

**DISTINGUISHING BETWEEN INTENTION AND NEGLIGENCE IN SOUTH  
AFRICAN CRIMINAL LAW**

By

**SERAPHINE NGANGYU KWANJE**

LLB

21966214

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**SUPERVISOR: MR G ROSSOUW**

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## **DEDICATION**

This work is dedicated to my family,  
For the love and support you rendered throughout my program.

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## ABSTRACT

This study presents an account of *mens rea* as a culpability requirement. Both intention and negligence are forms of *mens rea* recognised in terms of the South African criminal law. They are both endowed with distinct principles but they have a similar role which is to prove the legal blameworthiness of an accused. Sometimes this distinction might become blurred and may seem to overlap. Courts are sometimes faced with the difficulty of defining and distinguishing between intention and negligence. This study examines the resulting legal literature with regards to the challenges accounting for the courts' difficulties in distinguishing between these forms of *mens rea*. It then looks at the relevant case law in order to construct a defensible account of these forms of *mens rea* in explaining their distinctive features. Further, the study considers a comparative study to illuminate understanding in this regard.

## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1 Background to the study

It is common practice that those who transgress the law ought to be punished. A person must be held to account if he is the reason for a perpetrated act/conduct, whether knowingly or unknowingly. Such an act/conduct must be declared criminal by law. The criminality in this light would require some form of blameworthiness. There are several ways a person can be blameworthy and this has an impact on the amount of blame attached on a particular unlawful act/conduct. This brings in considerations of culpability. The maxim: *nulla poena sine culpa*; that is, there can be no punishment without culpability is the main principle underlying the South African criminal law. The courts normally refer to culpability as *mens rea*.<sup>1</sup> Before placing criminal responsibility on a person under the South African criminal law, such must comply with all the elements of the crime alleged to have being committed. One of such requirements is that of culpability. The crux of culpability can be expressed in one simple question: 'could one in all fairness have expected the accused [herein after referred to as 'X'] to avoid the wrongdoing?'<sup>2</sup> If the answer to this question is negative, then there is no culpability.

*Mens rea*, literally translated as 'guilty mind', means that X must be blamed personally for his unlawful conduct/act in terms the law.<sup>3</sup> *Mens rea* is no doubt connected to an understanding of legal responsibility and to the rationale for punishment. Thus, there must be grounds upon which an accused can be blamed for his actions in order to establish whether the accused is culpable or not, as well as the degree of his culpability. *Mens rea* further addresses the mental qualities of an accused before he can be convicted in a court of law.<sup>4</sup> It requires that not only should such an act/conduct (in other words *actus reus*) correspond to the definitional elements of a crime, but also that it must be

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<sup>1</sup> CR Syman *Criminal Law* (5<sup>th</sup> edn, LexisNexis Durban 2008) 149.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*

<sup>4</sup> J Burchell *Principles of Criminal Law* (3<sup>rd</sup> edn, Juta and Company Ltd 2005) 457.

blameworthy.<sup>5</sup> This lies at the heart of legal liability, and takes cognisance of the moral and ethical view that only persons deserving of blame ought to be punished.<sup>6</sup>

*Mens rea* can be seen in different guises, composed of intention and negligence. Simply explained, intention on one hand requires that X perpetrates or intends to bring about the prohibited conduct or X foresees a possibility that his act might bring about an unlawful result, nevertheless he is not deterred by that but proceeds in performing such act; negligence on the other hand refers to when X fails to foresee the outcome but in terms of the standard of a reasonable person, he should have foreseen that an unlawful result might ensue and X would have taken steps to prevent such. These concepts: intention and negligence will be discussed in detail in the subsequent chapters.

Intention and negligence have a similar end; to legitimately apportion some form of legal blameworthiness on an accused act/conduct which is deemed to be criminal. Legal blameworthiness in this context can be attributed to the actions of the accused: if on one the hand, he either intended to do wrong in the sense that it was his aim to act accordingly or he foresaw the possibility of acting in that manner; or, on the other hand, he failed to act based on the duty placed on him by the law.

There is a lot more to the analysis regarding these two forms of *mens rea* than what is involved in a lay person's idea as regards their legal meanings. The fact also remains that it might be difficult to distinguish between the two because of the intricacies present in establishing why an accused did what he did. In other words, the accused may not be aware that he or she was doing something unlawful.<sup>7</sup>

### **1.1 Problem statement**

*Mens rea* in the form of intention or negligence promotes where fault has been demonstrated in connection with the unlawful act/conduct, such an offender be

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<sup>5</sup> Snyman (n1) 149.

<sup>6</sup> Evode Kayitand, 'The Form of Intention Known as *Dolus Eventualis* in Criminal Law' [July 31, 2008]. Available at SSRN: <http://ssrn/abstract=1191502> or <http://dx.doi.org/10.2139/ssrn.119502>> accessed 18 July 2015.

<sup>7</sup> *S v Magidson* 1984 (3) SA 855 (T).

punished. The material distinction between intention and negligence is no doubt fraught with difficulties, especially when attempts are being made to prove the presence or absence thereof in a court of law. This has been a challenge since the coming into being of the *S v Ngubane*<sup>8</sup> [hereinafter referred to as *Ngubane*] decision where the court stated that intention does not necessarily exclude negligence on the same facts. The question to be asked here is; can a person foresee the possibility of harm as regards his conduct, and yet be negligent in respect of that harm ensuing? The absence of a clear understanding hereof would account for the courts' difficulties in distinguishing between these two forms of *mens rea*.

More often, the courts grapple with the challenge of establishing the state of mind of an accused. The determination of inferential reasoning through foresight in order to establish whether the accused was reckless or not is complex. Furthermore, to what extent is foresight classified in a scenario when a person successfully takes a conscious risk (and such risk is deemed unlawful in terms of the law) for the first time without being caught, but he is caught in the second endeavour? What are the issues that may arise in this given situation? As such, it becomes necessary to analyse the two concepts (intention and negligence) since an accused might still be held responsible even though he lacks any foresight of the consequences of his act at the commission of the crime. Investigating these concepts with a view to provide clarity on the differentiation between negligence and intention in the context of the South African criminal law is therefore of particular relevance to this study.

This becomes even more imperative, considering the fact that a clear distinction between the two concepts lies at the crux of the culpability requirement in criminal law with the expectation that the accused person acts in all fairness and in accordance to the law.<sup>9</sup> Besides that, the understanding of the two concepts cannot be confined to the determination of whether the accused had a certain knowledge or not.

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<sup>8</sup> *S v Ngubane* [1985] ZASCA 41; [1985] 2 All SA 340 (A).

<sup>9</sup> CR Snyman, 'Confusion Concerning the Defense of Ignorance of Law' (1994) 111 *The South African Law Journal* 1, 15.

In order to provide an analysis regarding the two concepts, this study will undertake a comparative study of the position of the South African criminal law and that of the English criminal law since the former is partly founded on the latter. The essence is to draw inferences in a bid to tackle the issues, as well as proffering recommendations in this regard. Further, a comparative legal study is crucial in providing a critical understanding of legal matters in this field of study. In this light, an analysis of the English Law with particular attention to *mens rea* will be done.

### **1.2 Aim of the study**

The aim of the study is to distinguish between intention and negligence as distinct concepts of *mens rea*. This extends to include other issues that may arise when a court is faced with determining whether an accused acted negligently or intentionally in order to be fairly blamed for transgressing the law.

### **1.3 Objectives of the study**

To achieve the above aim, the specific objectives of the study are to:

- a. clarify the terms 'intention' and 'negligence' with a view to distinguish between the two;
- b. critically analyse the issues which exist in instances where court judgments are unclear about the distinction between intention and negligence;
- c. make possible recommendations for the interpretation of negligence and intention as two distinct concepts in the light of a comparative study of the South African and English criminal laws in order to feed into future developments for the two concepts.

### **1.4 Research questions**

- a. What are the definitional and conceptual issues between intention and negligence?
- b. In terms of South African criminal law, are there instances where court judgements failed to account for the distinction between intention and

negligence which when compared to similar instances in English criminal law this distinction was established between the two concepts?

- c. What recommendations can be proffered to address issues of conceptual ambiguity between intention and negligence under the South African criminal law?

### **1.5 Rationale of the study**

The distinction between intention and negligence is fraught with difficulties when a court of law is faced with the task of distinguishing between the two. Thus, this study comes under the overall Research Unit Theme: *Distinguishing between intention and negligence in South African Criminal Law*. It seeks to address the key issues related to case law surrounding the establishment of a distinction between intention and negligence. Also, the study will illuminate understanding and contribute to the interpretation of various aspects of intention and negligence in the South African criminal law.

### **1.6 Limitation of the study**

This study is limited to providing a clear distinction between intention and negligence in South African criminal law as forms of *mens rea*. An analysis of the case of *Ngubane*<sup>10</sup> will be provided as well as an examination of the recent case law in this regard. The study is not, therefore, concerned with other aspects of culpability and as such will be given little attention.

### **1.7 Research methodology**

Considering that the study will constitute a theoretical basis for understanding the concepts negligence and intention in South African criminal law, the research methodology will focus on critical analyses of relevant case law, text books, journal articles, databases and materials from the internet. The study regarding the position in the English criminal law with respect to distinguishing between intention and negligence will be conducted by means of selective relevant literature and jurisprudence. While the intention is not to directly infuse any of the developments in the law reflected in the English criminal law into the

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<sup>10</sup> *Ngubane* (n 8).

South African criminal law, the choice of a comparative study in this research is informed by the need to draw attention to some of the distilling lessons from the position in the English criminal law. This approach no doubt will pave way for a critical evaluation of negligence and intention as distinct concepts.

### **1.8 Scope of the study**

It is also noteworthy that the study will focus entirely on the distinction between intention and negligence under the South African criminal law, particularly with reference to relevant issues that may arise when a court of law is faced with separating between the two. Relevant case law and academic postulations will be used to advance basis for the above statement.

### **1.9 Outline of the chapters**

#### 1 General introduction

Chapter one deals with the background to the study, problem statement, aim of the study, research objectives, research questions, hypothesis, rationale of the study, research methodology, limitation to the study, scope of the study, and an outline of the chapters herein.

#### 2 Literature review

Chapter two examines South Africa's criminal law's approach to intention and negligence. It begins with a literature review, which demonstrates academic opinion on the topic. Relevant case law related to the study focus will be used.

#### 3 Distinction between intention and negligence: issues in the South African criminal law

Chapter three focuses on in-depth discussion on analysing the issues that may arise when a court is faced with distinguishing between the two forms of *mens rea*.



#### 4 Comparative Study

Chapter four provides a comparative study of the position in South African criminal law and that of the English criminal law with regards to the distinction between intention and negligence.

#### 5 Findings, Conclusion and Recommendations

Chapter five contains the summary of the findings of the study, the conclusion, as well as recommendations with specific reference to the issues of intention and negligence in the South African criminal law.

## CHAPTER TWO

### LITERATURE REVIEW

#### 2 Introduction

As a point of departure, the law expects that in all fairness one is expected to avoid wrongdoing.<sup>11</sup> An accused [hereinafter referred to as 'X'] is endowed with the freedom of will which must be construed as the ability to rise above the influences which his impulses, passions and his environment have on him.<sup>12</sup> Burchell succinctly noted that:

the law understands that human beings have free will and thus are able to plan and anticipate the consequences of their conduct. The requirement of an element of fault ensures that criminal law does not inflict punishment upon persons for consequences or circumstances the individual neither planned, wished for, nor anticipated. This principle also forms the basis of the justification for punishment.<sup>13</sup>

With this in mind, it is safe to say that X will be at fault if in the eyes of the law he can be blamed for having done wrong.<sup>14</sup> The blameworthiness would be attributed to the actions of X, if on one hand he either intended to do wrong in the sense that it was his aim to do so or he foresaw the possibility, or, on the other hand, failed to act based on the duty placed on him by the law.<sup>15</sup> In other words X must be endowed with certain mental abilities in order to appreciate the unlawful results that may ensue from his act or conduct. Thus, could X for the purposes of criminal liability have avoided the wrongdoing?<sup>16</sup> If the answer to this question is yes, the next question is whether there are grounds upon which X can fairly be blamed for transgressing the law.<sup>17</sup> In order to decide this question, the mental state of X in the light of our knowledge and experience of human conduct must be judged by the law to term X blameworthy for his conduct or act.<sup>18</sup>

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<sup>11</sup> Snyman (n 1) 149.

