



**UNIVERSITY OF  
KWAZULU-NATAL**

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**INYUVESI  
YAKWAZULU-NATALI**

**A COMPARATIVE STUDY PERTAINING TO THE LAWS  
OF GERMANY AND AMERICA IN RESPECT OF THE  
TEST FOR *DOLUS EVENTUALIS* WITH A SPECIFIC  
FOCUS ON THE CRIMES OF MURDER AND CULPABLE  
HOMICIDE**

**BY**

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This dissertation is submitted in partial fulfilment of the regulations of the LL.M Degree in  
Advanced Criminal Justice at the University of KwaZulu-Natal.

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As the candidate's supervisor, I agree to the submission of this dissertation.

A handwritten signature in black ink, appearing to read 'Franaaz Khan', is written over a horizontal line.

**DR FRANAAZ KHAN**

# DECLARATION

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I, Kirstin Beverley Hagglund, do hereby declare that the dissertation titled ‘A Comparative Study Pertaining to the Laws of Germany and America in Respect of the Test for *Dolus Eventualis* with a Specific Focus on the Crimes of Murder and Culpable Homicide’ is my own work (except where referenced) and that all sources used and referred to have been acknowledged in full.

This dissertation is made available for photocopying and for inter-library loan.

**Signed:** .....

**Date:** 20<sup>th</sup> December 2017

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## ABSTRACT

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*Dolus eventualis* has correctly been described as an ‘enigma’. Not only has it been variously described by the courts, but they have applied the two-stage test, the cognitive and conative component, without providing an in-depth analysis of it means. Both *dolus eventualis* required for murder and conscious negligence required for culpable homicide contain an element of subjective foresight of the remote possibility of death occurring. As a result, the distinction between murder and culpable has become confused over the years, evident in the courts vacillating between findings of murder and culpable homicide. Regarding the cognitive component, the lack of clarity lies in the degree of foresight which is required, and with regard to the conative component, not only has it been variously described, but it is labelled ‘an unnecessary appendage’. Considering this lack of clarity, there exists a need to examine the test for *dolus eventualis* in the case of murder and to determine whether it can be distinguished from *culpa*, in the case of culpable homicide. German law is faced with the same lack of clarity when trying to demarcate *bedingter Vorsatz* from *bewusste Fahrlässigkeit*, the equivalent of South African *dolus eventualis* and conscious negligence respectively. American law is also faced with difficulties when trying to distinguish cases of manslaughter, the South African equivalent of culpable homicide, from ‘extreme indifference’ murder which occurs under substantially the same circumstances as *dolus eventualis*. Therefore, South African, German and American law and academic opinion is consulted to establish how the respective countries have dealt with the conflation of murder and negligent killings. This has been done by conducting desktop-based (digital and manual) research. From the findings of the research, the current test for *dolus eventualis* cannot properly be distinguished from cases of culpable homicide and should be reformulated to include foresight of a real, reasonable or substantial possibility of death ensuing. This creates a higher standard of proof which is appropriate for the seriousness of the crime of murder and allows for the contentious conative component to be dispensed with. However, if death was not foreseen as probable, it needs to be asked whether the accused’s conduct offends the legal system to cover those situations in which the accused’s conduct has no social utility and displays an extreme indifference to the value of human life.

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# CHAPTER ONE

## INTRODUCTION AND OVERVIEW

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### 1.1 INTRODUCTION AND BACKGROUND

MacKinnon<sup>1</sup> correctly points out that the meaning of murder is not self-evident, and that ‘both its definition and status relative to other forms of homicide present serious difficulties in criminal law theory.’ Murder is defined as the intentional unlawful killing of a person whilst culpable homicide is defined as the negligent unlawful killing of a person.<sup>2</sup> The sole difference and distinguishing feature between these two crimes, thus, lies in the fault element of the crime which determines whether the unlawful conduct was carried out intentionally or negligently.<sup>3</sup> Fault, referred to as the *mens rea* of the crime, is encapsulated in the Latin maxim ‘*actus non facit reum, nisi mens sit rea*’ which means that ‘an unlawful act does not make a person guilty unless the mind is also guilty.’<sup>4</sup> In terms of modern criminal law, intention does not mean that the accused must have aimed, wanted or meant to commit the crime in question.<sup>5</sup> An accused’s intention, thus, encompasses his ‘conscious acceptance of such risks of unlawful conduct as he foresaw occurring whilst he was pursuing some other aim or object, whether lawful or unlawful.’<sup>6</sup> MacKinnon<sup>7</sup> states that it is this ‘extension of the concept of intention to include foreseen consequences which is at the root of the *mens rea* problem.’ Once we include reference to foresight of consequences the blurring of a distinction between intention and negligence begins.<sup>8</sup>

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<sup>1</sup> P MacKinnon ‘Two Views of Murder’ (1985) 63 (1) *Canadian Bar Review* 130.

<sup>2</sup> G Kemp ... et al. *Criminal Law in South Africa* (2012) 30.

<sup>3</sup> Kemp ... et al. op cit (n2) 30.

<sup>4</sup> Ibid at 182.

<sup>5</sup> Ibid at 183.

<sup>6</sup> Ibid.

<sup>7</sup> MacKinnon op cit (n1) 132.

<sup>8</sup> Ibid.

Intention, also referred to as *dolus*, may take one of three forms, all of which involve a subjective inquiry into the accused's state of mind. The first form, *dolus directus*, occurs where the commission of the crime was the accused's actual goal.<sup>9</sup> The second form, *dolus indirectus*, occurs where the commission of the crime was not the accused's main objective, but he foresaw it as a virtually certain consequence of attaining that objective and persisted regardless.<sup>10</sup> The most contentious form, which deviates from intention in its ordinary sense,<sup>11</sup> and is the subject of this dissertation, is *dolus eventualis*. At present, South African courts conduct a two-stage test to determine whether *dolus eventualis* exists. The first stage, referred to as the cognitive component, asks whether the accused subjectively foresaw the possibility of committing harm. The uncertainty associated with the first stage has been succinctly framed in a question by Hoctor<sup>12</sup> who asks, 'should the cognitive component be limited to foresight of a real or reasonable possibility of harm, or does foresight of a remote possibility suffice for intention?' The second stage, referred to as the conative component, involves the direction of the accused's will towards the foreseen harm.<sup>13</sup> Not only has the conative component been labeled an unnecessary addition, but a lack of clarity exists as to its exact meaning in that it has been variously defined as: 'recklessness'; 'reconciliation with the risk of harm'; 'conscious taking of the risk'; 'persistence in such conduct, despite such foresight'; or a combination of these.<sup>14</sup> Whiting<sup>15</sup> correctly points out that:

'*Dolus eventualis* has become very much a controversial subject in South Africa of recent years. While everyone seems to be agreed that the concept of *dolus* or intention in the criminal law would be too narrow unless it embraced some kind of conscious risk-taking, it is here that unanimity ends. As soon as one goes further and asks how wide the concept of *dolus eventualis* should be and what kinds of conscious risk-taking it should encompass, one encounters differences in opinion.'

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<sup>9</sup> Kemp ... et al. op cit (n2) 184.

<sup>10</sup> Ibid at 185.

<sup>11</sup> CR Snyman *Criminal Law* 4ed (2002) 181.

<sup>12</sup> S Hoctor 'The concept of *dolus eventualis* in South African law – an historical perspective' (2008) 14 (2) *Fundamina: A Journal of Legal History* 22.

<sup>13</sup> S Hoctor 'The degree of foresight in *dolus eventualis*' (2013) 26 (2) *South African Journal of Criminal Justice* 132-133.

<sup>14</sup> Ibid.

<sup>15</sup> R Whiting 'Thoughts on Dolus Eventualis' (1988) 1 (3) *South African Journal of Criminal Justice* 440.

Therefore, although the courts have applied this concept, they have not analysed what it means which has left the gap for negligence to become ‘swamped by a distorted *dolus eventualis*.’<sup>16</sup> Negligence, referred to as *culpa*, may take one of two forms. The first form, inadvertent negligence, occurs where the accused did not subjectively foresee the possibility of his conduct being unlawful, but ought to have foreseen it because a reasonable person in the accused’s position would have foreseen it and taken reasonable steps to guard against it.<sup>17</sup> The second form, referred to as conscious (advertent) negligence, occurs where the accused subjectively foresaw the remote possibility of his conduct causing death, but unreasonably decides that death will not ensue.<sup>18</sup> It is therefore evident that both conscious negligence and *dolus eventualis* require actual subjective foresight of possible death ensuing and that the only difference lies in the attitude of the accused towards this potential result.<sup>19</sup> Consequently, it has been argued that the distinction between *dolus eventualis* and conscious negligence, though theoretically precise, is in fact so slight and artificial that it appears unlikely that it would be of any help in an actual situation.<sup>20</sup> It is for this reason that the distinction between murder and culpable has become confused over the years, evident in the courts vacillating<sup>21</sup> between findings of murder and culpable homicide in cases where the commission of the crime was not the accused’s actual aim or intention, but he subjectively foresaw the possibility that his actions could result in the death of a person. Therefore, no definitive answer exists to one of the most extensively debated questions in criminal law: ‘which consequences foreseen as possible should be considered to have been intended?’<sup>22</sup>

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<sup>16</sup> W Bertelsmann ‘What happened to *luxuria* – some observations on criminal negligence, recklessness and *dolus eventualis*’ (1975) 92 (1) *South African Law Journal* 69.

<sup>17</sup> Kemp ... et al. op cit (n2) 196.

<sup>18</sup> P Carstens ‘Revisiting the relationship between *dolus eventualis* and *luxuria* in context of vehicular collisions causing the death of fellow passengers and/or pedestrians: *S v Humphreys* 2013 (2) SACR 1 (SCA): comment’ (2013) 26 (1) *South African Journal of Criminal Justice* 68.

<sup>19</sup> GJ Brau ‘A Dog Much Confused: The Definition of Intention and Article 15(B) of the Penal Code of Puerto Rico’ (1985) 54 (1) *Revista Juridica de la Universidad de Puerto Rico* 18.

<sup>20</sup> Ibid.

<sup>21</sup> A Paizes ‘*Dolus eventualis* reconsidered’ (1988) 105 *South African Law Journal* 636: ‘judicial pronouncements on this subject have been characterized by vacillation and a surprising lack of clarity.’

<sup>22</sup> Bertelsmann op cit (n16) 68.

*Dolus eventualis* and conscious negligence are, thus, the two forms of fault which will be discussed and analysed in order to find a possible solution to the conflation of the two concepts. German law and academic opinion will be consulted because Germany recognises the same model of *dolus eventualis* (*bedingter Vorsatz*) and conscious negligence (*bewusste Fahrlässigkeit*), and is therefore presented with the same difficulties when trying to demarcate these two forms of fault. Furthermore, American law and literature on ‘extreme indifference’ murder, which occurs under substantially the same circumstances as *dolus eventualis*, and its distinction from manslaughter, which is the equivalent of culpable homicide, will also be looked at for guidance on to how to distinguish cases of murder from culpable homicide where it was not the accused’s main objective to cause death, but he foresaw it as a possibility of his proposed conduct.

## 1.2 THE LEGAL FRAMEWORK OF SOUTH AFRICA

*Dolus eventualis* forms an integral part of criminal liability in South African criminal law and has been recognised by the Constitutional Court in *S v Coetzee*<sup>23</sup> and *Thebus v S*.<sup>24</sup> The test for *dolus eventualis* in the case of murder is governed by the common law and is therefore developed by the courts through the doctrine of precedent. Since the case of *R v Nsele*,<sup>25</sup> the subjective test for *dolus* has been applied by South African courts which asks whether the accused *himself* foresaw the consequences of his act.<sup>26</sup> Forsyth<sup>27</sup> states that the pure

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<sup>23</sup> 1997 (3) SA 527 (CC) para [177]: ‘What is also clear however, from an examination of our law and that of foreign jurisdictions is that it is widely recognised (both in our common law and in the law of other countries) that the culpability required to establish criminal liability need not in all circumstances be evidenced by direct intent (*dolus directus*) on the part of the accused to commit a criminal act. In our own law other forms of intent, such as *dolus eventualis*, have been recognised as sufficient to meet the requirement of culpability.’

<sup>24</sup> 2003 (6) SA 505 (CC) para [49]: ‘If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue.’

<sup>25</sup> 1955 (2) SA 145 (A) at 147C-D.

<sup>26</sup> JM Burchell *Principles of Criminal Law* 4ed (2013) 353.

<sup>27</sup> ENCA ‘Oscar Pistorius: Is the ‘Link’ in *Dolus Eventualis* still Missing? (Part 3)’ available at <http://www.enca.com/opinion/%E2%80%9Coscar-pistorius-link%E2%80%99-dolus-eventualis-still-missing%E2%80%9D-part-3>, accessed on 03 October 2017.

subjectivity of the mental element required for murder is one of the ‘great achievements’ of legal purism in systems such as South African law. This means that intention will not exist where the accused himself did not foresee the consequences of his actions, but a reasonable person would, or ought to, have foreseen them.<sup>28</sup> As held in *R v K*,<sup>29</sup> ‘the words knew or ought to have known contrast knowledge with a merely reprehensible failure to know and wrongly import that either is sufficient for proving intention.’ This is due to the fact that the words ‘knew or ought to have known’ indicate an objective test which compares the accused’s conduct with a standard of conduct that is reasonable in the circumstances. In *S v Sigwahla*,<sup>30</sup> the Appellate Division held:

‘The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, a distinction between subjective foresight and objective foreseeability must not become blurred.’

However, it is often difficult to prove intention where the accused denies that he foresaw the risk of harm. Consequently, inferential reasoning is applied in terms of which the court attempts to ascertain the accused’s state of mind at the time of committing the crime. The court considers all the facts and circumstances that must have been known to the accused, together with the manner in which the accused acted with that knowledge, and it draws an inference as to whether or not the accused possessed foresight.<sup>31</sup> Therefore, Steyn<sup>32</sup> states that to establish intention, South African criminal law ‘compels a judge to step into the very body, mind and soul of the specific accused, with *all* his or her characteristics and fears, however unreasonable or irrational they may be at the time.’ As held in *S v Mini*,<sup>33</sup> ‘a trier of fact should try mentally to project himself into the position of that accused at that time.’ In *S v Sigwahla*,<sup>34</sup> the court

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<sup>28</sup> Burchell op cit (n26) 353.

<sup>29</sup> 1956 (3) SA 353 (A) at 356.

<sup>30</sup> 1967 (4) SA 566 (A) at 570C-E.

<sup>31</sup> Kemp ... et al. op cit (n2) 187.

<sup>32</sup> *Oscar Pistorius: Is the ‘Link’ in Dolus Eventualis still Missing?* op cit (n27).

<sup>33</sup> 1963 (3) SA 188 (A) at 196.

<sup>34</sup> 1967 (4) SA 566 (A) at 570E-F.

held that ‘to constitute proof beyond reasonable doubt, the inference must be the only one which can reasonably be drawn.’

In the case of a consequence crime, such as murder, it is said that the accused must have subjectively foreseen the possibility of killing the deceased or someone in the same position, category or class in substantially the same manner as he did kill.<sup>35</sup> However, in *S v Lungile*,<sup>36</sup> although the accused killed the deceased in an unusual manner, the Supreme Court of Appeal drew the inference that the accused foresaw this specific manner of death, amongst other possibilities. Therefore, *Kemp et al*<sup>37</sup> points out that proving foresight of the causal sequence is not likely to be an obstacle in cases where the accused possesses normal intelligence and life experience.

