

CRIMINAL NEGLIGENCE
AND
MENS REA:

IS
THE REASONABLE MAN
TEST
AN UNREASONABLE ONE?

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**CRIMINAL NEGLIGENCE
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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

by

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INTRODUCTION

In order to determine criminal negligence in South African law the conduct¹ of an actor is traditionally measured or tested against the standard of the reasonable man.² In this traditional test for negligence the reasonable man³ represents a timeless and universal standard of moderate prudence.⁴ The test is external to the personal characteristics of the actor and is therefore objective.⁵ Traditionally the reasonable man has not been attributed any of the personal characteristics of the actor.⁶ The potential harshness of the test and the avoidance of armchair criticism is to some extent alleviated by placing the reasonable man in the circumstances of the actor.⁷ Once again criteria external to the actor are considered in determining the actor's negligence. The personal or internal characteristics of the actor, "the race, or the idiosyncrasies, or the superstitions, or the intelligence of the person,"⁸ are

¹ The term conduct is used here not as denoting negligence as solely a course of conduct devoid of mens rea but rather in the manner in which it is used by Didcott J in S v Zoko 1983 (1) SA 871 (N) at 886C - D: "(O)ur criminal law at all events, does regard negligence as a state of mind rather than a type of conduct or, to put that more precisely, as a state of mind expressed in conduct rather than the conduct itself." (see Chapter I (iii) below)

² Snyman 1984: 183; De Wet 1985: 159.

³ Also referred to as the *bonus* or *diligens paterfamilias* Burchell & Milton 1991: 300. The term is sometimes (more recently) phrased as the reasonable person: see Burchell & Milton 1991: 300/1; and see Chapter II (i) below for a discussion on this particular rephrasing.

⁴ see for example S v Burger 1975 (4) SA 877 (A)

⁵ Burchell & Milton 1991: 300

⁶ see for example R v Mbombela 1933 AD 269

⁷ Burchell & Milton 1991: 301

⁸ R v Mbombela 1933 AD 269 at 173/4

disregarded. This traditional test, being universal and external to the actor, may appropriately be termed the "pure or absolute objective test."⁹

One traditionally recognised exception to the reasonable man as described above is in the case of a skilled or expert actor.¹⁰ Skills, such as medical skills, greater than those possessed by the reasonable man, but generally possessed by the class or group of persons from which the actor comes, are attributed to the reasonable man. The reasonable man in this instance loses his characteristic of universality. The ambit of the reasonable man becomes circumscribed in that not everybody is required to achieve the standard, only a certain class of persons, to which class the actor belongs, are required to meet the standard. Restriction of the characteristic of universality has been advocated for other classes of persons, for example children.¹¹ There have recently been further decisions in South African case law which have held that certain other characteristics of the class of persons from which the actor comes could be attributed to the reasonable man such as a superstitious belief in the tikoloshe.¹² In these latter instances, in contradistinction to the cases of the skilled actor, the pure objective test has been considered harsh because it may be inapplicable to the actor who through lack of capabilities is

⁹ A similar term has been used by Bertelsmann 1975: 63

¹⁰ Burchell and Hunt 1983: 198/200; Snyman 1984: 189; Burchell & Milton 1991: 304

¹¹ Snyman 1984: 189/90; Burchell and Hunt 1983: 199; see also S v T 1986 (2) SA 112 (O)

¹² S v Ngema 1992 (2) SACR 651

unable to attain the set standard of conduct demanded by the test. Indeed it has been argued¹³ that there has been a trend in South African law to move away from the pure objective test, because of its potential harshness when rigidly applied particularly in a heterogeneous society,¹⁴ to a more subjective test. In other words personal characteristics of the actor can be attributed to the reasonable man. As this is strictly speaking not a case of a subjective test, as the test still remains external to the personal attributes of the actor, even when they become the attributes of the reasonable man, I submit that a better term, wherever the universality and timelessness of the reasonable man are restricted by certain group or class attributes, is "restricted or relative objective test."¹⁵

A further area of potential unfairness of the application of the objective test is that of unfairness to society when somebody well capable of meeting a standard higher than that of the reasonable man is only expected to perform to standards below his capabilities. This is not a reference to the skilled or experienced actor but one naturally endowed with perceptive or intellectual capabilities beyond that of the reasonable man.

¹³ Schafer 1978

¹⁴ Grant 1986

¹⁵ Schaffer 1987 refers to the "partially subjective test" at 203 when discussing the decision S v Van As 1976 (2) SA 921 (A). This is not a satisfactory term for the test still remains external to the specific actor and thus remains objective albeit restricted.

There may be cases where a particular accused, because of his superior intelligence, insight or expertise, foresees much more than the reasonable man would have foreseen. *Dolus* is then present, although there is no question of objective foreseeability.¹⁶

As such potential for unfairness has already been identified in cases of the skilled actor there seems to be no cogent reason why the particularly intelligent should also not be expected to perform to a higher standard.¹⁷ De Wet summates the problems relating to the objective test in:

Hierdie werkwyse kan meebring dat die onontwikkelde gestraf word vir gedrag wat nie die uiting is van 'n afkeurenswaardige gesindheid nie, terwyl 'n hooggeleerde en intelligent persoon weer straflos kan uitgaan waar hy wel onagsaam was.¹⁸

The problems concerning the potential unfairness of the pure objective test apply similarly to the relative objective test. Does the latter do away with the potential unfairness of the pure objective test? If an actor is unable because of personal attributes to meet the required standard of conduct set by either the pure objective test or the relative objective test, he may be punished for not doing what he was incapable of doing. Consequently it has been argued¹⁹ that

¹⁶ Hugo 1973: 337 ("objective foreseeability" referring to the reasonable man test) Of course in cases where neither *dolus* nor objective foreseeability are present, the actor may be negligent with regard to his own capabilities. In this essay I shall focus on the potential unfairness to the actor, although my conclusions are no less applicable to the question of fairness to society.

¹⁷ This essay will focus on the potential for unfairness with regard to the actor who lacks the capabilities for meeting the standard of the reasonable man but there is no principled difference in applying the same argument to the particularly intelligent, indeed this is assumed.

¹⁸ De Wet 1985: 159

¹⁹ see for example De Wet 1985: 161

the actor's conduct should be measured against his own capabilities.²⁰ In other words the standard is set by reference to internal or personal attributes of the actor and the question is asked whether the actor was acting reasonably given his personal capabilities. This test is termed the "subjective test."²¹

The difference between the objective test and the subjective test was crisply summarised by Jansen JA in S v Ngubane²²

If the objective test for *culpa* is applied, the question is whether the *conduct* of the agent measured up to the standard of the reasonable man in the circumstances; if the subjective test were to be applied, the question appears to be whether the *conduct* of the agent measured up to the standard of his own capabilities.²³

In this essay I shall explore the various pertinent components of the test for criminal negligence paying particular attention to the issues raised above, namely, the pure objective test, the notion of the reasonable man, the relative objective test, circumstances external to the actor, and the subjective test. In doing so I shall critically consult and review the writings of various South African writers on the topic²⁴ as well as the courts' handling of the

²⁰ to be distinguished from abilities

²¹ De Wet 1985 at 161 refers to the test as "suiwer subjektief." It is respectfully submitted that the adjective is unnecessary as a subjective test cannot be anything other than subjective unlike the objective test which can be absolute or restricted.

²² 1985 (3) SA 677 (A)

²³ at 687D-E

²⁴ It should be noted that some of our leading writers have changed their views over the years in different editions

test and its attendant practical and theoretical difficulties.

For the sake of completeness and clarity certain other closely related issues will be explored, namely, whether the test for negligent delictual liability is applicable in criminal law, and the distinction between and nature of unlawfulness and mens rea in negligence crimes. These latter issues, which will not be developed as fully, serve as a necessary component of any discussion on the central question in this essay, namely, the justness and fairness of determining criminal negligence by means of the objective reasonable man test.

of their texts. The full ambit of views will however be critically examined. Where it is relevant the particular edition of the book will be referred to in the text, otherwise appropriate references will be located in the footnotes.

CHAPTER I

CRIMINAL NEGLIGENCE IN GENERAL

(i)

NEGLIGENCE, CRIME AND PUNISHMENT

I

The history of the introduction of negligence into our criminal law is a hazy one. Bodenstein argues that in primitive law when revenge was exacted for any wrong there was no place for the doctrine of *mens rea* in any form²⁵ and that in early Germanic law negligence did not always entail liability.²⁶ Whether negligence formed part of Roman Law is debatable. Bodenstein quotes Vrijheid who holds that:

In the whole of Roman criminal law no trace whatever is to be found of the second kind of *mens rea* which we recognise in *culpa*.²⁷

Bodenstein himself is however of the opinion that at least in theory negligence was part of the Roman Law although the Romans may have failed to apply it.²⁸ De Wet comments:

In die Romeinse reg is *dolus malus* dan ook gewoonlik as vereiste gestel vir strafregtelike aanspreeklikheid, en *culpa* of nalatigheid is heel selde as genoegsame grondslag vir owerheidstraf beskou.²⁹

²⁵ Bodenstein 1919: 324

²⁶ Bodenstein 1919: 326

²⁷ Bodenstein 1919: 328

²⁸ Bodenstein 1919: 335.

²⁹ De Wet 1985: 156

II

Whatever the origins of the concept are, it is trite that negligence is a part of our criminal law. As far as our common law is concerned negligence is an element of the offence of culpable homicide which offence is defined by Burchell and Milton as "the unlawful negligent killing of another human being."³⁰ Following a comprehensive discussion of the offence Didcott J restyled the definition as follows:

Culpable homicide is the killing of a human being which is both unlawful and blameworthy. Two footnotes follow. Both are implicit in the formulation. The first is that neither intention to kill or its absence is an ingredient of the offence. The second is that, while negligence always suffices for blameworthiness, it is not essential in itself or, once blameworthiness is otherwise apparent, at all.³¹

This definition has however not been followed and must be understood to have arisen within a particular debate.³² For a long time it was accepted that this was the only common law offence for which negligence was sufficient to found

³⁰ Burchell & Milton 1991: 417; Snyman 1989 at 428 defines the offence similarly: "Culpable Homicide is the unlawful, negligent causing of the death of another human being." (Also see the discussion of the definition in Chapter I (iii) below.)

³¹ S v Zoko 1983 (1) SA 871 (N)

³² The debate concerned whether negligence and intention may ever overlap or whether they were mutually exclusive. Should the latter be the case then to a charge of culpable homicide an accused could successfully raise the defence that he killed with intent. Fortunately this bizarre logic no longer prevails in our law and Didcott J's formulation of the offence to cope with this is no longer necessary. (see S v September 1972 (3) SA 389 (C), S v Alexander 1982 (4) SA 701 (T) and S v Ngubane 1985 (3) SA 677 (A); and also the references cited in Chapter I (iii) below.)

liability. However recently it was held³³ that in respect of a particular form of the common law crime of contempt of court committed by a newspaper editor either intention or negligence would suffice to found a conviction:

It therefore appears to me that there are sound policy considerations for holding at least the editor of a newspaper, or another form of the media, liable for contempt of court if he acted either intentionally or negligently.³⁴

Whether this decision is sound in law is moot. Clearly our common law writers could not have envisaged such a situation and so little guidance can be sought from them. While it may be argued that there are sound policy reasons for criminalising the negligent publishing of incorrect factual information as in the case of S v Harber, above, it is submitted that it is not for the courts to reinterpret our common law offences to include negligence as a basis for founding liability.³⁵

III

The legislature being sovereign may quite properly create negligence crimes. Of these the examples are legion.³⁶ The

³³ S v Harber 1988 (3) SA 396 (A)

³⁴ per Van Heerden JA at 418D-E; see also Burchell & Milton 1991: 298 and 634

³⁵ see generally Snyman 1984: 26 - 31; Burchell & Milton 1991: 54/9. See also Kaganes and Murray 1983 at 13 who submit that the extension of common law crimes may be in conflict with the principle of legality. But see also S v Burger 1975 (2) SA 601 (C) where the accused was found guilty under the *lex Cornelia de falsis* for a crime which was not specifically covered by the law nor mentioned by our common law writers.

³⁶ see generally Milton and Cowling 1988

debate concerning common law origins of negligence is therefore not particularly fruitful. We can however pose the philosophical question: Should negligence be part of our criminal law? or stated differently: Should negligence be punishable? Snyman is of the opinion that it should be although he acknowledges that writers on this question have failed to reach unanimity.³⁷ He argues that the threat of punishment even where thoughtless conduct is involved puts people on their guard.³⁸ In this respect he refers specifically to drivers of motor vehicles. This is a submission with which I can find no fault. Furthermore he argues that where one is involved with potentially dangerous activities especially in our technological society the threat of punishment is necessary.³⁹ With regard to the negligent injuring of a person by means of a firearm, Wyethe convincingly argues for the imposition of a criminal sanction.⁴⁰ A contrary view is argued by Van Rooyen who questions the validity of the deterrence theory of punishment.⁴¹ While this is an interesting and valid debate it is one which goes beyond the scope of this essay.⁴² For the sake of argument I submit, given the fact that "serious

³⁷ Snyman 1989: 224

³⁸ Snyman 1989: 225

³⁹ Snyman 1989: 225; It is admitted that accepting this argument, particularly in negligence offences other than driving a motor vehicle, comes close to accepting a normative theory of criminal law which may compel one to accept an objective test for negligence (although Snyman himself is able to overcome this problem in the second edition of his book). It will appear from the argument below however that this point is not crucial to the argument that will be developed in this essay.

⁴⁰ Wyethe 1977; see the Arms and Ammunition Act 75 of 1969

⁴¹ Van Rooyen 1978

⁴² see Rabie et al 1981: 81; also Hunt 1982: 423/5

injury and death are as somberly familiar as cause and effect in the walks of human experience,"⁴³ that the punishment of negligent acts is justifiable. However the more important question is, I submit, given that people are punished for negligent acts, whether the objective test for negligence in criminal law is an appropriate one.

In the application of the pure objective test it is possible that an actor may not have the personal capabilities, for example he may lack the necessary intelligence or adhere to a certain superstitious belief,⁴⁴ to meet the required standard of the reasonable man, but may nevertheless be found criminally liable for not meeting that standard. In these cases the objective test is a fiction⁴⁵ and is, I submit, unjustifiable. Such a situation evinces a complete disregard for the requirement of *mens rea* which is a fundamental part of our criminal justice system.⁴⁶ Such unfairness has often been acknowledged by our criminal law writers and our courts, the latter often only by implication. The only fair means of determining *mens rea* in the form of negligence is, I submit, by reference to the actual personal capabilities of the actor. In other words negligence should be determined subjectively if punishment for negligent acts is to be justifiable, and it is this argument that I shall develop in my essay.

⁴³ S v Bernadus 1965 (3) SA 287 (A) at 307A per Holmes JA; also quoted by Wyethe 1974 at 67

⁴⁴ R v Mbombela

⁴⁵ S v Van As 1976 (2) SA 921 at 928D per Rumpff CJ

⁴⁶ This point will be fully discussed in Chapter I (iii) below.

(*ii*)

NEGLIGENCE AND CRIMINAL AND CIVIL LIABILITY

The concept of and test for negligence is found in both our criminal law⁴⁷ and our civil law.⁴⁸ An important question therefore that needs to be addressed is whether the law concerning negligence in civil matters is applicable to the law concerning criminal negligence.

In R v Meiring⁴⁹ Innes CJ dismissed the argument that any deviation from the standard of the reasonable man in civil law was enough to establish liability whereas in criminal law the departure should amount to gross or culpable negligence.⁵⁰ Instead the Chief Justice held that:

In civil actions we have adopted as the simple test the standard of care and skill which would be observed by the reasonable man. And it seems right as well as convenient to apply the same test in criminal trials.⁵¹

Innes CJ did however acknowledge an important distinction between criminal and civil matters (but nevertheless considered that this did not affect the test):

⁴⁷ see generally Burchell and Hunt 1970: 148 - 161; Burchell and Hunt 1983: 192 - 214; Rabie et al 1981: 80 - 96; Hunt 1982: 412 - 425; Visser and Vorster 1982: 336 - 378; Snyman 1984: 181 - 191; De Wet 1985: 156 - 163; Burchell & Milton 1991: 297 - 313

⁴⁸ see generally Van der Walt 1979: 65 - 93

⁴⁹ 1927 AD 41

⁵⁰ at 45

⁵¹ at 46

The main difference between criminal and civil proceedings in respect of culpable homicide is that in the one case a private person seeks compensation for private loss, in the other the State intervenes to punish the offender.... The State only intervenes in serious cases, for it is only in regard to them that intervention is called for in the public interest. That fact, the importance of the possible consequences to the accused, and the high degree of assurance required will always invest criminal proceedings with a greater gravity than would surround a civil suit for the same act. But the test for liability would be the same in both.⁵²

A similar position was held in R v Van Schoor:⁵³

Both counsel for the Crown and counsel for the defence submitted that the test of what constitutes negligence is the same in a criminal case as it is in a civil case. With this I agree, but can add that in a criminal case the Crown must discharge the onus of proving the averred negligence beyond reasonable doubt, whereas in a civil case a plaintiff discharges the onus if he succeeds on the balance of probabilities as to the facts of the case.⁵⁴

This approach has been followed in a number of subsequent decisions.⁵⁵ Snyman also submits that there is no distinction between the tests⁵⁶ as do Burchell and Hunt in the 1970 edition of their book.⁵⁷ While in R v Meiring, above, the Chief Justice considered the distinction between civil and criminal matters important, the distinction in R v Van Schoor, above, was considered "slight".⁵⁸ It is difficult to

⁵² at 46

⁵³ 1948 (4) SA 349 (C)

⁵⁴ at 349 - 350

⁵⁵ R v Wells 1949 (3) SA 83 (A) at 88; S v Stavast 1964 (3) SA 617 (T) at 620; S v Bernadus 1963 (3) SA 278 (A) at 302G-H; S v Shimbrata 1966 (1) SA 771 (N) at 775; S v Russell 1967 (3) SA 739 (N) at 741; S v Blanket Mine (Pvt) Ltd 1992 (2) SACR 41 (ZHC) at 46a-b

⁵⁶ Snyman 1984: 185 (but he does draw a distinction in respect of children, for a discussion of which see below).