<sup>12</sup> *ibid.*

<sup>13</sup> Burchell (n 4) 456.

<sup>14</sup> Andrew Paizes, 'Unreasonable Conduct and Fault in Criminal Law' (1996)113 *South African Computer Journal* 237,237.

<sup>15</sup> *ibid.*

<sup>16</sup> Snyman (n 1) 149.

<sup>17</sup> Snyman (n 9) 4.

<sup>18</sup> Snyman (n 1) 151; Burchell (n 4) 456.

However, it is difficult to prove the existence of a guilty state of mind at the time of the commission of an act, for what is in the mind X at the time he commits an act which outwardly constitutes a criminal offence, is usually known to himself only. Proof of *mens rea* may only be inferred from the outward conduct of X and conclusions which are drawn from such conduct by using ordinary human experience as a yardstick.

Most crimes, certainly all serious crimes, also require some form of *mens rea* which takes the form of either intention (*dolus*) or negligence (*culpa*). The former on one hand denotes greater blame and more severe sanctions arising from deliberate criminal conduct.<sup>19</sup> Hence, X intended to do wrong in the sense that it was his main object to do so, or he foresaw the possibility of doing so.<sup>20</sup> In order to provide some clarity, the extent to which X was at fault depends on whether he intended to do wrong or at the very least, should have foreseen that he was doing wrong.<sup>21</sup> The latter connotes that X ought to have foreseen the possibility of the wrong but failed to take steps that ought to have guarded against that possibility.<sup>22</sup> Therefore this chapter provides a concise literature of these two forms of *mens rea* under the South African criminal law.

## **2.1 Forms of Mens Rea**

### **2.1.1 Intention**

Intention is the principal form of *mens rea*<sup>23</sup> and it entails that X is at fault where he or she intentionally commits the unlawful conduct knowing it to be unlawful.<sup>24</sup> In this light, X is aware that his conduct or act is unlawful, nevertheless he proceeds to do it. Snyman provides a definition of intention which refers to when:

A person commits an act:

1. While his will is directed towards the commission of the act or causing of the result;

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<sup>19</sup> Kayitand (n 6) 1.

<sup>20</sup> Paizes (n14) 237.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

<sup>23</sup> *Mens rea* in a simplistic way can be referred to as fault.

<sup>24</sup> Burchell (n 4) 459.

2. in the knowledge of the existence of the definitional elements of the crime;  
and
3. in the knowledge of the existence of the unlawfulness of the act.<sup>25</sup>

Thus if X's act or conduct is directed towards the commission of the act, but he only having knowledge referred to (2) and (3), his 'intention' will be said to be the so called 'colourless intention'.<sup>26</sup> It is important to draw this distinction from the ordinary definition of intention. Thus intention defined in a criminal context will mean 'the will to commit an act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such an act or result unlawful'.<sup>27</sup> It can therefore be seen that the attribute which gives 'colour' to intention is simply X's knowledge that his act might cause an unlawful result.

From the above paragraph, it is apparent that the test of intention is of an invariably subjective nature thus, requiring the court to find in relation to the act/conduct the subjective foresight of the possibility of the harm ensued.<sup>28</sup> Emphasis is made on X's actual state of mind in enquiring whether he would have foreseen the harm arising.

There are two elements of intention namely; the *cognitive* element which consists of knowledge of the act, the circumstances mentioned in the definitional elements and of the unlawfulness<sup>29</sup>; and the *conative* element (also known as volitional or voluntative) which is referred to as the will of X towards a certain result.<sup>30</sup>

The South African Law recognises three forms of intention: *dolus directus*, *dolus indirectus* and *dolus eventualis*. These different forms of intention are discussed in the subsequent paragraphs.

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<sup>25</sup> Snyman (n 1) 181.

<sup>26</sup> *ibid* 182.

<sup>27</sup> *ibid*.

<sup>28</sup> Shannon Hctor, 'The Concept of *Dolus Eventualis* in South African Law- A Historical Perspective' (2008) *Fundamina : A Journal of Legal History: The Harmonisation of Laws within the African Union* 14, 19.

<sup>29</sup> This would also involve that the accused knowing that what he is doing is wrong and punishable by law.

<sup>30</sup> Snyman (n 1) 182.

### 2.1.1.1 *Dolus directus*

This form of intention which is also known as direct intention, refers to when a person directs his will towards achieving the prohibited result or towards performing the prohibited act.<sup>31</sup> Hence X meant to perpetrate the prohibited conduct or to bring about the criminal consequence.<sup>32</sup> An illustration to this can be seen in the following example: X is involved in a criminal activity which for the purposes of this discussion is to rob a bank. In all awareness X is certain that the act he is about to commit is prohibited. The requisite for direct intention in this illustration is evident in the fact that the act of X robbing a bank is his main aim or goal and he does not regard it as a mere possibility.<sup>33</sup>

### 2.1.1.2 *Dolus indirectus*

*Dolus indirectus* translated as indirect intention, refers to the situation when the goal of X is not to commit the prohibited act or result, but he realises that in order to achieve his goal the prohibited result will ensue.<sup>34</sup> In other words, X foresaw the prohibited act or result as certain, or 'substantially certain', or as 'virtually certain'.<sup>35</sup> For instance in *R v Kewelram*<sup>36</sup>, even though X's objective was not to set fire to certain stock in the store in order to benefit from the insurance money, he foresaw that in order to realise his goal, the destruction of the store will occur. Hence the intention in this regard is seen as one of *dolus indirectus*.

### 2.1.1.3 *Dolus eventualis*

In terms of South African criminal law, the role played by *dolus eventualis* makes it an important form of intention even though *dolus directus* and *dolus indirectus* may be required in exceptional cases especially in the contravention of statutory offences.<sup>37</sup> *Dolus eventualis* has been described as a concept

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<sup>31</sup> cf Snyman (n 1) 183.

<sup>32</sup> Burchell (n 4) 461.

<sup>33</sup> Burchell (n 4) 461; Snyman (n 1) 183.

<sup>34</sup> Snyman (n 1) 183.

<sup>35</sup> Burchell (n 4) 461.

<sup>36</sup> 1922 AD 213 [118].

<sup>37</sup> Burchell (n 4) 461; Hoorntje (n 28) 14.

which is 'controversial' and 'a concept which can with justification be described as an enigma'.<sup>38</sup> Thus, the courts have consistently applied a notion consisting of a cognitive element and a conative component in order to prove that X acted despite such foresight of the possibility of harm.<sup>39</sup> According to Snyman, *dolus eventualis* is referred to as when:

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

(a) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused; and

(b) he reconciles himself to this possibility.<sup>40</sup>

Burchell refers to *dolus eventualis* as when the accused foresees the possibility that the prohibited consequence might occur but he accepts such possibility into the bargain.<sup>41</sup> Emphasis is laid on whether X foresaw the possibility that the act in question would have fatal consequences and was thus reckless as to whether the unlawful consequences will result or not.<sup>42</sup> For instance *dolus eventualis* is present if X directs his will towards a certain event which in this case is referred to as 'Y', but foresees that if he wants to achieve 'Y', there is a possibility that another event 'Z' may ensue. However he proceeds with his act despite the foreseen possibility that 'Z' may ensue. 'Z' in fact ensues. Thus, in the eyes of the law X has intention in respect of 'Z'.<sup>43</sup> The components of *dolus eventualis* are subsequently discussed below:

*(a) Dolus eventualis: foresight of the possibility of the unlawful result or consequence*

This requirement deals with what the accused conceives to be the circumstances or results of his act.<sup>44</sup> It is focused on what the accused subjectively foresaw as a possibility that the unlawful result might ensue.<sup>45</sup> This is described as the cognitive leg of *dolus eventualis*. In this light, X does not

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<sup>38</sup> Hoctor (n 28) 14.

<sup>39</sup> Shannon Hoctor, 'Death on the Roads and *Dolus Eventualis*- *S v Humpreys* 2013 (2) SACR' (2013) *South African Journal of Criminal Justice* 75, 78.

<sup>40</sup> Snyman (n 1) 184; Hoctor 'Death on the Roads and *Dolus Eventualis*' (n 39) 78.

<sup>41</sup> Burchell (n 4) 467.

<sup>42</sup> *S v Malinga* 1963 (1) SA 692 (A) at 674 G-H.

<sup>43</sup> Snyman (n 1) 184.

<sup>44</sup> *ibid* 185.

<sup>45</sup> *Humpreys* (424/2012) [2013] ZASCA 20.

plan or desire that such unlawful consequence should flow from his act but according to human experience, it can be expected such unlawful consequence would ensue.<sup>46</sup> Simplified further, this leg denotes foresight of the consequences or circumstances which are expected and which the actor realises will come about.<sup>47</sup> The courts do not expect an extraordinary circumstance but that which is an occurrence of normal human experience, for instance the court in *S v Sehlako*<sup>48</sup> stated:

Each and every person who drives a vehicle can expect to be involved [in a collision] at some or other time. It is wholly unacceptable that such a person, even if he is the cause of such collision, can be executed on the scene by the other driver...they must yield to society's legitimate demand that its members be entitled to drive the roads without the risk of being murdered by other irate drivers.<sup>49</sup>

In considering the issue of intention, what forms part of the test is whether X foresaw as a possibility that his act would lead to an unlawful result, hence death of Y.<sup>50</sup> What the accused actually subjectively foresaw versus what he ought to have foreseen is to be established.<sup>51</sup> The subjective test is therefore applied in this light as opposed to the objective test since it excludes the possibility of 'constructive' or 'fictitious' intent.<sup>52</sup>

Another aspect to be highlighted is the nature of the foresight. It is usually seen that X foresees the prohibited result not as one which will necessarily flow from his act, but only as a possibility.<sup>53</sup> The question to follow is: should foresight be limited to that of a 'real' or 'reasonable' possibility of harm, or does foresight of a reasonable possibility suffice?<sup>54</sup> Foreseeing a possibility forms part of the test for *dolus eventualis* however, it does not amount to the fact that even in the most remote circumstances such foresight must be taken as intended.<sup>55</sup>

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<sup>46</sup> Burchell (n 4) 467.

<sup>47</sup> *ibid.*

<sup>48</sup> 1999 (1) SACR 67 (W).

<sup>49</sup> *Sehlako* (n 48) 72 b-c.

<sup>50</sup> *Malinga* (n 42) 694 G-H; *Van Zyl* 1969 1 SA 553.

<sup>51</sup> Pieter Carstens, 'Revisiting the relationship between *dolus eventualis* and *luxuria* in context of vehicular collisions causing the death of fellow passengers and/or pedestrians: *S v Humphreys* 2013 (2) SACR 1 (SCA): comment' (2010) 26(1) *South African Journal of Criminal Justice* 67, 68.

<sup>52</sup> Burchell (n 4) 468.

<sup>53</sup> *Snyman* (n 1) 185.

<sup>54</sup> *Hoctor* (n 39) 22.

<sup>55</sup> Burchell (n 4) 471.

