in the equation of recklessness with some attitude or state of mind is a rejection of the connotations of negligence associated with recklessness⁵⁴⁸.

deciding the question of negligence. It follows that if recklessness meant negligence there would, in cases of *dolus eventualis*, be no room for private defence or the defence of necessity: the issues involved in such a defence would already have been disposed of in the decision on *mens rea*. Where the questions of intention and unlawfulness are kept separate, the requirement that intention must extend to the unlawfulness of the act allows the accused to escape liability on the ground that he genuinely (though mistakenly and reasonably) believed that his actions were justified, and thus that he had no *mens rea*. If, however, recklessness meant negligence, the question of unlawfulness being thus absorbed into that of *mens rea*, this defence would disappear - it would make nonsense to require that intention extend to an element of itself - and a form of strict liability would be introduced".

547. 1968 (4) SA 498 (A) 510.

548. See discussion of "recklessness as indifference" and "recklessness as taking a conscious risk" below. However, Labuschagne (n76) 436 at 439 describes the notion of recklessness as "'n vorm van late-aanspreeklikheid", in the following terms: "... Die begrip 'roekeloos' in die verband gebruik [referring to the remarks of Van Heerden JA in *S v Beukes* 1988 (1) SA 511 (A) 522], verwys na die nalate om bewustelik voorkomend op te tree en verwys nie slegs na wat in die dader se gees aangaan nie. Daar word derhalwe van die dader verwag om positief op te tree om sodoende die intrede van die gevolg of die verrig van die handeling te voorkom ..." (at 439). The learned author is incorporating an enquiry into negligence into the realm of *dolus eventualis*, which is unacceptable on the grounds of principled legal science. The question of the reasonableness of conduct should not enter into the enquiry into intention, which relates to the state of mind of the accused.

Recklessness as indifference

This alternative meaning of recklessness finds a firm measure of support as it is endorsed both by writers⁵⁴⁹ and in a number of cases⁵⁵⁰. The apparent source of the notion of recklessness in its present form, the Transkeian Penal Code⁵⁵¹, indicates that recklessness embodies an attitude towards the foreseen risk of harm. In a number of cases recklessness has been equated with indifference, as a concomitant to the emphasis upon subjective foresight. In describing recklessness, it has been held that the accused, despite having subjective foresight of the possibility of harm, acted "without caring"⁵⁵², "careless"⁵⁵³ whether death results or not, or that the accused's persistence in his conduct should display "... an insensitive recklessness ... not caring whether [the consequence] results or not"⁵⁵⁴ or showing a "reckless disregard" for or "regardless of"⁵⁵⁵ or

549. *Inter alia* Barlow (n174) 398: "... A man will be guilty of murder ... where he knowingly does an act likely to result in death and reckless of the consequences ..."; Loubser (n57) 139: "... terwyl daar in geval van dolus eventualis ... moontlikheidsbewussyn is, gepaardgaande met onverskilligheid ten opsigte van die bestaan van die omstandigheid of intrede van die gevolg ...".

550. See the cases cited in Burchell and Hunt (n2) 152 n 219.

551. Act 24 of 1886 (C).

552. *S v Mashele* 1972 (2) PH H136 (A).

553. *S v Steenkamp* 1960 (3) SA 680 (N) 684; *S v Melinda* 1971 (1) SA 798 (A) 802; *S v Rooinasie* 1971 (2) PH H126 (A). 'Careless' appears to be used in the sense of indifference rather than negligence here. (Smith (n492) 91 n 87).

554. *S v De Bruyn* 1968 (4) SA 498 (A) 510.

555. *R v Ngcobo* 1921 AD 92 at 94-5; *R v Jongani* 1937 AD 400 at 405; *R v Genele Xutu* 1941 (1) PH H7 (W); *R v Koning* 1953 (3) SA 220 (T) 230; *R v Lewis* 1958 (3) SA 107 (A)

being "indifferent towards"⁵⁵⁶ the possible consequences. Furthermore, Holmes JA defined the work "reck" as "... to take heed of something, so as to be alarmed or troubled thereby ..."⁵⁵⁷.

It appears from the above *dicta* that where the accused exhibits concern whether the foreseen unlawful consequence may eventuate, he will have a good defence⁵⁵⁸. A possible solution to this difficulty would be to hold a man to be reckless unless he cares so much about the possible consequences of his act that he does not act at all; however, as Smith points out, this would make the requirement of recklessness superfluous, because for an accused to desist from his course of conduct would exclude the *actus reus* and thus the accused could not be found guilty⁵⁵⁹.

The equation of recklessness with indifference on the basis of "not caring" whether the consequence ensues or not has been criticised as "... positively misleading ..." by Whiting⁵⁶⁰, in the following terms:

"... If a person hopes that a result will not ensue and does everything he can, short of abandoning his contemplated action, to ensure that it will not ensue, he can hardly be said not to care whether it ensues or not. Yet the fact that

109; *S v Thody* 1971 (2) SA 213 (N) 216; *S v Sabben* 1975 (4) SA 303 (A) 304.

556. *R v Jolly* 1923 AD 176 at 187; *R v Steenkamp* 1960 (3) SA 680 (N) 684.

557. *S v Nkombani* 1963 (4) SA 877 (A) 896.

558. Smith (n492) 91 "... where the accused does care whether the proscribed consequence ensues, he will have a good defence ...".

559. *Ibid.*

560. Whiting (n162).

he cared would surely not prevent him from being guilty of *dolus eventualis* in relation to the result in question if he then proceeded with his contemplated action, realising that despite his precautions there was still a substantial possibility that the result would ensue ..."⁵⁶¹.

Loubser and Rabie amplify this argument by pointing out that, in general, the accused will indeed be concerned about possible unlawful consequences that may ensue from his aiming to achieve another object, if only to avoid prosecution for harm resulting which does not fall within his original object⁵⁶². However, such an attitude constitutes a "... mere wish or desire to avoid the harmful result ..." and therefore should have no bearing on liability, whatever its effect on sentence⁵⁶³. As Smith points out:

"... it seems undesirable that a man who deliberately endangers the rights of others should escape liability just because he would prefer the danger not to materialize ..."⁵⁶⁴.

Furthermore the learned author questions the efficacy of enquiring into the attitude of the accused towards the risk of harm on the basis that recklessness is usually simply inferred from foresight, "... on the reasoning that if the accused foresaw the consequences and persisted, he must have been indifferent to them ..."⁵⁶⁵.

561. At 444.

562. Loubser and Rabie (n76) 421.

563. *Ibid* 421-2.

564. Smith (n492) 92.

565. *Ibid*. See 92 n97.

Recklessness as the taking of a conscious risk.

Recklessness has also been defined as the taking of a conscious risk⁵⁶⁶. This view finds support in the writings of Burchell and Hunt⁵⁶⁷, and Engers⁵⁶⁸. Burchell and Hunt regard the notion of recklessness as "... a colourless concept in that it has nothing to do with the accused's attitude of mind to the happening of the consequence ..."⁵⁶⁹. This view finds further apparent support in a number of cases in which the accused's persistence in his conduct, despite his appreciation of the risks, is emphasized⁵⁷⁰.

Smith identifies a few difficulties with this view however. In respect of the cases mentioned above, Smith points out that it is not clear whether the courts regard the taking of a conscious risk as recklessness *per se*, or whether it is actually evidence of something else, such as indifference⁵⁷¹. Secondly, if recklessness is simply the taking of a conscious risk, it is an irrelevant requirement: after initial subjective foresight of the possibility of harm, the accused who has not taken a conscious risk has either not acted, or has acted involuntarily in which case no *actus reus* exists, or has so altered his conduct that he

566. *S v De Bruyn* 1968 (4) SA 498 (A) 510.

567. Burchell and Hunt (n2) 152.

568. Engers (n262) 223.

569. Burchell and Hunt (n2) 152.

570. *S v Mtshiza* 1970 (3) SA 747 (A) 752; *S v P* 1972 (3) SA 412 (A) 416; *S v Kgware* 1977 (2) SA 454 (O) 455. See *S v Nkombani* 1963 (4) SA 877 (A) 896D 715: "... To reck means to take heed of something ... so as to modify one's purpose on that account ..." (per Holmes JA). Also *S v Kritzinger* 1973 (1) SA 596 (C) 602.

571. Smith (n492) 92.

no longer believes that there is any risk of harm, thus negating foresight (ruling out the risk of harm)⁵⁷². It is however worth noting that it may be that the accused in fact does modify his conduct but may nevertheless continue to foresee the possible occurrence of the harm⁵⁷³.

It may therefore be concluded that the concept of recklessness is indeed a useless and confusing one, and although frequently stressed by the courts, in practice it has no utility, as nothing is allowed to turn on it⁵⁷⁴. The difficulty of defining the concept certainly contributes to this state of affairs; as Smith points out "... whatever one makes [recklessness] mean, one gets into difficulty ..." ⁵⁷⁵. It has therefore been suggested that the notion be abandoned altogether⁵⁷⁶.

Loubser and Rabie, having examined the authorities on the point, conclude that:

"... Dolus eventualis ... involves only foresight of the possible consequences combined with persistence in the relevant course of conduct. Thus defined, dolus eventualis either lacks a volitional element and contains only the cognitive element of foresight; or contains a volitional element that may be inferred from the fact that the accused persisted in his conduct despite foresight of the harmful result ..." ⁵⁷⁷.

572. *Ibid.*

573. In such a case, the accused may be guilty of attempt liability if the foreseen harm does not ensue or may be liable for the completed crime should the foreseen harm nevertheless occur (despite precautions) See the discussion at 90-2 above.

574. Smith (n492) 93.

575. *Ibid.*

576. *Ibid.* Whiting (n162) 445; Burchell and Hunt (n2) 152-3; Morkel (n224) 324.

577. Loubser and Rabie (n76) 422. Of the authorities cited in (n576) Burchell and Hunt and Morkel require

Snyman criticizes this view on the grounds that there are decisions that have excluded *dolus eventualis* on the basis of an absence of recklessness; that the term intention implies a volitional element, and not merely "... knowledge or appreciation of the existence of some fact ..."; and that the courts have made the volitional element an invariable component of *dolus eventualis*⁵⁷⁸. The learned author therefore insists on the inclusion of the volitional element as a requirement for *dolus eventualis*. However Snyman prefers to use the phraseology that the accused "... must have reconciled himself to the possibility that the result may follow ..."⁵⁷⁹.

foresight of a real possibility, whilst Whiting favours this formulation, but allows limited scope for the utility of foresight of a remote possibility within the area of criminal intention (126 above). The latter formulation (persistence in conduct despite foresight of harm) finds some support in Holmes JA's reference to recklessness as "persistence in such conduct, despite such foresight" (in *S v De Bruyn* 1968 (4) SA 498 (A) 510). Further support may be found in the cases of *S v Kritzinger* 1973 (1) SA 596 (C) 602; *S v Kgware* 1977 (2) SA 454 (O) 455 EF.

578. Snyman (n3) 201.

579. *Ibid* 200.

Reconciliation with the possibility of harm.

This expression has found favour with the courts in some cases, although it has been expressed somewhat differently in different cases. The requirement that the accused must have reconciled himself to the possible occurrence of the result, as formulated in a number of cases⁵⁸⁰, has also been expressed as the accused associating ("vereenselwig") himself with the occurrence of the result⁵⁸¹ or that the accused formed the "... wilsbesluit om die moontlike gevolge nogtans te aanvaar ..." ⁵⁸². Other cases have simply required that the accused should have been content with the consequences of his act⁵⁸³. In the most recent cases to examine in depth the voluntative element required for *dolus eventualis*, the court in *Ngubane*⁵⁸⁴ seems to equate the terms "consent", "reconciles himself" and "takes it into the bargain" as all being appropriate in describing this component of *dolus eventualis*⁵⁸⁵, while the court in *Beukes*⁵⁸⁶ makes mention of both "recklessness" and "reconciling oneself with the result", without elaborating any further or indicating any preference between the expressions⁵⁸⁷.

580. *S v Thenkwa* 1970 (3) SA 529 (A) 533 C; *S v Swanepoel* 1983 (1) SA 434 (A) 455-6, 457 A; *S v Ngubane* 1985 (3) SA 677 (A) 685 DE, 686E; *S v Mbatha* 1987 (2) SA 272 (A) 285 C.

581. *S v Dladla* 1980 (1) SA 1 (A) 4 H.

582. *Ibid* 4 A-B.

583. *R v Jolly* 1923 AD 176 at 182; *S v Mavhungu* 1981 (1) SA 56 (A) 66 G-H.

584. *S v Ngubane* 1985 (3) SA 677 (A).

585. At 685D.

586. 1988 (1) SA 511 (A).

587. At 521 I.

A number of jurists favour this alternative formulation. In discussing the volitional component of *dolus eventualis*, De Wet and Swanepoel define it as "... dat hy [the accused] hom met die intrede van die gevolg versoen het ..." ⁵⁸⁸, while Strauss requires that "... the wrong-doer realises that [the result] may ensue and is reconciled with this eventuality ..." ⁵⁸⁹. Apart from Snyman ⁵⁹⁰, authors such as Van Oosten ⁵⁹¹, Visser and Vorster ⁵⁹², Labuschagne ⁵⁹³ and Bertelsmann ⁵⁹⁴ are in substantial agreement with this formulation. There is, however, some disagreement as to the equation of "recklessness" and "reconciling oneself with the harmful result". Bertelsmann rejects the notion of recklessness as useless and confusing ⁵⁹⁵, as do Visser and Vorster ⁵⁹⁶, citing *Dladla* ⁵⁹⁷ as sounding the death-knell for the notion of recklessness ⁵⁹⁸. Other jurists such as Snyman ⁵⁹⁹ and Labuschagne ⁶⁰⁰ indicate a simple equivalence in the concepts. Morkel, on the other hand, states that to

588. De Wet and Swanepoel (n4) 140.

589. S A Strauss cited in Thom (n13) 11.

590. Snyman (n3) 200.

591. Van Oosten (n271) 191.

592. Visser and Vorster (n340) 370.

593. Labuschagne (n76) 439.

594. Bertelsmann (n20) 38; Bertelsmann (n23) 71, 75.

595. W Bertelsmann "Farewell Recklessness - Welcome the Real Dolus Eventualis" (1980) SACC 28 at 29.

596. Visser and Vorster (n340) 370.

597. *S v Dladla* 1980 (1) SA 1 (A).

598. Visser and Vorster (n340) 370.

599. Snyman (n3) 200.

600. Labuschagne (n76) 439.

replace recklessness with reconciliation is to replace one empty cliché with another, as the concepts are largely synonymous⁶⁰¹. Whiting agrees, indicating that just as "... the conscious taking of the risk that the result will ensue ..." is superfluous⁶⁰², so too is the "reconciliation" formulation because "... by acting with foresight of the possibility that a result will ensue, one necessarily reconciles oneself to the possibility that it will ensue or takes this possibility into the bargain ..." ⁶⁰³. Whereas Morkel derives the volitional component of *dolus eventualis* from the persistent conduct of the accused despite his knowledge of the possibility of harm⁶⁰⁴; Van Dosten argues that though the persistent conduct of the accused may constitute evidence of the decision to take the risk that the consequences may follow, it cannot be regarded as conclusive proof of such a mental process⁶⁰⁵. Van Dosten contends that at some point between foresight of the possible consequences of his act and the act itself, there must be a decision on the part of the accused to accept or reject the risk of such consequences materializing⁶⁰⁶.

Snyman defends the notion of a conscious volitional element in the form of recklessness or reconciliation to the harmful result on the grounds that "... it is incorrect to allege that there are no decisions to the effect that [the accused] foresaw the result but did not reconcile himself to it (or was not reckless...)" ⁶⁰⁷. The learned author then proceeds

601. Morkel (n387) 163.

602. Whiting (n162) 445.

603. *Ibid.*

604. Morkel (n387) 170.

605. Van Dosten (n271) 191.

606. *Ibid.*

607. Snyman (n3) 201.

to cite the cases of *Hedley*⁶⁰⁸, *Fernandez*⁶⁰⁹, *Chitate*⁶¹⁰ and *Le Roux*⁶¹¹ as examples of such decisions.

In the case of *Hedley*, the accused fired two shots at a bird swimming on a dam. The second bullet ricocheted off the water, killing a woman on the other side of the dam. The court (per Broome JP) found that the accused knew that behind the bird were human dwellings and therefore also human beings, and confirmed a conviction of culpable homicide⁶¹². However the learned judge is reported to have used the following words:

"... He knew that the bullet he was firing would strike the water and might ricochet and that if it did ricochet it might pass near the huts and so might hit someone ..." ⁶¹³.

These words seem to indicate subjective foresight of the kind required for *dolus eventualis* and that the accused was guilty of murder. However this inference does not accord with the court's confirmation of the culpable homicide conviction; therefore it seems that the passage really refers to the accused's knowledge that he was firing in the direction of the huts, where people might be found and that the accused ought to have known that he might kill someone by his actions, although he did not have precise knowledge of the causal circumstances of the result⁶¹⁴.

608. 1958 (1) SA 362 (N).

609. 1966 (2) SA 259 (A).

610. 1968 (2) PH H337 (R).

611. 1969 (3) SA 725 (T).

612. At 363 F - I.

613. At 363 G-H.

614. Du Plessis (n380) 167.

Both Bertelsmann²¹⁵ and Snyman²¹⁶ regard the decision in *Hedley* as evincing an absence of volition on the part of the accused while Burchell²¹⁷ opines that the accused foresaw the remote possibility of death occurring and accepted this risk into the bargain, but regards the requirement of "accepting the foreseen risk into the bargain" as unsatisfactory. Loubser and Rabie²¹⁸ point out along the lines suggested above, that it is possible to infer that the accused acted negligently rather than intentionally because of the fact that he had or ought to have had, foresight of the possibility of the fatal result occurring, but (unreasonably) concluded that it would not occur in the circumstances, and therefore did not foresee its actual occurrence.

In the case of *Fernandez*²¹⁹, the accused failed to take the necessary precautions to ensure that a baboon did not escape while he was busy repairing its cage. The baboon escaped and killed a child. In its findings, the court (per Ogilvie-Thompson JA) held that the accused consequently ought to have foreseen the possibility of death resulting should the baboon leave its cage, and that the verdict of culpable homicide handed down in the court *a quo* was correct²²⁰. It appears therefore that this case was

615. Bertelsmann (n595) 31.

616. Snyman (n3) 201 n 17.

617. Burchell (n402) 158.

618. Loubser and Rabie (n76) 425.

619. 1966 (2) SA 259 (A).

620. At 264-5.

determined on the grounds of an absence of foresight of the harm resulting rather than an absence of volition⁶²¹.

In the case of *Chitate*⁶²², the accused was found to have foreseen the possibility of the fatal result arising out of an illegal abortion. Because it was not shown that the incidence of fatal abortions in like circumstances was high, the court found that *dolus eventualis* had not been proved, ie the accused was not reckless. This case appears to be the only authority in our case law where *dolus eventualis* was explicitly found to be lacking due to a lack of recklessness. However, it should be noted that an equally tenable conclusion would be that the low incidence of fatalities in such circumstances could justify the inference that the accused did not foresee death as a possible result and lacked *dolus eventualis* on the basis of lack of foresight⁶²³.

Finally, in the case of *Le Roux*⁶²⁴, which dealt with a charge of illegal camping within the borders of the Kruger National Park, the court held negligence to be a sufficient *mens rea* form for the offence. Therefore, premised upon the carelessness of the appellant, the conviction in the lower court was upheld. It appears that even if *dolus eventualis* were applied in this situation, it would be excluded on the grounds of a lack of proof of foresight rather than a lack of volition⁶²⁵.

621. As Du Plessis ((n380) 169) observes: "... This is a statement of unconscious negligence as traditionally understood ...".

622. 1968 (2) PH H337 (R).

623. Loubser and Rabie (n76) 424.

624. 1969 (3) SA 725 (T).

625. Loubser and Rabie (n76) 425-6.

It may therefore be concluded that these cases cited by Snyman do not in fact provide authority for the indispensability of the volitional element of *dolus eventualis* in the form of recklessness (or reconciliation). Van Heerden JA was therefore correct when he pointed out in the case of *Beukes*⁶²⁶ that there is no instance in our case law where *dolus eventualis* was not proved as a result of the lack of a volitional element⁶²⁷.

Although Van Heerden JA accepts in *Beukes*⁶²⁸ that an absence of recklessness has never excluded *dolus eventualis* in the case law⁶²⁹, the learned judge still envisages a role for the volitional element in *dolus eventualis*. Van Heerden JA does not define the volitional element in his judgment, although he makes it clear that this requirement will usually only be fulfilled in the event of the accused foreseeing the occurrence of the harmful result as a reasonable possibility⁶³⁰. Despite the fact that the "reasonable possibility" requirement automatically calls into question the further utility of the volitional element in assessing *dolus eventualis*, the learned judge nevertheless is of the opinion that the volitional element still fulfills a valuable function⁶³¹. It is the opinion of the learned judge that the volitional element is useful in two particular situations:

626. 1988 (1) SA 511 (A).

627. At 522 C-D.

628. 1988 (1) SA 511 (A).

629. 522 C-D.

630. At 522 E.

631. At 522 F.

(1) Where the accused has foresight of the possibility of the harmful result occurring and consequently takes precautions against its occurrence; and

(2) Where the accused at first does not foresee the harmful result as a reasonable possibility, but, after the causal sequence of events has been initiated, acquires such foresight⁶³².

In order to investigate whether these suggested situations can add anything to the practical utility of the volitional element of *dolus eventualis*, it is necessary to examine these situations in more detail.

In the first situation, the liability of the accused will to a large extent be dependent upon his prior conduct, the nature of the precautions and their success⁶³³. If the accused has not yet embarked on a criminal course of conduct and his precautions against the initiation thereof successfully prevent the foreseen harm occurring, there is no criminal liability⁶³⁴. Similarly, if the accused had already embarked on an unlawful course of conduct, despite foresight of the possibility of harm occurring, but changes his mind and successfully takes steps to avoid the harm occurring, there is no harmful result and consequently no liability for the completed crime⁶³⁵. It is however widely accepted that the accused may be convicted of attempt despite a belated voluntary withdrawal in these circumstances⁶³⁶. Where these precautions prove to be

632. At 522 F-H.

633. Loubser and Rabie (n76) 426.

634. *Ibid.*

635. *Ibid.*

636. *Ibid.* 427. See also the articles cited at (n76). Labuschagne and Snyman are of the opinion that in the

unsuccessful and the harmful result occurs, although the accused was convinced that the precautions would suffice to prevent the occurrence of the harm, the accused had ruled out the risk of the harm occurring and therefore lacked *dolus eventualis* subsequent to his change of mind⁶³⁷. The accused, however, might still be guilty of attempt on the basis of his prior conduct and state of mind, and of course could still be held to be criminally liable on the basis of negligence⁶³⁸.

As Paizes observes⁶³⁹, Van Heerden JA seeks to show the utility of the volitional element by indicating that the absence of *dolus eventualis* after taking precautions is due to the exclusion of the volitional element. In fact, the absence of *dolus eventualis* is simply predicated upon the lack of foresight on the part of the accused, after he has ruled out the risk of the harm occurring⁶⁴⁰. The foresight of the accused prior to taking precautions is of no importance to the assessment of criminal liability in respect of the completed crime. As Paizes states: "... It is difficult ... to appreciate what possible 'practical function' the dual inquiry serves here. It tends, only to induce one wrongly to overlook the requirement of contemporaneity by attaching legal significance to an antecedent state of mind that is irrelevant to the inquiry

event of voluntary withdrawal, there ought not to be attempt liability.

637. Loubser and Rabie *ibid.*

638. *Ibid.*

639. Paizes (n162) 641.

640. *Ibid.* Burchell (n402) 159, points out (as does Paizes at 641) that the learned judge (at 522 F) concedes that the accused in this situation would not in fact have foresight.

..."⁶⁴¹. Loubser and Rabie proceed to analyse the situation where the precautions taken by the accused eventually prove to be unsuccessful and the accused realises that his change of mind has occurred too late and that his attempts at precautions will not succeed in preventing the result from occurring⁶⁴²:

"It is suggested that the accused's change of mind, loss of volition, and even contrition, should not be regarded as excluding *dolus eventualis* at the time of occurrence of the harmful result. He continues to foresee the possibility of the harmful result actually occurring (that is why he belatedly attempts to prevent it), and his causative conduct or participation in a common purpose is accompanied by the foresight until the actual occurrence of the harmful result. His loss of volition and contrition at a late stage could be taken into account as an extenuating circumstance for the purpose of sentence, but arguably should not be regarded as excluding *dolus eventualis* ... (T)he accused continues to foresee the actual occurrence of the harmful result and therefore acts with *dolus eventualis* at all material times ..."⁶⁴³.

The learned authors illustrate their point of view with an example⁶⁴⁴ of a participant in a robbery who takes part in all the preparations and has joined in the decision of the other robbers to kill the persons in the building should there be any resistance. Despite a wholehearted change of mind on his part as the robbery is taking place, as evidenced by him running towards the building shouting "... I can no longer reconcile myself to any killing. I do not want to accept the risk of it happening. Do not shoot under any circumstances! ..."; his pleas are disregarded by the

641. Paizes *ibid.*

642. Loubser and Rabie (n76) 427.

643. *Ibid.*

644. *Ibid.*

other robbers, and death of a victim results. Loubser and Rabie submit that the change of heart and loss of volition, accompanied by the unsuccessful attempt to prevent the foreseen and eventually harmful result, should not be a defence to a charge of murder; the situation being analogous to voluntary withdrawal that does not exclude a conviction of attempt⁶⁴⁵.

The second situation suggested by Van Heerden JA can only be distinguished from the first on the basis that the accused only acquired foresight after the causal sequence of events has been initiated⁶⁴⁶. The learned judge opines that the accused will be careless as to the occurrence of the harmful result should he fail to take steps to interrupt the causal sequence of events⁶⁴⁷.

Burchell has criticized this suggestion as providing no adequate justification for the resuscitation of recklessness⁶⁴⁸. In his view, all that this suggestion achieves is the accentuation of the basic principle of the contemporaneity of *actus reus* and *mens rea*⁶⁴⁹. Participation in a common purpose is a continuing act and should the *mens rea* of a participant change prior to the commission of the crime, then the *mens rea* must be judged at the time of such change⁶⁵⁰. If the *actus reus* was completed before the foresight is acquired by the accused, the

645. *Ibid* 428.

646. *Ibid*.

647. At 522 G.

648. Burchell (n402) 159.

649. *Ibid*.

650. *Ibid*.

prosecution could only succeed if the accused had a legal duty to prevent the occurrence of the harmful result⁶⁵¹.

Where the accused, having acquired foresight, does take steps to prevent the harm resulting, the assessment of liability in this situation is identical to the first situation: where the accused still foresees the possibility of harm despite taking precautions, he may be held criminally liable on the basis of *dolus eventualis*, whereas a ruling out of the risk of harm occurring on the part of the accused will exclude *dolus eventualis*⁶⁵².

It may therefore be concluded that the examples mooted in *Beukes* do not add any convincing proof of the practical utility of the volitional element of *dolus eventualis*. The volitional element has never had a uniform definition amongst academic writers or in the cases⁶⁵³. It may be submitted however that "... (i)n general the volition

651. Paizes (n162) 641.

652. Loubser and Rabie (n76) 428.

653. *Ibid* "... The content has been variously described as a requirement that the accused must have been reckless or indifferent as to whether or not the consequence ensues, or that he must have been content with the result; or must have associated himself with the result; or must have reconciled himself to the occurrence of the result; or must have accepted the result; or must have accepted the result into the bargain; or must have decided to accept the result; or must have decided to accept the risk of the result occurring; or must have decided that the result will occur; or must have approved of the result; or must have consented to the result; or must have abided by the result; or must have resigned himself to the occurrence of the result. The Afrikaans terms used are 'versoening met'; 'vereenselwiging met'; 'neerlegging by'; 'berusting by'; 'instelling op'; 'aanvaarding van'; 'duld'; 'toelating van' ... This welter of terminology illustrates the fact that the concepts such as volition, will or consent are susceptible to a wide range of meaning, 'from eager desire at the one end and passive and reluctant acquiescence at the other' ...".

required for *dolus eventualis* seems to connote the sense of passive and even reluctant acquiescence, rather than positive will or desire ...⁶⁵⁴. This view is supported by Van Oosten's statement that the volitional element would be more accurately portrayed as a "negatiewe toelating" of the unlawful act, rather than a "positiewe instemming" towards it⁶⁵⁵.

Thus, as Loubser and Rabie observe:

"It appears therefore that virtually any form of volition will suffice, albeit of such a weak, passive and negative nature that it connotes nothing more than a conclusion (ie cognitive rather than voluntative in nature) on the part of the accused that the harmful result may occur in the circumstances... Such a conclusion therefore constitutes nothing more than foresight of the actual occurrence of the harmful result, as opposed to foresight of the harmful result as a mere theoretical possibility which is then discounted ..."⁶⁵⁶.

Some writers have stated that in order for *dolus eventualis* to exist, then, in addition to foresight of the possibility of the harmful result occurring, the accused must either take a decision that the result may ensue⁶⁵⁷ or decide to accept the risk of the consequence ensuing⁶⁵⁸. However, these views are open to criticism. The decision that a result will ensue amounts to little more than a cognitive element, in that the accused foresees the possibility that the consequence may actually ensue⁶⁵⁹. Hence, it is not the

654. *Ibid* 429.

655. F F W Van Oosten "Weer Eens Dolus Eventualis en Luxuria - 'n Verduideliking weens 'n Repliek" (1982) 45 IHRHR, 423 at 431.