⁵⁷ Burchell and Hunt 1970: 149 and see n 17

⁵⁸ 1948 (4) SA 349 (C) at 350

conceive of how the distinction can be considered slight when the implications for the actor in a criminal matter are qualitatively different to those in a civil matter the former possibly resulting in imprisonment but at least a criminal record. It is submitted that this distinction is substantial and should therefore impinge on the nature of the test for negligence.

In the second edition of their book Burchell and Hunt consider the differences between civil and criminal matters thus:

The purposes of the two are different. The criminal law aims at the punishment of wrongdoers, whereas the purpose of the civil law is that the injured party should obtain compensation. Values of fairness and justice require that punishment should not be inflicted except upon those who are personally morally blameworthy.⁵⁹

Should no significant distinction be acknowledged then it is logical to argue that the test in both delict and criminal law should be the same - the objective reasonable man test. Once the distinction is recognised as important, and it is my submission that it is, the test for criminal negligence has to be reconsidered. Should it happen in a negligence crime that an actor is incapable of meeting the required standard he is in fact without personal moral blame. To convict such a person can do little more than undermine the justness of the criminal justice system. It seems fair and just therefore that in criminal matters the test for criminal

⁵⁹ Burchell and Hunt 1983: 200 note 634

negligence should not be objective but subjective for only in the latter test can one be sure of determining moral blameworthiness. Burchell and Hunt consider that there "is every reason why negligence should be judged more subjectively in criminal law than in civil law."⁶⁰ After drawing the distinction between criminal and civil law they come to the following conclusion:

Moral blameworthiness, on the other hand, is not a prerequisite for the award of compensation in the civil law where moral blameworthiness and legal fault do not necessarily co-incide. It is submitted that it is otherwise in criminal law where the infliction of punishment upon one who could not possibly have avoided the harm and is without moral blame is unjustified, irrational and offensive to the sense of justice.⁶¹

Despite his acknowledgement earlier that there is no distinction in the test applied in criminal law and delict, interestingly Snyman contrariwise seeks to distinguish between civil and criminal matters in the test for the negligence of children, and also in order to depart from the pure objective test and introduce an element of subjectivity, or more correctly, a restriction on the pure objective test. After referring to Jones v SANTAM Bpk⁶² and Weber v SANTAM Bpk⁶³ he holds:

In my opinion this rule of the law of delict cannot apply in criminal law: the law of delict endeavours to balance the conflicting interests of two individuals, namely the plaintiff and the defendant, whereas criminal

⁶⁰ Burchell and Hunt 1983: 200 note 634

⁶¹ Burchell and Hunt 1983: 200 at n 634

⁶² 1965 (2) SA 542 (A)

⁶³ 1983 (1) SA 381 (A)

law is concerned with ascertaining the liability of a single individual, namely the accused.⁶⁴

Having drawn this distinction and having acknowledged its importance it is submitted that the test in the two branches of law are not blithely interchangeable. This is not to say that the civil law approach must be totally disregarded in criminal law but the former should be relied on with caution and discarded where it is incompatible with the criminal law.

⁶⁴ Snyman 1984: 189 note 47

(iii)

NEGLIGENCE, UNLAWFULNESS AND MENS REA

I

Conviction of a criminal offences is founded upon a finding of criminal liability dependent upon the fulfilment of a number of criteria. Burchell & Milton phrase these criteria as follows:

For criminal liability to result the prosecution (the State) must prove, beyond reasonable doubt, that the accused has committed I voluntary conduct which is unlawful (sometimes referred to as actus reus) and that this conduct was accompanied by II criminal capacity, and III fault (sometimes referred to as mens rea).⁶⁵

Snyman summaries the requirements thus:

To recapitulate, there are five requirements for criminal liability, namely, (a) legality; (b) an act; (c) the requirement that the act must correspond to the description of the prohibition; (d) unlawfulness and (e) mens rea.⁶⁶

Although Snyman does not mention criminal responsibility⁶⁷ or imputability⁶⁸ in his five requirements he is in accord with Burchell and Milton that it is a requirement.⁶⁹ The requirement of voluntary conduct falls outside the ambit of

⁶⁵ Burchell & Milton 1991: 71

⁶⁶ Snyman 1984: 24

⁶⁷ Snyman considers this term unsatisfactory because it could be confused with the term "criminal liability" and prefers the terms "criminal capacity" or "imputability" 1984: 118.

⁶⁸ Burchell and Milton refer to capacity 1989: 195; see also Visser and Vorster 1982: 205 for a collection of the various terms.

⁶⁹ Snyman 1989: 229

this essay as to a large extent does the requirement of imputability.⁷⁰ With regard to the latter suffice to say that the test for this is entirely subjective⁷¹ and involves an enquiry into whether the actor had the capacity to appreciate the wrongfulness of his conduct and if so whether he had the capacity to act in accordance with such appreciation.⁷² Common to both writers is that they consider *mens rea* or fault and unlawfulness to be among the criteria⁷³ and it is in these respects that the learned authors are in agreement with other writers on the criminal law.

The term *mens rea*, of English Law origin,⁷⁴ comes from the expression *actus non facit reum nisi mens sit rea* meaning that an act is not a crime unless the actor's state of mind is blameworthy.⁷⁵ Much the same idea is conveyed in the Roman

⁷⁰ on criminal capacity or imputability generally see Rabie et al 1981: 54 - 64; Visser and Vorster 1982: 205 - 283; Burchell and Hunt 1983: 239 - 318; Snyman 1984: 118 - 154; Burchell & Milton 1991: 195 - 242

⁷¹ Burchell & Milton 1991: 305

⁷² Burchell & Milton 1991: 195. The element of imputability will be discussed again in Chapter II (v) when I consider Burchell and Milton's solution to the problems arising from the application of the objective test.

⁷³ There are certain crimes for which an actor may incur criminal liability in the complete absence of *mens rea*. In these circumstances the actor's liability is said to be based on a strict liability. (Snyman 1984: 193 - 201; Bertelsmann 1975) There are however no common law offences for which strict liability suffices (Burchell & Milton 1991: 315) and few in statute law. (strict liability is seldom expressly stipulated in a statute but rather the legislature's intention in this regard is arrived at by judicial interpretation; see Snyman 1984: 194) Strict liability and the courts' attitude thereto will be treated of in Chapter II (iii) below.

⁷⁴ Hosten et al 1977: 715, n 72 and Burchell and Hunt 1983: 125, n 5

⁷⁵ Hosten et al 1977: 715, n 72

Dutch rule *nulla poena sine culpa*.⁷⁶ The use of the term *culpa* in this instance refers to blame or fault.⁷⁷ In South African law *mens rea* can take the form of either intention (also referred to as *dolus*) or negligence (also referred to as *culpa*).⁷⁸ While the term *culpa* in the expression *nulla poena sine culpa* may embrace both intention and negligence, it is usually used in the restricted sense of negligence⁷⁹ and will be so used in this essay.⁸⁰ While there are other issues concerning intention that relate to the issues of negligence such as whether the one excludes the other⁸¹ or whether they may overlap⁸² such issues fall outside the ambit of this essay and will therefore not be discussed. I wish to concern myself here solely with whether negligence is a form of *mens rea*.

Considering the central position that *mens rea* has in our criminal justice system⁸³ it is surprising that some commentators consider that in negligence crimes *mens rea* is not required.⁸⁴ In other words negligence is not a form of *mens rea* but only a course of conduct. Thus if X's conduct is negligent, he incurs liability irrespective of his *mens*

⁷⁶ Burchell and Hunt 1983: 125

⁷⁷ Burchell and Hunt 1983: 125, n 4

⁷⁸ Bodenstein 1919: 323

⁷⁹ Snyman 1989: 24

⁸⁰ I will however for the sake of clarity generally refer to the element as "negligence."

⁸¹ Van der Merwe 1972; Middleton & Rabie 1972; Hugo 1973; Van der Merwe 1983; Du Plessis 1984; Du Plessis 1986

⁸² Van Zyl 1983; St Q Skeen 1983

⁸³ Botha considers the *nulla poena* principle "the cardinal principle of criminal responsibility in our law" 1975 at 284; see also Whiting 1991: 431.

⁸⁴ see Grant 1986: 81

rea. This is a startling proposition⁸⁵ for it means that we can convict an actor even if he does not have a blameworthy state of mind.⁸⁶ Although the argument that I will develop, that negligence is a form of *mens rea*, applies to all negligence crimes,⁸⁷ it is instructive to focus on culpable

⁸⁵ see Bertelsmann 1975 at 61 who critically comments on Hugo's assertion that once *dolus* has been eliminated, the negligence enquiry totally disregards the subjective mental attributes of the actor.

⁸⁶ De Wet 1985 at 156/7 comments: Vandag nog word opset in die strafreg as skuld by uitnemenheid beskou, en daar word selfs soms aangevoer dat *culpa* of nalatigheid geen skuldgehalte het nie. Hierdie benadering is verstaanbaar en selfs aanvaarbaar as met "nalatig behandel" bedoel word "anders handel as die redelike man," want dan word daar eintlik nog niks oor die gesindheid van die dader gekonstater nie. In 'n strafregstelsel wat gegrond is op die beginsel van geen straf sonder skuld (*nulla poena sine culpa*), gaan dit egter nie daaroor of mens se doen en late aan objektiewe standaarde voldoen nie, maar of jou doen en late van 'n afkeurenswaardige gesindheid vergesel gaan. As daar naas *dolus* of opset geen sprake kan wees van strafregtelike aanspreeklikheid vir onopsetlike wangedrag sonder om die beginsel van geen straf sonder skuld prys te gee nie."

⁸⁷ With regard to statutory offences Bertlesmann 1975 at 62/3 comments: "Where the law does not permit of a subjective test for negligence, one would expect judges often to find themselves in embarrassing positions. If they embrace the *mens rea* principle as the most fundamental rule of criminal law; if, therefore, they presume that the legislator cannot have intended innocent violations of a statute to be punished; if, accordingly, they hold that the statute does not impose strict liability but requires a blameworthy state of mind for a conviction, *mens rea* at least in the form of *culpa*; can they content themselves with applying a purely objective concept of negligence which leaves the actor's mental state and its blameworthiness out of consideration? The answer must be No, and actually South African courts do, without much theorising, apply subjective tests for negligence, either instead of the objective one or in addition to it."

homicide⁸⁸ and try to understand how this state of affairs could have arisen.⁸⁹

II⁹⁰

Firstly, Hunt argues that historically negligence was used to describe accidental homicide as opposed to unlawful homicide and therefore negligence was not equated with *mens rea*.⁹¹ In 1928 Innes CJ noted:

Dolus and *culpa* (in the sense of negligence) are distinct conceptions, underlying distinct fields of legal liability. They can never be identical: for the one signifies intention, and the other connotes an absence of intent.⁹²

Following from this, that negligence was connoted by an absence of intention, a definition of culpable homicide without reference to negligence was therefore possible which is precisely how Gardiner and Lansdown defined the offence in 1957:

Murder is the unlawful killing of a human being, with intent to kill. Where this intention is absent the offence is culpable homicide.⁹³

⁸⁸ It is argued in Chapter II (iii) that the objective test is not strictly applied when determining statutory negligence.

⁸⁹ Interestingly though as early as 1919 Bodenstein hints at a subjective test for negligence: "you should not have done what you did, you ought and could have prevented the crime" at 323.

⁹⁰ For this section generally I have relied on Didcott J's judgment in S v Zoko 1983 (1) SA 871 (D)

⁹¹ Hunt 1982: 413

⁹² R v Nkosi 1928 AD 488 at 489

⁹³ quoted in S v Zoko 1983 (1) SA 871 (D) at 882D

The above definition obtained at a time when the doctrine of *versari in re illicita* was still held to apply in our law. The application of this doctrine meant that an actor could be held liable for a consequence even if the consequence had not been foreseeable; liability being based on the fact that the person was engaged in some or other unlawful activity.⁹⁴ However the doctrine was expunged from our law in the 1960's because it was held⁹⁵ to be in conflict with the principle *actus non facit reum nisi mens sit rea*.

Didcott J comments on the effect of this development:

The effect on culpable homicide was the emergence of *mens rea* as an indisputable and indispensable element of the crime.⁹⁶

Consequently it became necessary to redefine the offence of culpable homicide to include the element of negligence.

This was done by Holmes JA in S v Mtshiza⁹⁷

The traditional concept of culpable homicide is the unlawful killing of a person without intent to kill; see Gardiner and Lansdown, 6th ed., vol. 2, p. 1537, and also sec. 196 (1) of the Code. But once such intent to kill or *dolus* is absent, the only relevant *mens rea* to render his homicide punishable is *culpa*. And inasmuch as it is better to define a crime by reference to what it is than what it is not, I consider it appropriate to adopt the statement in *De Wet and Swanepoel, supra* at p. 211 *in fin.*, that culpable homicide is the unlawful negligent causing of the death of a fellow being.⁹⁸

⁹⁴ Hunt 1982: 412

⁹⁵ see S v Van der Mescht 1962 (1) SA 521 (A) and S v Bernadus 1965 (3) SA 287 (A)

⁹⁶ S v Zoko 1983 (1) SA 871 (D) at 883C

⁹⁷ 1970 (3) SA 747 (A)

⁹⁸ at 572C-E

In the light of this development it is clear that negligence can and must be considered a form of *mens rea* and it is submitted that the courts have indeed done so. While in S v Van der Mescht⁹⁹ an objective test for negligence was applied, the court also considered that negligence was a state of mind rather than a course of conduct.¹⁰⁰

In S v Ngubane¹⁰¹ Jansen JA considers *obiter* that if negligence amounts to failing to meet the standard of the reasonable man "then it seems unrealistic to equate it [negligence] to a state of mind at all"¹⁰² but should a subjective test be applied then negligence does indeed relate to a state of mind and that state of mind is inadvertence.

III

Secondly, a further problem that writers have in denoting negligence as *mens rea* is that thoughtlessness or carelessness cannot be equated with a state of mind¹⁰³ as strictly speaking *mens rea* connotes a state of mind suggesting a mental component¹⁰⁴ that is morally blameworthy. It has also been said that *mens rea* suggests a guilty mind¹⁰⁵ but such a narrow interpretation restricts *mens rea* to intention and prohibits the notion of *mens rea* being applied to negligence. Thus Snyman prefers to refer to *mens rea* as a

⁹⁹ 1962 (1) SA 521 (A)

¹⁰⁰ see Du Plessis 1986: 119; see also Hunt 1982: 413

¹⁰¹ 1985 (3) SA 677 (A)

¹⁰² at 686G

¹⁰³ Hunt 1982: 413

¹⁰⁴ Burchell & Milton 1991: 243

¹⁰⁵ Snyman 1984: 112

"blameworthy state of mind accompanying the act"¹⁰⁶ In dismissing the argument that intention is entirely distinct from negligence Didcott J in S v Zoko¹⁰⁷ uses the terms blameworthiness to denote both forms of *mens rea*. Burchell & Milton use the term fault¹⁰⁸ considering it less ambiguous than the term guilty mind.¹⁰⁹ In this essay I intend to use the term *mens rea* but as understood in the wider interpretation which I give below.

