

**THE INTERPRETATION AND APPLICATION OF *DOLUS*  
*EVENTUALIS* IN SOUTH AFRICAN CRIMINAL LAW**

by

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## DECLARATION

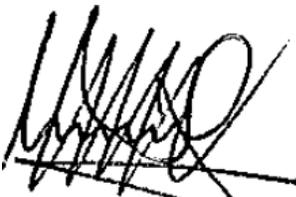
This research is submitted in accordance with the requirements for the degree of Doctor of Laws (LLD) in the subject Criminal and Procedural Law at the University of South Africa.

I declare that **THE INTERPRETATION AND APPLICATION OF THE CONCEPT OF *DOLUS EVENTUALIS* IN SOUTH AFRICAN CRIMINAL LAW** is my own work, and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

Signature: .



Linus Tambu Awa

Date: 5 November 2020

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## DEDICATION

This research is dedicated to my beloved parents; Mr Tambu Moses Dewa and Mrs Tambu Anastasia Anchi for their love and all the contribution and sacrifices they made to my life and education.

This research is also dedicated to my beloved wife Awa Ernestine Ngeh for her love, care and support.

To my twins

***Ethan & Elliott***

## SUMMARY

An accused cannot be held criminally liable by a court until he is considered to be culpable, a process which entails establishing criminal capacity and intention (*dolus*) or negligence (*culpa*). Determining a perpetrator's necessary intent in the form of *dolus eventualis* has proved to be a predicament in South African jurisprudence. This type of intent occurs when a person does not aim to cause the unlawful act, however, he subjectively foresees the likelihood that in pursuing with his conduct, the unlawful result will possibly happen, and he reconciles himself to this possibility. The problem with this form of intention, especially where the death of another is caused recklessly, is, amongst others, reservations as to whether the perpetrator's foresight was of a real, reasonable or a remote possibility.

This research examines the imperatives and rationale for preceding and current interpretations and applications of *dolus eventualis* and associate concepts in South African as well as in selected foreign legal frameworks in order to provide a comprehensive perspective on the subject. In this regard, the study challenges conflicting judgments on the application of *dolus eventualis* in domestic courts, especially as regards homicide- and putative private defence cases, amongst others. It is evidenced that in case law concerning *dolus eventualis*, legal rules were not properly articulated when determining this type of criminal intent. In this investigation, the legislative framework applicable to *dolus eventualis* under international law is also critically evaluated with the aim of facilitating the comprehension of this element in South African law.

As the concept of *dolus eventualis* is an indispensable concept in South African criminal law, recommendations are proposed on the application and interpretation of *dolus eventualis* suitable to the South African landscape, which includes possible law reform.

**KEY WORDS:** *actus reus*, *culpa*, culpability, doctrine of common purpose, *dolus*, *dolus directus*, *dolus eventualis*, *dolus indirectus*, foresight, *mens rea*, recklessness

## KEY WORDS

**Actus reus:** A criminal act, the required conduct to qualify as a crime. The important elements of the *actus reus* are that “the conduct be that of a human being, the conduct must be voluntary, and the conduct must be unlawful”.<sup>1</sup>

**Culpa:** Negligence. An unintentional criminal conduct. A gross deviation from the standard of care that is required of a reasonable person who should be aware of a risk but failed to avoid it from happening.

**Culpability:** Fault. It entails that, in the eyes of law, a perpetrator is personally blameworthy for the unlawful conduct. Culpability may either be in the form of intention (*dolus*) or negligence (*culpa*).<sup>2</sup>

**Doctrine of common purpose:** This is a legal rule stating that if two or more individuals resolve to commit a criminal act, each of them will be liable for that specific *actus reus* (which falls within their common aim) committed by one of their group members.<sup>3</sup>

**Dolus:** Intent or intention. Intention entails a wilful criminal act.

**Dolus directus:** Direct intent or actual intention.<sup>4</sup> The result of an unlawful conduct were both predicted and desired by the actor.

**Dolus eventualis:** Recklessness or legal intention. The perpetrator does not intend to cause the unlawful result,<sup>5</sup> but he subjectively foresees the likelihood that in pursuing his main goal, the unlawful result may occur, but that notwithstanding, reconciles himself to this possibility.<sup>6</sup>

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<sup>1</sup> Kemp *Criminal law in South Africa* 30.

<sup>2</sup> Snyman *Criminal law* 145.

<sup>3</sup> Burchell *Principles of criminal law* 467.

<sup>4</sup> Kemp *Criminal law in South Africa* 184.

<sup>5</sup> Burchell *Principles of criminal law* 347.

<sup>6</sup> *S v Makgatho* 2013 (2) SACR 13 (SCA) para [9].

***Dolus indirectus***: (Indirect intent). The perpetrator foresaw the unlawful result of a criminal conduct, but not necessarily wanted by the offender.

**Foresight**: Foresight is considered as knowledge of unlawfulness as an element of *dolus*.

***Mens rea***: Fault, capacity or knowledge. Knowledge is the consciousness that a circumstance exists, or that a result will ensue in the normal course of events.

## GLOSSARY OF ACRONYMS AND ABBREVIATIONS

AD	:	Appellate Division
AC	:	Appeal Court
AJA	:	Acting Judge of Appeal
AMT	:	American Military Tribunal
CA	:	Court of Appeal
CPA	:	Criminal Procedure Act
DPP	:	Director of Public Prosecutions
DDTA	:	Drugs and Drug Trafficking Act
FICA	:	Financial Intelligence Centre Act
HC	:	High Court
HRW	:	Human Rights Watch
ICC	:	International Criminal Court
ICJ	:	International Court of Justice
ICTY	:	International Criminal Tribunal for former Yugoslavia
ICTR	:	International Criminal Tribunal for Rwanda
ILC	:	International Law Commission
IMT	:	International Military Tribunal
J	:	Judge
JA	:	Judge of Appeal
MPC	:	Model Penal Code
NRTA	:	National Road Traffic Act

OHCHR	:	Office of the United Nations High Commissioner for Human Rights
PCCAA	:	Prevention and Combating of Corrupt Activities Act 12 of 2004
PTC	:	Pre-Trial Chamber
Res	:	Resolution
SA	:	South Africa
SALRC	:	South African Law Reform Commission
SCA	:	Supreme Court of Appeal
TPC	:	Transkeian Penal Code
UDHR	:	Universal Declaration of Human Rights
UK	:	United Kingdom
UN	:	United Nations
UNGA	:	United Nation General Assembly
US	:	United States of America
UNODC	:	United Nations Office on Drugs and Crime

# CHAPTER ONE

## INTRODUCTION

### 1.1 Background information

An accused cannot be held criminally liable by a court until he<sup>1</sup> is considered to be culpable. This is expressed in an indispensable principle of criminal justice in that a person will not be considered criminally liable unless there are grounds upon which the person may be blamed personally for his action - expressed in the maxim *actus non facit reum, nisi mens sit rea*.<sup>2</sup>

Culpability entails criminal capacity<sup>3</sup> and intention (*dolus*) or negligence (*culpa*). This implies that if an accused had capacity when he committed the unlawful act, there still needs to be an investigation whether he lacked or had the necessary intent, or whether he was negligent. Under South African criminal law, intention is required for all common-law crimes,<sup>4</sup> while statutory crimes involve either intent or negligence. Further, an accused may either have direct intent, indirect intent or *dolus eventualis*. It will be evidenced in this research that it is especially in interpreting and applying the concept of *dolus eventualis* in homicide cases that South African courts have experienced difficulties with in the past. It is therefore necessary to investigate how the courts interpret and apply the requirements of *dolus eventualis* in order to hold X<sup>5</sup> criminally responsible for crimes, such as murder.

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<sup>1</sup> This study will make use of the masculine form when denoting a perpetrator, but all genders should be here inferred. The feminine gender is utilised only in reporting case law concerning female court participants.

<sup>2</sup> Burchell *Principles of criminal law* 341.

<sup>3</sup> Certain writers such as Snyman *Criminal law* 155 favour the term 'criminal capacity' to describe the second element of culpability. Burchell *Principles of criminal law* 341, however, utilises the term 'fault' or '*mens rea*' (lit meaning 'guilty mind') to describe capacity. As Burchell explains, although the term *mens rea* is preferred by courts and the legal profession, the word 'fault' describes the element better. Similarly, Snyman argues that 'criminal capacity' is a sounder option than *mens rea*. This study will make use of both these terms interchangeably.

<sup>4</sup> The only two common-law crimes that do not require intention are culpable homicide and the crime of contempt of court when it is committed by an editor of a newspaper. See Burchell *Principles of criminal law* 341.

<sup>5</sup> In this study, the letter 'X' denotes the perpetrator, while 'Y' represents the victim.

*Dolus eventualis* is an essential concept in South African criminal law. This type of intent occurs when a perpetrator does not aim to cause the unlawful act,<sup>6</sup> however, he subjectively foresees the likelihood that in pursuing with his conduct, the unlawful result will possibly happen, and he reconciles himself to this possibility.<sup>7</sup> In other words, this is when the perpetrator foreknows that his conduct may lead to an unlawful result; yet he still persists with that conduct. The problem with this form of intention where the death of another is caused recklessly is uncertainties as to whether the perpetrator's foresight was of a real or remote possibility.<sup>8</sup> Further reservations as regards *dolus eventualis* also exist – if such instances are found not to be homicide, will they qualify as culpable homicide, and will the required culpability then be merely negligence or gross negligence? Does conscious or unconscious negligence play a role in this regard?

The question is further not only whether X foresaw that he may kill Y or not, and decided to acquiesce himself thereto, but whether X, in the course of his actions knew that he was acting unlawfully. This is especially important in cases of putative private defence. Unlawfulness must be determined before the query of culpability is settled. It is thus also necessary to analyse and evaluate how *dolus eventualis* is interpreted and applied in private defence cases.

Considering the fast evolving nature of modern society with ever-new complex crimes transpiring, it is important to evaluate the applicable requirements of *dolus eventualis* as to various types of crimes, and investigate whether the interpretation and application of this mental element as applied in South African case law is consistent and still adheres to its continental origin.

Even though *dolus eventualis* is an important requirement which is well recognised in South African criminal law, there still exist within this concept a number of aspects that require clarity - for example, the afore-mentioned cognitive aspect of *dolus*, the requirement that the defendant foresees that death, for example, will ensue for his actions.

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<sup>6</sup> Burchell *Principles of criminal law* 351.

<sup>7</sup> *Makgatho* para [9]. Also see Steyn [http://www.enca.com/opinion/\\_oscar-pistorius-what-essential-missing-link%E2%80%99-dolus-eventualis](http://www.enca.com/opinion/_oscar-pistorius-what-essential-missing-link%E2%80%99-dolus-eventualis) (Date of use: 20 September 2019).

<sup>8</sup> Burchell *Principles of criminal law* 342. This would, e.g., be the distinction between first and second degree murder in US law.

## 1.2 Research problem

It is certain that the legal doctrine of fault (or criminal capacity) has never satisfactorily been dealt with by South African courts.<sup>9</sup> There are still so many disparities and predicaments as regards the interpretation and application of *dolus eventualis*, especially by the courts. In this regard, the study intends to challenge conflicting judgments on the application of *dolus eventualis* in domestic courts, especially as regards homicide- and putative private defence cases, amongst others. It will be seen that in previous case law concerning *dolus eventualis*, legal rules were not properly articulated when determining this type of criminal intent. Due consideration will be given to the fact that in some cases where X causes death in the course of driving, a murder conviction is obtained, while in other similar cases, the verdict is culpable homicide. It will be interesting to consider how *dolus eventualis* is interpreted and applied in such circumstances since the concept is central to these convictions. Therefore, it is expected that on completion of this study, clarity will be provided on whether fault consists of more than just X's state of mind at the particular time of his conduct.

Considering the conflicting judgments under putative private defence and private defence, as will be illustrated in Chapter five, this research will ascertain whether any link exists between these two different defences. Certain private defence cases involving death have been considered by the courts as culpable homicide, while other courts may judge a similar situation to be murder, for example. In order to determine knowledge, the elements that distinguish criminal intent from negligence need to be investigated. The study will, as such, illuminate the various features that distinguish *dolus eventualis* from other forms of intention such as *dolus directus* - the fact that X takes a foreseen result into the bargain upon proceeding with his conduct, and *dolus indirectus*, where the accused was not aiming to achieve the unlawful result but was aware that the result may necessarily follow.<sup>10</sup>

Although there are available academic literatures on *dolus eventualis*, and courts have rendered judgments based on this kind of intent, there has not been any

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<sup>9</sup> Hoctor 2013b SACJ 131.

<sup>10</sup> Hoctor 2013a SACJ 75.

comprehensive research that illuminates how *dolus eventualis* should be interpreted and applied in criminal cases. This explains why various different high courts and appeal courts may end up rendering conflicting decisions. Consider the High Court's decision in the *Pistorius*-case<sup>11</sup> where the court refused to accept evidence of a quarrel in order to establish *dolus eventualis* in the shooting of the victim. However, the Supreme Court of Appeal reconsidered the same case and provided a different perspective.<sup>12</sup> It is clear from this case alone that *dolus eventualis* has not yet taken its rightful place in South African criminal law since there are no formulated applicable procedures or guidelines that determine this form of intent.

There has also hitherto not been any Constitutional Court decision that has addressed the concept of *dolus eventualis* in detail, especially in cases of possible putative private defence.<sup>13</sup> As such, this research intends to clear any doubt about the interpretation and application of the concept which has suffered much scholarly criticism, and conflicting requirements and judgments.<sup>14</sup> Knowledge gained by this investigation will permit this study to enlighten why certain decisions from courts *a quo* should remain correct, or why it is required that certain courts alter their verdicts.

One of the main problems courts have in determining *dolus eventualis* in a particular case is in applying the correct test when ascertaining whether the accused knew at the time of his conduct that it would lead to the forbidden result.<sup>15</sup> This study will therefore establish the appropriate test as required in law, and how courts should apply this test. The question whether courts refine or redefine the requirements and guidelines when determining if an accused (particularly in

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<sup>11</sup> *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 924 (hereinafter *S v Pistorius*).

<sup>12</sup> See *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015) (hereinafter *DPP v Pistorius*). Pistorius was found guilty of murder, reversing the High Court's decision of culpable homicide.

<sup>13</sup> See Steyn <https://www.enca.com/opinion/oscar-pistorius-the-two-heavyweight-champions-of-south-african-criminal-law-weigh-in-part-1> (Date of use: 20 September 2019).

<sup>14</sup> For e.g. *S v Pistorius* 924. Burchell has respectfully concluded in effect that "operative knowledge of unlawfulness was reasonably possibly absent in the circumstances according to the facts as accepted in the *Pistorius* case, and that culpable homicide is the correct verdict". See Steyn <https://www.enca.com/opinion/oscar-pistorius-the-two-heavyweight-champions-of-south-african-criminal-law-weigh-in-part-1> (Date of use: 20 September 2019). It should be noted that this was the view of the High Court but this decision was subsequently reversed to murder by the Supreme Court of Appeal.

<sup>15</sup> See *S v De Oliveira* 1993 (2) SACR 59 (A) (hereinafter *De Oliveira*).

murder cases) had criminal intent in the form of *dolus eventualis* will also be taken into consideration.

While one court would consider the “objective test”,<sup>16</sup> another would consider a “reasonable possibility” or a “real possibility”<sup>17</sup> of foresight, for example, to determine *dolus eventualis*. It will be shown that the basic elements of criminal culpability are averted or have been misinterpreted when determining *dolus*. In determining the difference between *dolus* and *culpa* as a matter of law, some courts have caused this distinction to become somewhat muddled.<sup>18</sup> There is no doubt that the applicable principles and legal elements to be considered in determining *dolus eventualis* has over time become blurred or imprecise.

This means that the origin of this criminal-law concept needs to be revisited in order to determine whether the legal rules that are applicable to intent should be applied the way it currently is or it ought to be. It is thus necessary to undertake a study of the evolution of this form of intention by tracing the roots of the concept in foreign- and South African jurisprudence. In South Africa, the manner in which this form of intention was interpreted and applied in criminal cases will first be followed from some 70 years ago, as well as some 30 years afterwards, and lastly, to determine the reason behind the modification of the concept 20 years later. The present position as regards the use and understanding of the element will also be ascertained.

This study also intends to uncover whether courts are obliged to accept expert evidence, and what role expert evidence plays in determining criminal intent. Although criminal intent is assessed by means of a subjective test, expert evidence is sometimes required by courts to evaluate the evidence presented by the perpetrator. It is important to also examine how knowledge of unlawfulness, as an essential element of *dolus eventualis*, is measured by the courts, and how courts evaluate such evidence. The research proposes to examine whether it is necessary to create precedence in new criminal cases. Another issue that has to be investigated in this regard is whether the courts, before passing a verdict, make

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<sup>16</sup> See *De Oliveira* 59.

<sup>17</sup> *S v Ushewokunze* 1971 (2) SA 360 (RA) (hereinafter *Ushewokunze*).

<sup>18</sup> See *S v Ngubane* 1985 (3) SA 677 (A) paras 687E-I (hereinafter *Ngubane*).

use of the concept of distinguishing cases.<sup>19</sup>

Findings about the interpretation and application of this mental element will be submitted after evaluating recent court decisions and academic submissions from legal scholars. Since the concept of *dolus eventualis* is an indispensable concept in South African criminal law, recommendations will be proposed regarding the requirements that courts should consider when determining intent.

The study will also consider whether there is a need for legislative or judicial regulations to ascertain a uniform, accurate approach in determining *dolus eventualis* in criminal court cases. Considering the fact that new and complex forms of crimes are constantly emerging, it becomes imperative to research and submit recommendations for legislative reform as to *dolus eventualis*, and the determination of criminal liability by the courts in such cases. This is because it is conclusive that the requirements advanced by the courts are understated or insufficient to cover a whole range of criminal cases, especially new ones.<sup>20</sup>

### 1.3 Research questions and hypotheses of study

The following research questions are posed in this study:

- What specific conduct constitutes the mental element of *dolus eventualis*?
- What is the origin of *dolus eventualis* in our law?
- From a structural and practical perspective; what are the challenges with the existing legal framework regulating *dolus eventualis*?
- How do the courts interpret and apply the requirements of *dolus eventualis* in order to hold an accused criminally liable for murder?
- How is *dolus eventualis* interpreted and applied in other cases, such as in private defence?
- Does the current legal framework regulating *dolus eventualis* still adhere to its continental origin?

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<sup>19</sup> Distinguishing cases means that a court decides that the legal interpretation or reasoning of a previous court (i.e. a precedent case) will not be applicable to the present case because there are material differences (especially in facts) between the two cases.

<sup>20</sup> Paizes 2018 *Crim JR* 7.

- How does international criminal law deal with the mental element of *dolus eventualis*?
- What can we learn from the experience of other jurisdictions' efforts in interpreting and applying *dolus eventualis*?
- Are law reforms necessary, and if found to be so; which policy and legislative response might regulate *dolus eventualis*?

The hypotheses underlying the research in this study are the following:

- The legal doctrine of fault (*mens rea* or criminal capacity) has never satisfactorily been dealt with by South African courts.
- The legislative framework that currently regulates *dolus eventualis* is inadequate or incoherently implemented in South African criminal law as different courts interpret the requirements for *dolus eventualis* in dissimilar ways.
- The test for *dolus eventualis* needs to be refined or redefined so as to guarantee a consistent and uniform application of the concept when determining if an accused (particularly in murder cases) had criminal intent in the form of *dolus eventualis* in order to be held culpable.
- The origin or history of the concept of *dolus eventualis* provides valuable information as to the development of intent in South African criminal law.
- The manner in which international law and comparative jurisdictions consider the mental element of *dolus eventualis* may assist South African jurisprudence in providing a better test for the concept.

#### **1.4 Methodology**

The study will be based on a content analysis of selected literature; examining both primary- and secondary sources. This form of inquiry involves a qualitative research technique which will be phenomenological and exploratory in nature. A phenomenological research study seeks to investigate “understanding through

qualitative methods ... that yield descriptive data".<sup>21</sup> Although research data is collected from previously established ideas in order to assess these hypotheses, the aim in this study is to develop further insights and understandings from the theories. This is referred to as 'grounded theory', which refers to:

...the inductive theorizing process involved in qualitative research that has the goal of building theory. A theory may be said to be grounded to the extent that it is derived from and based on the data themselves.<sup>22</sup>

This process will review the conclusions obtained from previous literature studies, but also show the gaps that exists in current knowledge in this field. As such, the research will follow a flexible research design where presumptive research questions are posed at the beginning of the study, but only fully answered at the end of the research, after additional knowledge on the subject matter has been evaluated and tested.

The current study will furthermore employ a logical-analytical and comparative evaluation of applicable legal resources on *dolus eventualis*. A comparative approach consists of contrasting and evaluating different jurisdictions' perspectives on this mental element of culpability. This approach is however complicated by the fact that *dolus eventualis* by name is not explicitly utilised in countries such as the United States of America (US), and where it is employed, the term may be defined differently.

A literature research has revealed that there is an adequate knowledge base on the topic to successfully undertake this study. This is evident from the availability of various sources like legislation, common law and judicial precedence. Secondary resources to be examined include articles, textbooks, reports, internet sources, research papers, and periodicals.

## 1.5 Literature review

In former times, it was held that any person who intends an act also intends the predictable result of such conduct. During the thirteenth century, scholars such as

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<sup>21</sup> Taylor, Bogdan and DeVault *Introduction to qualitative research methods* 4.

<sup>22</sup> Taylor, Bogdan and DeVault *Introduction to qualitative research methods* 8.

St Thomas Aquinas began to research the unintended consequences of a crime which an actor did not foresee occurring. He came to the conclusion that such an effect is the cause of an act “if the effect ordinarily, necessarily or naturally flowed from the act”.<sup>23</sup> During the sixteenth century, Covarruvias,<sup>24</sup> the Spanish lawyer, called this a “condition of the will *voluntas indirecta*”.<sup>25</sup> This theorist, however, did not require that the actor foresee the effect of his conduct since the effect of any thoughtful act is intended. The above philosophy planted the seeds for the development of the notion of indirect will, specifically by the Commentators.<sup>26</sup> This instituted the origin of the concept of *dolus eventualis*, although it was not termed as such. The doctrine of *voluntas indirecta* was introduced into German criminal law through Carpzovius as *dolus indirectus*.<sup>27</sup> As an immensely influential writer, Carpzovius’ version of intent, which may be inferred from the perpetrator’s act whether the actual effect had been intended or not, shaped the works of many Roman-Dutch and German jurists. The term *dolus eventualis* (an evil intention) was however first coined by the eighteenth century German jurist Johann Samuel Boehmer (1704-1769), but the concept was applied interchangeably for *dolus indirectus*.<sup>28</sup>

Continental writers from the early twentieth century already identified the three components of intent (which includes *dolus eventualis*) as still existing in its current form.<sup>29</sup> Legal intention, as adopted by these older writers, is still commonly applied in South African criminal law.<sup>30</sup> There has been much discussion on this

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<sup>23</sup> Hoctor 2008 *Fundamina* 15.

<sup>24</sup> Diego de Covarrubias Covarruvias was a Spanish jurist and Roman Catholic prelate who also served as Archbishop from 25 July 1512 - 27 September 1577.

<sup>25</sup> Hoctor 2008 *Fundamina* 16.

<sup>26</sup> Hoctor 2008 *Fundamina* 15.

<sup>27</sup> See Hoctor 2008 *Fundamina* 16. Carpzovius (1595-1666) wrote his *Practica Nova Rerum Criminalium* in the second quarter of the seventeenth century. In this work, he follows canonical law as regards intention (i.e. the doctrine of *versari in re illicita*) as pronounced by the thirteenth century Italian jurists. Canonical law distinguishes between accidental and non-accidental death, and thereby differentiates between acts which are punishable and acts which are not punishable.

<sup>28</sup> Hoctor 2008 *Fundamina* 16. Present-day theorists consider this concept to have been completely misconstrued. Some countries have borrowed and legally defined the term; e.g., the French appellation *dol éventuel* is considered a form of *faute non-intentionnelle* (unintentional fault). See Stuckenberg 2014 *J Int Crim J* 314.

<sup>29</sup> See Hoctor 2008 *Fundamina* 17 who discusses Bodenstern (writing in 1920) as a ground breaker in this regard.

<sup>30</sup> Badar 2009 *NCLR* 434.

concept in South African jurisprudence. Academic writers such as Snyman,<sup>31</sup> Burchell,<sup>32</sup> Hunt and Milton,<sup>33</sup> and Van der Merwe and Du Plessis,<sup>34</sup> amongst others, have all expressed their opinions on *dolus eventualis* in various textbooks. There also have been many South African journal articles on the subject as well, of which Bertelsmann,<sup>35</sup> De la Harpe and Van der Walt,<sup>36</sup> Engers,<sup>37</sup> Hoor, <sup>38</sup> Paizes,<sup>39</sup> Van Oosten,<sup>40</sup> and Whiting<sup>41</sup> are some of the more prominent writers. Not many unpublished research studies could be found on the topic, except for the two masters' studies of Du Preez,<sup>42</sup> who specifically examines the subjective test in *dolus eventualis* 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*; and Tsuru,<sup>43</sup> who suggests an alternative approach to *dolus eventualis* by creating different models for this type of intent. Except for these local viewpoints, foreign and international authoritative jurists have also added their stances in this regard. All of these various standpoints on legal intention have been taken into consideration in this research in order to provide a holistic perspective on its interpretation and application in South African courts.

Even though the present approach on *dolus eventualis* in South African criminal law is subjective; which requires the courts to determine intention in relation to the accused's state of mind, this was not the case some 70 years ago. During that era, the Appellate Division (as it was then known) applied the objective test to determine intention.<sup>44</sup> A major setback of this test is that it never takes into account X's mental state at the time when his alleged unlawful conduct transpired. The court merely focused on determining whether X ought to have foreseen the harm ensuing. The objective test was imported from the English criminal-law

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<sup>31</sup> Snyman *Criminal law* 7.

<sup>32</sup> Burchell *Principles of criminal law* 346.

<sup>33</sup> Hunt and Milton *South African criminal law and procedure* 374.

<sup>34</sup> Van der Merwe and Du Plessis *Introduction to the law of South Africa* 464.

<sup>35</sup> Bertelsmann 1975 *SALJ* 60.

<sup>36</sup> De la Harpe and Van der Walt 2003 *SACJ* 207.

<sup>37</sup> Engers 1973 *Responsa Meridiana* 223.

<sup>38</sup> Hoor 2008 *Fundamina* 14; Hoor 2013a *SACJ* 75; Hoor 2013b *SACJ* 131.

<sup>39</sup> Paizes 1988 *SALJ* 642.

<sup>40</sup> Van Oosten 1982 *De Jure* 423.

<sup>41</sup> Whiting 1988 *SACJ* 440.

<sup>42</sup> Du Preez *Dolus eventualis*.

<sup>43</sup> Tsuru *An alternative approach to dolus eventualis*.

<sup>44</sup> See *R v Shezi* 1948 (2) SA 119 (A) 128-130; *R v Koza* 1949 (4) SA 555-560; Hoor 2008 *Fundamina* 19.

principle of presumption whereby, in order to establish intention, it is presumed that X must have intended the expected and probable results of his conduct.

It should be noted here that both negligence and intention were determined by the use of presumption which was based on facts rather than law, and it was possible to be rebuttable based on evidence. The problem here was that the use of presumption of intention directly lead to the application of an objective test; resulting in that there was no difference between negligence and intention.<sup>45</sup> Consequently, X may still be found culpable even if he did not foresee the result of his actions. Therefore, little or no attention was placed on the necessary intention since the focus was on the state to prove that the accused committed the act. The use of the presumption meant that the courts were applying the principle of strict liability. This old doctrine of *versari in re illicita imputantur omnia sequuntur ex delicto*<sup>46</sup> holds that a person who is involved in any unlawful act is held culpable for any wrong arising from that act. In other words;

...a person who commits an unlawful act is criminally liable for all the consequences that follow, irrespective of whether they are foreseen, foreseeable or intended. It is therefore simply a form of strict liability, ignoring the mental state of the accused.<sup>47</sup>

The doctrine was considered some 50 years ago by the courts<sup>48</sup> to be obsolete. It is certain that the application of the presumption would be a setback to the development of the concept of *dolus eventualis*. This was also the conclusion a few years after *S v Bernardus*.<sup>49</sup> Recent decisions<sup>50</sup> further confirm this point of view. The courts have, over the past years, been inclined to discard the application of strict liability in statutory crimes requiring *mens rea*.<sup>51</sup>

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<sup>45</sup> Hoctor 2008 *Fundamina* 20.

<sup>46</sup> Leyser (1683-1752) already denounced the doctrine of *versari in re illicita* in the eighteenth century as vile and reprehensible. He believed that the possibility of foreseeing a consequence of an unlawful act was key in determining criminal responsibility. See Coertze 1937 *JCRDL* 90.

<sup>47</sup> Steyn <https://www.enca.com/opinion/oscar-pistorius-the-two-heavyweight-champions-of-south-african-criminal-law-weigh-in-part-1> (Date of use: 20 September 2019).

<sup>48</sup> See *S v Van der Mescht* 1962 (1) SA 521 (A) and the subsequent decision in *S v Bernardus* 1965 (3) SA 287 (A) (hereinafter *Bernardus*). The court rejected the decision in *S v Van der Mescht* 1962 (1) SA 521 (A) that the accused may be held to have intention to support a conviction of culpable homicide in the case where the victim dies as a result of his acts.

<sup>49</sup> *Bernardus* paras 298A-299H, 300H.

<sup>50</sup> Willis JA in the Supreme Court of Appeal judgment of *Ndwambi v The State* 611/2013 [2015] ZASCA 59 para 42.

<sup>51</sup> Bertelsmann 1975 *SALJ* 60.

Even though Bertelsmann was convinced that doubts relating to the subjective nature of intention have been cleared when he noted that “mistake of fact, ‘reasonable’, even if not, excludes intention”,<sup>52</sup> this has not been the case in recent cases. Owing to the alarming rate of crimes in South Africa, it is obvious that the courts are flooded on a regular basis with murder cases of varying natures. It has been stated that the courts in most murder trials turn to interpreting the facts rather than law.<sup>53</sup> Where this is the case, courts are bound to apply the law in varying degrees. For example, when the accused in the *State v Pistorius*<sup>54</sup> pleaded that he acted in putative private defence, the court relied on an old South African criminal-law principle known as *error in objecto* (a mistake regarding the identity of the victim), as the accused had stated that he thought the victim was an intruder.

This defence was rejected on the ground that it cannot be an appropriate defence to a charge of murder. It was concluded that Pistorius shot with the direct intention to cause someone’s death. This led to an alternative charge based on *dolus eventualis*,<sup>55</sup> as it was stated by the court that the accused cannot escape the finding that he himself had aimed while approaching his target; he foresaw the possibility that he may shoot and kill a person, but reconciled himself to that possibility by walking to his target, firing his gun and executing his intention.<sup>56</sup> The point of contention here is whether the court accurately interpreted and applied the concept, and whether the decision was based on questions of fact or law.

As early as 1920 the courts have, however, been beseeching to deviate from the notion that it is not possible that “a person intentionally caused, for example, death which he actually did not foresee, though he ought to have foreseen them.”<sup>57</sup> If this is the position, then it will imply the application of an objective approach to determine intent. There are a few academic writings on this subject but with divergent conclusions in terms of approach (subjective or objective); the necessary requirements; and the approach in terms of interpretation and application by the courts to determine criminal intent.

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<sup>52</sup> *S v Pistorius* 924.

<sup>53</sup> Phelps 2016 *J of Crim L* 1-2.

<sup>54</sup> *S v Pistorius* 793.

<sup>55</sup> Phelps 2016 *J of Crim L* 2.

<sup>56</sup> Phelps 2016 *J of Crim L* 2.

<sup>57</sup> Hoctor 2008 *Fundamina* 20, 23.

Burchell, for example, considers legal intention (*dolus eventualis*) as an element of liability through fault and unlawfulness, since, according to him, fault must be present in every element of the crime irrespective of whether fault is in the form of intention or negligence. To throw more light on this statement, he explains as follows:

...a person who kills another will be guilty only if he or she knows, or at least foresees the possibility, that he or she is unlawfully killing a human being.<sup>58</sup>

In this regard, fault must exist in relation to each one of the elements of the crime of which the person is charged. If there is an absence of fault in any of the elements of criminal liability (for example, the person believed that he was acting lawfully, or he did not know that he was killing a person), there can be no fault. Burchell further notes that this rule is applicable to all crimes.

Over the years, continuous attempts have been made to clear the ambiguity in the interpretation and application of intent, especially in the form of *dolus eventualis* in complex criminal cases.<sup>59</sup> Consider the case of *S v Maritz*<sup>60</sup> where the appellant, a police member from the Internal Stability Unit, was the driver of an armoured vehicle. He tied an eight-metre-long rope to the vehicle and the other end round the victim; a murder suspect who had implicated an unidentified person, and had been hesitant to lead the investigating officers to the suspect's home. The appellant then ordered the victim, whose hands were tied behind his back, to run in front of the vehicle as he drove along. After sixty metres, the armoured vehicle drove over the victim. The appellant immediately stopped the car but the victim had died. A key point to note here is that the appellant denied having the necessary *dolus* to kill the victim, although he admitted to have acted unreasonably. Although the court spent much time trying to reconstruct the incident, emphasis was laid on the fact that no one could precisely explain what had happened. The question then turned on whether intention in the form of *dolus eventualis* had been established in the case. The Appellate Division, as per Van den Heever JA, rejected the trial court's finding of *dolus eventualis* as, according to her, "the perpetrator does not accept a foreseen risk when he is convinced that

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<sup>58</sup> Burchell *Principles of criminal law* 346.

<sup>59</sup> See e.g. *S v Sigwahla* 1967 (4) SA 566 (A) (hereinafter *Sigwahla*); *S v Van Zyl* 1969 (1) SA 553 (A); *S v De Bruyn* 1968 (4) SA 498 (A) para 509H (hereinafter *De Bruyn*).

<sup>60</sup> *S v Maritz* 1996 (1) SACR 405 (A).

he can prevent it occurring”,<sup>61</sup> thus “he cannot be held to have the requisite intention to cause that result just because its occurrence proves him wrong”.<sup>62</sup> In this case, however, the learned judge did “not make or rely on a finding that the appellant had not taken the risk into consideration”.<sup>63</sup> The sentence was amended to culpable homicide.

As observed from the case above, the courts are expected to apply the subjective test in determining intent in cases where a statute prohibits an act or omission, irrespective of whether it was committed intentionally or negligently.<sup>64</sup> However, in cases where the conduct of the accused results in death, for example, criminal liability should be determined by applying either the subjective or objective test, or both. This is because once it is established that there is the presence of an objective element formally proscribed by statute, and the grounds of justification negated, it is no longer necessary to apply the objective test. The reasoning behind this assertion is that since any reasonable man knows that, for example, possessing an unlicensed firearm is unlawful, further investigation on *mens rea* should be geared towards the subjective *dolus* or *culpa*. This assertion is, however, short of the interpretation of *dolus* or *culpa*.

From a practical perspective, the existing legislative framework is facing certain challenges in terms of determining *dolus eventualis*. Although it is clear that the crime of murder implies *dolus* and an absence of *culpa*, and that the crime of culpable homicide implies *culpa* and the absence of *dolus*,<sup>65</sup> the relationship between *dolus* and *culpa*, especially in crimes that result in the death of a person, has been proven to become blurred in some cases such as *S v Maritz* cited above, and *S v Ngubane*.<sup>66</sup> This last-mentioned case seems to have left the window wide open to more contradiction in interpreting and applying *dolus eventualis*. According to *Ngubane*, where X, for example, pleads culpable homicide, and it is proven by the court that X, in fact, intentionally caused Y’s death, the possibility exists that X may still be convicted of culpable homicide instead of murder. The point to be

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<sup>61</sup> *S v Maritz* 1996 (1) SACR 405 (A) para 416f.

<sup>62</sup> *S v Maritz* 1996 (1) SACR 405 (A) para 416g.

<sup>63</sup> Boister 1996 SACJ 227.

<sup>64</sup> Bertelsmann 1975 SALJ 60.

<sup>65</sup> Carstens 2013 SAJCJ 67.

<sup>66</sup> See, e.g., *Ngubane* paras 687E-I. The position of the court was that it is inappropriate to assume that proof of intention excludes negligence.

made here is that X cannot, on the same facts, act both negligently and intentionally, yet this court held otherwise.<sup>67</sup>

In *Ngubane*,<sup>68</sup> X had pleaded guilty to culpable homicide on a charge of murder. On questioning this plea, in terms of section 112 of the Criminal Procedure Act (CPA),<sup>69</sup> the trial judge rejected his plea, and evoked CPA section 113 whereby a plea of not guilty was instituted before the trial. Ngubane was found guilty, and convicted of murder. The issue on appeal was that as the prosecutor had accepted a guilty plea to culpable homicide, the charge was reduced from murder to culpable homicide, and therefore the court acted erroneously in deciding on the charge of murder. The intention of CPA section 113 was that a plea of not guilty should be instituted in respect of the crime to which X had pleaded guilty, which was culpable homicide.<sup>70</sup> By disregarding the plea of culpable homicide under CPA section 112, the High Court seemed to have entertained this case objectively.<sup>71</sup> According to Jansen JA:

In principle it should not matter in respect of *dolus eventualis* whether the agent foresees (subjectively) the possibility as strong or faint, as probable or improbable provided his state of mind in regard to that possibility is “consenting”, “reconciling” or “taking [the foreseen possibility] into the bargain”. However, the likelihood in the eyes of the agent of the possibility eventuating must obviously have a bearing on the question whether he did consent to that possibility.<sup>72</sup>

From the above ambiguous description of *dolus eventualis*, it is apparent that much clarification is still required as regards the concept itself, as well as its

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<sup>67</sup> Snyman *Criminal law* 214 states that negligence and intention can never overlap, and 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.”

<sup>68</sup> *Ngubane* 677.

<sup>69</sup> Criminal Procedure Act 51 of 1977 (hereinafter CPA) s 112(1) states as follows: “Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea – (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only...”

<sup>70</sup> Du Plessis 1986 SALJ 3-4.

<sup>71</sup> Snyman *Criminal law* 214 criticizes this decision in that “the court manipulated the rules of substantive law in order to solve a typical procedural law problem. The problem which arose in these cases is procedural in nature. X was charged with the wrong crime. ... It is wrong to remedy defects in the law of procedure by distorting the logical rules of the general principles of criminal law in order to suit the law of procedure.”

<sup>72</sup> Pain 1989 SALJ 594.

interpretation and application in case law. In the following sub-paragraphs, brief preliminary explanations will be provided on the concept of *dolus eventualis* as utilised in common-purpose crimes, as well as intent in the form of *dolus eventualis* in other jurisdictions and in international law. These outlines serve merely as a general introduction to the topics, which will be further clarified in more detail in the chapters to follow.

#### 1.5.1 Intent and *dolus eventualis* in common-purpose crimes

The application of *dolus eventualis* in common-purpose crimes is a contentious issue. South African criminal law stipulates that where co-perpetrators of a crime have a joint purpose, for example, to rob a bank, enquiry into which member actually shot and killed the cashiers, for example, is irrelevant. This implies that all the gang members will carry the same blameworthiness.<sup>73</sup> Their common liability arises from their common purpose to commit the crime.

In criminal cases, as the example provided above, courts make use of *dolus eventualis* as it is very difficult to determine exactly what the specific criminal conduct of each co-perpetrator was in the unlawful joint enterprise. Such a member's guilt cannot be "qualitatively encapsulated".<sup>74</sup> In such consequence crimes, the prosecution do not need to prove beyond reasonable doubt that each member of the joint enterprise causally contributed to the final unlawful outcome. Proof of a prior agreement to commit the crime together will suffice; and if no such proof is available, the court merely needs to establish each members' active association in the common criminal design. The unlawful conduct of any one of the members of the group is imputed or attributed to the other members.

South African courts are of the view that callous criminals who act together to commit a crime ought to have foreseen the consequences in achieving their goal, even if it means applying violence, and possibly resulting in death.<sup>75</sup> The issue here is the test which the courts apply to arrive at such a conclusion. It has been submitted that determining intent and the final act (*actus reus*) should be

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<sup>73</sup> See *S v Lungile* (1999) 2 SACR 597 (A).

<sup>74</sup> *Paizes* 1988 SALJ 644.

<sup>75</sup> *Du Plessis* 1986 SALJ 2.

considered as inseparable.<sup>76</sup> Will the court also consider that the criminal gang, in fact, had the necessary *mens rea* in situations where one of their own members is killed? In such cases, it remains uncertain whether all the members were reckless regarding this possibility.<sup>77</sup> However, the thin line between crime of murder and culpable homicide, on the one hand, and intention and negligence on the other, becomes blurred if it is accepted “that there is such a thing as conscious negligence”.<sup>78</sup> These crucial inquiries will be deliberated on in more detail in Chapter five of this thesis.

### 1.5.2 Intent and *dolus eventualis* in other jurisdictions

It is necessary for this study to make reference to other jurisdictions owing to the fact that the various sources of South African criminal law have been influenced by other jurisdictions, such as Roman-Dutch law, which is also the common law of South Africa.<sup>79</sup> Except for the Dutch legal authorities who wrote treatises on *mens rea* in this legal system, recourse must be had to the works of German jurists who had an enormous influence on the derivation of *dolus eventualis* as a form of intent.<sup>80</sup> English law, which was introduced after Roman-Dutch law in South Africa, did not replace Roman-Dutch law, but it exerted a great influence on the South African legal system.

The South African courts are still inclined to reference American and English concepts which do not appropriately differentiate between the grounds of justification and grounds excluding *mens rea*.<sup>81</sup> English criminal law considers the requirements of *mens rea* to vary from one crime to another. This means that in some of the crimes, a result must have been intended, for example, grievous bodily harm, while in other crimes like criminal damage, it is considered that the result was not intended, and therefore, the accused would be guilty of

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<sup>76</sup> Du Plessis 1986 SALJ 3.

<sup>77</sup> De la Harpe 2003 SACJ 208.

<sup>78</sup> Du Plessis 1986 SALJ 3.

<sup>79</sup> Snyman *Criminal law* 7.

<sup>80</sup> Throughout this study, mention will be made to these jurisdictions' assessment of legal intention, mostly in footnotes. Where applicable, other states' perceptions on the topic will also be cited.

<sup>81</sup> Bertelsmann 1975 SALJ 59.

recklessness depending on the facts of each particular case.<sup>82</sup>

In other jurisdictions, like in Israel, the court seems to approach the concept of legal intention by piercing through subjective knowledge at the time of the accused's act. It is stated that:

...the knowledge possessed by the accused at the time of the act that his conduct would lead to a consequence which the legislature desired to prevent, is by a construction of the law regarded as intention to bring about this consequence. 'Knowledge' in this context does not necessarily mean 'full and certain' knowledge that this consequence is inevitable but on the other hand it must be knowledge which reached a high degree of probability.<sup>83</sup>

Bein does not hesitate to refer to this as the rule of 'constructive intention'. Although this meaning of legal intention is amplified by Snyman<sup>84</sup> who considers intention to comprise of two elements, according to Bein, this rule applies only in respect to particular crimes. He classifies crimes requiring a mental element into three groups of 'crimes requiring *mens rea*'; 'crimes involving negligence' and 'crimes of strict liability'.<sup>85</sup> This approach appears to be too broad which may lead to possible derailment in terms of application.

In the US, *dolus eventualis* is considered from a different perspective. Not only does the US classify culpability into four different types, namely, purposeful, knowing, reckless, and negligent, but various states and federal governments may have different definitions of criminal intent, and apply criminal law principles differently.<sup>86</sup> The concept of recklessness (or oblique intent) however corresponds the closest to *dolus eventualis*, as it involves perpetrating an unlawful act despite knowing the risks involved. The *mens rea* element in murder (a crime which is committed purposively, or with direct intent) is known as malice aforethought. There are also cases where the accused is performing a lawful act without any malice but unfortunately kills someone, this accused's act is considered a

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<sup>82</sup> Pain 1989 SALJ 594.

<sup>83</sup> *Adjarny v AG* (1959) 13 PD 421; Bein 1967 ILR 18.

<sup>84</sup> Snyman *Criminal law* 176. According to Snyman, intention means that "...a person commits an act: (1) while his will is directed towards the commission of the act or the causing of the result; (2) in the knowledge of (a) the existence of the circumstances mentioned in the definitional elements of the relevant crime and (b) in the knowledge of the unlawfulness of the act".

<sup>85</sup> Bein 1967 ILR 18-19.

<sup>86</sup> Dubber 2006 JLE 438.

misadventure if the accused was not negligent.<sup>87</sup> This is distinguished from the crime of involuntary manslaughter which is the result of an unlawful act.

As can be seen from the limited examples provided above, US criminal law on intent is in many ways ambiguous. Still, any attempt to shift the US penal procedure to align with other foreign criminal law jurisdictions would be considered as an affront to the very law the US seeks to reaffirm and reflect, according to Dubber.<sup>88</sup> As a sovereign state, it is asserted that the US is comfortable with its criminal law although other sovereign jurisdictions may consider it as warranting some adjustments in prosecution and penal procedure.

Another issue to consider is how *dolus eventualis* is interpreted and applied in various offences, such as in cases of private defence. There seems to exist disparity in terms of identifying the crime from one legal jurisdiction to another. There is therefore the possibility that the qualifiers for a particular crime would differ. In the Southern Australia, for example, in cases of private defence or in cases where a police is apprehending a felon, and the attacker or felon dies in the course, this will be regarded as manslaughter, and not murder. Since excessive force may be used in both Britain and in Southern Australia,<sup>89</sup> the intention of the actor seems irrelevant. There is thus a greater possibility that the accused will only be criminally liable for manslaughter, not murder.<sup>90</sup>

This position is well-illustrated in the Australian case of *R v McKay*.<sup>91</sup> In this case, thousands of chickens had been stolen from McKay's poultry farm in the past three years. He once managed to catch a thief, who only paid a fine. One night, when an intruder came to steal the chickens, McKay, when he saw the intruder, aimed his rifle and fired a shot at the intruder's hips and feet. When the intruder turned around and ran, McKay fired another shot. The intruder dropped three chickens, but continued running, and McKay fired a further three shots at the intruder. McKay made a statement to the effect that he meant to shoot the intruder as he had no right to be stealing the chickens. As McKay admitted that he

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<sup>87</sup> Homicide by misadventure occurs in the course of a lawful act.

<sup>88</sup> Dubber 2006 *JLE* 434.

<sup>89</sup> Steyn <https://www.enca.com/opinion/oscar-pistorius-the-two-heavyweight-champions-of-south-african-criminal-law-weigh-in-part-1> (Date of use: 20 September 2019).

<sup>90</sup> Norval 1960 *ALR* 23.

<sup>91</sup> *R v McKay* [1957] VR 560 561; [1957] ALR 648.

intended to shoot the intruder, he was tried for murder in the Victorian Supreme Court. Barry J informed the jury as follows:

If you think that the accused fired with the intention of killing the thief, and that at the time when he fired he was under the influence of resentment or a desire for revenge or a desire to punish the thief, then he is guilty of murder. If you think he was honestly exercising his legal right to prevent the escape of a man who had committed a felony and that the killing was unintentional but that the means which the prisoner used were far in excess of what was proper in the circumstances, then you should find him guilty of manslaughter. If, on some view of the facts which escapes me, you are able to say that the prisoner's conduct was reasonable and that death was an unintended consequence of the reasonable exercise of force shown while exercising a legal right, then it would be open to you to acquit the prisoner.<sup>92</sup>

McKay was finally convicted of manslaughter instead of murder. Thus, it can be concluded that intent to kill or the degree of force used is irrelevant in cases involving the apprehension of a felon, or protecting property, or averting a felony, or a mixture of these rights, which would lead to a conviction of manslaughter.<sup>93</sup>

### 1.5.3 Intent and *dolus eventualis* in international law

In international criminal law, legal responsibility is regulated by means of the Rome Statute,<sup>94</sup> which recognises the general principles of criminal liability. The International Criminal Court (ICC), as created by the Rome Statute, interprets and applies the stipulated criminal-law provisions. It has been argued that contemporary global issues relating to criminal law necessitates the unification of diverse domestic criminal laws. As such, international instruments on criminal law may be key to an internationally accepted, interactive criminal law system. Conde suggests this could subsequently influence a common standard of legislation for other countries.<sup>95</sup> This is especially important as the notion of culpability or intention may appear to be foreign to the country affected by the accused crime.<sup>96</sup>

A major setback in this endeavour is that under international criminal law, the issue of intention has not yet been conclusively settled. Considering the crime of

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<sup>92</sup> *R v McKay* [1957] VR 560 561; [1957] ALR 649; Norval 1960 ALR 25.

<sup>93</sup> Norval 1960 ALR 23.

<sup>94</sup> Rome Statute of the International Criminal Court (hereinafter the Rome Statute).

<sup>95</sup> Conde 2004 TLR 942.

<sup>96</sup> Damaška 2001 AJCL 457.

genocide, for example, where it is stated that two elements distinguish the subjective aspect of the crime. This includes the fact that the actor must have intended to commit any of the crimes listed under Article 6<sup>97</sup> of the Rome Statute, and that the actor must have intended to destroy, either in part or in whole, a national, ethnical, racial or religious group. Some writers have argued that these two mental components must be considered independently, stating that only proof of (general) intent to commit one of these listed crimes under Article 6 is a *mens rea* requirement to commit genocide. Consequently, the (special) intent should be considered as an additional subjective ingredient, which does not require the corresponding *actus reus*. This means that a single killing will suffice to have fulfilled the requirements of the offence. Other writers have a completely opposite view in determining *mens rea* for genocide. They consider that both the general and special intent are *mens rea* requirements which have to be considered together objectively. The uncertainty still remains unsettled here, also in terms of the distinction between full and attempted genocide.<sup>98</sup>

For a person to be held criminally responsible and liable for a crime within the jurisdiction of the ICC, the material elements of the international criminal law offence must be established, that is, the crime must be committed with intent and knowledge. In Article 30, the Rome Statute affords a wide-ranging definition for the necessary *mens rea* that is required to cause the criminal liability for breach of international humanitarian law,<sup>99</sup> yet this has not put an end to the prolonged debate on the paradox of *mens rea*. This is evident from recent ICC decisions<sup>100</sup>

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<sup>97</sup> Article 6 of the Rome Statute states as follows: For the purpose of this Statute, 'genocide' "means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group".

<sup>98</sup> Arnold 2003 *CLF* 127.

<sup>99</sup> Article 30 of the Rome Statute states on mental element as follows: "1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly".

<sup>100</sup> Badar 2009 *NCLR* 433.

where submissions were made to elucidate the meaning of the mental element in crimes as contained in Article 30.

Clark notes that these interpretations of the mental concept occasionally sneak back into later debates either to clarify, or to propagate further confusion.<sup>101</sup> Accordingly, although intent and knowledge are requisites for international criminal law offences; these concepts as defined overlap in their meaning. In this vein, *dolus* should be further considered as relating to two different situations – as conduct and as consequence.<sup>102</sup> Intent in relation to conduct means that a person “means to engage in the conduct”,<sup>103</sup> while with intent in relation to consequence “that person means to cause that consequence [or] is aware that it will occur in the ordinary course of events”.<sup>104</sup>

*Dolus eventualis* is not expressly mentioned in the Rome Statute. International law does however make use of this type of intent, especially in the Pre-Trial Chambers of the ICC, as will be illustrated in Chapter three of this study. This has caused enormous confusion, especially amongst Anglo-American jurists. Still, as Badar maintains, *dolus eventualis* may be considered as:

...one of the genuine and independent pillars of criminal responsibility which forms, on its own, the basis of intentional crimes and suggests its inclusion in the legal standard of Article 30 of the ICC Statute.<sup>105</sup>

This statement will be reflected on in-depth in Chapter three.

## 1.6 Summary

This introductory chapter has demonstrated the need to analyse the existing legal framework as to the concept of *dolus eventualis* in South African law. *Dolus eventualis* is an old and central concept in South African criminal law which has undergone various modifications over the years. The chapter further provided a general overview of the identified research problems; explored the hypotheses underpinning the problem and expounded the aims of the research study. A brief evaluation of legal authorities on the topic indicates that the approach to *dolus*

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<sup>101</sup> Clark 2001 *CRF* 301.

<sup>102</sup> Clark 2001 *CRF* 302.

<sup>103</sup> Rome Statute Art 30(2)(a).

<sup>104</sup> Rome Statute Art 30(2)(b).

<sup>105</sup> Badar 2009 *NCLR* 434.

*eventualis* lacks clarity, and consequently different and sometimes incorrect interpretations were formulated by the judiciary. The concept of *dolus eventualis* and associate concepts, as well as the historical development of *dolus eventualis* in various legal frameworks will be extensively examined in Chapter two of this study, while Chapter five provides an overview of the imperatives and rationale for the current interpretation and application of *dolus eventualis* in South Africa.

The uncertainty that reigns amongst South African jurists as regards the interpretation and application of *dolus eventualis* is reflected in international law, as well as in certain domestic jurisdictions, as seen from the short introduction provided in this chapter. Chapter three will explore the legal framework applicable to *dolus eventualis* in selected countries such as the US and Great Britain, while Chapter four will reveal the manner in which international law considers this elusive concept. In these chapters, attention will be specifically given to the interpretation and application of the concept in foreign jurisdictions and international jurisprudence so as to compare the results with the situation in South Africa. This research will culminate with Chapter five, which concludes on the study, and Chapter six, which seeks to present recommendations on the application and interpretation of *dolus eventualis* suitable to the South African landscape, including alternative measures.

## CHAPTER TWO

### CONCEPTUAL APPROACH TO *DOLUS EVENTUALIS*

#### 2.1 Introduction

In the preceding chapter, the study discussed the background to the research, the research problem, research methodology and a reflection of preliminary topics in the literature review. It highlighted the problem under investigation and the findings that the legal doctrine of fault has never satisfactorily been dealt with by South African courts. Thus, there still exist disparities and predicaments with regard to the interpretation and application of *dolus eventualis* by the courts. As noted, legal rules were not properly articulated when determining this type of legal intent. Different courts have different findings when determining whether X had *dolus eventualis* because no comprehensive research exists that illuminate how *dolus eventualis* should be interpreted and applied in criminal cases.

This chapter examines the concept of *dolus eventualis* and associate concepts in order to interpret the notion as dealt with in various court cases. For X to be blameworthy, he must have done something which the law recognises as unlawful. If X lacked the knowledge that his act is unlawful, it cannot be said that he acted with intent. Therefore, it will be necessary to elucidate the requirements for *dolus eventualis*. The concept of *dolus eventualis* cannot however be dealt with in isolation. Other associated concepts such as conduct, compliance with the definitional elements, unlawfulness and culpability will be briefly discussed because these elements of criminal liability will always be present whenever the concept of *dolus eventualis* is in question. This study focuses on *dolus eventualis* as a form of intention, however, the South African criminal law also recognises other forms of intention. In order to clearly understand *dolus eventualis* as distinguished from other forms of intent, the various forms of intent will also be briefly discussed.

This chapter will also reflect on the practice and theoretical concept of *dolus eventualis*, and relevant case law with regard to this concept.

Although criminal intent is assessed by means of a subjective test, (expert) evidence is sometimes required by courts to evaluate the evidence presented by X. In the process of determining criminal intent, courts are obliged to accept presented evidence. It is important in this study to also briefly assess the significance of evidence in determining criminal intent, and to uncover how knowledge of unlawfulness, as a key ingredient of *dolus eventualis*, is measured by the courts and how courts evaluate the evidence. During the fifteenth century, for example, both negligence and intention were determined by the use of 'presumptions' – which was based on facts rather than law, and was possible to be rebuttable based on evidence. Therefore, contributory sub-disciplines which contribute to a perspective on the topic, such as the law of evidence, will also be touched on in this chapter.

This focal chapter reflects on and develops the background information provided in the previous chapter in order to analyse the theoretical framework that will inform the development of subsequent chapters.

## **2.2 Criminal liability and *dolus eventualis***

This sub-paragraph intends to explain where the notion of *dolus eventualis* fits in the criminal conduct and liability design. Conduct, the definitional elements of the crime, unlawfulness and culpability are examined.

### **2.2.1 Conduct (act or omission)**

In order for X to be held culpable, he must have done (performed or acted) something or failed to do (performed an omission) something, which the law regards as unlawful and culpable. The reason an act and an omission are considered separate from each other is as a result of the application of prohibitive norms that prevent X from performing, and imperative norms that compel X to perform or to do something, which can only be infringed by failing to perform.<sup>1</sup> Considering the fact that most criminal-law norms are by their very nature

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<sup>1</sup> Snyman *Criminal law* 58.

prohibitive, these prohibitions may therefore be infringed either through a positive act (for example, a commission – to shoot and kill someone) or a negative act (for example, an omission – by failing to apply your brakes and hit someone with your car).

For X to be held criminally liable, X must have either done something which the law prohibits, or he must have failed to do what the law compelled him to do. Generally, an act is considered as a type of conduct on the part of X. This explains why there are two types of conduct – positive conduct (act) and negative conduct (omission). These types of conduct will subsequently be explained.

(a) *Act (positive conduct)*

This is sometimes referred to as a *commissio*. In a technical sense, act means “the type of act described in the definitional elements”<sup>2</sup> of a crime. This is because, in a general sense, an act will entail any human activity or conduct, for example, walking to the shop or picking up a tool. Therefore, for an act to be considered as a criminal conduct, that act in question must comply with the type of act mentioned in the definitional elements of the crime.

It has been noted that mere thoughts are not punishable, that the object of an act must be a human being, and that it must be a voluntary act on the part of X.<sup>3</sup> For example, if X is charged with murder, then the act which X must have performed is the causing of the death of another human being. This particular act by X will then function as the basis for his criminal liability, or a limitation thereof.

(b) *Omission (negative conduct)*

Negative conduct is sometimes referred to as *omissio*. This will be the case where, for example, X fails to act in a situation where he has a duty of care. As a general rule, the duty of care implies a legal duty for X to act positively if the society requires him to do so. Therefore, if there is a legal duty (not a moral duty) for X to act positively, and he fails to do so, such an omission is punishable.<sup>4</sup> Instances of a legal duty placed on X to act positively are the following: where it is required by

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<sup>2</sup> Snyman *Criminal law* 52.

<sup>3</sup> See Snyman *Criminal law* 53-58.

<sup>4</sup> *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) paras 597A-B; Jordaan *et al General principles of criminal law* 35-36.

statute that a person must act positively; for example, section 20 of the Prevention and Combating of Corrupt Activities Act (PCCAA)<sup>5</sup> requires a person who is aware that an offence of corruption is being committed to report such knowledge to the police. A common-law provision (rule) may also impose a legal duty to a person to report to the police any fact that reveals that a crime of high treason is being committed, or is about to be committed. A legal duty to act may also arise from an agreement,<sup>6</sup> or by virtue of an order from the court. Such legal duty may also arise from previous positive acts; and also where a person stands in protective relationship – for example, a parent has the duty to care for a child.<sup>7</sup>

It is important to note here that upon charging X for any criminal conduct, all other requirements for criminal liability (i.e. compliance with the definitional elements, unlawfulness and culpability) are qualifiers to the act to hold X liable. This is because without an act considered to be unlawful, all the other requirements for criminal liability become unnecessary.<sup>8</sup> Consider an example of a prohibitive norm like: “You may not kill another” – this prohibition may be infringed in a case where X caused the death of a pedestrian by failing (omitting) to apply his brakes. This brings again, our attention on the notion of a legal duty to act positively. X was under a legal duty to apply his brakes to avoid killing the pedestrian. With regards to this prohibitive norm, X’s conduct complies with the definitional elements of a crime (for example, murder). This will be illustrated in the following paragraph.

### 2.2.2 Conduct must comply with the definitional elements of a crime

Generally, for a particular conduct to be considered as criminal, that conduct must be the exact or true reflection of what the law seeks to prohibit in a particular type of crime (for example, theft). If it is concluded that there was conduct on the part of X, for the purpose of determining criminal responsibility, the next question will be to determine if the particular conduct in question complies with the definitional elements to constitute an offence.

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<sup>5</sup> PCCAA s 20; also see Financial Intelligence Centre Act (FICA) 2001 which requires persons or establishments to report knowledge of the commission of some financial crimes, failure to do so is punishable.

<sup>6</sup> See the English case of *Pitwood* (1902) 19 TLR 37.

<sup>7</sup> Jordaan *et al* *General principles of criminal law* 37-38.

<sup>8</sup> Snyman *Criminal law* 52.

To say that X's act must comply with the definitional elements implies the actual description of the requirements for criminal responsibility for that particular type of crime with which X is charged, as compared to other crimes.<sup>9</sup> Therefore, particular requirements apply to particular crimes. In other words, crimes differ from each other because of different definitional elements contained in each definition.

For example, the definitional elements of murder are the causing of the death of another human being. If X intentionally kills Y, X commits the crime of murder. This means that the act of X (killing Y irrespective of how X killed him) represents the definitional elements of that crime.<sup>10</sup>

In South African criminal law, crimes are grouped into two forms according to the definitional elements – formally-defined crimes and materially-defined crimes. In formally-defined crimes, the definitional elements proscribe a particular type of conduct, regardless of the result of that conduct, for example, possession of drugs and perjury.<sup>11</sup> In materially-defined crimes, the definitional elements do not proscribe that particular conduct, but rather, any conduct that causes a particular condition, for example, culpable homicide, arson and murder. That is why these types of crimes are also referred to as “consequence crimes” or “result crimes”.<sup>12</sup> As the conduct in materially-defined crimes must qualify as the cause of the prohibited result, there must be a causal link (*nexus*) between the conduct of X and the unlawful consequences. To establish a causal link, a court must establish that both factual causation (*condition sine qua non*) and legal causation (policy considerations) are present.<sup>13</sup>

Having established that X's act or omission complied with the definitional elements of a crime is not conclusive that he is guilty of the crime.<sup>14</sup> It must also be ascertained that the conduct in question was unlawful and that he was culpable.

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<sup>9</sup> Snyman *Criminal law* 71.

<sup>10</sup> Snyman *Criminal law* 71; It should be noted that the term ‘act’ as applied in criminal law means the act as set out in the definitional elements. See Jordaan *et al General principles of criminal law* 46.

<sup>11</sup> Jordaan *et al General principles of criminal law* 47.

<sup>12</sup> Jordaan *et al General principles of criminal law* 48.

<sup>13</sup> Jordaan *et al General principles of criminal law* 50.

<sup>14</sup> Snyman *Criminal law* 73.

### 2.2.3 Unlawfulness

Unlawfulness is one of the important elements in determining criminal responsibility.<sup>15</sup> Conduct will be unlawful if it varies with the good morals (*boni mores*) or the legal convictions of the society. If an act or an omission complies with the definitional elements, it does not automatically imply such act or omission is unlawful,<sup>16</sup> for example, consider a case where an ambulance carrying a patient to the hospital exceeds the speed limit.<sup>17</sup> In determining whether X's act was unlawful or not, the question is not whether X acted reasonably; the focus here is whether any grounds of justification exist to excuse or justify the unlawful conduct.<sup>18</sup> Therefore, unlawfulness may be defined simply as "the absence of a ground of justification."<sup>19</sup>

Certain conduct, which is generally considered as unlawful as it complies with what the law considers as a crime, may not necessarily be punishable. For example, in considering the requirements for criminal liability as regards murder, X must have omitted to act or committed an act, which meets the definitional elements of the crime (causing the death of another human being). This is unlawful, but X cannot be held criminally liable if he was acting within the ambit of the law, for example, as a police officer or under one of the other grounds of justification. Where this is the case, X's unlawful act is justified.

X would also not be liable if it is established by a court of law that he caused someone else's death in self-defence. His conduct will fall under one of the grounds of justification (self-defence) thus, the killing would be not unlawful.<sup>20</sup> However, if X erroneously (subjectively) believes that a ground of justification exists when he committed the crime; such 'putative' ground of justification does not exist – X erroneously imagines it exists; but it is not considered a ground of justification, and he will therefore be liable.<sup>21</sup> When determining whether X's

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<sup>15</sup> Snyman *Criminal law* 96. Other terms, such as "unjustified", "lack of justification" or "illegal" are sometimes used instead of 'unlawful', which may cause some confusion.

<sup>16</sup> Snyman *Criminal law* 95.

<sup>17</sup> Snyman *Criminal law* 96.

<sup>18</sup> Steyn [https://www.youtube.com/watch?v=n7U\\_u38H28Q&feature=youtube](https://www.youtube.com/watch?v=n7U_u38H28Q&feature=youtube) (Date of use: 14 February 2019); Snyman *Criminal law* 96-97.

