

**UNDERSTANDING THE LEGAL PRINCIPLE OF *DOLUS EVENTUALIS* IN THE
CONTEXT OF FATALITIES ARISING FROM MOTOR VEHICLE COLLISIONS**

by

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DECLARATION

I, DHAMIEN REDDY, student number 218076178, hereby declare that this dissertation entitled UNDERSTANDING THE LEGAL PRINCIPLE OF *DOLUS EVENTUALIS* IN THE CONTEXT OF FATALITIES ARISING FROM MOTOR VEHICLE COLLISIONS contains my own work except where specifically acknowledged. I also declare that I have obtained the necessary authorization and consent to carry out this research. I further declare that this research has not previously been submitted for assessment or completion of any postgraduate qualification to another University.

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CHAPTER 1

1. INTRODUCTION

The legal concept of *dolus eventualis* is a fundamental principle in South African criminal law¹ but the definition and application of *dolus eventualis* is subject to controversy² and criticism by legal scholars.³ There is much vacillation surrounding the definition and application of the concept, which has led to legal uncertainty throughout its development.⁴ It is submitted that despite the controversy surrounding *dolus eventualis*, it rightfully remains a firmly rooted form of intention in South African criminal law.⁵ The principle of intention is of paramount importance to South African criminal law, as South Africa subscribes to the *actus non facit reum nisi mens sit rea maxim*.⁶

This dissertation focuses exclusively on intention in the form of *dolus eventualis*. Other forms of intention such as *dolus directus*, *dolus indirectus*, *dolus generalis* and *dolus indeterminatus* will not be discussed as they fall outside the scope of this study.

The aim and purpose of this dissertation is to evaluate the application of *dolus eventualis* with specific reference to fatalities caused on our roads by the drivers of motor vehicles involved in motor vehicle collisions. The rationale of this study stems from the judgment of the Supreme Court of Appeal in *S v Humphreys*.⁷ The accused in *Humphreys* had driven a mini-bus through an active railway crossing despite the warning of the arrival of a nearby oncoming train. The mini-bus collided with the train. Although the accused had survived the collision, ten passengers died and four were severely injured.⁸ As a result, the accused had been charged and convicted on ten counts of murder and four counts of attempted murder. On appeal to the Supreme Court of Appeal, the court found the accused guilty of culpable homicide for the death of the ten deceased passengers

¹ A Paizes. 'Dolus eventualis reconsidered' (1988) 105 SALJ 636, 636.

² R Whiting 'Thoughts on *dolus eventualis*' (1988) 3 SACJ 440, 440.

³ MM Loubser & MA Rabie 'Defining *dolus eventualis*: a voluntative element?' (1988) 3 SACJ 415, 415.

⁴ Paizes (see note 1) 636.

⁵ *S v Coetzee and Others* 1997 (1) SACR 379 (CC) para 177 A.

⁶ *Ibid* para 162; JM Burchell *Principles of Criminal Law* 5ed (2016) 60: An act is not unlawful unless there is a guilty mind

⁷ *S v Humphreys* 2013 (2) SACR 1 (SCA).

⁸ *Ibid* 1.

and the four charges of attempted murder were set aside,⁹ as he was found to have acted negligently.¹⁰

An important question to ask is, why does the National Prosecuting Authority pursue charges of murder in cases where fatalities arise from motor vehicle collisions? At face value these fatalities are accidental or as a result of negligent conduct. Although it is respectfully acknowledged that the trauma caused to the victims of these incidents is truly horrific, is it legally correct to find that the accused had had the intention to kill under these circumstances?

Based on the legal principle of *dolus eventualis*, is there any merit in charging an accused with murder for causing fatalities from a motor vehicle collision? May our courts correctly find an accused guilty of murder under these circumstances or is it a futile exercise by the National Prosecuting Authority to bring charges of murder?

The crime of murder is a serious offence and should be placed upon those who legally deserve the conviction. Arguably, finding ordinary drivers of motor vehicles to harbor murderous intention in road collision circumstances may undermine the seriousness of the offence.

It is submitted that the state may be blinded by the high frequency of road fatalities when pursuing charges of murder in these scenarios.¹¹ The fight in support of reducing road accident fatalities tampers with the legal principle of *dolus eventualis*, as the state may feel pressured to institute charges of murder for deaths resulting from vehicle collisions as a means to deter drivers from driving dangerously.¹² Charges of culpable homicide would seem more appropriate in these circumstances.

It is by no means submitted that *dolus eventualis* cannot find application in fatalities arising from motor vehicle collisions. In fact, it may apply. However, it is submitted that its application in the context of motor vehicle collisions requires further scrutiny.

⁹ Ibid 28.

¹⁰ Ibid 20; *R v Steenkamp* 1960 3 SA 680 (N) 684; CR Snyman *Criminal Law* 6ed (2014) 452: The convictions of attempted murder were set aside because there is no crime in our law of negligent assault.

¹¹ Minister of Transport of South Africa, MS Dipuo Peters, Address at the occasion of the Africa Road Safety, 31 October 2016 at Tsogo Sun Elangeni Hotel, Durban, South Africa.

¹² Ibid.

Dolus eventualis is a legally technical and academically complex concept to understand and apply. These complexities arise from the subjective nature of this legal concept, which is proved by means of inferential reasoning.¹³ It is submitted that these technicalities and complexities become more challenging when *dolus eventualis* is applied to fatalities caused by drivers of motor vehicles.

This dissertation seeks to clarify the way in which the legal test for *dolus eventualis* ought to apply with regard to motor vehicle collisions. This will be achieved through an evaluation of the application of *dolus eventualis* in the decision of *S v Humphreys*.¹⁴ A foundational understanding of the concept of *dolus eventualis* and the controversy surrounding it are therefore essential before engaging in its application to motor vehicle collisions.

Consequently, this study will first deal with such foundational knowledge and controversy and then seek to ascertain whether it would be appropriate for the National Prosecuting Authority to charge accused persons with murder based on intention in the form of *dolus eventualis* for fatalities resulting from motor vehicle collisions.

In light of the *Humphreys* judgment, it is submitted that the legal distinction between *dolus eventualis* and *luxuria* is of fundamental importance, as it may provide clarity on the application of *dolus eventualis* in the context of fatalities caused by motor vehicle collisions. These legal concepts are closely related and characteristically overlap with each other. They will be discussed separately in chapter 2.

It is submitted that the research methodology adopted for this research is consistent with an analytical doctrinal research approach, which is also known as legal positivism research theory.

1.1 The development of *dolus eventualis*

The legal concept of *dolus eventualis* is now a firmly rooted principle in South African criminal law.¹⁵ It was only after 1945 that this legal concept began to establish its true authority on the South African law of intention.¹⁶ A brief examination of the way in which this fundamental principle infiltrated our law is necessary to understand the importance of its modern day presence.

¹³ Snyman (see note 10) 184 - 186.

¹⁴ *S v Humphreys* (see note 7).

¹⁵ *S v Coetzee* 1997 (3) SA 527 (CC) para 177. Burchell (see note 6) 355 - 356.

¹⁶ Burchell (see note 6) 355 - 356.

Intention in the form of *dolus directus* is the simplest form of intention to understand, as it describes intention in its ordinary grammatical sense.¹⁷ However, as early as the 13th century, Saint Thomas Aquinas (Aquinas) analysed a form of intention where the crime committed was not part of the goal of the perpetrator but occurred as a consequence of the perpetrator's intended act.¹⁸ The reasoning adopted by Aquinas to rely on this form of intention was based on the principle of cause and effect, which states that an effect is intended by the perpetrator if the effect ordinarily or naturally flows from that act.¹⁹ It was Aquinas's submission that a person intends the natural and ordinary consequences of their act.²⁰ Legal commentators have since built on this reasoning.²¹

In the 16th century Covarruvias adopted the theory advanced by Aquinas but it differed materially in the scope of its application.²² Covarruvias claimed that any consequence of an intended act is deemed to be intentional irrespective of whether or not such a consequence is an ordinary or natural consequence of such act.²³ By implication of his reasoning, foresight of the consequence is not necessary to prove intent and only the act needs to be intentional.²⁴ He referred to this concept of intention as *voluntas indirecta*.²⁵

Carpzovius, who was influential amongst the Roman-Dutch writers, holds a significant role in the law of intent, as he is deemed to have concocted a concept of intention that is implied by the perpetrator's conduct rather than the perpetrator's actual will.²⁶ He was responsible for carrying the doctrine of *voluntas indirecta* over into German law, which was interpreted by German scholars as *dolus indirectus*.²⁷

¹⁷ Ibid 350.

¹⁸ Focus '*Dolus eventualis*' 1988 SACJ 413.

¹⁹ S Hoctor 'The Concept of *Dolus Eventualis* in South African Law - An Historical Perspective' (2008) 14 *Fundamina* 14, 16.

²⁰ Ibid 16.

²¹ Ibid 16.

²² Ibid 16.

²³ Ibid 16.

²⁴ Ibid 16.

²⁵ Ibid 16.

²⁶ HDJ Bodenstern 'Phases in the development of criminal *mens reas*' 1920 SALJ 21. (Part 2 of article).

²⁷ Hoctor (see note 19) 16.

The contributions of Carpzovius are without doubt paramount to the development of the law of intention. However, German scholar Bodenstein is of the opinion that fellow German scholar Boemher was the first to discover *dolus indirectus*, in the 18th century.²⁸

It is thus clear that the writings of legal scholars depict discussions of a form of intention other than *dolus directus*, well before the South African courts gave consideration to their discussions.²⁹

In 1920 Bodenstein recognised three forms of intent in criminal law: *dolus directus*; *dolus indirectus* and *dolus eventualis*.³⁰ Bodenstein defined *dolus eventualis* as:

‘The effect caused by the willful act or inaction is foreseen as a possible consequence, the agent, however neither wishes it nor aims at it.’³¹ Bodenstein described the mental state of *dolus eventualis* as follows: Whenever the agent had beforehand consented to or approved of the effect; when the agent is so keen on the effect that he is prepared to take into the bargain, if need be, the undesired effects, or when the fact that he foresaw the effect as something certain to ensue would not have caused him to abstain from action; when the agent comes to the conclusion that if the undesired effect ensues that he is also game with it; or despite foreseeing the undesired effect still proceeds to act with the risk in mind; to proceed whether it will ensue or not.’³²

From examining the descriptions provided by Bodenstein of the mental state of the perpetrator, it may be concluded that the focus is on the subjective nature or state of the mind.

In 1937 Coertze approved of Bodenstein’s views and he appears to be the first South African jurist to adopt the Afrikaans translation of *dolus eventualis*.³³

Gie includes the doctrine of *dolus eventualis* in his interpretation of intention. However, his version of *dolus eventualis* differs, as it does not contain a volitional element, only a foresight element.³⁴

Gie states that *dolus eventualis* did not exist at the time in our courts because of the application of

²⁸ Bodenstein (see note 26) 22.

²⁹ Hoctor (see note 19) 17.

³⁰ Ibid 17.

³¹ Ibid 17.

³² Ibid 17.

³³ Ibid 18.

³⁴ Ibid 19. *Dolus eventualis* is considered to consist of two elements: a foresight element and a volitional element.

the presumption that the accused must have intended the natural and probable consequences of his act.³⁵

Gardiner and Lansdown was a dominant source of South African criminal law from about 1931 until the intervention of Strafreg by JC de Wet in 1949.³⁶ Bodenstein and Coertze's theoretical descriptions of *dolus eventualis* were not incorporated into South African law in Gardiner and Lansdown.³⁷

Gardiner and Lansdown makes reference to a type of intention that may be described as the closest approximation of *dolus eventualis*.³⁸ It is stated as:

'Mens rea in a less and mediate degree is found in those cases which an offender, without specific malice or intention directed to the crime charged, consciously sets forth upon a wrongful or unlawful design, and in the execution of it reaches a criminal result greater, short of, or otherwise different from that proposed, but which he should reasonably have contemplated as a possible consequence of his conduct.'³⁹

This description was considered as a lesser form of intention⁴⁰ and is closely linked to the English law presumption that a person intends the natural and ordinary consequences of his actions.⁴¹

This English law presumption was followed for many years in the South African courts.⁴²

Applying the presumption that a person intends the natural and ordinary consequences of their acts has been subject to criticism by legal scholars. Intention is meant to be assessed subjectively and the accused is meant to foresee the consequence of his act to be legally liable.⁴³ The use of the presumption creates an issue in both its form and language. It is submitted that presuming intention certainly strikes a blow to the *actus non facit reum nisi mens sit rea* maxim, and the state should not be assisted with a presumption of intent.

³⁵ Ibid 19.

³⁶ Digby Sghelo Koyana 'The Influence of the Native Territories Penal Code on South African Criminal Law' *unpublished PhD thesis*, University of South Africa, 1988, 2.

³⁷ Hoctor (see note 19) 18.

³⁸ Ibid 18.

³⁹ Ibid 18.

⁴⁰ Ibid 18.

⁴¹ Ibid 18.

⁴² *R v Jolly* 1923 AD 176: 186; *R v Jongani* 1937 AD 400: 406; *R v Longone* 1938 AD 532: 539; Burchell (see note 6) 355.

⁴³ Hoctor (see note 19) 19.