The notion of a guilty mind is too narrow a view of *mens rea*. Rather the definition of *mens rea* should be widened or defined more pragmatically to hold that *mens rea* includes not only conscious thought but also lack of thought or carelessness. In a broad sense lack of thought is certainly a mental attribute of the actor: "surely thoughtlessness is as much a state of mind as breathlessness is a state of respiration."¹¹⁰

To argue that lack of thought is not a mental attribute is as illogical and unhelpful as to argue that an omission to act does not constitute voluntary conduct.¹¹¹

¹⁰⁶ Snyman 1984: 112

¹⁰⁷ 1983 (1) SA 871 (N)

¹⁰⁸ Burchell & Milton 1991: 243; see also Rabie et al 1981: 81

¹⁰⁹ Burchell & Milton 1991: 245, n 8; but see Van der Merwe who contends that the terms fault and a blameworthy state of mind cannot be interchanged, quoted in Visser and Vorster 1982: 287; see also Du Plessis 1986: 24/9

¹¹⁰ Du Plessis 1986: 7

¹¹¹ S v A en 'n Ander 1991 (1) SACR 257 (N) where it was held that an omission to act was sufficient to found criminal liability; see also Minister van Polisie v Ewels 1975 (3) SA 590 (A); and see generally Snyman 1984: 41 - 43

Didcott J takes a common sense approach to the problem:

All that remains as a result is to make the best one can of negligence as mens rea, despite the idea's intrinsic awkwardness. This requires concentration on what the negligent state of mind contains, rather than animadversion on that which it does not.¹¹²

IV

The more important question to deal with is whether the presently phrased test for negligence is appropriate. If the test is such that even without thoughtlessness an actor is incapable of meeting the requirements of the test, possibly for reasons of intelligence or religious beliefs or superstition, there can be little serious contention that the actor lacks *mens rea* even in the wider interpretation suggested above. If however we acknowledge that negligence is a state of mind and that a finding of *mens rea* is essential for criminal liability, the traditional test for negligence has to be reconsidered. In the accepted test for negligence the question the court asks itself: "Did the actor achieve a certain standard of conduct that he should have?" Botha comments thus;

If fault *culpa* in its wide sense, including both *dolus* and *culpa* in its narrow sense) entails individual blameworthiness, and if a person can be blamed only if he could and should have acted in a manner other than that which the law regards as unlawful, it has to be conceded that the reasonable man test for negligence will lead to liability without fault in those cases in which it was impossible for the defendant to have come up to the required standard.¹¹³

¹¹² S v Zoko 1983 (1) SA 871 (N) at 887A
¹¹³ Botha 1977: 29

Having established that *mens rea* refers to fault or blameworthiness, it is submitted that it becomes an intrinsically subjective enquiry. Botha contends that fault "can have only a moral content."¹¹⁴ If an accused acts unlawfully but lacks the capabilities to know that his act was morally wrong, he acts without *mens rea*. If however he could have known but acted without bringing his full capabilities to bear on the matter then he is morally blameworthy. Given this intrinsically subjective nature of blame, it is illogical to apply the objective test to *mens rea*. The only logical and just approach would be to apply a subjective test and to ask the question: "Did the actor achieve a certain standard of conduct that he could have?" Botha phrases the test as follows:

Could and should this accused or this defendant have foreseen the unlawfulness that resulted; can we blame him for having acted as he did in the circumstances of the case?¹¹⁵

V

However one is still left with the requirement of unlawfulness and for all negligence offences the alleged negligence as with intention¹¹⁶ must relate not only to *mens*

¹¹⁴ Botha 1977: 30

¹¹⁵ Botha 1977: 35 (The "should" here refers to the enquiry into unlawfulness. In order to prevent confusion between the *mens rea* enquiry and the unlawfulness enquiry, it is my submission that the two tests should be stated separately. However, Botha's phrasing achieves exactly the same result.)

¹¹⁶ Snyman 1989: 226 note 6

rea but also to unlawfulness.¹¹⁷ The precise content of unlawfulness is difficult to define, at least in the common law offence of culpable homicide. In many statutory offences the content of unlawfulness is contained in the definition of the offence, for example, the unlicensed possession of a firearm.¹¹⁸ However where the content of unlawfulness is not defined Snyman suggests that unlawfulness incorporates the notion of an infringement of a legal interest as well as involving conduct contrary to the legal convictions of society.¹¹⁹ The latter essentially amounts to a requirement that conduct be objectively reasonable.¹²⁰ Burchell and Hunt phrase the test as follows:

In crimes of negligence the element of unlawfulness is usually covered by the requirement for negligence that a reasonable man in the situation of the accused would have guarded against the circumstance or consequence in question.¹²¹

Burchell and Milton also refer to the 'legal convictions of society' in regard to unlawfulness. While cautioning against the abuse of such a concept to further narrow sectional interests, they do not explicitly reject the term.¹²² In order to determine whether an act was unlawful the act is judged objectively, and what the actor thought of his act is irrelevant.¹²³ What is unlawful for one is

¹¹⁷ Snyman 1989: 225; Hunt 1982: 420

¹¹⁸ Bertelsmann 1975: 60; see also Du Plessis 1986: 99; see also for example the Arms and Ammunitions Act 75 of 1969

¹¹⁹ see also Visser and Vorster 1982: 107; also S v I 1976 (1) SA 781 (RA)

¹²⁰ Snyman 1984: 69/70

¹²¹ Burchell and Hunt 1983: 149

¹²² Burchell & Milton 1991: 107/8

¹²³ Rabie et al 1981: 36

unlawful for all "whether rich or poor, clever or stupid, young or old."¹²⁴ The test for unlawfulness ought to establish a standard against which all people should be measured. In the interests of legal certainty and for the protection of citizens against the vagaries of the acts of others this standard should be both universal and unvariable.

Botha comments:

It is correct that a legal rule expressing a standard to be followed applies to everybody under the same circumstances, just like any other rule of law.¹²⁵

The standard therefore must be set objectively. In most statutory offences the standard is set by the statute and setting the objective standard poses no difficulties.¹²⁶ With regard to culpable homicide the standard is set by objective reasonableness or by the reasonable man test. While it is acknowledged that the latter is problematic, and which will be discussed at length below, without such an objective standard we do indeed run the risk of "(e)ach man... a law unto himself."¹²⁷

VI

The practical effect of my argument is that a court should undertake two tests in respect of negligence. The first test would decide whether the act in question is unlawful, and

¹²⁴ Snyman 1984: 111

¹²⁵ Botha 1977: 36

¹²⁶ Burchell and Hunt 1983: 200; they argue that in such cases there is no need to rely on the reasonable man test at all.

¹²⁷ quoted in Bertelsmann 1975: 62

should the court on the basis of the objective test find the act not unlawful, that it the end of the matter. If the act is found to be unlawful then, secondly, the court should ask itself whether the actor acted reasonably in terms of his personal capabilities. This proposition is broadly in accord with that of Burchell and Hunt:

(P)roperly speaking, the objective test of the reasonable man should be confined to determining the issue of the unlawfulness of the accused's conduct, and should not be applied also to his personal characteristics since they are relevant to the accused's individual blameworthiness which is a different issue and one that should be judged subjectively.¹²⁸

De Wet holds similar views:

Al wat mens via die redelike man kan bereik, is om onregstreeks gedragsvoorskrifte neer te le, en al sou die besondere beskuldigde nie aan die voorskrifte voldoen nie, beteken dit nog nie dat hy vir sy tekortkoming verwyf kan word nie.¹²⁹

Contrariwise, in his review of Burchell and Milton's *Principles of Criminal Law* Du Plessis makes plain his objection to the above submissions:

A further welcome feature is the absence of any discussion of the view that at culpable homicide trials objective negligence should be investigated to determine whether the killing was unlawful, and subjective negligence to determine whether the accused is to be blamed. I doubt if any court would solemnly set out on this double enquiry into the same question.¹³⁰

¹²⁸ Burchell and Hunt 1983: 199 and 203

¹²⁹ De Wet 1985: 159

¹³⁰ Du Plessis 1992: 350

The reasons for his objection are not clear but it is incorrect to consider the enquiry the same in respect of negligence and in respect of *mens rea* when a different test should be applied to each. If his objection is to the application of two different tests then this is not clear and no reasons are advanced for this objection. Such a double enquiry would not be unique to South Africa. Morkel refers to the German criminal law which requires an objective test for negligence followed by an enquiry into the ability of the accused to conform to the objective standard.¹³¹ A similar approach has been advocated by Hart for English Law:

- i) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?
- ii) Could the accused, given his mental and physical capacities, have taken those precautions?¹³²

While it is true that neither of the above relate the tests to unlawfulness and to *mens rea* respectively, the principle of two different enquiries is the same as suggested by myself above.

¹³¹ Morkel 1981: 128

¹³² quoted in Morkel 1981: 128

CHAPTER II

CRIMINAL NEGLIGENCE AND THE
REASONABLE MAN TEST

(i):

**THE OBJECTIVE TEST AND THE
REASONABLE MAN**

I

The objective test for negligence, although having been stated in several forms, is in essence agreed upon by different writers. Burchell and Hunt style it as follows:

- (a) a reasonable man in the accused's position would have foreseen the possibility of the occurrence of the consequence or the existence of the circumstance in question; and
- (b) a reasonable man would have guarded against that possibility; and
- (c) the accused failed to take reasonable steps to guard against it.¹³³

The test has been similarly phrased in our case law. In Kruger v Coetzee¹³⁴ the test was stated as follows:

For the purposes of liability *culpa* arises if -

- (a) a *diligens paterfamilias* in the position of the defendant-

¹³³ Burchell and Hunt 1983: 152 (but note that they change the format of the test in their 1983 edition in order to include a subjective element at 203); in all three editions of his book Snyman styles the test similarly but note that in the latter two editions he also makes allowance for subjective factors; see also Rabie et al 1981 at 82 and Burchell & Milton 1991: 299.

¹³⁴ 1966 (2) SA 428 (A)

- (i) would foresee the possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.¹³⁵

Although the above is a civil matter its wording was specifically approved in subsequent criminal matters: S v Naik¹³⁶ and S v Poole.¹³⁷ (However in the year after S v Poole Rumpff CJ introduced a subjective factor into the test for criminal negligence.¹³⁸) In Namibia more recently the test has been similarly worded in S v Shivute:¹³⁹

As to culpa or negligence, the requirement is that the accused ought reasonably to have foreseen the possibility of death resulting from his or her conduct and failed to take steps to avoid this eventuality. The foreseeability and the reasonable action required is measured against the conduct of the reasonable person in the position of the accused.¹⁴⁰

In Zimbabwe an objective test has also been adopted: "(T)he standard of care expected of the appellant is that of the ordinary reasonable man..."¹⁴¹

The test may sometimes be phrased more laconically as "The actor should not have committed the act in question or ought not to have done it."¹⁴² Although all three steps in the test

¹³⁵ at 430E-F per Holmes JA

¹³⁶ 1969 (2) SA 231 (N) at 233D-E

¹³⁷ 1975 (1) SA 294 (N) at 928B-C

¹³⁸ S v Van As 1976 (2) SA 921 (A) (see Chapter II (v) below for a discussion of this judgment.)

¹³⁹ 1991 (1) SACR 656 (Nm)

¹⁴⁰ at 661d per O'Linn J

¹⁴¹ S v Blanket Mine (Pvt) Ltd 1992 (2) SACR 41 (ZHC) at 48e per Korash JA

¹⁴² see Snyman 1989: 230

(as phrased in the former quotations) are of equal importance and none may be left out of account, in practice the emphasis is on the first stage, also referred to as "reasonable foreseeability"¹⁴³ and it is in this respect that this essay will be primarily concerned although I will not be treating of this aspect in any detail as it falls outside the scope of the topic. It is important to note that the objective test takes no account of the individual characteristics of the accused:¹⁴⁴ "...the race, or the idiosyncrasies, or the superstitions, or the intelligence of the person accused do not enter the question."¹⁴⁵ Burchell and Hunt comment: "His deficiencies in education, experience, or knowledge, his physical and emotional disabilities, are all ignored."¹⁴⁶ All the court is concerned with is how the reasonable man would have acted in the circumstances irrespective of the capabilities or personal attributes of the actor in question. In cases where the actor does not have the capabilities of meeting the standard set by the reasonable man test, it is clear that the test is unfair to the particular actor.

Snyman argues that the reason for the objective test is for the proper ordering of society:

If society is to be properly ordered, a certain minimum degree of skill, knowledge and circumspection must be demanded of all persons engaging in certain activities,

¹⁴³ see for example Burchell and Hunt 1970: 153 - 160;
Burchell and Hunt 1983: 204 - 211

¹⁴⁴ Rabie et al 1981: 84

¹⁴⁵ R v Mbombela 1933 AD 269

¹⁴⁶ Burchell and Hunt 1983: 198

especially potentially dangerous ones, such as driving a motor car.¹⁴⁷

The problem with this reasoning is that it fails to draw the distinction between the test for unlawfulness and the test for *mens rea*. It is submitted that the reason is perfectly valid in respect of unlawfulness but not in respect of *mens rea*. It is interesting to note that Snyman drops this formulation in his later edition.¹⁴⁸ In the absence of the justification of the ordering of society there is no convincing reason why the objective test should be retained. Instead most writers concentrate rather on the difficulties of implementing the subjective test. These difficulties will be discussed in Chapter II (v) below.

II

One factor which mitigates the harshness of the objective test is the placing of the reasonable man in the same circumstances as the accused.¹⁴⁹ The negligence of the actor is then not determined *in abstracto*.¹⁵⁰ So if faced with a sudden emergency or stung by a bee while driving a motor car, the reasonable man will be placed in these same circumstances.¹⁵¹ The circumstances may be quite specific as in

(I)n judging the appellant's conduct by that of the reasonable man, we must judge it against that of a

¹⁴⁷ Snyman 1984: 183; see also Grant 1986: 79

¹⁴⁸ Snyman 1989

¹⁴⁹ Rabie et al 1981: 84

¹⁵⁰ Hunt 1982: 416

¹⁵¹ Burchell & Milton 1991: 304

reasonable man driving a fully loaded passenger bus in the particular circumstances which existed on the day of the accident.¹⁵²

The difficulty here is knowing what circumstances to ascribe to the reasonable man.¹⁵³ If the circumstances are such that the reasonable man begins to resemble the actor, the test is no longer purely objective. Snyman argues that these circumstances amount to the attribution of subjective factors to the reasonable man and that this "amounts to a certain degree of individualisation of the test."¹⁵⁴ The problem with Snyman's argument is that he fails to distinguish between factors external to the actor and those personal to the actor. Burchell and Hunt contend that only factors external to the actor are considered.¹⁵⁵ This is also the view of Burchell & Milton.¹⁵⁶ It is my respectful submission that the latter two authorities are correct as by considering only factors external to the accused the test remains objective. Thus factors such as the accused's intelligence are personal and so left out of account.

III

One of the prime difficulties of the objective test is to identify the reasonable man or to provide content to the concept. In Cape Town Municipality v Paine the reasonable man was described thus:¹⁵⁷

¹⁵² S v Southern 1965 (1) SA 860 (N) at 861

¹⁵³ Rabie et al 1981: 84

¹⁵⁴ Snyman 1989: 234

¹⁵⁵ Burchell and Hunt 1983: 198

¹⁵⁶ Burchell & Milton 1991: 304

¹⁵⁷ 1923 AD 207

It has repeatedly been laid down in this Court that accountability for unintended injury depends upon *culpa* - the failure to observe that degree of care which a reasonable man would have observed. I use the terms reasonable man to denote the *diligens paterfamilias* of Roman Law - the average prudent person.¹⁵⁸

In Peri-Urban Areas Health Board v. Munarin¹⁵⁹ Holmes JA referred to "that notional epitome of reasonable prudence." In S v Shimbrata¹⁶⁰ the reasonable man is formulated as follows:

Negligence is a failure to exercise in any given circumstances that degree of care and skill which a reasonable and prudent man would exercise in those circumstances....¹⁶¹

These somewhat laconic references to the reasonable man have been fleshed out in a number of other decisions as in S v Burger:¹⁶²

One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense.

In the sphere of delict the reasonable man was considered by Van den Heever JA as one who was not

a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures

¹⁵⁸ at 216

¹⁵⁹ 1965 (3) S.A. 367 (A.D.) at 373F

¹⁶⁰ 1966 (1) SA 771 (N)

¹⁶¹ at 775

¹⁶² 1975 (4) SA 877 (A)

out into the world, engages in affairs and takes chances.¹⁶³

Treating of delictual negligence Van der Walt¹⁶⁴ discusses in some detail the attributes of the reasonable man: he has a fairly wide knowledge of the common properties of a number of materials for example that DDT is poisonous¹⁶⁵, he knows of the habits and qualities of animals at a given time in a particular community,¹⁶⁶ that no allowance is taken in law if the actor is "stupid, unintelligent, uneducated, mentally retarded,"¹⁶⁷ but that physical illness or disability will be taken into account.¹⁶⁸

¹⁶³ Herschel v Mrupe 1954 (3) SA 464 (A) at 490F

¹⁶⁴ Van der Walt 1979: 69 - 73

¹⁶⁵ Clearly not everybody is aware of this fact and it is my respectful submission this is an example of how the reasonable man test could result in unfairness.

¹⁶⁶ This is in fact an application, as phrased by Van der Walt, of the relative objective test

¹⁶⁷ This is an aspect of the reasonable man test that Van der Walt is critical of at 70.

¹⁶⁸ Regrettably Van der Walt provides no authority for this proposition and as this does not appear from our case law it must be taken to be an incorrect statement of our law. This is the very criticism that De Wet 1985 at 161 has of the objective test: "Van die blinde kan nie ver wag word dat hy sal sien nie, van die dowe dat hy sal hoor nie, of van die kreupele dat hy vlug sal beweeg nie."

In a lighter vein, also in the field of private law, Zimu 1966 at 45 note 7 quotes from *The Law Journal (England)*: "He (the reasonable man) was a man of medium height, of average appearance and with fair health, save that he ruined his eyesight by his inveterate habit of reading everything that appeared in particularly small print on railway tickets, insurance policies, laundry and cleaners' receipts and in other documents under such headings as conditions, warranties, bye-laws, exemption clauses, time-limits, rules and regulations.... (However) the sober truth is that the reasonable man does not possess any outstanding qualities or special skill other than unflinching competence in whatever he did; in other words he was an efficiency fetishist."