<sup>19</sup> Jordaan *et al General principles of criminal law* 66.

<sup>20</sup> Snyman *Criminal law* 95.

<sup>21</sup> Snyman *Criminal law* 101.

conduct was unlawful, X's state of mind at the time of the conduct is irrelevant.<sup>22</sup> Knowledge of unlawfulness may be proved by direct evidence, or inferred as an exercise of logic, not of law, from other materials, for example, reports from the police, and information from others.<sup>23</sup>

The prosecution has the burden to prove beyond reasonable doubt that the conduct of X did not only meet the definitional elements, but also that his conduct was unlawful.<sup>24</sup> If these elements have been established, it must still be determined whether X had the necessary culpability when he committed the crime.

#### 2.2.4 Culpability

It is not sufficient to hold X liable simply for reasons that he committed a criminal act that meets the definitional elements of a crime and which was unlawful. The fourth element of criminal liability which must further be considered by the court is the element of culpability. Despite the fact that X's conduct complies with the definitional elements of a crime, and the fact that such conduct is prohibited, it does not mean that X should be held culpable. The question of determining culpability only arises when it has been concluded that the conduct of X was unlawful.<sup>25</sup> If X's conduct has been concluded to be lawful, no question as to X's culpability will follow. This will be the case where the unlawfulness of the act has been excluded by grounds of justification,<sup>26</sup> for example, (lack of) capacity.

The courts usually refer to culpability as *mens rea* – a guilty mind. Therefore, culpability will legally mean that there is a reason to blame X for his criminal conduct (committed or omitted). In order to find him culpable, X's subjective state of mind at the time of the commission of the crime has to be proven.<sup>27</sup> Snyman lists three grounds upon which X may be culpable for his conduct:

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<sup>22</sup> X's state of mind or what he subjectively believed at the time of the act will only be taken into consideration only when determining culpability.

<sup>23</sup> *S v Aitken and Another* 1988 (4) SA 394 (C) para 401G.

<sup>24</sup> Snyman *Criminal law* 102.

<sup>25</sup> Snyman *Criminal law* 145.

<sup>26</sup> Grounds of justification refer to those defences that exclude unlawfulness of X's conduct, e.g., self-defence, necessity and consent. Defences entail grounds that exclude liability, e.g., criminal incapacity and automatism.

<sup>27</sup> Hoorntje 2013b SACJ 131.

- (a) X was aware of the circumstances which made his act correspond to the definitional elements and rendered it unlawful;
- (b) he was capable of acting in accordance with his insights into right and wrong; and
- (c) he willed the commission of the act constituting the crime.<sup>28</sup>

The second and the third grounds are dependent on the first ground – knowledge that his act, which corresponds to the definitional elements of the crime committed is unlawful. X would be culpable if it is concluded that his unlawful act in question was committed in a “blameworthy state of mind”.<sup>29</sup> Two elements must be taken into consideration when determining X’s culpability, and include criminal capacity, and intention or negligence. These elements relate to Snyman’s second and third grounds listed above.

(a) *Criminal capacity*

Criminal capacity forms part of the requirements for culpability.<sup>30</sup> Therefore, an investigation as regards X’s criminal capacity concerns considering his mental abilities.<sup>31</sup> This is because at one point, a person may have criminal capacity, and at another point, he may lack criminal capacity. Criminal capacity means that X must have the mental ability to differentiate between what is right and wrong, and act in accordance with that appreciation.<sup>32</sup> The law can only hold X culpable if he possesses such mental ability.<sup>33</sup> In this regard, a child<sup>34</sup> or a mentally-ill person<sup>35</sup> who kills someone cannot be held to have capacity to act since such category of persons cannot distinguish right from wrong.<sup>36</sup> On mental defect and criminal responsibility, the CPA states:

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<sup>28</sup> Snyman *Criminal law* 151.

<sup>29</sup> Jordaan *et al General principles of criminal law* 100-101.

<sup>30</sup> Snyman *Criminal Law* 155.

<sup>31</sup> Jordaan *et al General principles of criminal* 104.

<sup>32</sup> Jordaan *et al General principles of criminal* 105.

<sup>33</sup> Snyman *Criminal law* 155.

<sup>34</sup> According to the Child Justice Act 75 of 2008 s 4, a child below the age of ten years is presumed to irrefutably lack criminal capacity. Please note that the Child Justice Amendment Bill (B32-2018) has been adopted whereby the minimum age of the criminal capacity of a child is increased from ten to twelve years.

<sup>35</sup> See CPA ss 77-78.

<sup>36</sup> Jordaan *et al General principles of criminal law* 101; Snyman *Criminal law* 155.

A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable-

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.<sup>37</sup>

Accordingly, there are two psychological legs of test for criminal capacity – X must have the ability to appreciate or understand the wrongfulness of his act, that his conduct is unlawful – that is, his knowledge or ability to distinguish right from wrong (X's cognitive mental function).<sup>38</sup> The second component of the psychological test is integrated to determine capacity – which is X's ability to conduct himself in accordance to the insight acquired as to the wrongfulness of his act or omission (X's conative ability to act or not to act).<sup>39</sup> Both legs must be satisfied in order to find that X had the necessary capacity to commit the unlawful act. However, if X suffers from a mental illness, he lacks criminal capacity and is incapable of either appreciating his unlawful act, or acting in accordance with the appreciation of such wrongfulness. As such, only one of these conditions must be satisfied for a mentally-ill person to have capacity in terms of the crime committed.<sup>40</sup> The defences which exclude capacity thus include mental illness and youth (as shown above), but also non-pathological criminal incapacity.<sup>41</sup>

*(b) Intention or negligence*

Even if X is endowed with criminal capacity, he still may not be culpable in the absence of either intention or negligence<sup>42</sup> being established. In other words, for X to be culpable he must have criminal capacity, and X must have conducted himself either intentionally or negligently at the time the offence was committed. An investigation into X's intention or negligence is an examination of his state of mind (knowledge).

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<sup>37</sup> CPA s 78(1) [subs (1) substituted by s 5(a) of CPA 68 of 1998].

<sup>38</sup> Snyman *Criminal law* 156-157.

<sup>39</sup> Jordaan *et al General principles of criminal* 105.

<sup>40</sup> See Snyman *Criminal law* 165.

<sup>41</sup> Jordaan *et al General principles of criminal* 106.

<sup>42</sup> For a definition of negligence, see Snyman 206. Also *supra* x.

The court will have to infer whether X really willed to do what he did, or what he did was without his will. The issue of X's intent or neglect will not arise where it is concluded that he had no criminal capacity. X may not be completely exonerated from criminal liability if he knew or did not know at the time of his conduct that he was acting unlawfully; if he is not held liable for having committed the act intentionally, he may still be liable for having committed the act negligently. X will be culpable if he has intention or negligence, plus criminal capacity.<sup>43</sup> As all four elements of criminal liability will consequently also be satisfied, X will be criminally liable for the crime committed.

As *dolus eventualis* resorts under intention, the following section will explain intention as well as the various types of intention in more detail.

### 2.3 Types of intention

Technically X will be said to have acted with intention if he directs his will towards committing an offence with the awareness of the existence of the definitional elements of the crime, and knowledge of the fact that his act is unlawful.<sup>44</sup> Intention, as this term is used in criminal law, means that a person commits an act:

- (1) while his will is directed towards the commission of the act or the causing of the result;
- (2) in the knowledge of
  - (a) the existence of the circumstances mentioned in the definitional elements of the relevant crime and
  - (b) in the knowledge of the unlawfulness of the act.<sup>45</sup>

Snyman states that if X fulfils the first part of the definition, i.e. he directs his will towards the commission of the act but without the knowledge referred to in the second part of the definition, he acts with so-called 'colourless intention'. X must have knowledge that his act might cause the unlawful result, in order to qualify as criminal intention, or 'coloured' intention. For example, X lives with his wife and two-year-old child in a security village, and late at night he sees a man (Y) carrying

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<sup>43</sup> Jordaan *et al* *General principles of criminal* 102.

<sup>44</sup> Snyman *Criminal law* 177.

<sup>45</sup> See Snyman *Criminal law* 176; Govender [http://www.researchgate.net/publication/320810690\\_Is\\_doluseventualis\\_a\\_'weaker\\_currency'\\_in\\_sentencing\\_for\\_murder](http://www.researchgate.net/publication/320810690_Is_doluseventualis_a_'weaker_currency'_in_sentencing_for_murder) (Date of use 18 June 2019)..

a gun. Y had already gained access into his premise and is struggling to open the main door, and X shoots and kill Y. X will be said to have acted with colourless intent. In other words, X's intent is not coloured by the knowledge of unlawfulness since X knew that he was acting in self-defence, X knew that he was acting lawfully.

As explained above, intention is an ingredient of criminal liability. For any offence requiring intention, there must be proof of guilty knowledge of unlawfulness.<sup>46</sup> The rationale is that where a specific type of intention (such as legal intention) is the necessary mental element (*mens rea*), actual intention, in the form of knowledge, must exist in respect of the circumstances.<sup>47</sup> Here, it must be proven that X deliberately intended to exceed the boundaries with knowledge of unlawfulness; as such, he must have intended the consequences.<sup>48</sup>

Courts determine *mens rea*, or fault, that is, blameworthiness by means of a subjective test. This means that the court has to dig deep into the mind of X to conclude, without any doubt, that he meant or did not mean to do what he did. The judge must put himself in the perpetrator's situation, as if he was X.<sup>49</sup> This implies reconstructing a past to know if X really intended what he did which the law considers unlawful. Therefore, it is necessary to consider X's state of mind when the act was being performed. South African criminal law recognises the following forms of intention (*dolus*):

### 2.3.1 *Dolus directus* (direct intention)

This type of intent is considered as intent in the ordinary sense of the word.<sup>50</sup>

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<sup>46</sup> *S v Aitken and Another* 1988 (4) SA 394 (C) paras 401E-F.

<sup>47</sup> *Pain* 1989 SALJ 594.

<sup>48</sup> Steyn [https://www.youtube.com/watch?v=n7U\\_u38H28Q&feature=youtu](https://www.youtube.com/watch?v=n7U_u38H28Q&feature=youtu) (Date of use: 14 February 2019).

<sup>49</sup> Steyn [https://www.youtube.com/watch?v=n7U\\_u38H28Q&feature=youtu](https://www.youtube.com/watch?v=n7U_u38H28Q&feature=youtu) (Date of use: 14 February 2019).

<sup>50</sup> German criminal law recognises *dolus directus* in two forms: *dolus directus* in the first degree (*die Absicht*) and *dolus directus* in the second degree (*den direkte Vorsatz*). The first type requires that X knows that his conduct will lead to the objective element of the crime; and this unlawful conduct was purposefully intended to bring about the result. This means that the volitional element prevails over the cognitive element since X purposefully desires to realise the prohibited consequences.<sup>50</sup> The second form of criminal intent does not require that X actually intend to cause the material element of the crime; even though he is aware that the 'constitutive element' (*Tatbestand*) of the crime will be as a result of his conduct. Where this is

Here, X means to cause the prohibited consequences or perpetrate the prohibited conduct.<sup>51</sup> The concept of *dolus directus* does not specifically require premeditation; X must merely act with the intention of bringing about the unlawful result. X has intention in the form of *dolus directus* if the causing of the unlawful result is his main aim. This implies that X takes all the necessary steps to make sure Y dies the way he (X) had planned. For example, if X wants to shoot and kill Y, X directs his will to that result. X acts with *dolus directus* when he conducted himself with the main purpose of killing the Y.<sup>52</sup>

All the circumstances, for example, from when it was possible that X was forming an intention, the carrying out of the intention, including the state of X's mind at that time, must be weighed to determine whether the unlawful conduct was deliberate and/or premeditated.<sup>53</sup> Generally, *dolus directus* does not necessarily require premeditation over a period of time, X can form the necessary direct intent to commit a crime instantaneously.<sup>54</sup>

### 2.3.2 *Dolus indirectus* (indirect intention)

With this type of intention the proscribed conduct is not X's main purpose, but he realised that in achieving his goal, the proscribed consequences will obviously ensue.<sup>55</sup> The court will have to determine X's state of mind during the time of the prohibited result, which was not his main intention; still the unlawful consequence was a direct result of X attaining his main goal.<sup>56</sup>

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the case, the degree of volitional element is overridden by the cognitive element. That is, the knowledge or awareness that his conduct will cause the unlawful result.<sup>50</sup> An example of *dolus directus* in the second degree is when X sets a house alight to claim money from his insurance company, and he is aware that Y, who is trapped in the house, cannot escape. Where this is the case, X will be said to have acted with *dolus eventualis* in the second degree in regards to the death of Y.

<sup>51</sup> Burchell *Principles of criminal law* 350. *Dolus directus* is required for crime of genocide under art 6 of the Rome Statute wherein it is stated that the perpetrator must not only intend to kill one or more persons, but intend to destroy, in whole or in part, a national, ethnical or religious group. The same applies for crimes against humanity (art 7 of the Rome Statute), where X must be aware that the conduct was, or intended to be part of a wide-spread systematic attack on a civilian population. Also see Rome Statute art 8. This is discussed in greater detail in chapter 4 of this study.

<sup>52</sup> *DPP v Pistorius* para [26]; Paizes 1993 SALJ 504.

<sup>53</sup> See *S v Raath* 2009 (2) SACR 46 (C).

<sup>54</sup> Du Preez *Dolus eventualis* 9.

<sup>55</sup> Snyman *Criminal law* 178.

<sup>56</sup> Hoorntje 2008 *Fundamina* 15.

In *dolus indirectus* offences X foresees the unlawful consequences as “virtually certain”,<sup>57</sup> but proceeds with his conduct, as he wants to realise his main aim. An example of this form of intention is a case where X sets fire to some stock in the storeroom to destroy the stock (*dolus directus*) so that he would obtain compensation from the insurance company. However, X foresaw the destruction of the store as an inevitable consequence of burning the stock (*dolus indirectus*). In such a case, X would be guilty of arson.<sup>58</sup>

### 2.3.3 *Dolus eventualis* (legal intention)

It has been accepted that *dolus eventualis* is an important ingredient for all crimes involving intention in South African criminal law. It is the most applicable form of intention,<sup>59</sup> and different from intention in the normal sense.<sup>60</sup> In criminal law, X may be held to have acted with intention in the form of *dolus eventualis* if he directs his will to commit an unlawful act, and he realises that his conduct may result in the anticipated unlawful consequences, yet he still persists with his unlawful act.<sup>61</sup> Snyman states that such intention exists if X foresaw the possibility that his conduct might lead to an unlawful consequence, and accepts this possibility into the bargain.<sup>62</sup> *Dolus eventualis* has also been considered to mean that X “subjectively foresaw the possibility of the death of the deceased and associated himself therewith”.<sup>63</sup> Snyman 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 his main aim, but:

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<sup>57</sup> Burchell *Principles of criminal law* 350.

<sup>58</sup> Burchell *Principles of criminal law* 350-351.

<sup>59</sup> Hoctor 2013b SACJ 134.

<sup>60</sup> Snyman *Criminal law* 179, Hoctor 2013b SACJ 131.

<sup>61</sup> Pain 1989 SALJ 594. Burchell *Principles of criminal law* 351 n 12 states that X does not ‘mean’ to cause the unlawful consequence, but foresees the possibility of the consequences ensuing, and still proceeds with such conduct.

<sup>62</sup> Burchell *Principles of criminal law* 357.

<sup>63</sup> Burchell *Principles of criminal law* 351 n 12. In German criminal law, *dolus eventualis* (*den bedingte Vorsatz*) would be considered in a case where X did not aim or anticipate that the objective elements of the crime will occur. However, the possibility that the objective elements of the crime may occur was anticipated, and he reconciled himself with the outcome. In this form of intent, both the cognitive (*Wissen*) and the volitional (*Wollen*) elements are unclearly defined. Even though the German Criminal Code (*Strafgesetzbuch*) under s 15 covers *dolus eventualis*, the Special Part of the Code clearly calls for a higher *mens rea* standard with regards to specific crimes than *dolus eventualis*.

- (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.<sup>64</sup>

From the above definition, the elements in this type of intent, according to Steyn, entail that X (a) foresees (factual cognitive element) the result of his intended conduct, (b) is aware (legal cognitive element) that his intended act is unlawful, and, (c) he takes steps to act (volitional element) irrespective of the foreseen consequences.<sup>65</sup> The requirements for *dolus eventualis* in consequence crimes is, according to Snyman, (a) foresight; (b) possibility; (c) correlation between what X foresaw and the actual consequences occurring; and (d) recklessness.<sup>66</sup>

Although Steyn<sup>67</sup> postulates a three-stage requirement for *dolus eventualis*, Snyman,<sup>68</sup> holds that X will be said to have acted with intention in the form of *dolus eventualis* if, although he did not intend to commit or cause the unlawful consequences, (a) he subjectively foresees that if he does what he intends to do, it may lead to an unlawful result (cognitive component), and (b) he still decides or takes steps (reconciles himself) to perform what he had intended to do, irrespective of whether the unlawful consequences he foresaw occur or not (conative component).<sup>69</sup> Therefore, in order to establish that X acted with *dolus eventualis*, these two components must be satisfied with regards to X's state of mind and his conduct at that time of the conduct.<sup>70</sup>

It has been argued that *dolus eventualis* is a mental state similar to the common-law recklessness; the difference is however that *dolus eventualis* classifies 'risk-taking behaviour' as a type of intent.<sup>71</sup> *Dolus eventualis* is as such concerned with

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<sup>64</sup> Snyman *Criminal law* 178. See also Schulze 2015 *De Rebus* 44; *S v Sabben* 1975 (2) All SA 657 (A) 658; *S v Makgatho* 2013 (2) SACR 13 (SCA) para [9] (hereinafter *Makgatho*). Burchell and Hunt *South African law and criminal procedure* 131 state: "It is sufficient if the accused, having foreseen the real possibility of the existence of the circumstances in question, nevertheless persisted in his conduct irrespective of whether it existed or not". See also Hahlo *et al* (eds) *Annual survey of South African law* 73.

<sup>65</sup> Steyn <https://www.enca.com/opinion/oscar-pistorius-the-two-heavyweight-champions-of-south-african-criminal-law-weigh-in-part-1> (Date of use: 10 September 2017).

<sup>66</sup> Burchell *Principles of criminal law* 358.

<sup>67</sup> Steyn <https://www.enca.com/opinion/oscar-pistorius-the-two-heavyweight-champions-of-south-african-criminal-law-weigh-in-part-1> (Date of use: 10 September 2017).

<sup>68</sup> Snyman *Criminal law* 178.

<sup>69</sup> Snyman *Criminal law* 181.

<sup>70</sup> Hoctor 2008 *Fundamina* 15.

<sup>71</sup> Ohlin 2013 *Mich J Int'l L* 79.

the measure of X's perception or preparedness to run the risk.<sup>72</sup> X must however be aware of the particular result ensuing. Therefore, in a materially defined crime such as murder, X must have foreseen the possible consequences of his act for there to be knowledge of unlawfulness. With respect to formally defined crimes like possession of drugs, for example, X must have knowledge with respect to the circumstance.<sup>73</sup> Therefore, intent in the form of *dolus eventualis* may exist where X foresees (or is aware of) the possibility that the substance which he possesses may be cocaine, but does not bother to consider this, and continues (reconciles himself to this possibility) by possessing the substance.<sup>74</sup> It must be proved that the perpetrator subjectively foresaw a 'real' possibility and not a 'remote' possibility of that result ensuing. Therefore, the foresight required for *dolus eventualis* is the subjective appreciation of a reasonable possibility that the unlawful consequences will occur.<sup>75</sup>

Where the main object of the wrongdoer is not to cause death, for example, his intention in the form of *dolus eventualis* arises if he foresaw the possibility that death might occur, but he nevertheless proceeded with his conduct in appreciation of that possibility, the second element has been realised. The perpetrator's conduct was reckless as to the consequences. This has also been considered to mean that the offender acted with gross negligence or that he reconciled himself with the consequences. In such cases, the guilty party does not need to foresee harm or death as a possible result of his conduct - if the possibility of harm or death was foreseen while ignoring the consequences, it is enough to constitute *dolus eventualis*.<sup>76</sup>

The diagram below is an illustration of the necessary elements that are needed to define legal intent.<sup>77</sup> The two elements (components) must be considered together.<sup>78</sup> These elements will now be explained in more detail.

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<sup>72</sup> Paizes 1993 SALJ 504.

<sup>73</sup> Snyman *Criminal law* 186-187.

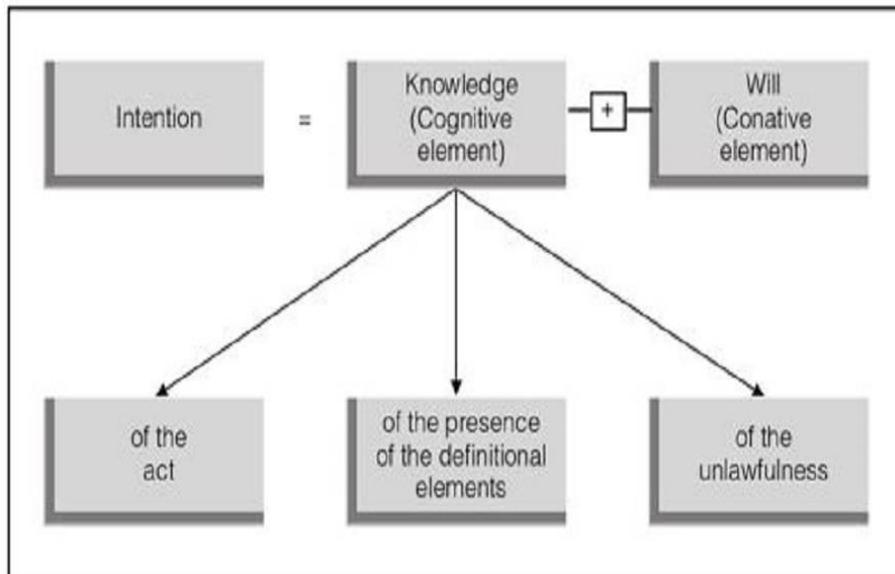
<sup>74</sup> Snyman *Criminal law* 187; *R v Z* 1960 1 SA 739 (A) 743, 745; *R v Churchill* 1959 2 SA 575 (A) 578.

<sup>75</sup> Ackerman AJA in *S v van Wyk* 1992 (1) SACR 147 (Nms) para 161b.

<sup>76</sup> *DPP v Pistorius* para [26].

<sup>77</sup> See Snyman *Criminal law* 177.

<sup>78</sup> *Van Schalkwyk v The State* (680/15) [2016] ZASCA 49 para [15] (hereinafter *Van Schalkwyk*).



### 2.3.3.1 Cognitive component (knowledge) of *dolus eventualis*

As already stated, this is the first component which relates to what the perpetrator had envisaged to be the result of his conduct. *Dolus eventualis* is absent if the perpetrator does not conceive the consequences. It is worth noting here that *dolus eventualis* differs from *dolus indirectus* in that the perpetrator foresaw the consequences, not as one which will necessarily occur from his conduct (as in *dolus indirectus*), but as a possibility.<sup>79</sup>

The determining factor of the cognitive element prior to 1950 was considered objectively. The issue was whether a reasonable person would foresee the consequences of his conduct. Where this was the case, the conclusion was that he did foresee the consequences,<sup>80</sup> as declared in *Van Schalkwyk*.<sup>81</sup>

For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence.

<sup>79</sup> That it is sufficient to foresee the *possibility* (as opposed to the *probability*) of the result ensuing is evident from *S v Nkombani and Another* 1963 (4) SA 877 (A) paras 891C-D (hereinafter *Nkombani*); *Sigwaha* paras 570B-C; *Snyman Criminal law* 180 n 122.

<sup>80</sup> Burchell *Principles of criminal law* 352.

<sup>81</sup> *Van Schalkwyk* para [50] referencing *S v Humphreys* (424/2012) [2013] ZASCA 20; 2013 (2) SACR 1 (SCA); 2015 (1) SA 491 (SCA) para [13] (hereinafter *Humphreys*).

In this particular case, the inference to be drawn from the facts with regard to knowledge is whether Van Schalkwyk foresaw the likelihood of death ensuing from his conduct considering that the hay hook is a farm tool, and not a long knife. The hay hook in the *Van Schalkwyk*-case had a relatively sharp ending, which a reasonable person in the position of the perpetrator would foresee that an impulsive strike on any person might result in death, and he foresaw the possibility that death might ensue from his conduct.<sup>82</sup>

When determining knowledge of unlawfulness of conduct (cognitive element in legal intention), three different aspects are taken into consideration:

- (i) The first aspect is the actual cognitive element, which is the perpetrator's premonition and understanding about what he intends to do or fails to do.
- (ii) The second aspect of the cognitive element is the understanding by the perpetrator that his act will result in a crime, or the understanding that his conduct meets the definitional elements of a crime.
- (iii) The third aspect under cognitive element is the legal understanding by the perpetrator that his intended conduct and the consequences are unlawful.<sup>83</sup> This fully culminates to legal intention only when the offender then directs his will (the conative element) to realize the result.

The perpetrator must have, first of all, subjectively foreseen the possibility of harm resulting from his conduct.<sup>84</sup> Establishing the conative component thus includes a subjective assessment whether the perpetrator had foresight of the consequences occurring. It is not sufficient that objectively he reasonably ought to have foreseen such possibility ensuing. There must be a distinction between what was actually in the perpetrator's mind at the time of his conduct, and what a reasonable person in his particular position would have thought at that time before his conduct. In this regard, any distinction between subjective foresight and objective foreseeability must not be blurred.<sup>85</sup>

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<sup>82</sup> *Van Schalkwyk* [51]-[52].

<sup>83</sup> Steyn [http://www.youtube.com/watch?v=n7U\\_u38H28Q&feature=youtube](http://www.youtube.com/watch?v=n7U_u38H28Q&feature=youtube) (Date of use: 14 February 2019).

<sup>84</sup> Hoctor 2008 *Fundamina* 15.

<sup>85</sup> Holmes JA in *Sigwaha* paras 570C-E.

An objective consideration would be relevant when determining whether the perpetrator foresaw such a possibility, and consideration must also be taken of what any reasonable person in his position would have done; in terms of what was in the perpetrator's mind at the time of his unlawful conduct. While the term 'likely' may be applied in the test for the cognitive component, the term 'foresight' of a possibility of harm or death is required.<sup>86</sup>

The possibility of a consequence ensuing would be considered as enough proof of the presence of the cognitive component. Therefore, the perpetrator must have foreseen that his conduct would likely cause the result. This position has however been regarded as a setback to determine *dolus eventualis* since it qualifies the degree of foresight. The word 'likely' is a very ambiguous word - it can refer both to the possibility and the probability of the result occurring.<sup>87</sup> As expounded in *R v Horn*:

It would be incongruous to limit a wrongdoer's constructive intent to cases where the result which he has foreseen was likely to cause death and not to infer such intent where the result he had foreseen was, although possible, not likely.<sup>88</sup>

The judgments in recent cases indicate that the first component is satisfied if it has been proven by inference that the perpetrator subjectively foresaw the risk of harm ensuing from his unlawful conduct.<sup>89</sup>

#### 2.3.3.2 Conative component (volitional element) of *dolus eventualis*

The conative component is regarded as the second leg of *dolus eventualis*.<sup>90</sup> Before 1945, the conative element of *dolus eventualis* was irrelevant to the courts since the accused in most cases would be acquitted for lack of intention. In other words, courts were not applying the conative component of *dolus eventualis*, nor was there any meaning given to the term. The reasoning behind this was that in most cases where the perpetrator was found not guilty, the element that was considered to be lacking was 'foresight', moreover, recklessness was never

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<sup>86</sup> Consider the statement of Holmes JA in *S v Sikweza* 1974 (4) SA 732 (A) 736.

<sup>87</sup> Loubser and Rabie 1988 SACJ 416; *R v Thibani* 1949 (4) SA 720 (A) 729 (hereinafter *Thibani*).

<sup>88</sup> *R v Horn* 1958 (3) SA 457 (A) para 467B (hereinafter *Horn*).

<sup>89</sup> *Van Schalkwyk* para [16].

<sup>90</sup> Snyman *Criminal law* 177.

considered.<sup>91</sup>

South African courts nowadays consider the volitional component as necessary in this form of intention. This was confirmed in the case of *S v Beukes*,<sup>92</sup> where the Appellate Division again had an opportunity to decide on the equivocal concept of *dolus eventualis*. The court alluded to the difference of opinion as to whether this form of intent only requires a cognitive element of foreseeability, or whether the element of volition was also necessary. The court held that this second leg of volition is only satisfied if the perpetrator foresaw the consequences of his conduct as a reasonable or real possibility, and furthermore reconciled himself to that possibility.<sup>93</sup> The *Beukes* court consequently acknowledged that some form of volition was required as constituent element for this form of *dolus*.<sup>94</sup>

Subsequent to this case, the implication is that where the offender foresaw the likelihood of the consequences emanating from his conduct only as remote, it would be concluded that he did not reconcile himself to that possibility or took that possibility into a bargain.<sup>95</sup> This perspective is confirmed by Paizes,<sup>96</sup> who maintains that *dolus eventualis* has never been considered to be present in a case where the perpetrator had foreseen the unlawful consequences of his conduct as only a slight or remote possibility, but only where there is a real possibility of harm occurring.

With regards to the cognitive component, the perpetrator must proceed or reconcile himself to performing the foreseen unlawful act.<sup>97</sup> At this stage, it is deemed that he was reckless as to whether the conduct will result to death or not.<sup>98</sup> In *S v Sigwahla*,<sup>99</sup> this component of *dolus eventualis* was considered in terms of

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<sup>91</sup> *Thibani* 730, 732; *S v Mini* 1963 (3) SA 188 9 (A) 196; *R v Mabena* 1967 (3) SA 525 (R) 528; *R v Nemashakwe* 1967 (3) SA 520 (RA) 523; *S v P* 1972 (3) SA 412 (AD) 419.

<sup>92</sup> *S v Beukes en 'n Ander* 1988 (1) SA 511 (A) 521-522.

<sup>93</sup> *S v Beukes en 'n Ander* para 522E; Whiting 1988 SACJ 440, 445.

<sup>94</sup> Loubser and Rabie 1988 SACJ 415.

<sup>95</sup> *Ngubane* paras 685F-686A; see Whiting 1988 SACJ 440, 445, whereby he rejects this reasoning on the basis that it is a fallacy. By acting with foresight of a remote possibility that a result will occur, one necessarily reconciles oneself to there being a remote possibility that it will occur, or takes this remote possibility into the bargain.

<sup>96</sup> Paizes 1988 SALJ 642.

<sup>97</sup> Steyn [http://www.youtube.com/watch?v=n7U\\_u38H28Q&feature=youtube](http://www.youtube.com/watch?v=n7U_u38H28Q&feature=youtube) (Date of use: 14 February 2019).

<sup>98</sup> Hoctor 2008 *Fundamina* 15.

<sup>99</sup> *Sigwahla* paras 570B-C.

recklessness; in *S v De Oliveira*,<sup>100</sup> the conative component was considered in terms of the perpetrator reconciling with a risk of harm; in *S v Roberts*,<sup>101</sup> it was held to include the perpetrator's "persistence in such conduct, despite such foresight";<sup>102</sup> while in *S v De Bruyn en 'n Ander*,<sup>103</sup> the court held that the conative component implies that the wrongdoer consciously took the risk.

The perpetrator may foresee a consequence as possible, but if he concludes that the consequences will not ensue from his conduct, he will lack *dolus eventualis* since he did not reconcile himself with that possibility.<sup>104</sup> A court, according to Paizes, would then not consider the volitional element:

...X must have consented to the foreseen consequences as a possibility; he reconciled himself to that possibility and took it into the bargain. If the court is satisfied that the possibility of the consequences of X's conduct as he (X) subjectively foresaw would not happen, it becomes irrelevant to invoke this second element (conative element) of *dolus eventualis* since it cannot be established.<sup>105</sup>

To reconcile oneself with the possibility simply means that the perpetrator decides to indulge in the conduct. Where this is the case, it implies that the person no longer cared if the anticipated consequences of his conduct occur or not - he is reckless<sup>106</sup> with regards to the unlawful consequences. He accepts the risk consciously.<sup>107</sup> The Supreme Court of Appeal in the *Humphreys*-case attempted to provide some guidelines with regard to the conative component; however, the decision failed to elucidate the legal position.<sup>108</sup> The court, in considering the conative component and the question of proof, stated that:

...where a court establishes that the accused foresaw a consequence, invariably the conative component is also held to be present. The chances that an accused will admit, or that it will be otherwise proved, that he foresaw a remote consequence are extremely slim. A court will therefore draw an

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<sup>100</sup> *De Oliveira* paras 65i-j. In this case, and in others as well, the foresight of the possible occurrence of the deceased's death is not mentioned; what is important is that the perpetrator's act involved some risk to life. See also *Horn* para 465D; *Nemashakwe* para 523B.

<sup>101</sup> *S v Roberts* 2000 (2) SACR 522 (SCA) para [17].

<sup>102</sup> Burchell *Principles of criminal law* 366; *Tyawana v S* (A68/10, A402/10) [2010] ZAWCHC 585.

<sup>103</sup> *De Bruyn* para 510H.

<sup>104</sup> It should be noted that as a second requirement for this form of intention, the perpetrator must reconcile himself to the possibility of the consequences of his conduct.

<sup>105</sup> Paizes (ed) *Commentary on the Criminal Procedure Act* 7.

<sup>106</sup> To be reckless simply means that the perpetrator consciously accepts the risk.

<sup>107</sup> Snyman *Criminal law* 181.

<sup>108</sup> Hoor 2013b SACJ 133.

inference concerning the accused's state of mind from the facts which indicate that, objectively assessed; it was reasonably possible that the consequence would occur. In the absence of such possibility, it is simply accepted that the accused did not foresee the consequence. If such possibility is established, it is usually accepted from the fact that the accused continued to act that he reconciled himself to the ensuing result.<sup>109</sup>

Taking the above into consideration implies that the conative component will become redundant if a court finds that an accused foresaw the consequence occurring. The subjective foresight of the possibility that the result will ensue is a necessary requirement; such possibility must however be substantial and not remote. The second component of the test adds value to the first component in terms of substance. As stated above in the *Humphreys*-case, the second component of *dolus eventualis* is determined on inferential reasoning from the facts of the case. If, through inferential reasoning, it is concluded that a person thought that the consequences would not occur, then it cannot be said that he reconciled himself to the possibility of the consequences.<sup>110</sup> Thus, for example, in the *Humphreys*-case, the inflated self-confidence that the taxi driver had in that he will continue to effectively carry out his life-threatening driving differentiates his conduct from those related to "foresight, derived from common human experience".<sup>111</sup>

Where it is concluded that both the cognitive and the conative components are absent, the perpetrator would have no intention in the form of *dolus eventualis*. *Dolus eventualis* is totally dependent on these two essential components – (the cognitive and the conative components) occurring. There are however also tests for *dolus eventualis*; this will be subsequently discussed.

### 2.3.3.3 The test for *dolus eventualis*

As previously noted, the concept of *dolus eventualis* is regarded as a controversial concept;<sup>112</sup> "a concept which can with justification be described as an enigma",<sup>113</sup> and some scholars have noted that the concept is characterised by a lack of

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<sup>109</sup> *Beukes* para 522C-E.

<sup>110</sup> *Snyman Criminal law* 182.

<sup>111</sup> *Van Schalkwyk* para [17].

<sup>112</sup> Whiting 1988 SACJ 440; Du Preez *Dolus eventualis* iii: "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*".

<sup>113</sup> Hoctor 2008 *Fundamina* 14.

clarity.<sup>114</sup> The definition of *dolus eventualis* is still being debated on in academic circles, but the courts,<sup>115</sup> in cases of murder, have stated that the test is whether there was the likelihood for X to foresee that his conduct would yield the unlawful consequences, but he proceeded recklessly with that conduct, regardless of whether his conduct resulted in, for example, death or not.<sup>116</sup> Foresight (as required by the first component of *dolus eventualis*) implies an investigation into the wrongdoer's state of mind. This means there must be an element of inference to establish his state of mind at the time of the conduct. As such, *dolus eventualis* concerns the accused's state of mind "but only in a cognitive sense in that it requires a conclusion as to whether a harmful result may actually occur in the circumstances of each case".<sup>117</sup> In this sense, Burchell and Hunt considers this type of intent as a "colourless concept".<sup>118</sup> It is thus a subjective disregard by X of an objectively considerable danger.

Before an unlawful act is committed, certain thoughts prompt the perpetrator to act in that particular manner. This means that these thoughts control the wrongdoer to either act, or not to act. Establishing this state of mind remains the issue in question – what exactly was in the mind of the perpetrator at the time of the unlawful conduct? Another unresolved issue is related to the question of how best one can determine that what the perpetrator says with regards to the events occurring, is true.<sup>119</sup> It is therefore necessary to consider the perpetrator's knowledge with regards to the consequence; whether he foresaw the result as practically certain to flow from his conduct.

Unfortunately, *dolus eventualis* had in certain cases been considered to be synonymous to negligence by South African courts; and in these cases the rule for

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<sup>114</sup> Paizes 1988 SALJ 636.

<sup>115</sup> *S v Malinga* 1963 (1) SA 692 (A) paras 694G-H (hereinafter *Malinga*).

<sup>116</sup> *DPP v Pistorius* para [26].

<sup>117</sup> Du Preez *Dolus eventualis* 55.

<sup>118</sup> Burchell and Hunt *South African law and criminal procedure* 152-153. Colourless intention means the decision to act and the direction of the will without any knowledge of the crime's unlawfulness. See also Steyn <https://www.enca.com/opinion/oscar-pistorius-the-two-heavyweight-champions-of-south-african-criminal-law-weigh-in-part-1> (Date of use: 10 September 2017).

<sup>119</sup> Snyman *Criminal law* 185.

negligence was applied to *dolus eventualis*.<sup>120</sup> *Dolus eventualis* requires the application of a subjective approach to determine what was in the mind of the perpetrator at the time of the unlawful conduct.<sup>121</sup> On the other hand, negligence does not involve an inquiry into the state of mind of the accused, but whether an accused can be blamed for having failed to adhere to the standard of conduct expected of a reasonable person under similar circumstances. This denotes that an objective test is applied in cases where negligence is to be determined.

The approach to determine *dolus eventualis* was initially framed in *R v Horn* and *S v Malinga*.<sup>122</sup> A troubling issue that has however persisted since these cases is in establishing a foresight of a possibility of harm; that is, whether the perpetrator was reckless or not. It has been widely accepted that a subjective test is appropriate when determining foresight by inferential reasoning.<sup>123</sup> Sometimes, the courts make use of phrases such as that the perpetrator must have foreseen the consequences of his conduct, for example, of death ensuing. A literal interpretation of this phrase would imply that the perpetrator in fact foresaw the consequences of his actions;<sup>124</sup> which is not a good approach to determine foresight. Where the court has to determine foresight by inferential reasoning whether there was intent, it must be guarded against not applying an objective consideration. The court must avoid imputing onto the perpetrator a state of mind based on the facts which are thought of only after the unlawful consequences have been committed.<sup>125</sup>

One of the main problems courts have faced in determining *dolus eventualis* in a particular case is in applying the correct test when ascertaining whether the

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<sup>120</sup> *Dlamini and another v S* [2006] SCA 110 (RSA) [10]; Govender [http://www.researchgate.net/publication/320810690\\_Is\\_dolus\\_eventualis\\_a\\_'weaker\\_currency'\\_in\\_sentencing\\_for\\_murder](http://www.researchgate.net/publication/320810690_Is_dolus_eventualis_a_'weaker_currency'_in_sentencing_for_murder) (Date of use: 18 June 2019).

<sup>121</sup> This is contrasted with conscious negligence (*luxuria*), in that the test is an objective one. Govender [http://www.researchgate.net/publication/320810690\\_Is\\_dolus\\_eventualis\\_a\\_'weaker\\_currency'\\_in\\_sentencing\\_for\\_murder](http://www.researchgate.net/publication/320810690_Is_dolus_eventualis_a_'weaker_currency'_in_sentencing_for_murder) (Date of use: 18 June 2019).

<sup>122</sup> *Horn* para 467B; *Malinga* paras 694G-H.

<sup>123</sup> Burchell *Principles of criminal law* 359; Snyman *Criminal law* 184; *S v Dube* 2010 (1) SACR 65 (KZP) paras [6]-[8] (hereinafter *Dube*); *Makgatho* para [10]; *Sigwahla* para 570; *Humphreys* paras [13], [14]. It is important to bear in mind that the *Humphreys*-case involved conscious negligence. *Humphreys*' conduct is differentiated from those acts associated with foresight, as derived from common human experience. See *Van Schalkwyk* para [17].

<sup>124</sup> Snyman *Criminal law* 185.

<sup>125</sup> *Sigwahla* para 570A; *De Bruyn* 507; *S v Sataardien* 1998 (1) SACR 637 (C) 644. See also Snyman *Criminal law* 185.

perpetrator had knowledge of unlawfulness that his conduct would cause the consequences.<sup>126</sup> Two different approaches have been commonly applied which include the subjective approach and the objective approach. These will be subsequently discussed.

(a) Objective approach

Before 1954, the test commonly applied by the courts was the objective test,<sup>127</sup> although the Appellate Division followed a subjective approach in *R v Sikepe*,<sup>128</sup> *R v Thibani*,<sup>129</sup> *R v Mkize*,<sup>130</sup> and *R v Valachia*.<sup>131</sup> Applying the objective test implies that the perpetrator's actual state of mind would be disregarded, and the focus would be on whether a prudent and reasonable person in the position of the perpetrator would have foreseen the consequences as a likelihood. The issue here is not whether the wrongdoer in fact foresaw the consequences, but whether he ought to have foreseen the consequences of his conduct ensuing.<sup>132</sup>

This test based on the objective assessment of the perpetrator's conduct implying that he ought to have reasonably foreseen such a possibility occurring, is not sufficient. As a starting point, a distinction must be made between what the offender was thinking at the time of his conduct, and what would have been in the mind of a sensible and reasonable person in the position of the actor. This implies that a distinction between subjective foresight and objective foreseeability must be made.<sup>133</sup>

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<sup>126</sup> *De Oliveira* 59.

<sup>127</sup> *R v Jongani* 1937 AD 400, 406; *R v Longone* 1938 AD 532, 539-542; *R v Kewelram* 1922 AD 213 (hereinafter *Kewelram*); *R v Duma* 1945 AD 410, 417; *R v Ndhlangisa* 1946 AD 1101-1105; *R v Shezi* 1948 (2) SA 119 (A) 128-130; *R v Koza* 1949 (4) SA 555 AD 560; *R v Mtembu* 1950 (1) SA 670 684. See *R v Radu* 1953 (2) SA 245 (E); *R v Maxaulana* 1953 (2) SA 252 [E].

<sup>128</sup> *R v Sikepe* 1946 AD 745, 756.

<sup>129</sup> *Thibani* 730.

<sup>130</sup> *R v Mkhize* 1951 (3) SA 28 AD 33.

<sup>131</sup> *R v Valachia and Another* 1945 AD 826, 831.

<sup>132</sup> One of the main reasons behind the objective test is derived from the English law presupposition that the perpetrator intends the natural and probable consequences of his conduct. The courts, in using this presumption, have pointed out that the source of the presumption was fact rather than law, and it could consequently be deduced or not depending on the evidence, and that it was rebuttable. See *Kewelram* 217; *R v Jolly* 1923 AD 176 181-189 (hereinafter *Jolly*); *R v Taylor* 1949 (4) SA 702 (A) 713; *R v Nkatlo* 1950 (1) SA 26 (C) 31; *R v Nsele* 1955 (2) SA 145 (A) 151; *R v Nkosi* 1960 (4) SA 179 (N) 180-181.

<sup>133</sup> *S v Sigwahla en 'n Ander* 1989 (3) SA 720 (A) paras 570 B-E.

For example, in the case of *Steyn v The State*,<sup>134</sup> Steyn shot and killed her former husband, who had been abusing her mentally and physically for years. Financial constraints forced her to remain in her former matrimonial home, though they no longer shared the same bedroom; and the deceased continued to abuse her. The deceased also assaulted the appellant on the evening of the incident. In this particular case, the court rejected the appellant's plea of self-defence. Applying the objective approach, the court concluded that when the appellant left her bedroom to fetch a potato from the kitchen, "a reasonable person in the appellant's position would have foreseen the possibility that the deceased, in the condition and mood he was in, might attempt to attack her".<sup>135</sup> In this regard, any reasonable person would not have proceeded to place himself in a dangerous situation where he might be provoked to apply lethal force with the deadly instrument at his disposal to protect himself. Accordingly, the court held that the appellant acted unreasonably; that, had she telephoned and waited for assistance, the lethal incident could have been avoided. On this note, the court held that the appellant "had acted negligently and was guilty of culpable homicide".<sup>136</sup> One would state here that if the subjective test was applied, the verdict might have been different. Considering the circumstances, and that her physical integrity and life were under threat, it was decided that Steyn did not act unlawfully. Her life was in great danger. and in such a situation she was compelled to apply fatal conduct to protect herself:

Had she not done so, it might well have cost her her life. In these circumstances her instinctive reaction, as she described it, of shooting at the deceased, who was seemingly hell-bent on killing her, was reasonable and the court a quo erred in finding otherwise.<sup>137</sup>

(b) Subjective approach

It is not enough that the perpetrator foresaw the possibility of the unlawful consequences emanating from his act; he must also appreciate the unlawfulness of his conduct, and act in accordance with such appreciation. What the court has

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<sup>134</sup> *Steyn v The State* (105/2009) [2009] ZASCA 152 (hereinafter *Steyn*).

<sup>135</sup> *Steyn* para [17].

<sup>136</sup> *Steyn* para [17].

<sup>137</sup> *Steyn* paras [24]-[25]. The appellant's plea of self-defence was upheld, and the conviction and sentence set aside.

to determine here is whether the perpetrator had the subjective foresight of the likelihood that his conduct would result in an unlawful consequence, but proceeded with the unlawful conduct. This is because, if he foresaw that someone would be killed, but proceeded with his conduct, he would be said to have acted with intent in the form of *dolus eventualis*.<sup>138</sup>

Accordingly, as mentioned above, the subjective test may be satisfied by inferential reasoning;<sup>139</sup> a fundamental approach which was set out when determining the state of mind of the perpetrator in *Blom* as follows:

In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.<sup>140</sup>

The court would have to place himself in the perpetrator's position when applying the subjective test in order to determine the necessary *mens rea*. It therefore becomes a technical issue to satisfy that the actor appreciated his conduct, as was the case in *Ndlanzi v The State*.<sup>141</sup> In this case, it was confirmed that any reasonable person would appreciate that driving a car onto a pedestrian area, as was the circumstance in this case, would possibly result in a collision with a pedestrian.<sup>142</sup> In this particular case, the objective test concerned whether any "right-minded person"<sup>143</sup> would have foreseen the pedestrian's death. The starting point in inferential reasoning may begin at the basics, as was the case in *Humphreys*, where it was stated that:

[I]nferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant

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<sup>138</sup> *S v Qege* 2012 (2) SACR 41 paras 48 e-f.

<sup>139</sup> Burchell *Principles of criminal law* 359; *Mini* paras 196G-H; *R v Wells* 1949 (3) SA 83 (A) 88; *S v Fernandez* 1966 (2) SA 295 (A) 264; Hunt and Milton *South African criminal law and procedure* 374.

<sup>140</sup> Watermeyer JA in *R v Blom* 1939 AD 188 202-203; *Jantjies v S* (871/13) [2014] ZASCA 153 para [14].

<sup>141</sup> *Ndlanzi v S* (318/13) [2014] ZASCA 31 (hereinafter *Ndlanzi*).

<sup>142</sup> *Ndlanzi* 35.

<sup>143</sup> *Ndlanzi* 35. No explanation was provided as to what a "right-minded person" constitutes.

would not have shared this foresight, derived from common human experience, with other members of the general population.<sup>144</sup>

In *Mini*, Williamson JA explains the process of inferential reasoning as follows:

In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems to me that a trier of fact should try mentally to project into the position of that accused at that time. He must of course also be on his guard against the insidious subconscious influence of *ex post facto* knowledge.<sup>145</sup>

According to Ackerman AJA,<sup>146</sup> the foresight required for *dolus eventualis* is a subjective appreciation of the reasonable possibility that the unlawful consequences will occur. In a bid to determine the presence of *dolus eventualis*, the Supreme Court of Appeal held in *Van Schalkwyk v The State* as follows:

In this case, the State had to prove beyond a reasonable doubt that (a) the appellant had had the subjective foresight of the possibility that striking the deceased on the upper part of his body with the hay hook could have fatal consequences; and (b) the appellant had “a disregard of that consequence”; put differently, he had reconciled himself with the foreseen possibility. The two legs are not considered in isolation. Brand JA in *Humphreys* described the test as follows: On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.<sup>147</sup>

Baartman AJA again confirms above that subjective foresight can be determined through inferential reasoning. In this regard, the process of inferential reasoning begins with the acknowledgement of ‘common human experience’, and the consideration that the possibility of the consequences would be obvious to any other ‘person of normal intelligence’. Where this is the case, the next issue to consider is whether there is a reason to believe that the perpetrator would not have shared his foresight in the light of the circumstances.<sup>148</sup> If it is accepted that a

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<sup>144</sup> *Humphreys* para [13].

<sup>145</sup> *Mini* 196; also see Burchell *Principles of criminal law* 159.

<sup>146</sup> *S v Van Wyk* 1992 (1) SACR 147 para 161b.

<sup>147</sup> *Van Schalkwyk* para [15].

<sup>148</sup> *Humphreys* para [13].

subjective consideration is a matter of inference, the issue of what the wrongdoer ought to have foreseen becomes redundant.<sup>149</sup> In *R v Bergstedt*,<sup>150</sup> Schreiner JA, accepting this application of the subjective test states:

As appears from *R v Nsele*...the words “or ought to have been”, though they have frequently been used in the past, do not, when applied to crimes like murder and attempted murder where intention must be proved, state the legal position accurately... But the words “was or ought to have been known” contrast knowledge with a merely reprehensible failure to know and wrongly import that either is sufficient to bring common purpose into operation.<sup>151</sup>

Therefore, the issue whether the perpetrator did not foresee the consequences ensuing from his conduct, even though a reasonable person would have foreseen them, is no longer necessary for the prosecution.<sup>152</sup> In such a case, the court has to maintain a strong standpoint on the particulars of the nature and extent of fault found to be proven.

From the above, when determining foresight subjectively, such inference must not be drawn so easily.<sup>153</sup> For example, in *Dube*, the fact that the appellants were unarmed except for the crow-bar they possessed as a weapon to gain access into the First National Bank, was considered to be sufficient inference to the fact that they “did not subjectively foresaw”<sup>154</sup> the possibility of any armed conflict occurring. However, determining intent purely on subjectivity in the form of *dolus eventualis* relates not only to foresight of the consequence, but also knowledge of unlawfulness on the part of the perpetrator. Burchell notes that anything short of reasonable possibility of harm would amount to “conscious negligence and not intention in the form of *dolus eventualis*”.<sup>155</sup>

#### 2.3.4 *Dolus indeterminatus* (general intention)

*Dolus indeterminatus* arises where X’s intention is not focussed on a particular

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<sup>149</sup> *R v Hercules* 1954 (3) SA 826 (AD) 831; *S v Du Randt* 1954 (1) SA 313; *R v Nsele* 1955 (2) SA 145 (A) 151; *R v Bergstedt* 1955 (4) SA 186 (AD) 188.

<sup>150</sup> *S v Bergstedt* 1955 (4) SA 186 (AD) 186.

<sup>151</sup> *S v Bergstedt* 1955 (4) SA 186 (AD) 188.

<sup>152</sup> *S v K* 1956 (3) SA 353 (A) 356.

<sup>153</sup> *Dube* para [1].

<sup>154</sup> *Dube* para [20]. Swain J also warned that the presence or absence of a firearm must not be considered as a determining factor in each case; and that each case must be considered based on its own facts.

<sup>155</sup> Burchell *South African criminal law and procedure* 358.

person. All he is willing or intends to do is to kill any person (in a case of murder).<sup>156</sup> His intention is thus directed at any unknown person or group, for example.<sup>157</sup> Consider the case of *Jolly*<sup>158</sup> where X derailed a train, and the case of *Harris*<sup>159</sup> where X caused a bomb to explode. Who the train was going to kill as a result of the derailment, or who the bomb was going to kill as a result of the explosion was not important to the perpetrators. This does not imply that X lack *dolus* since he foresees and intends that someone will die as a result of his act.<sup>160</sup>

Snyman notes that *dolus indeterminatus* is not a form of intention but that intent is present since anyone might be killed as a result of their conduct – the intent is directed at any indeterminate victim,<sup>161</sup> or an unknown identity, as held in *DPP v Pistorius*.<sup>162</sup> Therefore, it is possible for X to act with *dolus indeterminatus* and *dolus eventualis* concurrently.<sup>163</sup> This especially occurs in common-purpose crimes, as held in *Nkosi v The State*,<sup>164</sup> where, in an attempted hold-up, a gang member was shot by the victim in self-defence. The gang member who fired the deadly shot was convicted, but also the second appellant who only supplied a gun, although he was not even present at the scene. It was held that he foresaw the possibility that any person may be shot in the course of the robbery. A similar conclusion was reached in the case of *S v Nhlapo and Another*,<sup>165</sup> where there was a shootout between security officers and armed robbers at a Macro Store. The Appellate Division determined that the deceased security officer might have been shot by one of his fellow officers. Confirming the murder conviction by the trial court, Van Heerden JA stated that:

they also foresaw the possibility of one guard being killed by a shot fired in the direction of the robbers by another guard or, for that matter, a person such as a staff member of Makro witnessing the attack. In sum, the only possible inference, in the absence of any negating explanation by the appellants, is that they planned and executed the robbery with *dolus*

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<sup>156</sup> Hoor 2013b SACJ 133 n15.

<sup>157</sup> Burchell *Principles of criminal law* 348.

<sup>158</sup> *Jolly* 176.

<sup>159</sup> *R v Harris* 1965 2 SA 340 (A).

<sup>160</sup> Burchell *Principles of criminal law* 348.

<sup>161</sup> Snyman *Criminal law* 197.

<sup>162</sup> *DPP v Pistorius* para [31].

<sup>163</sup> See Snyman *Criminal law* 197.

<sup>164</sup> *Nkosi v The State* 2016 (1) SACR 301 (SCA) 11 (hereinafter *Nkosi v The State*). See also *Nkombani* 877; *S v Nhlapo and Another* 1981 (2) SA 744 (A).

<sup>165</sup> *S v Nhlapo and Another* 1981 (2) SA 744 (A); *Nkosi v The State* 11.

*indeterminatus* in the sense that they foresaw the possibility that anybody involved in the robbers' attack, or in the immediate vicinity of the scene, could be killed by cross-fire.<sup>166</sup>

According to Burchell all the three forms of intention (*dolus directus*, *dolus indirectus* and *dolus eventualis*) may generally be considered as *dolus indeterminatus*.<sup>167</sup> X will be held to have acted with *dolus indeterminatus* since he was aware (*dolus directus*), if he foresaw (*dolus eventualis*), that someone would die if as a result of his unlawful act (directed at unknown identities).<sup>168</sup> In South African criminal law *dolus eventualis* is sufficient for criminal liability in this regard; however *dolus directus* and *dolus indirectus* may be required in particular statutory crimes.<sup>169</sup>

## 2.4 Mistake as an exception to intention

As mentioned afore, a lack of criminal capacity will exclude culpability; but culpability can also be negated by other grounds, such as mistake.<sup>170</sup> Mistake occurs in situations where, for example, X intentionally performs an act which he thinks is lawful, but it turns out that his conduct is considered unlawful. Legally, it would be considered that there was a 'mistake' or 'error'<sup>171</sup> on his part. A mistake nullifies or excludes intention; but this is possible only if the mistake relates to an element of the crime (and not the culpability requirements). A mistake can only occur as pertaining to the act; the definitional elements; and unlawfulness.<sup>172</sup> However, the mistake need not be reasonable, but it must be a material mistake – considering the definitional elements of the particular crime.<sup>173</sup>

An example of mistake in respect of the circumstance mentioned in the definitional elements of the crime would be a case where X decides to go hunting in a bush area he expect to shoot an antelope. It was getting late in the evening; he shoots

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<sup>166</sup> See *Nkosi v The State* 11. Also see *S v Mavhungu* 1981 (1) SA 56 (A) 66; *Nkombani* para 892A, 896.

<sup>167</sup> Burchell *Principles of criminal law* 349.

<sup>168</sup> Burchell *Principles of criminal law* 352.

<sup>169</sup> Burchell *Principles of criminal law* 349 n 7.

<sup>170</sup> Jordaan *et al General principles of criminal* 101.

<sup>171</sup> Snyman *Criminal law* 187.

<sup>172</sup> Jordaan *et al General principles of criminal law* 139-140.

<sup>173</sup> Snyman *Criminal law* 188.

the object that is moving in the bush. It then transpires that it was a human being he has killed not an antelope. In such a case, X cannot be guilty of murder. The reasoning here is that, according to the definition of murder it must be a human being intentionally killed – he intended to kill an antelope not a human being. X was therefore mistaken in respect of one of the definitional elements of the crime of murder.

Mistake relating to unlawfulness (X did not know that the prohibited act was unlawful) includes mistake of law, and mistake relating to a ground of justification (self-defence or private defence).<sup>174</sup> In cases of self-defence, for example, X may honestly believe that he is being unlawfully attacked, but objectively, he is not; where this is the case - if X kills the putative aggressor, the defensive steps X took cannot constitute self-defence,<sup>175</sup> but mistake – an absence of the necessary *dolus* to commit murder.

In *De Oliveira*,<sup>176</sup> X was awoken by a noise at the back of his house on a Sunday afternoon. He thought a group of robbers were trying to break in. He fired a number of shots through the window, intending to scare them away, but one of them was fatally injured. It later transpired that it was X's long-standing employee and his friend who were trying to get into the employee's room from the back yard. Although the trial court rejected X's plea of putative private defence, the issue before the Appellate Division was whether X had the necessary fault. In cases of putative private defence, it is not the lawfulness, but the question of culpability that is an issue.<sup>177</sup> It is certain that if X labours under the belief that his life or property is in peril; his unlawful defensive act may exclude intention, and X may be convicted of culpable homicide, and not murder.<sup>178</sup> The court insisted on a purely

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<sup>174</sup> Mistake may also relate to the chain of causation. This type of mistake only occurs in materially defined crimes and would not exclude intention, e.g. X set to kill Y by pushing him off a bridge so that he would drown in the river, but Y hits his head several times on rocks and died before he reaches the river. X cannot escape liability by claiming that he only intended to kill Y by drowning him). See Jordaan *et al General principles of criminal law* 141; Snyman *Criminal law* 190; Goosen 1025-1026; Paizes 1993 SALJ 501.

<sup>175</sup> *De Oliveira* 59.

<sup>176</sup> *De Oliveira* 59.

<sup>177</sup> *De Oliveira* paras 63i-64a; Neethling, Potgieter and Scott *Casebook on the law of delict* 213.

<sup>178</sup> Reddi 2003 SACJ 74.

subjective (erroneous belief) when determining absence of intention.<sup>179</sup>

The appellant in *S v Joshua*<sup>180</sup> believed his life was in danger, but objectively considered, the facts did not show that he suffered an imminent attack. In this case, X's wife was robbed during the day. A neighbour assisted X, armed with a gun, in a search of his wife's robber. They encountered a group of youths and one of them fitted the description given to X by his wife.<sup>181</sup> The appellant and the neighbour testified that when X had demanded his wife's purse from the alleged robber, they had felt threatened by the aggressive response of the group. X then drew his firearm and fired four shots that resulted in three of the youths being fatally injured.<sup>182</sup> When X approached another member of the group at a house where the youth has escaped to, he was attacked with a knife by another youth who had tried to set his dog on X. For fear of his life, he shot the last two young men. It was held that X erroneously believed his life was under threat, and he thought it was lawful for him to defend himself.<sup>183</sup> In this case liability based on intent was excluded, and culpable homicide judged an appropriate sentence.<sup>184</sup>

In determining whether there was a mistake is a question of fact. X's state of mind and what he conceived to be the circumstances at the time of his conduct has to be established. As such, the test for mistake is subjective; X's background and his psychological temperament for example, would be considered when determining whether his conduct exclude intent as a result of mistake. This can be seen in the case of *S v Sataardien*,<sup>185</sup> where X was assaulted by the deceased who threatened to kill him. Believing that the deceased was reaching for his firearm, X pulled out his firearm and shot the deceased in the head. In this case, X's state of mind was considered "subjectively and the court had to place itself, as far as possible, in the position of the accused at the time of the events".<sup>186</sup> The issue of

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<sup>179</sup> Botha <https://www.litnet.co.za/putative-self-defence-defence-south-african-criminal-law-critical-overview-uncertain-path-pistorius-beyond> (Date of use: 25 October 2019); *S v Sataardien* 1998 (1) SACR 637 (C).

<sup>180</sup> *S v Joshua* 2003 (1) SACR 1 (SCA) (hereinafter *Joshua*).

<sup>181</sup> *Joshua* 2-11.

<sup>182</sup> *Joshua* 21.

<sup>183</sup> *Joshua* 21.

<sup>184</sup> *De Oliveira* paras 63i-64a; Neethling, Potgieter and Scott *Casebook on the law of delict* 213; Maharaj 2015 *De Rebus* 34; *Joshua* 32.

<sup>185</sup> *S v Sataardien* 1998 (1) SACR 637 (C).

<sup>186</sup> Maharaj 2015 *De Rebus* 35; compare *S v Dougherty* 2003 (4) SA 229 (W) where the deceased was unarmed.

whether a reasonable person in the place of X would have made such mistake is not relevant – otherwise this would imply applying the objective test. The reasonableness of the mistake is however the determining factor whether there was a (genuine) mistake or not.<sup>187</sup>

There are two factual situations which might seem to qualify as a mistake, but on closer scrutiny, these are not forms of mistake. These two situations will be briefly explicated below.

(a) *Error in objecto*

Mindful of the fact that the mistake must be material, consider a case in which X is mistaken about the object of his act (*error in objecto*); this is not a legal rule but merely a description of a particular factual situation.<sup>188</sup> In terms of murder,<sup>189</sup> for example, the object of murder is a human being. In a case where X intends to shoot a particular person Y, but it transpires that he erroneously shot Z instead of Y, X will still be guilty of murder. X's mistake did not relate to whether he was shooting a human being (as in the definitional elements of the crime), but the identity of the particular person he intended to kill. Mistake relating to the object of his act would be irrelevant; such mistake did not relate to the definitional element of a crime.<sup>190</sup>

(b) *Aberratio ictus*

*Aberratio ictus* means “the going astray of the blow”.<sup>191</sup> Similar to *error in objecto*, *aberratio ictus* is not a form of mistake. In *aberratio ictus* situation, X correctly figures out what he is aiming at, but as a result of poor skills or other factors, X misses his main purpose and the shot, for example, strikes somebody else. For example, X shoots at Y, but the bullet strikes a steel object, ricochets and kills Z instead. The issue to be determined in such a case is whether X had intent in respect of the death of Z. In this regard, two distinct approaches have been considered – the transferred intention approach and the concrete figure approach.

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<sup>187</sup> Snyman *Criminal law* 188.

<sup>188</sup> Snyman *Criminal law* 188.

<sup>189</sup> The definition of murder is the unlawful, intentional causing of the death of another person.

<sup>190</sup> Snyman *Criminal law* 189.

<sup>191</sup> Snyman *Criminal law* 193.

The transferred intention approach considers the fact that X had intent to kill, and his conduct satisfies the definition of murder as he caused the death of a person. X's intention to kill Y is 'transferred'<sup>192</sup> to Z although X did not foresee this possibility. On the other hand, the concrete figure approach considers the fact that X intended to kill Z only if he was aware that his 'blow' would strike (the specific or concrete figure) Z, or X foresaw the possibility that his 'blow' might strike Z and reconciled himself to the possibility (as in the test for *dolus eventualis*).<sup>193</sup> X cannot succeed with the defence that he lacked intention with regards to Z being killed by his blow.<sup>194</sup>

As evidenced for the above concepts, the principles for determining *dolus eventualis* is applied in certain factual situations. However, the concept of *dolus eventualis* have evolved over the years. This development will be discussed in the following sections.