The presumption also inherently, by its language, applies an objective assessment in determining intention, which is a subjective inquiry. However, this objective assessment of intention has been applied by our courts.⁴⁴ It measures the accused's conduct against a reasonable person in the same circumstances.⁴⁵ The use of the phrases: "naturally flowing from," "ordinarily," or "reasonably contemplated" refer to an objectively viewed state of affairs. The consequence is detached from the perpetrator's intention and is rather linked to an objectively determined expectation. The question asked is whether or not the accused ought to have foreseen the harm or should the accused have foreseen the harm? The use of the words "ought" or "should" measure the accused's conduct against that of a reasonable person, or applies a yardstick approach in determining intention.⁴⁶ This type of language must be avoided, as it entails an inquiry pertaining to negligence rather than intention because of its objective approach.⁴⁷ The question instead should be "did the accused subjectively foresee the harm?"⁴⁸

It is submitted that the language used by the presumption of intention, namely the words "naturally flowing from" and "ordinarily" are ambiguous. It is submitted that these phrases may lead to two possible interpretations, the first being the objective interpretation as discussed above and the second being a more subjective interpretation. If the words are used to imply consequences that flow from the accused's act as a result of normal human experience, it is then submitted that that interpretation strays away from comparing the accused's act to a reasonable person and rather becomes an inference of logic and reason.⁴⁹

The use of the presumption was justified by the reasoning that it is impossible to examine the mind of the accused and the law therefore presumes his intent from his actions.⁵⁰ In support of the

⁴⁴ *R v Jolly* (see note 42) 186; *R v Jongani* (see note 42) 406; *R v Longone* (see note 42) 539; Hoctor (see note 19) 19.

⁴⁵ Hoctor (see note 19) 19.

⁴⁶ P Carstens 'Revisiting the relationship between *dolus eventualis* and *luxuria* in the context of vehicular collisions causing the death of fellow passengers and/or pedestrians: *S v Humphreys* 2013 (2) SACR 1 (SCA)' (2013) *SACJ* 1 68.

⁴⁷ *Ibid* 68 - 69.

⁴⁸ *Ibid* 68.

⁴⁹ Snyman (see note 10) 185.

⁵⁰ Hoctor (see note 19) 19 - 20. Pain 'Some reflections on our criminal law' 1960 *Acta Juridica* 297: fn 69.

presumption, it was put forth that the courts relying on the presumption of intention was dependent on the facts and evidence⁵¹ of the case and that the presumption could be rebutted by the accused.⁵²

The issue with the presumption doctrine is that it assesses intention with an objective test, which has the effect of blurring the distinction between intention and negligence.⁵³

Glanville Williams is of the opinion that the presumption is unsatisfactory and distorts the line between intention and negligence.⁵⁴ The presumption masquerades as an inquiry for intention but is in fact using an objective assessment to determine a subjective inquiry.⁵⁵ In short, the presumption applies the test for negligence but refers to it as intention.

Swanepoel raises the following important issue: consider the situation where the accused did not foresee the consequence of his actions at all. Should he be deemed to have had intention based on a reasonable person standard?⁵⁶

Morkel submits that if such a presumption is followed then the state needs only to prove that the act was intended because the culpability of the accused will be implied from the act.⁵⁷ This creates the view that the presumption is an adoption of the *versari in re illicita* doctrine in disguise.⁵⁸ If this view is accepted then the presumption should be struck down on the same basis as the *versari in re illicita* doctrine was by the Appellate Division.⁵⁹ The state should not be assisted by a presumption of intent and must bear the burden of proving all the elements of the crime.⁶⁰

*R v Ndhlovu*⁶¹ may be considered as a turning point in our law in which South African courts began to shift from an objective approach to intention to a more subjective approach.⁶² There is no doubt that the introduction of Strafreg by J.C de Wet has fundamentally developed criminal law. The views of the German and Roman-Dutch writers for the abolition of the presumption doctrine and

⁵¹ Hoctor (see note 19) 20.

⁵² Hoctor (see note 19) 20. *R v Jolly* (see note 44) 181, 189.

⁵³ Hoctor (see note 19) 21.

⁵⁴ *Ibid* 20 - 21.

⁵⁵ Hoctor (see note 19) 20.

⁵⁶ Hoctor (see note 19) 21.

⁵⁷ *Ibid* 21.

⁵⁸ *Ibid* 21.

⁵⁹ *S v Mescht* 1962 (1) SA 521 (A); *S v Bernardus* 1965 (3) SA 287 (A).

⁶⁰ *R v Ndhlovu* 1945 AD 369: 386.

⁶¹ *Ibid* 386.

⁶² Hoctor (see note 19) 22.

the use of a more subjective approach to intention had become more compelling to the South African courts.⁶³

Characteristics of *dolus eventualis* appear to have always been present in the application of the law. However, only after 1945 did this form of intention truly infiltrate our courts.⁶⁴ Earlier South African case law indicates acceptance and the application of *dolus eventualis*.⁶⁵

Holmes in *S v De Bruyn* said that the purest form of *dolus eventualis* was illustrated in *S v Malinga*.⁶⁶ *Dolus eventualis* was described as follows in *Malinga*:

‘In considering the issue of intention to kill, the test is whether the *socius* foresaw the possibility that the act in question in the prosecution of the common purpose would have fatal consequence, and was reckless whether death resulted or not.’⁶⁷

There is no doubt that *dolus eventualis* forms part of South African criminal law. However, despite its firm presence in our law it remains subject to criticism and controversy regarding its meaning and application. This is discussed in chapter 2.

1.2 The constitutionality of *dolus eventualis*

It is respectfully submitted that the form of *mens rea* used by Gardiner and Landsdown and the presumption that a person intends the ordinary or natural consequences of their actions would not survive our modern constitutional scrutiny. The very presumption that it creates offends the autonomy of an individual, which in turn offends the dignity of that individual and is in conflict with the subjective approach to criminal intent in South African law.⁶⁸ In *S v Coetzee* the Constitutional Court held that *dolus eventualis* is a sufficient form of culpability in our law.⁶⁹

⁶³ Ibid 22.

⁶⁴ Burchell see (note 6) 355 - 356.

⁶⁵ *R v Valachia* 1945 AD 826; *R v Horn* 1958 (3) SA 457 (A).

⁶⁶ *S v De Bruyn* 1968 (4) SA 498 (A) 509 H.

⁶⁷ *S v Malinga* 1963 (1) SA 692 (A) 694 G-H.

⁶⁸ Hoctor ‘Dignity, The Criminal Law, and The Bill of Rights’ (2004) *SALJ* 304, 306 - 307.

⁶⁹ *S v Coetzee* 1997 (3) SA 527 (CC) para 177.

1.3 Conclusion

Dolus eventualis is a well-established principle in South African criminal law. As discussed above, *dolus eventualis* has developed progressively since the 13th century. The manner in which *dolus eventualis* portrays itself in the 21st century certainly respects the integrity of our constitutional principles and criminal law, as it regards people as autonomous beings.

Chapter 2 focuses on the principle of *dolus eventualis* as it is known and applied by our courts to date. In addition to the discussion of *dolus eventualis*, chapter 2 discusses the principle of *luxuria*.

CHAPTER 2

2. *DOLUS EVENTUALIS* AND *LUXURIA*

2.1 Introduction

As illustrated in chapter 1, the doctrine of *dolus eventualis* has developed significantly through various interpretations and legal systems. It is however submitted that the doctrine of *dolus eventualis* will always be difficult to define because of its inherently subjective nature. Definitions and descriptions of *dolus eventualis* may differ amongst legal scholars but despite such differences the definitions all retain the essential characteristics of the doctrine, which are that: (i) *dolus eventualis* is assessed subjectively and (ii) it consists of two components: a foresight component (cognitive) and a volitional component (conative).⁷⁰

A number of authors express the view that *dolus eventualis* should only consist of a foresight component (cognitive).⁷¹ However, it is submitted that this is not the view adopted by our courts.⁷² A discussion of this difference in opinions is presented further on in this chapter.

2.2 The definition of *dolus eventualis*

It is submitted that the definition of *dolus eventualis* offered by Snyman is the least controversial description in terms of the terminology used.⁷³ Snyman defines *dolus eventualis* as presented below.

A person commits a crime with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but:

- a) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed, or the unlawful result may be caused (cognitive element) and
- b) he reconciles himself to this possibility (conative element).⁷⁴

⁷⁰ Burchell (see note 6) 357 - 358; Snyman (see note 10) 178. Both these authors differ in definition.

⁷¹ Paizes (see note 1) 638: comments that the conative element is a notion without utility; Whiting (see note 2) 446.

⁷² *Humphreys* (see note 7) para 12. The court expressly described *dolus eventualis* as a two part test.

⁷³ S Hoctor 'The degree of foresight in *dolus eventualis*' (2013) 2 *SACJ* 146.

⁷⁴ Snyman (see note 10) 178.

Consider the following illustration that depicts the operation of the doctrine of *dolus eventualis*:⁷⁵

Person X is standing on a bridge above a freeway and throws a brick downwards onto the freeway that is full of fast moving vehicles. Person X foresees that the brick may or may not cause damage to a vehicle. He still wishes to throw the brick, not caring whether or not it could cause damage. If the brick does cause damage to a vehicle, Person X would have had intention in the form of *dolus eventualis*.

Also consider the following, which is a more practical situation in which *dolus eventualis* is applied.⁷⁶

Person Z brutally assaults person Y with a cricket bat by striking him on the head multiple times. Person Y dies as a result of the assault. Person Z knew that the manner in which he attacked person Y could kill him but he nevertheless continued to act, indifferent to the possibility of death occurring. Person Z cannot submit that he only had intention to assault person Y as a defense to murder. Person Z displayed intention in the form of *dolus eventualis* to kill person Y.

What may be ascertained from these illustrations is that the person performing the unlawful act does not need to have the direct intention to cause a specific result but is rather held liable for having the requisite foresight or knowledge that the unlawful result may occur.

2.3 *Dolus eventualis* and inferential reasoning

South African criminal law assesses intention subjectively, which means that the courts are tasked with assessing the actual state of mind of the accused during the commission of the crime. Proving intention in a court of law is therefore a difficult task and the evidential burden placed on the state is onerous. It is rare, if not impossible, to find direct evidence of intention. Direct evidence will only exist in circumstances in which the accused confesses to having intention or implies during his testimony that he had intention to commit the crime.⁷⁷ Relying solely on this type of evidence to prove intention would bring the legal system into disrepute on the basis that our criminal justice system will be dependent on the accused's version of events in order to prove the element of intention. This would amount to a rather unsatisfactory situation because the court would only be

⁷⁵ Ibid 179.

⁷⁶ Ibid 179.

⁷⁷ Ibid 184 - 185.

able to hear direct evidence supplied by the accused, which may be untrue and biased in favour of the accused. The onus on state to prove intention would become extremely difficult, if only direct evidence could be submitted to the court.

The courts rely on indirect evidence by using the process of inferential reasoning to determine the accused's subjective state of mind.⁷⁸ Based on the accused's outward conduct during the commission of the crime and the circumstances surrounding the situation, the court would be in a position to infer whether or not the accused had intent.⁷⁹

The courts must avoid applying an objective test or objective standards when assessing intent. In all circumstances the court must avoid adopting an armchair reasoning approach and refrain from comparing the accused to a reasonable person in the same circumstances.⁸⁰

The role of the court is to determine the actual state of mind of the accused at the time of the commission of the crime. The court must therefore consider all the circumstances surrounding the crime. A fine line exists between using common human experience and general knowledge to determine intent and between using a reasonable person standard.⁸¹ The courts must attempt to place themselves in the position of the accused at the time of the incident and must guard against *ex post facto* knowledge.⁸²

Language is a crucial factor when determining intention by inferential reasoning. In some instances, the courts have used the words "should" or "ought" when describing intention (specifically the cognitive element). By expressing that "the accused should have or ought to have foreseen the possibility" the court is engaging in a comparison of the accused's conduct to that of a reasonable person and is effectively applying the objective test for negligence rather than the subjective test for intention.⁸³

Another word that has been used by our courts that is subject to ambiguity is the use of the word "must" to describe the cognitive element.⁸⁴ The word "must" may be interpreted in two ways. The

⁷⁸ Ibid 185.

⁷⁹ Ibid 185.

⁸⁰ Ibid 185; *S v De Bruyn* (see note 66) 507 D.

⁸¹ Snyman (see note 10) 184 - 186.

⁸² Ibid 185 - 186; *S v Mini* 1963 (3) SA 188 (A) 196 E.

⁸³ Snyman (see note 10) 186.

⁸⁴ Ibid 185 - 186.

first interpretation the court may express is that the word "must" makes reference to what the accused should have foreseen.⁸⁵ The second interpretation that the court may express from the word "must" is that the accused did, in fact, foresee.⁸⁶ The former interpretation implies an objective test and the latter, a subjective test.⁸⁷ The context in which the word "must" is used is therefore important when distinguishing between objective and subjective tests.⁸⁸

The courts have also warned of too readily drawing the inference of subjective foresight. The jump from "ought to have foreseen" to "did foresee" must not be made too easily.⁸⁹ All the thought processes of the accused must be established beyond a reasonable doubt and the specific circumstances surrounding the crime must be considered before reaching the conclusion of subjective intention.⁹⁰

The degree of proof in determining subjective foresight by inferential reasoning was laid out in *S v Sigwahla* as:

‘Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.’⁹¹

Inferential reasoning is a powerful and useful tool in determining intention. However, the courts must use this tool with the caution and grammatical precision it requires. The line between negligence and intention has the potential to become blurred if not approached with caution. The effect of applying an objective assessment to a subjective inquiry will blur the line between negligence and intention. Using the words "should have" and "ought" when determining the cognitive element of *dolus eventualis* may lead to the court presuming intention based on a reasonable person standard. As illustrated in chapter 1, this line of deductive reasoning and

⁸⁵ Ibid 185 - 186.

⁸⁶ *S v Majosi* 1991 2 SACR 532 (A) 538 E; *S v De Oliveira* 1993 2 SACR 59 (A) 65 I-J.

⁸⁷ Snyman (see note 10) 186.

