

UNIVERSITY OF KWAZULU-NATAL

**DOLUS EVENTUALIS : THE SUBJECTIVE TEST TO
ESTABLISH THE “RECONCILIATION WITH THE RISK”
OR “THE TAKING INTO THE BARGAIN” OF THE
FORESEEN RESULT BY THE ACCUSED WITH
SPECIFIC REFERENCE TO S v PISTORIUS**

By
Danie Jan du Preez
213 573 848

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Supervisor : Prof. Shannon Hooctor

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DOLUS EVENTUALIS

The subjective test to establish the reconciliation with the risk or the taking into the bargain of the foreseen result by the perpetrator, with specific reference to *S v Pistorius*

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CHAPTER 1

1. INTRODUCTION

1.1. General

The aim and objective of this dissertation is the dissecting and interpretation of *dolus eventualis* or (legal intent), with reference to the so-called second leg or voluntative component of the test to establish the presence of *dolus eventualis*, one of the most important forms of intention in practice in South African Criminal Law¹ or as put even more strongly by Paizes² in his statement that there is no more fundamental concept in our criminal law than *dolus eventualis* or legal intention.

The concept of *dolus eventualis* was central in *S v Pistorius* CC133/2013 (High Court of South Africa, Gauteng Division) : a case that involves a human tragedy of Shakespearean proportions.³ A young man overcomes huge physical disabilities to reach Olympian heights as an athlete, in doing so he becomes an international celebrity, he meets a young woman of great natural beauty and a successful model; romance blossom and then, ironically on Valentine's Day, all is destroyed, when he takes her life.⁴

Oscar Leonard Carl Pistorius was charged with four counts. Count 1 being the murder of Reeva Steenkamp to which the accused pleaded not guilty. Murder is defined as the unlawful, intentional killing of another person.⁵

The accused handed in a plea explanation in terms of Section 15 of the Criminal Procedure Act.⁶ Masipa J. made the following extracts from the plea explanation in her judgment.⁷

- “During the early hours of the morning I brought two fans in from the balcony. I had shortly before spoken to Reeva who was in bed besides me”.

¹ S v Hooror The concept of *Dolus Eventualis* in South African Law – a Historical Perspective Fundamina (14 – 2) 2008 1.

² A. Paizes 1988 SALJ *Dolus Eventualis* Reconsidered 636.

³ Director of Public Prosecutions v Oscar Leonard Pistorius (96/2015) [2015] ZASCA 204 (3 December 2015).

⁴ <http://politicsweb.co.za/documents/gauteng-dpp-vs-oscar-pistorius-sca-judgment>.

⁵ Jonathan Burchell Principles of Criminal Law 3rd Edition 2005 157.

⁶ Act 51 of 1977 as amended.

⁷ S v Pistorius (CC113/2013). [2014] ZAG PPHC (12 September 2014).

- *“Unknown to me Reeve must have gone to the toilet in the bathroom at the time when I brought in the fans, closed the sliding doors and drew the blinds and the curtains.”*
- *“I heard the bathroom window sliding open. I believed that an intruder or intruders had entered the bathroom through the bathroom window which was not fitted with burglar bars.”*
- *“I approached the bathroom armed with my firearm so as to defend Reeve. At the time I believed Reeve was still in bed.”*
- *“The discharging of my firearm was precipitated by a noise in the toilet. I, in my fearful state, knowing that I was on my stumps, unable to run away or properly defend myself physically, believed it to be the intruder or intruders coming out of the toilet to attack Reeve and me.”*

Masipa J. continues, in the judgment,⁸ to summarise the common cause facts as follows:⁹

- *“the accused while on his stumps fired four shots at the toilet door.”*
- *“at the time the shots were fired the deceased was inside the toilet.”*
- *“the door of the toilet opened to the outside, that is into the bathroom.”*
- *“three of the four shots struck the deceased.”*
- *“the deceased died of multiple gunshot wounds.”*

1.2. *Murder versus culpable homicide, including the consideration of the subjective and objective tests for fault.*

South African law draws a basic distinction between intentional killing (murder) and negligent killing (culpable homicide).¹⁰ Making this distinction between intentional and negligent killing has an attractive simplicity but it also means that the South African law regards murder as including both a killing where death was merely foreseen as a possibility as well as the typical case of murder, where the killing was premeditated.

In *Grotjohn*¹¹ the court stated that a person who assists another in committing suicide could be found guilty of murder if the assistance to the deceased was

⁸ Ibid.

⁹ *S v Pistorius* (note 7 above) 3388.

¹⁰ J Burchell (note 5 above) 157.

¹¹ *S v Grotjohn* 1970(2) SA 355 (A).

unlawful and intentional. The required principal of unlawfulness and intention was confirmed in *Hartmann*.¹²

Culpable homicide is the unlawful negligent killing of another human being.¹³ The test to prove negligence is an objective test, measured against the conduct of the reasonable person. In other words, would the reasonable person have taken steps to guard against the consequences?

The difference between murder and culpable homicide is that between homicide with intent and homicide due to negligence, which means the difference between *dolus* and *culpa*.¹⁴

Intent in murder cases must be accompanied by unlawfulness and a comprehension and consciousness of unlawfulness.

Snyman¹⁵ identifies the elements of the crime of murder as (a) causing death (b) of another human being (c) unlawfully and (d) intentional and that of the crime of culpable homicide as (a) causing the death (b) of another person (c) unlawfully and (d) negligently.

The difference therefore between murder and culpable homicide is the form of fault, culpability (negligence) is required for culpable homicide, *dolus* (intention) is required for murder.

The rules relating to the element of intention which is required for murder will be discussed in more detail hereunder, but can be summarised as follows: The intention required is satisfied not only if X has the direct intention (*dolus directus*) to kill Y, but also if he merely foresees the possibility of Y being killed and reconciles himself to this possibility (*dolus eventualis*).¹⁶

¹² *S v Hartmann* 1975(3) SA 532 (C).

¹³ Burchell (note 5 above) 159.

¹⁴ J Kriegler & A Kruger *Hiemstra . Suid-Afrikaanse Strafproses* 2ed (2002) 258.

¹⁵ C.R. Snyman *Strafreg* 5th ed (2008) 447.

¹⁶ Snyman (note 15 above) 449.

In *Ndhlovu*¹⁷ it was stated that the state, in a charge of murder, must prove not only the killing but that the killing was unlawful and intentional. The state can discharge the onus either by direct evidence or by the proof of facts from which a necessary inference may be drawn. One such fact from which such inference may be drawn is the lack of an acceptable explanation by the accused.¹⁸

In *Sigwahla*¹⁹ Holmes JA makes the distinction between subjective foresight and objective foreseeability and states that “the distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus pater familias* in the position of the accused.”²⁰ Thus for the state to discharge the onus of proof of intent, which is required for a murder conviction, the subjective test should be applied and “the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. The two concepts never coincide.”²¹

Holmes JA confirms, with reference to culpable homicide, in *Ntuli*²² that *culpa* is an essential element of this crime and if an accused’s defence is reasonable, both in its application of force and his intention to apply are lawful, then there is no *dolus* on the accused’s part. *Dolus* consists of an intention to do an unlawful act. The *Ntuli*²³ case revolves around the excessive use of force in self-defence or private defence. If an accused ought reasonably to realise that he is using more force than is necessary to protect himself and he ought reasonably to foresee the possibility of the resilient death and death ensues, such person will be guilty of culpable homicide. If however, the accused realises that he is using more force than is necessary, then he is both applying force unlawfully and intending to do this and will be guilty of murder. The question on the use of excessive force is a question of fact, involving an enquiry into the state of mind of the accused. An accused is guilty of culpable homicide if he ought reasonably to have foreseen the

¹⁷ *R v Ndhlovu* 1945 AD 369 at 386.

¹⁸ Snyman (note 15 above) 447.

¹⁹ *S v Sigwahla* 1967(4) SA 566 (A) 570 B – F.

²⁰ *Ibid* 570.

²¹ *S v Pepenene* 1974(1) All SA 152 (O).

²² *S v Ntuli* 1975(1) SA 429 (A) 436.

²³ *Ibid* 436.

possibility of the resultant death²⁴ and guilty of murder if he foresaw the possibility of such resultant death but persisted, regardless whether it ensued or not²⁵. Intention in the form of *dolus eventualis* or legal intention is present.

²⁴ S v Bernardus 1965(3) SA 287 (A).

²⁵ S v Sigwahla (note 19 above).

CHAPTER 2

2. INTENTION (*DOLUS*)

The mere fact that a person has committed an act which corresponds to the definitional elements of the crime and which is unlawful, is not sufficient to render him criminally liable. Intention is included in the concept of culpability, being one of the forms of culpability.²⁶ The second being negligence. In Latin these legal forms of culpability are referred to as *dolus* and *culpa* respectively.

There is however, some debate about whether negligence is a form of fault or an assessment of conduct, but it seems that failure to measure up to rational standards and reasonableness can be seen as a type of fault.²⁷

According to Snyman²⁸ intention, as this term is used in criminal law, means that a person commits an act:—

- i. While his will is directed towards the commission of the act or the causing of the result;
 - ii. In the knowledge of the existence of the circumstances mentioned in the definitional elements of the relevant crime; and
 - iii. In the unlawfulness of the act. An accused is at fault where he or she intentionally commits unlawful conduct knowing it to be unlawful.
- Intention, opposed to negligence is the principal form of fault.²⁹

The basis of intention namely, the distinction between deliberate and accidental conduct is explained in an elementary appreciation by Oliver Wendell Holmes³⁰ when he pointed out that “even a dog distinguishes between being stumbled over and being kicked.”

²⁶ Snyman (note 15 above) 149.

²⁷ J. Burchell (note 5 above) 152.

²⁸ Snyman (note 15 above) 181.

²⁹ Ibid.

³⁰ O.W. Holmes The Common Law 3ed. (1991).

Jeremy Bentham³¹ is quoted by Snyman:³²

“... whether a man commits an offence knowingly or wilfully or whether he commits it unintentionally or even unwittingly, the immediate mistake is precisely the same. A man who does an injury, knowing that he is doing wrong and intending to do it presents himself to one’s mind as a wicked and dangerous fellow; while he who commits the mischievous act without such knowledge or such intention seems as one to be feared only by his ignorance or carelessness.”

The concept of intention has gradually been extended to cover not just deliberate but also foreseen conduct³³.

South African criminal law is founded upon promoting individual autonomy, which is centralised around and manifest in the dominance of the subjectivity of intention. Individuals are regarded as autonomous persons with a general capacity to choose among alternative causes of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices³⁴.

2.1. Cognitive and conative elements of intention

Intention as one form of fault (the other being negligence) and has two principal elements namely cognitive and conative.

Snyman³⁵ distinguish between two elements of intentions namely the cognitive (or intellectual) and conative (volitional or voluntative) element.

2.1.1. The cognitive element seen in the context of intention refers to the knowledge that the accused had of the act, of the circumstances mentioned in the definitional elements and of the unlawfulness.³⁶ The aforesaid assessment of the cognitive element as it relates to intention should clearly be distinguished from the cognitive function as it relates to the assessment of a person’s capacity to act. In this sense the cognitive function relates to a person’s reason or insight and understanding.

³¹ J. Bentham Theory of Legislation (1950) 17.

³² Snyman (note 15 above) 459.

³³ Burchell (note 5 above) 344.

³⁴ A. Ashworth Principles of Criminal Law 6th Ed (2009) 155.

³⁵ Snyman (note 15 above).

³⁶ Ibid at 182.

In the Criminal Procedure Act³⁷ the cognitive function as it relates to capacity is described as the ability to appreciate the wrongfulness of a person's act. Sometimes it is described as the appreciation of the unlawfulness of the act or the ability to differentiate between right and wrong.³⁸ However, for the purpose of considering the cognitive component in the context of intention, there has to be foresight of a circumstance or result and the cognitive element deals with what a person conceives to be the circumstance or result of his act. There is no intention if the circumstances or result is not conceived by the actor.

- 2.1.2. The conative element consists in directing the will towards a certain act or result, for example X decide to accomplish in practice what he has pictured to himself in his imagination only. The decision to act transforms what was only "day-dreaming" or "wishing" or "hoping" into intention. The decision to act is a reconciliation with the foreseen result or circumstance and the actor is not deterred by the prospect of a forbidden result flowing from his action.³⁹

The aforesaid assessment of the conative element has to, as with the cognitive element, be distinguished from the assessment of the conative element as it relates to the capacity of a person opposed to its function in assessing it (the conative element) for the purpose of proving intention.

Hiemstra⁴⁰ describes the conative element, in the capacity context, as a person's ability to conduct himself in accordance with his insight into right and wrong. The conative function when assessing capacity exists in a person's ability to control his behaviour in accordance with his insights – which means that unlike an animal, he is able to make a decision, set himself a goal, to pursue it, and to resist impulses and/or desires to act contrary to what his insight into right or wrong reveal to him. Here the key word is self-control. According to the Rumpff Report⁴¹ conative function as it relates to capacity, implies "a disposition" of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him, and thus set up a counter-motive to, its execution.

³⁷ Criminal Procedure Act (as amended) 51 of 1977 (Section 78(1)).

³⁸ Hiemstra (note 14 above).

³⁹ Snyman (note 15 above) 204.

⁴⁰ Hiemstra (note 14 above).

⁴¹ Rumpff Report 99,9 20-29, 9.33 (Rumpff Commission of Enquiry into Responsibility of Mentally Deranged Persons and Related Matters) 1967.

2.2. *Forms of Intention*

Snyman⁴² distinguishes between three forms of intention namely direct intention (*dolus directus*) indirect intention (*dolus indirectus*) and *dolus eventualis* or legal intent. These three forms may be *indeterminatus* (general).

2.2.1. *Dolus directus*

With *dolus directus* one has to do with intention in its ordinary grammatical sense namely the accused meant to perpetrate the prohibited conduct or bring about the criminal consequence even though the chance of the consequence resulting from his conduct was small. This concept differs from that of a planned and premeditated conduct. In *Raath*,⁴³ Bozalek J indicated that planning and premeditation suggests a deliberate weighing up of the proposed criminal conduct as opposed to the commission of the crime on the speed of the moment or in unexpected circumstances. According to Bozalek J all the circumstances, including the accused's state of mind and the time between the accused forming the intention and carrying out his intention, must be weighed in the balance in determining whether the commission of the crime is planned and premeditated. On the facts in *Raath*⁴⁴ it was held that the period of time between forming intent and carrying it out was a matter of a few minutes. *Dolus directus* does not necessarily require planning and premeditation. Deliberate, goal directed conduct does not necessarily have to be planned over a period of time.⁴⁵

Direct intention (*dolus directus*) comprises a person directing his will towards achieving the prohibited result or performing a prohibited act. The result of the act is his goal and desire.

The sudden flash of a knife is not easy to clarify in terms of the intention of the wielder. The question to be asked is: Did the perpetrator actually intend to cause the death of the deceased i.e. direct intent (*dolus directus*) or was it a case of foresight of the possibility of resultant death and persistence regardless whether

⁴² Snyman (note 15 above) 183.

⁴³ *S v Raath* 2009(2) SACR 46 (C).

⁴⁴ *Ibid.*

⁴⁵ J Burchell *Principle of Criminal Law* 4th (2013) 746.

death ensues or not (murder with *dolus eventualis*).⁴⁶ With regard to the requirements of “foresight” and “persistence” it becomes clear that the dividing line between cases of *dolus eventualis* and culpable homicide where the negligence is required as the form of fault instead of intention, is sometimes rather thin. According to Holmes J⁴⁷ seeking the right answer in every case one has to think one’s way perceptively through the facts, with an approach much more robust than exquisite.

Jansen AR⁴⁸ referring to *Mienies*⁴⁹ states that: “*Dolus eventualis* is ‘n elastiese begrip, aan die een uiterste kan dit grens aan nalatigheid, veral culpa, en aan die ander kant aan *dolus directus*.” In considering *dolus directus* there is no degree of foresight being applied (graad van voorsienbaarheid) i.e. not the *ex post facto* consideration of the degree of foresight, but rather the subjective consideration of the perpetrator at the time that the act was performed.

2.2.2. *Dolus Indirectus*

This form of intention exists where, although the unlawful conduct or consequence was not the accused’s aim and object, he or she foresaw the unlawful conduct or consequence as certain or as substantially certain or virtually certain⁵⁰ or as described by Hiemstra.⁵¹ “*Dolus indirectus* exists when the prohibited result (with murder, the death of the deceased) is not the main purpose but the perpetrator knows that the prohibited result must necessarily follow if the main purpose is sought.” The perpetrator sets a house alight in order to burn to death the woman who is inside. If the perpetrator knew that there are children with her, it does not help him to allege that he had no intent to harm the children or as in *Abraham*,⁵² the accused testified that he did not intend to kill the deceased but merely wished to render her unconscious or as he put it “ek wil haar net flou ‘gechoke’ het”. Friedman AJA⁵³ further stated that an accused can be found guilty

⁴⁶ *S v Sabben* 1975(2) All SA 657(A) 658.

⁴⁷ Ibid 658.

⁴⁸ *S v Dladhla en andere* 1980(3) All SA 273 (A).

⁴⁹ *S v Mienies* 1978(4) SA 560 (A) 562.

⁵⁰ Burchell (note 45 above) 346.

⁵¹ Hiemstra (note 14 above).

⁵² *S v Abraham* 1990(2) All SA 401 (A).