656. Loubser and Rabie (n76) 429.

657. Snyman (n3) 200.

658. Van Oosten (n271) 191.

accused's decision but rather his conclusion that the consequence will ensue that is material⁶⁵⁹.

Furthermore, there has been no practical example of a situation where an accused, having foreseen the possibility of the consequence occurring, did not decide to take the risk of the consequence happening, and nevertheless acted⁶⁶⁰. Implicit in the process of acting with such foresight is the incorporation of a decision to run this risk⁶⁶¹. It may be further submitted that if the volitional element of *dolus eventualis* is viewed as a decision to act (despite foresight), then such decision does not amount to a volitional element, but rather that it is of necessity included in the notion of a voluntary action⁶⁶². As Loubser and Rabie point out, whether the accused proceeds to act after concluding that a harmful result may occur in the particular circumstances or the accused proceeds to act after resigning himself to, and thus accepting, the risk of such a result occurring, there is hardly any question of volition; the accused merely forms a conclusion that the result may occur and nevertheless proceeds to act⁶⁶³.

659. Loubser and Rabie (n76) 430.

660. *Ibid.*

661. *Ibid.*

662. *Ibid.*

663. *Ibid.*

664. *Ibid.*

Dolus eventualis/conscious negligence.

In assessing the bounds of *dolus eventualis*, it is appropriate to distinguish between *dolus eventualis* and conscious negligence (*luxuria*)⁶⁶⁵. Such distinction is particularly important in respect of the enquiry into the volitional component, wherein most authorities have sought to differentiate between these two forms of fault⁶⁶⁶. The distinction in terms of the volitional component may be described as follows: Although both *dolus eventualis* and conscious negligence involve foresight of the possible consequences on the part of the accused, in respect of conscious negligence the accused does not reconcile himself to the occurrence of this result.

An alternative basis for the distinction has been sought in the realm of foresight by jurists such as Burchell and Hunt⁶⁶⁷, and Morkel⁶⁶⁸. As mentioned above⁶⁶⁹, it is the view of these writers that only foresight of a real or substantial possibility suffices for *dolus eventualis*, and therefore they would treat foresight of anything less than a

665. Conscious negligence (*luxuria*) is a somewhat controversial notion in our law. Firstly, it should be emphasized that it does not constitute a third species of fault, as suggested by Van der Merwe (n60) 280 n1. Secondly, Bertelsmann has expressed the view that due to the breadth of the definition of *dolus eventualis*, *luxuria* has been incorporated therein ((n20) 41 n 34). Finally, not all jurists acknowledge the existence of conscious negligence - see Du Plessis (n380) 150-180, and particularly at 177, where the learned author submits that the concept of conscious negligence has no place in our criminal law.

666. Bertelsmann (n20) 38; (n595) 33-4; Van Oosten (n271) 192; Snyman (n3) 202.

667. Burchell and Hunt (n2) 147-9.

668. Morkel (n239) 86.

669. 125 above.

substantial possibility as conscious negligence⁶⁷⁰. Burchell and Hunt motivate this point of view on the basis of the extreme difficulty⁶⁷¹ of proving whether an accused took a conscious risk or not, and consequently they conclude that a finding of this nature should instead depend upon the degree of the accused's foresight of the consequence, which the learned authors opine is a matter in which an inference can more readily be drawn in all the circumstances of the case. Morkel, in turn, relates the enquiry to the situation where as a result of foresight it is incumbent upon the accused to take special care, to take precautions or to avoid the proposed course of conduct. "... Dit mag egter wees dat die beskuldigde se oordeel verkeerd was en/of sy voorsorgmaatreëls onvoldoende ..." suggests Morkel, in which case it would be appropriate to enquire into conscious negligence, on the basis that the possibility of the harm occurring would be foreseen by the accused as less than substantial⁶⁷².

As canvassed above, the views of Burchell and Hunt, and Morkel, may be criticized for implying that foresight of less than a real or substantial possibility of harm is not

670. Another proponent of the need for foresight of a substantial possibility for *dolus eventualis*, Snyman (n3) 202 is of the opinion that substantially the same result can be achieved through the use of a volitional component. In the light of the decision in *Ngubane* 1985 (3) SA 677 (A), which held that the distinction between *dolus eventualis* and conscious negligence is to be found "... in whether or not X reconciled himself to the foreseen possibility (volitional element) ...". Snyman favours the use of the volitional element to distinguish between intention and negligence in this situation.

671. In the opinion of the learned authors, proof of conscious risk-taking on the part of the accused is difficult, if not impossible (Burchell and Hunt (n2) 149 n197).

672. Morkel (n224) 324.

foresight (for the purposes of intention in law) at all⁶⁷³. By definition, negligence implies an absence of a state of mind, and conscious negligence, as a subspecies of negligence, conforms to this fundamental characteristic. The principal difference between conscious and unconscious negligence⁶⁷⁴ is simply that in the former, the accused had foresight of the harm occurring, which he unreasonably proceeded to rule out as a possibility, in so doing causing a complete lack of foresight in his own mind, when he ought to have had such foresight.

Unconscious negligence occurs where there is no foresight whatsoever on the part of the accused. Therefore, only where the risk is ruled out altogether in the mind of the accused can there be an absence of foresight (and thus an absence of a state of mind), consequently shifting the enquiry from intention into the realm of conscious negligence. Where the accused maintains foresight of a possibility of the harm occurring, however remote, the appropriate *mens rea* form must be intention in the form of *dolus eventualis*.

The validity of the traditional distinction between *dolus eventualis* and conscious negligence may however also be questioned. In the light of the rejection of the notions of 'recklessness' and 'reconciliation' above⁶⁷⁵, it may be submitted that the volitional element is not an adequate basis for distinguishing between *dolus eventualis* and

673. Loubser and Rabie (n76) 431: "... It is submitted that instances in which the accused in fact foresaw the possible occurrence of the result, but only as a remote possibility, do not qualify as examples of conscious negligence ...".

674. They are identical in requiring that the conduct of the accused does not measure up to the standard of the reasonable man.

675. See particularly 208-210 above.

conscious negligence. It is clear that negligence can only be conscious in the sense that the accused had foresight of the possibility of harm, as in *dolus eventualis*, before he ruled out the risk of such harm occurring in his own mind. This process of 'ruling out the risk' constitutes a conclusion on the part of the accused that the foreseen harm will not come to pass in the circumstances, and it is this conclusion which distinguishes *dolus eventualis* from conscious negligence.

Validity of The Volitional Element

It is therefore submitted that the volitional element has no part to play in the distinction between *dolus eventualis* and conscious negligence, and the further utility of this element as a part of *dolus eventualis* is undermined to an even greater extent⁶⁷⁶.

It has been submitted that as a matter of strict logic, there are two equally tenable views regarding volition as a constituent element of *dolus eventualis*⁶⁷⁷:

(a) That volition is required in the form of a will, wish or desire, involving something more than a mere cognitive conclusion as to the possibility of the harmful result occurring⁶⁷⁸; or

(b) That a mere cognitive conclusion as to the possibility of the harmful result occurring suffices and that *dolus eventualis* exists where a person concludes that the harmful result may occur in the circumstances and nevertheless proceeds to act, even though he does not will, wish or desire the result⁶⁷⁹.

As is apparent from the above discussion, the content of the volitional element is uncertain and open to question. Policy considerations demand that this ambiguity be resolved

676. Implicit in the acceptance of the notion of recklessness by some writers was its usefulness in distinguishing between negligence and intention.

677. Loubser and Rabie (n76) 431-2.

678. See Bertelsmann (595) 28 ff for an enthusiastic acceptance of this voluntative test.

679. Whiting (n162) 446: "... A person will have *dolus eventualis* in regard to a result if he 'intentionally' commits an act, foreseeing that it may cause that result ...". For Whiting, "intentionally" constitutes the volitional element (446 n 11).

in order that a more precise and logically acceptable definition of *dolus eventualis* may be achieved⁶⁸⁰. Furthermore, if volition is required as a constituent of *dolus eventualis*, and such volition consists of a harmful result, it would presumably be excluded by a positive will or desire that the result must not occur⁶⁸¹. Thus a change of mind, along with sincere precautions, which are however foreseen by the accused to be ineffectual, will exclude *dolus eventualis*⁶⁸². It may be argued that this is an unacceptable result on grounds of policy⁶⁸³.

Therefore, in conclusion, it may be submitted that *dolus eventualis* relates to the state of mind of the accused, but only in the sense of a cognitive conclusion as to whether a harmful result may actually occur in the particular circumstances of the case⁶⁸⁴. This is a colourless concept, which does not involve will, desire or motive⁶⁸⁵. Therefore, "... if the accused takes a conscious risk, having concluded that the harmful result may actually occur, it seems acceptable from a logical and policy point of view to regard his conduct as being intentional. Absence of a more positive will, desire or motive should at most affect sentence ..."⁶⁸⁶.

680. Loubser and Rabie (n76) 432.

681. *Ibid.*

682. *Ibid.*

683. *Ibid.* See Morkel (n387) 162 at 169; Burchell and Hunt (n2) 152-3.

684. Loubser and Rabie (n76) 433. As remarked above, if the accused rules out the risk of harm, there is no foresight and no intention.

685. *Ibid.*

686. *Ibid.* As Loubser and Rabie note at 433 ff, similar questions of policy arise in respect of the concept of consent in the form of assumption of risk.

THE APPLICATION OF *DOLUS EVENTUALIS* TO SPECIFIC CRIMES

It is generally assumed in criminal law that in respect of crimes requiring intent, the intent may take the form of either *dolus directus*, *dolus indirectus* or *dolus eventualis*⁶⁸⁷. Furthermore, it is generally assumed that the rule that intent may consist of either *dolus directus*, *dolus indirectus* or *dolus eventualis* applies to all crimes that require intent, irrespective whether their origin lies in the common law or in a statutory enactment⁶⁸⁸. The scope of the application of *dolus eventualis* has however been called into question by some recent cases necessitating a brief examination of the concept in this regard.

Dolus eventualis is applied to crimes with a formal definition as well as crimes with a material definition⁶⁸⁹. However, *dolus eventualis* is almost invariably applied in the case of murder⁶⁹⁰. Apart from murder, *dolus eventualis* has been held to be a sufficient form of intention in respect of *inter alia* the following offences: attempted murder⁶⁹¹, assault with intent to commit murder⁶⁹², assault

687. Snyman (n3) 197; Burchell and Hunt (n2) 138-9.

688. *Ibid.*

689. Burchell and Hunt (n2) 139.

690. LAWSA (n1) para 89.

691. *R v Poteradzayi* 1959 (2) SA 125 (FC); *R v Chiswibo* 1961 (2) SA 714 (FC); *S v Mundell* 1968 (1) PH H59 (E); *S v Fick* 1970 (4) SA 510 (N); *S v Magubane* 1975 (3) SA 288 (N) 292-3.

692. *R v Jolly* 1923 AD 176; *R v Sofianos* 1945 AD 809; *R v Bergstedt* 1955 (4) SA 186 (A); *R v Di Carlo* 1957 (1) PH H123 (A); *R v Mzwakala* 1957 (4) SA 273 (A); *S v De Zoete* 1966 (2) PH H397 (SWA); *Haines v S* 1969 (2) PH H191 (N); *S v Macdougall* 1972 (1) PH H5 (N); *S v Van Jaarsveld* 1974 (1) PH H9 (A); *S v Tissen* 1979 (4) SA 293 (T).

with intent to do grievous bodily harm⁷³, assault⁷⁴, rape⁷⁵, sodomy or indecent assault⁷⁶, crimen injuria⁷⁷, abduction⁷⁸, abortion⁷⁹, theft⁸⁰, receiving stolen goods knowing them to be stolen⁸¹, malicious injury to property⁸², cruelty to animals⁸³, ill treatment of a child in contravention of the Children's Act of 1960⁸⁴,

693. *R v Edwards* 1957 R & N 107 (SR); *R v Barrie* 1959 (1) PH H22 (O); *R v Basson* 1961 (3) SA 279 (T); *S v Sikunyana* 1961 (3) SA 549 (E); *S v Thody* 1971 (2) SA 213 (N); *S v Zukelwa* 1971 (2) PH H150 (T); *Bradshaw v S* 1977 (1) PH H60 (A); *S v Sinzani* 1979 (1) SA 935 (E); *S v Tissen* 1979 (4) SA 293 (T); *S v Raisa* 1979 (4) SA 541 (O).

694. *R v Steenkamp* 1960 (3) SA 680 (N); *S v Kritzinger* 1973 (1) SA 596 (C); *S v Tissen* 1979 (4) SA 293 (T).

695. *R v Z* 1960 (1) SA 739 (A); *S v J* 1989 (1) SA 525 (A).

696. *R v H* 1962 (1) SA 278 (SR).

697. *R v E* 1954 (4) SA 501 (SR); *R v James* 1960 R & N 159; *S v I* 1976 (1) SA 781 (RA); *JDP Naude v S* 1977 (1) PH H9 (A).

698. *R v Churchill* 1959 (2) SA 575 (A).

699. *R v Chitate* 1968 (2) PH H337 (R).

700. *R v Dorfling* 1954 (2) SA 125 (EDL); *R v Dosthuizen* 1956 (1) SA 448 (SWA); *S v Ferreira* 1970 (2) SA 729 (O); *S v Moyo* 1978 (4) SA 538 (R).

701. *R v Markins Motors (Pty) Ltd* 1959 (3) SA 508 (A); *R v Patel* 1964 (2) SA 34 (FC); *S v Ushewokunze* 1971 (2) SA 360 (RA).

702. *R v Ncetendaba* 1952 (2) SA 647 (SR); *R v Msekeli* 1957 (2) SA 19 (SR); *R v Mtshiselwe* 1957 (3) SA 313 (E); *R v Nkomozombango* 1959 (1) SA 746 (SR); *S v Marshall* 1967 (1) SA 171 (O); *R v Ncube* 1968 (2) SA 18 (R); *R v Gideon* 1970 (1) PH H41 (R); *S v Mnyandu* 1973 (4) SA 603 (N); *S v Kgware* 1977 (2) SA 454 (O); *S v Moyo* 1978 (4) SA 538 (R).

703. *S v Sibeko* 1951 (2) SA 41 (E).

704. *S v Erasmus* 1973 (4) SA 481 (T), (Children's Act of 1960 repealed and replaced by Child Care Act 74 of 1983, s63(1) read with schedule).

contravention of s7(a) of Cape Act 27 of 1882⁷⁰⁵, contravention of s114 of the General Law Amendment Act 46 of 1935⁷⁰⁶, contravention of s27(1) Rents Act 43 of 1950⁷⁰⁷, fraud⁷⁰⁸, bribery⁷⁰⁹, reckless driving⁷¹⁰, treason⁷¹¹ and contempt of court⁷¹².

However, despite this wide application of *dolus eventualis* by our courts, in two recent decisions of the Appellate Division, *Pavlicev*⁷¹³ and *Nel*⁷¹⁴, it was held that *dolus eventualis* was insufficient, and that only *dolus directus* sufficed as the *mens rea* form for the particular offence. Both of these decisions involved the provisions of s54 of the Internal Security Act 74 of 1982, although *Pavlicev* was a case of subversion, whereas *Nel* was a case of sabotage. In both cases the State sought to prove the offence on the basis of *dolus eventualis*, and in both cases the court refused to countenance such a view, insisting on *dolus directus* for both offences.

705. *R v Hopkins* 1931 CPD 278.

706. *S v Smith* 1975 (2) PH H157 (NC), cited in LAWSA (n1) para 89.

707. *R v Suleman* 1960 (4) SA 645 (N).

708. *R v Myers* 1948 (1) SA 375 (A); *R v Bougarde* 1954 (2) SA 5 (C); *R v Oliver* (2) 1959 (4) 145 (D & CLD); *S v Jammy* 1976 (1) PH H34 (A); *S v Ostilly* 1977 (4) 699 (D & CLD); *S v Moodie* 1983 (1) SA 1161 (C); *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T).

709. *S v Deal Enterprises* 1978 (3) SA 302 (W).

710. *R v Ellis* 1959 (4) SA 497 (SR).

711. *R v Strauss* 1948 (1) SA 934 (A).

712. *S v Van Niekerk* 1970 (3) SA 655 (T); *S v Kaakunga* 1978 (1) SA 1190 (SWA).

713. *Minister of Law and Order and Others v Pavlicev* 1989 (3) SA 679 (A).

714. *S v Nel* 1989 (4) SA 845 (A).

Snyman criticizes these judgments, pointing out that the wording of s54 setting out the intention required is clear and unequivocal; it is the phrase "with intent to", which is almost invariably interpreted as meaning *dolus directus* or *dolus eventualis*, unless there are special reasons for departing from the ordinary meaning of the word⁷¹⁵. It is submitted by Snyman that in respect of s54 no such special reasons exist and consequently the ordinary meaning of the word in law, which includes *dolus eventualis*, must be applied⁷¹⁶. The learned author proceeds to analyse the reasoning of the courts in *Pavlicev* and *Nel* in some detail. *Inter alia*, the issue of whether *dolus eventualis* suffices for additional intent crimes is canvassed, and answered in the affirmative⁷¹⁷. Snyman also points out that on policy grounds it is difficult to reconcile the finding of the court that *dolus eventualis* is insufficient for a conviction of subversion or sabotage with the rule that *dolus eventualis* suffices for a conviction of murder, probably the most serious of all crimes, for which the death penalty may be imposed⁷¹⁸.

715. C R Snyman "Dolus Eventualis in the Offences of Terrorism, Subversion and Sabotage" (1990) 107 SALJ 365 at 368.

716. *Ibid* .

717. *Ibid* 369-370.

718. *Ibid* 372-3. M G Cowling "Recent Cases: Minister of Law & Order v Pavlicev 1989 (3) SA 679 (A), S v Nel 1989 (4) SA 845 (A)" (1990) 1 SACJ 112 welcomes the limitation of the form of intention required for "political" crimes such as terrorism, subversion and sabotage to *dolus directus*, on policy grounds. M C Maré "Minister of Law & Order v Pavlicev 1989 (3) SA 679 (A): Aspects of the Offence of Subversion" (1991) 4 SACJ 107 supports this view with regard to subversion which restricts the "vague and wideranging" ambit of the offence, although she observes that "... in principle there is no reason why *dolus eventualis* should not be sufficient for the additional intention required for subversion ..." (at 112).

The question of the sufficiency of *dolus eventualis* as a *mens rea* form also arose in relation to the crime of theft, in the case of *Aitken*⁷¹⁹. Van den Heever J expressed grave doubt as to the applicability of *dolus eventualis* in respect of theft, referring to such a proposition as a "novel concept"⁷²⁰. Thus the judge appears to be advocating that differentiated requirements exist in respect of *mens rea* for differing crimes for which *dolus* is required⁷²¹. The suggestion that *dolus eventualis* may not be a sufficient *mens rea* for theft has however been criticized as "unnecessary"⁷²² and "startling"⁷²³. As Maré observes, "... (i)t has always been accepted that where intention is an element of a crime, intention in any of its forms will suffice, and that it is therefore immaterial whether an accused has acted with *dolus directus*, *dolus indirectus* or *dolus eventualis* ..." ⁷²⁴. There seems to be no reason to distinguish theft from other crimes in this regard⁷²⁵. Maré⁷²⁶ and Sloth-Nielsen⁷²⁷ therefore agree that *dolus eventualis* is a sufficient form of *mens rea* for theft, and that *dolus eventualis* may relate to any of the elements of the crime of theft. It may therefore be concluded that the learned authors are correct in emphasizing that *dolus eventualis* is sufficient for the purposes of theft, as well

719. 1988 (4) SA 394 (C).

720. At 400 F-G.

721. J Sloth-Nielsen "Recent Cases: S v Aitken 1988 (4) SA 394 (C)" (1989) 2 SACJ 109 at 111.

722. *Ibid* 114.

723. Maré (n454) 115.

724. *Ibid*.

725. *Ibid* 118.

726. *Ibid*.

727. Sloth-Nielsen (n721) 113.

as for the offences of subversion and sabotage. Snyman cannot be faulted, it is submitted, when he states the following:

"One is here at the crux of the issue - the question whether *dolus directus* and *dolus eventualis* really constitute different types of intent, and whether it is at all feasible to distinguish between offences requiring only *dolus directus* and offences requiring either *dolus directus* or *dolus eventualis*. It is submitted that the answers to both these questions are negative, and that this applies to both common-law and statutory offences. It is trite law that intent should not be confused with motive or desire. Once one recognizes this crucial distinction, it becomes conceptually difficult, to say the least, to argue that certain crimes require only a certain type of intent (for example *dolus directus*), where as for other crimes any type of intent - thus also *dolus eventualis* - is sufficient. To know or foresee that a certain act may have a certain result and nevertheless to proceed with the act must, at least for the purposes of criminal law, be regarded as tantamount to intending that result ..."⁷²⁸.

728. Snyman (n715) 371. See Loubser (n57) 145.

DOLUS EVENTUALIS AND CAUSATION

The concept of *dolus eventualis* has also proved to be of some significance in respect of the issue of causation. In the light of the development of *dolus eventualis* as a response to the problem of the assessment of criminal liability where a crime is not part of the goal of the actor, but occurs as a consequence or result of the intended act of the accused, it is instructive to examine the notion of *aberratio ictus*.

Aberratio ictus may be defined as a "going astray of the blow" or a "missing of the aim or blow"; it is simply a "concise and convenient description of a certain type of factual situation"⁷²⁹. In its most common usage, *aberratio ictus* refers to the situation "... where a person, intending to kill or assault one victim, misses and kills or injures another victim instead ..."⁷³⁰. However it may also be relevant to other crimes such as assault, malicious injury to property and *crimen injuria*⁷³¹.

Aberratio ictus must be distinguished from *error in objecto*. In the *aberratio ictus* situation, the accused does not make a mistake regarding the object of his intention, but through a deficiency in skill, an accident, or some other cause, misses his intended object and hits another one⁷³². Liability for attempt will ensue in respect of the result which was the goal of the actor, but which did not occur⁷³³. however the question arises: can the actor be guilty of the

729. Snyman (n3) 210.

730. LAWSA (n1) para 94.

731. Snyman (3) 214.

732. LAWSA (n1) para 94.

733. *Ibid.*

criminal consequence which ensued even though it was not aimed at? In a number of early cases it was held that liability would ensue⁷³⁴. It is nevertheless clear that the approach of the courts was based on the *versari* doctrine, since discredited in our law, and which furthermore was in conflict with the subjective approach to *mens rea* now accepted as the law in South Africa⁷³⁵.

However, since the case of *Mtshiza*⁷³⁶, it has been accepted in our law that in order to be held liable on the basis of intention for a crime, the accused must at least have had *dolus eventualis* in respect of that crime⁷³⁷. It is therefore clear that there is no longer any need for a separate doctrine of *aberratio ictus*, as the application of the normal principles of criminal liability (especially those related to *mens rea*) is sufficient for the purposes of assessing guilt⁷³⁸. Turning to the interface between *dolus eventualis* and causation *per se*, it is a well-established rule in South African law that the precise manner of causation of harm does not have to be foreseen⁷³⁹. It is merely necessary that the accused should foresee that the particular result should flow from his act. The practical application of this approach may be seen in *Nhlajo*⁷⁴⁰, where

734. *R v Kuzwayo* 1949 (3) SA 761 (A); *R v Koza* 1949 (4) SA 555 (A).

735. *S v Mtshiza* 1970 (3) SA 747 (A) 751-2. Pain strongly favours the return of the "*aberratio ictus*" rule: J H Pain *Aberratio Ictus, the Doctrine, and its Reception in Botswana, Lesotho and Swaziland* (LLM Thesis University of Natal 1977).

736. *Ibid*

737. Snyman (n3) 213.

738. LAWSA (n1) para 94.

739. Snyman (n3) 208; Burchell and Hunt (n2) 150; De Wet and Swanepoel (n4) 141.

740. 1981 (2) SA 744 (A).

three robbers were convicted for the murder of a security guard, who was shot by a fellow security guard in the shooting affray which ensued when the robbers attacked the guards and attempted to rob them of the cash they were removing from a large store. It is suggested by Snyman that the basis upon which the robbers were convicted of murder - that they had foreseen the possibility of one of the guards being killed by a shot fired in his direction by another guard - may be questioned, as it is doubtful whether the robbers really foresaw such an extraordinary turn of events⁷⁴¹. However, Snyman agrees with the end result (the conviction for murder) on the basis that:

"... the accused foresaw the possibility that one (or more) of the guards might be killed in the affray, that they mistakenly thought that one of them, not a co-guard, might kill the victim, but that this mistake concerning the causal sequence leading to the victim's death was immaterial ..."⁷⁴².

It should, however, be noted that in his judgment in *Nhlapo*, the learned judge, Van Heerden JA, left open the question whether "... the unforeseen manner in which a foreseen consequence was caused, is legally relevant ..." (at 750 F).

It was, however, re-emphasized by the Appellate Division in the case of *Msiiza*⁷⁴³ that with regard to *dolus eventualis*, even if the death of the deceased which is foreseen as a possibility, occurs in a manner not precisely as foreseen by the accused, *dolus eventualis* will still be present.

This matter was however far from settled, as indicated by the next Appellate Division judgment on the point, in the

741. Snyman (n3) 210.

742. *Ibid*

743. 1984 (2) PH H116 (A).

case of *Talane*. In this case, three robbers were fleeing from a storekeeper, who fired at the panel van in which they were attempting to make their escape, at which point they evacuated the van, running in different directions. The first accused fled in a southerly direction, whilst the appellant and the second accused ran in a northerly direction. For some reason, the first accused changed his mind and turned around, heading back in a northerly direction. Upon his passing the door of the shop, the storekeeper came out and fired a number of shots in his direction until his ammunition was exhausted, in the process wounding the first accused in the stomach. After being called back by his friend, the storekeeper turned around and walked back to the shop, whereupon the first accused shot him in the back, killing him.

On the facts, the court found that the deceased no longer wished to prevent any of the robbers from fleeing: his pistol was empty, and he had been called by his friend. The court consequently held that it would be unfair to find beyond reasonable doubt on the facts that the robbers foresaw and intended that the deceased should be shot in such a situation:

"... Dit sou onregverdig wees om op die getuie nis bo redelike twyfel te bevind dat die rowers voorsien het en beoog het dat die oorledene ook nog in so 'n geval geskiet en buite aksie gestel moet word. Die skote wat beskuldigde 1 toe op die oorledene afgevuur het toe sy mededaders in alle waarskynlikheid alreeds ver en buite gevaar was en hyself ook buite gevaar was van agtervolging deur die oorledene, kan nie bo redelike twyfel bevind word te geval het binne die grense van wat die appellant voorsien het en hom mee versoen het nie. Die Verhoorhof het gevolglik gefouteer om appellant aan die moord op oorledene skuldig te bevind ..."⁷⁴⁵.

744. 1986 (3) SA 196 (A).

745. 207 I - 208 A.

It is instructive to note that the court accepted that the robbers had foresight of the dangers inherent in the robbery itself, ie the possibility of the victims being armed and offering resistance, and that they would have to resort to violence either to prevent themselves being injured, to prevent their victims trying to arrest them or to prevent their victims from following them or hindering their escape⁷⁴⁶. The court thus accepted that should a victim be killed to prevent any of these dangers eventuating, such a death would proceed with the necessary *dolus eventualis* on the part of the accused⁷⁴⁷. However the court declined to apply the established line that the precise manner of the causation of the harm need not be foreseen for liability to ensue; instead, choosing to limit liability on the basis that a foreseen consequence was caused in an unforeseen manner.

This new view of *dolus eventualis* in respect of causation was conclusively affirmed in the judgment of Van Heerden JA in the case of *Goosen*⁷⁴⁸. The learned judge adopted the views of some German jurists that the element of intention is not satisfied if the consequence occurs in a manner which differs markedly ("wesentlik") from the manner in which the accused foresaw the causal sequence⁷⁴⁹. Furthermore, the learned judge confined the dicta of Rumpff JA in *Masilela*⁷⁵⁰

746. 206 G-I.

747. 206 J. Cf Steyn CJ's judgment in *S v Nkombani and Another* 1963 (4) SA 877 (A) 882.

748. 1989 (4) SA 1013 (A).

749. At 1026, Van Heerden JA describes a "wesentlike afwyking" as existing when "... die daadwerklike kousale verloop tot so 'n mate van die gekontempleerde een verskil dat eersgenoemde nie redelikerwyse onder die dader se voorstelling tuisgebring kan word nie".

750. *S v Masilela and Another* 1968 (2) SA 558 (A).

and Jansen JA in *Daniels*⁷⁵¹, to the effect that the mistake of the accused with regard to the precise way in which death occurs is irrelevant for the purposes of liability, to the factual situations in those particular cases and in particular to instances when there was *dolus directus* in respect of the causing of death⁷⁵².

In support of this conclusion, Van Heerden JA supplied the following hypothetical example⁷⁵³:

A robber plans to rob a café owner. The robber carries a pistol with him and he foresees as a reasonable possibility that he might have to use the weapon, in so doing killing the café owner, although he earnestly hopes that there will be no resistance and thus no need to use the pistol. Hoping that the victim will hand over his money without the use of force, the robber conceals the weapon in his coat pocket. At that moment, he slips and falls on the floor, the pistol goes off, and the café owner is fatally wounded. On this set of facts, the learned judge would not hold the robber guilty of murder because of the mistake in the causal sequence which resulted in death.

As Burchell⁷⁵⁴ points out however, it could be argued that an acquittal on a murder charge in such a case could also result on the basis of the robber's conduct in entering the café with a loaded pistol in his pocket. In this instance the factual cause of the death of the café owner was not the legal cause of such death, since his slipping and falling constituted a substantially unusual event, which was not foreseen as a real possibility and which served to break the

751. *S v Daniels and Another* 1983 (3) SA 275 (A) 332 G.