## 2.5 The law of evidence required in *dolus eventualis* cases

Over the years, there has been significant developments in both criminal law and the law of evidence. This saw the gradual shift from trial by "ordeal".<sup>195</sup> The law of evidence is applicable to an assessment of *dolus eventualis* as it forms part of the investigation in "an honest attempt to discover and preserve the truth".<sup>196</sup> The law of evidence governs the requirements which must be met to prove or disprove X's guilt; and the steps to follow in order to render the admissibility of such information or objects as evidence (or evidentiary materials). It involves the procedure the court must apply to evaluate evidence that have to be admissible in order to come to a decision.<sup>197</sup> Therefore, before holding X culpable or not culpable, the court usually makes inquiries regarding the existence or non-existence of certain facts.

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<sup>192</sup> This approach is applied in US criminal law and it is referred to as the "doctrine of transferred malice". See Snyman *Criminal law* 193.

<sup>193</sup> Snyman *Criminal law* 193.

<sup>194</sup> Snyman *Criminal law* 197.

<sup>195</sup> With this type of trial, uncertainty to guilt is resolved by an appeal to divine judgment and the adoption of inquisitorial procedures - which requires the prosecution to prove X's guilt convincingly. See Schwikkard *Presumption of innocence* 1.

<sup>196</sup> Schwikkard *et al Principles of evidence* 6. The law of evidence comprises of common law and statutes.

<sup>197</sup> Bellengere *et al The law of evidence in South Africa* 4.

In this vein, the proof of facts in a court of law is usually guided by the law of evidence as a branch of procedure which embodies certain rights, like the right to cross-examination and to tender evidence, for example.<sup>198</sup>

The applicable law in South Africa, before the British occupied the Cape of Good Hope in 1806, was the Roman-Dutch law. These laws were then later replaced with the Cape Evidence Ordinance,<sup>199</sup> which was purely English law.<sup>200</sup> Before the Union of South Africa was established, statutory provisions regarding the law of evidence were not similar in the four colonies.<sup>201</sup> After the Union came into existence, the law of evidence in criminal proceedings were consolidated in the Criminal Procedure and Evidence Act 31 of 1917, which subsequently has also undergone various amendments.<sup>202</sup> Although the applicable law of evidence in South Africa is derived from English law,<sup>203</sup> the Appellate Division (as it was known then) in *Van der Linde v Calitz*<sup>204</sup> held that English case law is not binding on South African courts if it was wrongfully decided.<sup>205</sup> A number of statutes have either confirmed or modified the common-law rules of evidence, like the Criminal Procedure Act.<sup>206</sup>

However, the common-law rules or the statutory provisions of the law of evidence must comply with the Constitution.<sup>207</sup> In considering the effect of the Constitution on the applicable law of evidence in South Africa, it is certain that some of the rules of evidence have been modified with a shift from procedures to substance.

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<sup>198</sup> Schwikkard *et al Principles of evidence* 1.

<sup>199</sup> The Cape Evidence Ordinance 72 of 1830.

<sup>200</sup> Bellengere *et al The law of evidence in South Africa* 5.

<sup>201</sup> The four colonies were the Cape Colony, Natal, Transvaal and the Orange Free State. See Zeffertt *et al The South African law of evidence* 5.

<sup>202</sup> The Criminal Procedure and Evidence Act 31 of 1917 was later replaced in 1955 by the Criminal Procedure Act 65 of 1955, and then later by the CPA of 1977.

<sup>203</sup> Bellengere *et al The law of evidence in South Africa* 6.

<sup>204</sup> *Van der Linde v Calitz* 1967 (2) Sac 239 (A).

<sup>205</sup> It was settled that, if a statute required authoritative statements of the law by English courts, it was binding on South African courts. Before the interim Constitution, the courts, to some extent, had begun to let go of English case law, and certain English rules that were considered to be inappropriate or inapplicable in South African legal system. Preference was thus given to established South African practice – which is procedural rather than exclusively evidentiary. See Zeffertt *et al The South African law of evidence* 8-13.

<sup>206</sup> See e.g. CPA chapter 24; the Civil Proceedings Evidence Act 25 of 1965; and the Constitution of the Republic of South Africa, 1996 (hereinafter the SA Constitution).

<sup>207</sup> See s 2 (supremacy clause) of the SA Constitution.

### 2.5.1 Different types of evidence

Evidence is any information or object which a court has formally admitted in a proceeding. Evidence tendered in court will either be admissible or inadmissible. The court will evaluate submitted evidence to determine its relevance and to determine if its standard of proof has been attained.<sup>208</sup> There are different types of judicial evidence which include oral evidence,<sup>209</sup> which is the testimony of human beings with regard to the facts in issue. It consists of statements made in court under oath.<sup>210</sup> There are also documentary evidence,<sup>211</sup> which consists of evidence contained in a document which is presented in court as proof of the facts in issue, and real evidence,<sup>212</sup> which consists of material evidence which are produced in court for inspections or which are inspected out of court. For real evidence to be admissible as proof of fact, the object in question has to be accompanied by testimony which identifies it and explains its relation or significance to the facts in issue.

Evidence which suggests that something must have happened, but proof of its existence is not confirmed is called circumstantial evidence. In *DPP v Pistorius*,<sup>213</sup> it was held that the trial court did not appreciate material evidence relevant to the facts in issue. The position of the bullet holes in the toilet door, the marks the bullets left in the toilet cubicle, and the position of the injuries on body of Y indicated that she must have been standing behind the toilet door when she was first shot, and then collapsed down towards the toilet bowl. Photographs indicated that the toilet was too small in size, which made it impossible for Y to hide. All of these circumstantial evidence the Supreme Court of Appeal noted, were overlooked by the trial court when assessing the presence of *dolus eventualis*.

Since the subjective foresight of X cannot be proven by way of direct evidence to establish his mental state, the court in such a case rely on proof through inferential reasoning – this means as a type of evidence. The presence of foresight can only be proven through reference drawn from the conduct of X and the circumstances

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<sup>208</sup> See Schwikkard *et al Principles of evidence* 20.

<sup>209</sup> See Bellengere *et al The law of evidence in South Africa* 51.

<sup>210</sup> Schwikkard *et al Principles of evidence* 18.

<sup>211</sup> Bellengere *et al The law of evidence in South Africa* 58.

<sup>212</sup> Bellengere *et al The law of evidence in South Africa* 64.

<sup>213</sup> *DPP v Pistorius* paras [38] - [40].

in which the crime was committed.<sup>214</sup> Therefore, the method of determining actual subjective foresight always involves the drawing of a conclusion founded on objective probabilities based on general human experiences.<sup>215</sup>

## 2.5.2 Presumptions

Presumptions are related to an old obsolete doctrine<sup>216</sup> that anyone who commits an illegal act is criminally liable for any consequences that may follow as a result of that act -

...irrespective of whether they are foreseen, foreseeable or intended. It is therefore simply a form of strict liability, ignoring the mental state of the accused.<sup>217</sup>

With regard to criminal liability, the objective approach was applied in both negligence and intention with the use of presumption which was based on facts<sup>218</sup> rather than law,<sup>219</sup> and was which possible to be rebuttable based on evidence. The reason for the application of the objective test to determine legal intention was as a result of the common-law presumption that an actor intends or anticipates the possible results of his conduct.<sup>220</sup> The problem with the use of presumptions in intention, with the subsequent application of an objective test, is that there will be

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<sup>214</sup> *S v Van Aardt* 2009 (1) SACR 648 (SCA) para [39].

<sup>215</sup> *S v Dladla en Andere* 1980 (1) SA 1 (A) 4H.

<sup>216</sup> See *S v Van der Mescht* 1962 (1) SA 521 (A) and the subsequent decision in *Bernardus* 287. The court rejected the decision held in *S v Van der Mescht* 1962 (1) SA 521 (A) that the accused may be held to have intention, to support a conviction of culpable homicide in cases where the victim dies as a result of his acts. This view was also rejected in a recent decision as it will imply the re-introduction of the doctrine as per Willis JA in *Ndwambi v The State* 611/2013 [2015] ZASCA 59.

<sup>217</sup> See Hoctor 2008 *Fundamina* 21.

<sup>218</sup> These are inferences of probability which the court may draw if it appears to be appropriate after considering all other evidence. Presumptions of fact are statements of substantive law. Where proof of a certain fact cannot be disproved, the court is compelled to arrive at a particular conclusion. In this case, no other evidence will be admissible to prove the contrary - this is known as irrebuttable presumptions of fact. See Schwikkard *Presumption of innocence* 22. See also Schwikkard *et al Principles of evidence* 23.

<sup>219</sup> Consists of rebuttable presumptions of law and irrebuttable presumptions of law. In rebuttable presumption of law, what the law demands must be accepted in the absence of any evidence to the contrary. See Schwikkard *et al Principles of evidence* 34. E.g. X is presumed to be suffering of (intermittent) insanity so that he is not criminally responsible in terms of section 78(1A) of the CPA, until the contrary is proved on a balance of probabilities. Irrebuttable presumptions of law are guided by rules of substantive law. See Schwikkard *et al Principles of evidence* 23; Zeffertt *et al The South African law of evidence* 46. E.g. children in South Africa under the age of 10 years are presumed to be incapable of committing offences.

<sup>220</sup> Hoctor 2008 *Fundamina* 19.

no difference between negligence and intention,<sup>221</sup> since X may still be found culpable even if he lacked foresight of the consequences of his actions. The courts were applying the principle of strict liability, which means little or no attention was placed on the necessary intent since the focus was for the state to prove that X committed the unlawful act.

It has been noted that there is no difference between the application of the presumption and to state that a consequence is intended, so long as it was in fact possible. That is, a reasonable person would have foreseen the consequences of his conduct as a possibility. Therefore, if it is accepted that X intended the likely consequences of his act, the effect is that the subjective element of intention would be worthless, while the difference between intention and negligence would be effaced. Such an interpretation of intention has to be avoided.<sup>222</sup>

It is evident that, in the past, the courts did not take into consideration X's subjective foresight of the possibility of harm in determining *dolus eventualis*, as the objective approach was applied.<sup>223</sup>

### 2.5.3 The burden of proof

The burden of proof refers to the question about which of the parties to a dispute has to prove his case in order to be found not guilty in criminal cases.<sup>224</sup> The onus of proof is a burden which a party to a dispute has to satisfy the court that he is entitled to succeed in his claim or defence. This requires a whole range of aspects in order to satisfy the court, like the quantum of proof to the party who bears the onus of proof.

The general notion in criminal law that no accused should be punished for a crime without proof of his guilt triggers the question of validity. In this regard, South African courts make use of a two-stage constitutional approach to the question of validity. The first is whether a right has been violated, and the second stage is

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<sup>221</sup> Hoctor 2008 *Fundamina* 20.

<sup>222</sup> Hoctor 2008 *Fundamina* 20-21, citing Glanville Williams.

<sup>223</sup> *Jolly* 186; *R v Jongani* 1937 AD 400 406; *R v Longone* 1938 AD 532 539, 541-542; *R v Duma* 1945 AD 410 417; *R v Shezi* 1948 (2) SA 119 (A) 128-130; *R v Koza* 1949 (4) SA 555 560. See Burchell *Principles of criminal law* 141.

<sup>224</sup> Bellengere *et al The law of evidence in South Africa* 34.

“whether the violation was warranted under a provision that justifies its violation in certain circumstances”.<sup>225</sup> The court does this by drawing inferences to the relevant facts in issue.

In criminal trials, the burden of proof is determined or defined by the charge. Where there is a question about X’s criminal responsibility in relation to a conduct which constitutes an offence, the onus of proof with reference to X’s criminal responsibility shall be on Y who raised the issue.<sup>226</sup> This means there is a duty to also lead evidence in rebuttal by the other party (X). For example, if X is accused of committing a crime, the prosecution has the burden of proving it. Where X failed to contradict any evidence in a situation where the court led *prima facie* evidence implicating him, the *prima facie* evidence becomes conclusive with regards to X’s unlawful conduct.<sup>227</sup> This evidence that is considered as conclusive proof can no longer be contradicted.<sup>228</sup>

According to the law of evidence, the prosecution not only bears the burden to prove that X’s conduct corresponds to the definitional elements of the crime committed, but also that the act was unlawful. Therefore, if in the course of the trial it is concluded that X’s act was based on a ground of justification, for example, self-defence, the prosecution bears the responsibility to prove that the conduct of X cannot be justified.<sup>229</sup>

#### 2.5.4 The facts in issue

The facts in issue are those facts which X must prove in order to establish his case or defence. As such, facts in issue are those facts which a party must prove to succeed,<sup>230</sup> which are determined by substantive law.<sup>231</sup>

If Y wants to prove that X did something incriminating, Y can prove this directly or indirectly, or both. Y can provide a direct link by leading evidence that X conducted

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<sup>225</sup> Zeffertt *et al* *The South African law of evidence* 24.

<sup>226</sup> Section 78(1B) of the CPA.

<sup>227</sup> Zeffertt *et al* *The South African law of evidence* 39.

<sup>228</sup> Zeffertt *et al* *The South African law of evidence* 42.

<sup>229</sup> Snyman *Criminal law* 102.

<sup>230</sup> Schwikkard *et al* *Principles of evidence* 17.

<sup>231</sup> See Zeffertt *et al* *The South African law of evidence* 45. See also Schwikkard *et al* *Principles of evidence* 18.

himself or uttered certain words which conclude that X must have performed what is alleged against him. If the court concludes that the facts are directly linked with X, the main point of contention for the court remains whether X did it. Y can also provide an indirect link by proving independent facts which, if considered separately, may provide a remote link to X's alleged unlawful conduct. However, X must be linked to the independent facts to make them relevant to the fact in issue.<sup>232</sup> It will therefore be unwise to apply only one of the methods of classifying the relevant facts.<sup>233</sup> In *Jones v Harris*,<sup>234</sup> Napier CJ explained this procedure as follows:

It seems to me that the administration of the criminal law would be impossible, if it were not open to the prosecution to prove objective facts, leaving it to the jury to say whether they are prepared to draw the inference that connects the facts with the accused and makes them relevant to the charge. I refer to the illustration that I gave during the argument, of an accused person who is seen to pass the spot where - as it appears from other evidence - stolen property has been thrown over the fence: It seems to me that, in these circumstances, the prosecution must be allowed to prove the fact, with a view to asking the jury to infer that the prisoner had been in possession of the property. If the evidence stopped there it might be colourless; but if instances are multiplied - if the same sort of thing seems to happen wherever the man goes - then sooner or later, the point is reached at which reason rejects the hypothesis of mere coincidence, and the inference of a causal connection becomes irresistible.

From the above, the court endeavours to close any gap in terms of the burden of proof and the standard of proof beyond reasonable doubts. Where the court makes use of presumptions, it means that certain conclusion must be drawn until the contrary is proved. Therefore, where there is no proof to the contrary, then the facts must be taken as proof. Presumptions may also be made to indicate a conclusion which may be drawn unless it is disproved. For example, Y is dead from the wound of a knife, some few metres away; X is seen with a knife covered with blood. It will be presumed that X killed Y unless the contrary is proven. The fact that X is seen a few metres away from where Y has been stabbed, with a knife covered in blood, will be considered as a fact in issue. It is important to note here that there are different types or categories of relevant facts in issue. These include facts which occur at the same time and place with the facts in issue, facts which

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<sup>232</sup> See Wells 1960 ALR 313-314.

<sup>233</sup> Wells 1960 ALR 316.

<sup>234</sup> *Jones v Harris* [1946] SASR 98, 104.

occur at a different time and place from the facts in issue,<sup>235</sup> and facts which are in the nature of circumstantial evidence.

The law recognise facts relevant to the facts in issue (*facta probatia*). These are facts which tend to prove or disprove the facts in issue.<sup>236</sup> It has been noted that in principle there seems to be no difference between the exclusion of evidence by considering them inadmissible and the exclusion of the same,<sup>237</sup> once admitted, by not taking them into consideration when deciding the issue in question. The law of evidence determines the facts that must be relevant to the facts in issue.<sup>238</sup>

## 2.6 Summary

There have been irregularities with regard to the interpretation and application of *dolus eventualis* in South African substantive criminal law. Since X is the only one who knew his state of mind at the time of his conduct, and the possibility that he may tender false testimony, caused earlier courts to subsequently extend this state of mind beyond inferential reasoning – where the onus is on the court to determine whether he acted with the necessary intention, by means of direct proof. The general rule was that any reasonable person who commits the act which X committed, would know that it would result in the death of Y, therefore acted intentionally (objective test). The courts would make use of the application of general knowledge of human behaviour and what could trigger such behaviour. It was thus irrelevant whether X foresaw the harm, but rather whether he ought to have foreseen the harm resulting from his conduct. The courts therefore relied on what an ordinary or normal person could have done in the particular circumstance.

By concluding that *dolus eventualis* is absent simply means that X, at the time of his conduct, did not foresee the possibility that the consequences will ensue; it was irrelevant to consider whether X was reckless. As a requirement of *dolus eventualis*, recklessness serves to illustrate a state of mind that must exist if X proceeds to perform an act which one anticipates might likely lead to the unlawful

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<sup>235</sup> Such facts, although not the facts in issue, are so connected to the fact in issue as to form part of the same transaction. Such facts may nevertheless be excluded in a situation where the facts are too remote as to be material in all the circumstances of the case.

<sup>236</sup> Schwikkard *et al Principles of evidence* 17.

<sup>237</sup> *DPP v Pistorius* para [36].

<sup>238</sup> Schwikkard *et al Principles of evidence* 18.

consequences in issue. The existence of recklessness is, furthermore, independent of the degree of foresight one prefer to apply in the test for *dolus eventualis*, and it is pointless to use it as the court did, for example, in *S v Beukes*, in a bid to modify the foresight element of the test for *dolus eventualis*.

Legal intention is found only where there is foresight of a real or substantial possibility of harm or death. X will be said to have reconciled himself or taken into the bargain the consequences only if he foresaw the probability of the consequences ensuing. Where the court concludes that there is foresight of a remote or a slight possibility, legal intention become irrelevant. Even though there have been conclusions by the Appellate Division that foresight of a slight or remote possibility is sufficient, *dolus eventualis* has not once been considered to be present in such cases. In exceptional cases foresight, though remote, should be considered as sufficient to prove legal intention, and to hold X liable for the ensuing consequences, depending on the circumstances. This simply implies that the degree of foresight experienced by X is not restricted, some form of reasonableness or consideration may still be necessary. The courts have been, at some point, insisting on foresight of more than a slight or remote possibility.

Under this chapter, criminal liability and the relevant concepts connected to the concept of *dolus eventualis* were examined. As observed, an act or omission is generally deemed as conduct; and that conduct must comply with the definitional elements of crime. The other factors required for criminal liability, such as unlawfulness, culpability and various forms of intent have also been examined, while specifically highlighting the concept of *dolus eventualis*. A brief examination of the law of evidence, presumptions and the burden of proof were also considered. Before examining the interpretation and application of this concept in domestic legal systems, it is important to first consider how this concept is interpreted and applied in international criminal law under the following chapter.

## CHAPTER THREE

### ***DOLUS EVENTUALIS* IN INTERNATIONAL CRIMINAL LAW**

#### **3.1 Introduction**

International criminal law deals with an individual's criminal responsibility for committing international crimes. The core international crimes (over which international tribunals have been given jurisdiction under international law) are genocide, war crimes, crimes against humanity and aggression.<sup>1</sup> This chapter will however only consider the *mens rea* requirements for war crimes and crimes against humanity. In this regard, the criminal responsibility of a commander and the mental elements in joint criminal enterprises will be examined, amongst others. One of the issues worth clarifying is whether, considering the elements of criminal liability and *dolus eventualis* specifically, a commander or an officer can be held criminally liable for crimes committed by his subordinates or those under his control.

Traditionally, international law prescribes certain rules of conduct for signatory states. It is up to every state to decide on practical measures or domestic legislation to ensure that its citizens' behaviour are attributable to it, or under some primary rules, even all individuals under its jurisdiction to comply with those rules. Since international criminal law functions as a norm of general application, and most jurisdictions tap from international law; it is of the utmost importance to evaluate international criminal law and jurisprudence in a bid to ascertain the manner of its applications regards *dolus eventualis*. This chapter will consequently explore the mental elements in criminal conduct, and more specifically, the elements of *dolus eventualis* in international criminal law. Developments of this concept, and its interpretation and application within the international criminal legal framework will be considered. This will provide valuable information as to the development of this concept, and its interpretation and application in South African criminal law.

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<sup>1</sup> Art 5 of the Rome Statute.

### 3.2 Intent in criminal international law

Determining intent is a contentious issue, not only in domestic law, but also in international criminal law. The Nuremberg Charter (also known as the International Military Tribunal (IMT) Charter) first introduced the concept of intent to international criminal law.<sup>2</sup> Unfortunately, no provision was provided on the mental element, and so legal developments on this concept had to transpire on a case-by-case basis. The subsequent jurisprudence on intent remain confusing, especially since tribunals made use of both common-law and civil-law terminology.<sup>3</sup>

The main problem therefore lies in the fact that the concept of intent has no agreed-upon meaning or definition “that stretches across bodies of law and across legal cultures”.<sup>4</sup> Different jurisdictions furthermore interpret intent in their domestic criminal law in different ways.<sup>5</sup> In international law, intent may be considered a manifestation of some fault on the part of the perpetrator that ranges from conduct where he was contemplating the consequences of his conduct as a certainty, to where he foresaw it only as a possibility. These vague descriptions of types of intent situations have led to ambiguous interpretations, according to some critics.<sup>6</sup>

Determining intent or the ‘mental element’ under the Rome Statute comprises that:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.<sup>7</sup>

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<sup>2</sup> Lundberg *The limits of mens rea* 12.

<sup>3</sup> Badar *The concept of mens rea in international criminal law* 1-2.

<sup>4</sup> Ohlin 2013 *Mich J Int'l L* 81.

<sup>5</sup> Fletcher *Rethinking criminal law* 445-446.

<sup>6</sup> See, e.g. Ohlin 2013 *Mich J Int'l L* 79.

<sup>7</sup> Rome Statute art 30.

X will be criminally responsible under the jurisdiction of the ICC if it has been established that the material elements of the unlawful conduct were committed with 'intent and knowledge'.<sup>8</sup> Put differently, where the offender realised the material elements with intention and knowledge, there is a greater possibility that he will be found criminally liable. The phrase 'intent and knowledge' imply that there are two different forms of mental elements; and both are in fact necessary components for the mental element in the commission of an international crime. Intent implies at least some desire to do or to fail to do something with the understanding of the circumstances.<sup>9</sup> This conduct includes being cognizant about the conduct, and foreseeing the consequences of the conduct.<sup>10</sup>

According to the Rome Statute, the mental element as provided in the second article<sup>11</sup> indicates that intent is defined separately with regard to the unlawful conduct and its consequence. A distinction can thus be made in terms of the wrongdoer's intent in relation to his wrongful act or omission (conduct), and his intent in terms of the result or consequences of his conduct. Article 30(2)(a) of the Rome Statute requires that intent in relation to the perpetrator's act or omission be established in the course of the perpetrator's free will to perform;<sup>12</sup> except in cases where he acted mechanically at the time of the conduct, for example, as a result of automatism which rendered his conduct involuntary. Article 30(2)(b) of the Rome Statute relates instances in which the perpetrator had meant to realise the result or consequences. A simple understanding of the phrase – 'will occur in the ordinary

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<sup>8</sup> Intent concerns the willing of an act, and foreseeing and wanting the result. Knowledge, as a mental state, concerns being aware of the wrongfulness of certain conduct, or knowing that there is a risk of a prohibited result likely to occur but proceeding anyway. In some jurisdictions, knowledge includes 'wilful blindness', while others include 'recklessness' here.

<sup>9</sup> It is important to note here that "malice can, on the contrary, serve as proof of intent, and it can be taken into account as an aggravating circumstance that would influence the sentence imposed by a criminal court. Malice is not, however, a component of intent as such. Intentional homicide is not necessarily motivated by malice, ill-will or spite, it may be prompted by compassion, and some might even profess noble considerations, for example, in the case of euthanasia. There are an isolated number of offences of which malice is essentially a requirement - not as a manifestation of intent but as a distinct element in its own right of the offence. Cases of malicious prosecution or cases of murder with malice aforethought as a special category of criminal homicide may serve as examples in this regard. 'Malice aforethought' has lost its meaning in English law and signifies neither malice nor prior knowledge. As an element of criminal homicide, malice aforethought denotes the intention to kill (express malice), or the intention to cause grievous bodily harm (implied malice) irrespective of whether the accused foresaw the possibility of death setting in or not". See Van der Vyver 2004 *U Miami Int'l and Comp LR* 73-74.

<sup>10</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 62.

<sup>11</sup> Rome Statute art 30(2).

<sup>12</sup> Stiel and Stuckenberg *Article 103* 315.

course of events' means that X was to some extent convinced about the required outcome of the result.

Considering the differences stated in the Rome Statute on the mental element relating to conduct, the wording - the perpetrator "means to engage in the conduct"<sup>13</sup> would comprise '*dolus directus*', '*dolus indirectus*', and even '*dolus eventualis*' in terms of the general principles of criminal law. On the other hand, the mental element relating to the consequences of the conduct; where the offender "means to cause the consequence or is aware that it will occur in the ordinary course of events",<sup>14</sup> covers only *dolus directus* and *dolus indirectus*.<sup>15</sup> It may be argued here that it is not only awareness or knowledge of, but also the will to realise the unlawful consequences that qualifies *dolus directus*. With indirect intent or *dolus indirectus*, the harmful consequences are foreseen by the perpetrator as a certainty, but he nevertheless proceeds with the conduct. In contradistinction, in *dolus eventualis* the harmful consequences are foreseen by the perpetrator as a possibility, but he reconciles himself with the possibility and proceeds with the conduct. As will be seen in this chapter, in international criminal law the dividing line has become increasingly blurred when determining the mental state of *dolus eventualis*. The concept of legal intention and that of recklessness<sup>16</sup> are also confused.

The reference in article 30(2)(b) of the Rome Statute to 'the ordinary course of events' is, according to Ohlin, a pathway to the common-law meaning of 'purpose'

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<sup>13</sup> Rome Statute art 30(2)(a).

<sup>14</sup> Rome Statute art 30(2)(b). Also see Ohlin 2013 *Mich J Int'l L* 100.

<sup>15</sup> It seems to exclude *dolus eventualis*. Ohlin 2013 *Mich J Int'l L* 82 maintains that the ambiguous terms *dolus directus* and *dolus indirectus* were replaced by the more precise phrases "acting with purpose" and "acting with knowledge" in the US Model Penal Code (MPC). See also Moore *Intention as a marker* 179, 186-187. It must be kept in mind that the use of the terms *dolus directus*, *dolus indirectus* and especially *dolus eventualis* are seen by Anglo-American legal scholars as civil-law concepts.

<sup>16</sup> Ohlin 2013 *Mich J Int'l L* 100. Recklessness is defined in the US MPC s 2.02(2)(c) as follows: "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation". Ohlin 2013 *Mich J Int'l L* 79 states that recklessness is a mental state akin to "the civil law notion of *dolus eventualis*", however they differ in that *dolus eventualis* "classifies risk-taking behavior as a species of intent". Recklessness, together with intent, knowledge and carelessness (negligence) form the four main categories of mental state constituting *mens rea* elements to establish liability. Less culpability is required for recklessness than for intention, but more culpability than criminal negligence.

and 'knowledge' – suggesting a mental state requirement more than just recklessness. In relation to the principles of treaty interpretation, reasoning was developed based on articles 31 and 32 of the UN Vienna Convention on the Law of Treaties, in which the Pre-Trial Chamber defined this standard of occurrence as a “virtual certainty” or a “practical certainty”.<sup>17</sup> Therefore, X has to be certain that the consequence or the result will ensue. Undoubtedly, the standard set by the Pre-Trial Chamber is higher than what is expected for *dolus eventualis*, which only consists of foreseeing the possibility or the likelihood of the undesired result ensuing, and more accurately describes *dolus indirectus*.

According to the Chamber, the volitional element (purposive striving) under article 30 of the Rome Statute encompasses cases where the wrongdoer: “(a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*)”.<sup>18</sup> It was argued that the drafters of the Rome Statute should have made use of phrases like ‘may occur’ or ‘might occur in the ordinary course of events’ under article 30, so as to clearly indicate the concept of *dolus eventualis*.<sup>19</sup> The Rome Statute also provides in article 30 that intent and knowledge are applicable “unless otherwise provided”. This default requirement may be interpreted that if an accused person’s mental state does not meet the objective elements of the crime resulting from his acts or omissions, such mental state would not qualify in terms of the ‘intent and knowledge’ standard set by this article. It also means that *dolus eventualis* would suffice to render a perpetrator criminally responsible in instances where constructive knowledge of the crime is apparent.<sup>20</sup> The concept of ‘constructive knowledge’ is not included in the Rome Statute, but is used in the case law of the International Tribunal for Former Yugoslavia (ICTY). It has been suggested that this vague term denotes cases where no direct evidence was available to provide insight into the knowledge of the accused, and knowledge is then inferred on the

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<sup>17</sup> See *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424 (15 June 2009) para 362.

<sup>18</sup> *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 (14 March 2012) para 352(ii) (hereinafter *Lubanga Dyilo*); Stiel and Stuckenberg *Article 103* 317.

<sup>19</sup> *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424 (15 June 2009) para 363; Stiel and Stuckenberg *Article 103* 318.

<sup>20</sup> See, e.g., Wirth 2012 *J Int'l Crim Just* 995 who argues that to read *dolus eventualis* into the Rome Statute art 30 under the “unless otherwise provided” clause “leads to practicable outcomes that are consistent with both the law and a common sense approach to justice”.

basis of surrounding facts and circumstances.<sup>21</sup>

From the above discussion, it seems that the various forms of intent are present in international criminal law. However, as noted above, the concept of *dolus eventualis* is not expressly cited in the Rome Statute. The first draft of the Rome Statute's article 30 included a fourth paragraph specifically dealing with recklessness, but it was dropped from the final text after it proved impossible to reach agreement on the issue.<sup>22</sup> The concept was also not explicitly mentioned by the Additional Protocol I of the Geneva Convention's negotiators. It is only in the judgments of the international tribunals that *dolus eventualis* started to feature. As evidenced in the *Lubanga Dyilo* case,<sup>23</sup> it was held that the lack of a proviso under article 30(1) of the Rome Statute made provision for divergences from the general requirements of intent (*dolus directus* or *dolus indirectus*) in some circumstances. The ICC Pre-trial Chamber stated that the 'volitional element' also covers other features of intent, such as *dolus eventualis*,<sup>24</sup> which applies in cases where, for example, the wrongdoer is conscious of the danger that may ensue from his conduct, however, he allows the consequences by reconciling himself with it or accepting it.<sup>25</sup>

Since the Rome Statute advocates the principle of no liability without fault,<sup>26</sup> it is necessary to ascertain the criminal intent, and more specifically, the concept of *dolus eventualis* as attached to the selected international core crimes. The following section focuses on how the ICC interprets and applies this concept in war crimes and crimes against humanity.

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<sup>21</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 68; *Prosecutor v Duško Tadić* Case No IT-94-1-A (15 July 1999) para 657 (hereinafter *Tadić*). The Rome Statute requires actual knowledge, which excludes constructive knowledge.

<sup>22</sup> Negotiators and scholars have generally concluded that most delegations were sceptical about including *dolus eventualis* and recklessness within the Statute's default mental rule. However, it is maintained that *dolus eventualis* falls within the Rome Statute's art 30 default rule.

<sup>23</sup> *Lubanga Dyilo* para 352.

<sup>24</sup> *Lubanga Dyilo* para 352.

<sup>25</sup> *Lubanga Dyilo* para 352.

<sup>26</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 58-59. This concept of *mens rea* is applied as a general rule - assumed from the civil-law criminal justice system.

### 3.3 *Dolus eventualis* in war crimes and crimes against humanity

The ICC and other international tribunals rely on the ‘Elements of Crimes’<sup>27</sup> as provided in articles 6, 7 and 8 of the Rome Statute when adjudicating cases. These elements have to be accepted by a two-thirds majority of the Assembly of States parties present.<sup>28</sup> The rationale behind the crime elements is to ensure that each core crime is defined with clarity and precision in order to meet the required principles of legality for crimes consisting of the material elements – which is the objective requirements (*actus reus*), and the mental elements – which is the subjective requirements of intent and knowledge (*mens rea*). The ‘Elements of Crimes’ comprise of three different types of material elements which include conduct, consequence and circumstance.

All four core international crimes within the jurisdiction of the ICC concern unlawful direct attacks or aggression against unarmed people or property.<sup>29</sup> These serious crimes of concern include unlawful and inhumane conduct that leads to sufferings, bodily harm or death.<sup>30</sup> The aim of the Rome Statute provisions is consequently to prohibit hostile forces from intentionally targeting civilians, whether to cause bodily injuries or to kill (the so-called principle of distinction).<sup>31</sup> Such conduct is rendered punishable irrespective of the consequences; where this is the case, intent and knowledge must be relevant to the conduct. However, the unintentional causing of death and damage by forces is tolerated “unless the anticipated civilian deaths outweigh the expected military advantage of the strike”<sup>32</sup> (the principle of proportionality). In other cases like war crimes,<sup>33</sup> the *actus reus* and *mens rea* are interrelated, for example, in wilful killings.<sup>34</sup>

The following sections will closely scrutinise war crimes and crimes against humanity. These core international crimes will be defined, and discussed as to their *mens rea* requirements. The focus here is to understand how the ICC

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<sup>27</sup> This will be discussed in greater detail later in the chapter.

<sup>28</sup> Rome Statute art 9.

<sup>29</sup> Rome Statute art 5.

<sup>30</sup> Rome Statute art 7(1)(k).

<sup>31</sup> In international humanitarian law; see Ohlin 2013 *Mich J Int'l L* 79.

<sup>32</sup> Also in international humanitarian law; Ohlin 2013 *Mich J Int'l L* 79.

<sup>33</sup> Rome Statute art 8.

<sup>34</sup> Rome Statute art 8(2)(a)(i).

interprets and applies the element of *dolus eventualis* in war crimes<sup>35</sup> and crimes against humanity.<sup>36</sup>

### 3.3.1 War crimes

#### 3.3.1.1 *Definition and elements of the crime*

War crimes means:

- 2(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
- (i) Wilful killing;
  - (ii) Torture or inhuman treatment, including biological experiments;
  - (iii) Wilfully causing great suffering, or serious injury to body or health;
  - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
  - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
  - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
  - (vii) Unlawful deportation or transfer or unlawful confinement;
  - (viii) Taking of hostages.<sup>37</sup>

War crimes are violent wartime acts which breach the international rules of war. These acts consist of excessive injury and suffering inflicted upon enemy combatants, and the mistreatment of prisoners of war or civilians. The war crimes are committed during armed conflicts,<sup>38</sup> both nationally and internationally.<sup>39</sup> Perpetrators of war crimes may be held criminally culpable on an individual basis. Similar to the other core international crimes, war crimes are regulated by Geneva

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<sup>35</sup> Art 3 of the International Criminal Tribunal for former Yugoslavia (ICTY); art 8 of the Rome Statute.

<sup>36</sup> Art 3 of the International Criminal Tribunal for Rwanda (ICTR); art 5 of the ICTY; art 7 of the Rome Statute.

<sup>37</sup> See also Rome Statute art 8(2)(a); art II(1)(b) of the Nuremberg Trials Control Council Law No 10; art. 6(b) of the International Military Tribunal Charter (IMT Charter); Draft Code of Crimes Against the Peace and Security of Mankind art 20.

<sup>38</sup> The Rome Statute does not define 'armed conflict'. However, according to *Lubanga Dyilo* para 533, an 'armed conflict' exists "whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State".

<sup>39</sup> While art 8(2)(c) and (e) refer to acts committed in a non-international armed conflict, art 8(2)(a) and (b) of the Rome Statute covers acts and omissions committed in an international armed struggle.

Conventions and their Additional Protocols I,<sup>40</sup> and II,<sup>41</sup> the Hague Conventions,<sup>42</sup> and the Rome Statute.

Identifying a series of war crimes, according to international statutes, involves the objective evaluation of the facts and circumstances, and the subjective judgement of the proper course of action once these crimes have been identified. The incidents may consist of extensive obliteration and seizure of property not justified by military necessity,<sup>43</sup> launching attacks clearly regarded as excessive that could possibly lead to serious bodily injury, loss of life, or loss to civilian properties.<sup>44</sup>

### 3.3.1.2 *Intent and dolus eventualis in war crimes*

One should state here that irrespective of the general provision defining the mental elements,<sup>45</sup> the definition of war crimes contains words such as ‘wilful’ and ‘compelling’ which by implication signify the element of intent. Liability for any of the war crimes must be established on both the intent and knowledge requirements as stipulated in article 30(1)(2) of the Rome Statute. As regards knowledge, a link must exist between the act and the conflict to indicate that the perpetrator was conscious that the individuals or properties were under the protection of one or more of the Geneva Conventions. The definitional elements of war crimes further require the offender to have been “aware of the factual circumstances that established the existence of an armed conflict”.<sup>46</sup> This crime element is “common to all war crimes provided for in Article 8(2)(a) and (b) of the Elements of Crimes”.<sup>47</sup>

In the case of *Prosecutor v Thomas Lubanga Dyilo*,<sup>48</sup> it was confirmed that with regards to the subjective elements of war crimes, X must satisfy both intent and

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<sup>40</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>41</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977.

<sup>42</sup> First Hague Convention of 24 August 1898, and Second Hague Convention of 18 October 1907.

<sup>43</sup> Art 8(2)(a)(iv); see also arts 8(2)(b)(X)(xiii) and 8(2)(e)(xii).

<sup>44</sup> Rome Statute art 8(2)(b)(iv).

<sup>45</sup> Rome Statute art 30. Also see Rome Statute art 8(2)(b).

<sup>46</sup> ICC *Elements of Crime* 9.

<sup>47</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-717 (30 September 2008) para 244.

<sup>48</sup> *Lubanga Dyilo* para 351.

knowledge to be held liable for a war crime. This mental element, according to the majority of the trial Chamber tribunal, also includes *dolus eventualis*.<sup>49</sup> Even before the *Lubanga Dyilo* case, the concept of *dolus eventualis* dominated international criminal case law, especially at the ICTY, where individuals were put on trial for attacks on civilians. However, the ICTY Statute, as well as the statute of the ICTR lacked any provisions as regards *mens rea*. It was left to the judges of these tribunals to determine the prerequisites for intent and knowledge. As these judgments provided important decisions on the concept of *dolus eventualis*, a selection of the most important cases will be discussed.

In *Prosecutor v Galić*,<sup>50</sup> the general of the Bosnian-Serb Army, Stanislav Galić, was charged with war crimes. He was in command of the Sarajevo Romanica Corps between 1992 and 1994, when the siege of Sarajevo took place, and was responsible for a campaign of sniper fire and shelling executed by his troops against the civilian population of Sarajevo. The charges, among others, included war crimes as he ordered attacks on the civilian population. The conclusion of the *Galić* trial Chamber was based on article 51(2)<sup>51</sup> of Additional Protocol I, and article 13(2) of Additional Protocol II which is “either directly as treaty-based norms or indirectly as customary norms applicable to all armed conflicts regardless of their status as international or non-international”.<sup>52</sup> The Chamber held that intentionally targeting civilians as the object of an attack comprised a serious breach, in line with the *Tadić* standard<sup>53</sup> for defining war crimes.<sup>54</sup> This standard was satisfied since the defendant’s conduct had harmful results for the victims. Galić’s conduct consequently transgressed a core international humanitarian law principle. Moreover, individual criminal responsibility, both in the international and

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<sup>49</sup> *Lubanga Dyilo* para 351.

<sup>50</sup> *Prosecutor v Galić* Case No IT-98-29-T (5 December 2003) paras 3-4 (hereinafter *Galić*).

<sup>51</sup> Art 51 concerns the protection of the civilian population: “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”.

<sup>52</sup> According to art 13(2), a civilian population shall not be the object of attack. See also *Galić* paras 16-20.

<sup>53</sup> *Galić* paras 29, 31, referring to *Prosecutor v Duško Tadić* Case No IT-94-1-A (15 July 1999). Under this standard, a war crime will include: “i) a breach protecting important values with grave consequences for the victim; ii) a breach of a rule stemming from customary law or applicable treaty; and iii) a breach entailing individual criminal responsibility for the individual violator”.

<sup>54</sup> Ohlin 2013 *Michigan J Int'l L* 92-93.

national penal legislation, which includes Yugoslavia, was met.<sup>55</sup>

As regards the required mental element for the crime, the Trial Chamber analysed the standard of “wilfully ... making the civilian population or individual civilians the object of attack”.<sup>56</sup> Relying almost solely on the ICRC Commentary, the Trial Chamber contended that the notion of ‘wilfully’ includes recklessness:

...the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them (“criminal intent” or “malice aforethought”); this encompasses the concepts of “wrongful intent” or “recklessness”, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences.<sup>57</sup>

The Trial Chamber did not take into consideration that the concepts of ‘wrongful intent’ or ‘recklessness’ are not defined identically in different domestic legislations, as specifically pointed out in the ICRC Commentary.<sup>58</sup> Moreover, the Appeals Chamber in *Galić* did not correct the Trial Chamber’s interpretation of *mens rea*.<sup>59</sup>

Some war crimes which cannot be decided on objective facts require a subjective evaluation of the situation for an appropriate course of action, for example, crimes constituting extensive destructions to properties which are “not justified by any military necessity”,<sup>60</sup> or throwing a bomb that would cause incidental (foreseeable) damage or injuries to civilians. In the case of *US v Otto Ohlendorf et al*, the tribunal described such distinction as follows:

A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. The civilians are not

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<sup>55</sup> It has been stated that when assistance is offered by a foreign state to a state combating an armed resistance movement, it does not lead to the internationalisation of the conflict. See *Prosecutor v Callixte Mbarushimana* ICC-01/04-01/10 (16 December 2011) para 101. It was also stated in *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424 (15 June 2009) that the armed conflict was not of an international character while assistance was provided by the Chadian mercenaries and the Libyan troops.

<sup>56</sup> Additional Protocol I art 85.

<sup>57</sup> Sandoz *et al* (eds) *Commentary on the Additional Protocols* para 3474.

<sup>58</sup> Sandoz *et al* (eds) *Commentary on the Additional Protocols* 993 n 14.

<sup>59</sup> *Galić* para 30.

<sup>60</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 21.

individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children and shooting them.<sup>61</sup>

In such cases, the principles of distinction and proportionality will come into play. Although armed forces may intentionally target and kill combatants, it is strictly prohibited to kill civilians. If a civilian population is intentionally targeted, a war crime is committed. If the conclusion is that the act was not intentional, then the principle of proportionality is referred to. Did the harm caused outweigh the projected military benefit? If this is the case, then the unintended injury is not acceptable.

The problem most Anglo-American jurists have faced with regards to the use of *dolus eventualis* by international tribunals concern the two above-mentioned principles. Their argument is that international judiciaries have begun to rely greatly on the concept of *dolus eventualis*, and have progressively redefined what it means to “intentionally target a civilian population”,<sup>62</sup> merging the principles of distinction and proportionality. It is argued that a military commander who foresees that detonating a bomb in a street may result in civilian casualties, is already guilty of contravening the distinction principle. This is because *dolus eventualis* not only consists of situations where the perpetrator aspires a particular outcome, but also where the perpetrator knows that his act will result in a certain outcome, and he reconciles himself to the end result. The proportionality principle consequently becomes irrelevant with this type of intent.

However, in *Prosecutor v Strugar*, the Trial Chamber held that in order to prove murder as a war crime:

...it must be established that death resulted from an act or omission of the accused, committed with the intent either to kill or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission. In respect of this formulation it should be stressed that knowledge by the accused that his act or omission might possibly cause death is not sufficient to establish the necessary *mens rea*. The necessary mental

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<sup>61</sup> *US v Otto Ohlendorf et al* Nuremberg Military Tribunal Case IX (8 April 1948) 467.

<sup>62</sup> Ohlin 2013 *Mich J Int'l L* 79. Ohlin maintains at 84-85 that “collapsing the two tracks - distinction and proportionality - violates the Doctrine of Double Effect upon which the rule of collateral damage was modelled”.

state exists when the accused knows that it is probable that his act or omission will cause death.<sup>63</sup>

Therefore, every particular case concerning war crimes requires special caution; especially in cases where judgments are made as regards military commanders, for example. In such cases, the weighing of the “military advantage anticipated”<sup>64</sup> with the number of civilian lives’ lost and properties damaged should never be taken lightly. When determining whether a commander is criminally responsible or innocent “the situation as appeared to him must be given the first consideration”.<sup>65</sup> The next section examines the concept of *dolus eventualis* as realised in crimes against humanity.

### 3.3.2 Crimes against humanity

#### 3.3.2.1 *Definition and elements of the crime*

The Rome Statute defines crime against humanity in the following terms:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great

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<sup>63</sup> *Prosecutor v Pavle Strugar* Case No IT-01-42-T (31 January 2005) para 152.

<sup>64</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 21.

<sup>65</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 21.

suffering, or serious injury to body or to mental or physical health.<sup>66</sup>

Apparent from the above definition is that crimes against humanity are typified by different elements than that of war crimes, and the rules proscribing the elements aim at protecting different interests and values. There are, however, still similarities. For example, torture is considered under the Rome Statute as both a war crime and a crime against humanity.<sup>67</sup> The crime includes the causing of serious physical or mental suffering to one or more persons; however the purpose of the suffering is not necessary. According to the standard set out in the UN's Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the perpetrator need also not to have acted in an official capacity.<sup>68</sup> Another crime is that of murder, represented in the Rome Statute article 2(a)(i) as 'wilful killing'.

The purpose of the prohibition of crimes against humanity is to proscribe heinous and inhumane crimes such as rape, murder, torture, enslavement, extermination, et cetera, internationally. Crimes against humanity are different from other crimes in that these crimes are inspired by racism, or political, ideological or religious intolerance. In protecting such 'sacred' values, the motive for each transgression is considered.<sup>69</sup> The Pre-Trial Chambers acknowledged five general elements of crimes against humanity:

- (i) an attack directed against any civilian population,
- (ii) a State or organisational policy,
- (iii) the widespread or systematic nature of the attack,
- (iv) a nexus between the individual act and the attack, and
- (v) knowledge of the attack.<sup>70</sup>

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<sup>66</sup> Rome Statute art 7(1). Crimes against humanity are defined under art 3 of the ICTR. Also see the updated Statute of the ICTY as amended 7 July 2009 in its art 5 defining crimes against humanity; art 3 of the Statute of the ICTR; Draft Code of Crimes Against the Peace and Security of Mankind art 18.

<sup>67</sup> See Rome Statute art 7. Compare crimes against humanity art 7(1)(f) and war crimes 8(2)(c)(i) of the Rome Statute in which both provisions mention torture.

<sup>68</sup> Art 1(1); art 16(1). See also Stiel and Stuckenberg *Article 103* 113.

<sup>69</sup> ILC *Report of the International Law Commission 1989* paras 151-156.

<sup>70</sup> ICC *Situation in the Republic of Kenya* para 79; ICC *Situation in the Republic of Côte d'Ivoire* para 29.

Accordingly, the requirement of 'directed against' indicates that "the civilian population must be the primary object of the attack and not just an incidental victim of the attack".<sup>71</sup> It is not necessary that the whole population of that geographic location where the attack is taking place need to have been targeted.<sup>72</sup> The focus of the attack may consequently be on individual victims.

### 3.3.2.2 *Intent and dolus eventualis in crimes against humanity*

Criminal intent is inherent in the definitional elements of crimes against humanity. The development of the requirement of intention for crimes against humanity under article 7 of the Rome Statute was shaped by previous war tribunals such as the IMT Charter and the Nuremberg Trials, Control Council Law No 10. It should be noted that the primary requirement of *dolus* for crimes against humanity under the IMT Charter is the nexus between the crime and a state of war. The Nuremberg Trials' conditions of *dolus* were subsequently transferred into the Rome Statute as the standard requirement of intention under international criminal law.

Article 7 of the Rome Statute improves previous intent requirements to include the presence of a 'widespread and systematic attack directed against any civilian population'. Taking this definition into consideration, the intention requisite for crimes against humanity was not linked only to a state of war, but to the presence of a widespread attack in a systematic manner, directed against any civilian population. The ICTY Statute follows the prescriptions of the Rome Statute in this regard, and states in article 3 that crimes against humanity need not be limited to a state of war. Given that the Statute is the main source of international criminal law, these *dolus* prerequisites for crimes against humanity have become the standard jurisprudence for the prosecution of perpetrators for crimes against humanity in international criminal law.

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<sup>71</sup> *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424 (15 June 2009) para 76. See also *Prosecutor v Dragoljub Kunarac, Radomir Kovać and Zoran Vuković* Case No IT-96-23-T & IT-96-23/1-T (22 February 2001) paras 91-92 (hereinafter *Kunarac*).

<sup>72</sup> *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424 (15 June 2009) para 77; *Prosecutor v Milomir Stakić* Case No IT-97-24-T (31 July 2003) para 627; *Kunarac* para 90.

Crimes against humanity require a special intent or *dolus specialis*,<sup>73</sup> and not merely a general intent.<sup>74</sup> This type of intent is also called a discriminatory intent, as “circumstances surrounding the commission of the alleged acts substantiate the existence of such intent”.<sup>75</sup> Murdering or exterminating people; exercising control or ownership over people, including human trafficking; and some consent-related crimes like rape and enforced prostitution all require a specific intent. Another example is the crime of apartheid, which has to be “committed with the intention of maintaining”<sup>76</sup> a racist government. Moreover, as a specific intent crime, “enforced disappearance of persons” warrants that the arrests, kidnapping or forced migration of persons must have been carried out with the intent to remove them of protection over a protracted period of time.<sup>77</sup> Furthermore, the special intent necessary for crimes against humanity may not be presumed as a result of the act but must be proved.<sup>78</sup>

Committing a crime against humanity, such as murder, first requires that X intended the death of the victim. A conviction in this regard suffices if the evidence indicates that X was aware that death would unavoidably ensue from his conduct, although he might not have desired it. Therefore, for purposes of crimes against humanity, knowledge of circumstances plus the awareness that those circumstances would likely or possibly lead to death (*dolus eventualis*) meets the requirements of intent and knowledge as per the Rome Statute.<sup>79</sup>

As noted, the mental elements of crimes against humanity is set out under article 7 of the Rome Statute as ‘knowledge of the attack’. For example, in the *Hans Frank* trial it was ruled that Frank was a “willing and knowing participant [...] in a program involving the murder of at least three million Jews”.<sup>80</sup> In *Prosecutor v Arthur Seyss-Inquart*, Seyss-Inquart “was a knowing and voluntary participant in ... Crimes

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<sup>73</sup> Rome Statute art 7.

<sup>74</sup> For general intent crimes (or conduct crimes), the perpetrator intentionally performs an unlawful act, irrespective of the result. In special intent crimes, the perpetrator also performs an unlawful act intentionally, but furthermore intends to cause a particular result. See *Prosecutor v Ignace Bagilishema* Case No ICTR-95-1A-T 60 (7 June 2001) paras 55, 62, 153.

<sup>75</sup> *Prosecutor v Dario Kordić and Mario Čerkez* Case No IT-95-14/2-A (17 December 2004) paras 110-111.

<sup>76</sup> Rome Statute art 7(2)(h).

<sup>77</sup> Rome Statute art 7(2)(i).

<sup>78</sup> Rome Statute art 30; *Prosecutor v Miroslav Kvočka et al* Case No IT-98-30/1 (28 February 2005) paras 109-110 (hereinafter *Kvočka*).

<sup>79</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 14-15.

<sup>80</sup> *Prosecutor v Hans Frank* IMT Judgment Part 22 (1 October 1946) 498.

Against Humanity which were committed in the occupation of the Netherlands”.<sup>81</sup> X will be thus culpable of crimes against humanity if it is proved that during an armed conflict, he knew that there was an attack on civilians, and that his unlawful conduct formed part of the attack. However, this requisite must not be construed as necessitating proof of the wrongdoer’s awareness of all the circumstances or every little detail of the plan of the organisation or the state.<sup>82</sup> It is required that “the perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act”.<sup>83</sup>

Knowledge of the unlawful conduct may further be assumed if the perpetrator is in a position of authority. For example, the position of the perpetrator as commander-in-chief in the *Dönitz* case led to the conclusion that he “must necessarily have known”<sup>84</sup> that large numbers of people were confined in concentration camps, and used for forced labour. In the case of *Tadić*, the criminal conduct consisted of the ethnic cleansing of Bosnian Muslims in the Prijedor region. Although Tadić did not personally carry out the act of murders not included in the initial plan, it was held that he was able to foresee the likelihood of this result ensuing, and voluntarily took on the risk.<sup>85</sup>

...in light of the temporal and geographical proximity of the killings, the similarities between them and the organized and coordinated manner in which the Bosnian Serb Forces conducted them ... formed part of a single operation.<sup>86</sup>

The court held that the accused must have acted with knowledge of the greater dimension of criminal conduct.<sup>87</sup> Accordingly, actual or constructive knowledge of the broader context of the attack is necessary to satisfy the necessary *mens rea*

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<sup>81</sup> *Prosecutor v Arthur Seyss-Inquart* IMT Judgment Part 22 (1 October 1946) 521.

<sup>82</sup> *Prosecutor v Jean-Paul Akayesu* Case No ICTR-96-4-T (2 September 1998) para 589; *Prosecutor v Georges Anderson Nderubumwe Rutaganda* Case No ICTR-96-3-T (6 December 1999) para 80; *Prosecutor v Zejnil Delalić et al* Case No IT-96-21-T (16 November 1998) para 424; *Prosecutor v Tihomir Blaškić* Case No IT-95-14-T (30 March 2000) paras 216-217.

<sup>83</sup> *Prosecutor v Clément Kayishema and Obed Ruzindana* ICTR-95-1-T (21 May 1999) para 133 (hereinafter *Kayishema*).

<sup>84</sup> *Prosecutor v Karl Dönitz* IMT Judgment Part 22 (1 October 1946) 509; Badar *The concept of mens rea in international criminal law* 240.

<sup>85</sup> Paşca and Băra 2017 *Int'l Conf Know Org* 194.

<sup>86</sup> *Prosecutor v Vujadin Popović et al* Case No IT-05-88-T (10 June 2010) para 805; *Prosecutor v Zdravko Tolimir* Case No IT-05-88/2-A (8 April 2015) para 147.

<sup>87</sup> Rome Statute art 7.

element of the accused.<sup>88</sup> The Appeals Chamber in *Tadić* did not see any need to further require a link between the specific acts committed by Tadić and the armed conflict, or proof of Tadić's motive, to hold X responsible.<sup>89</sup> He had actual or constructive knowledge<sup>90</sup> of the broader context of the attack, and this element sufficed to hold him responsible for crimes against humanity.<sup>91</sup> Actual knowledge is also an ingredient of *dolus eventualis* although "in the form of foreseeing the consequences as a possibility or likelihood".<sup>92</sup>

*Dolus eventualis* in crimes against humanity is consequently considered as a 'conditional intent' through which a broader collection of a subjective mind set towards the consequences is expressed, and, therefore, entails a higher threshold than just recklessness. X not only means to engage in a certain conduct, or means to cause the result, X may also be aware that a certain consequence will ensue in the ordinary course of events. In such instances, X may be indifferent to the consequences, or be reconciled with the harm as a possible cost of attaining his objective. According to article 30(2)(b) of the Rome Statute, X is not required to be aware that a certain result will ensue in the ordinary course of events; he may only think that the consequences are possible. According to Ambos, article 30 of the Rome Statute leaves no room for an interpretation which includes *dolus eventualis* within the concept of intent as a form of indirect intent.<sup>93</sup>

The following section examines how the international courts and juristic bodies, as well as the Rome Statute, impute culpability for *dolus eventualis* in cases involving individuals or commanders who are in charge of a group. This may occur in both

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<sup>88</sup> *Kayishema* para 134.

<sup>89</sup> *Tadić* paras 271-272.

<sup>90</sup> Although similar statements were repeated in subsequent cases of crimes against humanity, effort has not been made to provide an exact meaning of 'constructive knowledge'. See *Kayishema*; *Rutaganda*; *Prosecutor v Alfred Musema* Case No ICTR-96-13-T (27 January 1999); *Prosecutor v Georges Ruggiu* Case No ICTR-93-32-T (1 June 2001); *Prosecutor v Zoran Kupreškić et al* Case No IT-95-16-T (14 January 2000); *Prosecutor v Dario Kordić and Mario Čerkez* Case No IT-95-14/2-A (17 December 2004). It has been suggested that if constructive knowledge implies attributing knowledge to X, which he did not in fact possess, such knowledge cannot be considered as awareness, taking into consideration the meaning of intent and knowledge in the Rome Statute. See Vyver 2004 *U Miami Int'l and Comp LR* 5.

<sup>91</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 67.

<sup>92</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 5, 68. Isolated acts of homicide not constituting part of the same assault on the population cannot be accumulated together to constitute extermination. See also *Prosecutor v Zdravko Tolimir* Case No IT-05-88/2-A (8 April 2015) para 150.

<sup>93</sup> Ambos 1999 *CLF* 21-22

war crimes and crimes against humanity. This category of perpetrators is discussed separately because there are specific complexities encountered as regards the determination of their culpability, especially when *dolus eventualis* is utilised.

### 3.3.3 Intent and *dolus eventualis* requirements for command responsibility

As previously mentioned as regards individual criminal responsibility, a commander can be criminally liable for a war crime committed by himself. The International Law Commission (ILC) consequently states that a head of a state, government or commander who commits an unlawful act against the peace and security of mankind will not be provided any relief or mitigated sentence.<sup>94</sup> This provision is duplicated in the ICTR Statute, which declares that, irrespective of the official position of the wrongdoer (whether as head of state or government or as a responsible government official), he shall not be relieved of criminal responsibility nor mitigated punishment.<sup>95</sup> Also, the ICTY Statute asserts that any “person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime”.<sup>96</sup> The ICTR Statute replicates this provision in article 6(1). Lastly, the ICTR article 6(4) states that where the perpetrator is charged with a crime against humanity because he acted in accordance with the order of a superior or a government, he will not be relieved of criminal liability, but this fact may be considered in sentence mitigation, if so decided.<sup>97</sup>

Article 33 of the Rome Statute similarly provides in respect to superior orders that a crime committed by a person with respect to a command from a superior or a government, military or civilian, “shall not relieve that person of criminal liability unless the person was under a legal obligation to obey orders of the Government or the superior in question; and the person did not know that the order was

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<sup>94</sup> ILC *Report of the International Law Commission 1996* art 7.

<sup>95</sup> Art 6(2) of the ICTR.

<sup>96</sup> ICTY art 7(1) (7 July 2009).

<sup>97</sup> International Law Commission (ILC) art 5.

unlawful".<sup>98</sup> Since an order to commit an international crime is considered unlawful, the Rome Statute does not consider superior commands as an objective ground of justification at all.<sup>99</sup> A superior order is however a defence in a case where the order was carried out by a subordinate without guilty knowledge, which negates the aspect of fault.<sup>100</sup>

A commander can also be held vicariously liable for unlawful acts committed by others under his control.<sup>101</sup> Article 28 of the Rome Statute declares that a commander will be punished for the same crime committed by his subordinates. This presents a peculiar situation which may be in violation of the principle of individual and culpable criminal responsibility. It is consequently critical to consider the different cases of command responsibility and *mens rea* requirements, which are based on distinct objective and subjective requisites.

According to the doctrine of command responsibility, where, for example, a military commander fails to prevent or suppress his subordinates' war crimes, the commander may be punished for the crimes of his subordinates.<sup>102</sup> This is because he failed to implement proper control over his subordinates.<sup>103</sup> Where a military group is placed under the full control of a commander, it is expected that the subordinates conduct themselves in accordance with the standard set by their commander. Such military commander ought to have been aware that his subordinates were about to commit war crimes or crimes against humanity, yet he failed to take the necessary measures to prevent their commission. Such omission, when a commander has the authority or ability to do so, may constitute an offence. In this regard, the Rome Statute provides that:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

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<sup>98</sup> Rome Statute art 33(1).

<sup>99</sup> Triffterer (ed) *Commentary on the Rome Statute* 573, 579, 587.

<sup>100</sup> Rome Statute art 33(1).

<sup>101</sup> *USA vs Wilhelm von Leeb et al* AMT Case No 72 (27 October 1948) 487, 511.

<sup>102</sup> Dunnaback 2014 *NWUL* 1385.

<sup>103</sup> Rome Statute art 28(b).

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>104</sup>

A commander thus has the duty to take all necessary and reasonable measures to make sure that those under his command do not commit violations of the law of war.<sup>105</sup> Consequently, a commander can be held liable for either by taking an affirmative role in the commission of war offences, or an omission in failing to prevent the offences. Similarly, the fact that a crime against humanity was committed by a subordinate, his superior may still be criminally liable if he knew, or ought to reasonably know at the time, that his subordinate was committing or was about to commit an unlawful act, or if he did not take reasonable measures within his powers to prevent the unlawful conduct.<sup>106</sup>

For a military commander to be held criminally liable for war crimes committed by those under his command, special rules are applied. Four elements must be considered in order to determine the crime, based on those executed by others and the responsibility of the commander.

- (i) an act or omission incurring criminal responsibility according to Articles 2 to 5 and 7(1) of the Statute has been committed by other(s) than the accused ('principal crime');
- (ii) there existed a superior-subordinate-relationship between the accused and the principal perpetrator(s) ('superior-subordinate-relationship');
- (iii) the accused as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so ('knew or had reason to know'); and
- (iv) the accused as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator(s) thereof ('failure to prevent or punish').<sup>107</sup>

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<sup>104</sup> Rome Statute art 28(a).

<sup>105</sup> Kastenbergh 2017 *Southwestern LR* 380; US Department of Defence *Law of war manual* 121.

<sup>106</sup> ILC *Report of the International Law Commission 1996* art 6.

<sup>107</sup> *Prosecutor v Naser Orić* Case No IT-03-68-T ICTY T (30 June 2006) para 294 (hereinafter *Orić*).

The first three requirements requiring conduct incurring criminal responsibility; an existing superior-subordinate relationship, and that the superior failed to take the necessary and reasonable measures to prevent the criminal acts of his subordinates or punish them for those actions, are clear and objective. The point of concern is the last requirement where the superior must have either actual knowledge regarding the crimes, or possess information that makes him aware of the risk of such unlawful conduct.<sup>108</sup>

Where a superior was not in fact aware, but he, however, consciously disregarded any information suggesting that his subordinates were about to commit, or were committing the unlawful act question; the superior can be held liable for such crime.<sup>109</sup> Negligence will not suffice in such a case; criminal responsibility may therefore be based on *dolus* in the form of *dolus directus*, *dolus indirectus* or *dolus eventualis*. A superior who deliberately ignored information (wilful blindness) will be responsible for crimes of the subordinates.

According to the ILC, such a perpetrator will be responsible for a crime mentioned under articles 18 (crimes against humanity) or 20 (war crimes) if he:

- (a) Intentionally commits such a crime;
- (b) Orders the commission of such a crime which in fact occurs or is attempted;
- (c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;
- (d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
- (e) Directly participates in planning or conspiring to commit such a crime which in fact occurs.<sup>110</sup>

The *mens rea* necessary for the vicarious liability of a military commander is distinguished from the vicarious liability of a civilian superior. While a military commander 'knew' (acted intentionally) or 'should have known' (legal responsibility in such circumstances could be dependent on negligence), criminal responsibility for crime committed by a civilian commander's subordinates as a result of his

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<sup>108</sup> Ambos 2007 *J Int'l Crim Just* 161.

<sup>109</sup> Art 28(2)(a). It has been stated that this is an instance of liability based on 'recklessness'.

<sup>110</sup> ILC *Report of the International Law Commission* 1996 art 2(3).

failure to exercise proper control, requires that the commander “knew, or consciously disregarded information which clearly indicated”<sup>111</sup> that those under his command were committing or about to commit the crime in issue. The civilian commander may further only be criminally liable for the conduct of those under his control if he “consciously disregarded information”<sup>112</sup> which clearly indicates intent in the form of *dolus eventualis*. The Trial Chamber in *Prosecutor v Tihomir Blaškić* used the phrase “impossible not to know”<sup>113</sup> to describe this mental state.

Another term to describe this mental make-up of the wrongdoer is ‘wilful blindness’, where a person is unwilling or do not want to know what he already foresees, and forged unawareness or ignorance so as to escape culpability. Wilful blindness indicates a mental disposition of X, for example, who do not want to know (pretends, or turning a blind eye) that which he already knows or foresee, but claim ignorance so as to escape criminal responsibility.<sup>114</sup> If it is established that X was wilfully blind in regard to the fact or the circumstance that could lead to his culpability, the *mens rea* requirements for war crimes, and crimes against humanity would be met.<sup>115</sup> Intentionally not wanting to know (wilful blindness) could be considered as knowledge of the possibility for the commission of an unlawful act.