The South African courts on one hand recognise foresight of a 'remote' possibility and on the other hand recognise foresight of a 'real' or 'reasonable possibility'.<sup>56</sup> In *S v De Bruyn*<sup>57</sup>, it was stated the presence of "possibility" in *dolus eventualis* would be seen if X foresees as a possibility of his act that death will ensue, irrespective of how remote it was.<sup>58</sup> Snyman submits that the term 'possibility' as used in this context may be a strong possibility, or only a slight or remote one.<sup>59</sup> The probability of the unlawful result occurring may vary in that some certainly occur while others will probably occur. An important point to note in this regard is, do all consequences however remote the possibility of their occurrence are, be said to have been intended or whether there is some point in the scale of probability at which foresight ceases to qualify as intention.<sup>60</sup> Burchell then submits that:

In short, if the accused foresaw the consequences or circumstances in question not as a probable result of his act but considered that there was a possibility that they could result ... he had intention in the sense of *dolus eventualis*. On the other hand, if he did not actually foresee, but as a reasonable man should have foreseen, the possibility of the consequence occurring, or circumstances existing, he lacked the intention, at most, will have been negligent'.<sup>61</sup>

The court in *S v Mashele*<sup>62</sup> said that the narrow issue is therefore whether the X foresaw or appreciated subjectively that Y who is the victim, might possibly die from the injuries inflicted upon her by X. If X so did then, there can be no reasonable doubt that X inflicted them recklessly.<sup>63</sup>

X is expected to subjectively foresee the possibility that his act or conduct will bring about an unlawful result. Subjective foresight can be proven by inferential reasoning.<sup>64</sup> The issue to be highlighted in this regard is how is foresight through inferential reasoning established? As explained earlier in this chapter, focus is laid on what can be reasoned that in the particular circumstances X

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<sup>56</sup> Ibid.

<sup>57</sup> 1968 (4) SA 498 (A) [123].

<sup>58</sup> *De Bruyn* (n 57) 59.

<sup>59</sup> Snyman (n 1) 185.

<sup>60</sup> Burchell (n 4) 470.

<sup>61</sup> Ibid 471.

<sup>62</sup> 1972 (2) PH H136 AD.

<sup>63</sup> Ibid.

<sup>64</sup> *Humpreys* (n 45) 12.



ought to have foreseen as opposed to what he did foresee.<sup>65</sup> In the wording of Brand JA:

like any other fact, subjectively foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out of the premise that, in accordance with human experience, the possibility of the consequence ensued would have been obvious to any of normal intelligence, the next step would then be to ask whether, in the light of all the facts of the circumstances of the case, there is any reason to think that the appellant would not have shared this foresight derived from common human experience, with other members of the general population.<sup>66</sup>

Furthermore, it is said that any right minded person would not ignore the possibility 'that a collision between a motor vehicle and an oncoming train might have fatal consequences for the passengers of the vehicle' because he would have foreseen the possibility of such collision.<sup>67</sup>

What is of importance to note in this regard is the determination of the state of mind of the accused at the time of commission of the crime. A court must place itself mentally in the position of X at the time he committed the crime. But it is often proven difficult because the accused is the only person who knows what his state of mind was at the crucial moment when he committed the act.<sup>68</sup> In the case of *S v Mini*<sup>69</sup> the court stated:

In attempting to decide by inferential reasoning the state of mind of a particular accused at a time, it seems to me that a trier of fact should try mentally to project himself 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>70</sup>

This position was further affirmed in the case of *Sigwahla and Bradshaw*<sup>71</sup> where the courts provided that inference must be drawn which should constitute proof beyond reasonable doubt that the inference can be reasonably drawn from the conduct.<sup>72</sup> Snyman submits that a court may base its finding that X acted intentionally on direct proof in intention and the court may infer the intention from evidence related to X's outward conduct at the time of the

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<sup>65</sup> Burchell (n 4) 468.

<sup>66</sup> *Humpreys* (n 45) 13.

<sup>67</sup> Carstens (n 51) 70.

<sup>68</sup> Snyman (n 4) 189.

<sup>69</sup> 1963 (3) SA 188 (A).

<sup>70</sup> *Mini* (n 69) 196.

<sup>71</sup> 1967 (4) SA 566 (AD) ; *S v Bradshaw* 1977 (1) PH H60

<sup>72</sup> *ibid* .

commission of his act as well as the circumstances surrounding the events.<sup>73</sup> Holmes JA's comments in *S v Sigwaha*<sup>74</sup> are useful to elucidate this. According to Holmes JA, inference must be drawn in order to prove foresight and such inference must be reasonably drawn.<sup>75</sup>

However, one should avoid the flawed process of inferential reasoning that if the accused should have foreseen the consequences, it could be concluded that he did and such reasoning would conflate the different tests for intention and negligence,<sup>76</sup> thus validating the fact that an inquiry into the cognitive component of *dolus eventualis* is entirely subjective in nature.<sup>77</sup>

*(b) Dolus eventualis: reconciling one's self to the ensuing result*

The second leg of the test for *dolus eventualis*, is whether X reconciled himself to the possibility that an unlawful result would ensue.<sup>78</sup> The next question to be posed is, does it follow from the fact that X who foresaw the result as a substantial possibility can be deemed to have *dolus eventualis*? X's state of mind with regard to that possibility must be one of 'consenting' to the materialization of the possibility, 'reconciling' himself to it, 'taking the foreseen possibility into the bargain'.<sup>79</sup> To reconcile oneself with a possible result is to simply accept the possible result, to live with it, if it happens. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result.<sup>80</sup> The issue as to whether an accused person who foresees the possibility of a consequence can be said to consent to, reconcile himself to, or accept the consequence into the bargain is referred to as the "volitional" or "conative" component of *dolus eventualis*.<sup>81</sup> Thus the focus is whether the accused was reckless, hence did he have 'subjective foresight of the possibility, however remote, of his unlawful conduct causing death to others, and persisted in such conduct with a reckless disregard of the possible

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<sup>73</sup> Snyman (n 1) 189.

<sup>74</sup> *Sigwaha* (n 71).

<sup>75</sup> *ibid* 570.

<sup>76</sup> *Humpreys* (n 45) 12 -3.

<sup>77</sup> Hoctor 'Death on Roads' (n 39) 78.

<sup>78</sup> Hoctor 'The Concept of *Dolus Eventualis*' (n 28) 14.

<sup>79</sup> Snyman (n 1) 186.

<sup>80</sup> *Sigwaha* (n 71).

<sup>81</sup> Burchell (n 4) 481.

consequences thereof'.<sup>82</sup> Holmes JA described recklessness in *S v De Bruyn*<sup>83</sup> 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'.<sup>84</sup> Jansen JA on the other hand validates this definition of reckless in *Ngubane* by highlighting the fact that recklessness refers to when the accused accepts the foreseen possibility into bargain but it would depend on the nature of the foresight; whether such foresight is of a real (concrete) possibility or remote (faint) possibility.<sup>85</sup> Jansen JA in *Ngubane* further emphasised that in so far as an inference can be drawn that the agent persisted in his conduct despite the foreseeing of such a possibility, he is deemed to have been reckless with regard to the unlawful result ensuing.<sup>86</sup>

Some legal writers argue that the volitional element of *dolus eventualis* is redundant, and what is required is whether X subjectively foresaw the unlawful result ensuing, provided such possibility is substantial and not remote.<sup>87</sup> Burchell in this regard submits that the issue is whether X who foresees the possibility of a prohibited result can be deemed to consented to it or reconciled himself to it, or accepted such unlawful result into the bargain.<sup>88</sup> In *R v Hercules*<sup>89</sup> it was said that it is a matter of inference however, it cannot be based on what X ought to have foreseen but on what he must have foreseen. Apart from recklessness, whether death was a probability of which was foreseen, and if death results, then that is *dolus* in law and a person cannot commit murder by negligent conduct.

Recklessness can therefore be said to refer to failure to take precautions which is often due to indifference towards the possible consequences.<sup>90</sup> This means X is truly indifferent or uncaring as regards the possible

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<sup>82</sup> *S v Sethago* 1990 (1) SA 270 (A) at 275 – 6.

<sup>83</sup> *De Bruyn* (n 57).

<sup>84</sup> *ibid* 86.

<sup>85</sup> Burchell (n 4) 481 – 82.

<sup>86</sup> *Ngubane* (n 8) 689 A – B.

<sup>87</sup> Snyman (n 1) 187.

<sup>88</sup> Burchell (n 4) 482.

<sup>89</sup> 1954 (3) SA 826.

<sup>90</sup> Paul T Smith, 'Recklessness in *Dolus Eventualis*' (1979) 96 *The South African Law Journal* 81, 90.

consequences of his/her action and this indifference must be established in the subjective sense.<sup>91</sup>

The court would draw an inference regarding X's state of mind from the facts indicating, objectively assessed, a reasonable possibility that the result will ensue.<sup>92</sup> Foresight of possibility (which is the cognitive element) and the fact that X reconciled himself to that possibility in his mind (which is the conative element) are two different things. If X refrains from acting because he realizes that a prohibited result may ensue from his conduct because there was a second operation in his mind, he would not be alleged to have intended to act. Likewise, if he proceeds, the judge will have to know the state of mind of X pertaining to the foreseen possibility (volitional element). However, if the manner of the occurrence of the consequence was very different from that of the accused, his liability or otherwise could often turn on the question of causation rather than intention.<sup>93</sup>

On one hand, there is *dolus eventualis* if X did not care that the prohibited result may ensue from his or her action. On the other hand, if X perceived and reconciled himself to the fact that the unlawful result will not ensue, there is no *dolus eventualis*. These are two distinct phases of *dolus eventualis*.

### **2.1.2 Negligence**

It is not only those unlawful acts which are committed intentionally which are punishable, for the law also punishes acts which are committed unintentionally.<sup>94</sup> Negligence in South African law is a term used to indicate that conduct of a person which falls short of a prescribed standard, normally weighed against the conduct of a reasonable person. Thus failure to ensure that conduct does conform to the above standard is reprehensible thereby making negligence a form of fault.<sup>95</sup> Negligence can also be seen if the accused

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<sup>91</sup> Van der Merwe, 'One Moment of Extreme Irresponsibility: Notes and comments on *Humpreys v S* and Component of *Dolus Eventualis* in the Context of Dangerous or Irresponsible Driving' (2013) *Democracy & Development*, Vol 17 (2013) 71. Available at <http://dx.doi.org/10.4314/d=idd.v17i14.4>> accessed 8 August 2015.

<sup>92</sup> Burchell (n 4) 482.

<sup>93</sup> Burchell (n 4) 473.

<sup>94</sup> Snyman (n 1) 208.

<sup>95</sup> Burchell (n 1) 522.

failed to exercise the required care and circumspection in acquainting himself with the relevant legal provision, in other words if the reasonable person in same circumstances would have been similarly ignorant. The concept that conduct should fall within prescribed standards derives from the fact that human beings undertake activities on a regular basis that create risk of harm to others.<sup>96</sup> In order to minimise risk to others, the law requires that such activities be carried out prudently, carefully and circumspectly.<sup>97</sup> As human beings, we are endowed with a certain criminal capacity which is weighed against the standard of that of a reasonable person. This standard is to be found in the particular circumstance which such reasonable person would have exercised in the circumstances.<sup>98</sup> According to Burchell, the reliance on the standard of the reasonable person allows courts to exercise a value judgement regarding the conduct of the accused and to set standards of minimum compliance for future transgressors.<sup>99</sup>

Negligence is determined by an objective test. This is due to the fact that the court must consider X's real knowledge and visualisation of the facts and of the law.<sup>100</sup> This implies that the court must weigh X's conduct against an objective standard, which must be outside that of himself. Such standard is that of a reasonable person.<sup>101</sup> Van den Heever JA in *Herschel v Mrupe*<sup>102</sup> provides that a reasonable person is one who is:

Not... a timorous faint heart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out in the world, engages in affairs and takes reasonable chances.<sup>103</sup>

In the wording of Snyman the components applied to determine negligence in a criminal context can be seen as follows:

A person's conduct is negligent if

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<sup>96</sup> Snyman 'Confusion Concerning the Defense of Ignorance of Law' (n 9) 1.

<sup>97</sup> Burchell (n 4) 522.

<sup>98</sup> Snyman (n 1) 208.

<sup>99</sup> Burchell (n 4) 522.

<sup>100</sup> Snyman (n 1) 209.

<sup>101</sup> *ibid.*

<sup>102</sup> 1954 (3) SA 464 (A).

<sup>103</sup> *Herschel* (n 102) 490F.