IV

This exemplar of moderate prudence is generally attributed the masculine gender.¹⁶⁹ But as society moves from unapologetic male dominance to gender inclusiveness one may justifiably feel a degree of disquiet at a female actor having to meet the standards of a reasonable man. Some authors¹⁷⁰ have therefore chosen to restyle the "reasonable man" as the "reasonable person."¹⁷¹ The terms however cannot, it is submitted, be glibly interchanged. So doing there is an assumption that the terms amount to the same thing and the

¹⁶⁹ Occasionally referred to as the "normal person" or the "average person." Snyman 1989:231; De Wet 1985 at 156 note 270 comments: "'Hier by ons word gewoonlik van die 'redelike man' gepraat, bes moontlik na aanleiding van die Romeinse reg se *bonus* of *diligens paterfamilias*. Die gestalte het egter 'n hele klomp name. Soms word gepraat van die deursnee-mens, die gemiddelde mens, die normale mens (die *homunculus normalis*, soos hy ook spottenderwyse genoem word), die besonne mens, die man in die straat, die man wat die grassnyer stoot, *the man on the Clapham omnibus*, en so meer." In a lighter vein Van Dam 1976 at 103 quotes from Herbert: "In all the mass of authorities which bears upon this branch of the law *there is no single mention of a reasonable woman...* such an omission, extending over a century or more of judicial pronouncements, must be something more than a co-incidence, that among the innumerable tributes to the reasonable man there might be expected at least in passing reference to the reasonable person of the opposite sex; that no such reference is found, for the simple reason that no such being is contemplated by the law; that legally at least *there is no reasonable woman...* It must be conceded at once that there is merit in the contention... I find therefore that at Common Law a reasonable woman does not exist."

¹⁷⁰ see for example Snyman 1989: 231 and Burchell 1991: 109
¹⁷¹ also per O'Linn J in S v Shivute 1991 (1) SACR 656 (Nm) in order to test the standard of conduct of a female nurse at 661d; and also per Hugo J in S v Ngema 1992 (2) SACR 651 (D) at 658f, although Hugo J also refers to the reasonable man; Rabie et al 1981 at 83 comment: "Sometimes reference is made to the ordinary, average man or person or the reasonable person or the reasonable human being, but most cases seem to refer to the reasonable man or the *diligens paterfamilias*."

interchangeability presumes that the reasonable man is the same as the reasonable woman. While I do not wish to raise a further and unrelated debate concerning the equality between men and women, I submit that the reasonable man cannot without further ado be equated with the reasonable woman. The switch from reasonable man to reasonable person suggests an underlying uncomfortableness with the former. Who could now contend that the female actor ought to conduct herself in the same manner as the reasonable man? Such a proposition would rightly be unacceptable. But the solution may not so simply be found in the collapsing of gender differences. Furthermore it makes the reasonable person a far more complex being than the reasonable man and a step further from reality than already the reasonable man is. Perhaps a more accurate reflection in the changing social mores would have been reflected in creating two reasonable beings: the reasonable man and the reasonable woman.¹⁷² However this is not a satisfactory solution: it may well create more problems than it seeks to solve. Instead of obfuscating the problem posed by the term, the problem should be confronted for what it is: that the reasonable man test relies on a fiction which may lead to unfairness, that and the only satisfactory solution would be to abandon the objective test in favour of the subjective test, and test each actor on the basis of his or her¹⁷³ personal attributes and capabilities.

¹⁷² a term suggested by Snyman 1989: 231

¹⁷³ For the rest of this essay I refer to the actor solely in the masculine gender for reasons of convenience, consistency and elegance and not for exclusiveness.

(ii)

EXCEPTIONS TO THE REASONABLE MAN

I

Where an actor has some specialised knowledge, skill or experience beyond that of the reasonable man his conduct is not measured against that of the mere reasonable man.¹⁷⁴ Rather the specialised knowledge or experience generally expected of persons in that field of expertise is imputed to the reasonable man and the actor's conduct is then measured against this raised standard.¹⁷⁵ The reason for this exception is quite obvious:

For example, if the question is whether a heart surgeon was negligent in the performance of an operation during which the patient died, the surgeon's negligence cannot be determined by reference to the criterion of the reasonable man, for the reasonable man is for all practical purposes a layman in the medical field.¹⁷⁶

This raised standard had already been suggested in the early decision of R v Mitchell & Dixon:¹⁷⁷

A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest degree of professional skill, but he is bound to employ reasonable skill and care; and he is liable for the consequences if he does not.¹⁷⁸

While this is not the clearest exposition of the standard of skill and care demanded of a reasonable practitioner as

¹⁷⁴ Burchell and Hunt 1970: 151; Burchell & Milton 1991: 304

¹⁷⁵ Burchell and Hunt 1970: 151

¹⁷⁶ Snyman 1984: 189

¹⁷⁷ 1914 AD 519

¹⁷⁸ at 525

one would hope for, it is submitted that in the context of the case the phrase "he is bound to employ reasonable skill and care" should not be read as the skill and care of a reasonable man but that of the reasonable practitioner. This interpretation is also given in Van Wyk v Lewis.¹⁷⁹

Clearly it would be unfair if skilled actors were to escape liability if their conduct satisfied the requirement of the pure objective test. In other words the standard of conduct is raised or "relaxed 'upwards.'"¹⁸⁰ While some writers¹⁸¹ are of the opinion that the test should be lowered in certain circumstances others are of the opinion that it ought not to be:

Daarom stem ek heelhartig saam dat die nalatigheidstoets - soos by deskundiges - net verswaar maar nie verlig kan word.¹⁸²

Snyman formulates the test as:

If the question is whether an expert in a certain field was negligent, the test is whether a reasonable expert undertaking such an act would have foreseen the possibility of death.¹⁸³

Burchell and Hunt are of the opinion, without providing any authority, that in the case of the expert, the actor's conduct is not judged objectively but subjectively, referring

¹⁷⁹ 1924 AD 438 - see the discussion of this case below

¹⁸⁰ Burchell & Milton 1991: 304

¹⁸¹ Burchell and Hunt 1970: 190; Burchell and Hunt 1983: 199; Snyman 1984: 189

¹⁸² Claasen 1986: 487

¹⁸³ Snyman 1984: 189

to it as the "one recognised exception to the objective test for negligence":¹⁸⁴

Whether the accused's conduct measured up to the norm of the reasonable man is judged objectively, in the circumstances of the case, save that where the accused has knowledge, skill or experience superior to that of the reasonable man, the test is subjective.¹⁸⁵

This is a proposition with which I cannot agree. It is difficult how the learned authors can come to that conclusion after having stated:

Where the accused has knowledge or experience beyond the average he is judged by what a *reasonable man with such knowledge or experience* would have foreseen and done.¹⁸⁶ (emphasis added)

This formulation of the test is clearly objective for the knowledge and experience of the actor is attributed to the reasonable man. In this instance the learned authors have phrased the relative objective test. Without taking the point any further Bertelsmann is also of the opinion that the test applied to such actors is a subjective one.¹⁸⁷

Visser and Vorster also challenge Burchell and Hunt's assertion and suggest that the "'reasonable expert test' should rather be seen merely as an application of a more subjective test."¹⁸⁸ This is a proposition that has merit but it still lacks clarity because it fails to draw the

¹⁸⁴ Burchell and Hunt 1983: 199

¹⁸⁵ Burchell and Hunt 1983: 213

¹⁸⁶ Burchell and Hunt 1983: 199

¹⁸⁷ Bertelsmann 1975: 63 note 27

¹⁸⁸ Visser and Vorster 1982: 355

sekere plante - hul wortels, blare en vrugte - eetbaar is, terwyl ander geftig en ook lewensgevaarlik kan wees as dit deur die mens ingeneem word. *Myns insiens kan daar nie twyfel wees nie dat die gewone redelike mens sou besef het dat die kruie moontlik lewensgevaarlik kan wees. Des te meer moes appellant dan as 'n kenner van plante dit besef het, in watter geval dit as selfsprekend volg dat die dood as 'n moontlike gevolg voorsienbaar was.*¹⁹⁸ (emphasis added)

The emphasised sentence would seem to indicate that on the basis of the pure objective test the accused was found liable. The personal knowledge of the accused only indicate that even more so the accused should have been aware of the life threatening properties of some herbs but this would not have any bearing on the liability already determined. At no stage does the judge refer to anybody like a reasonable herbalist. Thus we are not dealing with a relative objective test, and certainly the case is not authority for suggesting that the test is subjective as Burchell and Hunt contend.

The relative objective test in the case of drivers of motor vehicles is well established. In R v Du Toit¹⁹⁹ the court referred to "a reasonably careful driver" who "must be a skilled one."²⁰⁰ In Sardi and Others v Standard and General Insurance Co²⁰¹ it was held that "the licensed driver of a motor vehicle is expected to have a reasonable measure of expertise and the ability to manage his vehicle."²⁰²

¹⁹⁸ at 229A

¹⁹⁹ 1947 (3) SA 141 (A)

²⁰⁰ at 146 per Davis AJA

²⁰¹ 1977 (3) SA 776 (A)

²⁰² at 782G per Holmes JA

Snyman suggests the test should be raised in the case of an actor having more knowledge on a matter than the reasonable man would, for example, if the actor knows the tin can he is picking up and throwing contains a hand grenade²⁰³ or if a driver knows that a jay-walker is blind,²⁰⁴ he should not be judged on the knowledge of the reasonable man but on the basis of the knowledge that he has. While there can be little disagreement with this proposition it is to be regretted that this effective formulation of the subjective test, for it is neither similar to the test regarding an expert nor is the knowledge imputed to a reasonable man thus making the test external to the actor, is not recognised for what it is.

II

Although the test for the skilled actor is regarded as "the one recognised exception to the objective test"²⁰⁵ it has been pertinently raised whether the test for the negligence of children should not also be dealt with exceptionally.²⁰⁶ The leading Appellate Division cases in this regard deal with civil claims and must therefore be treated with some circumspection. In Jones v SANTAM Bpk²⁰⁷ it was held that where a child is involved this fact does not affect the test for negligence. While the child's personal characteristics

²⁰³ Snyman 1984: 190

²⁰⁴ Snyman 1989: 234/5

²⁰⁵ Burchell & Milton 1991: 304; but see above my criticism of this wording

²⁰⁶ see generally Visser and Vorster 1982: 355 - 359; also Olivier 1976, Van Zyl 1985, and Claasen 1986

²⁰⁷ 1965 (2) SA 542 (A)

are indeed taken into account to determine whether he was *culpa capax*, when it comes to a determination of negligence the child is compared to the reasonable man:

A person is guilty of culpa if his conduct falls short of that of the standard of the *diligens paterfamilias* - a standard that is always objective and which varies only in regard to the exigencies arising in any particular circumstances. It is a "standard which is one and the same for everybody under the same circumstances."²⁰⁸

Despite criticism²⁰⁹ of the decision and despite its obvious unreasonableness and potential for unfairness, especially if applied in criminal law, the principle was reiterated in Weber v SANTAM Bpk.²¹⁰ However in Roxa v Mtshayi²¹¹ three Judges of Appeal²¹² questioned whether the law relating to children, at least between the ages of 7 and 14, should not be re-examined and particularly whether an adult standard of carefulness (the *bonus paterfamilias*) should be applied to children.²¹³

Coming to criminal matters the pure objective test has also been held to apply to children.²¹⁴ In R v Mbombela²¹⁵ De

²⁰⁸ at 552 per Williamson JA

²⁰⁹ See Boberg 1965 who considers the distinction between the two inquiries unhelpful and that there should be only one subjective enquiry. See also Boberg 1968 where he holds that despite the law relating to the negligence of children prior to 1965 being "a little vague and inelegant" essentially because of its subjective nature, nevertheless yielded equitable results; see also Boberg 1973 at 160; and also Olivier 1976

²¹⁰ 1983 (1) SA 381 (A)

²¹¹ 1975 (3) SA 761 (A)

²¹² Jansen JA, Hofmeyer JA and Van Zijl AJA

²¹³ per Jansen JA at 771A-E; see Olivier 1976

²¹⁴ Schafer 1978 states without any authority that children between the ages of 7 and 14 are treated differently and

Villiers JA raised the question of the age of the accused but felt he did not need to decide the point.²¹⁶ In effect though he dismissed the idea that age may be a factor to consider and applied the reasonable man test. In R v Fortuin²¹⁷ the age of the accused is not given although it can be inferred²¹⁸ that the accused is not an adult for on a charge of culpable homicide resulting from the mishandling of a pistol the court says: "The accused is old enough to know..." and "his youth is a circumstance which can be taken into consideration in assessing the punishment to be imposed, it is not a factor which, in this case, can affect the verdict."²¹⁹ The accused was held liable on the basis of the pure objective test:

He will be guilty if he has done what a person of ordinary intelligence and prudence would not have done in the circumstances. That is the standard which must be applied viz. the standard to be expected from a reasonable man.²²⁰

In R v Wemyss²²¹ (a southern Rhodesian judgment) the accused was fifteen and a half years old and the court held that this fact "did not entitle him to claim that his conduct

that there is "some measure of subjectivity" in the test applied to them at 203. There does not seem to be any foundation for his proposition and it must be concluded that it is incorrect particularly as his article was written prior to the decision of S v T 1986 (2) 112 (O) which for the first time applied a relative objective test to children.

²¹⁵ 1933 AD 269

²¹⁶ at 274

²¹⁷ 1934 GWL 16

²¹⁸ as do Burchell and Hunt 1983: 199 and Botha and Nel 1986: p 215

²¹⁹ 1934 GWL 16 at 17

²²⁰ per Bok J at 16/7

²²¹ 1960 (1) PH H 76 (SR)

should be tested by less exacting standards than were applicable to an adult."

In a more recent case²²² however Steyn J, in an appeal against a conviction of culpable homicide in the regional court, rejected the pure objective test without, it is respectfully submitted, any satisfactory discussion, and applied a relative objective test for an accused who was 16 years old:

Wat die maatstaf betref waarvolgens appellant beoordeel moet word, het die landdros na my mening ook fouteer. Die maatstaf wat hy by herhaling toegepas het was die van die redelike man - dws die van die volwassene - terwyl dit behoort te wees die van die redelike skoolseun wat sopas 16 jaar oud geword. So 'n kind se insig, oordelsvermoe en selfbeheer is weens sy onvolwassenheid gewoonlik nog veel swakker as die van 'n volwassene, en so van 'n "redelike kind" van pas 16 jaar nie dieselfde mate van verantwoordelikheid en omsigtige optrede verwag kan word as van 'n volwasse "redelike man" nie. Vlg *S v J* 1975 (3) SA 146 (O) en *S v Lehnberg* 1975 (4) SA 553 (A) op 560 - 561. Optrede wat volgens die volwasse maatstaf van die "redelike man" as nalatig beskou moet word volgens, sal derhalwe nie noodwendiglik ook aldus beskou word volgens die onvolwasse maatstaf van die "redelike 16-jaarige skoolkind" nie. Te streng 'n maatstaf van beoordeling is derhalwe in hierdie geval op appellant tegepas, en het dit tot gevolg dat geregtigheid nie teenoor hom in hierdie opsig geskied het nie.²²³

This decision is a clear example of the courts' considering that the pure objective test may lead to unfairness and that the test therefore has to be modified or restricted. However the authority that Steyn J relies on, namely *S v J*²²⁴ and *S v Lehnberg*,²²⁵ deal with youth as a

²²² *S v T* 1986 (2) 112 (O)

²²³ at 127C-E

²²⁴ 1975 (3) SA 146

factor in extenuation of sentence and not the reasonable man test for criminal negligence and are thus inapplicable.²²⁶ It does seem rather remarkable that Steyn J could so overturn a long line of decisions and accepted views on the pure objective test without thoroughly canvassing the problems.²²⁷ Nevertheless his approach does attempt to obviate the problem with the pure objective test in respect of children. Although the reasonable child *in casu* closely resembled the accused, for the accused's characteristics are attributed to the reasonable child, the test is still external to the actor and is consequently a relative objective test. While the test was no doubt fair to the accused (*in casu* the conviction in the court *a quo* was set aside and the accused was acquitted) there still remains a possibility that a test external to the child actor may result in unfairness. Finally it must be said that if the courts are to so closely fashion the reasonable man (or child) on the characteristics of the accused in order to ensure fairness there seems to be little justification in keeping the test external to the actor. The logical approach and only guarantee of fairness would be to apply a subjective test.

²²⁵ 1975 (4) SA 553 (A)

²²⁶ see also Claasen 1986

²²⁷ see Botha and Nel 1986 who consider this judgment disregards the principle of *stare decisis* particularly in view of the fact this was a decision of a Provincial Division while there were Appeal Court decisions to the contrary. It should be pointed out though that the AD decisions were civil matters and therefore doubtful that they were binding on criminal matters, unless R v Mbombela is regarded as authority for holding that age is not to be considered. However in the latter age was not discussed by the Court.