⁵³ Ibid 406.

of murder whether his *mens rea* takes a direct or indirect form. When convicting an accused it is not necessary to indicate whether it finds a direct or an indirect intention. The distinction may only be important at the stage when enquiry is made into extenuating circumstances.

2.2.3. *Dolus eventualis*

The third form of intention apart from direct intention (*dolus directus*) and indirect intention (*dolus indirectus*) is *dolus eventualis* or legal intent. There is no doubt that *dolus eventualis* is by far the most important form of intention in practice in South African criminal law⁵⁴ or as stated by Loubser and Rabie⁵⁵ in referring to the *Beukes*⁵⁶ case:

“the Appellate Division had yet another occasion to examine the extensive concept of dolus eventualis”

and further on:

“although the concept of dolus eventualis has been the subject of innumerable reported judgments over several decades and almost as many academic publications, there is yet no certainty as to its content.”

Paizes stated that *“Judicial pronouncement on this subject have been characterised by vacillation and a surprising lack of clarity.”*⁵⁷

Whiting,⁵⁸ described *dolus eventualis* as *“very much a controversial subject.”*

Snyman⁵⁹ defines *dolus eventualis* as follows: 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 the 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; and

⁵⁴ SV Hoorer *The degree of foresight in Dolus Eventualis* SACJ (2013) 131.

⁵⁵ MM Loubser & MA Rabie *Defining Dolus Eventualis – a voluntative element* SACJ (1988) 415.

⁵⁶ *S v Beukes* 1988(1) SA 511 (A).

⁵⁷ A. Paizes *Dolus Eventualis Reconsidered* SALJ (1988) 636.

⁵⁸ R Whiting *Thoughts on dolus eventualis* SACJ (1988) 440.

⁵⁹ Snyman (see note 15 above).

- (b) he reconciles himself to this possibility.

Dolus eventualis is often referred to as legal intention and it occurs where the perpetrator foresees the possibility of death occurring and proceeds with his or her conduct, reconciling him/herself with the death.⁶⁰

2.3. *The development of dolus eventualis*

It is instructive to examine, in a little more detail the developmental path of the notion of *dolus eventualis* in order to grasp and work with the definition for *dolus eventualis*.⁶¹

In one of the leading cases *S v Malinga*⁶² *dolus eventualis* was described in the context of murder:

“In considering the crime of intention to kill, the test is whether the accused person had foreseen the possibility that the act in question would have fatal consequences and was reckless whether the harm will result.”

In order to dissect and examine the aforesaid definition or variants thereof such as

- *“the test for such dolus is whether the appellant, subjectively foresaw the possibility of death resulting from his assault on the deceased, but persisted therein reckless whether such possibility became fact”*⁶³ ; or
- *“whether the accused foresaw the possibility of death resulting from the unlawful act, yet persisted in his conduct reckless whether death ensued or not.”*⁶⁴

the historical development of the principles of *dolus eventualis* has to be examined.

⁶⁰ JM Burchell South African Criminal Law and Procedure Volume 1 General Principles of Criminal Law 4 Ed. (2011) 363.

⁶¹ Hoctor (note 1 above).

⁶² S v Malinga 1963(1) SA 692 (A) 694 G – H.

⁶³ S v Mtshiza 1970(3) SA 747 (A) 752.

⁶⁴ S v Mavhungu 1981(1) SA 56 (A) 66 G – H.

Snyman⁶⁵ stated that there is always a tension between law forces, namely firstly abstract theory, adherence to legal dogma or systematic reasoning and secondly the concrete or practical demands of social reality, pragmatism or policy considerations. This tension is largely also a tension between subjectivism and objectivism, where the subjective approach to criminal liability places emphasis on the subjective considerations pertaining to the individual offender and the objective approach emphasises the expectations of society.

Although the now established test for intention is invariably subjective in nature, thus requiring the court to find, in relation to *dolus eventualis*, actual subjective foresight of the possibility of harm, coming about it was not always so.⁶⁶

Before 1945 South African law relied upon a presumption that persons intended the natural and probable consequence of their acts.⁶⁷ The presumption neglects the accused actual state of mind and is concerned solely with the question as to whether a reasonable person in the position of the accused would have foreseen the consequences – in other words whether the accused “should” or “ought” to have foreseen the consequence irrespective of whether in fact he or she did or not.⁶⁸

Snyman⁶⁹ confirm the above, stating that up to around 1950, subjective considerations pertaining to criminal liability played a sub-ordinate role in the construction of criminal liability in South Africa and this introduction into South African law of an emphasis on subjective consideration in the construction of criminal liability owes much to the work by De Wet & Swanepoel titled *Strafreg*, first published in 1949.⁷⁰ Apart from consulting the writings on Roman and Roman-Dutch Law, De Wet was also strongly influenced by Continental European Literature, in particular German authors such as Von Liszt-Schmidt,

⁶⁵ C.R. Snyman General Principles of Criminal Liability and Specific Offences – The Tension between legal theory and policy considerations in the general principles of criminal law – Acta Juridica 1 (2003).

⁶⁶ Hoctor (note 61 above) 19.

⁶⁷ Whiting (note 58 above) 450.

⁶⁸ Ibid.

⁶⁹ Snyman (note 65 above).

⁷⁰ JC de Wet and HL Swanepoel *Strafreg* (1949).

Von Hippel and Beling, as well as Dutch authors such as Von Hamel, Pompe and Vos.⁷¹ These authors made a clear distinction between the objective and subjective requirement for liability.

The objective requirement referred to the act, definitional elements of the crime and unlawfulness

and

the subjective requirements were all placed under the umbrella approach of culpability (schuld) or “skuld”.

The resultant subjective concept of culpability is known as the psychological theory of culpability.

Hector⁷² refers to Gie⁷³ who (citing the German author Mezger) includes *dolus eventualis* in the theory on intention in the following formulation “*dus word ‘n gevolg ook as gewille herlui as die dader op die oomblik van sy handeling die moontlikheid voorsien het dat die verbode gevolg deur sy handeling veroorsaak kon word.*” It is notable and also pointed out by Hector⁷⁴ that “it is instructive to note that the definition makes no reference whatsoever to the volitional component in the form of recklessness.”

During the first half of the twentieth century however, the Appellate Division preferred the objective test for intention.⁷⁵

In *R v Jolly*⁷⁶ it was stated that it is a well settled rule that an accused person must be taken to have intended the ordinary and natural consequence of his act, consequence which he could have foreseen. It is further stated that the intention of an accused person has to be ascertained from his acts and conduct and where a person perform a dangerous act, such as derailing a train, it is an inference that

⁷¹ De Wet & Swanepoel (note 70 above) 15 – 16.

⁷² Hector (note 61 above) 19.

⁷³ CJC Gie n Kritiek op die Grondslae van die Strafreë in Suid-Afrika (1949) 99.

⁷⁴ Hector (note 61) 19.

⁷⁵ Burchell (note 60) 141.

⁷⁶ R v Jolly 1923 AD 176.

can be drawn from his act, that it was not merely his intention to derail a train, but to injure and kill. The court found that:

“As there was therefore evidence from which the inference could legally be drawn that the accused has an intention to kill, it become entirely a question of fact for the Trial Court.”

In *R v Jongani*⁷⁷ it was held *“that in as much as the appellant must have known⁷⁸ that the possible and probable consequence of a stab wound made by a knife might, under the circumstances mean the death of a person.”*

In *R v Duma*⁷⁹ reference is made to Moorman⁸⁰ who expresses the opinion that a proper distinction should be made according to the kind of weapon used by the accused. If a less lethal weapon is used like the accused’s hands as opposed to a more deadly weapon such as a gun or pistol one will not usually infer a deadly intention. It is also noted that the words “could” and “ought to have” realised is also used. Tindall JA finds in *Jolly*⁸¹ that the appellant “ought to have contemplated” that the deceased would have been killed.

What is clear from the above in particular in the use of terms such as *“must be taken to have intended”*⁸², *“must have known”* and *“could and ought to have realised”*⁸³ is that the objective test ignores the actual state of mind of a perpetrator or as stated by Hoctor⁸⁴ that the crucial question being enquired into is not whether the accused actually foresaw the result or consequence of the act, as would be the case with an subjective test, but whether the accused ought to have foreseen the result or consequence.

⁷⁷ *R v Jongani* 1937 AD 400.

⁷⁸ My emphasis.

⁷⁹ *R v Duma* 1945 AD 410 at 417.

⁸⁰ J Moorman *Verhandelinge over de misdaden en der selver straffen voor een groot gedeelte opgesteld* (2.1.18) JJ van Hasselt.

⁸¹ *R v Jolly* (note 76 above).

⁸² *R v Jongani* (note 77 above).

⁸³ *R v Duma* (note 79 above).

⁸⁴ Supra 59 Hoctor (note 61) 19.

The reason for the adoption of the objective test as the test for intention was the application of the presumption in English law that a person intended the natural and probable consequence of his or her action or as stated by Phelps⁸⁵

“if a perpetrator should have foreseen a potential consequence resulting from his/her actions then the court treats such expected foresight as if the perpetrator had foreseen the consequence.”

The principal objection to the presumption referred to above is that it resulted in an objective test for intention, which caused an overlap between intention and negligence.⁸⁶

The application of the presumption prevented an earlier development of the concept of *dolus eventualis* in our criminal law. Holmes JA, as referred to by Hoctor,⁸⁷ stated in *De Bruyn*⁸⁸ that the South Africa Courts for many years drew scant distinction, if any, between *dolus eventualis* and *dolus directus* in murder cases, simply applying the presumption in deciding the issue of intention to kill.

The landmark case in the shift to a subjective approach to the assessment of *mens rea* was the ruling by the Appellate Division in *Ndhlovu*⁸⁹ placing the onus of proof in criminal cases to the state in respect of all elements of liability. This was only the beginning of the development towards the subjective test for intention. According to De Wet and Swanepoel⁹⁰ the test was vicariously and sometimes imperfectly formulated. The development and adoption of the concept of *dolus eventualis* came hand in hand with the adoption of the psychological theory of fault, signalled by the rejection of the presumption of intent.⁹¹

⁸⁵ K Phelps The role of Error in Objecto in South African Criminal Law : “An opportunity for re-evaluation presented in S v Pistorius. www.publiclaw.uct.ac.za

⁸⁶ Burchell, Milton & Burchell. South African Criminal Law and Procedure Vol. 1, General principles (1983) 189.

⁸⁷ Hoctor (note 61 above).

⁸⁸ S v De Bruyn 1968(4) SA 498A 509 F – G.

⁸⁹ R v Ndhlovu (note 17 above) 389.

⁹⁰ JC De Wet & Swanepoel Strafreg (1960) 126 – 128.

⁹¹ Hoctor (note 61 above).

*In R v Nsele*⁹² the Appellate Division cleared up any remaining confusion between the objective and subjective enquiries into intention, by confirming the validity of *dolus eventualis* and the adoption of a purely subjective test for intention that has been applied by South Africa Courts subsequently.⁹³ Hoctor⁹⁴ as referred to by Phelps stated that:

“the fictitious reasonable person applied in the negligence test is not applicable to dolus eventualis – whatever such reasonable person might notionally have foreseen is irrelevant and the only assessment that is relevant is whether the accused actually foresaw the harm in question. A perpetrator can therefore only be held liable in terms of dolus eventualis in consequences of his actions that were actually foreseen than those that were foreseeable.”

The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus pater familias* in the position of the accused. In other words the distinction between subjective foresight and objective foreseeability must not become blurred.⁹⁵

The central position of *dolus eventualis* in South Africa criminal law has been recognised by the Constitutional Court.⁹⁶ In *S v Coetzee*,⁹⁷ O’Reagan J stated that *dolus eventualis* has been recognized as sufficient to meet the requirement of culpability and in *Thebus*,⁹⁸ a case dealing with legal limits of common purpose liability by active association, it was stated that:

“he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue”,

thus approving the definitions of *dolus eventualis*.

⁹² *R v Nsele*. 1955(2) SA 145(A).

⁹³ Phelps (note 85 above).

⁹⁴ S Hoctor *Death on the roads and dolus eventualis – S v Humphreys* 2013(2) SACR 1 (SCA) 1SACJ (2013) 79.

⁹⁵ *S v Sigwaha* (note 19 above) 570 B – C.

⁹⁶ Phelps (note 85 above).

⁹⁷ *S v Coetzee* 1997(3) SA 537 (CC) 177.

⁹⁸ *S v Thebus* 2003(6) SA 505 (CC) 20.

Individual autonomy is central to *mens rea* and only when people are adequately aware of what they are doing and the potential consequences of those actions, can they fairly be described as having chosen the behaviour and consequence, thus justifying the imposition of the coercive power of the state through criminal liability.⁹⁹

2.4. *The tests for dolus eventualis*

Dolus eventualis, as stated above, is defined as follows “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:

- (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; and
- (b) He *reconciles* himself to this possibility.”¹⁰⁰

The test for *dolus eventualis* is twofold, in other words it consists of two elements, namely (as was referred to in *Humphreys*¹⁰¹):

- (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*”.

The foresight is described as the cognitive component of the test and the reconciliation as the conative or volitional component of the test.

2.4.1. *The cognitive element in the test for dolus eventualis, namely the subjective foresight of the prohibited consequence, including the considering of the degree of foresight and inferential reasoning*

The cognitive component of the test for *dolus eventualis* refers to the mental foresight of a person or in other words what a person conceives to be the circumstances or result of his act. If there is no foresight of particular

⁹⁹ A Ashworth *Principles of Criminal Law* 5 ed. (2006) 158.

¹⁰⁰ Snyman (note 15 above) 184.

¹⁰¹ *Humphreys v S* 2013(2) SACR 1 (SAC) SACJ (2013) 79.

circumstances or a particular result, then the cognitive component of the test is absent and there can be no *dolus eventualis*.

The South Africa criminal law embraces the psychological concept of culpability which demands an enquiry into the subjective state of mind of an accused to determine a subjective foresight of the possibility of harm or result.

The question whether the cognitive component of *dolus eventualis* can be established involves a subjective enquiry assessing whether the accused had actual foresight of the possibility of the harm occurring¹⁰² in this regard.

The subjective or actual foresight of the accused is seldom able to be proved by means of direct evidence. To determine the mental state of mind of the accused a court can rely on proof by means of inferential reasoning whereby the presence of such foresight can be proved by inference drawn from the accused's conduct and from the circumstances in which the crime was committed.¹⁰³

In *S v Van Aardt*¹⁰⁴ the appellant was convicted in the Grahamstown High Court of murder of a fifteen year old following a beating by the appellant. The appeal to the High Court was unsuccessful, and the matter came on further appeal before the Supreme Court of Appeal. The appellant admitted common assault but denied that such assault caused the death of the deceased, or that he bore a legal duty to seek medical intervention for the deceased. The court concluded that the appellant did cause the death of deceased and then had to assess if the appellant's actions were intentionally. The court applied the test for *dolus eventualis* as formulated in *Sigwahla*¹⁰⁵ namely a foresight of the possibility of harm. The subjective foresight is established by a process of inferential reasoning. In *S v Van Wyk*¹⁰⁶ the *dictum* demands, that in order to determine subjective foresight by an accused, that all the relevant facts which bear on the accused's state of mind and intention must be cumulatively assessed and a conclusion reached as to whether an

¹⁰² *S v Sigwahla* (note 19 above).

¹⁰³ S.V. Hoor The degree of foresight in *dolus eventualis* SACJ (2013) 135.

¹⁰⁴ *S v Van Aardt* 2009(2) All SA 184 (SCA).

¹⁰⁵ *S v Sigwahla* (note 19 above).

¹⁰⁶ *S v Van Wyk* 1992(1) SACR 147 (Nm).

inference beyond reasonable doubt can be drawn from these facts that the accused actually considered it a reasonable possibility that the deceased could die, but reckless as to such fatal possibility persisted with his conduct or act.

In considering the first component of the test for *dolus eventualis* namely the subjective foresight, it becomes clear that the subjective element of the foresight, is determined by inferential reasoning. Therefore further consideration needs to be given to the process of inferential reasoning in the process of establishing subjective foresight.

2.4.1.1. Inferential reasoning in the process of establishing subjective foresight

Burchell¹⁰⁷ confirms the aforesaid by stating “*the subjective test may be satisfied by inferential reasoning.*” In *S v Mini*¹⁰⁸ it is stated that in attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems that the trier of fact should try mentally to project himself into the position of that accused at that time and must be on his guard against the “*insidious, subconscious influence of ex post facto knowledge*”.¹⁰⁹

Watermeyer JA sets out, in *S v Blom*, the fundamental tests that inferential reasoning must survive in order to sustain a criminal conviction in South Africa:-

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- (a) The inference sought to be drawn must be consistent with all the proved facts, if not then the inference cannot be drawn; and
- (b) The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences then there must be doubt whether the inference sought to be drawn is correct.

¹⁰⁷ Burchell (note 60 above) 353.

¹⁰⁸ *S v Mini* 1963(3) SA 188 (A) 196.

¹⁰⁹ *Ibid* 196.

¹¹⁰ *R v Blom* 1939 AD 188 at 202 – 3.

Wigmore¹¹¹ as quoted by Cameron¹¹² states that the process of addressing evidence and passing of probative value is and must be based ultimately upon the canons of ordinary reasoning, whether explicitly or implicitly employed.

