

**THE FEASIBILITY OF PUNISHING NEGLIGENT
ASSAULT**

by

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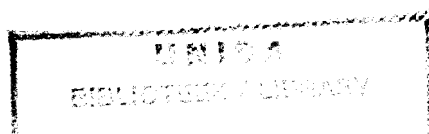
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SUMMARY

In this essay I consider whether or not there is a need for the creation of the crime of negligent assault. I start off by giving a brief exposition of the current position in South Africa with regard to assault. From this exposition it becomes clear that negligent assault is not recognised in South African law. I give a brief summary of the concepts of intention and negligence. After this I briefly discuss what criteria should be considered before invoking the criminal sanction.

In the next section of the essay I consider the need for, and the benefits of, creating the crime of negligent assault.

Lastly, I critically analyse whether the legislature should intervene or not. My conclusion is that the social benefits of criminalising the conduct do in fact outweigh the negative implications of not criminalising it, and that the legislature would not err if it were to create the crime of negligent assault.



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1. ASSAULT: GENERAL

A) Current position in South African law.⁹

Assault as we know it today was unknown in our common law. Conduct, which would today constitute criminal assault, was punished as a form of *iniuria*.¹⁰ Under the influence of English law, assault in South African law developed into a separate crime. Assault is a crime committed against another's *corpus*. It now forms part of a trinity of personality interests protected under South African law. The other two interests protected are *dignitas*¹¹ and *fama*¹². Assault is therefore nothing other than an *iniuria* committed against another's bodily integrity.¹³

The fundamental principle is that physical force, of whatever sort and in whatever degree, should not be applied to the body of another.¹⁴ This principle has been entrenched by the new Constitution, which protects a person's right to his physical integrity¹⁵ and human dignity.¹⁶ By recognising that the human body is not made up only of flesh and blood, but also the mind, the crime of assault punishes not only applications of force to the *corpus*, but also the application of force to the mind. It does this by punishing, as assault, the inspiring of fear in the mind of a person that he

⁹ The SA definition of assault (*supra*) emanates from the Transkeian Penal Code of 1886 s 10.

¹⁰ Voet 47 10.

¹¹ Punished as the crime of *crimen iniuria*.

¹² Punished as the crime of defamation. See Van der Berg J "Should there be a crime of defamation?" 1989 *SALJ* vol 102, 276 - 291.

¹³ *Jack* 1923 AD 176.

¹⁴ PMA HUNT *South African Criminal Law and Procedure* Vol II 3rd ed (JRL Milton) (1996) 407 - "This principle derives from law's concern to maintain law and order. It is human nature to react to violence directed at one's person, thus creating the potential for further violence and, ultimately public disorder."

¹⁵ See *supra*.

¹⁶ See *supra* n. 7 & 8.

or she is about to suffer physical harm.¹⁷

The strong influence of English law has resulted in the development of a number of qualified forms of assault, for example assault with intent to cause grievous bodily harm and indecent assault. However, a discussion of these forms of assault does not fall within the ambit of this essay. I will therefore restrict my discussion to common assault.¹⁸

B) History

As stated above, assault as we know it today was unknown in common law.¹⁹ The Romans regarded bodily aggression as just one way of committing the much wider wrong of *iniuria*.²⁰ It is not clear whether the Romans regarded all *iniuriae* as criminally punishable, or whether only serious *iniuriae* were punishable. There does, however, seem to be authority supporting the proposition that all physical assaults were punishable as crimes.²¹

However, under the influence of English law, assault in our law developed into a separate substantive crime, being an *iniuria* committed against a person's *corpus*.

In early English law, infliction of violence upon the person of another would have

¹⁷ *Sibanyone* 1940 55 40 (T); *Miya* 1966 (4) SA 274 (N) 276-277.

¹⁸ Also known as "ordinary assault".

¹⁹ See supra n 10.

²⁰ Which included the infringements of the *corpus, fama* and *dignitas*.

²¹ *Melius de Villiers The Roman and Roman-Dutch of Injuries, 1899* 160-3; De Wet & Swanepoel, *Strafreg*, 4th ed 1985, by De Wet JC, 234.

resulted in private vengeance. The law sought to prevent this. The courts wanted to maintain public peace and order, and thus punished the wrongful trespass upon another person causing actual physical harm (known as 'battery'). The law also deemed it necessary to punish the unlawful inspiring of fear in another person that he was going to be attacked (known as 'assault')²², as this could also have resulted in retaliation and private vengeance.

South Africa has adopted the English law's notion of assault.²³ However, despite the fact that our definition of assault²⁴ does not distinguish between the English law concepts of 'assault' and 'battery', these concepts have now fused together, resulting in the single crime of assault.²⁵

C) Essential Elements

The essential elements of assault are: a) applying force or inspiring apprehension of it; b) unlawfully; c) intentionally.²⁶

a) Applying force or inspiring the apprehension of it

²² i.e. creating in the mind of a person the apprehension that he or she was about to experience a battery.

²³ *Jolly* 1923 AD 176 at 179; *Marx* 1962 (1) SA 848(N).

²⁴ See *supra*.

²⁵ This was reflected in the definition of assault in the Transkeian Penal Code in 1886. s 152 reads: "An assault is the act of intentionally applying force to the person of another, if or attempting or threatening, by making any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that he has the present ability to effect his purpose."

²⁶ *Burchell and Milton op cit* (n 1) 480.

Applying force is the most common way in which assault is committed. Subject to the *de minimis* rule²⁷, even the slightest contact with another person's body may be sufficient.²⁸

The application of force may be direct or indirect, for example pulling out a person's chair or derailing a train.²⁹

Assault can even be committed by means of an omission. In *B*,³⁰ a woman was convicted of assault for failing to prevent her lover from assaulting her young child. As a mother, she was under a legal duty to protect her young child, and she failed to act positively to do so.

b) Unlawfully

As with any crime, the act of assault³¹ must be unlawful³².

However, due to the fact that human beings live in a community which is conducive to physical contact³³, it would be impossible to regard every touching that might occur as assault. For this reason, various grounds of justification exist which negate the unlawfulness of various acts. The following are the most common grounds of justification: a) authority³⁴; b) defence of person or property³⁵ and c) consent³⁶.

²⁷ See *Bester* 1971 (4) SA 28 (T).

²⁸ E.g. bumping someone or grabbing their arm.

²⁹ *Jolly* 1923 AD 176 at 179.

³⁰ 1994 2 SACR 237 (E).

³¹ Applying of force or inspiring apprehension that force is to be applied.

³² Conduct is unlawful if it is in conflict with the *boni mores* or legal convictions of society. See *Snyman* op cit (n 1) 90.

³³ E.g. touching another person whilst in a full lift or whilst passing each other in a corridor.

³⁴ Since the Constitutional Court in *Williams* 1995 (2) SACR 251 (CC) found corporal punishment to be unconstitutional, it is no longer possible for a court to impose corporal punishment.