The vast majority of cases to date<sup>38</sup> have established that the degree of foresight needed to establish the cognitive component of *dolus eventualis* is merely ‘the possibility of harm occurring.’<sup>39</sup> In terms of Black’s Law Dictionary, ‘possibility’ has been defined as ‘an uncertain thing which may happen’<sup>40</sup> and therefore the harm which results need not have been a certain result of the accused’s conduct, but there exists a chance that it may or may not ensue. In *R v Horn*,<sup>41</sup> it was held that ‘it would be incongruous to limit a wrongdoer’s constructive intent to cases where the result which he has foreseen was likely to cause death.’ As such, the foresight requirement has been framed in unqualified terms.<sup>42</sup> In *S v De Bruyn*,<sup>43</sup> the Appellate Division held, *obiter*, ‘[i]f under cross-examination, an accused were to admit that he foresaw the possibility of death, on the footing that anything is possible, that would contribute to a

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<sup>35</sup> *Kemp ... et al. op cit* (n2) 187.

<sup>36</sup> 1999 (2) SACR 597 (SCA) paras [15] – [18].

<sup>37</sup> *Kemp ... et al. op cit* (n2) 190.

<sup>38</sup> *S v Mbatha* 1987 (2) SA 272 (A) at 285; *S v Nomakhlala* 1990 (1) SACR 300 (A) at 303; *S v Nango* 1990 (2) SACR 450 (A) at 457; *S v Dlamini* 1991 (2) SACR 655 (A) at 664-5; *S v Morgan* 1993 (2) SACR 134 (A) at 174; *S v Terre Blanche* 2001 JDR 0134 (SCA) para [6]; *S v Erasmus* 2005 (2) SACR 658 (SCA) para [10]; *S v Molimi* 2006 (2) SACR 8 (SCA) para [35].

<sup>39</sup> Hoctor *op cit* (n13) 136.

<sup>40</sup> The Law Dictionary ‘What is Possibility?’ available at <http://thelawdictionary.org/possibility/>, accessed on 02<sup>nd</sup> August 2017.

<sup>41</sup> 1958 (3) SA 457 at 467B.

<sup>42</sup> Hoctor *op cit* (n13) 137.

<sup>43</sup> 1968 (4) SA 498 (A) at 511.

conviction of murder.’ However, there does exist authority for foresight of a reasonable or real possibility and the South African courts waver between, on the one hand, recognising foresight of a remote possibility and, on the other, demanding foresight of a real, reasonable or substantial possibility.<sup>44</sup> In *S v Cameron*,<sup>45</sup> the Supreme Court of Appeal held that for *dolus eventualis* to be present, the accused must have ‘subjectively appreciated the reasonable possibility.’ In *S v Ostilly*,<sup>46</sup> the court held that to prove *dolus eventualis* ‘it must be shown that a real possibility of that consequence resulting was foreseen.’ Therefore, Hoctor<sup>47</sup> points out that the courts have on occasion qualified the degree of foresight required for *dolus eventualis*. However, they have not authoritatively dismissed requiring an unqualified degree of foresight for liability to arise, which adds to the confusion surrounding the test for *dolus eventualis*.

The conative component of *dolus eventualis* was effectively introduced into our law in 1945 by the case of *R v Valachia*<sup>48</sup> in which Greenberg JA relied on Section 140 of the Transkeian Penal Code (Act 24 of 1886, Cape) to support his finding that murder will have been committed where it is proved, by inference, that the accused caused death to another by conduct which they ‘must have known to be of such a dangerous character that death would be likely to result therefrom, and were reckless whether it did so or not.’ Greenberg JA<sup>49</sup> stated:

‘It is interesting to see that sec. 140 of the Transkeian Penal Code ... which has not infrequently been found to have incorporated in its provisions the correct view of what our law is, provides that culpable homicide becomes murder in a number of cases, one of which is that “if the offender means to cause the person killed any bodily injury, which is known to the offender to be likely to cause death, and if the offender, whether he does or does not mean to cause death, is reckless whether death ensues or not.”’

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<sup>44</sup> Burchell op cit (n26) 357.

<sup>45</sup> 2005 (2) SACR 179 (SCA) at 183F-G.

<sup>46</sup> 1977 (4) SA 699 (D) at 728D-E.

<sup>47</sup> Hoctor op cit (n13) 145.

<sup>48</sup> 1945 AD 826 at 831.

<sup>49</sup> Ibid.

Therefore, the ‘recklessness’ contained in the conative component entails that the accused subjectively reconciled himself to the possibility of death ensuing<sup>50</sup> which means that the accused decided to proceed with his action despite foreseeing the possibility that death may follow. To him it was immaterial whether death resulted from his actions or not<sup>51</sup> and he did not allow the possibility of killing another human being to deter him from his proposed course of conduct. In other words, he consciously accepted the risk.<sup>52</sup> There is rarely direct evidence of the existence of the conative component and therefore it is inferred from the accused’s deliberation and preparation, together with a failure to render assistance.<sup>53</sup> An array of terminology exists to describe the conative component ranging from, as was held in *Boshoff v Boshoff*,<sup>54</sup> ‘eager desire at the one end and passive and reluctant acquiescence at the other.’ Some judgments<sup>55</sup> refer to the conative component as ‘insensitive recklessness’ or ‘callous indifference’ but *Kemp et al*<sup>56</sup> states that this is misleading. The accused’s feelings towards the risk is irrelevant when determining the conative component and it is irrelevant whether the accused was hoping that the risk would not materialise.<sup>57</sup> What matters is simply that the accused consciously proceeded to take the risk. As held in *R v Peverett*:<sup>58</sup>

‘In law desire must be distinguished from intention. The consequences which a man contemplates or expects to result from his act are the consequences which he “intends”, but ... such consequences may not always be desired. Though a desired consequence is usually an intended one, an intended consequence is not always a desired one.’

The test for *culpa*, in the context of culpable homicide, originates in the common law and is thus continually developed by the courts. In order to determine whether the accused was negligent, the court measures the foresight and conduct of the accused with that of the reasonable man, which asks whether a reasonable person in the position of the accused would

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<sup>50</sup> Carstens op cit (n18) 68.

<sup>51</sup> CR Snyman *Criminal Law* 6ed (2015) 181.

<sup>52</sup> Ibid.

<sup>53</sup> M Loubser & M Rabie ‘Defining Dolus Eventualis: A Voluntative Element’ (1988) 1 (3) *South African Journal of Criminal Justice* 420.

<sup>54</sup> 1987 (2) SA 694 (O) at 699-700.

<sup>55</sup> *S v De Bruyn en ‘n Ander* 1968 (4) SA 498 (A); *S v Mavhungu* 1981 (1) SA 56 (A).

<sup>56</sup> *Kemp ... et al.* op cit (n2) 190.

<sup>57</sup> Ibid.

<sup>58</sup> 1940 AD 213 at 219.

have foreseen the harm ensuing and taken steps to prevent it. In the delictual case of *Herschel v Mrupe*,<sup>59</sup> the Appellate Division held that:

‘The reasonable person is not a timorous faintheart always in trepidation lest he or other suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances.’

Furthermore, in *S v Burger*,<sup>60</sup> Holmes JA states:

‘One does not expect of a *diligens paterfamilias* (the reasonable man) 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.’

The relationship between *dolus* and *culpa* has become a grey area of law since the decision of *S v Ngubane*<sup>61</sup> in which the Appellate Division held that ‘a man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing.’ Therefore, the court went on to say that ‘the concept of conscious negligence clearly establishes that foresight *per se* does not exclude negligence.’<sup>62</sup> Conscious negligence occurs when the accused foresaw only a remote possibility of harm ensuing, but unreasonably trusts or is confident that the harm will not occur, and therefore failed to take the steps that a reasonable person would have taken to prevent harm.<sup>63</sup> Kemp *et al*<sup>64</sup> states that the greater the risk of the possibility of death ensuing, the greater the duty placed on a person to prevent the possibility from materialising. Conscious negligence therefore differs from traditional objective negligence which, in most cases, consists of inadvertence on the part of the accused and a failure to measure up to the foresight required of the reasonable person.<sup>65</sup> However, the courts scarcely refer to conscious negligence and the most commonly quoted passages on conscious negligence come from *S v Van Zyl*<sup>66</sup> in which the Appellate Division held that an accused who foresaw the harm may be guilty of

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<sup>59</sup> 1954 (3) SA 464 (A) at 477.

<sup>60</sup> 1975 (4) SA 877 (A) at 879D-E.

<sup>61</sup> 1985 (3) SA 677 (A) at 685A-B.

<sup>62</sup> *Ibid* at 686B-C.

<sup>63</sup> Burchell *op cit* (n26) 373.

<sup>64</sup> Kemp... *et al.* *op cit* (n2) 201.

<sup>65</sup> Burchell *op cit* (n26) 374.

<sup>66</sup> 1969 (1) SA 553 (AD).

negligence only. Therefore, the main difference between *dolus eventualis* and conscious negligence, in terms of the current legal framework, rests on whether the accused reconciled himself to the foreseen possibility, irrespective of the degree of foresight.

### **1.3. THE LEGAL FRAMEWORK OF GERMANY AND AMERICA**

The German concepts of *bedingter Vorsatz* and *bewuste Fahrlässigkeit* are almost identical to the South African concepts of *dolus eventualis* and conscious negligence respectively. Furthermore, American ‘extreme indifference’ murder occurs under substantially the same circumstances as *dolus eventualis* and its distinction from cases of manslaughter, the equivalent of culpable homicide in South Africa, has become contested. It is therefore beneficial to consult German and American law and academic opinion in order to establish how they have dealt with the conflation of murder and negligent killings.

#### **1.3.1. ‘Bedingter Vorsatz’ and ‘Bewuste Fahrlässigkeit’ in Germany**

In German law, intention consists of two elements: the accused must have been aware that his conduct fulfilled the definition of a crime, and it must have been his will to do so.<sup>67</sup> Germany, like South Africa, recognises three forms of intent. In the first form, direct intent of the first degree, the accused’s will was to commit a crime, irrespective of foresight. In the second form, direct intent of the second degree, the accused knew or foresaw as certain that, as a result of engaging in certain conduct, he would commit a crime. The last form, *bedingter Vorsatz*, the German equivalent of *dolus eventualis*, exists when the accused foresaw as a possible result of his actions that harm would be caused to another and approved or reconciled himself to that possibility.<sup>68</sup> Therefore, the first leg of the test is concerned with the knowledge and assessment of the possibility of harm by the accused and the second leg is concerned with the accused’s attitude towards the harm.<sup>69</sup> In the *Stakic* judgment,<sup>70</sup> the definition of *dolus eventualis* in

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<sup>67</sup> J Zekoll & M Reimann *Introduction to German Law* 2ed (2005) 392.

<sup>68</sup> Ibid.

<sup>69</sup> G Taylor ‘Concepts of Intention in German Criminal Law’ (2004) 24 (1) *Oxford Journal of Legal Studies* 109-110.

<sup>70</sup> *Prosecutor v. Stakic* Judgment Case No. IT-97-24-T ICTY Trial Chamber 31 July 2003 para 587.

German criminal law was described as follows: ‘if the actor engages in *life-threatening behaviour*, his killing becomes intentional if he reconciles himself or makes peace with the likelihood of death.’ Therefore, Taylor<sup>71</sup> states that the crucial question is whether the accused was ‘prepared to run the risk, knowing that it might materialise and being reconciled to that possibility?’ The accused’s motive has no bearing on criminal liability and therefore whether the accused desired the outcome or not is irrelevant.

Germany also recognises conscious negligence, called *bewusste Fahrlässigkeit*, which contains the same intellectual element as *dolus eventualis*: the accused is guilty for having carried on conduct despite realising that such conduct could lead to unlawful consequences.<sup>72</sup> However, *dolus eventualis* entails the accused having approved of the possible consequences, whereas in the case of conscious negligence, the accused disapproved of them and was confident or had reason to believe that such a consequence would not occur.<sup>73</sup> Therefore, the crucial question to be asked is ‘did the accused lull [him]self into a false sense of security, going ahead with [his] plan in the firm belief that the risk would not materialise.’<sup>74</sup> Accordingly, the accused who recognised the risk of harmful consequences of his actions, but unreasonably relied on their non-occurrence will have acted with conscious negligence.<sup>75</sup> This means that a distinction is drawn between *Hoffen* (hope) and *Vertrauen* (reliance): the hope that foreseen consequences will not ensue does not eliminate intent, but reliance on the possibility of avoiding or preventing these consequences, whether rational or not, does eliminate intent.<sup>76</sup> Taylor<sup>77</sup> provides an example to illustrate the distinction between *bedingter Vorsatz* and *bewusste Fahrlässigkeit* under German law:

‘One example that is commonly used is that of a driver overtaking on a road with insufficient opportunity to check for oncoming traffic. Such a driver, if competent, will realise the

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<sup>71</sup> Taylor op cit (n69) 110.

<sup>72</sup> D Morkel ‘On the Distinction between Recklessness and Conscious Negligence [comments]’ (1982) 30 (2) *American Journal of Comparative Law* 328.

<sup>73</sup> Zekoll & Reimann op cit (n67) 392-3.

<sup>74</sup> Taylor op cit (n69) 110.

<sup>75</sup> C Roxin ‘The Dogmatic Structure of Criminal Liability in the General Part of the Draft Israel Penal Code - A Comparison with German Law’ (1996) 30 (1 & 2) *Israel Law Review* 68.

<sup>76</sup> Ibid

<sup>77</sup> Taylor op cit (n69) 109.

possibility that someone might be coming the other way, and thus will fulfill the first criterion of *dolus eventualis*. But, unless suicidal, he will not fulfill the second, for he will neither approve of the possibility of an accident nor reconcile himself to it. Rather, he will trust in his luck and rely earnestly on the non-occurrence of an accident. Thus, our driver acts only with advertent negligence.’

### 1.3.2. ‘Extreme Indifference’ Murder in America

Under American law, an accused possesses intent to murder when he either desired to kill or knew that his conduct was certain to result in death.<sup>78</sup> ‘Reckless’ killings in which the accused consciously and unjustifiably risked killing another human being are punished as manslaughter, which is the South African equivalent of culpable homicide.<sup>79</sup> Between intentional murder and manslaughter lies ‘extreme indifference’ murder which comprises killings that occur without intention, but ‘deserve society's harshest punishment’.<sup>80</sup> Section 210.2 (1) (b) of the Model Penal Code,<sup>81</sup> which is referred to as the ‘central document of American criminal justice’,<sup>82</sup> defines ‘extreme indifference’ murder as a homicide that ‘is committed *recklessly* under circumstances manifesting *extreme indifference to the value of human life*.’ The distinguishing feature between manslaughter and ‘extreme indifference’ murder is therefore the accused’s ‘extreme indifference to the value of human life.’ According to Section 2.02 of the Code:

‘[a] person acts recklessly... when he consciously disregards a *substantial and unjustifiable risk* that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a *gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation.’

Therefore, with regard to the gravity and utility of the risks, the Code uses the words ‘substantial’ and ‘unjustifiable’. Taking a risk of death, thus, does not raise a question of liability unless the risk is substantial and ‘the social costs outweigh the benefits of the risk.’<sup>83</sup>

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<sup>78</sup> AC Michaels ‘Defining Unintended Murder’ (1985) 85 (4) *Columbia Law Review* 787.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> Hereinafter referred to as the Code.

<sup>82</sup> GP Fletcher ‘Dogmas of the Model Penal Code’ (1998) 2 (1) *Buffalo Criminal Law Review* 3.

<sup>83</sup> GP Fletcher *Rethinking Criminal Law* (1978) 261.