⁸⁸ Ibid 186.

⁸⁹ *S v Dube* 2010 (1) SACR 65 (KZP) para 20.

⁹⁰ *S v Mini* (see note 82) 196 C-H.

⁹¹ *S v Sigwahla* 1967 (4) SA 566 (A) 570 E.

presumption is subject to criticism and not always consistent with the psychological approach to crime.

It is submitted that courts will inevitably use facts to draw inferences. There remains a crucial difference in the use of objective facts to aid in the process of drawing inferences and the use of objective criteria to determine intention.⁹² The latter will result in a test for negligence and the former is a line of reasoning supported by logic and normal human experience.⁹³

2.4 The cognitive element of *dolus eventualis*

Dolus eventualis now discussed in terms of its constituent parts, beginning with the cognitive element.

The cognitive element of *dolus eventualis* may also be referred to as the foresight element.⁹⁴ This element of the definition requires the accused to subjectively foresee the possibility that his conduct may cause the unlawful result.⁹⁵ The academic debate surrounding the cognitive element pertains to the scope of foresight required to satisfy the cognitive element.⁹⁶ The crucial question is whether the foresight of the unlawful result should be defined in qualified or unqualified terms.⁹⁷ First, foresight defined in unqualified terms will be examined followed by foresight defined in qualified terms.

2.5 Foresight defined in unqualified terms

It is an established norm that the cognitive element of *dolus eventualis* requires the accused to have subjectively foreseen the unlawful result.⁹⁸ However, to what extent is such foresight applicable to criminal liability?⁹⁹

Defining foresight in unqualified terms requires that the accused foresaw the possibility of the unlawful result occurring irrespective of how remote or slight that possibility may have been.¹⁰⁰

⁹² Snyman (see note 10) 185 - 186.

⁹³ Ibid 185 - 186.

⁹⁴ Snyman (see note 10) 180.

⁹⁵ Ibid 179 - 180.

⁹⁶ Hoctor (see note 73) 131.

⁹⁷ Ibid 131.

⁹⁸ Snyman (see note 10) 179 - 180.

⁹⁹ Burchell (see note 6) 362.

¹⁰⁰ Hoctor (see note 73) 136 - 137.

The word possibility is imperative when expressed in unqualified terms and not supported by any adjectives relating to its scope of application. The term “possibility” breeds a particular interpretation.¹⁰¹ The degree or extent of such a possibility materialising has no bearing on the subjective foresight of the accused.

The essential characteristic of unqualified foresight is that the foresight of the unlawful possibility must have been present in the mind of the accused even though the foreseen possibility may have been unlikely or improbable. If the accused foresaw the result in his own mind then the accused satisfies the cognitive element of *dolus eventualis*.¹⁰²

By means of an illustration:

Assume person X subjectively foresees the possibility that he may cause the death of person Z if he engages in a certain type of conduct. However, he considers the chances of the death actually occurring as a rarity. The chances of death occurring may be highly unlikely, but person X still foresees that it may possibly occur. If person X acts and does in fact cause the death of person Z, he will then satisfy the cognitive element of *dolus eventualis* on the basis that he foresaw the possibility¹⁰³ of causing the death of person Z.

2.5.1 Case law in support of unqualified foresight

South African courts have supported the view that the cognitive element of *dolus eventualis* should be defined in unqualified terms. One of the earliest cases that touched on the issue of the degree of foresight was *R v Thibani*, in which Schreiner stated the following:

‘It seems to me to be clear that a man may have the intention to kill even though he does not visualise death as more likely than not to result from his acts. Supposing for instance that he was expressly warned at the time of the danger of death resulting from his act and, while realising that there was such danger, nevertheless did the act, reckless whether death resulted or not, I do not think that it would matter whether he thought that death would very probably result or whether he thought that, though reasonably possible, it would very probably not result ... I shall add that provided the requisite recklessness is present it may even be correct to say that realisation of the possibility of death resulting, even as a remote

¹⁰¹ Snyman (see note 10) 180.

¹⁰² *R v Thibani* 1949 (4) SA 720 (A) 729 - 730. Schreiner JA comments (personal adaptation).

¹⁰³ Own emphasis added to indicate the importance of the word possibility defined in unqualified terms.

chance, would suffice, though it is not necessary for present purposes to go to that length.’¹⁰⁴

In *R v Huebsch* the term 'some risk of life' was used to describe the foresight element of *dolus eventualis*.¹⁰⁵ The use of the word 'some' does not make reference to the extent of the risk that must exist but rather to the fact that there is at least a risk present.

Schreiner JA held in *R v Nsele* that:

‘... the risk must have been, and, therefore, by inference was, present to the mind of the accused, and provided that he was reckless whether or not it matured in death, I do not think that the seriousness of the risk is material.’¹⁰⁶

In *Thibani*, *Huebsch* and *Nsele* the indication of foresight being defined in unqualified terms was certainly expressed. The required degree of foresight was authoritatively laid down in *R v Horn*, when Beyers JA held:

‘No doubt, an accused may, in appropriate circumstances, be heard to say “That which has happened was so improbable that I did not appreciate that there was a risk of it happening.” But that is not to say that a person who does foresee a risk of death is entitled, because the risk is slight, to 'take a chance' and, as it were, gamble with the life of another.’¹⁰⁷

Van Blerk JA in *R v Horn* agreed with his learned colleague that foresight should be expressed in unqualified terms. Van Blerk JA made reference to the earlier case of *R v Huebsch* and said:

‘According to some decided cases death should have been a likely result of the act pursued by the wrongdoer ... Bodenstein ... refers only to the result foreseen as a possibility. This seems also to be what Schreiner JA conveyed in *Rex v Huebsch*, 1953 (2) SA 561, by the expression “some risk to life”, which means the possibility and not only the probability that death may result. It would be incongruous to limit a wrongdoer's constructive intent to cases where the result which he had foreseen was likely to cause death and not to infer such intent where the result he had foreseen was, although possible, not likely.’¹⁰⁸

¹⁰⁴ *R v Thibani* (see note 102) 729 - 730.

¹⁰⁵ *R v Huebsch* 1953 (2) SA 561 (A) 567.

¹⁰⁶ *R v Nsele* 1955 (2) SA 145 (A) 148.

¹⁰⁷ *R v Horn* 1958 (3) SA 457 (A) 465.

¹⁰⁸ *Ibid* 467; Burchell (see note 6) 363. (Exact quote from textbook).

The approach adopted in *Horn* was subsequently followed by our courts in later cases. In *S v Mini*, Holmes JA held that:

‘... the only reasonable inference is that the appellant did foresee the possibility, even if slight, of death resulting from what he was about to do and was doing.’¹⁰⁹

Holmes JA in *S v De Bruyn* confirmed his judgment in *Mini*, holding that:

‘... The accused foresees the possibility, however remote, of his act resulting in death to another...’¹¹⁰

In *S v Shaik* it was held that it does not matter whether or not the accused foresaw a result that was highly improbable or unlikely.¹¹¹

In *S v Ngubane*, Jansen JA held that:

‘In principle it should not matter in respect of *dolus eventualis* whether the agent foresees (subjectively) the possibility as strong or faint, as probable or improbable, provided his state of mind in regard to that possibility is "consenting", "reconciling" or "taking into the bargain". However, the likelihood *in the eyes of the agent* of the possibility eventuating must obviously have a bearing on the question whether he did "consent" to that possibility.’¹¹²

From the above case law it is clear that South African courts have adopted the view that the cognitive element of *dolus eventualis* should be defined in unqualified terms. Various legal scholars share this view.¹¹³

However, despite the authoritative precedent in favour of defining the cognitive element of *dolus eventualis* in unqualified terms, a further development of defining the cognitive element of *dolus eventualis* in qualified terms has also gained significant weight in many of the courts and among legal scholars.¹¹⁴

An examination of foresight defined in qualified terms follows.

¹⁰⁹ *S v Mini* (see note 82) 191 G-H.

¹¹⁰ *S v De Bruyn* (see note 66) 510 G.

¹¹¹ *S v Shaik and Others* 1983 (4) SA 57 (A) 62 F.

¹¹² *S v Ngubane* 1985 2 All SA 340 (A) 345 F.

¹¹³ Hoctor (see note 73) 151.

¹¹⁴ Paizes (see note 1) 637; Hoctor (see note 73) 140.

2.6 Foresight defined in qualified terms

Foresight defined in qualified terms requires the accused to foresee the likelihood of the unlawful result ensuing. Not only must the accused subjectively foresee the unlawful result but the unlawful result must also be probable or likely to occur. The foresight of a possibility is supported or qualified by adjectives such as "real",¹¹⁵ "reasonable",¹¹⁶ "substantial",¹¹⁷ or even "probable."¹¹⁸

The legal scholars who express the view that the cognitive element of *dolus eventualis* should be defined in qualified terms base their stand point on the criticism that the requirement of unqualified foresight is contrary to public policy and inconsistent with judicial practice.¹¹⁹

To avoid thoughts of inconsistency, it must be noted that when describing the cognitive element of *dolus eventualis* in qualified terms, the words reasonable, real, substantial, probable or likely are used as equivalents to one another.¹²⁰

2.6.1 Unqualified foresight and public policy

The use of unqualified foresight is deemed too broad and could lead to unjust results by the supporters of foresight being defined in qualified terms.¹²¹ Their quarrel is that foresight of even the slightest possibility would amount to an accused satisfying the cognitive element of *dolus eventualis*.

Burchell and Hunt offer the following example in support of foresight defined in qualified terms.

Consider a motorist who enters his vehicle and upon doing so foresees the possibility that he may harm other road users (and subsequently reconciles himself to this fact). If this unfortunate possibility does in fact occur, then the accused would have intent in the form of *dolus eventualis* for the harm caused to the other road user.¹²²

¹¹⁵ *S v Ostilly & others* (1) 1977 (4) SA 699 (D) 728 F.

¹¹⁶ *R v Suleman* 1960 (4) SA 645 (N) 646 H.

¹¹⁷ *R v Steenkamp* (see note 10) 684 F-G.

¹¹⁸ *R v Hercules* 1954 (3) SA 826 (A) 831.

¹¹⁹ Hoctor (see note 73) 137-138.

¹²⁰ *Ibid* 144.

¹²¹ Whiting (see note 2) 445.

¹²² Hoctor (see note 73) 138.

It is submitted that the scenario described above would indeed have unjust results and be against public policy. *Dolus eventualis* should not apply to mere thoughts of causing harm but rather to a will to cause harm. However, it must be mentioned that in the above example the conative element of *dolus eventualis* is assumed to be present.

To prove the foresight element of *dolus eventualis* in the above scenario would be close to impossible. *Dolus eventualis* is proved by inferential reasoning and to draw inferences from the thoughts of an accused without any outward conduct would not be possible. Inferential reasoning requires some sort of external evidence to justify a finding of the subjective state of mind.¹²³

The above submission aptly introduces the next reason for which legal scholars favour defining foresight in qualified terms.

2.6.2 Unqualified foresight and judicial practice

Legal scholars have opined that when the cognitive element of *dolus eventualis* is defined in unqualified terms, our courts rarely find the foresight element of *dolus eventualis* to be present. The reason for this submission is that it is difficult for a court to find, by means of inferential reasoning, that an accused foresaw a remote possibility. The reason for this is that remote possibilities are not generally supported by facts from which reliable inferences may be drawn.¹²⁴

It was previously shown that authoritative support has developed for foresight being defined in unqualified terms. Foresight defined in qualified terms has also established the support of South African courts. However, the reasoning behind the establishment of foresight defined in qualified terms has come under scrutiny.¹²⁵

Paizes submits that our courts have not once found *dolus eventualis* to be present where the accused foresaw a remote possibility.¹²⁶

Whiting is of the view that there is considerable inconsistency with the theoretical and the practical application of the cognitive element of *dolus eventualis*.¹²⁷

¹²³ Snyman (see note 10) 185.

¹²⁴ Paizes (see note 1) 638.

¹²⁵ Hoctor (see note 73) 151.

¹²⁶ Paizes (see note 1) 642.

¹²⁷ Whiting (see note 2) 444.

Paizes and Whiting both agree that courts only find *dolus eventualis* to be present when a real, substantial or reasonable possibility exists.

Whaley submits that the cognitive element of *dolus eventualis* should read: "foresight of the probability of harm."¹²⁸

Burchell and Hunt also favour the foresight of a probability of harm. However, they submit that if this is not accepted by the courts then foresight of a real or substantial possibility shall suffice.¹²⁹

Amongst the legal scholars who favour the approach of defining the foresight element of *dolus eventualis* in qualified terms, it is interesting to note that Snyman,¹³⁰ Paizes¹³¹ and Whiting¹³² do not exclude the foresight of a remote possibility as an option. In fact, they support the application of foresight defined in unqualified terms but only in exceptional circumstances.

It is respectfully submitted that this exception is contradictory to their support of qualified foresight.

Paizes and Whiting offer the following illustration in support of exceptional cases in which a remote possibility might suffice.

Person X has a cabinet filled with twenty firearms. Only one of the firearms in the cabinet contains a bullet; the rest are blank. Person X intends to use a scare tactic on person Y by pointing a randomly selected firearm at person Y. Person X happens to select the firearm that is loaded and subsequently kills person Y. Person X foresaw that he might select the loaded firearm and kill person Y. He also reconciled himself to this result. Speaking as a matter of probability, there was a five percentage chance that person X would kill person Y.¹³³

¹²⁸ Whaley 'Criminal in our courts: *Dolus eventualis*' 1967 *Responsa Meridiana* 117: 118.

¹²⁹ Hoctor (see note 73) 139.