Snyman argues that the Jones and Weber cases, above, should be restricted to civil law²²⁸ and that the determination of negligence in respect of children should be "the conduct of the reasonable child in the circumstances."²²⁹ Unfortunately he does not give any further flesh to this argument and it is respectfully submitted that while this is an advance on the pure objective test, although it does not go as far as the test went in S v T,²³⁰ above, it is essentially an argument for the application of a relative objective test. It does not go far enough though and may rather lead to more problems. The category "children" is too broad and admits of too great a variety for it to be a solution to the potential unfairness of the pure objective test. If it is admitted that the pure objective test is unfair because of the exacting standards it might impose on some children, then it is not difficult to see that the relative objective test may equally impose too exacting a standard in a particular case. Too many questions are unanswered: Is there only one standard of a child? If so what is that standard? At what age is a person a child? Should there be a separate standard for each chronological year of childhood? What allowance is made for the differing

²²⁸ Snyman 1984: 189 note 47

²²⁹ Snyman 1984: 189

²³⁰ In his second edition at 234 and note 60 Snyman relies on S v T as authority for his proposition that the negligence of children should be tested by the standard of the reasonable child. Considering the criticisms I have made of this judgment I respectfully submit that unless approved in the Appellate Division, or motivated with greater authority it is not as authoritative as Snyman may wish it.

rates of maturing in children? Claasen tellingly reveals to what absurdities a relative objective test could take us:

Die voorgestelde toets van regter Steyn, naamlik "die van die redelike skoolseun wat so pas 16 jaar oud geword het" (127C-D), dwing 'n persoon uit die aard van die saak in a doolhof van onbeperkte moontlikhede. Die skiet met 'n handwapen hou geen verband met "skoolseun"-aktiwiteite nie - dink aan die sinvolle subjektivering van deskendiges se nalatigheidstoets weens gedranginge binne hulle spesialiteitsgebied. Elke seun sal daarvolgens getoets moet word aan skoolseun, nie skoolgaande seun, plaasseun, dorpseun, universiteitseun, ensovoorts. Daarby kom nog die moontlikhede van geslag, nasionaliteit, ras, stamverband, ensovoorts, en die ouderdomme, 7 jaar, 8 jaar, 9 jaar, so pas 14 jaar, amper 15 jaar, ensovoorts. Waar hou ouderdom op om relevant te wees? Op 21 jaar? Hoekom? Op 18 kan jy immers al stem. 'n Persoon se insig, oordeelsvermoe en selfbeheer word nie magies verhoog op die moment wat hy by 20, 21, 22 ensovoorts word nie. Wanneer presies hou 'n mens op om 'n kind volgens die strafreg te wees?²³¹

III

Other than the above exceptions Burchell and Hunt suggest that in regard to the aged, the infirm and those suffering physical defects the objective test should be tempered by subjective factors.²³² Although they do not mention it in as many words, their suggestion is presumably based on the premiss that such persons may not be able to meet the standards of the reasonable man and so it would be unfair to judge them accordingly. While this reasoning cannot be faulted it is doubted that their solution is satisfactory as all it achieves is a relative objective test which may itself set a standard too high for a particular actor to meet. In the second edition of their book they discard this

²³¹ Claasen 1986: 486/7

²³² Burchell and Hunt 1970: 152

suggestion, but this is not surprising in view of the fact that they advocate the subjective test for negligence in respect of *mens rea*.²³³ Schafer holds that in respect of "the aged, the infirm and persons suffering from physical difficulties"²³⁴ the objective test for negligence is mitigated "with some measure of subjectivity." He provides no authority for this proposition and there are, with respect, no grounds for holding as he does. While what he holds may be desirable to some extent it is an incorrect statement of our law.²³⁵

IV

It has also been held that when an actor operates within a particular sphere of activity or some regulated trade, it is incumbent on the actor to be acquainted with the relevant regulations concerning his trade or activity.

Veral wanneer 'n persoon homself begewe in 'n bedryf, beroep of aktiwiteit wat greguleer word, het hy 'n regsplig om homself op hoogte te stel met die ware regposisie.²³⁶

If he does not acquaint himself with the relevant regulations, this may amount to negligence on his part.²³⁷

²³³ Burchell and Hunt 1983: 203

²³⁴ Schafer 1978: 203

²³⁵ It should be noted that despite the maxim *imperitia culpa adnumeratur*, it is not lack of skill as such that amounts to negligence but rather an actor is negligent if he embarks on conduct without having the necessary skill (Burchell & Milton 1991: 304). To a large extent this negates the criticisms of the subjective test that the unskilled actor could escape liability.

²³⁶ Geldenhuys 1987: 85

²³⁷ Burchell 1991: 109/110

Thus one who deals in diamonds ought to know the law relating to diamond-dealing.²³⁸ In S v Du Toit²³⁹ the accused was charged with contravening a regulation in respect of the saving of petroleum products²⁴⁰ and was found liable, for the requirement that anyone "engaging in an activity which to his knowledge is governed by regulations or laws designed to achieve a known object and which carry or may carry severe penalties for infringements is expected to acquaint himself with those regulations or laws"²⁴¹ also applies to a motorist. Noble argues, correctly I respectfully submit, that this is too wide an application of the test.²⁴² The motorist is not a specialist operating in a particular field as understood in our case law, and the application of the rule to a motorist in all probability will result in the application of a fiction.²⁴³

²³⁸ S v Tsochlas 1974 (1) SA 565 (T)

²³⁹ 1981 (2) SA 33 (C)

²⁴⁰ Government Gazette 5898 of 3 March 1978

²⁴¹ at 42B-C

²⁴² Noble 1981

²⁴³ In S v Wandrag 1970 (3) SA 151 (O) (where the accused was an employer in the building industry and failed to obtain the necessary permission to employ certain persons), S v Rabson 1972 (4) SA 574 (T) (where the accused was convicted of dealing in certain imported plants without obtaining ministerial permission) and S v Willemse 1975 (1) SA 84 (C) (where the accused increased rents in contravention of the Rents Act 43 of 1950) the determination of negligence turned on the defence of *ignorantia juris*. In discussing these cases Botha comments: "It is not ignorance of the law as such that is reprehensible: it is manifestly impossible for any human being in a highly regulated modern society to know all the law. But where a person wishes to engage in some activity in circumstances where a reasonable citizen would take reasonable and adequate steps to find out whether his activity is permissible and also to find out what must be done to keep within the bounds of the law, his failure to take such steps may justifiably earn him the reproach of negligence" (Botha 1957: 283). See also S v De Blom 1977 (3) SA 513 (A); S v Londistance (Pty) Ltd en'n Ander 1986

(3) SA 437 (N); S v Waglines (Pty) and Another 1986 (4) SA
1135 (N); S v Longdistance (Pty) Ltd and Another 1990 (2)
SA 277 (A)

(iii)

CRITICISMS OF THE OBJECTIVE TEST

I wish to deal with criticisms of the objective test in two broad categories. The first deals with the notion that the reasonable man is value-bound, dependant on what judges' perceptions are of what constitutes the reasonable man, and that the test is inapplicable in a heterogeneous society. The second category deals with criticisms of the test by the courts particularly in regard to statutory negligence.

I

In S v Ngema²⁴⁴ Hugo J made the following significant observation with regard to the reasonable man:

The reasonable man himself, of course, evolves with time. What was reasonable in 1933 would not necessarily be reasonable today. So, the reasonable man of today would have a different view, for example, of racial relations, of the cultures of other races, to that presumably prevailing in 1933.²⁴⁵

The notion that the reasonable man can evolve reveals a fundamental flaw in the objective test: that it is value bound. When values change the reasonable man changes. This is a case of at best legal imperialism and at worst political domination for it is up to the dominant to say what reasonable values are. Hugo J's example suggests that in 1933 it might have been reasonable for an actor in the circumstances of a white South African in 1933 to be a

²⁴⁴ 1992 (2) SACR 651 (D)

²⁴⁵ at 658h

racist. In practice the values ascribed to the reasonable man are the values of the bench.

Wittingly or otherwise the flaw is acknowledged by Mr Justice Hugo when he holds that the problem with the objective test is the difficulty of applying it in a heterogeneous society²⁴⁶ a difficulty long observed in erstwhile Rhodesia when it was acknowledged that to strike a mean between the Batonka fisherman and the university professor was no mean task.²⁴⁷

What is reasonable for one group of people may not be reasonable for another group. Once this is acknowledged then surely it requires not much of a theoretical shift to argue that what is reasonable for one man may not be reasonable for another.

II

Being a fictional character it is impossible to define with any finality the character of the reasonable man. His attributes, more particularly his conduct, is determined by the circumstances of each particular case. More correctly it could be said that his attributes and conduct are determined by the judge trying the matter and thus may depend on the judges on conceptions of reasonableness.²⁴⁸ Boberg comments

²⁴⁶ at 655f

²⁴⁷ R v Nkomo (1) 1964 (3) SA 128 (SR); for the full quotation see Chapter II (i) above.

²⁴⁸ see also Burchell and Hunt 1983: 197

No witness comes to testify as to the conduct of a reasonable man in given circumstances. The judge asks the questions of himself and answers them himself, as best he can. Certainly an element of personal predilection creeps in here. No one can escape his own temperament, attitudes and beliefs.²⁴⁹

Zimu writes similarly:

(T)he test of negligence is not and cannot be as objective as one would wish it to be, since a judge's interpretation of the facts must inevitably be coloured to some extent by his personal background and experience, and this differs from judge to judge.²⁵⁰

De Wet is more robust in his criticism of the reasonable man when he contends that the traditional formulation could be rephrased as "die gemiddelde blanke."²⁵¹

In S v Outram²⁵² the perceptions of the judge as to what constitutes the reasonable man were referred to by Coleman J. After having dismissed an appeal on a conviction of negligent driving from the magistrate's court, Coleman J was persuaded to grant leave to appeal against his finding:

While I remain convinced of the correctness of the judgment which I have given in this matter, I see some cogency in Mr Williamson's submission that, in deciding it, we have necessarily had to draw in some measure upon our personal experience as motorists, and have been influenced to some extent by our own temperaments. This has been an appeal in which the facts were clear and what really had to be decided was how a reasonable motorist would or should have behaved in the proved circumstances. The judgment reflects our view of the manner in which a reasonable man would and should have

²⁴⁹ Boberg 1988: 137

²⁵⁰ Zimu 1966: 43

²⁵¹ De Wet 1985: 159

²⁵² 1966 (3) SA 501 (T)

behaved but I do see some room for the possibility that Judges of different temperament or experience, approaching the same facts, might visualise the conduct and the duties of a reasonable man in a different way.²⁵³

Although in S v Outram, above, the Judges of Appeal were in accord with the two appeal judges in the provincial division as to what the conduct of the reasonable man should have been in that particular case, in National Employers' General Insurance Co Ltd v Sullivan²⁵⁴ there was not such accord. *In casu* the driver of a motor vehicle was found by the trial judge and by the three judges of first appeal in the provincial division to have been negligent in not anticipating that another vehicle would not stop at an intersection. Furthermore the appeal judges were so convinced of their understanding of what the reasonable man would have done in the circumstances that they refused the appellant leave to appeal to the Appellate Division. After a successful petition to the Chief Justice, five Appeal Judges decided unanimously that the driver had in fact not been negligent.²⁵⁵

In deciding whether a driver was reasonable in swerving after having his car being struck at by a panga-weilding man Baker J said in Samson v Winn²⁵⁶ "Speaking for myself, I

²⁵³ at 504E-G; presumably the Appellate Division was not quite as persuaded that different temperaments might give rise to different notions of the reasonable man for the appeal was dismissed in an *ex tempore* judgment (see editorial note at 501).

²⁵⁴ 1988 (1) SA 27 (A)

²⁵⁵ see generally Boberg 1988

²⁵⁶ 1977 1 SA 761 (C)

cannot blame him for having done these things."²⁵⁷ The learned judge was however not only speaking for himself but was simultaneously determining what the reasonable man would have done in the circumstances or at least what the judge felt the reasonable man would have done.

In lighter style Van Dam writes:

'n Paar jaar gelede het Dr Van der Merwe, in 'n lesing aan aspirant streeklanddroste, die redelike man probeer omskryf. My ou vriend "Buster" Brown het aan die einde van die lesing, met 'n doos ernstige gesig, gese "Dit lyk my of die redelike man net die gewone Groep III landdros is." Die opmerking was in ligte luim gewees, maar ek verstout my om te se dat dit baie na aan die kol was.²⁵⁸

It is not surprising therefore that Van Dam holds that the judge or magistrate on the bench is the *de facto* reasonable man.²⁵⁹

Finally, in what has been described as a humble and candid admission on the prejudice of judges²⁶⁰ Didcott J in Demmers v Wyllie²⁶¹ held:

In an era when rebellion for its own sake is the fashion and revisionism its intellectual style, values which used to be taken for granted are reappraised so frequently and ferociously that to identify the "right-thinking", and to postulate some general accord among them, is a difficult enough task in a homogeneous community. The problems are compounded enormously in a mixed country like South Africa, with its variety of races, cultures, languages, and religions, with its wide

²⁵⁷ at 767

²⁵⁸ Van Dam 1976: 101

²⁵⁹ Van Dam 1976: 101

²⁶⁰ Cameron & Van Zyl Smit 1978: 732

²⁶¹ 1978 (4) SA 619 (D)

social and economic differences. No single group has a monopoly of such a society's "right-thinking" members, and the "mythical consensus" must encompass them all. Subjectivity inevitably intrudes whenever this is sought. A judge would doubtless hesitate to see himself as the epitome of all "right-thinking" persons, or to say so at any rate. He is seldom likely, on the other hand, to attribute to the "right-thinking" a viewpoint which differs sharply from his own. More often he decides what he personally thinks is right, and then imputes it to the paragons. To others, however, the tenets thus decreed may seem merely the innate prejudices of the group or class from which he has sprung. That they indeed are is the danger against which he must guard.²⁶²

II

It has long been recognised that the application of the standard of the reasonable man is problematic in a heterogeneous society.²⁶³ In 1964 the Chief Justice of Southern Rhodesia held:

Adding to the problem of the reasonable man the courts have not always found it easy to apply the reasonable man test to all members of (especially a heterogeneous) society. In England with its relatively homogeneous population, the test of "the reasonable man"... has caused enough difficulty in attempting to define the standard. In a country such as this, with its diverse multi-cultural community, whose social and educational standards vary over almost the widest possible range, the task is wellnigh impossible. To strike a mean between the Batonka fisherman living his primitive life in some remote spot on the Zambesi, and the professor at the University College of Rhodesia, is to set a task which even an arch-exponent of the "reasonable man test" would shrink from attempting.²⁶⁴

The test requires that members of widely different cultural groups meet the same standard. It is not far-

²⁶² quoted in Cameron & Van Zyl Smit 1978: 729 - 730

²⁶³ Whiting 1991: 439

²⁶⁴ R v Nkomo (1) 1964 (3) SA 128 (SR) at 131 per Beadle CJ; see also Hunt 1982: 417

fetched to hold further that the standard is a reflection of the mores of one of those groups and furthermore of the dominant group. The reasonable man test therefore runs the risk of being a mode of cultural domination. The injustice of this approach is starkly illustrated in R v Mbombela,²⁶⁵ above. De Wet is also of the opinion that the objective test is inapplicable in South Africa:

Veral in 'n land soos ons s'n waar die beskawingspeil van die een mens geweldig verskil van die van 'nander, is die redelike man 'n onbruikbare maatstaf vir die bepaling van skuld.²⁶⁶

Secondly, the problem is compounded by the fact that the vast majority of judges and magistrates are drawn from one particular group and the dominant group at that. Grant notes:

At present all the South African judges and most of the magistrates are drawn from one section of the community. In a socially and culturally diverse society such as South Africa the fact that the reasonable man, the standard against which everyone is measured, is determined by reference to the conceptions of the judicial officers drawn from one section of the community is problematic.²⁶⁷

Corder in his book Judges at Work argues that our judges have doubtless been "influenced by their racial and class backgrounds, education, and training."²⁶⁸ The problem is also acknowledged by Burchell and Milton and forms the basis upon

²⁶⁵ see S v Jassane 1973 (4) SA 658 (T)

²⁶⁶ De Wet 1985: 159/60

²⁶⁷ Grant 1986: 84

²⁶⁸ Corder 1984:237

which they propose a solution to the potential unfairness of the reasonable man test.²⁶⁹

III

Given the prominence that the *mens rea* principle plays in our law it is not surprising that with regard to statutory offences²⁷⁰ the courts are reluctant to find that the Legislature intended that the offence in question could be committed in its absence, without *mens rea*, in other words where strict liability obtains. However it is common for the Legislature to fail to state expressly its intention with regard to *mens rea*. Consequently it has been for the courts to interpret legislation to determine whether *mens rea* is required and if so in what form. An important development in this regard has been the courts' acknowledgement of the potential unfairness of the pure objective test and its criticisms of the test. Furthermore statutory offences requiring negligence are so numerous and so widely prosecuted that it is necessary to consider in some detail negligence in these offences. In this regard Bertelsmann comments:

Further, while most of the literature on criminal negligence deals with crimes *mala in se* (in South Africa with culpable homicide), there are, in fact, already several hundred times as many *mala prohibita* that can be committed negligently. Legal science, it is submitted,