However, the drafters did not provide a definition for the phrase ‘extreme indifference to the value of human life.’ The commentary to Section 210.2 (1) (b) of the Code points out that the drafters intended ‘extreme indifference’ murder to cover homicides that fall short of the *mens rea* required for ‘knowingly’,<sup>84</sup> but are more severe than manslaughter.<sup>85</sup> This has provided little guidance and States have taken numerous and differing approaches in attempting to define ‘extreme indifference’ murder, which will be discussed in chapter two.

#### **1.4. MOTIVATION FOR THE RESEARCH**

Considering the lack of clarity surrounding the test for *dolus eventualis*, which has resulted in a conflation of intention and negligence in cases where an accused foresaw that his conduct could result in death but nevertheless proceeded, I was motivated to examine the current test for *dolus eventualis* in the case of murder and to determine its sufficiency and whether it can be distinguished from *culpa*, in the case of culpable homicide. This determination will be arrived at by consulting not only South African law and academic opinion but also that of Germany and America.

#### **1.5. THE RESEARCH QUESTION**

The research question in this dissertation is as follows:

***To determine whether the current test for dolus eventualis is sufficient in the case of murder and whether it can be distinguished from culpa in cases of culpable homicide by conducting comparative research of German and American law and academic opinion?***

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<sup>84</sup> Section 2.02 of the Model Penal Code states that a person acts ‘knowingly’ with respect to a material element of the crime when: ‘(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is *practically certain* that his conduct will cause death.’ This form of intention therefore mirrors *dolus indirectus* under South African law.

<sup>85</sup> JC Duffy ‘Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder’ (2007) 57 (2) *Duke Law Journal* 429.

## **1.6. OBJECTIVES**

- 1.6.1. To discuss the background and current legal framework of South Africa relating to *dolus eventualis* and *culpa*, Germany relating to *bedingter Vorsatz* and *bewusste Fahrlässigkeit*, and America relating to ‘extreme indifference’ murder and manslaughter;
- 1.6.2. To discuss the literature in South Africa on *dolus eventualis* and *culpa*, with a specific focus on Germany’s *bedingter Vorsatz* and *bewusste Fahrlässigkeit*, and America’s ‘extreme indifference’ murder and manslaughter;
- 1.6.3. To discuss case law in South Africa on the distinction between *dolus eventualis* and *culpa*, in Germany on the distinction between *bedingter Vorsatz* and *bewusste Fahrlässigkeit*, and in America on the demarcation of ‘extreme indifference’ murder from manslaughter;
- 1.6.4. To discuss and analyse the findings of the above as well as put forward recommendations for *dolus eventualis*.

## **1.7. RESEARCH METHODOLOGY**

The methodology adopted in this dissertation is desktop-based (digital and manual). The data comprises case law, textbooks and journal articles. Reference is made to the current legal framework, literature and case law of Germany and America. Therefore, comparative research is conducted.

## 1.8. CHAPTER SUMMARY

*Dolus eventualis* has been correctly described as ‘a concept which can with justification be described as an enigma.’<sup>86</sup> Such justification is based on the fact that the courts have applied the two-stage test, the cognitive and conative component respectively, without providing an in-depth analysis of what each component means. With regard to the cognitive component, the lack of clarity lies in the degree of foresight which is required. Paizes<sup>87</sup> summaries the controversy surrounding this component by asking, ‘must there be foresight of a ‘real’ or ‘substantial’ possibility of that consequence occurring, or does it suffice that there be foresight of a slight or remote possibility?’ It is one of the aims of this dissertation to provide an answer to this question. The conative component has not only been variously described, but has been labelled as ‘superfluous’ and therefore this dissertation aims to ascertain the correct definition and if, indeed, it is necessary. These ‘flaws’ which have been identified by legal academics has left the gap for *dolus eventualis* to be conflated and confused with *culpa*, especially conscious negligence, because both contain subjective foresight of a remote possibility. The abovementioned problems are not only applicable to South African law, but German law is faced with the same questions and lack of clarity when trying to demarcate *bedingter Vorsatz* from *bewusste Fahrlässigkeit*, as well as American law when trying to distinguish cases of manslaughter from ‘extreme indifference’ murder. Therefore, a literature review will be conducted and case law discussed from South Africa, Germany and America in order to find possible solutions to the existing lack of clarity and confusion surrounding the test for *dolus eventualis* where an accused is charged with murder.

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<sup>86</sup> Focus ‘*Dolus eventualis*’ (1988) 1 *SACJ* 414.

<sup>87</sup> Paizes op cit (n21) 636.

## 1.9. CHAPTER BREAKDOWN

- i. **Chapter One:** This chapter provides the introduction, background and current legal framework governing *dolus eventualis* and *culpa* as well as their relationship in South Africa. Furthermore, the current legal framework governing *bedingter Vorsatz* and *bewuste Fahrlässigkeit* in Germany as well as ‘extreme indifference’ murder and manslaughter in America will be discussed. This chapter also provides the motivation, research question, objectives, research methodology and a chapter breakdown.
- ii. **Chapter Two:** This chapter will provide a literature review of the relationship between *dolus eventualis* and *culpa*, seeking to demonstrate and discuss the current shortfalls and problems identified by prominent criminal law authors, as well the main solutions that have been proposed. Theories from Germany on *bedingter Vorsatz* and *bewuste Fahrlässigkeit* and the divergent state approaches from America on ‘extreme indifference’ murder will also be discussed in order to find possible solutions.
- iii. **Chapter Three:** This chapter will provide a discussion of South African case law in which the distinction between *dolus eventualis* and *culpa* has been in issue, German case law in which the distinction between *bedingter Vorsatz* and *bewuste Fahrlässigkeit* has been in issue, as well as American case law on the distinction between ‘extreme indifference’ murder and manslaughter.
- iv. **Chapter Four:** This chapter will comprise a concluding argument and analysis drawn from the preceding discussion, an answer to the research question proposed, as well as any recommendations and reforms that need to be applied to the current test of *dolus eventualis*.

# CHAPTER TWO

## LITERATURE REVIEW

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### 2.1. INTRODUCTION

While the definition of *dolus eventualis* in South African criminal law is contested amongst academics, Hoctor<sup>88</sup> proposes that an examination of academic opinion may provide valuable and persuasive authority which could assist in finding a solution to the current theoretical obstacles surrounding the subject. Therefore, this chapter will provide a literature review which seeks to demonstrate and discuss the current shortfalls associated with the two-stage test for *dolus eventualis*, the cognitive and conative component, as well as any solutions that have been identified by academics. Comparative research will be conducted by consulting academic opinion from Germany on the demarcation of *bedingter Vorsatz* and *bewusste Fahrlässigkeit* and from America on the distinction between ‘extreme indifference’ murder and manslaughter.

### 2.2. THE COGNITIVE COMPONENT OF DOLUS EVENTUALIS

One of the most contentious debates surrounding *dolus eventualis* is the degree of foresight required for the cognitive component. The question posed by Burchell<sup>89</sup> is: ‘given that foresight of a possibility will constitute intention in the form of *dolus eventualis*, does it follow that even the most remote and unlikely possibility, if foreseen, must be taken to have been intended?’ There exist arguments both in favour of foresight of a real, reasonable or substantial possibility and those which favour a remote possibility.

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<sup>88</sup> Hoctor op cit (n12) 23.

<sup>89</sup> Burchell op cit (n26) 356.

Whiting<sup>90</sup> correctly comments that ‘a remarkable disparity’ exists between the statement that foresight of a remote possibility is sufficient for *dolus eventualis* and the degree of foresight that is, in practice, applied by the courts. Paizes<sup>91</sup> states that in no case has the accused been convicted of murder where he foresaw death as a remote and not as a real possibility. Therefore, it is argued that the courts only find *dolus eventualis* to be present when the accused foresaw death as a real or substantial possibility. Burchell and Hunt<sup>92</sup> state that due to the court’s implicit rejection of a remote possibility, the minimum degree of foresight required is foresight of a substantial or real possibility which will confine intention ‘to a state of mind that can properly be regarded as such and keep the dividing line between intention and negligence clearcut.’ Burchell<sup>93</sup> states that where an accused foresaw the possibility of harm materialising as something less than a real possibility, but instead as a remote possibility, *conscious negligence* rather than *dolus eventualis* would be present and the accused would be found guilty of culpable homicide:

‘[I]f ... legal intention is confined to subjective foresight of a real possibility and if foresight of a lesser degree is regarded as conscious negligence, there could be no objection, in the latter kind of case, to liability being dependent upon the taking of an objectively justifiable risk, for an important issue in a case of negligence is whether a reasonable man would have guarded against the risk in question. Thus, where X causes the death of Y which X foresees as a remote possibility his liability for culpable homicide would turn upon whether or not his taking of the risk of Y’s death was justified, judged by the objective standard. In deciding this question many factors would be relevant, eg the degree of remoteness of the risk, whether the risk which the accused takes has a social value which outweighs the social harm of the danger inherent in the risk, the urgent and laudable action in which the accused is engaged and whether the precautions may have been so difficult, inconvenient and costly that a reasonable man would not have guarded against the slightest possibility of even a fatal accident.’<sup>94</sup>

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<sup>90</sup> Whiting op cit (n15) 444.

<sup>91</sup> Paizes op cit (n21) 637.

<sup>92</sup> EM Burchell & PMA Hunt *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* 2ed (by EM Burchell, JRL Milton & JM Burchell) (1983) 146 – 147.

<sup>93</sup> Burchell and Hunt op cit (n92) 148 – 150.

<sup>94</sup> Ibid at 154-155.

Providing a practical example in support of the contention that foresight of a remote possibility should only be restricted to cases of culpable homicide, Burchell writes:<sup>95</sup>

‘If, for example, X overtook a car on a blind rise and collided with an oncoming car driven by Y as a result of which Y was killed, apart from the question of recklessness, X’s liability for culpable homicide or murder would depend upon the degree of his foresight. If he merely foresaw Y’s death as a remote possibility he would at most be guilty of culpable homicide.’

There exists merit in the argument proposing that foresight of a real or substantial possibility be confined to murder, while foresight of a remote possibility be confined to culpable homicide. Negligence is referred to as the ‘junior partner’<sup>96</sup> of *dolus* because not only does it require a lower level of culpability, but it also involves a lesser sentence. It follows that *dolus*, involving a higher degree of stigma, harsher sentences and requiring a higher level of culpability, should as a result require a higher degree of foresight than negligence. It is imperative that the definition of murder should ensure that those convicted of murder will be deserving of the stigma associated with it.<sup>97</sup> Therefore, Whiting<sup>98</sup> argues that ‘in order to put the law on a sound footing, it will be necessary to reject the notion that the foresight required for *dolus eventualis* need not be of anything more than a remote possibility as being far too wide.’ It has been argued that expanding the scope of murder would not only be unjust but would also diminish the stigma to which society attaches value.<sup>99</sup> Morkel<sup>100</sup> expands on this by arguing that if foresight of a remote possibility constitutes sufficient foresight for *dolus*, then an accused could be held liable for murder where his conduct did not even fall short of the reasonable person. This could lead to ‘anomalous and unjust results’<sup>101</sup> because by extending the scope of foresight to a bare possibility for murder wrongful convictions could ensue.

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<sup>95</sup> Ibid at 147.

<sup>96</sup> R Whiting ‘Negligence, Fault and Criminal Liability’ (1991) 108 (3) *South African Law Journal* 431: ‘of the two recognised forms of fault or mens rea, intention (*dolus*) and negligence (*culpa*), negligence is in more than one sense the junior partner.’

<sup>97</sup> NK Thomson ‘Fundamental Justice, Stigma and Fault’ (1994) 52 (2) *University of Toronto Faculty of Law Review* 388.

<sup>98</sup> Whiting op cit (n15) 445-6.

<sup>99</sup> Thomson op cit (n97) 388.

<sup>100</sup> Hoctor op cit (n13) 138.

<sup>101</sup> Burchell and Hunt op cit (n92) 146.

Burchell and Hunt<sup>102</sup> state:

‘if applied, it would lessen confidence in the administration of justice, for it extends the scope of intention to embrace a state of mind which cannot properly be classified as intention at all. It is doubtful whether X can even be said to ‘foresee’ a possibility if he thinks of it but considers it very remote; and surely he cannot be said to ‘intend’ a consequence, even in the legal sense of intention (assuming the element of recklessness is present), if he foresees it only as a very remote risk, or as a hundred-to-one chance, or, to use Holmes JA’s own words, ‘on the footing that anything is possible.’”

However, according to Glanville Williams,<sup>103</sup> and endorsed by Pain,<sup>104</sup> foresight of a bare possibility is sufficient to convict for *dolus* only if the accused’s ‘conduct has no social utility, but that the slightest social utility of the conduct will introduce an inquiry into the degree of probability of harm and a balancing of this hazard against its social utility.’ Therefore, Whiting<sup>105</sup> suggests that one of the factors to be considered when determining whether *dolus eventualis* exists is the type of activity involved. Whiting<sup>106</sup> states that there are many activities which are socially and legally acceptable, notwithstanding that they do involve a risk of harm to others. The most common example which he provides is driving a car and states that because of its social utility the law encourages it but circumscribes the manner in which it may be performed so as to limit its possibility for causing harm.<sup>107</sup> Whiting<sup>108</sup> goes on to say:

‘There can be no question of liability where a person performs such an activity in a manner permitted by the law even though he realises that what he is doing involves some risk to the lives of others. But what if a person performs such an activity in a manner forbidden by the law, as where he drives his car at a substantially excessive speed? Here it might well be possible for it to be proved against him not only that he knew he was driving at a substantially excessive speed but also that he realised that in so doing he was endangering the lives of others to a degree which was clearly impermissible. Yet if this were to be proved and if in addition such driving had resulted in an accident in which someone else was killed, one’s sense of what is right would surely be very considerably offended by any suggestion that this would make him guilty of murder. One would say that he lacked *dolus eventualis* and would be guilty merely of culpable homicide,

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<sup>102</sup> Ibid.

<sup>103</sup> GL Williams *Criminal Law: The General Part* 1ed (1953) 55.

<sup>104</sup> JH Pain ‘Some Reflections on our Criminal Law’ (1960) *Acta Juridica* 301.

<sup>105</sup> Whiting op cit (n15) 440.

<sup>106</sup> Ibid.

<sup>107</sup> Whiting op cit (n15) 441.

<sup>108</sup> Ibid.

notwithstanding that he actually foresaw, *albeit* only as a rather slight possibility, that someone might be killed by his dangerous driving.’

Therefore, although Whiting<sup>109</sup> favours foresight of a substantial possibility, he states that foresight of a remote possibility will suffice when the conduct involved has no social utility, but ‘it is the accused’s purpose to expose the victim to the risk of death.’ Paizes<sup>110</sup> states:

‘It is true that if you commit an act that has no social utility and that is inherently dangerous and *prima facie* unlawful, such as hitting another person on the head with a heavy object, you will have *dolus eventualis* in respect of that person’s death if you go ahead with the act after you have foreseen the possibility of causing that result. But it is *not* true if you run a huge mining operation (which is inherently dangerous, has social utility and is not *prima facie* unlawful) with a similar state of mind. If it *were*, then you would be guilty of *attempted* murder every time a miner went down your mine and all mining operations would have to close. In addition, driving a car would attract a similar treatment, and transport would cease to function.’

Based on the above arguments, Snyman<sup>111</sup> uses the example of driving a car to argue against a broad interpretation of *dolus eventualis* involving foresight of a remote possibility due to the fact that every driver is aware of the possibility, however slight, that their driving may cause death to another human being. Therefore, in most car accidents, and dictated by human experience, the accused foresees death not as a real or substantial possibility, but as a chance occurrence.<sup>112</sup> As Hoctor asks,<sup>113</sup> ‘should every driver who causes death then be charged with the crime of murder, with the associated heavy sentence and stigma that follows a conviction for murder?’ However, Burchell and Hunt<sup>114</sup> state that, in the event of a fatality from a car accident, ‘if in the circumstances (eg the narrowness of the road, the heavy volume of traffic at the time, etc) he foresaw Y’s death as a *real possibility*, a verdict of murder would be justified.’ Whiting<sup>115</sup> states that a verdict of murder would be justified where the driver

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<sup>109</sup> Hoctor op cit (n23) 139.