752. At 1023.

753. At 1026 B-D.

754. J M Burchell "Mistake or Ignorance as to the Causal Sequence - A New Aspect of Intention" (1990) 107 SALJ 168 at 170.

causal chain⁷⁵⁵. In Burchell's opinion, the major, and most beneficial, effect of the approach of Van Heerden JA in *Goosen* will be that it could act as a way of limiting liability in common-purpose cases⁷⁵⁶. The learned author sees the judgment of Van Heerden JA as part of a trend to limit the "extreme approach" adopted in *De Bruyn* and *Shaik*⁷⁵⁷.

This approach may however be criticized on a number of grounds. First, it involves incorporating a value judgment into the approach of the courts in dealing with this type of case. In assessing *dolus eventualis* in the area of causation, it is required of the courts, according to the *Goosen* line, to investigate whether a marked correlation existed between the foreseen sequence of events and the actual sequence of events. Given that the proof in such a case is gathered by means of inferential reasoning, this requirement provides a lot of scope for the judge to impose his own "regsgevoel" (sense of justice) upon the facts of the case. Such a development therefore undermines legal certainty⁷⁵⁸. Secondly, it is submitted that this development is unnecessary, in terms of its further function as a safeguard for the accused. The accused is already sufficiently protected by the substantial burden of proof required to be discharged by the State. Thirdly, such an

755. *Ibid.*

756. *Ibid* 171.

757. *Ibid* 173; *S v De Bruyn en 'n Ander* 1968 (4) SA 498 (A); *S v Shaik and Others* 1983 (4) SA 57 (A).

758. Van Heerden JA acknowledged that "wesenlike afwyking" was a vague and uncertain term, but expressed the hope that definitive guidelines would gradually emerge from the courts (1026 G-H). However, as L Steyn "Recent Cases: *S v Goosen* 1989 (4) SA 1013 (A)" (1990) 1 SACJ 104 at 106 observes, the lack of clarity as to what constitutes "wesenlike afwyking" is cause for concern.

approach could lead to anomalous results. Taken to its logical conclusion, the accused may escape liability where he achieved his goal, although not quite in the manner in which he had planned. Thus in a case such as *Thabo Meli*⁷⁵⁹, where the accused assaulted the deceased and then rolled his body over a krantz, the court found a continuing intention to kill which included both acts, and thus upheld the murder conviction. However, if the accused was of the opinion that he had killed the deceased by assaulting him, whereas it was the fall over the krantz that caused him to perish, the accused could not on the *Goosen* line, be found guilty of murder, since there is not a substantial correlation between the foreseen sequence of events leading to the consequence and the actual sequence of events.

Jordaan⁷⁶⁰ observes that the decision in *Goosen* is contrary to the prevailing psychological approach to fault in South African law:

"... Die opsetsvereiste word bevredig waar 'n dader sy wil rig op 'n bepaalde handeling of gevolg terwyl hy kennis het van die ongeoorlooftheid van sy handeling. Sodra 'n verbode handeling of gevolg dus met hierdie laakbare gesindheid ('bose opset') teweeggebring word (ongeach hoe dit veroorsaak word), voldoen die dader aan die opsetsvereiste. Die feit dat sy verwytbare gesindheid nie met die daadwerklike gebeure verband hou nie, is, wat sy opset dan betref, regtens irrelevant ..." ⁷⁶¹.

759. *Thabo Meli v The Queen* [1954] 1 WLR. 228. See E M Burchell "Murder: Mens Rea and Actus Reus" (1961) 78 SALJ 239.

760. L Jordaan "Vonnis: S v Goosen 1989 (4) SA 1013 (A)" (1990) 2 SACJ 208.

761. At 210. However, Jordaan tentatively supports the *Goosen* decision, despite the fact that she acknowledges that it militates against "suiwer regsnorme", on the grounds that it satisfies one's "regsgevoel", particularly in the context of the compulsory death sentence which was still in operation at this time. She trusts however that "hierdie juridies onaanvaarbare

Snyman⁷⁶² points out that there is no South African authority for the *Goosen* decision⁷⁶³, and that the only sources which seem to support the court's view are the writings of certain German jurists⁷⁶⁴. These writers interpret "wesenskaplikheid" in terms of the theory of adequate causation, such that:

"... 'n dwaling ten aansien van die oorsaaklike verloop is wesenlik indien die werklike oorsaaklike verloop so ver afgewyk het van die oorsaaklike verloop wat die dader vir hom subjektief voorgestel het, dat hierdie afwykende gebeure buite die grense geval het van gevolge wat volgens menslike ervaring te verwagte is van die soort handeling wat die dader verrig het (of buite die grense geval het van wat voorsienbaar is, of van wat volgens menslike ervaring geneig is om voort te vloei uit die soort handeling wat die dader verrig het)..."⁷⁶⁵.

Snyman criticizes the use of adequate causation in solving the problem regarding mistake in respect of the causal sequence. He points out that if a judge decides that there was a "wesenskaplike dwaling", this means that "... die werklike oorsaaklike verloop so ver afgewyk het van die voorgestelde oorsaaklike verloop dat dit (dit wil sê die werklike oorsaaklike verloop) buite die grense geval het van gevolge

onsuiwerheid met sy gepaardgaande regonsekerheid ... mettertyd weer uit ons reg sal kan verdwyn".

762. C R Snyman "Dwaling Aangaande die Oorsaaklike Verloop" (1991) 4 SACJ 50.

763. At 52-3, Snyman points out that not one South African writer has supported the notion that "wesenskaplike dwaling" regarding the causal sequence excludes intention. He states that he can find no previous authority in our case law for this proposition. In this he is correct, I submit, with the exception of *Talane* 1986 (3) SA 196 (A), discussed above.

764. *Ibid* 53.

765. *Ibid* 54.

wat normaalweg verwag kan word ..."⁷⁶⁶. Therefore, as Snyman emphasizes, "... in so 'n geval sou daar in elk geval geen (juridiese) oorsaaklike verband tussen handeling en gevolg bestaan het nie ..."⁷⁶⁷. He states that the reason for finding the accused not guilty of committing the crime is consequently causation and not a lack of fault ("skuld"⁷⁶⁸). This is borne out, in Snyman's view, by the fact that "... die oomblik wat 'n mens probeer om die begrip 'weselik' by hierdie vorm van dwaling nader te omskryf, beland jy onvermydelik by die maatstawwe vir juridiese oorsaaklikheid ..."⁷⁶⁹. Thus the judge, in examining the "skuldvraag" returns to a test which he has already applied in determining causation⁷⁷⁰. The problem in the particular factual situation under discussion is therefore one of causation, not one of fault.

Snyman thus concludes that where the consequence comes about in an apparently unusual way, the problem to be solved is one of causation, and not one of fault⁷⁷¹. He states that there is therefore no good reason to deviate from the

766. *Ibid* 55.

767. *Ibid*.

768. *Ibid*.

769. *Ibid* 56.

770. *Ibid*.

771. *Ibid* 60. Although it may be submitted that Snyman's approach ultimately relies upon his own view regarding causation, Burchell and Hunt (n2) 150 agree that "... where the manner of the occurrence of the consequence is very different from that foreseen by the accused, his liability or otherwise is likely to turn on the question of causation rather than that of mens rea ...".

accepted rule that mistake regarding the causal sequence does not exclude intention⁷⁷².

It may therefore be argued that the *Goosen* line is an unwelcome development in its attempt to substitute a value judgment for the principles of *mens rea*, and by introducing a limitation on liability which may lead to anomalous results, where the culpable accused may escape liability due to a fortunate twist of fate in the causal sequence of events by which he achieves his end.

772. *Ibid.* Snyman points out (at 59) that he regards *Goosen* as wrongly decided on the facts, as there was a causal link between the action of the accused and the death of the victim. He observes that the court's acceptance of a causal link is implicit in the fact that the judgment of the court deals with fault ("skuld"), and that even if "wesentliche dwaling" excluded intention, there was no such mistake in this case. He relies on *S v Nhlapo* 1981 (2) SA 744 (A) (a judgment delivered by the selfsame Van Heerden JA) as authority for this proposition, and comments that it is difficult to reconcile *Goosen* with *Nhlapo*, where in fact it appears that the manner in which the victim died in *Nhlapo* is even more unusual than the manner in which the victim died in *Goosen* (at 60). In *S v Mkhwanazi and Others* 1988 (4) SA 30 (W), Van Schalkwyk J expresses an obiter view that in the particular factual situation in that case (four armed robbers were charged with the murder of their accomplice, who was shot in self-defence by a private citizen on the scene of the crime) the accused would not be found guilty even if they had foreseen the manner of his death. T Geldenhuys "Vonnisse : *S v Mkhwanazi* 1988 (4) SA 30 (W)" (1989) 2 SACJ 119 at 120 cogently rebuts this view: "... eerstens word oorsaaklikheid in die strafreg nie uitsluitlik deur 'proximate cause' bepaal nie ... en tweedens kan 'n handeling nie 'n novus actus daarstel indien sodanige handeling vooraf deur die dader voorsien is nie ...".

DOLUS EVENTUALIS IN RESPECT OF CIRCUMSTANCES

Although the entire discussion of *dolus eventualis* above has proceeded in respect of consequences, *dolus eventualis* is equally applicable to circumstances.

Intention must relate to all the elements of or requirements for the crime: the act, the circumstances or consequences set out in the definition of the crime, as well as unlawfulness⁷⁷³. Burchell and Hunt deal with the requirements relating to *dolus eventualis* in respect of consequences separately from requirements relating to *dolus eventualis* in respect of circumstances, although they acknowledge that the requirements are identical⁷⁷⁴. In the above analysis of *dolus eventualis*, the crime of murder was primarily used as the example in discussion; therefore only foresight of the consequences was examined. However it is only the materially defined crimes that are defined in terms of causing a certain consequence (for example the causing of death)⁷⁷⁵. Formally defined crimes, in contrast, are defined in terms of the commission of a particular act in certain circumstances⁷⁷⁶.

Intention in respect of a circumstance means simply that the accused knows of or is aware of the circumstance in question⁷⁷⁷. In this regard it is sufficient, for the

773. Snyman (n3) 205.

774. Burchell and Hunt (n2) 156.

775. Snyman (n3) 205.

776. *Ibid.*

777. Snyman at 205 gives the following example:

"... one of the requirements of theft is that the property taken must be a movable corporeal thing. Intention in respect of this requirement or circumstance means that X knows that he is dealing with a movable corporeal thing. This intention may also be

purposes of intention, to hold a belief that a circumstance may possibly exist, coupled with recklessness as to whether or not it does exist. Thus *dolus eventualis* in respect of circumstances is sufficient *mens rea* for a formally defined crime⁷⁷⁸. The cognitive element must consist of actual knowledge of the possibility of the circumstance existing; this knowledge may not be imputed to the accused⁷⁷⁹.

Burchell and Hunt describe the volitional element of *dolus eventualis* in respect of circumstances as "recklessness" and state that this has the same connotation as in *dolus eventualis* in respect of consequences, that is, the taking of a conscious risk⁷⁸⁰. The learned authors hold that "...

present in the form of *dolus eventualis*, namely if X realises that there is a possibility that the property he is taking may be movable and corporeal and belong to somebody else, but is not deterred by this consideration and nevertheless proceeds to take the property (in other words, he reconciles himself to this possibility).

See Van den Heever J's criticism of this example in *S v Aitken* 1988 (4) SA 394 (C) 400-401 and Maré's cogent discussion on the point: (n454) at 118.

778. Burchell and Hunt (n2) 156-7 cite the common law examples of abduction in *R v Churchill* 1959 (2) SA 575 (A) and rape in *R v Z* 1960 (1) SA 739 (A). Such a "belief" naturally implies subjective foresight. The same principles apply in respect of statutory offences requiring *mens rea* in the form of intention: *dolus eventualis* in respect of circumstances suffices and thus subjective foresight of the possibility of the existence of the fact or circumstance in question and recklessness whether it existed or not is sufficient to constitute intention. Burchell and Hunt cite *R v Suleman* 1960 (4) SA 645 (N) and *S v Kazi* 1963 (4) SA 742 (W) as examples of the application of *dolus eventualis* in cases of statutory liability.

779. *S v Tshwape* 1964 (4) SA 317 (C) 335.

780. Burchell and Hunt (n2) 158-9. For a criticism of the "taking of a conscious risk" formulation see 195-7 above.

it is sufficient if the accused, having foreseen the real possibility of the existence of the circumstance in question, nevertheless persisted in his conduct irrespective of whether it existed or not ..."⁷⁸¹.

The element of recklessness may be provided by a deliberate abstention from making inquiries which might lead to the truth⁷⁸². Burchell and Hunt⁷⁸³ stress that "... on its own wilful blindness does not constitute intention, the accused must also have entertained a belief, or a real possibility that the circumstance in question existed ..."⁷⁸⁴. On the other hand, wilfully refraining from making inquiries to avoid the confirmation of one's suspicions 'will generally justify the conclusion that what one might otherwise hold to be no more than suspicion is really a state of mind describable as conviction or belief'.⁷⁸⁵.

It may further be noted that since motive is irrelevant in respect of the volitional element of legal intention, the purpose of abstention from making inquiries need not be to avoid having one's suspicions confirmed⁷⁸⁶. Wilful blindness is therefore only one of the forms which the recklessness element of legal intention may take⁷⁸⁷.

781. *Ibid* 159. Burchell and Hunt's use of the "real possibility" criteria is criticized at 132 above.

782. *Ibid* n278. See the cases in relation to wilful blindness mentioned here.

783. *Ibid* 159.

784. See *ibid* n283.

785. *Ibid* n 284. *R v Markins Motors (Pty) Ltd* 1959 (3) SA 508 (A) 516.

786. Burchell and Hunt *ibid* 159.

787. *Ibid* 160.

In conclusion, it may be noted that most authors make no distinction in the treatment of circumstances and consequences. Loubser and Rabie use the term "result ... in circumstances" which, it is submitted, arguably suffices in describing both circumstances and consequences. Finally, it follows that the formulation of *dolus eventualis* adopted in respect of consequences above applies equally in this situation, in relation to circumstances. Thus the cognitive component of *dolus eventualis* in respect of circumstances would be foresight of a possibility (not a "substantial" or "real" possibility, merely a possibility, however remote). The volitional component of *dolus eventualis* in respect of circumstances would similarly be equivalent to a conclusion that the harm might result and persistence in the conduct. Wilful blindness in this situation would consist of a conclusion that the circumstances of the harm may exist and a deliberate abstention from making enquiries to establish the truth (conduct).

ENGLISH CRIMINAL LAW

INTRODUCTION

The significance of the development of *dolus eventualis* in South African law can be illuminated by a comparison with the methods adopted to deal with liability connected with foresight of harm elsewhere. It is specially appropriate to consider the English legal system, in the light of its general influence on the development of South African criminal law¹, as well as its elevated position in the area of comparative law in a global sense. The development in English law in respect of the notions of intention and recklessness, which *mens rea* forms deal with foresight, has primarily taken place over the last thirty years. Virtually all the theoretical problems that have arisen, have occurred in the context of the dichotomy between murder and manslaughter.

1. For an assessment of the historical influence of English law upon South African law, see Burchell & Hunt, South African Criminal Law & Procedure: Volume 1 (General Principles of Criminal Law) 2ed by E M Burchell, J R L Milton and J M Burchell (1983) 31-50.

INTENTION

Early developments.

Murder and manslaughter share a common *actus reus*² and thus the distinction between them is drawn in the area of *mens rea*. Traditionally, murder requires "malice aforethought" and although somewhat misleading³, the parameters of intention are still established in terms of this concept. It is customary to divide malice aforethought into three categories: express malice, implied malice and constructive malice. Express malice is equivalent to direct intention, that is it exists where the defendant actually intends to kill his victim⁴. Implied malice exists where the defendant intends to cause "grievous bodily harm" to his victim and in so doing, kills him⁵. Constructive malice may exist in two situations; "... where the defendant killed his victim in the course of, or in furtherance of, committing a felony ..."; and second "... when the defendant killed his victim in the course of, or for the purpose of resisting an officer of justice, or resisting or avoiding or preventing a lawful arrest, or effecting or assisting an escape or rescue from legal custody ..."⁶.

2. "... unlawfully killing a reasonable person who is in being and under the King's Peace, the death following within a year and a day ..." (C M V Clarkson and H M Keating Criminal Law: Text and Materials, 2ed (1990) 584. This formulation was originally cited by Coke.
3. R Goff "The Mental Element in the Crime of Murder" (1988) 104 Law Quarterly Review 30 at 33 regards the concept of malice aforethought, as required in the crime of murder, as "thoroughly misleading; since neither premeditation nor malice towards the victim were necessary ...".
4. *Ibid*, Clarkson and Keating (n2) 586.
5. Goff (n3) *loc cit*.
6. *Ibid*, Clarkson and Keating (n2) 587.

Liability for manslaughter is imposed where the defendant has unlawfully caused the death of another where the killing is not sufficiently blameworthy to warrant liability for murder⁷. There are two categories of manslaughter: involuntary and voluntary⁸. Since murder requires that the killing is intended by the actor, whereas manslaughter is satisfied by killing resulting from the actor's recklessness, it is of crucial importance to have legal certainty regarding the parameters of "intention". However, this has not been typical of the state of the English law over the past thirty years.

Prior to 1960, the courts favoured a strict interpretation of intention (ie as equivalent to aim or desire) in such cases as *Ahlers*⁹ and *Steane*¹⁰. In *Ahlers*, the defendant was acquitted of treason charges after he aided German nationals to return home after the declaration of war in 1914. The Court of Criminal Appeal held that the defendant merely

7. Clarkson and Keating (n2) 606.

8. *Ibid.* Liability for manslaughter arises:

"... 1. Where the defendant does not have the necessary mental element for murder (malice aforethought), but his actions can nevertheless be regarded as blameworthy to some extent (involuntary manslaughter); or

2. where the defendant does possess the necessary malice aforethought for murder, but has killed under certain specified circumstances which the law regards as mitigating the seriousness of his offence (voluntary manslaughter) ...".

9. [1915] 1 KB 616 (CCA).

10. [1947] KB 997 (CCA).

intended to do his duty as consul and therefore did not intend to aid the King's enemies¹¹.

Coincidentally, *Steane* also occurred in the context of assisting the enemy during wartime¹². The defendant had broadcast propaganda for the Nazi government, to prevent his family or himself being sent to a concentration camp. He was held not to have had an "intent to assist the enemy".

11. Williams includes undesired consequences which are known certainties under the umbrella of intention. This form of intention (known as "oblique", as distinct from "direct") holds a person to "... intend an undesired event that he knows for sure he is bringing about ..." (G Williams "Oblique Intention" (1987) 46 Cambridge Law Journal 417 at 418). Although he praises *Ahlers* as "... an admirable example of judicial balance in wartime ...", Williams considers it to be "... almost certainly wrong in law ..." (G Williams *Criminal Law : The General Part* 2ed (1961) 40) and points out that it contradicts a later decision (of the same court) in *Kupfer* [1915] 2 KB 321 (CCA), where the accused was convicted of paying money for the benefit of the enemy, although he made the payments with the intention of benefiting himself (*ibid*).
12. Prior to *Steane*, intention was also construed as synonymous with purpose in the case of *Thorne v Motor Trade Association* ([1937] AC 797; [1937] 3 All ER 157) in which Lord Atkin considered that to put a trader's name on a "stop list" so that his business would certainly be ruined might be "... an act done in lawful furtherance of business interests, and ... without any express intent to injure the person whose name is published ...".

The court sanctioned the view that only direct intention to assist the enemy would suffice for a guilty finding¹³.

This case has been widely criticized and its conclusions have been denigrated as "highly disputable"¹⁴ and "open to doubt"¹⁵. As *Steane* has been identified as the chief authority against the view that intention includes foresight¹⁶, this criticism is significant and bears examination.

Williams points out that the court never actually discussed the question whether foresight that the broadcasting was

13. In his judgment, Lord Goddard gave some illustrations which appear to indicate that belief in the probability or even the certainty of a consequence does not mean that the requisite intent existed with regard thereto. *Inter alia*, he adduced an example incorporating the offences of "shooting with intent to murder" (no longer a separate offence) and "shooting with intent to resist arrest", which were distinct offences, stating that if the accused shot at a policeman at close range, the jury should acquit him on a charge of shooting with intent to murder if they felt that the accused shot with intent to resist arrest. Another (somewhat dated) example mentioned by Lord Goddard was that of a man deliberately taking down his black-out curtains in wartime, resulting in a light appearing outside, perhaps during an air-raid. He observed that if the evidence was such that the accused acted in this way only to ventilate his room, then he would not be guilty of an offence with intent to assist the enemy, but only of an offence contrary to the blackout regulations imposed in wartime. Williams (n11 : Criminal Law) 41 n12 agrees that any assistance rendered to the enemy in the context of this example would be reckless, not intentional.

14. G Williams *The Mental Element in Crime*, (1965) 21.

15. Cross and Jones : Introduction to Criminal Law 9ed by R Card (1980) 33.

16. Williams (n14) *loc cit*. Although he makes the point in terms of "foresight of certainty", since this form of foresight is the most positive conception of foresight it naturally implies that lesser forms of foresight such as foresight of a probability are excluded.

bound to assist the enemy was equivalent in law to an intent to assist the enemy¹⁷. He concludes that the importance of the decision is based primarily upon its rejection of the notion that a person is deemed to intend the natural consequences of his acts¹⁸.

Clarkson and Keating observe that the court failed to acknowledge that a defendant can have two or more purposes in acting which are both intended¹⁹. Steane intended to assist the enemy in order to protect his family and prevent the threats of his captors being carried out. He knew that his purpose could only be achieved by reading the script given to him, thereby assisting the enemy. Moreover the ruling of the court in acquitting Steane is inconsistent with the rule of criminal law that motive usually has no effect on criminal liability²⁰.

Furthermore, apparently the court is straining the concept of intention to do a job for which it is not fitted²¹. It seems that the acquittal in *Steane* is more properly based on duress in regard to which motive may indeed be considered²². Williams states that the element of duress caused the court's sympathy towards Steane, citing in support the point that in cases where such sympathy is absent foresight of

17. Williams (n 11 : Criminal Law) 41. He observes that the decision is consequently not authoritative on the point.

18. Williams (n14) *loc cit*.

19. Clarkson and Keating (n2) 159.

20. *Ibid* 160.

21. J C Smith and B Hogan Criminal Law 6ed (1988) 58.

22. *Ibid*. Clarkson and Keating (n2) 159; Williams (n14) 21; Williams (n11) 40.

certainty has been taken to be equivalent to intent²³. He lends further weight to this argument when he observes that if Steane had acted as he did in order to obtain a packet of cigarettes, his defence would not have availed him²⁴.

Perhaps Clarkson and Keating provide the best assessment of the case when they cite it as a good illustration of the fact that the concept "intention" can be expanded or restricted to meet the demands of justice in any particular case²⁵.

The Privy Council provided further support for the limitation of "intention" to the ambit of direct intention in *Sinnasamy Selvanayagam*²⁶. This case concerned criminal trespass²⁷. The defendant refused to vacate government-owned rooms, which he and his forebears had occupied for

23. Williams (n14) 21. He cites *Arrowsmith v Jenkins* [1963] 2 QB 561. In this case it was held that "... the defendant's knowledge that a meeting she was addressing was obstructing the highway made her guilty of "wilfully" obstructing the highway, even though she had no particular desire to create an obstruction as such ...".

24. Williams (n11 : Criminal Law) 40. He provides an example in support of his reasoning: "... A man is charged with revealing state secrets to the enemy, and the result of his revelation has been to endanger the lives of many thousands of his fellow-subjects. On the principles of duress, which can be held to allow a balancing of evils, a judge will be inclined to say that no fear for his own safety can justify the accused in what he did. Yet if the decision in *Steane* is applied, the fact that the accused was motivated by fear is enough to show that he had no criminal intent ...".

25. Clarkson and Keating (n2) 161.

26. [1951] AC 83 (PC).

27. This was an offence under the Ceylon Penal Code in terms of which criminal trespass was committed by entering or remaining on the property of another with the intention to annoy him.

some 20 years. The magistrate held that the prohibited conduct was a natural consequence of his action, and convicted the defendant. In allowing the appeal, the Privy Council said *obiter* that the accused's "dominant intention" was to retain his home, even if he did anticipate the annoyance to the government superintendent²⁸.

An important legislative development prior to 1960 was the Homicide Act of 1957, which abolished the notion of constructive malice²⁹. It seems that prior to the Act there was a general misconception that implied malice and constructive malice were synonymous³⁰. The correct position was identified by the passing of the Act and the subsequent decision in *Vickers*³¹. There it was settled that a judge, when directing a jury in a murder case, could properly direct them that, if they were sure that, when the accused killed the victim, he either intended to kill him or intended to inflict grievous bodily harm upon him which caused his death, they should convict of murder.

Any hopes that the law had reached a settled and uncontroversial phase however were soon to be dashed by the House of Lords' decision in *DPP v Smith*³².

28. Williams (n11 : Criminal law) 42 states that the true reason for allowing the appeal was that the defendant had a claim of right. He further suggests that if the defendant had known he had no legal right to remain on the premises, he may well have been convicted and therefore that the knowledge (on the part of the defendant) of the certainty of causing the annoyance may in such circumstances be regarded as equivalent to intention.

29. "Constructive malice" is abolished by s1 of this Act.

30. Goff (n3) 33 n11.

31. [1957] 2 QB 664.

32. [1961] AC 290.

DPP v Smith [1961] AC 290.

The case of *DPP v Smith*, which arose from the death of a policeman³³, may be regarded as probably the most notorious English criminal case of recent times. It has been almost universally denounced and rejected by writers³⁴, the courts³⁵ and even legislatures³⁶.

The focus of the controversy was the application of the presumption that a person intends the natural and probable consequences of his acts. Donovan J in the trial court made extensive reference to the concept of the reasonable man in his judgment and his direction to the jury, apparently

33. The facts of *DPP v Smith* may be briefly summarized as follows: a criminal, trying to avoid arrest, killed a policeman by driving off at speed with the policeman clinging to his car and then zig-zagging until the policeman was thrown off, into the path of an oncoming car, which hit him.
34. K W B Middleton "An Apology for *DPP v Smith*" (1964) *Juridical Review* 75 at 76 observes that P J Fitzgerald denigrated it as: "... perhaps the most serious defect in our present substantive law ..." and that it evoked a leading article in *The Times* calling for legislative amendment and declaring that the moral basis of the criminal law was in peril. Williams regards *DPP v Smith* as having propagated a test which consisted of no more than a fictitious intent (G Williams *Textbook of Criminal Law* 2ed (1983) 81).
35. The Chief Justice of Australia, with the approval of all the other members of the High Court, denounced *DPP v Smith* as "misconceived and wrong" in *Parker* (1963) 111 CLR 610 at 632. Significantly, Goff (n3) 36 n23 observes that the decision was to a large extent simply ignored in practice by judges of first instance in England.
36. The New Zealand legislature reacted to *DPP v Smith* by removing the phrase "... or ought to have known ..." from s167(d) of the Crimes Act 1961, to ensure that the objectively tested mental state would have no place in the law of murder. (R A Caldwell *Garrow and Caldwell's Criminal Law in New Zealand* 6ed (1981) 140.)

applying the presumption³⁷. The Court of Criminal Appeal regarded this formulation as a misdirection, stating that it should have been made clear that the presumption was rebuttable and was valuable only for ascertaining the accused's mental state, and consequently quashed the murder conviction in favour of a manslaughter conviction. However the House of Lords reversed the finding of the Court of Criminal Appeal, holding that there was no misdirection by the trial judge.

The House of Lords assumed that the mental state associated with the result of an act may be transferred to the consequence that follows. Thus in *DPP v Smith*, the House of Lords accepted that once it was ascertained that the defendant intended to shake the police officer off his car (the result), he also intended to cause the officer grievous bodily harm (the consequence) - as long as the consequence was of a sort foreseeable as probable by the reasonable man, the House of Lords would thus attribute such intention to

37. The jury direction ([1961] AC 290 at 323) reads as follows: "... If you are satisfied that ... [the defendant] must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer ... and that such harm did happen and the officer died in consequence, then the accused is guilty of ... murder ...". C Salmon "The Criminal Law Relating to Intent" (1961) 14 *Current Legal Problems* 1 at 6 is of the opinion that although the value of the presumption was stressed by the trial judge, his use of such terms as "usually", "may infer" and "would be entitled to impute" in dealing with the evidence indicates that some discretion still existed for the jury. Williams (n11 : Criminal Law) 95 makes the same point, that the trial judge had directed the jury in "much less emphatic terms" than the House of Lords' decision.

the defendant, irrespective of whether or not the accused actually foresaw the consequence³⁸.