Wilful blindness would render a superior or a commander criminally responsible for crime committed by subordinates under his control. For both crimes against humanity and war crimes, the *mens rea* requirement is met if it is found that the wrongdoer was wilfully blind to the situation that brought his conduct within the provision of the offence in question. Wilful blindness is synonymous with knowledge, as alluded to above.<sup>116</sup> The concept of wilful blindness indicates that the perpetrator is aware, if not in confidence in the form of *dolus directus* or *dolus indirectus*, then at least he knew that a certain act may possibly occur or that the result for which he may take responsibility has become apparent (*dolus eventualis*).

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<sup>111</sup> Rome Statute art 28(b)(i). Also see art 28(a)(i) of the Rome Statute.

<sup>112</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 115.

<sup>113</sup> *Prosecutor v Tihomir Blaškić* Case No IT-95-14-T 249 (30 March 2000) para 180.

<sup>114</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 7-8.

<sup>115</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 7.

<sup>116</sup> See MPC s 2.02(7) (equating ‘knowledge’ to awareness of a high probability of the existence of a particular fact, unless the perpetrator “actually believes that it does not exist”).

Wilful blindness is thus a clear indication of the presence of *dolus eventualis*; and criminal responsibility may arise where this form of fault is established.<sup>117</sup> Under the ICC, wilful blindness is relevant particularly in cases of command responsibility. This aspect is evident in one of the most important trials that were brought before the ICTY - that of the Serbian General Radislav Krstić,<sup>118</sup> commander of the Drina Army Corps. In 1995, Krstić was the main instigator behind the forced deportation of Muslims who lived in the city of Srebrenica.<sup>119</sup> Krstić was found guilty of several crimes, including murder and rape. The ICTY held that these crimes were the natural and expected result of the deportation plan, although they were not conventional with the common plan.<sup>120</sup> It was accepted by the tribunal that Krstić foresaw or was aware of the possibility that the Drina Army Corps might kill, batter and rape the Muslim women and children.

The criminal liability of a military commander for the unlawful acts of those under his control may also be based on negligence.<sup>121</sup> Wilful lack of knowledge will not be an issue in such cases because actual knowledge is irrelevant for the purpose of determining negligence.<sup>122</sup> It should be noted in cases where a lesser form of intent, such as *dolus eventualis* suffices to hold X criminally liable (which do not include any of the crimes against humanity), instances of constructive knowledge might become relevant. As noted above, actual knowledge is an ingredient of *dolus eventualis*, although only in the form of foreseeing the consequences as a possibility.

Accordingly, *dolus eventualis* will suffice to secure a conviction where there is evidence of actual knowledge, or where the superior deliberately turned a blind eye in relation to the consequences. Wilful blindness might also rebut the defence of mistake. X can furthermore not claim ignorance as a defence if his ignorance is attributed to his wilful blindness to the facts or the law. On the other hand, a superior or commander may be held responsible to have acted recklessly (negligently) in a case where he foresaw his conduct as only a probable

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<sup>117</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* 8.

<sup>118</sup> See Paşca and Băra 2017 *Int'l Conf Know Org* 194.

<sup>119</sup> *Prosecutor v Radislav Krstić* Case No IT-98-33-T (2 August 2001) 615 (hereinafter *Krstić*).

<sup>120</sup> *Krstić* 616.

<sup>121</sup> Rome Statute art 28(1)(a).

<sup>122</sup> Schoeman 2016 *SACQ* 36.

consequence. In other words, recklessness is when the wrongdoer takes a conscious risk in the hope that such risk does not, or would not result to any harm.<sup>123</sup>

### 3.4 *Mens rea* in joint criminal enterprises

One of the challenges of international criminal law is the issue of criminal responsibility of individuals for collective criminality<sup>124</sup> who constitute the triggering force in the commission of war crimes or crimes against humanity, against those who actually executed the act. The doctrine of joint criminal enterprise comprises the prosecution of group members for their war crimes by means of common purpose.<sup>125</sup> Each member of such organised group will be individually responsible for crimes committed by group, despite the fact that there may be no causal link between each individual's conduct and the criminal act. Once there is the existence of a joint plan or purpose which amounts to the commission of a crime as provided in the Rome Statute, it becomes irrelevant for the plan to have been planned beforehand. The common purpose "may materialize extemporaneously and be inferred from the fact that pluralities of persons act in unison to put into effect a joint criminal enterprise".<sup>126</sup>

From the ICTY jurisprudence, three categories of joint criminal enterprise may be identified. The first kind is the basic form of joint criminal enterprise, where all co-perpetrators pursue a common purpose and possess the same criminal intention.<sup>127</sup> The second form is a systemic joint criminal enterprise. It consists of the basic form, but it is typified by a structured system of ill-treatment; for example,

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<sup>123</sup> A superior or a military commander will be liable to have acted negligently if he did not appreciate the unlawful consequences of his conduct, while any reasonable person would have foreseen and avoided the unlawful consequences. Negligence refers to the mental disposition of the perpetrator at the time the unlawful act was committed, although he did not intend to cause the unlawfully consequences, and in doing so, he deviated from acts expected from any reasonable person in the same situation.

<sup>124</sup> Summers 2014 *Wash U Global Stud LR* 667; also see Jain 2011 *Chicago J Intl' L* 159, 160.

<sup>125</sup> According to Snyman *Criminal law* 256, common purpose exists: "If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others".

<sup>126</sup> *Tadić* para 228.

<sup>127</sup> *Ambos* 2007 *J Int'l Crim Just* 160; *Tadić* para 220; *Prosecutor v Elizaphan Ntakirutimana and Gérard Ntakirutimana* Cases Nos ICTR-96-10-A and ICTR-96-17-A (13 December 2004) para 463 (hereinafter *Ntakirutimana*).

concentration camps.<sup>128</sup> The third category consists of an extended joint criminal enterprise. This form relates to a common purpose to commit a crime, where one of the participants commits an act outside the scope of the common purpose, but this act is still an expected and probable consequence of the common purpose. An example here where persons are shot and killed during the forcible removal of people. It was foreseeable that during the act of removing people, some might be killed, especially if they resist.<sup>129</sup>

It is especially in the last category where, for example, a member of the group commits a crime without the knowledge of the other members, but he is committing such crime as part of, or as a means to achieving the main criminal purpose, where problems arise.<sup>130</sup> The adoption of legal rules from national legal systems to handle such cases would lead to unfair results owing to its specific nature. However, the ICC has borrowed the concept of 'risk' in a bid to construct guilt in such cases, especially in cases relating to *dolus eventualis*, where the notion of the accused "willingly taking the risk"<sup>131</sup> applies as a form of criminal partaking.

Intent would differ here according to the various categories. For example, in the first category, what is required is a common intent of every co-perpetrator directing themselves towards the attainment of a common purpose. With regard to the second category, personal awareness or knowledge of the type of ill-treatment would be an ingredient, which could be proved by way of reasonable inference or direct testimony from the commander's position of authority, and a common intent to carry out that type of ill-treatment. The requirement for the third category is the intention to take part or contribute in, and to further the criminal action of the group.<sup>132</sup> Where a member of the group commits a crime other than the one commonly agree upon without the knowledge of the other members, responsibility arises if: "(i) it was foreseeable that such a crime might be perpetrated by one or

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<sup>128</sup> *Ntakirutimana* para 464.

<sup>129</sup> Summers 2014 *Wash U Global Stud LR* 674; *Ntakirutimana* para 465.

<sup>130</sup> Paşca and Băra 2017 *Int'l Conf Know Org* 193.

<sup>131</sup> *Tadić* para 228.

<sup>132</sup> *Tadić* para 228.

other members of the group and (ii) the accused willingly took that risk”.<sup>133</sup>

The foresight that other members within the group will commit crimes other than those specifically related to the joint criminal enterprise, but which have a nexus with the common purpose, is a risk that is taken willingly by any of the members. This risk takes the form of *dolus eventualis*. The question of risk was raised in the *Tadić*-case, where the Appeal Chamber stated:

Accordingly, the only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk.<sup>134</sup>

In *Tadić*, Duško Tadić was a regional leader of the Serbian nationalist party from Bosnia Herzegovina, and one of the main participants in the ‘Big Serbia’ plan, which had as its main objective the ethnic cleansing of Croats and Muslims in the Prijedor region. This regime led to rape, battering, and massacring of many civilians.<sup>135</sup> The court established guilt on the basis of his intention to participate in, and advance the criminal activities of the group.

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<sup>133</sup> *Tadić* para 228; Summers 2014 *Wash U Global Stud LR* 675; Ambos 2007 *J Int'l Crim Just* 161. This is also the second main element relating to *mens rea* in cases of a joint criminal enterprise; the first being the intention to partake in achieving the joint rationale of the group.

<sup>134</sup> Summers 2014 *Wash U Global Stud LR* 675; *Tadić* para 232. The Pre-trial Chamber II in *Bemba* considered the language of art 30 of the Rome Statute required, at a minimum, unless specified, that X have an “awareness that ...a consequence will occur in the ordinary course of events”. See Rome Statute art 30(1), (2)(b), (3); Summers 2014 *Wash U Global Stud LR* 683.

<sup>135</sup> Paşca and Băra 2017 *Int'l Conf Know Org* 193; *Tadić* para 227, where it is stated therein: “In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows: i. A plurality of persons. They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and *the Kurt Goebell* cases. ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose”.

It is important to note two important terms used by the Appeal Chamber in the passage above - 'foreseeable' and 'aware'.<sup>136</sup> These terms describe the *mens rea* required to prove participation in the third category of a joint common enterprise. Therefore, in *Tadić*, "murder was a predictable consequence of ethnic cleansing by the commission of inhumane acts directed at the non-Serb population of Prijedor".<sup>137</sup> *Tadić* possessed the intent to carry out the joint enterprise, as well as the foresight that those crimes committed outside the joint enterprise were likely to be perpetrated.<sup>138</sup> This conclusion was also reached in the case of *Prosecutor v Radislav Krstić*:

If the crime charged fell within the object of the joint criminal enterprise, the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime. If the crime charged went beyond the object of the joint criminal enterprise, the prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise.<sup>139</sup>

Once the principal perpetrator has already prepared or set into action his intention to commit murder, but still lacks some moral support or any other form of support to perform the act, any form of contribution to make the preparation or execution easier or possible, constitutes aiding and abetting.<sup>140</sup> In *Prosecutor v Naser Orić*,<sup>141</sup> the accused was charged with murder, cruel treatment and wanton destruction of cities, towns and villages not justified by military necessity. He was charged in terms of article 7(1) of the ICTY Statute with instigating, aiding and abetting these crimes.<sup>142</sup> Aiding and abetting, as a form of accessory liability, are constituted by the principal doer's participation in a criminal activity.<sup>143</sup> A three-stage test is considered in *Orić*:

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<sup>136</sup> It has been held that the terms 'foreseeable' and 'predictable' are interchangeable in this context. 'Awareness' on the other hand, is considered as knowledge. Summers 2014 *Wash U Global Stud LR* 677.

<sup>137</sup> Summers 2014 *Wash U Global Stud LR* 680; *Tadić* para 232.

<sup>138</sup> *Tadić* para 229.

<sup>139</sup> *Krstić* para 613.

<sup>140</sup> *Orić* paras 281-283.

<sup>141</sup> *Orić* paras 251, 262.

<sup>142</sup> *Orić* para 266.

<sup>143</sup> This is in line with the position with regard to aiding and abetting in *Kunarac* para 391. Also consider *Tadić* para 229; *Prosecutor v Mitar Vasiljević* Case No IT-98-32-A (25 February 2004) para 102. In *Prosecutor v Laurent Semanza* Case No ICTR-97-20-A (20 May 2005) paras 259, 357, the same consideration was taken for other mode of participation like instigation.

- (i) on the side of the principal perpetrator, there must be proof of the conduct which is punishable under the Statute,
- (ii) from the side of the participant, the commission of the principal crime(s) must either be instigated or otherwise aided or abetted, and
- (iii) with regard to the participant's state of mind, the acts of participation must be performed with the awareness that they will assist the principal perpetrator in the commission of the crime.<sup>144</sup>

The first two stages, i.e. (i) and (ii) above, seem to constitute the *actus reus* stage while the last stage constitutes the mental element stage (*mens rea*). The *mens rea* of the aider and abettor vary in terms of description.<sup>145</sup> However, it has been settled that aiding and abetting requires intent<sup>146</sup> - described differently in terms of content and structure. Intent is recognised as knowledge (awareness) of the aider and abettor that he is contributing to the unlawful act of the principal perpetrator.<sup>147</sup> In this regard, knowledge in terms of the precise criminal act that was intended is not necessary. What is necessary is the knowledge, awareness that one of a series of crimes "would probably be committed including the one actually perpetrated".<sup>148</sup> It is sufficient for the prosecution that X was aware of the substantial possibility that such contribution would be an adequate consequence of his unlawful act.<sup>149</sup> Therefore, the aider and abettor must have knowledge with regard to the main elements of the crime to be committed by the principal perpetrator including his (principal perpetrator) state of mind.<sup>150</sup> The *mens rea* required for aiding and abetting means that:<sup>151</sup>

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<sup>144</sup> See *Orić* para 269. A two-stage test can also be considered as in the case of *Kayishema* Trial Judgment para 198; *Kayishema* Appeal Judgment para 186.

<sup>145</sup> See stage iii above.

<sup>146</sup> *Tadić* para 689; *Orić* para 286.

<sup>147</sup> *Tadić* para 229; *Orić* paras 266, 269, 286; *Kunarac* para 392; *Kvočka* para 253; *Prosecutor v Milorad Krnojelac* Case No IT-97-25-T (15 March 2002) para 90; *Prosecutor v Mitar Vasiljević* Case No IT-98-32-A (25 February 2004) para 102; *Prosecutor v Mladen Naletilić and Vinko Martinović* Case No IT-98-34-T 31 March 2003 para 63; *Prosecutor v Radoslav Brđanin* Case No IT-99-36-T (1 September 2004) para 272 (hereinafter *Brđanin*); *Prosecutor v Mitar Vasiljević* Case No IT-98-32-A (25 February 2004) para 102; *Blaškić* para 49.

<sup>148</sup> *Brđanin* para 272; *Blaškić* para 50; *Prosecutor v Mladen Naletilić and Vinko Martinović* Case No IT-98-34-T (31 March 2003) para 63; *Kvočka* para 255.

<sup>149</sup> *Orić* para 287.

<sup>150</sup> *Brđanin* para 273; *Kunarac* para 392.

<sup>151</sup> *Orić* para 279.

- (i) aiding and abetting must be intentional;
- (ii) the aider and abettor must have 'double intent',<sup>152</sup> namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator;<sup>153</sup>
- (iii) the intention must contain a cognitive element of knowledge and a volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not;<sup>154</sup> and
- (iv) with regard to the contents of his knowledge, the aider and abettor must at the least be aware of the type and the essential elements of the crime(s) to be committed.<sup>155</sup> This, however, does neither require that the aider and a better already foresees the place, time and number of the precise crimes which may be committed in consequence of his supportive contributions, nor that a certain plan or concerted action with the principal perpetrator must have existed.<sup>156</sup>

With regard to aiding and abetting, proof is not necessary to justify the presence of a joint enterprise, and it is irrelevant that the principal had knowledge of the accomplice's partaking.

In terms of instigation which, although it shares some features with aiding and abetting like in cases involving encouragement, a distinction may be made between the potency of the inducement and the motivation of the principal perpetrator. If the principal perpetrator is still contemplating to act, any acts of encouraging, convincing or any form of moral assurance for X to kill may constitute

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<sup>152</sup> This 'double intent' does not imply that the aider and abettor would also have to share a special intent as may be required for the principal perpetrator. *Kunarac* para 392; *Kvočka* para 262; *Simić* para 264; *Brđanin* para 273; *Prosecutor v Laurent Semanza* Case No ICTR-97-20-A (20 May 2005) para 388; *Prosecutor v Emmanuel Ndindabahizi* Case No ICTR-2001-71-I (15 July 2004) para 457. The culpability of the aider and abettor may be lessened in a case where he did not share the special intent of the principal perpetrator (this may serve as a mitigating factor); see *Brđanin* para 274.

<sup>153</sup> Also consider the following judgments: *Brđanin* para 273; *Prosecutor v Pavle Strugar* Case No IT-01-42-T (31 January 2005) para 350.

<sup>154</sup> *Orić* para 277.

<sup>155</sup> *Kvočka* para 255; *Prosecutor v Milorad Krnojelac* Case No IT-97-25-T (15 March 2002) para 90; *Naletilić* para 63; *Simić* para 163; *Prosecutor v Vidoje Blagojević and Dragan Jokić* Case No IT-02-60 (17 January 2005) para 727; *Prosecutor v Laurent Semanza* Case No ICTR-97-20-A (20 May 2005) para 388. However, some judgments find that it is satisfied with the awareness of the aider and abettor "that one of a number of crimes will probably be committed, and one of those crimes is in fact committed": see *Furundžija* para 246; *Brđanin* para 27; *Prosecutor v Pavle Strugar* Case No IT-01-42-T (31 January 2005) para 350.

<sup>156</sup> *Orić* para 288.

instigation; in cases which involves superior or command responsibility, this may take the form of ordering.<sup>157</sup>

With regards to the nexus between aiding and abetting,<sup>158</sup> and the main criminal conduct,<sup>159</sup> commonly known as a causal relationship, it is applied differently in international criminal law. In terms of national legal norms, the requirement that, in terms of the *conditio sine qua non* principle, the unlawful act would not have been committed without (but-for) the accused involvement will not apply here. The reasoning here is that the commission of the act (for example, murder) may depend on a series of different conducts and circumstances. It suffices if it can be proved that the instigation was substantially “a contributing factor”<sup>160</sup> to the murder. In terms of a *conditio sine qua non*, it cannot be required that without the contribution of the participant, the principal act (murder) would not have occurred.<sup>161</sup>

### 3.5 Summary

Criminal intention is considered a principal element in all the serious crimes under international criminal law. Although it is assumed that the international legal regime applies intent consistently and in accordance to most systems of law in the world, it is especially this concept that is riddled with ambiguity in international law. This element is applied depending on the nature of the international crime in question; that is, whether it is a crime against humanity or a war crime, for example.

Under the general provisions, article 30(1) of the Rome Statute requires that all crimes within the jurisdiction of the Court, unless otherwise provided, be

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<sup>157</sup> *Orić* para 272.

<sup>158</sup> Stage ii above.

<sup>159</sup> Stage I above.

<sup>160</sup> *Prosecutor v Fatmir Limaj Haradin Balalsak Musliu* Case No IT-03-66-T (30 November 2005) para 514; *Prosecutor v Ignace Bagilishema* Case No ICTR-95-1A-T (7 June 2001) para 30; *Kamuhanda* para 65, where it is stated that “a certain influence” which the accused benefit from the community was not considered as sufficient. See also *Orić* para 274.

<sup>161</sup> *Prosecutor v Ignace Bagilishema* Case No ICTR-95-1A-T (7 June 2001) para 33; *Kunarac* para 391; *Prosecutor v Mitar Vasiljević* Case No IT-98-32-A (25 February 2004) para 70; *Simić* para 162; *Aleksovski* para 61; *Orić* para 284.

committed with intent and knowledge – an awareness that in the ordinary course of events a certain consequence will occur. Intent and knowledge, as stipulated in the Rome Statute, do not explicitly include *dolus eventualis*. According to the Rome Statute, it is certain that intent in relation to the consequences of an unlawful conduct necessitates X to be conscious that the intended consequences will occur in the normal course of events; however, this will depend on whether or not X really intended to cause the consequences.

Under the ICTR, the standard of *mens rea* required for murder as a crime against humanity is intentional and premeditated killing. Thus, where it is X's purpose to realise the consequences of his act, then consequences are intended (*dolus directus*), or X is conscious that the consequences will happen in the normal course of events (*dolus indirectus*). Being conscious that the consequences will occur in the normal course of events lays down a higher standard of cognizance than just awareness of the fact that a result might follow from the unlawful conduct (*dolus eventualis*).

It has also been seen in this chapter that the international tribunals have read *dolus eventualis* into the provisions of the Rome Statute, and in international criminal case law *dolus eventualis* is applied extensively. This especially concerns war crimes and crimes against humanity. The Rome Statute makes a quite significant distinction between the mental element pertaining to the conduct, and the mental element in relation to the consequence of the act. This could be construed to imply that crimes against humanity, for example, could in principle be committed by someone who never intended to engage in the conduct in question, and he never foresaw as a matter of confidence that the conduct will mean an act which constitute a crime against humanity (so long as it was seen as a likelihood within the meaning of *dolus eventualis*).

Still, no coherent *mens rea* framework is provided in the decisions on crimes against humanity. In current case law, more emphasis is placed on the understanding of the mental element (*mens rea*). The IMT, for example, imposes criminal liability by focusing instead on knowledge, which has advanced into constructive knowledge, as held in *Tadić*, by presuming that a position of authority entails knowledge. This shows that intent is problematic to deal with in an

international context.

Determining intent throughout the different tribunals has been incoherent. The inference of embodying words indicating intent in defining some of the war crimes and crimes against humanity while not in others, in consideration of the general requirements of intent and knowledge which apply to all crimes unless otherwise provided, requires cautious examination. In some cases, reference is made to the definition of crime against humanity to include knowledge of the attack only, and not to intent, which is challenging. The reasoning here is that knowledge of the attack may be considered to exclude the element of intent that could make up a very vital element of *mens rea*, and this could also be relevant to crimes against humanity in general. The necessity of this perspective towards this form of guilt arise from the lack of any rules or articles regulating *mens rea* in international statutes, and also from the inability to consistently apply the classic principles of criminal liability.

In command responsibility, there is a need for a more rigid meaning to apply to the definition of fault than the general provision which is currently applicable. The ICC deals with command responsibility separately because these are cases where a mistake of law could most probably occur. Under the Rome Statute, the general rule is that there is no excuse if a subordinate act upon the orders of a commander to commit a crime. This is because the order to commit such crime is in itself unlawful. The subordinates are therefore expected to disobey such orders. The only exception to this rule is if the subordinate was not aware that the order was unlawful, provided he was under a legal obligation to obey such orders from a superior. However, even then the order must not have been manifestly unlawful.

The *mens rea* requirement in international cases of joint criminal enterprise also remains unclear. The concept of joint criminal enterprise has however validated the criminal responsibility of criminal organisations and group leaders in some curtail cases brought before the ICC. These courts have continued with the ICTY perspective towards indirect intent, as established in *Tadić*.

This chapter concludes that although it may seem questionable in regard to the rule of law to infer a perpetrator's mental state from secondary evidence, this is a

crucial method for determining intent in the form of *dolus eventualis*. In many war crimes and crimes against humanity, the offenders' real intentions are hidden behind propagandist rhetoric, and other deceitful conduct. In such cases, the facts can only be determined by examining the particular circumstances, and construing the perpetrator's mental state. It is however recommended that the common law and civil law understandings of intent, and especially of *dolus eventualis*, be resolved so as to avoid any international misinterpretations.

In the following chapter, the concept of *dolus eventualis* as interpreted and applied in the jurisdictions of the US and the UK will be explored.

## CHAPTER FOUR

### INTENT AND RECKLESSNESS IN FOREIGN JURISDICTIONS

#### 4.1 Introduction

This chapter focuses on examining how the concept of *dolus eventualis* is interpreted and applied in selected foreign jurisdictions. These selected foreign states are the US and Great Britain.<sup>1</sup> These two countries were specifically chosen because of specific legislation and extensive case law on the particular legal principle. A comparison to the manner in which these countries have treated the concept can only be beneficial for this jurisdiction. It will be shown in this chapter that these legal systems do not employ the specific term, and that there are a variety of terms used to represent the different interpretations of intent around the world. It should be however noted that this study is not intended to examine every aspect of criminal law involving intent, and more specifically, *dolus eventualis*, in these jurisdictions. Therefore, attention will be paid to the concept as found in particular criminal conduct, like in murder cases, in order to appraise its application in these jurisdictions.

#### 4.2 *Mens rea* in US criminal law

Although there is significant progress towards consolidating the statutory laws in the US, its criminal law remains a mixture of statutes and common law - with its origin from common law. It is worth noting that these mixed bodies of laws vary from one state to another.<sup>2</sup> What is also akin to other national jurisdictions is that all crimes encompass *actus reus*<sup>3</sup> and *mens rea*,<sup>4</sup> and that criminal offences are

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<sup>1</sup> Great Britain consists of the countries of England, Scotland, and Wales (if Northern Ireland is included, the United Kingdom is referred to). Although the focus in this study is on Great Britain, particular attention is paid to England, with a few references to Scotland. On this note, the terms 'Great Britain', 'British criminal law' and 'English criminal law' will be used in this research interchangeably. Other jurisdictions like Germany and France, e.g., will also be compared, where necessary.

<sup>2</sup> Marchuk *The fundamental concept of crime in international criminal law* 24.

<sup>3</sup> See Chapter 1, para 6.

<sup>4</sup> See Chapter 1, para 6. Bobinson and Grall 1983 *Stanford LR* state that: "*Mens rea* doubtless meant little more than a general immorality of motive" (686), an "evil-meaning mind", a "vicious will" (685), or a particular kind of criminal intent to commit a crime (687).

considered acts committed or omitted by violating laws that prohibit or mandate the particular act or acts.<sup>5</sup> The US Model Penal Code (MPC)<sup>6</sup> states that a “person is not guilty of an offense unless his liability is based on conduct that excludes a voluntary act”. The *actus reus* necessitates proof that the act was voluntary – not the *mens rea* since wicked thoughts are not expected to automatically lead to consequences. However, determining criminal intent is a matter for the law of *mens rea*.<sup>7</sup>

*Mens rea* is defined as a culpable mental state which is described as a guilty knowledge or guilty mind.<sup>8</sup> The wrongdoer must have the knowledge that his act is criminal; and deliberately engage in the unlawful conduct.<sup>9</sup> In other words, he must intend that a certain consequence ensue from his conduct.<sup>10</sup> Negligence again denotes an omission to act according to required standards. This entails a lack of foresight regarding the unlawful consequences, and a lack of desire to prohibit the consequences from ensuing.<sup>11</sup> Negligence is the mental disposition of the perpetrator at the time the unlawful act was committed, although he did not intend to cause the unlawfully consequences, and in doing so, he deviated from acts expected from any reasonable person in the same situation. The MPC elaborates as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.<sup>12</sup>

Where the results of an act were unintentional (such as with a negligent death), one encounters constructive intent or inadvertent negligence. In such situations, the perpetrator had no intent to kill, and therefore, no guilty mind. The lack of *mens rea* indicates an absence of fault on the part of the perpetrator. In such situations,

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<sup>5</sup> Marchuk *The fundamental concept of crime in international criminal law* 24.

<sup>6</sup> MPC s 2.01.

<sup>7</sup> Marchuk *The fundamental concept of crime in international criminal law* 25.

<sup>8</sup> Legal Dictionary <https://legaldictionary.net/mens-rea/> (Date of use: 15 May 2019).

<sup>9</sup> Legal Dictionary <https://legaldictionary.net/criminal-intent/> (Date of use: 15 May 2019).

<sup>10</sup> Parsons 2000 *Mountbatten JLS* 5.

<sup>11</sup> Marchuk *The fundamental concept of crime in international criminal law* 22.

<sup>12</sup> MPC s 2.02(2)(d); Treiman 1981 *Am J Crim L* 298.

criminal liability cannot be established in a case where the violence is accomplished with a lesser state of mind (criminal negligence). Where this is the case, jurors have to make a determination whether a reasonable person in the position of the accused would have appreciated the danger his conduct posed to another person (the objective test). The accused will be convicted of criminal negligence if it is concluded that he acted with a lesser mental state.<sup>13</sup>

Since intention in any form is absent in this type of culpability, it will not be considered in much greater detail in this chapter, although crimes committed negligently do share some commonalities with recklessness in terms of the degree of blameworthiness.<sup>14</sup> It is consequently more important to focus on establishing intent and especially recklessness in crimes.

Determining whether a perpetrator possesses the necessary intent to commit an unlawful act, is a crucial but very often a contested facet in US criminal case law. One reason for the challenges experienced in the US in determining intent, is that the states and the federal governments sometimes define criminal intent differently. The reasoning here is that various forms of criminal intent exist based on the type of unlawful conduct, and the mental state of the perpetrator at the time of the conduct. Therefore, the degree of punishment to be meted on the accused depends on the mental state that would be proven at the time of the act.<sup>15</sup>

In the US, criminal intent is broadly categorised as either general (basic) intent, which can be deduced from the perpetrator's unlawful conduct requiring merely that he had intent, or was reckless towards the outcome of his conduct (such as assault); and specific intent; wherein the offence is so defined as to require an additional element besides the basic intent (such as assault with intent to do grievous bodily harm).

Intent may further be classified as direct intent (malice aforethought),<sup>16</sup> which necessitates premeditation and predetermination (such as murder); and oblique

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<sup>13</sup> See Marchuk *The fundamental concept of crime in international criminal law* 31.

<sup>14</sup> Treiman 1981 *Am J Crim L* 298.

<sup>15</sup> Legal Dictionary <https://legaldictionary.net/criminal-intent/> (Date of use: 15 May 2019).

<sup>16</sup> Malice aforethought is a specialised form of intent and is defined as a premeditated intent to cause another's death. It thus only applies to the crime of murder, and is considered the most severe crime that anyone can commit.

intent; where the result of the perpetrator's voluntary conduct was the natural consequence of such act, and the perpetrator foresaw it as such. This last-mentioned intent can also be described as unconditional intent.<sup>17</sup> In contrast, where the perpetrator's expected consequence of his act (unconditional intent) differs greatly from what he foresaw, conditional intent applies.

The confusion as regards intent and determining the correct form of intent is evident in the case of *Morissette v United States*,<sup>18</sup> where it was reiterated that the intention of the wrongdoer is an important ingredient of the criminal conduct charged. The facts of this case are as follows: In Michigan, the US government had established a training ground in a large uninhabited and untitled part in a wood in a sparsely populated region. However, this area was also extensively hunted. During training, the US Air Force dropped simulated bombs, consisting of metal cylinders at targets. The used bomb casings would be removed from the target "so that they will be out of the way".<sup>19</sup> Since the casings had been accumulated over time (over four years), some rusted away due to weather.

In December 1948, Morissette, a fruit stand operator during summer, and a scrap iron collector in winter, did not manage to kill any deer during hunting in these woods. He decided to load some of the empty bomb casings on his truck which he sold for \$84.<sup>20</sup> Morissette did the loading and transportation of these casings in broad daylight with no effort at concealment. During investigations, Morissette freely and promptly narrated the story to the investigators; stating that he had no intention of stealing, but thought the casings were abandoned, and considered of no value to the government. He was still indicted on the charge that he unlawfully, wilfully and knowingly stole and concerted property of the US.<sup>21</sup>

The facts in the *Morissette* case do not tally with requirements for intent. A person has criminal intent if he was aware, or he had knowledge of what he was about to do, and he was also aware of the consequences of his conduct. Morissette clearly

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<sup>17</sup> Oblique intent or unconditional intent resembles the concept of *dolus eventualis* in South African criminal law the most.

<sup>18</sup> *Morissette v United States* 342 US 246 (1952). This case is also an example of crimes committed with knowledge.

<sup>19</sup> *Morissette v United States* 342 US 246 (1952).

<sup>20</sup> *Morissette v United States* 342 US 247 (1952).

<sup>21</sup> *Morissette v United States* 187 F 2d 427, 431. Compare *United States v Balint et al* 258 US 250 (1922); *United States v Behrman* 258 US 280 (1922).

had no intent to steal, so there was no awareness of knowledge of unlawfulness. Consider another scenario where a perpetrator plans on how, where, when and with what to murder his wife and finally executes the plan. Therefore, as a result of his mental thoughts and actions, the person would be said to have acted with criminal intent since he knew that murder was unlawful, yet he took steps to plan and executes his plan. This person's intent differs completely from that of Morissette. An evaluation focussing on explicating the concepts of basic and specific intent will perhaps assist the understanding of the interpretation of intent in US jurisprudence. Such discussion follows next, while referring to the other analogous types of intent denoted above.

#### 4.2.1 General intent

General intent is considered an awareness or knowledge of engaging in unlawful conduct with a negative condition of mind. For a successful conviction of a crime involving general intent, it is sufficient if the prosecution can prove that X simply planned to engage in the unlawful act, whilst the desire to prove a particular result is needless. Examples of general intent crimes may include rape,<sup>22</sup> battery, and involuntary manslaughter, amongst others. General intent crimes require that the perpetrator's mental condition only comprise the intent to engage in the illegal act that led to the prohibited result. Battery as a crime, for example, necessitates that the wrongdoer in fact intended to apply an intentional and illegal use of force to the person of another. Therefore, one may infer general intent from such person's conduct if he acted with a "conscious disregard".<sup>23</sup> The Supreme Court in *United States v Bailey*<sup>24</sup> equated general intent to the concept of knowledge.<sup>25</sup> In *State v Smith*,<sup>26</sup> while on a highway, the accused haphazardly shot at some vehicles. It was alleged that in the course of his unlawful conduct which led to the death of a person, he was under the influence of alcohol. Although his claim was that "he did not intend to kill someone and was firing at an oncoming car because he hated the

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<sup>22</sup> MPC s 213.1.

<sup>23</sup> Marchuk *The fundamental concept of crime in international criminal law* 31.

<sup>24</sup> *United States v Bailey* 444 US 394, 405, 100 S Ct 624, 62 L Ed 2d 575 (1980).

<sup>25</sup> Marchuk *The fundamental concept of crime in international criminal law* 29.

<sup>26</sup> *State v Smith* 747 SW 2d 678 (Mo App SD 4 Mar 1988) (No 14994).

car”<sup>27</sup> and “hated the world”;<sup>28</sup> there was conclusive evidence that he did not just shoot at the vehicle, but shot at the section where someone inside could be killed. His behaviour was assessed to constitute intent to perform an act where someone could be injured or killed, and therefore went beyond recklessness - implying involuntary manslaughter.

Further, in *Tison v Arizona*,<sup>29</sup> the court concluded that the prosecution need only to prove that Tison had a reckless indifference to human life at the time of his conduct, provided he is a major participant in the felony murder.<sup>30</sup> The case of *Tison* validated subsequent findings, for example, in cases like *State v Coleman*, that requires specific intent to kill, including cases where the prosecution can prove the accused person’s major participation and disregard for human life in the course of his conduct.<sup>31</sup>

The setback with this distinction is that with specific intent crimes, the prosecution has to prove the perpetrator’s purpose with respect to the consequences. This also implies that the prosecution may not depend on the specific person’s knowledge regarding the certainty of the consequence when deciding on question of specific intent.<sup>32</sup>

#### 4.2.2 Specific intent

Specific intent is considered as a willingness to do what is proscribed, with the desire to achieve or cause a particular result. For an unlawful act to have been committed with specific intent, there must consequently be a supplementary

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<sup>27</sup> *State v Smith* 747 SW 2d 678 (Mo App SD 4 Mar 1988) (No 14994) 680.

<sup>28</sup> *State v Smith* 747 SW 2d 678 (Mo App SD 4 Mar 1988) (No 14994) 680. See Marchuk *The fundamental concept of crime in international criminal law* 33.

<sup>29</sup> *Tison v Arizona* 107 S Ct 1676 (1987). Tison’s three sons assisted his prison escape armed with weapons. During the escape, one of their car tires blew out. They decided to steal the Lyons’ car after the latter stopped to assist the Tisons. During the transfer of possessions from the Tison car to the other, Gary Tison and another opened fire on the Lyons family. Two other Tison brothers who were present, but who did not participate in the homicide, were convicted of murder, armed robbery, kidnapping, car theft, and sentenced to death under Arizona law.

<sup>30</sup> *Tison v Arizona* 107 S Ct 1676 1688. The accused may be convicted with a death penalty for participating in events before the felonious act although he did not intend to kill his victim or to cause any fatal injury.

<sup>31</sup> Hennings 1988 *Ohio NU LR* 129.

<sup>32</sup> *Pierre v Attorney General of US* 528 F 3d 180 192 (3rd Cir 9 Jun 2008) (No 06-2496).

purpose to accomplish the precise and unlawful result.<sup>33</sup> According to the MPC, specific intent crimes include, for example, conspiracy, solicitation, attempt, voluntary manslaughter, robbery,<sup>34</sup> and burglary.<sup>35</sup> For a successful conviction of any of these crimes, there must be proof on the part of the prosecution that the accused had the specific intent to cause the consequences. The notion of specific intent was explained by the Supreme Court in *United States v Bailey*<sup>36</sup> in that “purpose corresponds loosely with the common-law concept of specific intent”.<sup>37</sup>

The judges in *Pierre v Attorney General of US*<sup>38</sup> rejected the test in *United States v Bailey*<sup>39</sup> with regards to specific intent. It was held in *Bailey* that ‘purpose’ corresponds loosely with the common-law concept of ‘specific intent’; which was considered misleading and swerving from the historical definition. The phrase ‘with intent’ was considered to mean either: (1) X’s conscious desire to cause a particular result, or that (2) X was aware that a particular result would certainly ensue.<sup>40</sup>

Where a court establishes recklessness as an element in a crime, purpose is also established. This was held in the case of *Schroeder v State*,<sup>41</sup> where the defendant shot his wife and was convicted of murder. He appealed the conviction by submitting that in the course of the fight with his spouse, he blacked out and did not remember shooting her. Although the evidence adduced to justify self-defence and accident were relevant, his inability to recall having shot his wife did not warrant the defendant a charge of manslaughter. The verdict of murder was upheld by the trial court. It was held that where recklessness suffices to establish an element of a crime, such element will suffice if the perpetrator acts knowingly, and such element is also established when he acts purposely.

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<sup>33</sup> Therefore, accomplishing an unlawful act without a particular purpose in mind would not be considered as a specific intent crime. Specific intent simply relates to purpose; it includes the cognitive element of knowledge coupled with the wish to bring about a particular consequence. See Marchuk *The fundamental concept of crime in international criminal law* 30.

<sup>34</sup> MPC s 222.1.

<sup>35</sup> MPC s 221.1.

<sup>36</sup> *United States v Bailey* 444 US 394 405 100 S Ct 624 62 L Ed 2d 575 (1980).

<sup>37</sup> Marchuk *The fundamental concept of crime in international criminal law* 29.

<sup>38</sup> *Pierre v Attorney General of US* 528 F 3d 180 190. The case was ordered for a rehearing to determine the level of intent required.

<sup>39</sup> *United States v Bailey* 444 US 394 405 100 S Ct 624 62 L Ed 2d 575 (1980).

<sup>40</sup> *Pierre v Attorney General of US* 528 F 3d 180 190 (3<sup>rd</sup> Cir 2008).

<sup>41</sup> *Schroeder v State* 123 SW 3d 398 (Tex Crim App 3 Dec 2003) (No 561-03) 398-401.

This means that purpose, including awareness or knowledge, was considered as the appropriate definition of specific intent. In *Carter v United States*,<sup>42</sup> the specific intention of torture as a crime was also drawn around parallel terms. For an act to be considered as torture there must be proof that the accused had the necessary intent to commit the unlawful act as well as the intent to achieve the result – which is the infliction of pain and suffering. This means that if grievous pain is simply a foreseeable consequence of the offender’s conduct, the specific intent yardstick will not be met in terms of the crime of torture. Therefore, if a person commits an unlawful act knowingly, although he never intended the unlawful consequences to ensue, he must have committed a general intent, and not a specific intent crime.<sup>43</sup>

In the state of Ohio, a perpetrator may be convicted to death, but before a penalty is imposed, the prosecution must prove that he killed his victim in the course of a specified felony (requiring a specific intent). There will be conclusive proof if it is certain that the accused person was the principal offender at the time of the unlawful act, and he committed the act with knowledge and design. Where this is the case, the requirements of criminal intent are fulfilled.<sup>44</sup> In *State v Coleman*, however, the Supreme Court held that criminal intent based on a finding of participation or complicity may not be conclusive presumption of specific intent.<sup>45</sup>

In the *Coleman*-case, the defence relied on the precedent in *Enmund v Florida*<sup>46</sup> where it was argued that the conviction of murder was an excessive sentence owing to the weight of the evidence tendered. In the *Enmund*-case, the accused was a driver in a getaway car in a robbery where two people were murdered. He was convicted and sentenced to death for first degree murder and robbery.<sup>47</sup> The US Supreme Court held in *Enmund v Florida* that the eighth amendment to the US

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<sup>42</sup> *Carter v United States* 530 US 255 269 120 S Ct 2159 147 L Ed 2d 203 (2000) 145-146.

<sup>43</sup> *Carter v United States* 530 US 255 269 120 S Ct 2159 147 L Ed 2d 203 (2000) 145-146. Where a parent chastises his child, he does so with the knowledge of and purpose for the moral up-bringing and education of the child. In a case where such an act results in grievous bodily harm or death, the US criminal law would consider such unlawful conduct as a general intent crime. The reasoning here is that the child’s pain and suffering was a foreseeability consequence of the parent’s conduct. Chastisement is justified in US common law if it is moderate and reasonable. What is considered reasonable and moderate will depend on the circumstances of each case, for example, age, nature and extent of punishment amongst others.

<sup>44</sup> Hennings 1988 *Ohio NU LR* 119.

<sup>45</sup> *State v Coleman* 289 525 NE 2d 796. See Hennings 1988 *Ohio NU LR* 120.

<sup>46</sup> *Enmund v Florida* 458 US 782 (1982).

<sup>47</sup> *Enmund v Florida* 458 US 458, 784.

Constitution did not allow for the imposition of the death sentence if the defender who participated in the felony did not intend to kill the victim.<sup>48</sup> However, it was held in *State v Coleman* that a court could not rely on *Enmund v Florida* in terms of application since Ohio law requires proof of specific intent or purpose to kill.<sup>49</sup> In *Coleman*, there was enough evidence to prove specific intent by the jury without inference based on the finding of complicity.<sup>50</sup>

### 4.3 The different levels of criminal intent in the US

The modern approach<sup>51</sup> to criminal responsibility in the US considers 'knowledge' and 'intent' as two distinct entities. Moreover, the MPC distinguishes between 'purpose' and 'knowledge' by establishing observance to the interpretation of intention.<sup>52</sup> Except as stated under section 2.05, the MPC stipulates the requirements of culpability to the extent that a person is not guilty of any crime unless the person acted "purposely, knowingly, recklessly or negligently"<sup>53</sup> with regard to every material element of the crime.

In US criminal law, the enormous category of criminal liability that operates is not only in terms of diversity of the legal context in which the established vocabulary of *mens rea* apply, but also the diversity of the vocabulary itself – which distinguishes between the various conduct, for example, 'purposefully', 'wilfully', 'maliciously', 'knowingly', 'dishonestly', 'recklessly', and so on.<sup>54</sup> The elements of fault are considered in the US legal system in a different perspective or groupings of concepts which is based on, for example, the accused acting knowingly, purposely, recklessly or negligently as per the MPC (s 2.02(2)).<sup>55</sup>

In the following paragraphs, the four forms of culpability in US criminal law, that is, crimes committed purposely, crimes committed with knowledge, and crimes

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<sup>48</sup> *Enmund v Florida* 458 US 798-799.

<sup>49</sup> As in s 2903.01 of the Ohio Revised Code. See also Hennings 1988 *Ohio NU LR* 123-124.

<sup>50</sup> *State v Coleman* 37 Ohio St 3d 291, 525 NE 2d 797. See Hennings 1988 *Ohio NU LR* 124.

<sup>51</sup> On the other hand, the traditional approach towards intention views knowledge as its constitutive element.

<sup>52</sup> Marchuk *The fundamental concept of crime in international criminal law* 27.

<sup>53</sup> MPC s 2.02(1).

<sup>54</sup> Gardner and Jung 1991 *Oxford JLS* 562.

<sup>55</sup> Van der Vyver 2004 *U Miami Int'l and Comp LR* n 3.

committed recklessly will be examined.<sup>56</sup>

#### 4.3.1 Crimes committed purposely

If a person has the objective to consciously cause a proscribed result, he will be liable to have purposely cause the result.<sup>57</sup> What is important to note here is the presence of “a positive desire to cause the result”.<sup>58</sup> Therefore, in terms of culpability, purpose goes beyond knowledge of the result to certain consequences. For example, in *People v Newton*,<sup>59</sup> the defendant, after being shot by a police officer, shot another police officer and thereafter went for medical attention. The appellate court considered this purposeful conduct as reflective.<sup>60</sup> According to the MPC:

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.<sup>61</sup>

The claim that the purpose is fulfilled through the conviction that the circumstance exists remain controversial. The crime of murder requires proof that the perpetrator deliberately wanted the result regardless of whether his conduct would lead to the death or not.<sup>62</sup> This is the threshold for crimes requiring intention since the perpetrator must have a particular objective to cause a specific consequence, either directly or indirectly. It was held in *State v Scott* that an inference of the purpose to kill can be determined where there is evidence that:

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<sup>56</sup> Treiman 1981 *Am J Crim L* 285. It should be noted here that the focus of this study is only on the first three forms of fault.

<sup>57</sup> See MPC s 2.02(1)(a)(i); Bobinson and Grall 1983 *Stanford LR* 694. See also Marchuk *The fundamental concept of crime in international criminal law* 28.

<sup>58</sup> Marchuk *The fundamental concept of crime in international criminal law* 29.

<sup>59</sup> *People v Newton* 8 Cal App 3d 359 (Cal Dist Ct App 1970).

<sup>60</sup> *People v Newton* 8 Cal App 3d 359 (Cal Dist Ct App 1970) 376. See Ferzan 2001 *J Crim L & Criminology* 650.

<sup>61</sup> MPC s 2.02(2)(a). Also see Treiman 1981 *Am J Crim L* 289, 297-298.

<sup>62</sup> This *mens rea* standard is reminiscent of ‘*absicht*’ or *dolus directus* of the first degree in German criminal law. See Marchuk *The fundamental concept of crime in international criminal law* 28.

The participants in a felony entered into a common design and either the aider or abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the felony, or the felony and the manner of its accomplishment would be reasonably likely to produce death.<sup>63</sup>

If the perpetrator participated in a common purpose to commit the act by the use of violence, it is regarded as a non-conclusive inference that a purpose to kill may be ascertained. It is, however, sufficient in a case where a jury includes the requirements of specific intent; still mere association with other perpetrators does not make a person a participant of a crime.<sup>64</sup> Therefore, the perpetrator must have realised that through the manner and means employed to perform the conspired act, the victim's life would be lost or in grave danger. As such, the perpetrators would be bound by the natural consequences or results that flow from the furtherance of their unlawful act.<sup>65</sup>

In crimes committed purposely, the meaning of purposely is not only related to the result of the unlawful conduct; a particular purpose may also be prescribed as a definitional element of an offence. In such instances, the "purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense".<sup>66</sup>

This can be evidenced from the case *State v Coleman*,<sup>67</sup> where the court held that there was sufficient evidence from which the jury could infer that Coleman intended to kill the victim; that is, Coleman's purpose related to both the unlawful conduct and the definitional elements of the crime committed. In this case, Coleman and two others went to the house of Harry Walters pretending to make an inquiry about a campaign trailer Walters wanted to sell. Walters was hit by Coleman on the back of his head, and later found barely alive. His wife was dead. According to expert testimony, Walters' wife had been struck about 20 to 25 times on the head, and the back of her skull was smashed to pieces. The family car,

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<sup>63</sup> *State v Scott* 61 Ohio St 2d 155 400 NE 2d 375 (1980). In this case, the dangerous instrument was a handgun. See Potts *The Supreme Court of Ohio on criminal law* 143.

<sup>64</sup> *State v Coleman* 37 Ohio St 3d 286, 525 NE 2d 792 (1988). It is therefore irrelevant that the aider and abettor did not know that their accomplice was going to murder the victim if it can be proven that the means to rob the victim was to use a dangerous instrument, and that the accused participated in the planning and commission of the unlawful act.

<sup>65</sup> *State v Clark* 55 Ohio St 2d 257 379 NE 2d 597 (1978). This decision was however reversed on other grounds.

<sup>66</sup> MPC s 2.02(6).

<sup>67</sup> *State v Coleman* 37 Ohio St 3d 286 525 NE 2d 792 (1988).

money, jewellery, and shoes were appropriated. Coleman was found guilty of aggravated murder while committing aggravated burglary under the Ohio Revised Code.<sup>68</sup> The jury also found Coleman to be the principal offender in the crime, and in violation of the Ohio Revised Code,<sup>69</sup> involving the purposeful attempt to kill two or more persons. The death sentence was meted out for the aggravated murder conviction, and imprisonment terms were imposed for the aggravated burglary and aggravated robbery. This sentence was affirmed by the Court of Appeal.

It is clear from the above excerpts that in modern US criminal law, intent is considered as an equivalent to purpose or aim.<sup>70</sup> However, it could be accepted that the categorisation as specified in the MPC helps to differentiate between the perpetrator's objective and his knowledge, which will be discussed next.

#### 4.3.2 Crimes committed with knowledge

The main distinction between crimes committed purposely and crimes committed knowingly is dependent on the perpetrator's attitude in relation to his final objective. Although the distinction seems narrow, the significance lies in the existence or non-existence of a positive wish or a desire for the consequence. This distinction, in practice, leads to other forms of classification mentioned earlier (such as specific intent and general intent crimes, for example).<sup>71</sup>

Although knowledge is a requisite for intention, knowledge differs from intention in that the perpetrator is aware of the consequences that can ensue from his unlawful conduct, but disregards them.<sup>72</sup> The issue is whether the wrongdoer actually knew or was aware that his conduct was unlawful at the time the offence was committed.<sup>73</sup> Knowledge, at a conscious level, requires awareness more than

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<sup>68</sup> Section 2903.01 of the 2006 Ohio Revised Code is related to aggravated murder. It states as follows: "(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy...".

<sup>69</sup> See Ohio Revised Code s 2929.04(A); *State v Hamblin* 37 Ohio St 3d 153 524 NE 4dd 476 (1988).

<sup>70</sup> Marchuk *The fundamental concept of crime in international criminal law* 27.

<sup>71</sup> See paras 4.2.1 and 4.2.2 above. See also Marchuk *The fundamental concept of crime in international criminal law* 29.

<sup>72</sup> Legal Dictionary <https://legaldictionary.net/criminal-intent/> (Date of use: 15 May 2019).

<sup>73</sup> Treiman 1981 *Am J Crim L* 299.

any other mental state.<sup>74</sup> Consider a person who possesses cocaine, however, he believes that it is marijuana. According to federal law, this person is aware that he is in possession of an illegal type of drug, irrespective of whether it is cocaine or marijuana. This conclusion is obvious because the statute warrants only that a person knows that he possesses a prohibited substance.<sup>75</sup>

A person is said to have acted knowingly if he is conscious that such circumstance exists, or that his conduct will lead to the circumstance; except if he in fact believed that it does not exist.<sup>76</sup> A perpetrator will be said to also have acted knowingly<sup>77</sup> with regards to the proscribed result when, even though it is not his conscious objective to cause the result, but he is “practically certain”<sup>78</sup> that his act will cause the result.<sup>79</sup> It is clear that this aspect focuses on knowledge in terms of the result or outcome. What is important to note here is the absence of a positive desire to cause the result. The perpetrator’s knowledge in relation to the degree of risk must furthermore be highly probable.

According to the MPC, knowledge is present if:

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.<sup>80</sup>

The MPC defines knowledge in terms of the nature of circumstances as the actor<sup>81</sup> being aware that his conduct is of that nature, or that such circumstances exist.

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<sup>74</sup> This is because knowledge without awareness is negligence. See Ferzan 2001 *J Crim L and Criminology* 650.

<sup>75</sup> Ferzan 2001 *J Crim L and Criminology* 651.

<sup>76</sup> MPC s 2.02(7).

<sup>77</sup> According to Marchuk, the concept of *dolus eventualis* in German criminal law corresponds with the *mens rea* standard ‘knowingly’ as expressed in the MPC. Marchuk *The fundamental concept of crime in international criminal law* 45.

<sup>78</sup> ‘Practically certain’ is defined under s 2.02(7) of the MPC to include a high probability of its existence, or awareness of a high probability.

<sup>79</sup> MPC s 2.02(2)(b)(ii); Bobinson and Grall 1983 *Stanford LR* 695.

<sup>80</sup> MPC s 2.02(2)(b); Treiman 1981 *Am J Crim L* 289-298.

<sup>81</sup> Treiman has noted that the term ‘actor’ in the MPC refers to a person “engaging in prohibited conduct or charged with the crime ... ‘actor’ includes, where relevant, a person guilty of an omission ... ‘person’, ‘he’ and ‘actor’ include any natural person and, where relevant, a corporation or unincorporated association”. Treiman 1981 *Am J Crim L* 289-290, n 35.

However, it is not necessary to explore all these issues in every crime involving the question of recklessness because each of these issues may not arise on every occasion.<sup>82</sup>

The approach in the MPC is a move towards an element analysis, which is applicable to all crimes. This explains why knowledge is differentiated from purpose. Therefore, the degree of cognitive processes geared towards the commission of a crime differs; the cognitive element of knowledge or awareness thereof fits in the *mens rea* standard.

#### 4.3.3 Crimes committed recklessly

Similar to the requirements for knowledge, recklessness is concerned with the actual thoughts of the perpetrator.<sup>83</sup> The concept of *dolus eventualis* is not specifically applied in US criminal law,<sup>84</sup> yet it could be submitted that recklessness in US criminal law is quite similar to legal intention in South Africa. The term 'recklessness' is considered as a form of criminal liability nearest to direct intention and oblique intention,<sup>85</sup> as well as inadvertent negligence, to a lesser degree.<sup>86</sup> Recklessness is considered as a mental state where a perpetrator knowingly and unlawfully engages in conduct while wilfully disregarding any risks flowing from that act. Recklessness is less blameworthy than direct or specific intent wickedness, but is more blameworthy than careless behaviour. This will be elaborated subsequently in greater detail.

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<sup>82</sup> Treiman 1981 *Am J Crim L* 306.

<sup>83</sup> Treiman 1981 *Am J Crim L* 298.

<sup>84</sup> This mental element is not specifically recognised by several jurisdictions, e.g., in France, *dolus eventualis* is considered instead as an intermediate standard or barrier between negligence and intention. See Marchuk *The fundamental concept of crime in international criminal law* 50. For *dolus eventualis* to be established in German criminal law, the general opinion is that the perpetrator must have foreseen the consequences of his acts, with a relatively high degree of likelihood. In other words, the likelihood of the consequences must be serious (*ernstlich* in German). Therefore, the accused must 'reckon' (*rechnen* in German) with the consequences, which implies that he must have foreseen the consequences as possible – only when it is highly probable that the consequences will ensue. See Morkel 1982 *Am J Comp L* 328.

<sup>85</sup> Consider s 2.02(2)(b)(ii) of the US MPC. Oblique intention is also recognised under British criminal law.

<sup>86</sup> This concept is considered in German criminal law as '*bewusste Fahrlässigkeit*'. See Morkel 1982 *Am J Comp L* 326, 331.

#### 4.3.4.1 Defining the concept of recklessness in US criminal law

The concept of recklessness has been considered to be the most complex concept amongst the four different forms of culpability in US criminal law.<sup>87</sup> Recklessness is one of the states of fault (consisting of legal blameworthiness and criminal responsibility).<sup>88</sup> However, where fault includes both *actus reus* and *mens rea*, recklessness concerns only *mens rea* – the mental state of the accused. What is considered here is what was on the perpetrator's mind (the mental element) at the time he was performing the unlawful conduct. This is critical when determining the nature and the degree of the crime;<sup>89</sup> while it should be borne in mind that the distinction between recklessness and intent depends on the degree of risk and the attitude of the perpetrator towards the risk.<sup>90</sup>

Recklessness may be considered as a decisive concept; whether to convict or acquit the accused. This is because it is considered as the minimum level of culpability. The MPC defines recklessness as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.<sup>91</sup>

According to the MPC, a person who acts recklessly does so as regards the material element of an offence with reference to the results of his conduct.<sup>92</sup> The perpetrator may be reckless that a certain risk exists, and he may also be reckless that a particular result would ensue from his conduct.<sup>93</sup> Thus, risk must be examined with respect to the result and the circumstances – this requires examining the substantiality and unjustifiability of the risk<sup>94</sup> which requires

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<sup>87</sup> Treiman 1981 *Am J Crim L* 285.

<sup>88</sup> Marchuk *The fundamental concept of crime in international criminal law* 25.

<sup>89</sup> Davenport *Basic criminal law: the constitution, procedure and crimes* 40.

<sup>90</sup> Marchuk *The fundamental concept of crime in international criminal law* 17.

<sup>91</sup> MPC s 2.02(c); Treiman 1981 *Am J Crim L* 298.

<sup>92</sup> Treiman 1981 *Am J Crim L* 307.

<sup>93</sup> The complexity here is that a person can only act purposely, or knowingly possess, or fail to act.

<sup>94</sup> Treiman 1981 *Am J Crim L* 305.

recklessness (a conscious disregard of the risk).<sup>95</sup> The issue here is whether an actor will also be reckless in terms of the attendant circumstances of his conduct, by performing an act or not performing an act.<sup>96</sup>

The manner in which a perpetrator must be reckless is that he must consciously ignore “a substantial and unjustifiable risk that the material element exists or that a consequence would certainly ensue from his conduct”.<sup>97</sup> This implies that the perpetrator, by means of an act or an omission, “or, where relevant, a series of acts or omissions”,<sup>98</sup> deliberately disregards (the required accompanying state of mind) a critical risk, such as the probable consequences of his conduct.<sup>99</sup> The requisite that the perpetrator consciously ignores this risk is possibly the most important aspect in the definition of recklessness. Recklessness involves ‘conscious risk creation’ which is equivalent to ‘acting knowingly’ since it involves a state of awareness of a risk that would be a probability, more than a certainty.<sup>100</sup> It appears that this concept of conscious disregard is the determining factor distinguishing recklessness from negligence.<sup>101</sup>

A substantial and unjustifiable risk can be depicted as follows: A driver of a motor vehicle is late for work. While approaching a robot signalling a yellow light, and about to turn to red by the time he reaches that intersection, he decides to drive through the red robot since he is in a haste. The driver is unable to apply his brakes on time as a pedestrian is already crossing in front of his car, and the pedestrian is killed in the collision. This unlawful conduct - the causing of the death of the pedestrian is considered as criminal homicide;<sup>102</sup> but the issue whether the driver will be guilty of negligent homicide, manslaughter, or murder will depend on his mental state at the time of the act.<sup>103</sup> Clearly, the driver’s mental state was not

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<sup>95</sup> Treiman 1981 *Am J Crim L* 306.

<sup>96</sup> Treiman 1981 *Am J Crim L* 307.

<sup>97</sup> MPC s 2.02(c).

<sup>98</sup> Treiman 1981 *Am J Crim L* 287. Also see MPC s 1.13(5).

<sup>99</sup> Eisen 1989 *Crim LQ* 347.

<sup>100</sup> See MPC s 2.02.

<sup>101</sup> Treiman 1981 *Am J Crim L* 351: “The negligent actor fails to perceive a risk that he ought to perceive. The reckless actor perceives or is conscious of the risk, but disregards it. It is this conscious disregard of a known risk that makes recklessness more culpable than negligence. This distinction is important because recklessness is the minimum level of culpability for many crimes”.

<sup>102</sup> MPC s 210.1 defines criminal homicide.

<sup>103</sup> See the MPC s 210.2 defining murder as a purposeful or knowing homicide or one evidencing recklessness with extreme indifference to human life. Also see MPC s 210.3 defining

that of 'purpose' or 'knowledge'. He never had any conscious intention to kill anyone. He did not foresee the possibility or the certainty that he will kill anyone.<sup>104</sup> The question here then is whether the driver was reckless? The reasoning behind this question is because the MPC states that a reckless person must consciously disregard 'a substantial and unjustifiable risk'.<sup>105</sup>

Therefore, to hold the driver criminally liable for recklessness, he must have consciously disregarded the substantial and unjustifiable risk that he will kill the pedestrian in the course of his act of driving a motor vehicle. Here, the driver did not associate with this mental reckoning, though he might have been aware that there was some inherent risk driving through the red robot. Certainly, he did not think, "someone might be killed, but I am going to still drive over the red robot anyway".<sup>106</sup>

The reckless driver in the above scenario took a risk as described in the definition of recklessness. This risk involves the existence of any of the definitional elements of the particular crime in terms of conduct, the attendant circumstances or the result.<sup>107</sup> However, the risk must be of such a nature and to such an extent, that taking into account the manner and the objective of the perpetrator's act, and his knowledge about the particular existing conditions when the act was committed, the disregard of the risk taken must differ from what 'a reasonable person' in a similar situation would have done. This standard of conduct prescribed in the MPC is one which a law-abiding person, in the position of X,<sup>108</sup> would observe. The perpetrator, for example, knew that his act was risky, however, he wilfully disregarded the particular reason why his conduct was risky (since death might ensue). The issue here is, what would the court do if the perpetrator's mental state

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manslaughter as reckless homicide committed under extreme mental or emotional disturbance.

<sup>104</sup> See the MPC s 2.02(2)(a) and (b) defining 'purposely' and 'knowingly'.

<sup>105</sup> However, Treiman 1981 *Am J Crim L* 365 notes that X may only need to be aware of the substantial risk, not the unjustifiability of the risk. This view is different from what Alexander 2000 *Cal LR* 934-935 holds – that it is the unjustifiability, not the substantiality, of the risk that does all the work in recklessness. See also Ferzan 2001 *J Crim L and Criminology* 597-598 n 4.

<sup>106</sup> See Ferzan 2001 *J Crim L and Criminology* 598.

<sup>107</sup> Bobinson and Grall 1983 *Stanford LR* 695.

<sup>108</sup> See Treiman 1981 *Am J Crim L* 305.

concerning the risk was opaque?<sup>109</sup>

Recklessness is considered as a choice to perform an unlawful act irrespective of the risk involved. Consider an instance where a person, without any intention to shoot anyone, waves a loaded pistol in a crowd. If the pistol mistakenly triggers and injures anyone, this person's conduct could be considered as a criminal intent in the form of recklessness. Although he did not intend to injure anyone, he must have been aware that if the loaded pistol triggers, it would injure someone.<sup>110</sup>

Recklessness has been defined as a subjective state of mind of the perpetrator who foresees that his conduct may lead to a prohibited result, nevertheless, he takes the deliberate and unjustifiable risk of bringing it about.<sup>111</sup> It is important to note here that although recklessness has been defined subjectively, the definition carries with it some objective ingredients; that is – “whether or not the risk taken was justifiable”.<sup>112</sup> This will involve tests to determine recklessness, which will be discussed next.

#### 4.3.4.2 Tests to determine recklessness

In much US case law and legislation, phrases such as ‘mental state’, ‘mental component’ and ‘mental element’ are referred to in order to describe both the objective and subjective types of culpability.<sup>113</sup> However, it is evident that subjective culpability represents the mental state of the actor, while objective culpability represents a legal norm. This is made clear in the MPC which differentiates between negligence and recklessness by requiring a subjective awareness of a risk for recklessness.

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<sup>109</sup> According to Ferzan 2001 *J Crim L and Criminology* 599 n 9, a person would be “opaquely reckless whenever he engages in an activity consciously recognizing that that activity is dangerous, but fails to consciously disregard the exact harm that might materialize. But a statutory violation is not itself sufficient. That is, the actor may violate a statute, particularly a traffic law, without being reckless”.

<sup>110</sup> Williams 1991 *CLJ* 124. Also see Sullivan 1992 *Oxford J Legal Stud* 386. The New York Appeal Division held that a person is guilty of manslaughter if he recklessly causes the death of another person, as in *People v Baker* 4 AD 3d 606 771 NYS 2d 607 (2004) 612; New York State Penal Law s 125.15[1].

<sup>111</sup> Eisen 1989 *Crim LQ* 347.

<sup>112</sup> Eisen 1989 *Crim LQ* 347 n 2.

<sup>113</sup> Treiman 1981 *Am J Crim L* 291.