<sup>110</sup> A Paizes ‘*Dolus eventualis*: Two more decisions by the Supreme Court of Appeal’ (2016) 1 *Criminal Justice Review*.

<sup>111</sup> CR Snyman *Criminal Law* 3ed (1995) 183.

<sup>112</sup> CR Snyman *Criminal Law* 5ed (2008) 185.

<sup>113</sup> S Hoctor ‘General Principles and Specific Offences’ (2012) 25 (3) *South African Journal of Criminal Justice* 398.

<sup>114</sup> Burchell op cit (n26) 373.

<sup>115</sup> Whiting op cit (n15) 441.

deliberately took a specific concrete risk. Whiting<sup>116</sup> in this regard distinguishes a risk of a generalised statistical nature, such as speeding or driving with defective brakes, from a specific concrete risk by providing the following example:

‘A driver who wishes to make a quick getaway drives straight at a person standing in his path, hoping that he will get out of the way but realising that unless he manages to do this he will be hit and perhaps killed. Here the risk to the other person's life which the driver has knowingly taken is of so immediate and concrete a nature that he may well be held to have acted with *dolus eventualis* in relation to the other's death, with the result that if the other person was actually killed he would be guilty of murder.’

Associated words with ‘concrete’ include ‘certain’, ‘real’, and ‘substantial’<sup>117</sup> and consequently this type of risk taken by the accused indicates that he possessed foresight of a real or substantial possibility of death ensuing. It can, further, be argued, relying on inferential reasoning and the *dicta* of *S v Mini*<sup>118</sup> in which ‘a trier of fact should try mentally to project himself into the position of that accused at that time’ that the accused did, in fact, accept that possibility into the bargain. This is because human experience dictates that an accused who drives straight into a person cannot unreasonably trust that the person will move out of the way, but can merely hope.

However, Van Oosten<sup>119</sup> states that if only foresight of a real probability constitutes foresight for the purposes of *dolus eventualis*, and an accused who possesses foresight as something less could only be found guilty based on *conscious negligence*, then even if the accused has accepted that possibility into the bargain, there would be no *dolus eventualis*. According to this view, requiring foresight of a real or substantial possibility for a conviction limits the application of *dolus eventualis*. However, as argued above, should this limitation not be in place to prevent wrongful convictions? Engers<sup>120</sup> argues that ‘to say that foresight of a remote

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<sup>116</sup> Whiting op cit (n15) 442.

<sup>117</sup> The Free Dictionary by Farlex ‘Concrete’ available at <http://legal-dictionary.thefreedictionary.com/concrete>, accessed on 2 July 2017.

<sup>118</sup> 1963 (3) SA 188 (A) at 196E-F.

<sup>119</sup> FFW van Oosten ‘*Dolus eventualis* en luxuria – nog ‘n stuiwer in die armbeurs’ (1982) 45 *Tydskrif vir hedendaagse Romeins-Hollandse Reg* 189.

<sup>120</sup> KAB Engers ‘*Dolus eventualis* – which way now?’ (1973) *Responsa Meridiana* 223.

possibility is not foresight is straining both language and logic.’ He goes on to say that ‘no matter how unlikely such occurrence, the moment he contemplates that it may occur he foresees it as a possibility.’<sup>121</sup> Du Plessis<sup>122</sup> supports this by stating that ‘a possibility actually foreseen no matter how remote, is a possibility and suffices for *dolus eventualis*.’ Therefore, according to these views, the moment that the accused foresees the slightest chance that his conduct might result in death, the cognitive component of *dolus eventualis* has been satisfied and the court will then ask whether the accused accepted that possibility. Therefore, Hoctor<sup>123</sup> argues that ‘provided the foresight is of an actually existing possibility, whether it is labelled ‘reasonable’ or ‘remote’ matters not for the purposes of liability.’ Tsuru<sup>124</sup> favours this view, but correctly points out that ‘there may still be concerns that adopting this approach may open the floodgates of liability for crimes such as murder.’ She goes on to discount these concerns by stating that the fact that the probability of harm ensuing will be relevant in drawing an inference of foresight on the part of the accused indicates that the more improbable the harm, the more difficult it will be to prove that the accused possessed foresight.<sup>125</sup> As Hoctor<sup>126</sup> states, ‘one must guard against confusion between aspects of principle and aspects of proof.’ However, this line of reasoning can equally support the view that foresight of a remote possibility is not sufficient for a conviction of murder, and that, in fact, the courts will not find *dolus eventualis* to be present where the foresight of harm occurring was remote because a person of normal intelligence cannot accept, and therefore intend, that death will ensue where they foresee it as a remote happening. Tsuru<sup>127</sup> provides us with a second safeguard in that the remoteness of the foreseen possibility could be a mitigating factor when sentencing the accused. Van Niekerk<sup>128</sup> in this regard states that remoteness of the possibility may be relevant to the punishment imposed but it can never affect criminal liability because the accused knowingly chose to take the risk, however remote, and therefore has a ‘callous disregard for

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<sup>121</sup> Ibid at 221.

<sup>122</sup> JR Du Plessis *The Law of Culpable Homicide in South Africa* (unpublished PhD thesis, Rhodes University, 1986) 153.

<sup>123</sup> Hoctor op cit (n13) 153.

<sup>124</sup> JA Tsuru *An Alternative Approach to Dolus Eventualis* (published LLM thesis, University of KwaZulu-Natal, 2016) 104.

<sup>125</sup> Ibid.

<sup>126</sup> Hoctor op cit (n13) 152.

<sup>127</sup> Tsuru op cit (n124) 104.

<sup>128</sup> BvD van Niekerk ‘Dolus eventualis revisited’ (1969) 86 *South African Law Journal* 140.

the possibility of the harm occurring.’ However, this line of reasoning is flawed because there is a failure to consider the stigma of the term ‘murderer’ that will be attached to the accused. Due to the high degree of stigma associated with a conviction for murder, the principles of fundamental justice require a level of *mens rea* which correctly reflects the nature of murder.<sup>129</sup> Can foresight of a remote chance of death occurring reflect a level of *mens rea* which is sufficient for murder? Can an accused possess a ‘callous’ disregard for the possibility if it is only remote? As Paizes<sup>130</sup> correctly points out, ‘foresight of a remote possibility of death ordinarily signifies a less blameworthy mental condition than foresight of the real possibility of death.’ According to the Oxford Thesaurus, synonyms for the word ‘remote’ include ‘improbable’, ‘insignificant’ and, most importantly, ‘inconsiderable’<sup>131</sup>. Consequently, ‘remote’ suggests that the accused foresaw the harm as improbable, insignificant and so slight so as to not accept that it will happen. Therefore, it can be argued that requiring merely a remote degree of foresight for *dolus eventualis* does not sufficiently reflect a level of *mens rea* that is sufficient for murder and the stigma attached.

According to Hoctor,<sup>132</sup> the argument that foresight of a remote possibility is never applied in our courts is open to doubt. He refers to *S v Nkosi*<sup>133</sup> in which the court accepted that the accused were convicted on the basis of foresight of ‘no more than a *remote possibility*.’ Furthermore, in *S v Mazibuko*,<sup>134</sup> the court refers to the court *a quo*’s decision to convict the accused of murder where ‘the death of the deceased was foreseen as no more than a *remote possibility*.’ However, it is instructive that in both of these cases, the accused’s conduct had no social utility and deadly weapons, namely firearms, were used which the accused would have foreseen, that if used, would pose a real, reasonable or substantial possibility of death. Weldon<sup>135</sup> argues that ‘everyone knows that some weapons, such as loaded guns, and certain other instruments, such as stones, when used in a dangerous manner, are likely to produce

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<sup>129</sup> Thomson op cit (n97) 388.

<sup>130</sup> Paizes op cit (n21) 643.

<sup>131</sup> English Oxford Living Dictionaries ‘Remote’ available at <https://en.oxforddictionaries.com/thesaurus/remote>, accessed on 29<sup>th</sup> October 2017.

<sup>132</sup> Hoctor op cit (n13) 150.

<sup>133</sup> 1991 (2) SACR 194 (A) at 201.

<sup>134</sup> 1988 (3) SA 190 (A) at 200B-C.

<sup>135</sup> ED Weldon ‘Criminal Law--Deadly Weapon Doctrine’ (1946) 34 (4) *Kentucky Law Journal* 320.

death.’ It is contended that where a deadly weapon is utilised or an instrument is used in a deadly manner by the accused, unless it is proved otherwise, inferential reasoning dictates that the accused must have foreseen the real, reasonable or substantial possibility that death could ensue.

### **2.3. THE CONATIVE COMPONENT OF *DOLUS EVENTUALIS***

Many academics argue that the conative component is an unnecessary addition and only causes confusion due to the array of terminology used to define it. However, others state that it is this leg of the test which reflects the true essence of *dolus eventualis* and which distinguishes it from a finding of *culpa*. Hoctor<sup>136</sup> states that the ‘essence of *dolus eventualis* is egoism and selfishness, in that the actor places his ends at the same level or even higher than the ends protected by the law, and continues with his course of conduct in the face of the foreseen harm.’ Therefore, Bodenstein<sup>137</sup> argues that ‘if every effect preconceived as possible is said to have been intentionally caused there would be no distinction between intention and conscious *culpa*.’ It would, thus, be dangerous and lead to unjust results if foresight only was the determinant of fault, as the degree of fault is not always clearcut. It is for this reason that Snyman<sup>138</sup> argues that intention cannot consist merely in knowledge or appreciation of the existence of some fact. As Van der Merwe<sup>139</sup> points out, *dolus eventualis* is a subjective inquiry and therefore the problem cannot be solved with reference only to the possibility of death foreseen, even if real, because this does not provide conclusive proof regarding his state of mind. Hoctor<sup>140</sup> states that ‘the critical consideration for the purposes of criminal liability for harm caused to others is the accused’s mental state in respect of such harm to others.’ Therefore, these academics argue that by dispensing with the conative component the accused’s state of mind would be disregarded.

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<sup>136</sup> Hoctor op cit (n13) 155.

<sup>137</sup> Bertelsmann op cit (n16) 69.

<sup>138</sup> Snyman op cit (n51) 181.

<sup>139</sup> HJ Van der Merwe “‘One moment of extreme responsibility’”: Notes and comments on *Humphreys v S* and the volitional component of *dolus eventualis* in the context of dangerous or irresponsible driving’ (2013) 17 *Law, Democracy and Development* 74.

<sup>140</sup> S Hoctor ‘Death on the Roads and *Dolus Eventualis* - *S v Humphreys* 2013 (2) SACR 1 (SCA)’ (2013) 26 (1) *South African Journal of Criminal Justice* 83.

Morkel<sup>141</sup> argues that:

‘The proposition that when *dolus eventualis* is determined merely in terms of relevant foresight, it is not possible to distinguish it from conscious negligence is often sketched in terms of the example of the reckless driver. The argument proceeds as follows: the person who drives at an excessive speed knowing full well that, due to his tempo, a fatal accident might occur, but *trusting* that, thanks, to his *own* driving skills he will succeed in avoiding an accident, should such accident occur, be convicted of (intentional) murder or, as the case may be for attempted murder. A conviction of “intentional murder” in terms of the above facts is harsh and inappropriate; a conviction of “negligent culpable homicide” better satisfies the “*Rechtsgefühl*” (feeling for or idea of justice).’

It is, thus, argued that it is not the degree of foresight which is the determinant of whether *dolus* or *culpa* exists, but how the accused reacts to foreseeing the possibility of death. In terms of this line of reasoning, *dolus eventualis* will be present where the accused, accepting that death may result from his conduct, willingly decides to take a chance that it will not follow. However, where the accused unreasonably decides that death will not ensue he will be guilty of culpable homicide, based on conscious negligence. Jansen JA in *S v Ngubane*<sup>142</sup> held that ‘the distinguishing feature’ of *dolus eventualis* is the ‘volitional component’ and that provided that this component is present, it makes no difference whether the accused foresaw the possibility ‘as strong or faint, probable or improbable.’

However, some academics believe that the Appellate Division ‘took a wrong turn with *S v Ngubane*<sup>143</sup> in that it has introduced ‘unnecessary confusion into the requirements for *dolus eventualis*.’<sup>144</sup> One of the causes of this confusion lies in the fact that the courts have variously described its content. Academic opinion, however, mostly favours the view that *dolus eventualis* requires that the accused should have ‘reconciled himself to the consequences’ and therefore ‘accepts the consequences into the bargain.’<sup>145</sup> It has been argued, nevertheless, that the conative component adds no value to the test for *dolus eventualis* and should be abandoned in favour of the requirement that ‘subjective foresight must have existed contemporaneously

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<sup>141</sup> Morkel op cit (n72) 330.

<sup>142</sup> Supra (n61) at 685 A–H.

<sup>143</sup> Kemp... et al. op cit (n2) 191.

<sup>144</sup> Ibid.

<sup>145</sup> Loubser & Rabie op cit (n53) 423.

with the unlawful conduct.’<sup>146</sup> According to this view, *dolus eventualis* should be established only by subjective foresight of the unlawful conduct on the part of the accused. Burchell & Hunt<sup>147</sup> submit that where the accused foresaw harm as a real possibility but nevertheless persisted in his conduct he consciously took the risk of its happening and therefore possessed *dolus eventualis*. Paizes<sup>148</sup> goes on to say that the conative component is therefore ‘a notion without utility’ and that an accused who carries on certain conduct ‘reconciles himself’ to nothing more and nothing less than what he foresaw at the time of carrying on such conduct. In this regard Whiting<sup>149</sup> states that:

‘To say that *dolus eventualis* involves as an additional element reconciling oneself to the possibility that the result will ensue or taking this possibility into the bargain is open to the same objection as saying that it involves as an additional element the conscious taking of the risk that the result will ensue. It is superfluous, because, by acting with foresight of the possibility that a result will ensue, one necessarily reconciles oneself to the possibility that it will ensue or takes this possibility into the bargain.’

Therefore, it can be argued that an accused can never come to the conclusion that harm will ensue where he foresaw it merely as a remote happening, and conversely, an accused cannot legitimately argue that he concluded that death would not ensue when its happening was foreseen as real, reasonable or substantial. Van Oosten<sup>150</sup> contends that these views are incorrect because proceeding to act despite possessing foresight cannot automatically be taken as proof that the accused has intention and that somewhere between foresight and the execution thereof there must be a decision by the accused to accept or reject the risk of harm materialising.

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<sup>146</sup> Kemp... et al. op cit (n2) 191.

<sup>147</sup> Burchell & Hunt op cit (n92) 170.

<sup>148</sup> Paizes op cit (n21) 638.

<sup>149</sup> Whiting op cit (n15) 445.

<sup>150</sup> Loubser & Rabie op cit (n53) 423-4.

## 2.4. GERMAN ACADEMIC OPINION

In order to find possible solutions to the current theoretical obstacles surrounding *dolus eventualis*, German literature, which treats *bedingter Vorsatz* according to different theories, will be discussed.