The decision of the Law Lords has been criticized as inconsistent with decisions in other branches of criminal law³⁹. Furthermore, critics of *DPP v Smith* have raised the inadequate treatment of existing authority to the contrary, consisting of a number of pronouncements, subsequently approved, in the House of Lords and the Privy Council⁴⁰. Moreover, it has been postulated that the decision suggests an objective test for all crimes⁴¹. *DPP v Smith* has also been criticized on policy grounds, for failing to distinguish between what has traditionally been regarded by writers as two fundamentally different states of mind; that of the person who kills after appreciating the likely

38. A K W Halpin "Intended Consequences and Unintentional Fallacies" (1987) 7 Oxford Journal of Legal Studies 104 at 106. Williams (n11 : Criminal Law) 94 formulates the finding of the court somewhat differently: that there would be sufficient malice for murder if the accused intended to do something unlawful to someone, and his act was such that the reasonable man would have foreseen the probability (or likelihood) of grievous bodily harm, and death results. He views the presumption (that natural and probable consequences of an act are foreseen by the actor) as a "... serious threat to any rational theory of intention ..." and consequently criticizes *DPP v Smith* as opening the door to "an increase in the number of crimes of fictitious intent ..." (at 97).
39. S Prevezer "Recent Developments in the Law of Murder" (1961) 14 Current Legal Problems, 16 at 27.
40. *Ibid* 24.
41. Middleton (n34) 79. He concedes however that Lord Kilmuir was referring specifically to malice aforethought in regard to murder and possibly also to a charge of wounding with intent to do grievous bodily harm. Williams (n11 : Criminal Law) 97 states unequivocally that whatever the authority of the case may be with regard to murder, it does not, as a matter of precedent, extend to any other crime.

consequences of his conduct and the person who, whilst intending some bodily harm, kills unwittingly⁴². Furthermore it has been pointed out that deterrence cannot be regarded as a viable justification of this decision; the panicky or stupid person acting on the spur of the moment can hardly be deterred by the threat of punishment for consequences which he did not foresee⁴³. Prevezer observes that the most questionable feature of the decision is that it amounts to a denial of retributive purpose in the definition of murder by failing to draw a distinction of fundamental importance between the advertent and negligent killer⁴⁴.

The critical assessment of *DPP v Smith* has not been uniformly negative. Smith observes that the House was not espousing a wholly objective test - with regard to knowledge of facts which made the act dangerous, an element of intention was required, in the form of the actual intention of the accused (as distinct from the purely fictitious intention arising from the application of the presumption)⁴⁵. He regards the criticism that *DPP v Smith*

42. Prevezer (n39) 25.

43. *Ibid* 26.

44. *Ibid*.

45. J C Smith "Intention in Criminal Law" (1974) 27 Current Legal Problems, 93 at 97. He circumscribes the "substantial subjective element" in *DPP v Smith* as follows:

"... It must be proved that the accused: (i) intended to do something unlawful to another, and (ii) knew, when he did that act, of the circumstances which made it an act likely to cause the death of or grievous bodily harm to another ...".

imposed liability for mere negligence and advocated a wholly objective test as "wide of the mark"⁴⁶.

Another view holds that *DPP v Smith* does not establish an irrebuttable presumption of intent, and that the test is not completely objective in that it utilizes the standard of the sane man instead of the standard of the reasonable man⁴⁷. The test is thus what the man of ordinary responsibility

46. *Ibid* 98. Middleton (n34) 83 agrees with the sentiments of Smith: "... Nor is it correct to say that *DPP v Smith* means that the law by a fiction attributes to an accused an intention which he never had. The test applied to the intention to do the act from which the harm flows is subjective, and it is only with regard to foresight of consequences that an objective test is applied *Mens rea*, in other words, goes to intent, and not to foresight ...". Smith is however quick to point out that he is not defending the decision in *DPP v Smith*, as it brings many thoughtless acts within the ambit of murder, which he regards as "absurd" (at 98). J R Spencer "Murder in the Dark" (1986) 45 Cambridge Law Journal 161 illuminates this criticism somewhat when he states that the decision held that murder includes killing by risk-taking and pitched the level of risk required to make it murder very low. However *DPP v Smith* has been acknowledged to have improved the law in one particular sphere, by defining grievous bodily harm as "really serious harm", thus providing a potential limitation on liability (Salmon (n37) 4).

47. Salmon (*ibid*) 11. F McAuley "Mens Rea: A Legal-Philosophical View" (1982) 17 Irish Jurist 84 at 99 employs the same reasoning: "... the learned judge was adamant that an accused was guilty of murder in these circumstances only if he was in a position to comply with the standard of the reasonable man and that this question led necessarily to an inquiry into the exact state of his knowledge of the circumstances surrounding his victim's death or serious injury, as well as to an assessment of his general capacities as an agent ... Thus ... an accused might escape liability for murder for any of a number of purely personal reasons ..." (his emphasis).

would have foreseen and not what the reasonable man would have foreseen⁴⁸.

Although the question arose whether *DPP v Smith* revived the doctrine of constructive malice⁴⁹, legal developments prompted by the decision have rendered this question entirely academic.

In consequence of the criticism of *DPP v Smith*, its effect and implications were examined by the Law Commission, which concluded: (i) that the test of intention and foresight should be subjective, not only in respect of murder, but in respect of criminal law generally, and (ii) that the intention to inflict grievous bodily harm should not be sufficient to constitute a *mens rea* for murder and that only intent to kill should suffice⁵⁰.

The Law Commission produced draft clauses to give effect to these two objectives. The clause relating to "proof of criminal intent" became section 8 of the Criminal Justice Act of 1967⁵¹. This effectively reversed *DPP v Smith* by statute⁵².

48. It therefore follows that "... the jury will still have to consider what the accused intended in reaching their verdict. This would mean that the objective test laid down by the law imposes a somewhat circuitous method of arriving at a verdict but not one which could work any injustice ..." (Salmon (n37) 12).

49. See n29 above: constructive malice was abolished by s1 of the Homicide Act 1957. Prevezer (n39) 27 avers that the House of Lords not only restored in practice the constructive malice doctrine but in all probability extended it.

50. Smith (n45) 98.

51. The second clause was never enacted.

52. Section 8 of the Criminal Justice Act, 1967, provides:

"... A court or jury, in determining whether a person has committed an offence:

Moreover, in *Frankland and Moore v R*⁵³, *DPP v Smith* was in effect held by the Judicial Committee of the Privy Council to have been wrongly decided. This decision has moved Lord Goff to comment that the objective test was never actually part of the common law, properly understood, and that we can now simply forget about it altogether⁵⁴. However, he notes that it should not lightly be disregarded that a very distinguished and experienced group of judges felt that Smith could be guilty of murder, even if he did not have the intention to kill or to cause grievous bodily harm to his victim⁵⁵.

Despite the legislative clarification of the Criminal Justice Act, the major issue concerning the role of foresight of harm had not yet been resolved. This issue was at the forefront of *Hyam*⁵⁶.

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions, but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances".

53. [1987] 2 WLR 1251.

54. Goff (n3) 36.

55. *Ibid.*

56. [1975] AC 55; [1974] 2 All ER 41.

Hyam v DPP [1975] AC 55.

After the passing of the Criminal Justice Act, it seemed as if the law of intention had returned to the position prior to *DPP v Smith*; where a somewhat vague notion was used by the courts to ensure justice⁵⁷. In this context we may examine the next major contribution of the Law Lords to an explanation of the notion of intention in *Hyam*. In this case the defendant faced murder charges, after she vengefully set fire to her rival's house⁵⁸.

The case found itself before the House of Lords as an appeal against a jury direction given by Ackner J in the trial court on the question of intent. It was stated by the learned judge that the necessary intent was established if the jury were satisfied that when the accused set fire to

57. Examples of this approach can be seen in *Ahlers* and *Steane* discussed above (at 241-5).

58. The facts of this case may be summarized as follows: Mrs Hyam had a lover, Mr Jones, who abandoned her for Mrs Booth, to whom he became engaged to be married. Wishing to scare her rival into leaving the neighbourhood, a jealous Mrs Hyam went to Mrs Booth's home in the early hours of the morning. Having ascertained that Mr Jones was not in the house, Mrs Hyam proceeded to pour approximately half a gallon of petrol through the letter-box in the door, stuffed newspaper through it and lit the newspaper. Mrs Booth and her three children, a boy and two girls, were in the house at the time. The house caught fire. Although Mrs Booth and her son were able to escape by climbing through a window, the two girls were asphyxiated by fumes from the fire. Mrs Hyam was charged with murder.

the house she knew it was highly probable that this would cause serious bodily harm (or death)⁵⁹.

Hyam did not focus directly on the meaning of intention, although the Law Lords did deliver some dicta on this issue. The majority of the House was of the opinion that it was the law that an actor intends a result if he knows that it is a highly probable (or perhaps merely probable) result of his act, although it was not his purpose or object to cause that result⁶⁰. However it is clear that the actual decision was that foresight of a high probability of serious bodily harm was sufficient *mens rea* for murder, not that such a state of mind necessarily amounted to an intention to cause serious bodily harm⁶¹. Thus among the central issues examined by the Law Lords were: the question whether malice aforethought was satisfied by foresight of the probability (or high probability) of the consequence occurring, and, if so, whether this was because such foresight was a type of intention, or because malice aforethought was not limited to intention; the degree of harm (death or merely grievous bodily harm) which had to be foreseen by the accused; whether the defendant's act had to be "aimed at someone"; and whether the test of foresight should be objective or subjective⁶². Each of the five Law Lords delivered a judgment which differed somewhat from those of his

59. The House of Lords was required to answer the following certified question: "... Is malice aforethought in the crime of murder established by proof beyond reasonable doubt that when doing the act which led to the death of another the accused knew that it was highly probable that that act would result in death or serious bodily harm ...?"

60. Smith and Hogan (n21) 56.

61. *Ibid.*

62. J.A Lawrence "Criminal Intention - A New Definition?" (1985) 48 Modern Law Review 717 at 718.

colleagues⁶³ and therefore it is appropriate to briefly examine the views of each.

Lord Diplock dissented from the majority view on the ground that he thought that foresight of death, and not merely serious bodily harm, was an ingredient of malice aforethought. His view was that the mental element in murder should relate, not to grievous bodily harm, but to death or a bodily injury known to be likely to endanger life. In considering intention in general terms, Lord Diplock posed the following question: What is the attitude of mind of the accused towards the particular evil consequence of his physical act that must be proved in order to constitute an offence? He held that no distinction should be drawn in law between the "... state of mind of one who does an act because he desires it to produce a particular evil consequence, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act ..."⁶⁴. Thus Lord Diplock accepted Ackner J's direction that foresight of a high probability was equivalent to intention.

Lord Kilbrandon agreed with Lord Diplock that mere foresight of grievous bodily harm was insufficient to constitute the mental element required for murder, and that the defendant

63. Lords Cross and Hailsham, together with Viscount Dilhorne, constituted the majority, while Lords Diplock and Kilbrandon dissented.

64. [1974] 2 All ER 41 at 63.

must foresee some injury likely to cause death if murder is to be proved⁶⁵.

Lord Cross, of the majority, felt that he had not heard adequate argument to decide whether the term "grievous bodily harm", used in the context of the required intent for the crime of murder, meant "really serious harm" or "harm likely to cause death"⁶⁶. He was therefore not prepared to commit himself on this issue, but (on the basis that *Vickers* was correctly decided) thought that malice aforethought would be satisfied if the accused foresaw the possibility of the occurrence of grievous bodily harm⁶⁷. Lord Cross concluded that the "ordinary man" would equate foresight of likely consequences with intention, and although he found a

65. The use of the term "likely" by Lord Kilbrandon may be further illuminated in this extract from his judgment: "... if murder is to be found proved in the absence of an intention to kill, the jury must be satisfied from the nature of the act itself or from other evidence that the accused knew that death was a likely consequence of the act and was indifferent whether that consequence followed or not ...". [1975] AC 55 at 98; [1974] 2 All ER 41 at 72.

66. Lord Hailsham and Lord Dilhorne adopted the former interpretation from *DPP v Smith*.

67. [1975] AC 55 At 96: "... If it is the law that an intention to cause grievous bodily harm - using intention in the strict sense of the word - is "malice aforethought", whether or not one realises that one's act may endanger life, then I think that it is right that the doing of an act which one realises may well cause grievous bodily harm should also constitute malice aforethought whether or not one realises that one's act may endanger life ...". Lord Cross therefore thought that the requirement of foresight of a high probability was unnecessary and unduly favourable to the defendant, and that foresight of the probability of grievous bodily harm constitutes sufficient *mens rea* for murder.

linguistic difference between the concepts, he regarded a mere linguistic problem as insignificant⁶⁸.

Viscount Dilhorne also inclined to the opinion that Ackner J was correct in his direction to the jury⁶⁹. He felt that foresight of a high probability of grievous bodily harm amounted to intention and therefore also satisfied the "malice aforethought" requirement. He was not however prepared to decide whether the test of foresight was subjective or objective⁷⁰.

Despite arguably being the most confusing of the five judgments in *Hyam*, Lord Hailsham's judgment is, in at least one respect, the most significant. His assertion that awareness of the probability of harm is not equivalent to an intention⁷¹ contradicted those of his colleagues and opened the door for a later restrictive interpretation of intention⁷². He held that the requisite malice aforethought required for murder consists of the intention to do one of

68. J. B. Brady "Recklessness, Negligence, Indifference and Awareness" (1980) 43 Modern Law Review 381 at 393.

69. [1975] AC 55 at 82: "... A man may do an act with a number of intentions. If he does it deliberately and intentionally, knowing when he does it that it is highly probable that grievous bodily harm will result, I think most people would say and be justified in saying that whatever other intentions he may have had as well, he at least intended grievous bodily harm"

70. Together with Lord Hailsham, Viscount Dilhorne held that *Vickers* was correct in holding foresight of grievous bodily harm (as opposed to foresight of death) to be part of the *mens rea* for murder, and that *DPP v Smith* was correct in holding that "grievous bodily harm" meant no more than really serious harm.

71. [1975] AC 55 at 77. Lord Hailsham was referring specifically to the crime of murder.

72. This occurred in *Maloney* (below (n97)) and the cases following it.

three things: (i) kill, (ii) cause grievous bodily harm, (iii) expose a potential victim to a risk which the defendant knows entails a serious risk of death or grievous bodily harm⁷³.

Therefore it seems that the extent to which Lord Hailsham's scheme of malice aforethought differs from that of his colleagues depends on how we are to understand the "intention" to expose another to a serious risk. He provided a further clue as to its interpretation when he held that events which are recognized as a "moral certainty" are intended⁷⁴. Thus it appears that a conviction would be sustained in terms of Lord Hailsham's formulation if the accused knew that there was a serious risk and had the intention to subject someone to it - such intention being deemed present by virtue of proof of its moral certainty⁷⁵. Subjecting someone to a "serious risk" is a "moral certainty" if the proposed action, entailing it, proceeds. Thus as Lynn suggests, a defendant convictable in terms of the majority's foresight-of-probability test would evade Lord Hailsham's test of intentional-exposure-to-known-risk

73. [1975] AC 55 At 79.

74. *Ibid* 74. R M Lynn "*Smith .. then Hyam .., now Moloney*" (1985) *New Law Journal* 844 at 845 elaborates upon the use of this terminology as follows:

"... Thus, the motorist who recognizes that it is implicit in her/his proposed action that an oncoming cyclist will be subjected to a risk, which quantitatively is a 'serious' one - notwithstanding the most fervent wish that the cyclist sustain no harm - 'intends to expose a potential victim to a serious risk', for it is a 'moral certainty' that the risk will be incurred by the proposed manoeuvre ... only the nature of the known risk, 'serious bodily harm' or 'physical injury', would determine the appropriate charge; murder or manslaughter ...".

75. *Ibid*.

only by arguing that "serious risk" involved proof of more than a risk which was merely "probable"⁷⁶.

Is Lord Hailsham's dissension from his colleagues not more apparent than real?⁷⁷ McEwan and Robilliard note that the "... difference between the intention to expose someone to the risk of harm and foresight of harm has eluded many commentators ..."⁷⁸. Duff observes that if Lord Hailsham's "intention" is established by the agent's knowledge that his action was likely to cause death or serious injury, then he "... has simply reached the same conclusion by a more tortuous route ..."⁷⁹, while Lynn simply labels the attempted distinction as "implausible ..."⁸⁰.

Lord Hailsham added a further qualification to his suggested solution: that before an act was sufficient for murder it must be "aimed at someone", just as was held in *DPP v Smith*⁸¹, where the qualification was included in order to exclude from liability for murder the person who caused death by dangerous driving. However, doubt has been expressed whether it was necessary for him to include this qualification in *Hyam*, since he accepted that the test of

76. *Ibid.*

77. Brady (n68) 393-5 observes that just like his fellow Law Lords in *Hyam*, Lord Hailsham's account collapses the distinction between subjective recklessness ("foresight of a risk") and intention ("intentionally exposing to risk").

78. J McEwan and St J Robilliard "Recklessness: the House of Lords and the Criminal Law" (1981) 1 Legal Studies 267 at 272.

79. R A Duff "Intention, Recklessness and Probable Consequences" (1980) Criminal Law Review 404 at 405.

80. Lynn (n74) 845.

81. Lord Hailsham adopted the usage of the phrase as explained in *DPP v Smith* [1961] AC 290 at 327.

foresight was subjective (so excluding dangerous but not murderous drivers)⁸².

The broad notion of intention proposed in *Hyam* did not meet with an uncritical judicial response. This much was evident from two decisions of the Court of Appeal shortly after *Hyam* was decided, in *Mohan*⁸³ and *Belfrage*⁸⁴, both of which favoured real (direct) intent. In *Mohan*, which dealt with liability for attempt, the court rejected the argument that in *Hyam* the House of Lords had given intention a meaning which was generally applicable in the criminal law⁸⁵. Foresight was useful in an evidential sense, but was not to be equated with intention⁸⁶. This qualification of the *Hyam* view is somewhat problematic in that it encourages technical distinctions in seeking differing meanings of intention in

82. Lawrence (n62) 718. Spencer (n46) 162 refers to the "aimed at" requirement as "whatever that means", indicating that it merely added to the confusion in the judgments.

83. [1976] QB 1; [1975] 2 All ER 193.

84. (1976) 1 WLR 741.

85. The judges (per James CJ) held that there was nothing in the judgments in *Hyam* that bound the Court of Appeal to hold that *mens rea* for attempt had to be proved by establishing beyond reasonable doubt that the accused knew or correctly foresaw that the consequences of his act unless interrupted would "as a high degree of probability", or would be "likely" to, be the commission of the complete offence.

86. The court further held that evidence of knowledge of likely consequences is evidence by which the court may establish intent, but such evidence is not in respect of attempt, to be equated with intent. Such intention could only be equated with an "aim" or "specific intent" or a "decision to bring about a certain consequence".

differing contexts⁸⁷. The court in *Mohan* also identified foresight of a probability with recklessness⁸⁸.

In *Belfon*, the Court of Appeal wished to clarify matters for the jury in its consideration of the meaning of intention in the light of *Mohan*. The Court of Appeal quashed the conviction (for wounding with intent to do grievous bodily harm)⁸⁹ on technical grounds⁹⁰. However the court went further in allowing the appeal expressing the view that the

87. If the meanings of intent become so refined that they bear little resemblance to the ordinary usage of the word, grave problems could be created for juries (Elliott and Woods Casebook on Criminal Law 5ed by DW Elliott and M J Allen (1989) 78). Furthermore the court assumes, without discussion, that there is a distinction between acting with knowledge of a likely risk and recklessness; a distinction which may lead to some confusion (Brady (n68) 389 n42).
88. The definition of intention in *Mohan*: "... a decision to bring about, insofar as it lies within the accused's power, [a particular consequence], no matter whether the accused desired that consequence of his act or not ..." ([1975] 2 All ER 193 at 200), allows an interpretation that a man can be said to intend a consequence which is not desired in itself if that consequence is a condition precedent to the achievement of a desired objective and he decides to cause that consequence, insofar as it lies within his power. (Cross and Jones (n15) 29). This interpretation amounts to foresight of a certainty and approximates to oblique intention rather than real (actual) intention.
89. The conviction was in terms of s18 of the Offences Against the Person Act 1861. See the discussion of this case in J H Buzzard "Intent" (1978) Criminal Law Review 5.
90. The Court of Appeal set aside the conviction *inter alia* as a result of the introduction by the trial judge of the word "recklessly" in explaining the meaning of "intent".

trial judge was influenced by certain opinions in *Hyam*⁹¹ and that it was a misdirection to say that a man intends a consequence which he foresees as a probable consequence of his action⁹².

Despite the dissenting voices raised in the Court of Appeal, the Law Lords did not attempt to alter the ambit or implications of *Hyam*. Lord Diplock took the opportunity to affirm the result in *Hyam* in the case of *Lemon*⁹³. Although he delivered a dissenting judgment on the question of whether blasphemous libel required a mental element beyond

91. The court declined to follow the views of Lord Diplock in *Hyam* and Lord Simon in *DPP for Northern Ireland v Lynch*, and instead relied upon the dicta of Lord Diplock in *Mowatt* [1967] 3 All ER 47 (CA), which was concerned with recklessness rather than intention, with regard to s20 of the Offences Against the Person Act 1861. The import of the Court of Appeal decision seems to be that in all cases under s18, and perhaps in all other cases except murder, the judge need not explain the meaning of intention.
92. Buzzard (n89) 6, who notes that it seems implicit in the judgment that the court equally would regard the instructions of the trial judge as a misdirection if the term "certain" were substituted for "probable", ie that foresight of a certainty was not sufficient for intention to be established. Apart from the caveat mentioned above with regard to reliance on *Mowatt*, the judgment of the court in *Belfon* may further be criticised for ignoring authorities which contradict its view. It is especially noteworthy that in the case of *Allsop* ((1976) 64 Cr App R 29), which was decided shortly before *Belfon*, a differently constituted Court of Appeal took the opposite view. Faced with giving substance to the notion of "intent" in "intent to defraud", the court adopted and applied the statement of Lord Diplock in *Hyam*, which the court in *Belfon* declined to follow.
93. [1979] AC 617.

the intention to publish, he unequivocally stated that *Hyam* was the law in regard to foresight of a probable result⁹⁴.

Some six years after *Lemon*, in the case of *Leung Kam-Kwok*⁹⁵, all five Law Lords sitting on the Judicial Committee of the Privy Council followed the *Hyam* line. The Law Lords held that intention was established where the accused foresaw a consequence of his actions as "highly probable", as had been explicitly stated by Viscount Dilhorne in *Hyam*⁹⁶. Despite both explicit and tacit affirmation of the *Hyam* line, the law was far from settled. Just a few months after *Leung Kam-Kwok*, the House of Lords was to perform a complete about-face in *Moloney*⁹⁷.

94. Referring to the state of mind of one who does an act because he desires it to produce a particular result and to the state of mind of one who, when he does the act, is aware that it is likely to produce that result but is prepared to take the risk that it may do so, in order to achieve some other purpose, Lord Diplock stated: "... It is by now well-settled law that both states of mind constitute 'intention' in the sense in which that expression is used in the definition of a crime whether of common law or in a statute. Any doubts on this matter were finally laid to rest by the decision of this House in *R v Hyam* ..." (at 638).

95. (1985) AC 905; [1985] 1 All ER 1025.

96. The Law Lords disapproved of the use of the word "likely" by the trial judge, stating that it was more appropriate to use the phrase "highly probable" or "a high degree of probability".

97. (1985) 81 Cr App R 83, [1985] Crim LR 227.

R v Moloney [1985] AC 905.

Moloney arose out of a drunken game between the defendant (a soldier) and his stepfather, which resulted in the defendant shooting his stepfather dead⁹⁸. In a judgment concurred in by the rest of the court, Lord Bridge allowed the appeal against a murder conviction on the basis that the trial judge had misdirected the jury⁹⁹.

The substance of Lord Bridge's judgment may be encapsulated by the following observations. First, there is no rule of substantive law that foresight of a probability is equivalent to, or can act as an alternative to, intention. Thus, contrary to the majority view in *Hyam*, murder requires intention; foresight of the high probability of death or grievous bodily harm is not enough, much less an intention

98. The defendant shot his stepfather, whom he loved, when, in the course of a drunken game to establish who was "quicker on the draw" with loaded shotguns, he pulled the trigger in response to a challenge, "... if you have [the guts] pull the trigger ...". He may not have realised that the gun was aimed at point-blank range at his stepfather's head.

99. To cover the possibility that the accused had deliberately taken a serious risk, the trial judge told the jury that it is murder not only if someone aims to cause death or physical injury and kills, but also if he foresees that it will probably happen, whether he desires it or not. After lengthy deliberations, in the course of which the jury asked for further directions on the necessary mental element, the jury convicted of murder. The appeal was dismissed by the Court of Appeal, which endorsed the judge's decision, which followed the authority of *Hyam*. The Court of Appeal certified a point of law of general public importance which enquired *inter alia* whether malice aforethought was established by proof of foresight of the probable occurrence of death or serious harm at the time of causing death, irrespective of whether the actor desired these consequences. The House of Lords answered the certified question in the negative, allowing the appeal, and thus rewriting the law of murder, as well as the law relating to criminal intention, yet again.

to expose the victim to a serious risk¹⁰⁰. In a case involving risk-taking therefore, the need for "a moral certainty" should be insisted upon. This would consist of a possibility which is little short of overwhelming, and an act that "will lead to a certain event unless something unexpected supervenes to prevent it ..."¹⁰¹. However, Lord Bridge held that there should be no elaboration or paraphrase of what is meant by intention unless on the facts of the particular case that is necessary in order to avoid misunderstanding¹⁰². Such cases will be extremely rare. Foresight of consequences (as an element bearing on the issue of intention in murder or indeed any other crime of specific intent¹⁰³) is not part of the substantive law, but the law of evidence. Lord Bridge thus discards Lord Hailsham's qualification in *Hyam* that the act of the defendant must be "aimed at someone". He holds that while in most murder trials the facts are such that there is no need to explain to the jury what the meaning of intention is, when the need arises, the jury should be told that an act is regarded as intended to cause death or grievous bodily harm where "... the defendant foresaw that consequence as being a natural consequence of his act ...".

100. Spencer (n46) 163.

101. [1985] AC 905 at 925, 926, 929.

102. Spencer (n46) 163.

103. Clarkson and Keating (n2) 384 observe, regarding the meaning of "specific" and "basic" intent: "... What actually do these terms "specific" and "basic" intent mean? The true answer is - nothing. They are like elephants - the courts know them when they see them ...". They do offer a definition in the light of several attempts by the courts to define these terms: "... crimes of specific intent are crimes where the mens rea of the offence extends beyond the actus reus (sometimes called crimes of ulterior intent) while in crimes of basic intent the mens rea goes no further than extending to the elements of the actus reus itself ...".

Lord Hailsham, the only Law Lord who also sat in *Hyam*, added a few words to show that although almost everything he said in *Hyam* was wrong, the murder conviction was not a miscarriage of justice. He concluded with the somewhat pious hope that the question of murder and risk-taking were now settled for ever¹⁰⁴.

The judgment in *Moloney* has been criticized as "... yet another instance of the dearth of the credible conceptual understanding and convincing reasoning which increasingly underlies and stigmatises the decisions of the House of Lords ..."¹⁰⁵. One of the principle objections is the treatment of previous authority, more specifically *Hyam*. In his rejection of even a high degree of recklessness as a sufficient mental element for murder, Lord Bridge observed that no-one had yet suggested that recklessness could constitute the *mens rea* of murder. Lawrence points out that this statement is questionable as it is certainly arguable that the House of Lords decided in *Hyam* that subjective recklessness constituted the *mens rea* of murder (although it may have been described in somewhat different terms)¹⁰⁶. In keeping with the extreme reluctance of the House of Lords to overrule one of its previous decisions, Lord Bridge did not explicitly overrule *Hyam* but instead found some authority for his views in certain dicta of Lord Hailsham. However this meant dealing with Lord Hailsham's inclusion of the intention to expose a potential victim to a serious risk as a category of the *mens rea* of murder. Lord Bridge stated that this came "dangerously near to causing confusion" with the definition of recklessness as identified by Lord Diplock

104. Spencer (n46) 163.

105. R M Lynn "*Smith ... then Hyam ..., now Moloney - II*" (1985) *New Law Journal* 871 at 872.

106. Lawrence (n62) 720.

in *Lawrence*¹⁰⁷, and observed further that Lord Hailsham had merely caused confusion with recklessness, but had not meant to include recklessness in the definition of malice aforethought. It has been suggested that, if *Hyam* included recklessness in malice aforethought, *Moloney* has overruled *Hyam*¹⁰⁸. However it is clear that Lord Bridge went to great interpretative lengths to obviate the need to do this¹⁰⁹.

There is some doubt whether Lord Bridge achieved his aims in *Moloney*. As Lynn points out, whilst asserting intention as the only necessary and sufficient requirement of malice aforethought, "... his Lordship went on to conclude that there was an evidential role for knowledge and foresight whereby an inference that intention was present could be established ..."¹¹⁰. This raises the question whether

107. [1982] AC 510.

108. *Lawrence* (n62) 720.

109. The question remains: how did Lord Bridge reconcile his view with the judgments of the four other Law Lords in *Hyam*? Lynn's answer to this question is "... with ... an eclecticism of citation that borders on mischievous ..." ((n74) 844). At 844 ff, Lynn indicates the adaptation of the individual judgments in *Hyam* by Lord Bridge.

110. *Ibid* 845.

Moloney in fact ousted liability for murder based on foresight¹¹¹.

Lord Bridge's use (in his model direction) of the term "natural", in describing the consequence which is required to be foreseen, is also somewhat problematical. Lord Reid has described the word "natural" as "peculiarly ambiguous"¹¹² and the use of the word has been identified as perhaps the most problematic part of the judgment¹¹³. Lynn perceives that "... the recognised-as-a-'natural'-consequence test appears to import by the back door the probable - foresight test so recently frogmarched out through the front ...", and speculates that trial judges may interpret "natural" as "likely to occur", "unlikely not to occur" or "would not be surprising"¹¹⁴.

As Lawrence cogently states:

"The weakness of Lord Bridge's speech is, perhaps, that he is unable to explain what is meant by the word intention in terms not including foresight, and yet he rejects the view that foresight is the same as intention. It is submitted, therefore, that juries will find it difficult to distinguish

111. The problem is further illuminated by Lawrence (n62) 721: "It is questionable whether juries will be able to distinguish easily between foresight and intention. Thus Lord Bridge states that if both questions put to the jury are answered yes, the jury may properly infer that D [the defendant] intended the consequences of his acts. If they may only infer intention (but may not presume intention) this means that D may foresee a natural consequence and yet be held not to intend that consequence; to hold otherwise would be to conclude that foresight of a natural consequence is intention. Yet it is far from easy to imagine circumstances where a presumption of intention would not be suitable where D foresees the natural consequences of his acts ...".