³⁵ *Van Wyk* 1967 1 SA 488 (A).

³⁶ Whether consent legalises an assault depends on the *boni mores*.

Assault can also be committed, although there is no physical contact between parties. This occurs where X inspires the belief in Y that force is immediately to be applied to him.³⁷ This type of assault has developed due to the influence of English law.³⁸ The assault is committed by an act or gesture that leads the victim to believe that he is about to suffer an attack.³⁹ It is not relevant whether the person committing this type of assault has the ability to carry out the threat. All that is important is whether or not the victim has such apprehension.⁴⁰

c) Intentionally

Subjective *mens rea*, in the form of *dolus*, must be proven.⁴¹

Thus, X must have intended to apply force to the person of another, or to threaten him with immediate personal violence.⁴²

Dolus eventualis is sufficient for a conviction⁴³. For *dolus eventualis* to be present, X must foresee the possibility that his conduct may result in the direct or indirect application of force to Y's person or that it might inspire in Y the fear that such force would be immediately applied, and he must then reconcile himself to such possibility and proceed with his conduct.⁴⁴

³⁷ See references *supra* n 17.

³⁸ See *op cit* n 22.

³⁹ It is controversial whether mere words can amount to an assault. It would, however, appear that there is no reason why mere words cannot inspire a very real apprehension in the mind of the victim that he is about to suffer an assault. See Hunt *op cit* (n 14) 237.

⁴⁰ Whether or not the apprehension by the victim has to be reasonable or not is a controversial issue. Burchell and Milton, *supra* (n 1) 485 are of the view that any person who *intentionally* induces in the mind of a foolish person, an unreasonable apprehension that he is about to be attacked, clearly commits assault.

⁴¹ *Nkosi* 1928 AD 488 at 488; *R v Daniels* 1926 (2) PH H109 (C).

⁴² X must therefore have been aware of Y's fear.

⁴³ *Sikunyana* 1961 (3) SA 549 (E) at 552; *Sinzani* 1979 (1) SA 935 (E).

⁴⁴ This is based on Snyman's formulation of *dolus eventualis*. Burchell and Milton, *supra* (n 1) 305 have a different approach.

X must have *mens rea* in respect of each element of the crime.⁴⁵ Since the 1950's, our courts have held that intention is purely subjective.⁴⁶ The task of the court is to determine what the state of mind of the accused was at the time when he committed the offence. *Mens rea* will therefore be lacking if X makes a *bona fide* mistake⁴⁷ of fact, for example, X believes that circumstances exist which entitle him to act in self-defence, whereas in fact no such circumstances exist.⁴⁸

As has already been indicated above, our law does not know the offence of negligent assault.⁴⁹

D) Attempt

In terms of the previous definition of assault⁵⁰, attempt to apply force to the person of another was equated with the threat of applying such force. Due to this definition, the view has been taken that there is no such crime as attempted assault. All attempts to assault were deemed to be complete assaults.⁵¹ It is submitted that this view is wrong. It is based on the incorrect assumption that every threat of bodily harm will give rise to a corresponding fear of such harm on the part of the threatened person. In reality however, this does not always happen.⁵² Thus in such cases there is only attempted assault.⁵³

⁴⁵ Except for intention itself.

⁴⁶ *Malinga* 1963 (1) SA 692 (A) 694; *Mini* 1963 (3) SA 188 (A) 192.

⁴⁷ The term *bona fide* mistake is perhaps confusing. A mistake by its very nature can only but be *bona fide*.

⁴⁸ *Botes* 1966 (3) SA 606 (O) at 611.

⁴⁹ *Steenkamp supra* (n 4).

⁵⁰ See Transkeien Penal Code of 1886 *ibid* n 9.

⁵¹ *Barden* 1942 JS 117 (T).

⁵² For e.g.: where Y is unaware of the threats because he is asleep, or he does not understand them because he is drunk.

⁵³ The same view is held by *Snyman supra* 417 and *Hunt supra* 483.

In *Sikhakane*⁵⁴ the court recognised that there is a crime of attempted indecent assault. Since indecent assault is a species of assault, this may serve as authority for the proposition that there is such a crime as attempted assault.

2) INTENTION AND NEGLIGENCE

From the above it is evident that assault is a well-developed common law crime in the South African legal system. Courts⁵⁵ and authors⁵⁶, while perhaps differing slightly on some of the elements of the crime⁵⁷, seem to be in agreement regarding the element of *mens rea*. Only intention⁵⁸ suffices.

A. Intention

Intention can take three different forms: *dolus directus*⁵⁹, *dolus indirectus*⁶⁰ and *dolus eventualis*⁶¹. Intention consists of two elements⁶², namely X's knowledge of the surrounding circumstances and the means which he must employ in order to achieve his goal⁶³ and secondly, X's directing his will towards achieving the particular result or

⁵⁴ 1985 (2) SA 289 (N).

⁵⁵ *Daniels supra* (n 2); *Sikunyana supra* (n 3).

⁵⁶ Snyman op cit (n 1) 199; Burchell and Milton op cit (n 1) 413; 478.

⁵⁷ Especially regarding the second way in which the crime can be committed i.e. the inspiring of a belief that force is to be applied. See Snyman op cit (n 1) 415.

⁵⁸ In whatever form.

⁵⁹ The person directs his will towards performing the prohibited act.

⁶⁰ The prohibited act is not the perpetrator's main aim, but he realises that if he wants to achieve his main aim, the prohibited act will out of necessity ensue.

⁶¹ The person foresees the possibility of the prohibited result ensuing from his act, but reconciles himself to such foresight and proceeds with his conduct.

⁶² Snyman op cit (n 1) 168.

⁶³ Known as the cognitive element.

performing a particular act.⁶⁴

The test in respect of intention is purely subjective.⁶⁵ When determining whether a person had intention, the court must determine whether the person actually had the state of mind required for intention.⁶⁶ Intention must exist in respect of each element of the crime. Once this is established, then it is easy to establish legal guilt. Since the essence of *mens rea* is blameworthiness, the courts can justify blaming someone for subjectively directing their will towards a particular result, with knowledge of unlawfulness.⁶⁷ If a person's intention does not relate to all the elements of the crime⁶⁸, then he can not be held liable. This situation is referred to as 'mistake'. Due to the subjective nature of intention, such mistake need not be reasonable.⁶⁹

Mistake is a defence excluding intention. There are also other defences that exclude intention⁷⁰, but a discussion of these defences is not required here.

B. Negligence⁷¹

Before I can discuss negligent assault, I will need to give a brief exposition of what negligence entails.

The law does not only punish unlawful acts that are committed intentionally, but also in some circumstances punishes unlawful acts that are committed unintentionally.

⁶⁴ Known as the conative element.