### 2.4.1 The Consent and Approval Theory (*Einwilligungsund Billigungstheorie*)

The majority of German academics who support this theory state that the accused must ‘seriously consider’ the outcome and must ‘accept the fact’ that their conduct could lead to this harmful outcome.<sup>151</sup> Morkel<sup>152</sup> points out that the overwhelming consensus of German opinion is that the accused must have foreseen harm ‘with a relatively high degree of likelihood.’ Jescheck<sup>153</sup> submits that the accused must consider the likelihood to be ‘serious’ (ernstlich) while Schmidhauser<sup>154</sup> states that the accused must have foreseen harm as ‘concretely possible.’ If, however, the accused is ‘confident’ (*vertrauen*) and has reason to believe that the harm will not ensue he will only be negligent and possess *bewuste Fahrlässigkeit*.<sup>155</sup> Therefore, the prevailing opinion in Germany requires both a cognitive and conative component, namely knowledge and willfulness.<sup>156</sup> Jescheck<sup>157</sup> states that *dolus eventualis* is more or less defined as follows:

“*Bedingter Vorsatz bedeutet, dass der Tater die Verwirklichung des gesetzlichen Tatbestandes ernstlich für möglich halt und sich mit ihr abfindet*” (Eventual intention entails that the perpetrator foresees the relevant unlawful consequences of his act as a serious possibility and reconciles himself with such).’

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<sup>151</sup> ME Badar *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (2013) 141-142.

<sup>152</sup> Morkel op cit (n72) 328.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Badar op cit (n151) 142.

<sup>156</sup> Ibid.

<sup>157</sup> Morkel op cit (n72) 329.

With regard to cases of murder, the consent and approval theory is complemented by the inhibition level theory (*Hemmschwellentheorie*) according to which the intent to kill a person requires the accused to overcome a high inhibition level.<sup>158</sup> This high inhibition level is considered to be overcome when the death of the victim is so likely that ‘only a fortunate coincidence could have averted it.’<sup>159</sup> The example put forward is where the accused stabs the victim in the heart.<sup>160</sup> Therefore, German law provides that due to the severity of the crime of murder and how it is treated, the death of the victim cannot be a ‘remote’ happening. This is because people are generally reluctant to undertake a violent act which may lead to another person’s death.<sup>161</sup>

#### **2.4.2 The Theory of Possibility**

In Germany, some academics have argued for an interpretation of *dolus eventualis* based not upon the attitude of the accused towards the foreseen harm, but upon the possibility of the harm that he foresaw. Proponents of this theory argue that the envisaged possibility should have ‘halted’ the accused from acting.<sup>162</sup> However, the principal objection to requiring foresight of a mere possibility is that it casts the net of liability too wide and is in need of ‘casuistic correction’ for conduct which cannot be called intentional.<sup>163</sup> A common example, which is the subject of much debate, is the overtaking driver who is aware of the possibility that a vehicle might be coming the other way, but does not intend to kill himself or to become a murderer if he causes another person’s death.<sup>164</sup> Badar<sup>165</sup> provides an example which he argues demonstrates that wrongful convictions would ensue if only foresight was the determinant of *dolus eventualis*:

‘X is driving his car on a country road. In spite of low visibility due to fog, he overtakes a truck. While doing so he is fully aware that his overtaking is grossly contrary to road traffic regulations

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<sup>158</sup> Badar op cit (n151) 142.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Taylor op cit (n69) 115.

<sup>162</sup> Badar op cit (n151) 143.

<sup>163</sup> G Taylor ‘The Intention Debate in German Criminal Law’ (2004) 17 (3) *Ratio Juris* 352.

<sup>164</sup> Ibid.

<sup>165</sup> ME Badar ‘Dolus Eventualis and the Rome Statute without It?’ (2009) 12 (3) *New Criminal Law Review* 461.

as well as daredevil and perilous. Despite his awareness of the risk, X seriously trusts in his conduct not resulting in accident. However, when overtaking he causes a serious traffic accident in which an oncoming motorcyclist is killed. Did X commit manslaughter?" According to the possibility theory, X is seen to have possessed the intent to kill (*dolus eventualis*) since he has realized the possibility of the result's occurrence." X had seriously trusted the nonoccurrence of the result (the death of another person), and thus had not accepted this fatal result, he is still considered to possess the intent to kill (*dolus eventualis*) according to the possibility theory.'

However, it can be argued that this theory would not lead to unjust results because of dispensing with the conative component, but rather because the degree of foresight is unqualified. Taylor<sup>166</sup> recognises that this theory has been abandoned by the courts.

### **2.4.3 The Theory of Probability**

According to the 'theory of probability', *dolus eventualis* exists where the accused foresees the harm as probable while conscious negligence exists only when the accused foresees the harm as merely possible.'<sup>167</sup> Grossmann and Grunhut<sup>168</sup> state, in support of this theory, that the judge has before him objective facts. Using a car accident as an example, Grossman and Grunhnut<sup>169</sup> state that the objective facts are, *inter alia*, the speed at which the car was being driven, the number of pedestrians in the vicinity, the road conditions, and the judge only has to make a finding from these proven facts as to the degree of harm. The 'theory of probability' is, however, criticised because of its vagueness. The question which has been left unanswered is 'when does foresight reach the level of probability?' One recommendation which has been made to address the problem of vagueness is to reformulate the theory so that intentional conduct occurs when the accused thought that death ensuing from his conduct was more probable than not.<sup>170</sup> Taylor<sup>171</sup> states that the 'theory of probability' is an attempt to define *dolus eventualis* based on the view that, once a certain level of foresight beyond a remote possibility has been reached, and a person who wanted to avoid causing harm would modify

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<sup>166</sup> Taylor op cit (n163) 352.

<sup>167</sup> Ibid.

<sup>168</sup> J. S. F. Bohmer and Paul Feuerbach. K. Warnke, *Die Entstehung und Rehandllng der Dolusalten (The Origin and the Treatment of the kinds of dolus)* (unpublished thesis, Berlin, 1965).

<sup>169</sup> Ibid.

<sup>170</sup> Taylor op cit (n163) 350.

<sup>171</sup> Ibid.

his conduct accordingly or refrain from it altogether, intention has been proved. Taylor<sup>172</sup> goes on to say that proceeding to act in this situation justifies an assumption about the accused's guilt, which seems to be higher than in cases of foresight of the remote possibility of harm ensuing and allows us to dispense with the conative component of *dolus eventualis*. He argues that 'one who foresees a possible consequence of her actions but goes ahead anyway must approve to some extent of that consequence, or else she would not have gone ahead.'<sup>173</sup> Therefore, no convincing argument has been put forward which justifies the need for a conative component and he validly points out that for *dolus indirectus*, which requires certain knowledge, no conative component is required.<sup>174</sup> Therefore, why does *dolus eventualis* require a conative component? Morkel<sup>175</sup> demonstrates how prominent German academics such as Schonke, Schroder, and Welzel were on the brink of accepting that *dolus eventualis* entails that the accused acts, 'despite the knowledge that his conduct possesses those inherent qualities that presuppose hits culpability – i.e., we blame the accused for having acted despite foreseeing the relevant consequences.' However, Jescheck<sup>176</sup> rejected the test of probability because he thought that it was possible for the accused to 'trust' that harm will not occur despite the fact the he foresaw it with a high degree of probability. In response, Morkel<sup>177</sup> correctly and validly states that such a mental state is impossible:

'Should the perpetrator foresee something to such a degree of probability that he has to count on (reckon with) its existence-i.e., that he foresees it as concretely possible, then he may hope (but not trust) that it will not ensue. If such a mental state were at all possible, it would be that of a totally unrealistic, irresponsible optimist-and would have nothing to do with real-life experience. How is such trust to be designated psychologically? There can be no question of a rational conviction that damage will not result because the hypothesis is exactly the opposite-namely, that there is a preponderance of probability that "damage" will result from the conduct of the accused. In other words, when the perpetrator realizes that when, on balance, the facts speak so loudly for an unhappy ending, how can he trust in a happy ending?'

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<sup>172</sup> Ibid.

<sup>173</sup> Taylor op cit (n69) 116.

<sup>174</sup> Ibid.

<sup>175</sup> Morkel op cit (n72) 329.

<sup>176</sup> Morkel op cit (n72) 332.

<sup>177</sup> Ibid.

#### **2.4.4 The Risk-Recognition Theory**

In line with community moral responsibility, Frisch developed the risk-recognition theory. His theory asks whether a risk existed which was known to the accused and offends the legal system.<sup>178</sup> Frisch<sup>179</sup> states that the reason we impose harsher sentences for intentional conduct than negligent conduct is that the intentional actor has a greater degree of control over their conduct, consciously disobeyed the law or at least took the risk of violating it, and has a greater personal responsibility for the violation than the negligent actor. Therefore, he argues that intention cannot be defined by reference only to knowledge that harm may occur as this is not in line with the reasons as to why intention is punished more harshly.<sup>180</sup> The requirement added by Frisch that the conduct must offend the legal system provides a solution to cases which cannot reasonably be called intentional, such as the overtaking driver, and addresses the problem of the Russian roulette player in which the chances of firing the gun are one in five and he therefore believes that there will be a ‘happy ending.’

#### **2.4.5 The Indifference Theory (*Gleichgültigkeit*)**

Engisch<sup>181</sup> proposed to re-state the conative component of *dolus eventualis* as *Gleichgültigkeit* which, when translated into English means ‘indifference.’ He saw the accused’s indifference to a possibility foreseen by him as evidence that he was prepared to act despite this knowledge and, thus, acted intentionally.<sup>182</sup> This theory preserves the separation between the cognitive and conative components of *dolus eventualis* using the conative component as the distinguishing feature between intention and negligence. However, it could be criticised for the fact that where the death of the victim is not desired, the accused would be acquitted because it cannot be said that they are ‘indifferent’ to death.<sup>183</sup> The accused’s wishes or hopes play no part in determining their criminal liability and therefore indifference will be absent

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<sup>178</sup> Taylor op cit (n163) 365.

<sup>179</sup> Ibid at 366.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid at 355.

<sup>182</sup> Ibid.

<sup>183</sup> Badar op cit (n151) 142.

where they hope that death will not ensue. This contradicts the basic and founding principal of criminal law in which motive is irrelevant.

## **2.5. AMERICAN ACADEMIC OPINION**

The American crime of ‘extreme indifference’ murder occurs under substantially the same circumstances as *dolus eventualis* in that the accused must have consciously taken a substantial and unjustifiable risk under circumstances manifesting ‘extreme indifference to the value of human life.’ However, a difference lies in that a substantial risk must have been present whereas under South African law foresight of a mere ‘remote’ possibility of harm occurring is sufficient. The different approaches and formulations to the phrase ‘extreme indifference to the value of human life’ will be discussed below.

### **2.5.1 The Objective Circumstances Approach**

According to this approach, the accused’s subjective state of mind plays no role or is subjugated to the circumstances of the killing.<sup>184</sup> Michaels<sup>185</sup> states that:

‘In New York, for example, a homicide committed recklessly becomes murder instead of manslaughter when, by reference to the objective circumstances of the crime alone, the jury finds the circumstances themselves “so uncaring, so callous, so dangerous and so inhuman” as to show depraved indifference to human life.’

Therefore, it is the accused’s physical conduct which distinguishes murder from manslaughter. Michaels<sup>186</sup> states that this approach has many advantages, namely that it is fairly easy for the jury to comprehend, it has precedent, and it produces reasonable findings by the courts. Michaels<sup>187</sup> argues, however, that the lack of a definition for terms such as ‘callous; or ‘brutal’ may ‘allow murder convictions without any proof beyond well-packaged manslaughter’ and

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<sup>184</sup> AC Michaels ‘Acceptance: The Missing Mental State’ (1998) 71 (5) *Southern California Law Review* 1008.

<sup>185</sup> Ibid.

<sup>186</sup> Michaels op cit (n78) 793.

<sup>187</sup> Ibid at 794.

permit juries to convict ‘by instinct, or worse, prejudice.’ Pillsbury<sup>188</sup> goes on say that the vagueness of ‘moralistic phrases’ such as ‘brutal’ and ‘wanton’ may lead to ‘non-moral decision-making’ which is based on prejudice. Furthermore, Duffy<sup>189</sup> correctly points out that ‘the objective standard is also inconsistent with general homicide principles, which rely on mental states to differentiate various grades of murder.’ Therefore, this approach would not find acceptance in South Africa because South African courts have adopted the psychological concept of culpability, in terms of which the determination of whether an accused possesses *dolus* depends solely on his subjective state of mind.<sup>190</sup>

### **2.5.2 The Multiple Victims Approach**

Some states restrict ‘extreme indifference’ murder to where multiple victims have been threatened. The justification for this approach is that by threatening more than one person, the accused’s conduct must manifest ‘extreme indifference to the value of human life *generally*.’<sup>191</sup> Although this approach provides certainty in that it can easily be established whether the accused threatened more than one person, Michaels<sup>192</sup> correctly points out that ‘threatening multiple victims is certainly not a prerequisite for acceptance, and thus is not closely correlated with the culpability of knowledge.’ Therefore, this approach, once again, disregards the accused’s subjective state of mind at the time of committing the crime, an essential requirement for a finding of intention. Furthermore, it has been criticised for being both over and under inclusive.<sup>193</sup> *King v State*<sup>194</sup> demonstrates the failings associated with this approach. In this case, when the accused shot the tyres of an opponent’s car, one bullet went through the passenger window and killed the passenger.<sup>195</sup> The court upheld a conviction of murder because two people were in the car and therefore multiple victims were threatened. Michaels<sup>196</sup>

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<sup>188</sup> SH Pillsbury ‘Crimes of Indifference’ (1996) 49 (1) *Rutgers Law Review* 118.

<sup>189</sup> Duffy op cit (n85) 430.

<sup>190</sup> Hoctor op cit (n12) 14.

<sup>191</sup> Michaels op cit (n184) 1009.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> 505, So. 2d 403 (Ala. Crim. App. 1987).

<sup>195</sup> Ibid at 405-405.

<sup>196</sup> Michaels op cit (n184) 1009.

correctly states that ‘if King lacked acceptance, as he well may have, surely his action, though reprehensible, was less culpable than a knowing killing, notwithstanding the multiple individuals threatened.’

### **2.5.3 The Degree of Risk Approach**

Some states refer only to the riskiness of the accused’s conduct, in other words, on the probability that the accused’s conduct would cause death. Michaels<sup>197</sup> states that ‘it has the same strength of capturing many cases of acceptance while excluding others’ and that it can be ‘over inclusive or under inclusive where the presence or absence of the actor’s acceptance of killing and a particularly high degree of risk do not correlate.’ Furthermore, Duffy<sup>198</sup> points out that this approach fails to cover situations that appear to reveal an extreme indifference to life, ‘such as a game of Russian roulette in which there is less than a 50 percent chance that a bullet will discharge.’ Nourse<sup>199</sup> states that this approach becomes ‘a rationalisation for our judgments, not a means to them.’ Therefore, the court will come to a finding that superficially seems reasonable and valid, but is unrelated to the subjective state of mind of the accused. As Michaels<sup>200</sup> states, ‘high probability by itself fails as a proxy for the culpability of knowledge because it does not expressly consider the actor’s relative attitude between his conduct and the harm that conduct may entail.’ The accused’s subjective state of mind is therefore disregarded.

### **2.5.4 The Mens Rea Approach**

The *mens rea* approach to ‘extreme indifference’ murder looks at the accused’s state of mind and, therefore, asks the jury to ascertain the accused’s subjective attitude toward whether the victim lived or not.<sup>201</sup> This approach, however, does not provide any guidance on how to

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<sup>197</sup> Ibid at 1011.

<sup>198</sup> Duffy op cit (n85) 430.

<sup>199</sup> V.F Nourse ‘Hearts and Minds: Understanding the New Culpability’ (2002) 6 (1) *Buffalo Criminal Law Review* 386.

<sup>200</sup> Michaels op cit (n184) 984.