Hoffman and Zeffert¹¹³ warn as follows:

“the possibility of error in direct evidence lies in the fact that the witness may be mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but it involves an additional source of potential error because the court may be mistaken in its reasoning. The inference which it draws may be a non-sequitor, or it may overlook the possibility of other inferences which are equally probable or at least possible”.

and continue:

“it sometimes happens that the trier of fact is so pleased at having thought of a theory to explain the fact that he may tend to overlook, inconsistent circumstances or assume the existence of facts which have not been proved and cannot be legitimately inferred”.

Cameron¹¹⁴ further discusses the process of inferential reasoning against the background of the *Safatsa* case¹¹⁵ stating that there are at least three flaws in the court’s reasoning in finding the accused guilty based on inference made from circumstantial evidence due to a lack of direct evidence. Each of these so-called flaws will be discussed in order to point out the thought process and considerations to be given to proven facts and circumstances to be given when an inference is sought.

The discussion revolves around the third accused in the case known as the Sharpeville Six. He was sentenced to death for his participation in the brutal murder of the deputy mayor of the Lekoa Local Council. There was no direct evidence to implicate accused number three in the murder. His conviction was based on circumstantial evidence which the court regarded as damning namely:-

¹¹¹ Wigmore on Evidence (Tillers revision) 1983 Vol. 1A para 30.

¹¹² E. Cameron Inferential reasoning and extenuation in the case of the Sharpeville Six (1988) SACJ 243.

¹¹³ LH Hoffman & DT Zeffert The South African Law of Evidence 3 ed. 1983 464.

¹¹⁴ Cameron (note 112 above).

¹¹⁵ S v Safatsa 1988(1) SA 868(A).

1. A firearm used in the attack was found in possession of the accused. The court found that the only inference that can be drawn is that the accused was one of the persons who seized the deceased and disarmed him in order for rioters present to pelt him with stones with the intention to kill him.
2. A co-accused pointed accused three out as someone presumably in possession of the firearm that belonged to the deceased.
3. The court viewed accused three as a lying witness. “He (accused three) could give no acceptable explanation how accused one knew that he had possession of the firearm and the only reasonable inference is that he and number one accused took the firearm from the deceased.”¹¹⁶

The Appellate Division confirmed the death sentence of accused three on appeal.

Cameron¹¹⁷ refers to the “cardinal rule” as found in *Blom*¹¹⁸ namely that facts proved in relation to accused three had to be such that they excluded every reasonable inference from them save that he obtained the weapon by participating in the murderous attack. The flaws in the court reasoning, which led to the conviction is pointed out:

1. Failure to consider the accused’s attitude towards the police. The court relied solely on the accused dealings with the policeman upon his arrival at the accused’s home. The Appeal Court¹¹⁹ sought to attach signal and sinister importance to what accused three said to the policeman thereby failing to take into account the accused’s demeanour and actions upon the arrival of the police. The accused on the arrival of the police and accused one at his home (1) admitted that he was in possession of the firearm (2) lied about how he came to have it.

Alternative inference could be made from points (1) and (2) above namely, the accused admitted possession as he received the firearm from accused one who had now accompanied the police and in respect of (2) that he lied about how he came into possession of the firearm as to reveal

¹¹⁶ Ibid.

¹¹⁷ Cameron (note 112 above).

¹¹⁸ *R v Blom* (note 110 above).

¹¹⁹ *S v Safatsa* (note 115 above) 892 A – B.

that the weapon had been entrusted to him would have incriminated accused one immediately.

2. Neither the trial case nor the appellate division considered the long lapse of time between the murder and the weapon's location at the home of accused three. The fact that accused one took the police to the home of accused three proves nothing more than that accused one knew that accused three had the firearm. The only basis the court has for inferring the guilt of accused three was that he had lied about how he came to be in possession of the firearm. This untruthfulness does not seem sufficient in the circumstances to convict accused three.
3. Accused three was considered an untruthful witness, which led to an inference of guilt against accused three.

Cameron¹²⁰ states that there are two well-known strands of thinking about a lying accused in the Appellate Division precedents.

- (1) The first is represented in *R v Mlambo*¹²¹ where Malan JA states
"In my opinion there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inference which are not in conflict with or outweighed by the proved facts of the case. Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will in suitable cases be fully justified in rejecting an argument that, notwithstanding, that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefit as if he had done so."
- (2) In *Steynberg*¹²² the Appellate Division underlined that the *Mlambo* approach must be applied in suitable cases only and emphasized that lying by an accused can never itself be the basis for a conviction. The court

¹²⁰ Cameron (note 112 above).

¹²¹ *R v Mlambo* 1957(4) SA 727 (A) 738 A – D.

¹²² *S v Steynberg* 1983(3) SA 140 (A) 146.

stated that where the question concerns intent to kill the assessment must occur in accordance with the principles formulated in *Blom*.¹²³

The Appellate Division confirm the caution expressed in *Steynberg*¹²⁴ about drawing inferences or penalising an accused for his untruthfulness. Special care should be taken not to infer that because an accused was a liar that he is probably guilty. What have to be considered are the nature, extent and materiality of the lies, the accused's own circumstances which might explain the lies.¹²⁵

On returning to the point under discussion namely the first component of *dolus eventualis*, which is seldom proved by direct evidence, as it is a subjective test and therefore more often proved by inference. In *Humphreys*¹²⁶ it was confirmed that “*subjective foresight can be proved by inference.*” Common sense dictating that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequence that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether in light of all the facts and circumstances of this case, there is any reason to think that the accused will not have shared the foresight, derived from common human experience, with other members of the general population.

2.4.1.2 The degree of foresight required to establish *dolus eventualis*

In his article, The concept of *dolus eventualis* in South African Law – A Historical Perspective,¹²⁷ Professor Hooror states that there are a number of matters regarding the content of *dolus eventualis* which are still disputed and that two of the more significant disputes relates to the following questions:

- (1) Should the cognitive component be limited to a foresight if a real or reasonable possibility of harm or does foresight of a remote possibility suffice.

¹²³ *R v Blom* (note 110 above).

¹²⁴ *S v Steynberg* (note 122 above).

¹²⁵ *S v Mtsweni* 1985(1) SA 590 (A) 593 – 4.

¹²⁶ *Humphreys v S* (note 101 above) 79.

¹²⁷ Hooror (note 1 above) 22.

- (2) Can the conative component which require recklessness on the part of the actor, be adequately delineated, and if not should there be a conative component in the test for *dolus eventualis*.

The latter question shall be dealt with in more detail in the next chapter, however, before proceeding to that discussion, the degree of foresight that is required has to be discussed thoroughly as the conative component namely, recklessness is not even discussed in cases where the accused was acquitted on the ground that there was no intention where the element of foresight, the first element of *dolus eventualis*, was found to be lacking.¹²⁸

Turning once again to what Holmes JA set out in *S v Sigwahla*¹²⁹ namely that intention to kill does not in law necessarily require that the accused should have applied his will to compassing the death of the deceased, but that it is sufficient if:—

- (1) the accused subjectively foresaw the possibility of his act causing death; and
- (2) was reckless of such result,

It is clear that the statement by Smith¹³⁰ is confirmed namely that the conative element or so called second elements of the test for *dolus eventualis* is only considered once foresight of the result has been established.

In *R v Thibani*¹³¹ Schreiner JA stated that a man only have the intention to kill even though he does not visualize death as more likely than not to result from his act and¹³² further stating:

*“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 probably not result. The possibility of death resulting even as a remote chance would suffice.”*¹³³

¹²⁸ PT Smith *Recklessness in Dolus Eventualis* SALJ (1979) 81.

¹²⁹ *S v Sigwahla* (note 19 above) 570.

¹³⁰ Smith (note 128 above).

¹³¹ *R v Thibani* 1949(4) SA 720 AD 729 – 30.

¹³² My emphasis.

¹³³ Paizes (note 2 above) 637.

Hector¹³⁴ states that in earlier dicta where it was stated that the requisite foresight was foresight of the probability of harm. This was confirmed in *R v Longane*¹³⁵ and *R v Bergstedt*.¹³⁶ In *R v Buthelezi*¹³⁷ the term “calculated” was used to express that the requisite mental state was greater than foresight of a possibility or foresight that the act in question was “likely” to cause the particular result. As originally raised in *R v Valachia*¹³⁸ it is now accepted and firmly established that the accused need only foresee the “possibility” of harm occurring.¹³⁹

In *R v Horn*¹⁴⁰ it was settled that the cognitive component of *dolus eventualis* comprises foresight of the possibility of harm and that was the requirement set in the majority of cases as quoted by Hector.¹⁴¹

In *S v Mini*¹⁴² the Appellate Division held that the foresight of a possibility even slight or remote in nature constitutes the cognitive component of *dolus eventualis*.

Hector¹⁴³ states that notwithstanding the Appellate Division accepting an unqualified foresight of possibility, case law seemed to favour foresight of a qualified possibility of harm. In other words a foresight of a real, substantial or reasonable possibility.

In *S v De Bruyn*¹⁴⁴ the first appellant wanted to “teach the deceased a lesson”. When the deceased was struck to the ground by both the first and second appellant the appellant kicked the deceased’s head with a shod foot. Holmes JA stated¹⁴⁵ that what is needed in these cases is down-to-earth reasoning with a view to ascertain what was going on in the mind of the appellants. This reasoning involves looking at all the facts on the ground as it were, and allowing for human factors

¹³⁴ Hector (note 54 above) 133.

¹³⁵ *R v Longane* 1938 AD 532 at 539.

¹³⁶ *R v Bergstedt* 1955(4) SA 186 (A).

¹³⁷ *R v Buthelezi* 1925 AD 160 at 161.

¹³⁸ *R v Valachia* 1945 AD 826 at 830.

¹³⁹ Hector (note 54 above) 132.

¹⁴⁰ *R v Horn* 1958(3) SA (A) 457 at 457A – 467B.

¹⁴¹ Hector (note 54 above) 132 (vn 35).

¹⁴² *S v Mini* 1963(3) SA 188 (A) 191 H.

¹⁴³ Hector (note 54 above) 136.

¹⁴⁴ *S v De Bruyn* (note 88 above) 498.

¹⁴⁵ *Ibid* 507.

such as the robust truism that, when the blood is up, reason is apt to recede, or the human frailty that when intoxicating liquor has been imbibed to freely, sensitivity is apt to become blunted, so that a man may do things which sober he would not do. One must eschew any tendency to legalistic armchair reasoning. In analysing the different characteristics of *dolus eventualis*, Holmes JA stated further that: “*subjective foresight of the possibility however remote of the unlawful conduct causing death to another is sufficient to satisfy the element of foreseeability that is required for dolus eventualis.*”¹⁴⁶

Despite the acceptance of foresight of an unqualified possibility, the opposite viewpoint namely a foresight of a qualified possibility namely a “real,” “substantial” or “reasonable” foresight were developed in the writings of certain jurists.¹⁴⁷ Hoctor¹⁴⁸ discusses the three principal arguments against the acceptance of a remote of slight possibility of harm.

The first is with reference to Burchell and Hunt¹⁴⁹ as quoted:-

“[S]urely he cannot be said to intend a consequence, even in the legal sense of intention ... if he foresees it only as a very remote risk, or as a hundred to one chance or ... on the footing that anything is possible....”

Burchell¹⁵⁰ distinguished between *dolus eventualis* and conscious negligence by considering the degree of foresight, stating that anything short of a foresight of reasonable possibility of harm constitute conscious negligence and not intention (*dolus eventualis*).

The second is an argument that foresight of a remote possibility is far too wide and could lead to anomalous and unjust results.¹⁵¹ Morkel¹⁵² as quoted by Hoctor, favours a foresight of a concrete possibility and argue that if a remote possibility constituted sufficient foresight for liability, it could mean that a person could be

¹⁴⁶ PJ Visser & JP Vorster General Principles of Criminal Law through the cases (1985) 306.

¹⁴⁷ SV Hoctor (note 54 above) 137.

¹⁴⁸ Ibid 137.

¹⁴⁹ Burchell (note 60 above) 368.

¹⁵⁰ Burchell (note 60 above) 368.

¹⁵¹ DW Morkel Die onderskeid tussen dolus eventualis en bewuste nalatigheid : ‘n Repliek THRHR 321 at 323.

¹⁵² Ibid.

held liable for a crime requiring intention where such persons conduct did not even fall short of that of the reasonable person.¹⁵³

The third argument is that a foresight of a remote possibility has no use or application in practice. Paizes¹⁵⁴ states that although our courts confirmed that foresight of a remote possibility is sufficient to establish *dolus eventualis*, the form of intention has never been found to be present where the accused has foreseen the possibility of the consequence of the conduct as slight or remote, but only where the possibility is real.

Burchell and Hunt¹⁵⁵ is of opinion that the degree of foresight required is foresight of a real, if not substantial possibility.

Hector¹⁵⁶ states that Paizes¹⁵⁷ and Whiting¹⁵⁸ both favour the requirement of foresight of a substantial possibility, however both concede that in certain specific cases foresight of a remote possibility will suffice.

There has been a number of cases which dealt with foresight of a reasonable or real possibility.

*Hector*¹⁵⁹ concluded that there is now unanimity in South Africa law that the cognitive component of *dolus eventualis* should consist of foresight of a possibility and that it should be described in unqualified terms and that logic, language and the longstanding recognition of the unqualified possibility should be accepted, although there have been objections to the use of the unqualified criteria. The decisions in *Beukes*¹⁶⁰ and *Makgatho*¹⁶¹ favoured a foresight of a reasonable possibility, but this approach presents a particular problem given the test for negligence which asks the question whether a reasonable person would

¹⁵³ Hector (note 54 above) 137.

¹⁵⁴ A. Paizes (note 57 above) 642.

¹⁵⁵ Burchell (note 60 above) 146.

¹⁵⁶ Hector (note 54 above) 139.

¹⁵⁷ Paizes (note 154 above).

¹⁵⁸ Whiting (note 58 above) 443.

¹⁵⁹ Hector (note 54 above) 131.

¹⁶⁰ *S v Beukes en ander* 1988(1) SA 511 (A).

¹⁶¹ *S v Makgatho* 2013(2) SACR 13 (SCA).

have foreseen the reasonable possibility, thereby not assisting in maintaining the distinction between the test for intention (subjective) and negligence (objective). Paizes¹⁶² is careful in submitting that foresight of a slight or remote possibility should not ordinarily suffice for legal intention, but states that there are exceptional cases where foresight of a remote (however remote) possibility should be viewed as sufficient. This will depend on the circumstances of each case.

Notwithstanding the arguments in favour of a qualified foresight, the courts tend to refer to a foresight of a possibility or risk of death unqualified, in other words not defining the degree of foresight. This viewpoint or approach on an unqualified foresight is supported by the statement of Schreiner JA in *R v Nsele*¹⁶³ as quoted by Hoorntje:¹⁶⁴

“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”.

The aforesaid is further supported in *S v De Bruyn*¹⁶⁵ where it is stated that if “*an accused were to admit that he foresaw the possibility of death, on the footing that anything is possible, that would contribute to a conviction of murder*”.

Van Oosten¹⁶⁶ pointed out that if foresight of a real possibility constitutes foresight for the purposes of intention, an accused with less than such foresight could only be found guilty on the basis of conscious negligence (*luxuria*) then even if the accused has reconciled himself to the result occurring, there would be no *dolus eventualis* present.

Hoorntje¹⁶⁷ further argues that none of the qualifying adjectives on either side of the debate are helpful and in quoting Du Plessis¹⁶⁸ states that it would be very difficult if not impossible to distinguish between very remote, fairly remote, real,

¹⁶² Paizes (note 154 above) 642.

¹⁶³ *R v Nsele* (note 92 above) 148.

¹⁶⁴ Hoorntje (note 54 above) 149.

¹⁶⁵ *S v De Bruyn* (note 88 above) 511.

¹⁶⁶ FFW van Oosten *Dolus Luxuria*” nog ‘n stuiwer in die armbeurs 1982 THRHR 183 at 189.

¹⁶⁷ Hoorntje (note 54 above) 152.

¹⁶⁸ JR du Plessis *The Law of Culpable Homicide in South Africa* (unpublished PhD thesis Rhodes University 1986) 155.

substantial and concrete possibilities objectively as questions of fact. Hoctor¹⁶⁹ then states that it would be far more sensible to instead of seeking to identify a suitable adjective, for the degree of foresight, that the cognitive component should be established in terms of the actual subjective foresight of the possibility of harm and although their approach may increase the liability for crimes such as murder there are still safeguards to ensure that unfair convictions does not occur.

Loubser and Rabie¹⁷⁰ as quoted by Hoctor¹⁷¹ stated:

“the greater the likelihood or probability of death the stronger would be the inference that the accused foresaw it”

Therefore the probability or likelihood or the result occurring would more strongly support the inference that the accused foresaw the result.

It is now a widely accepted fact and established principle¹⁷² that intention in the form of *dolus eventualis* requires proof of two components namely the subjective foresight which was discussed above and reconciliation by the perpetrator with the foreseen result. The reconciliation with the foreseen result, is according to Hoctor¹⁷³ a further safeguard against conviction that follow an unqualified foresight.

2.4.2. The conative element in the test for *dolus eventualis* namely the reconciliation with the foreseen result or taking into the bargain of the foreseen consequence or recklessness towards the foreseen consequence

Dolus eventualis is not proved if the accused foresee a result but he decides or comes to the conclusion that the result will not ensue from this act.¹⁷⁴

The second component of the test for *dolus eventualis* requires that after having foreseen that the result may follow his actions, the perpetrator must also reconcile himself with the possibility that the result may follow.

¹⁶⁹ Hoctor (note 54 above) 154.

¹⁷⁰ Loubser (note 55 above) 417.