⁶⁵ Snyman op cit (n 1) 173; Burchell and Milton op cit (n 1) 519 - see also *supra* n 46.

⁶⁶ I.e. both cognitive and conative elements.

⁶⁷ Or in the case of *dolus eventualis*, for subjectively foreseeing the possibility that your conduct is prohibited and reconciling yourself to such possibility.

⁶⁸ According to Snyman, *supra* (n 1) 176, these include the following: the act, the definition of proscription and unlawfulness.

⁶⁹ *Modise* 1966 (4) SA 680 (GW).

⁷⁰ These include *inter alia*: youthfulness; intoxication; insanity; provocation.

⁷¹ The word *culpa* is often used as a synonym for negligence.

The law does this when an act is committed negligently. Negligence is a term used in law to indicate that the conduct of a person has not measured up to a prescribed standard.⁷²

According to Snyman⁷³, the test for negligence is the following:

- a) Would the reasonable person (*diligens paterfamilias*) in the circumstances in which X found himself have foreseen the possibility that the particular circumstances might exist or that the particular consequences might result from his act?
- b) Would the reasonable person have guarded against these possibilities?
- c) Did X's conduct deviate from what a reasonable person would have done in the circumstances?⁷⁴

The same test in respect of negligence is found in criminal and private law.⁷⁵

Negligence can be distinguished from intention.⁷⁶ Intention involves a purposefully chosen course of action, knowing it to be unlawful. It is an enquiry into the actual state of mind of the actor. The test for negligence is not what the actor thought or foresaw, but rather what a reasonable man would have done in the circumstances. The test is objective.⁷⁷ Therefore, intention can be regarded as a particular state of mind, whereas negligence (in the case of unconscious negligence) can be regarded as the absence of a state of mind.⁷⁸

⁷² Burchell and Milton op cit (n 1) 352.

⁷³ See op cit (n 1) 199.

⁷⁴ A similar formulation is advocated by Burchell and Milton op cit (n 1) 356; See also *Kruger v Coetzee* 1966 (2) SA 428 (A) 430.

⁷⁵ *Kruger v Coetzee* supra (n 74); *Russell* 1967 (3) SA 739 (N).

⁷⁶ *Ngubane* 1985 (3) SA 677 (A) 686 C-D.

⁷⁷ The objectivity of negligence is a controversial issue in South African law. This issue will be briefly discussed below.

⁷⁸ *Ngubane* supra (n 70) at 686 - 687.

Conscious negligence should be distinguished from unconscious negligence.⁷⁹

In the case of unconscious negligence, X does not foresee the prohibited circumstances or result.⁸⁰ In the case of conscious negligence, X does foresee it, but unreasonably decides that it will not ensue.⁸¹ Conscious negligence is not a form of intention. Unlike *dolus eventualis* where X reconciles himself to his foresight, in the case of conscious negligence X does not reconcile himself - he unreasonably decides that the circumstances do not exist or that the result will not ensue.

As stated above, the test for negligence is in principle objective. This is because the question to be answered is whether the reasonable person⁸² would have foreseen the result and would have guarded against it. According to Snyman⁸³, the objective character of the test is subject to a few exceptions. These are the following:

- a) The reasonable person should be placed in the circumstances in which X found himself at the critical moment.
- b) In the case of experts, a reasonable expert as opposed to a reasonable man, should be placed in X's circumstances.
- c) The same applies when determining the negligence of children. A reasonable child should be placed in X's position.

Many authors criticize the objective nature of the test for negligence.⁸⁴

⁷⁹ See Bertelsmann 1975 *SALJ* 59.

⁸⁰ With circumstance crimes it is a particular circumstance which renders a particular act unlawful. With result crimes (or materially defined crimes) it is the particular result which is forbidden.

⁸¹ As a reasonable person he should foresee it.

⁸² The reasonable person is a fictitious person who personifies the average; normal person. The reasonable person concept embodies an objective criterion.

⁸³ See *op cit* (n 1) 203.

⁸⁴ Snyman *op cit* (n 1); De Wet and Swanepoel *op cit* (n 21) 159, Boberg PQR "*The Little Reasonable Man*" *SALJ* 85 (1968) 127. Burchell and Milton *op cit* (n 1) 352.

In a heterogeneous society like South Africa, a purely objective test may lead to injustice, as it does not take into account the enormous disparity between levels of education, superstitious beliefs⁸⁵, idiosyncrasies and intelligence levels which can be found in the country.

Clearly, what is reasonable for one person may not necessarily be reasonable for another.⁸⁶ The nature of the test for negligence still attracts vigorous academic comment⁸⁷, but need not be discussed further in this essay.

C. Negligence in South African Criminal Law

i) Common-law Crimes

Historically, the common law punished negligence only where it resulted in the death of another human being.⁸⁸

In more recent times, the courts have held that negligence is a sufficient form of fault for a conviction for the common law crime of contempt of court.⁸⁹ This will be the case when dealing with the liability of an editor of a newspaper who publishes matter which constitutes contempt of court.⁹⁰

ii) Statutory Offences

The doctrine of strict liability⁹¹, which is encountered in statutory crimes, has not been well received by the judiciary. In an effort to try and reduce the harsh effects of the strict

⁸⁵ *Ngema* 1992 (2) SACR 651. The case dealt with the superstitious belief in the tikoloshe.

⁸⁶ For e.g. a bricklayer and a scientist.

⁸⁷ R Louw "*Criminal Negligence and Mens Rea: Is the reasonable man test an unreasonable one*" LLM dissertation (University of Natal) 1993.

DA Botha "Culpa - A form of mens rea or a mode of conduct?" 1977 *SALJ* 29.

⁸⁸ Punished as the crime of culpable homicide.

⁸⁹ *Harber* 1988 (3) SA 396 (A) 312; see also JM Burchell (1988) 4 *SAJHR* 375 ff.

⁹⁰ Intention or negligence will be a sufficient form of fault.

⁹¹ Liability without fault.

liability doctrine, judges have been prepared to let the accused escape liability if he can show that his contravention of the statute was not negligent.⁹² In doing this, the courts have given effect to the need to impose stricter standards of care and circumspection.

Negligence may be the fault element of a statutory offence even though negligence as such is not the gist of the offence created by the enactment. The question whether the legislature intended negligence to constitute the fault element of a particular offence will depend on the foresight or care which the statute in the circumstances demands.⁹³

Negligence as a form of fault provides a useful middle course between intention-based liability and the rigid strict liability criterion. In order to determine whether the legislature contemplated negligence as the fault element of an offence, the following factors must be considered: a) the language of the enactment; b) the scope and object of the enactment; c) the ease with which liability may be evaded if intention instead of negligence is required; d) the punishment prescribed and e) reasonableness of assuming that culpability is not required.⁹⁴

iii) Feasibility of punishing negligence

Whether negligence should be punished or not is still very much a moot issue amongst writers. Some writers are of the opinion that only conscious negligence⁹⁵ should be punished. If negligence is unconscious then it is not deserving of punishment.⁹⁶ It is also contended that to punish unconscious negligence does not encourage people to be more careful, since the person gives no thought to his actions, and thus the deterrent theory of punishment is not satisfied.⁹⁷

⁹² *R v H* 1944 AD 121 at 130; *Federated Meat Industries Ltd* 1949 (2) SA 795 (N) 797.