<sup>201</sup> A Abrahmovsky & JI Edelstein ‘Depraved Indifference Murder Prosecutions in New York: Time for Substantive and Procedural Clarification’ (2005) 55 (3) *Syracuse Law Review* 489.

establish the accused's mental state. In response to this lack of guidance Michaels<sup>202</sup> reformulates the test for 'extreme indifference' murder by stating that:

'Extreme indifference can be discovered by asking the finder of fact whether the actor would have committed the act had he known it would cause a death. This question goes to the very core of the meaning of indifference. It discovers the "abandoned and malignant heart" and willingness to kill that should define unintended murder. If the answer to the question is yes, the defendant placed virtually no value on human life and merits punishment for murder. If the answer is no, human life retained significant value to him, and only punishment for manslaughter is justified. To convince a jury that a defendant's reckless but unintentional killing constitutes murder instead of manslaughter, the prosecution should be required to show that the defendant would have committed the fatal act even had he known that a death would result.'

It can be argued that Michael's reformulation of 'extreme indifference' murder parallels with the conative component for *dolus eventualis* in that it asks the accused, after it has been established that the accused foresaw the real, reasonable or substantial possibility of death, whether the accused accepted that death would result from his proposed course of conduct. However, it can equally be argued that the accused's decision to proceed with his course of conduct after foreseeing the real, reasonable or substantial possibility of death demonstrates that he possessed a 'willingness to kill'.

#### **2.5.5 ABRAHMOVSKY AND EDELSTEIN'S REFORMULATION OF 'EXTREME INDIFFERENCE' MURDER**

Abrahmovsky and Edelstein<sup>203</sup> propose that in order to distinguish manslaughter from 'extreme indifference' murder that the *mens rea* should 'require that the defendant consciously disregard a risk that is caused *solely* by his own conduct and / or that of his accomplices.' Furthermore, they state that 'the definition should preclude acts purposefully directed at another, thus ruling out intentional murder or manslaughter in the first degree.'<sup>204</sup> Therefore, they argue that 'extreme indifference' murder occurs where the accused himself created the risk of death

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<sup>202</sup> Michaels op cit (n78) 807.

<sup>203</sup> Abrahmovsky & Edelstein op cit (n201) 492.

<sup>204</sup> Ibid at 494.

which is not directed purposefully at harming a specific individual, and provide hypothetical examples to demonstrate this:

‘Someone who drives at a high speed on the sidewalk would create a risk of death to pedestrians that would not otherwise exist. A pedestrian who steps onto a public sidewalk does not ordinarily accept the risk of being struck by a motor vehicle. Therefore, a driver who propels his vehicle onto a sidewalk engages not only in risk-disregarding conduct, but in risk-creating conduct, and might thus be guilty of depraved indifference murder in the event that his actions result in death.’<sup>205</sup>

## 2.6. CHAPTER SUMMARY

This chapter discussed the differing opinions regarding the two-stage test of *dolus eventualis*, the cognitive and conative component respectively. Arguments in favour of both a qualified and unqualified degree of foresight were put forward as well as arguments which support the conative component and those which render it redundant. The various German theories on *bedingter Vorsatz* were discussed as well as the different approaches and reformulations of American ‘extreme indifference to the value of human life’ as contained in ‘extreme indifference’ murder. Therefore, the plethora of literature on the topic and the differing opinions and approaches reflects that this is an area of law which needs clarification. However, reference cannot be made only to the literature and a discussion of the case law of South Africa, Germany and America will take place to ascertain the correct approach.

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<sup>205</sup> Ibid at 492-493.

# CHAPTER THREE

## A DISCUSSION OF SOUTH AFRICAN, GERMAN AND AMERICAN CASE LAW

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### 3.1 INTRODUCTION

South Africa's legal system includes a doctrine of precedent in terms of which the judgments of higher courts become principles of established law in cases where statutory law is silent on the matter. Both the crimes of murder and culpable homicide are not statutorily defined and therefore judgments of the courts have become the most important source on the rules relating to these crimes. It is, thus, imperative to place emphasis on what the courts have held. In finding the correct approach, German and American case law will be looked at for guidance.

### 3.2 SOUTH AFRICAN CASE LAW

#### 3.2.1 S v Beukes<sup>206</sup>

The Appellate Division held that it is highly unlikely that an accused will admit to or it will be proved that he foresaw a remote consequence and that it needs to be established that it was *reasonably possible* that harm would ensue.<sup>207</sup> The court went on to say that the conative component is of value as an additional element of *dolus eventualis* and will generally only be satisfied where the accused had acted despite possessing foresight of a reasonable possibility. Hoctor<sup>208</sup> states that this judgment 'by no means excludes foresight of a remote possibility' by referring to where the court states that 'liability for *dolus eventualis* will *normally* (his emphasis) only follow where the possibility is foreseen as a strong one.' However, it can be

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<sup>206</sup> 1988 (1) SA 511 (A).

<sup>207</sup> Ibid at 522C-E.

<sup>208</sup> Hoctor op cit (n13) 142.

argued, using Paize's<sup>209</sup> line of reasoning, that the court's use of the word 'normally' covers those 'exceptional cases where foresight of a possibility, however remote, *should* be viewed as sufficient' such as where the conduct has no social utility or its purpose is to expose the victim to death. Therefore, foresight of a remote possibility should be viewed as the exception, and not the norm. Paizes<sup>210</sup> provides an example of the game of Russian roulette to define such an exceptional case:

'What would the position be, however, if the number of chambers contained by the revolver was sufficiently high to render the statistical chances of B dying as a result of this ploy slight or remote? What if the number was, not seven, but seventy, or seven hundred, or seven thousand? It is submitted that the result is not affected by inflating empirical probabilities. If A were to kill B in these circumstances, he would be blameworthy even if he foresees the possibility of B's death as no greater than one in a thousand.'

In *S v De Ruiter*,<sup>211</sup> the 'solitary case in which *Beukes* has been explicitly followed in relation to the degree of foresight'<sup>212</sup> the court held that the 'reasonableness' referred to indicates the basis upon which the court must draw an inference to determine whether an accused possessed such intent. Hoctor<sup>213</sup> points out that 'the court in *Beukes* was not instituting a doctrinal sea change, but merely reflecting an evidential verity.' As held in *R v Horn*:<sup>214</sup>

'It is only in proving the wrongdoer's appreciation of death as a possible result that it becomes relevant whether death was 'likely', for the more likely death was, the stronger is the inference that he in fact appreciated the risk to life.'

Furthermore, in *Ngubane*,<sup>215</sup> Jansen JA held that 'the likelihood in the eyes of the agent of the possibility eventuating must obviously have a bearing on the question whether he did consent to that possibility.' From the abovementioned *dicta*, the argument in favour of a qualified degree of foresight is, in fact, strengthened. Where the accused foresees the possibility of his conduct causing harm as real or substantial, but nevertheless carries on engaging in such

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<sup>209</sup> Paizes op cit (n21) 462.

<sup>210</sup> Ibid at 462-463.

<sup>211</sup> 2004 (1) SACR 332 (W) para [9].

<sup>212</sup> Hoctor op cit (n13) 144.

<sup>213</sup> Ibid.

<sup>214</sup> 1958 (3) SA 457 at 467.

<sup>215</sup> Supra (n61) at 685F-G.

conduct, it can more easily be inferred that he accepted, and therefore intended, the consequences of his actions.

### 3.2.2 *S v Du Preez*<sup>216</sup>

This case provides an example of conscious negligence. The accused, whilst on a picnic with his wife and son, fired four warning shots diagonally in front of two men who were insulting towards his wife. According to the accused, he then noticed that ‘there were rocks in the road’ and realised that a bullet might ricochet and injure one of the men.<sup>217</sup> As a result, he thereafter fired over the men, aiming, he said ‘between two and three feet above their heads.’<sup>218</sup> One of the shots hit one of the men in the head and caused his death. The accused testified that he regarded himself as a ‘fairly good shot’.<sup>219</sup> He stated that he was ‘so confident that I could not have hit the deceased’ that he thought that the deceased’s fall was a ruse.<sup>220</sup> The court *a quo* found the appellant guilty of murder on the basis that he subjectively foresaw the possibility that his conduct could result in the deceased’s death and that he was reckless as to whether death ensued or not. On appeal, the court held that although the appellant ‘allowed a lamentably small margin of safety’ he was confident that he would not strike either of the two men.<sup>221</sup> The court went on to state:

‘Deplorable though appellant’s conduct was, it does not, in the light of all the evidence, in my view establish that [the] appellant subjectively foresaw the possibility of injury or death. That appellant ought to have foreseen such a possibility is, in my opinion, beyond all question; but, on a conspectus of all the facts of the case as found by the trial court, the State failed, in my view, to prove that, notwithstanding his denials, the appellant must have foreseen - and, therefore, did foresee - the possibility of injury or death ensuing from his actions.’<sup>222</sup>

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<sup>216</sup> 1972 (4) SA 584 (A).

<sup>217</sup> Ibid at 586H-587A.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid at 587A-C.

<sup>221</sup> Ibid at 589A-E.

<sup>222</sup> Ibid at 589D-G.

Based on the above, the court replaced the appellant's conviction of murder with that of culpable homicide. However, as stated above, the court came to the conclusion that the accused did not possess *dolus eventualis* because he did not foresee that he would shoot the deceased. Therefore, it can be argued that the conative component is redundant and because of the accused's misplaced confidence, he did not possess foresight, which was the end of the test. Therefore, his decision to proceed with his course of conduct could not amount to *dolus eventualis*, but at the least is conscious negligence. However, had the court found that he had foresight of a real, reasonable or substantial possibility, the inference would be that he 'accepted the possibility into the bargain.' Furthermore, it must be pointed out that discharging a firearm in the direction of moving individuals poses the real, reasonable or substantial possibility of causing death, and furthermore, it is conduct without social utility and which offends the legal system.

### 3.2.3 S v Maritz<sup>223</sup>

A murder suspect had been tied by a rope to a police vehicle and ordered to run in front of it by the appellant. However, part of the rope got caught under a wheel of the vehicle, which caused the deceased to be pulled back and dragged under the vehicle's wheels. The Appellate Division held that *dolus* was lacking because the accused had not considered the risk of death, but confirmed a conviction of culpable homicide because he ought to have done so. The court held that an accused does not consent to a foreseen risk where he *believes* that he can prevent its occurrence.<sup>224</sup> Boister<sup>225</sup> however points out that the court's conclusion that the accused had not accepted that death would ensue because he believed that he could avoid it could rather be argued on the basis that the accused did not foresee death as a real or substantial possibility. Therefore, Burchell<sup>226</sup> argues that this decision reveals the merit of dispensing with the conative component and favouring the distinction between foresight of a real and remote possibility.

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<sup>223</sup> 1996 (1) SACR 405 (A).

<sup>224</sup> Ibid at 416F.

<sup>225</sup> Burchell op cit (n26) 368.

<sup>226</sup> Ibid.

### 3.2.4 S v Dlamini<sup>227</sup>

In this case, the appellants had been charged with murdering the deceased, the cause of death being suffocation. The Supreme Court of Appeal held that:

‘in the absence of direct admissions, the state of mind of a perpetrator at the time of a crime is a question of inference drawn from all the material proven facts both for and against the conclusion of guilt. The facts must be considered holistically to determine whether they permit an inference to be drawn beyond a reasonable doubt that the accused actually foresaw the *reasonable possibility* that his victim could die from the assault but, nevertheless proceeded with it reckless of that outcome.’<sup>228</sup>

The above *dicta* demonstrates that the accused’s state of mind is ascertained from the degree of foresight that they possessed and that the conative component consists merely of having ‘proceeded’ with the proposed course of conduct, undeterred by the ‘reasonable possibility’ that the victim may die from such conduct. The court went on to state that:

‘the common experience of mankind is that shutting off the power to breathe leads within a short time to death. Just as it does not avail an assailant who points a loaded firearm at his victim's heart and pulls the trigger to deny an intention to kill without offering an acceptable explanation for such denial, so credibility is stretched beyond breaking point by one who forces a gag into his victim's throat and denies that he foresaw the *reasonable possibility* (own emphasis) of death but does not explain why such blindness possessed him.’<sup>229</sup>

Therefore, the court makes the valid point that once it is inferred that the accused subjectively foresaw the real, reasonable or substantial possibility of death, ‘credibility is stretched beyond breaking point’ where that accused denies that they accepted that death would ensue. It is illogical for an accused to have foreseen the real, reasonable or substantial possibility of death without having accepted that death could result. Therefore, by requiring a qualified degree of foresight, the conative component is fulfilled with the accused proceeding with the conduct that is foreseen to cause death. The court therefore held that there was evidence of foresight of a reasonable possibility of death and factual proof that despite such foresight he had taken the

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<sup>227</sup> 2006 JDR 0717 (SCA).

<sup>228</sup> Ibid para [10].

<sup>229</sup> Ibid para [11].

necessary steps to bring the expectation to reality. Accordingly, the court dismissed the appeal, upholding the appellants' convictions of murder. Burchell<sup>230</sup> states that 'this approach (combined with regarding anything short of this limitation as constituting at the most conscious negligence) is to be preferred to the *Ngubane* approach of extending *dolus eventualis* in principle to foresight of a 'remote' possibility.'

### 3.2.5 *S v Makgatho*<sup>231</sup>

The Supreme Court of Appeal held that for *dolus eventualis* to be present in respect of a consequence 'it must be shown that a real - as opposed to a remote - possibility of that consequence resulting was foreseen.'<sup>232</sup> The court referred approvingly to the case of *S v Van Wyk*<sup>233</sup> in which Ackermann AJA held that 'the subjective foresight required for *dolus eventualis* is the subjective appreciation that there is a reasonable possibility that the proscribed consequence will ensue.' Paizes<sup>234</sup> states the court's decision is 'a significant acceptance of what we submit to be the correct position' and that 'any doubt that foresight of a remote possibility might suffice has now been eliminated.'

### 3.2.6 *S v Oege*<sup>235</sup>

The accused, whilst driving a vehicle with the objective of evading police officers who were pursuing them in order to effect an arrest, executed a dangerous manoeuvre across sidewalks and, in doing so, killed three children. The court, after considering the evidence, held:

'The accused must have known in the subjective sense that he was executing a highly perilous manoeuvre, perilous not only to himself and his passengers, but also to pedestrians in the vicinity. He must also have known, again in the subjective sense, that the manoeuvre might not succeed and that somebody might be struck by the vehicle.'<sup>236</sup>

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<sup>230</sup> Burchell op cit (n26) 359.

<sup>231</sup> 2013 (2) SACR 13 (SCA).

<sup>232</sup> Ibid para [9].

<sup>233</sup> 1992 (1) SACR 147 (NmS) at 161*b*.

<sup>234</sup> A Paizes (2013) 1 *Criminal Justice Review* 12.

<sup>235</sup> 2012 (2) SACR 41 (ECG).

<sup>236</sup> Ibid at 51D-F.

The possibility of striking the children was not a remote, but a real possibility, evident in the fact that the court refers to the accused's conduct as a 'highly perilous manoeuvre'<sup>237</sup> and 'while attempting this manoeuvre, he (the accused) was conscious of the presence of people on the respective sidewalks.'<sup>238</sup> The court therefore held that the accused carried out his conduct with the knowledge that those in the vicinity would fall victim to his conduct and therefore can be said to have 'consented' or 'reconciled himself' to the deaths of the three children. The court went on to state that 'the accused was in possession and control of an instrument potentially no less lethal than a firearm. He used it with fatal effect.'<sup>239</sup> The court therefore convicted the accused of murder. This decision states that because the accused foresaw the real possibility of death ensuing he, as a result, consented to the death and therefore possessed *dolus eventualis*.