112. In *"The Wagon Mound" No 2* [1967] 1 AC 617 at 634F.

113. Lawrence (n62) 722.

114. Lynn (n105) 871.

between intention and foresight of natural consequences and that, in terms of the practical effect of *Moloney* (if not in strict legal theory), an intention to bring about a consequence may now be defined as identical to foresight of that consequence as a natural consequence of one's acts... In this way, foresight of consequences could become part of the substantive law even though Lord Bridge makes it clear that this is not intended to be the case ..."¹¹⁵.

It is apparent that Lord Bridge expressly intended that the "natural consequence" test along with his "golden rule" and related dicta should not merely be limited to the law of murder, and should apply to offences of "specific intent" as well. However "... it is axiomatic that such cannot be part of the ratio of *Moloney* and is merely persuasive authority for future judges dealing with such offences, other than murder ..."¹¹⁶. Smith and Hogan¹¹⁷ observe that *Moloney* must be read in the light of the explanation given of it in the subsequent cases of *Hancock and Shankland*¹¹⁸ and *Nedrick*¹¹⁹.

115. Lawrence (n62) 722.

116. Lynn (n105) 872.

117. Smith and Hogan (n21) 56.

118. [1986] AC 455; [1986] 1 All ER 641.

119. [1986] 3 All ER 1; [1986] 1 WLR 1025

R v Hancock and Shankland [1986] AC 455.

Hancock and Shankland arose out of the miners' strike in England¹²⁰. The accused were convicted of murder in the trial court¹²¹. On appeal, in the Court of Appeal, Lord Lane CJ took a bold step in condemning Lord Bridge's model direction, which had been adopted by the trial judge, as misleading. He pointed out that the main aim of the *Moloney* decision was to root out the notion that in murder knowledge of the risk of death or grievous bodily harm counts as intention to cause death. However, in his view, to "... foresee as a natural consequence" would be equivalent to "... foresee that it might happen ..." to anyone who had not read the rest of the judgment in *Moloney*, and it was the latter test which the House of Lords wished to discard, as it feared that the jury had been misled. The Court of Appeal therefore quashed the convictions and substituted a verdict of manslaughter, whereupon Lord Lane CJ proposed his own model direction (which involves instructions somewhat more elaborate than those cited in *Moloney*)¹²².

120. Two striking miners dropped lumps of concrete from a bridge onto a taxi taking a "scab" to work, killing the driver.

121. Lord Bridge's direction in *Moloney* concerning the meaning of intention was dutifully cited to the jury in the trial court. The jury convicted the accused on this basis.

122. Lord Lane CJ stated that where the defendant's motive or purpose was not primarily to kill or injure, the judge should ask the jury to consider the following questions:

"(a) Are you sure that the defendant did the act which caused death, knowing what he was doing and intending to do it? If no, you must find him not guilty of both murder and manslaughter. If yes, go on to consider the next question.

(b) Are you sure that the defendant's act was of a kind which was highly likely to cause death or really serious bodily injury? If no, you must find him not

On appeal, the decision of the Court of Appeal was affirmed in the House of Lords. Lord Scarman accepted Lord Lane's criticism of the model "natural consequence" direction in *Moloney*¹²³. However, he condemned Lord Lane's proposed alternative, stating that guidelines should be reserved for cases of real difficulty (a category into which he evidently thought this kind of case did not fall). Lord Scarman further affirmed three basic principles:¹²⁴

- (1) a judge need merely direct the jury in general terms that murder requires intention to kill or to do grievous bodily harm;
- (2) foresight of consequences are relevant only as evidence of the requisite intent;
- (3) the probability of the occurrence of a consequence is only a factor, although in some cases it may be a critical or very significant factor, in determining whether the accused acted with intent.

guilty of murder but he may be guilty of manslaughter. If yes, go on to consider the next question.

(c) On the evidence considered as a whole, which will of course include the defendant's evidence and that of his witnesses, are you sure that the defendant appreciated that what he did was highly likely to cause death or really serious bodily injury? If your answer is "no", you must not find him guilty of murder, but he may be guilty of manslaughter. If your answer is "yes", there is evidence before you from which you can infer that the defendant intended to cause death or really serious bodily injury, but you must not find him guilty of murder unless you feel sure that he so intended. If however you are sure, the fact that he may not have desired that result is irrelevant. Desire and intent are two different things ...".

123. Lord Scarman delivered the judgment of the court, Lords Keith of Kinkel, Roskill, Brightman and Griffiths concurring.
124. J E Stannard "Mens Rea in the Melting Pot" (1986) 37 Northern Ireland Legal Quarterly 61 at 73.

The decision of the House of Lords in *Hancock and Shankland* has been criticized as "... very unsatisfactory ..." because it is still not clear when killing by risk-taking amounts to murder - the House seems to be sure of what does not constitute intention, but unclear as to what intention is¹²³. Secondly, it appears as if this case has considerably increased the scope of juries to find that a defendant did not intend the consequences which he knew he would bring about, if he acted for reasons other than to bring about those consequences¹²⁴.

***R v Nedrick* [1986] 3 All ER 1.**

125. Spencer (n46) 164.

126. G R Sullivan "Intent, Purpose and Complicity" (1988) *Criminal Law Review* 641 at 647. Keating puts these criticisms into perspective as follows:

"... There is now no general definition of intention, it is a matter for the jury. They are not told how probable a consequence should be before a jury can draw an inference that it was foreseen (subjectively) nor how probable the defendant must foresee the result to be before the jury can infer that he intended the result. If they infer that he did foresee a result they may infer that he intended it. Can they refuse to do so? If they can, when would it be appropriate to do so? If not, and the inference is irresistible, how is this different from a substantive rule of law? The courts have abrogated their responsibility to the jury. There is no standard; instead the door has been opened to ill-formed, discriminatory judgments ...". (H M Keating "Fatal and Non-Fatal Offences" in I H Dennis (ed) *Criminal Law and Justice : Essays from the W G Hart Workshop 1986* (1987) 125.

As Spencer (n46) 162 observes, in the light of *Hancock and Shankland*, "... the best bet for a judge who wants to keep his wig clean is to tell the jury nothing about the meaning of intention and let them interpret it how they like. But what this means is that whether it is murder or manslaughter depends on what the jury in any given case happens to think is meant by intention. So there is no rule. And this matters ...".

The next case which provided an opportunity to clarify the law relating to intention was another murder case, *Nedrick*¹²⁷. On appeal¹²⁸, the Court of Appeal quashed the conviction and substituted a conviction of manslaughter. Lord Lane CJ held that the trial judge had erred in giving the jury such a direction, requiring a state of mind considerably less positive than being certain or virtually certain that the consequence would occur. Instead the court held, the jury should be instructed that "... they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case ..."¹²⁹.

Spencer observes that Lord Lane CJ did not go as far as to say that the trial judge should also direct the jury that if the accused did foresee death or grievous bodily harm as certain or virtually certain, he should be held to be guilty

127. The defendant set fire to his enemy's house while she was asleep. As a result of his actions, a child was burnt to death. It was the defendant's contention that he set fire to the house just to "wake her up and frighten her" and that he had no intention to kill.

128. The trial judge told the jury to convict if they found that the defendant knew death or serious injury was "highly probable", and as a result the defendant was convicted of murder.

129. [1986] 3 All ER 1 at 4. Leggatt and Kennedy JJ concurred in Lord Lane CJ's judgment.

of murder¹³⁰. This decision is praised by Spencer as "very welcome", and he remarks that "... at last it is becoming possible to give a simple answer to the question 'What is the mental element in murder?'"¹³¹.

Not all the commentators share Spencer's enthusiasm however. Halpin makes a number of critical observations regarding the model direction proposed by Lord Lane¹³². First, the direction ignores Lord Scarman's prohibition concerning guidelines in *Hancock and Shankland*. Although this prohibition is not absolute, "... it does forbid any 'generalisation' which curtails the use of the jury's 'common sense' - such as the limitation to cases of 'virtual certainty' in *Nedrick* ..." ¹³³. Secondly, the decision departs from the approach taken only four months earlier by the Court of Appeal itself in *Purcell*, which followed the House of Lords in refraining from giving a detailed

130. J R Spencer "Murder in the Dark : A Glimmer of Light?" (1986) 45 Cambridge Law Journal 366. The court held that "... where a man realizes that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence ..." (cited at 367).

131. *Ibid* 367.

132. A K W Halpin "Good Intentions" (1987) New Law Journal 696.

133. *Ibid*.

direction¹³⁴. Thirdly, in the requirement of "virtual certainty", the court in *Nedrick* stipulates a higher degree of probability before the inference of intention is possible, than the "highly likely" stipulated by the selfsame Court of Appeal in its direction in *Hancock and Shankland*. Although the direction in *Nedrick* purports to interpret the law, there are no indications in the House of Lords' decision in *Hancock and Shankland* that a higher degree of probability is required than was required in *Moloney*; in fact it is arguable that with the emphasis placed on the role of the jury's common sense by Lord Scarman, a lesser degree of probability may suffice ..."¹³⁵.

134. *Ibid.* Lord Lane stated in *Purcell* ((1986) 83 Cr App R 45) that "... You can only decide what his intention was by considering all the relevant circumstances and in particular what he did and what he said about it ..." (at 48). This direction does not place any restriction on cases of 'virtual certainty' as does *Nedrick*, thus the *Nedrick* judgment constitutes something of a *volte face* on the part of Lord Lane. Halpin (n38) 114 n44) remarks in respect of the *Purcell* direction that it is "esoteric" and that "what is relevant is presumably appreciated upon being initiated as a juror ...".

135. Halpin (n132) 696. J C Smith, in his commentary on *Nedrick* [1986] Criminal Law Review 743 emphasises that the inferred intention is "meaningless", but takes solace in the observation that the jury to whom the "mystery" of intention cannot be revealed is at least being informed as to "what is not intention". Smith also points out that there may be "... some confusion here with the problem of proof of intention in its strictest sense ...".

Since *Nedrick*, a restrictive interpretation of intention has been favoured in *Gillick*¹³⁶ and *Burke*¹³⁷. Whether this constitutes the beginning of a judicial trend or is merely further evidence of the freedom which English judges arrogate to themselves, to derive the terminological distinctions which best serve the interests of justice in each particular case, can best be assessed in the light of further case law. An opportunity to clarify the position

136. *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) AC 112. This case considered the criminal liability of a doctor who provides contraceptive advice as treatment to a girl under the age of sixteen. It appears that some of the Law Lords were of the opinion that a doctor, who knew that giving contraceptive advice to a girl under sixteen would encourage a man to have sexual intercourse with her, would not be guilty of abetting the offence, because her intention was to protect the girl, not to encourage sexual intercourse with her. The Law Lords were thus using the word "intention" in the sense of "purpose", and imposing a restrictive interpretation on "intention". However, Smith and Hogan (n21) 58 state that this case is an example of the use of the concept of intention to do a job for which it is not fitted. They point out that "... the case envisaged in *Gillick* seems to have been, in substance, one of necessity - a minor encouragement of sexual intercourse was a lesser evil than an unwanted pregnancy in the young girl ..." (*ibid*). Thus the purpose of the doctor was, in essence, honourable. They further state that it would be better if the true reason for such a decision is articulated, to avoid an undesirable distortion of the concept of intention (*ibid*).

137. [1988] Crim LR 839 (CA). In this case it was held that a person commits an offence under s1(3) of the Protection from Eviction Act 1977 when he does an act with the intent to cause a residential occupier to give up the occupation of the premises. This was affirmed although the performance of the act (*in casu* the storage of furniture in a bathroom) when done without any such intention would be a perfectly legitimate act on the part of the landlord. The commentary on the case interpreted the dictum as follows (at 841): "... the departure of the occupier must be the defendant's reason for doing the acts likely to interfere with peace or comfort; it must be his purpose, motive or object to get rid of the occupier ...".

arose in *Walker and Hayles*¹³⁸, a case of attempted murder¹³⁹. The defendants appealed on the grounds of a jury misdirection, claiming that the trial judge should have followed the *Nedrick* model.

The Court of Appeal rejected the appellants' ground of appeal. It held that the trial judge was not equating foresight with intent, but was in fact merely saying that foresight was something from which the jury could infer intent:

"... We do not accept that the reference to 'very high degree of probability' was a misdirection. The truth is ... that once one departs from absolute certainty, there is bound to be a question of degree¹⁴⁰. We do not regard the difference of degree, if there is one, between very high degree of probability on the one hand and virtual certainty on the other as being sufficient to render what the recorder said a misdirection Reading Lord Scarman's speech in *Hancock* and [reading] *Nedrick* we are not persuaded that it is only when death is a virtual certainty that the jury can infer intention to kill. Providing the dividing line between intention and recklessness is never blurred, and provided it is made clear, as it was here, that it is a question for the jury to infer from the degree of probability in the particular case whether the defendant intended to kill, we would not regard the use of the words 'very high degree of probability' as a misdirection ...".

Although Lloyd CJ proceeds to stress that the jury should ordinarily be instructed in terms of virtual certainty

138. (1990) 90 Cr App R 226 (CA).

139. The appellants threw their victim from a third floor balcony. At their trial for attempted murder the judge directed the jury that they could infer intention if there was a high degree of probability that the victim would be killed, and if the defendants knew "quite well that in doing that there was a high degree of probability" that the victim would be killed.

140. Smith and Hogan (n21) 59 n41 make the same observation.

rather than high probability, it is clear that a direction in terms of a lesser degree of foresight is not necessarily a misdirection. Although the basic approach may be summarised as "... the greater the probability of the consequence occurring, the more likely that it was intended ...", the tentative widening of the bounds of "intention" may well be the precursor to a significant new development in the English law¹⁴¹

141. S G Griffin "Inferring the Requisite Intention to Kill" (1989) *New Law Journal* 1637 criticizes the decision in *Walker and Hayles* as "... an excellent example of judicial misapplication ..." of the dictum in *Nedrick*, which "... was regarded as resolving the question of what state of mind could be inferred as amounting to intention ...".

RECKLESSNESS

Introduction

The term "recklessness" has only comparatively recently acquired prominence and some stability of meaning in English criminal law, although "recklessness" and its derivatives have been used in a large variety of contexts by Parliament and the courts¹⁴². As has been the case with the meaning of intention, there has been considerable controversy about what "recklessness" actually encompasses. This problem is particularly relevant in the light of the status of recklessness as an alternative *mens rea* form to intention for many crimes in English law.

As early as 1843, the Criminal Law Commissioners elaborately argued the case for the assimilation of intention and what would be regarded in modern terms as subjective recklessness. They "... included within the predicament of wilful offenders not only such as directly intend to inflict a particular injury, but also all such as wilfully and knowingly incur the hazard of causing it, ..." except where "... special justification ... warrants the hazard incurred ..."¹⁴³.

142. E Griew "Consistency, Communication and Codification : Reflections on Two Mens Rea Words" in P R Glazebrook (ed) *Reshaping the Criminal Law* (1978) 61.

143. Seventh Report, *Parliamentary Papers* (1843) XIX : 22, 25 cited in Griew (n142) 60. In respect of manslaughter, which for our purposes is the most important area of application of the notion of recklessness, Griew (at 62) notes that although the language of recklessness had appeared in reported manslaughter cases before 1937; "... it had done so irregularly and hardly ever as amounting to the key that might solve the jury's problem; and its use was as impressionistic and unanalysed as that of the other varied language in which judges sought to convey to juries a sense of manslaughter as felony ...".

In 1937, the House of Lords decided the important manslaughter case, *Andrews v DPP*¹⁴⁴. The facts of this case related to death as a result of driving¹⁴⁵. The House observed that it was "... difficult to visualize a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction of manslaughter ..."¹⁴⁶. However, it held that "... it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter ..."¹⁴⁷. Lord Atkin proceeded to equate "reckless" with a "very high degree of negligence ..."¹⁴⁸. This was the first influential and authoritative identification of recklessness with an objective major deviation from the standard of the responsible man, ie gross negligence.

This objective view of recklessness gained further currency in *Bates*¹⁴⁹, where Donovan J equated reckless with "careless", "heedless" and "inattentive to duty", and proceeded to direct the jury that a person could therefore be convicted of recklessly making a false statement although he honestly believed it to be true; a dictum confirmed by the Court of Criminal Appeal. Williams is critical of this

144. [1937] AC 576.

145. The jury convicted the accused after having been directed that if the accused drove recklessly and in a manner dangerous to the public and thereby caused death, he was guilty of manslaughter. On appeal the House of Lords sought to distinguish between "recklessly" and "in a manner dangerous".

146. [1937] AC 576 at 583.

147. *Ibid* 584.

148. *Ibid* 583.

149. The case was reported in [1952] 2 All ER 842 as *R v Bates* and (on appeal) in [1953] 1 WLR 77 as *R v Russell*.

line of reasoning. He remarks that if the judges are right, recklessness becomes merely an otiose synonym for negligence in general, thereby disturbing the established meaning of "recklessness"¹⁵⁰. "Recklessness" is given a meaning for which there is already an accepted term, and is deprived of a meaning for which there is no other single word¹⁵¹. He thus states unequivocally that "... inadvertent negligence is not a form of *mens rea*, because it is not, by definition, a state of mind ..."¹⁵². This criticism was to assume particular significance in the light of later developments in relation to recklessness.

150. G Williams "Recklessness in Criminal Law" (1953) 16 Modern Law Review 234 at 235 remarks that the term "recklessness" was implicitly defined in the context of deceit by Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 at 364, 367, 374. "... Recognizing that deceit can be committed recklessly, he laid it down that deceit cannot be committed by inadvertent negligence, even though gross. Lord Herschell said: "To make a statement careless whether it be true or false, and therefore without real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true ...".

151. Williams (*ibid*) also criticizes the decision for creating a difference of terminology between civil and criminal law, making the meaning in crime more severe than in tort, and by judicial construction creating a new offence not requiring *mens rea*.

152. *Ibid* 236.

"Subjective" Recklessness

In 1957, in *Cunningham*¹⁵³, the Court of Criminal Appeal handed down a decision which was to become the *locus classicus* of subjective recklessness in English law. A conviction on a charge of contravening s23 of the Offences against the Person Act 1861 (maliciously administering a noxious thing so as to endanger life) was quashed, on appeal, because the judge directed the jury that "malicious" merely meant "wicked". The Court of Criminal Appeal then proceeded to quote with approval the principle first propounded by Kenny in 1902:

"In any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (ie the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured ..."¹⁵⁴.

Thus, as Smith and Hogan observe, the Court of Appeal in *Cunningham* held that (in cases requiring "malice") "... it is not sufficient that, if D [the defendant] had stopped to think, it would have been obvious to him that there was a

153. [1957] 2 QB 396. In this case the defendant tore a gas meter from the wall of a cellar of an unoccupied house in order to steal the money from it. He left the gas gushing out; it proceeded to seep into a neighbouring house and was inhaled by the occupant, whose life was endangered.

154. Cited in Smith and Hogan (n21) 62. The court thus equated the word "maliciously", used in a statutory crime, with foresight of consequences. Applied to the facts, this meant that the accused was not guilty unless he knew at the time of tearing off the gas meter, or leaving the broken pipe with the gas escaping, that it might be inhaled by someone.

risk. He must actually know of the existence of the risk and deliberately take it ..."¹⁵⁵.

The subjective notion of recklessness, embodied in the foresight requirement, was the accepted interpretation of recklessness at the onset of the 1970's¹⁵⁶. This was confirmed by the Law Commission in its *Report on Criminal*

155. *Ibid.* In *Mowatt* [1967] 3 All ER 47 (CA), the Court of Appeal interpreted the phrase "... particular kind of harm ..." in the Kenny quote in *Cunningham* and held that it was unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described in the section in issue s20 of the Offences against the Person Act of 1861, that is, a wound or a serious injury. It was sufficient that he should have foreseen that some physical harm to some person might occur, albeit of a minor character.

156. The courts did lapse into objectivity on occasion however. A good example of such a reliance on reasonableness rather than actual realisation of risk is *Lamb* [1967] 2 QB 981. Lamb had a revolver with two bullets in it. He had ascertained that neither bullet was in the chamber opposite the barrel and so was of the opinion, as was his friend, that it was safe to pull the trigger. Thus, in the course of jesting with each other, Lamb pulled the trigger, and unfortunately, killed his friend. Neither was aware of the fact that, when the trigger is pulled, the cylinder containing the chambers rotates clockwise before the firing-pin strikes. Lamb thought that the cylinder revolved after a bullet is fired, when in fact it revolves before firing. Lamb was convicted of manslaughter, but his conviction was overturned on appeal on the grounds of misdirection. It is significant though that Sachs LJ, on appeal, said *obiter* that "... it would, of course have been fully open to a jury, if properly directed, to find the accused guilty, because they considered his view as to their being no danger was formed in a criminally negligent way ...". However Williams (n34) 100 states that "... to convict him of such a serious offence as manslaughter on these facts (as apparently he could have been convicted on a proper direction) was an over-assessment of his degree of fault ...". Williams favours a restriction of manslaughter convictions to cases of subjective recklessness.

*Damage*¹⁵⁷, in which it was stated that the mental element of interpreted in *Cunningham* was satisfactory¹⁵⁸. Parliament adopted this proposal in the Criminal Damage Act of 1971. Unfortunately no definition of recklessness was provided.

The underlying reason for this omission may go beyond deficient drafting, and may be epitomized by Lord Widgery LJ's statement in *Cato*¹⁵⁹: "... After all, recklessness is a perfectly simple English word. Its meaning is well-known and it is in common use. There is a limit to the extent to which the judge in the summing-up is expected to teach the jury the use of ordinary English words ..."¹⁶⁰.

The Court of Appeal attempted to clarify recklessness in the context of manslaughter in *Stone and Dobinson*¹⁶¹. However, it seems that this analysis served to compound rather than resolve the problems created by cases such as *Andrews* and *Cato*. Two states of mind were cited by the Court as examples of recklessness: (i) indifference to an obvious risk; and (ii) appreciation of the risk coupled with determination to run it nevertheless. Although the court

157. Law Com. No 29 (1970), confirming proposals in *Working Paper No 23* (1969).

158. "... They proposed only that it be 'expressed with greater simplicity and clarity' and that this should be achieved by using 'intentionally or recklessly' in place of the archaic and misleading 'maliciously' (Smith and Hogan (n21) 63).

159. [1976] 1 WLR 110.

160. *Ibid* 119. This dictum has been criticized by Brady as "inadequate"; and as he points out, it is all the more surprising since the trial judge in *Cato* equated recklessness with gross negligence, thereby obscuring the distinction between subjective and objective liability ((n68) 382).

161. [1977] QB 354. The case concerned manslaughter based on "gross neglect amounting to reckless disregard" for the health of the victim. (Brady (n68) 385).

held that "mere inadvertence" was insufficient to constitute recklessness, it should be noted that (i) does not require actual foresight of a risk, only a failure to advert to an obvious risk¹⁶².

The pendulum swung back to entirely subjective recklessness in *Briggs*¹⁶³. The Court of Appeal held that "... a man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act ..."¹⁶⁴. However in *Parker*¹⁶⁵, the Court of Appeal, whilst accepting that the presence of subjective recklessness implied culpability, added an alternative to "knowing" in the form of "... closing his mind to the obvious fact that there is some risk ...". This of course is a return to the exposition in *Stone and Dobinson*, and may be criticized on the same basis, for blurring the distinction between a subjective and an objective element.

162. Brady *ibid*. The decision further fails to make any reference to *Cato*. Griew characterises the result of the decision as follows: "... that the Court of Appeal has its own sense, however inadequately stated, of what the word 'recklessness' means when used specifically for the purpose of manslaughter, but that there is no need to let the jury into the secret ..." ((n142) 63).

163. [1977] 1 All ER 475.

164. *Ibid* 477.

165. [1977] 2 All ER 37. The issue in this case was whether the accused was liable for criminal damage in breaking a telephone receiver. Having been frustrated by a series of unhappy events, Parker, upon discovering that a public telephone was not in working order, twice smashed the receiver down onto its cradle. The receiver was damaged. It appeared from the evidence however that the accused did not consider the likelihood of the telephone being damaged, and was simply reacting to his feeling of frustration.

In 1978 the Law Commission added its support to the subjective recklessness test first advocated in *Cunningham* by stressing the foresight requirement in its standard test for recklessness as to results - "... Did the person whose conduct is in issue foresee that his conduct might produce the result and, if so, was it unreasonable for him to take the risk of producing it? ..."¹⁶⁶.

In *Stephenson*¹⁶⁷, the Court of Appeal in 1979 handed down a decision which has come to be regarded as the apogee of the notion of subjective recklessness. The accused was convicted of arson in terms of s1(1) of the Criminal Damage Act 1971¹⁶⁸, after lighting a fire in a haystack. Though any reasonable person would have been aware of the risk, Stephenson was suffering from schizophrenia and therefore may not have adverted to the risk. He appealed, *inter alia*, on the basis that the judge had misdirected the jury on what constituted recklessness.

The judgment of Geoffrey Lane LJ in the Court of Appeal emphasized the subjectivity of recklessness:

166. The Law Commission : *Report on the Mental Element in Crime* (1978) No 89. In respect of recklessness as to circumstances, the Law Commission held that the standard test is "... Did the person whose conduct is in issue realise that the circumstances might exist and, if so, was it unreasonable for him to take the risk of their existence? ...".

167. [1979] QB 695; [1979] 2 All ER 1198. The accused was a tramp, who took shelter in the hollow of a haystack. As he was feeling cold, he lit a fire. The haystack caught alight and was damaged.

168. The judge directed the jury that a person who without lawful excuse destroys or damages another's property was "reckless as to whether any such property would be destroyed or damaged", for the purposes of s1(1) of the 1971 Act, if he closed his mind to the obvious fact of risk flowing from his act, and that schizophrenia might be a reason which made a person close his mind to the obvious fact of risk.

"... A man is reckless when he carries out a deliberate act appreciating that there is a risk that damage to property may result from his act. It is however, not the taking of every risk which could properly be classed as reckless. The risk must be one which it is in all the circumstances unreasonable for him to take ..."¹⁶⁹.

Therefore if, because of his schizophrenia, the accused had not realised the risk of damage to the haystack, he was not reckless. Since the trial judge had not instructed the jury to this effect, there was a misdirection and the conviction was quashed. This form of recklessness is apparently still the *mens rea* required for crimes which must be committed maliciously. However, with limited exceptions¹⁷⁰, the objective approach was to attain precedence in the courts from this point onwards.

169. Clarkson and Keating summarize the double test imposed by the subjective approach in describing the definition of recklessness, both as to consequences and circumstances:

(1) whether the defendant foresaw the possibility of the consequence occurring; and

(2) whether it was unjustifiable or unreasonable for him to take the risk.

"... Whether a risk is justifiable or not depends on the social importance of the acts and on the chances of the forbidden consequence occurring ..." ((n16) 177).

170. These "exceptions", where the subjective test of recklessness was applied, include *R v Mullins* [1980] Crim LR 37, which dealt with the same offence as *Stephenson and Flack v Hunt* [1980] Crim LR 44, where the Divisional Court applied this test in respect of a charge of malicious wounding contrary to s20 of the Offences against the Person Act 1861.

"Objective" Recklessness.

Duff¹⁷¹ identifies the cases of *Murphy*¹⁷² and *Sheppard*¹⁷³ as marking the beginning of the retreat from subjectivism. In *Murphy*, which concerned a reckless driving charge, the Court of Appeal held that someone drives recklessly if he "deliberately disregards" that obligation or "is indifferent whether he does so or not" and "thereby creates a risk of an accident which a driver driving with due care and attention would not create"¹⁷⁴. This seems to be an attempt to include the grossly negligent driver within the bounds of recklessness. Duff characterises such a driver as having no more than latent knowledge of risk, having no explicit or tacit knowledge of the specific risks which he creates, although he would be aware of these risks were he attending properly to his driving¹⁷⁵.

Sheppard, decided in the House of Lords, related to the wilful neglect of a child by his parents¹⁷⁶. Although the

171. R. A. Duff "*Caldwell and Lawrence : The Retreat from Subjectivism*" (1983) 3 Oxford Journal of Legal Studies 77.

172. [1980] QB 434.

173. [1981] AC 394.

174. [1980] QB 434 at 440. The court had held that "... a driver's recklessness depends, not on whether he 'appreciated and consciously rejected a risk' or 'contemplated' the consequences of his driving, but on his 'mental attitude' to the obligation to drive with due care and attention imposed by s3 of the Road Traffic Act 1972.

175. Duff (n171) 80.

176. The House of Lords held that a parent who is to be found guilty of the wilful neglect of a child must not only fail to provide care which is in fact, or which a prudent parent would see to be, necessary for the child's welfare: for the neglect to be wilful the parent must at least be reckless of the risk to the child which that failure creates. (*Ibid* 81).

tenor of the judgment was initially subjective, it diverged from subjectivism "... by denying that recklessness in this context need involve any awareness of a risk to the child at the time of the *actus reus* ..."177. Duff submits that *Sheppard* is authority for the view that a court may hold a parent to be reckless as to an actual risk to his child, although unaware of any risk, if his unawareness is due to his indifference to the child's welfare178. He says that it seems that the court extends liability for recklessness to the negligent defendant by "... holding that a reckless agent need only have the latent knowledge which would enable him to notice that risk if he applied that knowledge to his present case ..."179. Both *Murphy* and *Sheppard* fail to provide extensive clues as to how to identify and characterize the requisite indifference to risk, but it is clear that neither requires that such indifference need involve any conscious risk-taking180.