¹⁷¹ Hoctor (note 54 above) 154.

¹⁷² Snyman (note 15 above) 184.

¹⁷³ Hoctor (note 54 above) 154.

¹⁷⁴ Snyman (note 172 above) 186.

Reconciliation with the possibility is explained by Snyman¹⁷⁵ as going ahead with the action even though it was foreseen that the action may result in a prohibited result.

Burchell¹⁷⁶ states that subjective foresight of the possibility of the occurrence of a consequence or the existence of circumstances is not in itself sufficient for *dolus eventualis*. In addition the accused's state of mind with regard to that possibility must be one of consenting to the materialisation of the possibility, reconciling himself or herself to it, taking into the bargain or acting reckless with regard to that possibility. The aforesaid terms were used by Jansen JA in *S v Ngubane*¹⁷⁷ elaborating on what he had expressed in *Dladla*¹⁷⁸ stating that;

*"the distinguishing feature of dolus eventualis is the volitional component in terms of which the actor consents to the consequences foreseen, reconciles himself to it and takes it into the bargain. Further confirming that the recklessness of which our courts often speaks means no more than this consenting reconciliation and taking into the bargain."*¹⁷⁹

In *Humphreys*¹⁸⁰ Brand JA refers to the impact of the second element, namely the "reconciliation with" by referring to the explanation given by Jansen JA in *Ngubane*.¹⁸¹

"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 in 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 (perpetrator) "consents" to the consequence foreseen as a possibility, "he reconciles himself" to it, he takes into the bargain ... our cases often speaks of the agent being reckless of that consequence but in this context it means consenting, reconciling and taking into the bargain ... and not the "recklessness" of the Anglo American system

¹⁷⁵ Ibid.

¹⁷⁶ Burchell (note 60 above) 365.

¹⁷⁷ *S v Ngubane* 1985(3) SA 677(A).

¹⁷⁸ *S v Dladla en ander* 1981(1) SA 1 (A) .

¹⁷⁹ Paizes (note 154 above) 637.

¹⁸⁰ *S v Humphreys* (note 101 above).

¹⁸¹ *S v Ngubane* (note 177 above) 685 A – H.

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...”

Paizes¹⁸² states that an actor who performs a voluntary act consents, reconciles or takes into the bargain nothing more or nothing less than what he foresees at the time. This is a very wide test for *dolus eventualis*.

In *Sethoga*¹⁸³ the consent or taking into the bargain was described by using the words “*persisted in such conduct*” i.e. the foreseen unlawful conduct.

In *Beukes*¹⁸⁴ Van Heerden JA was of the view that as an accused would seldom admit the volitional component of the *dolus eventualis* test and that a court had to draw an inference regarding an accused’s state of mind from the facts indicating, objectively assessed, a reasonable possibility that the result will ensue from the mere fact that he acted, it could be inferred that he reconciled himself to the result.

Burchell¹⁸⁵ in reference to what was said by Van Heerden JA in *Beukes*¹⁸⁶ states that there are two circumstances in which the volitional component is useful:—

- (i) when the perpetrator realises that a result could well ensue, but then takes steps to guard against the result occurring (although he admits that this case could be seen as one where the perpetrator eventually does not regard the result as a consequence of a reasonable possibility) and
- (ii) when a perpetrator had initially not foreseen the consequence as a reasonable possibility, but after the causal chain of events has commenced he or she changed his or her opinion.

In the latter case the perpetrator would be reckless if he or she did not take steps to terminate the chain of events.

¹⁸² Paizes (note 154 above) 637.

¹⁸³ *S v Sethoga* 1990(1) SA 270 (A) 275 – 276.

¹⁸⁴ *S v Beukes* (note 56 above) 128.

¹⁸⁵ Burchell (note 5 above) 157.

¹⁸⁶ *S v Beukes* (note 56 above) 182.

The volitional or second element of *dolus eventualis* should clearly be distinguished from negligence.

In *Humphreys*,¹⁸⁷ Brand JA stated that the second element of *dolus eventualis* should not be misunderstood as the equivalent of recklessness, in the sense of aggravated negligence. The true enquiry is however to ask if a perpetrator took the consequence that he foreseen into the bargain. If therefore a perpetrator thought that the consequence that he subjectively foresee would not actually occur, then the second element of *dolus eventualis* would not have been established.

In *Maritz*,¹⁸⁸ Van den Heever JA observed that a person does not accept a foreseen risk into the bargain when he or she is convinced that he or she can prevent it occurring. Therefore the requirement that there must be a reconciliation with the possibility that the result may follow and once there is the acceptance that the prohibited result may follow, then the actor proceeds, reckless as to whether the prohibited result does follow. In *Nkombani*, Holmes JA¹⁸⁹ stated that to reck means to “*take heed of something, so as to be alarmed or troubled thereby or so as to modify ones conduct or purpose on that account.*”

The requirement of recklessness was introduced into our law in 1945¹⁹⁰ by the *Valachia*¹⁹¹ case where the court relied on the Native Territories Penal Code.¹⁹²

Although there was reference to recklessness in prior cases, most cases only required that the perpetrator should have been reckless as to whether or not the unlawful consequence ensues. In *R v Ngcobo*¹⁹³, Innes CJ said:

“An intention to kill is an essential element in murder..... Such an intent is not confined to cases where there is a definite purpose to kill, it is also present in cases where the

¹⁸⁷ *S v Humphreys* (note 110 above) para 18.

¹⁸⁸ *S v Maritz* 1996(1) SACR 405(A) 416.

¹⁸⁹ *S v Nkombani* 1963(4) SA 896 (A).

¹⁹⁰ Loubser (note 55 above) 419.

¹⁹¹ *R v Valachia* (note 138 above) 826.

¹⁹² Smith (note 128 above) 84.

¹⁹³ *R v Ngcobo* 1921 AD 92.

object is to inflict grievous bodily harm calculated to cause death, regardless of whether dead results or not.”

Smith¹⁹⁴ states that the *Valachia*¹⁹⁵ case had a profound effect in our law on the second element of *dolus eventualis*, namely the volitional component. The question in the case was: What constituted *dolus eventualis*? Greenberg JA then proceeded to explain the word “reckless” in regard to the volitional component. 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.

The word recklessness has connotations of negligence. In the English law recklessness involves a culpable failure to take precautions coupled with foresight of the consequences. Smith¹⁹⁶ states “*to use the term to denote an attitude towards the foreseen risk of death is wrong, because in the English law it does not involve that idea at all.*” Then concludes that the reference to recklessness in *dolus eventualis* is the result of an historical accident. In adopting Section 140 of the Transkeian Penal Code, the court in *Valachia*¹⁹⁷ introduced into South African law a concept that was not only unwarranted but also a misleading expression of English law.

The killing of a human being cannot be, both intentional (*dolus eventualis*) and negligent (recklessness viewed objectively) as confirmed in *S v Ngubane*¹⁹⁸

“(i) the logical impossibility of concluding that a man may at one and the same time foresee certain consequences and also fail to foresee those consequences (ii) the premise that dolus and culpa are incompatible concepts.”

¹⁹⁴ Smith (note 128 above) 81.

¹⁹⁵ *R v Valachia* (note 191 above).

¹⁹⁶ Smith (note 192 above) 86.

¹⁹⁷ *R v Valachia* (note 191 above).

¹⁹⁸ *S v Ngubane* 1985(2) All SA 340 (A) 344.

In *S v Ntuli*¹⁹⁹ and *S v Burger*²⁰⁰ it was confirmed that although the divide between *dolus eventualis* and *culpa* are small there is no doubt that the two concepts are “*twee selfstandige en onderskeibare skuld vorms.*”

In the case of *dolus* the perpetrator is held accountable for the foresight of the unlawful consequence and acting reckless towards the foreseen result, while in the case of *culpa* the perpetrator is held accountable for not having the expected foresight.

Burchell & Hunt²⁰¹ states that the recklessness required for *dolus eventualis* means the taking of a conscious risk. The accused foresees the consequence in question as a real possibility and yet persists in his conduct irrespective of whether it does result or not. It seems that in every situation where the accused does foresee the consequence as at least a real possibility and nevertheless persist in his conduct irrespective of whether it result or not, he does consciously take the risk of it happening.

The distinction between *dolus eventualis* and conscious negligence is not found in the volitional element. In the case of *dolus eventualis* the perpetrator is blamed for having acted despite having foreseen, as a concrete possibility, that his conduct may be criminal.²⁰²

In view of the fact that *dolus* and *culpa* are two conceptually different concepts, the question is asked whether proof of *dolus* necessarily excludes *culpa*.²⁰³ *Dolus* connotes a volitional state of mind and *culpa* may entail a state of no mind. *Culpa* is constituted by conduct falling short of a particular standard namely that of the reasonable person and although this reasonable person standard may be individualised to some extent in certain circumstances, it remains an objective standard. Failing to meet the objective standard is the essence of *culpa* and it is therefore unrealistic to equate it to a subjective state of mind. In view of the above, proof of *dolus* does not exclude *culpa*.

¹⁹⁹ *S v Ntuli* 1975(1) SA 429 (A) 436.

²⁰⁰ *S v Burger* 1975(4) SA 677 (A).

²⁰¹ Burchell (note 5 above) 152.

²⁰² Morkel *SACC* (1981) 162 at 173.

²⁰³ *S v Ngubane* (note 196 above) 346.

In *S v Du Preez*²⁰⁴ it was stated that 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*.²⁰⁵

Smith²⁰⁶ further states that if it follows that recklessness meant negligence there would, in the case of *dolus eventualis* be no room for private defence or the defence of necessity. De Wet and Swanepoel²⁰⁷ as referred to by Smith²⁰⁸ take the view that the test for private defence and necessity makes no reference to the reasonable man (the test for negligence/*culpa*) but is only concerned with external facts. The unreasonableness or reckless of an accused's conduct has nothing to do with *mens rea* and should be considered in connection with a defence against unlawfulness. When an accused raises private defence his argument is that he acted as a reasonable man would have. The court therefore makes a decision on the same basis as if deciding on negligence and it follows that if recklessness meant negligence there would be, in the case of *dolus eventualis*, no room for private defence of a defence of necessity.

Most cases simply require that the accused should have been reckless as to whether or not the consequence ensues²⁰⁹ and as stated above this concept was introduced by *Valachia*.²¹⁰

In *S v Lubbe*²¹¹ recklessness by the accused is described as the accused being “*onverskillig teenoor die moontlikheid van dood*” or as described in *S v Kramer*²¹² “*roekeloos teenoor die moontlikheid van dood.*”

²⁰⁴ *S v Du Preez* 1972(4) SA 584 (A) 589.

²⁰⁵ Smith (note 192 above) 88.

²⁰⁶ Ibid at 89.

²⁰⁷ De Wet & Swanepoel *Die Suid Afrikaanse Strafbreg* 3ed. (1975).

²⁰⁸ Smith (note 192) above 88

²⁰⁹ *S v Thibani* 1949(4) SA 720 (A) 729-730.

²¹⁰ *R v Valachia* (note 138 above) 831.

²¹¹ *S v Lubbe* 1963(4) SA 459(W) 466D.

²¹² *S v Kramer* 1972(3) SA 331(A) 334H.

In *R v Chitate*,²¹³ *R v Lewis*²¹⁴ and *R v Ngcobo*,²¹⁵ all referred to by Loubser and Rabie,²¹⁶ recklessness is described as the accused having acted or persisted regardless of whether the result occurred or not or with callous or reckless disregard of this consequence, or acted “*ongeag wat die gevolge van sy aksies is*”.

The presence of the element of recklessness is normally proved by inference and the seriousness of the risk which an accused took would, according to Loubser and Rabie²¹⁷ also be a factor from which it would be inferred that the accused was in a reckless frame of mind, therefore the author concluded that a finding of recklessness for the purpose of *dolus eventualis* pre-imposes subjective foresight of the possible consequence and reckless conduct without such foresight is not sufficient to establish *dolus eventualis*.

Some writers are of the opinion that the conative (second) part of the test for *dolus eventualis* is redundant²¹⁸ and that all that is required for *dolus eventualis* is subjective foresight of the possibility of the result ensuing but provided the possibility is not remote but substantial or concrete thus resulting in the second leg namely the recklessness or reconciliation with the prohibited result not adding anything to the first part of the test.

Notwithstanding the aforesaid viewpoint, the courts favour the approach of a two-legged test for *dolus eventualis*. As stated in *S v Dladla*²¹⁹ the distinguishing feature of *dolus eventualis* is the volitional component where the accused consented to and reconciled himself with or takes the consequence into the bargain.

²¹³ *S v Chitate* 1968(2) PH H371(R).

²¹⁴ *S v Lewis* 1958(3) SA 107 (A).

²¹⁵ *R v Ngcobo* 1921 AD 92.

²¹⁶ Loubser (note 55 above) 400.

²¹⁷ Ibid.

²¹⁸ Snyman (note 15 above) 187.

²¹⁹ *S v Dladla* 1980(1) SA 1 (A) 4.

In *S v Dlodlo*²²⁰ it was stated that a possible explanation for recklessness so seldom featuring in private practice is that this element is usually automatically inferred from the proved foresight by the accused.

Burchell & Hunt²²¹ states that recklessness involves the taking of a conscious risk on deliberate chance but, as pointed out by Smith,²²² this would be a superfluous requirement, because the accused who initially foresees the possible occurrence of the consequence in question, but does not take a conscious risk “*has either not acted at all or has acted involuntary, in which case there is no actual risk or has modified his conduct so that he no longer believes that there is any risk of harm in which case there is no foresight*”.

Burchell & Hunt takes²²³ the view that recklessness is a colourless concept notwithstanding this remark and what has been discussed above, the Supreme Court of Appeal has attempted to provide some guidance as to the content of the conative component of the test for *dolus eventualis*.

In *S v Humphreys*²²⁴ the impact of the element was confirmed with reference to *S v Ngubane*,²²⁵ concluding that the question to be answered is whether it had been established that the appellant reconciled himself with the consequence of his conduct which he subjectively foresaw. The reconciliation with the consequence appears to be confirmed when the appellant, “*appreciating the possibility of the consequence nonetheless proceeded with his conduct, reckless as to these consequences.*”

Notwithstanding the attempt to clarify the conative component it is argued in the contrary²²⁶ that the judgment ultimately failed to clarify the legal position.²²⁷

²²⁰ *S v Dlodlo* 1966(2) SA 401(A) 405 F-H.

²²¹ Burchell & Hunt *South African Criminal Law and Procedure Vol 1* 2nd ed. (1983) 145-8.

²²² Smith (note 128 above) 93.

²²³ Burchell & Hunt (note 221 above).

²²⁴ *S v Humphreys* (note 101 above).

²²⁵ *S v Ngubane* (note 196 above) 685 A - H.

²²⁶ Hoctor (note 94 above) 75.

²²⁷ Hoctor (note 101 above) 141.

In *S v Beukes*²²⁸ as quoted by Hoorntje²²⁹ the court reasoned that where a court establishes that the accused foresaw a consequence, invariably the conative component is also held to be present. The question that then arises in regard to the conative element is as referred to in *Humphreys*²³⁰

“whether the appellant took the consequence 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 or put differently, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible consequence he subjectively foresaw would not actually occur, then the conative element of dolus eventualis would not have been established.”

A court thus draws an inference as to the state of mind from the facts which indicate that it was objectively viewed, reasonably possible that the consequence in question would ensue.²³¹

In *S v Van Aardt*,²³² Kgomo AJA approved the following dictum from *S v Van Wyk*²³³ with reference to the inference to be drawn in determining the conative component of *dolus eventualis*.

“All the relevant facts which bear on the accused’s state of mind and intention must be cumulatively assessed and a conclusion reached as to whether an inference beyond reasonable doubt can be drawn from these facts that the accused actually considered it a reasonable possibility that the deceased could die from the assault but, reckless as to such fatal possibility, embarked on or persisted with the assault.”

With regard to the word recklessness Brand JA stated in *Humphreys*²³⁴ that 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 the case, seems inevitable.

²²⁸ *S v Beukes en andere* 1988(1) SA 511 (A) 522 C-E.

²²⁹ Hoorntje (note 227 above) 141.

²³⁰ *S v Humphreys* (note 101 above).

²³¹ Paizes (note 2 above) 639.

²³² *S v Van Aardt* 2009(2) All SA 184 (SCA).

²³³ *S v Van Wyk* 1992(1) SACR 147.

²³⁴ *S v Humphreys* (note 101 above) 17.

Negligence (*culpa*) and intention (*dolus*) cannot overlap or co-exist on the same facts. This relationship was somewhat clouded in the decision of *S v Ngubane*²³⁵ where the court found that it is incorrect to assume on the same facts that proof of intention excludes the possibility that an accused was negligent. This resulted in the much criticised inference that intention and negligence can overlap. Snyman²³⁶ stating that:

“from a theoretical point of view the decision in Ngubane is clearly wrong. The argument of the court is contradictory and a study in illogicality.”

²³⁵ *S v Ngubane* (note 225 above).

²³⁶ Snyman (note 1 above) 218.

CHAPTER 3

3. S v PISTORIUS

3.1. *Dolus Eventualis* and *S v Pistorius* : The facts of the case and the High Court Judgment and appeal to the SCA considered .