¹³⁰ Snyman (see note 10) 180. '... the more remote (or improbable) the possibility that the result might ensue, the more difficult it will be to find as a fact that X indeed foresaw that possibility.' He leaves open the possibility of a remote possibility prevailing. Snyman notes that it is difficult to prove but not impossible.

¹³¹ Paizes (see note 1) 642.

¹³² Whiting (see note 2) 446.

¹³³ Paizes (see note 1) 642; Whiting (see note 2) 443.

The crucial question that this illustration poses is that if qualified foresight in determining the cognitive element of *dolus eventualis* were to be supported, would person X escape liability in the form of *dolus eventualis* because there was only a remote possibility that person Y would die? ¹³⁴

Legal scholars who support qualified foresight recognise that in this situation, foresight of a remote possibility will suffice. ¹³⁵

Whiting is of the opinion that this example is one of *dolus directus* and not *dolus eventualis*. The reason for Whiting's submission is that person X's purpose was to expose person Y to the risk of death.

It is respectfully submitted that *dolus directus* will only exist if person X intended to use all the firearms until he encountered the loaded firearm. If this was the case, then person X had a direct intention to kill person Y, because person X was certain that person Y would die by one of the firearms but was uncertain as to which specific firearm would deliver the fatal wound. The difference is that person X does not merely foresee the death of person Y but rather wills his death.

It is respectfully submitted that the above illustration is an example of intention in the form of *dolus eventualis*. The reasoning adopted is that person X did not wish to kill person Y, his intention was to scare him. However, person X foresaw the risk of causing person Y's death and accepted this. Person X only wished to solicit information from person Y. However, the method by which he chose to solicit such information caused him to accept the possibility that he could cause the death of person Y.

This illustration provides a practical scenario in which foresight of an unqualified possibility may suffice to satisfy the cognitive element of *dolus eventualis*.

It is respectfully submitted that the South African courts have been inconsistent in applying the cognitive element of *dolus eventualis* and have fluctuated between applying qualified and unqualified foresight criteria. ¹³⁶

¹³⁴ Ibid 643.

¹³⁵ Paizes (see note 1) 642.

¹³⁶ Hoctor (see note 73) 135 - 137.

2.6.3 Case law in favour of qualified foresight

A number of South African court judgments have supported the view that the cognitive element of *dolus eventualis* should be defined in qualified terms.¹³⁷ Legal scholars have offered praise and criticism for judgments in support of the cognitive element of *dolus eventualis* in qualified terms.¹³⁸

Milne J in *R v Steenkamp* described *dolus eventualis* as follows.

‘It seems to me, then, that, in so far as it is based on the wounding of the complainant, the conviction can only stand if it was proved that the appellant fired the shot with the specific intention of wounding the complainant or that, when he fired the shot, he knew that there was a substantial risk of his wounding the complainant and was reckless whether he wounded him or not.’¹³⁹

The debate between defining foresight in qualified or unqualified terms was not specifically dealt with in the case referred to above. However, the wording used by Milne J to describe the foresight element of *dolus eventualis* implies that foresight was defined in qualified terms.¹⁴⁰ The use of the term 'substantial risk' implies something more than a remote or slight risk.

Holmes J in *R v Suleman* described the cognitive element of *dolus eventualis* in qualified terms by stating that 'the accused must contemplate a reasonable possibility of the result flowing.'¹⁴¹

In both *Steenkamp* and *Suleman*, the issue of the degree of foresight required was not expressly dealt with by the court. It is respectfully submitted that these decisions are High Court judgments and do not provide the authoritative stance required. It is interesting to note that the court in both *Steenkamp* and *Suleman* defined foresight in qualified terms despite citing Appellate Division cases that favoured foresight in unqualified terms.¹⁴² No explanation was provided for the court's deviation from the *stare decisis* principle.

¹³⁷ *S v Beukes en 'n ander* 1988 (1) SA 511 (A) 522 C - E; *R v Suleman* (see note 116) 646 H; *S v Ostilly & others* (see note 115) 728 F; *R v Steenkamp* (see note 10) 684 F - G.

¹³⁸ Paizes (2013) 1 *Criminal Justice Review* 12.

¹³⁹ *R v Steenkamp* (see note 10).

¹⁴⁰ Hoctor (see note 73) 140 fn (60).

¹⁴¹ *R v Suleman* (see note 116) 646 H.

¹⁴² *R v Thibani* (see note 102) 729-730; *R v Horn* (see note 109) 467.

A pivotal case in the debate regarding the degree of foresight is *S v Beukes en 'n ander*,¹⁴³ in which the court discussed the conative element of *dolus eventualis*. However, before engaging in a discussion of the conative element, the court commented on the cognitive element of *dolus eventualis*.¹⁴⁴

Van Heerden JA began by acknowledging the acceptance of foresight of a remote possibility.¹⁴⁵ He then spoke of both the cognitive and conative elements and stated that if an accused foresees a result he invariably reconciles himself to it.¹⁴⁶ He further stated that it is rare that an accused will admit to foreseeing a remote possibility. The court will therefore draw an inference from the accused's state of mind that shows, objectively assessed, that it was reasonably possible for the result to occur.¹⁴⁷

Van Heerden JA then went on to say that the conative element of *dolus eventualis* is normally only satisfied if the accused foresees a reasonable possibility of the unlawful result occurring.¹⁴⁸

Legal scholars have welcomed the conclusion of *Beukes* insofar as it describes the cognitive element of *dolus eventualis* in qualified terms.¹⁴⁹ However, the reasoning used by the court to reach this conclusion has been criticized on a number of grounds.¹⁵⁰ Firstly, Van Heerden JA's comment that it is easier to prove, by inferential reasoning, a reasonable possibility as opposed to a remote possibility, may be generally true.¹⁵¹ However, this illustrates an evidential obstacle and not a justification to favour foresight in qualified terms.¹⁵²

Secondly, Van Heerden JA is criticised for formulating an unsound connection between the cognitive element of *dolus eventualis* and the rules of inferential reasoning.¹⁵³ Paizes notes that it

¹⁴³ *S v Beukes* (see note 137); Hoctor (see note 73) 141.

¹⁴⁴ *Ibid* 141.

¹⁴⁵ *Ibid* 141; *S v Beukes* (see note 137) 521I - 522B; *R v Thibani* (see note 102); *S v De Bruyn* (see note 66); *S v Shaik* (see note 111) and *S v Ngubane* (see note 112).

¹⁴⁶ *S v Beukes* (see note 137) 522C-E; Hoctor (see note 73) 141.

¹⁴⁷ *S v Beukes* (see note 137) 522C-E; Hoctor (see note 73) 141.

¹⁴⁸ *S v Beukes* (see note 137) 522 C-E.

¹⁴⁹ Whiting (see note 2) 445.

¹⁵⁰ Paizes (see note 1) 640.

¹⁵¹ Hoctor (see note) 142.

¹⁵² *Ibid* 142 fn (71).

¹⁵³ Paizes (see note 1) 640.

is not sufficient for the court to determine a reasonable possibility based on an objective assessment to conclude that the accused had subjective intent.¹⁵⁴

It is submitted that if the intention of Van Heerden JA was to imply that by inferential reasoning the court came to the conclusion that the possibility foreseen by the accused was the only reasonably possible result, then that interpretation is to be welcomed.¹⁵⁵ However, if what was implied was that through the process of inferential reasoning it was determined that there was a reasonable possibility that the result would occur, then this interpretation should not be accepted.¹⁵⁶ The reason is that this portrays an objective rather than subjective assessment in determining intention.

If the purpose in *Beukes* was to override the case law supporting the foresight of a remote possibility, why was this not done expressly?¹⁵⁷ Also, if the purpose of *Beukes* was such, then why did Van Heerden JA comment that *dolus eventualis* will normally follow where the possibility foreseen is strong? Does this suggest that possibilities that are slighter may have application?¹⁵⁸

It is submitted that *Beukes* did not override the precedent in favour of unqualified foresight, at most it merely expressed the difficulty involved in proving foresight of an unqualified nature.¹⁵⁹

In a Namibian case, *S v Van Wyk*,¹⁶⁰ Ackermann JA adopted a different interpretation of the *Beukes* judgment to that discussed above. Ackermann JA set out to discuss the degree of foresight needed for *dolus eventualis*. He cited *S v Sigwhala*¹⁶¹ as the authority for defining *dolus eventualis* and then proceeded to cite cases that favoured unqualified foresight.¹⁶² Ackerman JA was of the opinion that such a wide formulation (unqualified foresight) for the cognitive element of *dolus eventualis*

¹⁵⁴ Ibid 640.

¹⁵⁵ Ibid 640.

¹⁵⁶ Ibid 640.

¹⁵⁷ Hoctor (see note) 143.

¹⁵⁸ Ibid 143.

¹⁵⁹ Ibid 142.

¹⁶⁰ *S v Van Wyk* 1992 (1) SACR 147 (NmS).

¹⁶¹ *S v Van Wyk* (see note 160) 157 I-J, cites *S v Sigwhala* (see note 91) 570 B - C.

¹⁶² *S v Van Wyk* (see note 160) 158 A-E, cites *S v Mini* (see note 82), *S v De Bruyn* (see note 66) and *S v Shaik* (see note 111).

was not justified.¹⁶³ He then proceeded to state that the judgment in *Beukes* had thus overruled these cases by implication.¹⁶⁴

According to Ackerman JA:

‘There can, in my view, be no doubt that in this passage, and particularly by virtue of his repeated reference to “redelikemoontlikheid” (“reasonable possibility”), also when discussing the two reasons he advances for the retention of the two criteria, the learned Judge of Appeal lays down a test to the effect that, without proof that the actor foresaw, as a reasonable possibility, that the particular consequence would result, *dolus eventualis* cannot be established.’¹⁶⁵

In support of his conclusion, Ackermann JA cited case law in favour of qualified foresight. However, the cited cases were Rhodesian and three South African High Court judgments.¹⁶⁶

It is respectfully submitted that Ackermann JA failed to adequately provide reasons as to why he supported the description of foresight in qualified terms, other than stating that unqualified foresight was far too broad.¹⁶⁷

Later in *S v De Ruiter*, the qualified approach to foresight was followed. The court interpreted the *Beukes* judgment as follows:

‘...the reasonableness referred to does not import an objective element into the requirement for intention, but indicates the basis upon which the court must draw an inference from the facts to establish whether the accused, who disputes having *dolus eventualis*, actually had such intent.’¹⁶⁸

This interpretation of *Beukes* reflects the evidentiary difficulty of proving foresight by inferential reasoning and does not constitute an overruling of foresight of an unqualified nature.¹⁶⁹

¹⁶³ *S v Van Wyk* (see note 160) 158 A-E.

¹⁶⁴ *Ibid* 158 E-G.

¹⁶⁵ *Ibid* 159 I-160 B.

¹⁶⁶ *S v Ushewokunze* 1971 (2) SA 360 (RA) 363 E - H; *R v Steenkamp* (see note 10), *R v Suleman* (see note 116), *S v Ostilly* (see note 115).

¹⁶⁷ *S v Van Wyk* (see note 160) 158 A-E.

¹⁶⁸ *S v De Ruiter* 2004 (1) SACR 332 (W) para 9.

¹⁶⁹ Hoctor (see note 73) 144.

The qualified approach to foresight was followed in other cases but neither of those cases justified their reasoning.¹⁷⁰

The *Beukes* judgment was received differently by the courts, some of which adopted the interpretation that *Beukes* overruled the use of foresight in unqualified terms and favours foresight in qualified terms. The other interpretation, which it is submitted is the correct interpretation, is that *Beukes* highlights the evidentiary difficulty in proving the foresight of an unqualified possibility by means of inferential reasoning.

In *S v Ostilly and others*¹⁷¹ and in *S v Moodie*¹⁷² the court required foresight of a real possibility.

In *S v Van Aardt*, qualified foresight was favoured but unqualified foresight was not overruled, by both the High Court and Supreme Court of Appeal.¹⁷³

The Supreme Court of Appeal cited both *Sigwhala* and *Van Wyk*,¹⁷⁴ the former case in support of unqualified foresight and the latter in support of qualified foresight. The court did not address the conclusion reached by Ackermann JA that *Beukes* effectively overruled foresight of an unqualified nature.¹⁷⁵

The point of interest in *Van Aardt* and numerous other cases¹⁷⁶ is that even though foresight of a qualified nature was favoured, foresight of an unqualified nature was not dismissed or overruled.¹⁷⁷

More recently Shongwe JA in *S v Makgatho* affirmatively laid down the position regarding the degree of foresight.¹⁷⁸ Shongwe JA held as follows on an appeal against a conviction and sentence for murder:¹⁷⁹

‘A person acts with intention, in the form of *dolus eventualis*, if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively

¹⁷⁰ *S v Cameron* 2005 (2) SACR 179 (SCA) para 11; *S v Dlamini & another* (2006) SCA 110 (RSA).

¹⁷¹ *S v Ostilly* (see note 115) 728 D-E.

¹⁷² *S v Moodie* 1983 (1) SA 1161 (C) 1162B.

¹⁷³ *S v Van Aardt* 2008 (1) SACR 336 (E) 345 H - J; *S v Van Aardt* 2009 (1) SACR 648 (SCA) para 40; Hoctor (see note) 145.

¹⁷⁴ *S v Van Aardt* 2009 (see note 173) para 37, cites *S v Sigwahla* (see note 91) 570 B - F and para 39, cites *S v Van Wyk* (see note 160) 161 E - H.

¹⁷⁵ Hoctor (see note 73) 146.

¹⁷⁶ Hoctor 145-146

¹⁷⁷ *Ibid* 145.

¹⁷⁸ *S v Makgatho* 2013 (2) SACR 13 (SCA).