The cautious objectivization of the test for recklessness in *Murphy* and *Sheppard*, proved to be a harbinger of two decisions which completely changed the law in relation to the meaning of recklessness. This occurred on the same day in 1981 when the House of Lords, led by Lord Diplock, decided *Caldwell*181 and *Lawrence*182.

177. *Ibid* 82.

178. *Ibid*.

179. *Ibid* 84.

180. *Ibid* 85.

181. [1982] AC 341.

182. [1982] AC 510.

R v Caldwell [1982] AC 341 : *R v Lawrence* [1982] AC 510.

The defendant in *Caldwell* had been charged with arson in terms of section 1(1) and 1(2) of the Criminal Damage Act¹⁸³. After the conviction in the trial court was overturned by the Court of Appeal, the case was brought before the House of Lords¹⁸⁴. Lord Diplock delivered the majority judgment, during the course of which he laid down a new test of recklessness: "... In my opinion, a person charged with an offence under section 1(1) of the 1971 Act is 'reckless as to whether or not property would be destroyed or damaged' if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk

183. The defendant, who had done some work for the owner of a hotel as the result of which he had a quarrel with him, got drunk and set fire to the hotel as an act of revenge. The fire was discovered and extinguished before serious damage was caused and none of the ten guests in the hotel at the time was injured.

184. The defendant pleaded guilty to the lesser charge of intentionally or recklessly destroying or damaging the property of another, in terms of s1(1), but pleaded not guilty to the more serious charge, under s1(2), of damaging property with the intent to endanger life or being reckless whether life would be endangered. He claimed that he was so drunk at the time that he thought that he might be endangering the lives of the people in the hotel had never crossed his mind. The trial judge directed the jury that drunkenness was not a defence to a charge under s1(2) and the defendant was convicted. On appeal, the Court of Appeal quashed the conviction on the charge of contravention of s1(2), on the grounds that the offence required specific intent and that drunkenness could be a good defence thereto. The Crown appealed to the House of Lords, which ruled that, in order to decide whether drunkenness was a defence to a charge under s1(2), it was necessary to determine the precise meaning of the term "recklessness" as employed in that section.

or has recognized that there was some risk involved and has none the less gone on to do it ..."¹⁸⁵.

Thus the House of Lords discarded the accepted subjective test of recklessness which involved the "unjustified taking of a foreseen risk ...". Lord Diplock gave a number of reasons in support of his test. First, he rejected the argument that the formulation of recklessness in *Cunningham* was meant to be exhaustive¹⁸⁶. Although of the opinion that malice, as used in the Malicious Damage Act 1861, signified recklessness, Lord Diplock deemed the proper interpretation of Professor Kenny's statement (which provided the basis of *Cunningham*) to be that when Kenny defined the meaning of malice as intention or recklessness, he was compelled to restrict the meaning of recklessness accordingly¹⁸⁷. Lord Diplock therefore regards recklessness as extending from "... cases of actual foresight to cases of particularly wrongful inadvertence ...", and treats malice as referring only to that aspect of recklessness that requires advertence ie subjective recklessness¹⁸⁸. He selected the wide dictionary definition to describe the bounds of recklessness, thus imputing to it such values as "... careless, regardless or heedless of the possible harmful consequences of one's acts ...", which encompassed a wider

185. [1982] AC 341 at 354. Lords Keith and Roskill concurred in Lord Diplock's judgment, while Lords Wilberforce and Edmund-Davies dissented.

186. L H Leigh and J Temkin "Recklessness Revisited" (1982) 45 *Modern Law Review* 198 at 199.

187. M J Allen "Recklessness and Intoxication in the House of Lords" (1981) 32 *Northern Ireland Legal Quarterly* 373 at 377.

188. Leigh and Temkin (n186) 199, who regard this interpretation as a "complete distortion".

range of mental states¹⁸⁷. Professor Kenny's definition was therefore discarded.

Following on Lord Diplock's dictionary definition of recklessness, it seems clear that "... where recklessness is used, and not some near synonym, it comprehends cases where, if thought were given to the matter by the actor before the act were done, it would have been apparent to him that there was a real risk of harmful consequences ensuing ..."¹⁸⁹. As Leigh and Temkin point out however, viewed in this way recklessness could hardly be distinguished from negligence¹⁹¹. Lord Diplock does distinguish between the two mental states however, on the basis that the risk required for recklessness must be obvious.

A second reason for the *Caldwell* test, is that Lord Diplock considered the two states of mind encompassed in his test, viz foresight of risk and failure to consider the question whether there might be a risk, as equally blameworthy¹⁹². Lord Diplock further rejected the test of recklessness contained in the Malicious Damage Act 1861 as constituting a "meticulous analysis" of a "narrow dividing line" by the jury, whereas in fact, for the purposes of a statutory offence of damage to property, the distinction between an advertent state of mind and the inadvertent state "... would not be a practicable distinction for use in a trial by jury ...". It was Lord Diplock's submission that it was not feasible (by reason of the inherent difficulty of the distinction) to expect the jury to decide whether or not an accused had actually foreseen the risk of the harmful

189. Allen (n187) 377.

190. Leigh and Temkin (n186) 200.

191. *Ibid.*

192. Allen (n187) 377. Allen regards this approach as "novel" and "strange".

consequences of his acts, and that his test would remove this difficulty¹⁹³. A final argument by Lord Diplock in support of his test was that the 1971 Act purported to revise the existing law in relation to offences of damage to property and not to perpetuate it; therefore, he asserted, the term "reckless" used in the act ought to be given its ordinary meaning and not be interpreted as a legal term of art with a more limited meaning¹⁹⁴. This was in accordance with his view that recklessness does not have a limited legal meaning.

Lord Diplock's reasoning, outlined above, has been severely criticized both by writers and by the minority Law Lords in *Caldwell*.

Lawrence related to a charge of reckless driving and arose out of the death of a woman pedestrian¹⁹⁵. A conviction in the trial court was quashed by the Court of Appeal¹⁹⁶, who certified three points of general public importance:

193. *Ibid.*

194. *Ibid* 379. Allen regards the validity of this argument as highly questionable.

195. The accused was riding his motor cycle along a busy street in an urban area, subject to a 30 mph speed limit. He ran into and killed a woman pedestrian who was crossing the road, and was consequently charged with causing death by reckless driving, contrary to s1 of the Road Traffic Act 1972 as substituted by s50(1) of the Criminal Law Act 1977. The sole dispute of fact at the trial was the speed at which the motor cycle was travelling: the prosecution's case was that it was being driven at between 60 and 80 mph and probably near to the latter; the defence claimed that the speed of the motor cycle was no more than 30, or at most 40 mph and probably near to the former.

196. In the trial court, the jury convicted on a majority verdict, but on appeal the conviction was set aside as unsafe and unsatisfactory on the ground that the judge's directions on recklessness were unclear.

(i) Was *mens rea* involved in the offence of driving recklessly?

(ii) If yes, what was the mental element required?

(iii) Was the [trial court direction] a proper direction on a charge of driving recklessly?

On appeal to the House of Lords, all the Law Lords agreed on the answer to the three questions. This is very significant if one accepts Williams' assessment of the case. He is of the view that even though some passages purport to do little more than apply the principles stated in *Caldwell* to the offence of reckless driving, in fact the decision in *Lawrence* goes much further than *Caldwell*¹⁹⁷.

Lord Diplock, who once again led the court, adopted similar reasoning to that which he had employed in *Caldwell*. In fact, he referred to *Caldwell* in stating that, as the adjective "reckless" had not acquired a special meaning as a legal term of art in the sphere of criminal law, the same must be true for the adverb "recklessly" as used in the Road Traffic Act¹⁹⁸. He proceeded to identify two differences between the application of "reckless" in the Criminal Damage

197. G Williams "Recklessness Redefined" (1981) 40 Cambridge Law Journal 252 at 272. He analyses the underlying motivation for the decision in *Lawrence* as being "... to ensure that young tearaways and others who drive cars or motor cycles disgracefully will not get off a charge of reckless driving by saying that they were perfectly convinced that their manner of driving presented no danger, because they were so clever that they could always avoid a mishap ...". He continues, that "... the object of the offence of reckless driving is to catch the driver who flagrantly disregards rules of prudence, whatever he may think about the safety of his behaviour ...", and, consequently, "... this object would be frustrated if recklessness were given a subjective meaning ...".

198. Allen (n187) 385.

Act 1971 and the application of "recklessly" in the Road Traffic Act 1972:

(1) Unlike the act of driving a motor car, the *actus reus* of the Criminal Damage Act, the physical act of destroying or damaging property belonging to another, is in itself a tort¹⁹⁹.

(2) In the Criminal Damage Act 1971, s1 contains a definition of the *mens rea* of the offences stipulated in the Act, viz "... being reckless whether particular harmful consequences would occur ..."; the Road Traffic Act 1972 leaves the "... possible harmful consequences of which the driver must be shown to have been heedless ..." to be implied from the use of the word "recklessly" itself²⁰⁰.

Thus the *actus reus* of the offence is driving a vehicle in a way which presents a real risk of harmful consequences; it refers to the standard of driving. On the question of *mens rea*, Lord Diplock applied the *Caldwell* test. The House of Lords in *Lawrence* therefore held that on a charge of driving recklessly, a jury must be satisfied of two things:

"First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or doing substantial damage to property; and second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk, or, having
199. [1981] 1 All ER 974 at 981.

200. *Ibid.* Lord Diplock regards "recklessly" as descriptive of a physical act, such as driving a motor vehicle, which can be performed in a variety of different ways, some of which entail danger and others not, and which refers "... not only to the state of mind of the doer of the act when he decides to do it but also qualifies the manner in which the act itself is performed ...".

recognized that there was some risk involved, had none the less gone on to take it ..."²⁰¹.

The House of Lords therefore affirmed that inadvertence to an obvious risk suffices for liability. Lord Diplock uses the phrase "obvious and serious" to describe the necessary risk involved, as opposed to the use of "obvious" in *Caldwell*. It is apparent from *Lawrence*, however, that the House of Lords favoured an entirely objective test for recklessness, ie the prosecution merely had to prove a deviation from the reasonable man standard in order to convict; it was not necessary to traverse the question of foresight.

Caldwell and *Lawrence* have been severely criticized by many writers for "redefining recklessness"²⁰², both for the contents of the new definition and the manner in which it was achieved. Critics point out that the issue to be decided was one of huge significance for criminal responsibility "... recklessness is a key concept, whose outer boundaries frequently mark the difference between liability and no liability ..."²⁰³. With this caveat in mind, the criticism of Lord Diplock's drafting of a new notion of recklessness may be examined.

The House of Lords has been criticized for espousing an interpretation of "reckless" which is "... totally contrary to its understood criminal meaning, the intention of the Law Commission and the intention of Parliament ..."²⁰⁴. Previously the Law Commission had defined "recklessness" in

201. *Ibid* 982.

202. This is Williams' terminology (n197).

203. A T H Smith "Law Reform Proposals and the Courts" in Dennis (n126) 49.

204. Allen (n187) 379.

such a way as to place a subjective gloss on the term²⁰⁵. As acknowledged by the Court of Appeal in *Stephenson*, this is the sense that the draftsman must have had in mind when he drafted the Criminal Damage Act²⁰⁶. Yet Lord Diplock, in the course of his argument, makes no mention of this obstacle to his conclusion. Thus it appears that he has created a definition of recklessness at odds with the pre-existing authorities, which seems to border on the unconstitutional²⁰⁷.

The test for recklessness propounded by Lord Diplock has been criticized on a number of grounds, in particular for its expansive nature (in comparison to the restricted test of the Law Commission) which has resulted in an extension of the ambit of criminal liability in respect of unforeseen consequences. On account of the objectivity of the Diplock test, academic commentators have sought to lessen the perceived damage done thereby. Some writers, including Allen, have suggested that the decisions in *Caldwell* and *Lawrence* should only be authoritative in the context of the respective crimes of criminal damage²⁰⁸ and reckless

205. In its *Report on the Mental Element in Crime* (n166).

206. As Geoffrey Lane LJ (as he then was) held: "... We wish to make it clear that the test remains subjective, that the knowledge or appreciation of the risk of some damage must have entered the defendant's mind even though he may have suppressed it or driven it out ..." ([1979] QB 695 at 704).

207. "... It seems to me that, in redefining the limits of criminal liability in this way, his speech borders on the unconstitutional. Parliament, advised by the Law Commission, had chosen the point at which it thought that liability should attach. For all the reasons given by Lord Kilbrandon in *Lynch* it really is not for the courts, however elevated, to extend the limits of the criminal law beyond the point at which they have been set by the body constitutionally entrusted with the task ..." (Smith (n203) 50).

208. Allen (n187) 380.

driving²⁰⁹. Others have attempted to limit the objectivity of the proposed test by placing a subjective gloss on Lord Diplock's judgment in *Caldwell* (which was adopted in *Lawrence*). The key passage in support of this interpretation is Lord Diplock's reference to "... failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was ..."²¹⁰. This passage has been interpreted as creating a conditional subjectivity in the requirements for recklessness in *Caldwell*, with Williams holding that an agent is reckless as to a risk of which he is unaware only if that risk would be obvious, not just to a reasonable man, but to the agent himself if he gave any thought to the matter²¹¹. McEwan and Robilliard endorse this interpretation in outlining their support for the Diplock test for recklessness²¹². Writers such as Leigh and Temkin, whilst agreeing with Williams, state that the critical consideration is the capacity of the accused to have appreciated the risk had he thought of it when calm and sober²¹³. Syrota comments that an accused who can prove that he was incapable of appreciating the risk of his actions, by reason of factors such as excitement, rage or exhaustion, is entitled to be acquitted²¹⁴. Griew offers essentially the same argument, suggesting that factors such

209. *Ibid* 387.

210. [1982] AC 510 at 515 F.

211. Williams (n197) 268-70.

212. McEwan and Robilliard (n78) 281-6.

213. Leigh and Temkin (n186) 204.

214. G Syrota "Recklessness and *Caldwell*" (1981) *Criminal Law Review* 658-60.

as shock, stress and fatigue should be stressed on the basis that those do not warrant censure²¹⁵.

It certainly seems, as Nelken observes, that jurists "... are surely right to fear the encroachment of judicially defined terms of attributed responsibility in the criminal law ..."²¹⁶. However the suggestions regarding the limited objectivity of Lord Diplock's judgment are, in the light of recent developments, of purely academic interest. The further development of recklessness in English law will shortly be examined. However, before leaving the cases of *Caldwell* and *Lawrence*, one further matter bears some consideration at this point.

Despite the unrestrained objectivity of Lord Diplock's test for recklessness in *Caldwell* and *Lawrence*, it appears that he left some scope for the existence of a loophole within his test: a defendant may have given thought to the likelihood of the risk occurring and decided that the act would be safe. Thus "subjectivism still reigns" in terms of one particular set of circumstances, within Diplock's recklessness test²¹⁷. This is in accordance with his stated view that the state of mind of the defendant needed to be proved for recklessness²¹⁸. The defendant must have given thought to the possibility of the existence of the risk - both are regarded as mental states by Lord Diplock²¹⁹. It follows that an accused could only avoid liability if he

215. E. Griew "Reckless Damage and Reckless Driving : Living with *Caldwell* and *Lawrence*" (1981) Criminal Law Review 742 at 747-8.

216. D. Nelken "Critical Criminal Law" (1987) 14 Journal of Law and Society 105 at 115.

217. Williams (n156) 107.

218. Smith and Hogan (n21) 64.

219. *Ibid.*

"... has given thought and has decided that there is no risk [or negligible risk] (whether because the act was inherently safe or because he has taken sufficient precautions to make it safe)"²²⁰.

Smith and Hogan point out that the so-called "lacuna" or "loophole" in the proposed test is an essential part of Lord Diplock's theory, "... for, if the lacuna were filled and D held liable where he has given thought, it would no longer be possible to maintain that a state of mind must be proved ..."²²¹. The state of mind of the defendant would be immaterial, as proof that his conduct constituted an obvious and serious risk would suffice for conviction on the grounds of recklessness.

220. Williams (n156) 107. It is the defendant's responsibility to introduce this argument, as Lord Diplock stated in *Lawrence*: "... If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so, but regard must be given to any explanation he gives as to his state of mind which may displace the inference ..." ([1982] AC 510 at 535 H).

221. Smith and Hogan (n21) 65.

THE DEVELOPMENT OF THE NEW TEST FOR RECKLESSNESS

Elliot v C (a minor) [1983] 2 All ER 1005.

The impact of *Caldwell* and *Lawrence* upon the law can be seen in *Elliot v C*²²², which according to Spencer shows that "... the new test of recklessness, a bitter drink indeed for those who favour subjective theories of *mens rea*, must be swallowed down to the very last drop ..."²²³. The case concerned an arson charge against an educationally backward and emotionally disturbed 14 year old girl²²⁴.

The magistrates declined to convict the accused, holding that someone who would not have realized that she was creating a serious risk of causing damage even if she had thought about it, cannot be said to have done the damage recklessly, albeit that the risk would have been obvious to others. However, on appeal to the Divisional Court, the magistrates were overruled. Delivering the judgment of the court, Robert Goff LJ held (with extreme reluctance as he

222. [1983] 2 All ER 1005; [1983] 1 WLR 939.

223. J R Spencer "Manslaughter by Gross Negligence - Return to Victorian Values" (1983) 42 *Cambridge Law Journal* 187 at 188.

224. Disappointed at not being able to stay overnight at her friend's house, an educationally backward and emotionally disturbed girl, just fourteen years old, spends the night wandering around the neighbourhood instead of going home to her foster mother. At about 5 am, tired and exhausted, she enters a large shed on an allotment and finding both white spirit and matches there, pours some spirit onto the ground and tries to set it alight. She expects that it will burn out, but being backward and not having played with white spirit before, has no idea how extremely flammable it is. At her second attempt it catches alight, and before she knows what is happening the whole shed is in flames. A milkman sees her running away, and so the police have no trouble in tracing her. She is prosecuted in terms of s1(2) of the Criminal Damage Act 1971. It is not alleged that she intended to burn the shed down, but that she did so recklessly.

apparently considered that justice was not being served) that he was constrained by the decisions of the House of Lords in *Caldwell* and *Lawrence*. Following this authority, the question was whether the risk would have been obvious to the reasonable prudent person, not necessarily to the defendant if she had given any thought to it. As he held that the reasonable prudent person would have foreseen the risk, he convicted the accused of arson.

On appeal to the Appeal Committee of the House of Lords, the accused met with no success. The Law Lords regarded the matter as too plain for argument, refusing to entertain the accused's application for leave to appeal and brushing aside all suggestions that the outer limits of its earlier decisions required further consideration. This decision was taken notwithstanding the criticism of *Caldwell* by Goff LJ in the Divisional Court. Williams observes that it is depressingly clear that the Law Lords would not entertain the suggestion that Lord Diplock's model direction should be modified, "... even when his words are in conflict with other passages in his speech ..." ²²⁵. Thus the conviction was affirmed, and the accused was held to be criminally liable on the basis that the risk would have been obvious to the reasonably prudent man who had stopped to think.

The decision in *Elliot v C* has been the object of trenchant criticism by Williams and Glazebrook. Williams suggests that the Divisional Court was wrong, even if *Caldwell* were to be fully accepted ²²⁶. Glazebrook's condemnation of

225. Williams (n34) 111.

226. *Ibid* 110-111: "... That C was technically guilty, even apart from *Caldwell*, seems obvious. If she knew she was burning the carpet she must have known that she was damaging it. The mens rea need not go to the whole of the damage. But the reason given for the Divisional Court's decision has remarkable implications. If read literally, it would make an insane person who kills not knowing what he is doing guilty of manslaughter on the

*Elliot v C*²²⁷ is twofold: first, he observes, "... it tramples over the basic moral distinction ... between the person who knew, or was to blame for not knowing, that he was doing what was dangerous, and the person who, because he suffers from some physical or mental infirmity, haplessly did what was dangerous ..." ²²⁸, and secondly, along with *Caldwell* and *Lawrence*, "... these decisions also manifest the Law Lords' indifference to the creation of irrational distinctions between the minimum degree of fault required for the commission of crimes of essentially the same sort..." ²²⁹. Glazebrook regards *Elliot v C* as a part of a line of cases (proceeding from *Caldwell*) which is nothing short of a "disaster" ²³⁰.

ground of constructive recklessness, and would therefore nullify the traditional rule that such a killer is entitled to a verdict of not guilty on the ground of insanity. Also, it would mean that the intoxicated person is to be judged on a fully objective test, not Lord Diplock's semi-objective test ...".

227. P R Glazebrook "Criminal Negligence" (1984) 43 *Cambridge Law Journal* 1 at 2.

228. *Ibid.*

229. *Ibid.*

230. *Ibid* 5.

***R v Stephen Malcolm R* [1984] 79 CR App Rep 334.**

Elliot and Woods ask whether, if no sympathy is to be shown to the accused who was incapable of foreseeing the risks obvious to the ordinary prudent man, it would be possible to improve the accused's chances of acquittal by at least ascribing to the ordinary prudent man the age and such of the accused's characteristics as would affect the appreciation of the risk?²³¹ This question was conclusively answered in the case of *Stephen Malcolm R*²³² by the Court of Appeal, where a 15 year old accused was charged with arson²³³.

In the Court of Appeal the conviction was upheld on the basis that the judge had correctly applied the test of the ordinary prudent man. Ackner LJ, for the court, rejected the argument that the accused was reckless only if he did an act which created a risk obvious to someone his age and with such of his characteristics as would affect his appreciation of the risk. All that was required was that the risk had to be obvious to the ordinary prudent person, and it was not appropriate to endow the ordinary prudent person with the characteristics of the defendant. Smith and Hogan mourn this development: "*Caldwell*, as interpreted in *Elliot v C*

231. Elliot and Woods (n87) 122-3.

232. [1984] 79 Cr App R 334.

233. The accused, aged 15, committed a series of burglaries. Believing that a woman and her daughter had informed on them to the police, he and his accomplices threw three petrol bombs at the woman's house near the daughter's bedroom, causing loud bangs and sheets of flame. The accused claimed that he intended only to frighten and that he was not reckless whether life would be endangered because he did not realise that if a petrol bomb had gone through the daughter's window it might have killed her. He was convicted of arson in terms of section 1(2)(b) of the Criminal Damage Act 1971.

and [*Stephen Malcolm*]R, appears to be a slippery slope to intolerable justice with no obvious exit ..."²³⁴.

The approach of the court in *Stephen Malcolm R* was followed in *Bell*²³⁵, where the mentally disturbed accused suffered an attack of schizophrenia, and feeling that he was being driven on by an outside force he perceived was God, used his car as a "weapon to attack various targets which he regarded as evil" - namely a Butlins holiday camp. It was held by the court that the accused had acted recklessly, in that he failed to foresee risks which were obvious to the ordinary prudent person. The court discounted as irrelevant the fact that he might have been unable to foresee them. As Clarkson and Keating remark, it appears clear that the test is now "a purely objective one" and that if Stephenson, the schizophrenic, were to be arraigned today, he would be regarded as having acted recklessly²³⁶.

In *Kong Cheuk Kwan*²³⁷, a case of manslaughter, the Judicial Committee of the Privy Council approved the notion of recklessness fashioned by *Caldwell* and *Lawrence*²³⁸. The Law Lords held that an appropriate jury direction should be

234. Smith and Hogan (n21) 64.

235. [1984] 3 All ER 842.

236. Clarkson and Keating (n2) 190.

237. [1985] Crim LR 787.

238. This case arose out of a collision between two hydrofoils, as a result of which the defendant, who was the master of one of the vessels, and others were charged with the manslaughter of a passenger. The trial judge directed the jury on the ingredients of manslaughter by gross negligence as set out in Supplement No 2 (March 1983) to Archbold's Criminal Pleading (41st ed) and the jury convicted. The Court of Appeal of Hong Kong dismissed the appeal, but the conviction was quashed by the Privy Council's Judicial Committee.

comparable to that given in *Lawrence*, ie expressed in terms of "... an obvious and serious risk ..."²³⁹.

239. Thus the jury should have been told to consider whether the respective acts of navigation by the defendant and his co-defendants created "an obvious and serious risk" of causing physical damage to some other ship and thus to other persons who might have been travelling in the area of the collision at the material time, and if so whether any of the defendants by their respective acts of navigation so navigated either without having given any thought to the possibility of that risk or, while recognizing that the risk existed, took that risk.

R v Sangha (1988) 2 All ER 385 (CA).

The scope of the objective test for recklessness has been further amplified in *Sangha*²⁴⁰, which dealt with criminal damage by fire. On appeal, the Court of Appeal applied the *Caldwell/Lawrence* test of recklessness, phrasing the test in the immediate case as follows: "... is it proved that an ordinary prudent bystander would have perceived an obvious risk that property would be damaged and that life would thereby be endangered? The ordinary prudent bystander is not deemed to be invested with expert knowledge relating to the construction of the property, nor to have the benefit of hindsight ...".

The Court of Appeal found that the accused "... created a risk which was obvious and serious that property would be damaged and that the life of another would thereby be endangered. The fact that there were features here which prevented that risk from materialising is irrelevant ..."; therefore the ordinary person is considered by the courts to possess no particular expertise (besides having no inadequacies).

240. [1988] 2 All ER 385 (CA). The accused ignited a mattress and two armchairs in a flat, resulting in the premises being gutted. He was charged with causing criminal damage by fire, being reckless whether the life of another would be thereby endangered, in terms of s1(1)(b) of the Criminal Damage Act 1971. Unbeknown to the accused, due to the way in which the flat was constructed, there was no danger of the fire spreading to adjoining properties. Because there was no-one in the flat in which the fire was started, the accused claimed that he had not created a risk of danger to the lives of others. He was convicted.

The "lacuna" in the new test for recklessness.

Although the *Caldwell/Lawrence* test for recklessness was firmly established in the law, up to this point the courts had not had cause to consider the scope, or indeed validity, of the "lacuna" identified in Lord Diplock's test, viz where a defendant considers the possibility of a risk of harm occurring and rules it out. However in two cases in 1986, the courts had an opportunity to express an opinion concerning the manner in which this situation ought to be treated in the light of the *Caldwell/Lawrence* test.

In *Crossman*²⁴¹, the defendant, who worked as a lorry driver, ignored the advice he received to properly ensure the safety of the heavy machinery on his lorry by chaining and sheeting it. He considered the machinery to be "... as safe as houses ...". Unfortunately, he was mistaken, and the load fell off, killing a pedestrian. After the court rejected his argument that reckless driving is inextricably linked with the actual handling and control of the vehicle in question, the defendant pleaded guilty to reckless driving, and his conviction was upheld. However, as Smith and Hogan observe, if, after the defendant's attention had been drawn to the possibility of risk, he genuinely believed that his load was "... as safe as houses ...", he was not reckless according to the *Caldwell/Lawrence* test²⁴². It appears therefore that the court simply overlooked the "lacuna".

The "lacuna" in the *Caldwell/Lawrence* test was also the central issue in *Chief Constable of Avon and Somerset Constabulary v Shimmen*²⁴³, where the accused was charged with criminal damage to a plate glass window, which he had

241. [1986] Crim LR 787.

242. Smith and Hogan (n21) 65.

243. [1986] 84 Cr App R 7; [1986] Crim LR 800.

broken while demonstrating to his friends his control and skill in a Korean art of self-defence²⁴⁴. Accused's counsel argued that this was a "lacuna" case. However, the court held that Shimmen in fact did have awareness of the risk. In his evidence, the accused stated that he had "... weighed up the odds and thought he had eliminated as much risk as possible by missing by two inches instead of two millimetres ...". Yet, even the taking of a very slight risk is only acceptable where there is an appropriate reason for taking the risk, and in this case no such reason is apparent. On the facts, therefore Shimmen fell under the second limb of the *Caldwell/Lawrence* test, and he was held to be liable. Nevertheless it is clear that the courts seem to be willing to recognize the existence of the "ruling out of the risk" defence based on the "lacuna" in Lord Diplock's test²⁴⁵. Smith points out that the acceptance of the "lacuna" is central to the notion that the inquiry into recklessness still relates to state of mind²⁴⁶.

THE APPLICATION OF THE NOTION OF RECKLESSNESS.

Having examined the law relating to the development of the notion of recklessness, it becomes necessary to establish crimes or offences to which it applies.

244. He held both a green and a yellow belt in this art of self-defence. He had made as if to strike the window with his foot, but, intending to miss by a couple of inches and relying on his own skill and expertise, had concluded that no damage would result. Unfortunately his demonstration of his control was not as convincing as it might have been since his foot, far from stopping tantalisingly short of the window, actually made contact and shattered it at a cost of £495.

245. This is welcomed in R Taylor "Recklessness - Ruling Out the Risk" (1987) *New Law Journal* 231 at 232.

246. [1986] *Crim LR* 800 at 803.

Rape and indecent assault.

These offences may be committed recklessly: a man may be guilty of either offence if he is reckless as to whether the woman consents to the sexual intercourse, or indecent act²⁴⁷. Shortly after the decisions in *Caldwell* and *Lawrence*, the Court of Appeal in *Pigg*²⁴⁸ held *obiter* that the test propounded in those cases applied to the crime of rape in respect of the issue of consent. Thus the court accepted that *Caldwell* recklessness, together with an additional required of indifference, sufficed as the *mens rea* element for rape²⁴⁹. However this created immense difficulties for juries²⁵⁰.

The Court of Appeal therefore, changed its position in the case of *Kimber*²⁵¹, where indecent assault was in issue. It held that in respect of indecent assault, the law was that recklessness was only proved if the defendant did not believe that the victim was consenting and "couldn't care less" whether she was consenting or not²⁵². No mention was made of *Caldwell* or *Lawrence*²⁵³. This reasoning was

247. Smith and Hogan (n21) 66. For rape, the set of requirements of recklessness is expressed in the Sexual Offences (Amendment) Act 1976, s1(1) and, for indecent assault it is implied in the Sexual Offences Act 1956, s14(1).