- 1 the reasonable person in the same circumstances would have foreseen the possibility
  - (a) that the particular circumstance might exist ; or
  - (b) that his conduct might bring about the particular result;
- 2 the reasonable person would have taken steps to guard against such a possibility; and
- 3 the conduct of the person whose negligence has to be determined different from the conduct expected of the reasonable person.<sup>104</sup>

These various components can be discussed under the following headings.

*(a) Reasonable foreseeability*

This is the first leg of the definition of negligence which entails that X should have foreseen the possibility that a particular circumstance might exist or that a particular result may ensue.<sup>105</sup> If X is careless, it does make him guilty of the consequences.<sup>106</sup> Such negligence must pertain to the circumstances in issue which is: can it be established that a reasonable person if placed in the position of X would have foreseen the possibility that a particular result might exist?<sup>107</sup>

It is the *possibility* that the result may follow which must be foreseeable and not the *probability* that it may happen.<sup>108</sup> Thus the question is whether the reasonable person in the circumstances in which X found himself, would have foreseen the possibility, in the light of the circumstances in which X found himself at the time he committed his act.<sup>109</sup>

Rumpff CJ in *S v Van As*<sup>110</sup> stated:

If it is proved that the accused ought to reasonably have foreseen that death was a possible result and that the causation requirement has been satisfied the case is concluded... the question is, however, ...could and should the accused reasonably have foreseen that the deceased could have died as a result [of the assault].<sup>111</sup>

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<sup>104</sup> Snyman (n 1) 210.

<sup>105</sup> Snyman (n 1) 212.

<sup>106</sup> Burchell (n 4) 528.

<sup>107</sup> Burchell (n 4) 528.

<sup>108</sup> Snyman (n 1) 215.

<sup>109</sup> *ibid.*

<sup>110</sup> 1976 (2) SA 921 (A).

<sup>111</sup> *Van As* (n 110) 927-928.

Like intention, negligence must relate to all the definitional elements, as well as the unlawfulness of the conduct.<sup>112</sup> In *S v Goosen*<sup>113</sup> the court held that the foreseeable manner of the consequence occurring must coincide substantially with the actual manner of the consequence occurring.<sup>114</sup> According to the definitional elements of the crime of culpable homicide, it is Y's death and not merely bodily injury which must have resulted from X's act; X must have been negligent in respect of the death.<sup>115</sup> The distinguishing factor between intention and negligence can be found in the second leg for both concepts. The second leg to the test of *dolus eventualis* is whether X reconciled himself to the possibility of the harm ensuing from his act while the second leg of negligence is that X failed to foresee the harm ensuing from his conduct, while a reasonable person in the same circumstance would have foreseen such a result.<sup>116</sup>

Snyman submits that, that which needs to be proven is not whether the reasonable person would have foreseen the possibility of the death of Y but that it would be sufficient for the reasonable person to have foreseen the possibility of death in general.<sup>117</sup>

*(b) Reasonable person would have taken steps to avoid the unlawful results*

This leg of the test to negligence is given little importance because in the vast majority of cases the reasonable person who had foreseen the possibility of the result ensuing would have taken steps to guard against such result ensuing.<sup>118</sup> It is not sufficient that the reasonable person would have foreseen such possibility but that a reasonable person would have taken steps to guard against such possibility.<sup>119</sup> Paizes clearly states as follows:

The function of the second inquiry is interesting, it suggests that the foreseeability of a prohibited consequence is not itself to warrant a finding that the accused was at fault. One must, in addition explore whether the

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<sup>112</sup> Snyman (n 1) 215.

<sup>113</sup> *S v Goosen* 1989 (4) SA 1013 (A) [125].

<sup>114</sup> *Goosen* (n 113) 473-480.

<sup>115</sup> Snyman (n 1) 216.

<sup>116</sup> Castens (n 51) 68.

<sup>117</sup> Snyman (n 1) 216.

<sup>118</sup> *ibid* 216.

<sup>119</sup> Burchell (n 4) 530.

accused failed to act in a particular way, whether, that is, he failed to take the additional steps that he ought to have taken to guard against the possibility of the coming about of that consequence.<sup>120</sup>

*(c) Failure to take reasonable steps*

The question posed in this leg of the test is: did X fail to take the steps which should reasonably be taken to guard against the harm ensuing?<sup>121</sup> Burchell further states:

If a reasonable person would have foreseen the possibility of the occurrence of the consequence in question and would have guarded against it, the final inquiry is whether the accused took steps which a reasonable person would have taken to guard against.<sup>122</sup>

It is worthy of note to state that for an accused to be said to have negligently caused an unlawful result, he must have failed to take reasonable steps to prevent such harm from ensuing.

## **2.2 Chapter summary**

This chapter provided legal academic literature on intention and negligence as forms of *mens rea*. It is a fact that both are applied to determine the legal blameworthiness of an accused once he is alleged to have committed a crime. The two have are distinct concepts and sometimes this distinction might become blurred if a court does not clearly establish such distinction. The main problem in the law of culpability in criminal law is one which involves reconciling the continuance of *mens rea* in the light of both intention and negligence.

While a few courts, aided by statute, permit intention to suffice for criminal sanctions, the bulk of the courts expressly require recklessness before criminal liability. Much of the confusion as to the proper test of recklessness stems from a failure to distinguish the subjective test used to determine the defendant's state of mind from the objective means of proving such state of mind. Objective here means objective in the sense of externally observable conduct which permits an inference as to the state of mind.

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<sup>120</sup> Paizes (n 14) 237-38.

<sup>121</sup> Burchell (n 4) 530.

<sup>122</sup> *ibid.*



## CHAPTER THREE

### ISSUES THAT MAY ARISE IN THE DISTINCTION BETWEEN INTENTION AND NEGLIGENCE IN SOUTH AFRICAN CRIMINAL LAW

#### 3 Introduction

The previous chapter provided a concise literature review regarding the various forms of *mens rea* as reflected in the South African criminal law with particular reference to intention and negligence. However, there is more to these forms of *mens rea* than what meets the literal meanings of these concepts. An accused might act intentionally or negligently but what is central to discussion is whether such act or conduct which was committed intentionally or negligently can be termed unlawful.

The distinction between intention and negligence has become blurred since the decision in *Ngubane*.<sup>123</sup> What is the implication of this? What then are the issues that arise from the distinction between intention and negligence? Is it possible that on the same set of facts intention does not necessarily exclude negligence? However, one cannot ignore these issues which may arise when a court is faced with establishing a clear distinction between the two. Thus, this chapter strives to deal with these issues with the aid of useful case law and academic postulations which seek to achieve this distinct goal. The rationale of this chapter is not to harshly criticize the courts but to bring to attention these issues which may be seen as challenges thereof.

#### **3.1 The determination of the state of mind of an accused**

During the commission of a crime, there are certain thoughts which prompt a person to act in a certain way. These thoughts go as far as controlling a person to act or not. A question now arises as to how is such a state of mind established? In other words, what X believed in his mind to be true. Thus one has to look at the perceptions and beliefs of the consequences that he aimed at or foresaw as substantially or practically certain to follow as a result of his conduct.<sup>124</sup> On the other hand negligence does not involve an inquiry into the

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<sup>123</sup> *Ngubane* (n 8); Carstens (n 51) 67.

<sup>124</sup> Dan W Morkel, 'On the Distinction between Recklessness and Conscious Negligence' (1982) *The*

state of mind of the accused but that an accused is "blamed" for having failed to adhere to the standard of conduct expected of a reasonable person under similar circumstances.<sup>125</sup> This denotes that the objective test is applied in cases where negligence is to be determined. However, the researcher is of the humble opinion that the determination of the state of mind of an accused may be applicable in negligence, meaning that the test of negligence is not purely objective. Certain factors may be looked at pertaining to the circumstances in which X found himself can amount to a certain subjectivity of the test. For instance the first leg of negligence requires that a reasonable man would have foreseen that his conduct will bring about an unlawful result, while the first leg for *dolus eventualis* requires that X foresees that possibility that in order to achieve his goal a prohibited result might ensue. Foresight denotes an inquiry into the state of mind of X. Thus an element of inference into the determination of the state of mind of the accused can be seen in both instances.

Another issue in this regard is how one can determine that X's version of events is the truth. This would imply that the court will have to place itself in the position of the accused for such determination. According to Snyman, 'it is easy to determine the state of mind of X if X acted intentionally'.<sup>126</sup> The question now arises as to what challenges do the courts face when there is no direct evidence for such inference to the state of mind. Snyman submits that in such cases, a court might apply an objective standard instead of a subjective standard.<sup>127</sup> Snyman went on further to say:

the court must guard against "armchair reasoning": as far as possible it must avoid, in the calm atmosphere of the court, imputing to X a state of mind based on facts which came to light only after the act had already been committed.<sup>128</sup>

It is necessary to show that the accused's state of mind was one of callous disregard of the consequences so that the possible death was regarded as irrelevant when weighed against the attainment of his immediate objective.<sup>129</sup> It

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*American Journal of Comparative Law* 325, 326.

<sup>125</sup> Morkel (n 124) 326.

<sup>126</sup> CR Snyman *Criminal Law* (6<sup>th</sup> edn, LexisNexis Durban 2015) 184.

<sup>127</sup> Snyman (n 126) 185.

<sup>128</sup> Snyman (n 126) 185.

<sup>129</sup> Smith (n 90) 91.

will be an issue to prove whether an accused could appreciate his actions as the court in *Ndlanzi v The State*<sup>130</sup> confirmed that:

Any person with a modicum of intelligence would have appreciated that driving a motor vehicle onto the pavement in the prevailing circumstances of this case, raised the possibility that a collision with a pedestrian would occur with fatal consequences. Any right-minded person would have foreseen the possibility of the death of a pedestrian.<sup>131</sup>

How is “right-minded” classified in this regard? In *S v Sigwahla*<sup>132</sup> Holms JA in *obiter* highlighted the fact that the distinguishing trait of intention and negligence is that which actually went on in the mind of X and what would have gone on in the mind of a reasonable person who is placed in the position of X.<sup>133</sup> In deciding the basis of drawing a good inference as to the state of mind, objective factors such as the type of weapon which X used, the seriousness of the injury or depth of the wound, the part of Y’s body which was wounded as well as other objective probabilities of the case must be considered.<sup>134</sup>

Going back to *Humpreys* for example, the appellant was aware that the lights at the level crossing were activated, yet decided to cross regardless.<sup>135</sup> The appellant further claimed that even though he was aware of these material facts he proceeded to rely on the perception that he will cross successfully as he always did. Determining such a state of mind might be a challenge because weighing such statements will denote that the court places itself in the place of the accused at that time of the commission of the crime. Hence, foresight of the possibility that an unlawful consequence might ensue is difficult to prove due to difficulties in proving a state of mind.<sup>136</sup>

It would be a different position if X refrains from action because he realizes that there was a second operation in his mind.<sup>137</sup> Thus, if X had a different perception regarding his state of mind, for instance, if he had the perception that shooting a person in a closed room would not lead to death or if he had the

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<sup>130</sup> *Ndlanzi v The State* (318/13) [2014] ZASCA 31.

<sup>131</sup> *Ndlanzi* (n 130) 35.

<sup>132</sup> *S v Sigwahla en ‘n ander* 1989 (3) SA 720 (A).

<sup>133</sup> *Sigwahla* (n 132) 722 I-J.

<sup>134</sup> *Snyman* (n 126) 185.

<sup>135</sup> *Humpreys* (n 45) 7.

<sup>136</sup> Shannon Hoctor, 'The degree of foresight in *dolus eventualis*' (2013) *SACJ* 140.

<sup>137</sup> *Kayitand* (n 6).

perception that crossing a railway- crossing would not result in death of passengers, then it would be difficult to determine whether this is true or not.