This decision in *S v Pistorius*²³⁷ has as a result, caused a level of interest that is without precedent in the history of our system of criminal justice.²³⁸

The undisputed (common cause) facts of this case was set out by Masipa J as follows²³⁹:—

- *That on 14 February 2013 shortly after 3 in the morning screams were heard from the accused's house.*
- *that the accused, while on his stumps, fired four shots at the toilet door.*
- *that at the time the shots were fired the deceased was inside the toilet.*
- *that the door of the toilet was locked from the inside.*
- *that the door of the toilet opened to the outside that is onto the bathroom.*
- *that three of the four shots struck the deceased.*
- *that the deceased sustained a wound on the right thigh, a wound on the left upper arm, a head injury and a wound on the web of the fingers,*
- *that the deceased died of multiple gunshot wounds.*
- *that soon after the shots had been fired the accused called for help.*
- *that the accused used a cricket bat to break down the door.*
- *that the accused removed the deceased from the toilet to the hallway downstairs.*
- *that the accused was very emotional soon after the incident, and*
- *that the accused was trying to resuscitate the deceased.*

The accused was charged with the murder of Reeva Steenkamp, the deceased.²⁴⁰

The accused pleaded not guilty stating²⁴¹ that when he had armed himself with the

²³⁷ *S v Pistorius* CC 113/2013 11/9/2014 (unreported).

²³⁸ S. Van der Merwe Criminal Justice Review 2/2014, A. Paizes A Ed, at 4 The trial of Oscar Pistorius – *dolus eventualis* again.

²³⁹ *S v Pistorius* (note 237 above) 3288 par 10.

²⁴⁰ Section 51(1) of the Criminal Amendment Act 105 of 1997.

²⁴¹ Plea explanation in terms of Section 115 of the Criminal Procedure Act 51 of 1977.

firearm and fired through the toilet door he was acting in the mistaken belief that the deceased who was then, unknown to him in the toilet, was an intruder who posed a threat to his life and to that of the deceased. He believed that the intruder or intruders had come in through an open bathroom window which was not protected by burglar guards as he had earlier heard the window slide open and was unaware that the deceased had left the bedroom to go to the toilet.²⁴²

Murder is the intentional killing of another human being and as discussed above²⁴³ intention has three forms and after considering the common cause facts, the evidence of all the witnesses and drawing the inference the court found²⁴⁴ that there was only one essential point of dispute: namely, did Pistorius have the intention to kill the deceased when he pulled the trigger and fired the four shots through the closed toilet door.

There are three forms of intention, as discussed above,²⁴⁵ namely *dolus directus*, *dolus indirectus* and *dolus eventualis* or legal intent, which forms the topic of this dissertation.²⁴⁶

Dolus eventualis or legal intent consists of two elements namely foresight by the accused of the prohibited result and secondly proceeding with his conduct thereby being reckless towards the foreseen result or as explained by Snyman²⁴⁷ “going ahead with the action even though it was foreseen that the action may result in a prohibited result.”

Dolus eventualis is established by a subjective test as confined in *S v Ndhlovu*.²⁴⁸ The court must determine what the state of mind of the particular person, the accused, was when he committed the act. The question is not what he should have

²⁴² Ibid.
²⁴³ Snyman (note 15 above) 447.
²⁴⁴ *S v Pistorius* (note 237 above) 3317.
²⁴⁵ Chapter 2 above.
²⁴⁶ Snyman (note 15 above) 184.
²⁴⁷ Ibid.
²⁴⁸ *S v Ndhlovu* (note 89 above) 359.

foreseen but what the accused had in actual fact foreseen. The court has in numerous cases²⁴⁹ confirmed the subjective test for intention.²⁵⁰

Proving an accused's actual subjective state of mind is not an easy task and an accused will in the majority of cases not admit to a state of mind that proves *dolus eventualis* i.e. a subjective foresight of the prohibited result and a reconciliation with such result.

In *S v Dlodlo*²⁵¹ it was also stated that the subjective state of mind of an accused is not ordinarily capable of direct proof, therefore the subjective state of mind at the time when he acted, is objectively proved by inferential reasoning. The fundamental test for inferential reasoning as discussed above²⁵² namely the inference sought to be drawn must be consistent with all the proved facts and the proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn.

Considering *R v Mlambo*²⁵³ and *S v Nkombani*²⁵⁴ one may, in drawing the inference of *dolus eventualis*, consider what the normal or reasonable person in the same circumstances would have realised. In other words conclusions may be drawn on the grounds of objective probabilities based on general human experience.²⁵⁵ The court should endeavour to mentally place itself in the position of the accused at the time of the conduct²⁵⁶ taking into account the subjective ignorance or stupidity of the accused and avoiding *post facto* armchair reasoning.²⁵⁷

The focal point of this dissertation is the so-called second element of the test for legal intent or *dolus eventualis* namely the actor's reconciliation or taking into the

²⁴⁹ *S v P* 1972 (3) SA 412 (A); *S v Du Preez* 1972 (4) 315 (A) 584; *S v Dladhla* 1981(1) SA 1 (A).
²⁵⁰ Snyman (note 15 above) 189 vn 153.
²⁵¹ *S v Dlodlo* (note 220 above) 405 F – H.
²⁵² *R v Blom* (note 110 above) 202.
²⁵³ *R v Mlambo* 1960 2 All SA 47(W).
²⁵⁴ *S v Nkombani* 1963 (4) SA 896(A).
²⁵⁵ *S v Dladla* 1980(3) All SA 273 (A) ; *S v Beukes* 1988(1) All SA 326 (A) ; *S v Mlambo* 1960(1) SACR 227 (A).
²⁵⁶ *S v Mini* 1963 3 All SA 75(T) 196 E.
²⁵⁷ The court in *S v Ngubane* 1985(3) SA 677 (A) at 685 D, referred to various descriptions of the volitional component which the court treated as synonyms.

bargain of the foreseen prohibited consequence. Considering what has been said above, it is clear that the result of any attempt to give a clear picture on the volitional component as an element of *dolus eventualis*, without due and proper consideration and understanding of the undermentioned related elements, concepts and principles will remain vague:

- The element of subjective foresight as the first component in the test to proof *dolus eventualis*.²⁵⁸
- The various forms of intention.²⁵⁹
- Distinguishing between *dolus* and *culpa*, with a specific and clear understanding of what is meant by the word reckless in the context of the volitional component.²⁶⁰
- An understanding of unlawfulness²⁶¹ and specifically in the context to *S v Pistorius*, a clear understanding of private defence and putative self-defence²⁶² as well as the principles of error in objecto²⁶³.
- The principles of inferential reasoning²⁶⁴ and the assessment of circumstantial evidence²⁶⁵ during the process of drawing an inference from the circumstantial evidence²⁶⁶ and proved facts in order to prove the subjective state of mind of an accused.

²⁵⁸ It must be proved that the accused subjectively foresaw the possible occurrence of the consequence in question. *S v Nkombani* 1963(4) SA 896 (A) at 897 C-D.

²⁵⁹ The three forms of intention being *dolus eventualis* (direct intention), *dolus indirectus* (indirect intention) and *dolus eventualis* (legal intent) as set out by Snyman, *Criminal Law* 5th Edition (2008) 183.

²⁶⁰ *S v Sigwahla* 1967(4) SA 566 (A) 570 B-E where Homes JA makes the distinction between *dolus eventualis* and negligence.

²⁶¹ In *S v De Blom* 1977(3) SA 513 (A) the Appellate Division formerly recognised that knowledge of unlawfulness is required for *mens rea*. See also *The Rule of Error in Objecto in South African Criminal Law*. Kelly Phelps stating that since *S v De Blom* it is no longer true that every person is presumed to know the law and that ignorance of the law is no excuse.

²⁶² Private defence and putative private defence is distinguished by the test applied, that for the latter being subjective as with *dolus eventualis*.

²⁶³ Kelly Phelps (n 259 @ p11) states that despite the wide publicity this principle has achieved through the Pistorius trial its position in South African Criminal Law is less certain than appear from a superficial review of sources.

²⁶⁴ *R v Blom* 1939 AD 188 at 202-203.

²⁶⁵ SE van der Merwe *Evidence* (Ed). Juta legal guide series (1983) 36. Circumstantial evidence often forms an important component of the information furnished to the court.

²⁶⁶ *Ibid* – “In these instances (were there are circumstantial evidence) the court is required to draw inferences, because the witnesses have made no direct assertions with regard to the fact in issue”.

Returning to the judgment²⁶⁷ when the court *a quo* enquired into the evidence submitted it is clear that one essential point was in dispute, namely did the accused have the intention, either direct or the legal intent (*dolus eventualis*) to kill the deceased.

The court turned to the facts in order to determine whether the state had discharged the onus of proving intent to kill, whether in the form of *dolus directus* or *dolus in directus*. The court stated²⁶⁸ that no onus vests on the accused to convince the court of the truth of any explanation that he gives and if there is any possibility of the accused's explanation being true, then he is entitled to his acquittal²⁶⁹. In respect of *dolus directus* the court accepted the accused's version "*the simple explanation from the accused is that shooting the deceased was a genuine mistake as he thought he was shooting at an intruder behind the door*".²⁷⁰

The court continues:

*"Viewed in its totality the states evidence failed to establish that the accused had the requisite intention to kill the deceased referring to direct intention."*²⁷¹

The court then considered intent in the form of *dolus eventualis* which had to be proved in accordance with established tests as set out in *S v De Bruyn* 1968(4) SA 498 (A)²⁷² or as set out in the established twofold approach namely:—

- (1) did the accused subjectively foresee the possibility of death;
- (2) did he reconcile himself with the possibility²⁷³; or

The questions was put as follows by Masipa J in *S v Pistorius*.²⁷⁴

²⁶⁷ *S v Pistorius* (note 237 above) 3323.

²⁶⁸ Ibid.

²⁶⁹ *R v Difford* 1937 AD 370.

²⁷⁰ *S v Pistorius* (note 237 above) 3323.

²⁷¹ *S v Pistorius* (note 137 above) 3324.

²⁷² (1) The subjective foresight of the possibility, however remote, of his unlawful conduct causing death to another (2) Persistence in such conduct despite such foresight (3) recklessness (4) the conscious taking of the risk of resultant death, not caring whether it results or not (5) the absence of actual intent.

²⁷³ *S v Humphreys* 2013(2) SACR 1 (SCA).

²⁷⁴ *S v Pistorius* (note 137) above.

- (1) Did the accused subjectively foresee that it could be the deceased²⁷⁵ behind the toilet door; and
- (2) Notwithstanding the foresight did he (*Pistorius*) then fire the shots, thereby reconciling himself to the possibility that it could be the deceased²⁷⁶ in the toilet?

Before proceeding one has to carefully consider the first element of foresight for two reasons:—

- (1) A finding of recklessness for the purpose of *dolus eventualis*, pre-supposes subjective foresight of the possible consequence.²⁷⁷
- (2) Reckless conduct without the subjective foresight of the possible consequence is not sufficient to establish *dolus eventualis*.²⁷⁸

Masipa J in the *Pistorius*²⁷⁹ case stated:

“The accused clearly wanted to use the firearm and the only way he could use it was to shoot at the perceived danger. The intention to shoot does not necessarily include the intention to kill.”

The one essential point of dispute remains, namely: Did the accused have the required *mens rea* to kill the deceased when he pulled the trigger? In other words was there intention. The court, is assessing the two questions posed above regarding the elements of *dolus eventualis*, found that the evidence did not *“support the states contention that this could be a case of dolus eventualis.”*²⁸⁰

The court referred to the case of *Van der Meyden*²⁸¹ where the court warned against the danger of examining the version of the accused in isolation. The court then emphasised the importance of looking at the evidence as a whole and not piecemeal.²⁸²

²⁷⁵ Ibid.

²⁷⁶ My emphasis.

²⁷⁷ Loubser & Rabie (note 55 above) 416.

²⁷⁸ *S v Du Preez* 1972(4) SA 584 (A) 589 B-F.

²⁷⁹ *S v Pistorius* (note 137 above) 3319.

²⁸⁰ A. Paizes *Criminal Justice Review* 2/2014 4.

²⁸¹ *S v Van der Meyden* 1999(2) SA 79 (W).

²⁸² *S v Pistorius* (note 137 above) 3319.

The reason for the emphasis on the manner in which the evidence is to be considered, weighed and assessed is of particular importance when applying the tests for *dolus eventualis* which is a subjective test (opposed to an objective test for *culpa*) is that it was argued by academics after the *De Blom* case, that the subjective approach would be open to abuse and fabrication.²⁸³

Notwithstanding the aforesaid warning by the court to err on the side of caution when dealing with the subjective test for *dolus eventualis* and the assessment of the evidence before it, the court stated²⁸⁴ that:

“the evidence showed that from the outset the accused believed that at the time he fired the shots into the toilet door, the deceased was in the bedroom while the intruders were in the toilet”

and then the poses the following question:

“How could the deceased reasonably have foreseen that the shots he fired would kill the person behind the door, let alone the deceased who he thought was in the bedroom”.

Because Masipa J held that the first part of the test for *dolus eventualis* had not been satisfied²⁸⁵ she did not go on to consider the second element of the test which contain the volitional element which requires the accused to consent or reconcile to the foreseen consequence or to take the consequence into the bargain.

Much has been written about the so-called volitional element and before considering this element in the context of *S v Pistorius*²⁸⁶ and the appeal²⁸⁷ that followed, the authoritative academic writings and relevant cases will be revisited to emphasise the key issues to be considered when dealing with the volitional component of the test.

²⁸³ Phelps (note 85 above) 23.

²⁸⁴ *S v Pistorius* (note 137 above) 3328.

²⁸⁵ Paizes (note 280 above) 6.

²⁸⁶ *S v Pistorius* (note 137 above).

²⁸⁷ *Director of Public Prosecution v Pistorius* 2016 All SA 346 (A).

Smith²⁸⁸ refers to instances which can be compared to what transpired in *Pistorius*,²⁸⁹ by stating that in every case where an accused is acquitted on the ground that he had no intention, the element found not to be present is foresight, leading to recklessness or, in other words the volitional element, not being considered or discussed.

This raises the question namely should the test for *dolus eventualis*, consisting of a two-step test namely first having to determine foresight and once that has been established to proceed to the second step namely the volitional component, be redefined. The former is the manner in which the test for *dolus* are generally being applied by courts²⁹⁰ and prescribed by academics²⁹¹ although the test refers to one test with elements. Could the volitional component be determined independently from foresight in other words firstly confirming a subjective reconciliation with, taking into the bargain or reckless persistence while foresight is determined subsequently?

Smith²⁹² sites the *Valachia* case²⁹³ as a watershed with regard to the volitional element. There is hardly a single later case in which authority is given for requiring recklessness that does not rest directly or indirectly on the judgment of Greenberg JA in answering the question as to what constitute *dolus eventualis*. He stated that:

“If the offender means to cause injury which he knows is likely to cause death and if the offender whether he means to kill or not, is reckless about such killing then such offender will have intention in the form of dolus eventualis.”

Smith²⁹⁴ continues to distinguish recklessness as described in the *Valachia* case²⁹⁵ from recklessness which is most often used in ordinary speech and has

²⁸⁸ Smith (note 128 above) 81.

²⁸⁹ *S v Pistorius* (note 137 above).

²⁹⁰ *S v Humphreys* (note 101 above); *S v Tonkin* 2014(1) SACR 583 (SCA); *S v Ndlanzi* 2014(1) SACR 256 (SCA).

²⁹¹ CR Snyman *Criminal Law* 5th Ed 184; Burchell & Hunt *South African Criminal Law and Procedure* 2nd Ed. 141.

²⁹² Smith (note 128 above).

²⁹³ *R v Valachia* (note 138 above) 826.

²⁹⁴ Smith (note 128 above).

²⁹⁵ *R v Valachia* (note 138 above).

connotations with negligence or *culpa* and the proof of which requires an objective test by considering if the reasonable person would have foreseen the consequence.

This reminds of the question Masipa J put in the *Pistorius* judgement²⁹⁶ namely: “*would a reasonable person in the same circumstances as the accused have foreseen the reasonable possibility that if he fired four shots at the door of the toilet*”

Which clearly is not the correct approach as the question should be what the accused actually foresaw.

Recklessness in the context of the volitional component is also referred to as a subjective state of mind with the same meaning as careless, indifference or persistence in conduct despite the appreciation of risk.

Smith²⁹⁷ agrees that recklessness is a colourless concept, as stated by Burchell & Hunt²⁹⁸ having nothing to do with the accused state of mind and meaning the taking of a conscious risk. Submitting that the most desirable solution is to abandon it altogether, further stating that while the merit of the requirement has not been judicially questioned, there are a number of Appellate Division judgments in which convictions based on *dolus eventualis* have been upheld, without finding that the appellant had been reckless²⁹⁹

Loubser & Rabie³⁰⁰ in discussing *S v Beukes*³⁰¹ stated that that case was yet another opportunity to examine *dolus eventualis*, more particularly referring to a difference of academic opinion on the question whether *dolus eventualis* requires not only a cognitive element of foreseeability but also a further element of volition. With regard to the latter reference is once again made to the *Valachia*³⁰² case confirming that the requirement of recklessness was introduced into our law and further stating that courts require that an accused should simply have been

²⁹⁶ *S v Pistorius* (note 137 above) 3334.

²⁹⁷ Smith (note 128 above) 81.

²⁹⁸ Burchell (note 60 above).

²⁹⁹ *S v Lewis* 1958(3) SA 107 (A) 110 ; *S v Harris* 1965(2) SA 340 (A) 363.

³⁰⁰ Loubser & Rabie (note 55 above) 415.

³⁰¹ *S v Beukes* 1988 (1) SA 511 (A).