### 3.2.7 S v Humphreys<sup>240</sup>

The accused, who was found guilty of murder on the basis of *dolus eventualis* by the court *a quo*, was driving a minibus carrying fourteen schoolchildren when he collided with a train resulting in the death of ten children and injuries to four passengers and himself. On appeal, the court held that the test for *dolus eventualis* is two-fold, namely:

- (a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and
- (b) Did he reconcile himself with that possibility?<sup>241</sup>

Based on the evidence, the court agreed that the element of subjective foresight had been established because the accused had entered a boom-controlled level crossing with the booms down and the warning signals flashing. The court held, in relation to the cognitive component:

'One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate

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<sup>237</sup> Ibid at 51D-E.

<sup>238</sup> Ibid at 51C-D.

<sup>239</sup> Ibid at 52A-C.

<sup>240</sup> 2013 (2) SACR 1 (SCA).

<sup>241</sup> Ibid para [12].

the different tests for *dolus* and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.’<sup>242</sup>

Therefore, the court reasoned that every person of normal intelligence would recognise that disregarding the warning signals of an approaching train, and avoiding the boom aimed at stopping vehicles from entering a railway crossing by reason of the approaching train, may result in an accident with that train.<sup>243</sup> The natural consequence of such a recognition is the foresight on the part of ‘every right-minded person’, that disregarding these safety measures creates the possibility that the foreseen harm may ensue.<sup>244</sup> Van der Merwe<sup>245</sup> correctly states that Brand JA’s references to ‘any person of normal intelligence’ and ‘every right-minded person’, instead of a ‘reasonable’ person indicates that these *dicta* help to differentiate between *dolus eventualis* and conscious negligence by avoiding the application of an objective standard to the cognitive component of *dolus eventualis*. However, the court found that possession of foresight alone, whether slight or real, was not sufficient to find the accused guilty of murder, but that the determination of whether the accused is guilty of murder or culpable homicide rests on the conative component of *dolus eventualis*. The court went on to explain the significance of the conative component by referring to *Ngubane*<sup>246</sup> in which it was held that ‘the distinguishing feature of *dolus eventualis* is the volitional component.’ The court proceeded to state that the correct question to be asked under the conative component is:

‘Whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant

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<sup>242</sup> Ibid para [13].

<sup>243</sup> Ibid para [14].

<sup>244</sup> Ibid.

<sup>245</sup> Van der Merwe op cit (n139) 70.

<sup>246</sup> Supra (n61) at 685C-D.

may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.<sup>247</sup>

Therefore, the court, in applying the conative component, found that the court *a quo* had incorrectly found that the appellant ‘appreciating the possibility of the consequences nonetheless proceeded with his conduct, reckless as to these consequences.’<sup>248</sup> The court concluded that the appellant in the case foresaw the possibility of a collision occurring, but ‘he took a risk which he thought would not materialise.’<sup>249</sup> The court held that the fact that the appellant had on previous occasions successfully performed this manoeuvre probably led him to the belief that he could repeat it without harm.<sup>250</sup> This belief was a grievous error of judgment and, thus, constituted gross negligence on the appellant's part. The court, further, took the view that where the accused did not foresee himself being harmed by his reckless driving, then he cannot be said to have done so with regard to the deaths of others. The SCA went on to replace the court *a quo*'s finding of murder with a conviction of culpable homicide as ‘it cannot be suggested that any reasonable driver would behave as the appellant did.’<sup>251</sup> Van der Merwe<sup>252</sup> states that the *Humphreys* judgment ‘highlights that *dolus* is always determined with reference to the accused's actual state of mind.’ However, Burchell<sup>253</sup> argues that the court's reasoning on the volitional aspect of *dolus eventualis* neglects a crucial aspect of the cognitive component, namely, did the accused foresee death as a real or substantial possibility or not? Burchell<sup>254</sup> goes on to state that the fact that the accused had successfully executed such a manoeuvre in the past cannot override the inference that he foresaw that there was a substantial or real possibility of failure this time and points out:

‘Surely a person who agrees to race his car at breakneck speed against a vehicle driven by another on a public road foresees the real possibility of death resulting to someone, including himself. This conclusion is in no way diminished by the fact that he and others may have managed to escape unscathed from such races in the past or that he may have an over-optimistic

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<sup>247</sup> Supra (n240) para [17].

<sup>248</sup> Ibid para [16].

<sup>249</sup> Ibid para [18].

<sup>250</sup> Ibid para [19].

<sup>251</sup> Ibid para [20].

<sup>252</sup> Van der Merwe op cit (n139) 76.

<sup>253</sup> Burchell op cit (n26) 369.

<sup>254</sup> Ibid.

impression of his driving skill. If a fatal accident does result from this conduct, are the two drivers not both guilty of murder by means of *dolus eventualis*?’

### 3.2.8 S v Ndlanzi<sup>255</sup>

The accused, whilst driving a taxi, drove onto the pavement, in the city centre, colliding with a newspaper stall and knocking over the deceased who was walking on the pavement. The court *a quo* convicted the accused of murder on the basis of *dolus eventualis*. The accused admitted that it was peak hour traffic and that there were many pedestrians, however, he maintained that the pedestrians walking on the pavement were at a distance moving in the opposite direction.<sup>256</sup> He testified that he never saw the deceased because he ‘was looking back and sideways’.<sup>257</sup> On appeal, the court, applying the conative component as enunciated in *Humphreys*, held that:

‘Any person with a modicum of intelligence would have appreciated that driving a motor vehicle onto the pavement in the prevailing circumstances of this case raised the possibility that a collision with a pedestrian would occur with fatal consequences. Any right-minded person would have foreseen the possibility of the death of a pedestrian. On the evidence, there is no basis for concluding that the appellant did not possess the requisite subjective intent in accordance with this standard.’<sup>258</sup>

Therefore, it was found that the appellant had subjective foresight of the possibility of death to a pedestrian. However, the court held that this was not the end of the test and that ‘the second element of *dolus eventualis* requires proof.’<sup>259</sup> The court concluded that, on the evidence, the appellant *believed* that he would be able to avoid an accident with the pedestrians and therefore the court held that ‘it cannot be inferred that it was immaterial to the appellant whether he collided with a pedestrian on the pavement.’<sup>260</sup> The court, further, went on to state that it could also reasonably be inferred that the appellant may have thought that an accident with a

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<sup>255</sup> 2014 (2) SACR 256 (SCA).

<sup>256</sup> *Ibid* para [34].

<sup>257</sup> *Ibid*.

<sup>258</sup> *Ibid* paras [35] - [36].

<sup>259</sup> *Ibid* para [37].

<sup>260</sup> *Ibid* para [39].

pedestrian, which he subjectively foresaw, would not actually ensue.<sup>261</sup> In other words, he ‘took a risk which he thought would not materialise’ and accordingly could not be found guilty of murder on *dolus eventualis*.<sup>262</sup> Therefore, the court replaced the appellant’s conviction of murder with one of culpable homicide holding that ‘it is clear from the conduct of the appellant that he did not act like a reasonable driver.’<sup>263</sup> However, by taking a ‘risk which he thought would not materialise’ can equally be stated that he did not foresee a collision occurring and therefore did not possess the requisite foresight for *dolus eventualis*.

### 3.3 GERMAN CASE LAW

German case law will be consulted because the German *bedingter Vorsatz* parallels the South African *dolus eventualis*. Therefore, it will be instructive to discuss how German courts come to their findings.

#### 3.3.1 Leather Strap Case<sup>264</sup>

The accused in this case planned to knock the deceased unconscious, but the original method chosen to achieve this outcome failed and they resorted to choking the deceased with a leather strap until he could not move anymore. Throughout the commission of the crime, they wished only to render him unconscious, not to kill him. However, they did *realise* that there existed a possibility that the deceased could be strangled to death. The court held that *dolus eventualis* entails a two-stage test, namely that the accused foresees the harmful consequence as possible and that he approves of it. The court made it clear that the conative component can be present even where the accused honestly claims that he preferred the deceased’s survival to their death.<sup>265</sup> It is sufficient that in order to achieve his goal, which was to immobilise the deceased in order to rob him, the accused *accepted* the harmful consequence because it was the necessary

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<sup>261</sup> Ibid para [39].

<sup>262</sup> Ibid.

<sup>263</sup> Ibid para [40].

<sup>264</sup> BGHSt 7, 363.

<sup>265</sup> Dubber & Hörnle *Criminal Law: A Comparative Approach* (2014) 241.

means to achieve his end.<sup>266</sup> Therefore, the court convicted the accused of murder because they ‘approved’ of the deceased’s death ‘as a matter of law’ even though they disliked the outcome.<sup>267</sup> However, it can be said that once the accused ‘realised’ that the victim could die from suffocation he approved of the resulting death when he made the decision to continue with the act of choking of the deceased.

### 3.3.2 Gas Leak Case<sup>268</sup>

The court held that the mere hope which an accused may possess that the victim would remain unharmed and notice the gas leak, which the accused had intentionally caused in the home in which the victim lived, was insufficient to negate intention.<sup>269</sup> Therefore, the fact that the accused hoped that the harmful consequence would not materialise has no bearing on the determination of criminal liability. As Bockelmann<sup>270</sup> states, ‘it is trust, rather than hope, in a happy ending that determines the state of the mind of the person who believes that he has the matter in hand and that he can master the encountered danger without the help of luck.’ Therefore, this case illustrates that where the accused honestly believes or possesses an earnest reliance, rather than the hope, that the harmful consequence will not ensue, then the accused will be guilty of culpable homicide on the basis of conscious negligence. Taylor<sup>271</sup> states in this regard that:

‘It may well be that the accused in the *Gas Leak Case* could have demonstrated an earnest reliance by alerting someone to the danger he had created, but that would involve modifying his act by making the outcome of death objectively less probable, and accordingly does not really help us to identify a mental state which, without any modification of the facts, would count as earnest reliance rather than vague hope.’

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<sup>266</sup> Ibid.

<sup>267</sup> Dubber & Hörnle *The Oxford Handbook of Criminal Law* (2015) 496.

<sup>268</sup> (BGH, NStZ (1999) 508).

<sup>269</sup> Taylor op cit (n69) 114.

<sup>270</sup> Morkel op cit (n72) 331.

<sup>271</sup> Taylor op cit (n69) 114.

### 3.3.3 Doner Shop Case<sup>272</sup>

The Federal Supreme Court of Germany favoured a two-stage test for *dolus eventualis*. The accused in this case, wishing to force Turkish people out of Germany, set their doner kebab shop on fire.<sup>273</sup> In doing so, the accused injured K, who was in the shop whilst the fire was initiated. Due to the fact that the accused knew of K's presence he was charged with attempted murder. The question before the court was whether the accused possessed the requisite intention to kill.<sup>274</sup> The court held that intention to kill would be present where the accused 'considered the occurrence of the proscribed result to be a not entirely distant possibility and, further, if he approved of it or reconciled himself to it for the sake of attaining his desired goal.'<sup>275</sup> If, however, the accused 'had earnestly, and not merely in a vague way, relied on the non-occurrence of a fatal result'<sup>276</sup> he lacked the necessary intention. The court therefore had to assess whether the accused reconciled himself to the possible death of K, irrespective of the fact that he foresaw the possibility of death ensuing.

However, Taylor<sup>277</sup> validly argues that the courts are forced to attribute a fictional disposition to the accused as appears to have been in the *Doner Shop Case* and that German courts 'have never been able to give a convincing account of what it means to act in earnest reliance as distinct from a pious hope.' Therefore, he contends that the 'superfluity' of the conative component once a certain degree of foresight is reached is the reason why 'the dispositional criterion appears, on analysis, to be devoid of content.'<sup>278</sup> Dubber and Hörnle<sup>279</sup> state that 'German courts are often forced to infer volition from cognition, by determining whether the defendant's acceptance of the possible occurrence of harm may be inferred based on (his or her awareness) of the gravity of the risk.' Therefore, they contend foresight of a substantial

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<sup>272</sup> (NStZ-RR 2000, 165).

<sup>273</sup> Ibid at 199.

<sup>274</sup> Ibid at 166.

<sup>275</sup> Ibid at 100.

<sup>276</sup> Ibid at 166.

<sup>277</sup> Taylor op cit (n69) 119.

<sup>278</sup> Ibid.

<sup>279</sup> Dubber & Hörnle op cit (n265) 241.

risk will be taken as proof of the conative component, the result being that the conative component 'is in danger of being collapsed into the cognitive aspect.'<sup>280</sup>

### 3.4 AMERICAN CASE LAW

American case law on 'extreme indifference' murder, which has been likened to the German *bedinger Vorstaz* and is therefore similar to the South African *dolus eventualis*, will be briefly consulted. Only case law from the state of New York has been looked at because it is the focus of scholarly literature.

#### 3.4.1 People v Sanchez<sup>281</sup>

The accused got into a fight with his friend, Timothy Range, during a birthday party, following which the accused 'abruptly turn[ed] around, fire[d] a gun pointed at Range's chest and fle[d]'.<sup>282</sup> The accused was charged and convicted of 'extreme indifference' murder. On appeal, the majority held that despite that fact that the accused shot the deceased at point-blank range, the attack might have been 'an instantaneous, impulsive shooting – perhaps to disable or frighten, rather than to kill him.'<sup>283</sup> The court went on to hold that 'shooting into the victim's torso at point-blank range presented such a transcendent risk of causing his death that it readily meets the level of manifested depravity needed to establish murder.'<sup>284</sup> The court attempted to clarify the distinction between 'extreme indifference' murder and manslaughter by stating that 'in a depraved mind murder the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death.'<sup>285</sup> This accords with the degree of risk approach, however, it can be argued that this line of reasoning should be applied to the degree of foresight which is required for *dolus eventualis* and conscious negligence respectively. A higher degree of foresight, namely, a real, reasonable or substantial risk of

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<sup>280</sup> Dubber & Hörnle op cit (n265) 242.

<sup>281</sup> 98 N.Y.2d 373 (N.Y. 2002).

<sup>282</sup> Ibid at 376.

<sup>283</sup> Ibid at 378.

<sup>284</sup> Ibid.

<sup>285</sup> Ibid at 380.

death should be present for murder, whereas foresight of a remote possibility of death should be indicative of culpable homicide.

### 3.4.2 People v Suarez<sup>286</sup>

The New York Court of Appeals held, with regard to the distinction between reckless manslaughter and ‘extreme indifference’ murder, that:

‘The critical statutory language that separates second-degree manslaughter from depraved indifference murder is the defendant’s underlying *depraved indifference*. “[C]ircumstances evincing a depraved indifference to human life” are not established by recklessness coupled only with actions that carry even an inevitable risk of death. We therefore make clear that depraved indifference is best understood as an utter disregard for the value of human life – a willingness to act not because one intends harm, but because one simply doesn’t care whether grievous harm results or not.’<sup>287</sup>

It is seen how the law in New York changed from reference only to the objective risk of death to looking at the accused’s subjective state of mind i.e. ‘one simply does not care’ whether death results or not. It can be contended that one does not care whether death results or not when they act with the subjective knowledge that their conduct carries the real, reasonable or substantial possibility of causing death.

## 3.5 CHAPTER SUMMARY

This chapter discussed selected case law from South Africa, Germany and America and in doing so demonstrated the different approaches taken by the different jurisdictions. It also provided the support and criticisms which have been leveled against these decisions. The following chapter will summarise the findings of this dissertation and provide recommendations, based on these findings, on how to properly define *dolus eventualis* in the context of murder.

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<sup>286</sup> 844 N.E.2d 721 (N.Y. Ct. App 2005).

<sup>287</sup> Ibid at 730.