⁹³ *Arenstein* 1964 (1) SA 361 (A) at 366.

⁹⁴ A discussion of these considerations is not required here. See Snyman *op cit* (n 1) 232 – 233.

⁹⁵ *supra*

⁹⁶ Since it is not morally blameworthy.

⁹⁷ Morkel 1986 *JJS* 84; JC Smith and Brian Hogan *Criminal Law*, 7th ed 1992, 96-98.

I agree with Snyman⁹⁸ in saying that negligent conduct, whether conscious or unconscious, should be punished. The punishment of negligent conduct puts people on their guard. This is particularly important in today's technological era, which involves partaking in many potentially dangerous activities (for example driving a car, flying a plane or handling a firearm). These activities all require a certain minimum degree of care and circumspection.

With regard to negligent assault, everybody also has a constitutional right to his or her physical integrity.⁹⁹ Therefore, a person who undertakes an activity, which involves the risk of injuring another person, should be held to even a higher standard of care and circumspection in the light of the new constitutional dispensation.

⁹⁸ *op cit* (n 1) at 194.

⁹⁹ See *supra* (n 7).

3) WHEN IS CONDUCT DESERVING OF CRIMINAL SANCTION?

To criminalise or not? This has become an important question in the legal world. Criminal sanction has become a popular method of social control. According to Burchell and Milton¹⁰⁰ the function of criminal law is to coerce members of society, through the threat of pain and suffering, to abstain from conduct, which is harmful to various interests of society. Its object is to promote the welfare of society and its members by establishing and maintaining public peace and order. However, not all conduct, which may be harmful to society, may be criminalised. The law has to strike a delicate balance between effective criminalisation and overcriminalisation. When criminalising conduct, one needs to distinguish between two types of crimes:

- i) Common law crimes: Certain crimes in our law have existed since earliest times.¹⁰¹ These crimes are known as common law crimes and exist as part of our criminal law simply due to the fact that they appear as crimes in the sources of South African common law. In the past judges¹⁰² “invented” new common law crimes by simply pronouncing that they existed. This practice was welcomed at that stage, due to the fact that there was no other effective way to meet the needs of the rapidly changing times.¹⁰³

¹⁰⁰ Op cit (n 1).

¹⁰¹ for e.g. murder, assault, perjury, theft.

¹⁰² Who were the interpreters and expanders of the common.

¹⁰³ See Glanville Williams *Criminal Law: The General Part 2nd ed* 592.

However, today we do have effective means to create new laws. Parliament has the duty to create new crimes, and thus it is no longer the function of the judges to extend or create new common law.

- ii) Statutory Crimes: In modern parliamentary democracies, law-making power rests in the legislature. Due to the fact that the list of common law crimes is now closed, the only way that new laws can be created is by an enactment of 'the legislature'.¹⁰⁴ Since the democratically elected legislature expresses the will of the majority of the people, it follows that the legislature in creating new crimes closely reflects the attitudes and values of the people. It would therefore appear, that the only way in which negligent assault can be criminalised, is by means of legislative enactment.

If the purpose of criminal law is to prevent people from committing acts which are harmful to society interests,¹⁰⁵ then it would appear a simple solution to the problem, to criminalise all conduct which unlawfully¹⁰⁶ cause harm to another. In modern western democracies, the wide range of interests that are considered worthy of protection through criminal sanction, has led to a massive increase in the number of crimes that have been created.

¹⁰⁴ All legislation passed by parliament must however be compatible with the constitution and in particular the Bill of Rights. Any legislation that is found to be unconstitutional will be declared invalid by the Constitutional court.

¹⁰⁵ See *supra*

¹⁰⁶ For an explanation of the concept of unlawfulness see *supra* n 28.

Criminalising conduct has many implications, over and above the fact that the person committing the prohibited act is punished.¹⁰⁷ All the consequences of criminalising a particular form of conduct must be considered before such decision is taken. It has been argued that many western democracies have over-utilised criminal sanctions and that some societies face a 'crisis of overcriminalisation'.¹⁰⁸

It would therefore appear, that before jumping in headfirst and criminalising a particular form of conduct to achieve social goals, the lawmaker should carefully consider whether or not to invoke the criminal sanction. Packer¹⁰⁹ suggests the following criteria, that could act as guidelines to the lawmaker.

- “1) The conduct is prominent and in most people’s view, threatening behaviour.
- 2) Subjecting it to punishment is not inconsistent with the goals of punishment.
- 3) Suppressing it will not inhibit socially desirable conduct.
- 4) It may be dealt with through even-handed and non-discriminating enforcement.
- 5) Controlling it through criminal sanction will not expose that process to severe qualitative or quantitative strains.
- 6) There are no reasonable alternatives to criminal sanction for dealing with it.”

Thus, seen in these terms, the question whether or not to attach criminal sanction to a particular type of conduct, involves a balancing of interests - on the one hand the

¹⁰⁷ Firstly, it has a social cost, in that the person gets a 'criminal record' and as a result, gets burdened forever. Secondly, the economic cost of maintaining and operating the criminal justice system. The more crimes are created, the bigger and more expensive the infrastructure needs to be.

¹⁰⁸ See Burchell and Milton op cit (n 1) 32. Decriminalisation Act of South Africa 107 of 1991.

¹⁰⁹ H L Packer *The Limits of the Criminal Sanction* (1969) 270.

social gains from successful reduction of the conduct in question,¹¹⁰ and on the other, the social, human and financial costs of invoking the criminal sanction. Only once it is clear that the benefits or advantages of invoking criminal sanction outweigh the negative consequences referred to above, should the lawmaker criminalise such conduct.¹¹¹

C. BENEFITS OF PUNISHING NEGLIGENT ASSAULT

In the view of the above, the next question to be answered is whether 'negligent assault' is deserving of criminal sanction. In trying to answer this question, I am going to first discuss the reasons favouring the imposition of criminal sanction, and then I will discuss the criticisms of imposing criminal sanction for negligent assault

A) NEGLIGENT INJURY WITH A FIREARM

The issue of negligent injury with a firearm is not a new one. It has been debated in South African legal circles for many years. In 1956, the Minister of Justice asked the Law Revision Committee to consider it.

¹¹⁰ Packer *op cit* (n 108) 270.

¹¹¹ M A Rabie 'Criteria for the Identification and Creation of Crimes' 1977 *SACC* 93.