³⁰² *R v Valachia* (note 138) above.

reckless as to whether or not³⁰³ a consequence ensue or that the accused must have persisted in his conduct, reckless of the consequence³⁰⁴ or acting with callous.³⁰⁵ The important point made however makes it clear that the presence of the element of recklessness is, like that of the subjective foresight, is normally proved by inference and it is primarily inferred from the grave circumstances which flows from the accused and the still graver consequence which might be expected to flow from it.³⁰⁶ In this regard, referring to *S v De Bruyn*³⁰⁷ and *R v Horn*³⁰⁸ where the courts stated that the seriousness of the risk which an accused took would also be a factor from which it could be inferred that he was in a reckless frame of mind.

Considering the accepted order in which the two elements of the test should be enquired about, it is clear that a finding of recklessness for the purpose of *dolus eventualis* presupposes a subjective foresight of the possible consequence. *S v Du Preez*³⁰⁹ confirms that reckless conduct without foresight is not sufficient to establish *dolus eventualis*.

The practical effect of the volitional component is discussed by Loubser & Rabie³¹⁰ with reference to the following cases taken from Snyman.³¹¹

- *Chitate*³¹² relates to an illegal abortion. The court found that the accused had subjectively foreseen the possibility of death but found the volitional component to be absent. Due to the few incidents of fatalities the accused believed that death would not occur.
- *Hedley*³¹³ : the accused shot at some birds foreseeing that the bullet might ricochet off the water over which he was shooting and hit people in the background. There was a remote chance of death which he took into the

³⁰³ *S v Thibani* 1949(4) SA 720. *R v Horn* 1958 SA 457. *S v Sighwala* 1967(4) SA 566(A).

³⁰⁴ *S v Arnold* 1965(2) SA 215 (C)

³⁰⁵ *S v Chitate* 1968(2) PH H337 (R).

³⁰⁶ Loubser & Rabie (note 55 above) 415.

³⁰⁷ *S v de Bruyn* 1968(4) SA 498 (A) at 510G

³⁰⁸ *S v Horn* 1958 (3) SA 457 (A).

³⁰⁹ *S v du Preez* 1972(4) SA 584 (A) 510 G-H

³¹⁰ Loubser & Rabie (note 55 above) 415.

³¹¹ CR Snyman *Strafreg* 2ed. 1986 217.

³¹² *S v Chitate* (note 305 above).

³¹³ *S v Hedley* 1958(1) SA 362 (N).

bargain but subjectively concluded that it would not happen. This conclusion was unreasonable, therefore he was found to be negligent. He did not actually reconcile to the result therefore there was no intent.

- *Fernandez*³¹⁴ deals with an appellant who failed to take proper steps to prevent a baboon from escaping. The court found that the appellant ought to reasonably have foreseen that death might result, but he did not actually foresee. Due to lack of foresight and not only the absence of the volitional component the appellant was successful in his appeal.
- In *Le Roux*³¹⁵ it was clear that if there is no foresight, the case will turn on that point and not the point of absence of the volitional component.

The above cases also referred to in *Du Preez*³¹⁶ confirms that the volitional element of the test for *dolus eventualis* is not considered unless subjective foresight of the prohibited consequence is first established.

Having clearly established that in order to prove *dolus eventualis* the first element of the subjective test namely the subjective foresight of the possible occurrence of the prohibited result has to be established. We revert to Masipa J in *Pistorius*³¹⁷ who found that the accused did not foresee as a possibility “*that he would kill the person behind the door, let alone the deceased.*”³¹⁸ The judge directed her attention almost exclusively to the question which she considered pivotal to the issue of *dolus eventualis*, namely “*Did the accused subjectively foresee that it could be the deceased behind the door.*”³¹⁹ This question refers to the deceased specifically which is an incorrect approach. The broader question according to Paizes³²⁰ is whether the accused foresaw that he might kill the person³²¹ behind the door whoever he or she may have been. If the court had addressed the broader question at any length it would have come to a different answer as to the first element of foresight.

³¹⁴ *S v Fernandez* 1966(2) SA 259 (A).

³¹⁵ *S v Le Roux* 1969(3) SA 725 (T).

³¹⁶ *S v Du Preez* (note 309 above).

³¹⁷ *S v Pistorius* (note 137 above) 3328.

³¹⁸ *Ibid.*

³¹⁹ *S v Pistorius* (note 137 above) .

³²⁰ Paizes (note 280 above) 6.

³²¹ My emphasis.

Phelps³²² argues that the court's reasoning adheres to a subjective approach to intention where, if the facts and evidence suggests that an accused did not foresee the death of the victim they cannot be held to have intended that victim's death. If *Pistorius* had excluded the possibility that the deceased could be killed, then the application of the principle of error in *objecto* here would be to transfer his subjective foresight from the death of the supposed victim to the death of the actual victim. Phelps³²³ states further that an error in *objecto* will only result in a finding of *dolus* (intention to kill) where as a matter of fact, (proved by the prosecution beyond a reasonable doubt), the accused subjectively foresaw the possibility of killing the deceased and proceeded reckless towards that possibility. This argument is, with respect, incorrect and misguided in its application to the subjective foresight test for legal intention in a case of murder, as the principle of error in *objecto* is not a legal rule but describes a factual situation and it is wrong to assume that if a set of facts amount to an error in *objecto* that only one conclusion, that of guilty or not guilty, may legally be drawn. Whether error in *objecto* excludes intention and is therefore a defence, depends upon what the definitional element of the particular crime are. Murder is the unlawful, intentional causing of death of another person. The object of the murder, according to the definitional elements is therefore a human being. Murder is committed any time a person unlawfully and intentionally kills a human being and not merely if a person kills that particular human being who he wanted to be the victim. His mistake about the object of his act (error in *objecto*) will not exclude his intention, because the mistake did not relate to an element contained in the definition of murder.³²⁴

In *Pistorius*³²⁵ the Supreme Court of Appeal found that Masipa J made a fundamental error in that the trial court's consideration of *dolus eventualis* centred upon whether the accused knew that the person in the toilet cubicle was Reevea and the trial courts conclusion that *dolus eventualis* had not been proved was

³²² Phelps (note 85 above) 15.

³²³ Ibid at 17.

³²⁴ Snyman (note 15 above) 193.

³²⁵ DPP Gauteng v Pistorius (note 287 above) 29.

premised upon that the accused had thought that deceased was in the bedroom therefore he did not foresee that she was the person in the toilet. Leach AJ³²⁶ stated that what was an issue was not whether the accused had foreseen that the deceased might be in the cubicle when he fired the fatal shots at the toilet door, but whether there was a person behind the door who might possibly be killed by his actions. The accused's incorrect appreciation as to who was in the toilet is not determinative of whether he had the requisite criminal intent. The trial court had therefore mislead itself by confining its assessment of *dolus eventualis* to whether the accused had foreseen that Reeva was behind the door.

In view thereof that Masipa J had incorrectly applied the test for the first element of *dolus eventualis*, namely the subjective foresight of the possibility of killing whoever was behind the door of the toilet, it became relevant to include the second element, namely the volitional or conative element which requires that the accused subjectively consented to the consequence foreseen as a possibility, reconciles himself to it or takes it into the bargain, in the test for *dolus eventualis*.³²⁷

In *S v Dlodlo*³²⁸ it was held that the subjective state of mind of an accused at the time of the infliction of a fatal injury is not ordinarily capable of direct proof and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of the injury.

In *S v Dladla*³²⁹ the court found the distinguishing feature of *dolus eventualis* to be the volitional component in terms of which the accused consents to the consequence foreseen as a possibility, he reconciles himself to it, he takes it into the bargain and the recklessness of which our courts often speak means no more than the consenting, reconciling and taking into the bargain referred to above.

Loubser and Rabie³³⁰ stated that the presence of the element of recklessness is, like that of subjective foresight, normally proved by inference.

³²⁶ Ibid at 32.

³²⁷ *Humphreys v S* (note 101) 79.

³²⁸ *S v Dlodlo* (note 220 above).

³²⁹ *S v Dladla* (note 219 above).

³³⁰ Loubser & Rabie (note 55 above) 419.

Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it sought to establish.³³¹ An inference from facts is a matter of law and therefore a court of appeal is not bound by an inference drawn by an inferior court; it is entitled to enquire into the correctness of the conclusion arrived at by considering the same facts from which the inferior court drew the inference.³³² A court thus draws an inference as to an accused's state of mind from the facts which indicate that it was, objectively viewed, reasonably possible that the consequence in question would ensue and the voluntative element is normally only satisfied if the actor foresee the consequence as reasonably possible.³³³

The content of the volitional element required for *dolus eventualis* in case law is uncertain. It is acknowledged on the one hand that a positive will, wish or desire is not required while on the other hand, it seems, something more than a mere cognitive awareness of the possibility of the occurrence of the harmful result is required. This intermediate state of mind in respect of the possibility of the harmful result is described by terms such as accepting, reconciling oneself to or resigning oneself to.³³⁴

A further policy consideration is that if volition is required as an element of *dolus eventualis* and if such volition entails something more than foresight of the actual occurrence of a harmful result it would presumably be excluded by a positive will or desire that the result must not occur. Loubser and Rabie³³⁵ hold the opinion that a voluntary withdrawal subsequent to a contribution to a foreseen unlawful result will not exclude guilt.

In *Jolly*³³⁶ it was found that even if the accused did not wish for the death of the passengers of a train, they would still have *dolus eventualis* as they voluntary

³³¹ *R v Kleyn* 1946 OPD 405.

³³² *CIR v Stott* 1928 AD 252.

³³³ Paizes (note 2 above) 636.

³³⁴ Loubser & Rabie (note 55 above) 423.

³³⁵ *Ibid* 436.

³³⁶ *R v Jolly* (note 76 above) 187.

planned and executed the derailment having knowledge of the danger. It is submitted that *dolus eventualis* does concern the accused state of mind but only in a cognitive sense in that it requires a conclusion as to whether a harmful result may actually occur in the circumstances of each case. It should, as Burchell and Hunt³³⁷ considers it, be regarded as a colourless concept.

Volition is widely accepted as a constituent element of *dolus eventualis* and the content of such volition has been described in numerous ways.

It appear that:—

1. a positive will, wish or desire is not required but
2. a more passive acceptance of or reconciling to the harmful result.

The Supreme Court of Appeal in *Humphreys*³³⁸ considered the second element and attempted to give some guidance to its content.³³⁹

*S v Ndlanzi*³⁴⁰ involves the death of a pedestrian after having being run over by the accused while driving a motor vehicle. The court found that the accused had the subjective foresight of the consequence of his driving but it was inferred that he may have thought that a collision with a pedestrian would not actually occur. The appellant took a risk which he thought would not materialises.

*S v Tonkin*³⁴¹ is another case where specific enquiry is made into the second or conative element of *dolus eventualis*. The court once again refers to *Humphreys*.³⁴²

Returning to the process of inferential reasoning to determine the state of mind of the accused, the supreme court of appeal in *S v P*³⁴³ confirmed that “*the better approach is to think one’s way through all the facts before seeking to draw any*

³³⁷ Burchell & Hunt South African Criminal Law and Procedure Vol 1 2ed. (1983) 152-153.

³³⁸ *Humphreys* (note 101 above).

³³⁹ Hoctor (note 103 above).

³⁴⁰ *S v Ndlanzi* 2014(2) SACR 256 (SCA).

³⁴¹ *S v Tonkin* 2014(1) SACR 583 (SCA).

³⁴² *Humphreys v S* (note 101 above).

³⁴³ *S v P* 1972(3) SA 412(A) 416.

relevant inferences.”³⁴⁴ The court prefers to look at all the facts and from that totality to ascertain whether the inference in question can be drawn.³⁴⁵

In *S v Beukes en Ander*³⁴⁶ the court stated that the chances of an accused admitting, or of it appearing from other evidence, that he had indeed foreseen a remote consequence are very thin and a court draws an inference concerning an accused’s state of mind from the facts which point to it being, reasonably possible, objectively seen, that the consequence would eventuate. The court further held³⁴⁷ that:

*“if such a possibility does not exist it is simply accepted that the actor did not become conscious of the consequence. If it does exist it is usually inferred from the mere fact of him taking action that he took that consequence into account.”*³⁴⁸

In the *Pistorius* appeal the prosecution argued³⁴⁹ that the following factual findings should be taken into account in answering the question whether the trial court correctly applied the principles of *dolus eventualis*:

- *The Respondent armed himself with a loaded firearm and approached what he thought was danger with the firearm ready to shoot.*
- *He knew where he kept his firearm which was on the opposite side of the bed where he slept on the evening of the accident.*
- *The Respondent passed the bedroom door on his way to the bathroom.*
- *The Respondent walked from the bedroom to the bathroom.*
- *He had to cock his firearm.*
- *The Respondent while on his stumps fired four shots at the toilet door.*
- *Three of the four shots struck the deceased and she died as a result of multiple gunshot wounds.*
- *The toilet door was hinged to open outwards, into the bathroom and was locked from the inside.*
- *The Respondent knew there was a person behind the door.*

³⁴⁴ Appellant’s Heads of Argument - DPP v Pistorius (case 96/2015).

³⁴⁵ *S v de Bruyn en Ander* (note 307 above) 507F.

³⁴⁶ *S v Beukes* 1988(1) SA 511 (A).

³⁴⁷ Ibid 29.

³⁴⁸ Ibid 29 para 46.

³⁴⁹ Appellant’s main heads of argument DPP v Pistorius (case no 96/2015) 9 para 18.

- *The Respondent fired not one but four shots into the toilet door.*
- *The accused clearly wanted to use the firearm and the only way he could have used it was firing at the perceived danger.*

The appellant continues the argument by stating that the trial court, during sentencing expanded on the accepted facts, confirming the following findings:³⁵⁰

- *The Respondent knew there was a person behind the door when he fired the shots.*
- *The Respondent deliberately fired shots into the door with the aim to shoot the intruder.*
- *The Respondent knew when firing that the toilet was a small cubicle and an intruder would have no room to manoeuvre or escape.*
- *The Respondent was trained in the use of a firearm.*

The appellant conclude its argument before the court by submitting that:³⁵¹

“the only conceivable finding based on the abovementioned facts could, at a minimum be that, in arming himself, walking to the bathroom with the intention to shoot whilst knowing that there was a person behind the closed door of a small cubicle and intentionally firing four shots, should be that he intended to kill the person in the cubicle.”

The application of the principles of *dolus eventualis*, namely:

- a subjective foresight of the consequences of his actions; and
- the reconciliation or taking into the bargain of that consequence or being reckless towards the foreseen result³⁵²

can in view of the above only result in a finding that the respondent acted with *dolus eventualis*.

With regard to the circumstantial evidence Masipa J states in the judgment³⁵³ in relation to the murder charge that *“the evidence is purely circumstantial”* and then continues to state that the fundamental rule considering circumstantial evidence is that in order to justify an inference of guilt a court must be sure that inculpatory

³⁵⁰ Ibid.

³⁵¹ DPP v Pistorius (note 287 above).

³⁵² Humphreys v S (note 101 above).

³⁵³ S v Pistorius CC 113/2013 para. 3323.

facts are incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypotheses and other finding that “*viewed in the totality of the evidence failed to establish that the accused had the requisite intention to kill the deceased.*”³⁵⁴

Masipa J stated with reference to the evidence³⁵⁵ “*The court is however entitled to look at the evidence as a whole and the circumstances of the case to determine the presence or absence of intention at the time of the incident*” however when dealing with the question of *dolus eventualis*³⁵⁶ Masipa J then states that “*the evidence before the court does not support the states contention that this could be a case of dolus eventualis.*”

Circumstantial evidence often forms an important component of the information before a court.³⁵⁷ Circumstantial evidence is not necessarily weaker than direct evidence³⁵⁸ and in some cases can be of more value than direct evidence.³⁵⁹

In *R v De Villiers*³⁶⁰ it was stated that circumstantial evidence should be assessed as follows:

“The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can be reasonably drawn.”

In *S v Latchman*³⁶¹ it was stated that circumstantial evidence should never be approached in a piecemeal fashion. The evidence should be considered in totality.

³⁵⁴ Ibid 3324.

³⁵⁵ Ibid 3328.

³⁵⁶ Ibid 3329.

³⁵⁷ SE van der Merwe *Evidence* Juta 1ed. 1983 36.

³⁵⁸ Ibid 404.

³⁵⁹ Ibid 404.

³⁶⁰ *R v de Villiers* 1944 AD 508-509.

³⁶¹ *S v Latchman* 2010(2) SACR 52 (SCA) para 40.

In *S v Libazi*³⁶² it was stated that it is true that a trial court must consider the totality of the evidence to determine if the guilt of any accused person has been proved beyond reasonable doubt.

In *Chabalala*³⁶³ it was stated:

“the correct approach is to weigh up all elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses probabilities and improbabilities on both sides and having done so to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt of to the accused’s guilt.”

and in *S v Trainor*:³⁶⁴

“A conspectus of all the evidence is required. Evidence which is reliable should be weighed alongside such evidence as may be found false, independently verifiable evidence if any should be weighed to see if it supports any of the evidence tendered”.

The appellant in its Main Heads of Argument states³⁶⁵ that the court focused on the screaming and sounds and failed to evaluate all the circumstantial evidence holistically and merely ignored the bulk of the evidence of the crime scene and more specifically the bedroom and the toilet cubicle reconstruction which in the view of the appellant is the gravest misdirection and a clear mistake of law in the application of legal principles pertaining to circumstantial evidence.