248. [1982] 2 All ER 591 ; [1982] 1 WLR 762 (CA).

249. Smith and Hogan (n21) 66.

250. *Ibid.*

251. [1983] 1 WLR 1118.

252. Clarkson and Keating (n2) 196.

253. *Ibid.* Clarkson and Keating, at 196 n95, while conceding that *Caldwell* and *Lawrence* were probably not in point as any jury would have concluded, on the facts, that the defendant must have subjectively realised there was a possibility that the woman was not consenting or was incapable of consenting, observe that

followed by the Court of Appeal in the rape case of *Satnam and Kewal*²⁵⁴. Bristow J held that the common law, as stated by the House of Lords in *Morgan*²⁵⁵, was, following the recommendations of the Heilbron report, intended by Parliament to be incorporated in the Sexual Offences (Amendment) Act 1976. Therefore irrespective of the decision in *Pigg*, the formulation of recklessness in *Caldwell* and *Lawrence* did not apply to s1(1) of the 1976 Act, which related to rape²⁵⁶.

The learned judge distinguishes the cases of *Caldwell* and *Lawrence*. In so doing he avoids the need to apply them. Clarkson and Keating argue that it is not feasible to distinguish recklessness as to a result from recklessness as to a circumstance (as they interpret Bristow J to be attempting to do)²⁵⁷. However, they concede that because s1(2) of the Sexual Offences (Amendment) Act 1976 expressly endorses a subjective test, there may well be grounds for distinguishing "recklessness" in this context²⁵⁸.

the failure to mention these two House of Lords authorities on recklessness is "somewhat remarkable".

254. [1984] 78 Cr App R 149.

255. [1976] AC 182.

256. " ... *Caldwell* and *Lawrence* were concerned with recklessness in a different context and under a different statute. The word "reckless" in relation to rape involves a different concept to its use in relation to malicious damage or, indeed, in relation to offences against the person. In the latter cases the foreseeability, or, possible foreseeability, is as to the consequences of the criminal act. In the case of rape the foreseeability is as to the state of mind of the victim ...". (Cited in Elliott and Woods (n87) 124).

257. Clarkson and Keating (n2) 195.

258. *Ibid.*

Other statutory offences that can be committed recklessly.

In the case of *Seymour*²⁵⁹, which involved a case of "motor manslaughter", the House of Lords indicated that recklessness should bear its new meaning in all statutory offences²⁶⁰. Relying on the exception noted above in the case of rape, Clarkson and Keating submit that the test of recklessness espoused by Lord Diplock in *Caldwell* and *Lawrence* should apply across the board, except where the statute in question holds that the term is being used in a subjective sense²⁶¹. However the Divisional Court adopted the old subjective meaning of recklessness when interpreting an EEC Regulation in *Large v Mainprize*²⁶². Clarkson and Keating criticize this as an unacceptable approach because of the inconsistency it creates within the law, and state that the present test should remain, and be applied generally, until it is abolished²⁶³.

259. [1983] 2 AC 493.

260. Lord Roskill delivered the judgment, in which the other Law Lords concurred.

261. Clarkson and Keating (n2) 195.

262. [1989] Crim LR 213. The EEC regulation dealt with "recklessly furnishing false information as to a fishing catch contrary to regulation 3(2) of the Sea Fishing (Enforcement of Community Control Measures) Regulations 1985".

263. Clarkson and Keating (n2) 196.

Common Law Offences.

A large number of common law offences can be committed recklessly. It was held by the Court of Appeal in *Venna*, for example, that the crime of assault can be committed either intentionally or recklessly²⁶⁴. The jury direction of the trial judge, subsequently approved by the Court of Appeal, was framed in terms of knowledge of probability, ie following the subjective approach to recklessness. The subjective test adopted in *Kimber* indicates that the common law offences should be assessed by means of a subjective test of recklessness.

However, in the House of Lords' decision of *Seymour*, Lord Roskill stated that:

"... it would be quite wrong to give the adjective 'reckless' or the adverb 'recklessly' a different meaning according to whether the statutory or the common law offence is charged. 'Reckless' should today be given the same meaning in relation to all offences which involved 'recklessness' as one of the elements unless Parliament has otherwise ordained ..."²⁶⁵.

Although this dictum was *obiter*, going far beyond what was required for the decision of the case before the House, it was nevertheless followed by the Divisional Court in *DPP v K (a Minor)*²⁶⁶, where it was held that "in the light of the authorities" the *Caldwell* test of recklessness applied to the common law offence of assault. The Court of Appeal has expressed its disapproval of this view; in the case of *Spratt*²⁶⁷ it held that the subjective test of recklessness

264. [1976] QB 421.

265. Cited in Elliott and Woods (n87) 125.

266. [1990] 1 All ER 331.

267. [1990] *The Times* May 14.

propounded in *Cunningham* was the applicable *mens rea* form for assault.

Offences that can be committed maliciously.

Despite the criticism by Lord Diplock (in *Caldwell*) of the concept of recklessness as applied in *Cunningham*, and his Lordship's dislike of the subjective interpretation placed on "recklessness" in respect of statutory offences employing the term "maliciously" by that case, it is clear that the decision in *Cunningham* was distinguished, and not overruled²⁶⁸. This is a significant consideration in that several statutes employ the concept "maliciously", which has in the past been interpreted as meaning intentionally or recklessly²⁶⁹. Subsequent cases have confirmed that the *Cunningham* decision still applies. The Divisional Court in *W (a minor) v Dolbey* quashed the conviction of a fifteen-year-old boy²⁷⁰, who had been found guilty of a contravention of s20 of the Offences against the Person Act 1861. While convinced that the air rifle he was carrying was empty of ammunition, the defendant fired at the victim. Unfortunately for both of them, there was a pellet in the rifle, and the victim was injured. The defendant was charged with malicious wounding and convicted. The Divisional Court overruled the decision, holding that the defendant had not foreseen that any physical harm might result from his action in pulling the trigger, and that he was consequently not reckless on the *Cunningham* test. This decision was confirmed by *Grimshaw*²⁷¹, a Court of Appeal decision, which also related to a contravention of s20 of the Offences against the Person Act 1861. The trial judge,

268. Clarkson and Keating (n2) 197 point out that Lord Diplock was of the opinion that "maliciously" was a "term of art" whereas "recklessness" was not and should bear its ordinary meaning.

269. *Ibid.*

270. [1983] Crim LR 681 (DC).

271. [1984] Crim LR 109 (CA).

apparently misled by Diplock LJ's use of the phrase "should have foreseen" in *Mowatt*²⁷², directed the jury that the defendant was "malicious" if she ought to have foreseen that some physical harm might result from her act. The Court of Appeal quashed the conviction, holding that it was the actual foresight of the defendant which mattered, not the jury's assessment of the objective reasonableness of his acts.

Thus it appears that malice is "... a quite separate concept and not synonymous with recklessness; its meaning is quite unaffected by *Caldwell* and *Lawrence* ..." ²⁷³.

272. See (n92) above.

273. Clarkson and Keating (n2) 198.

CONCLUSION

We have briefly examined the most significant cases dealing with "intention" and "recklessness" as *mens rea* forms, in particular the developments over the past thirty years, and the criticisms thereof. The central issue throughout has been the manner in which the English law has dealt with the question of foresight. It is evident that despite their efforts to restrict the ambit of "intention", the courts have been compelled to acknowledge the fact that in order for the criminal law to be both theoretically and practically efficacious, the notion of foresight has to be accommodated within the legal framework of intention.

In English law prior to 1980, an awareness of the possibility of harm, along with the occurrence of such harm has either been regarded as an instance of intention or recklessness, with the degree of foresight being determinative. In fact, *dolus eventualis* expressed in terms of foresight of a probability could quite comfortably be fitted into the prevailing understanding of the concept of intention (in English law) prior to the case of *Moloney*. We have noted above that in utilizing the presumption that a person intends the natural and probable consequences of his action, the House of Lords in *Smith*²⁷⁴ actually provided authority for the ascription of liability beyond the realm of subjective foresight. Although this development was generally deplored and was never adopted by the courts, it is significant that foresight (albeit objectively assessed) was such an important factor in the House of Lords' assessment of liability on the basis of intention.

274. 247-253 above (*DPP v Smith* [1961] AC 290).

In *Hyam*²⁷⁵, the House of Lords provided strong and explicit support for the acceptance of foresight of the probability of harm occurring as an integral part of assessing intention. Despite rumblings of discontent in the Court of Appeal²⁷⁶, the House of Lords affirmed *Hyam* through the judgments of Lord Simon in *Lynch*²⁷⁷, Lord Diplock in *Lemon*²⁷⁸ and the Judicial Committee of the Privy Council in *Leung Kam Kwok*²⁷⁹. Moreover, *Hyam* was never explicitly overruled by the House of Lords, although it has been argued that, in substance, this is what was achieved by the case of *Moloney*²⁸⁰.

Dolus eventualis expressed in terms of foresight of the possibility of harm, on the other hand, was dealt with in terms of subjective recklessness. Subjective recklessness as typified in *Stephenson*²⁸¹ was the prevailing juridical conception prior to *Caldwell*²⁸² and *Lawrence*²⁸³, and was considered to be a "state of mind" along with intention. In

275. 254-261 above (*Hyam v DPP* [1975] AC 55).

276. 261-263 above.

277. *DPP for Northern Ireland v Lynch* [1975] AC 653: "... The definition of certain crimes requires a mens rea which goes beyond foresight of the actus reus. An example is wounding with intent to do grievous bodily harm. The actus reus is the wounding, and the prosecution must prove a corresponding mens rea - namely that the accused foresaw the wounding as a likely consequence of his act ...".

278. [1979] AC 617 at 638.

279. (1985) Cr App R 83, [1985] Crim LR 227.

280. *Lawrence* (n62) 720.

281. [1979] QB 695.

282. [1982] AC 341.

283. [1982] AC 510.

its subjective form, recklessness involves "appreciating an unreasonable risk".

Thus the present South African law in respect of *dolus eventualis*, until fairly recently, could comfortably be accommodated within the English scheme, with much the same results. The two legal systems employed similar processes of reasoning, despite differing *mens rea* notions (more specifically, relating to English law's adoption of recklessness). The accused would have received much the same treatment in whichever of the two systems he was brought to trial. However, the latest developments in English law have resulted in the two systems drifting further apart.

It is significant to take cognizance of the views of writers in the light of recent developments in English law. Halsbury's law of England states that a result is not intended merely because it is foreseen as certain²⁸⁴. Halpin favours restricting the interpretation of intention to desiring the outcome of one's actions²⁸⁵, although in relation to murder, he supports an expansion of the definition of murder, whereby explicit reference would be made to other factors in assessing liability²⁸⁶. Lord Goff rejects the notion of oblique intention in assessing murder, and consequently any use of foresight in establishing

284. Lord Hailsham Halsbury's Law of England (4ed) (1990) Volume 11(1) 24 n7.

285. Halpin (n132) 698.

286. Halpin (n38) 114. Halpin favours using the jury "... as an interpreter of standards in allegedly applying the technicalities of intention ...". He refers to terms in use in certain American States in this regard, such as "circumstances manifesting extreme indifference to human life..." and "... an abandoned and malignant heart ..." and the phrase "... being aware that he may kill ...", from the codification proposals for English criminal law.

intention for this crime²⁸⁷. His proposed solution is the acceptance of a test for the mental element of murder that will consist of either (i) an intention to kill; or (ii) indifference to death²⁸⁸. All the writers mentioned favour viewing intention as *dolus directus* (direct intention); however, significantly, each writer is also in favour of some extension of the notion of intention.

Others, such as Clarkson and Keating²⁸⁹, Leigh and Temkin²⁹⁰, and Griffin²⁹¹, favour the view that "... a consequence ought only to be regarded as intended when it is the aim or objective or desire of the actor or is foreseen as certain to result ...". Williams²⁹² and Smith²⁹³ prefer a framework of intention which would accommodate the notion of oblique intent along with desire, while foresight of "substantial" or "virtual" certainty suffices for the purposes of intention.

287. Goff (n3) 46.

288. *Ibid* 59.

289. Clarkson and Keating (n2).

290. L H Leigh and J Temkin "The Kindergarten Area of the Law" (1989) *New Law Journal* 851.

291. S G Griffin (n141).

292. Williams (n11 : Oblique Intention).

293. J C Smith "A Note on 'Intention'" (1990) *Criminal Law Review* 85. At 91, Smith suggests a redraft of clause 18 of Law Commission No 177 : *Draft Criminal Code Bill* (concerning intention to cause results):

"A person acts intentionally with respect to -

(a) ...

(b) a result when -

(i) it is his purpose to cause that result; or

(ii) his purpose is to cause some other result and he knows that if he succeeds, his act will, in the ordinary course of events, cause that result ...".

It is therefore noticeable that despite favouring a concept of intention that coincides with the desire, aim or objective of the actor, all the writers have conceded that a certain degree of foresight must be accommodated within such a concept. This experience was shared by the courts in each of the most recent judgments relating to intention.

Although Lord Bridge unequivocally refused to equate foresight with intention in *Moloney*²⁹⁴, his use of the ambiguous term "natural consequences" and his inability to explain intention in terms that did not involve foresight, both evidence the importance of foresight in establishing intention. Lord Scarman, in *Hancock and Shankland*²⁹⁵, whilst criticizing the formulation in *Moloney*, conceded that the probability of the occurrence of a consequence may well be a critical consideration in determining whether the accused acted with intention. Moreover, the undisguised devolution, to the jury, of the responsibility of deciding what constitutes intention in a particular case provides considerable scope for the foresight of the accused to become the major consideration in establishing intention. In *Nedrick*²⁹⁶, Lord Lane CJ rejected the trial court's jury direction in terms of high probability, stressing instead that such instruction ought to be in terms of virtual certainty. Although this dictum is somewhat clearer than those in previous cases, it is nevertheless problematic in that it contradicts the unequivocal message from the House of Lords in *Hancock and Shankland* which was followed by Lord Lane himself in *Purcell*²⁹⁷ not to give the jury detailed guidelines .

294. 265-270 above (*Moloney* [1985] AC 905).

295. 271-273 above (*Hancock and Shankland* [1986] AC 455).

296. 273-276 above (*Nedrick* [1986] 3 All ER 1).

297. (1986) 83 Cr App R 45.

In the most recent case in which this issue was considered, *Walker and Hayles*, the Court of Appeal accepted a jury direction in terms of high probability in the trial court, making the crucial point that "... once one departs from absolute certainty, there is bound to be a question of degree ..."²⁹⁸ Lloyd CJ proceeds to observe that death can be inferred even when it is less than a virtual certainty and that this is a question for the jury to infer from the degree of probability in the particular case.

Turning to recklessness, it is clear that, at least in theoretical terms, both the courts and writers in England favour recklessness as the repository of all harm proceeding from the "dolus eventualis situation" - where there has been foresight of risk, although the foreseen harm is not the purpose of the actor. This was an acceptable state of affairs when recklessness was understood in subjective terms, but in the light of the recent line of cases beginning with *Caldwell*, which has progressively objectified the notion of recklessness, this situation is problematic. Recklessness has become so strongly identified with gross negligence, that it may be asked whether it warrants an independent existence as a substantive legal notion within English law. Smith has pointed out that it is only the "loophole" situation allowed by the judgment of Lord Diplock in *Caldwell* that separates recklessness from negligence²⁹⁹, where an accused recognizes the risk of harm, but rules out the possibility of the harm occurring, he ought to have a valid defence.

298. 278-279 above (*Walker and Hayles* (1990) 90 Cr App R 226 at 232).

299. J C Smith "Commentary : *Chief Constable of Avon and Somerset v Shimmen* [1986]" Crim LR 800 at 803.

It seems however that in the cases to date the "loophole" has been largely ignored by the courts. In both *Crossman*³⁰⁰ and *Shimmen*³⁰¹, the court, although apparently conceding the loophole's existence, simply did not believe the defendants when they claimed that they, in their own minds, had ruled out the risk of the harm occurring. If these cases are indicative of the approach of the courts, then it is submitted that in reality the English courts, following Lord Diplock's lead, have conflated recklessness and negligence into one amorphous concept.

One could arguably draw a broad theoretical distinction between the two categories of mental state which currently form the basis of criminal liability in English law: intention, which is predicated upon the desire and/or purpose of the actor, and eschews all reference to foresight of probability; and recklessness/negligence, which incorporates all other culpable states of mind or lack thereof.

However, like all attempts to encompass an essentially pragmatic legal system like English law within the bounds of theoretical principle, this dichotomy is deficient. This may be illustrated with reference to the most important criminal cases dealing with the nature of intention over the past thirty years; all of which, it may be noted, have dealt with the crime of murder. Halpin suggests that "... the abstract analysis of intention is coloured by the emotive aspect of a murder verdict ... the emotional edge of murder has been responsible for an undisciplined approach to the subject of intention, prompting cases to be viewed from

300. [1986] Crim LR 787.

301. [1986] 84 Cr App R 7.

their particular facts rather than in accordance with coherent general principles ..."³⁰².

The flurry of writing regarding the nature of intention precipitated by recent case law has tended to obscure the fact that whatever the form of intention that constitutes express malice, the malice aforethought required for murder could equally be satisfied by implied malice, whereby the accused intended to inflict grievous bodily harm upon the victim and by so doing caused his death³⁰³. Implied malice was reaffirmed in *Vickers*³⁰⁴, and later in *Cunningham*³⁰⁵, as a valid form of malice aforethought for murder. In *Cunningham*, the House of Lords was unanimous in affirming *Vickers* and *Hyam*, Lord Hailsham remarking that to alter the law to a suggested alternative, namely so as to require an intention to endanger life, would result in a "... fruitless and interminable discussion of the question whether the

302. Halpin (n38) 105.

303. The House of Lords' decision in *DPP v Smith* [1961] AC 290 disapproved of the previously authoritative definition of grievous bodily harm attributed to Willes J in *R v Ashman* (1858) 1 F & F 88, namely that the injury need not be permanent or dangerous provided that it seriously interfered with comfort or health; stressing that the words "grievous bodily harm" should be given their natural meaning so as to convey that a really serious bodily injury was required. The jury was to determine whether the bodily injury could properly be described as really serious.

304. [1957] 2 QB 664.

305. [1982] AC 566. This decision clarified the position regarding the place of implied malice in English law, which was called into question by the dissenting judgments of Lord Diplock and Lord Kilbrandon in *Hyam*, who felt that the concept of grievous bodily harm could no longer be included in the definition of murder, and thus should have no place in the definition of implied malice. Lord Hailsham and Viscount Dilhorne both approved of the decision in *Vickers*, while Lord Cross agreed with them without stating any reasons for his conclusion.

accused intended to endanger life and thus expose the victim to a probable danger of death, or whether he simply intended to inflict really serious injury ..."³⁰⁶.

The problem with the implied malice approach applied in *Vickers* and *Cunningham* is that an accused may be convicted of murder without ever having given thought to the likelihood of death ensuing³⁰⁷. "The term 'really serious injury' may also be open to an exaggerated meaning, for if death results from an intentional assault, a jury when determining the severity of the accused's actions may be more likely to look at the resulting consequences of the attack (the death of the victim) rather than on [sic] what the accused actually had in mind at the time of the assault (which may not have been aggravated assault) ..."³⁰⁸.

In the light of these considerations, it is useful to compare the *mens rea* required for murder in English law with the *mens rea* required for murder in South African law. It is clear that English law extends beyond the reach of the South African law in one important respect. In terms of the current South African law, in order for liability to ensue, the accused must have foresight of at least a possibility of harm occurring. However, in terms of the notion of implied malice of English law, an accused can be convicted without any foresight of the harm, that is, death, occurring provided he intends to cause serious bodily harm to his victim. As Leigh and Temkin observe, this rule creates a paradoxical result: "... liability for murder arises when death is foreseen as certain, but not where it is only foreseen as highly probable, yet such liability also arises

306. *Ibid* 579.

307. T H Jones and S Griffin "Serious Bodily Harm and Murder" (1990) *Scots Law Times* 305 at 307.

308. *Ibid*.

where all that is foreseen is the certainty of grievous bodily harm ..."³⁰⁹.

In summing up, we may ask, what is the present state of the notions of intention and recklessness in English criminal law? It is tempting to postulate a drift towards the inclusion of foresight of a probability in the notion of intention: the courts have moved from a total exclusion of foresight in respect of intention (*Moloney*) to an acceptance of foresight of a virtual certainty (*Hancock and Shankland*, *Nedrick*), to an acceptance of foresight of a high probability (*Walker and Hayles*). However, it is as yet uncertain what effect, if any, *Walker and Hayles* will have upon the law. Perhaps the safest and most self-evident conclusions would be that first, as indicated above, foresight of a probability has not been eliminated from the English law concept of intention by the recent line of cases, and secondly that the pragmatic, casuistic English law approach that is at once a failing and a redeeming feature, allows justice to be served through the adaptation of principles by the courts. Although recent developments in the notions of criminal intention (and criminal recklessness) may seem to deviate from a coherent theoretical framework of *mens rea*, the focus on equitable results by the courts may avoid the subversion of the principles of justice.

In the area of recklessness however the use of the *Caldwell/Lawrence* definitions presently in favour would appear to punish inadvertent offenders as if they possessed a culpable state of mind. Such a practice is clearly aberrant. As Williams observes, recklessness is thus "... wholly swallowed up by negligence and all that is left is a

309. Leigh and Temkin (n290) 854.

hollow name, a mere synonym for negligence ..."³¹⁰, resulting in the scope of negligence, under the guise of recklessness, being drastically expanded for "...recklessness is an even wider, looser and therefore harsher concept than negligence ..."³¹¹. Smith has called for a return to the subjective notion of recklessness, and it seems that this is the only way to prevent further injustice being done³¹².

We have seen how English law has dealt with the problem of acting with foresight of the likelihood of harm eventuating (the *dolus eventualis* situation). The Austinian analysis of the mental elements in crime is of interest in drawing a final comparison between the English and South African legal systems and their treatment of the problem. Austin regarded as intended "... any consequence following from my acts which I desired, whether as an end in itself or as a means to an end, or which I merely contemplated or expected ..."³¹³ (whether such expectation was of a certain consequence or merely a probable consequence). He went on to divide intention into subdivisions depending upon whether the consequence was desired or contemplated. Significantly, he regarded these subdivisions as sufficiently similar for all to be characterised as intention³¹⁴, Austin's underlying reason for this equality was that "... he saw the basic division in *mens rea* lying not between desiring a consequence and contemplating it, but between producing

310. G Williams "The Unresolved Problem of Recklessness" (1988) 8 Legal Studies 74 at 88.

311. *Ibid.*

312. Smith (n299) 803.

313. D H Galligan "Responsibility for Recklessness" (1978) Current Legal Problems 55 at 60.

314. *Ibid.*

forbidden consequences advertently and inadvertently ..."³¹⁵.

While the present South African law (incorporating within the notion of intention a spectrum of liability ranging from *dolus directus* to *dolus eventualis*) and the pre-1980 English law (incorporating such subjective *mens rea* notions as intention and subjective recklessness) both acknowledge, with Austin, the distinction between "producing forbidden consequences advertently and inadvertently", the new notions of *mens rea* in English law focus on the primacy of the distinction between "desiring a consequence and contemplating it". It is submitted that, in view of the difficulties experienced by English law, it is preferable both in practical and theoretical terms to treat intentional action (the advertent production of forbidden consequences) as a coherent entity. All intentional action should therefore be considered in a logically connected whole as regards satisfying the *mens rea* requirements of criminal liability, as well as in respect of legal sanction and punishment, in accordance with the pre-1980 English law and the present South African law. Inadvertent production of harm should be regarded as a separate entity and treated differently. The new notions of intention and recklessness in English law are therefore inappropriate.

The question remains: why did English law dismantle a framework of *mens rea* which functioned smoothly and equitably and replace it with a new framework which is characterized by suppositional definition and inequitable results?³¹⁶ A possible motivating factor in the context of

315. *Ibid.*

316. See 302-308 above for examples of the injustice inherent in cases such as *Elliot v C* [1983] 2 All ER 1005; *Stephen Malcolm R* [1984] 79 Cr App R 334; *Bell* [1984] 3 All ER 842 and *Sangha* [1988] 2 All ER 385 (CA).

intention is the quest for terminological exactitude. The merits of this argument are questionable in a legal system which thrives on loose definition; being founded upon "ordinary language", which is by definition subject to interpretation. It is nonetheless clear that the courts have not followed this through; they have defined what is not intention and handed the task of determining what constitutes intention to the jury. Leigh and Temkin suggest that cases such as *Moloney* and *Hancock and Shankland* ought to be seen in the context of the expansion of recklessness precipitated by *Caldwell*: "... that is, the later cases may well be intended to limit murder by enunciating strict mens rea criteria, while leaving to manslaughter homicides ranging from cases where death was seen as highly probable to those where it came about as a result of culpable inadvertence ..."317. This observation begs the question: why *Caldwell* recklessness? Perhaps Lord Diplock and his supporters in the House of Lords have more to answer for than at first suspected.

Their creation of a new test for recklessness did not occur in a vacuum, and it seems that by associating recklessness with negligence, the proponents of the *Caldwell* line induced a narrower test for intention, which sought to exclude foresight of the probability of harm. Whereas pre-*Caldwell* recklessness bordered on intention, acting as an alternative *mens rea* form to intention in many cases, the objectivity of the *Caldwell* test necessitated drawing a rigid distinction between the two concepts. It seems that the courts were, at least partially, motivated by their fear of objectivity intruding upon subjective liability, in the form of *Caldwell* recklessness serving as an alternative for subjective criminal liability, thus drastically lowering the

317. Leigh and Temkin (n290) 854.

requirements for intention, and returning to the concept of intention favoured in *DPP v Smith*.

CONCLUDING REMARKS

CONCLUDING REMARKS

Broadly speaking, the sources of the criminal law are the moral, legal and social convictions of the community for which a system of criminal law exists¹. The significance of political and economic influences upon the criminal law is reflected in the rise of capitalism. It is evident that the society in which we live reflects "... the rationality of capitalism, which ... makes the security of the individual in this world the highest good ..."². However it is not human life, but property, which is at the very centre of the capitalist system, in which "... the amassing of capital becomes the most absorbing end ..."³. Murder, and other crimes against the person, are also of critical importance in our legal system, because in a system of legal equality no individual can rely on his superior command of force to achieve his will⁴.

It is these values which need to be counterbalanced in the society in which we live, which sanctions the taking of various risks for the sake of progress and profit. Even the value of human life is weighed up against various socio-economic priorities, such as mining operations, the construction of bridges, roads or buildings; and means of transport such as trains, aircraft and motor cars. The concept of *dolus eventualis* developed in South African law in response to a particular trend in society⁵, and it is

1. Burchell & Hunt's South African Criminal Law and Procedure 2ed vol 1 by E M Burchell, J R L Milton and J M Burchell (1983) 2.
2. N Seagle, cited in M Olmesdahl Criminal Law Cases and Materials (1978) 189.
3. *Ibid.*
4. *Ibid.*
5. 82 above.

necessary to delineate the functioning of such a concept, developed primarily to punish risk-taking, in a society which sanctions a great deal of risk-taking.

Before examining the legal basis of *dolus eventualis* more closely, it is necessary to sketch the philosophical underpinnings of the notion. As Ashworth cogently states, a system of criminal law exists "... to provide a framework for the state punishment of wrongdoers and thereby to preserve an acceptable degree of social order. Without criminal laws and their enforcement, each individual's person, property, and family would be substantially less safe from deliberate violation by others ..."⁶. He continues that "... it would hardly be sufficient to declare that individual members of society have certain rights to physical integrity, security of property and so on. It is also necessary *inter alia* to take steps to see that rights are not violated, a first step to which is to declare that individuals have duties not to violate the rights of others ... The specific technique of the criminal law is to provide for the conviction and punishment of those who culpably breach the more serious duties ..."⁷.

In so far as the justification for punishing an individual is concerned, we have seen that in a criminal law system premised upon the notion of free will, the concept of intention is an indispensable one⁸. Intention is a natural basis for moral and criminal liability where the postulate is accepted that we have some measure of choice in our

6. A Ashworth "Belief, Intent and Criminal Liability" in J Eekelaar and J Bell (eds) Oxford Essays in Jurisprudence : Third Series (1987) 1.

7. *Ibid.*

8. 13-19 above.

activities, or at least act as if we have such a measure of choice.

Of all the species of intention, the most important is that of intentional action⁹. There is a further distinction to be drawn within this class of mental states, between intending a consequence and bringing a consequence about intentionally¹⁰. For the purposes of our analysis we have accepted Duff's basic distinction between these concepts, which regards "intending" as synonymous with direct intention, thus encompassing those effects which provide part of the actor's reason for acting (ie his aim or objective); and acting "intentionally", as consisting of the actor bringing about the expected side-effects of his actions. This distinction is of fundamental importance in the assessment of the philosophical basis for *dolus eventualis*¹¹.

Although it must be acknowledged that we cannot, as observers, have direct knowledge of the mind of another, we have noted the inadequacy, in psychological and legal terms, of the dualist position, which advocates a strict mind/body dichotomy¹². We should accept, with Duff, that an agent has knowledge of his own intentions by virtue of his proximity to them as part of his own consciousness¹³. However, as regards proof of intention (in all its forms), it is necessary to make use of inferential reasoning, "... drawn from the actions or aspects of actions which we observe, to

9. 39 above.