²⁶⁹ see my discussion of their solution in Chapter II (v)

²⁷⁰ There does appear to be a difference in the manner in which the Courts treat negligence in statutory offences as opposed to the common law offence of culpable homicide. It is for this reason that statutory offences are considered separately here and the common law in Chapter II (iv). See generally Bertelsmann 1975 and also Burchell 1991 at 110.

can no longer afford to concentrate only on the former and to neglect the latter. If sheer numbers are any guide, the typical present-day crime of negligence is not constituted by bringing about a particular consequence. It is some formally described act of commission or omission, prohibited by statute, and punishable whether committed negligently or intentionally.²⁷¹

When interpreting statutory offences the courts will first look at the language of the enactment to ascertain whether the Legislature intended *mens rea* to be an element of the offence and if so in what form. If this does not yield an answer, the courts will look at the object and scope of the offence, for example when the legislation imposes a duty of care then it probably meant that negligent transgressions be punished. If the enactment could not be implemented if negligence were not punished then again negligence will probably suffice for liability. Related to this is the question of the reasonableness of requiring negligence as the *mens rea*; so if a statute is particularly complex the less the likelihood is that negligence will suffice. Finally the courts will also look at the punishment imposed by the statute.²⁷²

In interpreting statutory offences the courts have held the following. In S v Arenstein²⁷³ the importance of the *mens rea* principle was established:

The general rule is that *actus non facit reum nisi mens rea sit*, and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the

²⁷¹ Bertelsmann 1975: 60

²⁷² Burchell and Milton 1991: 310/311 including notes 60 - 68

²⁷³ 1964 (1) SA 361 (A)

absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable.... Indications to the contrary may be found in the language or the context of the prohibition or injunction, the scope and object of the statute, the nature and extent of the penalty, and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of *mens rea*.²⁷⁴

In determining the form of *mens rea* Botha JA held:

The degree of blameworthiness required for a culpable violation of a statutory prohibition or injunction must in the first place be sought in the language used by the lawgiver. The requirement of intentional wrongdoing is usually indicated by such words as "willfully", "intentionally" or "maliciously", and in the absence of any words expressly indicating the particular mental state required, the degree of *mens rea* must depend on the foresight or care which the statute in the circumstances demands.²⁷⁵

In S v Naidoo²⁷⁶ the following was held with regard to statutory interpretation:

The test is, it seems, whether the Legislature required of the subject so high a degree of circumspection as to lead to the necessary conclusion that, despite the absence of express provision to that effect, it must have intended a mere omission to exercise that degree of care which the law expects of a *bonus paterfamilias*, is sufficient to render one guilty of the offence created by the statute.²⁷⁷

Significantly, in deciding whether negligence is the required form of *mens rea* the courts have held that negligence might not suffice because being objective it might constitute unfairness for the accused. In S v Naidoo, above, Fannin J, in a minority judgment, held:

²⁷⁴ at 365C-D per Botha JA

²⁷⁵ S v Arenstein 1964 (1) SA 361 (A) at 366D-E

²⁷⁶ 1974 (4) SA 574 (N)

²⁷⁷ at 576B per Fannin J

In coming to the conclusion that mere *culpa* is not sufficient, I am mindful too of the widely differing standards of culture, education and social awareness of the various groups of persons to whom, as citizens of South Africa, this Act applies, and of the fact that the application of an objective standard to many of such persons may well result in a hardship so unjust as to make it unlikely that Parliament could have intended any such result.²⁷⁸

For the court in S v Ndlovu²⁷⁹ Shearer J held:

To apply, for example, an objective standard to an illiterate living near the border at whose home offensive literature has been left would create so unjust a result that it could not have been intended.²⁸⁰

Some more recent judicial criticisms of the unfairness of the objective test have been made by our Judges of Appeal. In respect of the offence of photographing a prison without authority²⁸¹ Nestadt JA held (with four other Judges of Appeal concurring) that:

(A) wide ranging (statutory) prohibition applicable to all citizens indicates *dolus* alone as the required standard of *culpa* will result in great hardship to the various groups of persons who may contravene the section in question through mere carelessness or thoughtlessness.²⁸²

In deciding whether the accused was guilty in terms of the Internal Security Act²⁸³ of possession of a prohibited

²⁷⁸ at 576G-H

²⁷⁹ 1986 (1) SA 510 (N)

²⁸⁰ at 514D-E

²⁸¹ section 44(1)(e)(i) of Act 8 of 1959

²⁸² Attorney-General, Cape v Bestall 1988 (3) SA 555 (A)

²⁸³ section 56 (1)(c) of Act 74 of 1982

publication, Hefer JA (with three other Judges of Appeal concurring) held:

If the so-called objective test of negligence is applied, as it generally is, the court hearing a case brought for an alleged contravention of s 56(1)(c) will be called upon to answer this question according to its own objective assessment of the reasonableness of the accused's failure to identify the publication; and in doing so, it will not take the accused's personal capabilities into account (*S v Ngubane* 1985 (3) SA 677 (A) at 687); the unsophisticated and uneducated shepherd will be treated no differently from the professor and no heed will be taken of the 'widely differing standards of culture, education and social awareness of the various groups of persons to whom, as citizens of South Africa, this Act applies.'²⁸⁴

IV

Two important consequences have resulted from the courts' interpretation of statutory offences. Firstly, negligence has been construed to be a form of *mens rea* (as opposed to a mode of conduct). Burchell and Milton comment:

The notion that negligence can constitute the fault element of a statutory offence flows from the judicial distaste, in the field of statutory crimes,²⁸⁵ for the doctrine of strict liability encountered there.

²⁸⁴ *S v Melk* 1988 (4) SA 561 (A) at 578E-G per Hefer JA. In a number of more recent cases negligence has been held to be insufficient: in *Attorney-General, Natal v Ndlovu* (1988 (1) SA 905 (A)) it was held that intention was necessary to found a conviction in terms of section 8(1)(d) of the Publications Act 42 of 1974 and in *S v Unverdorbe* (1990 (2) SACR 30 (T)) it was held that a contravention of section 2(1) of the Indecent or Obscene Photographic Matter Act 37 of 1967 also required intention. However in *S v Goodman* 1991 (2) SACR 33 (W) it was held that culpa was sufficient to found a conviction in terms of the Electoral Act.

²⁸⁵ Burchell & Milton 1991: 307

In S v Robson; S v Hatingh²⁸⁶ Kriegler clearly considers negligence in statutory offences to refer to *mens rea* when he rejected the argument that the objective test of the *bonus paterfamilias* could be equated with the notions of *boni mores* or 'regsoortuiging van die gemeenskap.' These may be considered when deciding unlawfulness but that negligence in statutory offences refers to the "fault element."²⁸⁷

V

Secondly, Bertelsmann argues that the courts have applied on occasion a subjective test for negligence in statutory offences:

Although the Appellate Division never used these terms, its decision in Oumbella (1966) clearly means that proof of objective negligence is not sufficient to show a blameworthy state of mind; to sustain a conviction where *mens rea* is required, subjective negligence must also be established.²⁸⁸

²⁸⁶ 1991 (3) SA 322 (W)

²⁸⁷ at 333D-F

²⁸⁸ Bertelsmann 1975: 65; *In casu* the accused was charged with failing to comply with an order in terms of s 11(i) of the Suppression of Communism Act 44 of 1950 in that he was found to be within the premises of a factory. The accused argued that he forgot that the order prohibited him from being within a factory and the Court held that forgetfulness on its own did not establish negligence. I am however not convinced that the Court applied a subjective test. The Court went into considerable detail as to the circumstances of the accused. Since being served with the order he had been detained, imprisoned and denied access to his order (a document of some seven pages). The Court held: "In the present case the appellant's forgetfulness was induced by extraneous factors, the most important of which was that he was deprived of the notices - his aid to memory - for nearly two years, during the major portion of which time his mind was occupied with problems of a pressing nature, and was wholly divorced from such considerations as where he was entitled to work. Thereafter his efforts to obtain copies of the notices proved unsuccessful" at 362B-D. (emphasis

In S v Qumbella²⁸⁹ the accused was found to be liable because he was "culpably negligent."²⁹⁰ Bertelsmann comments:

These words, so similar to those used by Rumpff JA in the *Jassat* case (negligently negligent), seem to allow of but one interpretation: 'culpably' must refer to subjective, and 'negligent' to objective negligence - both being required for a finding of guilty.²⁹¹

Finally in S v Le Roux²⁹² the accused was convicted of entering a national park without a permit on the following subjective basis:

Dat 'n polisiebeampte met nege jaar dins agter die rug so onkundig kan wees kan ek nie aanvaar nie. Na my mening dui alles daarop dat die appellant wel deeglik besef het dat hulle in die omgewing van die wildetuin kampeer, maar hy het nie die minste moeite gedoen om vas te stel waar die grense is nie. Hy was geheel en al onverskillig of hulle die terrein van die wildtuin betree al dan nie.... Die penarie waarin die appellant beland het is aan sy eie onversigtigheid te wyte.²⁹³

Also in S v Duma²⁹⁴ and S v Rabson²⁹⁵ Bertelsmann contends that a subjective test was applied.

added) It seems to me that the Court is describing the circumstances of the actor and not the actor's subjective capabilities. In other words the reasonable man in the same circumstances may well have forgotten the full and precise terms of the order. If my interpretation is correct, which I submit it is, then the Court applied an objective test.

²⁸⁹ 1967 (4) SA 577 (A) (note this is not the same case referred to in the quotation immediately above)

²⁹⁰ at 583A per Potgieter JA

²⁹¹ Bertelsmann 1975: 65. Although Bertelsmann does not expressly say it, in the last clause he must be referring to the test for *mens rea* and the test for unlawfulness respectively.

²⁹² 1969 (3) SA 725 (T)

²⁹³ at 729D-E per Trengrove J

²⁹⁴ 1970 (1) SA 70 (N); On appeal the accused was acquitted on a charge of contravening sections 4(1) and 23 (2) of Act

VI

With regard to statutory offences the relative objective test has also been applied because of an acknowledgement by the courts that the pure objective test would result in unfairness. In reviewing a conviction for the negligent loss of a firearm in contravention of section 39 (1)(i) of the Arms and Ammunition Act 75 of 1969 Kriegler J found it difficult to apply the pure objective test.²⁹⁶ The learned judge considered the application of the pure objective test a difficult and complex matter in "a diverse society such as ours"²⁹⁷ but relieves himself of this difficulty by restricting the test:

Fortunately in the present cases we are concerned with a statute which prescribes vetting and licensing as a

28 1937 by being in unlawful possession of a firearm. Bertelsmann argues that the test applied by the Court was subjective because the accused's *bona fide* belief that he had picked up a toy pistol was accepted. This is, with respect, not entirely convincing, for at 76F the Court appears to have applied an objective test: (F) or full acceptance of the appellant's evidence necessarily involves acceptance that he sincerely, unsuspectingly and **not unreasonably** believed that he had picked up a toy. (emphasis added) It is not clear whether the unreasonableness pertains to the actor or to some objective standard.

²⁹⁵ 1972 (4) SA 574 (T); The accused was charged with unlawfully importing certain wild plants into the country in contravention of section 82 (1) of Ordinance 17 of 1967 (T). He was acquitted on the following grounds: "It is clear that he did not have knowledge of the unlawfulness of his conduct. He *bona fide* and reasonably believed his conduct was in fact authorised by the permit which he held. Judging his conduct subjectively **he reasonably believed** his conduct lawful." (at 577E-F) (emphasis added) The emphasised phrase is a clear statement of the subjective test.

²⁹⁶ S v Robson; S v Hattingh 1991 (3) SA 322 (W)

²⁹⁷ at 333G

prerequisite to lawful possession of a firearm and, what is more, we are dealing with a very special kind of commodity. Consequently the circle of people to be considered in arriving at the image of the reasonable man is considerably restricted. The test would therefore be in the case of para (j) and in the case of para (k): how would the notional reasonable lawful possessor of a firearm have behaved in relation thereto? In answering the question the realities of current-day life in South Africa ought to be taken into account.²⁹⁸

Thereafter Kriegler J considers that it may be reasonable for different people to behave differently in respect of the safekeeping of a firearm:

A taxi-driver may keep it under his seat, removing it when he alights. A meter reader or debt collector may carry it on his person while on his rounds, while the average householder may keep it under lock and key during the daytime and to hand when he retires for the night.²⁹⁹

While I submit that the above, although highly specific, is an objective test, the reasonable man comes so close to resembling the actor in question that again it must be asked whether the objective test, even if only in name, is worth retaining. Indeed, De Wet argues that the courts pay only lip service to the test.³⁰⁰ If the reasonable man has to be so contorted to suit not only the circumstance but also in order to ensure fairness, then the test must simply be rejected and the real issue facing the court must be tackled square on: "Did the actor, given his situation and capabilities, act reasonably?"

²⁹⁸ at 333H-J

²⁹⁹ at 334D-E

³⁰⁰ De Wet 1985: 162

(iv)

"THE SWING TOWARDS THE SUBJECTIVE TEST"³⁰¹

I

In S v Van As³⁰² we had the first³⁰³ clear³⁰⁴ indication from the Appellate Division³⁰⁵ that the pure objective test may not always be applicable³⁰⁶ and that the attributes of the group

³⁰¹ Schafer 1978: 201; see generally Goosen 1979

³⁰² 1976 (2) SA 921 (A)

³⁰³ In his minority judgment in S v Van der Mescht 1962 (1) SA 521 (A) Hoexter JA hinted at a subjective test. After reviewing the appellant's work in a mine smelting-room, held that the appellant knew of the dangerous properties of gases (which in casu had caused the deaths of the deceased for which the appellant had been convicted of culpable homicide) given off during smelting and concluded "In my opinion, therefore, the evidence proves that the appellant was negligent because he was inadvertent to the danger which was within his knowledge, that danger being one of bodily harm to others against which a reasonable man would have taken steps to guard" at 541F-G. A move to a subjectivised test was also earlier hinted at in S v Bernadus 1965 (3) SA 287 (A) and for which see the footnote below.

³⁰⁴ Du Plessis 1986 at 141 argues that an indication of support for the subjective test in S v Van As relies on a strained interpretation. Certainly the indication is not clear, but there is definitely a shift from the pure objective test.

³⁰⁵ An earlier indication of a move away from the pure objective test can be seen in the Southern Rhodesian decision of R v Mara 1966 (1) SA 82 (SR) in which Young J summarised his understanding of S v Bernadus 1965 (3) SA 287 (A) in inter alia the following terms: "Killing in the course of an unlawful assault is culpable homicide if the accused, given his mental and physical make-up, would, had he thought about the matter, inevitably have recognised that in some way danger to life might be involved in the act" at 83G-H (emphasis added). Du Plessis 1986 at 142 considers this a "very subjective interpretation to the majority judgments in Bernadus which, with respect, cannot be justified in the light of those judgments."

³⁰⁶ Note that the discussion in this section applies primarily to the offence of culpable homicide as opposed to cases of statutory negligence which are treated of in Chapter II (iii).

from which the actor comes could be attributed to the reasonable man:

Hierdie *diligens paterfamilias* is natuurlik a fiksie en is ook maar al te dikwels nie 'n pater nie. Hy word "objektief" beskou by die toepassing van die reg, maar skyn wesenlik sowel "objektief" as "subjektief" beoordeel te word omdat hy 'n bepaalde groep of soort persone verteenwoordig wat in dieselfde omstandighede verkeer as hy, met dieselfde kennisvermoe. Indien 'n persoon dus nie voorsien nie wat die ander persone in die groep wel kon and moes voorsien het, dan is daardie element van *culpa*, nl. versuim om te sien, aanwesig.³⁰⁷

Although not in so many words Chief Justice Rumpff is referring in effect to a relative objective test. Some indication of this move may have been suggested by Rumpff as a Judge of Appeal in his minority judgment in the earlier decision of S v Bernadus³⁰⁸ where he held that:

Hy wat iemand opsetlik aanrand moet geag word te voorsien dat as gevolg van die aanranding die dood as hoogste letsel kan intree, selfs al het hy nie die intrede van die dood verwag nie en selfs al was die dood 'n ongewone gevolg, mits daar 'n kousale verband tussen die daad en die dood bestaan.³⁰⁹ (emphasis added)

In the later decision of S v Van As, above, Rumpff CJ sought to explain what is meant by the concept "must have foreseen":

In die strafreg, wanneer die dood volg op 'n onregmatige aanranding, moet dit bewys word, alvorens 'n bevinding van strafbare manslag gedoen kan word, dat die beskuldigde redelikewyse kon en moes voorsien het dat die dood kan intree as gevolg van die aanranding. Die

³⁰⁷ at 928D-E per Rumpff CJ; for a translation of this passage see S v Blanket Mine (Pvt) Ltd 1992 (2) SACR 41 ZSC at 48g-j

³⁰⁸ 1965 (3) SA 287 (A)

³⁰⁹ at 302H - 303A

uitdrukking "moes voorsien het" word gebesig in die sin van "behoort te voorsien het". Indien dit bewys word dat die beskuldigde wel die dood as moontlike gevolg redelikewyse moes kon voorsien het, en dat aan die kousaliteitvereiste voldoen is, is die saak afgehandel.³¹⁰

While Schafer argues that the Chief Justice may have been trying to clarify the ambiguity of previous phraseology and confirm the objective test, he does not do this satisfactorily at least in respect of clearly stating the objective test, for despite his explanation of the ambiguous term "moes voorsien het" he continues thereafter to use the term somewhat ambiguously so creating confusion as to his meaning. Schafer poses the question whether the Chief Justice was not deliberately allowing a "partially subjective test" to be developed.³¹¹ Whatever the Chief Justice's intention was, it is to be regretted that he did not state explicitly what he meant. Such lack of clarity can only lead to uncertainty.