In *S v Brown*³⁶⁶ the court espoused Snyman’s³⁶⁷ definition of *dolus eventualis* stating that

“dolus eventualis is defined as a person is acting with intention in the form of dolus eventualis if the commission of the unlawful act or the causing of the unlawful result is not the 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 and*

³⁶² *S v Libazi* 2010(2) SACR 233 (SCA) para 17.

³⁶³ *S v Chabalala* 2003(1) SACR 134 (SCA) para 15.

³⁶⁴ *S v Trainor* 2003(1) SACR 35 (SCA) para 9.

³⁶⁵ *DPP v Pistorius* Case No 96/2015 SCA Appellant Heads of Arguments para [32].

³⁶⁶ *S v Brown* 2015(1) SACR 211 (SCA) para 104.

³⁶⁷ Snyman (note 15 above) 184 – 185.

(b) *he reconciles himself to this possibility*”

then proceeding:

“another way of describing (b) is to say that X was reckless as to whether the act may be committed or the result may ensue. However it does not matter whether component (b) is described in terms of reconciliation with the possibility or in terms of recklessness.”

The appellant³⁶⁸ argued that *dolus eventualis* was proved³⁶⁹ if the accused foresaw a risk of death however slight, but nevertheless decides to take a chance and gambles with the life of the deceased reckless to the consequence, arguing that such a state of mind on the part of the accused can be inferred objectively from the totality of all the facts.

3.2 *Judgment of the Supreme Court of Appeal : Director of Public Prosecutions, Gauteng v Pistorius*³⁷⁰

The appeal was brought following the trial courts verdict that the accused was not guilty of murder. In summary:

- *The trial court did take into account that the accused clearly wanted to use the firearm*³⁷¹ *but “that the intention to shoot however does not necessarily include the intention to kill.”*
- *The trial court found that in viewing the evidence in totality, the evidence failed to establish that the accused had the requisite intention (dolus directus) to kill the deceased.*³⁷²
- *The trial court then proceeded to consider dolus eventualis or legal intent, however in asking the questions on foreseeability and reconciliation with the foreseen consequence, the court specifically considered the two elements as follows:*
 - (1) did the accused subjectively foresee that it could be the deceased behind the door, and

³⁶⁸ Appellant’s Main Heads of Argument : DPP v Pistorius (note 365 above).

³⁶⁹ S v Pistorius CC 113/2013 NGHC (11 September 2014).

³⁷⁰ Director of Public Prosecutions, Gauteng v Pistorius (2016) 1 All SA 346 (SCA).

³⁷¹ S v Pistorius (note 137 above) para. 3319.

³⁷² Ibid 3324.

(2) did he reconcile himself to the possibility that it could be the deceased in the toilet.³⁷³

- The court then stated:

*“The evidence before this court does not support the states contention that the accused was guilty of murder with intent in the form of dolus eventualis.”*³⁷⁴

In the judgment³⁷⁵ and referring to Count 1 – Murder, Masipa J found that the evidence led by the state was purely circumstantial and also weak circumstantial evidence. The court viewed the evidence given by the witnesses as unreliable, however, and notwithstanding stating in the judgement that the accused was a “very poor witness” and an “evasive witness” and also an “untruthful” witness, the court found³⁷⁶ that he had no intention to kill.

The accused was found guilty of culpable homicide which is distinguished from intention in that the test for negligence or *culpa* is objective namely what would the so-called reasonable person or *bonus paterfamilias* have done in a similar situation.³⁷⁷ In terms of the Criminal Procedure Act³⁷⁸, culpable homicide is a component verdict on a charge of murder. The court thus found on considering all the evidence that the state had not proved that the accused was guilty of murder, but of culpable homicide.

The appeal was based on the state’s contention that the trial court had erred on certain legal issues in particular arguing that the principles of *dolus eventualis* were not correctly applied to the accepted facts and the conduct of the accused. The appeal was brought in respect of a question of law in terms of Section 319 of the Criminal Procedure Act.³⁷⁹ The appeal court cannot interfere with any factual decision that the trial court has made such as rejecting the state’s version on issues relating to *dolus eventualis*³⁸⁰ in other words the rejected version cannot be

³⁷³ Ibid 3329.

³⁷⁴ Ibid 3329.

³⁷⁵ Ibid 3348.

³⁷⁶ Ibid 3330.

³⁷⁷ Snyman (note 115 above) 208.

³⁷⁸ Section 258 of the Criminal Procedure Act 51 of 1977 (as amended).

³⁷⁹ Ibid Section 319.

³⁸⁰ DDP v Pistorius (note 368 above) para 24.

reconsidered. The appeal court thus considered if the trial court had erred in regard to the issue of *dolus eventualis*, in its application of the law to the proved and accepted facts.

With reference to Snyman³⁸¹ and Burchell³⁸² *dolus eventualis* or legal intent is clearly one of three forms of intention, but has received by far the most attention of all the forms of intention³⁸³ and is according to Hoctor³⁸⁴ manifestly the most important form of intention in practice in South African law.

As stated by Leach JA³⁸⁵ *dolus eventualis*, although a straightforward concept, differs from *dolus directus* (where the object and purpose of the perpetrator is specifically to cause death) in that with *dolus eventualis* the risk of death, is foreseen, in other words the perpetrator does not mean to bring about death or unlawful consequence, but foresees the possibility but proceeds with his conduct.³⁸⁶

Notwithstanding the statement above by the appeal court³⁸⁷ that *dolus eventualis* is a straightforward concept Loubser and Rabie³⁸⁸ stated that, although the concept of *dolus eventualis* has been the subject of innumerable reported judgments over several decades and almost as many academic publications, there is still no certainty as to its content.

Leach AJ stated with regard to the foresight that it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his actions. It is sufficient that only the possibility of death is foreseen.

The varied points of view on the degree of foresight required has been discussed above with reference to Hoctor³⁸⁹ who concluded that attempts to distinguish

381 Snyman (note 115 above) 183.

382 Burchell (note 60 above) 461.

383 MA Rabie Criminal Law – General Principles LAWSA Vol 6 (1981) par.88.

384 Hoctor (note 1 above) 1.

385 DPP v Pistorius (note 368 above) para 26.

386 Burchell (note 60 above) 462.

387 DPP v Pistorius (note 385) above.

388 Loubser & Rabie (note 55 above) 415.

389 Hoctor (note 103 above) 153 – 154.

between a foresight of a very remote possibility, fairly remote possibility, real, substantial and concrete possibility is derived from a mistaken conflation of issues of proof and issues of principle and that it would be far more sensible to consider the cognitive component (foresight) to simply be established in terms of actual subjective possibility of harm. Holding someone liable for acting despite subjective foresight of a possibility of harm, whatever the degree of foresight, is in accordance with both the South African criminal law and the constitution underpinning it.

Paizes³⁹⁰ proposes, in the light of the difficulties experienced by the courts, that it is not ordinarily desirable to hold that an accused has *dolus eventualis* where he sees the possibility of his conduct causing the unlawful consequence as no more than remote or slight although he acknowledge that there are statements by our courts that foresight of a remote or slight possibility is sufficient for legal intention although it appears that the courts in practice insist on a foresight of more than remote or slight possibility. There may however be exceptional cases where foresight of a possibility, however remote, should be viewed as sufficient.

According to Loubser and Rabie³⁹¹ it is now, after some uncertainty, established law that what must be foreseen is only the possibility and not necessarily the probability or the likelihood of the result. Remoteness of the possibility is relevant in drawing an inference of the accused's subjective foresight of that possibility, the more remote the possibility the less likely that the accused did foresee.³⁹²

The second element which Leach AJ described as a reconciliation with the foreseen possibility³⁹³ has been expressed in various ways, as have also been discussed above.

³⁹⁰ Paizes (note 2 above) 642.

³⁹¹ Loubser and Rabie (note 55 above).

³⁹² S v Shaik 1983(4) SA 57(A) 62 F-G.

³⁹³ DPP v Pistorius (note 385) 358.

In *Humphreys*³⁹⁴ Brand JA refers to the second element as the perpetrator consenting to the foreseen possibility, he reconciles to it, he takes it into the bargain or the perpetrator is reckless to the consequence.

In considering the abovementioned second element in the test for *dolus eventualis*, three aspects need to be emphasised regarding the volitional component.

- (a). **Firstly**, the reference to the element as an accused being reckless as to whether a foreseen consequence would ensue or not. The requirement for recklessness was effectively introduced into our law by *R v Valachia*³⁹⁵ where the court relied on the Native Territorial Code³⁹⁶ and also discussed above with reference to Smith³⁹⁷ as also quoted by Loubser & Rabie.³⁹⁸

In certain cases the court required the recklessness to be in respect of the accused being reckless towards the consequence occurring or not³⁹⁹ opposed to other cases⁴⁰⁰ where the accused must have persisted in his course of conduct reckless as to the consequence thereof. In *S v De Bruyn*⁴⁰¹ *dolus eventualis* was found to be present where the accused foresaw the possibility of death but was reckless of its fulfilment. Most of the concepts used by the courts to indicate recklessness seem to be synonymous in other words reckless means careless or regardless and regardless means indifferent. Burchell and Hunt⁴⁰² and Smith⁴⁰³ refer to recklessness as a colourless concept only describing a state of mind. Could this description refer to a state of mind that is emotionless towards the foreseen result or have a neutral attitude to the foreseen result or consequence? The volume and variety of terminology used to describe the element of volition or recklessness towards a foreseen result in establishing the second element for *dolus eventualis* illustrates that the concept of volition is capable of a wide range of meanings, from

³⁹⁴ *Humphreys v S* (note 101 above) par.15.

³⁹⁵ *R v Valachia* (note 138 above) 826.

³⁹⁶ Native Territorial Penal Code Act 24 of 1886 (Cape) Section 140.

³⁹⁷ Smith (note 128 above) 84.

³⁹⁸ Loubser and Rabie (note 55 above) 419.

³⁹⁹ *R v Thibani* (note 131 above) at 729-30; *R v Horn* (note 140 above) 465 D; *S v Sigwahla* (note 19 above) 570 C.

⁴⁰⁰ *S v Arnold* 1965(2) SA 215 (C) 219 B.

⁴⁰¹ *S v De Bruyn* (note 144 above) 510.

⁴⁰² EM Burchell & PMA Hunt *South African Criminal Law and Procedure I : General Principles of Criminal Law* 2ed. (1983) 141.

⁴⁰³ Smith (note 128 above) 93 – 93.

a positive desire on the one end to a passive or reluctant attitude at the other. What appears to be required is a passive acceptance of the foreseen consequence, rather than a positive will or desire for the consequence to occur. As stated above the perpetrator does not mean for the consequence to occur but does foresee it but remains neutral to its actual occurrence.

*Humphreys*⁴⁰⁴ confirms what was stated earlier namely that the recklessness referred to as the volitional component of the test for *dolus eventualis* should not be misunderstood as the equivalent of recklessness in the sense of aggravated negligence. Negligence is determined objectively while recklessness in the context of *dolus eventualis* is established by determining what the subjective state of mind of the accused was towards a foreseen consequence.

The court of appeal in *Pistorius*⁴⁰⁵ considered the two questions asked by Masipa J in the judgment⁴⁰⁶ when the learned judge stated that she:

*“now deals with dolus eventualis namely did the accused subjectively foresee that it could be the deceased behind the door and when firing the shots at the door did he reconcile him that it could be the deceased in the toilet.”*⁴⁰⁷

and

“How could the accused reasonably have foreseen that the shots he fired would kill the deceased?”

The appeal court (SCA) found that the aforesaid reasoning is confusing in various aspects, firstly dealing with the question *“How could the accused reasonably have foreseen”* and stating that Masipa J wrongly applied an objective rather than a subjective approach to the question of *dolus*. The question, following the subjective approach would have been to ask what did the accused actually foresaw. The distinction must be made as to what actually went on in the mind of the accused and not what would or should have gone on in the mind of the reasonable person in the position of the accused. The distinction between

⁴⁰⁴ Humphreys v S (note 101 above).

⁴⁰⁵ DPP v Pistorius (note 385 above) 358.

⁴⁰⁶ S v Pistorius (note 137 above).

⁴⁰⁷ DPP v Pistorius (note 385 above) 359.

subjective foresight and objective foreseeability must not become blurred.⁴⁰⁸ The court also pointed out that the trial court's reasoning further conflates the test to be applied for *dolus directus* and *dolus eventualis* by firstly, presumably with the test for *dolus eventualis* in mind, finding that the accused had not subjectively foreseen that he would kill whoever was behind the door and then stating that if he intended to kill the person (*dolus directus*) he, the accused, would have aimed higher.

The appeal⁴⁰⁹ was brought on authority of Section 319 of the Criminal Procedure Act.⁴¹⁰ The state can only reserve a question of law on appeal. The findings by the trial court is, as far as it relates to the manner in which the two questions on (foreseeability and reconciliation) the proof *dolus eventualis* was set out and interpreted, goes to the heart of the question of law which was reserved by the state, namely whether the principles of *dolus eventualis* were properly applied. The questions asked by Masipa J centred upon whether the accused knew that the person in the toilet cubicle was the deceased, Reeva and its conclusion that *dolus eventualis* had not been proved premised upon an acceptance that, as he had thought Reeva was in the bedroom, he did not foresee that she was the person in the toilet.⁴¹¹ Phelps⁴¹² who supports the decision of the trial court, is wrong in her argument regarding *error in objecto* when quoting the following from the judgment⁴¹³

"We are clearly dealing with error in objecto in that the blow was meant for the person behind the door, who the accused believed was an intruder. The blow struck and killed the person behind the door. The fact that the person behind the door turned out to be the deceased and not the intruder is irrelevant".

Leach JA found that the above argument and the trial court's reasoning regarding error in *objecto* (having not foreseen that it was Reeva in the toilet) is a misdirection as to the appropriate legal issues. What was an issue was not whether the accused had foreseen that Reeva might be in the cubicle when he fired the fatal

⁴⁰⁸ S v Sigwahla (note 19 above) 570 C – E.

⁴⁰⁹ DPP v Pistorius (note 385 above).

⁴¹⁰ Criminal Procedure Act (note 378 above).

⁴¹¹ DPP v Pistorius (note 385 above) 368 para 30.

⁴¹² Phelps (note 85 above) 18; (note 322 above).

⁴¹³ S v Pistorius (note 137 above) 3325.

shots at the door, but whether there was a person behind the door who might possibly be killed. A person may have the intention to kill and such intention must relate to a person killed, but this does not mean that a perpetrator must know or appreciate the identity of the victim. A perpetrator can therefore act with *dolus indeterminatus* simultaneously with *dolus eventualis*⁴¹⁴ as *dolus indeterminatus* is not a form of intent but indicates that the intent of the perpetrator was directed to an unknown person.⁴¹⁵

As pointed out previously, Paizes⁴¹⁶ stated that if Masipa J asked the broader question when making the enquiry into foresight by the accused namely did he subjectively foresee that it was a person behind the door, instead of the deceased Reeva, and if that question was answered in the affirmative, then the second part of the test for *dolus eventualis* namely the volitional element which required the accused to reconcile himself with or take the foreseen consequence into the bargain, would become pertinent.

The SCA found that the trial court had misdirected itself with regard to the question on foreseeability, therefore the volitional element now becomes relevant and requires the test to be extended to include that component.

(b). The **second** aspect with regard to the volitional element of the test for *dolus eventualis* that requires consideration is the proof thereof by assessing the proved facts and circumstantial evidence and applying the principles of inferential reasoning. Leach AJ stated that a further issue which arises in respect of *dolus eventualis* on the point of law reserved by the appellant is the question whether circumstantial evidence were correctly applied.

The trial court⁴¹⁷ did emphasise the importance of looking at the evidence as a whole and not piecemeal. The process of reasoning which is appropriate to the application of the proper test in a particular case will depend on the nature of the

⁴¹⁴ Snyman (note 15 above) 200.

⁴¹⁵ S v Mavhungu 1981(1) SA 56 (A).

⁴¹⁶ Paizes (note 280 above) 6.

⁴¹⁷ S v Pistorius (note 137 above) 3319.

evidence the court has before it. The fundamental rule in considering circumstantial evidence is that in order to justify an inference of guilt a court must be sure that inculpatory facts are incompatible with the innocence of the accused.⁴¹⁸

To determine the subjective state of mind of an accused is very difficult. It is seldom possible to be done by direct evidence therefore a court have to also rely on proof by inferential reasoning where inferences are drawn from the accused conduct.⁴¹⁹

Leach JA in *Pistorius*⁴²⁰ refers to *S v Dlodlo*⁴²¹ and points out that the subjective state of mind of an accused person such as in the *Pistorius* case is an issue of fact that can often only be inferred from the circumstances surrounding the infliction of the fatal injury and the inference properly drawn must be consistent with all the proved facts and then, referring to what was stated by *Nugent J* in *Van der Meyden*⁴²² namely that the court must keep in mind that the conclusion which is reached must take all the evidence into account although some of it might be found to be false, unrealistic or possibly false or unrealistic. None may be simply ignored.

In *S v De Bruyn*,⁴²³ Holmes AJ emphasises that what is needed in determining the subjective state of mind of an accused, is down to earth reasoning which involves looking at all the facts, allowing for human factors, but guarding against armchair reasoning.

With specific reference to proof of the second component of *dolus eventualis* Brand JA while applying the principle of inferential reasoning stated that if it can be reasonably inferred that the appellant may have thought that subjectively

⁴¹⁸ Ibid 3323.

⁴¹⁹ Hoctor (note 1 above) 135.

⁴²⁰ *DPP v Pistorius* (note 385 above) 361.