The objective component has to be applied when determining the objective type of culpability; this refers to a legal standard, which is that of an imaginary reasonable person. Therefore, the objective standard to be taken into consideration is an external one – what a reasonable person (or law-abiding person) would perceive under the same circumstances. Based on the particular facts of each specific case, it must be decided whether a reasonable person would have acted similarly as the perpetrator did in the situation.<sup>114</sup> While it is fair to inquire whether a reasonable person would have known of the consequences, the question that still remains is whether the accused actually thought and knew the requisite information at the time of the conduct.<sup>115</sup>

This information can only be ascertained by applying the subjective components of culpability. The subjective test refers to the actual thoughts, knowledge, and beliefs of the perpetrator of the crime, at the specific time when the crime was committed. With this subjective approach, the court attempts to make an investigation into the accused's actual thoughts when he committed the crime.<sup>116</sup>

In terms of recklessness, the subjective determination of the actual thoughts of the accused is raised by the requirement in the definition of recklessness in that the accused must have consciously disregard a substantial risk – this includes the assumption that X had actual knowledge or awareness regarding the risk.<sup>117</sup>

The MPC makes it certain that recklessness (like negligence), requires more than an ordinary deviation from the usual “standard of care of a reasonable person”.<sup>118</sup> Some scholars, for this reason, correctly consider recklessness to have both objective and subjective components.

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<sup>114</sup> Treiman 1981 *Am J Crim L* 289.

<sup>115</sup> Treiman 1981 *Am J Crim L* 290.

<sup>116</sup> Treiman 1981 *Am J Crim L* 289-290.

<sup>117</sup> Treiman 1981 *Am J Crim L* 299.

<sup>118</sup> Treiman 1981 *Am J Crim L* 297.

#### 4.3.4.4 Confusion of terminology describing intention and recklessness

The copious terminologies in the MPC have led to numerous arguments with regard to the different forms of *mens rea*. In *People v Moore*,<sup>119</sup> although the court disagreed and upheld the conviction stating that the allegation of the word ‘knowingly’ modified both battery (the conduct) and disfigurement (the result). Here, the accused was indicted for aggravated assault in that he “did knowingly, without legal justification, commit a battery ... causing disfigurement...”.<sup>120</sup> On appeal, Moore argued that the outcome should have also alleged that he was practically certain that the battery would disfigure the victim (that is, knowingly disfigure, which is the result).

The MPC uses terms that combine both conduct and result, or conduct and circumstance elements, which makes it difficult to differentiate between conduct, circumstance and result. For example, the verbs “kills”<sup>121</sup> or “destroys”<sup>122</sup> are a combination of both the conduct and the result of the act, while verbs such as “removes”<sup>123</sup> and “agrees”<sup>124</sup> again embody both conduct and circumstance elements.<sup>125</sup> From the above, it can be stated that there is bound to be ambiguity in the application of the MPC, as will be further elaborated on below.

The uncertainty in the application of the MPC terms can already be perceived at state level. While purporting to adopt the MPC the state of New Jersey, for example, makes use of legal terms like ‘wilful’, ‘wanton’, ‘criminal negligence’, and ‘carelessness’<sup>126</sup> without any precise definition for any one of these terms. This undercuts some advances made in the MPC with regard to consistency and clarity.<sup>127</sup> A variety of terms such as ‘wilfully’, ‘corruptly’, ‘maliciously’, ‘feloniously’, ‘wrongfully’, ‘unlawfully’, ‘wantonly’, ‘intentionally’, ‘purposely’, ‘with criminal negligence’, and ‘culpably’ have all been utilised to describe the mental

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<sup>119</sup> *People v Moore* 90 M11A 2d 466 233 NE 2d 450 (1967).

<sup>120</sup> Searcy 1978 *Am J Crim L* 253.

<sup>121</sup> See s 250.11(3) of the MPC.

<sup>122</sup> See s 224.3 of the MPC.

<sup>123</sup> MPC s 212.1.

<sup>124</sup> Section 5.03(1)(a) of the MPC.

<sup>125</sup> Bobinson and Grall 1983 *Stanford LR* 709.

<sup>126</sup> Bobinson and Grall 1983 *Stanford LR* 705-706.

<sup>127</sup> Bobinson and Grall 1983 *Stanford LR* 706.

condition.<sup>128</sup> However, these terms have not received any explicit definitions.

Recklessness in relation to conduct has not been defined in MPC.<sup>129</sup> The drafters of the MPC never anticipated that the issue of recklessness as to conduct was likely going to arise; however, some jurisdictions consider recklessness as conduct,<sup>130</sup> which have led to some difficulties. It has been stated that:

...[w]hether the risk relates to the nature of the actor's conduct or to the existence of the requisite attendant circumstances or the result that may ensue is immaterial; the concept is the same.<sup>131</sup>

In defining recklessness, the phrase 'is aware that' in the MPC still remains ambiguous as it carries no clear meaning. The issue here is whether such awareness is introspective or behavioural. Moreover, the MPC defines the word 'knowingly' using phrases such as 'the nature of his conduct or the attendant circumstances',<sup>132</sup> and 'result'.<sup>133</sup> The words 'recklessly' and 'negligently' are both defined using the phrase – "a substantial and unjustifiable risk that the material element exists or will result from his conduct".<sup>134</sup>

It seems significant to be distinguishing between acting 'knowingly', acting 'purposely', and acting 'recklessly' since these terms are used together in the MPC. Section 2.02(5), for example, states that when the perpetrator is "acting knowingly surfaces to establish an element, such element also is established if a person acts purposely".<sup>135</sup>

Although the MPC fails to adequately distinguish between the three types of objective elements in a crime (the 'conduct', 'circumstance' and the 'result' elements), it is not certain whether the term 'obstructs' connotes a conduct or a result element. A precise definition of these categories of terms is important since in some cases, these legal terms are used as terms of capacities in the MPC. To

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<sup>128</sup> Treiman 1981 *Am J Crim L* 284.

<sup>129</sup> See s 2.02(2)(c) of the MPC.

<sup>130</sup> Bobinson and Grall 1983 *Stanford LR* n 141.

<sup>131</sup> See Bobinson and Grall 1983 *Stanford LR* n 146.

<sup>132</sup> MPC s 2.02(2)(b)(i).

<sup>133</sup> MPC s 2.02(2)(b)(ii).

<sup>134</sup> MPC s 2.02(2)(c) and (d).

<sup>135</sup> Section 2.02(3) further states: "Culpability required unless otherwise provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto".

act purposely with respect to conduct, or in order to cause a certain result, the perpetrator must have, as his conscious objective, these particular elements. On the other hand, to act purposely with respect to 'an attendant circumstance', the perpetrator only needs to be aware of the circumstance existing, or hope that it exists. In other words, the MPC defines 'purposely' using phrases such as "nature of his conduct or a result thereof",<sup>136</sup> or "attendant circumstances".<sup>137</sup>

The drafters of the MPC failed to recognise that all the mental states considered culpable do not apply to every offence element;<sup>138</sup> moreover, the MPC further specified culpability requirements that apply to all mental elements - stating that:

...[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.<sup>139</sup>

Section 2.02(4) of the MPC requires the offender to have acted purposely with respect to each one of the elements. In other words, the person has to be aware or hope that all the circumstance elements exists.<sup>140</sup>

There are certain reckless perpetrators, such as opaquely reckless transgressors, that do not fall within the scope of the MPC, and, therefore, their conduct falls outside the boundaries of most crimes.<sup>141</sup> Consider again the example of a motor vehicle driver, who, in the course of sending a message through his cell phone while driving, does not see a stop sign. He consequently fails to stop, and runs over another person crossing the road, killing him instantly. The driver receives two indictments – one for careless driving and one for failing to observe the stop sign. The driver is however not charged with culpable homicide. According to the police, he was not reckless as he did not see (was conscious of) the stop sign, but careless; a finding that appears to be prudent according to the MPC definition.

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<sup>136</sup> See s 2.02(2)(a)(i) of the MPC.

<sup>137</sup> See s 2.02(2)(a)(ii) of the MPC. Also see Bobinson and Grall 1983 *Stanford LR* n 146.

<sup>138</sup> Searcy 1978 *Am J Crim L* 253.

<sup>139</sup> MPC s 2.02(4).

<sup>140</sup> Bobinson and Grall 1983 *Stanford LR* 714.

<sup>141</sup> Ferzan 2001 *J Crim L and Criminology* 599-600. In Canada, relying upon the dicta of Lord Goddard CJ and Fenton Atkinson J respectively, Keirstead J in *R v Flynn* (1964) 50 MPR 96 ruled that *mens rea* is not an element of the offence of dangerous driving under s 221(4) of the Criminal Code. The Quebec AC in *Goodfellow v The Queen* (1965) 44 CR 113 flatly rejected the proposition that *mens rea* is not a necessary ingredient of this offence. Yet Higgins J of the Newfoundland Supreme Court in *R v White* [1965] 3 CCC 147 also held that the offence does not require *mens rea*. See Stapleton 1966 *UNB LJ* 49.

This driver may escape liability for the victim's death merely because he never thought beforehand that concentrating on his cell phone while driving may cause the death of another person.

In the situation described above, a person cannot act recklessly, as required by the relevant phrase in the MPC (section 2.02(2)(c)). Yet another confusion posed by the phrase 'acts recklessly' is whether there would be criminal liability for conduct involving omission, rather than a positive act. Another possible area of misunderstanding involves the crime of possession, and recklessness in relation to whether goods were stolen. The issue is whether the offender would be said to have acted recklessly when he possesses stolen property. It is suggested that the phrase should be avoided.<sup>142</sup>

It is contended that recklessness in US criminal law should be defined with respect to conduct, or conduct should be narrowly defined so as to limit its significance to the culpability element of involuntary conduct so that issues raised by the nature of the perpetrator's conduct be considered as circumstance elements for which recklessness is defined.<sup>143</sup> It has also been suggested that conduct should be defined literally and narrowly to imply pure conduct – the actual bodily or physical movement of the perpetrator,<sup>144</sup> for example, in firing a gun, a person should be aware that he is pulling the trigger, whether by means of his finger, or any other means.<sup>145</sup> The definition of 'result', on the other hand, has been proposed to mean "a circumstance changed by the actor".<sup>146</sup> This means that any element not fitting in this definition would serve as independent circumstance elements. It seems that reform is desperately required in US substantive criminal law as regards the mental element or culpability of the accused. This was also a recommendation made by the US National Advisory Commission on Criminal Justice Standards and Goals:

The criminal justice system of a State may be a model of contemporary efficiency; but if its basic criminal law is the outmoded product of legislative or judicial processes of an earlier generation or century, the protection afforded the average citizen through criminal law processes will be much less than it

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<sup>142</sup> Treiman 1981 *Am J Crim L* 297.

<sup>143</sup> See Bobinson and Grall 1983 *Stanford LR* 712.

<sup>144</sup> Bobinson and Grall 1983 *Stanford LR* 720.

<sup>145</sup> Bobinson and Grall 1983 *Stanford LR* 722.

<sup>146</sup> Bobinson and Grall 1983 *Stanford LR* 724.

ought to be. In other words, a primary objective of the criminal justice system is enforcement of the substantive criminal law, which itself must be revised and modernized constantly to conform to society's current needs and expectations.<sup>147</sup>

The following section examines intention and recklessness in Great Britain.

#### 4.4 *Mens rea* in British criminal law

Similar to intent in the US criminal law, British criminal law also considers intention as a type of *mens rea*, that, when accompanied by an *actus reus*, constitutes unlawful conduct. *Mens rea* or moral blameworthiness is likewise also seen as a function of the state of mind or the will of the actor, which cannot be determined merely by making reference to any external norms like a reasonable man.<sup>148</sup> The focus here is how British criminal law imputes criminal intent in a crime.

X will not be criminally liable except if the required state of mind corresponds with the forbidden *actus reus*. His conduct must “be contemporaneous with the guilty state of mind”.<sup>149</sup> Therefore, criminal responsibility may not be meted out on a person for committing an act prohibited by law; his conduct must go along with the required *mens rea*.<sup>150</sup> Accordingly, where X causes the death of another person, the killing will amount to murder if he did so with the intention to kill. X has an intent to kill if he is willing his conduct.<sup>151</sup> It is irrelevant whether the person killed is the person intended to be killed; it sufficient that the perpetrator intended to kill someone other than himself.<sup>152</sup> This means that, contrary to US criminal law, the perpetrator’s purpose is irrelevant whether the presumption is one of law, fact, or of common sense. Once the perpetrator’s awareness about the circumstance is established, such presumption could merely be rebutted through proof of

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<sup>147</sup> US National Advisory Commission on Criminal Justice Standards and Goals *Courts* 173. See also Treiman 1981 *Am J Crim L* 283.

<sup>148</sup> Bowen in *Angus v Clifford* [1891] 2 Ch 449 471-472.

<sup>149</sup> Granville *Criminal law: the general part* 2.

<sup>150</sup> Marchuk *The fundamental concept of crime in international criminal law* 8.

<sup>151</sup> In English criminal law, a person acts intentionally with respect to a result when “(i) it is his purpose to cause it; or (ii) although it is not his purpose to cause that result, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result”. See Law Commission *Legislating the Criminal Code* 90. See also *Re A* (children) (conjoined twins: surgical separation) [2000] 4 All ER 96 1027-1028.

<sup>152</sup> Draft Clauses of the Law Commission *Imputed criminal intent* cl 2(1), (2), (3).

incapacity to form intent, for example, mental illness.<sup>153</sup>

In *Hyam v DPP*,<sup>154</sup> the House of Lords stated that for an accused to be guilty of murder, the mental state required for the accused had to be established. In this case, Hyam set her rival's house alight so as to frighten her. She did so by putting burning newspapers through the letter box of the woman's house. This led to the death of the woman's two children. Although Hyam was aware that death or serious bodily harm may ensue from her unlawful conduct, she claimed that she never intended to kill. She would be guilty if she knew that her conduct would cause serious bodily harm or death. The majority of the House held that if the conduct resulting in death was caused by the accused, then the requirement of malice aforethought was satisfied if she was aware of the probability that grievous bodily harm would ensue.<sup>155</sup>

Similarly, in *R v Moloney*,<sup>156</sup> the accused competed with his stepfather about whom could load and fire a twelve-bore shotgun the quickest. A cartridge was shot from Moloney's gun, killing his stepfather instantly. Moloney was charged and convicted of murder. This court held that X may possess intention, even where he did not desire the result but merely foresaw it. On appeal, the Court of Appeal set aside the verdict of murder, and the accused was convicted of manslaughter.<sup>157</sup> Although the defendant rejected the contention that he intended to injure or kill his stepfather, the issue "was whether the defendant had the necessary intent when he pulled the trigger".<sup>158</sup> Lord Bridge, in the House of Lords, repudiated the conclusion that the foresight of probable consequences was equivalent to, or an alternative to the necessary intention for a crime of specific intent. He formulated a formula (a golden rule) consisting of two questions in a bid to guide the jury in deciding whether an act was committed with intent by reference to foresight of the natural consequences.<sup>159</sup>

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<sup>153</sup> Viscount Kilmuir in *DPP v Smith* [1961] AC 290 331.

<sup>154</sup> *Hyam v DPP* [1975] AC 55.

<sup>155</sup> *Hyam v DPP* [1975] AC 73.

<sup>156</sup> *R v Moloney* [1985] AC 905.

<sup>157</sup> *R v Moloney* [1985] AC 905, 929-930.

<sup>158</sup> *R v Moloney* [1985] AC 905, 905-906.

<sup>159</sup> *R v Moloney* [1985] AC 905, 926. See *R v Hancock and Shankland* [1986] AC 455, 473. It is the responsibility of the jury to make a decision whether the accused acted with the necessary intent.

- (i) whether death or really serious injury in a murder case was a “natural consequence” of the defendant’s voluntary act; and
- (ii) whether the defendant foresaw that consequence as being a “natural consequence” of his act. In the case of affirmative answers to both questions, the inference is that the defendant intended that consequence.<sup>160</sup>

If both questions are answered in the affirmative, the conclusion could be made that the perpetrator intended the consequence. A strict interpretation of Lord Bridge’s golden rule will imply that X takes his victim as he finds him. Accordingly, the foresight of consequences forms part of the evidence and arguments presented to the jury, and serves merely as elaboration which may be necessary to avoid any misconstruction.<sup>161</sup>

The concept of natural consequences, as termed by Lord Bridge, simply implies that all things being normal, certain conduct will lead to certain consequences, except if something unanticipated intervenes to prevent it from happening. It is prudent to state here that if a consequence is considered natural, there is the possibility that such consequences were also probable.<sup>162</sup> As stated in the case of *DPP v Smith*,<sup>163</sup> a person may be charged with murder even if he never meant to cause death or grievous bodily injury, so long as the consequences are, by an objective appraisal, “the natural and probable consequence”<sup>164</sup> of his conduct.

The path to ‘probable consequences’ was approved as an accurate assessment yardstick. If there is a high possibility that grievous bodily injury or death will occur, the possibility of that result may be considered as irresistible proof of the existence

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<sup>160</sup> *R v Moloney* [1985] AC 905, 929, 1039. This approach in *R v Hancock and Shankland* [1986] 1 All ER 641 650 was found as misleading since none of the questions directly referred to the probability for the jury to deliberate on the causal link between the conduct and its consequences. Applying this approach will imply a result could still be a natural one, although there was a low probability of it occurring.

<sup>161</sup> Lord Bridge in *R v Moloney* [1985] 1 All ER 1025 1038: “I am firmly of [the] opinion that foresight of consequences, as an element bearing on the issue of intention in murder, or indeed any other crime of specific intent, belongs not to the substantive law but to the law of evidence”. See Parsons 2000 *Mountbatten JLS* 8.

<sup>162</sup> *R v Moloney* [1985] AC 905, 929.

<sup>163</sup> *Director of Public Prosecution v Smith* [1961] AC 290 (hereinafter *DPP v Smith*).

<sup>164</sup> Intention has not been defined in Israeli Penal Law No 626/1996, although it is used in various provisions creating offences. The plain definition that has been applied in Israel case law consists of ‘knowledge’ of the circumstances relating to the *actus reus*, and ‘foresight of a result accompanied by a desire to bring it about’. See *Jacobovitz v Attorney General* (1952) 6 PD 514 545; *Mordechai Vannunu v The State of Israel* (1990) 44(iii) PD 265; *Azulai v The State of Israel* (1983) 37(ii) PD 565 578; see also Yuval 1996 *Isr LR* 106-107.

of the intention to cause serious bodily harm or death. As stated in *R v Hancock and Shankland*:

...the greater the probability of a consequence the more likely it is that the consequence was foreseen and if that consequence was foreseen, the greater the probability is that it was also intended.<sup>165</sup>

Therefore, if a perpetrator foresaw a consequence, then there is a greater probability that the consequence was intended.<sup>166</sup> Particular note should however be taken when evaluating to determine whether a perpetrator in fact really meant to cause the unlawful consequence.<sup>167</sup> In determining whether an accused person had the necessary intent to commit the offence, a court or jury:

- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.<sup>168</sup>

According to section 8 of the Criminal Justice Act 1967, even if X had foresights with regards to the consequences of his conduct, it should not be concluded only by reason of that result being the natural and probable consequences of his conduct, but, in a case where the consequences are the natural and probable result of his conduct, that should be part of the evidence from which foresight or intention may be inferred.

When considering whether there was the necessary *mens rea*, it is crucial to distinguish intent from motive or desire.<sup>169</sup> The reasoning here is that intention should not be restricted to results or consequences that are only desired or wanted (as in direct intention), but should also include consequences which the person did not want to ensue. It has also been accepted by legal scholars and

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<sup>165</sup> As per Lord Scarman in *R v Hancock and Shankland* [1986] AC 641.

<sup>166</sup> *R v Hancock and Shankland* [1986] AC 455, 473. See also *R v Nedrick* [1986] 1 WLR 1025 (Court of Appeal, Criminal Division).

<sup>167</sup> *R v Hancock and Shankland* [1986] AC 455, 474. See also Ashworth *Principles of criminal law* 155.

<sup>168</sup> Draft Clauses of the Law Commission *Imputed criminal intent* cl 1(a)(b). Also see s 8 of the Criminal Justice Act 1967.

<sup>169</sup> *R v Gnango* [2012] 2 All ER 129 para 125; also see *R v Moloney* [1985] 1 All ER 1025, [1985] AC 905; *R v Hancock*, *R v Shankland* [1986] 1 All ER 641, [1986] AC 455; and *R v Woollin* [1998] 4 All ER 103, [1999] 1 AC 82; *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 96 1012.

judges that a perpetrator can, in law, intend a result irrespective of whether or not he desires it for its own sake. However, as decided in *Hyam v DPP*,<sup>170</sup> although motive can relate to, for example, fear, jealousy, and power,<sup>171</sup> it is irrelevant whether a person's motive to bring about a particular consequence was meant for another motive.<sup>172</sup> Motive in the legal sense also implies a 'kind of intention'. It could be accepted here that in the absence of guidelines in terms of the kind of intention, motive becomes a term of general application. To this effect, direction to such an oblique intention<sup>173</sup> is necessary before the jury can form a verdict.<sup>174</sup>

As evidenced from the above discussion, there are still diverse opinions regarding the actual meaning of intent. This has led to the development of two concepts - direct intention and indirect intention. These two concepts will consequently be examined.

#### 4.4.1 Direct intent

According to the Law Commission, X intends a result when:

- (i) it is his purpose to cause it; or
- (ii) although it is not his purpose to cause that result, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.<sup>175</sup>

In 1985, the Law Commission proposed that the definition of intention provides that someone intends a result when:

...he wants it to exist or occur, is aware that it exists or is almost certain that it exists or will exist or occur.<sup>176</sup>

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<sup>170</sup> *Hyam v DPP* [1975] AC 55, 73.

<sup>171</sup> It was stated that it is necessary to distinguish between intention and motive when determining intention. See *R v Gnango* [2012] 2 All ER 129 para 125; *R v Moloney* [1985] 1 All ER 1025, [1985] AC 905; *R v Hancock*, *R v Shankland* [1986] 1 All ER 641, [1986] AC 455; and *R v Woollin* [1998] 4 All ER 103, [1999] 1 AC 82; *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 96 1012.

<sup>172</sup> *R v Moloney* [1985] 1 All ER 1025 1037. In stating that intention is different from motive, Lord Bridge was making reference to indirect intention.

<sup>173</sup> See n 179 below.

<sup>174</sup> *R v Gnango* [2012] 2 All ER 129 125; *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 96 1012.

<sup>175</sup> Law Commission *Legislating the Criminal Code* 8; s 7.1 Cl. 1(a) of the Criminal Code Bill 1998.

<sup>176</sup> Law Commission *Codification of the criminal law* 183.

The most recent recommendation on the meaning of intention was made by the Law Commission in 2006:

- (1) A person should be taken to intend a result if he or she acts in order to bring it about.
- (2) In cases where the judge believes that justice may not be done unless an expanded understanding of intention is given, the jury should be directed as follows: an intention to bring about a result may be found if it is shown that the defendant thought that the result was a virtually certain consequence of his or her action.<sup>177</sup>

Where the consequence in question was connected to the perpetrator's conduct, but such conduct was not a motivating cause, courts are bound to ward off an attribution of intent by reference to the reasons which motivated the underlying conduct.<sup>178</sup> This attracts what is traditionally referred to as oblique intention or subjective recklessness.<sup>179</sup>

Consider a case where a wrongdoer intends to use an anaesthetic on his victim in order to rape her with the awareness that she could suffer some respiratory difficulties that might lead to her death. If it was the wrongdoer's resolve to rape and kill his victim, he commits the crime of murder if the victim dies in the course. On the other hand, if the wrongdoer uses the anaesthetic with the sole purpose of preventing any resistance from his victim when performing his unlawful act, and not to kill her, the perpetrator would be convicted of manslaughter, and not murder. The reasoning here is that the victim's death was not the perpetrator's purpose, moreover, it was not a practical certainty that his conduct would result in the victim's death. The victim would also not have suffered any serious bodily harm if she had survived.<sup>180</sup> Therefore, it cannot be said that the perpetrator intended to cause grievous bodily harm, or the death of the victim.<sup>181</sup>

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<sup>177</sup> Law Commission *Murder, manslaughter and infanticide* para 3.27.

<sup>178</sup> Sullivan 1992 *Oxford J Legal Stud* 389; see also *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *R v Steane* [1947] KB 997; *R v Burke* [1991] 1 AC 135.

<sup>179</sup> Sullivan 1992 *Oxford J Legal Stud* 389. A person possesses oblique intent when the act is a natural consequence of a voluntary conduct, and they foresee it as such.

<sup>180</sup> Conceivably extreme emotional trauma could be characterised as serious bodily harm, extending the reasoning in *R v Miller* [1954] 2 QB 282; see Sullivan 1992 *Oxford J Legal Stud* 389.

<sup>181</sup> See Sullivan 1992 *Oxford J Legal Stud* 389.

In 1980, the Criminal Law Revision Committee rejected a test based on knowledge of a high probability that death, for example, will result from X's actions.<sup>182</sup> This was considered to be unsatisfactory because a test expressed in terms of probability of the consequences was very uncertain. However, the Criminal Law Commission considered that "it would be too narrow to confine intent to cases where the accused desires a certain result, preferring to include cases where the accused knows a particular result will follow".<sup>183</sup>

A person is said to have acted with direct intent when the prohibited consequences were his main aim. Therefore, the consequences of the perpetrator's conduct can only be considered as intended if that was his objective.<sup>184</sup>

#### 4.4.2 Indirect intent

The issue of indirect intent was considered by the House of Lords in *Hyam v DPP*<sup>185</sup> by stating that:

[N]o distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act.<sup>186</sup>

This implies that intention is present where the perpetrator desires or wants a result to ensue from his conduct; the reason for his conduct and, where the consequence is not intended, but he does the act with the knowledge<sup>187</sup> that the

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<sup>182</sup> Criminal Law Revision Committee *Offences against the person* para 10.

<sup>183</sup> Criminal Law Revision Committee *Offences against the person* para 10.

<sup>184</sup> Marchuk *The fundamental concept of crime in international criminal law* 11.

<sup>185</sup> *Hyam v DPP* [1974] 2 All ER 41.

<sup>186</sup> *Hyam v DPP* [1974] 2 All ER 41 63.

<sup>187</sup> German criminal law approaches criminal intent from a different angle than British criminal law. E.g., intention and negligent conduct are defined separately from intention and knowledge. According to the German Criminal Code: "(1) If the statute does not expressly threaten negligent conduct with punishment, punishability requires intentional conduct. (2) In the case of minimally negligent conduct the actor remains unpunished. (3) If the statute attaches a more severe punishment to a particular result of the act, it applies to the actor or participant only if he brought about the result negligently." See German Criminal Code (1969) s 16 'Intentional and negligent conduct' [*vorsätzliches und fahrlässiges Handeln*]. With regards to intention and knowledge: "(1) He acts intentionally who satisfies the statutory offence elements with knowledge and volition. (2) He also acts intentionally who seriously thinks it possible, and accepts, that the offence elements have been satisfied. (3) He acts knowingly

consequence is probable (foresight of a high probability), this can also amount to intention.<sup>188</sup>

The case of *R v Woollin*<sup>189</sup> settled any doubt on indirect (oblique) intention for murder. In this case, a father threw his three-month-old baby across a room in frustration because the baby would not stop crying. The baby died two days later as a result of a fractured skull. It was established by the court that Woollin did not intend to cause any harm or the death of the child, but that he foresaw the danger of causing grievous bodily injury or death to the baby as a result of his conduct. The jury was directed by the judge that oblique intention exist in cases where there is “an appreciation of a substantial risk of injury”:<sup>190</sup>

Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's action and that the defendant appreciated that such was the case.<sup>191</sup>

It was held by the jury that exposing someone to possible risk of harm was enough to amount to intention, and Woollin was convicted of murder. On appeal, the murder conviction was upheld, but the House of Lords overturned the murder conviction, and substituted it with manslaughter.<sup>192</sup> According to the House of Lords, the trial judge expanded the element of *mens rea* for murder. The trial judge should not have introduced the question as to whether the defendant foresaw a substantial risk. The reasoning here is that the use of the phrase ‘substantial risk’ makes the distinction between intention and recklessness<sup>193</sup> blurred. Moreover, recklessness could not be considered as sufficient *mens rea* to convict a person of murder; stressing the importance of keeping the terms separate.

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who knows that the elements for which the statute requires knowing conduct are satisfied, or anticipates with certainty that they will be satisfied.” See s 17 ‘Intention and Knowledge’ [*Vorsatz und Wissentlichkeit*] German Criminal Code (1969).

<sup>188</sup> Parsons 2000 *Mountbatten* JLS 7.

<sup>189</sup> *R v Woollin* [1999] 1 AC 82.

<sup>190</sup> As per Lord Steyn in *R v Woollin* [1999] 1 AC 103. This decision was affirmed in *R v Matthews and Alleyne* [2004].

<sup>191</sup> *R v Woollin* [1999] 1 AC 103

<sup>192</sup> *R v Woollin* [1999] 1 AC 82 97.

<sup>193</sup> For an explanation of recklessness in British law, see para 4.5.1 below.

Even if a number of questions flow regarding the direction provided in *Woollin*, the decision is important since it, however, draws a succinct distinction between intention and recklessness. The argument in *Woollin* is that the jury would have had to make an inference as to whether X had the aim of inflicting severe harm, or to kill his child when he threw him onto a solid surface. The same reasoning could have been applied in *Moloney*; accordingly, Lord Bridge states:

[T]he issue for the jury was a short and simple one. If they were sure that, at the moment of pulling the trigger which discharged the live cartridge, the appellant realised that the gun was pointing straight at his stepfather's head, they were bound to convict him of murder. If, on the other hand, they thought it might be true that, in the appellant's drunken condition and in the context of this ridiculous challenge, it never entered the appellant's head when he pulled the trigger that the gun was pointing at his stepfather, he should be acquitted of murder and convicted of manslaughter.

Where subjective recklessness is inferred in terms of foresight, foresights of a virtual certainty regarding the consequences encompass recklessness, although a jury is allowed to determine intention – making the overlap between intention and negligence visible. The elements as espoused in indirect or oblique intention is found in civil legal systems under the notion of *dolus eventualis*; however, this type of intention forms part of the law of evidence and not substantive law.

#### **4.5 Committing crimes with intent or recklessly**

As demonstrated above, intent is generally defined in terms of foresight of specific consequences, and a need to act or an omission to act in order for the consequences to occur. Recklessness differs from intent because, on a subjective basis, there is foresight, but no need or desire to produce the consequences. British courts are still continually struggling to determine the extent to which sufficient desire can be imputed to convert recklessness into intention.

In the following paragraphs, the concepts of recklessness and intent will be examined together with their respective tests. The various approaches to interpreting recklessness in British jurisprudence will also be examined in order to elucidate the general confusion in determining intent (or *dolus eventualis*).

#### 4.5.1 Defining the concept of recklessness in British law

Recklessness has been defined as being “careless, regardless, or heedless of the possible harmful consequences of one’s acts”.<sup>194</sup> In *Caldwell*,<sup>195</sup> although the defence raised by the accused was that he was so drunk to the extent that he never thought of the possibility that his action would be endangering lives; he was charged with unlawfully destroying property with the intent to endangering life or being reckless as to whether the lives of others would be endangered.<sup>196</sup>

Negligence is regarded as a prior condition for recklessness; it involves a test that would be considered in part as objective in legal jargon.<sup>197</sup> Recklessness has been considered in terms of moral fault, and involves a guilty state of mind. Therefore, an actor who has given thought and considered no risk will be involved (either because he thought his conduct is lawful or he thought sufficient precaution has been taken) “should not be accounted *Caldwell* reckless even though he might have been negligent”:<sup>198</sup>

Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting “recklessly” if before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it.<sup>199</sup>

From the above, it is assumed that there is no recklessness if a prudent person would not have appreciated the risk. On the other hand, it would be regarded as recklessness if a sensible person would have appreciated the risk.

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<sup>194</sup> Diplock in Eisen 1989 *Crim LQ* 354-355.

<sup>195</sup> *R v Caldwell* [1981] 1 All ER 961 [1982] AC 341.

<sup>196</sup> See Eisen 1989 *Crim LQ* 354. After the decision in *Caldwell*, some jurists refer the recklessness as determined in this case as ‘*Caldwell* recklessness’ or the ‘*Caldwell*-test’.

<sup>197</sup> See Glanville 1981 *Cambridge LJ* 253. This will be examined in greater detail when examining the test for recklessness.

<sup>198</sup> Glanville 1988 *Legal Stud* 87-88.

<sup>199</sup> Glanville 1981 *Cambridge LJ* 273-274.

The *Caldwell* decision was overruled in the case of *R v G and Another*,<sup>200</sup> where the test for recklessness was again based on a subjective criterion in order to judge the accused based on their age, experience and understanding rather than on the hypothetical reasonable person-standard. In this case, the appellants – two 11 and 12-year-old boys - were camping (with their parents' permission), when they found bundles of newspapers. They opened some to read, and also lit some of the papers which they threw under a large bin. They left the yard without putting out the fire. The fire spread from the bin to the roof of a shop and adjoining buildings, causing about £1 million damage. During the trial, the boys stated that they thought the fire will burn itself out, and they did not consider causing damage at all. The boys were held to be reckless whether the buildings would be destroyed, but not with intent to destroy them.<sup>201</sup> It was accepted that “they did not appreciate that there was any risk of the fire spreading the way it eventually did”.<sup>202</sup>

The appeal turned on the meaning of recklessness in the House of Lords. The House of Lords, upon quashing the conviction of the appellants, stated that a person acts recklessly with respect to:

- (i) a circumstance when he is aware of a risk that it exists or will exist;
- (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.<sup>203</sup>

In this regard, the House of Lords, requested a reconsideration of the ruling in *Caldwell*. The following section examines the various tests to determine intent and subjective recklessness.

#### 4.5.2 Tests to determine intent and recklessness

The issue of determining a perpetrator's liability is the mental state required at the time of the conduct in relation to the consequences. The person who commits the crime should know or act with knowledge of those circumstances the offence has in law. If this is the case, then determining the perpetrator's mental state can only

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<sup>200</sup> *R v G and Another* [2003] UKHL 50.

<sup>201</sup> *R v G and Another* [2003] UKHL 50.

<sup>202</sup> *R v G and Another* [2003] UKHL 50 para 2.

<sup>203</sup> *R v G and Another* [2003] UKHL 50 para 4.

be done subjectively (applying the subjective test); otherwise, the provision of any alternative to the requirement of knowledge should involve some lesser degree of cognition.<sup>204</sup>

The original test to determine intent in English law was objective - considering what a reasonable person in the position of the perpetrator would do. The conduct of the accused is compared to that of a reasonable person, without an assessment of what he was thinking at the time of his conduct.<sup>205</sup> This changed in *DPP v Smith*, where the court stated that the test for intention was subjective. A person had to desire and foresee the natural and probable consequences of his conduct; that is, what the person actually was thinking at the time of his conduct.<sup>206</sup> The facts in *DPP v Smith* is that Smith was driving a car containing stolen goods. He was blocked by a constable (Meehan) on duty who happened to know Smith. Meehan approached Smith and asked him to draw into his near side. Smith did not do so, but instead, he accelerated and drove away with Meehan hanging on. After Smith hit three other cars, Meehan was shaken off and he fell in front a fourth car receiving grievous bodily harm.

In the course of Smith's trial, the crown did not allege an actual intention to kill. The issue before the jury was whether "the prosecution had established intent to cause grievous bodily harm".<sup>207</sup> Smith was found guilty of capital murder by the jury. The Court of Criminal Appeal substituted the finding of capital murder to manslaughter,<sup>208</sup> as there was a misdirection when assessing the facts to determine the intention of the accused. The reasoning here was that the jury, in their conclusion, took into consideration what a reasonable man would think to be likely instead of considering this principle as a guideline for determining the appellant's real state of mind.

The trial judge in the Court of Criminal Appeal<sup>209</sup> stated that the accused's intention is usually determined by the jury by drawing presumptions from the surrounding situations, including the presumption of law that a person intends the

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<sup>204</sup> Law Commission *Report on the mental element in crime* para 19.

<sup>205</sup> Glanville 1981 *Cambridge LJ* 254.

<sup>206</sup> Glanville 1981 *Cambridge LJ* 254.

<sup>207</sup> *DPP v Smith* [1961] AC 290-291.

<sup>208</sup> *DPP v Smith* [1961] AC 303.

<sup>209</sup> *DPP v Smith* [1961] AC 290, 325-326.

natural and probable consequences of his conduct, and that:

It may well be the truth [that] he did only want to shake [the constable] off; but if the reasonable man would realise that the effect of doing that might well be to cause serious harm to this officer, then, as I say, you would be entitled to impute such an intent to the accused, and, therefore, to sum up the matter as between murder and manslaughter, if you are satisfied that when he drove his car erratically up the street, close to traffic on the other side, he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer still clinging on, and that such harm did happen, and the officer died in consequence, then the accused is guilty of capital murder...On the other hand, if you are not satisfied that he intended to inflict grievous bodily harm upon the officer - in other words, if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to the officer in consequence of his actions - well, then, the verdict would be guilty of manslaughter.

Upon another appeal to the House of Lords from the Crown Court, the decision of the Court of Criminal Appeal was subsequently reversed from manslaughter and a conviction of capital murder was reinstated.<sup>210</sup> In determining intention, the House of Lords applied the objective test:

[T]he sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was a natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.<sup>211</sup>

In the case of *DPP v Smith*, uncertainty existed whether the accused was aware at the time of his conduct that the harm was going to be serious or likely to cause death; thereby stating that murder should be distinguished from manslaughter by attaching conduct intended to inflict bodily injury which the accused was aware that it was likely to cause harm or death.<sup>212</sup> In other words, the accused should not be held to have committed murder if he was not aware that the injury he intended to cause on his victim will possibly kill him. Since the ultimate test of intent is

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<sup>210</sup> *DPP v Smith* [1961] AC 290, 335; Law Commission *Imputed criminal intent* para 3. See also *R v Moloney* [1985] AC 905, 929-930 where the Appeal Court set aside the verdict of murder to a verdict of manslaughter; *R v Woollin* [1999] 1 AC 82 97.

<sup>211</sup> *DPP v Smith* [1961] AC 290, 291. The position in Israeli criminal law is that a person will be presumed to intend the natural and probable consequences of his conduct. This position has been shifted to inferences, since the word 'natural' implies that all things being equal a particular act will lead to a certain consequence. See Yuval 1996 *Isr LR* 107.

<sup>212</sup> Law Commission *Imputed criminal intent* para 15(d).

determined and applied by the jury,<sup>213</sup> the issue which still had to be determined is whether the jury have to decide on the accused's intention objectively or subjectively.

The Law Commission examined the decision in *DPP v Smith*<sup>214</sup> where many controversial issues were raised regarding the nature of criminal intent as required in a crime.<sup>215</sup> It is reasonable to question the reasoning behind the varying decisions; and why the doctrine of imputed intent specifically required an examination.<sup>216</sup> It is also worth noting that the British Parliament reacted to the decision held in *DPP v Smith* by legislating section 8 of the Criminal Justice Act 1967 to restore the position originally at common law. The decision in *Frankland v The Queen*<sup>217</sup> also confirmed that the judgment in *DPP v Smith* was erroneous, but only inasmuch as it required objective foresight in determining intention, stating that the common law reflected section 8 of the 1967 Act.<sup>218</sup> Section 8 entitles a jury to draw reasonable inferences from all the evidence. In this regard, it was stated in *R v Belfon*:

Foresight and recklessness are evidence from which intent may be inferred but they cannot be equated...with intent.<sup>219</sup>

The Law Commission, in determining intent, considered foresight as being unnecessary and misleading, and that "willingness to kill is not limited in its application".<sup>220</sup> The reasoning here is that with foresight, more emphasis would be laid on the likelihood than on the willingness to cause death. If the point of departure remains "a total lack of respect for human life",<sup>221</sup> then the decision in *R v Woollin*<sup>222</sup> remains questionable if it is accepted that the perpetrator cannot will in the abstract but must have, to some extent, envisaged the subject matter of his will.

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<sup>213</sup> Law Commission *Imputed criminal intent* para 18(b).

<sup>214</sup> *DPP v Smith* [1961] AC 290.

<sup>215</sup> Law Commission *Imputed criminal intent (DPP v Smith)* para 10.

<sup>216</sup> Law Commission *Imputed criminal intent (DPP v Smith)* para 2.

<sup>217</sup> *Frankland v The Queen* [1987] AC 576.

<sup>218</sup> As per Lord Ackner in *Frankland v The Queen* [1987] AC 576.

<sup>219</sup> As per Wien J in *R v Belfon* (1976) 3 All ER 46.

<sup>220</sup> Law Commission *Imputed criminal intent* para 20.

<sup>221</sup> Law Commission *Imputed criminal intent* paras 20, 21.

<sup>222</sup> *R v Woollin* [1999] 1 AC 82.

The Law Commission recommended a subjective approach to determine both intent and foresight in murder, and in any other offences where these elements are required.<sup>223</sup> It is not required in law that the perpetrator intended to kill or inflict bodily injury and that the “inference of intent to be drawn from the natural and probable consequences of the act as a matter of common sense and experience is very strong; thus, the test of intent in murder cases should be subjective”.<sup>224</sup> Similarly, questioning the reasons why a person acted (*actus reus*) or what he was doing implies an inquiry into subjective recklessness.

In considering the subjective approach to determine *dolus*, the jury may exonerate the accused of murder if he said that he did not in fact consider the consequences at the time of his conduct.<sup>225</sup> X must not be held culpable for the consequences of conduct which he did not intend or foresee.<sup>226</sup> If a person does not believe that the consequences of his conduct would lead to a probable result, he cannot be considered to have intended to achieve the result.<sup>227</sup>

A subjective test would therefore seem problematic, especially in cases involving self-induced intoxication. The issue here is whether the accused would escape criminal culpability if he did not foresee the risk in such a case – self-intoxication. Conversely, if, for example, according to public policy, a person’s conduct goes beyond or exceeds the harm or risk caused, he cannot be found to have acted recklessly.<sup>228</sup> Although, in many cases, the dividing line between intention and

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<sup>223</sup> Law Commission *Imputed criminal intent* para 11.

<sup>224</sup> Law Commission *Imputed criminal intent* paras 8-9.

<sup>225</sup> As per Viscount Kilmuir in *DPP v Smith* [1961] AC 290 326. In *Attorney General v Malchiel Gruenwald*, District Court, Jerusalem, criminal case no 124 of 1953 (22 June 1955), the criminal responsibilities of Dr Kastner, a Jewish leader, had to be determined. The Jewish community leader was accused of having collaborated in the mass murder and extermination of the Jews by Nazis. In this case, the idea that where a perpetrator had the knowledge that a prohibited result was ‘highly likely’ to occur from his unlawful conduct, such knowledge through a construction of the law became an intent to bring about the result. Accordingly, it is not necessary that his knowledge be complete or certain in relation to the consequences; it only requires the person to possess a ‘high probability’. Irrespective of the introduction of this fine legal construct, Agranat J refused to establish intention of an accessory before the fact to the crime of murder. The refusal by the Justice to equate the accused knowledge to intention emanates from the fact that he, in extending assistance (as an accomplice), did so without the willingness to assist and with the belief however slight, that possibly the result would not occur.

<sup>226</sup> Gowers *Royal Commission on Capital Punishment 1949-1953: Report* para 107. It was on this basis that constructive malice was abolished which later affected s 1 of the Homicide Act 1957.

<sup>227</sup> Duff *Intention, agency and criminal liability* 58.

<sup>228</sup> *R v Renouf* [1986] 1 WLR 522; see Sullivan 1992 *Oxford J Legal Stud* 389.

subjective recklessness is barely discernible, what is necessary for consideration is not the desire for the consequences but foresight of the consequences. It has been submitted that, it is this foresight of the consequences that constitute *mens rea*. Therefore crimes requiring *mens rea* require recklessness.<sup>229</sup>

In determining the objective and subjective tests in criminal intent, the Law Commission of England and Wales of 1978 stated that, although a lesser or greater degree of probability may offer important proof regarding the actual intention of the accused, there is “no assigned degree of likelihood or probability that an injurious consequence will result from any act”<sup>230</sup> which can serve as a test of criminal responsibility. The extent of likelihood, if possible of being assigned, “afford no proper test of guilt, for it is not the precise degree of likelihood or probability in such cases, but the knowledge or belief that the thing is likely or probable which constitutes the *mens rea*”.<sup>231</sup> The Law Commission refused to accept the existence of a rebuttable presumption in murder cases - the reasoning being that any rebuttable presumption of this nature would appear incompatible with the fundamental principle of criminal law.<sup>232</sup> This Law Commission proposed a revised definition of intention as “a person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result”.<sup>233</sup>

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<sup>229</sup> Williams *Criminal law: The general part* 64-65; Eisen 1989 *Crim LQ* 353. There are certain cases where, although a reasonable person could have foreseen the possibility of the consequences of his conduct, but the accused, being of below average intelligence or capacity, would be unable to do so. A 14-year-old girl of low intelligence set fire to a shed by pouring some spirit on the floor and setting it alight. The court of first instance found that the accused gave no thought to the possibility of damage to the shed by her actions, and further, even if she had given thought to the matter, the risk would not have been obvious to her. It was thus found that she did not act recklessly within the definition of the Criminal Damage Act 1971. On appeal, the decision was reversed. *Caldwell* was followed in that if the reasonably prudent person would have been aware of the risk then the defendant is guilty regardless of whether she would/could have been aware of it. In *DPP v Morgan* [1975] 2 WLR 913 [1975] 2 All ER 347, it was held that the *mens rea* of rape is not knowledge of lack of consent, but intent to have intercourse with knowledge of lack of consent or recklessness as to whether or not there is consent. See Eisen 1989 *Crim LQ* 357.

<sup>230</sup> Rodensky *The crime in mind* 111; Royal Commission *Seventh report of Her Majesty's commissioners on criminal law* 23.

<sup>231</sup> Law Commission *Imputed criminal intent* para 5; making reference to the Royal Commission *Seventh report of Her Majesty's commissioners on criminal law* 23.

<sup>232</sup> Law Commission *Imputed criminal intent* para 7.

<sup>233</sup> Damar *Wilful misconduct in international transport law* 85 n 213.

The cases of *R v Moloney*<sup>234</sup> and *R v Hancock and Shankland*<sup>235</sup> presented instances where indirect intent or recklessness was established. In *R v Hancock and Shankland*,<sup>236</sup> some striking miners threw concrete blocks from a bridge that seriously injured a passenger, and killed the driver on the motorway below the bridge. According to the defendants, their main intention was to block the road. The issue before the jury was whether grievous bodily injury or death was a natural result of the conduct, and whether the defendants foresaw the result as a natural consequence. They were found guilty of murder,<sup>237</sup> but this verdict was altered to manslaughter by the House of Lords. The reasoning of the House of Lords was that the prosecution did not find an intention to cause bodily injury or death by the defendant. Lord Scarman considered the guidelines in *R v Moloney* to be unsatisfactory and misleading. His view was that intention could not be associated or likened to foresight of consequences. Therefore, intention may only be established in cases where there is actual proof of foresight. In determining intention, the issue should be whether the defendants foresaw the consequences of their conduct ensuing; in this vein, the greater the possibility that a result will ensue, the greater the likelihood that such consequence was foreseen, and the more likely that it was intended. Therefore, foresight should be considered as proof of intention and not as an alternative form of intention.

*R v Nedrick*<sup>238</sup> confirmed these decisions. In this case, the defendant had malice against another woman and placed a petrol bomb through a letter box, setting her house ablaze. As a result, one of her children died of asphyxiation and burns. Although X admitted he started the fire, he claimed his sole purpose was to frighten the house owner. Reference was made to *R v Moloney* and *R v Hancock*; where it was held that “a man may intend the certain result whilst at the same time not desiring it to come about”.<sup>239</sup> In terms of the foreseeability aspect of intent, the following scenarios were constructed:

- (i) If the defendant did not believe that death or serious harm was likely to result from his acts, he cannot have intended to bring about said result;

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<sup>234</sup> *R v Moloney* [1985] AC 905. Also see *R v Hancock and Shankland* [1986] AC 455.

<sup>235</sup> *R v Hancock and Shankland* [1986] AC 455.

<sup>236</sup> *R v Hancock and Shankland* [1986] 2 WLR 257.

<sup>237</sup> See the decision in *R v Moloney* [1985] 1 AC 905.

<sup>238</sup> *R v Nedrick* [1986] 1 WLR 1025 (Court of Appeal, Criminal Division).

<sup>239</sup> *R v Nedrick* [1986] 1 WLR 1025 (Court of Appeal, Criminal Division) 1027.

- (ii) If the defendant believed that there was a slight risk of the death or serious harm, he cannot have intended to bring about said result;
- (iii) If the defendant believed that death or serious harm would be virtually certain to materialize from his voluntary act, then it could be inferred from that fact that he intended to kill or cause serious bodily harm, even though he may not have had any desire to achieve that result.<sup>240</sup>

Considering the above scenarios, and the fact that one of the important elements in intent to kill is the desire to kill, an important question to a murder indictment should be whether, at the time of the perpetrator's conduct, "he was willing by that action to kill in accomplishing some purpose other than killing."<sup>241</sup> The person may have no intention to kill, or remain indifferent whether death should occur or not, but if he was willing to kill, and death did occur, he should be guilty of murder. Accordingly, "a jury is not entitled to find the necessary intention",<sup>242</sup> except if they feel certain that grievous bodily injury or death was inevitable, and such was appreciated by the accused.

Taking all these views into consideration, the direction on the interpretation and the application of the concept of recklessness in English criminal law is a subjective one. There is a residual objective element of *mens rea* which determines whether a person is blameworthy or not. While considering the subjective test as necessary, it is also important to ascertain whether the *mens rea* was *rea*.<sup>243</sup> This implies the need for an objective evaluation, which incorporates involuntariness when assessing the perpetrator's culpable state of mind.<sup>244</sup>

A perpetrator would be reckless even if there was no awareness on his part. This introduces a new element of inadvertence (involuntariness) into the law of recklessness, which has to be assessed objectively.<sup>245</sup> The reasoning behind an objective consideration (other than the subjective test) is because the perpetrator, although aware of the risk, may be excited or confused by drink or drugs so that he no longer appreciated the seriousness of the risk.<sup>246</sup> This person would then be culpable under a subjective consideration irrespective of whether he was partially

<sup>240</sup> *R v Nedrick* [1986] 1 WLR 1025 (Court of Appeal, Criminal Division) 1028.

<sup>241</sup> Law Commission *Imputed criminal intent* para 17.

<sup>242</sup> Lord Steyn in *R v Woollin* [1999] 1 AC 82 97.

<sup>243</sup> Lord Birkenhead in *DPP v Beard* [1920] AC 479 (HL) 504. See Lio 2018 *North East LR 72*.

<sup>244</sup> Lio 2018 *North East LR 72*.

<sup>245</sup> *DPP v Beard* [1920] AC 479 (HL) 355.

<sup>246</sup> *DPP v Beard* [1920] AC 479 (HL) 352. See Lio 2018 *North East LR 72-73*.

aware of the risk. In this light, the subjective test is considered to be too narrow, since this perpetrator, for example, who failed to realise the risk would easily escape culpability.<sup>247</sup>

Issues relating to criminal liability are seldom resolved by asking whether the test is objective or subjective, as asserted below:<sup>248</sup>

I share the distaste for the obsessive use of the expressions 'objective' and 'subjective' in crime. In all indictable crime it is a general rule that there are objective factors of conduct which constitute the so-called '*actus reus*,' and a further guilty state of mind which constitutes the so-called '*mens rea*' The necessity for this guilty state of mind has been increasingly emphasised of recent years (see *R v Sheppard* [[1980] 3 WLR 960]) and this I regard as a thoroughly praiseworthy development.<sup>249</sup>

It is considered faulty in a bid to resolving the issue of criminal liability by simply classifying liability into objective or subjective test.<sup>250</sup> To avoid conflicting expressions, where one term is used rather than the other, a relatively resolute legal language is required in which rules can accurately be expressed. It has been suggested that objective and subjective tests should not be used in instructing the jury, but should be considered as terms for technical discussions.<sup>251</sup> Nonetheless, the test for recklessness continues to be a hybrid test, as the accused person's subjective knowledge and understanding of the conduct committed (and the credibility of their denial of such knowledge and understanding) will always be evaluated against the objective criterion of what a reasonable person of the same age, experience and understanding as the accused would have done.

#### 4.5.3 Confusion in interpreting the concepts of intention and recklessness

There have been various approaches to hold a person criminally liable for reckless conduct. These have been referred to some as "a real risk of harmful consequences which anyone acting with reasonable prudence would recognize and give heed to".<sup>252</sup> By implication, 'a real risk' is not 'a slight risk' which a reasonable prudent person would treat as negligible. The issue that remains here

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<sup>247</sup> Lio 2018 *North East LR* 73.

<sup>248</sup> See Glanville 1981 *Cambridge LJ* 253.

<sup>249</sup> Glanville 1981 *Cambridge LJ* 254.

<sup>250</sup> Glanville 1981 *Cambridge LJ* 255.

<sup>251</sup> Glanville 1981 *Cambridge LJ* 254.

<sup>252</sup> See Glanville 1981 *Cambridge LJ* 275.

is in which situations a prudent and reasonable person would consider any risk as a slight risk. Does this imply that an ordinary prudent person would consider such risk as negligible?

The 'real risk' notion has been interpreted in other terms, such as an 'obvious risk' – another type of risk that would not be considered as a slight or a negligible risk. The question that remains is whether an 'obvious risk' and a 'real risk' could be used interchangeably. In terms of driving recklessly, it has been suggested that the jury must be satisfied of two things: (1) the jury must be satisfied that the perpetrator was, for example, driving a car in a manner that created an obvious and serious risk<sup>253</sup> to other road users, and (2) that the person nevertheless took the risk without giving any thought to the possibility that there was some consequences involved.<sup>254</sup> What should be considered or what qualifies as a serious or obvious risk still remains questionable. In *Moloney*, the court held that the perpetrator saw the consequences as a high probability or high risk.<sup>255</sup> However, the recent approach will be that such a perpetrator would be said to have intended a consequence only if he foresaw such consequences as a virtual certainty.<sup>256</sup>

The approach to Lord Bridge's test for natural consequences is also considered to be full of ambiguities; for example, there is no precise meaning of 'natural consequences' and, moreover, the degree or the level of probability that the consequence would occur was not given. Therefore, the requirement of the phrase 'certain consequences' implies that a very high degree of probability is required. The meaning of 'natural consequence' as defined in *R v Hancock and Shankland*<sup>257</sup> furthermore infers intent where the perpetrator foresaw the occurrence of the secondary consequence as a high probability. This explication seems to touch more on the concept of recklessness than clarifying oblique intent. This test has been considered as a low standard compared to the test provided in *Moloney*.

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<sup>253</sup> Glanville 1981 *Cambridge LJ* 275.

<sup>254</sup> Glanville 1981 *Cambridge LJ* 275.

<sup>255</sup> Broadbent <https://www.academia.edu/2298343/Intention> (Date of use: 06 June 2019).

<sup>256</sup> See *R v Nedrick* 1986; *R v Woollin* 1998.

<sup>257</sup> *R v Hancock, R v Shankland* [1986] 1 All ER 641 [1986] AC 455.

In terms of *mens rea* requirements for murder cases, *Woollin* has been considered as a leading authority, yet “the law has not yet reached a definition of intent in murder in terms of appreciating virtual certainty”.<sup>258</sup> It was held that *Woollin* did not have *dolus directus* to kill the baby or cause serious bodily injury; therefore, the issue was one of oblique intent. Oblique intent to murder could be inferred if it is virtually certain that death or grave bodily injury was the consequences of the perpetrator’s conduct, and he appreciated this fact. In this vein, if a person plants an explosive, he does not necessarily foresee death or serious bodily harm as virtually certain, but he can however be found to have the required intention to murder considering the risk he has created. Despite the approach to determining intention, *Woollin* has not provided a proper definition of intention, making the law on criminal intent still to some extent unclear. Thus, *Woollin* did not lay down a substantive rule of law. Accordingly, the difficulties of establishing the accused’s foresight imply that the jury should focus on the accused’s purpose when he was carrying out the unlawful act.

In the case of *Hyam v DPP*,<sup>259</sup> it was again pointed out that ‘foresight of a high degree’ of probability is not the same as foresight or intention, but it is intent which forms the mental element in murder. Here foresight of a high degree was explained as the perpetrator’s foresight that his conduct was likely or highly likely to cause grievous bodily harm or death, which is sufficient *mens rea* for the crime of murder. In *R v Moloney*, it was stated that it is sufficient evidence that if a perpetrator foresees a consequence, that that consequence is desired. This reasoning was supported by the court in *R v Hancock and Shankland* while it refused to acknowledge the second meaning given in *R v Hyam* – ‘foresight of a highly probable consequence’. The reasoning here is that foresight is simply evidence from which the jury may infer intention, but the problem is that since the court in *R v Moloney* refused to accept purpose, it will be meaningless when a jury infers intention.<sup>260</sup>

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<sup>258</sup> See n 189 above; Broadbent <https://www.academia.edu/2298343/Intention> (Date of use: 06 June 2019).

<sup>259</sup> Lord Hailsham LC in *Hyam v DPP* [1975] AC 55. See LawTeacher <https://www.lawteacher.net/cases/mens-rea-cases.php> (Date of use: 11 February 2019).

<sup>260</sup> Parsons 2000 *Mountbatten JLS* 8.

In *R v Nedrick*, the jury was asked to infer intent in a case where the perpetrator's conduct is considered to be highly likely, highly probable or a 'very high degree of probability' to result in death or serious bodily injury. The conviction of murder was overturned by the Appeal Court to manslaughter, as the jury should have been directed that they are not entitled to infer intention except if they are satisfied and certain that grievous bodily harm or death was a 'virtual certainty' of X's act and that he was aware of this.<sup>261</sup> In certain cases where an extension is obligatory regarding foresight, the court should apply the 'virtual certainty' test,<sup>262</sup> thus, modifying *R v Moloney*.<sup>263</sup> This is a suitable judgment of the jury since it provides direction with regards to when intention can be inferred from foresight. Therefore, the requirement in *R v Moloney* ('foresight of a natural consequence') cannot be sufficient to make an inference of intent. There must be foresight of a virtual certainty - a narrower concept which will certainly reduce the scope of culpability in murder cases. The 'virtual certainty'-test should also be used when considering oblique intention. However, instead of intention being answered positively to as regard the two questions stated above,<sup>264</sup> the jury should be allowed to find whether X acted with intention. The jury will thus not be compelled to find that the accused, in fact, acted with intention at the time the unlawful act was committed.<sup>265</sup> It has been argued that in murder cases, for example, the courts should aim at introducing "a tighter definition of intention",<sup>266</sup> and allow more intricate cases to be prosecuted by way of defences.

In *R v Walker Hayles*,<sup>267</sup> the victim was thrown from the third floor of a balcony by the defendants. During their trial for attempted murder, the jury was directed by the

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<sup>261</sup> *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 96 1029; *R v Woollin* [1998] 4 All ER 103 113 [1999] AC 82 96; *R v Nedrick* [1986] 3 All ER 1 4.

<sup>262</sup> See *Nedrick* (1986) and *Woollin* (1998).

<sup>263</sup> *R v Moloney* [1985] 1 AC 905. In Israel, Barak J took the view that the application of the knowledge test depends on the outcome after weighing and balancing the policies relating to a particular crime. This also implies taking into consideration the objective of the legislature, and the interest purported to be protected, amongst other considerations. It is worth noting here that Israeli criminal law has no substantive principle of general application in terms of oblique (indirect) intention or *dolus indirectus*. Sometimes foreseeability of a high probability of consequences was constituted but evidence of purpose and therefore, of direct intention, lacked; and at another situation where public policy considerations required the application of the foreseeability test, *dolus directus* was substituted for oblique intention.

<sup>264</sup> See n 160 above.

<sup>265</sup> Coffey 2009 *J Crim L* 394.

<sup>266</sup> Ashworth 2007 *Crim LR* 333.

<sup>267</sup> *R v Walker Hayles* (1990) 90 Cr App R 226.

trial judge that intention could be inferred if there was a high degree of possibility that the victim would be killed, and the defendants were aware of this possibility. The ground for appeal was that trial judge was confusing “foresight of death” with “an intention to kill”.<sup>268</sup>

Also, in *R v Scalley*,<sup>269</sup> it was alleged that Scalley murdered a five-year-old boy. This was done by setting fire to the house he once lived in. Following the directions of the trial judge provided to the jury, X was convicted of murder. The position was that the defendant must have foreseen serious bodily harm or death as virtually certain to ensue from his conduct. On appeal, the murder conviction was substituted for manslaughter. It is not certain whether, if foresight of serious bodily harm or death is not intentional, proof of intention may be inferred. The direction was that if the jury members are satisfied that the perpetrator did conceive the foresight of serious injury or death as virtually certain, then intention may be inferred, but they are not compelled to do so.<sup>270</sup>

In *Smith v Criminal Injuries Compensation Authority*,<sup>271</sup> a cyclist was riding dangerously fast through a pedestrian zone, saw pedestrians using a crossing, but did not stop at the red light, thus colliding with the victim. The accused argued that he never intended to injure the victim. It was held that the cyclist foresaw it as a virtual certainty that a pedestrian would be harmed; which amount to oblique intention. This case can be considered in terms of reckless driving, where the required *mens rea* is failing to give any thought to the possibility of there being any risk, or having recognised the possibility of a risk, but continuing with the conduct unjustifiably.<sup>272</sup> It might be stated here that the distinction between intent and recklessness does not invariably make appropriate distinctions between lesser and more serious crimes.

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<sup>268</sup> See *R v Nedrick* [1986] 1 WLR 102.

<sup>269</sup> *R v Scalley* [1995] Crim LR 504.

<sup>270</sup> Although this was a defamation case, it required intent to cause harm. It was held that the defendant foresaw with virtual certainty that harm would result from the defamatory publication, but did not in fact desire it. It was established that he was not motivated by the purpose to cause harm with the defamatory publication. Knowledge of the virtually certain result did not constitute an intent to cause harm. See *Shmuel Borochoy v Yefet* (1985) 39 (iii) PD 205 214-216; *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 96 1029, 1062.

<sup>271</sup> *Smith v Criminal Injuries Compensation Authority* Unreported case 24 (March 2015).

<sup>272</sup> Eisen 1989 *Crim LQ* 356.

On the other side of the coin, in the case of *Booth v Crown Prosecution Service*,<sup>273</sup> a pedestrian was convicted under the Criminal Damage Act 1971 by recklessly damaging a vehicle that hit him when he ran onto the road. This decision by the Divisional Court result seems correct if the pedestrian actually did consider the possibility of a vehicle hitting him when he crossed the road, and also if he further considered the possibility that the vehicle may be damaged in such a collision. However, it seems more likely that if the pedestrian actually took the time to consider such possibilities, or even paused to consider any risks at all of being involved in a car accident, he would surely first have limited such risk to that of his own injury.

#### 4.5.4 Recent developments in determining intent

Recent cases<sup>274</sup> seem to be gradually abandoning the concept of oblique intention, to turning their focus on other legal aspects of the case, and most cases seem to have settled around the term ‘foreseeability’. For example, in *R v Stringer and Another*,<sup>275</sup> a father and son were in the Crown Court for murdering Donald Donlan (“Bones”) in a joint enterprise with Jason McPhee who had pleaded guilty. Donald Donlan had been stabbed to death by Jason McPhee in a house in Partington Estate – in Trafford where they lived. The father and son appealed against the murder conviction “on the grounds of the judge’s direction on joint enterprise liability and his summing-up”.<sup>276</sup> According to the appellants, they had been following Bones and Jason McPhee as mere spectators, and they did not realise that Jason McPhee was attacking Bones with a knife until the very end. The appeal was that the appellants claimed they had no evil intention towards Bones.<sup>277</sup>

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<sup>273</sup> *Booth v Crown Prosecution Service* (2006) All ER (D) 225.

<sup>274</sup> See, e.g., *R v Stewart* [2010] 1 All ER 260; *R v Stringer and Another* [2011] 3 All ER 1119; *R v Gnango* [2011] 1 All ER 153; *R v Dowds* [2012] 3 All ER 154; *R v Clinton*; *R v Parker*; *R v Evans* [2012] 2 All ER 947; *R v Dawes*; *R v Hatter*; *R v Bowyer* [2013] 3 All ER 308; *R v Jenkin* [2014] 2 Cr App R (S) 649; *R v Adebolajo and Another* [2015] 4 All ER 194; *R v Bell* [2016] 3 All ER 284; *R v Golds* [2017] 1 All ER 1055; *R v Kay*; *R v Joyce* [2018] 1 All ER 881.

<sup>275</sup> *R v Stringer and Another* [2011] 3 All ER 1119.

<sup>276</sup> *R v Stringer and Another* [2011] 3 All ER 1119.