Du Plessis is of the opinion that Van As is not to be interpreted as a swing to the subjective test for negligence.³¹² He argues:

Bearing in mind that he nowhere criticises the majority judgments in Bernadus, nowhere directly rejects them and that a court of three judges could not overrule views substantially similar to if not identical with each other, expressed by four judges on a previous occasion, it strikes one as strange that some passages in Van As could give rise to the opinion that the objective approach adopted in the majority judgments in Bernadus were being rejected. It is submitted that one ought

³¹⁰ at 927H - 928A

³¹¹ Schafer 1978: 203

³¹² Du Plessis 1986: 132

simply to interpret the judgment on the basis that a court which wishes to change the law will say so clearly and unequivocally and that, in the absence of such a clear statement, a judgment should be read on the assumption that well known existing principles are accepted, assumed and taken for granted.³¹³

While it is admitted that the judgment is not as clear as one would hope, the submission in the second sentence of the above quote cannot be accepted quite so simply particularly in the light of the Chief Justice's reference to "'n bepaalde groep of soort persone." Again Du Plessis considers the lack of examples in this regard to imply that the remarks must be taken as no more than a reference to the existing law³¹⁴ and that persons with specialised knowledge are subject to a different test and that *in casu* the specialised knowledge relates to a knowledge of boxing and Judo. It is submitted that such a class of persons hardly accords with the categories of experts and those with specialised knowledge that the courts have applied.³¹⁵ Instead the Chief Justice was impliedly introducing a relative objective test which approach has indeed been followed in subsequent decisions.³¹⁶ Du Plessis concludes that the judgment is not to be interpreted as an espousal of the subjective approach.³¹⁷ While it is submitted that he is correct in this, Du Plessis' analysis fails because it draws an absolute distinction between a pure objective test and the subjective test without

³¹³ Du Plessis 1986: 132 note 11

³¹⁴ Du Plessis 1986: 138

³¹⁵ For a full discussion on the exceptions see Chapter II (ii) above.

³¹⁶ see for example S v Ngema 1992 (2) SACR 651 and S v T 1988 (2) SA 112 (O)

³¹⁷ Du Plessis 1986: 140

recognising a relative objective test. If indeed he had recognised this it would not have been necessary for him to force the judgment into the pure objective mould. Interestingly his last word on the case is:

A very simple approach to the facts would have been to consider whether it had been reasonably foreseeable that a very fat person, standing on a hard cement surface could fall and fatally injure himself as a result of a fairly hard quick slap delivered by a rather strong man.³¹⁸ (emphasis added)

Du Plessis himself has employed a relative objective test!

II

However even if it had been clearly stated that a relative objective test was to be followed in future,³¹⁹ this would not be an end to the confusion. What parameters does one refer to in defining the reasonable man in each instance? If one refers to "'n bepaalde groep of soort persone" then should the reasonable man be given a racial classification? This was specifically rejected in S v Mbombela³²⁰ and also in Van Aswegen v Minister van Polisie en Binnelandse Sake³²¹ where in casu two "Bantoespeurderkonstabes" were overpowered by a convict they were conveying and were consequently involved in

³¹⁸ Du Plessis 1986: 140 note 29

³¹⁹ In the subsequent decision of S v Nkwenja en 'n Ander 1985 (2) SA 560 (A) the court applied a pure objective test and specifically held (per Jansen JA at 572I - 573A) that S v Van As was not an obstacle to this approach. This of course is not to say that the courts will not in future apply the relative objective test, for the latter is applied when the pure objective test could result in unfairness to the accused.

³²⁰ 1933 AD 269

³²¹ 1974 1 PH J1 (T)

a motor vehicle accident, it was held per Bliss AJ that, quite correctly it is submitted, the racial characteristics of the policemen had no bearing in determining their negligence. However in S v Ngema³²² Hugo J does ascribe a racial classification to the reasonable man:

One must, it seems to me, test negligence by the touchstone of the reasonable person of the same background and educational level, culture, sex and - dare I say it - race of the accused.³²³

The difficulty with a racial classification being ascribed to the reasonable man is that it presumes certain stereotypical attributes of different "races" and requires all actors of that same classification to meet the standard of the stereotype. While such a position is not only socially untenable³²⁴ and based on a patently false assumption.³²⁵ More importantly it reveals the flaw in any relative objective test in that it is an unreliable measure of the *mens rea* of the actor.

In a rather prophetic foreshadowing of Hugo J's statement of the law, Schafer asks whether once we have accepted a racial classification for the reasonable man then should he not also "be clothed with the same cultural, social,

³²² 1992 (1) SACR 651 (D)

³²³ at 658f

³²⁴ Burchell 1991: 112; see also Grant 1986: 82

³²⁵ A startling example of such false assumptions is the comment by Rumpff CJ in S v Augustine 1980 (1) SA 503 (A) at 506A: "Blykbaar het die advokaat vir die verdediging en die Verhoorhof nog nie die ondervinding opgedoen nie dat inderdaad Kleurlinge en Swartmans soms mense steek sonder enige rede, behalwe oenskynlike steeklus."

religious, educational and environmental background as the accused person."³²⁶ The difficulty Schafer is identifying with a relative objective test is a valid one and one which has been noted by Claasen³²⁷ in respect of a relative objective test for children. Once one admits of certain attributes being ascribed to the reasonable man how far does one go? While it might be argued that to take an extreme position, of either the pure objective position or the subjective position, one runs the risk of avoiding the truth that so often is found somewhere between extremes. In this instance it is submitted the "middle path" or relative objective test creates a greater risk: that of uncertainty.³²⁸ Schafer argues for retaining the "traditional exceptions" and for limiting any other moves to subjectivity because it will, quite rightly it is respectfully submitted, be "well-nigh impossible to formulate such guide-lines."³²⁹

III

In Marine & Trade Insurance Co Ltd v Singh,³³⁰ an appeal from the Durban & Coast Local Division, in which the court a quo had referred to the "hypothetical reasonable driver, of say the Clapham omnibus"³³¹ drew a rebuke from the then Chief Justice Rumpff:

³²⁶ Schafer 1978: 205

³²⁷ Claasen 1986 (quoted above)

³²⁸ see for example Hugo J's criterion of "reasonableness" in S v Ngema 1992 (2) SACR 651 (D) at 658f and also the discussion of this criterion below.

³²⁹ Schafer 1978: 206

³³⁰ 1980 (1) SA 5 (A)

³³¹ Cameron & Van Zyl Smit 1980: 521

(I)t is somewhat strange to see that the need is felt in Durban, in order to measure the standard of driving ability of the South African busdriver, to refer to the Clapham bus, whose passengers a long time ago were supposed to be models of reasonable Englishman.³³²

Cameron and Van Zyl Smit contend that the "objection was to no substantive point of law raised or implied by the quoted passage."³³³ It does with respect seem strange that the Chief Justice would object simply for the sake of it and I submit that one may indeed interpret in the rebuke an implied objection. The Chief Justice may have been impliedly criticising the wholesale acceptance of an English notion of a reasonable man that is inapplicable in South Africa. The Chief Justice may have been suggesting that to hold to a pure objective test, where one can rely on a universal notion of a reasonable man, is either impossible or undesirable. Instead if we locate the reasonable man in South Africa, and thus rely on a relative objective test, we may come closer to being fair to the accused. This interpretation is not as strained as it appears at first blush when one considers other deliberations of the same learned Judge on the reasonable man.³³⁴

IV

³³² quoted in Cameron & Van Zyl Smit 1980: 521

³³³ Cameron & Van Zyl Smit 1980: 521

³³⁴ S v Bernadus 1965 (3) SA 287 (A) and S v Van As 1976 (2) SA 921 (A)

Jansen JA in S v Ngubane³³⁵ again suggests³³⁶ that a relative objective test should be applied:

Although the reasonable man standard may to some extent be individualised in certain circumstance, it remains an objective standard.³³⁷

Unfortunately no indication is given at what the "certain circumstances" are or when they may be applied. The learned judge thereafter refers to the Van As decision and holds that it does not connote "anything more than the conventional objective standard, albeit somewhat individualised."³³⁸ What is meant by the phrase "somewhat individualised" is also not explained.³³⁹ Certainly though this does not seem to refer to the "conventional" or pure objective test. It is respectfully submitted that the only reasonable interpretation that can be given to the above problematic phrases is that they refer to a restricted or relative objective test which may be applied when the pure objective test could lead to unfairness.³⁴⁰

V

³³⁵ 1985 (3) SA 677 (A)

³³⁶ albeit obiter

³³⁷ at 686F-G

³³⁸ at 687C

³³⁹ see Burchell & Milton 1991: 300

³⁴⁰ Du Plessis 1986 at 149 submits that this phrase is only applicable to the situation where the "reasonable man is placed in the position of the accused and credited with such special or specialised knowledge as the accused may have." Again it is submitted that Du Plessis fails to recognise the development in the objective test in the application of a restricted objective test and so he is forced to apply an artificial interpretation.

In the recent decision of S v Ngema³⁴¹ the relative objective test was given a significant fillip by Mr Justice Hugo. In a remarkable echoing of the facts in R v Mbomela³⁴² nearly sixty years on, the accused who lived "at or very near to the kraal at which the deceased, a two-year-old toddler, also lived"³⁴³ came home "very tired after a very hard day's work"³⁴⁴ and on entering his hut he sat down on a chair and fell asleep leaving his cane knife leaning against his leg. During his sleep the deceased probably³⁴⁵ clambered up onto the accused's lap at which time the accused dreamed that he was being throttled by a tikoloshe which was so frightening that he awoke, grabbed his cane knife, lashed out at and killed the child believing him to be the tikoloshe. The court considered whether the accused had acted negligently and so had the opportunity of reconsidering the patently unfair decision in R v Mbombela, above.

Hugo challenges the unfairness of the decision head on but makes the startling observation that the reasonable man has evolved with time:

The reasonable man himself, of course, evolves with time. What was reasonable in 1933 would not necessarily be reasonable today.³⁴⁶

³⁴¹ 1992 (2) SACR 651 (D)

³⁴² 1933 AD 269

³⁴³ S v Ngema 1992 (2) SACR 651 (D) at 652f

³⁴⁴ at 653g

³⁴⁵ at 654b

³⁴⁶ at 658h

Surely the reasonable man "of ordinary knowledge, intelligence and prudence" cannot evolve. He treads life's pathway with "moderation and prudent common sense"³⁴⁷ It seems difficult to know how such attributes could evolve unless the reasonable man chooses to depart from the via media but he would then no longer be acting reasonably. The reasonable man being an abstraction of moderation is timeless and cannot evolve.

What Hugo J is actually referring to is that the test for negligence has evolved with time. He refers to the problem identified in the Southern Rhodesian case R v Nkomo (1),³⁴⁸ to S v Van As, above, and at some length to S v Robson; S v Hattingh, above. He specifically rejects the "full-blown objectivism"³⁴⁹ of R v Mbombela, above, but is not prepared to go as far as accepting the subjective test in posing the rhetorical question: "Is his belief, short of an insane delusion, in fairies at the bottom of the garden, a factor that assists him in evading liability for acts that would render 99 per cent of his fellow citizens liable?"³⁵⁰ Hugo J tries to establish a middle path:

The most that can be said from the cases to which I have been able to refer, is that some subjective factors can

³⁴⁷ per Holmes JA in S v Burger 1975 (4) SA 877 (A) at 879D-E

³⁴⁸ 1964 (3) SA 128 (SR)

³⁴⁹ at 657f

³⁵⁰ at 568e-f. It is respectfully submitted that the example of fairies at the bottom of the garden is unfortunate for it conjures up images bordering on the ludicrous and so obfuscates proper analysis. Moreover it is submitted that such a belief should indeed be a factor to take into account if a court is to come to a proper finding of *mens rea*.

be taken into account. In particular there are those subjective factors which would put the accused in a higher category, as it were, than the reasonable man, for example expertise and knowledge and experience. On the other hand there are those who, because of a lack of education or experience, or because of beliefs peculiar to them, would be in a category from whom one would expect a lesser degree of foresight and care than from a notional reasonable man.³⁵¹

The conclusion Hugo J comes to is that the middle path or balance is to be determined by the criterion of "reasonableness." With due respect this criterion does not tell us much and fails to address the problem of possible judicial predilections as to the nature of the reasonable man.

Welcome as the move is to containing the potential unfairness of the pure objective test in S v Ngema there is an unfortunate flaw in the argument of Hugo J that undermines the development:

We accept, therefore, that the accused's negligence or otherwise must be assessed on the basis that he truly believed that he was being throttled by a supernatural being. Nightmares, however, are not peculiar to any particular race or class. Everyone has them from time to time. It is also not unknown for extraneous factors such as noises or physical contact to insinuate themselves into people's dreams. Could it ever be reasonable for a person, on awakening from the throes of such a dream, to strike out and deliver no fewer than nine blows to the perceived object of the dream? That conclusion, to my mind, would be monstrous.³⁵²

If it is reasonable for the accused to believe in the tikiloshe, as a real physical being, and he dreams he is

³⁵¹ 658c-d

³⁵² at 658g-h

being throttled by it, and he knows that physical contact of what ever sort may insinuate itself into his dream, and unknown to him during his sleep a child has crawled onto his lap, then why is it unreasonable for him to strike out, albeit nine times, at the perceived real object of threat? Other reasonable people who do not believe in the tikoloshe would upon awakening immediately realise that all they have experienced is a frightening nightmare and indeed it may not be reasonable for them to lash out. But the reasonable man who believes in the tikoloshe would not realise this because he really believes the tikoloshe is sitting on his lap. What we have in Mr Justice Hugo's reasoning is a case of double standards of reasonableness. While it is reasonable for the accused to believe in the tikoloshe and to dream of the tikoloshe, he must abandon those beliefs when it comes to the physical existence of the tikoloshe. In other words he must act like the reasonable man of the pure objective test. Unfortunately what Hugo J gave with one hand he took away with the other and left the accused in no other position than if he had consistently applied the pure objective test

VI

In conclusion it is respectfully submitted that it is doubtful that there has been a swing to a subjective test.³⁵³

³⁵³ Although De Wet also argues that there has been a swing to the subjective test, and in fact that the objective test is seldom applied in practice: "Dit wil trouens voorkom of daar in ons praktyd geleidelik in die rigting van 'n subjektiewe benadering geneig word, selfs waar daar nog lippediens bewys word aan die sogenaamde redelike" 1985 at 162.

(v)

THE SUBJECTIVE TEST AND CRITICISMS THEREOF

I

Given the socio-political changes occurring in our country, it is all too obvious that values in the guise of the reasonable man cannot be imposed on others. Our legal system is going to have to adapt to changing circumstances. Unfortunately S v Ngema, above, shows that we have not moved very much since R v Mbombela, above. Our legal system has not evolved effectively with time. The values of some cannot be imposed on others without attracting deserved criticism. Furthermore it is untenable in a civilised legal system to punish those who are in truth without fault. It is therefore my submission that if we are to find fault or blame in an actor, this can only tenably be done by reference to that actor's capabilities and this is best achieved by means of the subjective test. Firstly, this will not result, I submit, in a significant change in the number of convictions; most people are capable of meeting the standard of the reasonable man.³⁵⁵ Secondly, the test could be easily formulated thus:

1. Could the accused have reasonably foreseen the possibility of the occurrence?
2. Could the accused have reasonably taken steps to have guarded against the possibility?
3. Did the accused fail to take such steps?

³⁵⁵ Whiting 1991: 446

In the following sections I wish to deal with criticisms of the subjective test to reveal that they are without substance.

II

Snyman suggests that there are two principal objections to the subjective test, namely that it is impracticable and dangerous, the former:

because a court would then in each case have the wellnigh impossible task of determining X's real knowledge, ability, background, emotional life, degree of intelligence and so forth.³⁵⁶

This is, with respect, not a valid objection to the subjective test. Even though the State will be required to prove beyond reasonable doubt that the accused was negligent, the accused will have to, as with any other defence, lay the basis of his defence.³⁵⁷ I have no doubt that the courts will have as little difficulty in dealing with the validity of this defence as they have with any other defence raised by an accused. It could also have been said that to determine intention, not least of all *dolus eventualis*, is a well-nigh impossible task; but the courts are able to do this by inferring from the proven facts. There is no reason why a subjective test for negligence should prove any more difficult.

³⁵⁶ Snyman 1984: 183

³⁵⁷ Whiting 1991: 447 argues that the reasonable man test would be "presumptively the appropriate test."