⁴²¹ *S v Dlodlo* (note 328 above) 405 E – H.

⁴²² *S v Van der Meyden* (note 281 above) 449 – 450.

⁴²³ *S v De Bruyn* (note 144 above) 507 C.

foreseen consequence would not actually occur, then the volitional element of *dolus eventualis* would not have been established.

(c). **Thirdly**, consideration has to be given to the arguments raised by academics, that the volitional element is superfluous in the test for *dolus eventualis*. Whiting⁴²⁴ stated:

“It is superfluous, because by acting with foresight of the possibility that a result will ensue, one necessarily reconciles oneself to the possibility that it will ensue and takes the possibility into the bargain”.

Paizes criticised the judgements referred to below with regard to the volitional element stating that these cases are seeking to unjustifiably to add ballast to what is a tautological enquiry.⁴²⁵ The argument being that an accused who goes ahead with an act that he foresees might bring about an unlawful consequence, must necessarily have taken the risk of causing that consequence into the bargain. The Supreme Court of Appeal has confirmed the existence and acceptance of the volitional component in *S v Humphreys*⁴²⁶, *S v Tonkin*⁴²⁷ and *S v Ndlanzi*.⁴²⁸

The crux of the argument as to the relevance or not of the volitional component as the second element in the test for *dolus eventualis* appears to hinge on the degree of subjective foresight that is required.

Burchell⁴²⁹ states that the conative component of *dolus eventualis* should be rejected as irrelevant and confusing and there are no decisions of the South African courts where the verdict has turned on the recklessness requirement.⁴³⁰ This latter argument is no longer applicable with reference to the aforesaid cases in particular that of *Humphreys*.

⁴²⁴ Whiting (note 58 above) 440.

⁴²⁵ Paizes (note 280 above) 6.

⁴²⁶ *Humphreys v S* (note 101 above).

⁴²⁷ *S v Tonkin* (note 341 above) 583.

⁴²⁸ *S v Ndlanzi* (note 340 above) 256.

⁴²⁹ JM Burchell (note 60 above) 368.

⁴³⁰ Ibid 390.

The volitional component or element of recklessness and the various synonyms, reconciliation with, consent to and persistence in conduct, have been referred to frequently by our courts but it has seldom been of practical importance in the sense that *dolus eventualis* was explicitly found to be lacking if there was no recklessness, which was almost automatically inferred if there was foresight. The opposite being that if foresight was absent the volitional component was not further considered.

The two points in law that the state reserved on appeal were:

- *whether the trial court correctly applied the principles of dolus eventualis to the proved facts, and*
- *whether the legal principles applicable to circumstantial evidence were correctly applied to the evidence by the trial court.*

The questions reserved is clearly an overlap between fact and law as the assessment of circumstantial evidence impacts on the principles applicable to the proof of *dolus eventualis* when establishing:

- *foresight*
- *proving recklessness or reconciliation with the foreseen consequences.*

It is clearly emphasised above that foresight and recklessness, in this appeal, had to be proved by inference, by considering the proved facts and circumstantial evidence as a whole.

The appeal court⁴³¹ found that in the present instance, although the question of the accused's intention at the relevant time is one of fact, to be determined by inference, there appears to have been an absence of appreciation by the trial court of material evidence. The trial court failed to take into account the evidence of Captain Mangema, whose evidence proved that all the shots fired through the door would almost inevitably have struck a person behind it. Effectively there was no place for the deceased to hide. The evidence led by Captain Mangema on the Black Talon ammunition confirmed that it was specifically designed for self-

⁴³¹

DPP v Pistorius (note 385 above) 346 para. 38.

defence as the bullet would penetrate a hard object but mushroom when entering soft flesh causing devastating wounds. This evidence, although circumstantial, was crucial in the decision on whether the accused, at the time he fired the four shots through the door foresaw and reconciled himself to this result. He must have and therefore did foresee the potentially fatal consequences of his action. If this evidence was not ignored in answering the question on foreseeability the court's decision on the presence of *dolus eventualis* might have been different.

The pertinent issue then arises whether, on the primary facts found proved considering all the evidence and applying the correct legal tests, the inference has to be drawn that the accused acted with *dolus eventualis* when he fired the fatal shots.

The volitional or second element of the test for *dolus eventualis* as stated by Loubser and Rabie⁴³² is usually automatically inferred if foresight is proved but as shown in *Humphreys*⁴³³ this is not always the case. The following observation was also made by Brand JA⁴³⁴

“Like any other fact, subjective foresight can be proved by inference, moreover common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience the possibility of the consequence that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of the case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.”

On the accused's own version of the events as summarised by Masipa J in the judgment,⁴³⁵ the respondent thought there was an intruder in the toilet, he armed himself with a heavy calibre firearm loaded with ammunition specifically designed for self-defence, screamed at the intruder to get out of the house and proceeded forward to the bathroom in order to confront whoever might be there.

⁴³² Loubser & Rabie (note 55 above).

⁴³³ *Humphreys* (note 101 above).

⁴³⁴ *Ibid* para 13.

⁴³⁵ *S v Pistorius* (note 137 above) 3307.

He was holding the firearm ready to shoot, paused at the entrance to the bathroom and when he became aware that there was a person in the toilet cubicle, he fired four shots through the door and never offered an acceptable explanation for having done so.

The learned judge continued

“as a matter of common sense⁴³⁶ at the time the fatal shots were fired, the possibility of death of the person behind the door was clearly an obvious result, that inference is irresistible”.

Concluding that when firing the fatal shots the accused must have foreseen and did foresee, that whoever was behind the toilet door might die, but reconciled himself to that event occurring and gambled with that person’s life. These actions constituted *dolus eventualis*.⁴³⁷

⁴³⁶ S v De Bruyn en Ander 1968(4) SA 498 (A) 507 it was stated “*what is needed in these cases is down to earth reasoning allowing for human factors.*”

⁴³⁷ DPP v Pistorius (note 385 above) 366 par 51.

CHAPTER 4

4. CONCLUSION

Conclusion is defined as the last main division of a speech, lecture or essay⁴³⁸ or the opinion one has after considering all the information about something.⁴³⁹

This paper investigated and discussed *dolus eventualis* as a form of intent in particular the importance and relevance of the conative element, also described as the volitional component, being the so-called second element in the test to prove legal intent (*dolus eventualis*). This was done in conjunction with the cognitive component or first element namely the subjective foresight of a prohibited consequence. The investigation was done against the background of *S v Pistorius*⁴⁴⁰ and *DPP v Pistorius*⁴⁴¹ in which the question of *dolus eventualis* was central.

The trial court was held in the High Court of South Africa Gauteng Division, Pretoria before the honourable judge Masipa and two assessors and the court found that:

*“the accused could not be found guilty of murder dolus eventualis on the basis that, from the accused’s belief and conduct, it could not be said that he foresaw that either the deceased or anyone else for that matter, might be killed when he fired the shots at the toilet door. It also could not be said that he accepted that possibility into the bargain.”*⁴⁴²

The appeal by the state to the Supreme Court of Appeal before five judges who unanimously found per Leach JA:

*“In these circumstances I have no doubt that in firing the fatal shots, the accused must have foreseen and therefore did foresee, that whoever was behind the toilet door might die, but reconciled himself to that event occurring and gambled with that person’s life. This constituted dolus eventualis on his part....”*⁴⁴³

⁴³⁸ www.dictionary.com.

⁴³⁹ <http://dictionary.cambridge.org>.

⁴⁴⁰ *S v Pistorius* (note 137 above).

⁴⁴¹ *DPP v Pistorius* (note 385 above).

⁴⁴² *S v Pistorius* (note 137 above) 3347.

⁴⁴³ *DPP v Pistorius* (note 385 above) 366 par 51.

Before attempting to explain the above discrepancy and come to a conclusion on what has been dissected, investigated and discussed above one has to remind oneself that although the concept of *dolus eventualis* has been the subject of innumerable reported judgments and as many academic publications there is, as is clear from the two conflicting verdicts, no certainty as to its contents.⁴⁴⁴ Notwithstanding the clear and obvious uncertainty regarding the contents of *dolus eventualis* it remains by far the most important form of intention in practice in South African criminal law⁴⁴⁵ and there is no more fundamental concept in South African criminal law.⁴⁴⁶

The paper dealt with *dolus eventualis* in broad terms with an emphasis on the volitional component. The conclusion was however very soon (after research of law and academic writings), reached that until recently⁴⁴⁷ the volitional element of *dolus eventualis* was sometimes viewed as superfluous and in a sense vague due to the various descriptions and terminology by which it was referred to such as “recklessness”, “consent to”, “persistence in”, “reconciliation with” and “taking into the bargain” of the prohibited consequence. The conclusion is that any discussion or research of the volitional element has to take place in broad terms, having consideration for various other aspects that are relevant to the proof of intent (*dolus eventualis*), more specifically the volitional component.

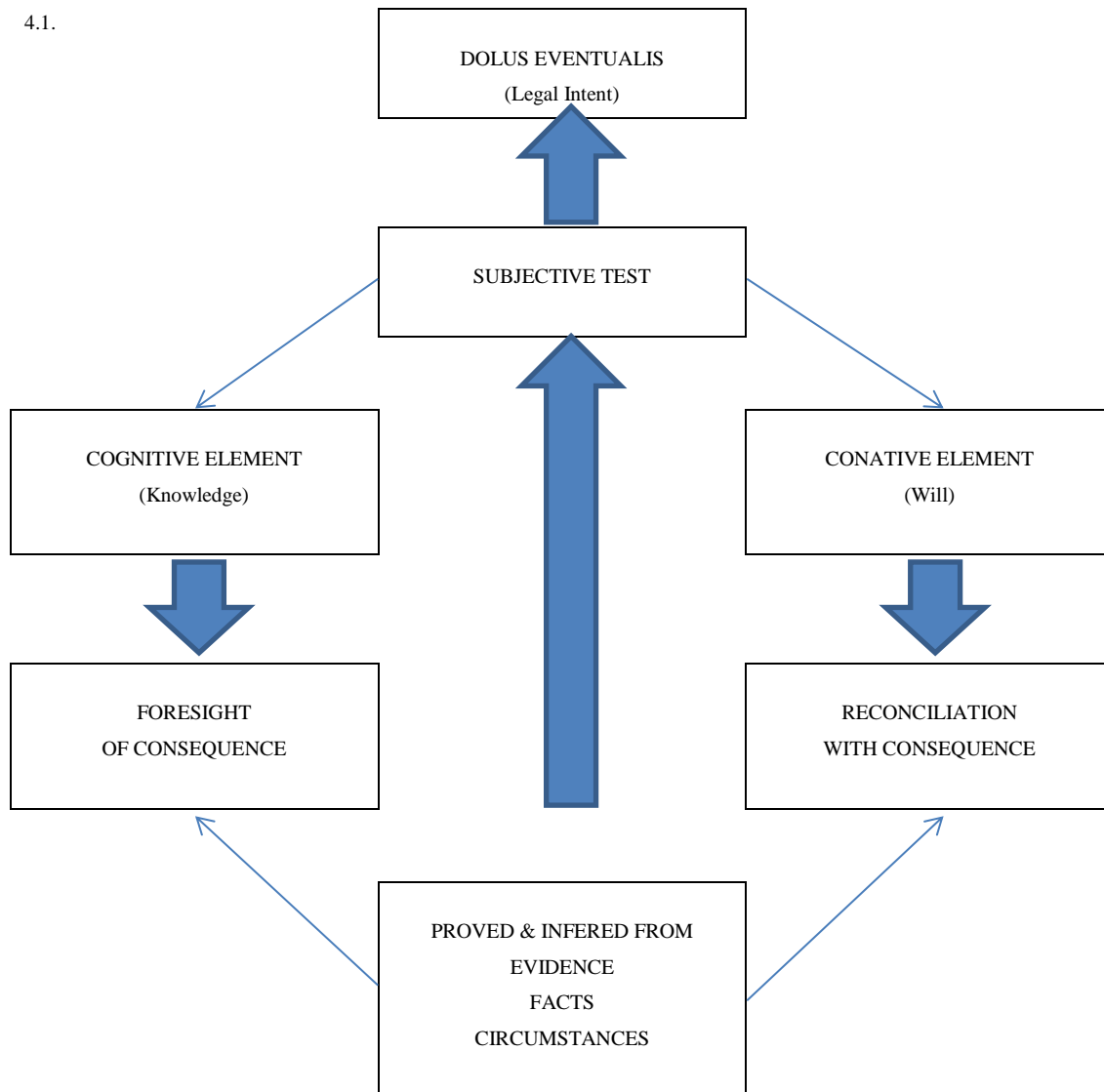
⁴⁴⁴ Loubser & Rabie (note 55 above) 415.

⁴⁴⁵ Hoctor (note 1 above) 131.

⁴⁴⁶ Paizes (note 280 above) 636.

⁴⁴⁷ Humphreys v S (note 101 above); S v Tonkin (note 341 above); S v Ndlanzi (note 340 above).

The various aspects referred to above and the process of how they conflate is set out in table 4.1.



The table clearly emphasises that there are two important components that are central in proving *dolus eventualis* and that the volitional component, which has in the past been viewed as redundant⁴⁴⁸ or superfluous⁴⁴⁹ by some academics, are

⁴⁴⁸ Snyman (note 15 above) 187.

⁴⁴⁹ Smith (note 128 above) 92 – 93; Paizes (note 2 above) 639.

in fact essential in proving *dolus eventualis*. This seems to also be the viewpoint of the Supreme Court in recent cases⁴⁵⁰ and is also confirmed by Snyman.⁴⁵¹

The two components, central in proving *dolus eventualis* are

- (1) the application of a subjective test, opposed to the objective test which is applied for *culpa*, and
- (2) the principles applicable to the making of inferences from proved facts and circumstantial evidence.

Although the application of the two aspects in the proof of *dolus eventualis* is trite law, their joint importance in the proof of the volitional component of the test of *dolus* has to be acknowledged by academics and applied by the courts with more down to earth reasoning⁴⁵² and properly considering all the evidence relevant to an issue.⁴⁵³ This should lead a court to a point where “*as a matter of common sense*” the inferences drawn from the facts or circumstantial evidence, is irresistible.

The South African Courts embrace the psychological concept of culpability in terms of which the question whether an accused has acted intentionally depends solely on his subjective state of mind⁴⁵⁴ as referred to by Hoctor.⁴⁵⁵

In terms of the psychological concept, fault (*skuld*) (which consist of *culpa* (negligence) and *dolus* (intent)) is a state of mind⁴⁵⁶ opposed to the normative concept in terms of which blameworthiness is measured against a norm, in other words an outside standard.⁴⁵⁷

⁴⁵⁰ Note 447 above.

⁴⁵¹ Snyman (note 15 above) 187.

⁴⁵² S v De Bruyn (note 144 above) 507.

⁴⁵³ DPP v Pistorius (note 137 above).

⁴⁵⁴ Visser & Maré Visser Vorster General Principles of Criminal Law through the cases (1990) 450.

⁴⁵⁵ Hoctor (note 1 above) 1.

⁴⁵⁶ FFW van Oosten The psychological fault concept : Quo Vadis South African Criminal Law THRHR (1995) 361.

⁴⁵⁷ Snyman (note 15 above) 154.

In view of the foregoing it is further concluded that although the subjective state of mind of the perpetrator is determined by a proof of foresight. The actual subjective state of mind and therefore the complete proof of *dolus eventualis* is reached by proving the volitional component.

The importance of the volitional component firstly lies therein that the foresight component is vague and subject to much debate due to the question on the degree of foresight and secondly that the foresight component addresses the cognitive or “knowledge” element and not the conative (will) element. The “will” element needs to be addressed to complete the test and thereby confirming the principles of the psychological concept of fault.

The second aspect central to finding *dolus eventualis*, and considering the importance of the volitional component is the proof that the accused did in fact in his mind reconcile himself to the result by inferences made from the proved facts and circumstantial evidence which has to be considered in totality. The finding must account for all the evidence.⁴⁵⁸

In *DPP v Pistorius*⁴⁵⁹ the appeal court through a proper consideration of the proved facts and circumstantial evidence and by proper application of the principles of inferential reasoning not only turned over the judgment of the trial court by finding that the proved facts and evidence proved:

- (1) foresight of the consequence, and
- (2) reconciliation with the consequence

but also reiterated the importance of the aforesaid two phased test for *dolus eventualis*.

Although Oscar Pistorius⁴⁶⁰ appeal to the Constitutional Court was refused, it may be pertinent to, make reference to what was written by David Jesse⁴⁶¹ about the questions which might have been considered by the Constitutional Court if the

⁴⁵⁸ *S v Van der Meyden* (note 281 above) 449 – 450.

⁴⁵⁹ *DPP v Pistorius* (note 385 above).

⁴⁶⁰ *S v Pistorius* (note 137 above).

⁴⁶¹ D Jesse *Why the Constitutional Court appeal for Oscar Pistorius may succeed* De Rebus 3/2016 43.

appeal was allowed. He is of the opinion that the SCA overstepped its bounds of authority and *ultra vires* the Constitution of the country by re-examining facts, under the pretence of dealing with a question of law and that the finding of *dolus eventualis* was misplaced.

The final conclusion is that to prove *adaequatio intellectus et rei* (the correspondence of the mind and reality) as far as it relates to *dolus eventualis* remains a controversial and contentious issue.

Cases

1. Director of Public Prosecutions v Oscar Leonard Pistorius (96/2015) 2015 ZASCA – now reported
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