### **3.2 The determination of foresight**

An accused will be at fault on one hand, if he can be blamed for having done wrong in the sense that it was his intended objective to do, or, on the other hand, he did so negligently in that he ought to have foreseen the possibility of doing wrong and failed to take steps to guard against that possibility.<sup>138</sup> Having said this, the key focus for both of these forms of *mens rea* are: actually foreseen versus that which ought to have been foreseen. Paizes draws attention to the fact that the foreseeability of a prohibited consequence is not itself to warrant a finding that the accused was at fault but that one reconciled oneself to that wrong or failed to act in a certain way.<sup>139</sup> In *S v van Wyk*<sup>140</sup>, Ackerman AJA expressed it as follows:

I am accordingly of the view that the subjective foresight required for *dolus eventualis* is the subjective appreciation that there is a reasonable possibility that the proscribed consequence will ensue.<sup>141</sup>

The issue the researcher is bringing to attention is the complexity in the determination of foresight of harm which will establish whether the accused was reckless or not in a court of law. Normally, a person has an option of not going ahead with the unlawful act and in such cases there are no excusable grounds for proceeding to act in circumstances where X foresees that the act will or might bring about the prohibited result in question.<sup>142</sup> Not only should a person foresee that his conduct might be unlawful but one has to ask in addition whether such a person could appreciate the wrongfulness of his conduct, and act in accordance to such an appreciation.<sup>143</sup> However, where X acts with the knowledge or foresight that Y may be killed, but proceeds to perform such an

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<sup>138</sup> Paizes (n 14) 237.

<sup>139</sup> Paizes *ibid* note 143 238.

<sup>140</sup> *S v van Wyk* 1992 (1) SACR 147 (Nms).

<sup>141</sup> *Van Wyk* (n 140) 161b.

<sup>142</sup> Paizes (n 14) 245 -46.

<sup>143</sup> Paizes (n 14) 247.

act with such knowledge and foresight, he is deemed to have acted in terms of *dolus eventualis*.<sup>144</sup>

That which must be proven is whether X had the subjective foresight of the possibility that his act would lead to an unlawful result.<sup>145</sup> If a clear separation between these two instances cannot be established, the distinction between subjective foresight and objective foreseeability may become blurred.<sup>146</sup> In *S v Sigwala*<sup>147</sup> the court noted that:

The fact that objectively the accused ought reasonably 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.<sup>148</sup>

However, it might be confusing when a court of law bases its finding on the premise that an accused can foresee that his conduct will or might be unlawful but still be negligent with regards to the harm ensuing from such a conduct. This raises an issue and the case of *Humpreys v S*<sup>149</sup> is important to discuss this. The facts of this case held thus: the appellant was the driver of a minibus which collided with a train that left ten passengers dead and four seriously injured. The appellant was convicted by the High Court for murder but the appellant appealed to the Appeal Court against the sentence given to him. The issue that was dealt with by the Appeal Court was whether the appellant's conduct had complied with all the requirements for intention in the form of *dolus eventualis* which had him convicted for murder. The Appeal Court stated that the Appellant's conduct had fulfilled the first leg of *dolus eventualis* but more emphasis had to be based on whether the conduct of the appellant had fulfilled the second leg of the test for *dolus eventualis*. The court acknowledged the fact that the appellant had executed the same movement of crossing the railway crossing despite clear warning of an approaching train in the past.<sup>150</sup> The

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<sup>144</sup> *S v Qege* 2012 (2) SACR 41 (ECG) 48 e-f.

<sup>145</sup> *Makgatho v S* (732/12) [2013] ZASCA 34 11.

<sup>146</sup> *S v Sigwaha en 'n ander* (n 132) 722 I-J.

<sup>147</sup> *ibid*.

<sup>148</sup> *Sigwaha* (n 71) 570B-E.

<sup>149</sup> (424/12)[2013] ZASCA 20.

<sup>150</sup> *Humpreys* (n 45) 11.

Appeal Court went on further to state that ‘it can be inferred safely that the appellant knew exactly what he was doing when he tried to perform the same exercise on the fateful occasion, the only difference was that on that occasion he was unsuccessful in doing so’.<sup>151</sup> Despite establishing this fact, the Appeal Court in *obiter* cautioned that in crimes of murder, what is required is voluntary act and *dolus*.<sup>152</sup> That ‘the test for *dolus eventualis* form is twofold: (a) did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and (b) did he reconcile himself with that possibility’.<sup>153</sup> On the second leg for *dolus eventualis*, the court stated:

My second reason for concluding that the appellant did not reconcile himself with the consequences rests on the evidence that the appellant had successfully performed the same manoeuvre in virtually the same circumstances previously. Moreover, as a matter of pure mathematical calculation, a collision with the train could plainly be avoided even if the crossing was entered after the boom came down... So, the fact that the manoeuvre which the appellant tried to execute was practically possible and that it had in fact been successfully executed by him previously, leads me to the inference that, as a matter of probability, the appellant thought he could do so again. Differently stated, the fact that the appellant had previously been successful in performing this manoeuvre probably led him to the misplaced sense of confidence that he could safely repeat the same exercise. Self-evidently the fact that his confidence was misplaced does not detract from the absence of reconciliation with the consequences he subjectively foresaw. It follows that in my view the court *a quo*’s finding of *dolus eventualis* was not justified.<sup>154</sup>

Thus, the appellant was convicted for culpable homicide and not for murder. Carstens is of the view that subjective foresight can be proved by inference, but what the accused actually subjectively foresaw as opposed to what he should or ought to have foreseen becomes a slippery slope and the courts often fall into that trap by applying the yardstick of what the accused should or ought to have foreseen to determine *dolus eventualis*.<sup>155</sup> That which is striking of concern with regards to the *Humpreys* case is that the court acknowledged that no person in their right mind can avoid recognition of the possibility that a collision between a motor vehicle and an oncoming train may have fatal consequences for the passengers of the vehicle.<sup>156</sup> The question now is: would

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<sup>151</sup> *ibid.*

<sup>152</sup> *ibid* 12.

<sup>153</sup> *ibid.*

<sup>154</sup> *ibid* 19.

<sup>155</sup> Carstens (n 51) 68.

<sup>156</sup> *Humpreys* (n 45) 14.

it have been a different judgement altogether if the appellant had not been previously successful in manoeuvring the vehicle through a railway crossing? It is submitted that the appellant had the actual subjective foresight that crossing a railway crossing with the possibility of an oncoming train would result in death. Even the court in *S v Dladla*<sup>157</sup> supported that “finding of *dolus* must be based on proof of actual foresight”.<sup>158</sup>

To levy some form of legal blameworthiness on the accused in this regard, what the accused intended to be the outcome of his unlawful act must be established.<sup>159</sup> Thus in *Humpreys* the appellant intended to cross a railway crossing regardless of whether it would bring about death or not, thus he appreciated that fact but reconciled himself to it? Hoctor is of the view that:

The essence of *dolus eventualis* is that the accused should be found blameworthy for intentional conduct because he/she foresees the possible harm, and accepting that it might possibly occur, he or she chooses to take a chance that such a consequence will not follow, instead of abstaining from his or her proposed course of conduct.<sup>160</sup>

Drawing an inference from Hoctor’s position, subjective foresight would mean an appreciation by X in his mind that there is a possibility that the unlawful result will ensue from his act.<sup>161</sup> In other words X must understand and appreciate the consequences of his actions.<sup>162</sup> Thus if this is unsuccessfully established in a court of law, this confusion will lead to a misplaced conception of placing what the accused actually foresaw with what he ought to have foreseen.

The reason why it is difficult to create this distinction is because such distinction relies on the whether the accused foresaw the harm and reconciled himself to that harm ensuing or took steps to guard against such harm. Paizes is of the opinion that even if X would have foreseen the possibility that his conduct/act might bring about a prohibited result in question, it should be regarded as intenton unless it can be established that the accused failed to take steps which the reasonable man in the position of the accused would have taken to guard

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<sup>157</sup> *S v Dladla* 1980 (1) SA 4H.

<sup>158</sup> *ibid.*

<sup>159</sup> Hoctor ‘The Degree of Foresight in *Dolus Eventualis*’ (n 136) 150.

<sup>160</sup> *ibid.*

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

<sup>162</sup> *Ntsime v S* 2005 48/04 31.

against such possibility.<sup>163</sup> The subjective test to determine intention must not be confused with the objective test to determine negligence.<sup>164</sup>

### **3.3 The second leg of *dolus eventualis* termed redundant**

An issue now arises as to whether the second leg of *dolus eventualis* is redundant.<sup>165</sup> This is because in so far as the accused foresees that his unlawful conduct will bring about an unlawful result, he should be charged with the necessary intent. This was illuminated in *S v De Bruyn*<sup>166</sup> where the court stated if X were to admit that he foresaw the possibility of death, it would contribute to a conviction of murder. What most authors advocate is that if an accused foresees that his conduct might bring about an unlawful result, it should not matter if he reconciles himself to the fact that an unlawful result might ensue or not. If this is the position, it would mean that X would be convicted if he foresaw the unlawful circumstances that would arise from his act/conduct regardless of whether it materialises or not. But Hoctor has a different view on this and states that the first leg of *dolus eventualis* would mean that an accused commits an act despite sustained foresight that the harm might occur and the accused is attentive to the risks involved in doing so.<sup>167</sup> According to the court in *Makgatho v S*<sup>168</sup>:

The fundamental question is not whether he should have accepted that the result would follow, but whether in actual fact he accepted that it would follow. The test in respect of intention is subjective and not objective. The objective test is applicable in cases involving negligence and not intention.<sup>169</sup>

If that is the case, can it be said that the second leg of *dolus eventualis* is redundant and leads to confusion? Most instances when X does not reconcile himself to the harm that will ensue from his act, but which in actual fact such an accused had the perception that his act will bring about an unlawful result even though he did not reconcile himself to the harm, he will be charged with culpable homicide. In *Humpreys* the court made mention of *misplaced*

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<sup>163</sup> Paizes (n 14) 238.

<sup>164</sup> *S v De Blom* 1977 (3) SA 513 A.

<sup>165</sup> Snyman (n 1).

<sup>166</sup> *Bruyn* (n 57) 511D-E.

<sup>167</sup> Hoctor 'The Degree of Foresight in *Dolus Eventualis*' (n 136) 150.

<sup>168</sup> *Makgatho* (n 145).

<sup>169</sup> *ibid* 10.



*confidence*. Is perception equivalent to misplaced confidence? The researcher is of the view that both are tantamount to the cognitive element of intention because both have some form of knowledge imputed in them. Putting it in context, can it be said that if X had the perception that an unlawful result might ensue from his actions, should X be convicted? How can this issue if left unsolved serve as a challenge? X having the knowledge, perception, or misplaced confidence cannot be the only requirement for intention. If this is the case, it would also mean that if X foresees that a particular consequence might exist or that his conduct might bring about a particular consequence, then he may be convicted based on negligence.

Looking at this position from a different angle, negligence requires that a duty is placed by the law on a person who must act to the standard of that a reasonable person. Drawing inference from the *Humpreys* case and based on the findings of the court, would a reasonable driver ignore all warning signs and proceed to cross a railway crossing having the knowledge of an upcoming train? This would raise an issue if not clearly explained. Deriving the definition of intention from Snyman who states:

A person acts with intention, in the form of *dolus eventualis*, if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may ensue, and he reconciles himself to this possibility.<sup>170</sup>

It should be noted that the second part of *dolus eventualis* should not be mistaken for the notion of recklessness as it relates to aggravated negligence which has nothing in common with *culpa*.<sup>171</sup> Intention in the form of *dolus eventualis* and conscious negligence are still separated by a fine line located somewhere between deliberate conduct and accidental criminal conduct and which can be properly separated through a case-by-case approach to the determination of fault.<sup>172</sup>

The second leg of *dolus eventualis* cannot be termed redundant because that will create issues as to an accused just being convicted of a crime based on the

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<sup>170</sup> Snyman (n 126) 184.

<sup>171</sup> Van der Merwe (n 91) 69.