The Committee however, did not find in favour of the proposed law reform. The issue was again raised in 1967 in the judgement of *Ex Parte Minister of Justice In Re S v van Wyk*.¹¹² In 1972, the Law Revision Committee again considered the matter, and again the Committee decided not to propose legislation. In 1977, the Wyethe proposals were published.¹¹³ This was then followed by similar proposals by Mr. J v R Pietersen, who in his arguments referred to the increase in prosecutions relating to the discharge of firearms and to the fact that in prosecutions involving injury with a firearm, intention was often very difficult to prove.¹¹⁴ Pietersen felt that people were allowing themselves to become too 'trigger-happy', and that this should be prevented.

In the article written by Wyethe,¹¹⁵ he lists the various common law crimes covering the shooting of a person, viz. a) murder and culpable homicide (if death resulted); b) attempted murder, assault with intent to do grievous bodily harm and common assault.

For all the crimes (with the exception of culpable homicide), proof of subjective *intention* was required.

Wyethe points out that where a person has negligently injured another person with a firearm, the only offence which he can be convicted of is the statutory offence contained in s 39 (1) (i) of the Arms and Ammunition Act 75 of 1969 (as amended), which penalises a person who "willfully points any arm, air rifle or air revolver at any other person".

¹¹² 1967 (1) SA 488 (A).

¹¹³ C F Wyethe "Negligent Injuring of a Person by Means of a Firearm" 1977 *The Magistrate* 66-68.

¹¹⁴ J v R Pietersen "Sneller-beheptheid en die miskennig van *dolus eventualis*" 1977 *The Magistrate* 148-150.

¹¹⁵ Op cit (n 113) at 66.

This provision however, is only concerned with the *intentional* pointing of a firearm at another person, and not with the negligent injury caused to such person as a result of a shot that was fired.¹¹⁶

Wyethe, like Pietersen, emphasises the difficulty that is often experienced in establishing proof of intention beyond reasonable doubt. The dividing line between murder (with *dolus eventualis*)¹¹⁷ and culpable homicide (with negligence) is rather thin. This difficulty is apparent if one considers the case of *Du Preez*,¹¹⁸ where the accused's conviction for murder was altered to culpable homicide on appeal, due to the fact that intention in the form of *dolus eventualis* had not been proven beyond reasonable doubt. The facts of the case are as follows: The accused, (who had taken his wife and his son for a picnic) fired a warning shot in front of two men who had behaved in an insulting manner toward his wife, as a method of scaring them off. The insulting behaviour continued and the accused then fired more shots about two or three feet above the mens' heads. The final shot hit one of the men in the head and killed him. The accused was at all times aiming to miss and never reconciled himself to the possibility of hitting the deceased due to the fact that he was confident in his skill as a marksman.¹¹⁹ The accused in this case was convicted of culpable homicide and sentenced to 4 years imprisonment.

¹¹⁶ The injury to the person is really the crux of what the legislature needs to prohibit.

¹¹⁷ See *supra* for the discussion of *dolus eventualis*.

¹¹⁸ 1972 (4) SA 877 (A) 879 C.

¹¹⁹ This is then clearly a case of conscious negligence and not *dolus eventualis*, as the accused never reconciled himself to the possibility of the hitting the deceased.

If the deceased was however not killed by the bullet, but merely injured, then the accused would have escaped liability. The mere fact that the deceased was killed by the bullet, and not merely injured, is determined by a *moment of chance*. It seems ludicrous that the same act can, on the one hand result in criminal liability if the person dies, but on the other hand result in no liability if, due to sheer luck the person is merely injured (to whatever degree).

A similar situation arose in *Steenkamp*¹²⁰, which demonstrates the inequity that flows from the absence of a crime of negligently causing bodily injury in our law. In this case the accused was found to have acted negligently in not adopting reasonable precautions to ensure that an alleged warning shot fired at the complainant who was attempting to escape lawful arrest would not hit him. Milne J, in setting aside a conviction for assault, said (at 684)

"had the complainant died in consequence of the wound inflicted by the bullet, the appellant could have been properly found guilty of culpable homicide . . . But where some injury not resulting in death is done to another in consequence of an act which is merely negligent and is not made criminally punishable by statute . . . a criminal offence is not committed . . ."

It would appear from this dictum that the determinant of criminal liability in cases of 'negligent assault' is the consequence which flows from the negligent conduct, thus

¹²⁰ *Supra* (n 4) at 684.

where death results, the perpetrator is criminally liable,¹²¹ but where severe injury, just short of death, results from identical conduct, the perpetrator would not be criminally actionable.

*Horn*¹²² is another case, which demonstrates the possible inequity that may arise due to the fact that there is no crime of negligent assault. In this case, the appellant, an overseer on a farm, found the deceased stealing pig melons from the lands. In an attempt to prevent the deceased from escaping, he fired a shot "just to frighten her", intending to fire a few paces to the right. The bullet, however, stuck and killed the deceased. The trial court found that the appellant had intention in the form of *dolus eventualis*.¹²³ On appeal however, the court found that the presence of *dolus eventualis* had not been proven beyond reasonable doubt. The court of appeal did however find that the appellant was negligent, and therefore guilty of culpable homicide. If however the deceased had not been killed by the shot, but merely injured to the extent that she was left lying at death's door, and permanently handicapped, the trial court, in finding that the accused had intention, would no doubt have convicted the accused of assault. However, the Appellate Division, in finding that the appellant had only acted negligently and not intentionally, would have had no choice but to find that the appellant was not guilty of any crime whatsoever. The fact that the deceased died in this case was totally dependent on chance. The *same act* by the appellant could just have easily left her ~~alive, but severely injured.~~

¹²¹ He can be found guilty of culpable homicide.

¹²² 1958 (3) SA 457 (A).

¹²³ i.e. that he foresaw the possibility that the shot might in fact hit and kill the deceased, but he reconciled himself to such possibility.

Allowing the appellant to escape criminal liability in such circumstances would surely be a failure of justice.

It is in view of the above untenable situation, that Wyethe proposes that it would be “in the interests of society, and therefore, completely justified” if a statutory enactment penalising the unlawful, negligent injuring of a person by means of a firearm was created.¹²⁴ He formulates his proposed statutory enactment as follows: “Any person discharging a firearm recklessly or *negligently* and thereby injuring a person or endangering the life of a person or damaging property other than his own property, shall be guilty of an offence”¹²⁵

B) MISTAKE¹²⁶

In order to be convicted of assault in present South African law, the state has to prove¹²⁷ that the accused acted with intention.¹²⁸ The accused’s intention must relate to all the elements of the crime, including the act, all the circumstances set out in the definition of proscription, and unlawfulness.¹²⁹ The accused must be aware of all these factors. If he is not, then it cannot be said that he intended to commit the crime. This is known as a ‘mistake’ or ‘error’.

¹²⁴ Wyethe op cit (n 113) at 67.

¹²⁵ Op cit (n 113) 68.