<sup>277</sup> *R v Stringer and Another* [2011] 3 All ER 1119, 1123.

The jury were directed by the judge on the aspect of common purpose liability to the effect that the defendants would only be guilty of murder if they had formed a common intent that the victim should be killed or be caused grievous bodily injury; and if at the time, or at some later stage the common purpose was formed, they had known or foreseen that in carrying out the joint purpose, a knife would or might be used, and that after they have known or foreseen the use of a knife, they have participated in the enterprise.<sup>278</sup> The appeal was dismissed.<sup>279</sup> Whether the defendants' conduct amounted to encouragement or assistance is a matter of fact to establish intention; whether they foresaw the possibility that with their assistance or encouragement McPhee would kill Bones or cause serious bodily harm.

This was not the case in *R v Gnango*.<sup>280</sup> The defendant voluntarily exchanged gunshots with another in a public place. The defendant opponent fired a shot that killed an innocent person. The defendant was found guilty of murder of the passer-by. During the trial, the prosecution advocated the fact that the gunfight was a joint enterprise crime between the defendant and his opponent, and that each foresaw that in the course of the gunfight to cause grievous bodily harm or death, someone other than their immediate target might be killed. The submission by the defence was that the defendant and his opponents were not parties to a joint scheme because each was engaged in a separate mission with opposite purposes – to harm the other. This was considered by the judge to be irrelevant.<sup>281</sup> According to the Crown Court, “the appellant had aided and abetted the shooting by bandana man with intent to kill”<sup>282</sup> since he was present and encouraged it. Therefore, if a joint enterprise comes into being before the commission of an unlawful act (killing, for example), the parties must be guilty of murder,<sup>283</sup> provided that other requirements are met.<sup>284</sup> The appeal was allowed and the conviction for murder

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<sup>278</sup> *R v Stringer and Another* [2011] 3 All ER 1119.

<sup>279</sup> *R v Stringer and Another* [2011] 3 All ER 1119 1132.

<sup>280</sup> *R v Gnango* [2011] 1 All ER 153.

<sup>281</sup> *R v Gnango* [2011] 1 All ER 153.

<sup>282</sup> *R v Gnango* [2011] 1 All ER 156.

<sup>283</sup> *R v Gnango* [2011] 1 All ER 159.

<sup>284</sup> If the jury were sure that: (a) the bandana man and the appellant were in a joint enterprise to cause an affray - to use unlawful violence against each other by having a gunfight and by firing at each other, whether this joint enterprise was the result of a pre-planned meeting or arose on the spur of the moment when they saw each other and; (b) in the course of that joint enterprise Magda was murdered by the bandana man on the basis of transferred malice, as he had

quashed.<sup>285</sup> The sentence was substituted for attempted murder.<sup>286</sup>

In cases involving oblique intent, it is also necessary to uncover whether courts are obliged to accept expert evidence and what role expert evidence plays in determining criminal intent. Although *mens rea* is assessed by means of a subjective test, expert evidence is sometimes required by courts to evaluate the evidence presented by the perpetrator. For example, in *R v Golds*,<sup>287</sup> Golds attacked his partner in their home with a knife after periodic arguments throughout the day. Golds inflicted some 22 knife wounds together with blunt impact internal injuries. It was alleged that Golds had a history of mental disorder leading to outpatient treatment and prescribed medication. Two forensic psychiatrists presented evidence that there was an abnormality of mental functioning arising from a recognised medical condition, although they disagreed as to what that condition was.<sup>288</sup> Even though there was no contradicting psychiatric evidence, Golds was still convicted of murder. The issue in this case was that, although the accused had admitted having killed his partner, whether he had proved his partial defence of diminished responsibility in which case he could only be convicted of manslaughter, and not of murder.<sup>289</sup> Although the jury had to consider the moral responsibility of the accused in this case; the focus was more on determining the mental responsibility as to the level of impairment, and what should be considered as “substantial impairment”.<sup>290</sup> A similar question was asked in the appeal case of

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previously explained, and (c) the appellant realised - and it was the Crown's case, that he must have realized - that in the course of their joint enterprise gunfight, the bandana man might kill by shooting with the requisite intention for murder. See *R v Gnango* [2011] 1 All ER 159.

<sup>285</sup> *R v Gnango* [2011] 1 All ER 170; *R v Coney* [1882] 8 QBD 534.

<sup>286</sup> *R v Gnango* [2011] 1 All ER 174.

<sup>287</sup> *R v Golds* [2017] 1 All ER 1055.

<sup>288</sup> *R v Golds* [2017] 1 All ER 1055 para 2.

<sup>289</sup> *R v Golds* [2017] 1 All ER 1055 para 1. The law to be applied was s 2 of the Homicide Act 1957 after its recent revision by the Coroners and Justice Act 2009. The issue is the correct approach to the statutory test of whether his abilities were in specified respects ‘substantially impaired’.

<sup>290</sup> *R v Golds* [2017] 1 All ER 1055 para 7. Also see para 32: “Where, for example, the recognised medical condition is an emotionally unstable personality disorder leading to histrionic and impulsive behaviour, or where it is depression leading to distorted thinking, the medical evidence may make it clear that it has had some impact on behaviour, and thus was a significant cause. The jury may be satisfied that if the defendant's personality had been different, or if there had not been some depression, he would not have killed as he did. The real question thus may very well be whether the condition passes the threshold of substantial impairment, or does not”. The appeal was dismissed. Also see *R v Bell* [2016] 3 All ER 284 where the appeal was against a minimum sentence. The defence and the prosecution had detailed reports on the appellant's mental condition at the time of the act. As a result, the

*R v Dowds*<sup>291</sup> as to whether voluntary intoxication could amount to a defence of diminished responsibility for conviction of murder.<sup>292</sup>

The 2018 cases of *R v Kay*; *R v Joyce*,<sup>293</sup> did not raise the question whether the accused acted with oblique intent but whether their responsibility for murder could be diminished by reason of mental abnormality arising from a recognised medical condition (although they had been heavily intoxicated with drugs and alcohol), for reasons of a partial defence of diminished responsibility under section 2(1) of the Homicide Act 1957. This means that each case would be considered based on their own particular facts.

#### 4.6 Summary

As seen in this chapter, in the US, a crime comprises two components – the *actus reus* and the *mens rea*. Fault comprises of either intent (*dolus*) or negligence (*culpa*). A person will be said to have acted with intent if he had foreseen the unlawful consequences of his conduct. In other words, unlawful conduct is said to be committed intentionally if the illegality and consequence were contemplated by X.

US jurisprudence reaffirms the position of criminal intent as a *sine qua non* of criminal responsibility. Criminal intention requires consciousness to some extent. Criminal intention has been categorised into specific or general intent; the distinction lies in X's operative condition during the specific moment the crime is committed. This mental element is significant in US state laws, although a concise meaning is still to be settled. The doubt around the real meaning and rationalisation of intent has been as a result of its use in terms of requiring a blameworthy state of mind for example, 'intentionally', 'wilfully', 'purposely', 'specific intent', 'general intent', 'constructive intent', amongst others, to suggest the mental ingredient of a crime.

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prosecution was ready to accept a guilty plea to manslaughter on grounds of diminished responsibility. The appeal was dismissed.

<sup>291</sup> *R v Dowds* [2012] 3 All ER 154.

<sup>292</sup> *R v Dowds* [2012] 3 All ER 155. It was held that voluntary acute intoxication from any substance like alcohol is not capable of diminishing responsibility - *R v Dowds* [2012] 3 All ER 187.

<sup>293</sup> *R v Kay*; *R v Joyce* [2018] 1 All ER 881.

In the Anglo-American legal systems, the moniker of *dolus eventualis* is not specifically utilised. Recklessness is the closest concept that can be associated to the South African notion of *dolus eventualis*. Recklessness is considered as an expression of fault in cases where X acted recklessly with regard to the consequences even though he foresees a possibility that an unlawful consequence might ensue from his conduct. The difference with negligence is that X does not foresee the consequences while any reasonable person placed in the same situation (objectively) would have been expected to foresee the possibility of those consequences to ensue from the unlawful conduct. It is certain that the concept of *dolus eventualis*, as a mental state, does correspond with the *mens rea* standard of 'knowingly' as contained in the MPC, but the South African concept is not directly applicable in US criminal law.

In Great Britain, some landmark cases have been examined in this chapter to espouse some clarifications on this aspect of *mens rea*. Although the *actus reus* elements of a crime may be easily established, much debate has centred around the *mens rea* element, especially when determining intention. There are many cases where X disputes the fact that he never intended to inflict bodily harm or death, and therefore he does not fulfil the *mens rea* requirement for murder. In such situations, the courts consider case law relating to oblique (indirect) intention or subjective recklessness.

In determining intent, the British Law Commission recommended a subjective, rather than an objective test in determining intent. The subjective test applies to all offences where the existence of intent has to be ascertained. In a criminal-law context, intent is mostly applied in relation to a particular result, although some crimes may involve no result, for example, possession of drugs. Although the jury is not bound to draw such an inference, if the intent to inflict serious bodily injury in murder cases be retained, a jury has the discretion to infer from the fact that death or serious bodily injury was the natural and probable consequences of X's conduct.

However, the decision in *R v Nedrick* indicates that intention may still be established even if X did not intend to attain the result. In this vein, the test is not one of probability or foreseeability, but whether X really meant to cause the

consequences. One may, in many cases, answer this question without considering such terms; one could accept that sometimes intent may be an innate common sense notion derived from terms like 'probability', 'desire', 'foreseeability', 'purpose'. Therefore, recklessness in British criminal law is subjective – a conscious taking of an unjustifiable risk.

In English criminal law, the *mens rea* requirement for intention differs from crime to crime. In some crimes, the consequences must be intended (for example, the intent to do grievous bodily harm), while in other recklessness will be sufficient. There are also variations with circumstances which sometimes necessitates that knowledge is required. Knowledge is a subjective element which establishes intention in law, as opposed to the evidentiary rule that a person intends the natural and probable consequence of his act - which serves only as proof of intention. Knowledge may also apply to conduct crimes that involve concealed intention. In such cases, having a virtual certainty of achieving that purpose is the same as intending such purpose. This is equivalent to result crimes where knowledge of the virtual certainty of the consequences is equal to the willingness to bring about it. Lord Bridge in *Moloney* did not accept that any substantive law exists; stating that the accused's foresight of any of these eventualities as possible consequences of his conduct where the possibility may be considered as exceeding a certain degree, is the same or the alternative to the necessary intention.

The two components of *dolus eventualis* as expressed in South African criminal law (that is; foresight of the possibility of the unlawful result or consequence, and reconciling one's self to the ensuing result) is somewhat similar to oblique (indirect) intention (and subjective recklessness) as applied in British law. In this type of intention, the accused foresees the prohibited result as one which is highly probable, or virtually certain to occur, even if achieving the result was not his purpose.

In the following chapter, the concept of *dolus eventualis* as interpreted and applied in South African criminal law will be explored.

## CHAPTER 5

### ***DOLUS EVENTUALIS* IN SOUTH AFRICAN CRIMINAL LAW**

#### **5.1 Introduction**

In chapter two of this thesis, a conceptual analysis of the various types of *mens rea* as mirrored in South African criminal law was provided. It should however be noted that there is more to these types of *mens rea* than what is reflected under the concepts as elucidated in chapter two. This chapter delves deeper into these concepts, and examines how the interpretation and application of *dolus eventualis* has evolved in South African jurisprudence. The discussion will also focus on the complexities surrounding the application of this concept over the years in South Africa.

This chapter will also explore the complications that arise from certain recent decisions regarding the interpretation of *dolus eventualis*, and the implications these judgments have. The question will be asked as to whether recent cases have fully interpreted the concept. In this regard the manner in which the courts interpret and apply the two legs of *dolus eventualis* will be evaluated. Although the origin of *dolus eventualis* has been noted to include a cognitive and a conative component, it has been argued that the conative component should be excluded as an element of this type of intention, as it is considered irrelevant and confusing. However, the conative component has time and again been applied in South African courts ever since the concept found its way into South African criminal law.<sup>1</sup> The manner in which foresight and the accused's state of mind are determined in South African jurisprudence will also be considered. In this regard, courts have been troubled by especially two issues: the degree of foresight necessary to establish *dolus eventualis*, and whether foresight of the consequence equate to intention in law or is evidence of intention.<sup>2</sup> The disparity in the approaches to determining foresight will also be focused on.

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<sup>1</sup> Hoctor 2013b SACJ 134 n 23.

<sup>2</sup> Monaghan *Criminal law directions* 55.

The interpretation and application of the concept of *dolus eventualis* in murder cases, especially in private defence and common-purpose crimes<sup>3</sup> will be taken into consideration. Another issue which will be briefly looked at in this chapter is whether this mental element should be excluded in particular cases, such as where death or severe bodily harm is caused in cases of reckless driving, amongst others. It is required that the perpetrator must have the necessary knowledge that there is a reasonable possibility that in driving a motor vehicle, he might hit someone. Should this person, as a matter of fact, avoid driving altogether just because this possibility exists? The reasoning here is that, except in cases of malicious intention, nobody would intend to commit murder while driving.

Although the notion of *dolus eventualis* has been the focal point of numerous court judgments over many years, and a sundry of publications have appeared on this topic, there is still no certainty as to what this concept exactly entails. This chapter will evaluate the evidence, and provide a conclusion as to the correct approach to follow.

It has however been an established fact that since 1950 *dolus eventualis* requires a subjective criterion in that the perpetrator subjectively foresaw the occurrence of the possible consequence. There are however still different interpretations in South African case law as well as by some academic jurists as to the correct approach in determining foresight. These quandaries will now be considered.

## **5.2 Evolution of *dolus eventualis* in South African criminal law**

*Dolus eventualis* is an old and a central concept in South African criminal law which has undergone various alterations over the years. In order to effectively understand the evolution and the revolution of this concept, it is important to evaluate how this concept has been interpreted and applied in the period before 1945, from 1946 to 1985, and the period after 1985. An evaluation of judicial precedence over the years indicates that the approach to *dolus eventualis* has been formulated differently, and in many cases, inaccurately. This concept has throughout attracted conflicting legal criticisms in terms of interpretation and application. This explains why the term still remains ambiguous; despite the fact

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<sup>3</sup> A brief introduction to common purpose was provided in para 1.5.1.

that the concept has been developed, and is still being developed in subsequent cases.

In the following sub-paragraphs, the development of the concept of *dolus eventualis* will be considered in three periods of evolution.

### 5.2.1 The period pre-1945

Before 1945, South African courts had depended on the presumption that X must have intended the reasonable, probable and natural consequences of his conduct.<sup>4</sup> Presumptions were relied on since it is impossible for the law to actually determine what was in X's mind during the time of his conduct.<sup>5</sup> This meant that X could not escape liability even though he did not intend the consequences, as long as the act was performed by him. Thus, knowledge of unlawfulness was of no essence.

In applying presumptions, the court focused on rebuttable presumptions of fact rather than presumptions of law.<sup>6</sup> Using presumptions implied that the courts applied the objective test to determine *dolus eventualis*, even though the test for intention is subjective. After realising the objectionable results of utilising this presumption, South African courts began to abandon this assumption, and gradually embraced the concept of *dolus eventualis* since it was similar to presumptions, though still taking into consideration the consequences of X's conduct. Like presumption, it was considered that X could be held accountable for the consequences of his conduct but it did not presume that X intended the consequences, requiring that, in fact, a person should have realised that the consequences might ensue. This generally implies that since the courts relied on inferential reasoning, the objective test was also being applied to determine intention. The implication here is the possibility that X, who may be without fault, could still be held culpable for his conduct.

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<sup>4</sup> Burchell and Hunt *South African criminal law and procedure* 225-226.

<sup>5</sup> *Jolly* 186; *R v Jongani* 1937 AD 400 406; *R v Longone* 1938 AD 532 539. The Appellate Division had also hold this position in 1945 and thereafter - see *R v Duma* 1945 AD 410 417; *R v Shezi* 1948 (2) SA 119 (A) 128; *R v Koza* 1949 (4) SA 555 (A) 560. However, in Roman and Roman-Dutch law, intention was determined subjectively. See Phelps 2016 *J of Crim L* 47.

<sup>6</sup> *Kewelram* 217.

In *R v Kewelram*,<sup>7</sup> the Appellate Division held that an inference stands unless it is disproved by X. In this case, a shopkeeper burnt a building which did not belong to him; his purpose was to burn his stock and defraud his insurance company. Relying on inference to determine intention, the court had to ask and answer the following questions: (1) whether the court was satisfied that X has caused the fire; (2) whether the fire injured or damaged the building of Muirhead; (3) if X caused the fire, should he have known and realised as an ordinary and reasonable man that the result would be damage to the building? (4) Was the fire caused by malicious and wrongful intent with the object and purpose of defrauding the insurance company in respect of X's own goods? The jury held that X had indirect intention for the crime of arson.<sup>8</sup> X must have foreseen that if he set fire to the stock, it would spread to the building and he did so for a fraudulent reason. It was found that X set fire to his stock with the direct intention to defraud the insurance company.<sup>9</sup> Considering these circumstances, the inference of a wrongful intention to burn the store was justified.<sup>10</sup> This justification was disputed on the ground that although there might be an implied intention to burn the store, it did not follow that there was an intention to injure the owner. The court cautioned here that intent must, in most cases, be gathered from conduct.<sup>11</sup>

The decision in *R v Jolly*<sup>12</sup> affords the beginning of an apparent model of the meaning of *dolus eventualis*. The appellants in *Jolly* were convicted by a special criminal court for having unlawfully and maliciously damaged the railway line which derailed and wrecked a train in which certain passengers were travelling.<sup>13</sup> Although no one was injured as a result of the derailment, and the appellants argued that they never intended to cause any injury; considering that they chose a spot where the train was moving slowly. After responding to certain legal questions in the affirmative, the court held that there was evidence from which the trial court was entitled to infer the existence of an intention to commit murder. It was held

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<sup>7</sup> *Kewelram* 213.

<sup>8</sup> Starosta <https://www.studocu.com/en-za/document/university-of-the-witwatersrand-johannesburg/criminal-law/lecture-notes/intention-2017/4498101/view> (Date of use: 24 October 2019).

<sup>9</sup> *Kewelram* 214-215.

<sup>10</sup> *Kewelram* 217.

<sup>11</sup> *Kewelram* 216.

<sup>12</sup> *Jolly* 176.

<sup>13</sup> *Jolly* 176.

that they had “contemplated the risk to life”<sup>14</sup> (they foresaw the possibility of death resulting), but still went ahead to perform their unlawful act. In the above case, it was held that it was not necessary to prove intent.<sup>15</sup> In this vein, the court focused on the consequences of X’s conduct since the courts relied on the presumption that X intended the unlawful consequences.

The courts relied on a cause-and-effect approach<sup>16</sup> to determine legal intention, by drawing inferences of legal intent from the injurious nature of the act, not as conclusive inference, but left it open for evidence that may be admissible to rebut the inference. Accordingly, the conviction was based on the common-law offence of endangering the lives of persons travelling on a railway.<sup>17</sup> In a case of the wilful derailment of a train, it was held that it is not necessary to show intent to kill any particular person. The same applies to a case where X deliberately fires a gun in a crowd of people in a market. X will be indicted for an assault with intent to murder. It was as such an established rule that X must have anticipated the possible consequences of his conduct; consequences which he could have possibly foreseen.

When X is charged with a particular conduct, of which the possible consequences may be fatal or deadly, an inference of no intention is one of law - resulting from the conduct of the act. If an act is wilfully done by X, then he necessarily intends that which must be the consequences of the act. Therefore, if X administered a poisonous drug which he knows will likely kill Y, but X is indifferent whether the drug will certainly kill Y, X must be looked upon as foreseeing the possible result of his conduct. It could also consist of a result caused by a wilful act or omission foreseen by X as a probable consequence, but X, however, did not wish it nor aim at the consequences. In other words, *dolus eventualis* occurred “whenever the agent had beforehand consented to or approved of the effect”.<sup>18</sup> Therefore, if death had resulted in the derailment of the train, it would have been a case of

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<sup>14</sup> University of Cape Town <https://www.coursehero.com/file/p6e8u4g/The-old-but-still-important-case-of-R-v-Jolly-1923-AD-provides-a-clear-example/> (Date of use: 8 October 2019).

<sup>15</sup> *Jolly* 181. See Chanock *The making of South African legal culture 1902-1936* 142.

<sup>16</sup> As noted earlier, South African criminal law considers this approach under the concept of causation (i.e. the factual and legal causation must be determined). With regard to the cause-and-effect approach, the court focuses on ascertaining whether X is the cause of the result in issue.

<sup>17</sup> *Jolly* 176.

<sup>18</sup> Hoctor 2008 *Fundamina* 17.

murder.<sup>19</sup> It was essential and sufficient that the court be satisfied that intent existed in the mind of X at the time of the conduct.

In some cases, the court will sway and focus on one part of the components of *dolus eventualis* and forget the other. For example, in *R v Butelezi*,<sup>20</sup> the word 'calculated' was applied to mean that the required mental state was greater than foresight of a possibility. The conative component, for example, has in various cases, been expressed in terms of 'recklessness'; 'reconciliation with the risk of harm', 'conscious taking of the risk', and 'persistence in such conduct, despite such foresight'.<sup>21</sup> Where this is the case, there is a possible risk that the principles of legality may indirectly be disregarded.<sup>22</sup>

In the case of *R v Butelezi*,<sup>23</sup> X was convicted of the murder of his wife. X had reasons to suspect that his wife misconducted herself with another man. He consequently stabbed her in the legs and the lower part of her body using a long knife, inflicting five wounds which caused her to bleed to death. He appealed against his conviction of murder. The court concluded that it is common cause that X did kill his wife as factual causation (*conditio sine qua non*) was proved. There was also no suggestion for any justification for committing the murder.

The defence's argument was based on two grounds; firstly, that due to provocation from his wife, X had acted in the 'heat of passion', and was deprived of the power of self-control, and inflicted the injuries which resulted in her death. Secondly, that the nature of the wounds inflicted indicated that there was no intention to kill or inflict serious bodily injuries geared towards causing death. This last argument was not credible since X stabbed the deceased five times. If any of these arguments were established, then, in law, X would have been guilty only of culpable homicide, not murder.<sup>24</sup>

The issue was one of fact to be inferred from the circumstances of the particular case under consideration. It was held that although an intention to kill is an

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<sup>19</sup> Fortunately, no one was killed.

<sup>20</sup> *R v Butelezi* 1925 AD 160 161.

<sup>21</sup> See Hoctor 2013b SACJ 133.

<sup>22</sup> Hoctor 2013b SACJ 132.

<sup>23</sup> *R v Butelezi* 1925 AD 160-161.

<sup>24</sup> *R v Butelezi* 1925 AD 161-162.

essential element in a crime of murder, the evidence showed that, despite the provocation X received, he had “not lost the power of self-control and had intended to kill his wife”.<sup>25</sup> An application for appeal was therefore refused. The question whether or not there was an intention to kill was one of inference on the relevant circumstances.

As evidenced above, as far back as 1922, and over some two decades afterwards, the Appellate Division (as it was then known) had been applying an objective test to determine intention.<sup>26</sup> In this regard, the courts turned to disregard X’s state of mind. This means that the inquiry whether X foresaw the harm was irrelevant, but rather whether he ought to have foreseen the harm resulting from his conduct. In 1937, Coertze (the first South African jurist to coin the Afrikaans translation for *dolus eventualis* as “opset by moontlikheidsbewussyn”),<sup>27</sup> stated that this concept consists in X possessing one goal (not the prohibited result), while foreseeing the possibility that a further consequence (the forbidden consequence) may flow from it, but he has no certainty that the forbidden consequence will not enter into effect.<sup>28</sup> However, in 1939, Gardiner and Lansdown do not mention or acknowledge *dolus eventualis* as a type of intention.<sup>29</sup>

Although the concept of *dolus eventualis* subsequently has gained much recognition in twentieth century case law, the unresolved question still is whether this concept has been accurately interpreted and applied in these cases. This is because the courts seem content in applying the concept in complete disregard of its true interpretation.<sup>30</sup> This is also the reason why it has been alluded that the application of this concept has been characterised by a lack of clarity and indecisiveness by the courts.<sup>31</sup> In the following sub-paragraph, this investigation into the development of *dolus eventualis* during the period 1946-1985 will be examined.

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<sup>25</sup> *R v Butelezi* 1925 AD 160; 166; 172.

<sup>26</sup> *Jolly* 186; *R v Jongani* 1937 AD 400, 406; *R v Longone* 1938 AD 532, 539-542; *R v Duma* 1945 AD 410, 417.

<sup>27</sup> Coertze 1937 *JCRDLL* 85; Hoctor 2008 *Fundamina* 18.

<sup>28</sup> Coertze 1937 *JCRDLL* 85; Hoctor 2008 *Fundamina* 18.

<sup>29</sup> Gardiner and Lansdown *South African criminal law and procedure* 30-38; Hoctor 2008 *Fundamina* 18.

<sup>30</sup> Hoctor 2013b *SACJ* 132. It should be noted here that the test for intention is subjective (what X was thinking); preferably, a mixture of subjective and objective consideration, but not purely be objective (which is applying the reasonable man test).

<sup>31</sup> Paizes 1988 *SALJ* 636.

### 5.2.2 The period 1946-1985

At the beginning of this era, it was already settled law that as long as X foresaw the consequences that would likely emanate from his conduct; it was irrelevant to draw inferences on how it occurred. Therefore, intention was present if death was foreseen as probable, but occurred in a different way than that anticipated by X. It was not required that X foresees the precise manner in which death may result. Therefore, it was sufficient if death was merely foreseen by X.<sup>32</sup>

Making reference to precedent from the previous decade,<sup>33</sup> the Appellate Division in *R v Kubuse* held that the existence of an intention to kill may be gathered from the circumstances, which is also present in a case where the object is to cause grievous bodily calculated to cause death, irrespective of whether it resulted in death or not.<sup>34</sup> In this case, five prison inmates attacked and choked a prison guard (Y) with a strap in order to gain access to a key from Y. Another five inmates were not directly involved in the assault, but did take part in the planning; they staged a mock fight in order to induce the warder to enter the cell, and helped to cover the warder's body with mats and blankets. The court found that there was common purpose, not only in obtaining the key from Y, but also in disabling him so that he would not be able to raise any alarm before their escape. It was accepted by the court that those who did not take part in the strangling saw what was taking place, and that they did not dissociate themselves from the killing but assisted in holding Y down. Evidence that the plan of throttling Y with a leather belt and a tie, and that X and the others must have realised that strangling Y was sufficient to cause unconsciousness and possibly death, was accepted by the court. The court refused that this offence amounted to culpable homicide.<sup>35</sup> The decision of the trial court was upheld by the Appellate Division in that the attack on the warder was committed in furtherance of a common purpose to which X has made himself a party.<sup>36</sup>

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<sup>32</sup> Mkhize *Foresight of the causal sequence* 9.

<sup>33</sup> *R v Ngcobo* 1921 AD 92.

<sup>34</sup> *R v Kubuse and Another* 1945 AD 189, 191-192, 200.

<sup>35</sup> *R v Kubuse and Another* 1945 AD 189 199.

<sup>36</sup> *R v Kubuse and Another* 1945 AD 189 189.

In *R v Lewis*,<sup>37</sup> another strangulation case involving the existence of an intention to kill as inferred from the circumstances, X asked Y to have homosexual relations. Y agreed but later rejected such advances as he began to scream. In order to smother the screaming and overcome the deceased's resistance, X then applied pressure to the deceased's throat, who collapsed. His body was later found in a state of decomposition. It could not be established whether death was caused by strangulation or by the pressure applied on the carotid arteries. The court found that X had realised the necessity to accomplish his indecent act and the decision to apply force was deliberately designed to be effective; and for it to be effective, severe pressure was necessary for some duration.<sup>38</sup> The court found that it was:

...however, directly incidental to the performance of what the appellant knew to be an inherently dangerous act and the fact that the precise consequence of the act could not have been foreseen or contemplated by the appellant is irrelevant and he is nevertheless ... guilty of murder.<sup>39</sup>

It was held that X had intent in the form of *dolus eventualis* since he was aware of the degree of force he applied on the deceased, and was able to become conscious of the reaction of the deceased, however, X still continued with the act. It was however considered that it was irrelevant that it resulted in death without X considering the precise manner in which it occurred.

The cognitive component of *dolus eventualis* was held in *R v Horn*<sup>40</sup> to include the foresight of the possibility of harm; a few cases after this decision have not followed that development. This is evident from decisions after the 1958 decision in *R v Horn*<sup>41</sup> that are suggestive of the fact that foresight of a probability (and not a possibility) of harm is required.<sup>42</sup> According to Beyers JA, an accused will not pass the test of *dolus eventualis* if, at the time of his act he foresees, although slightly, the possibility of death.<sup>43</sup>

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<sup>37</sup> *R v Lewis* 1958 (3) SA 107 (A).

<sup>38</sup> *R v Lewis* 1958 (3) SA 107 (A) para 109 C.

<sup>39</sup> *R v Lewis* 1958 (3) SA 107 (A) para 109H.

<sup>40</sup> *R v Horn* 1958 (3) SA 457 (A).

<sup>41</sup> *R v Horn* 1958 (3) SA 457 (A).

<sup>42</sup> As in *R v Mabena* 1967 (3) SA 525 (R) 527. Examples of case law where the foresight requirement is 'likely' are *R v Sikunyana* 1961 (3) SA 549 (E); *R v Mawena* 1962 (1) SA 896 (FC); *S v Ntuli* 1962 (4) SA 238 (W).

<sup>43</sup> *R v Horn* 1958 (3) SA 457 (A) 465.

In some cases, the approach applied by the courts was the foresight of a 'slight possibility' approach, while in other cases the requirement was considered as being 'some risk to life'.<sup>44</sup> The majority of cases during this period focused on the requirement that X must have a foresight of possibility. Unfortunately, the courts fail to qualify the scope that is required for foresight.<sup>45</sup> In other cases, the requirement of foresight has been framed in terms of appreciating the harm that could possibly occur. It is obvious here that by applying this approach, the interpretation of the concept is construed broadly.<sup>46</sup> This explains why the Appellate Division decided that foresight of a possibility, "even if slight",<sup>47</sup> would represent the cognitive component of *dolus eventualis*. This means that X would be said to have *dolus eventualis* if he had foreseen that his act was only likely to cause a particular effect.<sup>48</sup> The Appellate Division in *S v Mini*<sup>49</sup> similarly held that X foresaw the slightest possibility that death may result from his act, and yet continued recklessly to do the same.

In an intention to kill, it is sufficient if X subjectively foresees the possibility of his act causing death and is reckless to the consequences occurring, as decided in *S v Sigwahla*.<sup>50</sup> In this case, X advanced a long knife he was holding in his hand upon Y who was approaching. The court, with certainty, stated that as X came upon Y, he jumped forward, raised his hand and stabbed Y in the chest. The force used was sufficient that it penetrated four inches to injure his heart. There was nothing to suggest any subjective ignorance or an unawareness by X that he did not understand the effect of a knife if forced in the upper part of the body. Holmes JA stated *obiter* that X subjectively appreciated the possibility that the stab would be fatal. He then went further to state that:

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<sup>44</sup> *S v Dhlamini and Another* 1972 (1) SA 807 (A) 817; *S v Magubane* 1975 (3) SA 288 (N) 292.

<sup>45</sup> *Malinga* 695; *S v Mtshiza* 1970 (3) SA 747 (A) 752; *S v Sikweza* 1974 (4) SA 732 (A) 736; *S v Sabben* 1975 (4) SA 303 (A) 304; *S v V* 1979 (2) SA 656 (A) 668; *S v Nhlapo and Another* 1981 (2) SA 744 (A) 750-751; *S v Mbatha en Andere* 1987 (2) SA 272 (A) 285; *S v Nango* 1990 (2) SACR 450 (A) 457; *S v Dlamini* 1991 (2) SACR 655 (A) 664-665; *De Oliveira* 65; *S v Erasmus* 2005 (2) SACR 658 (SCA) para [10].

<sup>46</sup> *S v Salzwedel and others* 1999 (2) SACR 586 (SCA) para [9]; *S v Roberts* 2000 (2) SACR 522 (SCA) para [17].

<sup>47</sup> *S v Mini* 1963 (3) SA 188 (A) para 191H.

<sup>48</sup> The court relied on past precedence in this regard. See *R v Kubuse* 1945 AD 189 199; *R v Sofianos* 1945 AD 809 812; *R v Valachia* 1945 AD 826 830-831; *R v Sikepe* 1946 AD 745 756; *R v Strauss* 1948 (1) SA 934 (A) 940; *R v Kuzwayo* 1949 (3) SA 761 (A) 770; *Thibani* 729-730; *R v Ncetendaba* 1952 (2) SA 647 (SR) 651; *R v Huebsch* 1953 (2) SA 561 (A) 567.

<sup>49</sup> *S v Mini* 1963 (3) SA 188 (A) 191.

<sup>50</sup> *Sigwahla* paras 570B-E.

1. The expression “intention to kill” does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless.
2. The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide.
3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.<sup>51</sup>

The court was in essence not advocating the objective approach to determine *dolus eventualis* but that, in determining X’s subjective foresight, the court should apply objective foreseeability with the intention of determining *dolus*, not *culpa*. It was emphasised that the court must observe the distinction between what actually went on in the mind of X at the time of the act (subjective foresight), and what a reasonable person in the position of X would have done (objective foreseeability).<sup>52</sup> In determining whether X subjectively foresaw the possibility of his conduct resulting in death, inference may be made as an embodiment of proof beyond reasonable doubts.

Therefore, if there is subjective foresight of a slightest possibility by X that his act might lead to the death of another, he will not succeed in a plea of *dolus eventualis*.<sup>53</sup> A wider application of the concept is expressed by Holmes JA that legal intention will still be present if X “foresees the possibility, however remote, of his act resulting in the death to another”.<sup>54</sup> This means the court was rejecting the argument that X must foresee the real possibility of death ensuing from his conduct. By implication, even if X’s subjective foresight of the possibility of Y’s

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<sup>51</sup> *Sigwahla* paras 570B-E. See also *Malinga* paras 694G-H; *Nkombani* paras 883A-C, 890B, 895F. Also see *Van Schalkwyk* para [12].

<sup>52</sup> Holmes JA in *Sigwahla* paras 570C-E.

<sup>53</sup> *De Bruyn* 510.

<sup>54</sup> See Burchell *Principles of criminal law* 357.

death was remote, he will still be guilty of a legal intention to kill. This is so because, considering the above-mentioned cases, there seems to exist no distinction between a 'foresight of a remote possibility' and a 'foresight of a real possibility' of death. The Appellate Division held that foresight of a possibility, though remote; make up the cognitive component of *dolus eventualis*.<sup>55</sup> It could be stated here that the requirement of *dolus eventualis* was applied widely in these cases.

In determining the test for the cognitive component, it was decided in *R v Sikweza*<sup>56</sup> that although the word 'likely' may be employed, foresight of a real possibility is required. The court took another approach to interpreting and applying *dolus eventualis* with the requirement of foresight of real possibility.<sup>57</sup> However, the case of *S v Shaik and Others*<sup>58</sup> saw the abandonment of the 'real possibility' application. This court decided that the requirement that X must have predicted the real possibility of the victim's death must be repudiated.<sup>59</sup> In this vein, if it is admitted that the defendant predicted the possibility of the victim's death, he will have the necessary intention.

The real possibility approach had been considered to be widely applied to determine *dolus eventualis*. This led to subsequent cases applying the volitional component approach to determining *dolus eventualis*. In *S v Dladla en Andere*,<sup>60</sup> it was held that the main feature that distinguishes *dolus eventualis* from other forms of criminal intent is the volitional component; the awareness or foreseen consequences of the perpetrator's conduct as a possibility. The perpetrator foresees the possibility ensuing, even if it is only "faint",<sup>61</sup> yet he still proceeds or reconciles himself to that conduct, whether the foreseen consequence follows or not (that is, he takes it into the bargain).

If X did foresee the possibility of his conduct causing death, then recklessness is implied, taking into consideration that X reconciled himself to that possibility. This

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<sup>55</sup> *De Bruyn* 510G.

<sup>56</sup> *S v Sikweza* 1974 (4) SA 732 (A) 736.

<sup>57</sup> See *R v Hercules* 1954 (3) SA 826 (A) 831 where an ambiguous phrase "probable or possible" was used.

<sup>58</sup> *S v Shaik and Others* 1983 (4) SA 57 (A) (hereinafter *Shaik*).

<sup>59</sup> *Shaik* paras 62D-E.

<sup>60</sup> *S v Dladla en Andere* 1980 (1) SA 1 (A) 4.

<sup>61</sup> Loubser and Rabie 1988 SACJ 417.

means that it would be possible for an actor to reconcile himself to the consequences if he foresees the possibility of his ensuing conduct to be remote, rather than if he foresees it to be real. In other words, X, upon foreseeing the real possibility of his conduct resulting in death, consents to that real possibility if he continues with the act. On the other hand, if he foresees only a slight possibility of his conduct resulting in death, he reconciles himself only to that slight possibility. The Appellate Division in *S v Dladla en Andere*<sup>62</sup> seemed to have weakened the extremely wide approach to the test for *dolus eventualis* as was applied in previous cases. Although the court seemed not to pay particular attention to *dolus eventualis*, it concluded that there is no legal intention where there is foresight of a remote possibility, only where there exists foresight of a real possibility.<sup>63</sup>

At one point during this period, the arguments had been in favour of a qualified possibility of foresight, which means that a slight possibility of harm will be sufficient for a finding of *dolus eventualis*. Consequently, foresight of a remote possibility cannot be considered for a finding of *dolus eventualis*.<sup>64</sup> A point of contention here is a situation whether X can be said to have foreseen the possibility of harm if he thinks of such harm, but however, considered the harm to be remote. X cannot be said to intend a result if he foresees the result to be remote. Foresight of a remote possibility is therefore considered to be useless as a requirement for *dolus eventualis* for policy reasons, this approach was considered to be “far too wide”.<sup>65</sup>

Another pertinent issue before 1985 was whether mistake relating to the chain of causation excluded intention. The courts have held that mistake relating to the chain of causation did not exclude intention.<sup>66</sup> This is because the definitional elements of the crime of murder do not contain a requirement to the effect that death, for example, must occur only in a particular way (like poisoning, shooting or stabbing). The fact is that murder is committed as long as X causes the death of Y. The manner in which Y's death is caused is irrelevant.<sup>67</sup>

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<sup>62</sup> *S v Dladla en Andere* 1980 (1) SA 1 (A).

<sup>63</sup> Paizes 1988 SALJ 636-644, 638.

<sup>64</sup> Hoctor 2013b SACJ 137.

<sup>65</sup> Hoctor 2013b SACJ 137.

<sup>66</sup> *Nkombani* 877; *Masilela* 1968 (2) SA 558 (A) 573-574. See Snyman *Criminal law* 190.

<sup>67</sup> Snyman *Criminal law* 190.

It has been realised that from the period 1946 to 1985, the courts had applied different approaches to determining *dolus eventualis*. For example, the courts in certain cases have applied the following approaches: the subjective approach, the objective approach; a foresight of real possibility; and a foresight of slight possibility approach. It has also been gathered that in some cases the courts had expressed the requirement of *dolus eventualis* as being “some risk to life”.<sup>68</sup> In *R v Hercules* phrases like “probable or possible”<sup>69</sup> was used. In the following section, the most current transformations in the concept of *dolus eventualis* will be investigated.

### 5.2.3 The period after 1985

The concept of *dolus eventualis* still endured conflicting interpretations and application, even after 1985. This trend was continued in *S v Ngubane*.<sup>70</sup> In this case, the accused pleaded guilty to culpable homicide, but was convicted of murder with extenuating circumstances by the trial court. Ngubane appealed to the Appellate Division on the ground that, since the prosecution had been prepared to accept a plea of guilty of culpable homicide; he could not be convicted of murder. Ngubane stabbed the deceased five times and fled the scene. The court was of the view that he must have foreseen, and did in fact foresee, that the wounds he inflicted would result in death, but he however continued stabbing the victim, reckless whether death resulted or not.

Although the Appellate Division noted that this reflects a finding that the form of intent was *dolus eventualis* and that the inference of intention was fully justified,<sup>71</sup> the issue before the Appellate Division was:

...whether the effect of the prosecutor’s willingness to accept a plea of culpable homicide had the effect of reducing the charge from murder to one of culpable homicide and whether the court therefore acted irregularly in adjudicating on the charge of murder.<sup>72</sup>

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<sup>68</sup> Burchell *Principles of criminal law* 355.

<sup>69</sup> *R v Hercules* 1954 (3) SA 826 (A) 831. See also *R v Geere and Others* 1952 (2) SA 319 (A) 322; *R v Bergstedt* 1955 (4) SA 186 (A).

<sup>70</sup> *Ngubane* 677. Also see above para 1.5 n 50-55.

<sup>71</sup> *Ngubane* 684.

<sup>72</sup> *Ngubane* 681.

Based on the fact that Ngubane acted negligently in causing the death of the deceased, the Appellate Division altered the conviction of murder to culpable homicide.<sup>73</sup> Although the Appellate Division interpreted *dolus eventualis* in this case, it did not apply it. Jansen JA, with reference to an earlier decision,<sup>74</sup> did state that in considering the question whether X did in fact consent to the possibility, the likelihood of the possibility eventuating in the eyes of X must have a bearing; he added that if X keeps on with his conduct “despite foreseeing a consequence as a real or concrete possibility”,<sup>75</sup> then it would be conclusive that X reconciled himself to that consequence. In this regard, it would be stated that X was reckless of that consequence. The reasoning here is that X would be less likely to reconcile himself or to take into the bargain consequences if he foresees the possibility of the result as remote or even slight rather than if he foresees this possibility as being real or concrete.

A few years after the decision in *S v Ngubane*, Paizes was of the view that the above assertion is misleading since X:

...who acts after foreseeing the real possibility of his act causing the death of another consents to the real possibility of death ensuing; one who acts after foreseeing only the slight possibility of his act causing the death of another reconciles himself to the slight possibility of death.<sup>76</sup>

This implies that X who executes a wilful act reconciles himself or takes into the bargain what he foresees at the time of his conduct. Paizes’ disparity with Jansen JA is that he considered it necessary to challenge the broad test for *dolus eventualis* that was adopted.<sup>77</sup> The reasoning here is that if Jansen JA’s view is taken into consideration, it will imply that legal intention cannot be found to be present in a case where X foresees the likelihood of harm ensuing from his conduct to be merely a slight or remote possibility. Therefore, the view that legal intention should only exist in a situation where there is foresight of a real or concrete possibility of death or harm ensuing, for example, is not good law, as was

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<sup>73</sup> *Ngubane* 688.

<sup>74</sup> *S v Dladla en Andere* 1980 (1) SA 1 (A) 4. See Paizes 1988 SALJ 638.

<sup>75</sup> In *Ngubane* paras 685G-H.

<sup>76</sup> Paizes 1988 SALJ 638.

<sup>77</sup> See *S v Dladla en Andere* 1980 (1) SA 1 (A).

the case in *S v Beukes*.<sup>78</sup>

The brief facts in *S v Beukes* are that Beukes and Crawford had been convicted of murder and attempted robbery with aggravating circumstances. They had been shown to have participated in the attempted robbery together with another person, known as Van Staden. Although Beukes and Crawford were not physically involved in the violent acts that formed the subject of the two charges, they waited in Beukes' car while Van Staden performed these acts. Their participation included (a) the provision of different items of clothing by Beukes to Van Staden; (b) the driving of the car to the crime scene by Beukes; and (c), as it appeared from a statement by Crawford, an arrangement that Van Staden would 'pull the job' and obtain money for all three of them, while Beukes and Crawford waited in the car. The court a quo had found *mens rea* to be present in the form of *dolus eventualis*. On appeal, the appellants argued that they lacked the necessary *mens rea* for murder.

It was accepted in the appeal that since Beukes and Crawford were aware that Van Staden was carrying a loaded pistol, and that he had told them earlier that he would shoot anyone who tried to resist him during the robbery; Beukes and Crawford had foreseen the possibility that Van Staden might kill someone. However, it was challenged that Beukes and Crawford did not reconcile themselves to that possibility. The Appellate Division stated that one cannot quarrel with the finding that Beukes and Crawford had legal intention to kill. In the course of probing academic views, the court found it to be at odds. There are those who have the view that there is no further element necessary than a requirement that there should be foresight of a real or concrete possibility. Others again, call for a voluntative element, but do not give any substance to such condition.<sup>79</sup> From the facts, the court drew inference as to the state of mind of Beukes and Crawford which indicated that, "objectively viewed it was reasonably possible that the consequences in question would result."<sup>80</sup> Therefore, where such possibility is absent or remote, it will be accepted that if Beukes and Crawford were not aware of the consequences, they did not ultimately consider the

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<sup>78</sup> *S v Beukes en 'n Ander* 1988 (1) SA 511 (A).

<sup>79</sup> *S v Beukes en 'n Ander* 1988 (1) SA 511 (A) 330.

<sup>80</sup> See Paizes 1988 SALJ 639.

consequences as a reasonable possibility.<sup>81</sup>

However, where X whom, after convincing himself that no death will result, forms a common purpose with helpers to rob, X will be reckless in terms of the death of the victims of the robbery. *S v Beukes* is good law as it recommends that *dolus eventualis* generally requires foresight of more than merely remote or slight possibility.<sup>82</sup> Paizes had noted that the judge in *S v Beukes* seemed to have counterfeited some link between rules governing inferential reasoning, and substantive principles in relation to the degree of foresight that is required for legal intention.<sup>83</sup> *Dolus eventualis* was considered not to be present in this case as a result of the fact that when the accused conducted himself, he no longer foresaw the possibility of causing the relevant consequences.<sup>84</sup>

In *S v Aitken and Another*,<sup>85</sup> although the accused was convicted of theft based on *dolus eventualis* by a lower court, the court held that legal intention was not enough to hold the accused guilty since actual intention is required in crimes of theft.<sup>86</sup> This position was accepted and further developed in *S v Goosen*,<sup>87</sup> where it was held by the court that the elements of intention were not satisfied since the consequence occurred in a different manner from that which X foresaw.<sup>88</sup> By implication, *dolus eventualis* only exist in a case where there is ample connection between the manner foreseen by X and the actual manner in which the result occurred.<sup>89</sup> This was analysed by the Appellate Division as a form of mistake relating to the causal chain of events which exclude intention, so long as the actual causal chain of events is materially different from the intended or foreseen by him.<sup>90</sup>

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<sup>81</sup> *S v Beukes en 'n Ander* 1988 (1) SA 511 (A) paras 522F-G; Paizes 1988 SALJ 638.

<sup>82</sup> See Paizes 1988 SALJ 640.

<sup>83</sup> Paizes 1988 SALJ 640-641.

<sup>84</sup> There is no need to consider whether X was reckless since recklessness is a colourless concept.

<sup>85</sup> *S v Aitken and Another* 1988 (4) SA 394 (C).

<sup>86</sup> *S v Aitken and Another* 1988 (4) SA 394 (C) para 400F.

<sup>87</sup> *S v Goosen* 1989 (4) SA 1013 (A) para 1013 (hereinafter *Goosen*).

<sup>88</sup> *Goosen* paras 1026H-J.

<sup>89</sup> The courts refer to the situation where there is no ample connection between the way foreseen by X and the actual manner in which the result occurred as a mistake relating to the chain of causation or a mistake as to the causal sequence of events. See Snyman *Criminal law* 189.

<sup>90</sup> See Snyman *Criminal law* 190.

It has been submitted that the decision in *S v Goosen*<sup>91</sup> is an equitable judgment because a mistake relating to the causal chain of events should not exclude intention. The reasoning here is that in result crimes, such types of mistake is not material since the intention required in consequence crimes does not negate knowledge of the exact time and the manner in which the result is brought about. What is necessarily required here is that X foresees that his conduct will cause the unlawful state of affairs.<sup>92</sup> Specifically, the definitional elements of a crime, murder, for example, do not warrant that death be brought about in a particular manner – such as through shooting, poisoning or stabbing Y in the heart. What is required here is that X's act or omission, in general, should be the cause of Y's death.

Snyman,<sup>93</sup> in relation to the decision in *R v Goosen*<sup>94</sup> noted that once one attempts to give a meaning to the concept of 'material deviation', one is unavoidably applying the same standard or principles that is used to determine legal causation. Examples of key words used in this regard include 'improbable', 'unexpected', 'remote' and '*novus actus interveniens*'. He concludes that, if the courts were to apply the decision in *S v Goosen*, it would imply that the courts, when determining culpability (intention), will apply the criterion already applied when the court was determining the issue of causation.

It is apparent that a court cannot resolve an issue arising in one element of a crime by applying the test which the other element already has. Snyman is of the view that in a set of facts, if the court is reluctant to hold X culpable for murder, for example, the reason must be found in the lack of a legal causal link between X's act or omission and Y's death, and not in the absence of an intention to kill. In essence, the objection to the decision in *R v Goosen* is that following the rules laid down will push the courts in applying the principles of causation in a bid to answer

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<sup>91</sup> *Goosen* 1013.

<sup>92</sup> Snyman *Criminal law* 191 n159 quoting Ashworth: "When D sets out to commit an offence by one method but actually causes the prohibited consequence in a different way, the offence may be said to have been committed by an unforeseen mode. Since most crimes penalizing a result (with fault) do not specify any particular mode of commission, it is easy to regard the difference of mode as legally irrelevant. D intended to kill V; he chose to shoot him, but the shot missed; it hit a nearby heavy object, which fell on V's head and caused his death. Any moral distinction between the two modes is surely too slender to justify recognition ... Pragmatism is surely the best approach here, and English law is generally right to ignore the unforeseen mode."

<sup>93</sup> See Snyman *Criminal law* 191-192.

<sup>94</sup> *Goosen* 1013.

the question of culpability or intention. A mistake as to the causal sequence of events is not a material mistake; mistake as to causal sequence was confused with mistake as to the causal act.

On the other hand, if *dolus eventualis* embodies a cognitive element, which is a subjective insight of the likelihood that harm may ensue, and a conative element which involves the direction of the will towards the result,<sup>95</sup> then it is certain that X actually foresaw the possibility of harm but continued to that effect. Concluding that because X should have foreseen the consequences of his conduct, therefore *dolus eventualis* has been established,<sup>96</sup> has been considered to be a wrong approach.<sup>97</sup>

The courts seem to have abandoned the decision in *S v Goosen* in subsequent cases. This is because the Appellate Division, in subsequent decisions, did not refer to the rule applied in *S v Goosen*,<sup>98</sup> for example, as the decision in *Nair*<sup>99</sup> was considered to be a correct interpretation. It was considered that a mistake relating to the particular manner in which Y would die is irrelevant. The court, in this case, did not inquire as to the mistake in relation to the chain of events.<sup>100</sup>

In *Lungile*,<sup>101</sup> X and his gang executed an armed robbery where a police officer legally interceded by firing a few shots. Y, a bystander, died as a result of one of the shots. It was certain that X never intended that Y be killed. It was, however, submitted that X's conviction for murder was correct. The issue of the possibility of X's mistake as to the exact causal chain of events was irrelevant.<sup>102</sup>

For X to be liable for having committed a criminal act, it was stated that the conduct needed to establish criminal liability does not necessarily need to be

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<sup>95</sup> Hoctor 2013b SACJ 132-133.

<sup>96</sup> *S v Tshabalala* 2005 JDR 1196 (T) para [6].

<sup>97</sup> Hoctor 2013b SACJ 135.

<sup>98</sup> See Snyman *Criminal law* 192.

<sup>99</sup> *Nair* 1993 (1) SACR 451 (A). See Snyman *Criminal law* 192.

<sup>100</sup> In *Nair* 1993 (1) SACR 451 (A), X threw Y's body into the sea after assaulting Y. It was uncertain whether Y died as a result of the assault meted by X, or as a result of drowning. There was a reasonable possibility that X might have intended to let Y die by drowning, or that Y died as a direct result of X's assault, or the other way around. X was, quite correctly, convicted of murder.

<sup>101</sup> *Lungile* 1999 (2) SACR 597 (SCA). See Snyman *Criminal law* 192.

<sup>102</sup> Also consider the case of *S v Molimi and Another* (249/05) [2006] ZASCA 43 (hereinafter *Molimi*) where the existence of mistake relating to the chain of events was dismissed. This means that the rule in *Goosen* was disregarded.

evidenced by direct intent (*dolus directus*). In South African criminal law, other forms of criminal intention, such as *dolus eventualis*, is regarded to be sufficient to meet the requirement of criminal liability. It was held that flexibility ought to be allowed for the legislature to determine the appropriate level of fault required for any particular criminal conduct to render such conduct criminal.<sup>103</sup> Brand JA in *S v Humphreys* illustrated the test for *dolus eventualis* as follows:

On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.<sup>104</sup>

In *Van Schalkwyk v The State*,<sup>105</sup> X, a farmer, was convicted by a regional magistrate court for the murder of Y<sup>106</sup> with intent in the form of *dolus eventualis*. Y had failed to feed the cattle over the weekend as instructed by X, and in addition Y reported for duty on Monday, 14 February 2014, with a blood alcohol content of 0.26g/100ml, and was obstructive and unresponsive. X was annoyed. Y was holding two iron hay hooks, apparently intending to do what he did not do over the weekend. X instructed Y to leave the hooks and get off the trailer. Y remained unresponsive, standing on the trailer holding the two iron hay hooks. The state's version, according to Z, another farm worker, explained that X grabbed the hooks from Y and hit Y's chest on the left side with one of the hooks. The hook detached one of Y's ribs and pierced ten centimetres into his heart which killed him. X denied striking Y with the hook but admitted that he grabbed the hooks from Y, at which point Y moved backwards and turned his chest to the left before immediately moving forward towards the hooks and falling to his knees. However, counsel for X accepted that X had hit Y.

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<sup>103</sup> See the assertion of O'Regan J in the Constitutional Court judgment on *dolus eventualis* in *S v Coetzee* 1997 (3) SA 527 (CC) para [177].

<sup>104</sup> *Humphreys* para 13.

<sup>105</sup> *Van Schalkwyk* 49.

<sup>106</sup> X was convicted of murder on count 1, and attempting to defeat the ends of justice on count two.

The main issue before the Northern Cape High Court Division was to determine whether the appellant was guilty of murder with intent in the form of *dolus eventualis*. The Court of Appeal, referring to a recent decision<sup>107</sup> stated that:

...a person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore "gambling" as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act "reckless as to the consequences" (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been "reconciled" with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions.<sup>108</sup>

All the necessary elements have been eloquently clarified in the above quotation with Baartman AJA adding that it is enough that the probability of death is foreseen which, together with a disregard of the outcome, is enough to comprise the necessary criminal intent.<sup>109</sup>

In a bid to effectively interpret and apply the concept of *dolus eventualis*, the state in *Van Schalkwyk v The State* had to prove beyond reasonable doubt that (a) X had the subjective foresight of the likelihood that striking Y with the hay hook could result in deadly consequences;<sup>110</sup> and (b) X had ignored the consequences, or X had resolved or reconciled himself with the foreseen possibility. The essence here is that the two legs must be interpreted and applied in conjunction.<sup>111</sup> Consequently, the High Court decision was replaced with a conviction of culpable homicide.<sup>112</sup>

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<sup>107</sup> *DPP v Pistorius* para 26.

<sup>108</sup> See *Van Schalkwyk* para [14].

<sup>109</sup> See *Van Schalkwyk* para [14].

<sup>110</sup> On the first leg of *dolus eventualis*, Baartman AJA noted that when the accused was about to strike the deceased with a hay hook, he foresaw the possibility that death might ensue even though that may not have been what he wanted to happen. See *Van Schalkwyk* para [35].

<sup>111</sup> In *Van Schalkwyk*, the court justified the enquiry into the second leg of *dolus eventualis* when it concluded that the X disarmed Y who was standing in front of him, X had 40 years' experience as a farmer and was familiar with hay hooks, the weapon used, X's knowledge of the weapon and the part of the body where the wound was inflicted was conclusive that he subjectively foresaw the risk of death ensuing (para [16]); and it was convinced that force would have been necessary to mete out the wound (paras [18]-[19]).

<sup>112</sup> *Van Schalkwyk* 62.

Accordingly, it is submitted that the judgment in *Nair, Lungile* and *Molimi* are preferred above the decision in *Goosen*. The general perception here is that persons who carry out unlawful acts and who foresee the possibility that a person may be killed as a result, but nevertheless decide to continue with their unlawful acts are, as a rule, disregarding the actual nature in which Y, for example, may be killed.<sup>113</sup>

Accordingly, if the approach of the Supreme Court of Appeal was objective, whereas a subjective approach is required; to what extent must the court allow subjective inference? The interpretation and application of the concept of *dolus eventualis*, especially in case of murder, is still unclear even in recent cases like the *Pistorius*-case, in terms of varying approaches followed by the High Court and the Supreme Court of Appeal. The courts have time and again held accused in the course of robbery liable for murder, for having acted with both *dolus eventualis* and *dolus indeterminatus*. This type of situation is however not possible, especially as the law of evidence plays a significant role when determining X's guilt, based on the fact of each particular case. X cannot be convicted of a crime without the function of the law of evidence. It should be noted here that the law of evidence is very broad; therefore, attention will be paid only to very specific aspects or principles relating to the application of the concept of *dolus eventualis*. The following section will take into consideration this data while illustrating how the approach to determine foresight by South African jurists has been fraught with muddled interpretations.

### **5.3 Confusion in the approach to determine foresight**

One of the research questions in this thesis is to ascertain the specific aspects that constitute the mental element of *dolus eventualis*. While one court would consider the objective test,<sup>114</sup> another would consider reasonable possibility, and some other courts a real possibility<sup>115</sup> of foresight occurring in order to determine *dolus eventualis*. Certain courts have also considered foresight to require some kind of

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<sup>113</sup> See Snyman *Criminal law* 192.

<sup>114</sup> *De Oliveira* 59. See para 2.3.3.3 (a) and (b) above.

<sup>115</sup> *S v Ushewokunze* 1971 (2) SA 360 (RA).

risk, other courts determine foresight based on a remote possibility, or foresight of a real or reasonable possibility. Academic opinion also differs: Whiting and Paizes prefer that the degree of foresight should be remote, and not qualified. Burchell and Hunt have criticised this view as being too broad, and that it may likely yield unfair results. They doubt the fact that a person can think of, or foresee a possibility, but consider it as too remote.<sup>116</sup> To Engers, Loubser and Rabie, however, claim that foresight of a remote possibility does not exist, “would be straining both language and logic”.<sup>117</sup> Snyman supports the view that the possibility must be reasonable or material.<sup>118</sup> Morkel suggests that a concrete possibility must exist.<sup>119</sup> On the other hand, qualifying the degree of foresight has been critiqued on grounds that it cannot be consistently interpreted. These different interpretations will be elaborated on in a bid to determine the reasoning underlying the different approaches.

The approach to the interpreting and applying of *dolus eventualis* is already applied differently in *S v Cyril Salzwedel*.<sup>120</sup> In this case, the main witness for the prosecution, Theresa de Wet, was a group member within the Afrikaner Weerstandsbeweging (AWB) who had armed themselves, masked their identities and were patrolling a white neighbourhood in East London at night. Their main object was to indiscriminately attack any black person they meet. They were trained in the use of firearms by the AWB, but were never instructed by the AWB to attack any black person.<sup>121</sup> A group of black males drove from Beacon Bay to East London in a red car owned by a certain Tommy. The car broke down in the area patrolled by the white vigilante group. The group caused damage to the car in the absence of the occupants, and proceeded to other areas. When they returned, they noticed the black occupants inside the car. The group attacked them as they tried to escape, however, the deceased tripped and fell, and was brutally beaten to death.

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<sup>116</sup> Burchell and Hunt *South African criminal law and procedure* 146.

<sup>117</sup> Engers 1973 *Responsa Meridiana* 223; Loubser and Rabie 1988 SACJ 418.

<sup>118</sup> Snyman *Criminal law* 180.

<sup>119</sup> Morkel 1981 SACC 173.

<sup>120</sup> *S v Cyril Salzwedel and Others* SCA Case No 273/98 29 November 1999 paras [6], [7]. (hereinafter *Salzwedel*)

<sup>121</sup> *Salzwedel* paras [6], [7].

The circumstances that led to the conviction and sentencing of the respondent in *Salzwedel* were considerably acknowledged. Intrinsic in the findings is the suggestion that the respondents accepted or appreciated the fact that death might ensue from their unlawful act, but, however, decided to proceed with the act, regardless of the consequences that might ensue. What is worth noting here is that the trial judge found that the “accused did not desire the death of their victim. Indeed, it was the last thing they wanted”.<sup>122</sup> These findings, as noted by the Supreme Court of Appeal, were not justified owing to the objective facts leading to the gruesome manner in which the deceased was killed. The findings by the trial judge that the respondents were guilty of murder on the basis of *dolus eventualis* is considered inconsistent.

It was also found at the trial that there were mitigating factors affecting the commission of the murder, as it was not planned or premeditated.<sup>123</sup> On this point, the Supreme Court of Appeal emphasized that the respondents might not have planned the actual murder of the deceased, but the group had a plan of great foresight and precision to intimidate and attack black people, after arming themselves with weapons and affixing a false registration number on the car they were using.<sup>124</sup>

The trial judge placed much emphasis on the personal circumstances of the respondent, without properly balancing these conditions against the serious nature of the unlawful act committed.<sup>125</sup> In this regard, the Supreme Court of Appeal

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<sup>122</sup> *Salzwedel* para [15].

<sup>123</sup> *Salzwedel* para [16].

<sup>124</sup> *Salzwedel* paras [15], [16]. The four respondents were convicted and sentenced with the following charges by the court a quo: They murdered the deceased - each of the respondents was sentenced to ten years' imprisonment, but the whole of the sentence was suspended for five years on condition that the relevant respondent submit himself to three years' correctional supervision. Each of the respondents was ordered to pay R3000 into the Guardian's Fund in a monthly instalment of R50 for the benefit of the minor children of the deceased. For the offence of malicious damage to property, each of the respondents was sentenced to twelve months' imprisonment which was also suspended for five years on condition that the relevant respondent was not again convicted of malicious damage to property. Each of the respondents was also ordered to pay R150 to Tommy. Mr Turner, who stood for the state in both the trial and the appeal, took the view that the sentence in respect of the charge of murder was “glaringly inadequate”, and appealed against the sentence imposed on each of the respondents. See *Salzwedel* paras [1]-[5].

<sup>125</sup> The trial judge was largely influenced in this approach by the report and the evidence of Dr Irma Labuschagne, a forensic criminologist whose focus on the personal circumstances of the respondents had led her to recommend that they should be kept out of prison.

made reference to the remark made by Nienaber JA in *S v Lister*,<sup>126</sup> and the sentence imposed by the trial court was set aside. It was held by the Supreme Court of Appeal that all the respondents acted together in concert, therefore the act of each must be attributed to the other respondents.<sup>127</sup> The sentences of the respondents by the court *a quo* were set aside, and the accused were sentenced to twelve years' imprisonment.<sup>128</sup>

Stating that the perpetrator "should have foreseen"<sup>129</sup> the possibility, implies imputing blame already on him as the phrase says nothing in terms of what he personally, at that particular point of fact, was thinking or foreseeing. In this manner, the court is simply comparing the state of mind of the perpetrator with that of a fictitious reasonable human being. Snyman warns that when stating that the perpetrator had intention, it is not advisable for the court to make use of expressions like 'must have' or 'should have' foreseen the consequences.<sup>130</sup> According to Burchell, intention in the form of *dolus eventualis* relates to the result which is not intended by the perpetrator, but such result can be expected to ensue if he proceeds with his intended conduct. The focus here is on the consequence foreseen by the perpetrator,<sup>131</sup> and not on whether he reconciled himself to the consequences. Therefore, if it can be reasoned that the perpetrator ought to have foreseen the result; by inference he did foresee the consequences.<sup>132</sup>

When determining through inferential reasoning what the perpetrator foresaw or thought at the critical moment, the court must take into account objective factors, like the kind of weapon the person used, the gravity of the bodily harm on the victim, and also "objective probabilities of the case and general human experience".<sup>133</sup> In *Humphreys*, the Supreme Court of Appeal disregarded the aspect of considering an initial foresight inquiry into *dolus eventualis* – did the perpetrator foresee the consequences of his conduct as a real or substantial possibility or not? However, Burchell suggests that this inquiry is one of foresight,

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<sup>126</sup> *S v Lister* 1993 (2) SACR 228 (A) paras 232h-l. Also see *S v Botha* 1998 (2) SACR 206 (A) paras 211h-l.