¹⁷⁹ Hoctor (see note 73) 146; *S v Makgatho* (see note 178) para 9.

foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may ensue, and he reconciles himself to this possibility (see CR Snyman *Criminal Law* 5ed (2008) at 184).

EM Burchell & PMA Hunt *South African Law and Criminal Procedure* [sic] (1997:131) said: “It is sufficient if the accused, having foreseen the real possibility of the existence of the circumstances in question, nevertheless persisted in his conduct irrespective of whether it existed or not.”

(See also *Annual Survey of South African Law* (1964:73). In other words, it must be shown that a real – as opposed to a remote – possibility of that consequence resulting was foreseen. In *S v Van Wyk* 1992 (1) SACR 147 (NmS) at 161b, Ackermann AJA expressed himself as follows: “I am accordingly of the view that the subjective foresight required for *dolus eventualis* is the subjective appreciation that there is a reasonable possibility that the proscribed consequence will ensue.” ’

It is thus clear from *S v Makgatho* that foresight of a qualified nature is necessary to satisfy the cognitive element of *dolus eventualis*.

The decision in *Makgatho* has come under scrutiny by Hoctor,¹⁸⁰ who highlighted the discrepancies discussed below in the reasoning of the court.

1. The citation used by the court from the Burchell and Hunt textbook is incorrect. Professor Burchell was responsible for the third edition of this book in 1997 and not the late authors mentioned in the judgment.¹⁸¹ Furthermore, the statement cited does not appear on page 131 of the text.¹⁸²

2. *The Annual Survey of South African Law* (1964) reference is in fact a reference to a discussion on the general principles of contract law.¹⁸³ This statement supports a subjective approach to foresight but not a qualified approach to foresight, as *Makgatho* has chosen.¹⁸⁴

3. The court relies on *S v Van Wyk* in support of foresight of a qualified nature. However, it is respectfully submitted that as *Van Wyk* is a Namibian case, why did *Makgatho* not abide by the

¹⁸⁰ Hoctor (see note 73) 146-148.

¹⁸¹ Ibid 146-147.

¹⁸² Ibid 147.

¹⁸³ PMA Hunt ‘General Principles of contract law’ (1964) *Annual Survey of SA Law* 73; Ibid 147

¹⁸⁴ Hoctor (see note 73) 147.

stare decisis rule?¹⁸⁵ On what basis did the court fail to apply Appellate Division and Supreme Court of Appeal decisions, which have expressed support for foresight defined in an unqualified nature?¹⁸⁶

4. The *Van Wyk* judgment relies on the *Beukes* judgment. Why did the court not cite *Beukes*?¹⁸⁷

5. The *Makgatho* judgment is then further undermined by the fact that it cites case law that favours foresight of an unqualified nature.¹⁸⁸

It is respectfully submitted that in light of the above inconsistencies in *Makgatho*, the judgment is rather unconvincing.¹⁸⁹

2.6.4 Assessment of the degree of foresight required for *dolus eventualis*

It is submitted that foresight defined in unqualified terms is the correct approach to adopt.¹⁹⁰ The reasons for this submission are discussed below.

1. Accepting foresight in qualified terms strains both logic and language.¹⁹¹ Foresight is foresight irrespective of the degree of foresight. To find that an accused subjectively foresaw a possibility and to not accept such foresight because the possibility foreseen was unlikely definitely undermines the jurisprudential reasoning of subjective foresight.¹⁹² As South African criminal law subscribes to the psychological approach to crime,¹⁹³ it is submitted that to give credence to this approach, foresight defined in unqualified terms should be followed.¹⁹⁴ The reasoning behind this submission is that an accused should not be able to escape liability for his subjective foresight on the basis that such foresight was

¹⁸⁵ *Ibid* 147.

¹⁸⁶ *S v Mini* (see note 82); *S v De Bruyn* (see note 66); *S v Humphreys* (see note 7); *R v Horn* (see note 107).

¹⁸⁷ Hoctor (see note 73) 147.

¹⁸⁸ *S v Makgatho* (see note 178) para 10, cites *S v Ngubane* (see note 112) 345; *S v Qeque* 2012 (2) SACR 41 (ECG) 577. Other cases are cited however, these two expressly provide for foresight in unqualified terms.

¹⁸⁹ Hoctor (see note 73) 148.

¹⁹⁰ *Ibid* 151.

¹⁹¹ *Ibid* 149 - 150.

¹⁹² *Ibid* 151.

¹⁹³ Burchell (see note 6) 60. If the accused has a guilty mind, he should be criminally liable

¹⁹⁴ Hoctor (see note 73) 155.

remote or unlikely. Such a conclusion would be contrary to the psychological approach to crime.¹⁹⁵

2. Accepting foresight of a qualified nature has the potential to distort the line between intention and negligence.¹⁹⁶ It is submitted that by qualifying foresight with the terms “reasonable,” “real,” “substantial,” or “probable” creates two issues. The first, how does a court accurately define the meaning of these words without placing some sort of objective criteria in that determination?¹⁹⁷ By qualifying foresight one would essentially be comparing the accused's foresight to a standard of reasonableness, which would have the effect of adopting a yardstick approach to determining foresight.¹⁹⁸ By adopting such an approach one would effectively be applying a test for negligence as opposed to intention.¹⁹⁹ Another issue that may be present is one of interpretation. The courts may differ in their understanding of what constitutes a reasonable, real or probable possibility, which in turn will place strain on the legal certainty of *dolus eventualis*.²⁰⁰

If the cognitive element of *dolus eventualis* is defined in qualified terms, then the test for determining foresight in *dolus eventualis* will align too closely with the test set out in *Kruger v Coetzee*. *Kruger v Coetzee* sets out the test for *culpa* as: whether a reasonable person would have foreseen the reasonable possibility of his conduct injuring another person and causing her harm.²⁰¹ It is submitted that accepting foresight of a qualified nature would align rather too closely with the test for negligence. It is submitted that if objective criteria are used to determine a subjective inquiry, we would be reverting to a similar approach adopted by the courts prior to 1945, which was the English law presumption that a person intends the probable consequences of his actions.²⁰²

3. It is interesting to note that besides *Van Wyk*, no other judgment has expressly overruled foresight of an unqualified nature.²⁰³ In fact, certain judgments and legal scholars accept

¹⁹⁵ Ibid 155.

¹⁹⁶ Ibid 152.

¹⁹⁷ Ibid 151 - 152.

¹⁹⁸ Carstens (see note 46) 68.

¹⁹⁹ Ibid 68.

²⁰⁰ Hoctor (see note 73) 151 - 152.

²⁰¹ *Kruger v Coetzee* 1966 (2) SA 428 (A) 430 E - F. Ibid 152.

²⁰² Burchell (see note 6) 355 - 356.

²⁰³ Hoctor (see note 73) 145; *S v Beukes* (see note 137); *S v Van Aardt* (see note 173); even Paizes, Snyman and

the application of foresight of an unqualified nature in particular circumstances.²⁰⁴ It is submitted that the cognitive element of *dolus eventualis* should not consist of a qualified rule that caters for certain exceptions but should rather consist of an unqualified principle that may encompass all situations of foresight placed before it.

Those in favour of qualified foresight may argue that unqualified foresight is far too broad in its scope of application.²⁰⁵ However, it is submitted that this will not be the case, as *dolus eventualis* is a two part inquiry and foresight is only the first part of that inquiry. An affirmative finding of foresight will not automatically lead to criminal liability.²⁰⁶ The conative element of *dolus eventualis* still needs to be proved to find the accused criminally liable.²⁰⁷ It is respectfully submitted that the controversy surrounding the cognitive element of *dolus eventualis* is in respect of issues of proof.²⁰⁸ *Dolus eventualis* is proved by means of inferential reasoning, as highlighted in chapter 1. A reliance on this process of reasoning is a difficult burden to meet.

It is inherently difficult to prove the subjective state of mind of an accused by means of inferential reasoning and the burden placed on the state of proof beyond a reasonable doubt, is onerous.

4. The cognitive element of *dolus eventualis* in principle is theoretically flawless when expressed in unqualified terms. The only quarrel that presents itself is that of proof. It is submitted that it is indeed difficult to prove by means of inferential reasoning that the accused foresaw a remote possibility.²⁰⁹ The reason for this submission is that the external facts upon which inferential reasoning relies are not always present.

It is submitted that the debate surrounding the cognitive element of *dolus eventualis* is more an evidential issue than a doctrinal issue.²¹⁰ The essential feature of the cognitive element of *dolus eventualis* is subjective foresight. No further qualifying terms should be added to the element of

Whiting cater for foresight of an unqualified nature, in exceptional circumstances, see fn (135)

²⁰⁴ Paizes (see note 1) 642; Whiting (see note 2) 446; see also fn (135).

²⁰⁵ Whiting (see note 2) 445; Hoctor (see note) 138.

²⁰⁶ *S v Humphreys* (see note 10) para 12. Hoctor (see note 73) 154.

²⁰⁷ *Ibid* para 12.

²⁰⁸ Hoctor (see note 73) 152.

²⁰⁹ Paizes (see note 1) 640.

²¹⁰ Hoctor (see note 73)

dolus eventualis.²¹¹ The terms "reasonable", "real", "substantial", "probable", "remote" or "slight" should not feature in the definition of the cognitive element of *dolus eventualis*.²¹²

Put simply, if the accused subjectively foresaw the possibility of causing the unlawful result, then the accused satisfies the cognitive element of *dolus eventualis*.²¹³

2.7 The conative element of *dolus eventualis*

Now that the cognitive element of *dolus eventualis* has been firmly established, the focus shifts towards the second part of the inquiry, namely the conative element of *dolus eventualis*. It must be noted that a positive finding regarding the cognitive element of *dolus eventualis* is a prerequisite to considering the conative element of *dolus eventualis*.²¹⁴

By implication, if it is found that the accused did not subjectively foresee the possibility of causing the unlawful result, then a finding of intention in the form of *dolus eventualis* cannot materialise. This does not mean that the accused will escape liability entirely, as the concept of negligence will then be considered.²¹⁵

The conative element of *dolus eventualis* requires the accused to reconcile himself to the possibility that he foresaw an unlawful result (in other words, the cognitive element of *dolus eventualis*).²¹⁶

The debate surrounding the conative element of *dolus eventualis* has been about the lack of clarity and practicality regarding its meaning and description. The conative element has often been described with various synonymous terms but despite such descriptions,²¹⁷ it has lacked a particular meaning.²¹⁸

²¹¹ Ibid 153 - 154.

²¹² Ibid 153.

²¹³ Ibid 153.

²¹⁴ Snyman (see note 10) 181; Loubser and Rabie (see note 3) 419.

²¹⁵ Snyman (see note 10) 184 - 184. Specific reference is made to *luxuria*, which is a form of negligence closely related to *dolus eventualis*, which will be discussed further in this chapter.

²¹⁶ Ibid 181; Loubser and Rabie (see note 3) 419.

²¹⁷ Loubser and Rabie (see note 3) 419 - 420;

²¹⁸ PT Smith 'Recklessness in *Dolus Eventualis*' (1988) *SALJ* 81.

It is submitted that *S v Humphreys* has now provided some clarity of the meaning of the conative element.²¹⁹

2.7.1 The development of the conative element of *dolus eventualis* through case law

Before 1945 the conative element of *dolus eventualis* did not appear in the application thereof.²²⁰ It is submitted that the reasons for this are that the English law presumption that people intend the probable consequences of their acts was followed during this period.²²¹ Furthermore, the controversy surrounding the cognitive element of *dolus eventualis*²²² has, to an extent, clouded the application of the conative element. Additionally, the development of *dolus eventualis* was not firmly established in South African courts during this period.²²³

2.7.2 Recklessness

In 1945 in *R v Valachia*, Greenberg JA held the following on a charge of murder:

‘We may, I think, conclude from these authorities that the crime of murder will at all events have been committed if it be proved ... that the accused killed the deceased by an act which they must have known to be of such a dangerous character that death would be likely to result therefrom, and were reckless whether it did or did not.’²²⁴

First, it must be noted that Greenberg JA described the cognitive element of *dolus eventualis* in qualified terms by using the term "likely to result therefrom." However, the factor of importance for this discussion is the use of the word "reckless." Greenberg JA gave effect to the conative element of *dolus eventualis* by stating that a person had intention in the form of *dolus eventualis* if he acted recklessly in relation to his foresight.

Valachia is important because it is deemed to be the inception of the term ‘recklessness’ into our law, as this was one of the first occasions that the term was used to describe the conative element of *dolus eventualis*.²²⁵

²¹⁹ *S v Humphreys* (see note 10). This case will be discussed in Chapter 3.

²²⁰ Smith (see note 218) 81 - 84.

²²¹ Burchell (see note 6) 355 - 356.

²²² The debate between foresight defined in qualified and unqualified terms.

²²³ Burchell (see note 6) 355 - 356.

²²⁴ *R v Valachia* (see note 65) 831.

²²⁵ Smith (see note 218) 82 - 84.

Greenberg JA derived the term recklessness from s 140(b) of the Transkeian Penal Code (hereafter referred to as the TPC), which provides as follows:

‘Culpable homicide becomes murder in the following cases:

(b) 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.’²²⁶

A number of judgments have followed *Valachia* and built on the interpretation by Greenberg JA.²²⁷

For instance, in *R v Thibani*, Schreiner JA held:

‘The general principle is that the Crown has to prove the intention to kill, but this expression has an extended or legal meaning. It covers not only a striving to achieve the actual death of the deceased but knowledge that the act being done is so dangerous as to be *likely* to cause death, coupled with recklessness as to whether death results or not (see *Rex v Valachia and Another* (1945 AD 826 at p. 831)).’²²⁸

R v Thibani indicates by its wording that *dolus eventualis* consists of two parts. The sentence "coupled with recklessness" suggests that recklessness is a requirement to prove *dolus eventualis* in addition to the foresight element.