¹²⁶ Mistake in this context refers to a mistake of fact, and not a mistake (or ignorance) of law.

¹²⁷ Beyond a reasonable doubt.

¹²⁸ Of whatever form. See *supra*.

¹²⁹ Snyman op cit (n.1) 176.

There are two types of mistakes that are relevant to this discussion.

i) Mistake relating to circumstances set out in the definition of the proscription¹³⁰

An example of this type of mistake is the following. X, while hunting at dusk, sees a figure in the distance, which he believes is a buck. He aims and shoots at the figure. On closer examination of his prey, he notices that the 'buck' which he shot is in actual fact a human being. In this regard, he has made a mistake with regard to the definition of proscription of murder, which is, killing of a human being.

Provided X's mistake was a material one,¹³¹ he could not be found guilty of murder, due to the fact that his mistake nullified his intention. Due to the fact that the test for intention is completely subjective,¹³² X's mistake need not be reasonable.¹³³ X can therefore not be found guilty of murder if he made a material mistake, even if such mistake is totally unreasonable. However, it will not necessarily follow that X will not be convicted of anything. Although his mistake excludes his intention, the circumstances may well be such that he was negligent. X would have acted negligently if a reasonable person in the same circumstances would have foreseen that the figure he was aiming at was not a buck, but in fact a human being. If the court finds that X had acted unlike a reasonable person in the circumstances, then he will be convicted of culpable homicide.

¹³⁰ The definition of proscription signifies the concise description of the requirements set by the law for liability for a specific type of crime.

It does not refer to the 'general requirements' applying to all crimes, e.g. voluntary act, unlawfulness etc., but the particular requirements applying only to a certain type of crime.

¹³¹ A mistake will be material if it relates to all the elements of the offence referred to above. In this example, X's mistake would not be material if he aimed at a figure which he believed to be a human, but on closer examination, the person he shot was not the human he had in mind, but another person unknown to x. The definition of proscription for murder is, the killing of a human being, and not the killing of a specific human being.

¹³² *Malinga, Mini supra* (n 46) 694, 192.

¹³³ *Modise* 1966 (4) SA 680 (GW); *Sam* 1980 (4) SA 289 (T).

It is at this point that the lack of a crime of negligent assault may result in a *lacuna* in the law. Let us consider the following situation. In the same example given above, let us assume that X's mistake in subjectively believing that he was shooting a buck was totally unreasonable. On an examination of the facts, the court comes to the conclusion that X had been grossly negligent in shooting at the figure in question. If the bullet had killed the person whom X had negligently mistaken for a buck, X would almost certainly been convicted of culpable homicide. If however, the bullet fired by X, in exactly the same circumstances, had not killed the person in question, but severely injured him to the extent that he was left permanently handicapped, then the court would have no option but to find that X is not guilty of any crime.

C) ABERRATIO ICTUS SITUATIONS

Aberratio ictus means the going astray of the blow.¹³⁴ It is not a form of mistake. X pictures what he is aiming at correctly, but through a lack of skill, clumsiness or other factors he misses what he is aiming at and hits somebody or something else.

Originally, our courts¹³⁵ applied the transferred intent approach to *aberratio ictus* situations. In terms of this approach, X's intention in respect of the person at whom the shot was aimed, is transferred to the person who was eventually struck. This would be the case even where X in no way foresaw the possibility of the shot striking such other person. The transferred intent approach was however later rejected in favour of the concrete intent approach.

¹³⁴ Snyman op cit (n 1) 181.

¹³⁵ *Kuzwayo* 1949 (3) SA 761 (A); *Koza* 1949 (4) SA 555 (A).

This latter approach was more in line with the subjective nature of intention¹³⁶ and the rejection of *versari in re illicita* doctrine.¹³⁷ In *Mtshiza*¹³⁸, Holmes JA held that *aberratio ictus* situations should be judged as follows:

- a) X will normally always be guilty of attempted murder in respect of the person which he wished to, but did not kill.
- b) As far as X's liability in respect of the person actually struck by the blow (Z) is concerned, there are three possibilities:
 - i) If he had foreseen that Z could be struck by the blow, and had reconciled himself to this possibility, he had *dolus eventualis* in respect of Z's death and is guilty of murder in respect of Z.
 - ii) If he had not foreseen the possibility that his blow might strike Z¹³⁹, or if he had foreseen such a possibility, but had not reconciled himself to this possibility¹⁴⁰, he lacked *dolus eventualis* and can therefore not be guilty of murder. This does not necessarily mean that, as far as Z's death is concerned, he has not committed any crime. If the evidence reveals that he had caused Z's death negligently, he is guilty of culpable homicide.
 - iii) If it is established that there was neither intention¹⁴¹ nor negligence on his part, then he will not be guilty of any crime in respect of Z's death.

The above method of dealing with *aberratio ictus* situations¹⁴², adequately meets the needs of a factual situation in which the shot that went awry kills the innocent victim.

However, it offers no solution to the following set of facts.

¹³⁶ *Supra* (n46).

¹³⁷ *Bernardus* 1965 (3) SA 287 (A).

¹³⁸ 1970 (3) SA 747 (A).

¹³⁹ This would be a case of unconscious negligence.

¹⁴⁰ This would be a case of conscious negligence.

X intends to kill his archenemy Y, by shooting him. X goes to Y's house and shoots at him through an open window. Just at that point, Y's six year old child (Z) runs past the window and the bullet hits the child in the head. If the bullet killed Z, then the method described above would offer a solution. What if, however, the bullet merely left Z in a state of invalidism? If the court finds that X in no way foresaw the possibility of Z running in the line of fire, or if he did foresee it, he did not reconcile himself to such foresight, the court can then not convict X of murdering Z, as X did not subjectively have the required intention. The court will then have no choice but to find X not guilty of any crime in respect of Y. This will be the case even if the court finds that x was grossly negligent in shooting Z.¹⁴³

Once again, the inequity of not punishing negligent assault, is apparent. If Z had died as a result of the negligent shot fired by X, then X would have been convicted of culpable homicide. However, a serious, near death injury resulting from the same negligent act, goes unpunished.

¹⁴¹ In these instances the form of intention mostly found is *dolus eventualis*.

¹⁴² Which was confirmed in: *Tissen* 1979 (4) SA 293 (T) at 135 and *Mavhungu* 1981 (1) SA 56 (A) at 137.

¹⁴³ In that, as a reasonable person he should have foreseen the possibility that Z might be hit by the shot, and did not take any steps to prevent such possibility.

D) EXCEEDING THE BOUNDS OF PRIVATE DEFENCE

A person acts in private defence¹⁴⁴, and his act is therefore lawful, if he uses force to repel an unlawful attack, provided his defensive act is necessary to protect the interest threatened and is not more harmful than necessary to ward off the attack.