10. This crucial distinction is discussed at 20-25 above.

11. This is the submission of this dissertation. See 20-25 above.

12. See the discussion of Dualism at 26-34 above.

13. R. A Duff *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) 134.

the broader patterns of meaning of which they are part ..."¹⁴. This accords with Brett's postulate that we all have an "indwelling understanding" of other human beings¹⁵.

The moral background to the notion of *dolus eventualis* is to be found in the consequentialist conception of responsible agency, which focuses on outcomes, and justifies the principles of criminal liability by their consequences, adopting those principles which would most efficiently serve the law's aim of preventing harm¹⁶. In terms of this view, there is no intrinsic moral difference between intent and foresight and consequently there is no need to distinguish between intended and intentional agency¹⁷. It is necessary to qualify this view such that criminal liability accords with "morally culpable responsibility" in accepting the notions of knowledge and control as determinative¹⁸. In contrast, the non-consequentialist position finds an intrinsic moral significance in intended action¹⁹.

The psychological concept of culpability is the theory which has been adopted by our courts (along with the Anglo-American legal systems). In terms of this theory, it is appropriate that intentional agency be regarded as sufficient to constitute "intention": the psychological concept regards culpability as something in the mind of the offender²⁰.

14. *Ibid* 131.

15. P Brett *An Inquiry into Criminal Guilt* (1963) 139.

16. See the discussion of consequentialism at 34ff above.

17. Duff (n13) 111.

18. *Ibid* 109.

19. *Ibid* 111.

20. A A G Peters *Opzet en Schuld in het Strafrecht* (1966) 320.

Many writers have sought to limit the ambit of "intention" to "intending", by equating it with either the concept of "desire" or that of "purpose", both of which are synonymous with the restrictive interpretation of intention (ie direct intention). We have seen that both of these concepts are problematic however, in that they exclude certain situations which would reside under intention in terms of its "ordinary language" conception²¹. In contrast, foresight is an indispensable part of intention in all its forms²² and indeed, may be equated with intention. A number of writers have emphasized the notions of knowledge and control and concomitantly, foresight, in assessing subjective criminal liability²³. It is therefore submitted that the concept of

21. This argument, along with other related arguments which are indicative of the unsuitability of these terms are canvassed at 45-58 above.
22. R Goff "The Mental Element in the Crime of Murder" (1988) 104 Law Quarterly Review 30 at 43 states that "... intention can exist without foresight of the relevant consequence ...". He holds that a consequence that is "...most unlikely to occur ... cannot be said to have been foreseen ...". Surely this is incorrect, as it militates against the fact that intention requires a cognitive component. How can one intend something that is not foreseen? It is submitted that Goff's golfing example, drawn from Lord Reid (at 44), to the effect that "... if I say I intend to reach the green, people will believe me although we all know that the odds are ten to one against my succeeding; and no one but a lawyer would say that I must be presumed to have intended to put my ball in the bunker because that was the natural and possible result of my shot ...", is not convincing. Although the golfer may hope to reach the green, he himself foresees as a very high probability ("ten to one") that he will land the ball in the bunker; therefore his shot was performed with foresight of the highly probable "harm" (hitting his ball into a highly unsuitable place) and is consequently intentional.
23. See the writers mentioned at 67-74 above. R Cross "The Mental Element in Crime" (1967) 83 Law Quarterly Review 215 at 226 also places special emphasis on the notion of "control" in assessing the mental element in crime. H Keating "Fatal and Non-Fatal Offences against the Person under the Draft Criminal Code" in I H Dennis

intention is most accurately encompassed by the notion of intentional action and consequently, foresight, as interpreted in the notions of knowledge and control, ought to be determinative²⁴.

Dolus eventualis, as is typical of all the forms of intention, consists of a cognitive and volitional element²⁵. Since the demise of the presumption (in the courts) that a person intends the natural and probable consequences of his acts, with its *versari in re illicita* overtones, *dolus eventualis* is assessed on the basis of the subjective foresight of the occurrence of the harm²⁶. This is proved by inferential reasoning based on the conduct of the accused and in line with the subjective test, is not assessed on the standard of the reasonable man, but on the state of mind of the accused at the time of the act²⁷. The test for *dolus eventualis* is the same with regard to consequences and circumstances²⁸. Although *dolus eventualis* is in no way a lesser form of *dolus*²⁹, the existence of *dolus eventualis*

(ed) Criminal Law and Justice - Essays from the W G Hart Workshop 1986 (1987) 129, outlines the argument that control and choice ought to be determinative concepts in relation to murder.

24. The notion "choice" has been used above, in the arguments of certain writers. It is submitted that this notion is equivalent to "knowledge" and therefore these notions can be used interchangeably to constitute, along with "control", determinative criteria for criminal liability for intentional action.

25. C R Snyman Criminal Law 2ed (1989) 197.

26. See the discussion at 95-104 above.

27. The requirements for the proof of foresight are set out in *S v Sigwahla* 1967 (4) SA 566 (A) 570.

28. See the discussion at 235ff above.

29. M M Loubser "Die Implikasies van die Onderskeid tussen Dolus Eventualis en Dolus Directus" in J J Gauntlett (ed) J C Noster 'n Feesbundel (1979) 139 at 143, C R

might play a role in mitigation, especially in the light of the legislative development embodied in the Criminal Law Amendment Act³⁰. It may be submitted that a judge is likely to avoid the death sentence in the event of a guilty verdict premised upon *dolus eventualis*³¹. A corollary of the submission that *dolus eventualis* is in no way a lesser form of intention is that *dolus eventualis* should suffice for criminal liability for all crimes which require intention³².

Snyman "Dolus Eventualis in the Offences of Terrorism, Subversion and Sabotage" (1990) 107 SALJ 365 at 372.

30. For the implications of the Criminal Law Amendment Act 107 of 1990, see 93-94 above.

31. *Ibid.* This was expressly held in *S v Ntuli* 1991 (1) SACR 137 (A).

32. See the discussion at 218-223 above.

Dolus eventualis - cognitive component

There is general agreement amongst South African writers, as well as being a well-established rule in the courts, that the cognitive component of *dolus eventualis* is satisfied by foresight of the possibility of harm³³.

Prior to the 1980's, English law dealt with this problem by including foresight of the probability of harm within the context of intention, with foresight of a lesser degree being classified as subjective recklessness³⁴. However, the new developments in English law have sought to identify recklessness with objective liability and negligence; and have concomitantly attempted to limit the foresight required to found liability on the basis of intention to foresight of a certainty³⁵.

It is evident in the new line of cases dealing with intention, that the courts have in each case qualified their support for their requirement that there must be foresight

33. 111ff above.

34. For a discussion of the English law concept of intention between 1960 and 1980, see 247-264. The subjective notion of recklessness is discussed at 283-288 above.

35. The new notion of recklessness in English law is discussed at 289-310 above, while the attempts to limit the foresight requirement in respect of intention is discussed at 265-279.

of certainty for the purposes of intention³⁶. In *Moloney*, Lord Bridge proposed that the jury should be directed that an act is intended where the defendant foresaw the consequence as being a natural consequence of his act. However, it has been observed that the "natural consequence test" allows an intention (to bring about a consequence) to be identified with foresight of a consequence as a "natural consequence" of his act. In *Hancock and Shankland*, the emphasis on the role of the jury's common sense makes allowance for the jury to find that the defendant had an intention to cause the harm where foresight of a probability

36. A number of writers have argued against accepting foresight of a probability for the purposes of intention. See particularly G Williams *Textbook of Criminal Law* 2ed (1983) 83-4 who elicits the argument that "intention" should conform to its ordinary meaning, and A K W Halpin "Intended Consequences and Unintentional Fallacies" (1987) 7 *Oxford Journal of Legal Studies* 104 at 108, who argues that "... no matter what level of probability we are speaking of, inasmuch as we are speaking in terms of probability of the consequence occurring, it must be recognized that there is also a probability of the consequence not occurring. This crucial fact is sufficient to falsify any equation between intention and foresight of probability, no matter how high the probability ...". It is submitted that Halpin is wrong. First, "probability" is usually associated with a greater than 50% chance of occurring, which would make a contradictory probability of the consequence not occurring mathematically impossible; but more importantly, in legal terms, the fact of foresight of the probability of harm, associated with a continued willingness to take the risk is legally relevant, and the contradictory "probability" (of the harm not occurring) is not.

As regards the new line of cases in English law relating to intention, McAuley observes that the House of Lords in *Moloney* and *Hancock and Shankland*, and the Court of Appeal in *Nedrick*, have "attempted to beat the concept of intention into submission", and thus the results of these cases have not been satisfactory. (F McAuley "Modelling Intentional Action" (1987) 22 *The Irish Jurist* 179 at 190). See 265-276 above for a discussion of these cases.

has been proved. The Court of Appeal in *Nedrick* accepted that foresight of a "virtual certainty" would suffice for intention, while in *Walker and Hayles*, the same court (differently constituted) held that foresight of a high degree of probability could constitute intention.

This vacillation by the courts from the foresight of a certainty approach simply reflects a recognition on their part that "nothing is certain in human affairs"³⁷. However, it is clear that once we depart from absolute certainty "there is a question of degree and an uncertain boundary between intention and recklessness"³⁸.

Silving illuminates this point when she observes that "... in both 'knowledge' and 'awareness', there is always involved the profound epistemological problem of 'knowability': 'knowledge' is always knowledge of a probability rather than of a certainty. Where the issue is one of foresight of a future event, 'certainty' is a particularly precarious concept ..."³⁹. Silving observes further that the borderline between "intent" and "knowledge" as well as between "foresight as a certainty" and "foresight as likely" is often very tenuous, and that a "reckless" actor is often socially equally blameworthy (and equally dangerous) as one who acts with "intent"⁴⁰.

It is significant that the English courts, despite rejecting an equation between foresight of probability and intention, have sought to establish a connection between the two by

37. J C Smith "A Note on Intention" (1990) Criminal Law Review 85.

38. J C Smith and B Hogan Criminal Law 6ed (1988) 59. This statement was quoted in *Walker and Hayles* 1990 (90) Cr App R 226 (CA) at 232.

39. H Silving Constituent Elements of Crime (1967) 219.

40. *Ibid* 224.

holding that foresight of probability is evidence from which intention may be inferred⁴¹. Halpin observes that if foresight of a probability as evidence of intention is regarded as distinct from foresight of a probability as an equivalence of intention, it is pertinent to ask in what the distinction consists⁴². "... Indeed, in practical terms, it is difficult to see what difference it would make for a judge to direct a jury along the lines of, (1) 'if you are satisfied that the defendant foresaw death as a probable consequence of his actions, that amounts to an intention to cause death, and if you find that he intended to cause death you must find the defendant guilty of murder'; or, (2) 'if you are satisfied that the defendant foresaw death as a probable consequence of his actions, you may infer from the evidence that he intended to cause death, and if you find that he intended to cause death you must find the defendant guilty of murder' ..."⁴³. Halpin concludes that the English courts have failed to illustrate the distinction, and until such time as the vacancy for such an illustration is filled, the claim that treating foresight of a probability as evidence of intention can be regarded as distinct, "... cannot be taken seriously ..."⁴⁴.

It is therefore evident that despite their attempts to exclude foresight of a probability from the ambit of

41. *Moloney* [1985] 1 All ER 1025 at 1038; *Hancock and Shankland* [1986] 2 WLR 357 at 363.

42. Halpin (n36) 109.

43. *Ibid.*

44. *Ibid* 111. Halpin discusses the case of *Steane* (1947) KB 997, cited by Lord Bridge in *Moloney* as an example of a case where foresight of probability amounted to evidence of intention, but where intention was not established. However, as discussed above at 244, it seems that *Steane* did have the intention to assist the enemy, and that his acquittal ought to be premised upon duress instead of lack of intent.

intention, the courts have not succeeded in doing so. In the light of this conclusion, South African criminal law compares favourably in terms of its explicit acknowledgement of the role of foresight as an indispensable part of the notion of criminal intention. The debate which has occupied most of the time of the courts and writers in South Africa is not whether foresight should be accepted in the scheme of intention at all, but rather, which degree of foresight ought to be required for intention⁴⁵. This debate has principally been played out in the academic journals and textbooks, as the courts have, for the most part, simply discussed the foresight requirement as an unqualified possibility. It may be submitted that the phrasing of the foresight requirement in this manner may be interpreted as support for the "remote possibility" line, that is, provided the harm is foreseen by the accused, the remoteness of such harm is not relevant in respect of criminal responsibility. This argument enjoys the support of a number of writers, although there is equal support for the proposition that the requisite foresight ought to be qualified in some way⁴⁶. The Appellate Division seems to have adopted this qualification upon the foresight requirement in two recent cases, *Ngubane*⁴⁷ and *Beukes*⁴⁸. The learned judges who delivered the judgement of the court in each of these cases sought to indirectly exclude the volitional element of *dolus eventualis* by virtue of the remoteness of the foreseen possibility, such that an accused could not be said to have "consented" to the occurrence of the foreseen harm had he

45. See the discussion at 111ff above.

46. The views of all the South African writers are canvassed at 111ff above.

47. *S v Ngubane* 1985 (3) SA 677 (A).

48. *S v Beukes* 1988 (1) SA 511 (A).

not foreseen the possibility of the harm occurring as real or reasonable.

The dubious utility of the volitional component notwithstanding, it has been pointed out that it does not follow that an actor will only "consent" to a real or reasonable possibility, and that in fact an actor would be more likely to reconcile himself to a remote possibility⁴⁹. It is therefore submitted that this indirect attempt to qualify the foresight requirement of *dolus eventualis* is not logically sound.

Furthermore, it is submitted that the attempts to restrict the ambit of the foresight requirement are all subject to an inherent deficiency, the ambiguity of ordinary language when adopted for legal usage. Adjectives such as "real", "reasonable" and "concrete" cannot be quantified for legal purposes, and to insist on qualifying foresight by using these terms is therefore problematic. It is moreover difficult to draw the line between these terms and the terms such as "slight" or "remote", used to describe a lesser possibility⁵⁰.

The submission of this thesis is therefore the following: the foresight requirement, constituting the cognitive component of *dolus eventualis*, should be entirely unqualified. If the risk of harm occurring is envisaged by the actor, there is foresight, and the fact that the actor takes cognizance of this risk eliminates the possibility of unjust results. Where the actor has ruled out the risk of

49. 161-162 above.

50. J. R. Du Plessis *The Law of Culpable Homicide in South Africa* (unpublished D Phil Thesis, Rhodes University 1986) 155 "... It would be extremely difficult if not impossible to distinguish between very remote, fairly remote, real, substantial and concrete possibilities objectively as questions of fact ...".

the harm occurring, he has no foresight and therefore can at most be found guilty of a crime on the basis of conscious negligence. However, where the actor has foresight of the harm occurring, and chooses to act regardless of such foresight, he should be convicted of the intentional commission of the crime in question⁵¹. The mere remoteness of a possibility does not remove it from the ambit of *dolus eventualis*⁵².

It is necessary to examine the nature of the foresight required for *dolus eventualis* in more depth. Having accepted that the cognitive component is satisfied by

51. G Fletcher Rethinking Criminal Law (1978) 448 n35 cites Schmidhäuser, who "... rejects the relevance of probability to *dolus eventualis* on the ground that the improbability of hitting a distant, but intended target does not preclude a finding that a successful hit was intentional ...".
52. Du Plessis (n50) 178. Snyman (n29) 371 refers to a "... kaleidoscope of possible results ...", stating that "... the degree of foresight of desire cannot affect the judgment that I 'intended' all these consequences ..." (at 372). At face value, this would seem to run contrary to Snyman's support of the argument that only foresight of reasonable possibility suffices for proof of *dolus eventualis*. (See Snyman (n1) 199). It is submitted that at 371-2, Snyman is simply stating the law, as it stands. As to the sufficiency of foresight of a remote possibility as the cognitive component of *dolus eventualis*, similar arguments may be adduced in this regard to those proposed in the context of "oblique intention" by J L Mackie "The Grounds of Responsibility" in P M S Hacker and J Raz (eds) Law, Morality and Society (Essays in Honour of H L A Hart) (1977) 181: "... If an agent brings into consideration and weighs thoroughly everything he knows about the nature and circumstances and likely consequences of a proposed action and performs the action as a result of this deliberation and in fulfillment of the decision in which it culminates, then he has intended a rather complex act which includes all the features of the action known to him. He has accepted its undesired or neutral components for the sake of the desired ones, knowing that he cannot have these without those ...".

foresight of the (unqualified) possibility of harm occurring, the question arises whether this foresight has to be at the forefront of the actor's mind when acting. It is submitted that at this point a distinction should be drawn between the notions of "knowledge" and "awareness", where knowledge, "... the most elemental positively imputable mental state ...", differs from "awareness", in not requiring actual consciousness, at the crucial time, of the pertinent circumstance; "pre-conscious" knowledge is sufficient⁵³. "Pre-conscious" knowledge means that the person concerned "... had at some prior time acquired the relevant information and that the latter has not been repressed, but is susceptible of being brought to consciousness if needed ..."⁵⁴. While it is suggested that "knowledge" will suffice for the majority of crimes, for certain crimes such as perjury awareness will be required⁵⁵.

A second issue which should be canvassed in relation to the nature of the foresight required for *dolus eventualis*, is the amount of premeditation or deliberation the actor engages in before acting. Sistare suggests that the amount of time spent contemplating what one intends cannot make one more or less responsible, though it may affect one's degree of culpability or laudability⁵⁶. It is therefore submitted that the immediacy or duration of the foresight is

53. Silving (n39) 218.

54. *Ibid.*

55. It is submitted that this would counteract the attempts made by the courts to limit the intention required for "political crimes" to *dolus directus* (220-221 above), and maintain the approach which is more sound in principle; that *dolus eventualis* is a sufficient *mens rea* form for every crime requiring intention.

56. C T Sistare "Models of Responsibility in Criminal Theory : Comment on Baker" (1989) 7 Law and Philosophy, 295 at 307 n18.

irrelevant in terms of the enquiry into proof of intention, although the circumstances of the case may provide grounds for mitigation of sentence.

Thirdly, as regards precautions taken by the accused who foresees the possibility of harm:

"... The accused who takes precautions which he knows or believes are not sufficiently effective to guarantee that the undesirable results will not supervene, is simply making the foreseen possibility more remote. His position is still that of a person who foresees a possible criminal result of his conduct but does not desist. The accused who takes adequate precautions or, more importantly, who believes that he has taken adequate precautions and that the undesired result will not supervene, obviously no longer foresees the possibility. Such an accused cannot be said to have *dolus eventualis* as *mens rea* ..."57.

Two further applications of *dolus eventualis* need to be briefly considered. First, *dolus eventualis* is applied in assessing whether an accused had knowledge of unlawfulness, and it is submitted that the above analysis is equally relevant in this regard. Thus, whatever the reasons of the accused are in "... failing to make enquiries to dispel or confirm his suspicions are irrelevant ..." if the accused complies with the basic requirements for *dolus eventualis*58.

In so far as causation is concerned, another judicial attempt was made (by Van Heerden JA, who also delivered the judgment in *Beukes*) in *Goosen* to limit the requisite foresight for *dolus eventualis*. It was held by the Appellate Division in this case that the element of intention was not satisfied if the consequence occurs in a manner which differs markedly ("wesenskaplik") from the manner

57. Du Plessis (n50) 162.

58. See the discussion of knowledge of unlawfulness in terms of *dolus eventualis* at 165-175 above.

in which the accused foresaw the causal sequence. Apparently the policy underlying this decision was the exclusion of remote possibilities foreseen by the accused from the ambit of criminal liability. However, it is submitted that it is preferable to maintain the long-established rule that the precise manner of causation of harm need not be foreseen; and that the accused should merely foresee the possibility that the particular result should flow from his act. It is preferable to exclude criminal liability on the basis of remoteness of causation rather than foresight⁵⁹.

59. See the discussion of *dolus eventualis* and causation at 224-234 above.

Dolus eventualis - Volitional/conative component

Despite the arguments of the majority of jurists to the contrary, the courts have consistently reaffirmed the utility and indispensability of the volitional component of *dolus eventualis*, whether described as "recklessness" or "reconciliation with the result"⁶⁰.

Those jurists which dismiss the volitional component of *dolus eventualis*, regard the conduct of the accused as intentional if the accused takes a conscious risk, having concluded that the harmful result may actually occur. These writers therefore appear to favour a cognitive conclusion in place of "recklessness" or a "reconciliation with the result", which is usually identified as the volitional component of the notion⁶¹.

It appears as if the volitional element of *dolus eventualis* is subsumed in the conduct of the accused. This may be inferred from the statements of some of the writers. Snyman states that "... if [the accused] foresaw a consequence as possible but did not allow such possibility to deter him from proceeding with his main aim, then he took such a possibility" into the bargain "and is deemed by the law to have intended it ..."⁶². Morkel observes that "... the person who acts despite his knowledge of the possible infringement of the law commits himself to such infringement by the very fact that he becomes active despite such

60. See the discussion at 176ff above. Along with such cases as *Ngubane* (1985 (3) SA 677 (A)) and *Beukes* (1988 (1) SA 511 (A)) where the Appellate Division expressly accepted the notion, there are more recent cases such as *S v Hutchinson* (1990 (1) SACR 149 (D & CLD)) and *S v Nango* (1990 (2) SACR 450 (A)) which place emphasis upon recklessness.

61. See the views of Loubser and Rabie at 210-211 above.

62. Snyman (n21) 372.

knowledge ..."⁶³. Similar reasoning is adopted by Du Plessis in his suggested definition of *dolus eventualis*: "... Dolus eventualis is that form of dolus which is encountered when an accused carries on with a course of conduct aware that a criminal result could possibly flow from such conduct ..."⁶⁴.

The volitional element appears to be implicit in the fact that the accused did not arrest or modify his actions after having foreseen the possibility of harm resulting therefrom. It is instructive to compare the views of writers who have focused on the conduct itself in examining intentional action. McAuley states that the intentional component of intentional action is in the action itself, not in some shadowy, immaterial realm of pure mental states⁶⁵. McAuley's theory of the intentionality of an action consists of the following test: "... Being able to describe the action in the form 'He gave effect to his intention by doing A', where A stands for the non-intentional component of the action, ie for the agent's bodily movements and the results, if any, that flow from them ..."⁶⁶.

Duff similarly observes that "... we should rather understand intention as a matter of the relation between the agent's actions and her beliefs - which beliefs are relevant to, as providing the reasons for, her actions; and as a matter, not of what is going on in her mind, but of the pattern which her actions (including what she says about what she is doing) instantiate ... Discerning an agent's intentions resembles discovering a book's meaning (which is

63. D W Morkel "The Distinction between Dolus Eventualis and Advertent Negligence" (1981) 5 SACC 162 at 170.

64. Du Plessis (n50) 159.

65. McAuley (n36) 180.

66. *Ibid* 185.

not a hidden entity whose existence and nature we need to infer from what we can see), rather than inferring the hidden causes of an observable event ..."⁶⁷.

In this regard, Hampshire observes that there are many activities and situations where the actor knows what he is going to do, but does not think in words at all⁶⁸. He cites *inter alia* the example of a dancer - if you ask a dancer how he will perform something, he can show you⁶⁹. If you would learn from him, you learn from him by watching him, ie by imitation⁷⁰. Hampshire points out that there is a real difference between practical reasoning and theoretical reasoning: "... The games player, the dancer, indeed, has thought, but it is not verbal thought, and what it issues in is not a judgement ..."⁷¹. It is submitted that this argument gives us a clue as to the content of the "conclusion" to continue with the proposed course of actions, despite foresight of harm. Such a conclusion need not be (and often is not) preceded by a process of actual, practical reasoning in words.

Moral reprehensibility - the policy grounds

The policy grounds underlying the acceptance of *dolus eventualis* as a fully-fledged form of intention are informed by the moral reprehensibility of the actor who acts despite foreseeing the possibility of harm. Such an actor evidences

67. R A Duff "The Obscure Intentions of the House of Lords" (1986) Criminal Law Review, 771 at 780.

68. S Hampshire "Comments" in Y Yovel (ed) *Philosophy of History and Action*. (1978) 68.

69. *Ibid.*

70. *Ibid.*

71. *Ibid.*

a "willingness" to bring about the harm rather than to give up his proposed course of action⁷².

It is therefore manifest that the essence of *dolus eventualis* is egoism, in that the person acting with *dolus eventualis* places his ends at the same level or even higher than the ends protected by the law⁷³. In the case of *dolus eventualis*, the inhibiting, negative value of the harm envisaged by the offender is weaker than the positive value that attaches to the accomplishment of the act⁷⁴. One is thus able to state unequivocally that, in the case of *dolus eventualis*, it is selfishness which motivates the actor continuing with his proposed course of conduct in the face of the possible harm⁷⁵.

Van Niekerk emphasized this aspect of *dolus eventualis* in his writings on the subject. He spoke of the "... culprit [who] in order to achieve his larger design, willingly and intentionally runs the risk of the unlawful act's materializing ..." ⁷⁶. In respect of the crime of murder, Van Niekerk characterizes *dolus eventualis* as "... the callous disregard of the possibility (or even probability) that a certain act may lead to the death of a person ..." ⁷⁷.

72. R Sklar "'Desire', 'Knowledge of Certainty' and Dolus Eventualis" (1972) 8 (2) Journal of Ethiopian Law 373 at 387.

73. *Ibid* 388 n64. Sklar is citing Von Hippel in this respect.

74. *Ibid*.

75. *Ibid*.

76. B v D Van Niekerk "Dolus Eventualis, A Mitigating Factor?" (1968) 85 SALJ 122 at 124.

77. B v D Van Niekerk "Dolus Eventualis Revisited" (1969) 86 SALJ 136 at 140.

To return to the initial discussion regarding the role of policy factors as a context for *dolus eventualis*, it is clear that society ought not to sanction the selfishness which leads an actor to consciously and callously infringe upon the rights of another person. This proposition is further supported by the fact that one cannot intend to do something and not intend to do something at the same time. Thus, acting despite foresight of a conscious risk can never be condoned as mere careless behaviour, it is simply intentional wrongdoing. As outlined above, the moral legitimacy of the doctrine of *dolus eventualis* is supported by consequentialist considerations. Since knowledge (choice) and control on the part of the actor are the relevant criteria for attributing criminal liability, it is appropriate to include all intentional action within the ambit of criminal intention. Thus the accused acting with *dolus eventualis*, will have both knowledge of the possible consequences of acting and control over his course of actions and will be held to have had the intention to cause the envisaged harm. He will have chosen to commit the foreseen harm "... should (possibly fortuitous) circumstances make this result inevitable in the execution of a wider design ..."⁷⁸.

Although holding the accused to be criminally liable on this basis may seem to be unduly harsh to some, particularly in the context of the more serious crimes (in terms of the resultant drastic infringement upon the liberty of the

78. *Ibid.* Although apparently similar to conditional intention in terms of this statement, there is a critical distinction between the two notions: in respect of *dolus eventualis*, the accused "unconditionally" accepts the consequences into the bargain should the harm occur as a result of his actions, whereas in respect of conditional intent, the accused only intends to cause the harm if the condition is fulfilled. (H Silving Criminal Justice - Volume II (1971) 685-6; Silving (n39) 227).

accused), it should be noted that the remoteness of the foreseen possibility would be relevant to the question of sentence. Furthermore, foresight of a remote possibility would be difficult for the prosecution to prove. It is submitted that the standard of proof and the operation of mitigating circumstances would be sufficient counterweight to prevent injustice occurring.

It may therefore be restated that the notion of *dolus eventualis* is sound both in terms of policy and principle. The operation of this doctrine in South African law compares favourably with the means adopted in the English law to deal with foresight of the possibility of harm. *Dolus eventualis* should thus consist of the foresight of the possibility of the harm occurring, and continuation in the proposed course of conduct despite such foresight, from which a "conclusion" to continue, regardless of the possibility of harm, could be inferred.

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ABBREVIATIONS

- SACC - South African Journal of Criminal Law and Criminology
- SACJ - South African Journal of Criminal Justice
- SALJ - South African Law Journal
- THRHR - Tydskrif vir Hedendaagse Romeins-Hollandse Reg
- TRW - Tydskrif vir Regswetenskap

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SUMMARY

Although *dolus eventualis* is the most important form of intention in South African criminal law, the content of this concept is still the subject of some dispute. This dissertation seeks to address this problem and provide an approach which is sound in principle and logic.

Apart from the detailed examination of the concept of *dolus eventualis* in South African criminal law, the philosophical and moral considerations which provide the justification for the ascription of criminal liability, in respect of the commission of foreseen harm, are discussed. The treatment of this problem in English law is compared and contrasted with the approach of South African law.

The following principal submissions are made:

Dolus eventualis is equally applicable to consequences and circumstances, and is in no way a lesser form of intention. Thus *dolus eventualis* is a sufficient form of *mens rea* for all crimes requiring intention, and a finding of *dolus eventualis* does not automatically mean that extenuating circumstances will be present. *Dolus eventualis* requires subjective foresight of harm by the accused, which is proved by inferential reasoning.

Dolus eventualis consists of: (a) a cognitive component, which is satisfied by subjective foresight of the possibility of harm occurring.

(b) a volitional component, which consists of no more than a "conclusion" to continue with the proposed course of conduct despite the foreseen harm. This "conclusion" is inferred from, and thus inextricably linked with, the conduct of the accused.

Attempts to qualify the degree of foresight required to found *dolus eventualis* are criticized. The inadequacy of the notions of "recklessness" and "reconciliation to the risk" are discussed. *Dolus eventualis* is further distinguished from conscious negligence.

The practical application of the concept of *dolus eventualis* in the areas of knowledge of unlawfulness, causation and specific crimes is also examined. It is suggested that the principled approach is the correct approach to follow, and that policy factors should not intrude upon the enquiry into the existence of *dolus eventualis*, in the mind of the accused, at the time of the offence.