<sup>172</sup> *ibid* 70.

fact that it can be inferred that he saw a harm ensuing from his act. The accused must reconcile himself to the fact that an unlawful result may ensue and proceed to commence with such act. In other words, the accused foreseeing the consequences nevertheless performs the deed.<sup>173</sup> However an accused's genuine albeit misplaced confidence in their ability to prevent risk from materializing is enough to negate intention.<sup>174</sup> Thus, the second leg to *dolus eventualis* if termed redundant might be mistaken with that of cross negligence.

### **3.4 Reconciling oneself to the harm ensuing and blameworthiness**

It is important for a court to establish the relationship between reconciling oneself to the unlawful result or consequence with the level of blameworthiness. This is so because apportioning blame in the form of intention on X's *actus reus* will depend on whether X indeed foresaw that unlawful consequence might ensue from his actions, yet proceeded in performing such act with the knowledge that an unlawful consequence might ensue. The court in *Makgatho v S*<sup>175</sup> stated that:

The fundamental question is ... whether in actual fact he [X] accepted that it would follow. The test in respect of intention is subjective and not objective. The objective test is applicable in cases involving negligence and not intention.<sup>176</sup>

But sometimes this relationship might prove difficult to establish. What therefore, are the issues arising if this relationship is not established? What challenges are present if in some cases, it is difficult to demote whether X was reckless in the form of *dolus eventualis* or had *mens rea* in the form of negligence? These questions are to be decided depending on 'whether the State has proven beyond a reasonable doubt that the appellant subjectively foresaw the possibility that his actions would result in the death of the deceased, and nevertheless persisted in his conduct'.<sup>177</sup> What if, for example, X states that he had the intention to shoot at Y but did not have the intention to kill

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<sup>173</sup> *Mini* (n 69) 190 F-G.

<sup>174</sup> *Van der Merwe* (n 91) 71.

<sup>175</sup> *Makgatho* (n 145).

<sup>176</sup> *ibid* 10.

<sup>177</sup> *ibid* 11.

Y?<sup>178</sup> How is it denoted that X's version of events is not tantamount to him not reconciling himself to the unlawful result or consequence? This issue draws a line between *dolus eventualis* and conscious negligence. In the case of *S v Adair Oliveira*<sup>179</sup> Smalberger JA *in obiter* reasoned that:

[If X's]... belief that his life or property was in danger may well (depending on the precise circumstances) exclude *dolus* in which case the liability for the persons death based on intention will also be excluded. At worst for him, he can then be convicted of culpable homicide.<sup>180</sup>

Drawing an inference from Smalberger's position, it means that X must place himself in as a victim to the unlawful consequence or result, otherwise he is deemed to have *mens rea* in the form of negligence. But this might raise an issue because X will not necessarily admit that he intended to cause the unlawful result or consequence. Thus, the bulk of the task will rest on the State to prove beyond reasonable doubt that X indeed reconciled himself to the harm ensuing from his act. If this is a failed endeavour in a court of law, it might prove a challenge because it gives minimal insight to the level of blame that should be apportioned to X.

### **3.5 Chapter summary**

There exist certain issues that are present when a court is faced with the task of distinguishing between intention and negligence in South African criminal law. As provided in the afore-mentioned paragraphs, if these issues are not dealt with accordingly, the *Ngubane* decision may serve as the appropriate precedent. As stated above, these issues need to be dealt by the courts in order to provide a concise separation between the two concepts; intention and negligence as regards their applicable principles. Sometimes these principles blur the line which separates the two.

It is argued that if there is no clear distinction between these concepts, they might seem to overlap. Given the situation, one cannot ignore the plausible efforts by the courts in explaining their distinction even though it serves to be proven difficult to establish in criminal law.

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<sup>178</sup> *S v Pistorius* (CC113/2013) [2014] 3325.

<sup>179</sup> *S v Adair Oliveira* 1993 C SACR 59 (A).

<sup>180</sup> *ibid* 63 - 4.

## CHAPTER FOUR

### COMPARATIVE STUDY

#### 4 Introduction

The South African criminal law is founded on Roman – Dutch law and English law. *Mens rea* in English law is an element which is crucial to the criminal offence. Thus, the *mens rea* element comprises a state of mind with which a person acts; a failure to comply with a standard of conduct; partly of such a state of mind and partly of such a failure. *Mens rea* in criminal law denotes the mind of the accused at the time the crime was committed. It is worthy of note to state that the elements of intention, negligence and recklessness imply the different degrees of *mens rea* in terms of English law.

With this in mind, this comparative study will mostly look at English law as to how *mens rea* is determined. The questions that the researcher strives to obtain clarity on with regards to the relevance of this chapter are the determination of state of mind of an accused, determination of foresight: in circumstances of intention and negligence, whether the second leg to the test of *dolus eventualis* is redundant and the relationship between reconciling oneself to the result ensuing to the level of blameworthiness. The rationale is to meet these challenges stated in the previous chapter so as to draw principles and rules. It is important to highlight that *mens rea* in this regard takes different forms.

#### **4.1 The mens rea requirement: the position in terms of English law**

##### *4.1.1 Intention*

Intention has been defined by reference to different states of mind, which may be compared to the rings of a target but two of these states of mind are highlighted. Stannard gives an illustration by stating that:

At the core, in the bull's eye as it were, is the situation where the defendant ('D') sets out to achieve a consequence as an end in itself; for instance, D kills the victim ('V') because V is D's deadly enemy and D wants V to die. The second situation is where D sets out to achieve a consequence not as an end in itself, but as the necessary means to some other desired end; for

instance, D kills V because D wishes to inherit the money from V's estate. These two situations are sometimes described as cases of 'direct' intention, and correspond to the civilian concept of *dolus directus*. Intention in this light refers to when D acts with the purpose of doing so and focus is laid on D's purpose not his desire that the unlawful result will ensue from his act. If D fires a shot to kill Y and it is his object to do so, then he is said to have the intention to kill. It is immaterial whether such a shot was a poor shot, thus killing Y was thus object or purpose and not his desire or what he wishes to be a consequence.<sup>181</sup>

Intention in English law is that which transcends cases of spontaneous conduct. The court in *Nedrick*<sup>182</sup> provided foundation on the definition of intention to be:

- (a) A result is intended when it is the actor's purpose to cause it
- (b) A court of jury may also find that a result is intended, though it is not the actor's purpose to cause it, when-
  - (i) the result is a virtually certain consequence of that act, and
  - (ii) the actor knows that it is a virtually certain consequence.<sup>183</sup>

Intention takes two forms; direct intention and indirect intention. They are discussed below:

#### 4.1.1.1 Direct intention

Direct intention occurs when the unlawful result which ensued from the act was the actor's purpose.<sup>184</sup> This is considered to be the ordinary meaning of the word. For instance, the accused (hereinafter referred to as D) wants to shoot Y. He directs his gun towards Y and fires a shot and such a shot kills Y eventually. It is immaterial whether the shot was a poor shot or not. D is termed to have intention to kill Y because that was his object or purpose.

#### 4.1.1.2 Indirect intention

This form of intention is sometimes referred to as 'oblique' intention. Under this form of intention, it may be sufficient that the accused had foreseen the prohibited result as one which is highly probable, or virtually certain to occur

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<sup>181</sup> David Ormerod, *Smith and Hogan Criminal Law* (12<sup>th</sup> edn, Oxford University Press Inc New York 2008) 97.

<sup>182</sup> [1986] 1 WLR 1025.

<sup>183</sup> Ormerod (n 181) 98.

<sup>184</sup> Ormerod *ibid* 98.

even if achieving the result was not his purpose.<sup>185</sup> For instance D (also known as the 'accused') will have sufficient *mens rea* where he does not have as his purpose V be killed or caused grievous bodily harm by his conduct, but foresees that V's death or grievous bodily harm as probable, or highly probable, or virtually certain to result.<sup>186</sup> This implies that a person who knows that it is practical certain that a result will happen and it will be deemed that he intended the result to happen even though his whole purpose to act is to avoid the unlawful act from ensuing. Thus, a person will be held as intentionally causing a result when it is his purpose to cause it or although it is not his purpose to cause it, 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>187</sup>

A wider view encompasses other results foreseen by D; D foresees the outcome as a possibility, though not necessarily one that is likely; for instance, D plants the bomb and gives a fair warning, but knows that there is always a possibility that it will kill someone when it explodes, thus this notion is found in civilian systems under the heading of *dolus eventualis*.<sup>188</sup> However, the law of oblique intention is a law of evidence not substantive law.

#### 4.1.2 Negligence

Negligence is referred to the inadvertent taking of an unjustified risk.<sup>189</sup> In other words, if D is unaware of the risk he is about to take, when he ought to be aware of it and such yields to an unlawful result.<sup>190</sup> According to Ormerod:

Where D did consider whether or not there was a risk and concluded, wrongly and unreasonably, either there was no risk, or the risk was so small that it would have been justifiable to take it, he is negligent.<sup>191</sup>

Thus, D will be negligent with respect to a circumstance when a reasonable person would know that it exists, whether he has given thought to the question

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<sup>185</sup> Ormerod *ibid* 98.

<sup>186</sup> *ibid* 98.

<sup>187</sup> *ibid*.

<sup>188</sup> John Stannard, 'Murder and the Ruthless Risk-Taker' (2008) 8(2) *Oxford University Commonwealth Law Journal* 139, 139.

<sup>189</sup> Ormerod (n 181) 116.

<sup>190</sup> *ibid*.

<sup>191</sup> *ibid*.

or not.<sup>192</sup> Thus, when the failure to perceive the risk does not deviate from the standard of care that a reasonable person would observe, an actor is not negligent and, with regard to the criminal law, is without cognizable fault.<sup>193</sup> 'Perceive' in this context would refer to D being aware, in other words if D is unaware of the unlawful consequences or fails to meet the objective standard of a reasonable person, he cannot be termed to have acted intentionally but negligently.

#### 4.1.3 Recklessness

Recklessness is a vice or personal fault, like dishonesty, cowardice and self-indulgence or prima facie poor choice.<sup>194</sup> The definition of recklessness employed in most common law crimes comes from *Quinn v Cunningham*,<sup>195</sup> a case involving reckless cycling causing injury to a pedestrian. The court highlighted that recklessness requires 'an utter disregard of what the consequences of the act in question may be' and 'indifference to the consequences for the public generally'.<sup>196</sup> In this light, a person is said to be reckless if he takes an unjustified risk but does not intend to cause a harmful result, he is said to be negligent if he does.<sup>197</sup>

It should be noted that not all risk - taking constitutes recklessness. To justify to take a risk depends on the social value of the activity involved relative to the probability and the gravity of the harm which might be caused.<sup>198</sup> How is the risk determined? If the conduct has a high degree of social utility, then only a high degree of probability of grave harm that outweighs the social utility will suffice to condemn such a conduct as recklessness.<sup>199</sup> The forms of negligence include the following:

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<sup>192</sup> Ormerod (n 181) 116.

<sup>193</sup> Paul Robinson, 'A Brief History of Distinctions in Criminal Culpability' (1980) *Hastings Law Journal* 815, 820.

<sup>194</sup> John Gardner and Heike Jung, 'Making Sense of *Mens Rea*: Antony Duff's Account' (1991) *Oxford Journal of Legal Studies* 559,574 - 575.

<sup>195</sup> *Quinn v Cunningham* 1956 JC 22.

<sup>196</sup> *Cunningham* (n 195)24-5.

<sup>197</sup> Ormerod (n 181) 107.

<sup>198</sup> *ibid.*

<sup>199</sup> *ibid.*

#### (a) Subjective recklessness

A conduct is only "negligent" if the actor is not aware of the substantial risk, but should have been.<sup>200</sup> This requires not only proof of taking an unjustified risk, but proof that D was aware of the existence of the unreasonable risk. In other words, D's own perceptions of the existence of a risk.<sup>201</sup> People act "recklessly" with respect to a result if they are aware of, yet disregard, a substantial risk.<sup>202</sup> Thus, the Criminal Damages Act<sup>203</sup> provides that:

A person acts recklessly within the meaning Section 1 of the Criminal damages Act 1971 with respect to-

- (i) a circumstance when he is aware of the risk that exists or will exist;
- (ii) a result when he is aware of a risk that will occur and it is, in the circumstances known to him, unreasonable to take the risk.<sup>204</sup>

It must then be established that if D must close his mind to the risk then he can be found reckless within the subjective definition.