If the attacked party exceeds the limits of private defence, by for example, causing more harm to the attacker than is justified by the attack, then he himself acts unlawfully.¹⁴⁵

The next question for the court to answer, is whether or not the person who exceeds the bounds of defence, has the required culpability for a conviction of murder or culpable homicide.¹⁴⁶ If X (the person who was originally attacked) is aware of the fact that he is exceeding the bounds of private defence, he is then acting with knowledge of unlawfulness, and therefore intentionally. He would also be acting with intention if he subjectively foresees the possibility that he may be exceeding the bounds of private defence, and he then reconciles himself to this possibility.

In these circumstances, X could be convicted of murder.¹⁴⁷ If however, intention is absent, X may nevertheless be convicted of culpable homicide if he ought to have reasonably foreseen that he might be exceeding the bounds of private defence and that he might kill the aggressor. He is then negligent in respect of the death.¹⁴⁸

If however, X, in the course of exceeding the limits of private defence, does not kill the original aggressor, but merely injures him, there are only two possibilities - either he will

¹⁴⁴ The words 'private defence' is to be preferred to 'self defence'. The reason for this is that the interests that can be protected by acting in private defence are not restricted to the person acting in defence. Any legally recognised interest (even that of another person) may be protected in 'private defence'. See Snyman op cit (n 1) 99.

¹⁴⁵ I.e. he becomes the attacker himself.

¹⁴⁶ Being intention or negligence respectively.

¹⁴⁷ *Ntuli* 1975 (1) SA 429 (A).

¹⁴⁸ *Ngomane* 1979 (3) SA 859 (A) 863.

be guilty of assault (if the required intention is present) or he will not be guilty of any crime (if negligence was present).¹⁴⁹

Again, we can see the untenable situation which arises. If X negligently exceeds the bounds of defence, and in the process kills the original aggressor, he will be guilty of culpable homicide. If however, X, with the same blameworthy act, severely injures the original aggressor in a negligent manner, he will then escape criminal liability entirely.

E) VOLUNTARY INTOXICATION

After the decision in *Chrieten*¹⁵⁰, an accused who committed a crime while intoxicated, was allowed a complete defence. If the accused's intoxication resulted in him being unable to form an intention, not having criminal capacity or being unable to perform a voluntary act, then he could be acquitted on the charge for which intention was the required form of *mens rea*. This decision was severely criticised in various quarters, as it resulted in a socially unacceptable situation where a sober person is punished for criminal conduct, whereas the same conduct committed by a drunken person is pardoned, merely because he was drunk.

This criticism resulted in legislation being passed in 1988, which was clearly aimed at preventing a drunken person from escaping liability in such cases. Section 1 of the Criminal Law Amendment Act 1 of 1988 changed the position under *Chrieten*¹⁵¹. The effect of the Act is that a person who is so intoxicated at the time of the commission of

¹⁴⁹ In practice, most cases of exceeding the bounds of private defence will not involve intention, but mostly negligence. The attacked person normally retaliates and 'intends' (in the form of direction of will) to put the aggressor out of action. However the second leg of intention (knowledge of unlawfulness) will usually not be present. In such a case, the court could then find that the attacked person should have known he was acting unlawfully, and that he was therefore negligent.

¹⁵⁰ 1981 (1) SA 1097 (A).

¹⁵¹ *Supra*.

the offence, that he lacks criminal capacity or the ability to perform a voluntary act¹⁵², shall be guilty of contravening the section and shall be liable for the same punishment as he would have got had he committed the crime whilst in a sober state.

The act did, however, not block all escape routes for the accused. If his intoxication only affected him to the extent that it excluded his intention¹⁵³, then he will be found not guilty in terms of the Chrieten position and in terms of Act 1 of 1988. Thus if X assaulted Y while he (X) was intoxicated to the extent that he lacked criminal capacity or the ability to act, then he would be convicted of contravening section 1 (1) of Act 1 of 1988. If however X assaults Y while he is intoxicated only to the extent that he did not have intention, then he will be acquitted. If X's assault upon Y in the latter instance resulted in Y's death, then X could still not be convicted of murder, but will be convicted of culpable homicide. Acts committed whilst by a person who is voluntarily intoxicated will be regarded by the courts as being performed negligently. The reason for this finding is to be found in the objective test for negligence. A reasonable man would not have indulged in excessive consumption of alcohol. Thus, the person's intoxication will be a pointer towards negligence. If however, X's assault upon Y merely resulted in Y being injured, the court would have to find X not guilty of any crime.¹⁵⁴

¹⁵² The act only refers to a person that lacks criminal capacity. It can however be assumed that it also refers to a person who cannot perform a voluntary act, as this would result from an even more intoxicated state.

¹⁵³ As opposed to his criminal capacity and ability to perform a voluntary act.

¹⁵⁴ This in spite of the fact that X had been negligent in indulging excessively in alcohol.

5. Critical analysis

The various scenario's discussed above clearly indicate that there is *prima facie* a need to create a crime of negligent assault. However, identifying the problem is just the tip of the iceberg. Providing a solution to the problem is often the most challenging obstacle in the way of the lawmaker. When deciding whether to criminalise conduct or not, the following considerations must be taken into account.

First, the effect that the criminalising of the conduct will have on society must be considered. Crimes are created to protect certain interests, such as human rights and collective welfare. The criminal sanction is a mechanism that coerces members of society, through the threat of punishment, to abstain from conduct which is harmful to public interests. The community is entitled to protect its interests, even sometimes at the expense of the rights of the individual¹⁵⁵. Such interests include human life, physical integrity and dignity¹⁵⁶. The criminalisation has to be justified in terms of the Constitution. No act should therefore be criminally proscribed unless its incidence, actual or potential, is substantially dangerous to society.

Our legislature has on previous occasions intervened and made criminal certain negligent acts. The National Road Traffic Act¹⁵⁷ provides that no person shall drive a vehicle on a public road recklessly or negligently¹⁵⁸. The Arms and Ammunition Act¹⁵⁹ provides that any person who discharges an arm and thereby negligently injures or endangers the life or limb of another is guilty of an offence¹⁶⁰.

¹⁵⁵ Only if the provisions of section 36 of the Constitution are complied with.

¹⁵⁶ *Supra* n 7 & 8.

¹⁵⁷ 93 of 1996.

¹⁵⁸ S 63 (1).

¹⁵⁹ 75 of 1969.

¹⁶⁰ S 39 (1).

However, the mere fact that the legislature criminalised these acts, does not necessarily imply that negligent assault can also be criminally proscribed. The effectiveness of legal threats must be based on recognition of the differences between the offences. As Andenaes puts it, "Simple common sense indicates that a threat of punishment does not play the same role in offences as different as murder, rape, tax evasion, shoplifting or illegal parking"¹⁶¹. Negligent assault is clearly not the same as negligent driving. Driving is part and parcel of everyday life. There is almost universal consensus as to what constitutes proper driving standards. Van Rooyen¹⁶² crisply summarises this point by referring to the fact that "there is a pervasive infrastructure of social control' relating to motor car driving, which together with criminal sanction, could play a meaningful role in ensuring safe passage on streets and roads".