# CHAPTER FOUR

## CONCLUSION AND RECOMMENDATIONS

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### 4.1 INTRODUCTION

The question posed in chapter one asked ‘which consequences foreseen as possible should be considered to have been intended?’<sup>288</sup> In order to answer this question it needs to be determined whether the current two-stage test for *dolus eventualis* adequately defines the situation in which a risk-taking accused is found to possess *dolus*, and in doing so distinguishes itself from *culpa*. Based on the discussion of literature and case law in chapters two and three, this chapter will determine the sufficiency of *dolus eventualis* by summarising and analysing the findings of the preceding discussion, as well as providing recommendations which will help demarcate *dolus eventualis* from *culpa*.

### 4.2 SUMMARY OF FINDINGS

The summary below comprises the main findings from the research conducted in the dissertation.

#### 4.2.1 The Cognitive and Conative Component of *Dolus Eventualis* in South Africa

It is currently settled law that the degree of foresight required is merely the possibility of harm occurring. However, it is not settled amongst academics whether the most remote and unlikely possibility of death, if foreseen, must be regarded as intention. It has been pointed out that the courts only find *dolus eventualis* to be present when the accused foresaw death as a real, reasonable or substantial possibility and, therefore, they implicitly reject that a murder conviction will ensue where the accused foresaw the possibility of death ‘on the footing that

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<sup>288</sup> Bertelsmann op cit (n16) 68.

anything is possible.’<sup>289</sup> Therefore, it is argued in the literature that the foresight required is of a real, reasonable or substantial possibility in order to confine intention ‘to a state of mind that can properly be regarded as such and keep the dividing line between intention and negligence clearcut.’<sup>290</sup> By extending the degree of foresight to that of a chance occurrence, wrongful convictions could ensue because an accused cannot foresee a possibility if he thinks of it but considers it to be remote.<sup>291</sup> It is therefore the degree of foresight which is the determinant of whether the accused possessed *dolus* or *culpa*. It has been proposed that foresight of a remote possibility will only suffice when the accused’s conduct has no social utility and where it was the accused’s purpose to expose the victim to death. Furthermore, it has been argued that when determining whether the accused possessed *dolus eventualis*, the court must ascertain whether the risk taken was of a general statistical nature or whether it was concrete. However, in the literature, many academics argue that requiring foresight of a real, reasonable or substantial possibility limits the application of *dolus eventualis* and that the position to be favoured is that of an unqualified degree of foresight. They argue that, in response to the fears that an unqualified degree of foresight will ‘open the floodgates of liability for murder’,<sup>292</sup> there are in fact safeguards in place: that it is more difficult to infer foresight where the consequence was improbable; and remoteness of the possibility will reduce the punishment.

It is settled law that the conative component is recognised as part of the test for *dolus eventualis*. Although the courts have variously described its content, the majority of academics hold that the conative component is satisfied when the accused has ‘reconciled himself to the consequences’<sup>293</sup> and ‘accepts the consequences into the bargain.’<sup>294</sup> The proponents of this component state that it is conative component of *dolus eventualis* which distinguishes it from *culpa*. They argue that to dispense with it would lead to unjust results because foresight alone does not provide conclusive proof regarding the accused’s state of mind. However, some academics argue that it is redundant and only causes confusion. Rather, the test for *dolus*

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<sup>289</sup> 1968 (4) SA 498 (A) at 511.

<sup>290</sup> Burchell and Hunt op cit (n92) 146.

<sup>291</sup> Ibid.

<sup>292</sup> Tsuro op cit (n124) 104.

<sup>293</sup> Loubser and Rabie op cit (n53) 423.

<sup>294</sup> Ibid.

*eventualis* should require only that the accused subjectively foresaw the possibility of death ensuing as real, reasonable or substantial. They submit that where the accused persisted with his course of conduct despite possessing this level of foresight he consciously took the risk of its happening and therefore reconciled himself to the possibility that it will ensue. It is therefore argued that the conative component is rendered redundant because an accused reconciles himself to nothing more and nothing less than what he subjectively foresaw. In response to the criticisms that dispensing with the conative component disregards the accused's state of mind, it is contended that '*dolus eventualis* does concern the accused's state of mind, but only in the cognitive sense'<sup>295</sup> and therefore subjective foresight alone is sufficient to ascertain the accused's state of mind.

In *S v Beukes*,<sup>296</sup> *S v Dlamini*,<sup>297</sup> and *S v Makgatho*,<sup>298</sup> the Supreme Court of Appeal favoured an unqualified degree of foresight which shows that authority does exist for the position. However, in *S v Du Preez*,<sup>299</sup> *S v Maritz*,<sup>300</sup> *S v Humphreys*,<sup>301</sup> and *S v Ndlanzi*,<sup>302</sup> the courts favoured an unqualified degree of foresight and held that the accused lacked *dolus eventualis* because he 'believed' or was 'confident' that death would not ensue. However, Boister<sup>303</sup> submits that this belief or confidence could rather be argued on the basis that the accused did not foresee death as a real or substantial possibility. In *S v Dlamini*,<sup>304</sup> the Supreme Court of Appeal makes the point that once it is inferred that the accused subjectively foresaw the real, reasonable or substantial possibility of death, 'credibility is stretched beyond breaking point' where that accused denies that they accepted that death would ensue. Furthermore, the court in *S v Qeque*,<sup>305</sup> although still referring to the conative component, implicitly states that because the accused foresaw death as a real possibility, he can, as a logical inference, be said to have

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<sup>295</sup> Loubser & Rabie op cit (n53) 433.

<sup>296</sup> Supra (n206).

<sup>297</sup> Supra (n227).

<sup>298</sup> Supra (n231).

<sup>299</sup> Supra (n216).

<sup>300</sup> Supra (n223).

<sup>301</sup> Supra (n240).

<sup>302</sup> Supra (n255).

<sup>303</sup> Burchell op cit (n26) 368.

<sup>304</sup> Supra (n227) para [11].

<sup>305</sup> Supra (n235).

reconciled himself to the death. The court's findings are, in reality, solely based on the degree of foresight possessed by the accused at the time of committing the crime and therefore the accused's foresight, which reflects his state of mind, indicates a willingness to kill. The conative component consists merely of the accused having proceeded to carry out the risky conduct despite possessing foresight of something more than the merely 'possible'.

#### **4.2.2 Bedingter Vorsatz and bewusste Fahrlässigkeit in Germany**

Bedingter *Vorsatz*, the German equivalent of *dolus eventualis*, involves two components, namely, that the accused foresaw harm as a serious possibility and that he reconciled himself with it. This accords with the consent and approval theory which requires both knowledge and willfulness. With cases of murder, the consent and approval theory is complemented by the inhibition level theory in terms of which death must be so likely that 'only a fortunate coincidence could have averted it.'<sup>306</sup> However, some academics in the literature argue that *dolus eventualis* is present when the accused foresaw the possibility of harm, as contained in the theory of possibility. This theory is criticised by some for being over inclusive in that it includes conduct which cannot reasonably be called intentional. Another theory which supports the view that *dolus eventualis* consists only of subjective foresight is the theory of probability in terms of which the accused will be guilty of murder when he foresaw the harm as probable and of culpable homicide when he foresaw the harm as less than probable. However, the theory of probability has been criticised in the literature as being too vague, but some argue that, once a certain level of foresight has been reached, the person who wanted to avoid harm would have adjusted his action. It has been pointed out that *dolus indirectus*, which only differs from *dolus eventualis* in the degree of foresight, does not require a conative component, but that the accused proceeds with his actions, thereby evincing approval of the consequences. The Risk-Recognition Theory was also developed in terms of which the court must ask whether a risk existed which was known to the accused and offends the legal system. The requirement that the conduct must offend the legal system provides a solution to cases which cannot be called intentional, such as the overtaking driver, and equally addresses the problem of the

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<sup>306</sup> Badar op cit (n151) 142.

Russian roulette player, in which the probability of death may not be high, but the conduct is reprehensible and has no social utility. The last approach discussed was the Indifference Theory, which proposes that the conative component should mean that the accused was indifferent to the unlawful consequence materialising. However, the Indifference Theory has been criticised in the literature for including the accused's wishes or hopes, as the person who hopes or wishes that harm will not ensue cannot be indifferent.

In the *Leather Strap*,<sup>307</sup> *Gas Leak*<sup>308</sup> and *Doner Shop* cases,<sup>309</sup> a two-stage test for *dolus eventualis* is favoured and the courts hold that *dolus eventualis* is distinguished from conscious negligence in the conative component. They hold that the accused must possess 'an earnest reliance' that death will not ensue, not merely a 'pious hope'. However, Taylor<sup>310</sup> and Dubber and Hörnle<sup>311</sup> point out that the courts have never given content to the terms 'earnest reliance' and 'pious hope' evident in the abovementioned cases because they infer the accused's state of mind from the accused's foresight of the consequences.

#### **4.2.3 'Extreme Indifference' Murder in America**

In terms of Section 210.2 (1) (b) of the Model Penal Code, 'extreme indifference' murder occurs when the accused takes a substantial and unjustifiable risk under circumstances manifesting 'extreme indifference to the value of human life.' However, different states have taken different approaches to the phrase 'extreme indifference to the value of human life.' The Objective Circumstances approach focuses on the circumstances of the crime alone which are 'uncaring', 'callous', 'dangerous' and 'inhuman'.<sup>312</sup> However, it has been argued in the literature that one must avoid moralistic phrases such as, *inter alia*, 'callous' and 'brutal' because it can lead to prejudicial decision-making. Furthermore, an objective standard neglects the accused's state of mind. Some states only find 'extreme indifference' murder where the

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<sup>307</sup> Supra (n264).

<sup>308</sup> Supra (n268).

<sup>309</sup> Supra (n272).

<sup>310</sup> Taylor op cit (n69) 119.

<sup>311</sup> Dubber & Hörnle op cit (n265) 241.

<sup>312</sup> Michaels op cit (n184) 1008.

accused threatened more than one person's life, referred to as the Multiple Victims approach. However, although it provides certainty, it is argued that threatening multiple victims is not a prerequisite for acceptance. Therefore, it is both over and under inclusive. The Degree of Risk approach is applied by some states in terms of which the court refers only to the probability that the accused's conduct would result in death. However, it is argued in the literature that the objectivity of this approach neglects the accused's mental state and fails to cover situations that appear to reveal an extreme indifference to human life such as a game of Russian roulette. The *Mens Rea* approach is used by some states and asks the jury to ascertain the accused's subjective attitude toward whether the victim lived or not. However, it is pointed out that this approach does not provide any guidance on establishing the accused's mental state. In response, it has been proposed that the test for 'extreme indifference' be reformulated by stating that the court must ask whether the accused would have committed the act had he known it would cause death. If answered in the affirmative, then the accused has demonstrated a willingness to kill. Abrahmovsky and Edelstein<sup>313</sup> propose that 'extreme indifference' murder should only take place where the accused created a risk of death that did not exist before his conduct and which is not directed at any one particular individual.

New York's case law was consulted and it was found that a high degree of risk must be present. In *People v Suarez*,<sup>314</sup> the New York Court of Appeals added to the test set out in *People v Sanchez*<sup>315</sup> and held that 'extreme indifference to the value of human life' is taken to mean that the accused did not care whether death ensued or not.

#### **4.3 RECOMMENDATIONS**

The findings of the research demonstrate that the degree of foresight contained in the cognitive component should be qualified. In other words, the accused must have foreseen death as a real, reasonable or substantial possibility and foresight of anything less will constitute culpable homicide. Due to the high degree of stigma associated with a conviction for murder, the

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<sup>313</sup> Abrahmovsky & Edelstein op cit (n201) 492-494.

<sup>314</sup> Supra (n286).

<sup>315</sup> Supra (n281).

principles of fundamental justice require a level of *mens rea* which reflects the nature of murder.<sup>316</sup> Therefore, requiring a remote degree of foresight for *dolus eventualis* does not sufficiently reflect a level of *mens rea* that is sufficient for murder and the stigma attached. This is why both Germany and America require that there be a high degree of risk for a murder conviction. Furthermore, the courts, in practice, do not find *dolus eventualis* to be present where the foresight of harm occurring was remote, as a person of normal intelligence cannot accept, and therefore intend, that death will ensue where they foresaw it as a remote happening. Consequently, it appears that the conative component is rendered redundant and should be dispensed with. Not only have the courts never delved into explaining the content of the conative component, thereby leaving it a confusing concept, but they also infer this component from cognition by ascertaining whether the accused's acceptance of death may be inferred based on his foresight of the probable result of death. Therefore, foresight of a probable risk will be taken as proof of the conative component, the result being, as Dubber and Hörnle<sup>317</sup> state, that the conative component is 'collapsed' into the cognitive component. Furthermore, Taylor<sup>318</sup> validly points out that for *dolus indirectus*, which requires only the certain foresight of death, no conative component is required. When foresight is of a real, reasonable or substantial possibility, there exists no reason why *dolus eventualis* should contain a conative component merely because there is a reduction in the foresight of the possibility of death. Therefore, the arguments put forward, that foresight alone does not reflect intention and neglects the accused's state of mind, have no validity. It is for this reason that Loubser and Rabie<sup>319</sup> state that '*dolus eventualis* does concern the accused's state of mind, but only in a cognitive sense, in that it requires a conclusion as to whether a harmful result may actually occur in the circumstances.' This conclusion is based on the degree of foresight possessed by the accused at the time of committing the crime because an accused cannot conclude that a harmful result will ensue when he foresaw it as a remote happening and the courts infer accordingly.

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<sup>316</sup> Thomson op cit (n97) 388.

<sup>317</sup> Dubber & Hörnle op cit (n265) 242.

<sup>318</sup> Taylor op cit (n69) 116.

<sup>319</sup> Loubser & Rabie op cit (n53) 433.

However, there are cases which cannot reasonably be called cases of intentional acting, such as the Russian roulette player, in which the chance of firing the gun is not probable and the accused therefore believes that there will be a ‘happy ending’. It is submitted that the Risk-Recognition theory in which the accused’s conduct must offend the legal system provides a solution to the abovementioned cases and should therefore be welcomed. This accords with the views that foresight of a remote possibility will suffice when the conduct involved has no social utility, but ‘it is the accused’s purpose to expose the victim to the risk of death.’<sup>320</sup> Likewise, the slightest social utility of the conduct will introduce an inquiry into the degree of probability of harm and a balancing of this hazard against its social utility.’<sup>321</sup> This can also be said to be in line with Abrahmovsky and Edelstein’s reformulation of ‘extreme indifference’ murder in which the accused himself created the risk of death because, for example, a car accident is an everyday risk, but, when an accused decides to drive on a public sidewalk, it is a risk which would not have been there absent the accused’s conduct.

#### **4.4. CONCLUSION**

In conclusion, the current test for *dolus eventualis* is not sufficient and cannot properly be distinguished from cases of culpable homicide. The arguments put forward in this dissertation have led to the conclusion that the test for *dolus eventualis*, in the context of murder, should be reformulated as follows:

- i) Did the accused possess foresight of a real, reasonable or substantial possibility of death ensuing from their proposed course of conduct? In other words, was death foreseen as probable? This creates a higher standard of proof than the current test, which is appropriate for the seriousness of the crime of murder.

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<sup>320</sup> Hoctor op cit (n13) 139.

<sup>321</sup> JH Pain ‘Some Reflections on our Criminal Law’ (1960) *Acta Juridica* 301.

- ii) If death was not foreseen as probable, it needs to be asked whether the accused's conduct offends the legal system? In other words, did the accused's conduct have any social utility and would the risk of death have existed but for the accused's conduct? This covers those situations in which the risk taking of the accused demonstrates an 'extreme indifference to the value of human life' and, as such, cannot be regarded as merely negligent due to the moral blameworthiness of the accused.

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