Similarly, in *R v Huebsch*, Schreiner JA commented in reference to *Valachia* and *Thibani* that, our law recognises the notion that there must be an appreciation that there is some risk to life involved in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death.²²⁹

In *R v Nsele*, Schreiner JA held:

‘... provided that the risk must have been, and, therefore, by inference was, present to the mind of the accused, and provided that he was reckless whether or not it matured in death, I do not think that the seriousness of the risk is material...’²³⁰

²²⁶ Ibid 84.

²²⁷ Ibid 84.

²²⁸ *R v Thibani* (see note 102) 729.

²²⁹ *R v Huebsch* (see note 105) 567 H.

²³⁰ *R v Nsele* (see note 106) 148.

The above quote also illustrates that our courts have recognised that *dolus eventualis* is a two part inquiry, comprising a "foresight of risk" element and an element of "recklessness".

In *S v Mini*, Holmes JA held:

‘The proposition is well established in our law that a person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and nevertheless inflicts that injury, reckless whether death will ensue or not.’²³¹

In *S v De Bruyn*, Holmes JA held the following on *dolus eventualis*:²³²

‘The accused foresees the possibility, however remote, of his act resulting in death to another, yet he persists in it, reckless whether death ensues or not. On analysis, the multiple characteristics of this form of *dolus* are:

1. Subjective foresight of the possibility, however remote, of his unlawful conduct causing death to another.
2. Persistence in such conduct, despite such foresight.
3. An insensitive recklessness (which has nothing in common with *culpa*).
4. The conscious taking of the risk of resultant death, not caring whether it ensues or not.
5. The absence of actual intent to kill.’

The comments made by Homes JA in *S v De Bruyn* indicate that *dolus eventualis* consists of two parts. The first is that of subjective foresight, which is expressed in unqualified terms and the second is that of "recklessness" or "conscious risk taking" with the former term expressly stated as being different from negligence.

Jansen JA in *S v Ngubane* held that:

‘The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain". Our cases often speak of the agent being "reckless" of that consequence, but in this context it means consenting, reconciling or

²³¹ *S v Mini* (see note 82) 190 A.

²³² *S v De Bruyn* (see note 66) 510 G - H.

taking into the bargain and not the "recklessness" of the Anglo American systems nor an aggravated degree of negligence.'²³³

Smalberger JA defined *dolus eventualis* with regard to the accused persons in *S v Sethoga* as follows:

‘...they had subjective foresight of the possibility, however remote, of their unlawful conduct causing death to others, and persisted in such conduct with a reckless disregard of the possible consequences thereof (*dolus eventualis*).’²³⁴

Smalberger JA again held in *S v De Oliveira* on a charge of murder:

‘...he must have foreseen, and by necessary inference did foresee, the possibility of death ensuing to the persons outside, but reconciled himself to that event occurring. In the circumstances he was correctly held to have had the necessary intention to kill in the form of *dolus eventualis*.’²³⁵

It is submitted that the conative element has been described differently throughout the years and often described synonymously with terms such as ‘recklessness’,²³⁶ ‘callous disregard’,²³⁷ ‘conscious risk taking’,²³⁸ ‘persistence regardless of whether the result occurs or not’,²³⁹ ‘indifferent to the consequences of his actions’,²⁴⁰ ‘foresaw into the bargain’²⁴¹ and ‘consents’.²⁴²

2.7.3 Criticism of the term recklessness and of the conative element of *dolus eventualis*

Smith criticises the use of the word “recklessness” as derived from the TPC. His criticism highlights the fact that the term ‘recklessness’ is ambiguous in its meaning.

The term “recklessness” was derived from the TPC, as mentioned in *Valachia* above. The TPC is a product of English law. Smith submits that according to English law, the term “recklessness” is commonly referred to as a type of advertent negligence.²⁴³ Smith is therefore of the view that

²³³ *S v Ngubane* (see note 112) 685 D.

²³⁴ *S v Sethoga* 1990 (1) SA 270 (A) 275 - 276.

²³⁵ *S v De Oliveira* (see note 86) 65 I-J.

²³⁶ *R v Valachia* (see note 65) 831.

²³⁷ *R v Chitate* 1968 (2) PH H 337 (R); *R v Lewis* 1958 (3) 107 SA 109 E - F.

²³⁸ *S v De Bruyn* (see note 66) 510 H.

²³⁹ *S v Shaik* (see note 111) 62 A - B.

²⁴⁰ *R v Steenkamp* (see note 10) 684 B - C.

²⁴¹ *S v Humphreys* (see note 7) para 17.

²⁴² *S v Ngubane* (see note 112) 685.

²⁴³ Smith (see note 218) 84 - 86.

recklessness is a type of negligence that compares the accused to a standard of reasonableness.²⁴⁴ Smith's interpretation differs from the approach adopted in *Ngubane* and *De Bruyn*, in which recklessness is expressly stated to be different from negligence.

In *R v Strydom*, Dowling J held:

‘In my opinion the intention which must be proved in an assault with intent to do grievous bodily harm must be proved as an actual fact, and therefore heedlessness and recklessness cannot, in charges of assault with intent to do grievous bodily harm, take the place of an actual proved intention.’²⁴⁵

The term recklessness was viewed in a similar manner in *S v Du Preez* by Ogilvie Thompson CJ:

‘To shoot with a pistol in the direction of a moving human being leaving so small a margin for safety may indeed fairly be described as reckless conduct; but reckless conduct per se is not necessarily to be equated with *dolus eventualis*.’²⁴⁶

Despite Smith's criticism, he does acknowledge that recklessness has been interpreted as a state of mind by our courts. However, he is of the opinion that the conative element of *dolus eventualis* should be omitted from the definition of *dolus eventualis* and that it should consist of only the cognitive element defined in qualified terms.²⁴⁷

More recently and in contradiction with precedent, *S v Humphreys* authoritatively held that the use of the term recklessness is incorrect when describing *dolus eventualis*, as it places an objective inquiry into the element of intention.²⁴⁸ *Humphreys* strays from the conclusion drawn in *Ngubane* and *De Bruyn* regarding the meaning of the term ‘recklessness’. This judgment has been subject to criticism and is discussed thoroughly in chapter 3.²⁴⁹

²⁴⁴ Ibid 84 - 86.

²⁴⁵ *R v Strydom* 1956 (3) SA 681 (T) 682 - 683.

²⁴⁶ *S v Du Preez* 1972 (4) SA 584 (AD).

²⁴⁷ Smith (see note 218) 90 - 93.

²⁴⁸ *S v Humphreys* (see note 7) para 16, 17.

²⁴⁹ Professor Hoctor criticises the court for its interpretation of the word recklessness.

2.7.4 Is the conative element of *dolus eventualis* superfluous?

There are legal scholars who hold the opinion that the conative element of *dolus eventualis* is redundant.²⁵⁰ Some go as far as to say that it is a notion without utility.²⁵¹ It is submitted that the scholars who make the above submission are in favour of defining the cognitive element of *dolus eventualis* in qualified terms.

The reasoning in support of such a submission is that if an accused subjectively foresees a "real" or "reasonable" or "substantial" possibility, he then also "reconciles" or "consents to the consequences" or "acts recklessly" with regard to that possibility.

In addition to the above submission, case law rarely exists in which the conative element was called upon to determine the existence of *dolus eventualis*. The reasoning is that *dolus eventualis* depends on the degree of foresight.

However, as was discussed earlier, their quarrel is one of proof and not principle.²⁵²

It is difficult to ignore the submissions of these legal scholars but the case of *S v Maritz* offers an illustration in which the conative element found application.²⁵³ This case is one of the few that provide an example of the meaning of the conative element.²⁵⁴

The facts of *Maritz* were that a man was tied by a rope to a vehicle and forced to run in front of it. The rope was pulled taut and the man was caught under the wheel of the vehicle, which killed him. The Appellate Division found the accused guilty of culpable homicide, reasoning that intention was lacking. The form of intention applied to these facts was *dolus eventualis*. The accused did subjectively foresee that he may cause the death of the deceased by his actions (cognitive element). However, the accused did not accept that this would occur, as he genuinely believed that he was

²⁵⁰ Paizes (see note 1) 638.

²⁵¹ Whiting (see note 2) 444.

²⁵² Discussed earlier under the cognitive element fn (210).

²⁵³ *S v Maritz* 1996 (1) SACR 405 (A).

²⁵⁴ Burchell (see note 6) 375. A contrary interpretation is offered by Boister who deems the case to have turned on the fact that the possibility foreseen was remote. N Boister 'General Principles of Liability' (1996) 9 *SACJ* 226.

in control and would not let the death of the deceased materialise.²⁵⁵ The facts in *Maritz* are apt for a discussion of the concept of *luxuria*.²⁵⁶

In light of the above, it is submitted that the conative element of *dolus eventualis* serves an important function and retains the subjective elements of intention.²⁵⁷

2.8 The concept of *luxuria*

Luxuria is a form of negligence in South Africa criminal law that it is also known as conscious negligence.²⁵⁸ It is submitted that this form of negligence is the middle ground between intention (*dolus eventualis*) and negligence.

Luxuria and *dolus eventualis* have characteristics in common. If an accused satisfies the cognitive element of *dolus eventualis* as well as the conative element, he is deemed to have intention.²⁵⁹ However, if the accused satisfies the cognitive element of *dolus eventualis* and fails to satisfy the conative element, he is deemed to have acted in a state of *luxuria*, which is a form of negligence.²⁶⁰

By means of illustration:²⁶¹

A professional sniper assumes his position and identifies his target, person X. The sniper intends on shooting and killing person X, however, person X is standing very close to person Y. The sniper foresees the possibility that he may miss his target (person X) and in fact shoot and kill person Y (this describes the cognitive element). In light of such foresight, the sniper truly believes that he will never miss his target based on the fact that he is a well renowned shot and has never missed before. The sniper fires the shot and misses his target (person X) and hits person Y.

²⁵⁵ *S v Maritz* (see note 253) 417 F-G.

²⁵⁶ Discussion to continue in chapter 3 below.

²⁵⁷ This submission will be further discussed in relation to *S v Humphreys*, chapter 4.

²⁵⁸ *Snyman* (see note 10) 183.

²⁵⁹ *Ibid* 183.

²⁶⁰ *Ibid* 183.

²⁶¹ *Ibid* 184. Personal adaption of *Snyman's* illustration.

The sniper in the above example would escape liability for murder on the basis that the conative element of *dolus eventualis* was not satisfied because he was under a genuine belief that he would not kill person Y.²⁶²

Luxuria may be described as follows: when an accused foresees a result (satisfies the cognitive element) but does not reconcile himself to that result (does not satisfy the conative element).

Jansen JA in Ngubane held the following, which explains the difference between *dolus eventualis* and *luxuria*:²⁶³

‘A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, eg by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility . . . The concept of conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers. . . . Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain" ... It is the particular, subjective, volitional mental state in regard to the foreseen possibility which characterises *dolus eventualis* and which is absent in *luxuria*.’

The principle of *luxuria* may certainly seem to be against the views of public policy. However, it is submitted that as a matter of legal principle the concept is accepted. On the basis that South African criminal law subscribes to a psychological approach to crime and that an accused who is not blameworthy ought not to be punished by the criminal law.

The *Humphreys* judgment provides another example of the way in which the accused acted in a state of *luxuria* in the context of a motor vehicle collision.²⁶⁴

2.9 Conclusion

Snyman's definition of *dolus eventualis* should be preferred by our courts as it remains neutral with regard to the academic debate surrounding both the cognitive and conative elements of *dolus*

²⁶² He will however, be liable of culpable homicide in respect of the death of person Y. The above illustration is an example of *aberatio ictus*.

²⁶³ *S v Humphreys* (see note 7) 15.

²⁶⁴ To be discussed in Chapter 3.

eventualis. Snyman's definition defines the cognitive element in unqualified terms and avoids using the ambiguous term 'recklessness' in describing the conative element.

It is submitted that the principle of *dolus eventualis* is a two part inquiry. The cognitive element ought to be defined in unqualified terms and the conative element of *dolus eventualis* serves an important function in the definition of *dolus eventualis*. The importance of this function is highlighted in cases where an accused is acting in a state of *luxuria*.²⁶⁵

Chapter 3 discusses the judgment of the Supreme Court of Appeal in *S v Humphreys* and the significance of the conative element of *dolus eventualis*.

²⁶⁵ As illustrated in *S v Maritz* (see note 253).

CHAPTER 3

3. *S v HUMPHREYS*

3.1 Introduction

This chapter focuses on a discussion of the judgment by the Supreme Court of Appeal in *S v Humphreys*.²⁶⁶ This judgment has sparked both praise²⁶⁷ and criticism²⁶⁸ concerning the application of *dolus eventualis*.

With due respect to the victims of the *Humphreys* incident, the manner in which the facts of this case unfolded are of cinematic proportions. The facts of *Humphreys* are presented below.²⁶⁹

On 25 August 2010 in Cape Town, a minibus transporting fourteen children was struck by a train whilst crossing a railway track. The driver, (hereafter referred to as the accused), of the minibus had crossed the railway track despite the warning signs indicating that the train was approaching. Ten of the children were fatally injured in the collision and four sustained serious injuries.

The events unfolded on that fatal morning in the following manner.²⁷⁰

The accused had stopped behind the last vehicle in a queue of cars waiting to cross the railway track (the road was named Buttskop Road). The crossing was controlled by two booms, one for oncoming traffic and the other for forward moving traffic. The booms were positioned on different sides of the railway line and could be avoided, even when they are down, by moving into the lane intended for oncoming traffic and by then returning to the correct lane to pass the boom on the other side.