#### (b) Objective recklessness

Objective recklessness on the other hand is reflected as thus:

- (1) D's failure to give thought as to whether there was such a risk (which might be designated as inadvertent recklessness;

Or

- (2) D's knowledge that there was some risk (advertent negligence).

Thus D is reckless whether a circumstance exists or will exist when it is obvious that it may be so and he knows that.<sup>205</sup>

### 4.1.4 Knowledge

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<sup>200</sup> Robinson (n 193) 819.

<sup>201</sup> Ormerod (n 181) 108.

<sup>202</sup> Robinson (n 193) 819.

<sup>203</sup> Act of 1971.

<sup>204</sup> Ormerod (n 181) 109.

<sup>205</sup> *ibid* 116.



People act "knowingly" with respect to a result if they are nearly certain or aware of a high probability that their conduct will cause the result.<sup>206</sup> Knowledge is usually used in relation to circumstances the current definition of knowledge in English law is that it is satisfied by proof of a true belief, thus D knows that goods are stolen when he correctly believes where they are.<sup>207</sup> A word requiring particular attention in this regard is "knowledge," or its equivalent "knowingly" or "knowing," used to represent the *mens rea* requirement of certain offences, such as receiving stolen property knowing it to be stolen, knowingly uttering a forged instrument or designedly and knowingly obtaining the property of another by false pretences.<sup>208</sup> This emphasizes both that "knowledge" or its equivalent as a *mens rea* requirement must be determined by a subjective test and also that it does not require what is ordinarily meant by the word.<sup>209</sup> X's knowledge of the circumstances could be rebutted if there is proof of incapacity to form an intent, insanity or diminished responsibility.<sup>210</sup>

#### 4.1.5 Belief

Belief is something that is short of knowledge. It may be said that the state of mind of a person who says to himself: I cannot say that I know for certain that the circumstances exist but there can be no reasonable conclusion in the light of all circumstances.<sup>211</sup>

#### 4.1.6 Wilful blindness

This refers to a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which a person does not care to have and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make.<sup>212</sup> "Wilful blindness"

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<sup>206</sup> Robinson (n 193) 818.

<sup>207</sup> Ormerod (n 181) 117.

<sup>208</sup> Rollin M Perkins, "'Knowledge' as a *Mens Rea* Requirement' (1978) 29 *Hastings Law Journal* 953, 954.

<sup>209</sup> Perkins (n 208) 955.

<sup>210</sup> *ibid.*

<sup>211</sup> Ormerod (n 181) 119.

<sup>212</sup> *Roper v Taylor's Garage* [1951] 2 TLR 84 288; Ormerod (n 181) 119.

has no more bias towards visual means of acquiring knowledge than does "deliberate ignorance," another term used to express the same idea.<sup>213</sup>

#### *4.1.7 Suspicion and reasonable grounds to suspect*

In this light it requires that the accused 'suspects' relevant facts or 'suspicion' or 'having reasonable grounds to suspect'.<sup>214</sup> For instance, section 18(1) of the Terrorism Act<sup>215</sup> states that "a person commits an offence if he enters into an agreement which facilitates another person's retention or control of such property".

#### *4.1.8 Blameless inadvertence*

This refers to when a person may reasonably fail to foresee a consequence that follows from his act- as when a slight slap causes the death of an apparently healthy person; or reasonably fails to consider the possibility of the existence of a circumstance. This state of mind will be classed as blameless inadvertence.<sup>216</sup>

## **4.2 Comparing the position in English Law**

### *4.2.1 Establishing a state of mind*

It seems impossible to denote what was going on in the mind of an accused person as it can only be drawn by a process of inference from what is known of his conduct.<sup>217</sup> Where *mens rea* is in issue, indeed, many lawyers have been uncharacteristically eager to swap their judicial or juristic hats for philosophical ones.<sup>218</sup> They have raised questions about the status, accessibility and moral significance of the human mind. Moral blameworthiness is a function of the state of mind (or will) of the agent himself and cannot be determined by a reference to any external norm such as the reasonable man, or at least cannot

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<sup>213</sup> Perkins (n 208) 960.

<sup>214</sup> Ormerod (n 181) 119.

<sup>215</sup> Act of 2000.

<sup>216</sup> Ormerod *op cit* (n 181) 123.

<sup>217</sup> JWC Turner, 'The Mental Element in Crimes at Common Law' (1936) 6 *The Cambridge Law Journal* 31,66 .

<sup>218</sup> Gardner & Jung (n 193) 559.

be solely so determined.<sup>219</sup> Even Bowen L.J in *Angus v. Clifflord*<sup>220</sup>, had this to say:

A great deal of the argument . . . of the principle that you cannot look into a man's mind. . . It is said that you are to have fixed rules to tell you that he must have meant something, one way or the other, when certain exterior phenomena arise. The answer is that there is no such thing as an absolute criterion which gives you a certain index to a man's mind. . . .<sup>221</sup>

What should matter is what the agent has in mind (or will), and not what the reasonable (or normal or average) man, or what the trier of fact, would have had in mind (or will).<sup>222</sup> It can be said that in order to determine fault, the court takes interest in the working of the mind of the accused in question with regards to the crime he is charged with. The human tendency to reason about and infer mental states in other people and this capacity to infer mental states—typically called the *theory of mind or folk psychology*<sup>223</sup> which serves to coordinate social interaction and is thought to be a driving force in human biological and cultural evolution.<sup>224</sup> According to Malle and Nelson:

There are at least two challenges to a fair and just treatment of mental states in the law. One is conceptual—the valid and precise use of the concepts of mental states in reasoning about the defendant's actions and in assigning responsibility, blame, and punishment. The second is inferential—making reliable and accurate inferences of mental states from behaviour and circumstantial evidence.<sup>225</sup>

They further stipulate that forming an intention requires the presence of a desire for an outcome and beliefs about an action leading to that outcome (and of course a process of reasoning to combine desire and beliefs).<sup>226</sup> Mental state in a situation where intention is to be established would involve the agent's (or the accused's) own actions which must grow out of reasoning and such must show signs of commitment.<sup>227</sup> In the words of English judge Lord Lane in *R v Nedrick*:

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<sup>219</sup> Gerald H. Gordon, 'Subjective and Objective *Mens Rea*' (1975) 17 *Criminal Law Quarterly* 355, 355.

<sup>220</sup> *Angus v. Clifflord* [1891] 2 Ch. 449.

<sup>221</sup> *Angus* (n 220) 471.

<sup>222</sup> Gardner & Jung (n 194) 559.

<sup>223</sup> This concept operates like a filter that classifies certain perceptual input into significant categories and thus frames or interprets the perceptual input in ways that facilitate subsequent processing, including prediction, explanation, evaluation, and action

<sup>224</sup> Bertram F. Malle and Sarah E. Nelson, 'Judging *Mens Rea*: The Tension between Folk Concepts and Legal Concepts of Intentionality' (2003) *Behavioral Sciences and the Law* 563, 563.

<sup>225</sup> *ibid* (n 224) 564.

<sup>226</sup> *ibid* 567.

<sup>227</sup> *ibid* note 222 571.

Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen.<sup>228</sup>

These will aid in establishing intention in an event where a crime is committed. In the case of oblique intention there is a common mental denominator because the actor chooses to cause the proscribed result.<sup>229</sup> Thus a person who does not act in order to cause the proscribed result but when he acts he knows that there is a practical certainty that his action will cause the proscribed result also chooses to cause that result.<sup>230</sup> Such state of mind which constitutes *mens rea* in the form of intention is perceived by the law as a mental event preceding or accompanying the physical action: when it is said that the Crown must prove *mens rea*, what is meant is, they must prove the occurrence of this mental event.<sup>231</sup> For example, to fire a gun voluntarily or intentionally is to do two things - to will or intend to fire it, and to fire it.<sup>232</sup> In *Peda v. The Queen*, Judson J., went on to say that the jury's task:

is to determine the actual behaviour of the driver in the light of the section and while this will necessarily entail some consideration of the state of mind of the driver, as a car does not drive itself, it does not mean that the jury must find that a given state of mind exists before they can convict.<sup>233</sup>

Thus the agent's point of view which is confidently foreseeing evil results are no less likely to occur, and may even be more likely to occur, than directly intended results. It is in this fact, then, that the agent is most fundamentally implicated as a promoter of evil.<sup>234</sup> Turner goes on further to say that:

Intention' describes the state of mind of the man who not only foresaw, but also desired the possible' consequences of his conduct. 'Recklessness ' describes the state of his mind if he foresaw those consequences, although there is no evidence that he desired them; he may have been indifferent to their ensuing, or he may even have hoped that they would not ensue, but he knowingly took the risk of their ensuing. 'Negligence' indicates the state: of mind of the man who acts *without adverting* to the possible consequences of his conduct; he *does not foresee* those consequences. The word further indicates that he is in some measure in fault, and that we 'should expect an

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<sup>228</sup> *R v. Nedrick* [1986] 1 WLR 1025 4.

<sup>229</sup> Itzhak Kugler, 'The Definition of Oblique Intention' (2004) 68 *The Journal of Criminal Law* 79, 82.

<sup>230</sup> Kugler (n 229) 82.

<sup>231</sup> Gordon (n 219) 357.

<sup>232</sup> *ibid.*

<sup>233</sup> *Peda v. The Queen* [1969] 4 C.C.C. 245 255.

<sup>234</sup> Gardner & Jung (n 193) 570.

ordinary, reasonable, man to foresee the possibility of the consequences and to, have regulated his conduct so as to avoid them.<sup>235</sup>

#### 4.2.2 *The determination of foresight through inferential reasoning*

The test of inferential reasoning is drawn from the facts provided they are correct. The question that arises is how is foresight of a virtually certain result conclusive proof that X intended the result or is foresight of a virtually certain result merely evidence from which the jury may go and find that X indeed intended the result? The court in *D.P. P v Smith*<sup>236</sup> [hereinafter referred to as *Smith*] went further to explain that as a man is usually able to foresee what the natural consequence of his actions are it would be reasonable to assume that he did foresee and intended them provided an inference can be drawn unless such inference will be drawn on incorrect facts, then it should not be drawn. In *R v Vallance*<sup>237</sup>, the court stated:

A man's own intention is for him a subjective state, just as are his sensations of pleasure or of pain... when it has to be proved, it is to be proved in the same way as other objective facts are proved. A jury must consider the whole of the evidence relevant to it as a fact in issue. If an accused gives evidence of what his intentions were, the jury must weigh his testimony along with whatever inference as to his intentions can be drawn from his conduct or from other relevant facts. References to a "subjective test" could lead to an idea that the evidence of an accused man as to his intent is more credible than his evidence of other matters... But always the questions are what did he in fact know, foresee, expect, intend.<sup>238</sup>

Gordon is of the opinion that however subjective one may hold intention to be in theory, in practice its presence is determined by or inferred from objective conduct.<sup>239</sup> This inference is made on the basis of common experience, as indeed is the acceptance that objective factors can sometimes be misleading so it may be safer not to make the normal inference in the face of strong contrary protestations by the agent.<sup>240</sup>

As stated above, the concept of 'oblique' intent includes consequences foreseen as likely to happen, the argument being that D chooses for them to

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<sup>235</sup> Turner (n 217) 39.

<sup>236</sup> *D.P. P v Smith* [1961] AC 290 (HL).

<sup>237</sup> *R. v. Vallance* [1961] 108 C.L.R. 56 83

<sup>238</sup> Reference here

<sup>239</sup> Gordon (n 219) 372.