In any event to determine negligence objectively is on the face of it also well-nigh impossible for it requires determining what standard of conduct the reasonable man would adhere to. De Wet likewise does not consider the subjective test any more difficult than the objective test:

Teen die subjektiewe benadering kan miskien die beswaar geopper word dat dit moeilik aanwendbaar sal wees in die praktyd. Hierdie beswaar is net in skyn 'n beswaar. Die beoordeling van nalatigheid op 'n subjektiewe basis is tog seker nie moeiliker as die vasstelling van die "redelike man" onder die omstandighede sou gedoen het nie.³⁵⁸

Only the very vaguest of guidelines are followed in the objective test, and the standard is largely a matter of conjecture:

For the prudence and circumspection which *Carpovius* suggests as a test of due care in such cases is in effect the standard of care which a reasonable man would observe. The difficulty of defining culpable negligence apart from some such test is very great. Even so accurate and precise a writer as Sir Fitzjames Stephen does not attempt it. "What amount of negligence can be called culpable," he says, "is a question of degree for the jury, depending on the circumstances of each case." (*Digest of Criminal Law: Ch. 22, Art. 232.*) An unsatisfactory position indeed.³⁵⁹

With regard to the dangerousness of the subjective test Snyman has the following to say:

It would be dangerous because those lacking ability, skill and experience would then have no incentive to acquire the knowledge and skill of a reasonable man.³⁶⁰

³⁵⁸ De Wet 1985: 161/3

³⁵⁹ per Innes CJ in *R v Meiring* 1927 AD 41 at 46

³⁶⁰ Snyman 1984: 18

Such a proposition hardly accords with common sense and experience. It is doubted that the fear of conviction on the basis of the subjective test is ever a demotivating factor behind gaining skills and experience. Alternatively it is unlikely that a potential criminal will say to himself: "Let me remain dull and unskilled so that if I ever decide to lead a life of crime I will be able to rely on my dullness and ignorance as an excuse." A person who says to himself "I would like to deal in unwrought gold but I have no idea if it is legal or not. If it is illegal and I try to find out but am still not completely certain and go ahead in any case, I might be acting negligently because having made initial enquiries I could really have found out"³⁶¹ rather than escape liability may be found to have *dolus eventualis*.

Snyman goes on to say that:

Each individual would then be measured only according to his own abilities: for example, an unskilled or weak-sighted driver would not be punishable for culpable homicide if because of these deficiencies he caused an accident in which other people were killed.³⁶²

Interestingly Snyman goes on to refute his own argument:

If X knew that he was likely to suffer epileptic fits, but nevertheless drove a motor car, and then suffered a fit while driving, thereby causing an accident in which Y died, he would be negligent in respect of Y's death, not because he was an epileptic, but because he drove a

³⁶¹ such a convoluted argument on the part of a potential criminal probably contains its own refutation for the argument itself is probably evidence of his capabilities of finding out the law!

³⁶² Snyman 1984: 183

motor car when as a reasonable person he should have foreseen that he might suffer a fit while driving.³⁶³

With the only difference being that in the former example the driver was myopic and in the latter example epileptic, the two examples are on all fours with each other. The case of the myopic driver obfuscates the issue because the real enquiry is into the reasonableness of the actor's conduct not the physical disability. Even for a physically fit person it may be unreasonable for him to drive in a particular situation just as it may be reasonable for him to drive in another.

Snyman makes another important error in interpreting the subjective test. He holds that the accused is measured according to his own "abilities"³⁶⁴ where in actual fact the accused is measured according to his own capabilities, that is, what he is potentially able to do. In other words a naturally clumsy (his limited abilities) person who causes a motor vehicle accident because of his clumsiness will be able to escape liability. However if it is found that he knew he was clumsy and that his clumsiness could lead to a motor vehicle accident, he may certainly be found to be negligent. If he was aware of his clumsiness (his mental capabilities) but always believed with extra effort he would be able to overcome his clumsiness, he will again not escape liability. Given the history of the failure of his efforts to overcome his clumsiness, it would have been unreasonable for him to

³⁶³ Snyman 1984: 190

³⁶⁴ Snyman 1984: 183

hope that in this particular situation he would finally triumph over his clumsiness.

It might also be argued that a subjective test for negligence will provide an easy escape for the negligent. But this did not happen when ignorance of the law became an excuse,³⁶⁵ when intoxication³⁶⁶ and provocation³⁶⁷ could get an accused off murder, and when it became defensible to kill in order to protect property.³⁶⁸ Such fears show no faith in the competence of our courts to dismiss specious defences. Hugo J had no difficulty in finding that it was reasonable for the accused to believe in the tikiloshe. Why should any other subjective qualities prove any more difficult?

III

Du Plessis is also critical of the subjective test arguing that such a test would involve the court in an endless enquiry. To this argument it may again be said that the accused would be required to lay the basis of his defence. In support of his contention of the difficulties involved in the subjective test he gives the following rather outlandish scenario:

If in the light of the subjective test for negligence, we consider the famous example of the Batonka fisherman contrasted with the university professor and adapt it to

³⁶⁵ S v De Blom 1977 (3) SA 513 (A)

³⁶⁶ S v Cretein 1981 (1) SA 1097 (A)

³⁶⁷ S v Arnold 1985 (2) SA 215 (C); S v Wiid 1990 (1) SACR 561 (A)

³⁶⁸ Ex parte Minister of Justice In re S v Van Wyk 1967 (1) SA 488 (A)

the facts in Mbombela, we could arrive at the following interesting problem: What if a university professor in anthropology had killed the deceased believing him to be the 'tikoloshe?' This would have given rise to a public outrage. Why would a university professor believe in the existence of a 'tikoloshe'? There may have been subjective factors at work in him which would cause such a belief to rise to the surface from the depths of his unconscious. Strange things have happened to anthropologists who do field research. Some have commenced as hostile sceptics and ended as complete converts.³⁶⁹

Other than providing little in support of his example (he only refers to an account of a western anthropologist who became a voodooist in Haiti and to the "early history of St Paul")³⁷⁰ the reader's imagination is stretched to unacceptable limits in this example. In any event the example dazzles rather than deals with the problem. Should in the unlikely event the professor of anthropology believe in the tikoloshe then there is no basis in fairness to hold him liable for acting on those beliefs. The example is also unfortunately undercut by an implicit criticism of a belief in the tikoloshe as opposed to a belief in a western god, for surely the reasonable man believes in god? The example again reveals that the reasonable man concept is not free of implied values.

IV

Hunt, in the 1970 edition of his book, is critical of the subjective test because, for example, a hot-tempered person may kill somebody should he lose self-control, which he may

³⁶⁹ Du Plessis 1986: 108/9

³⁷⁰ Du Plessis 1986: 109, notes 38 & 39

easily do, and escape liability; or a clumsy or careless person may escape liability because of his clumsiness; or that the religious person may believe his seriously ill child will be cured by faith and not medicine. Botha convincingly dismisses the first two examples³⁷¹ but it is my respectful submission that Botha's response to the problem of the religious actor³⁷² is not convincing. If a religious person sincerely believes that his child will be healed by faith, then it might not be said that subjectively tested the actor was blameworthy. Is this then not a flaw in the subjective test? Not at all. It is not the purpose of the criminal law to convict all accused persons but to convict only those who are to blame for their actions, or, are found to be blameworthy. If the religious parent who acted without subjective *mens rea* is acquitted then the criminal system has treated him justly. To convict him by means of the objective test would not be just. Adherents of the subjective test should not by all manner of strained argument bring the results of the subjective test into accord with those of the objective test. They cannot be so brought into accord and that is the very reason why the subjective test is advocated. It is the objective test that may unjustly convict a

³⁷¹ He argues, firstly, that if an actor knew he was apt to lose his temper he may be held liable for foreseeing the probability of killing someone in such a situation and so not avoiding the situation. Secondly, the clumsy person's liability will also be determined by his foreseeability of the results of his clumsiness. See also my discussion of this problem in Chapter II (v) below.

³⁷² Botha 1977: 38 "If the court further finds that despite his religious beliefs, the accused ought to have foreseen the possibility of death, he will have acted with *culpa*."

blameless person. The subjective test acquits the same person.

V

To all the criticisms of the subjective test Bertelsmann has a most common sense response:

Suffice to say, with great respect, that if they were insuperable, the abolition of the subjective test would, at least, be under consideration in those countries where in living memory the test has always been applied because of the *mens rea* principle.³⁷³

Furthermore, other than De Wet (and formerly De Wet and Swanepoel) who has always advocated the subjective test, recently in revised editions of earlier texts, the subjective test has attracted favourable comment from some of our leading writers in criminal law. Firstly, Burchell and Hunt have held:

However, as has been pointed out, properly speaking, the objective test of the reasonable man should be confined to determining the issue of the unlawfulness of the accused's conduct, and should not be applied also to his personal characteristics since they are relevant to the accused's individual blameworthiness which is a different issue and one that should be judged subjectively.³⁷⁴

Secondly a similar position has also been advocated by Snyman:

It follows that the determination of negligence comprises both an objective and a subjective test. It

³⁷³ Bertelsmann 1975: 62

³⁷⁴ Burchell and Hunt 1983: 199

is just as wrong to allege that the test to determine negligence is purely objective as it is to allege that it is purely subjective. The objective test is necessary in order to determine whether there was wrongdoing. Only if it is clear that there was wrongdoing (that is unlawful conduct complying with the definition of the proscription), is it necessary to ask whether there was also *mens rea* in the form of negligence; it is then necessary to apply a subjective test.³⁷⁵

VI

Burchell and Milton³⁷⁶ acknowledge that the pure objective test is potentially unfair but do not concern themselves with any of remedies ranging from "a purely subjective assessment of negligence to the introduction of subjective factors into an otherwise objective test of reasonableness"³⁷⁷ Instead they suggest a unique solution.³⁷⁸ They suggest that the already subjective enquiry into criminal capacity, developed over the past decade with regard to such factors as intoxication and provocation, could be further developed to take into account considerations such as illiteracy and belief in the supernatural, and then if applied could obviate the unfairness in such cases as S v Mbombela, above. An important premiss to their solution is that it is appropriate to a heterogeneous society such as South Africa and particularly where the society is striving to move away from injustice to one based on the rule of law and the elimination of prejudice and discrimination. The solution is an appealing one especially as it deals with the problem of

³⁷⁵ Snyman 199: 226

³⁷⁶ Burchell & Milton 1991: 305 - 307

³⁷⁷ Burchell & Milton 1991: 304

³⁷⁸ Much the same solution is suggested by Burchell 1991.

unfairness and possibly achieves the same result as would a subjective test for negligence. However there are a number of problematic factors that render the solution unconvincing.

Firstly, they admit that their solution would diminish³⁷⁹ the unfairness of the objective test. Why it diminishes and not eliminates potential unfairness is not clear; no hypothetical examples are provided but clearly they are acknowledging at least impliedly that there may still be an inadequacy with their solution.³⁸⁰

Secondly, they wish to retain the objective test for negligence³⁸¹ particularly as South Africa emerges into a new and just society. The objective test will reveal an even-handed approach from the bench. However this argument is based on a hope that the bench will be more fully representative of society and will be able to apply a fair objective test. (Why this objective approach should be perceived by the public as even-handed as compared to the subjective capacity enquiry is not explained.) The argument with respect misses the point and conflates criticism of the

³⁷⁹ see also Burchell 1991: 111

³⁸⁰ Possibly the learned authors envisage a situation where an actor will be found to have criminal capacity and be found liable on the objective test whereas he would not be liable on the subjective test; but without hypothetical examples it is not clear why the term "diminished" is used.

³⁸¹ They do not state this in so many words but it is apparent from one of the reasons for the capacity test being an appropriate solution to the problem or unfairness: "With a Bench which is fully representative of the major sections of the community, this even-handedness can more realistically be attained and a uniform standard will play a part in removing the perception of sectionalism" at 305.

objective test with the debate concerning the composition of the bench. Theoretically the pure objective test cannot vary irrespective of who is on the bench. By acknowledging that in practice it does, simultaneously acknowledges that the pure objective test may not always be applied in practice. So why refer to it as even-handed, and why retain it at all? Possibly the learned authors are referring to the relative objective test as they argue that an even-handed approach will remove the "perception of sectionalism."³⁸² Furthermore, irrespective of the composition of the bench an objective test may still be unfair. Finally, this argument relies on the hope that the bench in the future will be more representative of the South African population. While I cannot go into this vexed debate, suffice to say that this hope may be more difficult to achieve than Burchell and Milton envisage.

Thirdly, they argue that their solution would be "fully in keeping with existing, and recent, case authority."³⁸³ This is not strictly correct as a number of cases have advocated a

³⁸² Burchell & Milton 1991: 307; Burchell 1991 at 111 elaborates on this point: "Just as scepticism has arisen over the current emphasis by the government on group rights, so distrust may be generated by a sectional approach to the standard of reasonableness." This argument simultaneously reveals that the relative objective test may not solve the problems of the pure objective test, and in fact may raise further unforeseen problems.

³⁸³ Burchell & Milton re-interpret the "could and should" phrase of Rumpff CJ in S v Van As 1976 (2) SA 921 (A) at 927H and hold that the "could" refers to the capacity enquiry (and the "should" to the negligence enquiry). With respect it is submitted that this is a strained interpretation and that there is nothing in the judgment which justifies it.

relative objective test in an attempt to deal with the problem of unfairness. We would first have to reject the judgments applying the relative objective test and re-establish the prominence of the pure objective test. This would not be difficult but it would go contrary to a developed (and possibly developing) trend.³⁸⁴

Fourthly, they introduce a restriction to the subjective capacity enquiry which is, with respect, not justifiable. They hold that any belief based on racial prejudice should not be tolerated and that we have all "had the opportunity to know that racial prejudice and discrimination are unacceptable, particularly if we live in a society where we have continual contact with the mass media and the contemporary emphasis on basic rights and liberties."³⁸⁵ Presumably they intend this restriction to pre-empt a defence something like: "I was so blinded by racial hatred that I did

³⁸⁴ the most recent decision being S v Ngema 1992 (2) SACR 561 (D); Burchell contends that the relative objective test (admittedly he does not use that phrase) is a "...compromised standard applied as a temporary device to overcome injustices. Although the individualised standard of reasonableness is not necessarily racially sectional, it may be interpreted in this way or viewed as smacking of paternalism" 1991: 112. It is submitted that the first part of this quotation can only be referring to the relative objective test such as in S v Ngema, above. Why this is a "compromised standard" is not clear unless Burchell considers a departure from the pure objective test a compromise. Furthermore why this should be considered a "temporary device" is also not clear. The last sentence in the quotation appears to refer to the subjective test. Unfortunately Burchell's failure to distinguish between the relative objective test and the subjective test obfuscates his argument. Finally it is unclear why a subjective test should be viewed as racial and paternalistic yet a subjective capacity enquiry which would rely on the same subjective criteria would not.

³⁸⁵ Burchell & Milton 1991: 307

not know what I was doing when I shot at the crowds of people of the racial group which I hate." This is an argument based on social expediency rather than legal validity. If a court indeed finds that a person was indeed so blinded by racial hatred that he lacked criminal capacity, then on what legal basis can he be found to be liable? Of course his actions are reprehensible, but that is not the only issue in a criminal trial. If he lacks capacity, the matter should end there and then with his acquittal. (The same would apply in respect of the subjective test for negligence.) Why introduce a fiction into the capacity enquiry? Does this not open the door to other exceptions, such as religious intolerance, and also undermine the very strength (its subjective nature) of the test?

Finally, it is submitted that it is not justifiable to eliminate the problem of unfairness through what is essentially the back door. The objective test for negligence is potentially unfair³⁸⁶ and so it is that test which should be abandoned in favour of a subjective test for negligence. Should a capacity enquiry render the same result, that is all very well, but it fails to deal with the problem where it lies.

³⁸⁶ The unfairness of the objective test is acknowledged by Burchell & Milton 1991 at 304.

CONCLUSION

It is all very well to play with fictions in private law, but in criminal law it becomes a very dangerous method.³⁸⁷

It has been argued in this essay that the objective test for criminal negligence is unsatisfactory because of its artificial or fictional nature and therefore because of its potential for unfairness or injustice. For the incapable actor it unreasonably sets an unattainable standard. This has been acknowledged by the courts albeit largely by implication. Consequently the courts have loosened the grip of the pure objective test so much so that it has been argued that there has been a swing towards applying a subjective test. This argument however does not satisfactorily explain the development in the test for negligence. Instead a more restricted version of the objective test has been applied so that the reasonable man is not too far removed from the actor but bears some more realistic representation of the actor making the test a fairer one. It may be argued that the test has been applied differently to statutory crimes on the one hand and culpable homicide on the other; the former attracting at times a subjective test and the latter a restricted objective test. This restricted objective test is what I have referred to as a relative objective test. It is I submit analytically necessary to identify it as such because it reveals that the fundamental criticism of the pure

³⁸⁷ Bodenstein 1919: 345

objective test has not been addressed, namely its potential for unfairness and its potential for a finding that an actor acted with *mens rea*, whereas in truth he did not. If however the objective test is to be so restricted such that the reasonable man virtually resembles the actor, the criticisms may be addressed but then there is no reason for retaining the objective test in any form. Furthermore the courts' differing approaches to statutory negligence and to common law negligence should be brought into accord. The proper approach would be to jettison the objective test recognising it for the fiction that it is and to apply consistently to all negligence offences, in its stead, the subjective test.

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