There was large stop signs and other traffic signs indicating the presence of a railway track on both sides of the railway track. There were also large red lights facing the traffic on both sides, which begin flashing when a train is approaching. Subsequent to and shortly after (approximately a few

²⁶⁶ *S v Humphreys* (see note 7).

²⁶⁷ HJ Van der Merwe ‘One moment of extreme irresponsibility: 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*.

²⁶⁸ S Hoctor ‘Death on the Roads and *Dolus Eventualis* - *S v Humphreys* 2013 (2) SACR 1 (SCA)’ (2013) 1 SACJ.

²⁶⁹ *S v Humphreys* (see note 7) para 1.

²⁷⁰ *Ibid* para 3, 4, 5, 6.

seconds after the flashing red lights), the booms begin to close. Once the booms are closed, it takes approximately one minute for the train to reach the crossing.

The state witnesses stated that the accused had overtaken the line of vehicles on their right-hand side and had approached the crossing in the lane destined for oncoming traffic. At that stage the red lights were already flashing, and the booms were closed. The appellant maneuvered around the booms and crossed the railway track and the minibus was struck on the left side, causing the fatalities.

These facts gave rise to ten charges of murder and four of attempted murder in the Western Cape High Court. The accused was convicted as charged and sentenced to twenty years imprisonment. The basis for the court's decision was that the accused had possessed intent in the form of *dolus eventualis*.²⁷¹ The accused, (hereafter referred to as the appellant), appealed both conviction and sentence. On appeal to the Supreme Court of Appeal (SCA), the ten convictions of murder were set aside and replaced with ten convictions of culpable homicide and the four convictions of attempted murder were set aside.²⁷² The reasoning of the SCA was that the accused had not possessed criminal liability in the form of intention. However, the SCA found that his conduct had been negligent in nature,²⁷³ hence the convictions of culpable homicide.

3.2 The judgment of the Supreme Court of Appeal

3.2.1 Issues other than *dolus eventualis*

Before the discussion on *dolus eventualis* proceeds there are two other points that need to be addressed.

First is the matter of the evidence. The SCA found the state witnesses to be reliable and credible in their testimonies. There were certain inconsistencies between the state witnesses, but these were declared by the court to be peripheral and immaterial.²⁷⁴

²⁷¹ Ibid para 1.

²⁷² Ibid para 28.

²⁷³ Ibid para 20.

²⁷⁴ Ibid para 2, 3.

Second is the defence of sane automatism.²⁷⁵ The appellant claimed that from the time he had joined the back of the queue at the railway crossing he could not remember anything, implying that he had suffered amnesia in respect of what happened thereafter. The appellant's contention was that the state had failed to prove intention for the reasons provided below:²⁷⁶

'When the appellant made the U-turn [in Buttskop Road] he must have realised that the level crossing danger lights were activated and that the booms were closing. If the actions of the appellant were conscious and deliberate he would have realised the dangers involved, as he was a railway worker. Therefore, it is submitted that it is highly improbable that his actions were conscious and deliberate. It was a suicidal movement which, it is submitted, no reasonable person would have made if he was conscious of his actions.'

This submission was described by the court as confused reasoning and alleges that the appellant did not act consciously. If this was so, then the defence available to the appellant would be that his actions were not voluntary. If the submission of the appellant is that he acted involuntarily, then the defence available to him would be sane automatism.

It is a trite principle in our law that the state has to prove all the elements of the crime beyond a reasonable doubt. However, when the defence of sane automatism is raised, the state is assisted by the inference that a person who commits a criminal act does so consciously and voluntarily.²⁷⁷ The onus is then shifted onto the accused to prove that they acted involuntarily.²⁷⁸

For the appellant to be successful with such a defence, he would have had to set out a factual foundation for his reliance on such a defence.²⁷⁹

The court rejected the possibility of this defence by finding that the accused had not laid a factual foundation to rely on the defence of sane automatism. It therefore found that he had acted voluntarily.²⁸⁰ The court stated that the appellant may have been suffering from retrograde amnesia rather than amnesia associated with a person who had acted as an automaton.²⁸¹

²⁷⁵ Ibid para 8.

²⁷⁶ Ibid para 7.

²⁷⁷ Ibid para 9.

²⁷⁸ Ibid para 9.

²⁷⁹ Ibid para 9. The application of this defence warrants a lengthy discussion on its own, however, such a discussion is not permitted for this dissertation.

²⁸⁰ Ibid para 12. The court sets out briefly the circumstances in which the defence may succeed in paragraphs 9, 10 and 11.

²⁸¹ Ibid para 11.

Once it was established that the accused had acted voluntarily, the element of intention was up for discussion.

3.2.2 *Dolus eventualis*

The question that faced the court was, did the appellant have the necessary intention to cause the death of the ten passengers and attempt to cause the death of the four other passengers? The SCA agreed with the Western Cape High Court that the appellant had not desired to cause death or harm to his passengers, therefore ruling out that he had intent in the form of *dolus directus*.²⁸²

The Western Cape High Court however found that the appellant had had intention in the form of *dolus eventualis* to bring about the deaths and injuries to his passengers. This was the issue that the SCA sought to examine on appeal.

3.2.2.1 The definition of *dolus eventualis* in *Humphreys*

Brand JA first sought to define the principle of *dolus eventualis* when he stated the following:

‘In accordance with trite principles, the test for *dolus eventualis* is twofold: (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 (see eg. *S v De Oliveira* 1993 (2) SACR 59 (A) at 65ij). Sometimes the element in (b) is described as ‘recklessness’ as to whether or not the subjectively foreseen possibility ensues (see eg *S v Sigwahla* 1967 (4) SA 566 (A) at 570).’²⁸³

Brand JA seems to have adopted the definition of *dolus eventualis* proposed by Snyman.²⁸⁴ It is submitted that praise is due for the use of this definition, as the description by Snyman remains neutral on both the cognitive and conative elements of *dolus eventualis*.²⁸⁵

Furthermore, the court has defined element (a), which is the cognitive element, in unqualified terms by only referring to the "possibility" of harm arising.

²⁸² Ibid para 12.

²⁸³ Ibid para 12.

²⁸⁴ Snyman (see note 10) 178.

²⁸⁵ Hoctor (see note 73) 146. Snyman's definition remains neutral on both the cognitive and conative element.

However, six days later the Supreme Court of Appeal in the *Makgatho* judgment seems to contradict the definition offered in *Humphreys* by requiring foresight of a qualified possibility.²⁸⁶

3.2.2.2 The cognitive element of *dolus eventualis* in *Humphreys*

The SCA then discussed element (a), the cognitive element.²⁸⁷

The court emphasised that the foreseen possibility must be subjectively and not objectively determined. If the appellant's foresight was compared with that of a reasonable person, that would amount to negligence and not intention.²⁸⁸

The court also warned against using the process of deductive reasoning, which states that the appellant should have foreseen the possibility of harm arising and therefore did foresee the possibility.²⁸⁹ The result of this line of reasoning is to obscure the distinction between negligence and intention, as illustrated in chapter 1.

The court then held that the correct approach to adopt in determining subjective foresight is the process of inferential reasoning, which is proved by drawing inferences from common human experience and consideration of the facts and circumstances of the case.²⁹⁰

After setting out the manner in which foresight ought to be determined, Brand JA then said the following:²⁹¹

‘...the appellant subjectively foresaw the death of his passengers as a possible consequence of his conduct. I do not believe this conclusion can be faulted. I think it can confidently be accepted that no person in their right mind can avoid recognition of the possibility that a collision between a motor vehicle and an oncoming train may have fatal consequences for the passenger of the vehicle. Equally obvious, I think, would be the recognition on the part of every person that the heedless disregard of clear warning signals of an approaching train, together with the deliberate avoidance of a boom specifically aimed at preventing traffic to enter a railway crossing by reason of the approaching train, may result in a collision with that train.’

²⁸⁶ *S v Makgatho* (see note 178) see fn (181) in Chapter; Also see Hoctor (see note 73) 146.

²⁸⁷ *Ibid* para 13.

²⁸⁸ *Ibid* para 13.

²⁸⁹ *Ibid* para 13.

²⁹⁰ *Ibid* para 13. See also chapter 1 fn (83).

²⁹¹ *Ibid* para 14.

It is submitted that praise is due for the manner in which the court determined the cognitive element of *dolus eventualis*. The distinction between intention and negligence remained clear and the subjectivity of the process intact.

3.2.2.3 The conative element of *dolus eventualis* in *Humphreys*

The court then discussed element (b), the conative element of *dolus eventualis*.²⁹² Earlier the SCA had mentioned that the term recklessness is used to describe the conative element, but the use of this word leads to confusion.²⁹³

The SCA began its discussion by citing the following passage from *S v Ngubane*:²⁹⁴

‘A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, e.g. by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility . . . The concept of conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers. . . . Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain". . . . Our cases often speak of the agent being "reckless" of that consequence, but in this context it means consenting, reconciling or taking into the bargain . . . and not the "recklessness" of the Anglo American systems nor an aggravated degree of negligence. It is the particular, subjective, volitional mental state in regard to the foreseen possibility which characterises *dolus eventualis* and which is absent in *luxuria*.’

The SCA then held that the Western Cape High Court had formulated the test for *dolus eventualis* in relation to the appellant as:

‘The question is, therefore, whether it had been established that the appellant reconciled himself with the consequences of his conduct which he subjectively foresaw. The court a quo held that he did. But I have difficulty with this finding. It seems to me that the court a quo had been influenced by the confusion in terminology against which Jansen JA sounded a note of caution in *Ngubane*. That much appears from the way in which the court formulated its finding on this aspect, namely – freely translated from Afrikaans – that the

²⁹² Ibid para 15.

²⁹³ Ibid para 12.

²⁹⁴ Ibid para 15, citing *S v Ngubane* (see note 112) 685 A-H.

appellant, ‘appreciating the possibility of the consequences nonetheless proceeded with his conduct, reckless as to these consequences.’²⁹⁵

Brand JA had difficulty in accepting the use of the word reckless and said the following:²⁹⁶

‘Once the second element of *dolus eventualis* is misunderstood as the equivalent of recklessness in the sense of aggravated negligence, a finding that this element had been established on the facts of this case, seems inevitable. By all accounts the appellant was clearly reckless in the extreme. But, as Jansen JA explained, this is not what the second element entails. The true enquiry under this rubric 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.’

With regard to the above reasoning the SCA held that the appellant had not reconciled himself to the possibility of causing the deaths of the passengers for the two reasons²⁹⁷ presented below.

1. Common sense dictates that for the accused to foresee the death of his passengers he would have also had to foresee his own death as a possibility of the collision. It was held by the court that the appellant had not contemplated his own death into the bargain nor was there any indication that the accused had been indifferent towards his possible death.²⁹⁸

In simpler terms, the court held that the accused had not reconciled himself to the possibility of causing the death of his passengers because for him to have done so he would have had to reconcile himself with his own death in the situation and the court found no evidence that the accused had valued his life less than that of the passengers.

2. The appellant was under a false confidence that he would have successfully avoided the collision with the train.²⁹⁹ The court arrived at this conclusion because the appellant had successfully performed this dangerous manoeuvre on two previous occasions.³⁰⁰ In addition to the appellant’s false confidence, the dangerous manoeuvre which the appellant

²⁹⁵ Ibid para 16.

²⁹⁶ Ibid para 17.

²⁹⁷ Ibid para 18.

²⁹⁸ Ibid para 18.

²⁹⁹ Ibid para 19. The court used the term ‘misplaced confidence’.

³⁰⁰ Ibid para 19.

had performed was practically possible to execute as the train took one minute to arrive once the booms had closed.³⁰¹

3.3 Assessment of the court's reasoning with regard to the conative element

There are three points that warrant discussion under this element. Firstly, the SCA's rejection of the term "recklessness". Secondly, the first reason the court held that the accused failed to satisfy the conative element of *dolus eventualis* and thirdly, the second reason the court held that the appellant failed to satisfy the conative element.

First, the rejection of the word "recklessness". Hoctor criticises the court's rejection of the term "recklessness" when describing the conative element.³⁰² The reason for his criticism is that the court equated recklessness to advertent negligence.³⁰³ The court reached its conclusion on this aspect by citing from the *Ngubane* judgment.³⁰⁴ However, in examining the comment of Jansen JA in *Ngubane*, it is evident that the term 'recklessness' is used to describe a state of mind that is subjective and not a level of negligence.³⁰⁵

It is submitted that all Jansen JA attempts to warn us of is the ambiguity in the meaning of the word "recklessness". This is the same contention made by Smith, who states that the term "recklessness" is derived from English law and imports objective elements into a subjective inquiry.³⁰⁶

It is submitted that the views expressed by Smith and Brand JA in respect of the use of the term "recklessness" have merit. If we examine the origin of the word recklessness, it is derived from s 140(b) of the TPC, which is a document that was written by an English judge and first used in *R v Valachia*.³⁰⁷

³⁰¹ Ibid para 5.

³⁰² Hoctor (see note 268) 80, 81, 82.

³⁰³ Ibid 80.

³⁰⁴ *S v Humphreys* (see note 7) para 15.

³⁰⁵ Hoctor (see note 268) 81 - 82.

³⁰⁶ Smith (see note 218) 84 - 93.

³⁰⁷ Ibid 85.