<sup>240</sup> *ibid.*

happen, or is at least willing for them to happen.<sup>241</sup> Therefore oblique intent has been a useful tool for convicting them of murder. In *Hyam v DPP*<sup>242</sup>, Pearl Kathleen *Hyam* set her rival Mrs Booth's house on fire in order to frighten Mrs Booth out of the neighbourhood. Two of Mrs Booth's children were killed in the resulting blaze. At *Hyam's* trial for murder, Ackner J told the jury that the crucial question was whether she intended to kill Mrs Booth or do her grievous bodily injury.<sup>243</sup> D was duly convicted, and appealed to the Court of Appeal, arguing that the judge was wrong to equate foresight of consequences with intention. The court dismissed the appeal, saying that a person who acted in the knowledge that a certain consequence would probably occur could be said to have intended that consequence and that, in any event, a killer who foresaw that death or grievous bodily harm would probably occur as a result of his acts could properly be convicted of murder.<sup>244</sup> In *R v Woollin*<sup>245</sup>, the House of Lords approved the following formula for use in cases of this sort:

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 actions and that the defendant appreciated that such was the case.<sup>246</sup>

According to Lord Steyn in *Woollin*, this meant that a consequence 'foreseen', as in 'virtually certain', was the same as an 'intended consequence'; but in *R v Matthews and Alleyne*<sup>247</sup> it provided that it is a misdirection to say that a jury is entitled to find intent suggests that they are equally entitled *not* to find it in a suitable case. As Byrne J puts it in the English Court of Criminal Appeal in *Smith*:

as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts

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<sup>241</sup> Stannard (n 188) 141.

<sup>242</sup> *Hyam v DPP* [1975] AC 55 (HL).

<sup>243</sup> *Ibid.*

<sup>244</sup> *ibid* 240.

<sup>245</sup> *R v Woollin* [1999] 1 AC 82.

<sup>246</sup> *Woollin* (n 245) 96.

<sup>247</sup> *R v Matthews and Alleyne* [2003] EWCA Crim 192.

of the particular case it is not the correct inference, then it should not be drawn.<sup>248</sup>

For the jury to be entitled to find intent in this sort of case, death or serious injury must be a virtual certainty as a consequence of D's acts, and must be perceived as such. The effect of this was to do for 'foresight', in English law, what section 8 of the Criminal Justice Act<sup>249</sup> did for 'foreseeability'. Just as someone may be presumed to intend the natural and probable, that is to say, 'foreseeable' consequences of his or her acts, so they may be presumed to intend those which were actually foreseen.<sup>250</sup> But even if there are good grounds for thinking that what matters in deciding whether to required intention rather than confident foresight as the *mens rea* of some offence is whether the *mens rea* in question is ulterior or basic, we obviously cannot profit much from knowing that unless we also know what criteria legislatures and judges should use in deciding whether to make a particular *mens rea* ulterior rather than basic in the relevant sense.<sup>251</sup>

Stannard refers to what is known as the "ruthless risk taker" who in this case denotes the killer whose conduct, whilst not directly designed to kill, nevertheless manifests such a callous disregard for human life as to merit the label of a murderer.<sup>252</sup> An inference would have to be drawn into the character or attitude of the accused.<sup>253</sup> There is the presumption of law that a man intends the natural and probable consequences of his acts.<sup>254</sup> According to Norrie, there must be a wide definition of intention so that the law can convict the ruthless risk-taker of murder without abandoning the rule that murder is a crime of intent.<sup>255</sup> For instance in *Moloney*<sup>256</sup> the court stated that even though D did not wish B (unlawful circumstance) to occur, it will nevertheless be deemed to have been intended.

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<sup>248</sup> *Smith* (n 356).

<sup>249</sup> Act of 1967.

<sup>250</sup> Stannard (n 188) 145.

<sup>251</sup> Gardner & Jung (n 194) 574.

<sup>252</sup> Stannard (n 188) 187.

<sup>253</sup> *ibid* 188.

<sup>254</sup> *Smith* (n 236) 325.

<sup>255</sup> Alan Norrie, 'Oblique Intention and Legal Politics' (1989) *Criminal Law Review* 793, 793.

<sup>256</sup> *Moloney* [1985] AC 905 929.

Where X knew for a fact and ascertained that an unlawful result will ensue from his act and he had no good reason for ascertaining such, his position will be regarded as one who knew and had such purpose of intending an unlawful result. Thus the mental element will be that X must realise that the effect of the unlawful result will ensue from his act and this allows an input of intent on the accused. To elucidate further the court in *Smith*<sup>257</sup> stated that if grievous bodily harm was likely to result and such harm indeed resulted in consequence, then X is guilty and is deemed to have intended. Whilst in England its most prominent application was by the House of Lords in the case of *Smith*, where Viscount Kilmuir LC formulated the *mens rea* of murder in the following terms:

The jury must, of course, in such a case as this make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone . . . on the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the 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>258</sup>

With regard to negligence the general rule is that a person has a duty to take actions to safeguard others against harm or refrain from conduct that may harm others, thus places criminal liability if not adhered to. Inference is drawn to denote whether a duty can be placed on the accused to act and failure to comply with such duty may render criminally liable. The English law makes use of inactivity and abstention quality of negligence which means that X failed to give attention to, and take precautions against the inherent risks based on the facts, hence a reasonable person test is applied to determine whether when it is and when it is not reasonable to act.<sup>259</sup>

That which differentiates intention from negligence is the accused's knowledge of the circumstances and the nature of his acts which is ascertained from the facts and cannot be rebutted by the strongest evidence. Even though intention is defined so as to include foreseeable consequences; rather it is merely a matter of inference to be drawn from the evidence. Thus knowledge that certain consequences will probably occur could be said to have intended the

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<sup>257</sup> *Smith* (n 236) 331.

<sup>258</sup> *ibid.*

<sup>259</sup> Gordon (n 219) 372.



consequence resulting from the act in question unlike in a case of negligence.<sup>260</sup>

*Mens rea* in the form of recklessness exists only, in the current view, when the agent adverts to the risk; objective recklessness in itself is merely a form of negligence.<sup>261</sup> By extending *mens rea* to include recklessness and at the same time requiring actual foresight of the risk involved and a deliberate decision to take that risk, a compromise is reached. Recklessness so defined approximates closely to intention; in some formulations it is little more than intention shorn of desire.<sup>262</sup>

Unlike the South African position of fault, recklessness is a distinct element of fault in terms of English law. Recklessness on its own denotes a state of mind, in other words whether accused was careless or not. Recklessness in English law is advertent in nature and requires a conscious choice to take an unjustified risk. An accused is reckless therefore if he performs an act, foreseeing but not desiring the unlawful consequence to ensue from his act.<sup>263</sup> All that is required by way of mental element is a certain type of cognition in considering the agent's mind which is other than purely cognitive, and which could intelligibly be described as attitudinal.<sup>264</sup> This is an element which is different from the *mens rea* requirement in terms of South African criminal law.

Gordon is of the view that "foresight" in recklessness indicates that what is involved is a mental event which describes both D's actions and some contemporaneous mental activity consisting of foresight and acceptance of risk.<sup>265</sup> D's mind must be that which is under the influence of strong emotions as panic or rage and these may further require the accused to contemplate certain results.<sup>266</sup>

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<sup>260</sup> *ibid.*

<sup>261</sup> *ibid.*

<sup>262</sup> Gordon (n 219) 372.

<sup>263</sup> Gardner & Jung (n 194) 577.

<sup>264</sup> *ibid* 577.

<sup>265</sup> Gordon (n 219) 378.

<sup>266</sup> *Ibid.*

### **4.3 Chapter summary**

From the above paragraphs it can be seen that English law divides the various forms of fault which show the different forms of *mens rea*. Drawing an inference from English law and comparing it to the position in South African criminal law which combines recklessness to intention in the form of *dolus eventualis*, the English law makes recklessness as a distinct concept for *mens rea*. This means that if the accused foresaw that an unlawful consequence might ensue from his act, he is already endowed with intent. Distinguishing and setting recklessness as an independent requirement of *mens rea* makes it easier to comprehend which makes all the intricacies which come with this distinction avoidable.

As seen above determining the state of mind of accused in order to distinguish what the accused foresaw as opposed to what he would have foreseen is of pivotal importance. That which the researcher is bringing to attention is that in so far as an accused takes a careless risk, such careless risk should be classified under recklessness. However, the risk should depend on the gravity of the harm caused.

## CHAPTER FIVE

### CONCLUSION, FINDINGS AND RECOMMENDATIONS

#### 5 Introduction

Before an accused is charged with criminal liability, the crime for which he is charged with must comply with all the elements of a crime. The culpability requirement of criminal liability concerns itself with the state of mind of an accused at the time of the commission of an act or omission of a conduct. It is trite law that *mens rea* either in the form of intention or negligence is an indispensable element for a crime that pertains to the apportioning fault or blame to X's act or conduct. This legal blameworthiness takes two forms: intention and negligence, under the ambit of the South African criminal law.

#### 5.1 Conclusion

This study sought to provide a clear distinction between intention and negligence in the light of the South African criminal law. The aim was to analyse the issues therein when court judgments are unclear when it comes to their distinction. Even though this distinction might be fraught with difficulties, one cannot deny the fact that they are both independent concepts when it comes to proving the legal blameworthiness of an accused.

There are some court cases which show that the "recklessness" component have not been vividly explained. This is a result of the fact that in some cases of *dolus eventualis* the accused is reckless in any sense of the word, so that it is unnecessary for the courts to make clear distinctions, and they content themselves with a bare finding that recklessness has been proven. It is argued that recklessness is given little discussion due to the unclarity in assigning a precise meaning to the term "recklessness".

The *Ngubane* decision is critiqued for its confusion which provided that intention and negligence might co-exist on the same set of facts. This result was investigated through the use of case law in the previous chapters. There is a line which distinguishes between intention and negligence with regards to their

tests and applications thereof. The test for the two is clearer in relation to the applicable principles, however it can be said that this application thereof often blur the lines between the two. In the case of *dolus eventualis* on one hand, the accused foresees subjectively the possibility of an unlawful result ensuing, and reconciles himself with such possibility. In the case of negligence on the other hand, the accused subjectively foresees the possibility of an u unlawful result or consequence, but dismisses that possibility. These two situations becomes onerous on the state, and in most instances, it might be difficult to prove that an accused reconciled himself with a particular outcome.

A comparative study was provided to shed more light on these concepts and in order to get distilling principles from them. The comparative study looked at *mens rea* in English Law. The comparative study also strived to give answers with regards to the issues that were raised in chapter three of this study. Even though the courts are faced with these issues, they must be applauded for their work in explaining the separation between these two concepts: intention and negligence.

## **5.2 Findings**

- (i) That both intention and negligence are independent forms of *mens rea* under the South African criminal law.
- (ii) Both have applicable principles independent from each other in tackling the issue of determining fault in an accused unlawful act/conduct.
- (iii) The decision in *Ngubane* blurred the line that distinguished between these two forms of *mens rea* as it provided that intention and negligence might co-exist on the same set of facts.
- (iv) It is difficult to establish the state of mind of an accused because the facts are only known at the time of the commission of a crime.

- (v) What the accused actually foresaw as opposed to what he would have been foreseen becomes a slippery slope if court judgements are not clear as to such distinction.
- (vi) Unlike the position in South African criminal law, recklessness serves as an independent requirement to *mens rea* in terms of the English criminal law.
- (vii) Recklessness in English law is used as a criteria to determine rape and assault.

### **5.3 Recommendations**

I submit that more light must be shone on the distinction between foreseeability of harm by X and X reconciling himself to that harm since as much of the confusion arise from this. This should be done in order to avoid the confusion between *dolus eventualis* and conscious negligence, thereby resulting in an overlap between the two concepts. Recklessness in *dolus eventualis* need to be clarified so as to avoid any confusion which may arise when there is an unclarity as to what it really entails.

Since as much of the confusion arises from whether X reconciled himself to the harm or not, the study recommends that the English law of recklessness which is an independent form of *mens rea* should be introduced in our system and reckless should serve as an independent requirement of *mens rea*. This will in turn avoid the confusion that exist in the distinction between *dolus eventualis* and conscious negligence.

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