<sup>127</sup> *Salzwedel* para [19].

<sup>128</sup> *Salzwedel* para [22]. Each of the respondents still had to pay R150 to Tommy.

<sup>129</sup> Snyman *Criminal law* 184.

<sup>130</sup> Snyman *Criminal law* 186; Burchell *Principles of criminal law* 359.

<sup>131</sup> Burchell *Principles of criminal law* 358.

<sup>132</sup> Burchell *Principles of criminal law* 359; *Mini* 196.

<sup>133</sup> Snyman *Criminal law* 186.

and that the addition of the volitional component to determine *dolus eventualis* is superfluous.<sup>134</sup>

Burchell argues that if death was foreseen by the perpetrator as a real possibility; it might be easier to draw the inference that he took the likelihood of the unlawful consequences into the bargain.<sup>135</sup> For example, if a motor vehicle driver, who is driving within the stipulated speed limit and causes the death of another, is arrested for murder, a court must be established that the driver foresaw a real possibility that his conduct would result in death.<sup>136</sup> It is, however, still questionable whether the issue of a real possibility lies in the mind of the accused. This is because *mens rea* is found in cases where the perpetrator, without any particular malice to commit murder, consciously took upon perpetrating an act (driving within the required speed limit) which he was aware was lawful, but which resulted in unlawful consequences (causing the death of another).

In the *Humphreys*-case, the many successful executions of his dangerous driving manoeuvres were not satisfactory enough to overrule the inference that he foresaw that there was a real or a substantial risk that on another occasion, it might not be successful. The court's conclusion was that there was no evidence that he reconciled himself to his own death or to that of his passengers because he thought it would not happen. This practically rule out any finding of *dolus eventualis* - where injuries or death caused to others as well as to the perpetrator are foreseen as a consequence of the conduct. In this vein, the jurisprudence surrounding the volitional component of *dolus eventualis* could not be credible.<sup>137</sup>

The approach that led to the decision in the *Humphreys*-case was later applied in *Ndlanzi v The State*<sup>138</sup> where the perpetrator, who was driving a taxi during peak hours, collided with a newspaper stall on the pavement. He then reversed in order

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<sup>134</sup> Burchell *Principles of criminal law* 376. See para 2.3.3.2 (n 108-111) above.

<sup>135</sup> Burchell *Principles of criminal law* 377; *Humphreys* para [18]. The reason for the decision in *Lawrence* was to guarantee that "those who abuse public roads will not get off a charge of reckless driving by saying that they were perfectly convinced that their manner of driving presented no danger, because they were so clever that they could always avoid a mishap. In order to rule out this defence as a matter of law, it was not enough to ask whether the risk would have been obvious to the defendant if he had been cool and sober, and had given thought. The object of the offence of reckless driving is to catch the driver who flagrantly disregards rules of prudence, whatever he may think about the safety of his behaviour".

<sup>136</sup> Paizes (ed) *Commentary on the Criminal Procedure Act* 1.

<sup>137</sup> Burchell *Principles of criminal law* 377.

<sup>138</sup> *Ndlanzi* para [39].

to get back onto the road, and in doing so, drove over the victim resulting in his death. Ndlanzi was convicted in both the regional and the High Court for murder. On appeal, it was found that even though he had foreseen the possibility that by driving on the pavement, he could cause the death of someone, he did not reconcile himself to that possibility. Accordingly, the second component of *dolus eventualis* was not established based on the evidence. The reasoning here is that he had subjectively taken a risk which he indeed thought would not lead to the unlawful consequences.

The approach in *Humphreys*-case was also followed in other cases<sup>139</sup> after *Ndlazi*. In *S v Maarohanye*,<sup>140</sup> two perpetrators who were racing against each other on a public road in a residential area, lost control of their cars, causing the death of four pedestrians, and maiming two others. The appeal court concluded that the findings by the court *a quo* based on the evidence that “the effect of the drugs had induced a sense of euphoria”<sup>141</sup> which made them think that their conduct would not lead to any unlawful consequences, indicate the absence of *dolus eventualis*. The appeal court found that, as a result of the drugs the two drivers took, they did not foresee the likelihood of causing any injury or death. Therefore, they did not reconcile themselves with such eventualities.<sup>142</sup> The conviction of murder was set aside by the appeal court, and the two perpetrators were convicted of culpable homicide.

The following subsection examines the relevance of the requirement that foresight must include some kind of risk. The degree of possibility required for this form of intent will consequently be discussed.

### 5.3.1 Foresight requiring some kind of risk

The test for criminal responsibility in earlier cases had been whether the consequences were ‘likely’.<sup>143</sup> In *S v Du Randt*, the court decided that the degree of foresight should be qualified and defined as “some kind of risk”<sup>144</sup> - considering

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<sup>139</sup> See the decision in *Maarohanye and Another v S* 2015 (1) SACR 337 (GJ) (hereinafter *Maarohanye v S*).

<sup>140</sup> *S v Maarohanye and Another* 2015 (2) SA 73 (GJ) (hereinafter *S v Maarohanye*).

<sup>141</sup> See *Maarohanye v S* paras [22], [23].

<sup>142</sup> *Maarohanye v S* para [24].

<sup>143</sup> Burchell *Principles of criminal law* 362. See para 2.3.3.1 above.

<sup>144</sup> *S v Du Randt* 1954 (1) SA 313, 316.

that one of the requirements is an appreciation of a reasonable possibility of risk to life. However, there is no indication of how this requirement should be established. The phrase 'some risk to life' is similarly vague, as it does not clearly indicate whether there must be a possibility or a probability of the death foreseen. In some case law, it has been held that the phrase refers to a possibility, and not a probability that death may result.<sup>145</sup> The authority in *R v Horn* went on to cite that 'likely' is also comparable to 'probable'.<sup>146</sup> Moreover, it has been stated that where the perpetrator intends to cause a result,<sup>147</sup> he will have *dolus eventualis* regardless of the remoteness of the possibility.<sup>148</sup> This is because a person who does not see the possibility of a death occurring because, as, according to the perpetrator, the risk is slight or unlikely, is entitled to gamble with the life of another.

The problem with this approach is that where a consequence is considered to be improbable or too remote, it would be very difficult to ascertain by inferential reasoning that the perpetrator actually foresaw the consequences of his conduct. In other words, where the possibility of some kind of risk is remote, the less likely it is that the consequences were foreseen by the perpetrator.<sup>149</sup> Applying the requirement of 'some kind of risk' would certainly lead to wrong or harsh decisions. As seen above, South African courts normally use the concepts 'foresight with a possibility' or 'foresight with a risk' of the result transpiring, without qualifying the degree thereof with an adjective. Yet, in some cases, this has happened. For a finding of *dolus eventualis*, the descriptives "even if slight",<sup>150</sup> "improbable",<sup>151</sup> "highly improbable",<sup>152</sup> and "however remote"<sup>153</sup> have sufficed. In this vein,

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<sup>145</sup> *Horn* paras 467A-B; *Nemashakwe* para 523B. This issue has been settled in that the perpetrator only has to foresee the possibility, and not necessarily the probability of the death occurring. The probability, however, still plays a role, according to Loubser and Rabie 1988 SACJ 417: "the probability or likelihood of its occurrence may be relevant in drawing the inference that the accused did in fact foresee it: the greater the likelihood or probability of death, the stronger would be the inference that the accused in fact foresaw it".

<sup>146</sup> *Horn* para 467B.

<sup>147</sup> Whiting 1988 SACJ 443.

<sup>148</sup> Paizes 1988 SALJ 636, 642. Whiting considers the required foresight by introducing the question of social utility – "where the act involved is without social utility, the accused will be held liable, even if his foresight was only of a remote possibility, where he consciously created the risk". See Whiting 1988 SACJ 440, 446.

<sup>149</sup> *Shaik* paras 62D-E.

<sup>150</sup> *Mini* para 191H.

<sup>151</sup> *Ngubane* paras 685F-G.

<sup>152</sup> *Shaik* paras 62F-G.

foresight of a 'remote' possibility' has also been considered in some cases. This will be discussed next.

### 5.3.2 Foresight of a remote possibility

Another approach the courts apply is the foresight of a remote possibility.<sup>154</sup> The issue here is whether the perpetrator would be guilty of *dolus eventualis* in terms of the consequence on grounds of foresight of a remote possibility of the result occurring.<sup>155</sup> While it is accepted that the foresight required for *dolus eventualis* must not be more than a remote possibility of the consequences ensuing, there is a remarkable difference between such statement and the approach applied by South African courts over the years.<sup>156</sup> This issue can be resolved by considering the following hypothetical case: A perpetrator possesses a number of pistols, but he is aware that only one of the pistols is loaded. He does not know which one is loaded, or which are not loaded. He randomly picks one of the pistols, puts it against another person's forehead, and pulls the trigger. The purpose of the perpetrator is to expose the other person to risk, and not to kill him. If the perpetrator happened to pick up the loaded pistol, killing the person instantly, the question is whether the perpetrator will be responsible for murdering the deceased. One might state here that consideration must be had on the number of pistols that were in his possession. The reason is because it is certain that the more pistols this person possesses, the more the probability is slighter or more remote that it would result in fatal consequences.

This case differs with *dolus eventualis* because it is the perpetrator's intent (he acts with *dolus directus*) to expose the deceased to such risk. Therefore, such case should be treated in the same manner as in cases where the perpetrator has *dolus directus* in terms of the result. Where this is the case, the number of pistols put together is irrelevant, so that he could then consider the likelihood of a fatal

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<sup>153</sup> *Thibani* 729-730; *De Bruyn* para 510G.

<sup>154</sup> Van Oosten 1982 *De Jure* 423 supports the view that a remote possibility is sufficient for *dolus eventualis*.

<sup>155</sup> Whiting 1988 *SACJ* 443.

<sup>156</sup> Whiting 1988 *SACJ* 443-444.

outcome as very slight or remote - he will still be held responsible for murder.<sup>157</sup>

Paizes points out that although there are declarations by the courts regarding foresight of a remote possibility as sufficient; *dolus eventualis* is absent where the perpetrator has foreseen the possibility of the consequences eventuating as a slight or remote, but not as a real possibility.<sup>158</sup> Therefore, accepting foresight of a remote possibility would likely lead to conflicting findings.<sup>159</sup> Subjectively, the more remote or improbable the perpetrator foresaw the likelihood that a consequence might ensue from his conduct, the more improbable it is to conclude that he in fact foresaw the likelihood of the consequences ensuing.<sup>160</sup> Therefore, *dolus eventualis* will not be present since the perpetrator did not reconcile himself to the likelihood that the result would occur.

In a bid to effectively interpret and apply this concept correctly, one of the issues the Supreme Court of Appeal in the *Pistorius*-case had to decide upon was whether the concept of *dolus eventualis* was properly applied to the particular facts, including a situation of *error in objecto*.<sup>161</sup> In ascertaining whether Pistorius acted with *dolus eventualis*, the court made reference to the trial court's reasoning in this regard:

1. Did the accused subjectively foresee that it could be the deceased behind the toilet door and
2. Notwithstanding the foresight, did he then fire the shots, thereby reconciling himself to the possibility that it could be the deceased in the toilet?<sup>162</sup>

It is admitted that the evidence tendered before the court did not support the argument of the state that this was a case of *dolus eventualis*. Evidence was submitted in that Pistorius thought at the time he was firing the shots through the toilet door, the victim (his girlfriend) was in the bedroom. If it is certain that he mistakenly thought that his life was at risk, it would exclude intention. The court

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<sup>157</sup> See Whiting 1988 SACJ 440, 443, citing Williams *Criminal law* 59-60, who states it as having been used by the English criminal law commissioners in 1833; *Horn* 467; *R v Suleman* 1960 (4) SA 645 (N) para 647A.

<sup>158</sup> Paizes 1988 SALJ 636, 642; *Humphreys v The State* (424/12) [2013] ZASCA 20 60.

<sup>159</sup> Burchell and Hunt *South African criminal law and procedure* 146; Burchell *South African criminal law and procedure* 373.

<sup>160</sup> Snyman *Criminal law* 180; *Shaik* paras 62D-E.

<sup>161</sup> *DPP v Pistorius* para [20]. For an explanation of the concept, see para 2.4 (a) above.

<sup>162</sup> *DPP v Pistorius* para [27].

had to consider whether he foresaw the possibility that his action would result in death, but continued recklessly, whether death occurred or not. The response was not in the affirmative, even though state counsel had referred to “a good grouping”<sup>163</sup> of bullets fired at the toilet door as proof of his aim to kill whoever was behind the toilet door – although no evidence was submitted to support this assertion.

One is tempted to question here, for example, whether the accused in the *Pistorius*-case foresaw the possibility (the cognitive part of *dolus eventualis* – that is, knowledge of unlawfulness) that someone could be killed? Did he reconcile himself (conative or volitional) by acting to that possibility? According to Snyman, the term ‘possibility’ is elastic.<sup>164</sup> The issue to consider here is whether such possibility must be a ‘strong possibility’, ‘remote’, or ‘slight possibility’? Snyman makes it clear that if the possibility is foreseen by the perpetrator as far-fetched or remote, then it cannot be said that he had *dolus eventualis*.

Any normal person foresees that there is a remote or exceptional possibility that an everyday activity, such as driving a motor car, may result in somebody else’s death, and if he nevertheless proceeds with such an activity, it does not mean that he therefore has *dolus eventualis* in respect of the result which he foresees only as a remote possibility. On the other hand, *dolus eventualis* is not limited to cases where the result is foreseen as a strong possibility. It is submitted that the correct approach is to assume that there must be a *real or reasonable* possibility that the result may ensue.<sup>165</sup>

There have been many legal arguments whether foresight of even a remote possibility is sufficient.<sup>166</sup> South African courts have considered foresight of a remote possibility to constitute *dolus eventualis*.<sup>167</sup> While there is strong support to restrict the scope of criminal responsibility to foresights of a real or substantial possibility;<sup>168</sup> it has been acknowledged that where the possibility of grievous bodily harm or death was very remote, it is not accepted,<sup>169</sup> and that foresight of a remote possibility is sufficient. This means that the more remote the possibility that

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<sup>163</sup> *DPP v Pistorius* para [27].

<sup>164</sup> Snyman *Criminal law* 180.

<sup>165</sup> Snyman *Criminal law* 180; See *Makgatho* para [9].

<sup>166</sup> Van der Merwe and Du Plessis *Introduction to the law of South Africa* 464.

<sup>167</sup> Burchell *Principles of criminal law* 364; *De Bruyn* 510; *Shaik* paras 62D-F; *Malinga* 694; *S v Sethoga* 1990 (1) SA 270 (A) 358.

<sup>168</sup> Van der Merwe and Du Plessis *Introduction to the law of South Africa* 464.

<sup>169</sup> *Shaik* paras 62D-E.

the consequences might occur, the more difficult it would be to accept that the perpetrator foresaw the possibility.<sup>170</sup>

### 5.3.3 Foresight of a reasonable, substantial or real possibility

As stated above, the legal term 'possibility' is elastic,<sup>171</sup> and the question remains whether such possibility must be a strong or real,<sup>172</sup> a slight, a substantial,<sup>173</sup> or a reasonable<sup>174</sup> possibility to be sufficient? Practically, if the perpetrator foresees that in driving a car (an everyday activity), it may result in the death of someone; and he, however, proceeds to drive the car, it does not therefore mean that he has *dolus eventualis* in relation to any fatal consequences, which is only foreseen by him as a very remote possibility. Conversely, *dolus eventualis* is not restricted to cases where the perpetrator foresaw the consequence as a strong or real possibility of the existence of a consequence occurring, and he nevertheless proceeds with his conduct.<sup>175</sup>

As evidenced above, some earlier cases have considered foresight of a slight possibility of the result to suffice to establish *dolus eventualis*.<sup>176</sup> However, Burchell notes that foresight of a real, substantial or reasonable possibility is required<sup>177</sup> to constitute intention in the form of *dolus eventualis*.<sup>178</sup> The issue still is whether the possibility, if foreseen, should be considered as intended.<sup>179</sup> A number of cases have required the degree of foresight be in the form of a real possibility.<sup>180</sup> In *S v Moodie*,<sup>181</sup> the court held that a real, and not a remote

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<sup>170</sup> Snyman *Criminal law* 180; *S v Dladla en Andere* 1980 (1) SA 1 (A) para 4H.

<sup>171</sup> Snyman *Criminal law* 180; n 163 above.

<sup>172</sup> *Ushewokunze* paras 364B-C. In *Shaik* paras 62C-F, the requirement of foreseeing the death as a real possibility was expressly rejected.

<sup>173</sup> *R v Steenkamp* 1960 (3) SA 680 (N) paras 684F-G.

<sup>174</sup> *Ushewokunze* 363; *S v Tazwinga* 1968 (2) SA 590 (RA) para 591D; *Beukes* para 522E.

<sup>175</sup> *Makgatho* para [9].

<sup>176</sup> *Horn* 465; *Mini* 191.

<sup>177</sup> Burchell *South African criminal law and procedure* 373. Burchell and Hunt *South African criminal law and procedure* 145-148 argue that a real possibility should be required is, or even better, a probability.

<sup>178</sup> Burchell *Principles of criminal law* 363.

<sup>179</sup> In English criminal law, foresight of this nature would be considered as recklessness, not intention; while in continental law the state of mind in cases where foresight is considered as a remote possibility, is considered as conscious negligence (*luxuria*). See Burchell *Principles of criminal law* 363-364.

<sup>180</sup> *S v Ostilly and Others* (1) 1977 (4) SA 699 (D) paras 728D-E. See Burchell and Hunt *South African criminal law and procedure* 131.

<sup>181</sup> *S v Moodie* 1983 (1) SA 1161 (C) para 1162B.

possibility is required. In other cases, the courts have considered foresight not only of a real, but even a reasonable possibility to constitute *dolus eventualis*.<sup>182</sup> What the perpetrator conceived to be the result of his conduct would be considered as the first requirement to deal with; this is because there is no *dolus eventualis* if he did not foresee the consequences.<sup>183</sup> A real or reasonable possibility of the consequences ensuing has been held to be the appropriate approach to determine foresight.<sup>184</sup>

In the case of *Makgatho*,<sup>185</sup> the Supreme Court of Appeal also held that for there to be intention in the form of *dolus eventualis*, the court must be satisfied that a real, and not a remote possibility of the consequences resulting from the perpetrator's conduct was foreseen, and that he reconciled himself with the consequences. In this vein, the appellant should have foreseen, for example, that the firing of a shot towards the direction of the victim would result in his death.<sup>186</sup> However, it has generally been accepted that where the perpetrator foresaw the consequences of his unlawful act, he need not to have foreseen the manner of its happening.<sup>187</sup> It is submitted that the correct approach requires that *dolus eventualis* be restricted to foresight of a real, substantial or reasonable possibility.<sup>188</sup>

There are many instances where *dolus eventualis* is utilised to prove that a perpetrator had the necessary intent to commit the crime. In the following section, one of these situations, namely that of private defence cases, will be examined as

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<sup>182</sup> *Ushewokunze* para 363H; Burchell *Principles of criminal law* 364.

<sup>183</sup> Snyman *Criminal law* 180.

<sup>184</sup> *Makgatho* para [9]. For strong support of the proposition that what is required is foresight of a reasonable possibility, see *S v Van Wyk* 1992 (1) SACR 147 (Nm) para 161*b* (per Ackermann AJA). This view of *dolus eventualis* was quoted with apparent approval by the SCA in *Van Aardt* 2009 (1) SACR 648 (SCA) para [39]. In *Qeqe* 2012 (2) SACR 141 (ECG), the court erroneously rejected an argument that the foresight must be one of a reasonable possibility, and opted for the view that foresight of even a remote possibility suffices. It is interesting to note the definition of intention in s 2(1) of the PCCA, as well as s 1(6) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, and more particularly when a person is deemed to have knowledge of a certain fact in terms of these acts. Both these Acts provide that the perpetrator is deemed to have knowledge of a fact *inter alia* if he believes that there is a reasonable possibility of the existence of that fact. This is a strong indication that even the legislature requires a reasonable (as opposed to a remote) possibility for *dolus eventualis*. See Snyman *Criminal law* 180 n 123.

<sup>185</sup> *Makgatho* para [9].

<sup>186</sup> Burchell *Principles of criminal law* 366 n 115.

<sup>187</sup> Burchell *Principles of criminal law* 366.

<sup>188</sup> Burchell *Principles of criminal law* 364.

to how *dolus eventualis* is interpreted and applied.

#### 5.4 *Dolus eventualis* as applied in private defence cases

One of the research questions expressed in chapter one is how *dolus eventualis* is interpreted and applied in various offences and grounds of justification - such as in cases of private defence where a murder has been committed. It is important to note here that in order to protect human rights and property in South Africa, a person is permitted to resort to private defence. The perpetrator must meet the requirements with which any person acting in private defence must comply with, that is, he must comply with the requirements for the defensive act against the alleged unlawful attack.<sup>189</sup>

An attack implies a voluntary, unlawful act<sup>190</sup> or omission<sup>191</sup> by the attacker. However, private defence, as a ground of justification, would not apply in cases where the perpetrator failed to justify the lawfulness of his defensive act. The focus here is on how the concept of *dolus eventualis* is interpreted and applied in private defence cases so as to hold a person criminally responsible.

As already stated, the test for private defence is objective;<sup>192</sup> and it must be considered in the light of the actual facts the perpetrator considered to be at the exact time of his conduct. Before 1950, private defence was also based on an objective consideration; and the issue was whether a reasonable person would have foreseen the unlawful consequences ensuing from his conduct.<sup>193</sup> As noted

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<sup>189</sup> For a person acting in self-defence to pass the test of private defence, on the one hand, the attack against his interest deserving protection must be unlawful, the attack must be threatening but need not be complete; on the other hand, the person must also meet certain requirements for the defence – his defensive act must be necessary, and reasonably proportional to the attack, and he must have knowledge that he is acting in private defence. For more details on the requirements for the attack and the requirements for the defence, see Snyman *Criminal law* 103-112; Jordaan *et al General principles of criminal law* 69; Le Roux 2010 *THRHR* 328; *Botha v S* (1074/2017) [2018] ZASCA 149 para [10] (hereinafter *Botha v S*).

<sup>190</sup> Singh *Self-defence as a ground of justification* 87.

<sup>191</sup> Singh *Self-defence as a ground of justification* 119.

<sup>192</sup> Snyman *Criminal law* 112. Snyman accepts this proposition but notes that it is acceptable provided that the role of the objective test is to differentiate between putative private defence and actual private defence. See also Burchell *Principles of criminal law* 358.

<sup>193</sup> Burchell *Principles of criminal law* 358.

earlier, it was based on the presumption that the wrongdoer “intends the natural and probable consequences”<sup>194</sup> of his conduct.

With regards to interpreting and applying *dolus eventualis* in private defence cases, some courts *a quo* did not apply the concept correctly. Some courts applied the concept of *dolus eventualis* in cases where it was not necessary; some courts applied the subjective approach; while other courts again applied the objective approach.<sup>195</sup> These issues were then finally settled either in the Appellate Division or in the Supreme Court of Appeal.

In *Dlamini and another v S*,<sup>196</sup> for example, the appellants pleaded not guilty to murder but pleaded guilty to robbery.<sup>197</sup> Dlamini claimed he was attacked by the deceased with a bottle at his home when he invited him to his farm to fetch wages he was owed, and that he acted in self-defence.<sup>198</sup> He was convicted and sentenced to 20 years’ imprisonment<sup>199</sup> for murdering the deceased. He appealed to the Supreme Court of Appeal against the conviction. It was submitted that the court *a quo* erred in its findings that the appellant planned to kill the deceased, and that culpable homicide was an appropriate conviction for the appellant. The Supreme Court of Appeal pointed out that the court *a quo* was required to draw inferences with regards to the subjective intention of each one of the appellants; whether any of the appellants had the necessary *dolus* to kill the deceased: As has often been emphasised, in the absence of direct admissions, the state of mind of a perpetrator at the time of a crime is a question of inference drawn from all the material proven facts, both for and against the conclusion of guilt. The facts must be considered holistically to determine whether they permit an inference to be drawn beyond a reasonable doubt that the accused actually foresaw the reasonable possibility that his victim could die from the assault, but nevertheless

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<sup>194</sup> Burchell *Principles of criminal law* 358 n 49.

<sup>195</sup> For example, the High Court in *Pistorius* applied the subjective test while the SCA applied the objective test in determining whether X’s conduct was reasonable with what is acceptable in society. See the following cases where the courts have been applying the objective test in private defence cases: *S v Engelbrecht* 2005 (2) SACR 41 (W) para 327; *De Oliveira* para 63i; *S v Ntuli* 1975 1 SA 429 (A) 436; *S v Motleleni* 1976 1 SA 403 (A) 406C; *Snyders v Louw* 2009 2 SACR 463 (C) 474. See Snyman *Criminal law* 112; Jordaan *et al General Principles of criminal law* 77.

<sup>196</sup> *Dlamini and Another v S* [2006] SCA 110 (RSA) (hereinafter *Dlamini*).

<sup>197</sup> *Dlamini* para [7].

<sup>198</sup> *Dlamini* para [8].

<sup>199</sup> *Dlamini* para [1].

proceeded with it, reckless as to the outcome.<sup>200</sup>

The Supreme Court of Appeal confirmed the conviction of murder by the appeal court.<sup>201</sup> The second appellant may not have participated in the choking of the deceased; however, the inference drawn by the Supreme Court of Appeal was that he was aware of the circumstances, and was content to abandon the deceased in that desperate state. The Court subsequently held that there was no difference in both their states of mind.<sup>202</sup> Heher JA, accordingly, maintained:

Jordaan AJ was clearly entitled to have regard to the degree and circumstances of the attack on the deceased, even to the point of recognising that it was life-threatening, but in so far as he emphasised the fatal consequences of the attack and the effect of a finding of *dolus eventualis*, it seems to me that he misdirected himself. Indeed I cannot find any such circumstances present which warrant the imposition of a sentence less than the mandatory minimum in respect of either appellant.<sup>203</sup>

The appeal was dismissed against the conviction and sentence by the Supreme Court of Appeal.<sup>204</sup> It should also be noted that in *Dlamini*, although the court *a quo* took a subjective approach, the issue of *dolus eventualis* was misdirected.

Another case involving private defence and *dolus eventualis* is the *Pistorius*-case,<sup>205</sup> which found its way to the appeal court under section 319 of the Criminal Procedure Act.<sup>206</sup> Interestingly, the question of *dolus eventualis* arose in this particular case in terms of interpretation and application. The High Court's decision was appealed in the appeal court that the court *a quo* did not interpret and apply the concept accurately – which constituted an error of law. As a result of this misinterpretation, it was stated that Pistorius should be convicted of culpable homicide instead of murder.

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<sup>200</sup> *Dlamini* para [10]; Also see *S v Van Wyk* 1992 (1) SACR 147 (Nm) paras 161f-g.

<sup>201</sup> *Dlamini* para [11].

<sup>202</sup> *Dlamini* para [12].

<sup>203</sup> *Dlamini* para [15].

<sup>204</sup> *Dlamini* para [16]. The appeal against the sentence of 20 years' imprisonment was upheld, but it was substituted for a 15 years' imprisonment to each of the applicants.

<sup>205</sup> Already briefly referred to above in e.g. paras 1.2, 1.5, 2.3, 2.6.1.

<sup>206</sup> CPA s 319(1)(2) states:“(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first- mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division. (2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law”.

The *Pistorius*-case involved a tragic incident that took place between a physically-disabled Olympic celebrity,<sup>207</sup> and his girlfriend, a beautiful model, resulting in her death. The romantic relationship between Pistorius and his girlfriend was attended by disagreement and worries, which was evidenced by transcripts of text messages between them. In the early hours of 14 February 2013, gunshots, cries for help and a loud noise were heard stemming from the perpetrator's home. Pistorius was later found in a disturbing state as he knelt beside the already dead victim at the foot of the stairs to the bedroom. She had been carried downstairs by him from a bathroom where the shooting took place. Pistorius' girlfriend had been shot by him four times. This was evidence tendered as exhibits during the trial.

The issue before the court was whether the perpetrator, having caused the death of his girlfriend, committed the crime of murder or culpable homicide; that is, whether his act of killing the victim was an intentional act or a negligent act. Pistorius stated that he had woken up in the early hours when he heard the sound of the bathroom window opening. He right away thought an intruder must have found his way into the bathroom using a ladder. He moved backward, snatched his 9mm pistol that was under the bed, and whispered to his girlfriend to get down and phone the police, before proceeding to the bathroom. During that moment, he was without his prosthetic legs, and was conquered with fear as he screamed and shouted for the intruder to get out of his house. He then quietly approached the bathroom as he heard the toilet door bang.<sup>208</sup>

Pistorius started screaming again as he heard the noise from the bathroom; and he immediately fired four shots at the toilet door. Only after firing the shots, did he think that it could be his girlfriend in the toilet. In fright, he put on his prosthetic legs, and successfully shattered the door where he found his deceased girlfriend slumped over the toilet bowl. He then carried her downstairs after making some phone calls. The court, with ample justification, found him to be "a very poor witness".<sup>209</sup>

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<sup>207</sup> Pistorius was "born with deformed legs, the fibula on each side having been missing. Consequently, before his first birthday, both of his legs were surgically amputated below the knee and, since then, he has had to rely on prosthetics". See *Pistorius* para [11].

<sup>208</sup> *Pistorius* para [15].

<sup>209</sup> *Pistorius* paras [16], [17]. Some worrying issues relates to the fact that at the outset Pistorius declared as follows: "Then I heard a noise from inside the toilet - what I perceived to be

Although the state, by way of circumstantial evidence, attempted to convince the court that Pistorius shot his girlfriend after she had locked herself in the toilet in order to escape an argument,<sup>210</sup> it could not be proved that he had fired the shots through the toilet door for any reason other than that he thought an intruder was in the toilet. Thus, it could not be said that Pistorius did not entertain an indisputable conviction that there was an intruder in the toilet who created a risk to him. In this vein, he cannot be guilty of murder based on *dolus eventualis*; as he did not know that his girlfriend was in the toilet. The High Court held that the perpetrator, in shooting as he did, did not do so with *dolus eventualis*. Concluding that the shooting was unlawful, the court held that the perpetrator had done so negligently, and therefore was only guilty of culpable homicide.<sup>211</sup>

The issue before the court was not what was reasonably foreseeable when Pistorius fired at the toilet door, but whether he really foresaw that death might occur when he fired the four shots. A distinction had to be drawn between what was in the mind of the perpetrator and what a reasonable person in his position would have done. In so doing, the notion that a reasonable person in Pistorius' position would have foreseen the reasonable possibility that firing four shots might kill the person in the toilet, is completely out of question in this case. In considering whether *dolus eventualis* is present or not, the question is not whether the perpetrator had directly intended to kill the person in the toilet, but whether he foresaw the possibility that the person in the toilet would be killed by the shots, and reconciled himself to that possibility, whether it materialised or not. Accordingly, the trial court held that the perpetrator did not foresee the possibility that death might ensue since he never had the direct intent to kill. Moreover, the trial court found that he did not realise that it was his girlfriend behind the door, and did not foresee the possibility that his conduct would lead to her death; as such, he could not be held guilty of murder.

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somebody coming out of the toilet. Before I knew it, I fired four shots at the door. I got to the entrance of the bathroom, at the end of the passage. At this point I was certain that an intruder or intruders were there in my bathroom. I wasn't sure if somebody was going to come out of the toilet and attack me [...] I wasn't sure if someone was going to come up the ladder and point a firearm and start shooting. So I just stayed where I was and I kept on screaming. I didn't want to believe it was Reeva in the toilet, I was so scared that someone was coming in to attack us". See BBC News <http://www.bbc.com/news/world-africa-26417240> (Date of use: 22 September 2019).

<sup>210</sup> Pistorius para [14].

<sup>211</sup> Pistorius paras [18], [19].

It was contested that the High Court erred regarding certain legal issues. The Director of Public Prosecutor appealed on the ground that the sentencing would be one of murder, and not that of culpable homicide. The Supreme Court of Appeal stated that although Pistorius' intent to kill must relate to the person killed, it does not imply that he must "appreciate the identity of the person"<sup>212</sup> killed. Taking these into consideration, the Court stated that the test for *dolus eventualis* was incorrectly applied by the trial court.<sup>213</sup>

It was accepted that as a matter of common sense, there was a possibility when the perpetrator was firing the fatal shots (not one, but four), the risk of death of the person behind the toilet door was apparent, of which the consequences were supposed to have been foreseen by him. There was a possibility of the perpetrator foreseeing death ensuing as the weapon used was a deadly firearm. Accordingly, the trial court erred to conclude that he did not subjectively foresee the possibility of the victim's death occurring in the toilet.<sup>214</sup> The Supreme Court of Appeal concluded:

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, and the identity of his victim is irrelevant to his guilt ... there had in fact been no attack upon him that he had acted to ward off - he had genuinely but erroneously believed that his life was in danger when he fired the fatal shots. As opposed to what is commonly known as self-defence, this is so-called putative private or self-defence.<sup>215</sup>

The accused armed himself to shoot if there was someone in the toilet, and when he realised that there was someone, he reconciled himself to the consequences resulting. In doing so, he must have foreseen, and indeed, he did foresee that whoever was behind the door might be fatally injured. The argument that he acted in putative private defence was rejected by the Supreme Court of Appeal, as it

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<sup>212</sup> The perpetrator will certainly be ignorant about the identity of his victim if he caused a bomb to explode in a market; however, he will be said to have intention to kill any person who happen to die as a result of the explosion. Thus, he will be said to have killed by an indeterminate intent (*dolus indeterminatus*).

<sup>213</sup> *Pistorius paras* [29], [30], [33].

<sup>214</sup> *Pistorius para* [50].

<sup>215</sup> *Pistorius paras* [51], [52].

held that Pistorius acted with *dolus eventualis* in causing the death of the victim.<sup>216</sup> He was found culpable of murder with criminal intent in the form of *dolus eventualis*.<sup>217</sup> However, some academics postulate that the Supreme Court of Appeal's ruling reversing the decision of the trial court was a misjudgement. It has been contested that the Supreme Court of Appeal applied the objective approach instead of the subjective approach when determining the legal question (knowledge of unlawfulness).<sup>218</sup> Therefore, when determining whether the perpetrator lacked knowledge of unlawfulness, the test should be purely subjective.

After 1950, South African courts gradually shifted from the objective approach to subjective approach in determining *dolus eventualis*.<sup>219</sup> The courts have continuously applied the subjective approach to criminal intent. When applying the subjective approach, only the perpetrator's state of mind is taken into consideration – whether he foresaw the unlawful result emanating from his conduct.<sup>220</sup> Consideration must also be had as to the state of mind of the perpetrator at the time of his conduct.<sup>221</sup> As noted earlier, it is not enough that he foresaw the possibility; he must also reconcile himself to that possibility. This issue will subsequently be discussed.

#### 5.4.1 Reconciling to the possibility

Reconciling himself to the possibility would imply that the perpetrator is fulfilling the second component of *dolus eventualis*. If the perpetrator is aware that his conduct may go beyond the limit of private defence - that is, if for example, he subjectively foresees that his conduct will result in death, and he reconciles himself to that possibility, he has therefore acted with *dolus*, and knowledge of “unlawfulness and is guilty of murder”.<sup>222</sup> If, subjectively, it is inferred that the perpetrator did not

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<sup>216</sup> *Pistorius* paras [51], [54].

<sup>217</sup> *Pistorius* para [58].

<sup>218</sup> *Pistorius* paras [49], [53]-[55].

<sup>219</sup> Burchell *Principles of criminal law* 358; *S v Mkize* 1951 (3) SA 28 (A) 33; *S v Hercules* 1954 (3) SA 823 (A) 831.

<sup>220</sup> Burchell *Principles of criminal law* 358.

<sup>221</sup> Burchell *Principles of criminal law* 358.

<sup>222</sup> Snyman *Criminal law* 113; *S v Ntuli* 1975 (1) SA 429 (A) (6(ii)); *De Oliveira* paras 63h-l. Therefore, if it is found that intention to kill was absent, the perpetrator may still be responsible for culpable homicide if he ought to have reasonably foreseen that his conduct would be

foresee the likelihood of death ensuing, and it is also concluded that he ought reasonably not to have foreseen the possibility of the death or grievous harm, then he will not be liable of murder or even culpable homicide.<sup>223</sup>

The following case illustrates this aspect well. In *Botha v S*,<sup>224</sup> the appellant who was in a love relationship with the deceased's husband, was seated outside a restaurant when the deceased, visibly angry, came from behind swearing and assaulting the appellant. The deceased proceeded to attack the appellant for the second time; she was grabbed and pulled by her hair so that her feet were lifted off the floor, whilst being sworn and shouted at.<sup>225</sup> The appellant admitted that she stabbed the deceased with a steak knife that was on the table, but that she was not aware it was a knife, as it was wrapped in a serviette. She only realised it was a knife, and that she had stabbed the deceased when she saw the blood. Her defence was that she stabbed the deceased in self-defence.<sup>226</sup>

The issue raised in the Supreme Court of Appeal was whether the court *a quo* was accurate in its findings that murder in the form of *dolus eventualis* was proved. For the first component - subjectively foreseeing the possibility of death - it was not sufficient for the appellant to have (objectively) foreseen the possibility of bodily harm,<sup>227</sup> because any reasonable person in the appellant's position would have foreseen the consequences.<sup>228</sup> With regards to whether the appellant reconciled herself to the possibility, reference was made to *Ngubane*-case,<sup>229</sup> where it was held that the perpetrator may foresee the likelihood of harm, and still be careless regarding the consequences ensuing – by unjustly failing to take appropriate

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exceeding the limits of private defence, and that the aggressor might be killed. He will consequently be held liable for negligence. See also *S v Ngomane* 1979 (3) SA 859 (A) 863-864; *S v Dougherty* 2003 (2) SACR 36 (W) paras 47a-b.

<sup>223</sup> Snyman *Criminal law* 114.

<sup>224</sup> *Botha v S* para [1].

<sup>225</sup> *Botha v S* paras [2], [3], [4].

<sup>226</sup> *Botha v S* para [5]. The appellant was convicted with murder in the regional court, where after she appealed to the Gauteng Local Division where her conviction of murder in the form of *dolus directus* was substituted as murder in the form of *dolus eventualis*. The High Court was satisfied on appeal that that it was necessary for the appellant to avert the attack but held that her "retaliatory conduct was excessive and disproportionate", and that it was "not a reasonable response to the deceased's attack". See *Botha v S* para [1]. It then concluded that the appellant had the requisite intention to kill in the form of *dolus eventualis*, and that her conviction of murder should stand. Her sentence was reduced from 15 to 12 years.

<sup>227</sup> That would be considered as negligence, and not intent in any form.

<sup>228</sup> *Botha v S* para [14].

<sup>229</sup> *Ngubane* paras 685A-F.

measures to avoid the possibility (conscious negligence or *luxuria*).<sup>230</sup> If it is inferred that the perpetrator actually subjectively thought that the consequences would not ensue, the second element could not be said to have been established,<sup>231</sup> since he did not reconcile himself to the possibility.

The Supreme Court of Appeal, in considering whether the two elements of *dolus eventualis* were present in the *Botha*-case, held that the appellant subjectively foresaw the likelihood that a stab in the chest might result in death. With regards to the second element, there was no evidence that the appellant purposefully intended to inflict a fatal injury on the deceased.<sup>232</sup> Although “the appellant foresaw the possibility of death, she thought it would not happen”.<sup>233</sup> Therefore, she did not reconcile herself to that possibility. Proof of the elements of murder in the form of *dolus eventualis* was consequently not established. The sentence was set aside, and substituted with culpable homicide.<sup>234</sup> It is submitted that this approach taken by the Supreme Court of Appeal in *Botha* is correct.

As can be evidenced from the above discussion, interpreting and applying *dolus eventualis* in private defence cases has had varied results. This uncertainty occurs in other crimes as well. The following section evaluates the interpretation and application of the concept of *dolus eventualis* in common-purpose crimes.<sup>235</sup>

## 5.5 *Dolus eventualis* in common-purpose crimes

As no appropriate theory of participation was developed in Roman law, most crimes were defined widely to the extent that anyone who instigated another person to execute any criminal act, or who assisted, or met the definition of that

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<sup>230</sup> The distinction between conscious negligence and *dolus eventualis* lies in the volitional component – the perpetrator reconciles himself with the possibility, or takes that possibility into the bargain. In cases of negligence, the perpetrator lacks the necessary foresight. Also, the second leg of *dolus eventualis* involves a subjective consideration of the possibility of death, while the second leg of *luxuria* entails what a reasonable person, despite the foresight of the possibility of harm, would have done in the circumstances. See Govender [http://www.researchgate.net/publication/320810690\\_Is\\_dolus\\_eventualis\\_a\\_'weaker\\_currency'\\_in\\_sentencing\\_for\\_murder](http://www.researchgate.net/publication/320810690_Is_dolus_eventualis_a_'weaker_currency'_in_sentencing_for_murder) (Date of use: 18 June 2019).

<sup>231</sup> *Botha v S* para [14].

<sup>232</sup> *Botha v S* para [15].

<sup>233</sup> *Botha v S* para [16].

<sup>234</sup> *Botha v S* para [20].

<sup>235</sup> The concept of common purpose was briefly introduced in para 1.5.1.

crime, would all suffer the same punishment.<sup>236</sup> Accordingly, the doctrine of common purpose is considered a principle of law that in a case where two or more persons act together to pursue a common objective, the act of each of the members to achieve such objective is, in law, considered as an act done by all of the members.<sup>237</sup>

The South African doctrine relating to common-purpose crimes emanates from the English Native Territories Penal Code,<sup>238</sup> as a means to control the security threats of the majority black Africans during the apartheid regime. According to section 78:

If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.<sup>239</sup>

The law on participation in South African criminal law arose on two different practicalities: (1) criminal responsibility as perpetrators and accomplices, and (2) criminal responsibility in terms of the doctrine of common purpose.<sup>240</sup> Innes CJ in *R v Peerkhan and Lalloo*<sup>241</sup> explained the common-law position on participation in that:

It (our law) calls a person who aids, abets, counsels or assists in a crime a *socius criminis* - an accomplice or partner in crime. And being so, he is under Roman-Dutch law as guilty, and liable to as much punishment, as if he had been the actual perpetrator of the deed. Now it is clear that in our criminal

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<sup>236</sup> Maré *The doctrine of common purpose in South African law* 114.

<sup>237</sup> *Shaik* para 65A; *S v Safatsa and Others* 1988 (1) SA 868 (A) 894, 896, 901; *S v Mgedezi and Others* 1989 (1) SA 687 (A); *S v Thebus and Another* 2003 (2) SACR 319 (CC) para 341e (hereinafter *Thebus*); Snyman *Criminal law* 257; Koyana *The influence of the native territories Penal Code on South African criminal law* 154.

<sup>238</sup> Native Territories' Penal Code Act 24 of 1886. See also Yusha *The doctrine of swart gevaar to the doctrine of common purpose* 5. The doctrine of common purpose is preached in general terms; it is not confined only to a particular crime, but for purposes of simplicity, particular attention is paid to the crime of murder.

<sup>239</sup> Section 5(e) of the Native Territories' Penal Code expands s 78. See Yusha *The doctrine of swart gevaar to the doctrine of common purpose* 5.

<sup>240</sup> The decision in *R v Peerkhan and Lalloo* 1906 TS 798 802 is considered as the basis of the law of participation in South Africa. See *R v Jackelson* 1920 AD 486; *R v Longone* 1938 AD 532; *S v Moumbaris* 1974 (1) SA 681 (T). It was not until *Williams v S* 1980 (1) SA 60 (A) 63, that the Appellate Division explained the distinction between perpetrator and accomplices, together with the requirements for liability for each of the different types of participants. See Maré *The doctrine of common purpose in South African law* 115. For more information on perpetrator and accomplice, see Snyman *Criminal law* 249-255.

<sup>241</sup> Maré *The doctrine of common purpose in South African law* 115-116.

courts men are convicted for being *socii criminis* without being specially charged in the indictment as such.<sup>242</sup>

In terms of common-purpose crimes in South Africa, the doctrine of common purpose is applied by courts to convict a number of persons who acted together of murder. This doctrine is summarized as follows:

If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others... Conduct by a member ... which differs from the conduct envisaged in the said common purpose may not be imputed to another member ... unless the latter knew that such other conduct would be committed, or foresaw the possibility ... and reconciled himself to that possibility. A finding that a person acted ... in a common purpose is not dependent upon proof of a prior conspiracy. Such a finding may be inferred from the conduct of a person ... If, on a charge of culpable homicide, the evidence reveals that a number of persons acted with a common purpose to assault ... and that the conduct of one or more of them resulted in the death of the victim, the causing of the victim's death is imputed to the other members of the group as well, but negligence in respect of the causing of the death is not imputed.<sup>243</sup>

The existence of common purpose can be proved in two distinct ways: (1) an express or implied prior agreement to commit the crime, and (2) active association and participation in a common criminal design.<sup>244</sup> As regards a prior agreement, the perpetrator needs not be present when the unlawful act is committed for him to be liable; however, for active association to apply, the presence of the perpetrator at the moment the unlawful act is committed is necessary.<sup>245</sup>

Criminal responsibility as a result of active association is more restrictive in nature than liability arising from prior agreement.<sup>246</sup> Irrespective of whether the common purpose was committed by previous agreement to commit the unlawful act or by active association with the unlawful act of the principal perpetrator, evidence of a causal link (*nexus*) between the conduct of the participants and the final unlawful result must be established.<sup>247</sup> Where this is the case, the act of the principal

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<sup>242</sup> Maré *The doctrine of common purpose in South African law* 116.

<sup>243</sup> See Snyman *Criminal law* 256-257.

<sup>244</sup> Burchell *Principles of criminal law* 477; Snyman *Criminal law* 260-261; *S v Mgedezi and Others* 1989 (1) SA 687 (A) paras [705]-[706]; Yusha *The doctrine of swart gevaar to the doctrine of common purpose* 1.

<sup>245</sup> Snyman *Criminal law* 260-261; Mzwempi paras [54], [56], [76].

<sup>246</sup> Mzwempi para [77]; Snyman *Criminal law* 261.

<sup>247</sup> Thebus para [22]; Yusha *The doctrine of swart gevaar to the doctrine of common purpose* 1.

perpetrator will be imputed to others in the common purpose.<sup>248</sup>

The predicament with participation crimes has always been the establishment of individual conduct of each group member to meet the requirements of causation. In such a situation, it becomes difficult to attach criminal responsibility for murder based on the application of the general principles of liability.<sup>249</sup> However, in a majority of cases relating to common-purpose crimes, courts have doggedly disregard the causal requirement.<sup>250</sup> With regards to criminal liability in common-purpose crimes, Moseneke J in *Thebus* stated that:

Where two or more people agree to commit a crime or are actively associated in a join unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime.<sup>251</sup>

The doctrine applies in situations where the identity of the member who caused the actual result is unknown, provided it is established that the consequences were brought about by one of the group members, and all the members had the same intent.<sup>252</sup> Where this is the case, it would be established by the prosecution that each participant approved of the commission of that particular crime, or associated themselves actively with the commission of the crime by one of its members with the requisite element of fault.<sup>253</sup> One could mention here the view of Holmes JA, who asserts that:

This conclusion, arrived at by reference to reason and the facts, is also consistent with social necessity, that wicked minds which devise and plan such evil deeds may know the risks they run in the matter of forfeiting their own lives.<sup>254</sup>

This is the case where it has been established that the parties to the common purpose foresaw the likelihood of causing death, and reconciled themselves to that possibility.

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<sup>248</sup> Burchell *Principles of criminal law* 477.

<sup>249</sup> Snyman *Criminal law* 255.

<sup>250</sup> *R v Shezi* 1948 (3) SA 119 (AD); *R v Mgxwiti* 1954 (1) SA 370 (A); *R v Nsele* 1955 (2) SA 145 (AD); *R v Bergstedt* 1955 (4) SA 186 (AD); *R v Dladla* 1962 (1) SA 307 (A); *R v Macala* 1962 (3) SA 270 (A); *Malinga* 692; *Nkombani* 877; *S v Bradbury* 1967 (1) SA 387 (AD); *S v Williams* 1970 (2) SA 645 (AD).

<sup>251</sup> *Thebus* para [18].

<sup>252</sup> Burchell *Principles of criminal law* 477.

<sup>253</sup> *Thebus* para [34].

<sup>254</sup> Holmes JA in *Nkombani* paras 896E-F; *S v Nkosi* [2015] ZASCA 125 para [13] (hereinafter *Nkosi*).

### 5.5.1 Foreseeing and reconciling to the possibility

If a group of persons acting together cause the death of another person, and it is not certain which one of them was criminally responsible for the death, it would be difficult to ascertain whose act could be causally linked to the victim's death. The doctrine of common purpose was therefore formulated based on an objective approach to criminal responsibility. In this vein, reference to what the accused ought to have known, would be a probable result, as was explained in *R v Garnsworthy*.<sup>255</sup>

Where two or more persons combine in an undertaking for an illegal purpose, each of them is liable for anything done by the other or others of the combination, in the furtherance of their object, if what was done was what they knew or ought to have known, would be a probable result of their endeavouring to achieve their object.

This position was also confirmed in *R v Duma*<sup>256</sup> and *R v Ndhlengisa*.<sup>257</sup> In terms of the doctrine of common purpose, the perpetrator may be guilty of murder only if he had direct intention or *dolus eventualis* to commit the crime,<sup>258</sup> as elucidated in *S v Malinga*.<sup>259</sup> The possession of a weapon by one of the members of a joint purpose with intent to commit a crime is further explained by Holmes JA in *Malinga* in that all the accused knew that they were going on a housebreaking venture, and that one of them was carrying a lethal weapon which was obtained particularly for that purpose. Accordingly, it is certain that their common purpose was not only housebreaking with intent to steal, but also what can be considered as the get-away:

And they must have foreseen, and therefore by inference did foresee the possibility that the loaded fire-arm would be used against the contingency of resistance, pursuit or attempted capture.<sup>260</sup>

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<sup>255</sup> *R v Garnsworthy* 1923 WLD 17; Maré *The doctrine of common purpose in South African law* 118, 121.

<sup>256</sup> *R v Duma* 1945 AD 415.

<sup>257</sup> *R v Ndhlengisa* 1946 AD 1106.

<sup>258</sup> *R v Nsele* 1955 (2) SA 145 (A) 148; *R v Hercules* 1954 (3) SA 826 (AD); *R v Bergstedt* 1955 (4) SA 186.

<sup>259</sup> *Malinga* paras 694F-G.

<sup>260</sup> *Malinga* paras 695A-B; *Dube* para [19].

Therefore, “the liability of a *socius criminis* is not vicarious but is based on his *mens rea*”<sup>261</sup> – whether the perpetrator foresaw the likelihood that his *socius* would, in the prosecution of their common objective, commit the unlawful act. It is not required that an intention in the form of *dolus directus* to kill be present; his intention can take the form of *dolus indirectus* if he foresaw the possibility that the conduct of his associates may result in the victim’s death, and reconciles himself to that possibility.<sup>262</sup>

Whether a group member of a gang who did not directly participate in the causing of the death also had the intention to commit the murder, must be determined by the facts of the particular case. The inference may be drawn, for example, from the fact that the person knew that one of the members was carrying a weapon, and might use it.<sup>263</sup> A joint enterprise in the form of active association covers cases where there is proof of absence of any prior agreement. However, before deciding on this form of common purpose, the requirements for an active participation must be met.

In *Thebus*, the trial court held that the first appellant was a party to an unlawful joint enterprise in which a child was murdered. The court relied on the decision in *S v Mgedezi*<sup>264</sup> in convicting the accused. In this case, it was decided that in order to evoke the doctrine of common purpose to hold a party criminally responsible; certain requirements must be complied with:

[i]n the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the

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<sup>261</sup> Maré *The doctrine of common purpose in South African law* 118.

<sup>262</sup> Snyman *Criminal law* 261.

<sup>263</sup> This part of the text was quoted with apparent approval in *S v Gedezi* 2010 (2) SACR 363 (WCC) para 55. For examples of the application of the principle set out in the text, see *S v Nkomo* 1966 (1) SA 831 (A); *S v Maxaba* 1981 (1) SA 1148 (A) 1156; *S v Phillips* 1985 (2) SA 727 (N) 735; *S v Mbatha en Andere* 1987 (2) SA 272 (A); *Nzo* 1990 (3) SA 1 (A) 5-8; *S v Mkhize* 1999 (2) SACR 632 (W) paras 638f-g. For cases in which the courts have held that one of the members of a gang did not have the necessary *dolus eventualis* in respect of the victim’s death, see *S v Magwaza* 1985 (3) SA 29 (A); *S v Talane* 1986 (3) SA 196 (A) 207-208; *S v Munonjo en 'n Ander* 1990 (1) SACR 360 (A); *Molimi* 18-21; *Dube* para [19]; Snyman *Criminal law* 261.

<sup>264</sup> *S v Mgedezi and Others* 1989 (1) SA 687 (A) paras 705I-706B.

killing of the deceased, 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.<sup>265</sup>

It could also be argued that all the members of a gang would be held criminally responsible if, for example, in the course of a robbery, one of the gang members is shot by the robbed party. South African courts have time and again held that where the perpetrator is a participant in a shooting with others, for example, during an armed robbery, he would be criminally responsible in the form of *dolus eventualis* for any death that may ensue (which includes that of his fellow gangsters).<sup>266</sup>

This situation is well illustrated in the case of *Nkosi*. The issue in this case before the Supreme Court of Appeal was whether the appellant's conviction of murder by the trial court based on *dolus eventualis* was correct.<sup>267</sup> The perpetrator was convicted of the death of one of his gang members by the defender. He appealed to the Supreme Court of Appeal against his conviction for murder and robbery.<sup>268</sup> It was found that the three robbers, including the appellant, carried with them loaded firearms; an indication that they were aware of the possibility that they may encounter resistance, and may have to use their weapons.<sup>269</sup> Therefore, the appellant subjectively foresaw the possibility of death resulting, and reconciled himself with it. The Supreme Court of Appeal held that *Nkosi* was correctly convicted of murder; and the appeal failed.<sup>270</sup> This was not the case in *S v Dube*.<sup>271</sup> The perpetrators in this case were not armed, which implies:

...a reasonable inference that even if the appellants subjectively foresaw the possibility of arrest, their subjective intention was that there would be no 'resistance dangerous to life' In other words, the appellants, being unarmed, did not reconcile themselves to a 'dangerous resistance' to arrest with all its attendant consequences.<sup>272</sup>

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<sup>265</sup> *Thebus* para [20].

<sup>266</sup> *Nkosi* para [5].

<sup>267</sup> *Nkosi* para [3].

<sup>268</sup> *Nkosi* para [2].

<sup>269</sup> *Nkosi* para [5].

<sup>270</sup> *Nkosi* paras [13]-[14].

<sup>271</sup> *Dube* para [16].

<sup>272</sup> *Dube* para [16]; *Nkosi* para [8]. While drilling a hole to gain access into the bank, the police surprised them; and one of the police officers shot and fatally wounded one of the robbers as they tried to escape. The court held that a reasonable inference can be drawn that the

In *S v Molimi and Another*,<sup>273</sup> during the course of a robbery, one of the robbers took a man hostage inside the store. A bystander aimed at this robber, but shot the hostage instead. The murder of the hostage was one of the charges against the accused. Molimi's defence was that the death of the hostage was not foreseeable. Accordingly, Cachalia AJA stated that:

Once all the participants in the common purpose foresaw the possibility that anybody in the immediate vicinity of the scene could be killed by cross-fire, whether from a law-enforcement official or a private citizen, which in the circumstances of this case they must have done, *dolus eventualis* was proved. ... [T]he common purpose doctrine does not require each participant to know or foresee every detail of the way in which the unlawful result is brought about. But neither does it require each participant to anticipate every unlawful act in which each of the participants may conceivably engage in pursuit of the objectives of the common purpose.<sup>274</sup>

In *S v Nkombani and Another*,<sup>275</sup> a robber was killed by a gunshot fired by one of his fellow gang members. The conviction of not only the member of the joint enterprise who fired the shot, but also of the co-conspirator who only supplied one of the guns, was confirmed.<sup>276</sup> But in *S v Nhlapo and Another*,<sup>277</sup> a security officer, and not a criminal gang member, was shot during a shootout between security officers and armed robbers. The Appellate Division confirmed the trial court's murder conviction for the robbers for causing the death of the deceased. Van Heerden JA stated that the robbers definitely had foreseen the possibility that one of the guards or a staff member may be shot. He asserted that "they planned and executed the robbery with *dolus indeterminatus* in the sense that they foresaw the possibility"<sup>278</sup> that anyone involved in the course of their robbery could be killed by the cross-fire. After the decision in *Mgedezi*, it has been settled that where the prosecution relies on a joint criminal enterprise as the basis for criminal responsibility, for example, to establish murder, a "causal connection between the conduct of each participant in the crime and the unlawful consequence caused by

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appellants never subjectively foresaw arrest because of the measures they took to avoid arrest, coupled with the absence of a firearm.

<sup>273</sup> *Molimi* 43.

<sup>274</sup> *Molimi* paras [35], [36]; *Nkosi* para [4].

<sup>275</sup> *Nkombani* 877.

<sup>276</sup> *Nkombani* paras 896A-B.

<sup>277</sup> *S v Nhlapo and Another* 1981 (2) SA 744 (A).

<sup>278</sup> See *Nkombani* para 892A for the remarks of Rumpff JA.

one or more in the group, is not a requirement”.<sup>279</sup>

It is worth stating here that in South African criminal law, the doctrine of common purpose has been developed in this jurisdiction since its introduction from English law; as the scope of the doctrine has been extended; for example, the extension in relation to a new form – active association – which has been constitutionally endorsed. However, reaching any conclusion as regards a crime committed in common purpose should be by reference to reasoning and fact, which is consistent with the social necessity that persons who plan such unlawful acts know the risk they run in terms of forfeiting their own lives.

In the final discussion of this chapter, it will lastly be concluded on if the concept of *dolus eventualis* has been fully interpreted in South African criminal law, or whether there is still some scope for improvement.

## **5.6 Has recent cases fully interpreted the concept of *dolus eventualis*?**

Before 1955, it was not certain whether *dolus eventualis* required foresight on the part of the perpetrator that the unlawful result would possibly ensue from his conduct. This uncertainty was settled in *R v Horn*,<sup>280</sup> where the court held that a person would be criminally liable if he realised the possibility of the consequences of his conduct ensuing. Here, the focus is on the result foreseen “as a possibility not a probability”.<sup>281</sup> Therefore, the state is required to prove that the perpetrator had subjective foresight, and continued with that conduct, disregarding (or taking into the bargain or being reckless as to) the possibility of the consequences occurring.<sup>282</sup> In murder cases, the element of recklessness was explained by the Supreme Court of Appeal to mean that the perpetrator “did not care whether death

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<sup>279</sup> *Thebus* para [22]; *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (A) para 789G.

<sup>280</sup> *Horn* para 567B.

<sup>281</sup> Burchell *Principles of criminal law* 362. It is worth noting here that South African criminal law differs from Anglo-American criminal law in that Anglo-American law considers foresight of a probability as intention, and foresight of a possibility as a form of fault (recklessness). See Burchell *Principles of criminal law* 363 n 83.

<sup>282</sup> *Ngubane* 685; *S v Sethoga* 1990 (1) SA 270 (A) 275-276.

would in fact result”.<sup>283</sup> A further description was added by this Court in the *Pistorius*-case to mean “gambling”<sup>284</sup> with the life of the person against whom the unlawful conduct is directed.

With regards to the interpretation and application of the conative element, it has been satisfactorily concluded in the *Humphreys*-case where it was held that there was no evidence that the appellant reconciled himself to his death or to that of the passengers, since the driver thought that the accident would not occur; and that he had, over and over, performed the same act successfully.<sup>285</sup> It was held by the Supreme Court of Appeal that *dolus eventualis* was not established. The Court set aside the attempted murder and murder convictions, and the appellant was convicted of culpable homicide.<sup>286</sup>

On appeal to the High Court, it was held in *Maarohanye*<sup>287</sup> that determining *dolus eventualis* should be a subjective value judgment that is based on inferential reasoning about what the perpetrator thought, and not about what he should have foreseen. As an approach to inferential reasoning, the following questions were put forward:

- (a) did the accused subjectively foresee the possibility of the death of the victims ensuing from their conduct; and
- (b) did they reconcile themselves to that possibility.<sup>288</sup>

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<sup>283</sup> *S v Campos* 2002 (1) SACR 233 SCA 38. Burchell *Principles of criminal law* 373 emphasizes the fact that the concept of recklessness in South Africa is not that of the Anglo-American systems (as stated in *Ngubane* para [134]). In the earlier case of *De Bruyn* (para [133]), Holmes JA described recklessness (as an element of *dolus eventualis* in the crime of murder) as “persistence in such conduct, despite such foresight” or “the conscious taking of the risk of resultant death, not caring whether it ensues or not”. Burchell *Principles of criminal law* 373 points out that Holmes’ definition “came in for a good deal of academic criticism and, in fact, some writers questioned not only the confusing nature of the concept, but also the very need for ‘recklessness’ as an additional element of *dolus eventualis*”. The learned author also indicates at n 175 that Holmes JA “was considering whether *dolus eventualis* could be an extenuating circumstance, not the requirements of such intention of such liability, these dicta are probably *obiter*”.

<sup>284</sup> *DPP v Pistorius* para [26].

<sup>285</sup> *Humphreys* para [19]; Burchell *Principles of criminal law* 376.

<sup>286</sup> *Humphreys* para [28]; Burchell *Principles of criminal law* 376.

<sup>287</sup> See para 5.3 (n 138-141) above.

<sup>288</sup> In *Maarohanye*, the accused, after taking drugs, lost control of his automobile in a drag-racing competition against each other on Mdlalose street, Johannesburg. One of the appellants caused the accident where four people were killed and others grievously injured. The trial court held that the accused recklessly disregarded traffic rules, and he was convicted of murder based on intention in the form of *dolus eventualis*. Accordingly, it was held that the accused subjectively foresaw that death or injury might ensue to pedestrians, but persisted in the conduct despite foreseeing that possibility. See Schulze 2015 *De Rebus* 43-44.

Accordingly, the High Court held that once the court concludes that the use of drugs influenced their sense of euphoria, which made the drivers believe that no accident would ensue in the course of their conduct, and that other road users would give way to them, it was considered as an indication of absence of *dolus eventualis*. Therefore, it could no longer be suggested here that they foresaw the possibility that their conduct would cause death or bodily harm to any pedestrian and reconciled themselves to that possibility.

Therefore, in the absence of a foresight of possibility of harm or bodily injury, it could not be said that there was *dolus* in the form of *dolus eventualis*. In this vein, it was held that both convictions of murder and attempted murder could not stand.<sup>289</sup> The High Court convicted the accused instead under the NRTA for driving an automobile while under the influence of drugs.<sup>290</sup> The appeals were upheld and the conviction of murder was substituted with that of culpable homicide.

In the *Pistorius*-case, for example, from a technical-legal perspective, the perpetrator was guilty of murder. Since the supposed intruder was a person, Pistorius could be found culpable of murder since he intended to kill the person behind the door, and did so by shooting four shots in different directions through the door,<sup>291</sup> and he in fact killed the person. Pistorius did not murder an intruder, since there was no intruder, but one also cannot conclude that he murdered the victim because he never intended to kill her, neither *directus* nor *indirectus*.

It may be legally correct to state that Pistorius never intended to kill his girlfriend, but he in fact did murder her. This leads to the argument that a murder case of this nature cannot be based on *dolus eventualis* where it is established that the perpetrator has subjectively excluded the death of the actual victim as a possible consequence of his conduct. It complicates the case even further if one were to consider the concept of *error in objecto*.<sup>292</sup>

However, a mistake in terms of who was behind the door does not change the fact that he intended to perform an unlawful act – to kill a person, but his particular

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<sup>289</sup> Schulze 2015 *De Rebus* 43.

<sup>290</sup> See Schulze 2015 *De Rebus* 44.

<sup>291</sup> *DPP v Pistorius* para [50].

<sup>292</sup> As explained in para 2.4 (a) above. See also n 160.

intention with regards to the killing can change the degree of his culpability, for example, in case of private defence. However, to state that he murdered her would be legally misleading; considering the fact in *Pistorius*-case, it could be stated that he was found to have intended to kill a supposed intruder; and accordingly, he reconciled himself to murdering the intruder.