Punishing negligent driving would therefore appear to be more acceptable from a social point of view. In contrast however, there is no generally accepted standard which applies to cases of negligent assault.

There is also the fear in many quarters that punishing negligent conduct, beyond the traditionally recognised situations, could lead to over-criminalisation. The fear is that all crimes requiring intention for a conviction, may possibly be extended to provide for negligence as a sufficient form of *mens rea*.

If, however, we consider the crime of assault, we will notice the following. Assault is a crime committed against another person's *corpus*. It results in the infringement of another's body, which does not result in death¹⁶³.

¹⁶¹ Andenaes "The General Preventive Effects of Punishment" (1966) 114 *University of Pennsylvania Law Review* 950 at 957.

¹⁶² JH van Rooyen "Negligent Injury with a Firearm: Punish or Prevent?" 1978 *SACC* 121.

¹⁶³ The act will remain assault regardless of the injury sustained.

If the infringement of the person's body is so severe that it results in the person's death, then the crime of murder is committed. In essence, both crimes involve similar acts. It is just the result which differs. Murder however, has a negligent counterpart - culpable homicide.

Any person who negligently causes the death of another person shall be guilty of a crime. Due to the fact that murder has a negligent form, it is easier to justify creating a negligent form of assault.

Secondly, foreign jurisdictions can be consulted and used as guidelines. South Africa is an open and democratic state, which has a supreme constitution. Therefore, when considering the position in foreign jurisdictions, one should constantly bear in mind that any law passed in South Africa will have to be justified in terms of our constitution. In Germany (a country which is regarded as being open and democratic, based on human dignity and equality), the Criminal Code provides that whoever causes bodily harm to another through negligence shall be punished by up to three years imprisonment or a fine¹⁶⁴. When considering German Law, it should be noted that while the test for negligence is still in principle an objective test, it involves more subjective considerations than the South African test.¹⁶⁵ Both 'conscious' and 'unconscious' negligence is recognised. Therefore, in considering German Law, the different approach to negligence should constantly be borne in mind.

¹⁶⁴ S 230 of the German Penal Code (Strafgesetzbuch). Cf American Law Institute *Model Penal Code*, which in s 211.1 sets out the offence of negligently causing bodily injury with a deadly weapon.

¹⁶⁵ CR Snyman *Criminal Law* 2nd ed (1989) at 225.

Thirdly, one must with reference to the various theories of punishment, consider the effectiveness of creating negligent assault. Punishing negligent assault may be difficult to justify in terms of the various theories of punishment, as will be explained below.

a) Negligence and general deterrence

The theory of general deterrence in its basic form relies on the deterrent effect of the threat of punishment. Rabie summarises this theory as follows:¹⁶⁶ “The idea is that man, being a rational creature, would refrain from the commission of crimes if he should know that the unpleasant consequences will follow the commission of certain acts.”

This classic utilitarian theory of punishment would appear to have a very suited application to crime, which involves the subjective form of *mens rea*, namely intention. After all, the accused subjectively and consciously directed his will towards performing a certain act which he knew was unlawful”. However, the question is to what extent it is applicable to crimes of negligence, keeping in mind that the test for negligence (save for a few exceptions)¹⁶⁷, is objective - i.e. that of an objectively reasonable man. A person who commits a negligent crime has not given any thought to the consequences of his act.

¹⁶⁶ Rabie *Theories of Punishment* (1977) at 29.

¹⁶⁷ E.g.: in the case of children and experts.

b) Negligence and retribution

Retribution can be regarded as a reflection of the community's condemnation of a crime¹⁶⁸. The community is angered by the commission of crimes and insists that they be punished. If the state fails to punish offenders, this could result in the members of the community taking the law into their own hands to avenge the crimes. Turner¹⁶⁹ contends that the only moral test on which criminal punishment should be based, is that of actual foresight of the consequences of one's conduct. This will only be the case with subjective intention.

Retribution presupposes moral guilt. An accused that directs his will towards a particular result or act, with knowledge of unlawfulness, clearly can be said to be morally guilty¹⁷⁰. However, when dealing with negligent acts, the presence of moral guilt will not always be that easy to establish. Williams, Glanville object to the application of the retributive theory of punishment to negligent conduct. They state:¹⁷¹

“Some people are born reckless, clumsy, thoughtless, inattentive, irresponsible, with a bad memory and a ‘slow reaction time’. With the best will in the world, we all of us at some times in our lives make negligent mistakes. It is hard to see how justice requires mistakes to be punished”.

Likewise, Hall¹⁷² argues in favour of a policy that *actual culpability*, not the objective standard of the “reasonable man”, should be the only test for penal liability.

¹⁶⁸ “Emphatic denunciation by the community of the crime”, according to Lord Denning in his evidence before the Royal British Commission on Capital Punishment (1953) 18.

¹⁶⁹ Radzinowitz and Turner *The Modern Approach to Criminal Law* (1948) 207.

¹⁷⁰ Provided of course, all the other elements of criminal liability are satisfied.

¹⁷¹ Glanville Williams *supra* n 103 122.

¹⁷² *General Principles of Criminal Law* 2nd ed (1960) 139.

He states that the requirement of a subjective *mens rea* (i.e. intention in its various forms), as opposed to an objective standard as in negligence, "represents not only the perennial view of moral culpability, but also the plain man's morality".¹⁷³ He therefore rejects negligence as a basis for criminal liability, on the basis of the retributive principle.

6. CONCLUSION

Providing a solution to a given problem is not always as simple as it seems. However, identifying the problem is always a step in the right direction. It is evident from the above that there is a need for the existence of the crime of negligent assault. As already indicated, various factors must be taken into account before such decision to criminalise can be taken. Only if the social benefits of criminalising the conduct outweigh the negative implications of not criminalising the conduct, should the lawmaker intervene.

It is my submission, that despite these difficulties, the legislature should intervene and criminally proscribe negligent assault. South African *mores* have been sculpted by the introduction of our supreme Constitution, which *inter alia* protects our rights to our physical integrity and dignity. These fundamental human rights have now been accorded even higher status than before. The legislature would therefore, in my opinion, not err if it were to extend the protection given to a person's physical integrity and dignity even further, by creating the crime of negligent assault.

¹⁷³ *Ibid.*

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*The legal journals are abbreviated as follows:

SALJ -- South African Law Journal

SACC -- South African Journal of Criminal Law and Criminology

JJS -- Journal for Juridical Science

THRHR -- Tydskrif vir Hedendaagse Romeins-Hollandse Reg

SACJ -- South African Journal of Criminal Justice

SAJHR -- South African Journal of Human Rights

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