Since *Valachia*,³⁰⁸ the term “recklessness” has been followed in subsequent Appellate Division cases.³⁰⁹

In light of the criticism of the term “recklessness”, it is submitted that the term has been interpreted and applied differently than in the English law sense³¹⁰ and therefore the reasoning for which the court in *Humphreys* has favoured an alternate interpretation is rather unconvincing.³¹¹

The second point of discussion is the first reason of the court, which was that the appellant was lacking the conative element as he failed to reconcile himself to his own death occurring in the collision. It is submitted that the court correctly assumed that the appellant and the passengers were subjected to the same fate when the train struck the minibus.³¹² It is presumed that the court arrived at this conclusion based on the fact that the appellant and the deceased were all in the same vehicle. It is submitted that this reasoning is satisfactory and that if a particular person were to survive the collision it would be a matter of fortune rather than calculated malice.

It is submitted that the court's reasoning is based on a logical presupposition. If all the people inside the vehicle are subject to the same fate, then it is sufficient for the accused to foresee the death/injury of anyone of the people inside the vehicle to satisfy the cognitive element of *dolus eventualis*. It does not matter whose death he foresaw. The fact that he had not foreseen his own death meant that he had not foreseen the death of the other people in the vehicle.

It is submitted that the more correct question to ask in this scenario would be, did the accused foresee the death of any of the occupants in the motor vehicle, including himself?

Hoctor disagrees with the court's reasoning and offers the following illustration in support of his view:³¹³

A person is ascending a blind rise in his vehicle whilst stuck behind a slow-moving truck. Frustrated with his slow progress he chooses to overtake the truck despite the foresight that there

³⁰⁸ *R v Valachia* (see note 65).

³⁰⁹ *S v De Bruyn* (see note 66) 510 G-H; *S v Nkombani* 1963 4 SA 877 (A) 896 D; *S v Ngubane* (see note 112) 685 A - H.

³¹⁰ *S v De Bruyn* (see note 66) 510 G-H; *S v Nkombani* (see note 309) 896 D; *S v Ngubane* (see note 112) 685 A - H.

³¹¹ Hoctor (see note 268) 81.

³¹² *S v Humphreys* (see note 7) para 18.

³¹³ Hoctor (see note 268) 83.

may well be oncoming traffic. By swerving into the path of such oncoming traffic in order to overtake the truck, he may cause a collision that may fatally wound the occupants of the other vehicle. Where the driver nevertheless decides to take the risk of the collision occurring, overtaking in the face of such foresight, and the foreseen collision takes place with fatal consequences for the occupants of the oncoming vehicle, such driver may be held liable for murder on the basis of *dolus eventualis*. What if in deciding to take the risk the driver foresees that the overtaking manoeuvre could cause his own death if a collision were to take place but discounts the possibility of this occurring? Does his discounting of the foresight of his own possible death exclude his liability for the foreseen death of the occupants of the other vehicle? It should certainly not do so. Whatever his own belief about what may happen to him, 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.

However, it is submitted that the facts in the illustration offered by Hoctor differ substantially from the situation posed in *Humphreys*, as both the accused and the deceased are in the same vehicle in the latter case. The people inside that vehicle are subjected to the same fate, which is why the court in *Humphreys* inquired into whether or not the accused foresaw his own death. It is therefore respectfully submitted that the criticism offered by Hoctor does not have relevance in the *Humphreys* scenario.

It is submitted that the first reason of the court is logical and sound. For the accused to have reconciled himself to the death of his passengers he would have had to have reconciled himself to his own death, which he did not do. Therefore, reconciliation of death did not occur in the mind of the accused.

Thirdly, it is submitted that the second reason of the court is on much firmer ground, which was that the accused failed to reconcile himself to the death of his passengers because he was acting under a sense of false confidence.³¹⁴ The SCA held that the appellant had acted under a sense false confidence that he would successfully cross the railway track.

The court based its conclusion that the accused was acting under a sense of false confidence on the fact that the appellant had successfully executed the same manoeuvre on two previous

³¹⁴ Ibid 84.

occasions.³¹⁵ Furthermore, the court held that the manoeuvre was practically possible to perform because the train took about one minute to reach the crossing once the booms closed.³¹⁶ The false confidence was that the accused genuinely believed that he would not cause any harm from his actions due to his past experiences performing the same manoeuvre.

The issues that arise as a result of the SCA finding that the accused had a false sense of confidence are obvious. How does one establish the existence of such a false sense of confidence?

One would assume that the court would draw inferences from the circumstances and consider the facts that would influence the subjective state of mind of the accused. In light of the inferences drawn, the court will have to exercise its discretion as to whether it believes that the accused had indeed acted with false confidence.

It is submitted that the SCA in *Humphreys* correctly found that the accused was acting under a false sense of confidence. The process of proving intention by means of inferential reasoning is a subjective inquiry. It is submitted that the SCA in *Humphreys* correctly applied the process of inferential reasoning and retained the subjective nature of the inquiry. The court took into account all the circumstances relevant to the accused's state of mind and avoided an armchair approach to determining intention.

However, does this notion of a "false sense of confidence" create a dangerous precedent for irresponsible and hazardous drivers?

Consider the person who often texts while driving on a freeway with fast moving traffic. If the person eventually causes an accident and kills someone, does this mean that because of their previous success they would escape liability in the form of intention, justified by the reasoning that they were acting under a false sense confidence?

It is submitted that this example may seem theoretically possible. However, the crucial aspect in establishing a sense of false confidence would be a question of evidence. In *Humphreys* the evidence given was sufficient to firmly establish his defence.

³¹⁵ *S v Humphreys* (see note 7) para 6. Witnesses testified to this happening.

³¹⁶ *Ibid* para 5. The Court determined this by an inspection *in loco*.

3.4 Conclusion

It is submitted that the *Humphreys* judgment warrants praise, as it reinforces the subjective approach to determining the presence of the element of intention and is in accord with the psychological approach to crime.

It is submitted that it would be absurd to find the accused guilty of murder in the circumstances of *Humphreys*. The only way the accused could have been properly convicted of murder in this scenario would be if he had intended to kill himself and his passengers but had miraculously survived the collision. However, in the circumstances of this case, it could not be that the accused had foreseen the possibility of the death of his passengers but had excluded himself from that possibility. It is therefore submitted that, based on a correct interpretation of the legal principle of *dolus eventualis*, the SCA rightly overturned the appellant's convictions of murder and replaced them with convictions of culpable homicide.

CHAPTER 4

4. CONCLUSION AND RECOMMENDATIONS

4.1 Findings on *dolus eventualis*

Paizes is correct in describing *dolus eventualis* as one of the most fundamental principles in South African criminal law.³¹⁷ *Dolus eventualis* is a form of intention that broadens the scope of intention in South African criminal law. It allows for criminal liability to be proven without there being direct intention that an accused committed an unlawful act.³¹⁸ As discussed in Chapter 1, direct intention is not always present and if our legal system were to rely solely on direct evidence, our prosecution system would find it difficult to secure convictions based on intention.³¹⁹

The legal principle of *dolus eventualis* has developed since the 13th century and moved further away from its objective nature towards a more subjective approach to assessing *dolus eventualis*.³²⁰

In respect of the debate surrounding the definition of *dolus eventualis*, it is submitted that *dolus eventualis* is best described as a two part inquiry containing both a cognitive and conative element.

In respect of the cognitive element, it is submitted that the inquiry ought to be defined in unqualified terms, as discussed in chapter 2. The recent approach adopted in *S v Makgatho*, which defines *dolus eventualis* in qualified terms, should not be followed.³²¹ The approach followed in *Makgatho* adds objective criteria into the cognitive element of *dolus eventualis*, as highlighted in chapter 2. Such objective criteria are unsatisfactory and an incorrect application of *dolus eventualis*. Furthermore, using objective criteria to determine *dolus eventualis* disregards the psychological approach to crime.

With regard to the conative element, it is submitted that the approach adopted by the SCA in *S v Humphreys* is the correct approach to follow. The rejection of the word “recklessness” by the court is welcomed on the basis that the word has introduced ambiguity into our law that has caused

³¹⁷ Paizes (see note 1) 636.

³¹⁸ Snyman (see note 10) 184 - 185.

³¹⁹ Ibid 189.

³²⁰ The discussion under heading 1.2 in chapter 1.

³²¹ *S v Makgatho* (see note 218) 9.

confusion within the conative element of *dolus eventualis*.³²² Grammatical precision is required when applying *dolus eventualis* and the word “recklessness” does not assist in providing clarity of the conative element. A lack of clarity has the potential to blur the distinction between intention and negligence.

4.2 Findings on *dolus eventualis* in the context of motor vehicle collisions

It is submitted that *dolus eventualis* may apply in the context of motor vehicle collisions. However, a finding of intention in these circumstances deserves critical scrutiny and consideration. *Dolus eventualis* applied to motor vehicle collisions that cause death are considerably different from *dolus eventualis* in respect of deaths caused by other unlawful acts. The difference is that in motor vehicle scenarios the accused is performing a social utility, (driving a motor vehicle), which involves no initial unlawful conduct or intention. In scenarios of murder committed by the use of a firearm or weapon, the unlawfulness of the act is present even before the unlawful killing occurs.

It is submitted that to find that ordinary motorists have the intent to kill other road users in the form of *dolus eventualis* tarnishes the seriousness of this form of intention. South Africa subscribes to the psychological approach to crime,³²³ which attaches criminal liability in accordance with the level of blameworthiness of the accused. It is therefore rather difficult to accept that ordinary motorists who cause fatalities as a result of their driving could be labeled as intentional killers.

Fatalities that arise from motor vehicle collisions stress the importance of the conative element of *dolus eventualis*. On this basis, the concept of *luxuria* is important in the context of motor vehicle collisions. It is submitted that the legal concept of *luxuria* needs to be expressly discussed by our courts when discussing the concept of *dolus eventualis*. The concept of *luxuria* may assist a court in determining whether or not an accused has satisfied the conative element of *dolus eventualis*. The only difference between *dolus eventualis* and *luxuria* is that in the former form of culpability the conative element is proven to be present and, in the latter, the conative element is absent.

³²² Smith (see note 218) 84 - 86.

³²³ Burchell (see note 6) 60.

The principle of *luxuria* involves the foresight of a possibility (cognitive element) but lacks the reconciliation of such foresight (conative element). The difference between *dolus eventualis* and *luxuria* therefore lies within the conative element.

The judgments of *S v Maritz* and *S v Humphreys* both illustrate practical examples of how an accused may foresee a possibility of causing a fatality and still not reconcile himself to the fact that such a possibility may materialise. The accused is therefore not acting with intention in the form of *dolus eventualis* but rather acting negligently in the form of *luxuria*.

A finding of intention in the form of *dolus eventualis* relies on inferential reasoning.³²⁴ For an inference to be drawn from the facts, such an inference must be the only reasonable inference that can be drawn from those facts.³²⁵ Proving that an accused drove a motor vehicle with the intent to kill will be difficult to do without knowledge of the events that transpired inside the motor vehicle. The outward movements of the motor vehicle may indicate a dangerous and irresponsible driver, however, this could be incorrect, as the accused may have simply lost control of the motor vehicle for reasons beyond his control.

Drawing inferences in this context may not be sufficient evidence to find that the accused had acted intentionally. The SCA in *Humphreys* deserves praise for the manner in which it subjectively assessed the state of mind of the accused. The reasoning in *Humphreys* avoided objective criteria and standards.

4.3 Recommendations

The increase in the number of fatalities experienced on South African roads is of serious concern.³²⁶ However, it is submitted that enforcing harsher convictions on road users who cause such fatalities is not the correct approach to reducing the number of road fatalities. In fact, such an approach tampers with the principle of *dolus eventualis*. The National Prosecuting Authority may be pressured into initiating charges of murder in circumstances that do not warrant such a charge and as a result, judgments may be delivered that reflect the incorrect application of the principle

³²⁴ Snyman (see note 10) 184 - 186.

³²⁵ *S v Sigwaha* (see note 91) 570 E.

³²⁶ DOI 'It's a bloodbath as South African road fatalities soar' available at <https://www.iol.co.za/motoring/industry-news/its-a-bloodbath-as-south-african-road-fatalities-soar-18583275>, (Accessed: 8 January 2019).

of *dolus eventualis*. The principle of *dolus eventualis* should not be tampered with to gain a political advantage.

Dolus eventualis may apply in the context of motor vehicle collisions.³²⁷ However, the chances of its success are rare and largely dependent on the inferences that can be drawn from the available evidence.

The success of *dolus eventualis* is dependent on the inferences that may be drawn in the circumstances. In the *Humphreys* scenario, it was highly unlikely for the charge of murder to succeed based on intention in the form of *dolus eventualis*, as the accused and the deceased persons were all in the same vehicle. To find that the accused had the intention to kill the deceased persons would logically imply that the accused had intended to bring about his own death as well, unless the contrary can be proven.

It is respectfully submitted that the National Prosecuting Authority should be hesitant in charging motorists who cause fatalities as a result of motor vehicle collisions with murder, as it is questionable if such accused persons had the intention to kill. It is submitted that their actions fall short of being intentional in the eyes of the law and are much better described as a type of aggravated negligence. Verdicts of culpable homicide with aggravated sentences based on the principle of *luxuria* may be a more suitable punishment and deterrent to other dangerous motorists.

Applying the concept of *luxuria* to the drivers who cause fatalities from motor vehicle collisions is the more legally correct approach for the National Prosecuting Authority to adopt than pursuing charges of murder based on *dolus eventualis*.

The conduct of an accused person in the context of motor vehicle collisions is certainly inconsiderate, dangerous and irresponsible. However, it may be incorrect to find that their conduct was intentional in the eyes of the law. They may well be acting in a state of *luxuria*.

³²⁷ *S v Qeqe* (see note 188). *Dolus eventualis* was found to be present in this scenario. The accused drove into a crowd of pedestrians. The decision in this case is open for criticism.

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