Examining the *Pistorius*-case from the perspective of negligence, it can be stated here that the subjective test was appropriately applied by the Supreme Court of Appeal to establish the factual cognitive element – foresight of the consequences.<sup>293</sup> However, taking into consideration the cognitive element – knowledge of unlawfulness, it appears it was not appropriately applied by the Supreme Court of Appeal.<sup>294</sup> Here, the perpetrator’s state of mind was assessed objectively, and not subjectively. Pistorius was not assessed with reference to what his actual state of mind at the time of his conduct was. Knowledge of unlawfulness, which is an element of intent, was abandoned. There was no inquiry regarding mistake as to the unlawfulness of his action. The specifics with regards to the pressure induced by the perceived situations were not closely compared in order to distinguish the *Pistorius*-case from the *De Oliveira*-case.<sup>295</sup>

The deceased in *Van Schalkwyk v The State*<sup>296</sup> was a farm employee who was hit by the appellant with a hay hook. He died as a result of the injury.<sup>297</sup> The issue before the Supreme Court of Appeal was whether the court *a quo* correctly convicted the appellant of murder with intention in the form of *dolus eventualis*.<sup>298</sup> The state had to prove that the appellant had a subjective foresight of the possibility that striking the deceased with the iron hay hook could lead to grievous harm or death; and that he disregarded the consequences, or had reconciled

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<sup>293</sup> *Pistorius* paras [50]-[51].

<sup>294</sup> *Pistorius* para [53]: “Thus not only did he not know who was behind the door, he did not know whether that person in fact constituted any threat to him. In these circumstances, although he may have been anxious, it is inconceivable that a rational person could have believed he was entitled to fire at this person with a heavy calibre firearm, without taking even that most elementary precaution of firing a warning shot (which the accused said he elected not to fire as he thought the ricochet might harm him). This constituted *prima facie* proof that the accused did not entertain an honest and genuine belief that he was acting lawfully, which was in no way disturbed by his vacillating”.

<sup>295</sup> For information on *De Oliveira*, see para 2.4 (n 174-177) above.

<sup>296</sup> *Van Schalkwyk* 49. See n 104-105 above.

<sup>297</sup> *Van Schalkwyk* paras [3]-[5].

<sup>298</sup> *Van Schalkwyk* para [11]; also see *Salzwedel* in this regard.

himself with the foreseen possibility.<sup>299</sup> The Court, with reference to an earlier judgment<sup>300</sup> stated:

[A] person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore "gambling" as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act "reckless as to the consequences" (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been "reconciled" with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. *It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.*<sup>301</sup>

To infer that the appellant did not subjectively foresee the consequences ensuing from his conduct would mean a refusal to acknowledge that the stab wounds in the chest were possibly foreseen to be deadly.<sup>302</sup> The cognitive element (knowledge) of the act and that it was unlawful are sufficient; however, by subjective consideration, it then becomes irrelevant whether he reconciled himself to the consequences.<sup>303</sup>

In *Botha*,<sup>304</sup> the two elements of *dolus eventualis* were appropriately interpreted and applied by the Supreme Court of Appeal. Although the appellant foresaw the possibility of death, she thought that it would not materialise.<sup>305</sup> Therefore, she did not reconcile herself to that possibility. Murder in the form of *dolus eventualis* was not established. The Court discarded the conviction based on *dolus eventualis* and substituted it with a conviction of culpable homicide.<sup>306</sup>

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<sup>299</sup> *Van Schalkwyk* para [15].

<sup>300</sup> *Pistorius-case* para [26].

<sup>301</sup> Baartman AJA in *Van Schalkwyk* para [14] (own italics).

<sup>302</sup> *Van Schalkwyk* para [16].

<sup>303</sup> *Van Schalkwyk* para [57]. The court set aside the conviction of murder and the accused was convicted of culpable homicide. See *Van Schalkwyk* para [62].

<sup>304</sup> *Botha v S* paras [14], [15].

<sup>305</sup> *Botha v S* para [16].

<sup>306</sup> *Botha v S* para [20]. She was sentenced to three years' imprisonment subject to the provisions of s 276(1)(i) of the CPA.

Conflicting verdicts seem to stem, amongst other reasons, from the misinterpretation of terminologies used in the course of interpreting and applying the concept of *dolus eventualis*. By stating that the terminology be put aside implies technically that the question of interpretation and application of *dolus eventualis* should be approached plainly and subjectively. An ordinary standard approach to *dolus eventualis* should be applied in murder-related cases as a result of reckless driving, and murder resulting from intent crimes. The reasoning here is that it will be unreasonable to apply, for example, the verdict in the *Humphreys*-case to the *Nyalungu*-case.<sup>307</sup> If the same approach in the *Humphreys*-case is applied to the facts in *S v Nyalungu*,<sup>308</sup> it would imply that although the rapist accepted the risk to rape his victim, he hoped not to infect his victim. Therefore, the decision in the *Humphreys*-case cannot be a precedent to *Nyalungu*. In this light, a standard approach to *dolus eventualis* may be relevant, but its interpretation and application in various cases must vary.

Although the appellants in the *Humphreys*- and *Maarohanye*-cases<sup>309</sup> escaped criminal responsibility for attempted murder and murder, it does not imply that the same verdict also applies to other reckless drivers. Considering that the concept of *dolus eventualis* has been extensively elucidated in these landmark cases, the nature and contents of other such cases remain open-ended. A case-by-case approach has been suggested.<sup>310</sup>

It was held in *Humphreys* that “there can be no better example of *dolus eventualis* than this case, where a person wilfully and knowingly, with a vehicle full of passengers, drove into the face of an oncoming train”.<sup>311</sup> Foresight of a possibility of the consequences resulting from the perpetrator’s conduct is thus sufficient for *dolus eventualis* to be established in South African criminal law.<sup>312</sup> The Supreme Court of Appeal unanimously concluded that the wrongdoer must have a foresight of a reasonable possibility that the consequences may ensue.<sup>313</sup>

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<sup>307</sup> See *S v Nyalungu* 2013 (2) SACR 99 (T)

<sup>308</sup> *S v Nyalungu* 2013 (2) SACR 99 (T).

<sup>309</sup> See also *Van Schalkwyk* 49.

<sup>310</sup> Paizes and Van der Merwe *Commentary on the Criminal Procedure Act* 10.

<sup>311</sup> Henney in *Humphreys* para [19].

<sup>312</sup> Burchell *Principles of criminal law* 363.

<sup>313</sup> Snyman *Criminal law* 180; *Makgatho* para [9]; *Van Wyk* 1992 (1) SACR 147 (Nm) para 161b.

One could therefore state here that what establishes criminal intent is the presence of an operative knowledge of unlawfulness. In *Humphreys*,<sup>314</sup> it was concluded that the appellant did not reconcile himself to the possibility of the consequences ensuing, since he thought he could still successfully perform the similar act again. Self-evidently, the fact that his confidence was misplaced does not detract from the absence of reconciliation with the consequences he subjectively foresaw.<sup>315</sup> The Supreme Court of Appeal accordingly found that *dolus eventualis* was absent in this case.

An important rule that was stated in the *Humphreys*-case as per Brand JA is that:

...if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.<sup>316</sup>

In this vein, it cannot be said that the perpetrator reconciled himself with the possible consequences. Although cases of reckless driving that involves *dolus eventualis* seem controversial, it appears that the ordinary concept of *dolus eventualis* applies in murder cases as a result of reckless driving, as well as other intent-based crimes.<sup>317</sup>

It is worth stating here that recent landmark cases (for example, the *Pistorius*-case) have been hovering over the issue of interpretation, which still suggests the ambiguous nature of *dolus eventualis*. In this regard, it is required that every case should be considered based on the particular circumstances of each case since one cannot precisely formulate a test to determine the lawful or unlawfulness of a perpetrator's conduct who, for example, acted on grounds of private defence.<sup>318</sup>

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<sup>314</sup> *Humphreys* para [19].

<sup>315</sup> *Humphreys* para [19].

<sup>316</sup> *Humphreys* para [17].

<sup>317</sup> Tsuro *An alternative approach to dolus eventualis* 86.

<sup>318</sup> There should be a reasonable balance between the attack and the defensive act; see *Steyn* para [9].

## 5.7 Summary

In South African criminal law, *dolus eventualis* is considered as the broadest type of intention; this explains why the concept has over the years been considered to be controversial. It would be accepted that during the early 1920s not much attention was being paid to this concept. The issue of legal intention was never taken into consideration to determine culpability so long as the courts were satisfied that the consequences were as a result of the conduct of X. In other words, it was unnecessary for the courts to consider the foresight of X leading to the consequences since it was assumed that X must have intended or anticipated the probable consequences of his conduct. Prior to the decision in *S v Goosen* in 1989, the position, as exemplified in the *Bernardus*-case, was that once the court is satisfied that the defendant anticipated the unlawful happening, the manner in which the consequences occurred was no longer necessary. This meant that it was sufficient if the accused foresaw the consequences of his unlawful act, even if events did not happen exactly the way he anticipated them to be. Thus, it was not necessary that the defendant had to foresee how death would ensue, *dolus* was present so long as it was established that the defendant foresaw death. The cause-and-effect approach was applied in most cases to determine legal intention. Here, X will take his victim as he finds him. The courts, at one point, relied on a foresight of the causal sequence which must be satisfied in cases of consequential crimes.

It has been realised that during the period 1946 up to 1985, the courts had also applied different approaches to determining *dolus eventualis*. For example, the courts, in certain cases applied the objective approach, and in other cases, the courts applied a foresight of real possibility, or a foresight of slight possibility. By 1958, the position was that the cognitive component of *dolus eventualis* included foresight of the possibility of harm. This is evident from judgments after the 1958 decision in *Horn* indicating that foresight of a probability of harm was required. A few cases after this decision did not follow this approach.

By 1972, the approach applied by the courts shifted from foresight of a slight possibility to the requirement that the conduct of must involve some risk to life; and

then to the requirement that X must have foreseen the possibility of harm ensuing from his conduct. However, the courts failed to qualify the scope that is needed for foresight. By 1999, the requirement of foresight had been framed in terms of X appreciating the harm that could possibly occur from his conduct; however, this approach appears to have been broadly interpreted.

It was evidenced that the mental concept of *dolus eventualis* has attracted conflicting legal criticisms over the years in terms of interpretation and application. This explains why it still remains vague; despite the fact that the concept was expounded on in the *Goosen*-case. The courts have, in certain cases, interpreted and applied this concept inadequately by recognising that when X foresaw the consequences ensuing in a particular way, and it happened, but in a different way, it is not the same crime X anticipated, and therefore X cannot be held liable thereof. Here, the focus was on causation while indirectly disregarding the issue of culpability. The principle upon which such rule was adopted is, to some extent, defective; luckily, it has since not been consistently applied by the courts.

A perpetrator will be held to have acted with *dolus eventualis* in a case involving conscious risk-taking if he foresaw the consequences as a substantial or real possibility. Put differently, a person will have intent in the form of *dolus eventualis* if it is established, based on inferential reasoning, that he had real subjective foresight of the possibility of the consequences ensuing from his conduct, and he proceeded in such conduct despite the foresight.

As evidenced from the discussion in this chapter, as well as previous chapters, all model definitions of *dolus eventualis* include a requirement of foresight of a possibility of the consequences ensuing. However, there are no fixed rules that qualify the specific foresight required in South African criminal law in order to be found guilty on the basis of *dolus eventualis*. Different opinions exist as regards the requirements; Whiting and Paizes support a view that the degree of foresight should be remote, and unqualified. Burchell and Hunt again criticise this interpretation as being too wide-ranging and uncertain. Some courts have considered the degree of foresight to be a real possibility, while other courts prefer such possibility to be a reasonable one. Snyman espouses the standpoint that the possibility must be reasonable or material, while Morkel favours a concrete

possibility. On the other hand, qualifying the degree of foresight has been disapproved of on the grounds that it cannot be consistently interpreted.

The requirement of foresight of possible events occurring could in certain situations be considered to be recklessness whether the foreseen result would occur or not, and reconciling oneself to that possibility. The concept of *dolus eventualis* is close to the common-law notion of recklessness. This is the reason why some scholars and commentators consider *dolus eventualis* and recklessness as concepts that can be used interchangeably (as mental states). Although the concept of *dolus eventualis* includes the cognitive and volitional elements, there is no volitional, but a cognitive element in the common-law concept of recklessness. However, there still exists a volitional component in recklessness, since the perpetrator would still proceed with his conduct in spite of the risk.

Knowledge of unlawfulness and foresight of the consequences should be assessed with reference to a perpetrator's actual state of mind. In other words, when determining the state of mind of the accused, the factual cognitive components and the conative components of the accused should be assessed subjectively; therefore, the court have to place himself in the accused's position at the time the unlawful act was committed. The courts, in applying the subjective test, have applied different approaches based on the circumstances of each particular case, yet they have reached the same outcome. In some cases, however, varying verdicts are arrived at in the courts. It is clear that it is difficult for courts to apply an established precedent to a different *dolus eventualis* case. Therefore, the ruling in *Humphreys*, similar to the judgment in the *Pistorius*-case, should not be taken as the only true interpretation and application of the concept of *dolus eventualis*.

Where the assessment of the subject's state of mind is distorted as a result of lack of an appropriate approach and the process of establishing these approaches, there is a possibility of arriving at a wrong verdict. In the *Pistorius*-case, for example, the Supreme Court of Appeal correctly considered the subjective test to determine foresight of death, but the Court failed to apply the same approach to determine knowledge of unlawfulness. In this vein, knowledge of unlawfulness was not assessed as a component of *dolus eventualis* – the issue in *Pistorius*-case

was intent, and not unlawfulness, and private defence is concerned with unlawfulness.

Recent cases appear to be landmark cases to the approach to interpretation and application of the concept in each particular case. This justifies the reason why it has become apparent that the approach set out by South African courts remain inadequate and elastic to cover a whole range of circumstances that are supposed to be considered in such cases.

## CHAPTER 6

### RECOMMENDATIONS AND CONCLUSION

#### 6.1 Summary

In this study, a comparative analysis has been provided to clearly understand how the concept of *dolus eventualis* is interpreted and applied in South Africa, the US, Great Britain and international criminal law, in order to answer the pertinent issues raised under Chapter one. This has been possible through a literature review of the intricate detail of the elements of criminal liability, the concept of intention and *dolus eventualis*, and associate concepts. Although *dolus eventualis* is considered differently in other jurisdictions, at the centre of this concept as applied in all the selected jurisdictions are the elements of *mens rea* (knowledge) and *actus reus* (conduct).

In Chapter two, it was seen that in South Africa, as well as in the US and Great Britain, an act and an omission are considered as the *actus reus* of a criminal offence; and only voluntary unlawful conduct would attract criminal responsibility. There still exist grey areas in the law of *mens rea* in terms of its application in factual situations. This may be largely as a result of the vagueness of terms and their inconsistent use; for example, in certain jurisdictions, recklessness covers *luxuria* and *dolus eventualis* pieced together, as seen in paragraph 2.3.3.3.

In determining criminal capacity, a distinction is made between *culpa* (negligence) and *dolus* (intention); in distinguishing culpable homicide from murder. A mistake (excuse) excludes intention – see paragraph 2.4 above. Such a mistake may be based on an honest error of law, or as to the circumstances described in the definitional element of the crime, or relating to a ground of justification. In such cases, it is reasonable to exclude culpability although the unlawful consequences were foreseen. This differs from situations where X intends to achieve a particular purpose and foresees an unlawful consequence will likely emanate from the conduct in the course of achieving that purpose, even though he does not intend the consequences.

Chapter three focused on the concept of *dolus eventualis* as found in international criminal law where a statutory text - the Rome Statute, provides precise guidelines for determining intent. There are still however a series of flaws in this regard. The definition of the mental element under Article 30 (para 3.2 above) which focuses on intent and knowledge appears to be narrow and rigid. The proviso 'unless otherwise provided' in article 30 of the Rome Statute implies that this section is making reference to the Elements of Crimes, but the worrying issue is that the Elements of Crimes are supposed to guide judges in the interpretation of the Statute. On this note, this article does not explicitly incorporate *dolus eventualis* 'unless otherwise provided' as the required mental state. This denotes that it is open to the ICC to import some aspects of recklessness or *dolus eventualis* into their interpretation of case law.

Article 30 thus fails to provide for a suitable source of law; unlike article 31 which specifically states - 'in this statute' - suggesting that the drafters envisaged other sources of law here as well. Still, one would accept that, except if there is a separate provision for a mental state – like the specific intent provisions on war crimes (see para 3.3 of this study); intent and knowledge appear to remain the yardstick for other provisions in the Statute. This indirectly avoids the issue of having to stipulate a particular mental state in every crime in the Statute. It is worth mentioning that there are possible overlaps between war crimes, crimes against humanity and crimes of genocide when determining *dolus*. Notwithstanding, the definition and circumstances for the trial of acts such as genocide under international law is *ultra vires* South African and any other national jurisdiction, like the US and Great Britain.

It would be prudent to state here that the 'likelihood' narrative of *dolus eventualis* is not included in the Rome Statute; *dolus eventualis* requires risk in that X has knowledge (awareness) that a result 'will occur', instead of 'likely to occur'. Here, the focus of the Rome Statute is on the definite knowledge (of the future consequence) on the part of X that it will ensue. Therefore, the issue of risk-taking or reckless conduct with regards to the consequences is not considered under this section.

It has also been revealed in this particular chapter that the international law tribunals do however make extensive use of the concept of *dolus eventualis*. The practices of international tribunals indicate that there are substantive and procedural reasons why knowledge of a substantial risk of committing a particular international crime should be considered as sufficient proof for culpability. The jurisprudence of both ICTR and ICTY serve as a compass, for example, in identifying rape as a special indication of genocide (see para 3.3.1.2 above).

When considering murder as a crime against humanity, the ICC does not follow the *mens rea* principle as applied, for instance, by the US states, which will convict X of murder, for example, where he intended to cause grievous bodily harm in reckless disregard of the possible consequences, while being aware that in the ordinary course of events death might ensue as a result. As indicated in the Nuremberg trials, the primary requirement of intent is the nexus between the crime of murder and a state of war. For a conviction of murder in this regard, X must have intended the death of the victim. This will be the conclusion if the evidence indicates that X was aware that death would unavoidably result from his conduct, even though he might not have desired it. Therefore, for purposes of crimes against humanity, knowledge of circumstances plus the awareness that those circumstances would likely or possibly lead to death (as required for *dolus eventualis*) meet the requirements of intent and knowledge as per the Rome Statute. For most jurisdictions, purpose and knowledge as a practical certainty that a result will ensue will satisfy the *mens rea* requirement. Also, most jurisdictions hold that a conscious creation of a significant risk would invite some degree of criminal culpability.

The proper interpretation and application of *dolus eventualis* was an issue of concern in the *Lubanga*-case, and not as much the meaning of the concept (para 3.3.1.2 above). This occurred because the concept is interpreted differently by the various States Parties. The application of specific domestic concepts with no universally satisfactory meaning should be avoided. It is sufficient if the requirements of the requisite mental state are defined in practical terms. This is because any dependence on conceptual realism would yield misguided judgments.

This is especially evidenced in the case law involving command responsibility. Despite the great number of international case law on this matter, the *mens rea* requisites for command responsibility have never been interpreted with precision. With regard to the language, the terms applied do not translate directly from one legal system to another. International tribunals and international courts sometimes borrow concepts from national legal systems and neglect the precise context in which those terms are applied in national courts. The lack of clarity in translation stems from the different legal systems and their different categories of *mens rea*. Moreover, the ICC has not been clear in stating whether the same mental state that is necessary with regards to every material element of a crime apply to both superiors and subordinates.

Since the introduction of the joint criminal enterprise as a form of criminal responsibility (see para 3.4 above), *dolus eventualis* meets the model for most criminal conduct as pronounced in international law. One would accept here that the application of various forms of criminal liability that diminishes the mental element has, in effect, distorted the *mens rea* of international criminal law from intent and knowledge to *dolus eventualis*.

Responsibility in joint criminal enterprises arises whenever there is some risk that a crime, which did not form part of the common purpose, will occur, and this crime was also a foreseeable consequence of the common design's execution. There is still uncertainty regarding the applicable standard to attribute criminal responsibility for risky conduct in international criminal law. The problem has basically been around the approach, because an elastic approach may lead to criminal responsibility that may exceed culpability; and, on the other hand, an approach that is rigid or restrictive may exonerate criminals who deserve punishment. There has further been disagreement whether the foreseeability of the commission of an unlawful act which is not defined by the joint plan should be determined objectively or subjectively. There has been no provision in terms of guidelines by the jurisprudence of the international courts on this issue. Some courts, such as in *Tadić*, applied the subjective test in determining the state of mind of a person who did not intend to cause a certain result, but did realise that the group's conduct was likely to lead to that result, and still willingly took the risk.

Applying the notion of risk inherent in *dolus eventualis* to construct recklessness (advertent recklessness or indirect intent in some national legal systems) presents a great opportunity to also establish the criminal liability of leaders of organised criminal groups in complex domestic cases. The reasoning behind this approach to fault is as a result of no rules in the ICTY statute that regulates this form of criminal participation. As perceived, international criminal law is permeated with *mens rea* provisos that are of common-law origin, but different national jurisdictions apply different guiding principles to determine culpability.

When examining legal intention in the selected jurisdictions of the US and Great Britain as discussed in Chapter four, it was discovered that the concept of *dolus eventualis* is not cited as such in US criminal law, as explained in paragraph 4.2 in this study. A broad understanding of *dolus eventualis* includes what is regarded in US criminal law as a mental state similar to the common-law recklessness. The US also has a legal code (MPC) which punishes perpetrators for committing unlawful conduct. It is clear that any penal code must be quite explicit in terms of what it considers as an act or conduct. Yet, as evidenced in paragraph 4.3.4.1 in this research, the MPC sets out in s 1.13(5) that in order to establish that a particular act or omission qualifies as conduct, one needs to analyse the accompanying mental state of the actor. If thoughts can be distinguished from acts, it becomes questionable whether acts should be defined. The attempted definition under the MPC s 1.13(2) equating acts to bodily movement, seem insufficient, and using these terms seems vague.

Still, the fixed rules determining intent are one of the major contributions of the MPC in that it introduced a few lists of criminal liability vocabulary that are defined with regards to the particular material elements of the offence. The US categorises crimes under the two groups of specific intent- and general intent crimes. The main distinction between these group of crimes are those that are committed knowingly, purposely, recklessly, and crimes committed negligently. The different categories of criminal intent are considered as an operative state of mind at the time of the unlawful act. X may be found guilty of having committed a crime intentionally, knowingly or purposely; this may vary with the nature of the crime committed.

Determining the *mens rea* of an accused is nonetheless one of the problematic areas of substantive US criminal law; this is as a result of many improvised terminologies applied to define the mental state. The term as used in cases requiring a blameworthy state of mind like 'intentionally', 'wilfully', 'knowingly', 'purposely', 'maliciously', 'fraudulent', 'recklessly', 'negligently', indicate amongst others, the mental elements of crimes. US criminal law has been inconsistent regarding the mental elements of crime; just as some of the definitions have remained inconsistent, considering the variety of cases in different circumstances, for example, the same term sometimes may be applied to describe a variety of mental states. Even though *mens rea* is regarded as an essential element in crime, this notion may be altered by statute creating the criminal offence. In cases relating to the crime of 'endangering the public' by driving an automobile, the intention of X is not necessary in cases relating to reckless driving in the US. If the physical aspect is present and the driving is voluntary on the part of the operator, an offence has been committed.

If *mens rea* is considered as a state of mind, one point worth noting is that there is no particular state of mind common to all crimes, which make the precise definition of *mens rea* uncertain. If this view is accepted, then *mens rea* should be considered as a chameleon, with no particular colour. This means that the concept of *mens rea* requires for different crimes a distinct and precise meaning. This may be the reason for the MPC's shift to a more element analyses approach by providing specific details or meanings to particular blameworthy states of mind (as in s 2.02(1)). By implication, a particular culpable state of mind exists for every material element of that crime. Therefore, the blameworthy requirements would differ for different elements of the same crime (for example, murder). Certainly, the extent of cognitive awareness in the course of committing an unlawful act varies.

Even though the concept of *mens rea* suffers a continuous misconstruction in terms of certain crimes by the courts, the concept still remains neglected by the legislature. In determining intent, there must be proof on the part of the prosecution that X had the specific intent, for example, to kill his victim (Y). Proof is required that X was the principal offender or that the unlawful act was committed with knowledge and design. Unlawful conduct considered to be wilful or wanton is

considered to carry the highest penalty. Therefore, US criminal law leans more towards defining the elements that incriminate a particular conduct (substantive law), rather than considering the mental state of X at the time of his conduct. The drafters of the MPC were satisfied with the 'element analysis' than considering the 'offence analysis' with the *mens rea* standard outlined in relation to 'circumstance' 'conduct', and 'result' of the offence.

Crimes committed with purpose (see para 4.3.1) would be considered under specific intent crimes. Intent is equivalent to purpose, which is not explicitly defined and applied in the MPC. A hindrance with this distinction is that with specific intent crimes, the prosecution has to prove X's purpose in relation to the result. This implies that the prosecution may not rely on X's knowledge of the certainty of the consequences when deciding on the question of specific intent. The claim that 'purpose' is fulfilled through 'belief' or the 'hope' that a circumstance exists, remains contentious. The provision of 'hope' under section 2.02(2)(a)(ii) is an indication that the legislators intended to diminish the threshold of criminal liability with regards to the element of circumstance. Since X is not guilty for having committed an unlawful act except if he acted 'knowingly', 'purposely', 'negligently' or 'recklessly', in order to avoid confusion, verbs requiring 'purposeful' action should be equated to 'purpose' in the absence of intention.

In cases where the charge is murder, and the direction of the jury is not sufficient, the jury is not required to presume the necessary intention, except if they are swayed that grievous bodily injury or death was a virtual certainty as a result of X's conduct, and that he appreciated the consequences; although he may not have desired it. The responsibility is one for the jury to take into consideration all the necessary evidence.

Although the offences as described in the MPC varies with the practice of judicial precedence of various states, there has been some consistency in holding a person criminally responsible for any conduct that meet the academic definition of unlawful conduct and the fixed criteria for liability. Still, the US approach on criminal intent appears to be undulating in general as it seeks to uphold a just outcome in a particular case rather than gearing toward consistency. These systems uphold justice based on each particular case, especially where the

application of a general rule would be considered an injustice. This aspect is noticeable in English criminal cases as well.

As explained in paragraph 4.4 of this chapter, English criminal law recognises that the doctrine of *mens rea* is closely related to fault on the part of X for a prohibited conduct. The scale of *mens rea* standards in English criminal law includes intention, negligence and recklessness, amongst others. English courts differ, and are inconsistent as regards the interpretation and application of the concept of *mens rea*. A point to clarify here is that even though the different approaches to intention in terms of different crimes generate more confusion around terms; intention cannot be interpreted and applied the same in every context of criminal law, and the test for intention as applied in murder cases equally applies to all crimes. One would therefore state here that in order to comprehend and correctly apply *mens rea*, a thorough examination of the definition of that particular crime is necessary.

The courts have furnished judicial precedence coupled with many contradictory definitions of intention. These varying interpretations of *mens rea* lead to incongruity among judges with regards to the application of the appropriate *mens rea* standard to particular offences. English jurisprudence indicates that there is intent when X aims to cause an unlawful act. The difficulty in interpretation and application lies in cases where X did not have the required aim to cause any unlawful consequences, but his conduct has however led to the unlawful consequences.

When considering whether X acted intentionally, intention should be distinguished from motive or desire. Intention should also not be restricted to the result or consequences that are desired, but should also include consequences which X did not wish to ensue, but the jury found that such consequences (a) are the virtually certain result of X's conduct (free from some unforeseen intervention); and (b) such results were foreseen by X as virtual certainty to ensue from his conduct. This encompasses the essence of *dolus eventualis*.

*Dolus eventualis* in English criminal law is commonly referred to as indirect (oblique) intention or subjective recklessness – where X foresaw the possibility of

an unlawful result as virtually certain or highly probable to ensue, although the consequences may not be his main purpose. Complications in terms of interpretation of intent may arise in cases where it was not the primary aim of X to cause the unlawful result, but, however, he did so. In such a case, as decided by substantial precedents, intent must be found from X's foresight of the result ensuing as a virtual certainty.

When determining foresight and proof of indirect intent in murder cases, a subjective approach is recommended, as well as to any other offences where these elements are required. While *Cunningham* is considered as the essential precedent with regards to the application of the subjective approach to determine subjective recklessness, in *Caldwell*, two limbs of recklessness had been established: (i) foreseeability of the likelihood of the unlawful result; and (ii) undertaking the irrational risk (the probability of the result). *Caldwell* should also be considered as a leading precedent only in terms of the standard of objective recklessness, as explained in paragraph 4.5.1 of this thesis.

The English cases of *Woollin* and *Moloney* are further examples involving direct intention (see para 4.2.2 above). In these court cases, the jury made use of foresight but this did not assist them to ask the proper questions relating to the facts, and whether these facts were proven and satisfied beyond a reasonable doubt; that is, whether X's aim was to inflict serious bodily harm or to cause death when he committed the act that resulted in the consequence. The murder case of *Woollin* remains questionable as the first point of consideration by the jury concerned the accused's total lack of respect for human life, which is a moral question.

*Woollin* however remains the leading precedent when the courts are considering indirect intention. In this case, the House of Lords attempted to clarify indirect intent by stating that if it is virtually certain that the accused foresaw the consequences ensuing from his conduct, the jury may find that such conduct was intended, even though it was not X's purpose to cause the result. This is not considered as a suitable interpretation. The exact meaning is distorted when juries are allowed to determine intent as a question of fact. The ultimate inference to determine intent depends on the evidence in which X is a witness; if the jury is

allowed to determine indirect intention as a question of fact, then X's criminal liability is determined objectively - an approach that may lead to an incorrect inference, and consequently an erroneous verdict.

It has, however, been stressed in *Woollin* that the meaning of intention must not be considered to be the same in every criminal aspect. This is because the meaning of intention may be approached differently in various crimes. One may state here that this conception has led to more terms being confused, if not mystified. Terms like 'knowledge', 'intention', 'purpose', 'wilfulness', 'reasonable cause to believe', 'dishonesty', amongst others, have been employed to suggest culpability.

Lord Scarman in *R v Hancock and Shankland* again emphasised that intention must not always be structured in terms of the degree of probability of foreseeability (see paragraph 4.5.3 in this regard). This supports the proposition that X may foresee the consequence of his conduct as virtually certain, but he cannot be held to have intended the consequences. This approach to foreseeability of certain consequences will not amount to proof of intention in this case, but in other cases, it may apply. However, the court in *R v Moloney* directed that where X foresaw serious bodily harm or death as 'natural consequences', X had oblique intention. The Appeal Court rejected the reference to a 'very high degree of probability' as a misdirection, and held that where an extension is required regarding foresight, the court should apply the 'virtual certainty' test – thus modifying *Moloney*. In this vein, the likelihood of the consequences occurring is important when determining whether the unlawful conduct was intended. Therefore, the jury would not be required to infer the necessary intention unless they are certain that the unlawful consequence was a virtual certainty.

Foresight of a consequence should not be considered as intentional, but as a basis of presupposition for X's purpose or intent. The guidelines in *Hancock and Shankland* were also explained in *Nedrick* by the Court of Appeal in a situation where the consequence was not X's desire or motive. It was stated that if the jury is satisfied that X recognised that death would certainly result from his conduct, then that forms the basis to infer that X intended to kill, although he may not have had the desire to kill.

The current position is that the jury may decide that X foresaw the consequences as a virtual certainty. The degree of foresight is as such considered to be very important; as the concept of 'virtually certain' is a higher level than any other degree of foresight of possibility. This concept must however be comprehensible to the jury. Taking such a direction implies an objective consideration, unless the jury is certain that grievous injury or death was virtually certain. All that has to be satisfied here is proof that the unlawful result was objectively foreseen by X as a virtual certainty, and the results foreseen occurred. It is recommended here that intention should also be considered subjectively, whether direct or indirect. The Law Commission has considered the factor of foresight as misleading, and that it is not required when determining intent, and that 'willingness to kill' (intent as to the purpose) is not limited in its application; the reasoning here is that foresight may lay more weight on the possibility than on the willingness to kill.

Recent cases indicate a gradual drifting back to the 1891 era of *Angus v Clifford* with the principles that moral blameworthiness is a function of the state of mind or the will of the actor which is not determined merely by making reference to any peripheral norms like a reasonable man. The case of *DPP v Smith* indicates that X may be convicted of murder even if he never meant to cause death so long as the unlawful consequences were (objectively) the natural and probable consequence of his conduct. This implies that X's purpose is immaterial regardless of whether the presumption is, of fact, law, or of a reasonable person.

In Chapter five, the concept of *dolus eventualis* as found in South African criminal law is regarded as a controversial concept, characterised by a lack of clarity. In order to effectively understand the evolution of this concept, background information as to where the concept fits in as to *mens rea* requirements, as well as how this type of intention has been judged by the South African jurisprudence, was provided. As it is important to evaluate how this concept has been interpreted and applied, different periods of development; that is, the years before 1945, from 1946 to 1985, and the era after 1985, were considered in paragraph 5.2 above.

It was shown that in South Africa, the forms of criminal intent are *dolus directus*, *dolus indirectus*, and *dolus eventualis*. *Dolus eventualis*, which is the focus of this study has two components in terms of interpretation – the cognitive component

(knowledge) and the conative component (volitional element) with two different approaches to interpreting the concept (subjective and objective approach). South African courts have always recognised the cognitive and the conative components to be present in cases of *dolus eventualis*. This is the doctrine in civil-law jurisdictions, such as in the Dutch and German laws in which the South African criminal law concept of *dolus eventualis* is deeply rooted. One could therefore state that in South Africa, a person will be liable of murder in the form of *dolus eventualis* if both the cognitive and conative elements have been satisfied. In this regard, he must have foreseen the possibility of a consequence ensuing from his conduct, and reconciles himself to the risk of that possibility; thus, the one leg complements the other. In other words, although the perpetrator foresees the possibility of a prohibited consequence, but he has no assurance that the prohibited consequence will not occur.

Although the definition of *dolus eventualis* is still being debated on in South African academic circles, the courts, in cases of murder, have stated that the test is whether there was the likelihood for X to foresee that his conduct would yield the unlawful consequences, but he proceeded recklessly with that conduct, regardless of whether his conduct resulted in, for example, death or not. Foresight (as required by the first component of *dolus eventualis*) implies an investigation into the wrongdoer's state of mind. This means there must be an element of inference to establish his state of mind at the time of the conduct. As such, *dolus eventualis* concerns the accused's state of mind but only in a cognitive sense as it necessitates a decision as to whether a harmful result may actually occur in the circumstances of each case.

Much case law was discussed in order to illustrate the challenges faced by the courts when interpreting and applying the requirements in order to hold X criminally liable for murder. Prior to the decision in *Goosen* in 1989 (see para 5.2.3), the position, as exemplified in the *Bernardus*-case, was that once the court is satisfied that the defendant anticipated the unlawful happening, the manner in which the consequences occurred was no longer necessary. In more recent cases, the courts seem to take a different view as regards the requirement of

foresight; there would be a lack of *dolus* if there is no causal link. This means there is no intention if the end result is different from what the defendant anticipated.

The challenges faced by the existing legislative framework, which has been regarded as one of the reasons for the variances in judicial precedence with regard to the concept, have also been considered. It was concluded that the current legal framework regulating *dolus eventualis* still adheres to its continental origin, with no legislation on the concept.

## **6.2 Recommendations**

After researching the interpretation and application of *dolus eventualis* in South African criminal law, and comparing how this concept is treated in international criminal law, and jurisdictions such as the US and Great Britain, the following recommendations can be made:

### **6.2.1 Consistency in determining intent and differentiating between the types of intent**

In most common law jurisdictions, the definition of the concept of the mental state is not defined, either in case law or in the criminal law codes. Moreover, the formulation of a particular definition meant to be applicable to all material crimes undermines the essence of criminal law. On the principle of legality, in order to clearly distinguish between the various forms of culpability, the *mens rea* necessary for every crime should be distinct.

It has been seen that different domestic laws and international instruments (Rome Statute) differentiate between intent in their own distinctive ways. Intent under the Rome Statute is considered as purpose in the US' MPC. While the Rome Statute speaks of a 'mental element', the US' MPC accentuates the 'material element' of a crime for criminal responsibility. In the US, the general requirements of culpability are also considered under different headings. A disparity is also envisaged under the Rome Statute Article 30(2) and the model Penal Code Section 2.02 with

regard to intent; where 'conduct' and 'consequences' are considered as different forms of intent.

The ICC system is based on principles and notions that are not customary within most common-law jurisdictions, and is based on a language many common-law lawyers and other legal practitioners might find it foreign in their own legal environments. On the other hand, the US' observation of the subjective element of criminal responsibility had filtered and influenced some of the judgments of the ICTY, but those decisions are not binding on the ICC.

It has also been perceived in this study that the US differentiates between 'general intent' and 'specific intent' crimes, while the law governing English criminal law distinguishes various forms of *mens rea* as 'direct intent' and 'indirect intent'. Although 'general intent' and 'specific intent' crimes are known in South Africa, this jurisdiction's classification comprises direct intent (*dolus directus*), indirect intent (*dolus indirectus*) and legal intent (*dolus eventualis*). In this regard, direct intent in South Africa corresponds with that of Great Britain, but the concept of indirect intent does not completely agree in these two countries. The difficulties lie in analysing and recognising the different types of intent and of distinguishing it from negligence.

In homicide and culpable homicide cases in South Africa, courts would have to determine whether X's unlawful conduct was perpetrated with either intent or negligence where X possibly could have foreseen death, but he did not think of that possibility ensuing. This is made a more difficult task by the overlapping of certain terminologies used in the distinction between these two mental states. In South Africa, where the test for negligence is objective, and the test for intent is subjective, different possibilities may arise here (i) it could be said that a reasonable person could not have foreseen the likelihood of death ensuing, accordingly, there is a lack of foresight in relation to the consequences, and X might not be liable for murder. Some legal systems would consider this as 'unconscious or inadvertent negligence'. (ii) A reasonable person would have foreseen death, but with X's personal background, he did not foresee the consequences. As such, X did not possess the necessary *mens rea*, however, he may be guilty of culpable homicide. (iii) X foresaw the possibility of death ensuing

from his unlawful act, but he thought that it would not materialise (conscious or advertent negligence or *luxuria*). In this case, X would be held liable for culpable homicide. In fact, this amounts to a subjective approach where X's personal background (like fear and emotion) is considered. (iv) X foresaw the possibility of death ensuing from his unlawful act, but he disregarded, and reconciled himself to that possibility (legal intention, constructive intention or *dolus eventualis*). (v) X's main aim is causing another person's death (direct intent or *dolus directus*). *Dolus eventualis* and conscious negligence are clearly distinguished from one another in that *dolus eventualis* involves a purposeful conduct while conscious negligence involves an inadvertent conduct. However, X's genuine, although misplaced confidence, as was the case in *Humphreys*, in his ability to prevent the unlawful consequences from materialising negates intention. In this regard, each particular case must be decided based on each particular fact.

As noticed above, there is a distinct possibility that these concepts may overlap with one another if there is no clear distinction between them. It consequently also becomes complicated for courts in determining whether X had *dolus directus*, or was reckless, or negligent, or if he had intention in the form of *dolus eventualis*. Making such a life-changing decision depends in each case on whether the prosecution has proven beyond a reasonable doubt that the perpetrator subjectively foresaw the possibility that his actions would result in the death of the deceased, and nevertheless persisted with his unlawful conduct. The requirements of 'foresight' and 'persistence' with such conduct lead to further complications when distinguishing between culpable homicide and murder (*dolus eventualis*) cases where the negligence required is a form of fault not intention. To arrive at the right answer implies one has to think perceptively through the facts of every particular case.

In connection with the US' specific intent, it is recommended that this term should function as a characteristic of a type of wrongdoing in relation to a particular criminal plan which does not necessarily has to be complete. In a case of theft, for example, even though not every co-actor is personally motivated by the criminal plan, it does not change the legal nature of the joint enterprise (where there is division of labour) if each of them is aware of the plan, and acts accordingly.

Where this is the case, the knowledge of the plan, even in the form of *dolus eventualis*, is both necessary and sufficient.

The MPC further divides general and specific crimes into crimes committed with 'knowledge', 'purposely', or crimes committed 'recklessly'. When defining a crime, the MPC attempts to make it possible to clearly infer whether X committed the unlawful act with knowledge or was reckless. In this regard, there is uniformity when employing major substantive legal terminologies; whereas South African courts would make use of inferential reasoning in this regard to determine intent and recklessness.

As seen from the categories above, whereas the common law categorically distinguishes between intention and negligence, the notion of intention in US criminal law was discarded by the drafters of the MPC. This is probably as a result of the fact that the term remains insignificant in cases where a subjective inference has to be made. It would have been prudent for the drafters of the Code to clearly differentiate between the different types of intent comprising knowledge, purpose and recklessness within the definition of intention.

Drawing inferences from Great Britain in a bid to compare with the South African position, English criminal law considers recklessness as a distinct form of *mens rea*. Therefore, if X foresaw the possibility of an unlawful result ensuing from his conduct, he at that moment had intent. Differentiating recklessness as a separate requirement of *mens rea* seems to make this form of intent easier to understand, thus avoiding all the complexities when distinguishing between the various types of intent. English criminal law recognises oblique intention as another moniker for indirect intent. Although the concept of oblique intent has been applied in recent cases; the focus has been more on recklessness. Concluding with how comparative jurisdictions treat the mental element of *dolus eventualis*, it is worth stating that there are some similarities between the law of evidence with regards to 'indirect intent' applicable in Great Britain and US' 'general intent' or 'inferred intent'. However, there still exist some differences in terms of the forms of proof which is applicable only within the legal framework of a particular jurisdiction.

Irrespective of how these categories of intention are being defined, one would possibly argue here that to some extent, even these have lost focus. South African jurists refer to *dolus eventualis* as 'legal intention' or 'constructive intention', and also 'actual intention', which may seem strange. The implication here is that any particular unlawful act committed by X may be termed differently by even the courts in the same jurisdiction, (and even differently by various jurisdictions). In order to gain more certainty when determining intent and types of intent, there must be more consistency in the use of the *mens rea* terminologies.

### 6.2.2 Consistency in the use of terminology

From the above discussion on the use of different vocabulary to distinguish between intent and the different types of intent in domestic and international law, it is clear that there is no common terminology being utilised by all parties involved. This naturally leads to complications in interpreting case law for foreign jurisdictions, and also for international criminal law cases.

In international criminal law, an endeavour was made to universalise the *mens rea* concepts, however, because of the different national conceptions and their varying interpretations and applications, this attempt was abandoned. It is recommended, however, that the Rome Statute continue to avoid the use of national terminologies in its articles, and to make use of neutral descriptive terms. The normative approach to blameworthiness would be that, if X performs an unlawful act irrespective of the awareness (of a minor or substantial risk) that such conduct may lead to unlawful consequences (wilful blindness), X should thus be punished for the particular offence.

The US' MPC is flawed with a bunch of divergent phrases and terms that sometimes reflect on the gradation of X's state of mind during the commission of the unlawful act. The Rome Statute's 'wilful blindness' translates in the MPC to the state of recklessness as an element of an offence, such element is also established if X acts knowingly or purposely. Moreover, if X has knowledge of unlawfulness but still decides to engage in the unlawful conduct anyway, *dolus eventualis* will be established (in South Africa). If this interpretation is accepted, then there seems to be no difference between *dolus eventualis* and recklessness.

Moreover, if it is accepted that X had knowledge (he is aware of the possibility) of the consequences, then X must have a purpose, and consequently the necessary intent. This justifies the disparity in opinions in terms of the mental element associated with the interpretation of *dolus eventualis*.

It has, however, been seen in cases involving *dolus eventualis* in South Africa that frequent use is made of the word 'reckless', yet the exact meaning of the term is not adequately explained. As seen in paragraph 5.6 above, although certain courts, such as Holmes JA in *De Bruyn*, have made attempts to explain this term, the definition has been criticised as confusing. It further seems that the courts are satisfied by the ordinary meaning of the word when finding that recklessness has been proven. As such, they find it accordingly unnecessary to clearly distinguish between recklessness and *dolus eventualis*, for example. It is required here that courts should ascribe a precise legal meaning to this word, if the term is to be used in criminal cases. While the notion of recklessness is commonly applied in both the jurisdictions of South Africa and Great Britain, there is also a slight resemblance of US criminal law on *mens rea* to that of its English counterparts. In the US, the *mens rea* yardstick of crime committed 'purposely' corresponds closely with the notion of direct intent in other jurisdictions like Great Britain.

Lastly, concepts such as 'mental state' appears to be nostalgic since it fails to address the real issues on *dolus eventualis*. It is not whether consciously taking a risk can be attributed to X's will or not, but whether by performing the act irrespective of the risk (minor or substantial) a certain unlawful consequence will ensue.

### 6.2.3 Certainty as to the tests for determining *dolus eventualis*

The tests to determine intent may be traced back to the sources of each jurisdiction's laws. Although the current test for intention is subjective, the objective test was utilised by the earlier courts, as discussed in paragraph 1.5 of this study. Since English law is one of the sources of South African criminal law, it would be admitted that the reason for the application of the objective test to determine legal intention was as a result of the presumption that X intends the possible results of

his conduct. It is therefore admitted that the courts in the past were not taking into consideration the subjective foresight of X.

Similarly, in Great Britain, the Court of Criminal Appeal in *DPP v Smith* stated that the jury must determine X's intention by drawing presumptions from the surrounding situation, including the presumption of law. This suggests the reason for the presumption that X intends the natural and probable consequences of his conduct, giving room for this presumption to be rebutted.

Under English common law, the application of the objective test to determine intention has been recognised, though with some doubt as scholars had advocated for a subjective approach. In the same way, the approach applied by the Supreme Court of Appeal in *Pistorius* was also not completely welcomed by South African scholars. One would therefore state here that distinguishing between negligence and recklessness would be difficult if the objective approach is applied.

The House of Lords in *DPP v Smith* applied the objective approach in determining the accused's culpability. This court voiced this test as deciding what an ordinary, reasonable man would have envisaged as the natural and probable consequences, if placed in similar circumstances as that of the case. This position, it is recommended, must be shifted to a subjective approach, this is because the word 'natural' would imply that if everything remain the same, a particular conduct would lead to a particular result.

There are no given lists of *dolus eventualis* situations, or any types of risk involved justifying the presence of *dolus eventualis*; such risks are not concrete specific. Although such cases may be scarce, it could be accepted that there are certain aspects in specific cases that may negate the presence of *dolus eventualis*, despite foresight of the possibility of the consequences occurring. The court makes use of inferential reasoning to determine whether a person had intent in the form of *dolus eventualis* or not; however, making such a determination is complex. No reasons have been advanced to justify the view that the foresight necessary for *dolus eventualis* has to be more than a remote possibility. The correct test must be used to determine the culpability of the accused - tests with different distinction

opens the door to arbitrariness and unequal treatment of accused under the law (injustice).

In order to determine knowledge of unlawfulness, the elements that distinguish criminal intent from negligence should first be investigated. Intention can be established only when there is proof of foresight. Subjective foresight can be proved by inference. When determining intention, the point of departure should be whether X actually foresaw the unlawful result ensuing from his conduct. In this vein, the greater the possibility that a result will ensue, the greater the likelihood that such consequence was foreseen, and the more likely that it was intended. Courts should avoid falling into the trap by setting the gauge as whether the accused should or ought to have foreseen the prohibited consequences ensuing in order to determine *dolus eventualis*. Therefore, foresight should be considered as proof of intention, and not as an alternative form of intention. Whereas the Anglo-American systems are orientated towards actual risk and knowledge of risk; it is recommended that such a test should also include the subjective element of X reconciling himself with such a risk, and the result ensuing. This calls for a partly objective (wrongdoing) and a partly subjective test (attribution; i.e. where the personal characteristics of the accused is considered).

Courts grapple with the challenge of establishing the state of mind of the accused when the unlawful act has already been committed. It is required that the facts in every particular case involving *dolus eventualis* be carefully inferred subjectively - taking into consideration the testimony of the accused with an objective consideration. This calls for a value judgement in each individual case.

#### 6.2.4 Considering a penal code stipulating requirements

There is no statutory or case-law in place that enumerates all aspects of *dolus eventualis* that would be satisfied in any particular case. Although it is perceived that the courts may be reluctant to abandon the basic approach applied in the past, a thorough consideration of most of the recent high profile cases on *dolus eventualis* indicates that the approach to *dolus eventualis* cannot remain constant. While this research advocates that legal intention should be determined on a case-by-case basis, South Africa jurists should perhaps look into the possibility of the

codification of legal rules in order to eliminate any uncertainty in applying this type of legal intent. As evidenced by the MPC and Rome Statute, such legal codes could provide more clarity as to how *dolus eventualis* should be interpreted and applied.

#### 6.2.5 Better instructions to jury

In jurisdictions where a jury system is still made use of, better instructions must be given to the jury, so as to improve the ability of jurors to comprehend the directives in order to apply the law. The complexity of *dolus eventualis* cases combined with the problematic linguistic constructions of the concept may inhibit jurors' understanding in such criminal cases.

Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.

Such suitable instruction to the jury provides a direction as to when the intention can be inferred from foresight. Foresight of a natural consequence is not sufficient for there to be an inference of intent. There must be foresight of a virtual certainty - a narrower concept which will certainly reduce the scope of murder convictions.

#### 6.2.6 A simple, uniform and universal definition of *dolus eventualis*

There have been infinite opinions on the concept of *dolus eventualis*, leaving the impression that there is no settled definition of this concept as it is full of ambiguity in terms of interpretation and application. The concept has been interpreted as encompassing different meanings; sometimes within the same legal system, and in other legal systems. The point of disparity centres on which test, angle and theory the court has to interpret and how to apply the concept.

It has been shown that civil-law countries specifically apply the concept of *dolus eventualis*, while most Anglo-American countries do not. However, even within civil-law systems, *dolus eventualis* does not have a uniform meaning.

Nonetheless, it does seem that the concept has commonalities in these systems as all require that the perpetrator has knowledge that the unlawful conduct will occur in the ordinary course of events; i.e. that the consequence will occur. This phrase has however been interpreted differently in the various civil-law countries. The words 'will occur' has been taken to mean that there must be a substantial or a high degree of probability that the act will result. It has also been construed as necessitating knowledge of a substantial or serious risk that the result will ensue; and also as being indifferent to the result transpiring. Indifference, again, is very similar to recklessness in common-law countries. Some civil-law jurisdictions furthermore include the mental element of negligence (inadvertence) in the meaning of this concept.

Having taken the historical background of this concept into consideration, it is required that South Africa formulates a uniform approach which can be consistently applied in all types of criminal cases. Although the solution to effectively interpreting and applying this concept is not theoretical but practical in nature, theories from modern German and Dutch jurists may be a starting point if South African courts have to provide persuasive authorities, taking into consideration the emergence of new and complex forms of crimes. Given the historical evolution of *dolus eventualis* which has gradually been shaped by South African jurisprudence, it is possible for courts to still develop the specifics of this type of intention in order to create a clearer and more straightforward concept entailing an uncomplicated interpretation and application.

Various definitions and interpretations of the concept of *dolus eventualis* have evolved over time. *Dolus* is intention - a wilful conduct; and the mental disregard to risk that would warrant X culpable for intentional offence is *dolus eventualis*. Defining or stipulating a specific set rules for the concept seems difficult to get to; the different approaches to interpreting and applying *dolus eventualis* in court cases have not satisfactorily covered every practical situation that involves determining whether intention on the part of X is established. The argument here is that all unlawful conduct cannot be determined in terms of, for example, 'purpose', 'foresight', 'knowledge', 'motive', or 'aim' - which may even go beyond a particular result. Instances of foresight may also not necessarily lead to intent.

Some cases may contain the element of purpose, but lack the element of foresight because the result may not be probable.

There have also been disparities with regard to foresight. Courts should be compelled to ascertain whether the cognitive requirement should be limited only to foresight of a 'real' or 'reasonable possibility' of, for example, death, or if foresight of a 'remote possibility' suits *dolus*, and whether the conative requirement (for example, carelessness) on the part of the accused can sufficiently be defined. Moreover, while some courts focus on foresight, others focus on the result, and some on both foresight and the result. This study suggests that foresight should be qualified as a real or reasonable possibility, or even better, a virtual certainty.

One would accept that imputing a legal meaning in these commonly used terms is difficult. Some scholars, such as Paizes and Whiting, as well as some courts have preferred that the degree of foresight must not be qualified – this perspective thus accepts a remote, slight or faint possibility of the consequence to be sufficient for *dolus eventualis*. However, this position has been criticised on the basis that it is too broad, and the fact that what is remote or slight cannot be measured. It is therefore recommended that foresight be defined in qualified terms, especially when considering the cognitive element of *dolus eventualis*.

The cases of *Ngubane* and *Beukes* add some substance to the volitional component of *dolus eventualis*, but in a manner that negates the findings of legal intention in cases where there is an indication of a foresight of a remote or slight possibility. It is submitted that foresight of a real possibility or foresight of a reasonable possibility be applied to hold X guilty in the form of *dolus eventualis*. Paizes adds that some kind of qualitative assessment in the form of a moral judgement may be necessary in exceptional circumstances, determined on a case-by-case basis.

In a bid to interpret *dolus eventualis*, terms such as 'disregard' have been employed; the reason here is to include all forms in relation to the indifference shown to the object worthy of protection by deliberating violence. In this vein, the quintessence of a mental position why X is blamed for killing Y is X's 'disregard' of Y's life. It is thus possible for South African criminal law to further advance the

subjective elements of the different types of killing. Where this is the case, X may not be convicted of any form of homicide unless there is some degree of disregard for human life on his part.

Although scholars have termed the second arm of *dolus eventualis* redundant, this cannot be acceptable since X must take into the bargain the fact that an unlawful consequence may occur – yet he nevertheless went further to perform the act despite the foreseen consequences. In this regard, the intent prescriptions in the MPC should not be followed as regards the mental state. The MPC's rule does not capture X's pre-considered choice to engage in the unlawful conduct, and also his conscious decision towards the actual risk foreseen. The mental state must however be morally equivalent to the concept of recklessness as contained in the MPC. The reasoning here is that when X decides to engage in an unlawful conduct, he not only understands the level of the possible risk involved, but it is his choice to engage in the undertaking which necessarily includes this pre-conscious approval or appreciation. Thus, the volitional component of *dolus eventualis* contains elements of recklessness, but preferably, it should be considered as 'aggravated negligence' – when X reconciles himself to that possibility.

Another issue is the degree of 'likelihood' on which the consequence must be 'foreseen' before one could conclude that X passed the test for *dolus eventualis* in relation to the result. If the jury are to find whether X had intent, they are not compelled to find that X actually acted with intent when the unlawful act was committed. Since much of the contradictions and confusion arise from X foreseeing the risk and reconciling with the possibility, it is also required that a further distinction be drawn between foreseeability of the possibility of harm or death by X, and X reconcile himself to that possibility of harm; in this regard, confusion between conscious negligence and *dolus eventualis* would be avoided.

One of the confusions had always remained whether X 'reconciled himself to the possibility' or not; it is recommended that since English law on recklessness is an independent form of *mens rea*, it should be introduced in South African criminal law so that recklessness serves as a distinct form of *mens rea*. This will also avoid the confusion that exists when distinguishing between conscious negligence and *dolus eventualis*.

For the interest of clarity and a consistent interpretation and application of this concept, it is required that the definition of intention cover cases where, if all things being equal, X is aware that his conduct will lead to the relevant consequences. This approach eliminates reference to the foresight or probability, since the principle of 'foreseeability' or 'knowledge' as a substantive rule will lower the 'virtual certainty' threshold. However, if the element of foresight is to be kept, it is recommended that reference is made to probability, in that the greater the probability of a consequence, the more likely it is that the consequence was foreseen, and that if that consequence was foreseen, the greater the probability is that that consequence was also intended. It is recommended that, court decisions, or legislation clearly distinguish between the foresight of X at the time of his conduct, from what he (a reasonable person) would have foreseen at the time of his conduct. The degree of foresight must also be qualified. In relation to cases involving legal intention, a more refined approach should be that:

- (a) X acts intentional with reference to a consequence when he foresees with virtual certainty that it will occur, regardless of whether or not it is his purpose to bring about the result (i.e. he is reckless as to the consequence), and he proceeds with the unlawful act;
- (b) There is absence of intention if X never anticipated that his act would bring about the result.

In this vein, the 'knowledge' test therefore becomes evidentiary instead of substantive. This approach advocates that both the cognitive and conative element must be accepted as substantial for a concept of *dolus eventualis*, and that the cognitive element be qualified. For a more nuanced and comprehensive approach, each individual case must be determined according to the facts of the particular situation, and the evidence weighed in the equation to determine the culpability of the accused. It is however certain that the scope of *dolus eventualis* and the range of conscious risk-taking situations this concept encompass will continue to be questioned as it encounters variant opinions, different judgments and various case scenarios.

### 6.3 Conclusion

This study on the application and interpretation of *dolus eventualis* in South African criminal law strived to answer pertinent research questions raised under Chapter one. A comparative evaluation was employed intending to provide more and different perspectives on the concept of *dolus eventualis* in order to appropriately appreciate its interpretation and application in South African criminal law. In conclusion, it can be stated that the research questions of this thesis have been answered, and the hypotheses proved.

- It was shown that the legal doctrine of fault (*mens rea* or criminal capacity) has never satisfactorily been dealt with by South African courts. There are still so many disparities and predicaments as regards the interpretation and application of *mens rea* and the different types of intent, especially by the courts. The study challenged conflicting judgments on the application of *mens rea* in domestic courts, especially as regards decisions on intent and negligence in homicide- and putative private defence cases, amongst others. Due consideration was given to the fact that in some cases where X causes death in the course of driving, for example, a murder conviction is obtained, while in other similar cases, the verdict is culpable homicide. Since *dolus eventualis* as a form of intent was central to these murder convictions, the interpretation and application of this concept in such circumstances was investigated in order to provide more clarity on whether fault consists of more than just X's state of mind at the particular time of his conduct.
- One of the research problems raised under chapter one is the role expert evidence plays in determining criminal intent. The onus of proof with reference to X's criminal intent rest on the prosecution. While expert evidence is based on fact, inferential reasoning is based on opinion; both operate as ingredients influencing the court's decision. As noted, the cause-and-effect approach was applied in earlier cases; and evidence may be led in rebuttal. However, the court must guide against being misled by expert evidence. If it is inferred that X did not reasonably foresee the possibility of death, he will not be held liable for the act committed. Although expert evidence plays a significant role in criminal proceedings, it depends on the

approach (subjective, inferential reasoning, or objective) taken by the court, in order to determine criminal intent. The admissibility of expert opinion evidence should be considered by the judiciary only if it is sufficiently reliable, relevant, impartial, and viable.

- This study also validated the fact that the legislative framework that currently regulates *dolus eventualis* is inadequate or incoherently implemented in South African criminal law as different courts interpret the requirements for *dolus eventualis* in dissimilar ways. After extensive examination of the interpretation and application of *dolus eventualis* in South African criminal law, it was seen that in the course of time, the concept has undergone a process of continual shifts. In other words, over the years the courts have interpreted and applied this concept in different dimensions to include foresight of the causal sequence to prove the existence of *dolus eventualis*; or foresight of a real possibility of death resulting from the conduct, or even foresight of a slight possibility. In other cases, some courts relied on a cause-and-effect approach (a form of strict liability), while others would focus solely on the cognitive component instead of on both the two essential cognitive and conative requirements. In previous case law concerning *dolus eventualis*, legal rules were not properly articulated when determining this type of criminal intent. From the above, it is evident that the interpretation and application of this concept have not been consistent; most of the disparities centres on qualifying X's foresight.
- From the evidence exhibited, it is clear that the test for *dolus eventualis* needs to be refined or redefined so as to guarantee a consistent and uniform application of the concept when determining if an accused (particularly in murder cases) had criminal intent in the form of *dolus eventualis* in order to be held culpable. South African jurists interpret the elements of *dolus eventualis* in different ways; for example, Steyn's three-stage requirement for *dolus eventualis* entails that X (a) foresees (factual cognitive element) the result of his intended conduct, (b) is aware (legal cognitive element) that his intended act is unlawful, and, (c) he take steps to act (volitional element) irrespective of the foreseen consequences. Snyman holds that only two

components must be satisfied with regards to X's state of mind and his conduct at that time of the conduct in order to qualify as *dolus eventualis*: although X did not intend to commit or cause the unlawful consequences, (a) he subjectively foresees that if he does what he intends to do, it may lead to an unlawful result (cognitive component), and (b) he still decides or takes steps (reconciles himself) to perform what he had intended to do, irrespective of whether the unlawful consequences he foresaw occur or not (conative component).

Where the main object of the wrongdoer is not to cause death, for example, his intention in the form of *dolus eventualis* arises if he foresaw the possibility that death might occur, but he nevertheless proceeded with his conduct in appreciation of that possibility, the second element has been realised. The perpetrator's conduct was reckless as to the consequences. This has also been considered to mean that the offender acted with gross negligence or that he reconciled himself with the consequences. In such cases, the guilty party does not need to foresee harm or death as a possible result of his conduct - if the possibility of harm or death was foreseen while ignoring the consequences, it is enough to constitute *dolus eventualis*. This research also recommended a preferred approach to interpreting and applying this concept.

- In the course of examining to determine how courts interpret and apply the concept of *dolus eventualis*, the origin of the concept has been taken into consideration. The origin or history of the concept of *dolus eventualis* provided valuable information as to the development of intent in South African criminal law, as well as in other jurisdictions and international criminal law. Although the concept of *dolus eventualis* originates from German law, it has undergone much change, especially under the influence of the Roman-Dutch law, one of the sources of South African criminal law. Continental writers from the early twentieth century already identified the three components of intent (which includes *dolus eventualis*) as still existing in its current form. Legal intention, as adopted by these older writers, is still commonly applied in South African criminal law (and in civil-law countries).

The approach to determining *dolus eventualis* has also changed. Courts currently employ a subjective approach to *dolus eventualis*, which requires the courts to determine intention in relation to the accused's state of mind. However, some 70 years ago, the Appellate Division (as it was then known) applied the objective test to determine intention, which did not take into account X's mental state at the time when his alleged unlawful conduct transpired. The court merely focused on determining whether X ought to have foreseen the harm ensuing. It was observed that this objective test was imported from the English criminal-law principle of presumption whereby, in order to establish intention, it is presumed that X must have intended the expected and probable results of his conduct. This history of *dolus eventualis*, as well as the development of the tests for *dolus eventualis* have provided invaluable background information as to how the current courts interpret the accused's foresight in relation to the unlawful consequences.

- The manner in which international law and comparative jurisdictions consider the mental element of *dolus eventualis* was also considered in this study. These perspectives did assist this study in revealing their various strengths and weaknesses in order to provide a better test for the concept. Issues relating to the application and interpretation of this concept under international law (as established in war crimes, crimes against humanity, command responsibility and joint criminal enterprises) has been considered by examining intent and *dolus eventualis*. It was seen that although the Rome Statute employed clear and simple terms to describe the *mens rea* requirements; it did not expressly include recklessness. It was left to the international tribunals to read this aspect into their case analyses. These tribunals' use of *dolus eventualis* has not been received well by the Anglo-American States Parties.

It was also found that Anglo-American jurisdictions like Great Britain and the US have not coined this particular concept, however, intent (which includes recklessness) and negligence similarly form the basis for criminal liability for unlawful conduct. In English criminal law, the elements of intention, recklessness and negligence imply different degrees of *mens rea*, and intent

consists of two forms – direct intent and indirect intent. In US criminal law, different levels of criminal intent are also utilised – crimes are either committed purposely, or with knowledge, or recklessly. In South Africa, recklessness is not explicitly recognised as a different category of criminal responsibility that warrants culpability for unlawful conduct requiring knowledge (intention). Recklessness is considered by some jurists as part of *dolus eventualis* as the basis of subjective culpability; that is, X's subjective state of mind - the psychological concept of culpability.

Most of the conflicting verdicts and various opinions had centred on X 'foreseeing the possibility' of harm and X 'reconciling himself' to the possibility. It is required that these issues be addressed accordingly so as to avoid the confusion that may arise when discerning between different cases involving *dolus eventualis*. Mindful of the hypotheses underlying this research as already enumerated, the English criminal law on recklessness should be incorporated into South African criminal law as an independent *mens rea* requirement. There is much to gain in recognising this particular form, as it may be helpful in alleviating the difficulties when interpreting and applying the various forms of *mens rea*, in particular, the enigma of *dolus eventualis*.

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